

Social Norms in the Theory of  
Mass Atrocity and Transitional Justice

By

Paul Morrow

Dissertation

Submitted to the Faculty of the  
Graduate School of Vanderbilt University  
in partial fulfillment of the requirements

for the degree of

DOCTOR OF PHILOSOPHY

In

PHILOSOPHY

August, 2014

Nashville, Tennessee

Approved:

Larry May, Ph.D.

Robert Talisse, Ph.D.

Marilyn Friedman, Ph.D.

Gerald Postema, Ph.D.

To my parents, Lee and Becky, who first encouraged my curiosity  
and

To my partner, Megan, whose support carried me through

## ACKNOWLEDGMENTS

This dissertation was supported by a Raab Foundation Visiting Research Fellowship at the Mandel Center for Advanced Holocaust Studies at the United States Holocaust Memorial Museum. Additional grant and fellowship support came from the Robert Penn Warren Center for the Humanities, the Department of Philosophy, and the Graduate School at Vanderbilt University.

## TABLE OF CONTENTS

	Page
ACKNOWLEDGMENTS .....	iii
LIST OF TABLES .....	vi
Chapter	
1. Introduction .....	1
1.1 Key Concepts.....	2
1.2 Methodology.....	8
1.3 Chapter Summaries .....	11
2. The Hart-Fuller Debate and the Nature of Normative Systems .....	16
2.1 The Hart-Fuller Debate: Context, Content, Influence .....	19
2.2 Hart and Fuller on the Nature of Normative Systems .....	24
2.3 Law's 'Extended Sense': Hart and Fuller on Informal Principles of Social Order .....	39
2.4 The Message of Cain and the Testimony of Ulysses .....	44
2.5 Conclusion .....	49
3. Social Norms: Conceptual and Methodological Issues .....	51
3.1 Social Norms, Conventions, and Traditions .....	53
3.2 Social Norms: A Four-Feature Account.....	65
3.3 Explaining Social Norms and Explaining With Social Norms .....	73
3.4 Conclusion .....	84
4. Social Norms and Professional Participation in Mass Atrocity .....	86
4.1 Professions, Professionals, and Professional Norms .....	89
4.2 German Professionals and Professional Norms, 1900-1950 .....	101
4.3 Norm Breakdown and Professional Participation in Atrocities .....	107
4.4 Professional Complicity and the Transformation of Social Norms.....	112
4.5 Conclusion .....	120
5. Categories and Categorization in the Theory of Mass Atrocity .....	122
5.1 Prospective Categorization .....	124
5.2 Retrospective Categorization.....	136
5.3 Social Norms and the Order of Mass Atrocity: Historical Illustrations .....	146
5.4 Objections.....	155

6. Social Norms and the Distinctiveness of Transitional Justice.....	160
6.1 Teitel on Transitional Normative Shift.....	163
6.2 Two Critics of Teitel’s Account of Transitional Justice .....	169
6.3 Norm Transformation and the Distinctiveness of Transitional Justice .....	176
6.4 Transitional Norm Transformation in Practice: The Case of East Timor .....	189
7. Conclusion.....	203
WORKS CITED.....	205

## LIST OF TABLES

Table	Page
1. Distinguishing Social, Moral, and Legal Norms .....	5

## Chapter 1. Introduction

Meeting the moral and political challenges posed by genocide and mass atrocity requires historical clarity and conceptual acuity. Raphael Lemkin, famous for coining the term genocide, and for securing the prohibition of this crime in international law, well understood these needs. Concerning the need for historical clarity, Lemkin wrote, “one cannot describe a crime by one example; one must rather draw on all available experiences of the past.”<sup>1</sup> Concerning the need for conceptual acuity, Lemkin observed, “when people think about [a] new phenomenon, when they speak about it fervently, when they finally reach out for action in connection with this phenomenon, they must have a name for it.”<sup>2</sup>

During his life, Lemkin devoted strenuous efforts to making sense of mass atrocity. Since his death, scholars working in a wide range of disciplines have substantially improved our understanding of genocide, ethnic cleansing, crimes against humanity, and other types of large-scale crimes. They have done so largely by following the two lines of inquiry Lemkin laid down: first, expanding our store of historical knowledge of such crimes via archival research, oral histories, and ethnographic studies; second, developing concepts capable of capturing the distinct qualities of different kinds of mass atrocity.

In this study, I use the tools of analytic moral and political philosophy to address pressing questions in the theory of mass atrocity and transitional justice. I introduce the conceptual framework of social norms, and show how this conceptual framework can aid

---

<sup>1</sup> Donna-Lee Frieze (ed.), *Totally Unofficial: The Autobiography of Raphael Lemkin*, New Haven, CT: Yale University Press, 2013, 152.

<sup>2</sup> Raphael Lemkin, “Introduction to Genocide,” in Steven Leonard Jacobs (ed.), *Lemkin on Genocide*, New York: Lexington Books, 2012, 21; 24.

scholars and practitioners in their efforts to explain, prevent, and pursue accountability for individual and group participation in mass atrocities.

While scholars of mass atrocity increasingly credit changes in moral norms with making possible widespread popular participation in such crimes, and while theorists of transitional justice assert the importance of changing legal norms in accordance with rule of law principles, researchers in both fields have for the most part failed to consider concurrent changes in social norms. It is not difficult to explain this comparative inattention to social norms. Social norms are less extensively theorized than either legal or moral norms. Social norms stand in less manifest connections with questions of justice than either legal or moral norms. Finally, social norms may simply strike us as less weighty than either legal or moral norms.

I believe a proper understanding of social norms – one that identifies the pathways of emergence and transformation of such norms; clarifies the grounds of the normativity of such norms; and reconstructs the operation of such norms from within the practical point of view – can indeed help us to resolve pressing problems in the theory of mass atrocity and transitional justice. In this study I seek to substantiate these claims. In this introduction I identify the main concepts this study employs, explain the basic methods it adopts, and review the principal questions it addresses.

## **1.1 Key Concepts**

### *1.1.1 Social Norms*

Social norms form a distinct class of action-guiding prescriptions, prohibitions, and permissions. Over the last half-century, philosophers have paid social norms the kind



of careful attention formerly reserved for moral and legal norms. They have clarified core features of social norms and identified conditions for the emergence, persistence, and transformation of social norms. More recently, philosophers have begun to integrate the conceptual framework of social norms into longstanding inquiries in moral and political philosophy – including inquiries into the grounds of political authority and inquiries into the scope and sources of public reason. So far, these integrative efforts have focused chiefly on determining the normative significance of social norms under conditions of social and political stability. This study, by contrast, considers the normative significance of social norms in contexts of severe social and political upheaval.

In this study, I present a four-feature account of social norms, according to which social norms are (1) particular, (2) practice grounded, (3) group intentional, and (4) accountability creating. On this account, social norms:

- (1) Circulate within particular groups or populations;
- (2) Are normatively grounded in real or perceived social practices;
- (3) Are sustained by particular profiles of beliefs and intentions amongst members of the groups in which they circulate; and
- (4) Serve group members as shared standards of accountability for decisions and actions.

I believe these four features, properly specified, are at least jointly sufficient to distinguish social norms from moral norms. Moral norms, I claim, are not practice-grounded, and may not be particular in the way that social norms are. Legal norms, I suggest, may not be group-intentional, and differ from social norms with respect to the specific forms of accountability they create. The following chart summarizes what I take to be the key differences between social norms and legal and moral norms – while leaving open a number of meta-normative questions that I cannot address here.

**Table 1: Distinguishing Social, Moral, and Legal Norms**

---

	<b>Social Norms</b>	<b>Moral Norms</b>	<b>Legal Norms</b>
Particular (not Universal)	Yes	?	Yes
Practice-Grounded	Yes	No	Yes
Group-Intentional	Yes	No	?
Accountability-Creating	Yes (Informal)	Yes	Yes (Formal)

---

In elucidating these four features of social norms, it is helpful to compare and contrast them not only with legal and moral norms, but also with other kinds of informal principles of social order, such as conventions and traditions. Conventions, I suggest, lack the specifically normative character of social norms, and perform their action-guiding function essentially by engaging the interests, rather than the normative attitudes, of individual actors. Traditions, I contend, operate in a manner distinct from social norms more generally within practical reasoning: traditions serve as sources of *exclusionary reasons*, rather than reasons weighed in the usual fashion against reasons supplied by moral and legal norms.

Each of these different types of norms and informal principles belongs to the full picture of political society – and to the full theory of mass atrocity and transitional justice. The aim of this study is to demonstrate the contributions that the conceptual framework of social norms, specifically, can make to ongoing efforts to understand and prevent mass atrocities and to achieve justice in transitions.

### *1.1.2 Mass Atrocity*

The term “mass atrocity” picks out a complex array of crimes, including genocide, mass killing, mass rape, forced relocation, and forced sterilization. These crimes are linked to each other by their large scale and by their extreme – or, on some views, manifest – injustice. In this study I understand ‘mass atrocity’ principally as a term of descriptive social science, rather than as a legal term of art or an instrument of moral suasion. For stylistic purposes, I will use the phrase ‘large-scale crimes’ as a synonym for mass atrocity. This substitution may seem to blur the descriptive/normative boundary by attaching the quality of crime to the acts and deeds that are the objects of this study. However, there is already intrinsic normative content in the concept of ‘atrocity,’ and I do not think the perplexities we face on this front are made any greater by explicitly referring to mass atrocities as large-scale crimes.

With respect to the scale of mass atrocities, no simple numerical threshold can be relied on to distinguish between mass atrocities and other kinds of collective crimes. Some authors stipulate 100,000 killed as the lower threshold for mass killing; other analysts adopt the number 1,000 killed, with qualifications, as the threshold for mass atrocity. For my purposes, the key features of mass atrocity are qualitative, not quantitative. Mass atrocities involve large numbers of people imposing significant harms on other large numbers of people in coordinated fashion, and over significant geographical and temporal extents. While it is possible to construct hypothetical scenarios that lack one or more of these aspects (such as the example of a lone individual committing genocide with a biological weapon) historical mass atrocities exhibit the several qualitative features I have identified. It is these historical cases that supply the

empirical background for my analysis of the action-guiding function of social norms before, during, and after atrocities.

### *1.1.3 Norm Transformation*

Historical and social scientific inquiries into mass atrocities typically focus on the actors who plan and perpetrate them, the institutions and structures that support them, and the identities and ideals that are pursued through them. This emphasis on actors, structures, and meanings has led quite naturally to claims about norms, and especially the action-guiding power of norms, amongst perpetrators, bystanders, and resisters of atrocities. During the past two decades, as investigators have come to stress the importance of widespread participation by ‘ordinary’ individuals in atrocities, scholars have increasingly endorsed a particular claim about the explanatory role of norms before and during, and after mass atrocities, which I call the *thesis of norm transformation*.

The thesis of norm transformation holds that participation by large numbers of morally competent individuals in mass atrocities is at least partially explained by transformations in basic norms that structure social and political life. So far, this thesis has been advanced, and evaluated, only with regard to legal and moral norms. It is easy to see why priority has been given to norms of these kinds. Mass atrocities are striking for the way in which they require large numbers of individuals to act in ways sharply contrary to legal and moral norms they previously affirmed – norms proscribing murder, or the intentional imposition of suffering, or appropriation of another persons’ property without consent. The central explanatory puzzle is therefore to explain how such deeply

engrained legal and moral norms could be selectively altered, or inverted, so that actions previously prohibited should come to be permitted, or prescribed.

I believe the thesis of norm transformation should be extended to include social norms. I believe that changes in social norms can and do play an important role in precipitating, and prolonging, mass atrocities, and so must be studied alongside changes in legal and moral norms. Of course, as I have already suggested, not all social norms undergo transformations before or during mass atrocities. This provides a second reason for scholars who embrace the hypothesis of norm transformation to attend to social norms. The persistence of social norms during mass atrocities, I shall argue, conditions the effects that transformations in legal and moral norms have on the decisions and actions of particular individuals caught up in such catastrophes. This applies to professionals and members of elite organizations as well as to ‘ordinary’ individuals who perpetrate, or attempt to resist, mass atrocities.

By exploring the influence of social norms – and changes in social norms – upon individuals and groups before, during, and after mass atrocities, this dissertation seeks to achieve three main goals. First, it seeks to show how attention to social norms can increase our understanding of the decisions and actions of particular individuals and groups during mass atrocities. Second, it seeks to support the claim that different modes and distributions of individual and collective accountability may be appropriate in cases where social norms exert a determinate influence on such actors. Finally, it seeks to show that efforts to change social norms, like efforts to change legal norms, are central to the practical challenges faced by individuals and groups working to secure just political transitions in the wake of large-scale crimes.

## 1.2 Methodology

Social norms have a dual character. They present both “normative” and “socio-empirical aspects.”<sup>3</sup> This dual character contributes substantially to the power of social norms to structure social reality. At the same time, this dual character raises methodological questions that must be addressed if the conceptual framework of social norms is to be successfully integrated into the philosophical, historical, and social scientific literatures on mass atrocity. These methodological questions fall under three main headings: some are meta-descriptive, some are meta-normative, and some are normative.

### *1.2.1 Meta-Descriptive Questions*

Meta-descriptive methodological questions about social norms focus on the forensic methods by which social norms are identified and individuated, and on the epistemic criteria by which claims about the action-guiding influence of social norms can be corroborated. The forensic methods available for detecting the existence of social norms within particular populations differ according to whether the domain of inquiry covers contemporary or historical groups, organizations, and collectivities. The epistemic criteria by which claims about the action-guiding power of social norms can be corroborated do not differ qualitatively across temporal domains of description, though they may differ in the degree of stringency with which they may be applied, resulting in different degrees of credence for the particular claims assessed.

---

<sup>3</sup> Geoffrey Brennan, Lina Eriksson, Robert Goodin, and Nicholas Southwood, *Explaining Norms* (Oxford: Oxford University Press, 2013), 3.

Although experimental approaches are currently being devised for the descriptive study of social norms, this study focuses chiefly on evidence drawn from non-experimental, discursive sources. Methods employed include: studying historical records for patterns of behavior that have persisted over time in particular groups; listening to the reflections of individuals concerning past, present, and prospective decisions and actions; and focusing in on cases of apparent application of social sanctions against individuals and organizations. The epistemic criteria employed for corroborating claims about the action-guiding influence social norms are similar to those adopted in experimentally-oriented work – though the focus on social norms within historical groups and populations adopted here conditions the degree to which these criteria can be satisfied. Such epistemic include: avoiding circularity; seeking independent confirmation of first-personal norm claims; distinguishing clearly between social norms and other related social facts (such as conventions); and judiciously using counterfactuals to clarify the significance of particular sightings of social norms.

### *1.2.2 Meta-Normative Questions*

Meta-normative questions about social norms concern the normative grounding of social norms, the dynamics of persistence and change in social norms, and the accessibility of social norms for both theoretical reflection and practical deliberation by human agents. With respect to grounding of social norms, some theorists reduce social norms to descriptive facts, while other theorists seek to ground them in properly normative structures or considerations. Likewise, some theorists seek a common grounding for social norms, legal norms, and (or) moral norms, while others assert

differences in grounding across these categories of norms. With respect to the dynamics of social norms, some theorists rely on qualitative descriptions and observations to explain the processes by which norms emerge, persist, and change, while other theorists employ sophisticated quantitative models in order to trace (or more commonly reconstruct) processes of norm transformation. With respect to the accessibility of norms, some theorists focus on showing how social norms can guide human action without ever rising to the level of conscious reflection, while other theorists focus on identifying deliberative principles suitable for guiding practical deliberations involving social norms.

As noted above, this study distinguishes social norms from moral and legal norms on the basis of four core features of social norms. Many elements of this four-feature account are reflected in the work of other theorists of social norms. What is distinctive about the meta-normative approach to social norms adopted in this study is the emphasis on reconstructing the influence of social norms from within the practical point of view, i.e. the point of view of individuals deliberating about action. Whereas in ordinary circumstances social norms often operate without rising to the level of conscious reflection or deliberation, the circumstances of mass atrocity seem likely often to provoke such reflections, due to the conflicts that commonly arise in such circumstances between emerging social norms and previously accepted legal or moral norms. To be sure, even the best forensic efforts do not permit us to “get in side the heads” of historical actors, and so the accounts provided of practical deliberations involving social norms will be necessarily reconstructive. Nevertheless, simply attempting to reconstruct the shape of those deliberations can provide insights into meta-normative aspects of social norms.



### *1.2.3 Normative Questions*

Reconstructing the role of social norms in practical deliberations requires not only meta-normative, but also normative reflection. It requires us to consider questions about when social norms should be followed, and should not be followed; should be altered, or should not be altered; and should be instituted, or should not be instituted. Further normative questions concern the *ways* in which social norms should be instituted or altered – e.g. through transparent and consensual or through manipulative means.

Some historians and social scientists who study mass atrocity prefer to set aside such normative questions. Others acknowledge that the concepts and categories at the core of this literature – such as ‘perpetrators’, ‘bystanding’, ‘resistance’, and, indeed, ‘atrocity’ itself – are laden with normative content, and so are bound to dispose readers and auditors to make normative judgments. I believe responsible research on mass atrocities and political transitions cannot evade, but must confront, difficult questions about the distinction between description and evaluation of historical and contemporary actors and actions. This is the approach I adopt in this study.

## **1.3 Chapter Summaries**

The five substantive chapters of this study develop a continuing argument about normative significance of social norms during mass atrocities and liberal political transitions. At the same time, each chapter makes a distinctive contribution to particular debates in the philosophical and social scientific literature, and it has been my aim to render each chapter readable on its own terms. By way of concluding this introduction I will provide a brief summary of the aims and arguments of each chapter.

Present-day inquiries into the contributions of norms, and changes in norms, to mass atrocities are rooted in earlier, post-WWII investigations and exchanges. One of the most important philosophical precedents for such inquiries is the mid-century debate between American legal scholar Lon Fuller and English legal philosopher H.L.A. Hart. CHAPTER TWO reconstructs – and reflects critically upon – the main points at issue in this debate. I begin by briefly sketching the ‘Grudge Informer case,’ and arguing that the Hart-Fuller debate should be understood as an exchange of conflicting meta-normative claims concerning the action-guiding power of legal and moral norms during periods of deep social and political turmoil. Next, I suggest that the differences between Hart and Fuller’s views on law as a system of norms can be used to elucidate three general features of normative systems: (1) cognitive and conative accessibility, (2) concurrent functioning with other norms and normative systems, and (3) the creation of social meanings and identities. After this, I show that, although both Hart and Fuller avowed an interest in extra-legal and extra-moral norms principles of social order – e.g. customs, conventions, and social norms – neither Hart nor Fuller seems to have considered the practical importance that such principles acquire, or retain, in the context of “wicked legal systems.” I conclude by offering reasons to think that such principles deserve greater attention from scholars seeking to make sense of mass atrocities.

The category of informal principles of social order is broad. The category of social norms is considerably narrower. CHAPTER THREE sets out the basic account of social norms adopted in this dissertation. I first distinguish between three different kinds of informal principles of social order: conventions, traditions, and social norms. Next, I develop and defend my own four feature account of social norms, according to which

social norms are (1) particular (2) practice-grounded (3) group-intentional and (4) accountability creating. In the third section of the chapter I explain why I believe it is important for an account of social norms to be able to represent such norms from within the practical point of view – i.e. the point of view of individual agents deliberating about action. I conclude by addressing some methodological questions about the identification of social norms in historical contexts.

Historical and social scientific explanations of genocide and mass atrocity typically advance some version of the thesis of norm transformation. This is the thesis that large-scale crimes, involving participation by large numbers of morally competent individuals, must be explained in whole or in part by fundamental transformations in the norms that govern the particular social and political relationships in which those individuals stand. CHAPTER FOUR analyses this thesis as it has been applied to highly structured groups found to have been complicit in, or direct perpetrators of, mass atrocity. The chapter takes as its chief historical example the widespread participation by German professionals – including doctors, lawyers, and teachers – in the crimes of the Holocaust. I first consider the definition of professions and professional groups, and reviews prominent accounts of the normative grounds and status of professional codes. It then provide a brief overview of the extensive historiographical literature on professional collaboration and complicity in the Holocaust. Finally, I review a range of concrete historical examples of social norms contributing to participation, or occasionally resistance, by individual legal, medical, and academic professionals in the Holocaust. These examples, I argue, provide reasons for extending the thesis of norm transformation to include social, as well as legal and moral, norms.

Professionals and other social elites are not the only actors whose decisions and actions may be influenced by social norms, and changes in social norms, during mass atrocities. Many perpetrators, bystanders, resisters, and targets of mass atrocities belong to the class of “ordinary men” (and, less frequently, women). CHAPTER FIVE examines the influence of social norms amongst each of the standard actor-types of perpetrators, bystanders, resisters, and targets or victims – while also showing how the framework of social norms can be used to put those actor-types in question. I first identify four different modes of categorization that commonly appear in theories of mass atrocity: administrative categorization, cognitive categorization, historical categorization, and juridical categorization. I then examine some abiding questions concerning each of these forms of categorization – considered individually, and in relation to each other. Some of these questions are meta-descriptive, some are meta-normative, and some are normative. The framework of social norms, I suggest, can help to resolve some of these questions.

Transformations in social norms are not only critical to understanding large-scale crimes. They are also crucial for the success of political transitions undertaken in the wake of such crimes. CHAPTER SIX explains the normative significance of transitional changes in social norms. I begin by distinguishing between the two principal aims of liberal political transitions—securing stability going forward, and pursuing accountability for past crimes—and explaining why many theorists consider these aims to be in tension. Next, I examine several competing models of norm transformation proposed by philosophers and legal scholars for resolving this tension, and argue that each of these models needs to be extended to include attention to changes in social norms. I then present two new principles of transitional justice, which I suggest ought to govern the

kinds of transitional transformations in social norms commonly undertaken by international non-governmental actors. The chapter closes with a case study of efforts by the UN and other international organizations to build the rule of law and reform the justice sector in transitional East Timor.

## Chapter 2. The Hart-Fuller Debate and the Nature of Normative Systems

On July 27, 1949, the Provincial Court of Appeals in Bamberg, West Germany delivered a finding of guilt against a woman accused of having denounced her husband, a soldier, to Party authorities in late 1944 for remarks belittling Hitler and the German war effort.<sup>1</sup> The Bamberg Court overturned a local West German court's acquittal of the woman on the specific charge of illegal deprivation of liberty.<sup>2</sup> The Bamberg Court affirmed the lower court's ruling that the judge presiding in the 1944 court martial had not acted illegally, but in accordance with his judicial duty, in recognizing the Nazi law against 'treacherous utterances' as valid and sentencing the denounced husband to death.<sup>3</sup>

The full record of domestic German courts' efforts to try crimes committed during the Nazi era has only recently begun to receive serious scholarly scrutiny. During the past decade, historians have studied the structure, legal foundations, and decisions of domestic German trials of Nazi crimes in the late 1940's and early 1950's – a period marked by the termination of Allied military tribunals and by the escalation of Cold War tensions.<sup>4</sup>

---

<sup>1</sup> In describing this case here and below I have relied on H.O. Pappé, 'On the Validity of Judicial Decisions in the Nazi Era,' *The Modern Law Review* 23 n. 3 (May 1960), 260-274; Thomas Mertens, "Radbruch and Hart on the Grudge Informer: A Reconsideration," *Ratio Juris* 15 n. 2 (June 2002) 186-205; and David Dyzenhaus, "The Grudge Informer Case Revisited," 1000 *New York University Law Review* 83 (October 2008). Dyzenhaus's essay includes as an appendix an English translation of the Appeals Court's judgment.

<sup>2</sup> 'Illegal deprivation of liberty' had been recognized as an offense under the 1871 German Criminal Code. The judgment's characterization of the woman as an 'indirect perpetrator' of this crime was just one of several constructions available to the court; the choice of a different construction might have required a different (i.e. more extensive) distribution of guilt, as will be explained below.

<sup>3</sup> Though sentenced to death, the husband was, according to the Bamberg court's judgment, sent to the front instead. Cf. Dyzenhaus 2008, Appendix, 1032.

<sup>4</sup> Cf. Alan Steinweis and Robert Rachlin (eds.), *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice* (New York: Berghahn Books, 2013);

Scholars have also investigated specific legal-historical questions: such as why so many judges implicated in the wartime breakdown of procedural and substantive justice remained on the bench during the 1950's, and how the legal fates of male and female defendants charged with comparable crimes differed.<sup>5</sup>

Viewed against this background, the case reviewed by the Bamberg Appeals Court in 1949 is interesting, but not exceptional. Viewed from the perspective of legal and political philosophy, the case has acquired a significance surpassing almost any trial from this period. Typically referred to as the “Grudge Informer” case, it featured prominently in one of the most famous debates in 20<sup>th</sup> century Anglo-American jurisprudence. This was the midcentury debate between the American Lon Fuller and the Englishman H.L.A. Hart over the problem – or possibility – of ‘wicked law’.<sup>6</sup>

Launched in lectures and articles, and continued in substantial books, the Hart-Fuller debate broaches large questions of legal philosophy: questions about the foundations of legal rules, the texture of legal reasoning, and the legal and moral obligations that obtain

---

Nathan Stoltzfus and Henry Friedlander (eds.), *Nazi Crimes and the Law* (New York: Cambridge University Press, 2008).

<sup>5</sup> For the continuation of National Socialist-era judges in East and West German Courts during the Cold War, see Annette Weinke, “The German-German Rivalry and the Prosecution of Nazi War Criminals During the Cold War, 1958-1965,” in Stoltzfus and Friedlander 2008, 151-172. For discussion of the different characterizations and charges brought against male and female perpetrators in the post-war period, see Ulrike Weckel and Edgar Wolfrum (eds.), *‘Bestien’ und ‘Befehlsempfänger’: Frauen und Männer in NS-Prozessen nach 1945* (Göttingen: Vandenhoeck und Ruprecht, 2003). The University of Amsterdam’s series *Justiz und NS-Verbrechen* [published in English as *Nazi Crimes on Trial*] offers the most complete record of postwar trials of murder-related crimes in East and West German courts. The series devotes fifteen volumes to the years 1949-1954

<sup>6</sup> The Amsterdam Series does not digest the specific case Hart and Fuller cite, possibly because it did not ultimately result in death of the husband of the grudge informer – though some other cases included in this series have a similar result. The series does include the 1952 West German Supreme Court case cited by Pappe as a more representative, and helpful case in his 1960 article.

between differently positioned legal actors. At the same time, the debate focuses attention on pathologies of practical reasoning that arise in the context of severely unjust legal systems. Due to the gravity of the jurisprudential questions it raises, and due also to the sensational quality of the Grudge Informer case itself, the Hart-Fuller debate remains a staple of law school syllabi, and is regularly re-opened by latter-day legal philosophers.

In this chapter, I use the Hart-Fuller debate to introduce the basic normative, meta-normative, and meta-descriptive questions addressed in this study. These are questions about the contribution of norms generally, and social norms particularly, to the explanation and prevention of mass atrocities, and to efforts to secure accountability for such large-scale crimes in the context of liberalizing political transitions.

The Hart-Fuller debate illuminates the problems of practical reasoning that confront individual and institutional agents in situations where legal and moral norms diverge dramatically, or change radically. At the same time, Hart and Fuller's jurisprudential writings offer important insights into the ontology and action-guiding power of what I call 'informal principles of social order' – e.g. customs, conventions, traditions, and social norms. Neither Hart nor Fuller ever substantially connected these two strands of research. Neither theorist seriously considered what contributions such informal principles might make to our understanding of large-scale crimes. My aim in this chapter, and in this study generally, is to show that such informal principles generally, and social norms particularly, can and do play an important action-guiding role before, during, and after mass atrocities – and so deserve the attention of scholars and practitioners seeking to make sense of, and to secure accountability for, such large-scale crimes.



The chapter proceeds as follows. In Section 2.1 I briefly review the context, content, and influence of the Hart-Fuller debate. In the Section 2.2 I discuss three general features of normative systems illuminated by the Hart-Fuller debate. These features are: cognitive and conative accessibility; concurrent functioning with other normative systems; and the creation and maintenance of social meanings and identities. In Section 2.3 I introduce the notion of informal principles of social order, and show that both Fuller and Hart were keenly interested in the way such informal principles function concurrently with positive or “enacted” laws within modern political societies. Finally, in Section 2.4, I argue that historical cases like the Grudge Informer case give us good reason to consider how such informal principles contribute to circumstances Hart described as cases of “Hell created on earth by men for other men.”<sup>7</sup>

## **2.1 The Hart-Fuller Debate: Context, Content, Influence**

The Hart-Fuller debate began with a lecture given to an American audience by an English legal philosopher who chose to illustrate his thesis using a West German court case. Each of these contextual factors helped to shape the content of this debate. Each also helps to explain the standing this debate has retained within Anglo-American jurisprudence.

In this section I briefly review the context, content, and influence of the Hart-Fuller debate. My goal is not to give a comprehensive overview of that debate (a task

---

<sup>7</sup> H.L.A. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review* 71 (February 1958), 616.

already excellently performed by others)<sup>8</sup>, but rather to highlight questions and claims about the relationship between law and other normative systems that are integral to my own study. Along the way, I will explain Hart and Fuller's interest in the Grudge Informer case, and note several few points on which their information about that case was inaccurate.

### 2.1.1 Context

The Hart-Fuller debate is widely agreed to have begun with H.L.A. Hart's 1957 Holmes Lecture, "Positivism and the Separation of Law and Morals," delivered to a large audience at the Harvard Law School. Lon Fuller, co-sponsor of Hart's invitation to spend a year as a visiting professor at Harvard, had been a member of the Law School faculty since 1939.<sup>9</sup> Fuller knew in advance that Hart's developing positivist conception of law and legal systems differed substantially from his own purposive theory of law. Nevertheless, Hart's Holmes Lecture prompted Fuller to respond directly to Hart's jurisprudential position. Fuller's reply, "Positivism and Fidelity to Law," directly follows Hart's lecture in the February 1958 number of the *Harvard Law Review*.<sup>10</sup>

Postwar developments in West German law feature prominently in both Hart and Fuller's 1958 papers, and it is particularly important to understand this contextual factor. Both papers engage with the claims of the German legal scholar Gustav Radbruch, before

---

<sup>8</sup> For an excellent overview of the Hart-Fuller debate, cf. Nicola Lacey, "Out of the 'Witches' Cauldron?': Reinterpreting the Context and Reassessing the Significance of the Hart-Fuller Debate," in Peter Cane (ed.), *The Hart-Fuller Debate in the Twenty-First Century* (Oxford: Hart Publishing, 2010), 1-42.

<sup>9</sup> Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (New York: Oxford Publishing, 2006), 179.

<sup>10</sup> Hart 1958; Lon Fuller, "Positivism and Fidelity to Law," *Harvard Law Review* 71 (February 1958), 630-672.

the war a leading legal positivist, who afterwards came to hold that “supra-positive” law, or ultimate principles of justice, stand above and can invalidate enacted law in severely unjust legal systems.<sup>11</sup> Fuller himself had partially translated Radbruch’s key writings on this topic, which include discussion of wartime denunciation cases; he shared his translations with Hart, who evidently used them as the basis for his critique of Radbruch.

Hart and Fuller also shared a second common source: an English summary of the Bamberg Court’s 1949 decision in the Grudge Informer case, which was published in 1951 in the *Harvard Law Review*. As H.O. Pappé pointed out in 1960, and as scholars such as David Dyzenhaus and Thomas Mertens have more recently explained, this early summary of the Grudge Informer case misrepresented both the facts of that case and the reasoning behind the Bamberg Court’s decision.<sup>12</sup> These misrepresentations were consequential for Hart and Fuller’s illustrative invocations of this real-world case in their papers, as we shall see.

### 2.1.2 Content

It is easy to identify the start of the Hart-Fuller debate. It is more difficult to say precisely when that debate ended, or to state categorically which publications it comprehends. After their initial *Harvard Law Review* exchange, Hart and Fuller continued to critique each other’s views on issues of fundamental jurisprudence for at least a decade. In this section I briefly introduce the various books and articles I consider salient to this debate.

---

<sup>11</sup> See Robert Alexy, “A Defence of Radbruch’s Formula,” in *Recrafting the Rule of Law*, ed. David Dyzenhaus (Portland, OR: Hart Publishing, 1999), 15-39.

<sup>12</sup> Pappé 1960; Mertens 2002; Dyzenhaus 2008.

Hart's principal response to Fuller's 1958 paper appears in his 1961 book, *The Concept of Law*. In that book, Hart famously argues that the rule of law is compatible with "great iniquity."<sup>13</sup> Later, in his review of Fuller's 1964 book *The Morality of Law*, Hart deploys the example of a "morality of poisoning" – i.e. a set of rules adopted by assassins for the regulation of their manifestly immoral craft – in order to refute Fuller's claim that there is a necessary connection between the formal properties of a code of conduct and the moral character of the content of that code.<sup>14</sup>

Within *The Morality of Law* Fuller offers his own further criticisms of Hart's novel form of legal positivism. Here Fuller sets forth his fable of Rex, the unsuccessful lawgiver, in order to illustrate the many ways in which disregard for legality obstructs the creation of valid law.<sup>15</sup> In the same book Fuller emphasizes the notion of reciprocity between lawgivers and law subjects as an important, quasi-sociological requirement for the endurance of legal systems over time – and suggests that Hart's analysis of the concept of law unjustifiably neglects this significant dimension of legal systems.<sup>16</sup>

Beyond these key texts, it is difficult to say how much further the Hart-Fuller debate extends. My own view is that at least some later texts are crucial for understanding that debate. I have in mind particularly Fuller's 1969 essay "Human Interaction and the Law," which never names Hart directly, but clearly critiques positions on custom and

---

<sup>13</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press 1961), 202.

<sup>14</sup> H.L.A. Hart, "Review of Lon Fuller's *The Morality of Law*," *Harvard Law Review* 78, n. 6 (April 1965), 1281-1296.

<sup>15</sup> Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964), 33-38.

<sup>16</sup> Fuller 1964, 139-140.

convention found in *The Concept of Law*.<sup>17</sup> By including this and other additional texts in my basic background for the Hart-Fuller debate, I suppose I am committing myself to a broad interpretation of this jurisprudential exchange.<sup>18</sup> As we shall see, this broad view is crucial for comparing Hart and Fuller's respective views on the nature and dynamics of informal principles of social order.

### 2.1.3 *Influence*

The influence of the Hart-Fuller debate within legal philosophy, and within analytical political philosophy more generally, has been considerable. Many leading figures in Anglo-American jurisprudence today – including Jeremy Waldron, Joseph Raz, Leslie Greene, Gerald Postema, and Scott Shapiro – have written extensively on the substantive points at issue in that debate. Many of those substantive points, in turn, have taken on new relevance in light of various legal, political, and philosophical developments of the late 20<sup>th</sup> and early 21<sup>st</sup> century.

In the first place, Fuller's attempt to specify desiderata, or perhaps criteria, for determining when the rule of law is satisfied, has been taken up and extended by scholars studying the defining problems of transitional justice.

In the second place, Hart's account of social rules and Fuller's account of informal principles that help to structure social interactions continue to be studied by

---

<sup>17</sup> Lon Fuller, "Human Interaction and the Law," in Kenneth Winston (ed.), *The Principles of Social Order* (Durham, NC: Duke University Press, 1981), 211-246.

<sup>18</sup> Insofar as Hart's posthumously published postscript to *The Concept of Law* contains modifications of his earlier conception of the moral domain in general, it too can plausibly be said to bear on the Hart-Fuller debate. Additionally, newly discovered texts, such as Hart's newly discovered essay on "Discretion," written while he was visiting at Harvard, seem salient. Cf. H.L.A. Hart, "Discretion," *Harvard Law Review* 125 n. 2 (December 2013), 652-665.

philosophers working on conventions, social norms, and other informal rules and principles that constitute the stuff of first-personal reflection and practical deliberation.

As stated above, I believe these two strands of influence from the Hart-Fuller debate ought to be more thoroughly combined and brought to bear on the normative and meta-normative problems arising from mass atrocities and political transitions. In order to make this argument, I must now undertake a more in-depth interpretation of the main points at issue in the Hart-Fuller debate. In the next section, I will consider what the Hart-Fuller debate over law and legality can tell us about norms and normative systems generally. After that, I will turn to consider their specific claims about norms and principles that fall outside the boundaries of law and morality, and belong instead to the general category of informal principles of social order.

## **2.2 Hart and Fuller on the Nature of Normative Systems**

I understand norms as practical prescriptions, prohibitions, or permissions accepted by members of particular groups or populations, and capable of guiding the actions of those members.<sup>19</sup> I understand normative systems as sets or collections of norms that stand in certain ordered relationships with each other, and which are characterized as a body by certain formal qualities, such as non-redundancy, non-contradiction, and commensurability. Different normative systems may be grounded in different kinds of facts or considerations, and the norms they comprise may apply to

---

<sup>19</sup> I should note that I have in mind here the normative, rather than the merely statistical, concept of a norm. That is, I am concerned with the concept of a norm that contains an intrinsic connection to guiding action, rather than with the concept of a norm that simply picks out a feature or behavior that is exhibited by a majority of objects or actors in some collectivity.

distinct groups or collections of agents, engaged in distinct activities. Sometimes, as with chess, we say that a particular normative system is constitutive of – i.e. makes possible – a particular activity, and thus must be accepted by all who take part in that activity.<sup>20</sup>

Other times, as with war, we say that, although particular normative systems can and frequently do regulate an activity, they are not constitutive of that activity – which could be, and may have been, regulated by different norms and normative systems than those currently in force.<sup>21</sup>

Despite the diversity of normative systems, there are some features that all such systems share in common. Some of these features have to do with the ways in which normative systems operate – the ways in which they help guide the actions and deliberations of the agents to whom the norms they contain apply. Other features have to do with the values, identities, and meanings that such norms and normative systems create and sustain.

Legal systems are useful as models for thinking about these shared features of normative systems. This is true no matter whether the particular legal system selected for study is well formed or, as may be more instructive, defective. When legal systems are seriously defective across one or more dimensions, they are said to suffer failures of the rule of law, or legality.<sup>22</sup> The Hart-Fuller debate was in large part a debate about the degree to which a legal system can be defective, and still satisfy the rule of law. But it

---

<sup>20</sup> As this example indicates, I do not mark a major distinction between norms and rules, insofar as both are accepted by some person(s) – though it is possible that at least some rules remain rules even when not accepted by anyone.

<sup>21</sup> John Rawls, “Two Concepts of Rules,” *Philosophical Review* 64, n. 1 (1955), 3-32; Andrei Marmor, *Social Convention*, Princeton, NJ: Princeton University Press, 2005.

<sup>22</sup> Legal theorists sometimes use the term ‘legality’ in a technical sense. In this study, I use the term more or less interchangeably with the term ‘rule of law,’ i.e. as an evaluative term used for assessing qualitative features of laws and legal systems.

was also a debate about the best way to reconstruct the practical dilemmas faced by particular actors in cases where two normative systems – law and morality – conflict.

In this section, I use the Hart-Fuller debate to highlight three general features of normative systems. These are the features of (1) cognitive and conative accessibility; (2) concurrent functioning with other normative systems; and (3) creation and expression of social meanings and identities. Although I consider these features necessary (though perhaps not sufficient) conditions for the existence of normative systems, I will not seek to defend that claim here. Instead, I want to show that different normative systems manifest these features in different ways, and to different degrees. This is a claim that both Hart and Fuller would accept, despite their different views on the relationship between law and morality.

### *2.2.1 Cognitive and Conative Accessibility*

A first general feature of normative systems is that of cognitive and conative accessibility. According to this feature, normative systems – along with the particular norms they comprise– are generally available as possible objects of belief and desire for individuals to whom those normative systems apply.

Particular theories of particular kinds of normative system often differ in their accounts of to whom, to what extent, and in what way those systems must be accessible to the various agents to whom they apply. Within ethics, major divisions exist concerning how moral norms become objects of belief and desire (notably, on whether cognitive attitudes towards moral norms entail conative attitudes towards those same norms). Within jurisprudence, questions abound about which particularly positioned actors need



to have cognitive and conative access to legal norms. Within both spheres, it is disputed how complete any given individual's access to relevant norms at any particular time must be in order for the particular normative system to maintain its action-guiding role.

