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# Power, Paradigms, and Legal Prescriptions: 'The Rule of Law' as a Necessary but Not Sufficient Condition for Transitional Justice

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In Rwandan history, everyone obeys authority. People revere power, and there isn't enough education . . . The peasants, who were paid or forced to kill, were looking up to people of higher socio-economic standing to see how to behave. So the people of influence, or the big financiers, are often the big men in genocide. They may think they didn't kill because they didn't take life with their own hands, but the people were looking to them for orders. And, in Rwanda, an order can be given very quietly.

Philip Gourevitch, We Wish to Inform You that Tomorrow We Will Be Killed With Our Families, 1998

## Introduction

It is difficult to reckon with human-rights abuses on a mass scale such as occurred in the Rwandan genocide, the Holocaust, and the Reconstruction-era American South. It is tempting to conclude that an abject abandonment of legal order lies at the root of such inhumanity, and that, consequently, a robust commitment to "the rule of law" can prevent such atrocities. It is comfortable for us to believe that states with an adequate commitment to the rule of law need not fear the slippery slope of ethnic, racial, religious, class, or ideological divisiveness, because an adequate commitment to the rule of law ably safeguards against the possibility of abusive regimes, genocide, and other mass atrocities.

This picture of "rule of law" as talisman against the unthinkable is challenged by David Gray in his excellent and provocative chapter, "Transitional Disclosures: What Transitional Justice Reveals about Law."[1] Gray offers two distinct insightful descriptive narratives and provides a prescription, in light of these narratives, of how law might better serve as a bulwark against abusive regimes. Gray's first descriptive narrative illuminates a "multidimensionality of law" that is frequently overlooked in the context of transitional justice.[2] His second narrative examines the

hegemonic risks of cross associations along multiple identity lines (such as class, religion, ethnicity, or ideology) within transitional societies and argues that although it may seem counterintuitive, a "dynamic stability among competing and overlapping associations and oppositions" is necessary to stave off abusive regimes.[3] Finally, Gray offers a prescription: transitional law would do well to build legal structures that support rather than dissipate multiple and overlapping lines of identity-based association and opposition.[4]

Gray's descriptive points underscore the nearly inscrutable web of factors that seem to contribute to the rise of abusive regimes, as well as the difficulties inherent in making both macro and micro causal claims about these types of complex--and heartbreaking--human events. In highlighting the "multidimensionality" of the meaning, role, and practice of law in the context of societies in crisis (or societies not yet in crisis but nonetheless vulnerable to the rise of abusive regimes), Gray presents a persuasive argument that placing too much reliance on the rule of law ignores the role that law itself plays in constructing and perpetuating human-rights catastrophes. Gray rejects the conventional view that it is primarily "lawlessness" that gives rise to atrocity, and he succeeds in providing an alternative narrative that locates the cause of atrocity within the collapse of the dynamic tension among intra-societal identity-based associations.[5]

Here, however, Gray is painting with very broad strokes across a number of important conceptual lines, each of which warrants distinct consideration before we can draw conclusions about the nature (or concept) of law, the role of law and the rule of law in transitional and pre-transitional societies. In particular, in presenting his claim of "law as paradigm" Gray is necessarily making implicit claims about (1) law as a practice constituted by social norms; (2) law as constitutive agent and participant in social practice; and (3) the relationship of the "rule of law" (or legality) to the content of law and role of law in pre-transitional societies.

Therefore, I argue in this chapter that while Gray's descriptive picture is compelling, it also merits a closer parsing of three concepts that are central to his analysis: the role of law, the rule of law, and the concept of law. A closer examination of these concepts reveals that the relationship between law and the perpetuation of atrocity is more nuanced than Gray's broader strokes may suggest, and that in light of these nuances, a robust commitment to the rule of law remains as a necessary (yet not sufficient) condition of his prescription for a successful transitional regime.

Toward this end, in part 1 of this chapter I pursue some conceptual distinctions between the content of law and Gray's conception of the "law as paradigm." In part 2, I explore the role that law plays in pre-transitional and transitional societies. Part 3 considers the significance of the rule of law in the context of abusive regimes in light of the insights of parts 1 and 2.

## I. Abusive Norms and the Content of Law: Some Conceptual Parsing

Gray argues that the emphasis placed on the rule of law by those interested in transitional justice is premised in part on a misapprehension of the nature and role of law in abusive regimes.[6] In abusive regimes, Gray posits, law often plays not only a role, but a key role, in facilitating (and even, infrequently, requiring) atrocity.[7] To describe these regimes as "lawless" is inaccurate and, in Gray's view, obscures the powerful ways in which law acts to shape "moral meaning and ethic value," mark the boundaries of inclusion and exclusion within a society, and to otherwise aid in framing the bloody vectors of opposition that ultimately culminate in mass graves.[8] An exclusive focus on "black-letter law" (which most often expressly forbids the kinds of abuses committed or tolerated by the state) fails to account for these important aspects of law. Therefore, Gray argues, a better account of "the concept of `law' includes elements of a broader social paradigm in which

law participates and which affects what law is such that to talk about `law' is really to talk about a broader set of norms, practices, and institutions constitutive of what [Gray describes as] the paradigm of law."[9]

As an initial matter, Gray is walking upon well-trod ground insofar as he takes the concept of "law" to extend in some way to the practices engaged in and the norms abided by legal actors.[10] Few (if any) legal theorists understand the concept of "law" to be coterminous with so-called black-letter law, and indeed legal positivists of all stripes generally adhere to some version of what is known as "the social fact thesis," which holds (in its broadest construal) that what counts as law in any particular society is fundamentally dependant upon certain social facts within that society.[11] By most positivists' lights, one of two types of social facts are potentially significant in determining the content of law in a given society: (1) social facts that relate to sovereignty (a theory premised upon Hobbes's ideas concerning sovereignty and political authority)[12] or (2) social facts that relate to the social rules that constitute the rule of recognition within that society (a theory most famously advanced by H.L.A. Hart).[13] The significance of a particular kind of social fact turns on the strand of positivism one embraces.

