SOCIAL REALITY AND PHILOSOPHICAL IDEALS IN TRANSITIONAL JUSTICE

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INTRODUCTION

Transitional justice practitioners continue to try to create authoritative legal systems in countries with fragile communities. Although there are increasing efforts to address psycho-social needs of victims and promote institutional change of corrupt governments, transitional justice practitioners continue to premise much of their emphasis on legal

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constructs. Most practitioners build their theories of law from the Western legal philosophy that informs legal education. These legal theories are based on ideal-type societies, where mutual interests prevail and individuals are capable of working together to achieve their interests. This ideal foundation does not exist in most countries, particularly those where violence undermines social cohesion and tensions undermine trust.

If practitioners wish to create legal systems in fragile communities, they would benefit from looking at what authoritative legal systems require. This search would lead them to examine the philosophical foundations of their legal training. The most important theme that emerges from a philosophical inquiry is that community is a prerequisite for authority in a legal system. Therefore, rebuilding community should be of primary importance in creating a legal system in a country emerging from violence.

This point, perhaps intuitive, can arouse cynicism in those who question the relevance of law in societies where corruption is rampant and community tensions appear insurmountable. As empirical studies increasingly show the inefficacy of transitional justice mechanisms like war crimes tribunals and truth commissions, scholars and concerned individuals are left to wonder what went wrong. However, this cynicism is not useful in trying to discover the important role that law is playing

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2 See International Center for Transitional Justice, What is Transitional Justice, http://www.ictj.org/en/tj/ (last visited Apr. 10, 2008) [hereinafter International Center for Transitional Justice]. This organization provides training for leaders in countries emerging from violence. The "transitional justice approaches" to accountability include "institutional reform" and "reconciliation." In their general description, the ICTJ emphasizes the importance of human rights and international humanitarian law as the foundation for transitional justice approaches.


4 See Stover & Weinstein, supra note 1, at 323 ("Our studies suggest that there is no direct link between criminal trials (international, national, and local/traditional) and reconciliation, although it is possible this could change over time. In fact, we found criminal trials - and especially those of local perpetrators - often divided small multi-ethnic communities by causing further suspicion and fear."); Martha Minow & Antonia Chayes, Imagine Coexistence: Restoring Humanity After Violent Ethnic Conflict (2005) (offering another qualitative analysis of different social programs to rebuild relationships after violence in Bosnia and Rwanda).
in these fragile communities. Law can contribute to community as well as serve as an authority.

The case study of Bosnia can highlight the dialectical relationship between community and law, and the contradictions between philosophical ideals and social realities of transitional justice. Bosnia is a striking example of a country where transitional justice practitioners have skipped the crucial step of community building as they design and implement judicial mechanisms. Unless lawyers and policy-makers address community building, they will continue to design and implement policies that are, at best, irrelevant and, at worst, counterproductive to creating peaceful social relationships and communities.

This argument begins with a discussion of the literature on transitional justice and a brief overview of two primary concepts in the philosophy of law, community, and authority. It relies on two positivist law philosophers, Joseph Raz and H. L. A. Hart, and two non-positivist philosophers, Ronald Dworkin and Lon Fuller, to reveal how different philosophical theories rely on these two concepts. This inquiry into legal philosophy reveals a fundamental contradiction. Most definitions of "law" presuppose the presence of shared norms and values in a cohesive community. Such cohesion is absent in countries emerging from violence. The first part concludes with an example of this contradiction by way of a brief history of the nature of authority and community in Bosnia.

The argument proceeds in Part II with an analysis of some of the legal mechanisms that have been implemented to create authority in the fragile community within Bosnia. Transitional justice practitioners have tried and, to a large extent, failed to create authoritative judicial mechanisms to address the war crimes from the 1991-1995 war with Serbia and Croatia. The argument concludes in Part III with a discussion of transitional justice mechanisms, community, and authority. Additionally, Part III highlights the need to develop transitional justice mechanisms that prioritize community building.

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5 See infra Part I.C.
6 See infra Part I.B.
I. Transitional Justice and Legal Philosophy

A. Transitional Justice as Instrumentalism

Most narrowly defined, transitional justice is "made up of the processes of trials, purges and reparations that take place after the transition from one political regime to another." In fragile communities, such as groups living as part of a society that has been fractured by violence, proponents of international human rights law suggest that these transitional justice mechanisms, particularly trials, are important to establish rule of law and provide the foundation for a new democracy. Others argue that governments must be prudent in their use of judicial mechanisms to redress past violence because of political instability. Both of these approaches to transitional justice focus on using law without adequately reflecting on the interpersonal and intrapersonal needs of community cohesion after conflict. Trials may establish blame and punish individuals, but a legal system does little for the general community if it does not provide guidance for social relationships.

These judicial approaches result from the fact that the majority of transitional justice processes have developed on a case-by-case basis and not as a result of some verifiable understanding of how fragile communities rebuild after conflict. In spite of the historical contingencies in each society, legal scholars and practitioners have made broad claims about the power of government-supported trials and sanctions to help societies create the rule of law. For example, law professor Mark Osiel makes the claim that trials can have a cathartic effect on society through staging the human drama of mass atrocity in a courtroom, a public forum that he compares with ancient Greek theater. He suggests that even show trials, those used for political purposes, can contribute to rule of law by creating common norms about justice. Transitional justice scholar Ruti Teitel suggests that judicial processes can help rebuild ad-

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7 Elster, supra note 1, at 1.
8 See Mark Osiel, Mass Atrocity, Collective Memory and the Law 15-22 (1999); Teitel, supra note 1, at 6; Stover & Weinstein, supra note 1, at 11-12. For a summary and explanation of transitional justice mechanisms and goals, see International Center for Transitional Justice, http://www.ictj.org (last visited Aug. 19, 2008). This organization is a leading consulting group for governments implementing war crimes tribunals and truth commissions.
10 Osiel, supra note 8, at 65.
11 Id.
ministrative and judicial systems in new governments. A
der Neier, writing about his work with Human Rights Watch
to establish a war crimes tribunal in the midst of the war in
Yugoslavia, proposed a war crimes tribunal as a key tool
to address the atrocities his staff observed in Croatia in

These scholars suggest that a judicial mechanism can provide
the foundation of a peaceful society, an instrumental view on two
fronts—the judicial mechanism as a tool to create a legal
system and a legal system as a tool to foster peaceful
relationships after violence. This instrumental
view requires a theory of law that is not divorced
from society; society must embody certain characteristics
for law to exist and be an effective tool for certain ends.
As such, the instrumentalist approach of law as a tool
that independently shapes society should be reformulated
in such a way to show that law and society are mutually
constitutive. If scholars think that a legal system will be able
to create a just society, what assumptions are embedded in
their approach? What must society have in order for a legal
system to exist and function effectively?