Hart and Fuller differed significantly in their views on the cognitive and conative accessibility of normative systems generally, and legal systems specifically.

Characteristically, Hart was more inclined than Fuller to frame questions about cognitive and conative accessibility in terms of necessary conditions for the existence of legal and other normative systems. Here I will first consider Hart's account of the cognitive and conative accessibility of legal systems, and then try to reconstruct Fuller's view.

Two distinctions are central to understanding Hart's views on the cognitive and conative accessibility of legal systems. First, Hart distinguished between "primary" and "secondary" rules within legal systems; second, he distinguished between the "internal" and "external" perspectives that legal officials and law subjects can and do take on such rules. I will discuss each of these distinctions in turn.

Primary rules, on Hart's view, are rules according to which "human beings are required to do or abstain from certain actions, whether they wish to or not."<sup>23</sup> Secondary rules are rules that specify conditions for introducing, modifying, or in other ways controlling the application of primary rules.<sup>24</sup> Primary rules are the constituent elements of many different kinds of normative orders and normative systems, including rules of

---

<sup>23</sup> Hart 1961, 78-9.

<sup>24</sup> *ibid.*, 79.

etiquette, cultural traditions, and so forth.<sup>25</sup> Hart thought it was the central characteristic of legal systems to be composed of a union of primary and secondary rules.

Hart's claim that primary rules require agents subject to them to perform or abstain from actions "whether they wish to or not" directly raises the question about the conative accessibility of the norms composing legal systems – i.e. the ability of agents to arrive at the right sort of motivational states with respect to such rules. Here Hart's distinction between "internal" and "external" perspectives on primary and secondary rules becomes crucial. The external perspective on legal (or other) rules, Hart contends, regards the power of those rules to guide (and ultimately, explain) action as arising chiefly from the penalties or sanctions typically meted out for infractions. To take the internal perspective on a rule is to accept that rule in such a way that one will be disposed to treat infractions (by oneself or others to whom the rule applies) not only as triggering, but as justifying sanctions.<sup>26</sup>

Hart suggests that in most actually existing legal systems a combination of internal and external perspectives on legal rules prevails amongst law subjects.<sup>27</sup> It should be clear that both perspectives help to solve the problem of conative accessibility – since the desire to guide one's action according to a rule can, plausibly, be founded on either acceptance of that rule, and full acknowledgment of its power to create obligations, or on

---

<sup>25</sup> As I explain in Section 2.3 below, Hart did not think rules of etiquette rose to the level of a system, referring to these instead as a 'set' of primary rules. Hart did, however, believe that other kinds of non-legal rules could constitute genuine normative systems. He seems to suggest that the presence of even a rudimentary rule of recognition – such as 'consult this or that list or text' – was sufficient for a set of norms to become a system; whether he also considered this a necessary condition for systematicity is less clear. Cf. Hart 1961, 93.

<sup>26</sup> *ibid.* 88.

<sup>27</sup> *ibid.*, 113.

the threat of sanctions for violations of that rule, once these become sufficiently severe.<sup>28</sup>

It is less clear that either of these distinctions adequately addresses the problem of the cognitive accessibility of legal rules – i.e. provides insights into the ability of law-subjects to reliably form beliefs about what the norms are that apply to them. Indeed, recent critics of Hart’s account have suggested that it is implausible to suppose that all those subject to a legal system could enjoy either an internal or an external perspective on all the rules of that system. Rather than trying to respond as Hart might to this critique, I want to turn now to consider what Fuller’s significantly different jurisprudence can tell us about the cognitive and conative accessibility of normative systems.

Fuller’s best-known contribution to legal theory is his proposal of a set of conditions, or as he called them, desiderata for legal systems satisfying the rule of law. Sometimes described as developing a “laundry list” account of the rule of law,<sup>29</sup> Fuller identified eight such desiderata in his 1964 book *The Morality of Law*. These are: (1) clarity (2) prospectivity (3) publicity (4) generality (5) non-contradictoriness (6) possibility of fulfillment (7) constancy and (8) congruence of official words and actions.<sup>30</sup>

These eight desiderata go far towards securing, but do not guarantee, the cognitive accessibility of legal norms. One reason they do not guarantee such accessibility, as Fuller saw it, is that formal features of norms themselves cannot guarantee that individuals subject to them will be able to form clear beliefs about them. Instead, Fuller

---

<sup>28</sup> Importantly, Hart believed that legal systems could not exist, or persist, in which the external perspective prevailed universally.

<sup>29</sup> Jeremy Waldron, “The Rule of Law and the Importance of Procedure,” *NOMOS L: Getting to the Rule of Law* (New York: NYU Press, 2011), 5.

<sup>30</sup> Fuller 1964, Ch. 2.

believed that social conditions of reciprocity, or mutual responsiveness of legal officials and law subjects to each others actions under law, are necessary in order for individuals to form beliefs appropriate for guiding their actions according to legal norms. As we will see below, Fuller eventually expanded this idea of reciprocity into a larger claim about the *interactive* character of law as a system of norms.

Fuller also considered these eight desiderata crucial to the conative accessibility of legal norms, i.e. the ability of individuals to form desires to guide their actions according to them. The central concept of Fuller's jurisprudence related to conative accessibility is the notion of "fidelity" to law. Fidelity to law means, most generally, a disposition to act in ways that support or sustain law as a form of governance. Exactly what actions manifest fidelity to law differ depending on the particular position a legal actor occupies – whether legislator, judge, or law-subject. In each case, however, the ability of particular legal actors to maintain fidelity depends, in part, on the commitment of differently positioned legal actors to do the same. It is for this reason, I think, that Fuller claims that Hart's 1957 Holmes lecture raises the question of fidelity to law. What Fuller suggests in his response to Hart is that the violations of legality under the National Socialist legal system were so extreme that not only the ability to know what laws there were, but the ability to form desires to guide one's actions according to those laws, were dramatically undermined.

### 2.2.2 *Concurrent Functioning*

A second general feature of normative systems is that they function concurrently with other normative systems to regulate individual and group conduct. Concurrent

functioning does not mean mere parallel operation, or co-existence without precedence. Most normative systems make claims of priority, superiority, or exclusion against the norms of certain alternate systems. Philosophical work on the concurrency of normative systems focuses on assessing the grounds of such claims, and on identifying critical standards for settling conflicts. Another major philosophical line of inquiry consists in trying to reconcile apparently distinct normative systems by showing that they reduce to the same fundamental principles, such as principles of rationality, or fundamental values, such as autonomy.

Methodologically, it is possible to describe the concurrency of normative systems from a number of different perspectives. One perspective describes normative systems – and their interactions – substantially, as “things in the world” continuously available for study and description. A second perspective approaches normative systems and their interactions subjectively, that is, from the point of view of an agent engaged in practical reasoning. Within the context of the Hart-Fuller debate, Hart generally worked from the former perspective, while Fuller tended towards the latter. As above, I will first discuss Hart’s views on the concurrency of normative systems, then turn to Fuller’s.

As Peter Crane has observed, the analytical power of Hart’s theory of law and legal systems stems chiefly from the fact that it “deploys a set of relatively clear criteria that can be used to identify specific similarities and differences between various normative regimes.”<sup>31</sup> Crane has in mind both the criteria Hart uses to distinguish modern from “primitive” legal systems (i.e. the existence in union of both primary and secondary rules) and the criteria Hart offers for distinguishing moral norms from legal norms. Since

---

<sup>31</sup> Peter Crane, “Morality, Law and Conflicting Reasons for Action,” *Cambridge Law Journal* 71 no. 1 (March 2012), 68.

I discussed the distinction between primary and secondary rules above, I will focus here on Hart's distinction between legal and moral norms.

Hart clearly believed that legal and moral norms, and the normative systems to which they belong, operate concurrently; he also, famously, believed that those normative systems were separable. Both of these claims are implicated in Hart's analysis of the Grudge Informer case (according to which the law under which the Informer's husband was convicted was legally valid, but morally unconscionable), and both claims are implicated in the principle of "candor" he recommends for judges and analysts of unjust laws.<sup>32</sup> But what, if anything, distinguishes the specific kinds of norms that compose legal and moral normative systems?

Hart highlights four (but in fact mentions five) distinguishing features of specifically moral norms. Moral norms, he claims, are characterized by (1) "importance" (2) "immunity from deliberate change" (3) the "voluntary character of moral offences" and (4) the "forms of moral pressure" surrounding them.<sup>33</sup> In fact, it is doubtful whether any of these features (properly spelled out) are really distinctive of moral norms; and since even an affirmative answer seems to rely on claims borrowed from substantive theories of moral ontology (a sphere on which Hart declares a desire to remain largely agnostic) the discussion appears to fail on its own terms. We should take from this the cautionary point that even if we are strongly convinced that two normative systems are concurrent but separate (or separable), explaining precisely the qualitative differences that distinguish the norms they contain is difficult.

---

<sup>32</sup> Hart 1958, 619-21.

<sup>33</sup> Hart 1961, 164; Crane 2012.

One further, fifth distinguishing feature of moral norms is briefly mentioned in *The Concept of Law*. Hart makes the point in connection with his claim that moral norms are immune from deliberate change, and particularly legislative change; he suggests that, at a conceptual level, the “repugnan[ce]” of proposals to legislate morals derives from the fact that “we conceive of morality as the ultimate standard by which human actions (legislative or otherwise) are evaluated.”<sup>34</sup> If correct, this claim implies a very specific kind of concurrent relationship between law and morality: a relationship in which, as Crane puts it, moral norms serve as “trumps” on legal norms – overriding legal norms in every case where there is an irreconcilable conflict between legal and moral norms.<sup>35</sup>

I will not argue here one way or another on whether Hart considered moral norms to “trump” legal norms everywhere and in all cases where they conflict. It is clear enough, from his discussion of the Grudge Informer case, that he believed that moral norms do trump at least in scenarios where legal actors face extremely unjust laws. I do want to point out, however, that there are at least two ways to construe how moral norms trump legal norms in such cases. On the one hand, moral norms might outweigh legal norms – meaning that, although defeated, legal norms do carry some weight, and specifically, that legal norms cannot simply be excluded from agents’ practical reasoning. On the other hand, in some cases, moral norms might exclude legal norms – meaning that agents make a mistake of reasoning if they even include those legal norms in their practical deliberations.

Fuller’s views on the concurrent functioning of legal and other normative systems are more difficult to summarize. The main point, which is in some ways the heart of his

---

<sup>34</sup> *ibid.*, 225.

<sup>35</sup> Crane 2012.

debate with Hart, is that Fuller believes the eight formal principles of the rule of law discussed above constituted the “internal morality of law.” Exactly how this phrase should be interpreted is disputed; but one way is to say that Fuller believed that legal systems that satisfy the principles of legality would for that reason alone be less likely to be compromised by unjust laws.

Many positivists, including most prominently Hart and Joseph Raz, flatly denied the kind of necessary connection between the form and content of the law that this interpretation of Fuller’s “internal morality of law” entails. Hart famously used the case of the Grudge Informer, along with other examples real and hypothetical, to show that law is compatible with “great iniquity.”<sup>36</sup> Raz analogized law to a knife, arguing that both entities are instruments equally compatible with serving benign or malignant purposes.<sup>37</sup> On these views, while law and morality are necessarily concurrent normative systems (at least so long as law exists at all), they are not necessarily complementary normative systems, for they are quite capable of guiding agents in fully opposite directions.

It is easier to dismiss than to clearly explain exactly what the complementarity of law and morality would look like on Fuller’s view. David Dyzenhaus has recently provided an epistemic account of this complementarity, suggesting that failures of legality in legal systems should prompt us to reconsider the morality of the law or laws that seem responsible for those failures.<sup>38</sup> So, for example, when a legal system treats individuals as fully competent adults for some purposes, but not for others (as was the case in the United States at that time when draft-eligibility began at 18, but eligibility to

---

<sup>36</sup> Hart 1961, 202.

<sup>37</sup> Joseph Raz, “The Rule of Law and Its Virtue,” in *The Authority of Law: Essays on Law and Morality* (New York: Oxford University Press, 2009), 225-226.

<sup>38</sup> David Dyzenhaus, “Unjust Law in Legal Theory,” Unpublished Manuscript.



vote at 21), we might be prompted by the failure of generality of the legal system with respect to the age of majority to consider whether it is *morally suspect* to separate eligibility to die for one's country from eligibility to vote for one's leaders in this way.

I do not know if Fuller would endorse this interpretation of his notion of the internal morality of law. I do think Dyzenhaus's interpretation helps us to understand one particular way in which law and morality, or indeed any two normative systems, can be both concurrent and complementary. We might call the relationship Dyzenhaus describes one of *epistemic complementarity* between normative systems – in which the cognitive processes involved in determining what norms belonging to one normative systems are or require leads non-coincidentally to discoveries about what the norms of a different normative system are or require. In the next section, I will consider a different interpretation of the internal morality of law; one based on the morally valuable social meanings and identities that government by law helps sustain.

### 2.2.3 *Social Meanings and Identities*

A third general feature of normative systems is that they create and maintain social meanings and social identities.<sup>39</sup> 'Social meaning' refers to the ways in which individual and group actors construe the purpose and the value of their actions – whether norm-guided or norm-rejecting – within an arena where those actions are also visible to other actors. 'Social identity' refers to the ways in which individual and group actors perceive themselves in relation to other actors. Thus defined, social meanings and social

---

<sup>39</sup> I borrow this terminology from Geoffrey Brennan, Lina Eriksson, Robert Goodin, and Nicholas Southwood, *Explaining Norms* (Oxford: Oxford University Press, 2013), 156.

identities are mutually determining: the actions that actors are seen to take affect the identities they claim, and the identities actors claim often dispose, and sometimes compel, them to take certain actions.

Social meanings and identities spring from numerous sources, and it is difficult to specify precisely the importance of norms and normative systems in creating or maintaining them. Likewise problematic are attempts to quantify the significance of social meanings and identities in motivating, and consequently explaining, action. Within political science, constructivists convincingly argue that social meanings and identities rightly belong among the utility functions that rational choice theorists use to model and explain action, but it is hard to attain any greater specificity than this.

Narrowing our focus to legal systems specifically, we should distinguish between two different levels of inquiry about the power of such systems to create and maintain social meanings and identities. At one level, we might ask what meanings and identities the laws and legal systems of particular jurisdictions create and maintain. This is the sort of question pundits and politicians presume to answer when they say that the laws of England preserve liberty; the laws of America, freedom; the laws of France, equality.<sup>40</sup> Pronouncements of this kind are common, but they are not particularly philosophical, and neither Hart nor Fuller spends much energy discussing them.

At another level, we can ask what meanings and identities, if any, are created or maintained by law considered in itself – that is, by the sheer kind of normative system

---

<sup>40</sup> Many considerably darker claims about connections between the laws of particular political societies and social meanings and identities within those societies can be found in history. These include the National Socialist claim that law organized around the *Führerprinzip* supports *Völkisch*-ness, and the claim that race laws in antebellum America supported the preservation of God's ordering of humanity.

that law is, regardless of jurisdictional variations in form and content. Asking this question leads us to perceive one further substantive difference between Hart and Fuller, which is of considerable consequence for their positions on the problem of unjust law.

For Fuller, legal systems that meet the minimal requirements of legality necessarily create and sustain important social meanings and identities for both legal officials and law-subjects. In particular, legal systems that meet the test of legality express and preserve an image of human beings as “responsible agents” bearing “dignity.”<sup>41</sup>

This is a feature of Fuller’s thought that has lately been much emphasized, most notably by Kristen Rundle and Jeremy Waldron.<sup>42</sup> How exactly does law support dignity? Fuller’s answer seems to be that law is distinguished from many other kinds of normative systems in that it does not generally seek to prescribe goals or objectives for law subjects, but rather creates a sphere of regulated freedom in which law subjects can pursue their own goals and objectives. This may seem close to the Hayekian idea that the value of law lies centrally in the creation of predictability, and consequently of liberty. However, Fuller also believed that part of having dignity was in being able to enter into direct discursive relations with legal officials, e.g. by explaining one’s own actions in court, or by asking officials for reasons for their own actions.<sup>43</sup> Not all normative systems have this feature. Indeed, we can think of many such systems, including the regulations of some clubs or fraternal organizations, which deny some or all members the opportunity to

---

<sup>41</sup> Fuller 1964, 162.

<sup>42</sup> Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller* (Oxford: Hart Publishing, 2012); Waldron 2011.

<sup>43</sup> This is a point that Jeremy Waldron has stressed in a number of recent publications on the rule of law. Cf. Jeremy Waldron, “The Concept and the Rule of Law,” 43 *Georgia Law Review* 1, 2008-2009; also Waldron 2011.

ask for explanations or justifications of rules. Those normative systems may create or secure many different kinds of meanings or identities. But they do not preserve dignity in the way Fuller thought law did, by allowing persons subject to norms to enter into direct discursive relations with persons responsible for creating and upholding them.

It is tempting to draw a sharp contrast between Hart and Fuller on this point, and to say that Hart believed legal systems do not, at the most general level, necessarily create or maintain any particular identity for those who fall within their various jurisdictions. To say this would be to ignore Hart's discussion, in *The Concept of Law*, of the "minimum content of natural law."<sup>44</sup> In this section, Hart suggests that, as a matter of natural necessity, all legal systems rest on a certain minimal conception of human nature and capacities, characterized by five elements. These are: (1) human vulnerability, (2) approximate equality, (3) limited altruism, (4) limited resources, and (5) limited understanding and strength of will.

These five minimal constraints on legal systems clearly arise from, and help to sustain, a certain notion of human identity. This is not a conception of human identity that can easily be celebrated or made into a creed, but it is not a negative or pessimistic picture, either. Indeed, although Fuller would insinuate that Hart's conception of law would allow that title to be applied to a system of mere "managerial direction," that claim is hard to square with this account of the minimal content of natural law, and so it is not surprising to find Hart's expositors bristling at this claim.<sup>45</sup>

---

<sup>44</sup> Hart 1961, 189-195.

<sup>45</sup> Neil MacCormick suggests that "one cannot but reject – reject even with indignation – [this] aspersion cast upon Hart as legal philosopher by the late Lon L. Fuller." Cf. MacCormick, *H.L.A. Hart*, Second Edition (Stanford: Stanford University Press, 2008), 193.

### 2.3 Law's 'Extended Sense': Hart and Fuller on Informal Principles of Social Order

Toward the end of his 2011 book, *Legality*, Scott Shapiro suggests that Fuller overlooked one very important benefit officials and citizens get from governance, or “social planning,” according to law. This is:

the enormous cognitive energy saved by not having to think about the best way to regulate our lives and to convince others about the rectitude of our judgments. Even when the rules are misguided or corrupt, we are at least spared from having to deliberate and debate about what should be done.”<sup>46</sup>

Such a characterization of Fuller’s jurisprudence is only possible if one ignores Fuller’s 1969 essay, “Human Interaction and the Law.”<sup>47</sup> In the essay, Fuller identifies calculability, or cognitive economy, as central to the functional value of law, and integral to the explanation of law’s origins in other, informal principles of social order.

Fuller does not mention Hart directly in “Human Interaction and the Law.” Nevertheless, that essay is very clearly a continuation of Fuller’s earlier criticisms of Hart’s positivism generally, and Hart’s *The Concept of Law* specifically. An important strand of Fuller’s criticism targets Hart’s own account of the relationship between informal principles of social order – i.e. customs, conventions, traditions, and social norms – and law properly so called.

In this section I discuss Hart and Fuller’s respective understandings of the ontology and action-guiding power of such informal principles of social order. Both theorists thought such informal principles could be called law, in an “extended sense,” but they differed as to what that qualification meant.<sup>48</sup> I will not be able to discuss all the interesting aspects of their respective views here. Instead, I will focus on explaining to

---

<sup>46</sup> Scott Shapiro, *Legality* (Cambridge, MA: Harvard University Press, 2011), 396.

<sup>47</sup> Fuller 1969.

<sup>48</sup> *ibid*, 212.

what extent both men believed that such informal principles constituted normative systems, and on considering how both theorists conceived of the *concurrency* of such informal principles with the normative systems of law and morality.

### 2.3.1 *Fuller on Customary Law*

In his 1969 essay, Fuller joins together under the term “customary law” a range of informal principles of social order, including customs, conventions, traditions, and social norms.<sup>49</sup> Philosophers today will be inclined to hold these different kinds of principles distinct, on the basis of analysis of their differing structures, sources, and forms of normativity. I myself am committed to such distinctions, as will become clear in the next chapter. Nevertheless, I believe Fuller’s less specialized account stands as a good introduction to thinking about the varieties of normative systems composed of such informal principles.

Three basic claims about customary law, so understood, are defended in “Human Interaction and the Law.” First, Fuller argues that customary law is epistemically prior to positive, or ‘enacted’ law. That is, positive law cannot properly be understood except when customary law is properly understood. Second, Fuller argues that a functional understanding of customary law, rooted in the notion of “interactional expectancy,” is superior to an understanding based either on mere habit or on habit plus felt obligation. Third, Fuller argues that customary law is not diminished, but rather pervasive, in political societies featuring extensive positive legislation.

---

<sup>49</sup> *ibid.* This ‘wide’ use of the term law is already proposed in *The Morality of Law*. Cf. Fuller 1964, 124-29.

To illustrate the savings in mental calculation that customs commonly secure, Fuller cites the example of a developing custom (we would call it a convention) of reciprocal, one-to-one expulsion of diplomats from the U.S. and the U.S.S.R. Fuller suggests that the value of this convention lies in its easy calculability; “any responsible official,” he writes, “would reflect a long time” before choosing to alter the proportion of the exchange, since doing so would render not only the opposing nation’s interpretation of this action, but also their likely future responses to this action, less predictable.<sup>50</sup> As Fuller concludes, “this is a case where both sides would probably be well-advised to stick with the familiar ritual.”<sup>51</sup>

This example is offered by Fuller to illustrate the general interactive quality of customs, contracts, and enacted law, and it succeeds on those terms. Some commentators have sought to show that law rests in its foundations on certain interconnected conventions.<sup>52</sup> One challenge in doing this is to show how conventions, which commonly regulate interactions of a very specific and limited kind, can support broader normative systems, including legal systems. Fuller certainly thought that some areas of customary law were much more systematized than this particular example; in both *The Morality of Law* and “Human Interaction and the Law” he describes the rules of clubs, colleges, labor unions, and so on as being both systematic and customary.<sup>53</sup>

---

<sup>50</sup> Fuller 1969, 218.

<sup>51</sup> *ibid.*, 218-19.

<sup>52</sup> Gerald Postema, “Coordination and Convention at the Foundations of Law,” *Journal of Legal Studies* 11 (January 1982), 165-203; *idem.*, “Conventions and the Foundations of Law,” *Legal Philosophy in the Twentieth Century: The Common Law World*, Springer (2011), 483-546.

<sup>53</sup> Fuller 1969, 212. By describing the sets of norms governing such groups and collectivities as “systems” that are “‘law-like’ in status and function”, Fuller seems to mean that these sets of rules have certain procedural requirements when they are applied.

Studying Fuller's account of customary law enhances our understanding of his views on the concurrency of normative systems. Fuller sees customary law not as being superseded, but rather as continuing to pervade, societies that also feature enacted law. Studying this account also helps to clarify what kinds of identities Fuller thought formal law creates, as compared to custom. As he remarks, whereas customs and conventions commonly prescribe very precise roles and spheres of action for those who are party to them, statutory laws typically leave a wide sphere of possible actions and identities open, ruling out only some of the most prejudicial to a shared social life.<sup>54</sup> If the general framework orienting this study is correct, then such differences in the kinds of actions prescribed and identities established by informal rules and by enacted laws will be just as consequential for understanding situations of several social and political unrest and violence as they are for understanding the ordinary, orderly functioning of societies.

### 2.3.2 Hart on Customs, Traditions, and Social Rules

Hart has had a more substantial influence than Fuller on subsequent philosophical work on informal principles of social order. Philosophers including Margaret Gilbert, Philip Pettit, and Geoffrey Brennan have adopted and expanded the account of social rules that Hart provides in *The Concept of Law*. Within legal theory, Hart has become associated, since the posthumous publication of his uncompleted postscript to *The Concept of Law*, with the thesis of conventionalism – in particular, with claiming that the rule of recognition judges rely on in determining what is law is conventional. Besides these kinds of informal principles, Hart also discusses customs and traditions in his work,

---

<sup>54</sup> Fuller 1969, 244.



as informal principles that often operate alongside, but do not themselves have the character of law.

One notable claim Hart makes about social rules, such as rules of etiquette, in *The Concept of Law* is that social rules do not typically display the systematic quality typically found in legal or moral systems. Instead, he suggests, social rules – of etiquette, and perhaps of other things – typically form “sets” rather than “systems.” Hart goes on to suggest that it is in various ways inconvenient for rules of this kind to lack the qualities of systematicity – which seems to mean, to lack secondary rules – but that this lack of systematicity hardly bars these rules from being properly accepted, obligatory rules.

It is possible to press a similar point against both Hart and Fuller’s accounts of informal principles of social order. Namely, if we look more closely at the nature and dynamics of social rules, and at the kinds of practical problems they help to solve, it may turn out that a lack of systematicity, like a lack of generality, or prospectivity, or one of the other principles associated with legality, allows such norms to emerge and spread with the speed necessary to resolve those problems, in the sense of assigning responsibilities for tasks, of penalties for exploiting common resources. Just because social norms often lack these qualities, however, they seem to be particularly suspect from the standpoint of justice. And this may be something like a negative demonstration of Fuller’s notion of the internal morality of law: if it could be shown that systems or sets of norms that are not commonly reviewed in the aspirational sense for accordance with the rule of law require stricter scrutiny from the standpoint of justice, then the conclusion that formal principles of legality do, as a practical matter at least, incline a system towards justice (as opposed to pure instrumental success or efficiency) seems to follow.

### *2.3.3 Informal Principles and the Full Picture of Political Society*

In this section, I have shown that both Hart and Fuller, as a direct corollary of their theoretical work on law, undertook to understand the ontology and action-guiding power of informal principles of social order. Hart's investigation of social rules, especially, remains influential today; but neither his account of social rules nor Fuller's study of customary law is commonly treated as part of the Hart-Fuller debate. Furthermore, it is not clear that either Hart or Fuller saw his interest in informal principles of social order as meaningfully connected to the questions raised by unjust laws and legal systems.

In my view, this represents a missed connection. In order fully to understand the problems of practical reasoning that confront individual actors in the context of extremely unjust political societies, we need to ask not only whether and how political leaders or factions use law to achieve and sustain immoral policies, but also how they create or exploit informal principles of social order for this purpose. In the next, and final, section I will suggest that the retrospective, prospective, and present-oriented aims of research on mass atrocity and transitional justice requires attending more closely to such informal principles.

## **2.4 The Message of Cain and the Testimony of Ulysses**

One of the most trenchant observations in Fuller's 1969 account of informal principles of social order is his claim that such principles do not become less, but indeed become more, significant in contexts of war and conflict. We already saw hints of this in Fuller's example of the developing convention of reciprocal expulsion of diplomats; this

example provides a clear reminder of the Cold War context of Fuller's essay. Towards the end of "Human Interaction and the Law," Fuller suggests that such principles are still more likely to arise during 'hot' wars, remarking:

Paradoxically the tacit constraints of customary law between enemies are more likely to develop during active warfare than during a hostile stalemate of relations; fighting one another is itself in this sense a social relation since it involves communication.<sup>55</sup>

Fuller seems to have in mind war in its traditional form— i.e. conflict between hostile parties that do not antecedently share common enacted or customary laws. It is less clear whether he would agree that informal principles of order also arise and guide action within less traditional kinds of conflict, such as civil wars or state-sponsored attacks on particular groups of citizens. I believe that informal principles of the kind both Hart and Fuller wrote about do help to structure and sustain such non-traditional forms of conflict. In this final section of this chapter, I want to return to the Grudge Informer case, and argue that a proper reconstruction of this case (and cases like it) requires attending to informal principles of social order, as well as to legal and moral norms.

When historians study denunciation cases from the National Socialist period, or comparable episodes from other instances of mass atrocity, they take such cases to form part of (but only part of) a complete explanation of how such large-scale crimes occur. The particular problems of explanation that historians of mass atrocity concern themselves with are (1) problems of capturing and describing the full scale of such large-scale crimes, and (2) problems of explaining widespread participation by ordinary individuals in such crimes. Studies of informers, like studies of killers or studies of

---

<sup>55</sup> *ibid.*, 241.

bystanders, generally aim at addressing both of these questions – though they often give priority to one or the other.

In order to explain the decisions and actions of informers and killers, bystanders and rescuers in historical contexts, historians typically bring to bear a broad range of tools for social explanation, looking not only at laws and legal sanctions but also at informal principles, rules, and sanctions. Within the literature on mass atrocity, more so than in other areas of study, there is also a tendency to include moral norms, and transformations such norms, within the set of explanatory factors used to make sense of such large-scale crimes.

In their mid-century reflections on the Grudge Informer case, Hart and Fuller were less concerned with providing a full reconstruction of the normative and descriptive dimensions of the decisions and actions made by the different historical actors in that case than they were with singling out dimensions relevant to their respective theories of the relationship between law and morality. Nevertheless, I believe that their accounts, elsewhere, of informal principles of social order provided them with the necessary conceptual tools to give an account of the broader normative dimensions of this case.

What would such an account, such a reconstruction, look like? It would include attention not only to the points of law that the judge presiding in the original court martial deliberated over, but also to the professional rights and duties that judges in this particular historical context accepted, and did or did not act upon. This would allow us to make more considered judgments about whether the Grudge Informer case is primarily a case of malfeasance on the part of law-subjects, or on the part of legal officials. A full account would also consider the actions (or inactions) of the neighbors and friends of the

couple in question, who apparently did not provide testimony on the accused soldier's behalf. This would allow us to better understand how bystanding, or failure to act to prevent unjust actions, helped maintain a criminal state. A full account would, furthermore, consider sexual and gender conventions or norms that the Informer in this case apparently defied, not only by denouncing her husband but also by entering into an affair while he was away in the war. This would allow us to reflect more critically on our own initial intuitions concerning the distribution of moral and legal accountability among the various actors in this and comparable denunciation cases.<sup>56</sup>

What broader goals does a perspective on large-scale crime that includes attention to informal principles of social order serve? First and foremost, it allows us better to understand the conditions that structure and sustain what Hart aptly described as “Hell created on earth by men for other men.” It helps us, that is, to understand how mass atrocities begin, and how they can continue over time with direct or indirect participation from large numbers of morally competent individuals. It also holds out the promise of two kinds of consequences from that better understanding: first, an opportunity to develop better warning signs for mass atrocities; second, an opportunity for thinking critically about the proper distribution of responsibility for such crimes. Together, these are the three aims that orient this study.

How can we acquire knowledge of the contributions that informal principles make and have made to mass atrocities? Here again a phrase from Hart is suggestive,

---

<sup>56</sup> Our intuitions about accountability may change in particular cases if, for example, a full reconstruction shows that the informer in question was suffering physical abuse from her spouse. For discussion of cases of this kind, see Joshi Vandana, "The 'Private' becomes 'Public': Wives as Denouncers in the Third Reich," *Journal of Contemporary History* 37 n. 3 (2002), 419-435.

though in this case it must be supplemented. Hart suggests there is inherent value in the “testimony of Ulysses,” i.e. the testimony of those who have been caught up in unjust legal systems, have been persecuted by those systems, and have survived. Hart had in mind Gustav Radbruch; it is natural to extend this category to include individuals like Primo Levi (who eloquently adopted the figure of Ulysses in his *If This Be a Man*) and indeed all those who have been persecuted by or have resisted, at significant risk, unjust regimes.

There is another important source of testimony about the informal principles that help to structure large-scale crimes. That testimony comes from the perpetrators themselves – as well as those who, by their actions or non-action, aid them. It is this well of testimony that historians such as Christopher Browning and Jean Hatzfeld, as well as political scientists such as James Waller and Kristen Renwick Monroe, have relied on in their efforts to make sense of mass atrocity. Rather than the testimony of Ulysses, we might call this, to borrow a trope from a different tradition, the message of Cain: the message, that is, of individuals who have caused great suffering to their families, neighbors, or colleagues by taking part in large-scale crimes. Both of these strands of testimony, I submit, are necessary in order to understand fully the contribution of informal principles to the precipitation, prolongation, and prevention of mass atrocities.

In this section I have argued that, when we attempt to model or reconstruct the practical deliberations and actions of specific individuals in specific social and political contexts, we need to consider those deliberations and actions in light of the whole picture of political society. This is true whether our aim is to explain how particular patterns of intention and action could have arisen in particular historical social and political contexts;

to critique, from a normative perspective, intentions and actions that have arisen or might arise in current social and political contexts; or to predict what patterns of intention and action are likely to arise given prospective (or proposed) changes in social and political contexts. Although I have given reasons for employing this approach here, I expect its real value to be borne out through its application in subsequent chapters of this study.

## **2.5 Conclusion**

H.L.A. Hart and Lon Fuller, along with most of the scholars who subsequently developed and extended their debate, looked to unjust legal systems, and to particular cases considered characteristic of such systems, in hopes of resolving questions arising independently within legal philosophy. My order of inquiry in this study is almost exactly the reverse. I want to consider how conceptual frameworks developed within philosophy – specifically, the framework of social norms – can be used to resolve meta-descriptive and meta-normative questions arising independently within theoretical work on mass atrocity and transitional justice. These include questions about the validity of the thesis of norm transformation as an explanatory factor in mass atrocities, as well as questions about the appropriate distribution of legal and moral responsibility to individual and institutional agents in the wake of large-scale crimes.

The discussion of the Hart-Fuller debate provided in this chapter helps to introduce those meta-normative and meta-descriptive questions in a way that should be accessible to philosophers and social scientists alike. In the chapter, I have highlighted three general features of normative systems – cognitive and conative accessibility; concurrent functioning; and the creation of social meanings and identities – that are

crucial to understanding the action-guiding power of social norms. At the same time, I have suggested that many different kinds of informal principles of social order may be detected in societies undergoing large-scale violence – including customs, conventions, and traditions, as well as social norms. The aim of the next chapter will be to explain exactly what features or qualities distinguish social norms from these other kinds of informal principles of social order, and to consider in more detail the methods we can use to reconstruct the action-guiding influence of social norms within particular groups and populations in contexts of mass atrocity and political transitions.



### Chapter 3. Social Norms: Conceptual and Methodological Issues

Three great English memoirists of the First World War attest to the influence of informal principles of social order upon the lives and fates of combatants in that conflict. Robert Graves, in his acerbic *Goodbye to All That*, analogizes the “strict caste system” and “social code” of his elite boarding school with the jealously guarded traditions of his adopted army regiment.<sup>1</sup> Siegfried Sassoon, in his *Memoirs of an Infantry Officer*, recalls one commander’s gambit to win distinction for his division by laying down discretionary rules against rum and cigarettes, and by prohibiting his men from wearing new – and lifesaving – steel helmets.<sup>2</sup> Edmund Blunden, in his *Undertones of War*, devotes an early chapter to the topic of “trench education,” and generally represents himself as an innocent overwhelmed by a raft of unfamiliar – and unfathomable – army protocols.<sup>3</sup>

Blunden’s description of his conflicting feelings upon demobilization indicates the strength of the social meanings and identities grounded in martial customs and norms:

Looking back over 1918 and this opening quarter of 1919, I became desperately confused over war and peace. Clearly, no man who knew and felt could wish for a second that the war should have lasted a second longer. But, where it was not, and where the traditions and government which had called it into being had ceased to be, we who had been brought up to it were lost men. Strangers surrounded me. No tried values existed now.<sup>4</sup>

Regimental traditions and army regulations were not the only practical prescriptions, prohibitions, and permissions accepted by officers and soldiers during the First World

---

<sup>1</sup> Robert Graves, *Goodbye to All That* (New York: Jonathon Cape & Harrison Smith, 1930).

<sup>2</sup> Siegfried Sassoon, *Memoirs of an Infantry Officer*, in *The Complete Memoirs of George Sherston* (London: Faber and Faber, 1937), 408.

<sup>3</sup> Edmund Blunden, *Undertones of War* (Garden City, NY: Doubleday, 1929).

<sup>4</sup> Edmund Blunden, “Aftertones of War,” in *The Mind’s Eye* (London: Jonathon Cape, 1934), 34.

War. Literary theorist Paul Fussell famously called that conflict “more ironic than any before or since;” many of the specific ironies he cites stem from the intrusion of “social norms” and “social usages” familiar from civilian life into the trenches.<sup>5</sup> These transplanted social norms and informal principles frequently had the effect of insulating civilians and convalescing soldiers from the realities of the front. One case Fussell cites concerns the practice of acknowledging lifesaving aid in battle with the kind of trifling gifts customarily used to repay favors at home.<sup>6</sup> Another concerns the “conventional[ly] phlegmatic” epistolary style adopted by soldiers at the front – a style prescribing that the “maximum number of clichés” be used in order to “fill the page by saying nothing.”<sup>7</sup>

Reflecting on these reports and reminiscences, we might ask what features distinguish social norms from the other types of informal principles, such as conventions and traditions. We might ask whether these same features distinguish social norms from legal and moral norms. And we might ask whether there is any principled way of reconstructing the action-guiding influence of particular social norms in historical contexts – including contexts of war and contexts of mass atrocity.

In this chapter, I address these questions. In Section 3.1 I distinguish social norms from conventions and traditions on the basis of their intrinsically normative character and their status as sources of non-exclusionary, rather than exclusionary, reasons for action. In Section 3.2 I lay out my basic, four-feature account of social norms, according to which social norms are (1) particular, (2) practice-grounded, (3) group intentional, and (4) accountability-creating. In order to illustrate these features, I develop a hypothetical

---

<sup>5</sup> Paul Fussell, *The Great War and Modern Memory* (New York: Oxford University Press, 1975), 8.

<sup>6</sup> *ibid.*, 67-68.

<sup>7</sup> *ibid.*, 181-183.

example based on Robert Graves's description of a particularly striking trench practice. Finally, in Section 3.3, I address some methodological questions about the identification of social norms in historical contexts. Here, as elsewhere in this study, I engage closely with the work of Cristina Bicchieri, Geoffrey Brennan, Lina Eriksson, Robert Goodin, and Nicholas Southwood on the nature and dynamics of social norms.

Finally, a word on examples. Throughout this chapter, I employ examples drawn from the English experience of the First World War. This approach is motivated by two main aims. First, it helps to show that social norms play an important role in structuring situations of conflict and violence, as well as situations of peace and stability. Second, this strategy highlights both the promise and the perils of relying on testimonial materials for evidence of the operation of social norms in historical contexts. The significance of such issues will become clearer towards the end of the chapter.

### **3.1 Social Norms, Conventions, and Traditions**

Conventions, traditions, and social norms constitute three major categories of informal principles of social order. Each of these different types of informal principles helps to secure coordination or cooperation within groups and collectives, often in the absence of formal agreements, promises, or regulations. Each supplies a portion of what political theorist Jon Elster calls “the cement of society.”<sup>8</sup>

Despite their overlapping functions within social and political life, conventions, traditions, and social norms can be distinguished on the basis of the three features of norms and normative systems identified in the previous chapter. They can be

---

<sup>8</sup> Jon Elster, *The Cement of Society: A Survey of Social Order* (New York: Cambridge University Press, 1989).

distinguished, that is, on the basis of their cognitive and conative accessibility; their concurrent functioning with other norms and normative systems; and their ability to create and sustain social meaning and identities. In this section I distinguish conventions, traditions, and social norms along these lines. In the next section I outline my basic, four-feature account of social norms.