An extensive explanation of these two branches of positivist thought is not necessary here, but a consideration of the basic distinctions between these two kinds of social facts is helpful in evaluating Gray's claim that a "broader social paradigm [consisting of abusive `norms, practices, and institutions' that lie outside the express letter of legislative or judge-made law] affects what law is" such that the concept of law itself incorporates these norms, practices, and institutions.[14] Gray's claim that these norms alter or constitute the content of law itself in transitional and pre-transitional societies is an important one, and is central to his claim that the conventional emphasis on the rule of law among proponents of

transitional justice is misplaced. Therefore it is important to consider how (and, ultimately, whether) the abusive norms Gray identifies affect the content of law in transitional and pre-transitional societies.

It may be helpful to begin this inquiry with an explanation of why the demarcation between what does and does not "count" as law in pre-transitional societies is significant in the context of Gray's arguments. This explanation must begin with the perhaps obvious point that unless we can reasonably identify what counts as "law" we are not able to identify what is "lawless" or "unlawful."[15] The demarcation of what counts as law then is a necessary precursor to both claims of legality and claims of a departure from legality (or an abandonment of the rule of law). So, for example, in the context of Gray's example of the Reconstruction-era American South, if, as Gray hypothesizes, abusive social norms about the inherent inferiority and subhumanity of former slaves formed part of the law itself such that those norms succeeded in altering the content, application, or scope of other laws (such as the Equal Protection Clause and state laws against lynching), then it would be inaccurate to describe the widespread practice of lynching former slaves as "unlawful" within that society. It follows then that if the lynching of former slaves was not unlawful in the Reconstruction-era South, we cannot conclude that the targeted violence that occurred in that society resulted from an inadequate commitment to the rule of law. So if Gray is right that abusive social norms made their way into content of the law in the Reconstruction-era South, we can neither criticize the targeted violence that occurred in that society as unlawful, nor can we rely on a robust commitment to the rule of law to aid in the prevention of future abuses.

However, to evaluate Gray's hypothesis that what "counts" as law in pre-transitional societies includes abusive norms, practices, and institutions, we must be clear about the mechanism by which Gray contends that abusive norms are incorporated into the law of a given society. In

Gray's view, abusive social norms are incorporated into the content of the concept of law by a mechanism of state sponsorship in which state officials "normalize" the abusive norms either by participating directly in targeted violence, or by encouraging or tolerating targeted violence.[16] "These official acts form part of the paradigm of law that provides license for the targeted violence."[17] This process of official "normalization" of targeted violence in turn affects the popular perception of the legality of targeted violence and the perception of who is (and is not) entitled to the benefit of legal protection.[18] Ultimately, this mechanism of state sponsorship contributes to the transformation of an act that is otherwise often expressly forbidden (by the state's black-letter law) into an act that is "legal" insofar as it is consistent with the "paradigm of law" that operates in that particular society.[19]

But is it accurate to state that the mechanism of state sponsorship described by Gray succeeds in transforming otherwise illegal acts into legal acts (or acts consistent with the content of the concept of law embraced by a given society)? As stated earlier, positivists generally understand the kinds of social facts that impact the content of law to be limited to either facts about sovereignty or facts about the rule of recognition. It is not immediately clear to which--if either--of these categories Gray understands the facts constitutive of the "paradigm of law" to belong, but a consideration of each construction of the social-fact thesis may aid in illuminating Gray's arguments.

**1. The Sovereign Makes the Rules**

It is possible that Gray's arguments are tacitly premised on an understanding that the concept of "law" in the pre-transitional societies he describes is consistent with the command theory of law.[20] Early legal positivists, relying on Hobbes's account of law as the command of the sovereign, understood social facts that relate to the existence or absence of sovereignty to inform the

question of what "counts" as law in a given society.[21] In this understanding, "law" is the command of the sovereign backed by sanction, and therefore questions concerning what counts as law turn almost entirely upon social facts about who may validly lay claim to sovereignty and the content of the sovereign's commands.[22] Although most modern positivists have abandoned this construction of the content of "law" in favor of some version of Hart's more nuanced theory of the rule of recognition, this earlier position is worth mentioning in the context of Gray's analysis because much of Gray's ideas concerning abusive norms as part of the concept of law seems to turn on the behavior of agents of the state: state officials.

Gray believes that his multidimensional understanding of the concept of law in pre-transitional societies is warranted by the fact that officials in pre-transitional societies often embrace and participate in paradigms of abuse.[23] Officials fail to enforce laws that prohibit targeted violence (or even directly participate in targeted violence) and thereby express and extend the belief that individuals targeted for violence fall outside the class of individuals protected by the law.[24]

The fact that officials engage in this expression and extension of abusive norms seems significant to Gray's account in a way that may suggest that Gray embraces two underlying premises about the pre-transitional societies he discusses. First, Gray may construe state officials to be "sovereign" in some pre-transitional societies. Second, Gray may understand the concept of law itself within those societies to be aligned with the idea that law (in those societies) consists of the command of the sovereign backed by the credible threat of sanction.[25] If Gray adheres to the command theory of law and perceives each of these premises to be correct, it may be possible to construe the actions (in participating in targeted violence) or inaction (in failing to prevent legally prohibited violence) of agents of the sovereign to be tantamount to commands of the sovereign. Therefore the behavior of state

officials in pre-transition societies could be understood to "count" as law itself (or alter the content of law) within those societies.[26]

However, there are three reasons why Gray's account of "law as paradigm" seems inconsistent with most versions of the command theory. First, to illustrate his "law as paradigm" arguments, Gray points to examples of transitional societies in which the sovereign appears to be formally (at least initially) constrained by legal limitations. In other words, the command of the sovereign in these societies appears to be formally subject to conditions of legality--at least until a point of political crisis or regime changes appears to signal the abandonment of a previously accepted legal order. Second, the abusive norms that Gray identifies as part of the paradigm of law do not appear to bear directly on the question of who the rightful sovereign is in any given society, or the content of the sovereign's commands. Finally it is difficult to square Gray's account of the positive obligations created by law with a command theory of law. Each of these ideas is discussed in turn below.