B. Law’s Foundations

Current critiques of transitional justice do not address the critical
question of the philosophy behind the legal training of most transitional
justice scholars and practitioners. One cannot understand the as-

12 Teitel, supra note 1, at 6.
13 Aryeh Neier, War Crimes: Brutality, Genocide, Terror, and the Struggle for
14 This instrumental conception reveals the strength of the “total justice” ideology, a
view that law can afford to provide compensation for victims of unfairness, and policy
makers should create a legal system that can fulfill this promise. See generally Lawrence
Friedman, Total
Much
15 In general, the criticisms of transitional justice fall into five main categories, some
with empirical foundations and some with philosophical foundations. Scholars question the follow-
ing five issues. First, scholars question the relevance of transitional justice mechanisms on
people’s day to day lives. Lars Waldorf, Mass Justice for Mass Atrocity: Rethinking Local Justice as
Int’l L.J. 557 (2006). Third, scholars question the competing goals of transitional justice and
political realities. Waldorf, supra; Ruti Teitel, The Law and Politics of Contemporary Transitional
differences between transitional justice elites and victims of violence. Jeremy Sarkin & Erin
Daly, Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies, 35 Colum.
Hum. Rts. L. Rev. 661, 710-13 (2004). Fifth, they question the inherent philosophical con-
sumptions embedded in transitional justice without looking at the philosophy that informs it. A review of scholarship in the philosophy of law reveals that most transitional justice practitioners and scholars have skipped an important step in the development of a legal system; they rely on a notion of law that presupposes community. Thus, these theories present a contradiction for law in fragile communities.

One of the prominent philosophies of law is called positivism for the fact that it posits the existence of law in the social realm, thereby defining a legal system by the presence of a community that has prescribed rules for rule-making and social relations. A classic in positivist legal philosophy, H. L. A. Hart's *Concept of Law* develops the idea of the rule of recognition to differentiate between social rules and law. In this philosophy, social rules and customs form the primary rules by which people order their daily lives. The rules become law when an authority, validated through secondary rules which determine who has authority—known as the "rule of recognition"—deems the rules to be law and enforces them as such.

Another positivist philosopher, Joseph Raz, expands on this positivist notion of law to show the way that law is the same as authority—both should be used to mediate between reasons and subjects, preempting reason when one has conflicting reasons for a particular decision. Raz claims that law is "an institutionalized system of guidance and adjudication that claims supreme authority within a society and enjoys effective authority." A legal system is an authority that is successful at promulgating directives that tell people how they ought to behave. One can measure the legitimacy of such an authority through its success at giving such directives, revealed in whether or not people adhere to the

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18 Id.


20 Id. at 43 ("These institutionalized aspects of law identify its character as a social type, as a kind of social institution. Put in a nutshell, it is a system of guidance and adjudication claiming supreme authority within a certain society and therefore, where efficacious, also enjoying such effective authority.").

21 Id. at 215, 218.
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directives. Raz specifies that a legitimate authority is an authority that acts for reasons and has success at doing so.

These positivist philosophers rely on social facts to identify sources of law, but they do not explain the origins of the social facts that become sources of law. Moreover, they do not address how law can actually contribute to these social facts.

While positivist legal theories suggest that law is authoritative without regard to the value of its contents, non-positivist theories of law often suggest that content is central to the notion of law. For example, natural law theories emphasize the importance of reason and morality in order for a legal system to be authoritative. Thomas Aquinas, who articulated the concept of natural law, believed that human laws translate God's laws through reason, and immoral laws do not suffice as law. Recent concepts of natural law reflect on the nature and need of "good reason," laws that reflect moral reason.

Other non-positivist legal theorists embody some ideas of natural law to argue that legal systems require the presence of communities that share certain values. Ronald Dworkin's definition of law builds on Hart's by explaining the ways in which judges must call on community principles, such as equality, in order to interpret written statutes. Dworkin suggests, unlike positivist philosophers, that these community principles do not necessarily have to be located in a particular written statute or decision. A judge's role is to interpret the community norms and apply them to a given case.

In Dworkin's concept of law, community norms provide a source for law and judicial decisions. Like positivist philosophy, this concept assumes that community norms exist. This account does not explain

22 Id.
24 See Raz, Law and Morality, supra note 16, at 45. Raz is more stringent about the sources of law than Hart, claiming that one can identify law by social facts alone without reference to social rules or customs.
25 See John Finnis, Natural Law and Natural Rights 35-36 (1980).
27 See Ronald Dworkin, Law's Empire 2-6, 18 (1988).
28 Id. at 187.
29 Id.
30 In positivist philosophy, these community norms would be likely called social facts if an authority can identify them either in writing or by some other way to show their strength.
how law functions in fragile communities where it is hard to identify community norms. Dworkin's notion of "law as integrity" emphasizes the importance of coherence in the law, another problem in societies with new legal systems. Dworkin argues that individuals should view law as integrity that functions in ideal communities, defined as associative communities in which citizens desire their government to treat all other members of the society with equal care and concern. This definition of law requires a community, a social unit made up of individuals who are interested in the well being of each member of the community.

Another influential non-positivist philosopher, Lon Fuller, also presents law as a normative system that requires a cohesive community. Fuller's theory of law emphasizes the intrinsic relationship between morality and law with his argument that law must have an "internal morality" of clarity and constancy through time. Under Fuller's philosophy, law serves as an ideal of rules that reflect moral characteristics. Though Fuller does not critically examine the role of community in his concept of law, he points out that "law brings to explicit expression conceptions of right and wrong in the community." Like the positivist theory, this definition requires the existence of a community to provide the norms for the legal system.