### *3.1.1 Conventions*

Conventions are informal practical principles that sustain behavioral regularities within groups and collectivities across distance and over time. Conventions are grounded in shared interests and shared expectations amongst the various actors who compose the groups and collectivities in which they circulate. Conventions do not, as a general matter, support the kinds of social meanings or identities associated with traditions and social norms. Nor do they require the kinds of genuinely normative attitudes, such as attitudes of felt obligation and justified sanctioning, essential to traditions and social norms.

My discussion of Fuller's jurisprudence in the last chapter introduced several different examples of conventions. One was the common example of the convention, in America and many other parts of the world, of driving on the right hand side of the road, rather than the left. Another was the example of the convention amongst sovereign nations of reciprocally ejecting each other's diplomats. Both conventions serve to coordinate action among parties whose opportunities for communication are constrained, but whose interests overlap. Both conventions are made possible by the fact that the parties involved share interests in being able to predict other parties' actions under set

circumstances, and in having their own actions, under such circumstances, match other parties' expectations.

The practical problems that both of these sample conventions help to resolve belong to a broad class of scenarios known generally as *coordination problems*. Coordination problems are a species of collective action problems; they are solved (as in the examples offered) when the decisions and actions of individual actors achieve equilibrium with the decisions and actions of other actors.<sup>9</sup> Some philosophers – notably, David Lewis – build the concept of coordination problems directly into their accounts of convention.<sup>10</sup> Others – notably, Margaret Gilbert – deny that coordination problems are necessary or sufficient conditions for the existence of conventions.<sup>11</sup>

In this study, I withhold judgment as to whether the existence of a coordination problem, however specified, is a necessary or sufficient condition for the existence of a convention. I will likewise withhold judgment on the question of whether conventions must be “arbitrary”.<sup>12</sup> I will instead use examples – both real and hypothetical – to draw attention to features that I do take to be essential to conventions.

Consider the WWI example of ‘stand-to.’ ‘Stand-to’ occurred twice daily along the front-line trenches in France and Belgium. Soldiers on both sides of the line would, at

---

<sup>9</sup> A great deal of technical work has been done on coordination problems and their solutions, as on the broader category of collective action problems. Because I don't consider this technical work to essential to explaining the distinction between conventions and social norms, I will not address this work in detail here.

<sup>10</sup> David Lewis, *Convention: A Philosophical Study* (Malden, MA: Blackwell Publishing, 2002 [1969]).

<sup>11</sup> Margaret Gilbert, *On Social Facts* (Princeton, NJ: Princeton University Press, 1992), 343-344.

<sup>12</sup> Arbitrariness is another feature that Lewis takes to be central to the concept of convention, and which Gilbert denies. See Lewis 2002 [1969], 70; Gilbert 1992, 399-403.

dawn and at sunset, take up positions of readiness in anticipation of a possible enemy attack.

There were, as Paul Fussell notes, important strategic reasons for heightened readiness for attack at dawn and at sunset. The east-west division of the front entailed that, in the morning, soldiers on the western side of no-man's-land might remain in darkness a few minutes longer than the enemy soldiers along the eastern side, giving them a slight advantage in firing accuracy and so an opportunity for attack; the reverse was true at sunset.<sup>13</sup>

If we look past strategic reasons for the practice of stand-to, however, we can see that a number of conventional practices could also be coordinated on the basis of the predictable rising and setting of the sun. The distribution of alcohol at a time when all soldiers could easily be assembled to receive it offers one example – for the moments of stand-to were typically also the moments when soldiers would receive their daily ‘tot’ of rum.<sup>14</sup> The transition from one cycle of rest or duties to another before and after stand-to is a second example of a trench practice conventionally organized around stand-to.

To use the term introduced by economist Thomas Schelling, we can say that sunrise and sunset furnished WWI soldiers and officers with *focal points* around which a wide variety of activities could be coordinated up and down the lines, without the need for repeated or long-distance communication amongst different divisions and companies.<sup>15</sup> This informal arrangement served the purpose of reliably coordinating action in the same way a standing policy of convening on the last Thursday of the month

---

<sup>13</sup> *ibid.*

<sup>14</sup> Fussell 1975, 51-52.

<sup>15</sup> Thomas Schelling, *The Strategy of Conflict* (Cambridge, MA: Harvard University Press, 1981).

might serve an academic department's common interest in effortlessly coordinating regular departmental meetings.

What general points can we draw from this example of trench conventions? I believe there are several. The first point is that conventions do not necessarily create or sustain social meanings or identities. Compare, for example, the statements “a soldier is a person who confronts danger without undue concern for his (or her) bodily safety” and “a soldier is a person who always gets his (or her) tot of rum at sunrise.” The former statement has a plausible claim to saying something true about what it means to be a soldier, about the identity of a soldier. The latter statement makes sense only as satire – prompting us to question whether there is any substantial meaning or identity involved in being a soldier. The success of the joke depends on our intuition that no serious meaning or identity can be found in, or founded upon, this type of trench convention.<sup>16</sup>

A second point concerns the normative character or quality of conventions. As defined in the rational choice literature, conventions are, by definition, efficient (insofar as they provide solutions to coordination problems) and although different conventions may be more or less efficient it is generally supposed that the efficiency of any given conventions supplies at least a pro tanto reason for relevant parties to follow it, rather than following none. But to say that parties have an instrumental reason to follow a convention is not yet (or is not obviously) to say that parties have an obligation to follow

---

<sup>16</sup> This argument is not meant to show that conventions cannot support social meanings or identities, but only that this is not an essential feature of conventions. We should also be cautious about being too narrow in our judgments about what kinds of experiences can be invested with meaning of this kind. Fussell notes that the policy of ‘stand-to,’ whatever its strategic or coordinating functions, also had the consequence that soldiers regularly experience brilliant sunrises and sunsets, and notes that these experiences were in fact frequently endowed with great, though nebulous, significance in war memoirs and war poetry. See Fussell 1975, 52-60.

that convention, or would be justified in sanctioning other parties for failing to follow it. Indeed, much of the explanatory power of conventions, within this literature, resides in the fact that conventions can explain behavioral regularities by way of the self-interest of individuals, without having to appeal to normative beliefs or attitudes of this kind. The conative accessibility of conventions, on this view, can be explained most simply in terms of self-interest, without reference to associated normative attitudes. We are left to ask whether there are any significant normative attitudes that are intrinsic to conventions, or whether such normative attitudes must be derived from external considerations.

This is a question that has divided philosophers studying convention. David Lewis claimed that whatever normative status conventions have comes from external considerations, i.e. from utilitarian assessments of the value of coordination.<sup>17</sup> Margaret Gilbert has argued that normative attitudes of the kind mentioned above are in fact intrinsic to the concept of conventions; she distinguishes between so-called ‘Lewis conventions’ and conventions proper.<sup>18</sup> Gerald Postema, while disputing specific features of Gilbert’s account of convention, similarly holds that conventions are intrinsically linked to normative attitudes, and impose genuinely normative requirements upon particularly positioned actors.<sup>19</sup>

---

<sup>17</sup> Lewis 2002 [1969], 98-99.

<sup>18</sup> Gilbert 1992.

<sup>19</sup> Gerald Postema, “Conventions and the Foundations of Law,” in *Legal Philosophy in the Twentieth Century: The Common Law World*, Volume 11 of *A Treatise of Legal Philosophy and General Jurisprudence* (Dordrecht, NL: Springer, 2011), 533. Postema is particularly concerned with defending a conventionalist account of law. It may well be that the picture of convention I am adopting is incompatible with such a theory – though this point is too removed from the main aims of this study for full consideration here.



My own view is that conventions are not intrinsically normative – that is, do not, by themselves, create obligations, although they do often provide instrumental reasons for action. The absence of intrinsic normativity suggests that, although conventions operate concurrently with norms and normative systems in everyday life, they are not themselves norms. To be sure, conventions can and frequently do evolve into social norms – as properly normative attitudes arise within the particular populations that share those conventions.<sup>20</sup> But in the case of the trench conventions I have described, it seems we cannot say that it would be wrong, though it might well be less efficient, for officers to distribute rum rations to their troops at a different time of day from sunrise or sunset, or for soldiers to transition between duties (or between duties and rest) at a time other than stand-to.

It will be understood from the structure of this section that I believe social norms differ significantly from conventions across two important dimensions of norms and normative systems– i.e. with respect to their connection with social meanings and identities, and with respect to their intrinsically normative character. I will begin to set out my basic account of social norms shortly. First, however, I want to discuss another

---

<sup>20</sup> My account thus differs from that defended by Gerald Postema, according to which the existence of a convention does entail genuinely normative features, such as the power to bind or obligate parties to the convention. Postema helpfully distinguishes mere empirical reliance on or expectation of behavioral regularities from the kinds or types of expectations capable of founding legitimate obligations; however, on the view I am presenting, which aligns more closely with the views of Geoffrey Brennan et al, genuinely normative expectations or attitudes about the expected or observed conduct of others push the principles in question into the category of social norms. See Gerald Postema, “Coordination and Convention at the Foundations of Law,” *Journal of Legal Studies* XI (January 1982), 172-182; Geoffrey Brennan, Lina Eriksson, Robert Goodin, and Nicholas Southwood, *Explaining Norms* (Oxford: Oxford University Press, 2013), 15-19; 101-104.

contrasting case within the category of informal principles of social order. This is the case of traditions.

### 3.1.2 Traditions

In *The Concept of Law* H.L.A. Hart draws an analogy between traditions and moral rules: neither of these two kinds of practical principles, Hart suggests, can be “legislated,” or willfully and immediately created or called into being.<sup>21</sup> Attempts to legislate such principles, in the manner of legal rules, are not just sociologically hopeless. Rather, they reflect a conceptual mistake.

One can of course hold that the concepts of both traditions and moral rules bar creation by direct legislation, but for different reasons – as Hart himself observes.<sup>22</sup> It is, Hart urges, “repugnant to the whole notion of morality” to suppose there could be “a moral legislature with competence to make and change morals, as legal enactments make and change laws.”<sup>23</sup> If this is correct, then it seems that those who actively try to legislate morality are not merely conceptually mistaken, but may also err morally.<sup>24</sup>

In the case of tradition, the error involved in attempts at direct legislation is purely conceptual. One cannot willfully and immediately “legislate” traditions. Here the difficulty resides in the “immediately,” rather than in the “willfully.” Not all traditions are products of will, but all traditions are products of time. It is this latter quality that cannot be achieved through legislation. This is significant, since it is the “time-honored”

---

<sup>21</sup> Hart 1961, 172; 225.

<sup>22</sup> *ibid*, 225.

<sup>23</sup> *ibid.*, 173.

<sup>24</sup> Hart later elaborated on the difficulties involved in attempts to legislate morality in his response to Patrick Devlin’s *The Enforcement of Morals*.

quality of traditions that explains their distinctive mode of guiding action – i.e. by supplying exclusionary reasons.

Exclusionary reasons are reasons that, once recognized, cut off consideration of certain other, potentially competing reasons, without actually outweighing or defeating them. Some philosophers (notably Joseph Raz) have argued that all norms (including legal norms institute by a legitimate authority) serve as second-order, exclusionary reasons in practical reasoning.<sup>25</sup> I do not accept this general claim about the action-guiding function of norms, but I do think traditions, as a specific sub-class of norms, operate in this way.<sup>26</sup>

One point that tells in favor of this view of the action-guiding power of traditions, or of their role in the deliberations of individual agents about action, concerns the close connection between traditions and social meanings and identities. Unlike conventions, traditions generally do create and sustain social meanings and identities, including meanings that attach to communities at large, and roles or offices that specific individuals within those communities occupy.

Consider Robert Graves' description of a dress tradition associated with his own adopted army unit, the Royal Welch Fusiliers:

The most immediate piece of regimental history that I met as a recruit-officer was the flash. The flash is a fan-like bunch of five black ribbons, each ribbon two inches wide and seven and a half inches long; the angle at which the fan is spread is exactly regulated by regimental convention. It is stitched to the back of the tunic collar. Only the Royal Welch are privileged to wear it. The story is that the Royal Welch were abroad on foreign service for several years in the 1830's, and by some chance never received the army order abolishing the queue. When the regiment returned and paraded at Plymouth the inspecting general rated the

---

<sup>25</sup> See Joseph Raz, *Practical Reason and Norms* (London: Hutchinson & Co., 1975), 35-48.

<sup>26</sup> Accordingly, I see the difference between traditions and conventions as rather more substantive than, say, Gilbert. Cf. Gilbert 1992, 404-405.

commanding officer because his men were still wearing their hair in the old fashion. The commanding officer, angry with the slight, immediately rode up to London and won from King William IV, through the intercession of some Court official, the regimental privilege of continuing to wear the bunch of ribbons in which the end of the queue was tied – the flash.<sup>27</sup>

The existence and endurance of such “regimental peculiarities” cannot be explained in terms of providing stable solutions to coordination problems, as conventions can. Instead, this and other kinds of traditional rules and requirements persist precisely because of the social meanings and identities that they help to sustain.<sup>28</sup> Indeed, the practical influence of traditions – their function as exclusionary reasons – is often dependent on agents’ commitments to the social roles or identities they help to support. The tradition of wearing the flash on one’s uniform, for example, does not simply fail to prevail amongst officers of other regiments; rather, it fails to count as a practical consideration at all.

This integral connection with social meanings and identities, combined with the practical status of traditions as exclusionary reasons amongst those who accept them, often results in clashes between traditions and other concurrently operating normative systems. The sartorial traditions Graves describes are innocuous, but other cases of traditions coming apart from accepted legal or moral norms are quite serious. The tradition of circumcision within Jewish communities, for example, has recently run up against laws designed to protect the bodily integrity of children in Germany; more

---

<sup>27</sup> Graves 1930, 108-9.

<sup>28</sup> It need not be the case that the specific meanings and identities supported by traditions remain unchanged, in order for those traditions to hold up over time. As Brennan et al point out, any given norm is only partially constitutive of a particular social meaning or identity, and this means that particular norms – here, traditions – can change, even as the social meanings or identities they help support remain the same. See Brennan et al 2013, 173.

distantly, the tradition of dueling in Europe and United States for a long time operated in direct conflict with laws against killing or fighting. Philosophers such as Kwame Anthony Appiah have eloquently described how these traditional rules can lose their ability to operate as exclusionary reasons over time,<sup>29</sup> but the fact remains that traditions often exclude other kinds of normative principles from the practical reasoning of individuals strongly committed to the particular social meanings and identities which those particular traditions support.<sup>30</sup>

### 3.1.3 *Social Norms*

If conventions lack a necessary connection with social meanings and identities or with intrinsically normative attitudes, and traditions resist direct or immediate creation or emergence, as well as functioning chiefly as sources of exclusionary reasons, then we can gain a preliminary understanding of social norms by seeing how they differ from conventions and traditions on each of these grounds.

In the first place, social norms are intrinsically connected with normative attitudes. That is to say, social norms create obligations, rather than just giving incentives, for members of the groups and collectives in which they circulate; and they

---

<sup>29</sup> Kwame Anthony Appiah, *The Honor Code: How Moral Revolutions Happen* (New York: W.W. Norton and Company, 2011).

<sup>30</sup> Traditions seem particularly well suited to pass the two-part test Raz sets for exclusionary reasons: we are susceptible to experiencing “a peculiar feeling of unease” both when “we wish to censure a person who acted on the balance of reasons” for ignoring a tradition, and when “we have to justify someone’s acting on [that tradition] against claims that the persons should have acted on the balance of reasons.” See Raz 1975, 41.

are sustained by corresponding normative attitudes amongst those members.<sup>31</sup> Whether or not it makes sense to define conventions in terms of stable solutions to coordination problems, it does not make sense to define social norms in this way – for social norms are not confined to the function of coordinating action, and their stability (such as it is) does not depend on performing such a coordinating role.<sup>32</sup>

In the second place, social norms are capable of far more direct or immediate creation than traditions. To be sure, many social norms – such as norms governing the loudness of one’s voice in public places, or the distance one maintains between one’s body and that of one’s interlocutors in conversation – are products of quite gradual and undirected development. Nevertheless, it is characteristic of social norms that they can emerge and propagate quite rapidly, sometimes as a result of charismatic leadership by norm entrepreneurs; sometimes in consequence of bullying and ‘tendentious’ criticism; sometimes simply as a result of systematic misperceptions of the beliefs and intentions of other members of particular groups, organizations, or collectivities. The feasibility of these different pathways for norm emergence depends in part on the size of the groups or collectivities in question, but there seem to be no minimums or maximums on the

---

<sup>31</sup> Different theorists specify the nature of those normative attitudes differently. Cristina Bicchieri speaks of “normative expectations” as necessary (but not sufficient) for the persistence of social norms; Geoffrey Brennan et al associate social norms with “clusters of normative attitudes,” which they spell out in terms of dispositions to criticize, evaluate, sanction, and so forth on the basis of social norms. I will discuss the normative attitudes that help to sustain social norms in more detail in Section 3.2 below.

<sup>32</sup> Thus I reject Cristina Bicchieri’s claim, in her 2006 book *The Grammar of Society*, that, as a general matter, social norms transform what are originally mixed-motive games – or practical dilemmas in which differently positioned actors do not share central interests – into coordination problems. It is not clear whether Bicchieri maintains this claim in her more recent work on social norms. Cf. Cristina Bicchieri, *The Grammar of Society* (New York: Cambridge University Press, 2006), 38.

populations required to produce, and sustain over time, social norms – just as there is no clear temporal minimum or maximum period for the emergence of such norms and the normative attitudes that correspond to them.

Unlike traditions, social norms do not normally supply exclusionary reasons; their role in practical reasoning is, instead, frequently to guide action in areas that are not obviously covered by either legal or moral norms. Nevertheless, it is possible for social norms to either overlap, or conflict with, both legal and moral norms in practical reasoning. This equivocal status of social norms vis-à-vis legal and moral norms lies at the basis of much of the current theoretical and practical interest in social norms. Properly understanding the concurrent functioning of these different kinds of norms and normative systems is crucial to the larger goals of this study. In order to reach that understanding, I want to turn now to a more detailed account of basic features of social norms.

### **3.2 Social Norms: A Four-Feature Account**

In the last section, I provided a preliminary characterization of social norms, one that worked chiefly by contrasting social norms with conventions and traditions on the basis of three features of norms and normative systems identified in Chapter 2. In this section and the next I want to provide a more perspicuous account of social norms, by outlining my basic, four-feature account of social norms. The four features I will consider are (1) particularity (2) practice-groundedness (3) group-intentionality and (4) the creation of accountability. As I explain, I believe these features are at least jointly sufficient to distinguish social norms from legal and moral norms.

First, some preliminary points. My account of social norms is individualist, rather than holist. That is, I take it that social norms are grounded in, and can be explained by reference to, facts about the attitudes and actions of individuals, rather than facts about collectives. I do not rely on anything like the irreducibly group intentions discussed by Philip Pettit and Christian List – which may be a feature of group social life, but which are not, on my view, integral to the explanation of social norms.<sup>33</sup>

Amongst individualist approaches to social norms and social rules, some theorists (such as Margaret Gilbert) posit a special category of intentions, called “we-intentions,” which are held at the individual level, but which are accepted at level of, and refer to the actions of, a group. Other theorists, such as Geoffrey Brennan, Bob Goodin, Lina Eriksson, and Nicholas Southwood, resist the idea that any special class or category of intentions is necessary to explain the existence or influence of social norms. My account follows this latter view, as will become clear in my discussion of the group-intentional feature of social norms.

Finally, my four-feature account of social norms can be distinguished from other accounts insofar as I consider it important to understand how social norms operate from within the practical point of view, i.e. the point of view of individual agents deliberating about action. Some theorists of social norms, most notably Cristina Bicchieri, characterize social norms as serving to guide action chiefly in ways that bypass conscious deliberation or reflection on the part of agents. This perspective reflects the fact that the concurrent functioning of social norms consists partially in governing and guiding behavior not covered by legal or moral norms. Nevertheless, particularly in order to

---

<sup>33</sup> Philip Pettit and Christian List, *Group Agency* (Oxford: Oxford University Press, 2013).



understand and reconstruct conflicts amongst social norms and other kinds of norms, I believe we need to take up the practical point of view. My discussion will therefore focus on explaining how we can understand the action-guiding function of social norms from this perspective.

### *3.2.1 Four Features of Social Norms*

In the first place, social norms are particular. That is, they apply within specific groups, organizations, and collectivities, rather than claiming universal applicability. In so doing, social norms often serve as markers of *identity* for members of particular groups, organizations, and collectivities – though this need not be so. What does generally follow from the particularity of social norms is that individuals can sometimes escape the obligations such norms impose simply by establishing that they do not belong to the particular groups or collectivities in which those norms apply.

The particularity of social norms may help to distinguish social norms from properly moral norms, which are often taken to be universal in scope. Whether real or presumed universality is in fact a necessary feature of moral norms is a question that will divide philosophers based on their favored meta-ethical theories; however, those who do accept this feature as essential to moral norms should take it as one feature that distinguishes social norms from moral norms.

In the second place, social norms are practice-grounded. This means simply that the normativity of social norms – i.e. their ability to create genuine obligations and inspire genuinely normative attitudes – depends partially on the existence or perception of corresponding social practices. This second feature of social norms also plausibly

serves to distinguish social norms from moral norms, which we generally do not take to derive their normativity from real or perceived social practices, but instead consider to at least claim to create obligations even in the absence of corresponding practices.<sup>34</sup>

In the third place, social norms are group-intentional. This means that social norms depend for their existence on certain profiles of beliefs and intentions across the members of the particular groups or collectivities in which they apply. Different philosophers describe the nature of the cognitive and conative states that sustain social norms differently. Likewise, different philosophers adopt different methodologies for testing exactly which profiles of beliefs and intentions are capable of sustaining social norms over time. For my purposes, this third feature of social norms is interesting chiefly insofar as it helps explain the peculiar dynamics of emergence and transformation of social norms – the fact that changes in social norms track changes in the beliefs and intentions of group members, and so are susceptible to quite as rapid, and as radical, transformations as those beliefs and intentions are.

Finally, social norms serve to create accountability. That is to say, social norms do not only create obligations for members of the groups in which they apply, and thus lay a partial claim to guide the actions of those members; but they also serve as shared standards for criticizing and sanctioning the actions of group members. In some cases, as with professional codes, there are fairly well-developed procedural rules for holding members accountable; in other cases, of the kind I will consider below, it is precisely the lack of such procedural rules, and the wide distribution of standing to criticize and

---

<sup>34</sup> Nicholas Southwood considers practice-groundedness to be the key feature that distinguishes social norms from moral norms. See Nicholas Southwood, “The Moral/Conventional Distinction,” *Mind* 120, no. 479 (2011), 761-802; also Brennan et al 2013, 57-89.

punish, that characterizes the accountability-creating feature of social norms. The absence of such procedural rules, or of anything equivalent to rule of law requirements, in the case of social norms indicates one way of distinguishing social and legal norms.

### 3.2.2 Example: *Grim Sweepstakes*

In order to illustrate my four-feature account of social norms, I will use a hypothetical example based on a (possibly apocryphal) platoon practice described by Robert Graves in *Goodbye to All That*:

[A fellow soldier] had been telling me how had won about five pounds in the sweepstake after the Rue du Bois show. It was a sweepstake of the sort that leaves no bitterness behind it. Before a show [i.e. battle] the platoon pools all its available cash and the winners, who are the survivors, divide it up afterwards. Those who are killed can't complain, the wounded would have given far more than that to escape as they have, and the unwounded regard the money as a consolation prize for still being here.<sup>35</sup>

Suppose there is a social norm corresponding to this trench practice, which we might call *Grim Sweepstakes*. Consider how the four features of social norms outlined above help to explain the content of such a hypothetical norm.

First, the hypothetical norm of *Grim Sweepstakes* will be particular – just as the practice Graves describes is particular, limited to a specific army platoon. Individuals belonging to other platoons may have their own rules governing the disposition of the affects of killed or injured comrades; these rules may approximate those of Graves's platoon, or they may be quite different (e.g. requiring that money, like personal items, be sent home to the relatives of fallen soldiers). In any case soldiers who do not belong to this platoon will not be bound by *Grim Sweepstakes*, and will not be accountable to

---

<sup>35</sup> Graves 1930, 145.

members of Graves's platoon for acting according to (or contrary to) this hypothetical social norm.

Second, the hypothetical norm of *Grim Sweepstakes* will be practice-grounded. This point follows trivially from the fact that the norm we are imagining is based directly on a reported social practice. Nevertheless it is helpful to reflect on just what this feature entails for our hypothetical social norm. Is it possible, for instance, that the norm of *Grim Sweepstakes* could be based on a perceived, rather than a real, social practice? Although the answer depends partially on how we understand the relationship between the existence and the actual operation of a norm, it seems there are several ways this could be so. First, if "shows" (i.e. battles) are infrequent, then it seems like members of Graves's platoon could have all the normative attitudes and dispositions associated with this social norm, without ever encountering a corresponding practice; and even possible that their beliefs in the existence of such a norm could collapse, once a battle does come, by the failure of that practice to materialize. Second, given the high turnover of members of platoons, it seems possible that the norm could exist prior to the practice, in the following sense: if a particularly convincing (or bullying) long-term member of the platoon manages to convince new arrivals that a norm of *Grim Sweepstakes* exists, then this might be enough to produce a new practice where previously there was none.<sup>36</sup> Of course, it is by no means necessary that a norm like *Grim Sweepstakes* be grounded (initially) in a perceived, rather than a real, social practice. The same norm could develop out of an ongoing social practice that was not initially associated with any typically normative

---

<sup>36</sup> This sort of phenomenon is sometimes described as social norms 'bootstrapping' themselves into existence, by creating the practices which they ultimately sustain. See Brennan et al 2013, 94-95.

qualities, such as the creation of obligations or corresponding normative attitudes amongst group members.

The first two features of social norms I have identified do little to distinguish our imagined social norm of *Grim Sweepstakes* from the social practice Graves describes. It is only when we turn to the final two features of social norms that we can really distinguish this hypothetical norm from the actual (or perceived) practice.

As noted above, the group-intentional feature of social norms holds that social norms are supported by particular profiles of beliefs and intentions, including specifically normative beliefs, and intentions arising from specifically normative attitudes. What might such beliefs and attitudes look like in the case of *Grim Sweepstakes*? In the first place, we must imagine that the members of Graves's platoon do not merely put their money into the pool before battles for the purely instrumental reasons Graves (satirically) describes – i.e. that if one dies one needs no money, if one is wounded one has received a surplus, and if one survives unscathed one deserves compensation. Instead, we should imagine that soldiers in the platoon hold normative beliefs and normative attitudes towards this practice – that they consider themselves obligated, though not morally or legally obligated, to participate in the pool, and that they are disposed to hold a range of other normative attitudes towards themselves and their comrades with regard to the pool, such as approving those who participate, and criticizing or sanctioning those who do not. In the absence of such features, I have suggested, we cannot speak of a norm here at all, but only a certain practice, which individuals are free to abstain from without abrogating any obligation or setting themselves against the normative beliefs and attitudes of others.

The accountability creating capacity of our imagined norm, *Grim Sweepstakes*, completes the conceptual distinction between this norm and the mere practice described by Graves. For such a norm to arise and persist, there must be at least a shared belief that failures to participate in the money pool, if not excused or exempted, will result in some form of sanction from other members of the platoon. These sanctions may be tangible or intangible; they need not be governed by any well-developed procedural rules – though we can certainly imagine a group of soldiers with time on their hands developing quite elaborate rules of this kind, and even holding mock-tribunals for norm violators. In order for accountability to be effective there must be some way of monitoring compliance with the norm, and this may be one factor that makes *Grim Sweepstakes* more likely to persist within a fairly small unit, such as a platoon, than in a company or brigade, where opportunities for cheating (e.g. by withholding one’s own money from the pool) are greater.

To conclude discussion of this example, we should imagine that *Grim Sweepstakes* contravenes a rule of military law, e.g. a norm against gambling (broadly interpreted to include this case), or a norm against denying resources to next of kin. With such a contrary legal rule in mind we are in a position to imagine individual soldiers weighing these legal and social norms against each other, and making a decision about which to follow – perhaps determined in part by the relative significance of the sanctions imposed for violations of each kind of norm, or by the perceived likelihood of being caught violating the one or the other. Over time, we may imagine, conformity with *Grim Sweepstakes* might become so entwined with the identities of members of a particular unit that they take this norm not merely to outweigh, but in fact to exclude as irrelevant

any contrary norm of military law. In that case, as I have suggested, we should be inclined to judge that *Grim Sweepstakes* has ceased to be a mere social norm, and has become a tradition, with whatever other differences in status and action-guiding power this entails.

### **3.3 Explaining Social Norms and Explaining With Social Norms**

The value of the four-feature account of social norms offered above lies chiefly in its ability to help us make sense of actual, rather than hypothetical, norm-governed behavioral regularities. My own interest in this study is to show how closer attention to social norms can help us to explain individual and group participation in mass atrocities, to secure legal and moral accountability in the wake of such large-scale crimes, and to devise effective safeguards against future occurrences of acts that “shock the conscience of mankind.”

In order to finish laying the groundwork for this specific inquiry, I want in this section to address three general methodological questions concerning explanations of, and explanations by, social norms. The first question concerns how can we reliably identify social norms within specific historical contexts. The second question concerns how can we reliably explain the decisions and actions of particular individuals by reference to such social norms. The third question concerns how we can explain the origins of, or transformations in, social norms. I will discuss each of these questions in turn.

### 3.3.1 *Identifying Social Norms in Historical Contexts*

As Cristina Bicchieri has pointed out, a risk of circular reasoning generally accompanies our efforts to identify social norms in contemporary and historical contexts.<sup>37</sup> The circle revolves as follows. First, in order to account (at a theoretical level) for the existence or endurance of a particular behavioral regularity, we infer the existence of a corresponding social norm. Then, we take the continuation of that behavioral regularity as confirmation of the existence of such a social norm.<sup>38</sup>

Bicchieri takes her own experimental research program to counterbalance this risk of circularity. By exploiting the conditions of behavioral experiments, in which both the practical problems subjects face and the information subjects are privy to can be controlled, we can independently confirm, and even measure the degree of, the influence of social norms within particular populations. The same experimental methods can help to answer questions of the kind broached in the discussion of the group-intentional feature of social norms above, i.e. questions concerning the range of profiles of beliefs and intentions across group members capable of sustaining, or prompting the emergence of, social norms.<sup>39</sup>

Bicchieri's experimental approach does little to help us overcome the problem of circularity when considering social norms in historical contexts. Historical reconstruction

---

<sup>37</sup> Bicchieri Forthcoming.

<sup>38</sup> To be clear, Bicchieri is here concerned with an error of theoretical, rather than practical, reasoning about social norms. The charge of circularity does not apply, or at least does not apply in the same way, when we posit norms to explain behavioral regularities amongst our peers in our daily lives, and then decide to act (or not) in accordance with those norms.

<sup>39</sup> Cristina Bicchieri, Erte Xiao, and Ryan Muldoon, "Trustworthiness is a Social Norm, but Trusting Is Not," *Politics, Philosophy and Economics* 10, n. 2 (May 2011), 170-187.



is not and cannot be historical reenactment. To this practical impossibility is added a moral impermissibility when the historical contexts in question are of the kind at issue in this study, i.e. contexts of mass atrocity. The most influential behavioral experiments within the literature on large-scale crimes – i.e. the Milgram experiments and the Zimbardo prison experiment – are compelling just insofar as they identify dispositions that are not practice-grounded, as social norms are, but are rather enduring features of human psychology that predictably emerge in the face of situational pressures. Rather than suggesting that we can use experimental methods to reconstruct historical social norms, then, these experiments offer evidence that such a program cannot succeed.

In this study, I rely on a different strategy for identifying social norms in historical contexts. This strategy consists in looking at the testimony of historical individuals themselves, conveyed in a variety of fora – from diaries and memoirs to interviews and courtroom statements. The use of First World War writings in this chapter helps to illustrate the promise of this approach; it also helps to illustrate some objections to this approach, as I shall explain.

First, particular kinds of testimonial materials – such as memoirs – may not be written with a strict (or even a loose) view towards accuracy. Particular trends or incidents may be blown up to greater significance than they in fact had; sensational stories or rumors may be repeated unchecked.<sup>40</sup> Other sorts of testimonial materials are equally subject to objections of this kind, which we might call objections of *subjective non-veracity*.

---

<sup>40</sup> Paul Fussell quotes from Robert Graves's own reflections on the writing of *Goodbye to All That* in order to make a similar point about the intentional insertion of fantastic or unbelievable incidents into Graves's book. See Fussell 1975, 204-205.

Second, every first-personal identification of a particular social norm – whether offered in the present, or recovered from the past – is subject to objections of *objective veracity*. Objections of this kind do not impugn the sincerity, or good faith, of the individual offering testimony about the norm in question, but rather point to the fact that individuals frequently misidentify social norms: mistaking mere social regularities as signs of social norms, for example, or assuming that certain actions on the part of others imply normative attitudes, when none are in fact present.

Both of these objections pick out genuine concerns about the veracity of testimonial evidence concerning social norms. At the same time, these objections help to demonstrate the importance of testimonial accounts. Concerns about subjective and objective non-veracity are not limited to our theoretical dealings with social norms. Instead, such concerns pervade our practical experience of social norms. In everyday life, when we are told or when it is intimated to us that a social norm applies to some behavior or practice that we aspire to engage in, we always have an opportunity to question the sincerity or the accuracy of such claims. We do not always engage in such questioning, but when we do we typically employ strategies of confirmation that apply equally at the theoretical level: i.e. looking for further evidence from the testimony of others, comparing what we are told about a practice to what we actually see, and so on. I consider it a virtue, rather than a vice, of the focus on testimonial materials that it preserves these features of the first-personal practical perspective on social norms.

The comparison with our everyday experience of social norms also provides some clues as to what kinds of social norms are likely to be included, and what kinds excluded, in testimonial accounts. In daily life, we are more likely to take notice of a social norm

when it is new, when it is changed (either in the scope of actions it applies to, the set of individuals it applies to, or in some other way), when it is violated, or when it appears to conflict with a norm of another kind (e.g. a legal or moral norm). To take an example, while many theorists identify norms determining the distance that individuals maintain between each other's bodies during conversation, we generally don't take notice of such norms unless we either experience an individual violating it (in which case we may sanction that person) or we are introduced into a new group or population (as when traveling abroad) where different norms apply.

As we shall see in later chapters, similar patterns seem to apply to testimonial accounts of social norms in the context of mass atrocity. What this means is that a study employing this methodology is likely to focus chiefly on social norms that are new, changed, violated, or in conflict with other norms. If this were a mere exercise of natural history, that might be a problem; but given the specific aims of this study, it seems to me that the focus on social norms falling into one or more of these classes is exactly right. It allows us to see how newly introduced social norms might contribute to individual participation in atrocities; it allows us to consider cases of conflict between social and moral norms; and it offers us insight into the sanctioning activities involved in enforcing social norms even in times of social turmoil and conflict.

### *3.3.2 Explaining Individuals' Actions Via Social Norms*

Simply identifying or demonstrating the existence of a social norm is not always sufficient to establish that a particular individual's action can be explained, wholly or partially, by reference to that social norm. The same can be said of other informal

principles, such as conventions and traditions; nevertheless there are a number of complicating factors in the case of social norms, as I shall explain.

One complicating factor occurs in cases where there are social norms, but no actual social practices corresponding to them. Such cases are allowed by the fact that social norms are sometimes grounded in perceived, rather than actual, social practices. In such circumstances, it will necessarily be the case that most individuals who accept the norm do not actually perform the actions which would seem most readily explainable on the basis of that norm – for otherwise the practice would be actual, rather than simply perceived. However, in such cases there will also frequently be a range of other actions that are at least partially explained by the social norm. Some of these actions will consist in concealing the fact that one is not actually engaging in the practices prescribed by the norm; other actions will consist in holding accountable individuals who do not (successfully) conceal their own failure to engage in such practices.<sup>41</sup>

It would be a mistake, however, to limit our view to individuals who attempt to hide their evasion of social norms corresponding to perceived, but not actual, social practices. Just as in cases of actual social practices corresponding to actual social norms within particular populations, there will likely be some individuals who do not accept a particular social norm for which they are nevertheless likely to be held to account, and who intentionally defy that norm. When individuals intentionally defy legal norms while nevertheless considering themselves accountable under them, we tend to speak of civil disobedience; it is not clear whether this term applies to intentional defiance of social

---

<sup>41</sup> See Brennan et al 2013, 20-21.

norms, but the two cases are analogous insofar as the defiant action taken is itself explained (at least partially) by the social norm.<sup>42</sup>

In fact, there are a broad range of actions individuals can take that are ‘norm-responsive’ but not ‘norm-satisfying.’<sup>43</sup> Acting opposite to a norm; defiantly failing to act in accordance with a norm; and failing to act in accordance with a norm while concealing or disguising this fact in order to avoid sanctions are all cases of norm-responsive, but not norm-satisfying, ways of acting. To be sure, it is not always clear whether an individual acting opposite to, or failing to act in accordance with, a social norm is doing so out of ignorance, or doing so with knowledge but without intention, or doing so with both knowledge and intention. Here again, my basic methodological approach for distinguishing between these cases will be to use testimonial materials to indicate clear cases of acting with intention and knowledge in a way that fails to satisfy a social norm. As we shall see, such distinctions will be particularly important when it comes to explaining the actions of resisters to mass atrocities.

A second complicating factor occurs in cases where there is in fact no social norm at a given point in time governing some practice or piece of conduct, but where the (mistaken) beliefs held by individuals concerning the existence of such a norm form part

---

<sup>42</sup> Cases of this kind are especially interesting insofar as they seem to provide particularly good evidence of the existence of social norms, as well as of the ability of those norms to guide actions. It is true that individuals sometimes do take themselves to be defying (social) norms which don’t actually exist; but in such cases the absence of genuine sanctioning behavior is generally evident (save, perhaps, to the “disobedients” themselves). Cases of this latter kind may nevertheless fall into the category of individuals responding to what they (mistakenly) believe to be social norms – a category that I discuss below.

<sup>43</sup> Brennan et al use the terms ‘norm complying’ and ‘norm conforming’ to capture a distinction similar to, but not identical with, the one I mean to establish between “norm responsive” and “norm satisfying” action. See Brennan et al 2013, 195n3.

of the explanation for their acting in a given way. As I have suggested above, systematic mistakes of this kind are one way that scholars have used to explain the emergence of social norms and corresponding social practices. I will not spend much time considering cases of this sort in this study, but it is worth pointing out that this is another significant complicating factor in explaining individual's actions by way of social norms.

### *3.3.3 Explaining Changes in Social Norms*

So far we have been considering social norms as more or less fixed entities – as practical prescriptions, prohibitions, or permissions that help to explain behavioral regularities over time. In order to complete our picture of social norms, however, we must finally consider how social norms themselves emerge, change, and break down. We must consider, that is, how to make sense of the dynamics of social norms.

This is a large topic, and I can do no more than review a few of the most significant conceptual and methodological issues here. I will first distinguish types of changes in norms, then turn to consider strategies for explaining each of these types of changes.

In the first place, consider different pathways for the emergence of social norms. Social norms may develop and guide action in situations that have long been encountered, but have previously lacked norms, or they may develop and guide actions in situations that are newly made possible by changes in technology, institutions, or other aspects of social life. Existing social norms governing one area of interaction may provide the model for social norms in another area of interaction, or they may serve as a negative model or point of caution. Social norms may emerge due to the conscious efforts

of individuals and groups (such as ‘norm promoters’ and ‘norm entrepreneurs’) or they may be the result of chance patterns of events and systematic mistakes in the beliefs and intentions of members of particular groups or populations.

In the second place, consider different kinds of changes in social norms. Social norms may undergo changes related to each of the four features of social norms discussed above. The groups or populations to which they are particular may change – both internally (as when existing groups or populations grow or shrink) and externally (as when a social norm spreads from one group or population to another). The type of practices in which social norms are grounded may change – e.g. going from merely “perceived” to “actual.” The profile of beliefs and intentions supporting a social norm may change – with consequences for the stability and strength of sanctions of such norms. And, as this implies, the extent or strength or type of accountability associated with particular social norms may change.