The first way in which Gray's ideas about "law as paradigm" seems an uneasy fit with the command theory of law concerns the fact that in the period leading up to the execution of mass atrocities, most (if not all) of the pre-transitional societies that Gray identifies as examples seemed to have in place formal pre-commitments that constrained the legal power of the sovereign. Perhaps the easiest illustration of this lies in Gray's example of the Reconstruction-era South. It was certainly the case in the Reconstruction-era South that many officials' behavior evidenced an expression and extension of abusive norms that were widely held within that society regarding the appropriateness of lynching former slaves. Countless sheriffs, prosecutors, judges, and other state officials engaged in concerted action to both participate in targeted violence (often as members of the Ku Klux Klan) and to decline to enforce laws that prohibited targeted violence.[27]

As a result, both state and private actors throughout the South committed acts of targeted violence with near impunity.[28] Could this widespread endorsement and enforcement of abusive norms by state officials be said to "count" as law in that society?

Legal systems may answer this question differently depending on social facts specific to each system relating to whether state officials can be described as "sovereign" in that system. In a constitutional democracy, such as in the United States, the sovereign is "the people" rather than any particular branch or arm of the government, but the people (as sovereign) must follow specific procedures to create norms that count as "law."[29] Thus social facts specific to our legal system make it impossible for the behavior of officials (in failing to enforce the law) to affect the content of the law. The fact that individual laws are ignored or flouted does not mean, in this system, that those laws no longer "count" as law, because, here, laws are only altered by processes consistent with our rule of recognition.[30] Thus, in the instance of the Reconstruction-era South, our legal system has ultimately concluded that even the ubiquitous disregard of (or aggressive contravention of) law fails to nullify or amend those laws that have been created in a manner consistent with our rule of recognition.[31]

Thus, an evaluation of Gray's claim that the behavior of officials can be said to "count" as law (or alter the content of law) in some pre-transitional societies turns on specific facts about each of the societies in question as well as the version of positivism that one embraces. It may be the case that Gray embraces the command theory of law, and that his claims implicitly posit that some pre-transitional societies vest in their officials a kind of unconditional sovereignty (i.e., a sovereignty that is not conditioned on legal limitations) and therefore the concept of "law" in those societies consists of the command of the sovereign backed by sanction.[32] An analysis of whether legal pre-commitments formally constrained the legality

of actions by the sovereign in each of the societies that Gray cites (or in most pre-transitional and transitional states) stands outside the scope of this chapter, but for the purposes of this brief exploration of Gray's idea of "law as paradigm," it is sufficient to say that it is not obvious that the content of "law" in each of these societies can be accurately described as the command of the sovereign backed by sanction.

However, even if this were the case, there is a second point of discontinuity between Gray's idea of the "paradigm of law" and the command theory of law. For the abusive norms that Gray identifies to affect the content of law within a command theory understanding of law, they would have to elucidate either who is empowered to give commands or the content of those commands.[33] In the examples that Gray raises, the former seems unlikely and the latter seems redundant.

Gray's narrative of German Nazism and the Holocaust provides an instructive example.[34] When the Nazis came to power in the early 1930s, a pronounced undercurrent of anti-Semitism existed in Germany, as in much of Europe.[35] The Nazi regime did not introduce anti-Semitism to Germany, nor did the abusive norm of anti-Semitism serve to identify or define who the sovereign was during the Nazis' twelve-year reign.[36] Instead, the Nazi party assumed authority to govern Germany first through mechanisms consistent with the rule of recognition established by the Weimar Republic, and later by a seizure of power that represented an abandonment of the parliamentary republican system of government that was in place prior to Nazi seizure of power.[37] As central as anti-Semitism was to the Nazis' political identity and agenda, the norm of anti-Semitism did not serve as an accepted criterion that fundamentally identified the Nazi party as the sovereign of Germany as distinguished from other plausible claimants. Of course, without question the Nazi regime exploited, amplified, participated in, encouraged, codified, and ultimately compelled anti-Semitism in Germany, in part by defining moral and

patriotic imperatives through the lens of an almost preternatural hate.[38] However, the norm of anti-Semitism did not aid in identifying who, in Germany, commanded the obedience of the governed.

Further, were we to pursue the command theory from the alternative angle, the norm of anti-Semitism also did not serve to identify the sovereign's command. The Nazis codified the norm of anti-Semitism and used the abusive paradigm to perpetuate and justify the atrocities committed in the Holocaust.[39] However, to the extent that it is accurate to describe the Nazis' regime as a "legal system" and Nazi commands as "laws"--a point to which we will return later--the explicit "black-letter law" of the Nazi regime codified the abusive norm into a formalized set of rules.[40] To describe the paradigm of abuse as an unexpressed part of the law is superfluous: the paradigm of abuse was explicitly defined by the "law."[41] The parameters of authorized atrocity were expressly detailed by law and while it can certainly be said that abusive norms were therefore expressed and reinforced by the law, it is not the case that abusive norms identified the law. The "legality" of an order that incorporated abusive norms was identified by its source, not its content.[42] Even to the extent that officials or non-officials engaged in abuses that were consistent with the prevailing paradigm of abuse but not expressly authorized by "law," they did so because they took the attitude of the government to be such that extralegal atrocities consistent with the prevailing paradigm of abuse would be tolerated (and perhaps even rewarded)--not because the boundaries of the abusive norm had itself come to define the parameters of "lawful" activity. Therefore, under the command theory it is difficult to find grounding for Gray's argument that abusive paradigms affect the content of law in pre-transitional societies. The types of norms he identifies serve to neither identify the rightful claimant to sovereignty, nor to identify the sovereign's command.[43]