Since their legal training is based on these philosophies, transitional justice practitioners and scholars rely on these philosophies of law as they make claims about law's ability to aid social relationships. Regardless of their philosophical differences about the source or morality of law, these theories of law require that a legal system have a justification for its authority with a necessary connection between law and the morality practiced in the community. Without community, there can be no authoritative legal system.

31 Dworkin, supra note 27, at 166-67.
32 Id. at 186-90.
33 Id. at 190.
35 Id. at 92.
36 See Duxbury, supra note 3, at 2; accord Clarence Morris, How Lawyers Think 126-37 (1937) (discussing the analytic tools that lawyers develop and apply throughout their legal education).
C. Authority and Community in Bosnia

Bosnia is a useful case study to examine these philosophies, as there are clear limitations to how legal scholars can apply concepts of authority and community in a society that is far from the philosophical ideal. Legal philosophers present a legal system as a rule-based system that serves as an authority within a community, a social reality that does not exist in many countries torn apart by war. Scholars and advocates who rely on these philosophies must take into account social realities exemplified in the following discussion.

From 1943 until 1991, Bosnia was a republic in the federation of Yugoslavia, a country created as a result of the disintegration of the Ottoman Empire in World War I (WWI). Between WWI and WWII, Croats and Serbs struggled to claim Bosnian territory. Under the socialist Tito regime founded after WWII, Bosnia became an independent republic within the former Yugoslavia. The socialist government tried to unify the three major ethnic/religious groups in the region—Croats, Serbs, and Muslims. After Tito died in 1981, and increasing economic and political pressure threatened Yugoslavia's polity, Slovenians, Croats, Serbs, and Bosnians began to vote for nationalist leaders who advocated the independence of ethnically defined territories.

The war in 1992 resulted from contestations over the break-up of the former Yugoslavia, as different states within the Yugoslav federation voted for independence. Bosnia was the weakest, both militarily and economically, of the former republics within Yugoslavia. Both Croatia to the west and Serbia to the east disputed the territorial claims of the Bosnian leaders. The brutal war over Bosnian territory ensued for over three years and ended through an internationally brokered ceasefire. Bosnian Muslims, or Bosniaks, found themselves fighting Catholic Croats and Orthodox Serbs in order to keep the territory of Bosnia from becoming part of the newly formed Croatia or Serbia. The community, previously defined by a nationalist identity, fragmented.

In 1995, world leaders, led by the United States, divided up Bosnia into two entities, the Republica Srpska and Bosnia-Herzegovina, and set up a transitional government that still rules. The government is primarily controlled and funded by international organizations and the


United States.\footnote{See generally \textsc{David Chandler}, \textit{Bosnia: Faking Democracy After Dayton} 8-9 (2d ed. 2000); \textsc{Florian Bieber}, \textit{Post-war Bosnia: Ethnicity, Inequality and Public Sector Governance} (2006).} Peacekeepers remain in the streets of many cities, NGO personnel maintain an important presence, and the United States embassy exerts significant control over local policy-makers, all contributing to the feeling that the country is governed by those outside of Bosnia.\footnote{An example of this can be seen in the separate thoroughfares for internationals, named after US leaders. Kimberly Coles, \textit{Ambivalent Builders: Europeanization, the Production of Difference and Internationals in Bosnia-Herzegovina}, in \textit{The New Bosnian Mosaic}, supra note 38, at 256-57.} Local economies are largely dependent on foreign aid as well as foreign jobs.\footnote{Stef Jansen, \textit{Remembering with a Difference: Clashing Memories of Bosnian Conflict in Everyday Life}, in \textit{The New Bosnian Mosaic}, supra note 38, at 196. Jansen describes an interview with a man from a Tuzla employment agency who estimated that thirty percent of all officially employed Tuzlaci work for an international NGO. \textit{Id.}}

Despite the efforts of world leaders to govern Bosnia, many Bosnians do not recognize the legitimacy of the current government.\footnote{See \textit{Chandler}, supra note 40, at 10; \textit{Bieber}, supra note 40; \textit{Bougarel}, supra note 38.} There is severe corruption, severe unemployment, and mounting separation between the government's efforts for integration and the growing segregation in the country.\footnote{\textit{Beiber}, supra note 40, at 29-30.} There is widespread cynicism about the capacity of the judiciary to deliver justice and widespread dissatisfaction with the government leadership.\footnote{See generally \textit{Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors}, 18 \textit{Berkeley J. Int'l L.} 102, 104 (2000) [hereinafter \textit{Justice, Accountability and Social Reconstruction}].} After the general elections in November 2002, the three nationalist parties regained power and have remained dominant in politics. This nationalism has contributed to political instability as Serb leaders advocate separation of the Serb-dominated territory from the rest of Bosnia-Herzegovina.\footnote{Neven Andjelic, Institute for Slavic Studies, University of California, Berkeley, \textit{Post Elections Bosnia} (Feb. 20, 2007).} The election in 2007 revealed the continuing power of ethno-nationalist rhetoric as individuals still vote according to ethnicity.\footnote{\textit{Id.}} Instead of government authorities, Bosnians are looking to religious and nationalistic politicians to give them directives.\footnote{Torsten Kolind, \textit{In Search of Decent People}, in \textit{The New Bosnian Mosaic}, supra note 38, at 124 (Kolind writes that ethno-religious identity has been lifted to the foreground in both
are often aimed at creating ethnic national identities and undermine the fragile community that remains in Bosnia.

Bosnia is not doomed to sectarian collapse, and transitional justice efforts might play a role in strengthening the Bosnian community. Before the war, Bosnia was a multi-ethnic, largely integrated community comprised mainly of Catholic Croats, Muslim Bosniaks, Orthodox Serbs, and Jews. Scholars write that Bosnians were reluctant to categorize themselves as distinct from their neighbors. Members of the community generally manifested care for neighbors regardless of ethnicity. The community tensions that did exist often stemmed from competition over resources rather than ethnic differences. This dynamic has changed.