All of the above changes can affect particular social norms without actually destroying the continuity of those norms themselves. But there are other changes which do result in the loss or absorption of particular social norms. In some cases, social norms may undergo a change in status: the most obvious example is when social norms transform into legal norms governing the same kinds of actions, though arguably social norms may also sometimes take on the status of moral norms.<sup>44</sup> In other cases, a different kind of transformation occurs, which can generically be called norm breakdown. In this

---

<sup>44</sup> For discussion of changes in status of social norms, see Brennan et al 2013, 110-113. For an account of changes in the status of norms in the sphere of international relations, see Gerald Postema, “Custom in International Law: A Normative Practice Account,” in *The Nature of Customary Law* (New York: Cambridge University Press, 2007), 279-306.

case, a social norm comprising a particular practical prescription, prohibition, or permission simply ceases to exist – because of a change in perceptions about social practices, because of a change in normative attitudes and dispositions, or both. Social norms may also go out of existence if the particular groups in which they circulate are dissolved.

An interesting subclass of cases of norm breakdown consists of cases of norm inversion. Norm inversions occur when behaviors or actions previously prescribed by social norms come to be prohibited by social norms, or vice-versa. As I shall argue in later chapters, understanding the dynamics of norm inversion is particularly important for research on mass atrocity, since it is bound up with the theoretical problem of explaining how “ordinary” individuals can commit “extraordinary” crimes.

Turning from the question of what kinds of changes norms may undergo to the question of how to explain those changes, it is evident that we have already covered some of the relevant points in previous sections. So, for example, much current political science work on norm emergence focuses on the role of individuals actively engaging in norm promotion as part of the explanation for the emergence of social norms.<sup>45</sup> A second, more critical line of analysis comes from Margaret Gilbert, who notes the “tendentious” manner in which many social norms originate – i.e. through claims about what is right and wrong that precede, sometimes by a long time, group acceptance of those claims.<sup>46</sup>

---

<sup>45</sup> See for example Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization* 52 (Autumn 1998); Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W. W. Norton & Co., 2011).

<sup>46</sup> Margaret Gilbert, *A Theory of Political Obligation*, (New York: Oxford, 2008), 199.



In many cases, of course, it is impossible to establish what individuals or groups – if any – actively worked to promote the acceptance or proliferation of particular social norms. In such cases, as Brennan et al point out, we may attempt to provide functional explanations for the existence of those norms – i.e. explanations that work through showing what coordination- or cooperation-enhancing purpose social norms currently serve. These authors rightly urge caution with regard to functional explanations, and consider the best-case scenario to occur when we can roughly identify when the norms in question came about, and amongst which particular groups or populations.<sup>47</sup>

One particular sub-category of explanations for the emergence of social norms, about which I have written elsewhere, concerns the *manipulative introduction* of social norms.<sup>48</sup> Explanations by manipulative introduction are purposive explanations, with the added stipulation that locating the agent(s) responsible for introducing the norms is necessary, not merely desirable (since on my account manipulation is an intentional action, which must be undertaken by some particular actor(s). Although I take manipulation to be morally less savory than many kinds of non-obfuscatory norm promotion, I am less certain that it is more morally problematic than the kinds of bullying or pugnacious activities commonly involved in the tendentious introduction of social norms, and under certain circumstances of exigency it may be that the moral value of manipulatively instituting social norms dissuading actors from particular actions may outweigh the moral concerns we have for electing to institute social norms in this way. In sum, I believe there are a large number of increasingly specific ways of instituting or

---

<sup>47</sup> Brennan et al 2013, 138-148.

<sup>48</sup> Paul Morrow, "Mass Atrocity and Manipulation of Social Norms," *Social Theory and Practice* 40, n. 2 (April 2014), 255-280.

maintaining social norms that deserve closer attention, and in the remaining chapters of this study I will indicate particular dynamics or processes of norm emergence or transformation that merit further study.

### **3.4 Conclusion**

In this chapter, I have presented my basic account of social norms. I first distinguished social norms from other informal principles of social order – specifically conventions and traditions – on the basis of the three features of norms and normative systems highlighted in the last chapter. I then laid out my basic, four-feature account of social norms, and illustrated that account using examples rooted in testimonial materials stemming from the First World War. Finally, I addressed several methodological questions concerning the suitability of this account for resolving the meta-normative and meta-descriptive questions that are my major concern in this study.

Although my discussion has touched on a variety of disputed questions in contemporary philosophical work on normativity, I have left other meta-normative issues largely unaddressed. I did not discuss, for example, what the implications of current work on the evolution of morality might be for the plausibility of the distinctions between social and moral norms that I advanced. Nor did I consider the distinction between explaining, and assigning responsibility for, the institution or enforcement of social norms. These questions, and especially the second one, will be of considerable importance in subsequent chapters of this study, and I will give them greater attention there.

Throughout this chapter, examples drawn from the First World War have helped to show that informal principles of order of many different kinds, including social norms, perform an important action-guiding function even in combat zones. The First World War was hardly a “conventional” conflict in the eyes of its combatants. Nevertheless, it was a more traditional sort of contest between belligerents than many of the intra-state or inter-ethnic conflicts that have followed, and which have proved particularly insidious as sources of mass atrocity. In the next two chapters of this study, I will show that social norms play an equally important role in guiding actions amongst elites and ordinary individuals during such large-scale crimes.

## Chapter 4. Social Norms and Professional Participation in Mass Atrocities

How can we explain widespread participation by morally competent individuals in crimes that “shock the conscience of mankind”? Theoretical responses to this question have grown increasingly sophisticated over the half-century since Raphael Lemkin posited “demoralization” as a common feature of historical perpetrators of genocide.<sup>1</sup> Some key contemporary explanatory theses for large-scale participation in mass atrocities include: wartime brutalization;<sup>2</sup> deindividuation, or the submergence of individual personality traits in group contexts;<sup>3</sup> obedience to authority;<sup>4</sup> ideological influence;<sup>5</sup> and sheer “thoughtlessness” on the part of individuals whose actions, if evil, are also ‘banal.’<sup>6</sup>

My focus in this dissertation falls on a more recently evolved explanatory thesis within the interdisciplinary literature on large-scale crimes. I call this the *Thesis of Norm Transformation*. In Chapter 3, I defined norms as “practical prescriptions, prohibitions, or permissions accepted by members of particular groups or populations, and capable of guiding the actions of those members.” Using this definition, we can state the Thesis of Norm Transformation as follows:

---

<sup>1</sup> See the various case studies compiled in Steve Jacobs (ed.), *Lemkin on Genocide* (Lanham, MD: Lexington Books, 2012).

<sup>2</sup> Benjamin Valentino, *Final Solutions* (Ithaca, NY: Cornell University Press, 2005), 55.

<sup>3</sup> Craig Haney, Curtis Banks, and Philip Zimbardo, “Interpersonal Dynamics in a Simulated Prison,” in Adam Jones (ed.), *Genocide*, Vol. III (Washington, D.C: Sage, 2008), 88-105; James Waller, *Becoming Evil* (New York: Oxford University Press, 2001), 216-218.

<sup>4</sup> Stanley Milgram, *Obedience to Authority: An Experimental View* (New York: Harper and Row, 1975).

<sup>5</sup> Daniel Goldhagen, *Hitler’s Willing Executioners* (New York: Vintage, 1997).

<sup>6</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 2006).

THESIS: Participation by large numbers of morally competent individuals in mass atrocities is at least partially explained by transformations in basic norms that structure social and political life.

This general thesis takes on a variety of specific forms within the literature on genocide and mass atrocity. These variations reflect the many different types of transformations in norms identified in the last chapter. Some scholars explain individual participation in mass atrocities in terms of a *breakdown* or *collapse* of norms, while others speak of an *inversion* of norms.<sup>7</sup> Some describe a transformation in one particular type of norms (e.g. legal or moral norms), while others refer to crosscutting transformations across different categories of norms.<sup>8</sup> Some detail transformations in norms governing the conduct of individuals belonging to particular groups, associations, or organizations, while others examine transformations in norms that circulate in society at large.<sup>9</sup>

In this chapter and the next, I use the conceptual framework of social norms developed in the previous chapters of this study to clarify and extend the thesis of norm

---

<sup>7</sup> Benjamin Valentino describes a breakdown in norms against cruelty occurring amongst perpetrators of mass atrocity. Cf. Valentino 2005, 55. James Waller and Christopher Browning refer instead to an inversion of ordinary moral norms amongst perpetrators. See Waller 2001, 203; Christopher Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland*, New York: Harper Perennial, 1993, 150.

<sup>8</sup> Browning and Waller both speak exclusively of transformations in moral norms in the works cited above. Mid-century legal scholar Lon Fuller famously (and controversially) described a mutually reinforcing breakdown in legal and in moral norms in Germany under National Socialism. Cf. Lon Fuller, 'Positivism and Fidelity to Law: A Reply to Hart,' *Harvard Law Review* 71, 630-672. Kristen Rundle has recently updated Fuller's thesis in 'The Impossibility of an Exterminatory Legality,' *University of Toronto Law Journal* 59 (2009), 65-126.

<sup>9</sup> Berel Lang discusses the breakdown of norms amongst professionals, particularly in 'The Third Reich and the Breakdown of Professional Ethics,' *The Future of the Holocaust*, Ithaca, NY: Cornell University Press, 1998, 92-104.

transformation. My specific concern in this chapter is to examine the connection between norm transformation and professional participation in historical mass atrocities. By examining historical cases of professional complicity large-scale crimes, I contend, we can get a better grasp on the various forms and interpretations of the thesis of norm transformation. We can also see how the conceptual framework of social norms can be used to address key questions in the literature on mass atrocity.

Two reasons particularly support starting our analysis of the thesis of norm transformation by looking at professionals and professional participation in atrocities. One reason is that professionals – doctors, lawyers, academics, and so on – frequently engage in conscious reflection on their activities and practices, and often leave highly articulate accounts of the beliefs and intentions, the aims and the attitudes associated with their actions.<sup>10</sup> As we shall see, this is as true in circumstances of social upheaval and political violence as it is in periods of peace and stability. Much of the material underpinning my analysis of the thesis of norm transformation in this chapter comes from primary documents left behind by professionals implicated in, or known to have resisted, large-scale crimes.<sup>11</sup>

A second reason for studying the thesis of norm transformation with special reference to professionals relates not to the availability of evidence, but rather to the degree of influence that professionals and professional groups exert within larger populations. Charges of complicity amongst professionals in mass atrocities sometimes concern actions that professionals themselves perform, but often they concern actions

---

<sup>10</sup> This is not to say that materials pertaining to professionals and their state of mind can be read uncritically, or can be exempted from suspicion of camouflage.

<sup>11</sup> My use of such sources is subject to the methodological cautions outlined in Chapter 3 above.

performed by individuals considered especially susceptible to professionals' influence.<sup>12</sup> Professionals, according to such claims, enjoy the power to promote, or prevent, norm transformations within non-professional populations. Hence it makes sense to study norm transformation amongst professionals as a prelude to studying norm transformations within non-professional populations implicated in mass atrocities.

The chapter proceeds as follows. In Section 4.1 I address some general questions about professions and professional codes—including definitional questions of professions, and questions about the normative status of the norms that make up professional codes. In Section 4.2 I discuss some distinctive features of professionals and professional activity in Germany in the tumultuous decades between 1900 and 1950. In Section 4.3 I review Berel Lang's effort to explain German professional complicity in the Holocaust via a particular version of the thesis of norm transformation. In Section 4.4 I argue that the thesis of norm transformation should be expanded to include explicit attention to social norms, and I provide examples of particular social norms that contributed to German professional participation in the Holocaust. I also clarify my conception of complicity, and respond to the objection that changes in norms *constitute*, rather than *cause*, professional complicity in large-scale crimes.

#### **4.1. Professions, Professionals, and Professional Norms**

On September 11, 1940 Dr. Leonardo Conti of the Reich Interior Ministry addressed the following letter to his former teacher, Professor Gottfried Ewald:

---

<sup>12</sup>This is how Robert Ericksen defines complicity in Robert P. Ericksen, *Complicity in the Holocaust* (New York: Cambridge University Press, 2012), 21-23. I consider the concept of complicity in more detail in Section 4.4 below.

Dear Professor Ewald,

With the deepest gratitude I acknowledge the receipt of your letter of 21 August. I still remember with great pleasure your lectures in Erlangen.

Your analysis contains much that is right, I'm sure. Nevertheless, I take a different view, although I cannot and will not set it down in writing at this time. I would only like to say, that I am fully convinced that the opinions of the entire German *Volk* concerning these things are undergoing a transformation, and I can very easily imagine that things which in one period are considered objectionable [*verwerflich*] can in the next period come to be regarded as the only right choice. This is something we have experienced countless times in the course of history. As the most recent example I would gently point to the sterilization law: here the process of a transformation in thought [*Umformung des Denkens*] is today already quite far advanced.<sup>13</sup>

The analysis to which Conti here refers consisted in Professor Ewald's critical evaluation and rejection of the secret Nazi euthanasia program, Aktion T4. Under this program, physically and mentally disabled German children and adults were selected by physicians for killing in state-regulated hospitals and medical establishments.<sup>14</sup> Professor Ewald is one of the few German physicians acquainted with this program who is known to have openly opposed it. His case is cited within Holocaust historiography as a notable exception to the widespread phenomenon of professional complicity in genocide.<sup>15</sup>

Professor Ewald's principled opposition to the secret euthanasia program is laudable. But it is Dr. Conti's rejoinder to his former teacher that I find remarkable, for it seems to provide clear and direct support for the historiographical thesis of norm transformation.

---

<sup>13</sup> For the German text of this letter, cf. Thorsten Sueße and Heinrich Meyer, *Abtransport der "Lebensunwerten,"* Hannover: Verlag Clemens Koechert, 1988, 103-104. The above translation is my own. This same letter is cited in Ericksen 2012, 161-163.

<sup>14</sup> Cf. Dick de Mildt, *In the Name of the People* London: Martinus Nijhoff, 1996.

<sup>15</sup> Robert Jay Lifton, *The Nazi Doctors: Medical Killing and the Psychology of Genocide*, New York: Basic Books, 1986, 82-87; Henry Friedlander, *The Origins of Nazi Genocide: From Euthanasia to the Final Solution*, Chapel Hill: University of North Carolina Press, 1995, 78; Ericksen 2012.



‘Seems to provide,’ because in fact the transformation in public attitudes towards euthanasia predicted by Conti never occurred. When word of the secret program eventually got out, it became the subject of strenuous public condemnation by several different German bishops and clergy.<sup>16</sup> As a result, the government officially called a halt to the euthanasia program, while clandestinely continuing it until the end of the war.

Importantly, what Conti anticipates in his letter is not a mere collapse or breakdown in norms prohibiting killing the mentally or physically impaired. Rather, the letter predicts an inversion of norms: “things which in one period are considered objectionable can in the next period come to be regarded as the only right choice.” I believe we should read this letter as predicting inversions in norms belonging to three kinds or categories of normativity, namely, moral, legal, and social norms.

In the first place, Conti predicts an inversion in moral norms – or norms against killing that are understood as universal in scope, and as grounded neither in positive law or established social practices, but on some other foundation. In the second place, Conti’s letter anticipates an inversion in legal norms – an inversion not yet fully accomplished by the secret order authorizing Aktion T4, but one ultimately expected and, indeed, relied on by the doctors and nurses who participated in the program. In the third place, Conti’s letter looks forward to, and indeed promotes, an inversion in social norms – specifically, in the particular, practice-grounded norms that guide the actions of members of the medical professions.

Professional norms provide a good starting point for thinking about the specific contributions of social norms, and changes in social norms, to mass atrocities. Many

---

<sup>16</sup> Ericksen 2012.

professions – from medicine and law to engineering and museum curatorship – promulgate codes of ethics; but on both substantive and procedural grounds there is reason to question whether all or any of the particular prescriptions, prohibitions, and permissions contained in such codes have the status of moral norms, or whether instead they are more like legal or social norms.

In this section I argue that professional codes are primarily composed of social norms. I first consider Michael Davis's definition of a profession, and use it to establish the relationship between professional ideals and professional codes. I then argue that the specific norms that make up professional codes should be understood as social, rather than legal or moral norms. I provide examples designed to show that professional norms display the features of practice-groundedness and group-intentionality characteristic of professional norms (while allowing that professional norms sometimes overlap with properly legal or moral norms). Finally, I distinguish between the ways in which codified and non-codified social norms help to guide the actions of professionals.

#### *4.1.1 Defining Professions and Professional Codes*

Philosopher Michael Davis has proposed the following definition of a profession:

A profession is a number of individuals in the same occupation voluntarily organized to earn a living by openly serving a certain moral ideal in a morally permissible way beyond what law, market, and morality would otherwise require.<sup>17</sup>

This definition provides a good starting point for discussing professions, professionals, and professional norms.<sup>18</sup> It asserts the collective character of professions;

---

<sup>17</sup> Michael Davis, What Can We Learn by Looking for the First Code of Professional Ethics?, *Theoretical Medicine and Bioethics* 24 (2003), 442.

links particular professions with particular moral ideals; and suggests special moral considerations constrain, but do not determine, the ways in which professionals pursue those ideals. I will briefly expand on each of these points before turning to critique Davis's further claims concerning the normative status of professional norms.

First, Davis's definition highlights the collective, or group-based, character of professions.<sup>19</sup> Some philosophers deny that this is a necessary feature of professions. They argue that it is in principle possible for there to be a 'profession of one.'<sup>20</sup> The arguments offered for this claim are unconvincing. At most they establish that some professions look back to single individuals as sources of their particular professional ideals. They do not show that those individuals, practicing alone, satisfied all the necessary and sufficient conditions for the existence of a profession.<sup>21</sup>

Second, Davis's definition associates particular professions with particular moral ideals. Such ideals are most strikingly evident in the self-conceptions of the traditional

---

<sup>18</sup> To say that this starting point is reasonable is not to say that it is one which all will ultimately accept. Even amongst philosophers, some reject key features of Davis's definition, as I point out below. Sociologists, who have their own well-developed discourse on professions, will likely take issue with the normative assumptions contained in Davis's definition, and may also protest the absence of any attention to the economic basis and effects of professionalization, such as the ability to monopolize the provision of services in particular areas.

<sup>19</sup> Davis 2003, 442.

<sup>20</sup> Cf. Daryl Koehn, *The Grounds of Professional Ethics*, New York: Routledge, 1994, 57, 110-111

<sup>21</sup> The claim that professions have a collective character should not be mistaken for the claim that any particular professional organization, association, or group is coextensive with the profession at large. Not only are professional organizations often divided along local, state, or national lines, but there are often multiple professional organizations operating within a particular jurisdiction, with greater or lesser overlap amongst their memberships. What this shows is that professionals themselves often encounter difficulties in fixing the boundaries and internal hierarchies of their professions, despite the incentives—financial and otherwise—they have for doing so.

‘liberal professions’, i.e. law, medicine, and ministry—devoted, respectively, to ideals of justice, health, and salvation or spiritual well-being.<sup>22</sup> Practitioners of emergent or aspirant professions often find it difficult to demonstrate that they too serve distinctive moral ideals.<sup>23</sup> It is a descriptive question, how exactly emergent professions go about associating themselves with a particular moral ideals. It is a normative question, whether service to distinctive moral ideals is in fact a core feature of professions, and of professional practice.<sup>24</sup>

Closely connected with this second feature of Davis’s definition is a third feature, which goes to the *ways* in which professionals pursue their particular moral ideals. Davis writes that professionals pursue their ideals “openly,” in “a morally permissible way,” and “beyond what law, market, and morality would otherwise require.” What these three criteria amount to, for Davis, is the claim that professionals pursue their distinctive ideal by following distinctive professional norms, which are publicly enumerated in professional codes.

---

<sup>22</sup> See Koehn 1994.

<sup>23</sup> The case of museum curators and other museum workers provides a fascinating illustration of this point. As Hugh Genoways has pointed out, the controversy over whether museum work qualifies for, or can at least aspire to, professional status dates back to at least the 1930’s. It has been carried on more recently by such prominent figures as Stephen Weil, former secretary of the Smithsonian Institution. One key question in the debate seems to be precisely that raised by Davis, namely, the question of whether there is a distinct, and distinctly *moral*, ideal that museum workers serve. Cf. Hugh Genoways, “To Members of the Museum Profession,” in *Museum Philosophy for the 21<sup>st</sup> Century*, Hugh Genoways (ed.) Oxford, UK: AltaMira Press, 2006, 221-222.

<sup>24</sup> In fact, it is often difficult to distinguish normative and descriptive questions or claims when studying institutional facts in general, and professions in particular. Such a problem seems to be built in to Davis’s definition, which was arrived, as he says, through “public conversation” with professionals themselves, and which seems to tell us not just what professions are, but also what they should to be. Daryl Koehn discusses a similar problem in Koehn 1994, 4-6.

#### 4.1.2 Professional Norms and Social Norms

Davis's clearest discussion of the normative status of professional norms comes in an earlier article entitled, "The Moral Authority of a Professional Code."<sup>25</sup> Here, Davis argues that professional codes comprise solutions to those collective action problems that are most likely to be encountered by professionals when pursuing their particular ideals. Thus, professional norms acquire whatever moral authority they have from the fact that those ideals which they assist professionals in serving are moral ideals.<sup>26</sup> In order to possess genuine moral authority, these norms must also meet certain baseline requirements, such as the requirement (already mentioned above) of being morally permissible in their own right. This requirement, along with the stipulation that the ideal professionals serve must itself be a moral one, rules out certain paradoxical examples, such as blackmailers' codes, or the ethics of poisoners. Ultimately, Davis suggests that we should conceive of professionals as constantly being guided by a single "auxiliary rule," namely, "Follow Your Profession's Code."<sup>27</sup>

Davis's exposition of the normative status and action-guiding power of professional codes is illuminating. Nevertheless, it can be criticized on two fronts. First, it does not make clear whether all the particular rules or norms contained in morally authoritative professional codes must themselves be understood as moral rules or norms. Second, it says little about the way in which uncodified social norms guide professionals in pursuit of their particular moral ideals. I will consider each of these points in turn.

---

<sup>25</sup> Michael Davis, "The Moral Authority of a Professional Code," *NOMOS XXIX: Authority Revisited*, James Pennock and John Chapman (eds.), New York: New York University Press, 1987.

<sup>26</sup> Davis 1987, 321.

<sup>27</sup> *ibid.*, 323.

### *A. Codified Professional Norms*

Davis's account of the moral authority of professional codes seems to rest on the following two principles:

P1: where a given end Y is morally required, any action X that is a necessary means to that end is likewise morally required.

P2: where a norm or accepted rule of conduct makes possible a morally required action, that norm has moral authority (or, as I shall say, has the kind of normativity characteristic of moral norms).

The first of these two principles may be sound, but it is not clear how it applies to professions and professional codes, at least as Davis defines them. Davis's definition of a profession stipulates that professionals pursue their moral ideal "beyond what law, market, and morality would otherwise require." This suggests that the ends towards which the actions prescribed in professional codes are directed are not strictly morally required; and if this is the case, then P1 does not establish that actions necessary to secure those ends are morally required.

The second of these two principles seems to me to be unsound. We can see this by examining more closely Davis's description of the function of profession norms. Davis claims that the norms that make up professional codes are solutions to collective action problems that arise in the course of pursuing professional ideals. Davis does not claim that any given set of norms within any given professional code *uniquely* suffices to solve such problems – and indeed, I see no reason why this should be so. If other solutions – other norms – are feasible, then it is not clear why existing solutions should carry normative authority, unless that authority is at least partially grounded in established

practices. But practice-groundedness, as I argued in the last chapter, is a feature of social, rather than moral, norms.

In light of these considerations, I believe the norms contained in professional codes should be regarded as a comparatively formal type of social norms. These professional norms sometimes overlap with moral norms, but they also sometimes conflict with moral norms, and in many cases they regulate behaviors for which there simply are not any corresponding moral norms. Codified professional norms also exhibit the feature of group-intentionality characteristic of social norms; and although the forms of accountability they create can be analogized to the accountability associated with legal norms, here again the distinction is shown by the fact that codified professional norms can conflict with legal norms.

Consider an example. In the United States, as in other countries, lawyers were for a long time banned by the provisions of their professional codes from advertising their services in the manner of ordinary commercial enterprises. Justifications of this norm usually invoked the idea that legal representation was a public service, performed for the good of clients, and rewarded (rather than simply paid for) with a gratuity. So things stood until 1976 when, in *Bates vs. State Bar of Arizona*, the U.S. Supreme Court struck down, on First Amendment grounds, this well-entrenched, widely accepted professional norm.<sup>28</sup>

How should we understand what happened in this case? I think the norm against advertising clearly fits Davis's description of professional norms as solutions to collective action problems. In this case, the problem is perhaps best described as a kind of

---

<sup>28</sup> Cited in Koehn 1994, 2.

social dilemma, in which, while it would be better for all lawyers if no lawyer advertised (since this would have the effect of decreasing competition over fees, and thus keep marginal profits high), each individual lawyer has an incentive to cheat and advertise in order to attract a disproportionate share of clients. The ban on advertising, built into Bar Association codes, and backed by the Associations' enforcement powers, solves this social dilemma. But does it do so *for the purpose of enabling professionals to better pursue their moral ideal*? This is precisely the point in question, and many legal philosophers have argued that, in fact, the ban on advertising helped lawyers' bottom lines, but if anything hindered the provision of services to, especially, the neediest clients.<sup>29</sup>

It seems to me that this analysis is correct, and that, in this instance, there is no plausible argument according to which the ban on advertising is best understood as a moral norm. Nor was it a legal norm – though it was eventually struck down on the basis of a legal principle. Rather, the ban on advertising was a comparatively formal, codified social norm. It exhibits each of the four features of social norms that I have described in previous chapters of this dissertation. First, the norm was specific to lawyers—thus exhibiting the *particularity* feature of social norms. Second, the norm was at least partially grounded in existing or perceived practices within the legal profession—such that we can reasonably assume, counterfactually, that if no lawyers had ever observed this prohibition (or been perceived as observing this prohibition), then there would be no norm to speak of. Thus it exhibits the *practice-groundedness* feature of social norms. Third, the norm was supported by the shared beliefs and intentions of members of the

---

<sup>29</sup> David Luban, *Lawyers and Justice: An Ethical Study*, Princeton, NJ: Princeton University Press, 1988, 273.



legal profession, and in particular, was capable of guiding the actions of individual lawyers in their pursuit of their legal practice. Thus it exhibits the *group-intentional* feature of social norms. Finally, the norm existed explicitly to create accountability amongst lawyers for a pursuing, or rather refraining from pursuing, a certain kind of “unprofessional” conduct. Thus it exhibited the *accountability-creating* feature of social norms.

### *B. Uncodified Professional Norms*

Professional codes are not the only source of social norms that guide, and structure, professional practice. Professionals are frequently influenced by social norms particular to their professions, which nevertheless do not find a place within their respective professional codes; and they are also commonly influenced by social norms that are not particular to their profession, but rather circulate within the various populations professionals serve.

To illustrate the first point, we may consider the profession of museum curatorship. Recent research by historians such as Steven Conn amply demonstrates the changes that have occurred in the practice of museum curators in the U.S. over the past century—from a decrease in the research activities conducted by curators, to trend away from displaying mere objects and towards interactive or experiential environments.<sup>30</sup> While many of these changes may be described as trends, not all trends are grounded in, or driven by, changes in social norms. Curators who abstain from making their exhibits more interactive, for example, are unlikely to face any kind of accountability before their

---

<sup>30</sup> Steven Conn, *Do Museums Still Need Objects?* (Philadelphia: University of Pennsylvania Press, 2010).

peers, though they may face economic repercussions. One change that does appear to have a basis in changing social norms, however, relates to the educational attainments of curators. For many years, museum curators typically held advanced degrees in the particular field of inquiry to which the museums at which they worked were devoted: in art history, for example, or in biology, paleontology, and so on. During the 1970's, however, the first undergraduate and advanced (masters') degrees in museum studies began to be offered at universities in the US and the UK. With this development, there is a chance—though, so far as I know, it remains only a chance—that a social norm will develop according to which museum curators are expected to have a degree in this area, formal education replacing workplace experience as the “right” path to a career. To the extent that there is a code of conduct for the museum profession, it certainly does not contain any such norm regarding degree attainment, so it is appropriate to describe this as a (potential) social norm.

Well-documented, by contrast, are efforts by professionals in other established and emerging professions to be responsive to (and in some cases, to exploit) social norms circulating within the wider, non-professional populations they serve. Physicians and scientists conducting research in sub-Saharan Africa, for example, have contemplated the ethics of exploiting local norms of hospitality, such as the norm against refusing requests made by guests in one's own home, in order to obtain consent for collecting medical information. Undertakers and cemetery directors, by contrast, have had to be responsive to changing social norms regarding the proper intensity, duration, and direction of shows of mourning in American society over the past century, and have at times attempted to

channel such changes into increased prospects for their own professional recognition.<sup>31</sup> Some professionals may become indignant at claims that their actions are in part guided by non-codified social norms; but it can hardly be doubted that this is the case, given the kinds of groups that professions are: groups with fairly strictly defined and monitored boundaries, whose members typically undergo long periods of training and acculturation, and where interactions (commercial and otherwise) with non-members constitute the core of the groups' shared practices.

In this section I have analyzed the nature of professions and of the norms that characteristically guide the actions of professionals. I argued that the norms contained in professional codes should be understood as social norms, and I contended that uncoded social norms also serve as important influences on professional action. To be sure, other kinds of norms – including moral and legal norms – can and do guide the conduct of professionals, and it is a major argument of this chapter that, in cases of conflict between moral and social norms, professionals ought to favor action according to moral norms. Such conflicts become particularly pronounced in contexts of mass atrocity, as we shall see in the following sections.

#### **4.2 German Professionals and Professional Norms, 1900-1950**

Participation by German professionals in the crimes of the Holocaust is today the subject of an extensive research program. Attention first focused on this issue in the immediate postwar period, through the Nuremberg successor trials (e.g. the Doctors' Trial and the Justice Case), as well as in scattered publications by émigré scholars (such

---

<sup>31</sup> David Sloane, *The Last Great Necessity* (Baltimore, MD: Johns Hopkins University Press, 1995).

as Max Weinreich's 1946 polemic, *Hitler's Professors*).<sup>32</sup> During the early decades of the Cold War the issue surfaced only occasionally, most notably in the 1960's campaign by East German journalists to expose "Blood Judges" within the ranks of the West German judicial service.<sup>33</sup> During the 1980's, historians in Germany and elsewhere broke the subject wide open, and since then scholars have produced a slew of studies of the conduct – and misconduct – of many professional groups during the Hitler era.

Two books published in the early 1990's, Konrad Jarausch's *The Unfree Professions*, and Charles McClelland's *The German Experience of Professionalization*, offer a good overview of this material, and provide a good starting point for analyzing the thesis of norm transformation as applied to professionals. Both studies center on the experience of German lawyers, teachers, and engineers from 1900 to 1950.<sup>34</sup>

Jarausch distinguishes three categories of professions in his study: "free" professions (corresponding roughly to the Anglo-American notion of liberal professions, including law and medicine); state-organized professions (such as philologists, or upper-level high school teachers who traditionally engaged in original research); and emergent or aspirant professions (such as engineers). One aim of Jarausch's study is to use the experiences of each of these types of professions in Germany in the period between

---

<sup>32</sup> See Max Weinreich, *Hitler's Professors* (New Haven: Yale University Press, 1999 [1946]).

<sup>33</sup> For discussions of the "Blood Judges" episode, cf. Annette Weinke, "The German-German Rivalry and the Prosecution of Nazi War Criminals During the Cold War, 1958-1965," Nathaniel Stoltzfus and Henry Friedlander (eds.), *Nazi Crimes and the Law*, New York: Cambridge University Press, 2008, 159-160; also Kenneth Ledford, "Judging German Judges in the Third Reich," in Alan Steinweis and Robert Rachlin (eds.), *The Law in Nazi Germany*, New York: Berghahn Books, 2013, 173-174.

<sup>34</sup> Konrad Jarausch, *The Unfree Professions*, New York: Oxford University Press, 1990; Charles McClelland, *The German Experience of Professionalization*, New York: Cambridge University Press, 1991.

national unification in 1871 and the end of the Hitler era to comment on claims and hypotheses about professions offered by scholars familiar primarily with the Anglo-American context. Here I suspect Jarausch would cast doubt on that part of Michael Davis's definition that refers to professions as "voluntarily organized" groups—since reflection on the German experience requires "recognition of the role of the state as the source of licensing or social policies," and since traits commonly associated with professions in the Anglo-American context, such as "the market, associational self-control, and autonomy," are, according to Jarausch, "likely to be less important in Germany."<sup>35</sup> While I do not think that the German context of professionalism described by Jarausch differs sufficiently to be incompatible with the account of professions and professional norms offered above, I will attend to such differences in the analysis that follows.

The trajectory Jarausch traces for German professions, professionals, and professional norms in the period from 1871 to 1945 is too complex to summarize here. My aim will simply be to pick up on some points that are especially applicable to the present study. To begin with, Jarausch demonstrates throughout his study that changes in the institutional context in which professionals carry out their practice can have a significant impact on professionals' ability to be guided by norms that they accept. His discussion of the changing institutional environment in which philologists, or academically trained upper-level school teachers, conducted their dual pedagogical and research activities amply illustrates this point.

---

<sup>35</sup> Jarausch 1990, 6-7. Charles McClelland likewise emphasizes the stronger tradition of state supervision of professions in Germany (and elsewhere in Central Europe) as compared to the Anglo-American context. Cf. McClelland 1991, 35-37.

Following unification in 1871, upper-level teachers took an active part in pushing for national standardization of the qualifications for, and chief activities of, their profession, closely guarding in particular the requirement that teachers at this level engage in significant independent research.<sup>36</sup> The outbreak of World War I negatively affected the practice, if not the status or self-conception, of these upper-level teachers: school graduation requirements were in many places lowered, and in some cases the final year of secondary schooling cancelled entirely, as a result of mobilization.<sup>37</sup> Immediately following the war, male philologists attempted, with mixed success, to block the entry of women into their profession—for example, by barring membership to women in their largest professional organization, the *Philologenverband*.<sup>38</sup> Concerns with closing, and preserving, the masculine ranks of the profession were exacerbated during the inflation crisis of the early 1920's, as government education ministries attempted to deal with immense deficits by cutting the number of teachers in schools and raising the number of students per class and hours of teaching expected of those who remained.<sup>39</sup> Once again, upper-level teachers complained that these added duties encroached on the distinguishing feature of their profession, i.e. the expectation of independent research.

While the outlook for philologists improved somewhat in the second half of the 1920's, an oversupply of trained teachers in the early 1930's contributed to the appeal of National Socialist promises of reform and full employment. After the Nazi party's rise to power in 1933, however, upper-level teachers saw their distinct position above primary-school teachers (who did not undertake academic research) eroded, as distinctive

---

<sup>36</sup> *ibid.*, 15-16.

<sup>37</sup> *ibid.*, 27.

<sup>38</sup> *ibid.*, 36.

<sup>39</sup> *ibid.*, 58-60.

professional organizations such as the *Philologenverband* were discouraged and ultimately banned.<sup>40</sup> The purge of Jewish teachers and affiliates with other politically suspect groups during the mid-30's created openings for some opportunistic teachers to enter the profession, but other features of National Socialist ideology, such as a suspicion of specialization in scholarship, lowered the status of philologists, and decreased support for their academic research. With the outbreak of aggressive war in 1939, upper-level high school studies were again cut short due to mobilization, and the pursuit of scholarship further infringed by both changes to curricula (with an increased emphasis on indoctrination) and sheer physical distress (such as disruption of the teaching day by power outages, nighttime bombing raids, and so on).<sup>41</sup> Reflecting on this long series of institutional developments and disruptions, Jarausch concludes, "instead of affecting just some dimensions like the Weimar crisis, the Nazi system impaired professionalism categorically: training standards declined, certification produced a manpower shortage, economic remuneration fell short of increased work, academic status lines were blurred, practice was hindered, ethics were warped, and free association destroyed."<sup>42</sup>

I have reprised this historical discussion at some length because I believe it provides a clear, but largely benign, example of a transformation in social norms amongst a particular group of German professionals during the first half of the twentieth century. The pursuit of significant independent scholarly research was clearly the object of normative attitudes amongst German upper-school teachers at the beginning of this period, and many professionals retained those attitudes, even as the institutional

---

<sup>40</sup> *ibid.*, 120-122.

<sup>41</sup> *ibid.*, 190, 193.

<sup>42</sup> *ibid.*, 199-200.

conditions necessary for such scholarly pursuits deteriorated. Put differently, there was a clear professional norm regarding such research. I will set aside for the moment the question of whether this norm operated as a tradition in the context of practical reasoning and consider first whether this norm satisfied the four features of social norms outlined in the previous chapter of this study.

The rule requiring philologists to undertake independent research seems clearly to satisfy each of the four features of social norms included in my account. It is particular to philologists (and indeed, those Jarausch describes took it as a point of pride that they, as opposed to lower-school teachers, engaged in such research). It is grounded in an existing practice—in this case one which predates by many years German unification in 1871. It is group-intentional, in this case not only guiding individual philologists to undertake research and share it in conferences, learned journals, and the like, but also, according to their self-conception, supposed to decisively influence and guide their teaching of pupils as well. And, finally, it is accountability-creating: this is pointed out not by Jarausch, but by Charles McClelland, who notes that during the Weimar era philologists rejected the idea that music and drawing teachers instructing upper-level students should be granted the same privileges as themselves, since they were not trained to engage in research.<sup>43</sup>

There is a further question as to whether this norm operated in the manner of a tradition, i.e. by excluding other kinds of formal and informal principles from consideration. I believe the historical materials I have marshaled suggest that this probably was the case in the early part of the 20<sup>th</sup> century, but that eventually this particular mode of operation broke down, as laws and institutional arrangements bearing

---

<sup>43</sup> McClelland 1991, 211.



on the profession changed. If this is correct, then it would be worth considering whether what had been a tradition became (for a shorter or longer time) a social norm, before ceasing to be able to guide action entirely). While my meta-normative account of social norms explains how such a transformation is possible, it is an empirical question, and one I am not in a position to resolve, whether such a transformation in fact occurred.<sup>44</sup>

The case of the German philologists as recounted by Jarausch is only one out of many possible examples of the way in which professional social norms were altered or eroded by the social and political upheavals of the first half of the twentieth century. It is also a designedly benign example. Though there is evidence of complicity by upper-level teachers in the rise of National Socialism and the induction of young men into its imperial and genocidal projects, there is no reason to think that the philological norm requiring original scholarship contributed, directly or indirectly, to this complicity. If anything, the opposite seems to have occurred: the rise of complicit practices of indoctrination and manipulation of curricula seem to have degraded, even practically destroyed, the norm regarding scholarship. In the next two sections I will consider less benign examples of transformations in social norms, and consider the import of such cases for the general thesis of norm transformation.

### **4.3 Norm Breakdown and Professional Participation in Atrocities**

Having considered the nature of professions generally, and the experience of German professions and professionals particularly, we are in a position to take up the

---

<sup>44</sup> For the difference between “how possible” and “how plausible” models in evolutionary theory, see Edouard Machery and Ron Mallon, “Evolution of Morality,” in *The Moral Psychology Handbook* (New York: Oxford University Press, 2012), 3-46.

thesis of norm transformation. The most conceptually sophisticated discussion of this thesis appears in an article by philosopher and Holocaust scholar Berel Lang. In this article, entitled “The Third Reich and the Breakdown of Professional Ethics,” Lang (1) clarifies the sense in which the thesis of norm transformation is an explanatory hypothesis, (2) explains how the specific thesis of norm *breakdown* differs from a generic thesis of norm *transformation*, and (3) offers evidence for the occurrence of such a norm breakdown in a number of different professions implicated in the Holocaust. In this section I discuss each of these elements of Lang’s account, then address a general challenge to explanatory appeals to norms, and changes in norms, in studies of historical mass atrocities.