**2. The Rules Make the Sovereign**

Another way to understand Gray's claim that abusive norms affect the content of law is to hypothesize that Gray embraces the more widely held understanding of the concept of law in which social facts (here, officials' conduct in embracing and extending abusive paradigms) are relevant to the content of law insofar as they relate to a particular society's rule of recognition.[44] However, the basis for this claim is less clear. Generally we think of social facts that relate to the rule of recognition in a given society as those facts that indicate that "officials" in that society recognize that a particular rule (or set of rules) identifies what constitutes valid law in that society, and that officials understand this rule itself to be valid and to be binding on each official in the society.[45] Thus facts that relate to the rule of recognition generally shed light on the fact that such recognition exists among officials in the society.[46]

However, Gray is clear that the norms that comprise the "abusive paradigm" precede the abusive regimes that he identifies. While Gray contends that law functions to extend abusive paradigms and "grant leave" to individuals to act upon abusive norms, the "truth" that underlies abusive regimes--that is, the "truth" that one group is inferior to another--may have its origin in colonial occupation, political ideology, religious doctrine, or any number of other sources that are exogenous to the abusive regime.[47] In other words, Gray does not maintain--nor does it seem to be a fair extension of his argument to maintain--that the abusive norms that lie at the foundation of targeted violence originate in (or are themselves a fundamental form of) law qua law. In Gray's account, law functions to amplify, exploit, normalize, and more deeply entrench existing abusive identity-based lines of opposition, but it is not the case that these abusive paradigms provide criteria for identifying legality in a given society.

Much has been written about the rule of recognition in transitional and pre-transitional societies and a full discussion of the subject exceeds the

scope of this chapter, as the norms that Gray describes as "part of the law" do not seem to bear on questions of the criteria for legality within the pre-transitional societies that he discusses. However it is worth noting that secondary rules in transitional and pre-transitional societies may be more difficult to identify, particularly where the regime of interest--here Gray's "abusive regime"--represents a departure from a preceding form of government.[48] Where the rise of an abusive regime follow a war or other political event that represents a sharp or dramatic break with past forms of government, it may be difficult to identify settled secondary rules and in some instances it may be more accurate to identify these breaks with past forms of government as a departure from legality--a point which we will return to in the final part of this chapter.

## II. The Role of Law: Law as Constitutive Agent and Participant in Social Practice

Much in Gray's arguments turns on his conception of the functioning of "paradigms" and particularly "abusive paradigms" within pre-transitional societies.[49] Gray aptly observes that "Paradigms draw and maintain the boundaries of society and designate the roles and positions of individuals within society. In addition, because paradigms regulate the terms of acceptable conduct and describe the content and categorization of social identity, they are both the subject and the object of social action. That is, in addition to generating their own subjects, paradigms enter into contest with competing paradigms."[50] Thus "paradigms," in Gray's view, seem to be sets of interdependent and mutually reinforcing social rules that are sufficiently accepted within a relevant community (or "group"), such that they can be described as "entrenched" for that community--meaning that the fact that a rule exists within the relevant community becomes a reason for each member of the community to adhere to the rule.[51] Abusive paradigms would seem to be

those paradigms in which the organizing norms constitute hierarchical rules concerning the inherent superiority of one group and inherent inferiority of another.[52] Gray further describes the potential of abusive paradigms to render acts of targeted violence "pregnant with `moral meaning.'"[53] Gray masterfully and successfully details the power of an abusive paradigm to transform garden-variety hierarchical preferences (e.g., "my group is superior to their group") into genocidal beliefs (e.g., "their group is subhuman and deserves to die;" or "the existence of their group threatens the existence of mine") that impose on the believer significant and affirmative ethical desires and obligations.[54]

Regardless of whether one accepts his idea that abusive paradigms comprise part of the "law" of some pre-transitional states, it seems clear that Gray is absolutely correct that abusive social norms play a central role in the construction and execution of genocide and other mass atrocities. But if we do not accept the idea that these broadly accepted abusive norms succeed in birthing abusive regimes (which ultimately engage in mass atrocities) or otherwise instigating targeted violence by affecting the content of law, what then is the relationship between law, abusive norms, and mass atrocity? Implicit in this question are really three questions: (1) What impact do abusive norms have on the role of law in a given society? (2) What impact does the law have on abusive norms? and (3) What role does the law play in ushering in abusive regimes or otherwise transforming abusive norms into targeted violence? The first two of these questions are addressed in the sections that immediately follow, while the final question is grappled with in part 3 of this chapter.

**1. The Role of Law and Abusive Norms: Enforcement, Perception, and Enablement**

Whether the participation in and sanctioning of mass violence by state officials "counts" as law (or alters the content of the concept of law in a given society) says nothing about the relationship between the "paradigm of

abuse" embraced by those officials (and the broader society) and the role that law plays within that society. Thus, if it is the case that the "paradigm of abuse" that Gray describes cannot be said to constitute or affect what "law" is in a given state, this account certainly does not alter the impact that officials' (and/or non-officials') sanction-free lawlessness has on the manner that victims or perpetuators of targeted violence experience and interact with "law." Abusive norms may be embraced systemically or by individual officials and private citizens and may thereby fundamentally affect the degree to which law is enforced and experienced, and consequently the manner in which it is perceived. More significantly, where the adoption of abusive norms prompts officials to decline to protect victims of targeted violence, the abusive paradigm literally enables the perpetuation of targeted violence. The technical understanding that officials are behaving "illegally" in failing to protect victims does little to diminish the fact and impact of targeted violence.