During the war, over half of the Bosnian population was displaced, fracturing the pluralistic community. The systematic campaign to rid areas of certain ethnic groups left cities like Banja Luka without Muslims, and Mostar firmly divided into Croat and Muslim sides. Only Tuzla and Sarajevo, controlled by the Bosnian army, remained ethnically plural. Immediately after Dayton, Serbs and Bosniaks resettled according to the political boundaries of the Republica Srpska and Herzegovina. Since Dayton, these ethnic groups have increasingly segregated themselves through work, schooling, and religious affiliation. Increasing distrust of other ethnic groups undermines community, as does the lack of empathy for what others experienced during the war.

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49 Id.
51 Id. at 151.
52 Id. at 156-57.
53 Beiber, supra note 40, at 29.
54 Bougarel, supra note 38, at 5.
55 Id.
56 “In December 1995, the Dayton Peace Agreement made official the existence of two distinct entities (the Federation and the Republika Srpska) within a minimal common institutional framework.” Id. at 6.
57 See Beiber, supra note 40, at 2-3.
58 See Kolind, supra note 48, at 124.
59 Jodi Halpern & Harvey Weinstein, Empathy and Rehumanization After Mass Violence, in Stover & Weinstein, supra note 1, at 303-22.
In philosophical terms, this is a community by happenstance, wherein members treat their "association as only a de facto accident of history and geography among other things, and so as not a true associative community at all." Bosnians may not have shared norms and values that prioritize the well being of all community members because of the little contact that they actually have with each other. As the following discussion will show, the absence of community undermines the authority of transitional justice mechanisms. However, current challenges do not preclude these mechanisms from becoming part of a strategy to strengthen the Bosnian community.

II. Transitional Justice in Bosnia

This section provides insight into three major transitional justice mechanisms in Bosnia: the International Criminal Tribunal for the former Yugoslavia ("ICTY"), the War Crimes Chamber ("WCC"), and the proposed but never actualized truth commission. The fragility of the transitional justice mechanisms mirrors the fragile community in Bosnia. Philosophical insights contribute to our understanding of these mechanisms but have fallen short of guiding transitional justice practitioners to an effective implementation of these mechanisms in the context of post-Dayton Bosnia.

A. ICTY

The International Criminal Tribunal for the Former Yugoslavia is a striking example of the limits of a judicial mechanism's authority in the absence of community. The ICTY was established in 1994 in the midst of the war in Bosnia. The United Nations, rather than intervene in the conflict, created a judicial body to prosecute perpetrators during the war. On May 25, 1993, the United Nations Security Council passed Resolution 827 to establish the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia. The mandate of the ICTY is to contribute to reconciliation, create an authoritative account of the violence, and hold perpetra-

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60 Dworkin, supra note 27, at 209.
61 The lack of contact is compounded by increasing geographical segregation within the country. Beiber, supra note 40, at 29-30.
tors of war crimes accountable for violations of the Geneva Conventions.\textsuperscript{63}

The ICTY's procedures, though designed to increase its judicial authority by maintaining consistency and clarity, have created undesirable community tension in Bosnia. The tribunal largely neglected the Bosnian people and appears to have organized its procedures to appeal to the United Nations and NATO donors.\textsuperscript{64} Most of the drafters were foreign lawyers trained in adversarial common law, an influence that has had a significant impact on the tribunal's functions.\textsuperscript{65} The ICTY safeguards many common law protections, such as the right to appeal and particular evidentiary standards.\textsuperscript{66} The court follows common law procedure, in which live witnesses, rather than paper dossiers (allowed in the Nuremberg trials), are required as evidence of criminal activity.\textsuperscript{67} Strict adherence to common law procedures has created tension and mistrust for the witnesses and victims of the war.\textsuperscript{68} Given the contentious nature of ethnic relations in Bosnia, witnesses face a variety of dangers when participating in the trials. Upon testifying, some must leave their home villages for fear of violent reprisals.\textsuperscript{69}

\textsuperscript{63} For a history of goals and design, see generally \textsc{Neier, supra} note 13.

\textsuperscript{64} \textit{See} \textsc{Eric Stover, The Witnesses: War Crimes and the Promise of Justice in the Hague} 37 (2005) [hereinafter Stover].

\textsuperscript{65} \textit{Id.} at 44.

\textsuperscript{66} These procedures have affected some key trials. In October 2001, for example, the court overturned the guilty verdicts for Mirjan, Zoran, and Vlatko Kupreskic. The defense claimed that witnesses wrongly identified them, and the appeals judges decided the witnesses' testimony were insufficient to convict them. \textsc{Prosecutor v. Kupreskic, Case No. IT-95-16-A, Judgment, §§ 34-41 (Oct. 23, 2001) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber)}; \textit{see also} Kupreskic et al., Appeals Judgement Table of Contents, \url{http://www.un.org/icty/kupreskic/appeal/judgement/index.htm}, at IV.C.1.g (last visited Aug. 21, 2008).

\textsuperscript{67} \textit{See Stover, supra} note 64. The Tribunal contains an Office of the Prosecutor (OTP), which decides whom to prosecute, the Chambers, where the cases are heard, and the Registry, which offers administrative support.

\textsuperscript{68} The Office of the Prosecutor claimed the decision in the Kupreskic case, cited supra note 66, increased the legitimacy of the court in terms of its ability to follow certain legal standards. However, there is little doubt that the defendant committed atrocities, a fact that undermines any legal justification of the decision to the witnesses who participated in the case. This situation decreased the legitimacy of the court in the eyes of the witnesses and victims of the atrocities. \textit{See Stover, supra} note 64, at 63-64.