Throughout this chapter, I have referred to the thesis of norm transformation as an explanatory thesis—a proposed way of making sense of participation by large numbers of ordinary, i.e. morally competent, individuals in mass atrocities. There are some who consider the very effort to supply explanations for genocide and mass atrocity misguided. This is especially true in the particular case of the Holocaust. Berel Lang sketches the broad outlines of this dispute at the beginning of his essay. He acknowledges that there are risks involved in taking the Holocaust (and, we may suppose, other mass atrocities) to be the result of “day-to-day processes which, in their individual causal patterns, hardly appear as extraordinary at all.”<sup>45</sup> One such risk is that of underestimating the suffering inflicted on victims. Another is excusing, by explaining, the actions of perpetrators. Lang contends that these risks are no worse than those incurred by taking the Holocaust as

---

<sup>45</sup> Berel Lang, “The Third Reich and the Breakdown of Professional Ethics,” in *The Future of the Holocaust*, Ithaca, NY: Cornell University Press, 1998, 92.

“incomprehensible or ineffable,” as “a conceptual or practical aberration.”<sup>46</sup> He thus allies himself unreservedly with the pro-explanation camp and proffers his account of a breakdown in professional norms as a contribution to the “search for the origins of even the enormity of the Nazi genocide in the commonplace background from which it emerged.”<sup>47</sup>

Since the previous section provided a broad overview of the structure and social position of the professions in Germany in the early 20<sup>th</sup> century, we may pass over Lang’s own sketch of this background, and consider his essay’s principle claim: that a systematic breakdown in professional norms contributed materially to professional complicity in the Holocaust. Clearly this is a version of the general thesis of norm transformation outlined at the outset of this chapter. Here our task is to understand its specific features, and particularly to understand why Lang speaks in terms of a *breakdown* of professional norms.

Three features of Lang’s account stand out as salient. First, Lang is not concerned with the alteration or erosion of particular professional norms so much as he is with fundamental changes in structures and procedures through which professional norms are created and emended. He remarks that, during the Nazi period, such changes in norms occurred across a variety of professions “without open discussion inside or outside the profession;” without any effort “to reach a professional consensus,” and with the explicit intention of concealing such changes from non-professionals.<sup>48</sup> Second, with respect to changes in particular norms, Lang points out that the departures from previous

---

<sup>46</sup> *ibid.*

<sup>47</sup> *ibid.*

<sup>48</sup> Lang 1998, 96.

professional practice tended to be radical, rather than incremental. Finally, Lang asserts that in most cases professionals themselves were fully conscious of these substantial alterations in the structure and procedures for the creation of professional norms, and in the contents of the norms themselves.

All three of these features are on display in the case of the Nazi euthanasia program, Aktion T4, discussed earlier in this chapter. The initial order ‘authorizing’ this program was highly secret.<sup>49</sup> Neither Professor Ewald’s critical analysis of this program nor Dr. Conti’s reply to his former teacher circulated publicly. Indeed, they did not circulate widely within the medical profession itself – in which there was no effort to achieve consensus on this radical change in norms for treating, or rather dealing with, severely disabled patients.<sup>50</sup> Ultimately it was German clergy, not German physicians, who eventually exposed Aktion T4 to public attention and outcry.<sup>51</sup> Although that public reaction belied Conti’s prediction of a “transformation of thought” amongst ordinary Germans towards euthanasia, both his letter and Ewald’s analysis testify to the fact that those physicians who were apprised of Aktion T4 were fully conscious of the radical break with previous professional norms embodied in this program. These included not only the famous prescription “first do no harm” but also professional norms against deceiving patients or their guardians and against basing diagnoses on insufficient

---

<sup>49</sup> The accuracy of Lang’s observation is attested to by the fact that previously, in the Weimar period, there had been an open academic debate concerning the moral and legal propriety of euthanizing highly disabled persons during wartime. See Friedlander 1997, 1-22.

<sup>50</sup> For a detailed account of these matters, cf. Sueße and Meyer 1988.

<sup>51</sup> These included Protestant Bishop Theophil Wurm of Württemberg and Catholic Bishop August Count von Galen of Münster. Cf. Ericksen 2012, 110-112.

information. Thus, each of the three criteria for norm breakdown proposed by Lang are in evidence in this case.

Lang's list of conditions for a breakdown in professional ethics makes a good fit with some of the more egregious documented instances of professional complicity in the crimes of Holocaust. We may yet wonder whether, or to what extent, the radical transformation in professional norms Lang describes *explains* professional complicity in genocide. Above, I distinguished between the merely statistical concept of a norm and the properly normative concept of a norm, and I argued that one distinguishing feature of the normative concept of a norm is that norms thus understood are inherently (rather than contingently) action guiding. This is true across specific categories of norms, such as legal, moral, and social norms. Nevertheless, as explained in the last chapter of this study, there is a standing question, when we are confronted with some particular empirical pattern of behavior shared across time and across agents, whether that particular pattern should be explained, in part or in whole, by reference to the action-guiding power of a norm. In the specific case of the Euthanasia program, we might ask whether the fact of widespread participation by doctors, surgeons, and other medical professionals in mass murder can be partially or completely explained by the fact that these professionals were guided in their actions by a particular norm – whether a moral norm of the kind Conti describes, or a norm of any other kind.

As I argued in the last chapter, I believe such questions can be answered using techniques of history and social science. Historians, and especially historians of the Holocaust, have long been accustomed to dealing with multiple, mutually incompatible theses concerning the causes or contours of events in the distant past, and they have

developed sophisticated strategies of counterfactual reasoning, creative collation of source types, and critical readings of testimonial and documentary evidence in order to address such challenges. Within Holocaust historiography, some of the best-known difficulties have to do with the unreliability of testimonial evidence (particularly when obtained through legal proceedings) and the extensive use of misleading euphemisms, or “camouflage,” in Nazi-era documents.<sup>52</sup> These strategies and these precautions seem to me perfectly adequate to deal with the circularity problem described above, and to secure the viability of explanations of individual and group participation in mass atrocities that reserve an action-guiding role for legal, moral, or social norms. If this is correct, then the thesis of norm transformation should also be viable, in the sense of being capable of being supported by historical evidence. My aim in the next, and last, section of this paper will be to show that changes in social norms, specifically, can help make sense of professional complicity in mass atrocity.

#### **4.4 Professional Complicity and the Transformation of Social Norms**

So far in this chapter I have relied on a definition of complicity drawn from the historiographical literature on genocide and mass atrocity, and specifically from Robert Ericksen’s recent book, *Complicity in the Holocaust*.<sup>53</sup> On this view, complicity is a term of normative assessment reserved for actors who are not (or not usually) direct

---

<sup>52</sup> I have discussed such “camouflage” extensively in my paper “Mass Atrocity and Manipulation of Social Norms,” in which I argue that the so-called “language rules” [*Sprachregeln*] adopted by Nazi officials and German military commanders to refer to atrocities should themselves be understood as examples of social norms. See Paul Morrow, “Mass Atrocity and Manipulation of Social Norms,” *Social Theory and Practice* 40, n. 2 (April 2014), 255-280.

<sup>53</sup> Ericksen 2012, 21-23.

perpetrators of atrocities, but who, because of certain facts about their position within society at large or within specific institutions and organizations, may reasonably be supposed to have exerted some influence upon the practical reasoning of those individuals who did directly perpetrate atrocities. Ericksen's two focal points, German ministers and German university faculty, can easily be accommodated by such a definition, since the ideals historically associated with their professions are, respectively, to exert moral and intellectual influence.

The specific aim of this last substantive section of my paper is demonstrate the contribution of social norms, and changes in social norms, to professional complicity in the Holocaust. In order to achieve this goal, it will be useful to introduce a slightly more refined definition of complicity. The definition I will use is drawn from Christopher Kutz's work on this concept. Kutz's excellent work bridges ethical and legal perspectives on complicity; for my purposes, I want to focus solely on complicity as a moral concept. I shall therefore understand complicity as *the moral status or condition of an agent who has contributed to some act or pattern of wrongdoing, insofar as that contribution is irreducibly mediated by the contributions of other agents.*<sup>54</sup>

Let me point out a few features of this definition. First, it is clearly broader than the definition employed by Ericksen and other Holocaust and Genocide scholars, but it clearly accommodates that definition, since intellectually or moral influencing perpetrators of wrongdoings can count as a contribution to those wrongdoings.<sup>55</sup> Second, the definition acknowledges that agents often bear more than one (blameworthy) moral

---

<sup>54</sup> For the language in Kutz's text that inspired, but does not directly overlap with, this definition see Christopher Kutz, *Complicity: Ethics and Law for a Collective Age*, New York: Cambridge University Press, 2000, 2.

<sup>55</sup> In case some doubt this, I describe specific examples below.

status or condition at a time. This is why it refers to contributions to wrongdoing insofar as those contributions are irreducibly mediated by others. Often, agents can be charged with both mediated and unmediated contributions to large-scale wrongs like genocide and mass atrocity; those agents are complicit in some wrongs, and directly culpable for others.<sup>56</sup> Finally, the definition is neutral with regard to individual and group agents. As we have seen, historians and other scholars of mass atrocity commonly speak of groups (and not only professions) as being complicit. It is generally unclear whether this moral assessment of complicity is (1) being charged against the group as a group; (2) being charged against all or some of the individuals who compose the group, or (3) both. My definition is neutral between these options in the following sense: it allows for cases in which one group or collective agent contributes to wrongdoings in a way that is irreducibly mediated by other group agents. In what follows, I shall discuss both the complicity of individual agents who belong to professional groups, and the complicity of those professional groups themselves.

Social norms are eminently suited to giving rise to complicity, as I have defined it, for the following reason: individual agents whose actions are guided in part, or in whole, by social norms are usually (though not always) acting in ways that are irreducibly mediated by other agents.<sup>57</sup> Consider an example from a well-known primary

---

<sup>56</sup> It may also be possible for agents to be both complicit in, and directly culpable for, “the same” wrongdoings. The chief difficulty here consists in individuating wrongdoings (understood as a specific sub-class of actions). For a classic statement of the problem, see Joel Feinberg, “Action and Responsibility,” in *Doing and Deserving* (Princeton, NJ: Princeton University Press, 1970).

<sup>57</sup> The qualification “usually” accounts for cases in which social norms are grounded in perceived (but not actually existing) social practices. Generally such cases are unstable – the perception of the practice at t1 that gives rise to the norm commonly continues by giving rise to the practice itself at t2, so that at t2 we can speak of an



source: Jewish professor Victor Klemperer's diaries of the Nazi era. Klemperer, who himself was married to a non-Jew, but had not children, describes in an entry for August 11<sup>th</sup>, 1940 an emergent social norm affecting children of comparably "mixed" marriages:

Children of mixed race were also no longer being admitted to secondary schools. Officially it was still allowed; but a rector who permitted a mixed race child among his pupils would earn a complaint to the Party from Hitler Youth and parents: Thus one rector had been dismissed for being 'pro-Jewish,' as a result of which no headmaster accepted a mixed-race child anymore.<sup>58</sup>

Klemperer later refers to the denial of secondary schooling to 'mixed race' children as a "dreadful disgrace."<sup>59</sup> We may certainly call it a wrongdoing, and it is appropriate to charge individual school rectors who complied with this norm with complicity in this wrongdoing, insofar as their denials of admission were in fact guided by this social norm. Additionally, since this social norm, as described, was enforced not only by other rectors, but also by members of other formal groups (such as the Hitler Youth) and informal collectives (parents of non-mixed, 'Aryan' children), it is appropriate to speak of complicity of schoolmasters as a group, since their part in this wrongdoing was (apparently) irreducibly mediated by other groups.<sup>60</sup>

---

actually existing social practice. In a small minority of cases, however, it may be that social norms can exist within groups, organizations, or societies, and influence the behavior of individual members in certain ways, without the corresponding practices ever emerging. In some cases I am unsure whether the action of an individual agent that is guided by such a social norm should be considered to be mediated by others.

<sup>58</sup> Victor Klemperer, *I Will Bear Witness: A Diary of the Nazi Years, 1933-1941*, trans. Martin Chalmers, New York: Modern Library, 1999, 352.

<sup>59</sup> Victor Klemperer, *I Will Bear Witness: A Diary of the Nazi Years, 1942-1945*, New York: Modern Library, 2001, 240.

<sup>60</sup> The reverse is also true, i.e. the members of the Hitler Youth and parents should also be charged with complicity, along with, perhaps, more direct forms of culpability in this case. Some may also wish to speak of differing levels, or degrees, of complicity; I cannot give adequate attention to the possibility of such levels here.

The above example is meant to indicate how a change in norms, and particularly the emergence of a new social norm amongst a certain group of German professionals, gave rise to complicity in one of the many wrongdoings associated with the Holocaust. I have not described this change in norms as an inversion, or breakdown, because I am not aware that corresponding norm of free admittance, or free admittance based on merit, existed amongst headmasters prior to the rise of the Nazi movement. By contrast, a case drawn from the experience of the German legal profession during this period illustrates the phenomenon of norm inversion. As Jarausch points out in his study of German professions, and as Kenneth Ledford has more recently highlighted, prior to the 1930's there was a strong norm of freedom of representation within the legal profession in Germany – according to which lawyers were free to defend clients no matter what their political affiliations. This norm survived the clashes between extreme leftist and rightist groups immediately following the First World War, and subsequently during the Weimar period. It seems to have persisted for a time during the mid-1930's. But it was decisively eradicated, or rather inverted, after 1939, when lawyers were forbidden, as a matter of official justice ministry policy, from unreservedly defending individuals accused of political crimes.

The clearest expression of this transformation in professional norms comes in a *Richterbriefe*, or 'Letter to Lawyers,' issued by Reich Justice Minister Otto Thierack on October 1, 1944. After discussing in a general manner changes in the administration of justice in Germany that had occurred during the war, Thierack turns to the changed role of defense attorneys within the justice system, writing:

[Today] the lawyer as defense attorney has been brought closer to the state and the community. He has been integrated into the community of the *Rechtwahrer* [defender of law], and has lost his earlier position as one-sided advocate for the accused. Whoever cannot clearly and unconditionally admit to this internally, and who is not constantly ready and willing to act accordingly, should not put on the robe of a German lawyer, or enter the defense attorney's bench.<sup>61</sup>

Thierack's comment is clearly meant to confirm – and reinforce – a fairly recently developed professional norm applicable to lawyers acting as defense attorneys.<sup>62</sup> What's more, like Dr. Conti, Thierack acknowledges that this new norm – under which defense attorneys are to act as defenders of the law, rather than defenders of clients – marks a serious shift from previous practice. Possibly Thierack himself would not accept the notion that this shift represents a complete inversion in norms, in the way that Conti does when speaking of sterilization and euthanasia, but the historical evidence suggests that in fact such a description is justified, with a majority of defense attorneys who remained in practice<sup>63</sup> advancing the interests of the state against accused individuals, rather than advancing the interests of the accused against the state. For this reason it is reasonable to speak of complicity amongst individual German lawyers resulting from an inversion in professional norms.

---

<sup>61</sup>Otto Thierack, Letter of 1 October 1944, excerpted in Martin Hirsch, Diemut Majer, and Jürgen Meinck (eds.), *Recht, Verwaltung und Justiz im Nationalsozialismus: ausgewählte Schriften, Gesetze und Gerichtsentscheidungen von 1933 bis 1945: mit ausführlichen Erläuterungen und Kommentierungen*, Baden-Baden: Nomos Verlagsgesellschaft, 1997, 545.

<sup>62</sup>Traditionally, and also during the Nazi period, lawyers acting as defense attorneys were certified by the state, via examinations, but were not directly employed by the state, or counted as civil servants – in contrast to judges and prosecuting attorneys. Cf. Jarausch 1990.

<sup>63</sup>In light of this and other fairly radical change in expectations as to how they were to comport themselves in the courtroom, some defense attorneys opted to remove themselves from criminal trials altogether, taking only civil cases. Thierack himself acknowledges (and reproves) this tendency in his letter. See Hirsch et al 1997, 546.

Having examined a case of social norm inversion and a case of social norm emergence, I want to consider an objection. This objection is a species of the circularity objection discussed in Chapter 3 above, and runs as follows: I have generally referred to transformations in social norms *contributing* to professional complicity in large-scale wrongs, which suggests a causal connection in which the change in norms comes first, and the complicity follows; but I have also spoken at times as if the mere fact that a change in norms occurred itself *constituted* the complicity of professionals in such wrongs. The worry then is that it can't be the case that complicity is entailed in both of these ways by norm transformation; and perhaps this worry is compounded by the worry that the purported causal connection between a change in norms and professional complicity is itself dubious.<sup>64</sup>

My response to this objection is to argue that both the causal and the constitutive accounts of how a shift in professional norms drives professional complicity are true, and that they are not in fact incompatible. On this view, we may distinguish, if we choose, between a causal and a constitutive version of the thesis of norm transformation stated at the beginning of this chapter – but in fact, in the case of professionals, at least, both of these theses are likely to be true at once in particular cases of mass atrocity. Let me explain. On the one hand, the constitutive version of the thesis, according to which the fact of norm transformation (of a certain kind) within a given group itself constitutes that group's complicity, fits well with Berel Lang's account of the breakdown of professional ethics, in which he understood that breakdown to be marked in large part by the changes in the procedures by which professional norms were created, revised, or dispensed with.

---

<sup>64</sup> This second worry especially mirrors the general concern about circularity discussed above.

On this view, the complicity of German professionals, such as lawyers and headmasters, consisted in part in their loss of control of the procedures by which the norms governing their own activity were regulated. Such an account is especially apt when the individuals or groups that thereby gained influence over professional norms could not reasonably claim any authority to exert such influence – as in the cases of the headmasters.

On the other hand, I believe the causal version of the thesis of norm transformation is itself viable, i.e. not contradictory, and in fact applicable to at least some of the cases discussed here. Proving that any particular professional was in fact influenced by a transformed norm to participate in some wrongdoing will of course always require a careful gathering of historical data, and the judicious exercise of analytical reasoning. Nevertheless, there is no in-principle objection to the idea that changes in norms can cause complicit behavior. In the first place, it is not a necessary condition for the emergence of any particular social norm for the practices on which that norm is grounded to already exist, but only necessary that those practices be perceived, by some agents, to exist. In the second place, it often happens that some practice in fact exists, but is not associated with any particular norm capable of guiding action, amongst a population. In some such cases, that practice subsequently comes to be associated with a social norm by members of that population – either through mistaken perceptions, or through the active efforts of norm entrepreneurs. In such cases, we would say that practice itself did not cause the emergence of the norm, but the norm, once established, may have caused the continuation (and expansion) of the practice. Possibly this is what happened in the case of the German defense attorneys whose change in practices

Thierack approves – though it would be rash to leap from a demonstration that such a causal pathway is possible, to the conclusion that it is plausible, or actual.

With respect to such a modest theoretical finding it might be asked who could possibly object to the idea that social norms, and social norms, can contribute in this way to mass atrocities. In response to this worry, I would say that I see this chapter, and this study more generally, chiefly as filling in neglected theoretical terrain, rather than refuting existing claims about the significance (or insignificance) of social norms to making sense of mass atrocity. Nevertheless, there are some theoretical positions that my account does conflict with. On the one hand, the emphasis on norms, and especially social norms, rules out general explanations of mass atrocity that rely on widespread deficiencies in moral cognition amongst perpetrators or bystanders to atrocities.<sup>65</sup> On the other hand, my account conflicts with descriptions of mass atrocity that interpret such large-scale crimes as products of sheer collapse or breakdown in many or all principles of social order.<sup>66</sup>

#### **4.5 Conclusion**

The thesis of norm transformation is an intriguing explanation for professional complicity in genocide and mass atrocity. It is certainly only a partial explanation; it tells

---

<sup>65</sup> Although such explanations are now largely out of favor, they were once taken seriously by scholars seeking to make sense of particular mass atrocities. One example is psychologist G.M. Gilbert's 1960's characterization of German SS members as "murderous robots." See Waller 2001, 61-62.

<sup>66</sup> My research is thus complementary to the work done by Scott Straus and others on the structures and organizational patterns that underlie episodes of mass violence. See Scott Straus, *The Order of Genocide* (Ithaca, NY: Cornell University Press, 2008); also Stathis Kalyvas, Ian Shapiro, and Tarek Masoud (eds.), *Order, Conflict, and Violence* (New York: Cambridge University Press, 2008).

us little, by itself, about the macro-level causes of the social and political transformations that led to transformations at the micro-level in particular norms and sets of norms, such as professional codes. In this chapter I have not tried to newly validate the thesis of norm transformation for any particular collection of actors charged with collaboration or complicity in large-scale crimes. Instead, I have tried to clarify the meta-normative underpinnings of this thesis, to demonstrate the variety of codified and uncoded social norms that commonly guide professionals in their practice, and to distinguish different ways in which transformations in such norms are connected, causally or constitutively, with professional complicity in atrocities.

Not all cases of professional participation or complicity in mass atrocity can be explained by reference to transformations in professional norms. Some cases within Holocaust historiography, such as recent studies of academic anti-Semitic research, indicate that certain longstanding scholarly norms, such as norms requiring ‘objectivity,’ and norms requiring footnoting and peer review, could be evaded without being changed in order to advance genocidal projects and policies; in this case the thesis of norm transformation seems not to apply. Nevertheless this chapter has demonstrated how closely that thesis fits a wide variety of cases in the annals of professional complicity in the Holocaust. In the next chapter of this study I will expand my view to consider how social norms, and changes in social norms, can be used to make sense of collaboration, bystanding, and resistance by non-professionals in the face of genocide and mass atrocity.

## **Chapter 5: Categories and Categorization in the Theory of Mass Atrocity**

Categories and processes of categorization are conspicuous in current scholarship on genocide and mass atrocity. State-centered theories of mass atrocity record and compare administrative categories deployed by political and military leaders in order to separate and set at odds members of different demographic groups during large-scale crimes. Agent-centered theories of mass atrocity adopt psychological models of cognitive categorization in order to explain the widespread collapse – as well as the occasional survival – of affective ties and normative commitments amongst friends, relatives, and neighbors in the context of mass atrocities.

Additional categories appear in historical and legal investigations of large-scale crimes. Historians employ a broad array of categories – including ‘perpetrators’, ‘bystanders’, ‘rescuers’, ‘resisters,’ and ‘victims ‘or ‘targets’ of atrocities– in order to synthesize large quantities of historical data, and ground comparisons between the actions (or inactions) of temporally and geographically dispersed individuals. Lawyers and judges work within constraints imposed by existing juridical categories, while also seeking to expand or reshape those categories, in their efforts to secure legal accountability for large-scale crimes.

In this chapter, I use the conceptual framework of social norms developed in this study to define and distinguish these four forms of categorization – administrative and cognitive, historical and juridical. Each of these four forms of categorization contributes to different ends in the context of mass atrocity and transitional justice. Each exhibits significant points of complementarity and conflict with the others. Reflecting philosophically on the different ways in which social norms shape and sustain these



different forms of categorization before, during, and after mass atrocities will help us to better understand the connections between these different sets of categories. It may also help us to resolve some of the more serious conflicts.

We saw in the last chapter how one particular actor category – that of ‘professionals’ – serves the needs of state officials before and during mass atrocities, and receives scrutiny from historians and judges afterwards. The category of professionals generally applies only to elite participants in atrocities. The more general forms of categorization considered in this chapter are expansive enough to include those “ordinary men” (and women) whose direct and indirect participation in large-scale crimes is the subject of much recent research. One reason for examining categories and processes of categorization using the framework of social norms is that such norms commonly serve both to distinguish different segments or levels of political societies and to connect the decisions and actions of individuals across those different segments or levels. A second reason is that social norms, with their socio-empirical and normative aspects, may serve to bridge the boundary between the descriptive and normative features of the four kinds of categories under consideration here.

As with my earlier discussion of professional norms and professional participation in mass atrocities, a variety of historical and social scientific sources ground my analysis in this chapter. Diaries, oral testimonies, and works of secondary scholarship supply the various historical examples of social norms and categories that I discuss. I have tried to incorporate exemplars from a range of mass atrocities, varying both geographically and chronologically through the 20<sup>th</sup> century. The restriction of the analysis to 20<sup>th</sup> century large-scale crimes reflects the fact that I am concerned chiefly with state-directed or

state-supported mass atrocities. The four forms of categorization I shall consider are, as we shall see, particularly applicable to crimes of this kind.

The chapter proceeds as follows. In Section 5.1 I define and distinguish two prospective forms of categorization – state-level administrative categorization and individual-level cognitive categorization – and explain some of the extant questions about the interactions between these two forms of categorization in the context of real or impending large-scale crimes. In Section 5.2 I take up two retrospective forms of categorization – historical and juridical categorization – and consider some conflicts that arise between the descriptive and normative aspects of the particular categories deployed in each. In Section 5.3 I use historical examples to illustrate how social norms influence each of these four forms of categorization, and how the perspective of social norms can help to resolve some apparent conflicts among them. Finally, in Section 5.4 I consider some objections to my account of categorization, and highlight key theoretical and practical consequences.

## **5.1 Prospective Categorization**

Categories make manageable problems and phenomena that initially appear intractable. The four forms of categorization considered in this chapter each serve to resolve, in particular ways, for particular actors, problems of scale, scope, or complexity associated with the perpetration, reconstruction, or redress of large-scale crimes.

Administrative and cognitive forms of categorization aid planners and perpetrators of mass atrocities, and they do so prospectively – i.e. before atrocities begin, or while they are ongoing. In this section, I define and distinguish these two forms of categorization,

paying close attention to the role of social norms, and changes in social norms, in each. As we shall see, these two prospective forms of categorization help clarify the thesis of norm transformation discussed in the last chapter.

### *5.1.1 Administrative Categorization*

Mass atrocities are large-scale undertakings, which require coordinated action across space and time, and demand the mobilization of large segments of local, regional, and national populations. Though commonly described in terms of social or political disarray, mass atrocities are ordered, if not orderly, events. One of the principal tools used by state governments and quasi-governmental organizations to give order to planned or ongoing mass atrocities is the form of categorization that I call *administrative categorization*.

Administrative categorization consists in the division of national or regional populations according to ethnic, religious, racial, political, class, gender, or other demographic differences. Although just and peaceful political societies regularly engage in administrative categorization, this form of categorization is also integral to political societies riven by large-scale crimes.

Genocide remains the paradigm example of mass atrocity in international law and politics, and it is no accident that Raphael Lemkin's foundational essay on this crime stresses the "concentrated and coordinated" character of genocide.<sup>1</sup> More recently, historian Eric Weitz has demonstrated the significance of administrative categories and processes of categorization before, during, and after genocide. In his 2003 study, *A*

---

<sup>1</sup> Raphael Lemkin, "Genocide," in *Axis Rule In Occupied Europe* (Washington: Carnegie Endowment for International Peace, 1944), 82.

*Century of Genocide*, Weitz analyzes four central cases of 20<sup>th</sup>-century genocide: in the Soviet Union, Nazi-controlled Europe, Cambodia, and Bosnia-Herzegovina.<sup>2</sup> In each of these cases, the administrative categorization of citizens and inhabitants along racial, ethnic, religious, national, and class-based lines marked a clear step in the progression towards genocide. Weitz argues that the process of categorization is an empirically necessary stage on the way to genocide, reflecting state leaders' "determination to remake fundamentally the societies and states they had either conquered or inherited."<sup>3</sup>

Administrative categorization is not limited to genocide, but is also a key element in other kinds of large-scale crimes. In order to demonstrate the importance of categorization for forms of mass atrocity distinct from genocide, we may look to Christian Gerlach's notion of "extremely violent societies."<sup>4</sup> Gerlach introduces this notion, along with the corollary concept of "mass violence," precisely in order to counter what he takes to be shortcomings in current legal and political conceptions of genocide. He argues that the concept of genocide is politically convenient, insofar as it assumes that responsibility resides with a relatively small number of state leaders and planners, but that it is descriptively and analytically insufficient for dealing with many real world episodes of mass violence, which exhibit (1) plurality in the direction of violence; (2) plurality in the perpetrators of violence; (3) complex (rather than direct) links between

---

<sup>2</sup> Eric Weitz, *A Century of Genocide: Utopias of Race and Nation* (Princeton, NJ: Princeton University Press, 2003).

<sup>3</sup> Weitz 2003, 237-238.

<sup>4</sup> Christian Gerlach, *Extremely Violent Societies* (New York: Cambridge University Press, 2010).

the planning and the carrying out of violence; and (4) considerable diversity of motivations for promoting or participating in acts of violence.<sup>5</sup>

Gerlach's case studies of historical examples of extremely violent societies – including Indonesia, former East Pakistan, and elsewhere – go a long way towards establishing his claims about the diversity of the targets and the perpetrators of large-scale killings, rapes, and other crimes. His analysis of the “coalition[s] for violence” that characterize extremely violent societies helps fill out the picture of administrative categorization I have been developing.<sup>6</sup> It does so in two ways. First, Gerlach's analysis shows that the institutional and administrative levels or sites at which categories are introduced or appropriated are multiple and, in many cases, competitive, rather than monolithic (so that militaries or police services may deploy categories independently from state political apparatuses). Second, the analysis shows that relationships of alliance or antagonism between members of differently-categorized populations are fluid, evolving over time, so that it is not possible to say of any particular group at the first moment of categorization that it is destined either to perpetrate atrocities or to suffer them.

These findings enrich and extend Weitz's claims concerning the importance of administrative categorization before and during genocide. Extremely violent societies, like societies engaged in genocide, exhibit important elements of order and stability, even in the midst of considerable normative and institutional change. Such societies contain multiple hierarchies, multiple centers of control, but they nonetheless retain sufficient degrees of structure and organization to impose or reinforce distinctions between

---

<sup>5</sup> *ibid.*, 1-9.

<sup>6</sup> *ibid.*, 17-91.

members of different demographic groups, and on this basis recruit perpetrators, thwart potential resisters, and isolate targets of persecution and violence.

How do states and quasi-governmental organizations impose or reinforce such demographic distinctions? One important strategy is the exploitation and transformation of social norms. Because of their particularity and practice-groundedness, social norms are ready-made sources of distinctions between racial, ethnic, religious, gender, or other demographic groups within national or regional populations. Because of the shared normative attitudes that help support them, social norms are also relatively durable features of groups on which to base administrative distinctions; and they have the advantage the monitoring for compliance and enforcement commonly comes from within groups themselves, rather than requiring external monitoring and enforcement.

Although these features of social norms make them useful tools for state institutions and quasi-government organizations engaged in administrative categorization, existing social norms must often be altered or modified in order to serve this purpose before or during atrocities. Sometimes these alterations affect the range of practices or activities to which the norms apply; sometimes they affect the scope of the populations in which these norms circulate. In many cases, too, the build up to large-scale crimes will be marked by efforts to transform social norms into legal norms – and in this way centralize control over the imposition of sanctions for violations.

Administrative categories and processes of categorization profoundly affect the fates and fortunes of individuals and groups in modern political societies. Inclusion or exclusion from particular racial, ethnic, religious, geographic, or citizenship categories can make all the difference in determining what resources individuals command, what

rights they enjoy, and what responsibilities they owe. Even within highly egalitarian societies, administrative categories are necessary to allow public institutions to operate effectively in the face of naturally occurring differences of age and geography, health and heredity. Because of their great significance for the prospects of those subject to them, such categories often are central to struggles for justice; but they can also serve as instruments of profound injustice.

In Section 5.3 I will review some historical examples of the exploitation of social norms, and changes in social norms, for purposes of administrative categorization before and during mass atrocities. I want now to consider a second form of categorization that plays an important prospective role in mass atrocities. This is cognitive categorization.

#### *5.1.2 Cognitive Categorization*

In order to understand how administrative categories help order and structure large-scale crimes, we need to understand how these macro-level categories reach down to the level of individuals and individuals' actions. Current accounts of cognitive categorization in the context of mass atrocity provide this bridge between macro-level state policies and micro-level individual conduct. Cognitive categorization, as I understand it, refers to the basic ways in which individual actors perceive events and situations, including normative aspects of those events and situations, during mass atrocities. Social norms both contribute to processes of cognitive categorization and are subject to alteration by such processes, as I will show.

Political scientist Kristen Renwick Monroe has provided the most sophisticated theory of the determinants of individual choice and action during large-scale crimes.

Monroe's 2012 book, *Ethics in an Age of Terror and Genocide*, synthesizes half a century's worth of empirical social scientific research and develops a novel theory of individual moral choice during mass atrocity.<sup>7</sup> Like Weitz, Monroe takes categorization as one of the cornerstones of her account. Unlike Weitz, the particular form of categorization with which Monroe is concerned is not administrative but rather cognitive categorization – the form of categorization that takes place in the minds of individual actors facing specific practical problems during atrocities.

Monroe's account of the psychological mechanisms involved in cognitive categorization is similar to the account that Cristina Bicchieri and other experimentally-oriented philosophers offer of norms generally, and social norms particularly – though, as I shall suggest, Monroe's model seems to leave less room for reflective weighing of norms. The account construes cognitive categorization as operating in several distinct stages. First, out of the manifold data of experience, cognitive categorization settles the particular ways in which particular situations will be framed for particular actors. Particular modes of framing, in turn, lead to the activation, or suppression, of particular scripts for behavior. These scripts, finally, count as the proximate causes of observed conduct.<sup>8</sup>

In developing her theoretical apparatus, Monroe largely refrains from discussing individual decisions and actions from within the practical point of view – i.e. the point of view of individual agents deliberating about action and weighing various practical

---

<sup>7</sup> Kristen Renwick Monroe, *Ethics in an Age of Terror and Genocide* (Princeton, NJ: Princeton University Press, 2011).

<sup>8</sup> *ibid.*, 255-260.



considerations.<sup>9</sup> Her extensive experience interviewing individuals known to have been perpetrators, bystanders, or victims of atrocities leads her to affirm that “ethical acts emanate not so much from conscious choice but rather from deep-seated instincts, predispositions, and habitual patterns of behavior.”<sup>10</sup> This methodological position is central to Monroe’s whole approach, as indicated by the fact that she introduces her inquiry by asking how it can be the case that perpetrators, resisters, and bystanders all experienced themselves as having had “no choice” concerning their very different conduct during atrocities.<sup>11</sup>

I believe the perspective of practical reasoning is indispensable if we are to understand the action-guiding function of norms, including social norms, during mass atrocities, and make sense of the ways in which high-level administrative categories come to influence the decisions and actions of individual actors. For this reason, I believe an account like Monroe’s, which largely elides the perspective of practical reasoning, is necessarily incomplete –though not, for that reason, unhelpful. Indeed, I have benefited considerably from studying Monroe’s theory, and I hope the criticisms I offer in the remainder of this chapter may be seen as supplementing, rather than supplanting, that theory, by showing that considerations from within the larger literature on perpetrators, bystanders, and resisters of genocide give us reason to take up the perspective of practical reasoning, and the framework of social norms. Three such considerations stand out: the

---

<sup>9</sup> This is not to deny that Monroe asks the individuals she interviews about their deliberations over what to do. Rather, what I mean to say is that, apparently on the basis of those interviews, Monroe discounts the possibility that serious episodes of weighing different norms and normative considerations against each other played a major part in the contexts of action about which these individuals were interviewed.

<sup>10</sup> *ibid.*, 256.

<sup>11</sup> *ibid.*, 3.

first stemming from work on bystanders, the second from research on resisters, and the third from studies of perpetrators of atrocities.

One reason to take up the perspective of practical reasoning when studying cognitive categorization is that this approach makes better sense of cases in which the breakdown of norms renders cognitive categories, and the frames and scripts connected to them, inoperable. Bystander inaction in the face of atrocities, when reflective of a collective action problem, illustrates this scenario. Many of the most provoking cases of bystanding involve neighbors – individuals and families living in close proximity to and in longstanding relationships with each other – failing to respond in the face of mistreatment or abuse of some subset of themselves. In many cases, as Monroe herself shows, bystanding seems to result from a specific kind of cognitive categorization, where ethnic, racial, national, religious, or other identities are stimulated so as to set neighbor against neighbor, or at least leave them indifferent to each others' suffering.<sup>12</sup> In at least some cases, however, a change in cognitive categorization seems to be not the cause, but rather the effect, of bystanding. Carlos Santiago Nino, discussing bystander behavior during the 'Dirty War' in Argentina, argues that neighbors of 'disappeared' persons in Buenos Aires and elsewhere faced a serious collective action problem, where no single individuals' actions or protests could suffice to end government kidnappings, and where any first- mover to speak out or intervene faced serious risks of reprisal. In the face of their failure to overcome this collective action problem, Nino suggest, ordinary citizens

---

<sup>12</sup> For a particularly powerful historical case study of this phenomenon, see Jan Gross, *Neighbors: The Destruction of the Jewish Community in Jedwabne, Poland* (Princeton, NJ: Princeton University Press, 2001).

came to exhibit anomie.<sup>13</sup> Anomie, in this context, means a general “disregard for social norms,” as well as a failure of the motivating power of affective ties.<sup>14</sup> The cognitive category of neighbors, in other words, lost its normative significance, due in part to the breakdown of ordinary social norms of neighborly regard in the face of state-sponsored violence.

It is not clear that Monroe’s model can accommodate cases in which failures of norms undermine or alter cognitive categories. In particular, it is not clear that her model can distinguish between cases in which bystanding is the result of the ordinary functioning of cognitive categories, and cases in which bystanding occurs in the face of categories, due to collective action problems and the failure of existing social norms to overcome them. I want to suggest that the perspective of practical reasoning be used to make sense of this distinction. This perspective is already reconstructive, designed to provide an idealized picture of processes of practical deliberation suggested by first-personal reports; it is thus especially appropriate to bystander cases, in which a great deal seems to turn on whether an individual’s inaction stems from a failure of conditions necessary for successful action (due to collective action problems) or from a failure of an intention to act (due to cognitive categorization).

A second reason for taking up the perspective of practical reasoning comes from work on resisters of atrocities, particularly the various individuals and groups who, at considerable risk to themselves, shelter persons picked out by administrative categories for persecution or killing. On Monroe’s analysis, rescuer behavior is driven by the same

---

<sup>13</sup> Carlos Santiago Nino, *Radical Evil On Trial* (New York: Oxford University Press, 1996), 47.

<sup>14</sup> *ibid.*

non-deliberative mechanisms of cognitive categorization as bystander and perpetrator behavior; this is, again, an analysis that purports to explain the feeling of “having no choice.” A closer look at the range of rescuer behavior, however, suggests that normative weighing and deliberation are an important part of the theoretical reconstruction of this behavior. Nechama Tec, who studies particularly Christian rescuers in occupied Poland, marks an important distinction between short term and long term rescuers – between those individuals who provided Jews and other targeted persons with a bed for the night and those who set up long term shelters and hiding places. Tec notes that “on balance for rescuers long-lasting aid had to be more perilous. Simply put, more things could happen in a longer time.”<sup>15</sup> Her interviews with rescuers lead her to conclude that long-term rescue required considerable moral patience, by dint of its being a necessarily open-ended commitment.<sup>16</sup> In some noteworthy cases, this commitment even managed to survive alongside avowed anti-Semitic beliefs and feelings, which, in so many other cases, placed victims of persecution outside the bounds of humane concern.<sup>17</sup>

Action over the long term to resist mass atrocity in a given way is not easily analyzable in terms of sub-conscious, instinctual or automatic reactions.<sup>18</sup> Rather, such temporally extended resistance demands instead the kind of analysis that the practical point of view provides.<sup>19</sup> This perspective complements, rather than contradicts, the approach outlined by Monroe: it allows for a more nuanced reconstruction of the context

---

<sup>15</sup> Nechama Tec, *When Light Pierced the Darkness: Christian Rescue of Jews in Nazi-Occupied Poland* (New York: Oxford University Press, 1987), 82.

<sup>16</sup> Nechama Tec, *Resistance* (New York: Oxford University Press, 2013), 20-21.