In this sense, Gray is correct that by "sustaining an environment in which targeted violence is tolerated or encouraged" abusive norms affect the enforcement of law in pre-transitional societies such that perpetrators of violence have "license" to act with impunity.[55] However, Gray errors in stating that "these official acts [of tolerating and encouraging violence] form part of a paradigm of law."[56] Certainly the behavior of officials (in failing to enforce the law or directly participating in criminality) and the prevalence of abusive social paradigms (which provide moral motivation and justification for atrocities) both assume some manner of causal roles in the existence and extension of mass violence. But they do not contribute to the fact of mass violence by infiltrating and altering the content of law itself. The key point here is that regardless of the undeniably powerful impact that Gray's "abusive paradigms" have on the enforcement and perception of the law and the degree to which the consequent lack of enforcement enables

atrocities, acts of violence by officials and non-officials that are not authorized by the law qua law of the state remain fundamentally extralegal or lawless acts.

For example, from the perspective of the victims and perpetrators of violence in the Reconstruction-era South it may have appeared as though widespread acts of lynching bore the shape and heft of "law." Undoubtedly the widespread adoption of abusive norms by state officials dramatically affected the role that law played in the lives of both the governing and the governed. Abusive norms greatly undermined the role that state actors played in delivering the substantive guarantees of the Fourteenth Amendment to southern African Americans, and yet the content of the law itself was not altered by the fact that state officials failed to enforce it (and indeed acted in contravention to it).[57] Instead, due perhaps in part to our system's internalized commitment to the rule of law, where state actors failed to enforce state and federal law (or directly participated in criminal activity) their conduct, although undeterred, was nonetheless understood as "lawless" even by the standards of the time.[58]

In this light it becomes clear that the role of law in a given society must be carefully distinguished from the content of law within that same society. Thus, Gray is undoubtedly correct that prevalent abusive norms within a society transform the role that law plays within that society, and the role that law plays in a pre-transitional society in the thrall of an abusive paradigm determines in part whether opportunity exists to transform abusive norms into abusive actions.[59] The fact that abusive norms affect the role that law plays in pre-transitional societies does not mean that abusive norms have become part of the law of those societies. Instead, it is more accurate to say that abusive paradigms succeed in overpowering and dissolving any conflicting concomitant commitment to legality itself on the part of officials and non-officials who participate in targeted violence. Rather than

affecting "law," abusive paradigms affect adherents' sense of their obligation (whether it issues from a Hartian sense of positive duty or an Austinian fear of sanction) to follow the law--a point we will return to.

**2. The Constitutive Force of Law**

A particularly persuasive aspect of Gray's argument holds that "'[l]aw' has a significant role in the construction, extension, and expression of abusive paradigms."[60] While much of this point is closely tied in Gray's chapter to the role that law plays in enabling targeted violence, implicit in this statement is the keen insight that apart from the impact that abusive norms have on "law" (or, more accurately, the role of law, as previously discussed), law has a significant impact on the construction and content of abusive norms. Law serves as one of the many (and perhaps one of the most potent) of the "public institutions" that develop, establish, and extend the identity norms that can form the basis of abusive paradigms.[61] In other words, the law plays an important constitutive role in the construction of social norms. The fact and degree to which law applies constitutive force to social norms has been the focus of much study, yet it is a phenomenon of particular significance in the context of mass identity-based atrocities, and so it warrants independent attention here.[62]

Law can operate with either "soft" or "hard" constitutive force on the development of social norms. Law operates with "hard" constitutive force in situations in which the law serves as a constitutive rule (rather than merely a guide or an influence) because the law is empowered to act as the definitive authority as to composition of a given class or category.[63] Generally, when we speak about a rule bearing constitutive force, we mean that the rule determines what does and does not "count" as falling within the extension of a particular concept or the boundaries of a particular practice.[64] Constitutive rules enable us to engage in certain practices by defining our activities as falling within the boundaries of those practices.[65]

The paradigmatic constitutive rules are the rules of a game.[66] For example, the rules of baseball tell us what counts as a "ball" and what counts as a "strike" and only by abiding by those rules of baseball am I able to engage in the practice of baseball. Similarly, law operates as a constitutive rule when it serves to distinguish which practices, objects, or people fall within a legally defined category. So, for instance, in the United States, the law operates as a constitutive rule when it determines who counts as a "man" for the purpose of state marriage statutes that limit marriage to a "man" and a "woman."[67] A person who fails to meet the law's criteria is disabled, authoritatively, from not only engaging in the legally authorized practice (here, marriage), but from being or belonging within the legally constructed category (here, "man"). When the law operates with "hard" constitutive force there are no criteria by which one can contest the content of the rule, because authoritative constitutive rules do more than define boundaries--they themselves are boundaries.

Law operates with "soft" constitutive force when it does not serve as the definitive authority with respect to a contested class, but the law nonetheless interacts with and influences background social norms with respect to that class. For example, the law is not empowered to authoritatively determine whether a postoperative female-to-male transsexual individual is recognized as a "man" by his community, but the degree to which the law treats that individual as though he were a "man" may either substantially reinforce and entrench (or, alternatively, challenge and undermine) background norms regarding real or genuine "maleness." When the law operates with "soft" constitutive force in this manner, an individual may still employ a variety of other bases for validly claiming "maleness" within his community, but depending on the community, the law may serve as a significant influence on the development of social norms concerning "real" maleness.