\textsuperscript{69} The interviews in \textsc{The Witnesses} give many examples of these situations and the effects on the community. \textsc{Stover, supra} note 64, at 101-03. One witness was even pressured to change her testimony because she would be in danger. \textit{Id.} at 102.
At the same time, the ethno-political tensions also undermine the court proceedings. Serb nationalist groups maintain active websites to expose the illegitimacy of the court, and the Republica Srpska government refuses to participate in the court proceedings.70 Right wing Croatian groups have launched rhetorical attacks on the ICTY for criminalizing their “Homeland War.”71

From a philosophical perspective, the ICTY should not have any true legal authority because of its design and function. As Dworkin notes, legitimate legal authority stems from the assumption that community members are in some sense the authors of the political decisions made by leaders.72 The tribunal was imposed upon, not created by, Bosnians. Since the tribunal reflects the legal training of the international actors who created it, the laws of the ICTY take into account the assumptions, norms, and values of the international transitional justice community, not Bosnians.73 There is no judge to interpret how these international human rights norms differ or converge with norms within Bosnia. With a foundation of different and sometimes competing norms of justice, vengeance, and forgiveness, the ICTY struggles to justify its actions to the many people affected by its laws. By not offering protection or support to witnesses, the court actually undermines Bosnia’s multi-ethnic community and the social foundation of its legal system. This result diverges greatly from the espoused goals of international human rights lawyers and scholars and the ideals of a legal system based on integrity.

Despite these challenges, the ICTY still appears to be an important example of law functioning in a fragile community. The court uses social facts about international human rights norms established within the framework of the United Nations. The disappointment in the court stems more from unrealized expectations and hopes for the power of law to assist the community. In an interview study with several victims as-

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72 DWORKIN, supra note 27, at 189.

73 See generally JOHN HAGAN, JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL 213-15 (2003) [hereinafter HAGAN]; NEIER, supra note 13. See also Peskin, Beyond Victor’s Justice, supra note 70; STOVER, supra note 64.
sociations, Isabelle Delpla revealed that many Bosnian victims were hopeful that the tribunals would bring justice to those war criminals who had personally victimized them. Over time, however, the people expressed disappointment with the selection of cases and the sentences invoked, skeptical of how the ICTY came to its judgments. At the same time, most Bosnians wanted more arrests and condemned impunity. A study of residents of Sarajevo in 2005 revealed the increase in distrust and skepticism regarding the ICTY, as expectations for more accountability were increasingly disappointed.

From a positivist perspective, ICTY judges followed primary rules after secondary rules established the judges’ authority. From a non-positivist perspective, the ICTY court is a symbol of morality and of the potential of law that defines community values. Individuals are still looking to the ICTY to offer norms and guidance. The criticisms in Bosnia stem from their desires to have a legal system that is not purely positive. Bosnians want the court to reflect their own ideals of justice. There is a modest potential for creating shared community norms around procedural values, even in the absence of shared norms about each others’ well being.

B. War Crimes Chamber

A more recent attempt to counter impunity and build respect for the rule of law in Bosnia is the War Crimes Court (WCC) in Sarajevo, another example of placing a legal mechanism within a fragile community as a means to create shared norms about justice. Policy makers hoped the location of the WCC in Bosnia would accelerate justice and reconciliation in Bosnia and promote rule of law.

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75 See id. at 233.

76 Id. at 225.

77 See generally Ivković & Hagan, Punishment, supra note 74.


The legal background to the WCC suggests that international leaders began to trust the fragile community in Bosnia to administer justice for war crimes. Under the original Dayton agreement, the Bosnian government did not have jurisdiction over war crimes of the 1992-1995 war. In 2003, the High Representative in Bosnia, the office created in the Dayton Peace Accords in order to oversee the implementation of the civilian aspects of the Peace Agreement, restructured the criminal code to allow State Court jurisdiction over war crimes. In 2005, the State Court initiated the War Crimes Chamber in order to try to "lower to mid-level perpetrators." If the prosecutor deems a case "highly sensitive" and the indictments have not been confirmed, the War Crimes Court can claim jurisdiction from the local canton or district courts.

Policy-makers of the WCC were aware of community tensions and made efforts to minimize the challenges within Bosnian society. They divided the court into five judicial panels with two international judges and one local presiding judge, perhaps in the hope that the presence of international jurists would remove some of the politicization of ethnicity in Bosnia. However, tensions continue to undermine the authority of the WCC.

Much of the criticism of the WCC stems from a lack of consistent standards for prosecution. Upon its founding, the WCC was already investigating 202 "highly sensitive" cases. As of October 2006, it had issued eighteen indictments for thirty-two defendants. Over 90% of the cases have involved Serb defendants, leaving Bosnian Serbs suspicious of the process. Victims groups have a strong influence on the

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81 See Human Rights Watch (2006), supra note 78.

82 Id. at 5.


85 Id.


87 Id. at 10. A recent ruling increased the sentence of a Bosnian Serb involved in an attack in the Visegrad massacre. Deutsche Presse-Agentur, Appeals Court Increases Sentence of Bosnian
selection of cases, and most victims groups are comprised of Bosniaks. The WCC has not been able to clarify how it chooses its cases and originally focused on those involved in the Srebenica massacre during which seventeen thousand Bosnia Serb soldiers participated in the massacre of Muslim refugees. The gravity, scope, and scale of this atrocity created significant challenges for prosecutors in choosing potential defendants.

Other concerns involve the capacity of investigators, lawyers, judges, and community members responsible for managing the Chamber. One goal of the court was to build local judicial capacity and to counter accusations of ineffective and corrupt judicial practices. Corruption persists in the judiciary as low pay and cynicism undermine faith in court procedures. The Bosnian Criminal Code, largely influenced by United States lawyers and policy-makers, promoted an adversarial legal process whereby a prosecutor and police member, not a judge, conduct investigatory work. This investigatory work requires skills that are largely absent in Bosnia, leading to testimonies that are incomplete and often inadmissible in court.

Finally, the Court has not been able to serve as a public forum due to the sensitive nature of the trials and the fragility of the Bosnian community. There are threats to witnesses and fears of retaliation. Two of the trials have been conducted almost entirely in closed session. This undermines the legitimacy of these trials as they are not public forums.


Delpla, supra note 74, at 213.


Id.

See Justice, Accountability and Social Reconstruction, supra note 45, at 1116-17.


Id. at 16, 29.