<sup>17</sup> Tec 1987, 99-109.

<sup>18</sup> This may not apply to those individuals who acted in many different ways, for short periods, to resist.

<sup>19</sup> See Michael Bratman, “Agency, Time, and Sociality,” *Proceedings and Addresses of the American Philosophical Association* 84, n. 2 (2010), 7-26.

and continuation of individual and group action, which in turn can serve as the basis for further empirical research.

A third, and final, consideration in favor of taking up the perspective of practical reasoning comes from work on perpetrators of atrocities themselves. Early accounts of perpetrators of atrocities, particularly those stemming from the Holocaust, tended to play down or even deny the ability of perpetrators to engage in practical deliberations – casting perpetrators as “murderous robots,” or cogs in a killing machine.<sup>20</sup> The widely publicized trial of Adolf Eichmann, and Hannah Arendt’s controversial assessment of Eichmann as guilty, ultimately, of a failure to think, seemed to leave little space for considering the practical deliberations of perpetrators. More recent scholarship on mass atrocities, however, frequently informed by juridical testimony or direct interviews with perpetrators, has led scholars to suggest that it is precisely the breakdown, inversion, or transformation of norms that helps to explain perpetrator behavior.

In such dynamic situations, it is not enough simply to say that perpetrators were following established norms, based on familiar cognitive categorizations of persons and situations. Instead, we must look more closely at where there were points of continuity in norms, and where there were transformations. In the latter case, we must consider how those transformations came about. The contest between established and newly developing norms is, I believe, best described from within the perspective of practical reasoning; this perspective also provides important (though not exclusive) insights into the phenomenon of norm transformation itself, as I have argued throughout this study. Finally, in keeping with the general analytical framework of this dissertation, I believe it is important to

---

<sup>20</sup> James Waller, *Becoming Evil* (New York: Oxford University Press, 2001), 62.

produce an account of mass atrocity that can make sense of conflicts among different kinds of norms, including legal, moral, and social norms. The perspective of practical reasoning assists in this. For this reason, and the two others I have discussed, consideration of the guiding function of norms, and changes in norms, within the practical deliberations of individual actors should be integrated into the theory of cognitive categorization that Monroe provides.

## **5.2 Retrospective Categorization**

Prospective forms of categorization help make possible the perpetration of large-scale crimes by connecting the decisions and actions of individual actors with the overarching patterns, plans, and processes of violence set out by state and quasi-governmental organizations before and during mass atrocities. Retrospective forms of categorization, by contrast, assist scholars and officials reconstructing those patterns of individual and group conduct, and subjecting them to empirical description and normative evaluation. In this section I define and distinguish two key forms of retrospective categorization – i.e. historical and juridical categorization – and discuss the significance of social norms, and changes in social norms, in each.

### *5.2.1 Historical Categorization*

Historical studies of mass atrocities, and especially state-directed or state-supported mass atrocities, are usually grounded in documents, declarations, and decrees issued by the organizers of such crimes. As a result, historians, like lawyers and judges in international courts, must be aware of, and sometimes work with, administrative

categories employed prospectively by planners and perpetrators of atrocities. At the same time, however, historians of mass atrocity typically introduce their own categories in order to clarify the complex relationships between individuals and groups that they attempt to retrospectively reconstruct. The process of retrospectively deploying categories for such purposes is what I call *historical categorization*.

Two ongoing debates attest to changes in traditional modes of historical categorization in the study of mass atrocity. The first debate concerns the empirical validity of actor categories of the kind I introduced above: categories such as ‘perpetrators,’ ‘bystanders,’ ‘victims’ or ‘targets,’ and ‘resisters.’ The second debate concerns the normative content or function of these categories. Closer attention to the influence of social norms, and changes in social norms, upon historical actors can, I suggest, help to move these debates forward.

Holocaust historian Raul Hilberg exemplifies the traditional approach to historical categorization in the study of mass atrocity in his 1992 book, *Perpetrators Victims Bystanders*.<sup>21</sup> Hilberg grants serious situational and dispositional differences amongst the different individuals and groups whose actions during the Holocaust place them in these categories. Amongst perpetrators, he differentiates between true believers and mere sadists amongst perpetrators. Amongst victims, he distinguishes between “advantaged” individuals and “strugglers” or “the unadjusted.” Hilberg does not consider such internal variations to undermine the integrity of the basic historical actor categories he employs, however. Rather, Hilberg claims, “these three groups were distinct from one another and

---

<sup>21</sup> Hilberg includes resisters in his category of victims. Cf. Raul Hilberg, *Perpetrators Victims Bystanders* (New York: Harper Perennial, 1992).

did not dissolve in their lifetime. Each saw what happened from its own, special perspective, and each harbored a separate set of attitudes and reactions.”<sup>22</sup>

More recent historical and social scientific studies of perpetrators, bystanders, and rescuers in the context of genocide and mass atrocity challenge Hilberg’s views concerning the fixity and non-overlapping character of these historical categories. The trend towards comparative approaches in the study of mass atrocity has led scholars to tinker with the basic categories used to distinguish and compare historical actors and their conduct during large-scale crimes. New hybrid categories, such as “killer-rescuers” and “indirect perpetrators,” have been proposed.<sup>23</sup> At the same time, more nuanced accounts of the practical positions occupied by individuals and groups included in these categories have become customary.

One way that the conceptual framework of social norms supports current efforts to rethink traditional historical categorizations of actors during atrocities is by suggesting that particular individuals may act differently – i.e. act as perpetrators, engage in rescue, or simply not act in the manner of bystanders – according to whether they believe they are subject to monitoring by their peers, and hence at risk of being held accountable. In the next section, I will consider an example of a “killer-rescuer” from Rwanda that seems to support this view.

---

<sup>22</sup> *ibid.*, ix.

<sup>23</sup> See Lee Ann Fujii, “Rescuers and Killer-Rescuers during the Rwandan Genocide: Rethinking Standard Categories of Analysis,” in Jacques Semelin, Claire Andrieu, and Sarah Gensburger (eds.), *Resisting Genocide: The Multiple Forms of Rescue* (New York: Columbia University Press, 2011), 145-157; Andrew Szanajda, *Indirect Perpetrators: The Prosecution of Informers in Germany, 1945-1965* (New York: Lexington Books, 2010).



Attention to social norms also promotes internal differentiation in the particular historical categories employed in research on mass atrocity. Elsewhere, I have argued that the intentional manipulation of social norms is one of the more indirect ways in which individuals and groups can seek to prolong atrocities.<sup>24</sup> If this is correct, then the category of perpetrators ought to include those who engage in such manipulation, as well as the more proximate performers of violence.

A second major debate related to the use of historical categories in studies of mass atrocity concerns the normative content or function of these historical categories themselves. With respect to the sorts of actor categories under discussion here, the debate concerns whether normative judgments, for example moral judgments of the kind “perpetrators of atrocities are morally blameworthy,” “unjust,” or “corrupt,” are to be aired, or whether, for the sake of objectivity, should be avoided. The practice in dispute is sometimes referred to pejoratively as the “tribunalization of history.” It has been discussed expressly in the context of Holocaust historiography, but is certainly relevant to the study of other genocides and mass atrocities as well.

The conceptual framework of social norms can help resolve such debates by showing, first, that not all normative judgments made outside a legal forum must be moral judgments, and second, that it is possible to make first-order claims about the normative judgments reflected in the actions of historical individuals while either expressing or withholding second-order claims about the propriety of those judgments. Social norms offer historians a low-stakes way to begin incorporating claims about the norms accepted by particular groups into their historical reconstructions and analyses.

---

<sup>24</sup> Paul Morrow, “Mass Atrocity and Manipulation of Social Norms,” *Social Theory and Practice* 40, n. 2 (April 2014), 255-280.

Some may worry that this proposal misses the main point in question, which concerns whether it is appropriate for historians to make (or even to undertake) all-things-considered normative judgments, and particularly *moral* judgments, about the historical individuals and groups that they study. I agree that, ultimately, the cases we find most interesting are those in which individuals seem to follow social norms, but thereby violate moral norms; or, alternatively, where individuals flout social norms in order to fulfill moral obligations. A full treatment of this historiographical problem is more than I can offer here, but I believe there are signs that such judgments, which are already frequently made, can be rendered on a principled basis by incorporating some minimal necessary conditions for moral accountability. Ernesto Verdeja has done helpful work on the distinction between moral (i.e. morally accountable) and non-moral (i.e. not morally accountable) bystanders to atrocities; I have tried to extend this line of analysis to consider conditions for the praiseworthiness of resisters.<sup>25</sup> Accurately reconstructing extant social norms is an important component of such analyses, since social norms affect both the kinds or sources of information available to differently positioned actors during atrocities, and the variety of practical considerations that help guide their actions – and since these two features of agents’ subject positions seem to bear on our assessments of the praiseworthiness or blameworthiness of their actions or inaction.

### *5.2.2 Juridical Categorization*

Juridical categorization is critical to the effort to retrospectively redress mass atrocities by means of the various civil and criminal penalties available under domestic

---

<sup>25</sup> Ernesto Verdeja, “Moral Bystanders,” in Adam Jones (ed.), *New Directions in Genocide Research* (London: Routledge, 2012), 153-168.

and, increasingly, international law. Juridical categorization shares many features with historical categorization, but the two forms of categorization also differ in important ways. Perhaps the most contentious forms of juridical categorization concern the definition and identification in practice of particular kinds of large-scale crimes – such as genocide, crimes against humanity, ethnic cleansing, and so forth. Here, a variety of problems arise. I will consider some of these problems in my discussion of transitional justice and transitional normative shift in the next chapter. For now, I want to focus on a few paradoxes that arise when legal actors attempt to categorize large-scale crimes and charge individuals and groups with directly or indirectly participating in them.

Like historians of mass atrocity, lawyers and judges seeking to deliver legal redress for past large-scale crimes must be able to make sense of the administrative categories that set the stage for such crimes. This means that legal practitioners who would use law to prevent, or punish, genocide and other international crimes are sometimes put in the paradoxical position of having to affirm, at least provisionally, administrative categorizations of sub-populations that seem to lack reality outside the delusions of ideologues. In the case of genocide, for example, as philosopher Larry May has pointed out, members of the ‘groups’ targeted for destruction in alleged genocide cases may not perceive themselves to share meaningful identity characteristics with the other individuals they are thrown together with – or at least, do not perceive themselves to do so before policies of persecution based on those characteristics begin. May’s juridical rule of thumb for certifying the existence of groups in genocide cases is to look for markers or characteristics that reliably allow for recognition of purported group

members both by those within the group, and those without.<sup>26</sup> While this “publicity condition” supports the ontological soundness of the four types of group included in the UN’s Convention on Genocide (i.e. national, ethnic, racial, or religious groups), May suggests that the same considerations support the inclusion of other types of groups, including political or professional groups, in the law on genocide.

Successful prosecution of other kinds of atrocity crimes also depends upon juridical categorization. So, for example, in the case of crimes against humanity, though the intention perpetrators will not include the destruction or displacement of groups as groups, categorization of groups as targets of persecution is essential. This is because crimes against humanity, like other large-scale crimes, aim principally at populations, rather than individuals.<sup>27</sup> Indeed, as David Luban has argued, it is because of the focus of such crimes on populations, and because of the inevitability of humans living in populations that can be carved up on the basis of a variety of distinguishing group characteristics, that we can speak of them as crimes against humanity, or the condition of being human, at all.<sup>28</sup>

Because contemporary large-scale crimes are usually highly organized, indictments for such crimes commonly target not only the individuals and groups directly implicated in perpetrating murder, rape, torture, and other harms, but also the state leaders and officials whose actions occasioned or facilitated them. In distributing legal accountability across these various levels, lawyers and judges face problems of

---

<sup>26</sup> Larry May, *Genocide: A Normative Account* (New York: Cambridge University Press, 2010), 40-50.

<sup>27</sup> David Luban, “A Theory of Crimes Against Humanity,” 29 *Yale Journal of International Law*, 2004, 104.

<sup>28</sup> *ibid.*, 117.

differentiation similar to those confronted by historians, but must resolve those problems in accordance with strict, and in many cases, restrictive procedural and substantive rules of law. An historical example of the curious juridical categorizations that can result from such restraints can be found in the Cold War era prosecutions of Nazi soldiers and prison camp guards in Germany, who, even when directly responsible for the deaths of prisoners, could be convicted only of being accessories to murder, rather than of murder, due to the requirement in the applicable section of the German legal code that guilt for murder must be accompanied by a “hateful mentality.”

While recent developments in international criminal law have been responsive to such deficiencies in domestic legal codes for dealing with mass atrocities, international law, and international courts, are the products of contentious political processes. The standards and criteria that lawyers and judges use to assign defendants to particular juridical categories differ in important ways from those employed by historians, and the findings reached by these groups can differ drastically. Political scientist Richard Ashby Wilson accounts for such discrepancies by suggesting that law and history exhibit fundamentally different epistemologies.<sup>29</sup>

How can greater attention to social norms help to resolve these paradoxes of juridical categorization? Again, I can only sketch some promising possibilities, the practicality of which must be worked out through further research. In the first place, insofar as social norms, particularly longstanding or codified social norms, help to structure groups and organizations, and expand their capacities for coordinated action, including illegal action, attention to social norms may provide reasons for distributing

---

<sup>29</sup> Richard Ashby Wilson, *Writing History in International Criminal Trials* (New York: Cambridge University Press, 2011), 7.

responsibility relatively more heavily on those at the top of group hierarchies. This accords with claims by moral and political philosophers that different distributions of accountability at the individual and collective levels may be justified for relatively long-lasting, highly structured groups, on the one hand, and for collectivities that are more ephemeral or loosely structured, on the other.<sup>30</sup>

A second point is related. Within hierarchical groups and organizations, social norms provide superiors with one among many different mechanisms or levers of control over their inferiors. As research on social norms expands, it is likely that leaders of organizations may undertake direct efforts to regulate, or alter, social norms. Mark Osiel provides a good example of this when he proposes that military officers be made to incur civil penalties when soldiers under their command, or fellow officers, commit war crimes.<sup>31</sup> The idea is to break down certain affective and normative ties between soldiers seen as having potentially negative effects on society at large. This proposal is hardly limited to the problem of mass atrocities; it might, for example, be extended to include cases of sexual assault, or other cases where wrongdoing is severe enough to merit concentrated efforts to change social norms.

In this section I have discussed two forms of retrospective categorization central to current theoretical and practical responses to mass atrocity. As we have seen, both historical and juridical forms of categorization must be attentive to the administrative forms of categorization employed prospectively by states and quasi-governmental

---

<sup>30</sup> See Christian List and Philip Pettit, *Group Agency* (New York: Oxford University Press, 2011), 165-169; Tracy Isaacs, *Moral Responsibility in Collective Contexts* (New York: Oxford University Press, 2011).

<sup>31</sup> Mark Osiel, *Making Sense of Mass Atrocity* (New York: Cambridge University Press, 2009), 203-217.

organizations to plan and perpetrate large-scale crimes. Likewise, both historians and justice-sector officials have a considerable interest in understanding the cognitive processes, including the processes of norm cognition, that help drive individual actors' participation in, or resistance to, large-scale crimes. Nevertheless, the ways in which historians and justice-sector officials reconstruct individual and group patterns of conduct during large-scale crimes differ significantly on both descriptive and normative grounds.

I have argued that we can gain a better perspective on these differences, and resolve some of the apparent conflicts between historical and juridical modes of categorization, by focusing on the action-guiding influence of social norms during mass atrocities. I have suggested that the particularity and practice-groundedness of social norms makes them helpful tools for understanding inter- and intra-group dynamics during mass atrocities. I have also suggested that closer attention to social norms may shift some of our judgments about the proper distribution of legal and moral accountability to individuals and groups in the wake of atrocities – though the effects here are likely to be small, given the large range of factors that tend to influence such judgments.

In discussing the ways in which attention to social norms can alter our thinking about prospective and retrospective forms of categorization, I have mainly concentrated on abstract features of social norms and theoretical claims about the nature of categorization. In the next section, I will illustrate the value of these discussions and arguments by considering how social norms – as well as other kinds of informal principles of social order – have affected process of categorization in real world, historical cases of mass atrocity. The specific historical exempla I consider also help

clarify the general thesis of norm transformation as it appears in current theories of mass atrocity.

### **5.3 Social Norms and the Order of Mass Atrocity: Historical Illustrations**

Social norms mediate between macro-level administrative categories and the micro-level cognitive categories, thus significantly influencing the deliberations and actions of “ordinary” individuals during atrocities.<sup>32</sup> Studying the influence of social norms, and changes in social norms, upon ordinary men and women during atrocities complements the analysis of professional participation in mass atrocities offered in the last chapter. It does so by drawing attention to a wider range of social norms that contribute to atrocities, and to a broader array of dynamics that can be observed in the changes that social norms undergo in the context of large-scale crimes. This is true, as I shall argue, no matter whether the individuals under consideration act as perpetrators, resisters, bystanders, or targets of such crimes.

#### *5.3.1 Perpetrators*

Perpetrators are individuals who, by their actions, contribute more or less directly to mass killing, mass rape, and other mass atrocity crimes.<sup>33</sup> As noted above, my interest

---

<sup>32</sup> By referring to “ordinary” individuals, I mean in the first place to draw a contrast with the focus on professionals and other elites in the previous chapter. I mean in the second place to signal that my analysis bears comparison with the now-dominant research paradigm that focuses on “ordinary men” (or, more rarely, women) and their experiences during mass atrocities.

<sup>33</sup> This definition, like the ones that I will offer for the other three actor categories considered in this section, is only provisional. It will be significantly complicated in the discussion of historical and legal categorization below – as will the very idea of stable, clearly demarcated actor categories as adequate solutions to the problems of



in this chapter lies not in elite, but in “ordinary,” perpetrators of atrocities. Lee Ann Fujii, a scholar of the Rwandan genocide, has argued that it is necessary to study norms in order to understand how the mass mobilization of ethnic Hutus as perpetrators of the mass killing of Tutsis was possible. She writes:

Norms become *more* important when reality is confusing, contradictory, or changing. The more ambiguous the situation, the more likely people are to rely on norms as guides for behavior; and the clearer the prescription of a given norm, the more likely people will follow that norm and not others.<sup>34</sup>

The Rwandan genocide, like other historical episodes of mass atrocity, presents us with the case of a program of violence of enormous scale, but perpetrated in large part by intimates – neighbors, friends, and family members – within local communities. The genocide was far from a normal occurrence; it represented a major disruption in the ordinary rhythms and habits of agricultural life. Even so, many pre-existing norms, specifically social norms, persisted through and helped to structure the violence of the genocide, even as new norms developed to complete the ordering of mass killing. To take one clear example of an old social norm carried over into the new context of genocide, the gendered division of housework and fieldwork, familiar from the agricultural existence of Hutus in Rwandan society, persisted into the genocide, with men, and particularly young men, performing the bulk of the killing. Jean-Baptiste, one of the ten perpetrators whose testimony is recorded in Jean Hatzfeld’s book *Machete Season*, explains the gendered division of labor during the genocide as follows: “it is a country

---

scale that must be surmounted by those who would furnish historical or social scientific reconstructions of mass atrocities.

<sup>34</sup> Lee Ann Fujii, “Transforming the Moral Landscape: the Diffusion of a Genocidal Norm in Rwanda. *Journal of Genocide Research* 6, n. 1 (March 2004), 100.

custom that women do not concern themselves with any bothersome task of cutting. The machete is for a man's work. This was as true for the farming as for the killing."<sup>35</sup>

As Jean-Baptiste goes on to explain, female Hutu's lives did not remain entirely unchanged during the genocide, and women did not escape complicity in the violence against their Tutsi neighbors. Many Hutu women took part in looting after their neighbors had been killed or fled, and some revealed the hiding places of Tutsi to male killers. Nevertheless, it seems clear that the persistence of this "country custom" contributed significantly to the structure and organization of genocide.

Along with the persistence of old customs, we should pay attention to the emergence of new social norms corresponding to the novel social conditions and practices involved in large-scale crimes. The historical and social scientific literature on mass atrocities provides clear evidence of the influence of such emergent social norms. Here again, we may turn to the post-trial testimonies of perpetrators in Rwanda for an initial indication of the kinds of norms in question.<sup>36</sup> So, for example, as Léopold, another of the perpetrators interviewed by Hatzfeld, explained concerning the balance between murder and looting amongst perpetrators:

We began the day by killing, we ended the day by looting. It was the rule to kill going out and to loot coming back. [...] Those who killed a lot had less time to pillage, but since they were feared, they would catch up because of their power. No one wound up ahead, no one wound up robbed.<sup>37</sup>

It would be risky to extrapolate, based on the reports of individuals within the particular group of perpetrators whose testimony Hatzfeld solicited, the extension of this

---

<sup>35</sup> Jean Hatzfeld, *Machete Season: The Killers in Rwanda Speak*, Laura Coverdale trans. (New York: Picador, 2003), 109.

<sup>36</sup> Keeping in mind that, with perpetrators particularly, it is important to apply tools of source criticism to confirm claims about the emergence and influence of specific social norms.

<sup>37</sup> Hatzfeld 2003, 86.

particular rule governing slaughter to the larger commune or national level. Following the terminology I have used throughout this dissertation to discuss social norms, this report leaves unclear the extent of the group or collectivity to which this purported social norm was particular. Rather than challenging the conceptual framework defended here, however, this example helps to make the case for more careful, systematic study of social norms by historians and social scientists researching mass atrocity.

### 5.3.2 *Bystanders*

If we look beyond Rwanda, and beyond perpetrators, we can find other examples of novel social norms and other kinds of informal principles of social order arising in the course of mass atrocities. Victor Klemperer, the Dresden professor whose wartime diary provided evidence of professional norm transformations in Chapter 4 above, reports a notable emergent convention amongst bystanders to nascent anti-Jewish persecution in 1930's Germany. In his diary entry for June 13, 1934, Klemperer shares an anecdote concerning the consequences of boycotts of Jewish-owned business in three neighboring towns outside Dresden:

In Falkenstein one is not allowed to buy from the "Jew." And so the people in Falkenstein travel to the Jew in Auerbach. And the Auerbachers in turn buy from the Falkenstein Jew. However, on bigger shopping expeditions the people from the one-horse towns travel to Plauen, where there's a larger Jewish department store. If you run into someone from the same town, no one has seen anyone. Tacit convention.<sup>38</sup>

This comic anecdote illustrates the way in which informal principles of social order can arise and operate in ways that are complementary to administrative categories and legal norms before and during large-scale crimes. Boycotts of Jewish-owned

---

<sup>38</sup> Klemperer 1998, 67-68.

businesses in small towns, as well as in urban centers, depended on administrative processes of categorization concluding in criteria for determining definitively which businessmen, and businesses, counted as Jewish, and which not. The reported response of non-Jewish residents of the small towns mentioned – i.e. their observance of the boycott against Jewish-owned businesses within their own towns, but not in other towns, recalls Monroe’s account of cognitive categorization: here, a shared belief about the bounds of the group within which a particular principle applies gives rise to a definite pattern of behavior that would be difficult to make sense of except by reference to that principle.

Intuitively, it seems appropriate to categorize the individuals Klemperer describes as following this “tacit convention” as bystanders to persecution. The convention furnishes a standing means of circumventing an established rule (apparently legal) without being held accountable for breaking it. Klemperer’s diary description is, of course, defeasible as testimony to the existence of this social norm; it only picks out individuals with respect to this particular ban on frequenting Jewish-owned businesses – and so does not tell us anything about actions or behaviors these individuals might have engaged in on other occasions, which could lead us to consider them also as perpetrators, or as resisters. A more in depth discussion of bystanding – of the temporal scope of bystanding, and of the distinction between blameworthy and non-blameworthy bystanding – is beyond the scope of this section; but I believe this is one of many points on which philosophy can contribute substantially to the theorization of mass atrocity.

### 5.3.3 *Targets (or Victims)*

Traditional historical and social scientific accounts of mass atrocity typically designate those individuals or groups picked out for abuse as victims. More recently this designation has become controversial, due to its connotations of passivity and sacrifice. Here I will use the less historically-burdened term ‘targets’ to discuss individuals and groups picked out for, and in many cases actually subjected to, abuse during atrocities.

Gender-based social norms have affected the experience of targets, as well as perpetrators, of large-scale crimes. Recently, in Darfur, the gendered norm requiring women, and particularly young girls, to fetch water, firewood, and other domestic provisions for their families continued into the displaced persons’ camps to which many Darfuri’s fled, and there left women especially exposed to attacks by militia when they left the camp to gather firewood.<sup>39</sup> In a different historical context, Victor Klemperer records at one point his relief in finally having privacy to cook for himself and his wife Eva again without being subject to criticism from fellow residents of his “Jews’ House” for taking on such a feminine task.<sup>40</sup> It should be noted, of course, that gender-based social norms do not persist everywhere and in all cases of genocide and mass atrocity; Tony, the Dutch resister whose testimony provides one of the key foundations of Monroe’s grounded theory of moral choice, takes peculiar pleasure in noting how fully norms governing relations between men and women broke down within the resistance

---

<sup>39</sup> Gerard Prunier, *Darfur: A 21<sup>st</sup> Century Genocide*, Third Edition (Ithaca, NY: Cornell University Press, 2008), 102.

<sup>40</sup> Victor Klemperer, *I Will Bear Witness: 1942-1945* (New York: Random House, 2000), 150.

cells in which he was active – anticipating, as he sees it, postwar women’s liberation movements.<sup>41</sup>

Not every difference in group practices granted new significance in the context of mass atrocity is structured by social norms. Nechama Tec, reporting on her interviews with Jews hidden by Polish Christians during World War Two, highlights the difficulties some Jews had blending in with local populations, and the changes in comportment they made in order to fit in: “When as it often happened, passing Jews lived among lower class Poles they had to make a conscious effort to use rough language. Those who spoke softly and politely stood out within this kind of an environment.”<sup>42</sup> Without further evidence, it would be wrong to interpret this case as one where a norm supported the culture of cursing; instead, the passage shows that individuals’ efforts to assimilate to (or escape from) social practices, whether during mass atrocities or not, must extend beyond assimilation to or escape from social norms.

#### *5.3.4 Resisters*

The most extensive extant body of social scientific research on the connection between social norms and individuals’ decisions and actions during atrocities focuses on those who resist atrocities. Exactly what counts as resistance is not always stated in this literature; elsewhere, I have argued that the constitutive features of a working definition of resistance should leave open questions about praiseworthiness.<sup>43</sup> Here I will focus on

---

<sup>41</sup> Monroe 2011, 37.

<sup>42</sup> Tec 1987, 38.

<sup>43</sup> Paul Morrow, “Responsibility, Resistance, and the Limits of Praiseworthiness,” Unpublished Manuscript.

examples of the kind most commonly cited in the literature: i.e. examples of individuals who, through their actions, help to rescue or preserve targets of atrocities.

Both philosophical and social-scientific studies of rescuers often cite a tendency toward flouting, or living in exception to, social norms as correlated with rescue, and particularly altruistic rescue.<sup>44</sup> Kristen Renwick Monroe seems to accept this traditional claim (though, as noted above, her account of rescuer behavior seems to suggest that conscious weighing, and rejection, of social norms is not at work here). Lawrence Blum, in his essay “Altruism and the Moral Value of Rescue,” offers a more philosophically nuanced account of this general claim by discussing some of the social norms that rescuers seem to reject which we may be less inclined to judge generally invalid – such as norms suggesting that one’s family deserves to be privileged in one’s deliberations about what to do, and that children, particularly, should not be exposed to unnecessary risk. Blum suggests that rescuers exhibit a mixture of response to principle, and empathetic response to particular needs, that causes them to flout such social norms – but without becoming subject to negative reflective moral judgments for this reason.

Nechama Tec’s account of Polish rescuers challenges Blum’s discussion on this last point, at least as far as first-order moral judgments are concerned. Her description of Polish Christian’s fear of revealing that they were rescuers even after WWII ended, and of the reception they received from their neighbors when they did reveal this, shows that rescuers could continue to be held accountable to social norms even after the act of rescuing was over; and seems to confirm that rescue is importantly bound up with the refusal to follow social norms. This refusal may sometimes be non-deliberative, in the

---

<sup>44</sup> Samuel and Pearl Oliner, *The Altruistic Personality* (New York: The Free Press, 1992); Tec 1987, 2012.

way Monroe suggests; but in other cases it seems to have been quite carefully considered, and the framework of social norms indispensable for reconstructing how it occurs.

One interesting final case to consider, appropriately drawn from Lee Ann Fujii's work, is that of the mixed category of "killer-rescuer." While interviewing a confessed Rwandan *genocidaire* named Olivier, Fujii asks her interlocutor whether he ever rescued anyone during the several months of killing. Olivier replies that he once encountered a Tutsi boy fleeing the *interahamwe* [local bands of killers], and instructed the boy to take one path, rather than another, in order to avoid them. The boy survived. Clearly Fujii (and indeed, Olivier himself) takes this to have been the morally right action; but the fact that (apparently) it did not give rise to any further acts of the same kind, or measurably reduce Olivier's subsequent participation in killing, prompts us to ask why this should have been a one-off occurrence.<sup>45</sup>

One possible explanation, in terms of social norms, is that although Olivier was generally subject to a social norm requiring that he take part in killing, and although that social norm generally carried with it strong forms of accountability, in this one instance Olivier was outside the range of monitoring of any of the other young men to whom this social norm applied, and so the practical cost of the morally right action was radically diminished. This is, of course, only one of several possible explanations for this noteworthy case of rescue, but it illustrates well, I think, a possible way in which actions prescribed by particular moral norms are sometimes arrived at by individuals who more typically allow certain social norms to outweigh or exclude those moral norms.

---

<sup>45</sup> Fujii 2011, 155.



The specific examples of social norms I have considered in this section (and in other work on this topic) are fallible; they are open to counterexample and contrary evidence, as good historiographical methodology requires them to be. My aim has been to offer further evidence of the relevance of the framework of social norms to the study of mass atrocity. The examples I have provided are all designed to show how social norms – particular, practice-grounded, group intentional, and accountability creating – help to mediate between the collective-level administrative categorization states typically deploy during the build up to mass atrocity, and the individual-level cognitive categorization which, it is supposed, constrains the choices available to specific individuals in the context of mass atrocity.

#### **5.4 Objections**

In this chapter I have examined the connections between four forms of categorization central to current scholarship on genocide and mass atrocity. I have used the framework of social norms to explain how each of these forms of categorization represents a response to certain problems of scale encountered by elite and ordinary actors before, during, and after mass atrocities. Before and during mass atrocities, I have argued, social norms help to mediate between macro-level administrative categorization and micro-level cognitive categorization. After mass atrocities, I have suggested, attention to social norms can help resolve challenges raised by both historical and juridical modes of categorization. In this final section, I want to consider three objections to the account I have offered. A first objection comes from the general literature on genocide and mass atrocity, and concerns the state-centered approach to mass atrocity

that I have adopted. A second objection is more classically philosophical, and concerns the normative-descriptive, or is/ought distinction. A third, and final, objection is historiographical, and concerns the validity of the particular historical examples of social norms I have provided.

A first objection holds that, in my general approach to the structure of genocide and mass atrocity, and in my particular focus on administrative categorization, I am fixating on only a partial, and perhaps even an exceptional, sub-class of large-scale episodes of violence. On this view, it is a quirk of the last century that many episodes of mass atrocity were in fact apparently centrally organized; and it might also be true even in those cases that the focus on central authorities or architects of destruction is more a convenient way of limiting retribution than an accurate way of representing the social conditions productive of mass violence. The objection has its roots in the “intentionalism” or “functionalism” debate in Holocaust studies;<sup>46</sup> it extends the functionalist side of that debate to mass violence more generally through notions such as “structural violence” and “genocidal social practices.”<sup>47</sup>

In response to this objection I would say that the framework of categories and of social norms developed here is flexible enough to accommodate more and less centralized, or centrally organized, episodes of mass violence. At the limits, to be sure, the value of these analytical tools runs out – e.g. in the case of one-off attacks. To be clear, however, the balance of current scholarship seems to suggest that most mass atrocities, like most traditional armed conflicts, are not like this. They may be carried out

---

<sup>46</sup> For an accessible overview of that debate, see Tom Lawson, *Debates on the Holocaust*, Manchester, UK: University of Manchester Press, 2010, Ch. 4.

<sup>47</sup> Daniel Feierstein, *Genocide as a Social Practice*, Douglas Andrew Town (trans.) (New Brunswick, NJ: Rutgers University Press, 2014).

by “coalitions of violence,” of the sort Gerlach describes, but in that case categories and social norms are likely to become more, not less, important analytically, as they are used to explain differences between the targets and the methods of participant groups.

A second objection is philosophical in character. It holds that the prospective and retrospective uses of the framework of social norms for the study of mass atrocity that I have advocated violate the is/ought distinction by confounding descriptive and normative claims. The objection is not the same as the historiographical worry, noted above, that engagement in normative judgments may render historical accounts less objective, and thus less epistemically valuable. Instead, the objection here is conceptual, holding that I have treated social norms as both empirical facts or states of the world, and as normative entities or claims about “ought”-ness.

The correct response to this objection is to say that it is no objection at all, but rather an appropriate description of the two-fold aspect of social norms. As explained in Chapter 3 above, I accept the view recently put forward by Geoffrey Brennan and others, according to which social norms combine “normative” and “socio-empirical elements.”<sup>48</sup> At the core, when we imagine or identify social norms, we are taking to be a matter of descriptive fact that some practical prescription, permission, or prohibition exists within a particular community – where existence is (as I have argued in previous chapters) a matter of a certain profile of beliefs and intentions amongst group members, or, more simply, a matter of *acceptance* by a sufficient proportion of group members.<sup>49</sup>

---

<sup>48</sup> Brennan et al 2013, 3.

<sup>49</sup> “Acceptance” is the general term that Brennan et al adopt to capture what I have called the “group intentional” feature of social norms.

A third objection is both philosophical and historiographical, and concerns my method for discovery and verification of social norms in historical contexts. The basic worry is that it is circular to take patterns or structures of events as evidence of social norms, and then to use the claim of social norms to explain those patterns of events. As I noted in Chapter 3 of this study, scholars like Cristina Bicchieri have tried to counter this objection in their study of present-day social norms by turning to experimental, laboratory methods; but this alternative approach is clearly not available for the study of historical events, such as historical mass atrocities.

My response to this concern is to cede the point that circularity is a risk in reconstructing the role of social norms in historical contexts of mass atrocity. It need not, however, be taken as fatal to the project of integrating social norms into theories of mass atrocity. Historians have numerous tools for confirming or disconfirming the explanations of behavior that they offer: from corroboration of motivational claims by multiple sources to counterfactual thinking about how and whether individuals' decisions and actions might have differed had circumstances changed. I cannot claim to have demonstrated these tools in all their sophistication in my own discussion of social norms in this chapter. The particular cases I have cited should be considered as exempla: illustrative, but nevertheless criticizable on a variety of grounds. Scholars working directly in history and the social sciences will, I expect, be able to craft responses to some of these criticisms, and will be able to move the study of categories and social norms in the context of mass atrocity beyond the point to which I have taken it here. My goal in this chapter, as in this study, has been to make the conceptual and theoretical case for integrating the framework of social norms into discussions of categories and

categorization before, during, and after large-scale crimes. It is my hope that other scholars may find this framework useful, and employ it in ways and for purposes that I have neither considered nor conceived.

## Chapter 6. Social Norms and the Distinctiveness of Transitional Justice

In the previous chapters of this study, I have outlined the conceptual framework of social norms and explained how this framework can help scholars and practitioners make sense of individual and group participation in mass atrocities. In this final chapter, I will consider how this framework can be applied to some characteristic problems of justice that arise in the wake of atrocities, as local and international actors pursue legal accountability for past crimes while simultaneously striving to secure social and political stability going forward. I consider, that is, how the framework of social norms can be used to identify, and resolve, typical problems of *transitional justice*.

Current scholarship on transitional justice is marked by vigorous debates about the contents of core principles of transitional justice and about the contexts in which those principles apply. Theorists debate the roles that individual and institutional actors play during political transitions,<sup>1</sup> scrutinize the significance of particular historical precedents,<sup>2</sup> and set out competing accounts of the main obstacles to achieving justice in transition.<sup>3</sup> Current scholarship on transitional justice is also characterized by various *meta*-debates about the origins, the aims, and the limits of the theory of transitional

---

<sup>1</sup> Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (New York: Cambridge University Press, 2010); Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, New York: W.W. Norton and Company, 2011.

<sup>2</sup> Ruti Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003), 69-94; Jon Elster, *Closing the Books*, New York: Cambridge University Press, 2004, 3-78.

<sup>3</sup> Cf. Martha Minnow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, Boston, MA: Beacon Press, 1999; Debra Satz, "Countering the Wrongs of the Past: The Role of Compensation," in *NOMOS LI: Transitional Justice*, Melissa S. Williams, Rosemary Nagy, and Jon Elster, eds., New York: New York University Press, 2012, 129-150; Gary Bass, "Reparations as a Noble Lie," *ibid.*, 166-179.

justice itself.<sup>4</sup> Some theorists dispute where the center of the theory of transitional justice lies. Others question whether distinctively transitional principles of justice, capable of grounding a distinct theory of transitional justice, exist at all.<sup>5</sup>

In this chapter I address the distinctiveness of transitional justice – examining in detail differences between those principles of justice that apply during ordinary times in the life of political societies and the principles of justice that apply specifically during transitional periods. I argue that transitional transformations in social norms, and the various institutions that promote them, stand in need of governance by distinct principles of transitional justice.

Previous disputes over the distinctiveness of transitional justice have tended to regard political transitions as scenes of transformation in legal norms. Theorists on both sides of such disputes have mined the Hart-Fuller debate – discussed in the first chapter of this study – for support for their respective claims about the uniqueness, or routineness, of the rule of law challenges that arise during transitions. These theorists have not given comparable attention to the sorts of informal principles of social order – such as conventions, traditions, and social norms – that also figured prominently amongst Hart and Fuller’s concerns. Here I shall argue that theorists who frame the problems of transitional justice exclusively in terms of conflicts between laws and rule of law

---

<sup>4</sup> For general overviews of the sources and subjects of such ‘meta-debates’ within this expanding field see Christine Bell, “Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field,” *The International Journal of Transitional Justice* 3, no. 1 (2009), 5-27; also Alexander Hinton, “Introduction” in *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence*, New Brunswick, NJ: Rutgers University Press, 2010, 1-22.

<sup>5</sup> Cf. Elster 2004, 77-78; Eric Posner and Adrian Vermeule, “Transitional Justice as Ordinary Justice,” *Harvard University Law Review* 117, no. 3 (2004), 761-825; Stephen Humphreys, “Laboratories of Statehood: Legal Intervention in Colonial Africa and Today,” *The Modern Law Review* 75, no. 4 (July 2012), 475-510.

principles mistake the importance of transformations in social norms during liberalizing political transitions, and overlook the distinct problems of justice that such transformations raise.

The chapter proceeds as follows. In Section 6.1 I examine Ruti Teitel's influential theory of transitional justice, with particular emphasis on her account of transitional normative shift. I show that this notion of transitional normative shift is central to Teitel's general argument for the distinctiveness of transitional justice, and I reconstruct one particular principle of transitional justice, the principle of transitional prioritization, which her account supports. In Section 6.2 I engage with two prominent critics of Teitel's theory of transitional justice, David Dyzenhaus and Dirk Venema. I argue that, while both of these critics make good arguments against Teitel's explanation of the distinctiveness of transitional justice, neither gives sufficient consideration to her notion of transitional normative shift, or the ways in which that notion might be expanded to encompass transformations in social, as well as legal, norms during transitions. In Section 6.3 I distinguish between different types of intentional transformations in social norms commonly undertaken during liberalizing political transitions, and briefly identify different strategies for pursuing such transformations. I then establish the importance of international organizations – including multi-national organizations like the European Union and the United Nations, as well as NGOs – in promoting and pursuing transitional transformations in social norms, and I identify two principles of justice – the principle of local collaboration and the principle of selective norm conservation – which I believe apply distinctly to the activities of such international organizations during liberalizing political transitions. Finally, in Section 6.4, I present a case study of the United Nations'



efforts to transform both legal and social norms in transitional East Timor in the late 1990's and early 2000's. This case study provides support for my claim that building stability and the rule of law in transitional contexts requires promoting transformations in social as well as legal norms in accordance with principles of justice.