Thus, the law has the potential to employ both "hard" and "soft" constitutive power in the context of the construction of identity-based norms, and this is particularly so in the context of abusive paradigms of identity-based norms such as Gray discusses. For example, the "law" of the Third Reich clearly exerted hard constitutive force on the construction of norms concerning the identity and character of German Jews.[68] In the 1930s, the Nazis promulgated a series of laws that identified "Jewish" as a racial category and defined in great detail the ancestral criteria by which individuals were designated "Jewish."[69] In so doing, these laws, sometimes called the Nuremberg Laws, eliminated the legal possibility of competing criteria of Jewish membership and identity (such as religious, cultural, or self-identified criteria), and imposed ancestry as the definitive and irrefutable boundary of the legally constructed (and consequential) Jewish identity.[70] Of course the Nuremberg Laws exerted soft constitutive force as well, as they necessarily served to reinforce and entrench existing background anti-Semitic norms within German society. The fact that the law authoritatively defined German Jews as "other" and as definitionally unentitled to German citizenship, rights, and privileges served to, as Gray observes, "normalize" and encourage existing anti-Semitic norms within German society.[71]

However, much of the soft constitutive force of law in constructing identity-based norms in pre-transitional societies exists outside the context of laws that formally identify racial classification. In the course of interpreting the distribution and application of rights and privileges in a society, law tacitly passes upon background judgments about what constitutes identity within that society and what consequences should follow from the designation of "other." In determining what justice requires in the context of equality and discrimination, law implicitly approves or disapproves of sets of background assumptions about the content of the concept of "other."

Therefore, Gray's chapter presents an essential insight: insofar as transitional justice is concerned with preventing future atrocities, the project must be cognizant of the constitutive force that law applies to the shape and strength of existing abusive norms within transitional societies, and the ways in which law could be structured to exert a positive constructive influence on these background norms.

So if we embrace Gray's insight that law embodies tremendous constitutive potential in the context of abusive paradigms, yet we question his claim that those same abusive norms affect the content (rather than the enforcement or role) of law, where does this analysis leave us with respect to Gray's claim that the conventional emphasis on the "rule of law" in transitional justice literature is misplaced?[72] A consideration of this question follows.

## III. The Rule of Law and Abusive Paradigms

If we take the behavior of abusive regimes to be distinct from the content of law, but we embrace the idea that abusive legal regimes largely rely on (and usually further entrench) existing abusive norms in order to execute genocidal goals, what, if any, role does the "rule of law" play in perpetuation of the violence that follows?

The argument that has been presented here holds that the content of the concept of "law" matters within a given society because "law" plays an indispensable role in distinguishing lawfulness from lawlessness, even where abusive norms within that society have succeeded in blocking the enforcement of legal protections, manipulating popular perception of the bounds of lawfulness, and even enabled the perpetration of mass violence. The content of law matters even in the absence of meaningful enforcement because departures from "law" mark the moments in which a commitment to the strictures and pre-commitments of the legal system would have generated an alternative, possibly atrocity-avoiding, result. In other words, the concept

of law within a pre-transitional society allows us to determine when and how legality was incrementally discarded and ultimately abandoned on the road to the unimaginable.

Much of the time, the departure from legality in pre-transitional societies seems to take the form of an abrupt or violent political break with a previous legal order, as was in the case in Gray's examples of the Rwandan genocide and the Reconstruction-era South.[73] In each of these cases, an existing legal system was displaced and an abusive regime assumed power using methods that were inconsistent with the rule of law under the old regime. Insofar as the new abusive regimes lacked basic indicia and structures of a "legal system"--that is, minimally, that the sovereign itself is subjected to legal limits--the departure from legality can be located in the displacement of the previous legal order (if indeed it qualified as a legal system), or in the construction of a new abusive political order that lacks a system of "laws."[74]

Of course, it is not always the case that abusive regimes arise following a violent departure from an established order. For example, Hitler assumed power in a manner that was consistent with the rule of law under the Weimar Republic.[75] Even the major mechanisms by which Hitler began consolidating power in preparation for dismantling the republic and establishing a totalitarian regime were "legal" maneuvers within the Weimar legal system.[76] The Reichstag Fire Decree of February 1933, for instance, which suspended most of the Weimar constitutional civil liberties, was issued as an emergency order by Reich president Hindenburg pursuant to Article 48 of the Weimar Constitution, which allowed the president to take "emergency measures" without the consent of the Reichstag--a provision that had been used over 250 times to suspend rights prior to the Nazi seizure of power.[77] Similarly, the Enabling Act of March 1933, which transferred legislative powers to Hitler's administration, was passed by the Reichstag and signed by

President Hindenburg.[78] Thus, it was not the case that the Nazis overthrew or violently destroyed the legal order that preceded their regime. Instead the Nazi takeover was encased in an existing legal framework and democratic institutions were imploded from within.[79] At some point in the transformation from the Weimar Republic to the Third Reich, the political order in Germany abandoned structures critical to a legal system. Yet, as the "rule of law" provides less of a bright line between a "legitimate legal system" and an "abusive regime" in this instance, it also seems to hold less promise as a means of preventing the rise of abusive regimes.

The Nazi example seems to underscore Gray's contention that a robust commitment to the rule of law is an insufficient safeguard against the rise of abusive regimes.[80] To prevent the rise of abusive regimes, Gray contends, law must provide support for the "diversification of groups and group affiliation" by, among other things, providing civil space within which groups and associations may compete with one another, supplying alternative routes to violence, and erecting barriers to claims of group superiority or entitlement.[81] A legal system that succeeds in creating these structures should be positioned to promote and protect the cross-associational "dynamic stability" that is, in Gray's view, essential to preventing the rise of abusive regimes within pre-transitional and transitional societies.[82]

However, in the absence of a robust commitment to the rule of law, it would seem that the types of legal structures and institutions that Gray prescribes would be of little use in situations in which the adoption of abusive norms by officials obstructs the enforcement (or equal enforcement) of laws, as was the case in the Reconstruction-era South. Such protections would also seem to be of limited utility in circumstances in which a politically ambitious group exploits (or creates) a political crisis to seize control and dismantle existing legal institutions, and uses abusive norms to justify the takeover or to silence opposition, as was the case in Nazi

Germany, the Argentine Dirty War, and the Rwandan genocide. In each of these cases, for legal rules and institutions to provide protection against atrocity, they must be preceded by and ensconced within a minimal commitment to "the rule of law."[83] Where this is not the case, legal structures that serve to protect and promote diverse associations and construct barriers to the hierarchical ordering of those associations remain vulnerable to threat of abandonment in times of political crisis. It would seem that for the law to provide any degree of protection against atrocity, it must be attended by a minimal commitment to follow the law when those protections are most required.