See id. at 30.
in which the Bosnian community and the media are actively involved and can monitor the proceedings.\textsuperscript{96}

As with the ICTY, the WCC faces challenges to its authority. Most Bosnians do not recognize the current government as legitimate. According to Hart's positivist philosophy, this lack of legitimacy undermines the secondary rules (rules about who can make rules) that allow for primary rules (social rules or norms) about justice for war crimes.\textsuperscript{97} Unfortunately, the Court has not offered sufficient justifications for its actions, decreasing its ability to serve as a legitimate authority.\textsuperscript{98} The private trials and differential treatment towards Serb and Bosnian victims present problems for the Court because it appears not to be making its decisions on principles of equality—a fundamental principle for any civil community that recognizes law as an expression of integrity\textsuperscript{99} and inner morality.\textsuperscript{100}

Despite these philosophical critiques, the War Crimes Chamber, like the ICTY, is an important expression of positivist law in Bosnia. The social realities differ from the philosophical contingencies and goals of transitional justice scholars, but the Chamber does function in bringing attention to the war crimes, and authorities do issue directives that are followed to some extent. The fragile Bosnian community is slowly gaining some shared norms about justice.\textsuperscript{101} The question for transitional justice scholars today regards how to help these norms develop such that individuals can show care and concern for others in the community.

C. Truth Commission

The debate over a truth commission provides additional data to examine the relationship between transitional justice mechanisms, authority, and community. A truth commission serves a very different purpose than a trial, sometimes an opposing purpose when the truth commission is used along with an amnesty policy for perpetrators of

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\textsuperscript{96} Id.

\textsuperscript{97} HART, supra note 17, at 91.

\textsuperscript{98} See RAZ, LAW AND MORALITY, supra note 16, at 218.

\textsuperscript{99} DWORKIN, supra note 27, at 189.

\textsuperscript{100} See generally FULLER, supra note 34.

\textsuperscript{101} See Delpla, supra note 74, at 234.
violence. At the same time, proponents of truth commissions argue that truth commissions are another transitional justice mechanism that can contribute to a legal system by providing a shared set of information and shared norms about the violence. The history of the truth commission in Bosnia reveals how current foundations of community and authority undermined efforts to create a mechanism that could contribute to developing shared norms and values.

In 2001, Jakob Finci led the National Coordinating Committee for the Establishment of a Truth and Reconciliation Commission in Bosnia. His plea was based on impressions that truth commissions in other countries were able to promote community. Such a commission, Finci argued, would be able to unify the different ethnic groups around the challenge of remembering the war, thus creating a shared identity which condemns violence and possibly preventing another war.

Proponents had many hopes for a truth commission. They wanted to unite the country around a history of war that would condemn violence in general, not only violence from one side. The truth commission was to serve as a forum for individuals to tell their stories of violence and to analyze the social structures that permitted the violence to grow. Such structures include political systems, the media, and ethnic identities that were dangerously exploited by certain political and military leaders.

For a survey of 22 truth commissions in the past 30 years, see Priscilla B. Hayner, Unspeakable Truths (2000) [hereinafter Hayner]. For a more recent analysis of truth commissions and war crimes tribunals, see Roht-Arriaza & Mariezcurrena, supra note 1.

See generally Martha Minow, Between Vengeance and Forgiveness (1999); Desmond Mpilo Tutu, No Future Without Forgiveness (1999) [hereinafter Tutu].


Id. at 52.

Id.

Id.; see also Hayner, supra note 102, at 207. Most of the arguments for a truth commission rest on historical comparisons with other countries as a way to create legitimate authority and community in countries where there is political instability. Truth commissions are increasingly popular in light of the apparent success of the Truth and Reconciliation Commission (TRC) in South Africa. The TRC was unique in its legal approach to amnesty, reparations, and presentation of the history of violence. See generally Tutu, supra note 103; Alex Boraine, A Country Unmasked (2000). Despite the many problems, notably the lack of autonomy to grant reparations payments and the differential racial responses to the TRC, the commission had general support among both blacks and whites for creating a public forum to expose the violence of apartheid and for creating a shared narrative of history. See James Gibson, Does Truth Lead to Reconciliation? Testing the Causal Assumptions of the South African Truth and Reconciliation Pro-
Despite the contemporary creation of truth commissions in other countries, proponents were unable to realize a truth commission in Bosnia. The National Coordinating Committee on the Establishment of a Truth Commission in Bosnia lobbied for several years to gain support from the ICTY, the UN, and other international organizations. Among other roadblocks, the ICTY did not back the idea of a truth commission for fear that its activities would interfere with their prosecutions. ICTY leaders worried that a parallel legal process that uncovered potential evidence for a trial, such as a truth commission, would undermine their authority.

In this instance, the ICTY exercised its authority and successfully opposed the truth commission. Though individuals may be skeptical about following directives issued by the ICTY, local government is obliged to follow the directives: funding in the former Yugoslavia has been conditioned on compliance with ICTY directives, creating a situation in which the ICTY acts as an authority in local political decisions.

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108 See generally Roht-Ariaza and Marquez-Currena, supra note 1. There have recently been truth commissions in East Timor, Sierra Leone, and Morocco, where leaders attempted to create a state sponsored history of state violence.


111 Id.

112 The government in Bosnia is dependent on foreign aid and cannot create a truth commission without donor support. See Kritz & Finci, A Truth, supra note 104. See generally Ivkovic & Hagan, Punishment, supra note 74. "Obliged" is used differently in the philosophy of law and common parlance. For purposes of this Article, it is used in the way meant by Hart to clarify how legal actors exercise their authority: that a statement that someone was obliged to do something is normally understood to mean that he in fact did it. See discussion in Hart, supra note 17, at 83-88.

Even if the ICTY supported a truth commission, the lack of community in Bosnia would present even greater challenges for any truth commission attempting to exercise authority. The history of the war is highly contested. Individuals on all sides argue about the proper history and are increasingly cynical about any legal institution's ability to redress their grievances. Bosniaks (Muslims), Croats, and Serbs reproduce their own narratives of history, and it may be difficult for them to accept the legitimacy of a new narrative. Given the contentious nature of political elections where so many decisions are based on ethnic identity, it is unclear whether or how a truth commission would be able to present an image of neutrality. If foreigners run the truth commission, it will likely be viewed as a political tool of the West much like the ICTY. If Bosnians are in charge and have to place blame, they will likely be viewed as partial towards a particular ethnic group.