### **6.1 Teitel on Transitional Normative Shift**

In her 2000 book *Transitional Justice*, legal scholar Ruti Teitel claims that the “quintessential and defining feature” of political transitions is “the grounding within society of a normative shift in the principles underlying and legitimating the exercise of state power.”<sup>6</sup> Such shifts constitute what Teitel terms the basic “phenomenology of transition.”<sup>7</sup> In her book, and in subsequent essays, Teitel employs historical examples to illustrate her notion of transitional normative shift. These examples highlight the context-dependent nature of the challenges encountered by legal and political actors during particular political transitions; they also form the basis of Teitel's general account of the emergence of the idea of transitional justice over the last half-century.<sup>8</sup>

In this section, I will sketch Teitel's account of transitional normative shift, and identify one particular principle of justice that she suggests applies distinctively to such transitional changes in norms. Before I do so, I want to note two clear limits of Teitel's account of transitional justice. First, Teitel is concerned exclusively with “liberal” (or, as I shall say, *liberalizing*) political transitions. Such transitions aim at establishing (or restoring) democracy, respect for human rights, and the rule of law. The last of these

---

<sup>6</sup> Ruti Teitel, *Transitional Justice*, (New York: Oxford University Press, 2000), 213.

<sup>7</sup> *ibid.*, 5.

<sup>8</sup> Teitel 2003.

three objectives is crucial for Teitel's argument for the distinctiveness of the pursuit of justice during transitions.

The second clear limit of Teitel's account of transitional justice is that Teitel is concerned exclusively with *legal* aspects of liberalizing transitions. She is concerned, that is, with changes in the laws that constrain and ground government action and social interaction in transitional societies. Accordingly, Teitel's account of transitional normative shift focuses entirely on shifts in legal norms. Even those legal norms, such as the norms established by international humanitarian and human rights law, that appear to be strongly supported by, and perhaps even grounded in, properly moral norms, are considered solely from a legal perspective.<sup>9</sup>

I will consider later whether these limitations are compatible with the project Teitel takes on, i.e. the project of explaining how societies in transition achieve fundamental shifts in the norms that structure and constrain government policy and social interaction. I want for now to reconstruct Teitel's account of the phenomenon of (legal) normative shift as it occurs during liberalizing political transitions.

Teitel begins by insisting that any truly just transition must satisfy two different, and often competing, goals. The first is the retrospective goal of seeking justice for wrongdoers who enjoyed impunity under predecessor regimes. The second is the prospective goal of securing peace and stability going forward. During liberalizing political transitions, these two goals are pursued principally in and through law. Attempts

---

<sup>9</sup> Thus it is a major question for Teitel how judges or advocates manage to integrate international human rights law with pre-existing domestic law during transitions; but she does not extend to her inquiry to the question of how the various moral norms bound up with respect for human rights come to play a part in the practical deliberations of officials and citizens in countries where abuses of those rights were previously routine.

to reconcile the retrospective and prospective goals of transitional justice by means of the law commonly give rise to what Teitel considers the core problem of liberal political transitions: the “transitional rule of law dilemma.”

Teitel explicates her notion of transitional rule of law dilemma in several different ways. She makes the general observation that, while law traditionally facilitates the “transmission of authoritative norms across time,” during liberal political transitions law is redirected towards the aim of “radically transform[ing]” such norms.<sup>10</sup> She refers back to the Hart-Fuller debate, and uses the eight principles of the rule of law identified by Fuller to explain, in abstract terms, the possibility of conflicts among rule of law requirements during transitions.<sup>11</sup> Finally, she discusses an array of concrete, historical examples of transitional rule of law dilemmas.

Early in her book, Teitel contrasts the quite different choices made by the Hungarian and German courts in the wake of the fall of communism. In such “successor cases,” Teitel writes, “judicial rhetoric conceptualizes the problem in terms of multiple competing rule of law values in seemingly intractable conflict: one value deemed relative, and the other essential.”<sup>12</sup> In Hungary, she claims, the Constitutional Court understood itself as confronting a dilemma between the rule of law value of “predictability” and the substantive justice principle of accountability for past wrongdoings when it was forced to rule on a law abrogating statutes of limitations for 1950’s political persecutions. Ultimately the court ruled the law unconstitutional, and in so doing, Teitel suggests, it gave priority to a previously suppressed principle of justice:

---

<sup>10</sup> Teitel 2000, 219.

<sup>11</sup> Teitel 2000, 12-15.

<sup>12</sup> Teitel 2000, 17.

“if the totalitarian legal system abolished or ignored the line between the individual and the state, the line drawn by Hungary’s Constitutional Court posited a new constraint on the state: an individual right of security.”<sup>13</sup> The results of prioritization were different in Germany. Here, Teitel cites the well-known case of the (former) East German border guards, who were put on trial during the unification process for shootings of civilians attempting to cross the Berlin Wall. Although good legal arguments existed for the claim that the guards had acted in accordance with East German law, and so could not be prosecuted under the post-unification legal settlement, the guards were in fact convicted. Their conviction, Teitel writes, should be regarded as a case of legal discontinuity, in one sense, and continuity, in another. The judgment of the court broke with the law that existed at the time in East Germany, and so could be considered discontinuous (and indeed, retroactive), but it reaffirmed judgments made in the post-WWII period, where the courts had found that “evil legislation lacked the status of law.”<sup>14</sup>

The contrasting historical cases described here illustrate Teitel’s notion of the transitional rule of law dilemma. They also go some way towards explaining how “normative shifts” can justly settle such dilemmas. Neither here, nor anywhere else in her work, however, does Teitel explicitly identify particular principles of justice fit for governing such shifts. She offers instead some general descriptions of the considerations

---

<sup>13</sup> Teitel 2000, 16.

<sup>14</sup> *ibid.* German legal scholar Robert Alexy, writing on this same case, has suggested that the post-unification German courts invoked a substantive conception of the rule of law, while relaxing certain procedural rule of law principles, such as non-retroactivity and (arguably) predictability. I believe this reading is consistent with the “prioritization” reading Teitel presents. Cf. Robert Alexy, “A Defence of Radbruch’s Formula,” in *Recrafting the Rule of Law*, ed. David Dyzenhaus (Portland, OR: Hart Publishing, 1999), 15-39. See also the discussion of retroactivity as a violation of the rule of law in Ch. 2 above.

that contribute to transitional normative shift, writing for example, “which rule of law values ultimately take precedence in transition is a function of the particular historical and political legacies—that is, of the primary understanding of the sources of fear, insecurity, and injustice that gains authoritative normative force in the society.”<sup>15</sup> Teitel terms this highly contextual approach to determining which rule of law values should be relaxed, and which upheld, in particular cases “transitional constructivism.”<sup>16</sup>

I have said that Teitel does not explicitly identify specific principles of transitional justice in her account. Some critics go further, and claim that it is not possible to reconstruct such principles from a close reading of her work.<sup>17</sup> I do not think this is accurate. Although Teitel does not explicitly identify the principle(s) of justice that she believes should guide transitional shifts in legal norms actors, at least one such principle can easily be extracted from the historical examples described above. This is the *principle of transitional prioritization*.

According to the principle of transitional prioritization, judges, administrators, and other legal actors should resolve rule of law dilemmas in particular cases by prioritizing one of two or more conflicting rule of law values. Actors should determine which rule of law value to prioritize in each instance by considering which of these values has suffered more serious abuse under prior regimes, and also by reflecting on the comparative advantages and disadvantages of upholding one or more values at the expense of the others. Prioritizing previously neglected values, such as equality before

---

<sup>15</sup> Teitel 2000, 215.

<sup>16</sup> Teitel 2000, 219-223; Teitel 2005, 285-287.

<sup>17</sup> Pablo De Greiff, “Theorizing Transitional Justice,” in *NOMOS LI: Transitional Justice*, Melissa S. Williams, Rosemary Nagy, and Jon Elster, eds., New York: New York University Press, 2012; 61.

the law, or rights, such as property rights, will in some instances require discounting or selectively neglecting other values that did not suffer similar abuses. But it is the assumption of those who accept the principle of transitional prioritization that the legal and political gains achieved through considered choices outweigh whatever losses are incurred.

Does this principle of transitional prioritization provide the basis for a distinct theory of transitional justice – i.e. a theory whose core principles differ substantially from those which apply during ‘ordinary’ circumstances? In my view, it does not. In the first place, rule of law dilemmas do not arise only during transitions between political regimes, and so it is difficult to see why this specific strategy Teitel recommends for resolving such dilemmas should be limited to transitional contexts. In the second place, whether or not rule of law dilemmas are distinctive of transitional societies, they hardly exhaust the “phenomenology” of liberalizing transitions.<sup>18</sup> A complete descriptive account of liberalizing political transitions must attend to more than the paradoxes involved in seeking to transform legal norms while preserving the rule of law. On my view, it is impossible to gain a clear picture of how either the retrospective, justice seeking or the prospective, stability securing aims of transitional justice can be achieved without attending to shifts in social and moral, as well as legal, norms achieved or attempted during transitions. In the final two sections of this chapter, I will show that transformations in social norms belong centrally to the phenomenology of liberalizing political transitions. First, I want to look more closely at some objections that have been

---

<sup>18</sup> Teitel 2000, 5.

raised against Teitel's account of transitional justice, and to consider in more detail her notion of transitional normative shift.

## **6.2 Two Critics of Teitel's Account of Transitional Justice**

Critics of Teitel's account of transitional justice divide into two camps. First, there are critics who share Teitel's rule of law-based approach to transitional justice, but who reject either her description of transitional rule of law dilemmas, or her claim that such dilemmas should be solved by principles of transitional justice that are distinct from the principles applicable during 'ordinary' periods in the life of liberal political societies. Second, there are critics who believe that a theory of transitional justice should not be confined to liberal, rule of law-based transitions, but should extend to non-liberal, or even anti-liberal, transitions and anti-liberal conceptions of justice. In this section, I will argue that Teitel's notion of transitional normative shift remains central to the study of transitional justice even if one or the other of these lines of criticism succeeds. At the same time, I will suggest, that these criticisms give us reason to expand Teitel's notion of transitional normative shift to include attention to transitional transformations in social, as well as legal, norms.

### *6.2.1 Rule of Law-based Criticisms*

I will begin by considering those critics of Teitel who generally endorse a rule of law approach to transitional justice, but who object to Teitel's specific version of that approach. Perhaps the most controversial claim in Teitel's account concerns the "distinctiveness" of the rule of law dilemmas encountered during liberalizing political

transitions. This claim has provoked criticism from various scholars.<sup>19</sup> Here, I will focus on the objections raised by David Dyzenhaus.

Dyzenhaus, whose work on the Hart-Fuller debate I discussed briefly in Chapter 2, has written extensively on the theory of transitional justice.<sup>20</sup> He has pointed to limitations in notions that enjoy wide currency within the literature on transitional justice, denying for example that the conceptual framework of “restorative justice” can be applied to societies, such as South Africa, in which no prior period of equality and respect for liberty existed that could be restored.<sup>21</sup> Dyzenhaus has argued against Teitel, specifically, that rule of law dilemmas are features of ‘ordinary’ periods in the life of liberal political societies, as are efforts amongst officials to prioritize particular rule of law values. For this reason, neither these dilemmas nor the principle of transitional prioritization can ground a distinctive theory of transitional justice.

Dyzenhaus’s argument runs as follows. He begins with the Fullerian claim that the satisfaction of certain formal features of the rule of law, such as the eight “internal” principles outlined in *The Morality of Law*, is a necessary condition for the achievement of certain substantive desiderata, such as real freedom and equality for citizens.<sup>22</sup> Second,

---

<sup>19</sup> See for example Posner and Vermeule 2004.

<sup>20</sup> David Dyzenhaus, “Justifying the Truth and Reconciliation Commission,” *Journal of Political Philosophy* 8, no. 4 (2000), 470-496; David Dyzenhaus, “Transitional Justice,” *International Journal of Constitutional Law* 1, no. 1 (2003), 163-175 [hereafter cited as *Dyzenhaus 2003a*]; David Dyzenhaus, “Judicial Independence, Transitional Justice and the Rule of Law,” *Otago Law Review* 10, no. 3 (2003), 345-369 [hereafter cited as *Dyzenhaus 2003b*]; David Dyzenhaus, “as a Theory of Transitional Justice,” in *NOMOS LI: Transitional Justice*, Melissa S. Williams, Rosemary Nagy, and Jon Elster, eds., New York: New York University Press, 2012, 180-217.

<sup>21</sup> Dyzenhaus 2000, 485.

<sup>22</sup> Eric Posner has recently criticized Dyzenhaus for adopting this view in Eric A. Posner, “Transitional Prudence: A Comment on David Dyzenhaus, ‘Leviathan As a Theory of Transitional Justice,’” in *NOMOS LI: Transitional Justice*, Melissa S. Williams,



he endorses the further Fullerian position – central to Teitel’s account – that the various formal features of the rule of law cannot always be satisfied simultaneously, or at least not in the same degree. But this problem, Dyzenhaus point outs, is not restricted to transitional contexts. Rather, it is a general feature of the pursuit of the rule of law in liberal political societies. The ‘transitional rule of law dilemmas’ Teitel describes are not qualitatively different from the rule of law dilemmas encountered during ‘ordinary’ times, and so cannot ground a distinction between ‘ordinary’ and transitional justice.

Teitel might respond to this argument by asserting that it is not the form of the dilemma, but rather the preferred *solution* to the dilemma, which differs during transitional – as opposed to ‘ordinary’ – periods. Hence it is worth considering Dyzenhaus’s account of the way in which the rule of law dilemmas encountered during ordinary periods are to be resolved, in order to see whether this differs substantially from the procedure of ‘prioritization’ which Teitel recommends for resolving transitional rule of law dilemmas. Dyzenhaus recommends that a strategy of “principled compromise” be applied in both transitional and ‘ordinary’ rule of law dilemmas.<sup>23</sup> A principled compromise is a compromise that relaxes or reduces the requirements of one or more formal features of the rule of law in order to ensure compliance with one or more other features. What a principled compromise does *not* allow is for any single formal feature of

---

Rosemary Nagy, and Jon Elster (eds.) (New York: New York University Press, 2012), 228-229.

<sup>23</sup> David Dyzenhaus, “Justifying the Truth and Reconciliation Commission,” *Journal of Political Philosophy* 8, n. 4 (2000), 483-485. Dyzenhaus takes the notion of a principled compromise from Jonathon Allen, “Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission,” *University of Toronto Law Journal* 49 (1999), 315-353.

the rule of law to be sacrificed entirely in order to ensure satisfaction of the other features (or, for that matter, any other politically-desirable result).<sup>24</sup>

It remains to consider how far apart Teitel and Dyzenhaus's views concerning the resolution of (transitional) rule of law dilemmas really are. If Teitel's principle of 'prioritization'<sup>25</sup> is in fact equivalent to Dyzenhaus's strategy of 'principled compromise,' and if Dyzenhaus is also correct in saying that rule of law dilemmas requiring such compromises are a normal feature of liberal political societies, then we seem to have reason to accept Dyzenhaus's conclusion that transitional justice really is just ordinary rule of law justice – unless some other grounds can be found for the distinction. We should consider whether Teitel can offer any argument in favor of instances of transitional prioritization which do not stop at "principled" compromise, but go all the way to sacrifice one or more rule of law principles whole cloth, within the limited context of transitional jurisprudence.

Here the defect in Teitel's preferred strategy for explicating her notion of transitional rule of law dilemmas, and the attendant normative shifts, becomes evident. As noted above, Teitel explicates these notions chiefly by means of historical examples, and it is far from clear that any of the examples she describes furnish an instance of existential compromise, of wholesale, self-conscious repudiation of one or more rule of law values. None of her examples, that is, fully substantiate her claim that we must "distinguish understandings of the rule of law in ordinary and transitional times."<sup>26</sup> This

---

<sup>24</sup> *ibid.*

<sup>25</sup> A principle which, it should be recalled, I have reconstructed on the basis of my reading of Teitel's work, rather than one which Teitel expressly names and explicitly describes as such.

<sup>26</sup> Teitel 2000, 12.

is not to say that no successful argument can be made for this conclusion; indeed, I will attempt to mount a different argument later in this chapter. But it does mean that such an argument cannot be drawn directly from Teitel's text.<sup>27</sup>

### *6.2.2 Non-Rule of Law-Based Critiques*

So far I have considered objections to Teitel that come from within rule of law-based approaches to transitional justice. I want now to consider objections that fault Teitel precisely for centering her account of transitional justice on liberal, rule of law-based political transitions. Such an objection is lodged by Derk Venema in his article, "Transitions as States of Exceptions: Towards a More General Theory of Transitional

---

<sup>27</sup> Dyzenhaus is not the only scholar who accepts Teitel's claim that efforts to advance the rule of law are integral to liberal political transitions, but who differs in his assessment of the implications of this claim for how transitional justice ought generally to be theorized. In his article "Theorizing Transitional Justice," Pablo De Greiff has recently argued that the rule of law is in fact only one of four ideals that form the normative core of liberal political transitions (the others are (1) mutual recognition of citizens as equal bearers of rights, (2) civic trust, and (3) reconciliation). An adequate theory of transitional justice, De Greiff argues, must explain how these ideals can be pursued in a "holistic" fashion, through a diverse slate of transitional justice mechanisms.<sup>27</sup> De Greiff's main objection to Teitel is that she fails to recognize these other integral goals of liberal political transitions, and so ultimately provides merely a descriptive, rather than a properly normative, account of transitional justice. This charge seems to me to be unfair, if it means simply that Teitel provides no normative principles that might guide legal and political actors during transitions. For, as I have argued above, Teitel does supply one such principle: the principle of transitional prioritization of those rule of law principles that are most endangered. However, it seems that De Greiff is more concerned to argue that the particular set of problems to which Teitel devotes most of her attention, i.e. the problems of legal normative shift exemplified by the notion of transitional rule of law dilemmas, offers only a partial, rather than a holistic, view of the problems that must be confronted during transitions, and gives insufficient direction to actors as to how those problems can be solved. If this is right, then it seems to me that De Greiff could lodge precisely the same complaint against Dyzenhaus. See De Greiff 2012.

Justice.”<sup>28</sup> While acknowledging the value of Teitel’s account of liberal political transitions, Venema advocates “expanding the theory of transitional justice to include all fundamental political transformations.”<sup>29</sup> He advertises his own general theory as a purely descriptive exercise, belonging to the tradition of “factual or analytic research” in the social sciences.<sup>30</sup> At the same time, Venema is particularly interested in showing that the sorts of transformations in legal norms highlighted by Teitel are features not only of liberal, but also of non-liberal, and even anti-liberal, political transitions.<sup>31</sup>

Venema connects Teitel’s notion of legal normative shift to an array of legal and political thinkers, from Immanuel Kant to Hans Kelsen to H.L.A. Hart. He argues that, while the notion of normative shift does provide an important resource for theorizing transitions, it is not necessary (nor does it often happen) that all or even most members of a political society on the brink of a transition undergo a fundamental change in attitudes towards the validity of the law and its grounds. At most, Venema argues, “members of the legal community” and “people that take an interest in law and politics” must undergo such a change in their “*factual normative attitude*” in order to create a “sufficient social basis for the new regime.”<sup>32</sup> What Venema describes here is a clear example of *norm leadership*, in which particular legal actors, by dint of their special positions within

---

<sup>28</sup> Derk Venema, “Transitions as States of Exception: Towards a More General Theory of Transitional Justice,” in *Critical Perspectives on Transitional Justice*, Nicola Palmer, Phil Clark, and Danielle Granville (eds.) (Portland: Intersentia, 2012), 73-89.

<sup>29</sup> *Ibid.*, 73.

<sup>30</sup> *ibid.*, 73-74.

<sup>31</sup> By taking a descriptive perspective on transformations in legal norms, Venema restricts himself to what Brennan et al call the socio-empirical aspect of norms. Cf. Brennan et al 2013, 3.

<sup>32</sup> *Ibid.* 76. This claim clearly parallels Hart’s contention that, at the limit, only legal officials must internalize primary and secondary rules in order for a society to have law.

society, instigate (or at least facilitate) a transformation in norms in the hopes of having those new norms eventually trickle down to the level of ordinary citizens.

Having amended Teitel's notion of legal normative shift, Venema proceeds to show that such shifts occur not only during liberal, but also during non-liberal and even anti-liberal, political transitions. To illustrate this point, he uses the twin examples of the (anti-liberal) transition to National Socialist government in the Netherlands following the German occupation of that country in 1940, and the (liberal) transition back to liberal, democratic government following the liberation of the Netherlands in 1945. In both cases, Venema argues, local legal and political actors associated with the predecessor regime came to accept (and to apply) laws sharply at odds with previously enacted laws.

Although Venema's discussion of these particular historical events aims chiefly at showing that the notion of normative shift can be used to make sense of both liberal and anti-liberal political transitions, he concludes his article by reflecting on the implications for "the fundamental legal philosophical question around the nature of law."<sup>33</sup> The fact that ostensibly indispensable legal principles have been repeatedly violated in both liberal and anti-liberal political transitions, by the very actors who take upon themselves responsibility for creating and interpreting the law, suggests, that the "fundamental characteristics" of law are not to be found in such principles at all, but rather in "something much more pragmatic like the ordering power of law or the expression of a political identity."<sup>34</sup>

Venema's reflections on the relationship between problems of transitional justice and questions of general jurisprudence are intriguing. It is not obvious, however, that the

---

<sup>33</sup> Venema 2012, 88.

<sup>34</sup> Ibid, 88-89.

facts of the particular cases of liberal and non-liberal transitions under discussion justify such sweeping claims about the nature of law. Particular legal and political actors frequently have reason to reassess their particular legal obligations. Such reassessments need not stem from fundamental transformations in basic normative commitments. They may, rather, be driven by observations of changes in the conduct or commitments of other, differently positioned legal actors. Ultimately, changes in attitudes amongst legal actors towards the contents and grounds of the law of the kind that occur during political transitions tell us less about the nature of law itself than they do about the ways in which beliefs about the law, and about legal obligations, circulate and find expression in the beliefs and actions of legal actors. It is my view, set out in previous chapters of this study, that at least some of those beliefs and attitudes reflect *social norms* prevailing amongst particularly-positioned individuals and groups, including professional groups, within particular political societies. Hence, I believe that an adequate general theory of transitional justice and transitional norm transformation must attend to changes in social, as well as legal, norms within societies undergoing both liberal and non-liberal political transitions. In the next section of this chapter, I will expand the discussion to consider various kinds of transformations in social norms that commonly occur during liberalizing political transitions, specifically, and I will consider whether such transitional shifts in social norms might be governed by distinctive principles of justice.

### **6.3 Norm Transformation and The Distinctiveness of Transitional Justice**

Transformations in social norms make up an important part of liberalizing political transitions. Liberalizing political transitions open up institutional space for

international actors to promote transformations in social norms related to public health, gender equality, economic interactions, and other favored policy goals within transitional societies. While the opportunities are considerable, unchecked efforts by international actors to transform social norms during liberalizing political transitions may conflict with concurrent rule of law reforms, or raise other questions of justice. Accordingly, it is important to understand what different forms these transitional transformations in social norms take; what duties their backers owe to members of local populations; and what moral principles, or principles of justice, ground such duties.

In this section, I respond to each of these questions. My analysis is in three parts. First, I will show that transformations in social norms are often central aims of local and international actors during liberalizing political transitions. Second, I will show that these local and international actors are institutional in such a way as to be liable to considerations of justice. Finally, I will identify two distinct principles of transitional justice which I believe ought to govern the efforts of international actors to effect transformations in social norms during liberalizing transitions.

### *6.3.1 Types and Modes of Transitional Transformations in Social Norms*

In considering the importance of transformations in social norms as part of the process of liberalizing political transitions, we can focus either on the different types of transformations undertaken, or on the different strategies by which those transformations are pursued.<sup>35</sup> Here I will consider each of these points in turn.

---

<sup>35</sup> There are, of course, any number of unintended transformations in social norms that occur during political transitions. Here my attention is confined to intentionally pursued transformations in social norms. I understand 'intentional' to cover both cases where the

A first type of change in social norms commonly pursued during liberalizing political transitions consists in the *inversion* of social norms. As I explained in Ch. 2 above, inversions in norms occur when actions or policies previously prohibited within a particular population come to be prescribed, or vice-versa.<sup>36</sup> Some of the most dramatic inversions of norms that occur during political transitions are really reversions, as in cases where moral prohibitions against killing have been inverted during ongoing atrocities, only to be restored at the close of violence. The inversions in social norms that occur during political transitions are frequently less dramatic, involving instead such things as the gendered division of labor within a society, or the educational attainments expected of members of different racial or ethnic groups, or the prescribed language of business or politics. Nevertheless, though not bound up with the immediate survival of members of particular groups or populations, such social norms exert a powerful influence on the long-term well being of individuals, and the project of inverting them often takes up just as much energy as rule of law reforms amongst domestic and international actors involved in transitions.

A second type of transitional transformation in social norms concerns the introduction of genuinely new social norms to govern unprecedented interactions or relationships. This type of transformation in social norms mirrors the transitional introduction of entirely new legal institutions and regimes, such as international criminal

---

change in social norms is itself the proximate goal of some actor(s), and cases where the change in social norms is a foreseen step towards or by product of some other proximate goal. See Michael Bratman, "Two Faces of Intention," in *Intentions, Plans, and Practical Reason* (Cambridge, MA: Harvard University Press, 1987).

<sup>36</sup> I will focus here only on cases where the two norms that stand in a relationship of inversion are both social norms – though clearly inversions in norms sometimes involve a change in status from, say, a social prescription to a legal prohibition.



courts and proceedings, which have garnered great attention within theories of transitional justice. Transitional introductions of new social norms may be related to the legal sector, but they also frequently occur within the commercial sector, as international aid and development organizations provide funding for markets and infrastructure previously unseen within particular societies. Establishing norms against cheating and in favor of trust amongst participants in large-scale development projects, for example, may be a major aim of liberalizing political transitions in some cases.

A third type of transitional transformation in social norms is more or less the opposite of the second. It consists in the transitional destruction or disruption of social norms. These social norms may or may not be closely related to the causal pathways that have given rise to past large-scale crimes. On the one hand, transitional efforts to break down social norms related to ethnic or religious identification may be directly related to perceived importance of ethnic or religious identification in past atrocities. On the other hand, transitional efforts to break down norms prescribing the bribing of officials, or prohibiting reporting of infractions of workplace regulations, may not be directly related to large-scale crimes at all, but may instead be the result of an inflow of money and attention from international actors, combined with the relative paucity of opportunities for political participation by local actors.

These three types of transitional transformations in social norms can be pursued through a variety of different strategies. Local governments or international organizations may sponsor media campaigns over radio or television in an effort to establish practices, and instill normative attitudes. Celebrities from sports or entertainment may use their personal recognizability to promote particular changes in social norms (which may be

more palatable from a public relations standpoint than promoting changes in legal norms). Local communities, confronting altered distributions of wealth, resources, and population groups, may engage in deliberations about how to solve novel social problems, or how to compensate for the breakdown of customs or traditions. Finally, in some cases, local or international actors may engage in more clandestine, or even manipulative, strategies for introducing new social norms within transitional societies.<sup>37</sup>

I have offered only a brief sketch of the different ways in which local and international actors undertake to transform social norms during liberalizing political transitions. A great deal more could be said on this important policy issue from the standpoint of implementation. I want to turn now to consider such transitional transformations in social norms from the standpoint of justice. I will first show that such intentional efforts to transform social norms in transitional societies are legitimate objects of assessments of justice. I will then turn to consider two particular principles of justice which I believe apply distinctively to such transitional transformations in social norms.

### *6.3.2 International Actors as Subjects of Justice During Transitions*

The duties grounded in principles of transitional justice are standardly assumed to apply chiefly to states and their agents. This assumption appears in the work of both those who, like Teitel, think that these principles are ‘distinctive’ or ‘extraordinary,’ and in the work of those who, like Dyzenhaus, think these principles are ‘ordinary’ or not distinctive to transitions. It is perhaps because these authors focus their attention chiefly on changes in legal norms occurring during liberalizing political transitions that they

---

<sup>37</sup> For the difference between the manipulative introduction and the manipulative activation of social norms, see Morrow 2014.

concentrate on states and state institutions as bearers of duties of justice. Transitional transformations in social norms are by no means uniformly directed or approved by states and state institutions, however. We should consider, then, whether the other actors involved in promoting transitional transformations of social norms can be bearers of obligations grounded in principles of justice.

The set of international actors involved in transitional transformations in social norms is as large and as diverse as the set of international actors involved in international development, international security, and international affairs more generally. It includes inter-governmental organizations, such as the European Union or the African Union; humanitarian organizations such as the Red Cross and UNICEF; religious and ethnic-based non-profits; university-based public health experts; economic institutions such as the IMF and the World Bank; and even private corporations. Each of these organizations actively and intentionally undertakes to change social norms and social practices within transitional societies, with substantial expected effects on the lives and livelihoods of large numbers of individuals. Such efforts are clearly morally assessable; but are they assessable from the standpoint of justice? And what does it mean if they are?

Political theorist Jennifer Rubenstein has recently distinguished two different ways of thinking about the activities of humanitarian non-governmental organizations (NGOs), which bear important implications for the ability of these actors to be subjects of claims of justice.<sup>38</sup> I believe her account can help us to understand how international actors involved in transitional norm transformation can be subject to claims of justice. On the one hand, Rubenstein suggests, we can think of humanitarian NGOs like the Red

---

<sup>38</sup> Jennifer Rubenstein, "Humanitarian NGOs' Duties of Justice," *Journal of Social Philosophy* 40, n. 4 (Winter 2009), 524-541.

Cross or Doctors Without Borders as engaging in an indefinite series of *interactions* with local populations in various countries – providing vaccines or medicines; distributing food and drinking water; and generally offering individuals and populations a “bed for the night.”<sup>39</sup> In many ways, as Rubenstein points out, humanitarian NGOs intentionally cultivate and defend this image, in order (at least in part) to avoid being drawn into political debates that might hinder effective provision of life saving aid.<sup>40</sup>

On the interactional account, Rubenstein argues, humanitarian NGOs bear a variety of moral obligations to those they serve (as well as those from whom they solicit funding), but they do not bear duties of justice. This is because, as Rawls most famously pointed out, duties of justice arise principally in the context of institutions and institutionalized relationships between individuals, rather than in the context of occasional (or even one-off) interactions between individuals or groups.<sup>41</sup>

Against this interactional account of humanitarian NGOs, Rubenstein offers an institutional account, according to which humanitarian NGOs do in fact compose a durable institutional structure of humanitarian aid, and can therefore be understood as bearing duties of justice to the various parties (including donors and recipients of aid) whom they serve. Three features of humanitarian NGOs which Rubenstein cites as evidence of this institutional status are: the significant effects humanitarian NGOs have on the well being of clients and patrons; the pervasiveness of such NGOs on the

---

<sup>39</sup> *ibid.*, 527-528. See also Michael Barnett, *Empire of Humanity* (Ithaca, NY: Cornell University Press, 2011), 37-39.

<sup>40</sup> *ibid.*

<sup>41</sup> John Rawls, *A Theory of Justice: Original Edition* (Cambridge, MA: Harvard University Press, 2005), 7-11; Rubenstein 2009, 526.

international scene; and the way in which their work “constrains people’s options in a serious way.”<sup>42</sup>

I believe the many non-state actors that participate in political transitions and help to promote transitional norm transformations together meet the criteria Rubenstein proposes for a social institution capable of standing in relationships characterized by duties of justice towards other institutions and the individuals who compose them. Support for this position comes, in part, from critics of the transitional justice “industry”, such as Stephen Humphreys.<sup>43</sup> Humphreys complains that the same international NGOs, staffed by elite lawyers, economists, and other transitional justice “experts,” can be seen jetting in to advise on political transitions around the globe, writing model constitutions and engaging in rule of law building activities organized around sets of best practices and lessons learned. Insofar as these criticisms accurately pick out a distinct set of international transitional justice specialists, they seem to support the view that such agents operate as established, institutional actors whenever they temporarily enter into specific transitional contexts. In the case study that closes this chapter, we will see the United Nations entering into just such a relationship with newly recreated institutions in transitional East Timor, and struggling to address the problems of justice arising from this relationship.

---

<sup>42</sup> *ibid.*, 532. Technically Rubenstein ascribes these features to the “institution of international humanitarian aid at large,” rather than to any particular NGO engaging in humanitarian activities in any particular context. For reasons I state below, I believe that during political transitions significant opportunities, and significant pressures, arise for particular international actors to enter into institutional, rather than merely ‘interactional,’ relationships with local populations.

<sup>43</sup> Humphreys 2010.

There is another reason for considering many international actors to stand in institutional, justice-assessable relationships with local populations during liberalizing political transitions. In transitional contexts, international organizations like the UN or humanitarian and development oriented NGOs will commonly have a longer track record, and a more continuous leadership structure, than the nascent state institutions which it is the goal of liberalizing transitions to cultivate. Put another way, whereas in many contexts in which they operate international organizations are not able to act on their own authority, but require the consent of domestic institutions, in transitional contexts international organizations may be the most powerful actors and effective actors on the domestic scene when it comes to the economy, security, or public health. In light of this, I believe there is often good reason to take the institutional, rather than the interactional, perspective on the many groups and organizations engaged in transitional justice activities, and thus to consider those activities susceptible to assessments of justice.

While I cannot give an exhaustive list of necessary conditions for international actors involved in liberalizing transitions to be subject to duties of justice, I think the following conditions are at least jointly sufficient. Where international actors have an established presence on the international scene prior to the onset of a particular political transition; where they come to be regarded as the point of first, rather than last, resort for supporting critical health, economic, or security needs by members of local populations; and where these actors exercise dynamic decision-making powers on the basis of changing facts on the ground, rather than abiding strictly to static mission guidelines or organizational rules, then these international actors owe duties of justice to members of local populations, and also (perhaps) to other international actors.

### 6.3.3 *Two Principles of Transitional Justice*

I have argued that at least some international actors involved in the various activities of liberalizing political transitions stand in relationships of justice to members of local populations within transitional societies. In this section, I want to consider what principles of justice ground the duties that these international actors owe to local populations, and to ask whether those principles are in any way distinct from principles of justice that apply in ordinary periods. We saw in the first part of this chapter that transformations in legal norms are among the major tasks undertaken or assisted by international actors during liberalizing political transitions; but it was questionable whether the principles of justice that govern such transformations are really distinctive, or merely ordinary. Furthermore, the discussions by Teitel and Dyzenhaus focused chiefly on how local governments ought to go about effecting such transformations. Here I want to consider instead the transformations in social norms undertaken by international actors during transitions. I will suggest that two principles of justice apply to such transformations, which are themselves distinctive to transitional contexts. These are the *principle of local collaboration* and the *principle of selective social norm conservation*.

The principle of local collaboration holds that international actors ought to seek genuine local collaboration in their efforts to transform particular social norms. Such collaboration might include local deliberations in public meetings or gatherings; partnerships with citizens of transitional societies for the purposes of norm promotion and norm entrepreneurship; and soliciting local appraisals of the success of particular norm-transformation campaigns.

The principle of local collaboration may seem so obvious and uncontroversial as to be no real normative principle at all. Nevertheless, there are real pressures that international actors face to avoid or bypass genuine local collaborations. In the first place, the window of opportunity for such actors to effect changes in social norms is often brief, at most one or two years before local institutions gain the strength to take over key decision-making functions, and interest amongst donors to specific causes begins to dry up. Genuine local collaborations, such as community decision-making procedures, can take months or even years, and so it is not always in the immediate interests of international organizations to engage in such processes. Furthermore, in so far as some of these processes are political, certain international organizations may hesitate to take sides in potentially contentious debates about education, gender equity, or other proposed changes in social norms, and will prefer to use non-political processes to seek changes in norms.

It is important to distinguish justice-based reasons for seeking local collaborations from mere instrumental reasons for doing so. As Cristina Bicchieri has pointed out, in some contexts local deliberative processes are the best way to bring about the changes in normative attitudes necessary to change social norms.<sup>44</sup> While such efficiency-based considerations may help motivate some international organizations to pursue local collaborations, I am concerned with the justice-based reasons for doing so. Those justice-based reasons are, once again, grounded in the distinctive institutional position that international actors stand in vis-à-vis local populations during political transitions, as often the most visible and capable institutions exerting an influence on the lives and

---

<sup>44</sup> Bicchieri Forthcoming.



livelihoods of individuals. In non-transitional contexts, international organizations working to change social norms in liberal political societies may plausibly rely on the local governmental institutions with which they partner, or by which their activities are regulated, to secure local consent for their operations; in transitional contexts, by contrast, this mediated form of local collaboration will often be absent. For this reason, the principle of local collaboration governing the efforts of international actors to achieve transitional transformations in social norms has a claim to be a distinctively transitional principle of justice.

The second principle of transitional justice I want to propose likewise reflects the distinct institutional position international organizations frequently occupy during liberalizing political transitions. This is the principle of selective norm conservation. This principle holds that international actors should selectively choose not to seek to change particular social norms, even when such changes are central to their organizational mission, in cases where doing so would pose a significant threat to the success of efforts to found new stable domestic institutions.

The principle of selective norm conservation is in some ways analogous to the principle of transitional prioritization discussed above. In the case of social norms, however, there are not generally considered to be guiding principles akin to the principles of the rule of law that could restrain efforts to change particular social norms in transitional contexts. The principle of selective norm conservation supplies this need. Unlike the principle of prioritization, however, it is hard to see why the principle of selective norm conservation should apply in non-transitional, as well as transitional contexts. In non-transitional contexts, legal norms and government institutions are

generally well enough established that attempts to change social norms cannot be a very great threat to social and political stability. In transitional contexts, by contrast, social norms may often serve as important points of continuity between modes of life existing before social breakdowns and transitional patterns and practices.

What does the “selective” portion of this principle entail? As I noted at the beginning of this section, liberalizing political transitions often open institutional space for international actors to seek to change social norms which have little to do with whatever political turmoil or large-scale violence preceded transitions. Clearly, insofar as certain social norms contributed causally or structurally to large-scale crimes, attempts to change those social norms will be an important task of transitional justice, and not one that should be ignored. In many cases, however, the norms targeted for transformation by international actors will have had nothing to do with past criminality; and when attempts to change such norms threaten stability going forward, then there is at least a *pro tanto* reason to refrain from seeking changes.

The two principles of transitional justice I have identified are clearly limited in their application; they hardly exhaust the practical challenges faced by domestic and international actors during liberalizing political transitions. It may be that there are other, distinctively transitional principles of justice that surpass these two in the scope of their application; it is certainly the case that other, ‘ordinary’ principles of justice apply to transitional efforts at norm transformation, along with these two principles. However, I believe these two principles do apply to an important, insufficiently studied part of the “phenomenology” of liberalizing political transitions, which occurs alongside transitional transformations in legal norms. In the final section of this chapter I will consider in more

detail a case study of the efforts of one particular non-state actor, the United Nations, to regulate changes in both legal and social norms during its mandate as the effective governing power in East Timor. Through that case study, I hope to show both how these principles of transitional justice might be applied, and that the phenomenon of norm transformation is in fact a defining feature of liberalizing political transitions.

#### **6.4 Transitional Norm Transformation in Practice: The Case of East Timor**

Having reviewed some key problems of transitional justice, and identified two specific principles of justice that apply to international actors engaged in transitional transformations in social norms, I want finally to illustrate my account using a concrete historical case. In this section, I will use UN and international efforts to rebuild state institutions in East Timor (formerly East Timor) following the violence that occurred in that country in 1999 in order to show that transforming social norms was a key aim of these international actors, and a core element of their overall efforts to promote sustainable justice sector reforms.

I will develop this argument in several steps. First, I will provide a brief historical account of the ongoing liberalizing political transition in Timor Leste, focusing particularly on the chief “rule of law dilemmas” faced by variously-positioned legal and political actors in that country. The case of Timor Leste is especially interesting in this regard, since for several years it was in fact *international* legal actors, associated with the United Nations Transitional Administration in East Timor (UNTAET), who were directly confronted with these transitional rule of law dilemmas. The actions taken by the UNTAET to solve several of these dilemmas have been sharply criticized by both

indigenous Timorese and international observers, and my account will pay due attention to these criticisms.

Next, I will review some of the broader lessons that scholars of international rule of law promotion have taken from the example of Timor Leste, and show that both critics and proponents of the “rule of law industry” agree that the transformations in legal norms sought by such practitioners generally cannot be accomplished without simultaneous transformations in social norms.

Finally, in my conclusion, I will argue that, while the notion of normative shift is a powerful tool for theorizing liberal, rule of law-based political transitions, it must be expanded to include transformations in social as well as legal norms.

#### *6.4.1 UN Administration and Justice Processes in East Timor: A Mixed Record*

Modern Timor-Leste occupies the eastern half of the island of Timor, situated in the far eastern portion of the Indian Ocean. Its closest neighboring countries are Indonesia to the west, Papua New Guinea to the east, and Australia to the south. Timor-Leste has a long history of colonial occupation: nearly 500 years under Portuguese governance.<sup>45</sup> As we shall see, that history of colonial rule deeply affected the difficult course of the transition to democratic, autonomous government currently taking place in this country.<sup>46</sup>

---

<sup>45</sup> The territorial division of the island between East and West Timor dates to the 17<sup>th</sup> century, when Dutch colonial administrators gained control of the western half of the island, and Portuguese administrators the eastern half.

<sup>46</sup> The details of the next five paragraphs are drawn from the various studies cited below.

In 1974, a bloodless coup in Lisbon (known as the “Carnation Revolution”) led to the cessation of Portuguese claims to possession of numerous territories abroad, including Angola, Cape Verde, Mozambique, and East Timor. Political aspirations of residents of East Timor at this time were divided, with some factions seeking complete independence, and others favoring maintaining some political ties to Portugal, with the status of an autonomous province. Civil war broke out in August 1974 between supporters of each of these positions. In September 1974 the Portuguese administration withdrew, and shortly thereafter, forces from neighboring Indonesia invaded East Timor. The following year, the Indonesian occupation received the endorsement of those factions in East Timor that had supported maintaining political ties to Portugal. In 1976, the East Timor legislature, packed with representatives picked by Indonesian authorities, officially ratified integration with Indonesia.

The de facto Indonesian annexation of East Timor never won legal acceptance from the United Nations. However, no strenuous action was taken to force the end of Indonesian occupation, despite severe human rights violations and incidents of mass starvation. In 1998, the resignation of Indonesian president Suharto provided an opportunity for the pro-independence movement to assert itself more forcefully, and in the following year Suharto’s successor, President Habibie, agreed to hold a referendum on the question of independence. Portuguese, Indonesian, and Timorese leaders, along with UN officials, collaborated on designing the referendum, which was strongly contested by some segments of the Indonesian population, in particular the military and Islamic religious leaders. Under the agreement, the United Nations was to have

responsibility for staging the referendum, while the Indonesian military was to provide security support.

The vote on independence was held on August 30, 1999. Even before the vote, numerous acts of intimidation and violence against known pro-independence leaders were recorded. Nevertheless, participation in the referendum was strong, at nearly 99 percent of the population; and support for independence was decisive, at 78 percent of all ballots cast.

After the referendum, a brief but intense period of violence and destruction ensued, propelled by local pro-Indonesian militias, as well as by passive (and in some cases active) collaboration by portions of the Indonesian security forces. More than a thousand Timorese civilians were killed, many in mass killings in churches and other refugee assembly points. Beyond the loss of life, massive destruction of property took place, estimated at more than 70 percent of all infrastructure in the territory. The extensive damage to buildings, roads, and communications networks proved particularly problematic for subsequent efforts to rebuild the justice system in East Timor, as will be discussed below.

A month and a half after the referendum, the United Nations dispatched an Australian-led peacekeeping mission to East Timor, known as the UN International Force in East Timor (INTERFET). At the same time, the Security Council created the Transitional Administration in East Timor (UNTAET). This Transitional Administration would take on responsibility for everyday government operations in East Timor, for rebuilding the political and institutional capacities necessary for autonomous government in that country, and for ensuring that adequate justice procedures for perpetrators of

serious crimes in the period before and after the vote for independence. As observers noted at the time, this was an enormous undertaking for the United Nations, nearly unprecedented, and inevitably precedent-setting.

Legal scholars and other international observers have commented extensively on the ongoing transition in Timor-Leste, focusing particularly on the UN's efforts to rebuild institutions and to pursue justice for wrongdoers both during and after the mandate of the UNTAET, which ceded day-to-day responsibility for governance in 2002. Some of these scholars are concerned specifically with assessing how well (or how poorly) the UN discharged its duties as administrator of East Timor and as defender of international law and legal processes.<sup>47</sup> Others attempt to connect events in East Timor with larger themes and problems in the current literature on transitional justice and transitional rule of law promotion. Within the latter group, some theorists look to events in East Timor for examples of problems associated with *legal pluralism*, or the condition of having more than one legal system in effect within or across a single jurisdiction.<sup>48</sup> Others use the case of East Timor to assess the challenges that confront international actors seeking to

---

<sup>47</sup> For an early assessment by scholars who served as legal consultants to the UNTAET, see Jonathon Morrow and Rachel White, "The United Nations in Transitional East Timor: International Standards and the Reality of Governance," *Australian Yearbook of International Law* 22 (2002), 1-45. For more critical assessments of the UN's efforts to pursue accountability for perpetrators of atrocities prior to and immediately following the vote for independence, see David Cohen, "Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?" Analysis from the East-West Center no. 61, August 2002, 1-8, and also David Cohen, "'Justice on the Cheap' Revisited: The Failure of the Serious Crimes Trials in East Timor," Analysis from the East-West Center no. 80, May 2006, 1-12.

<sup>48</sup> Laura Grenfell, "Legal pluralism and the challenge of building the rule of law in post-conflict states: a case study of Timor-Leste," in *The Role of International Law in Rebuilding Societies After Conflict: Great Expectations*, Brett Bowden, Hilary Charlesworth and Jeremy Farall, eds., New York: Cambridge University Press, 2009, 78-112.

contribute to the rebuilding (or new creation) of domestic governmental institutions, such as courts and legislatures, which are both compatible with international law and in some ways continuous with local customs and traditions.<sup>49</sup>

One of the most serious challenges confronted by the UN Transitional Administration in East Timor was the reconstruction of a functioning justice system in that country, capable of interpreting and applying both ordinary, domestic law in everyday cases and the complex and novel international laws considered particularly applicable to the pursuit of justice against perpetrators of atrocities before and after the vote on independence. During the period of the UN Administration Hansjörg Strohmeyer documented the many impediments to implementing justice sector reform (abbreviated JSR in the literature) in East Timor, some of which were bluntly material: court buildings and offices had been destroyed, court records, case files, and law books had been burned or dislocated.<sup>50</sup>

Other impediments consisted in a lack of personnel. As Strohmeyer and others have reported, during the quarter century of Indonesian control over East Timor few non-Indonesian Timorese had obtained legal degrees, let alone practiced law in their native country, and thus it was impossible to find sufficient qualified lawyers and judges to staff courts and prosecutors' offices, or to serve as defense counsel for citizens accused either of ordinary or serious crimes. In the latter case, a further problem presented itself: many of the individuals suspected of having carried out the most serious crimes prior to and

---

<sup>49</sup> Morrow and White 2002; Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions*, New York: Cambridge University Press, 2006, 334-339.

<sup>50</sup> Hansjörg Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor," *The American Journal of International Law* 95, no. 1 (January 2001), 50.



following the August 1999 vote for independence were no longer within the territorial jurisdiction of East Timor, but were rather residing in Indonesia.

The UN, for better or worse, approached the task of justice sector reform by designing policies that aimed to address a number of these material and personnel-related impediments at the same time. One of the more prominent steps taken was the establishment of a special court to hear cases involving atrocities prior to and after the vote for independence. This court was attached to the district court in Dili, the capital of East Timor. In establishing the protocols for this special court, the UN sought to achieve both the goal of applying international criminal law to crimes in East Timor, and the goal of building local judicial capacity. It did so by composing each of the trial panels of two international judges, and one judge from East Timor, who, it was thought, would benefit from mentoring by their international colleagues.

The East Timor special crimes process has been the target of numerous criticisms. Some observers accuse the UN of seeking “justice on the cheap” by employing a so-called “hybrid” panel based in Dili, rather than the much more elaborate and costly ad hoc tribunals created to try crimes in the former Yugoslavia (ICTY) and Rwanda (ICTR).<sup>51</sup> Such criticisms connect the form of the trial process with the substantive quality of justice it achieved—pointing to cases, for example, where defendants were convicted of crimes of which they had not been accused, or where defense attorneys failed to call any defense witnesses, due to lack of funds.<sup>52</sup> Other critics have argued that the special crimes process was designed in such a way that it was asked to do too much: both providing high-quality justice to individual defendants, and creating conditions for

---

<sup>51</sup> Cohen 2002; 2006.

<sup>52</sup> Cohen 2006.

reconciliation. Though “aiming at several aims of transitional justice,” the special crimes process (and the UN organizations which oversaw it) failed to achieve any of them.<sup>53</sup>

#### *6.4.2 Justice Sector Reform and Shifts in Social Norms*

Earlier, I argued that one important function of social norms is to structure and sustain institutions. In principle it would be possible to analyze any particular institution, in any particular context, and discover the various ways in which particular social norms influence the operations of that institution and the conduct of its members. Here I will briefly discuss a few ways in which social norms, shifts in social norms, and clashes between conflicting social norms have affected efforts at justice sector reform in East Timor.

The first point I want to highlight concerns efforts to develop a particularly liberal self-understanding amongst judges in East Timor. As an especially visible, fairly well-defined category of legal actors, judges in liberal political societies typically behave in ways that reflect a whole host of specialized social norms, ranging from fairly mundane codes of dress to deeply felt norms prescribing independence and imperviousness to outside influence. These social norms help ground the social identity of judges and lawyers in liberal political societies, while also creating accountability. Amongst legal professionals in newly independent East Timor, however, little precedent existed for such common liberal institutional norms. As Hansjörg Strohmeyer writes, post-independence programs to train East Timor’s judges “had to focus not only on conveying legal and

---

<sup>53</sup> Jovana Davidovic, “Timor-Leste and Transitional Justice: Should We Pursue International Prosecutions for the Crimes committed in East Timor in 1999?” in Larry May and Andrew Forcehimes (eds.), *Morality, Jus Post Bellum, and International Law* (New York: Cambridge University Press, 2012), 102.

practical skills, but, equally importantly, on fostering appreciation of the crucial role of the judiciary in society and the benefits of a culture of law.”<sup>54</sup> Under Indonesian rule, Strohmeyer suggests, such a marked distinction between the judiciary on the one hand and the political branches of the government had been lacking. As David Dyzenhaus has argued, failures on the part of the judiciary to maintain a distinctive role are common in societies marked by political repression.<sup>55</sup> Strohmeyer adds that, “in a society that had never experienced respect for the rule of law, and in which the law was widely perceived as yet another instrument for wielding authority and control over the individual, the meaning of independence and impartiality of the judiciary had to be imparted gradually.”<sup>56</sup>

Few would object to the claim that, particularly in liberal political societies, judiciaries form a group apart, both in terms of the crucial function they perform in creating what are sometimes called “rule of law cultures,” and in terms of the distinctive practices they adopt that allow them to perform that function. But whereas norms such as maintaining independence and resisting undue influence from the political branches of government are highly abstract, and easily idealized, many much more mundane, practice-grounded social norms also became relevant in the effort to build up the East Timorese judiciary. One of the most straightforward, but also most controversial, of these norms concerned language use. It is not surprising that, in the serious crimes process panels, composed as they are of both international and Timorese judges, problems of language and of interpretation have arisen. More salient, however, is the fact, as David

---

<sup>54</sup> Strohmeyer 2001, 55.

<sup>55</sup> Dyzenhaus 2003b.

<sup>56</sup> Strohmeyer 2001, 55.

Cohen points out, that there has been a concentrated effort by the central government in East Timor to make Portuguese the official language (an effort reflected, for example, in the 2005 name-change to Timor-Leste).<sup>57</sup> The fact that few of the Timorese judges were used to working in, or even knew, Portuguese prior to their appointment (most were accustomed to working in Bahasa Indonesia)<sup>58</sup> meant that this imposed rule exacerbated already-existing language difficulties, whatever its other practical or symbolic merits. In my view, this imposition of a working language constitutes a clear example of an attempted institution of a social norm, albeit one where the practice in which it is supposed to be grounded does not extend much farther than the particular executive organization imposing it.

Less abstract than the notion of judicial independence, but less concrete than rules regulating judicial language, are the various judicial skills in which Timorese judges received training in on-site as well as off-site seminars and workshops during and after the period of UN administration. Judges received training in the contents and application of international criminal law and in basic principles of procedural justice. Some commentators have suggested that Timorese judges might have benefitted more from training in more fundamental judicial skills, such as decision-writing and courtroom management.<sup>59</sup>

How do the two principles of transitional justice identified in the last section apply to these different attempted and achieved transformations in social norms in

---

<sup>57</sup> Cohen 2002, 6.

<sup>58</sup> Caitlin Reiger and Marieke Wierda, "The Serious Crimes Process in Timor-Leste: In Retrospect," International Center for Transitional Justice Prosecutions Case Studies Series, March 2006, 16.

<sup>59</sup> Ibid, 17; Stromseth et al 2006, 234.

transitional East Timor? In the first place, the efforts to build social norms contributing to the social identity of judges and lawyers in that country seem broadly in accordance with the principle of local collaboration. Indeed, these efforts provide a clear example of how international actors enter transitional contexts as considerably more established than local counterparts, while at the same time actively working to build up and secure local institutions that will render their presence superfluous.

The effort to make Portuguese the working language of the judiciary may have violated the principle of selective norm conservation, as I have described it. Importantly, we should note that it in this instance it was not international actors directly, but rather the central government in East Timor, that sought to impose this linguistic rule.

Nevertheless, international actors are implicated in this situation, since there seems to arise a tension between the two principles I have identified: the proposed change in language requirements came from local actors, and thus satisfied the principle of local collaboration, but insofar as it posed a challenge to timely and effective adjudication of cases of alleged perpetration of past atrocities, it seems to have challenged the principle of selective norm conservation.<sup>60</sup>

Efforts to advance justice sector reform in East Timor were also significantly influenced by the particular aims and commitments of the various international organizations and donor groups involved in that process. It is beyond the scope of this chapter to investigate the particular practices and norms that circulate within and across these different groups, but it is nevertheless worth pointing out that political scientists are

---

<sup>60</sup> I have argued that this principle applies specially in the context of political transitions. For this reason, I do not mean to claim that there is, or might be, a problem in the long term with the effort to make Portuguese the language of the courts in East Timor.

paying increasing attention to the efforts of such actors to promote rule of law and international law in countries undergoing transitions.<sup>61</sup> Given that these actors often have substantially different conceptions of what the rule of law entails (with some adopting a primarily economic perspective emphasizing the importance of markets, and others adopting a primarily political perspective, emphasizing the importance of fair elections and independent judiciaries) it is not surprising that their representatives often differ substantially in both the main obstacles to the rule of law that they perceive, and in the solutions that they propose.

#### **6.4 Conclusion**

The ongoing transition to liberal, democratic government in Timor-Leste has required legal and political actors in a variety of positions, both in that country and internationally, to undertake the difficult task of instituting changes in both legal and social norms, as part of the process of rebuilding or newly creating local institutions capable of sustaining and satisfying duties of justice. Both during the period of direct UN administration and afterwards, significant rule of law dilemmas, of the kind discussed by Teitel, presented themselves. Timorese officials worried, for example, that stringent pursuit of justice against Indonesian perpetrators of atrocities might jeopardize trade relations between the two countries, relations critical to rebuilding efforts in East Timor. UN administrators, for their part, labored under the necessity of building up the local Timorese judiciary, on the one hand, while also being responsible for assuring that

---

<sup>61</sup> For a critical examination of the work of international rule of law promoters associated with organizations like the World Bank, the EU, USAID, and others, cf. Humphreys 2010. For a more positive, though still cautious, assessment cf. Richard Sannerholm, *Rule of Law After War and Crisis*, Portland: Intersentia, 2012.

defendants in both ordinary and serious crimes proceedings received adequate counsel and procedural justice.

Although the case study of East Timor provided here can be used to illustrate various points made in the debate between Teitel and her critics, this is not my aim. Instead, I have sought to expand upon one aspect of the debate upon which there is significant agreement amongst participants: namely, the claim that transitional justice can be theorized using the notion of normative shift. Whereas Teitel and her critics focus on shifts in legal norms undertaken during political transitions, I have argued in this chapter that those shifts in legal norms, when successful, are accompanied and supported by shifts in social norms within the various more and less specialized groups of legal and political actors that compose the political society undergoing the transition. I have illustrated this claim by focusing on the relationship between efforts at rule of law promotion and justice sector reform in transitional East Timor.

Ultimately, the focus on transformations in norms displayed by scholars of transitional justice mirrors the focus on transformations in norms exhibited by scholars of mass atrocity. The former group of scholars is concerned mainly with prospective, normative questions: such as how social and political institutions should be reformed or established in accordance with principles of justice, and how rule of law principles ought to be prioritized where they conflict. The latter group of scholars is concerned mainly with retrospective, descriptive questions: such as how it is possible that ordinary individuals come to participate in extraordinary crimes. Nevertheless, these different lines of inquiry are clearly mutually informing. In order to understand how to reconcile the aims of stability and accountability during transitions that follow atrocities, it is necessary

to understand how those atrocities occurred. And in order to understand how atrocities occur, it is helpful to understand the changes in norms that are the mark of political transitions, both liberal and non-liberal or anti-liberal – as well as to understand the criteria by which we might assess the justice of such transitional norm transformations.



## **Chapter 7: Conclusion**

Recent philosophical research on normativity has clarified the nature and dynamics of social norms. Social norms are distinguished from legal and moral norms on the basis of their scope, their grounds, their characteristic forms of accountability, or some combination of these features. Because of their distinct character, social norms can reinforce practical prescriptions, prohibitions, and permissions provided to particular actors by legal or moral norms. They also can conflict drastically with those prescriptions, prohibitions, and permissions – resulting in serious practical dilemmas.

The identification of normative principles capable of resolving practical dilemmas arising from conflicts between different kinds of norms is a major aim of contemporary moral and political philosophy. My goal in this dissertation has been to contribute to this aim by establishing the significance of conflicts between social norms and legal or moral norms during mass atrocities and liberalizing political transitions. I have argued that social norms, and changes in social norms, are critical components of accurate descriptions and responsible evaluations – both legal and moral – of the actions of individuals and groups before, during, and after mass atrocities. I have contended, further, that distinct principles of justice apply to transitional efforts by non-state actors to transform social norms in societies recovering from large-scale crimes.

Three principal results follow from my efforts in this dissertation to integrate the conceptual framework of social norms into the study of mass atrocity. First, I have clarified and extended the historiographical thesis of norm transformation, according to which participation by ordinary individuals in mass atrocities is at least partially explained by transformations in basic norms that structure social and political life.

Second, I have identified a novel basis on which to apportion legal and moral accountability for mass atrocities between individuals and groups or collectivities – i.e. on the basis of the specific contributions of social norms. Third, I have provided new support for the disputed claim that distinct principles of justice apply to the various actors involved in liberalizing political transitions.

## WORKS CITED

- Alexy, Robert. 1999. "A Defence of Radbruch's Formula." In *Recrafting the Rule of Law*, ed. David Dyzenhaus (Portland, OR: Hart Publishing, 1999), 15-39.
- Appiah, Kwame Anthony. 2011. *The Honor Code: How Moral Revolutions Happen*. (New York: W.W. Norton and Company).
- Arendt, Hannah. 2006. *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin). Orig. Pub. 1964.
- Barnett, Michael. 2011. *Empire of Humanity* (Ithaca, NY: Cornell University Press).
- Bass, Gary. 2012. "Reparations as a Noble Lie." In *NOMOS LI: Transitional Justice*. Melissa Williams, Rosemary Nagy and Jon Elster (eds.). (New York: New York University Press), 166-179.
- Bell, Christine. 2009. "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'," *The International Journal of Transitional Justice* 3:1, 5-27.
- Bicchieri, Cristina. 2006. *The Grammar of Society*. (New York: Cambridge University Press).
- . 2012. "Descartes Lectures". University of Tilburg. Forthcoming.
- Bicchieri, Cristina, Erte Xiao, and Ryan Muldoon. 2011. "Trustworthiness is a Social Norm, but Trusting Is Not," *Politics, Philosophy and Economics* 10:2 (May) 170-187.
- Blunden, Edmund. 1929. *Undertones of War*. (Garden City, NY: Doubleday).
- . 1934. "Aftertones of War." In *The Mind's Eye*. (London: Jonathon Cape).
- Bratman, Michael. 1987. "Two Faces of Intention." In *Intentions, Plans, and Practical Reason*. (Cambridge, MA: Harvard University Press).
- . 2010. "Agency, Time, and Sociality," *Proceedings and Addresses of the American Philosophical Association* 84:2, 7-26.
- Brennan, Geoffrey, Lina Eriksson, Robert Goodin, and Nicholas Southwood. 2013. *Explaining Norms*. (Oxford: Oxford University Press).
- Browning, Christopher. 1993. *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland*. (New York: Harper Perennial).
- Cohen, David. 2002. "Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?" *Analysis from the East-West Center* no. 61, (August.) 1-8.

- . 2006. “‘Justice on the Cheap’ Revisited: The Failure of the Serious Crimes Trials in East Timor.” *Analysis from the East-West Center* no. 80 (May), 1-12.
- Conn, Steven. 2010. *Do Museums Still Need Objects?* (Philadelphia: University of Pennsylvania Press).
- Crane, Peter. 2012. “Morality, Law and Conflicting Reasons for Action.” *Cambridge Law Journal* 71:1 (March).
- Davidovic, Jovana. 2012. “Timor-Leste and Transitional Justice: Should We Pursue International Prosecutions for the Crimes committed in East Timor in 1999?” in Larry May and Andrew Forcehimes (eds.), *Morality, Jus Post Bellum, and International Law* (New York: Cambridge University Press).
- Davis, Michael. 1987. “The Moral Authority of a Professional Code,” *NOMOS XXIX: Authority Revisited*, James Pennock and John Chapman (eds.), (New York: NYU Press).
- . 2003. “What Can We Learn by Looking for the First Code of Professional Ethics?” *Theoretical Medicine and Bioethics* 24, 433-454.
- Dyzenhaus, David. 2000. “Justifying the Truth and Reconciliation Commission.” *Journal of Political Philosophy* 8:4, 470-496
- . 2003a. “Transitional Justice,” *International Journal of Constitutional Law* 1:1, 163-175.
- . 2003b. “Judicial Independence, Transitional Justice and the Rule of Law,” *Otago Law Review* 10:3, 345-369.
- . 2008. “The Grudge Informer Case Revisited.” *1000 New York Law Review* 83 (October).
- . 2012. “*Leviathan* as a Theory of Transitional Justice,” in *NOMOS LI: Transitional Justice*, Melissa S. Williams, Rosemary Nagy, and Jon Elster, eds., (New York: NYU Press), 180-217.
- . 2014. “Unjust Law In Legal Theory.” Unpublished Manuscript.
- Elster, Jon. 1989. *The Cement of Society: A Survey of Social Order*. (New York: Cambridge University Press).
- . 2004. *Closing the Books*. (New York: Cambridge University Press).
- Ericksen, Robert. 2012. *Complicity in the Holocaust* (New York: Cambridge University Press).
- Feierstein, Daniel. 2014. *Genocide as a Social Practice*, Douglas Andrew Town (trans.) (New Brunswick, NJ: Rutgers University Press).

- Feinberg, Joel. 1970. "Action and Responsibility." In *Doing and Deserving*. (Princeton, NJ: Princeton University Press).
- Finnemore, Martha and Kathryn Sikkink. 1998. "International Norm Dynamics and Political Change." *International Organizations* 52 (Autumn), 887-917.
- Friedlander, Henry. 1997. *The Origins of Nazi Genocide: From Euthanasia to the Final Solution*. (Chapel Hill: University of North Carolina Press).
- Fuller, Lon. 1958. "Positivism and Fidelity to Law." 630 *Harvard Law Review* 71 (February).
- . 1964. *The Morality of Law*. (New Haven, CT: Yale University Press).
- . 1969. "Human Interaction and the Law." In Kenneth Winston (ed.). 1981. *The Principles of Social Order* (Durham, NC: Duke University Press).
- Fujii, Lee Ann. 2004. "Transforming the Moral Landscape: the Diffusion of a Genocidal Norm in Rwanda." *Journal of Genocide Research* 6:1 (March), 99-114.
- . 2011. "Rescuers and Killer-Rescuers during the Rwandan Genocide: Rethinking Standard Categories of Analysis," in Jacques Semelin, Claire Andrieu, and Sarah Gensburger (eds.), *Resisting Genocide: The Multiple Forms of Rescue* (New York: Columbia University Press), 145-157.
- Fussell, Paul. 1975. *The Great War and Modern Memory*. (New York: Oxford University Press).
- Genoways, Hugh. 1996. "To Members of the Museum Profession." In *Museum Philosophy for the 21<sup>st</sup> Century*, Hugh Genoways (ed.) (Oxford: AltaMira Press).
- Gerlach, Christian. 2010. *Extremely Violent Societies* (New York: Cambridge University Press).
- Gilbert, Margaret. 1992. *On Social Facts*. (Princeton, NJ: Princeton University Press).
- . 2008. *A Moral Theory of Political Obligation*. (New York: Oxford University Press).
- Goldhagen, Daniel. 1997. *Hitler's Willing Executioners* (New York: Vintage).
- Graves, Robert. 1930. *Goodbye to All That*. (New York: Jonathon Cape and Harrison Smith).
- Greiff, Pablo de. 2012. "Theorizing Transitional Justice," in *NOMOS LI: Transitional Justice*, Melissa S. Williams, Rosemary Nagy, and Jon Elster, eds., (New York: NYU Press), 31-77.
- Grenfell, Laura. 2009. "Legal pluralism and the challenge of building the rule of law in post-conflict states: a case study of Timor-Leste." In *The Role of International*

- Law in Rebuilding Societies After Conflict: Great Expectations*, Brett Bowden, Hilary Charlesworth and Jeremy Farall (eds.). (New York: Cambridge University Press), 78-112.
- Gross, Jan. 2001. *Neighbors: The Destruction of the Jewish Community in Jedwabne, Poland*. (Princeton, NJ: Princeton University Press).
- Haney, Craig, Curtis Banks, and Philip Zimbardo. 2008. "Interpersonal Dynamics in a Simulated Prison." In Adam Jones (ed.), *Genocide*, Vol. III (Washington, D.C: Sage).
- Hart, H.L.A. 1958. "Positivism and the Separation of Law and Morals." 616 *Harvard Law Review* 71 (February).
- . 1961. *The Concept of Law*. (Oxford: Clarendon Press).
- . 1965. "Review of Lon Fuller's *The Morality of Law*." 1281 *Harvard Law Review* (April).
- . 2013. "Discretion." 652 *Harvard Law Review* 125 (December).
- Hatzfeld, Jean. 2004. *Machete Season: The Killers in Rwanda Speak*. Trans. Laura Coverdale (New York: Picador).
- Hilberg, Raul. 1992. *Perpetrators Victims Bystanders* (New York: Harper Perennial).
- Hinton, Alexander. 2010. "Introduction" in *Transitional Justice: Global Mechanisms and Local Realities after Genocide and Mass Violence*, (New Brunswick, NJ: Rutgers University Press), 1-22.
- Hirsch, Martin, Diemut Majer, and Jürgen Meinck (eds.). 1997. *Recht, Verwaltung und Justiz im Nationalsozialismus: ausgewählte Schriften, Gesetze und Gerichtsentscheidungen von 1933 bis 1945: mit ausführlichen Erläuterungen und Kommentierungen* (Baden-Baden: Nomos Verlagsgesellschaft).
- Humphreys, Stephen. 2010. *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (New York: Cambridge University Press).
- . 2012. "Laboratories of Statehood: Legal Intervention in Colonial Africa and Today." *The Modern Law Review* 75:4 (July), 475-510.
- Isaacs, Tracy. 2011. *Moral Responsibility in Collective Contexts* (New York: Oxford University Press).
- Jarausch, Konrad. 1990. *The Unfree Professions*. (New York: Oxford University Press).
- Klemperer, Victor. 1999. *I Will Bear Witness: A Diary of the Nazi Years, 1933-1941*. Trans. Martin Chalmers. (New York: Modern Library).
- . 2000. *I Will Bear Witness: 1942-1945* (New York: Random House).

- Koehn, Daryl. 1994. *The Grounds of Professional Ethics*. (New York: Routledge).
- Kalyvas, Stathis, Ian Shapiro, and Tarek Masoud (eds.). 2008. *Order, Conflict, and Violence* (New York: Cambridge University Press).
- Kutz, Christopher. 2000. *Complicity: Ethics and Law for a Collective Age*. (New York: Cambridge University Press).
- Lacey, Nicola. 2006. *A Life of H.L.A. Hart: The Nightmare and the Noble Dream*. (New York: Oxford University Press).
- . 2010. “Out of the Witches’ Cauldron?: Reinterpreting the Context and Reassessing the Significance of the Hart-Fuller Debate.” In *The Hart-Fuller Debate in the Twenty First Century*. Peter Cane (ed.). (Oxford: Hart Publishing), 1-42.
- Lang, Berel. 1998. ‘The Third Reich and the Breakdown of Professional Ethics,’ *The Future of the Holocaust*. (Ithaca, NY: Cornell University Press), 92-104
- Lawson, Tom. 2010. *Debates on the Holocaust*. (Manchester, UK: University of Manchester Press).
- Ledford, Kenneth. 2013. “Judging German Judges in the Third Reich,” in Alan Steinweis and Robert Rachlin (eds.), *The Law in Nazi Germany*. (New York: Berghahn Books).
- Lemkin, Raphael. 1944. “Genocide.” In *Axis Rule In Occupied Europe* (Washington: Carnegie Endowment for International Peace), 79-95.
- . 2013. *Totally Unofficial: The Autobiography of Raphael Lemkin*. Donna-Lee Frieze (ed.). (New Haven, CT: Yale University Press).
- . 2012. “Introduction to Genocide.” In *Lemkin on Genocide*. Steven Leonard Jacobs (ed.). (New York: Lexington Books), 3-54.
- Lewis, David. 2002. *Convention: A Philosophical Study*. (Malden, MA: Blackwell Publishing). Orig. Pub. 1969.
- Lifton, Robert Jay. 1986. *The Nazi Doctors: Medical Killing and the Psychology of Genocide*. (New York: Basic Books).
- Luban, David. 1988. *Lawyers and Justice: An Ethical Study*. (Princeton, NJ: Princeton University Press).
- . 2004. “A Theory of Crimes Against Humanity.” *29 Yale Journal of International Law* 85.
- MacCormick, Neil. 2008. *H.L.A. Hart*. Second Edition. (Palo Alto, CA: Stanford University Press).

- Machery, Edouard and Ron Mallon. 2012. "Evolution of Morality." in John Doris (ed.) *The Moral Psychology Handbook* (New York: Oxford University Press), 3-46.
- Marmor, Andrei. 2005. *Social Convention*. (Princeton, NJ: Princeton University Press.
- May, Larry. 2010. *Genocide: A Normative Account* (New York: Cambridge University Press).
- McClelland, Charles. 1991. *The German Experience of Professionalization*. (New York: Cambridge University Press).
- Mertens, Thomas. 2002. "Radbruch and Hart on the Grudge Informer: A Reconsideration." *Ratio Juris* 15:2 (June), 186-205.
- Mildt, Dick de. 1996. *In the Name of the People*. (London: Martinus Nijhoff).
- Milgram, Stanley. 1975. *Obedience to Authority: An Experimental View* (New York: Harper and Row).
- Minnow, Martha. 1999. *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*. (Boston, MA: Beacon Press).
- Monroe, Kristen Renwick. 2011. *Ethics in an Age of Terror and Genocide* (Princeton, NJ: Princeton University Press).
- Morrow, Jonathon and Rachel White. 2002. "The United Nations in Transitional East Timor: International Standards and the Reality of Governance," *Australian Yearbook of International Law* 22, 1-45.
- Morrow, Paul. 2014. "Mass Atrocity and Manipulation of Social Norms." *Social Theory and Practice* 40:2 (April), 255-280.
- Nino, Carlos Santiago. 1996. *Radical Evil On Trial*. (New York: Oxford University Press).
- Oliner, Samuel and Pearl. 1992. *The Altruistic Personality*. (New York: The Free Press).
- Osiel, Mark. 2009. *Making Sense of Mass Atrocity* (New York: Cambridge University Press).
- Pappe, H.O. 1960. "On the Validity of Judicial Decisions in the Nazi Era." *The Modern Law Review* 23:3 (May), 260-274.
- Pettit, Philip and Christian List. 2013. *Group Agency*. (New York: Oxford University Press.)
- Posner, Eric A. 2012. "Transitional Prudence: A Comment on David Dyzenhaus, 'Leviathan As a Theory of Transitional Justice,'" in *NOMOS LI: Transitional Justice*, Melissa S. Williams, Rosemary Nagy, and Jon Elster (eds.) (New York: NYU Press), 218-232.



- Posner, Eric and Adrian Vermeule. 2004. "Transitional Justice as Ordinary Justice." *Harvard University Law Review* 117:3 (2004), 761-825;
- Postema, Gerald. 1982. "Coordination and Convention at the Foundations of Law." *Journal of Legal Studies* 11 (January), 165-203.
- . 2007. "Custom in International Law: A Normative Practice Account." In *The Nature of Customary Law*. (New York: Cambridge University Press), 279-306.
- . 2011. "Conventions and the Foundations of Law." *Legal Philosophy in the Twentieth Century: The Common Law World*. (Dordrecht, NL: Springer), 483-546.
- Prunier, Gerard. 2008. *Darfur: A 21<sup>st</sup> Century Genocide*, Third Edition (Ithaca, NY: Cornell University Press).
- Rawls, John. 1955. "Two Concepts of Rules." *Philosophical Review* 64:1, 3-32.
- . 2005. *A Theory of Justice: Original Edition* (Cambridge, MA: Harvard University Press).
- Raz, Joseph. 1975. *Practical Reason and Norms* (London: Hutchinson & Co.).
- . 2009. *The Authority of Law: Essays on Law and Morality* (New York: Oxford University Press).
- Reiger, Caitlin and Marieke Wierda. 2006. "The Serious Crimes Process in Timor-Leste: In Retrospect," International Center for Transitional Justice Prosecutions Case Studies Series. (March).
- Rubenstein, Jennifer. 2009. "Humanitarian NGOs' Duties of Justice." *Journal of Social Philosophy* 40:4 (Winter), 524-541.
- Rundle, Kristen. 2009. "The Impossibility of an Exterminatory Legality." 65 *University of Toronto Law Journal* 59.
- . 2012. *Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller*. (Oxford: Hart Publishing).
- Sannerholm, Richard. 2012. *Rule of Law After War and Crisis*, Portland: Intersentia).
- Sassoon, Siegfried. 1937. *Memoirs of an Infantry Officer*. In *The Complete Memoirs of George Sherston*. (London: Faber and Faber).
- Satz, Debra. 2012. "Countering the Wrongs of the Past: The Role of Compensation," in *NOMOS LI: Transitional Justice*, Melissa S. Williams, Rosemary Nagy, and Jon Elster, (eds.), (New York: NYU Press) 129-150
- Schelling, Thomas. 1981. *The Strategy of Conflict*. (Cambridge, MA: Harvard University Press).

- Shapiro, Scott. 2011. *Legality*. (Cambridge, MA; Harvard University Press).
- Sikkink, Kathryn. 2011. *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*. (New York: W.W. Norton & Co.).
- Sloane, David. 1995. *The Last Great Necessity* (Baltimore, MD: Johns Hopkins University Press).
- Southwood, Nicholas. 2011. "The Moral/Conventional Distinction." *Mind* 120:479, 761-802.
- Steinweis, Alan and Robert Rachlin (eds.) 2013. *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice*. (New York: Berghahn Books).
- Stolfus, Nathan and Henry Friedlander (eds.). 2008. *Nazi Crimes and the Law*. (New York: Cambridge University Press).
- Straus, Scott. 2008. *The Order of Genocide*. (Ithaca, NY: Cornell University Press).
- Strohemeyer, Hansjörg. 2001. "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor." *The American Journal of International Law* 95, no. 1 (January).
- Stromseth, Jane David Wippman and Rosa Brooks. 2006. *Can Might Make Rights? Building the Rule of Law After Military Interventions*. (New York: Cambridge University Press).
- Sueße, Thorsten and Heinrich Meyer. 1988. *Abtransport der "Lebensunwerten,"* (Hannover: Verlag Clemens Koechert).
- Szanajda, Andrew. 2010. *Indirect Perpetrators: The Prosecution of Informers in Germany, 1945-1965* (New York: Lexington Books).
- Tec, Nechama. 1987. *When Light Pierced the Darkness: Christian Rescue of Jews in Nazi-Occupied Poland* (New York: Oxford University Press).
- . 2013. *Resistance*. (New York: Oxford University Press).
- Teitel, Ruti. 2000. *Transitional Justice*. (New York: Oxford University Press).
- . 2003. "Transitional Justice Genealogy." *Harvard Human Rights Journal* 16, 69-94.
- Valentino, Benjamin. 2005. *Final Solutions: Mass Killing and Genocide in the 20<sup>th</sup> Century*. (Ithaca, NY: Cornell University Press).
- Vandana, Joshi. 2002. "The 'Private' becomes 'Public': Wives as Denouncers in the Third Reich." *Journal of Contemporary History* 37:3, 419-435.
- Venema, Derk. 2012. "Transitions as States of Exception: Towards a More General Theory of Transitional Justice," in *Critical Perspectives on Transitional Justice*,

- Nicola Palmer, Phil Clark, and Danielle Granville (eds.) (Portland: Intersentia), 73-89.
- Verdeja, Ernesto. 2012. "Moral Bystanders," in Adam Jones (ed.), *New Directions in Genocide Research* (London: Routledge), 153-168.
- Waldron, Jeremy. 2008. "The Concept and the Rule of Law." 1 *Georgia Law Review* 43.
- . 2011. "The Rule of Law and the Importance of Procedure." In James Fleming (ed.) *NOMOS L: Getting to the Rule of Law*. (New York: NYU Press), 3-31.
- Waller, James. 2001. *Becoming Evil*. (New York: Oxford University Press).
- Weckel, Ulrike and Edgar Wolfrum (eds.). 2003. *'Bestien' und 'Befehlsempfänger': Frauen und Männer in NS-Prozessen nach 1945*. (Göttingen: Vandenhoeck und Ruprecht).
- Weinke, Annette. 2008. "The German-German Rivalry and the Prosecution of Nazi War Criminals During the Cold War." In Stolfus and Friedlander (eds.), *Nazi Crimes and the Law* (New York: Cambridge University Press).
- Weinreich, Max. 1999. *Hitler's Professors* (New Haven: Yale University Press). Orig. Pub. 1946.
- Weitz, Eric. 2003. *A Century of Genocide: Utopias of Race and Nation* (Princeton, NJ: Princeton University Press).
- Wilson, Richard Ashby. 2011. *Writing History in International Criminal Trials* (New York: Cambridge University Press).