## Conclusion

Although Gray presents key insights about the significance of the constitutive force of law and the importance of fostering dynamic cross-associations within transitional societies, he draws broad conclusions about the impact that abusive norms have on the content of law in pre-transitional and transitional societies. In focusing holistically on the "multidimensional" role that law plays in pre-transitional societies, distinctions between the role and content of law become blurred. However, a closer parsing of these distinctions reveals that the rule of law serves as a necessary (but not sufficient) bulwark against catastrophic human rights abuses both in preventing the establishment of abusive regimes and in ensuring that legal protections and the positive constitutive force of law are engaged within a given legal paradigm.

Notes

1. David Gray, "Transitional Disclosures: What Transitional Justice Reveals about `Law,'" in this volume. (My quotations and citations refer to Gray's draft of 05-17-10.)

2. Gray suggests that the particular "multidimensionality of `law'" that he illuminates in this chapter is present, too (if overlooked), in

"stable states where the central distraction frequently is black-letter law." Ibid., 4.

3. Ibid., 19.

4. Ibid., 29-39.

5. Ibid., 19.

6. Ibid., 4.

7. Ibid., 6.

8. Ibid., 8.

9. Ibid., 4 (emphasis added).

10. Similarly, in addition to theories that address the relationship between social norms and legal content, those who employ pragmatic approaches to legal meaning advance the proposition that legal meaning is derived from norms internal to legal practice. See, e.g., Karl Llewellyn, The Case Law System in America (Chicago: University of Chicago Press, 1989). Dennis Patterson has argued that in the wake of the collapse of legal formalism, it was proto-legal pragmatist Karl Llewellyn who first articulated the idea that the practice of law is the "ultimate source of legal meaning. Practice or `way of acting' not rule or principle is primary." Dennis M. Patterson, "Law's Practice," Columbia Law Review 90 (1990): 577. For Llewellyn and other thinkers who apply pragmatic methods to questions of legal meaning, knowing what law is means knowing how to "do" law, and norms that guide the "doing" (i.e., practice) of law both justify and create legal meaning. Llewellyn, The Case Law System in America, 577.

11. Jules L. Coleman and Brian Leiter, "Legal Positivism," in A Companion to the Philosophy of Law and Legal Theory, ed. Dennis Patterson (Oxford: Blackwell Publishing, 1999). [AU: Do I delete the open parenthesis in the following title, or do I add a close parenthesis after Positivism?] But see Kevin Toh, "An Argument Against the Social Fact Thesis (and Some Additional Preliminary Steps Towards a New Conception of Legal Positivism,"

Law and Philosophy 27 (2008): 5. The analysis presented here is limited to legal positivist accounts of the relationship between "law" and social norms because I take Gray's position to be more closely aligned with that tradition than other plausible alternatives (such as natural law theories).

12. See, e.g., Jeremy Bentham, Of Laws in General, ed. H.L.A. Hart (London: Athlone Press, 1970); John Austin, The Province of Jurisprudence Determined (Cambridge: Cambridge University Press, 1995).

13. H.L.A. Hart, The Concept of Law (Oxford: Oxford University Press, 1961), 100-110.

14. Gray, "Transitional Disclosures," at 4 (emphasis added).

15. Hart, The Concept of Law, 100-123.

16. Gray, "Transitional Disclosures," 13.

17. Ibid. at 14.

18. Ibid. at 14.

19. Ibid. at 29.

20. See John Austin, The Province of Jurisprudence Determined (Cambridge: Cambridge University Press, 1995); see also, Anthony J. Sebok, "Misunderstanding Positivism," Michigan Law Review 93 (1995): 2061-2066 (describing the major tenants of command theory positivism).

21. Sebok, "Misunderstanding Positivism," 2061-2066.

22. Ibid.

23. Gray, "Transitional Disclosures," 13.

24. Ibid.

25. See generally Thomas Hobbes, Leviathan, ed. Edwin Curley (Indianapolis, IN: Hackett Publishers, 1992). Many modern positivists do not recognize a system of rules that consists only of commands backed by the threat of sanction to be a "legal system." See Hart, The Concept of Law, 100. But see, Frederick Schauer, "Was Austin Right After All? On the Role of Sanctions in a Theory of Law," Ratio Juris 23 (2010): 1-21.

26. That is, if state officials could be said to be "sovereign" in those societies.

27. See Monroe v. Pape, 365 U.S. 167, 174-176 (1961) (discussing the congressional history of the Ku Klux Klan Act that was passed in 1871 to redress what was perceived to be widespread acts of violence against former slaves in the Reconstructive-era South. The Court stated, "[The Act] was passed by a Congress that had the Klan `particularly in mind.' The debates are replete with references to the lawless conditions existing in the South in 1871. There was available to the Congress during these debates a report, nearly 600 pages in length, dealing with the activities of the Klan and the inability of the state governments to cope with it . . . . It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind this `force bill.' Mr. Lowe of Kansas said: `While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. . . . Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.'" "State official" is used broadly here to indicate individuals acting under the authority (or color) of state, local, or even federal law.

28. Ibid.

29. Scott Shapiro, "What is the Rule of Recognition (and Does it Exist)?" in The Rule Of Recognition and the U.S. Constitution, ed. Matthew Adler and Kenneth Himma (Oxford: Oxford University Press, 2009).

30. See generally, Matthew Adler and Kenneth Himma, eds., The Rule of Recognition and the U.S. Constitution(Oxford: Oxford University Press, 2009).

31. Reasonable minds disagree as to what, exactly (if anything), constitutes the rule of recognition in the United States. See generally, ibid.