We cannot know whether the lack of community would have been an insurmountable challenge for the truth commission to establish a common historical account and norms regarding the violence in the 1992-1995 war. However, we do know that the lack of community within Bosnia has led to a governance structure in which an international body has authority over domestic society. Such a situation requires additional efforts to strengthen community norms and values.

III. Implications

A. Transitional Justice in Bosnia: Some Suggestions

Due to the fragile community in Bosnia, the ICTY and WCC have lacked authority, and a potentially useful transitional justice mechanism in the form of a truth commission has been discarded. The ICTY, the WCC, and the untested truth commission all suffer on account of distrust between ethnic groups and between citizens and their government. However, rather than discard transitional justice mechanisms, one can use concepts from the philosophy of law to think more creatively about

114 Svetlana Broz, Good People in an Evil Time: Portraits of Complicity and Resistance in the Bosnian War lix (2005) (this quote is taken from the introductory chapter); see also Bougarel, supra note 38; Peskin, Beyond Victor's Justice, supra note 70; Ivković & Hagan, Punishment, supra note 74.

115 See Ivković & Hagan, Punishment, supra note 74, at 398; see also Delpla, supra note 74, at 226-27.

116 Id.

117 See Kolind, supra note 48.

118 Minow & Chayes, supra note 4, at 94-95; Delpla, supra note 74, at 233.
what these transitional justice mechanisms actually contribute to a legal system.

It is possible that law, in the form of transitional justice mechanisms, might be an instrument to create community after violence. Viewed in this way, transitional justice mechanisms become one of many strategies that governments undertake to redress violence from the past and to create a community of shared values and norms. This view validates the hopes of transitional justice scholars but requires new theories about how law operates in different societies. Transitional justice mechanisms will necessarily have different functions and different standards than legal mechanisms in countries with established legal systems.

The empirical evidence suggests that the ICTY may not be a legitimate authority to the people of Bosnia, but it might still contribute to feelings of community because it validates shared norms about procedural values. Delpla highlights victims' misgivings towards the ICTY, but her ethnographic study reveals that individuals view the court as more legitimate than other international organizations, NGOs, the media, and political groups.\(^{119}\) The Tribunal offers individuals a norm to which they can compare local practices that they deem as immoral and difficult to support. Delpla suggests that most Bosniak (Muslim) victims view the court as an expression of vital norms that should be a model to their local governments.\(^{120}\) In this way, the ICTY may provide an ideal model of justice around which community norms can develop.

If the Office of the Prosecutor at the ICTY approached its role with more emphasis on the community building aspect of its processes, it could be more effective at issuing directives that people would follow. For many, interpersonal treatment is as significant as the outcomes in the individual determinations of justice.\(^{121}\) Individuals may value each other more, which is the foundation of an associative community, if they believe that their model of justice is an environment in which they are treated with value by legal authorities. The court could, for example, devote more resources to witness protection programs and community outreach.

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\(^{119}\) Delpla, supra note 74, at 226.

\(^{120}\) See id.

The difficulties of the War Crimes Chamber to provide general standards or public trials highlight the need for a new understanding of how transitional justice mechanisms might need different standards of law to help create community. For example, closed sessions may be necessary for proper witness protection, allowing individuals to participate in a legal forum that they would otherwise avoid.\footnote{Human Rights Watch (2006), \textit{supra} note 78, at 1-2.} If the WCC develops evidentiary standards that reflect local needs, not adversarial ideals, more people might be able to participate. By engaging in a judicial mechanism, individuals begin to feel that they are part of the legal system and can influence the law-making body. This participation can help citizens feel that they are part of the community that is creating law and can help legitimize the law that their communities create.

Finally, the challenge of creating a truth commission in Bosnia reveals that policy-makers must prioritize community building through transitional justice mechanisms. Given the dynamics of authority and community in Bosnia, proponents were not able to test whether or not a truth commission could make a contribution to community in Bosnia. In its actions as an authority, the ICTY may have undermined the effort to strengthen the community. Lawyers in the ICTY might have reflected on the need for community in Bosnia rather than the need for authority in the tribunal.

B. Community before Authority

These reflections lead to insights about the dynamic interaction between law and community. The positivist philosophy offers tools to identify law within community but does not offer insights into how to identify community itself. In the case of transitional justice in Bosnia, the community includes international donors and international lawyers, local politicians, and those who have suffered from perpetrating violence or being victims thereof. There are many competing norms in this community, different statutes, and potential sources of law that challenge one's ability to identify the social facts on which to develop law. The struggles to develop law in post-war societies present contradictions in the non-positivist legal philosophy that men are governed by the same reason and are part of the same community. If people do not want to be part of the same community and their reason leads to distrust and skepticism of others, can they still be governed by the same law?
In transitional justice, law is not only a source of authority or an ideal of rules for an ideal community. Law also functions as a means to create community. Yet the ICTY, War Crimes Chamber, and the doomed truth commission reveal that the fragile Bosnian community needs a different approach to law. If policy-makers focus on the ways in which transitional justice mechanisms can and should contribute to the community, they could create mechanisms that value individuals more than procedures. They could put more resources into outreach programs and witness support. They could recognize how a truth commission might assist society as much as prosecutions. They also might reflect on how resources that have gone into prosecutions can go into other community building activities.\textsuperscript{123}

C. Towards a Functional Approach to Law

Despite the preceding analysis, the Author is skeptical that trials and truth commissions can address the underlying needs of fragile communities. Individuals need far more than a norm of justice and the knowledge that a perpetrator has been brought to justice.\textsuperscript{124} Moreover, while legal scholars often debate the concepts of justice and accountability, and transitional justice scholars emphasize reconciliation, empirical research reveals that transitional justice mechanisms often are utilized by those in power to create a self-serving narrative.\textsuperscript{125} At this point, transitional justice mechanisms have become institutionalized; they are infused with value beyond their original meaning.\textsuperscript{126} The recent use of trials in Iraq, despite the complete lack of domestic capacity,\textsuperscript{127} reveals this reality.

\textsuperscript{123} Minow and Chayes' attempt to make this shift in their project entitled "Imagine Coexistence." They created and analyzed community building programs funded by the United Nations High Commissioner for Refugees. Their critique reveals the many challenges in Bosnia but provide critical new approaches to ameliorating ethnic tensions. See Minow & Chayes, supra note 4, at 5-6.

\textsuperscript{124} For a general description about the complex needs of societies after war, see Laurel Fletcher & Harvey Weinstein, Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation, \textit{24 Hum. RTS. Q.} 573 (2002). Fletcher and Weinstein critique the individualized notions of guilt that emerge in trials and the dangers of rewriting history as a consequence.

\textsuperscript{125} See Wilson, supra note 107, at 224; see also Waldorf, supra note 15, at 6.

\textsuperscript{126} Philip Selznick, Leadership in Administration: A Social Interpretation 17 (1957).

\textsuperscript{127} See Eric Stover, Hanny Megally & Hania Mufiti, Bremer's "Gordian Knot": Transitional Justice and the US Occupation of Iraq, in Roht-Arriaza & Mariezcurrena, supra note 1, at 229-55.
However, given the fact that transitional justice practitioners continue to encourage trials and truth commissions,128 scholars and practitioners would benefit from a philosophy to explain how a legal system can function in the absence of community and how transitional justice mechanisms can contribute to the community. Legal philosophy should not only attempt to describe how law functions in ideal societies but also how law might contribute to creating the foundations for ideal societies. Law does not only reflect social practices, it also creates them. This constitutive understanding of law leads to alternate explanations of how a court or truth commission can establish authority.

A court that values witnesses and participants can give individuals a standard with which to define justice and may help them define their community through procedural values. An international court can provide people with the sense that they are part of an international community—an international community that cares about the violence they experienced even if it did not prevent the violence. By sharing resources, an international tribunal can be an important symbol to connect survivors of the war to international actors who try to gather evidence and condemn individuals who violated basic social norms. Honoring local norms along with international human rights norms make international human rights norms more relevant in local practices.129

If transitional justice practitioners want judicial mechanisms to affect community norms, they would be wise to use local courts that can more readily conduct outreach and involve the community. However, given the fact that community dispute resolution practices were not obliterated during the war, local customs should also be analyzed and considered prior to developing a domestic court that is modeled on foreign legal constructs.130


129 Though Waldorf asserts that most attempts to unify formal state systems and informal local systems have failed, there is some evidence to suggest that international human rights norms can develop along with both formal and informal approaches. Waldorf, supra note 15, at 13. For analysis of these dynamics in South Africa, see Wilson, supra note 107, at 227. Cf. Caitlin Reiger, Hybrid Attempts at Accountability in Timor Leste, in ROHT-ARRIAZA & MARIEZCURRERA, supra note 1, at 159, 162 (highlighting the successes and challenges of internationally supported local reconciliation projects in East Timor).

130 This is not a neutral point. Local community customs can be exploited by those who remain in power after the violence. See, e.g., Waldorf, supra note 15, at 85. They can also
Finally, a truth commission is one example of a community building tool that can offer individuals the opportunity to share their experiences during the war, but it requires a particular approach. There are stories of individuals who saved others from violence, and these stories can reveal the potential of a cohesive community. Without this shared knowledge of positive examples of human action during violence, few can have hope that a country is capable of becoming a community without ethnic tension and violence. This history does not usually emerge during war crimes trials that focus on the perpetration of violence.

Law can be a powerful force in society but, given the philosophy that underlies our notion of law, it must be tailored to the needs of individual communities. Transitional justice scholars cannot rely on a notion of law that is based on particular social realities and philosophical ideals. They must think of their goals as contributing to a social reality that can better support their philosophy of law.

CONCLUSION

In Bosnia, a sense of injustice is at the root of bitterness over the war. This sense of injustice contributes to the lack of community, and this injustice might be addressed through transitional justice mechanisms. The legal mechanisms of transitional justice should be viewed as only one of many approaches to create a community of shared norms. Along with other efforts of educational and institutional reform, these legal mechanisms, hopefully, can help undermine the sense of injustice, help promote community, and eventually provide a foundation for an effective legal system.

Bosnia is just one example; many post-conflict countries suffer similar challenges of community and authority. The majority are not

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131 See Broz, supra note 114, at 4.

132 Both a history of perpetration and courage can be revisionist and may be used to further the interests of those in power, a common and valid critique of truth commissions. See Laura Nader, A Wide-Angle on Dispute Management, 10 WILLAMETTE J. INT'L L. & DISP. RESOL. 37, 44 (2002). It may be impossible to overcome this dynamic but if a truth commission can help individuals learn about the experiences of others, they may be able to develop empathy that might otherwise not be possible. See Halpern & Weinstein, supra note 59.

133 See Delpla, supra note 74, at 218-19.
liberal political regimes that resolve conflicts with state laws. Most countries emerging from violence are still governed by corrupt leaders and are trying to control crime and violence. Law, particularly law that is imposed by foreigners, cannot be an authority if individuals distrust each other and their leaders.

As scholars continue to develop theoretical models and systematic suggestions for social recovery after conflict, they would benefit from asking several key questions about the social foundations of a legal system. Legal philosophy reveals the dialectic between a legal system and community: law and community can create the other. Transitional justice scholars must keep this idea at the forefront of their approaches as they try to develop law in fragile communities.

These suggestions offer a more nuanced analysis of law but do not depart from the now-institutionalized approaches to transitional justice, approaches that continue to be refined as advocates apply lessons from one country to another.134 Hopefully, these advocates will step back to understand the roots of the challenge in transitional justice—to recreate community after war through legal mechanisms that rely on community for authority. Recognizing the contradictions between social realities and philosophical ideals is an important first step.

134 See International Center for Transitional Justice, supra note 2.