32. See Austin, The Province.

33. Hart, The Concept of Law, 50-78.

34. Gray, "Transitional Disclosures," 15.

35. Daniel Jonah Goldhagen, Hitler's Willing Executioners (New York: Alfred A. Knopf, 1996), 49-79.

36. Ibid.

37. Ibid.; Joachim C. Fest, Hitler (New York: Harcourt Brace Jovanovich, 1974), 387-416.

38. Fest, Hitler, 80-128; see also, William Sheridan Allen, The Nazi Seizure of Power (New York: Franklin Watts, 1965), 218-232.

39. Goldhagen, Hitler's Willing Executioners, 131-163.

40. An example of this was the Law for the Restoration of the Professional Civil Service, enacted in April 1933, which required (with some exceptions) that Germans of Jewish descent and other non-Aryans retire from civil service. First Regulation for Administration of the Law for the Restoration of the Professional Civil Service, v. 4.11.1933 (RGB1. I S. 195). ("A person is to be regarded as non-Aryan, who is descended from non-Aryans, especially Jewish parents or grandparents.")

41. Goldhagen, Hitler's Willing Executioners, 89-111.

42. Fest, Hitler, 391.

43. Moreover, it is difficult to reconcile the command theory of law with Gray's description of abusive paradigms of law forming "positive expressions of ethical commitments to self and to the world as it ought to be." Gray, "Transitional Disclosures," at 8.

44. Hart, The Concept of Law, 100-110.

45. Ibid.

46. Ibid.

47. Gray, "Transitional Disclosures," at 15.

48. See Hart, The Concept of Law, 97 (discussing the emergence of secondary rules as marking the transition from pre-legal to legal society).

49. Gray, "Transitional Disclosures," generally, but particularly at 29-36.

50. Ibid., 8-9.

51. For a discussion of the entrenchment of social rules, see Frederick Schauer, Playing by the Rules (Oxford: Clarendon Press, 1991), 42-52.

52. Gray, "Transitional Disclosures," 11.

53. Ibid., 12.

54. Ibid., 29.

55. Ibid., 13.

56. Ibid., 13 (emphasis added).

57. See note 27, Monroe v. Pape, 365 U.S. 167, 174-176 (1961) (and accompanying text).

58. This understanding was expressed in the floor debates surrounding the passage as codified (and thereby itself became part of the corpus of American law) in 1871 when Congress passed the Ku Klux Klan Act in an effort to redress lawlessness on the part of southern officials. Ibid.

59. Abusive norms may even affect the enforcement and perception of law to the extent that the legal system ceases to bear any indicia of legality--but (depending on the version of positivism one embraces) this phenomenon, too, is generally best described as a departure from legality (or more precisely the abandonment of a legal system) rather than an enrichment or revision of the content of the concept of law itself. See Hart, The Concept of Law, 112-117. Hart understands that for a legal system to exist two conditions must be met: (1) the rules of behavior (or laws) that are valid

according to the system's rule of recognition must be generally obeyed; (2) officials must accept the validity of the rule of recognition. Ibid.

60. Gray, "Transitional Disclosures," 13.

61. Ibid., 10.

62. See, e.g., Austin Sarat and Jonathan Simon, "Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship," in Culture Analysis, Cultural Studies, and the Law, ed. Austin Sarat and Jonathan Simon (Durham, NC: Duke University Press, 2003), 14-15 ("[Law] enters social practices and is, indeed, `imbricated' in them, by shaping consciousness, by making law's concepts and commands seem, if not invisible, perfectly natural and benign. Law is, in this sense, constitutive of culture . . . Law has played, and continues to play, a large role in regulating the terms and conditions of cultural production."). See also, Meredith M. Render, "Gender Rules," Yale Journal of Law and Feminism [forthcoming, 2010]. [AU: Can you give a volume number and page numbers for this now?]

63. For a discussion of constitutive rules, see Schauer, Playing by the Rules, 6-7.

64. Ibid.

65. Ibid., 6.

66. Ibid.

67. See, e.g., Kantaras v. Kantaras, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004) (holding that a postoperative female-to-male transsexual person did not count as "male" and, therefore, could not marry a woman in Florida because the term "male" within Florida's marriage statute refers to an immutable trait determined at birth; therefore, no surgery could transform a person not born with this trait into a person who counts as "male" for the purpose of the marriage statute); accord Littleton v. Prange, 9 S.W.3d 223 (Tex. App. 1999).

68. See Cecilia O'Leary and Anthony Platt, Bloodlines: Recovering Hitler's Nuremberg Laws (London: Paradigm Publishers, 2005) (discussing the Nuremberg Laws).

69. Ibid.

70. Ibid.

71. Goldhagen, Hitler's Willing Executioners, 89-128.

72. Gray, "Transitional Disclosures," 2.

73. See Gerard Prunier, The Rwanda Crisis (New York: Columbia University Press, 1995), 192-206 (describing the political events that led up to the death of President Habyarimana and the beginning of the Rwandan genocide).

74. See Hart, The Concept of Law, 100-110 (describing the fundamental structures necessary for a legal system); see also, Jeremy Waldron, "The Concept and the Rule of Law," Georgia Law Review 43 (2008): 19-37 (offering an account of "the essence of a legal system").

75. In the earliest part of Hitler's reign (January 1933-March 1933), the legality of an order by his government was determined by the criteria of legality (i.e., rules of recognition) of the Weimar Republic, which included in most instances that an act of law was passed by the Reichstag, was consistent with the provisions of the Weimar Constitution, and bore the signature of Paul von Hindenburg, then president of Germany. See Fest, Hitler, 387-391.

76. Ibid.

77. See Sanford Levinson and Jack M. Balkin, "Constitutional Dictatorship: Its Dangers and Its Design," Minnesota Law Review 94 (2010): 1811.

78. Fest, Hitler, 391.

79. Ibid., 391.

80. Gray, "Transitional Disclosures," at 6.

81. Ibid., 30-31.

82. Ibid., 19.

83. See Waldron, "The Concept and the Rule of Law," 5 (describing the rule of law as the "requirement that people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong").