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The Mythology of International Rule-of-Law Promotion

Shane Chalmers

In 1992 Peter Fitzpatrick published The Mythology of Modern Law, a work that exposed the constitutive relation between Europe's racialized imperialism and its conception of modern law. In the three decades since, a renewed field of "law and development" has grown, this time in the name of "the rule of law." This Article shows how the mythology of modern law endures in this field of rule-of-law development. To do this, Part I draws out the main threads from Mythology. These are then woven through the Article, beginning with the World Justice Project's Rule of Law Index®, before turning to the United Nations' rule-of-law assistance, and ending with the World Bank's 2017 World Development Report. The analysis shows how the mythology of modern law, in its racialized imperial form, is integral to the work of international rule-of-law promotion. One consequence is the denial of "local" law by a rule of law that obtains its authority by purporting to be responsive to legal pluralism. But the Article also points to the mythological possibilities of decolonization, specifically the possibilities of a "mythological legal pluralism" that is attentive to the ways in which the world's plurality of laws already rule.

INTRODUCTION

"The mythology of modernity is sustained in the experience of imperialism. Nowadays, imperialism is usually seen as something marginal, exceptional and evanescent, whereas in my argument it is central, ordinary and enduring" (Fitzpatrick 1992, x). Written just over twenty-five years ago, these sentences preface Peter Fitzpatrick's book *The Mythology of Modern Law*, a work that exposed the racist constitution of the "Occidental" conception of modern law.[1] My contention in this Article is that those sentences, and the book they introduce, remain as central and as enduring as the racialized imperialism with which they were concerned.

As central and as enduring—and yet not nearly enough as ordinary. In the three decades that have passed since publication of *Mythology*, a renewed field of "law and development" has grown, this time in the name of "the rule of law." Now a multi-billion-dollar industry, this field of rule-of-law development covers the globe. In parallel, a large body of scholarship has increasingly subjected this field to examination and critique.[2] Much of this critical inquiry has focused on the field's failures to achieve

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1. Exemplified by H. L. A. Hart's *The Concept of Law*; see Fitzpatrick (1992, ch. 6); Mulqueen (2017).

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its declared goals, continuing the earlier critiques of the failures of the "first wave" of law and development in the 1960s and 1970s (see Trubek 2009; Trubek 2001; Trubek and Galanter 1974).

One of the main reasons for the failures, according to this scholarship, is that the field continues to fundamentally misunderstand the nature of "law." This was the most important question, or "problem of knowledge," raised in Thomas Carothers's famous critique of the field at the end of the 1990s: "the question of where the essence of the rule of law actually resides," a question that turns on an understanding that "[l]aw is also a normative system that resides in the minds of the citizens of a society," and not simply an objective institutional arrangement that can be replicated around the world by building courts, prisons, police stations, and so on, as had been—and continues to be—presumed (Carothers 2006, 19–21).

In a similar way, scholars also attribute the field's failures to its misunderstanding, and indeed abuse, of "the rule of law" (see, e.g., Krygier 2016a; Krygier 2016b; Krygier 2011; Krygier 2009). By far the most frequent refrain here is that "the rule of law" has become meaningless. The literature is full of creative metaphors for describing this problem: "the rule of law" has become like a modern-day snake oil, a "magical elixir" that is "touted" as a "panacea" for all of the world's ills (Kleinfeld 2006, 32; Carothers 2006, 3); it has become like a "rhetorical balloon" full of "warm air" that moves through the field as the wind blows (Krygier 2016a, 200).

All of these critiques (asking why the field continues to fail, examining the field's understandings of "law" and "rule of law") have contributed important insights, especially on the legal aspects of this field of development—but they tend to leave the field of development itself unexamined (see further Chalmers and Pahuja forthcoming; but compare Taylor 2016; Humphreys 2012; Mattei and Nader 2008). The "means" of achieving rule-of-law development are critiqued; the "ends" of rule-of-law development are critiqued; but there remains an implicit if not explicit affirmation of the development project.[3] The recent turns in the field to "indicators" and to "legal pluralism," which I consider in this Article, can be seen as just two of the most recent responses to these failures of rule-of-law development (see also Chalmers and Pahuja forthcoming). The problem is that such responses leave intact, and indeed reaffirm, a field that remains fundamentally racist; the problem, to return to the opening lines of the Article, is that a racialized imperialism remains "central, ordinary and enduring" in this field, while the acknowledgement of this in the literature remains not nearly ordinary enough.

When *Mythology* was published in 1992, its major contribution was an approach to "law as myth" that showed the constitutive relation between racialized imperialism and

2. For example, see Chalmers and Pahuja (forthcoming); Chalmers (2018); Brown (2017); Farrall and Charlesworth (2016); Gowder (2016); Cheesman (2015); Grenfell (2013); Massoud (2013); Humphreys (2012); Kleinfeld (2012); Linnan (2012); Rajah (2012); Zürn, Nollkaemper and Peerenboom (2012); Bergling, Ederlöf, and Taylor (2009); Bowden, Charlesworth and Farrall (2009); Hurwitz and Huang (2008); Palombella and Walker (2008); Trebilcock and Daniels (2008); Carothers (2006); Stromseth, Wippman, and Brooks (2006); Trubek and Santos (2006); Krygier, Czarnota, and Sadurski (2005); Jensen and Heller (2003); Hatchard and Perry-Kessaris (2003); and more generally the *Hague Journal on the Rule of Law*.

3. On development as a "project," see Pahuja (2011); Hodge (2015); Hodge (2016).

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modern law. As Lawrence Douglas and Austin Sarat wrote in their 1994 review, *Mythology* demonstrates that "[r]acialisation cannot be dismissed as a contingent, admittedly unfortunate, feature or by-product of modern Western thought and law; it is woven into the very fabric of these discourses. It is, in fact, what enabled and defined them" (Douglas and Sarat 1994, 535). This was a hugely significant achievement. At the time, in the 1990s, critical legal theory, with its focus on "law as ideology" (framed by Marxian theory), or else "law as rhetoric" (framed by Critical Legal Studies), had no satisfactory account of this relation between colonialism and law (Douglas and Sarat 1994, 526–30).[4] While *Mythology* addressed this gap, by reorienting critical legal theory to make it attentive to the constitutive relation between racialized imperialism and law, the book also opened up new empirical possibilities for studying law in this way.

In contrast to the two main critical legal approaches in the 1990s ("law as ideology" and "law as rhetoric"), which both focused narrowly on official state institutions and their texts, Fitzpatrick, perhaps under the influence of his sociological training as well as his time living and working in Papua New Guinea, understood law as having a life outside official state institutions and texts, in social interactions, practices, rituals, and so on. By taking this more expansive, or "capacious" view of law, *Mythology* was able to, in the words of Douglas and Sarat, "bridg[e] the gap between critical jurisprudence and the empirical study of legal institutions," holding out "the promise of a broader based critical examination of law and of an expanded scope for jurisprudential inquiry" (Douglas and Sarat 1994, 529–30). With the major advances that have been made in the past twenty-five years in sociolegal studies,[5] it is now possible to examine "law as myth" in ways that were not possible when *Mythology* was first published. This is the other major contribution of Fitzpatrick's book for scholars working in this field today: an approach to law as myth that is ripe for empirical research, not only to expose the enduring operation of the mythology of modern law, but much more hopefully, to accord recognition to the mythologies that are able to flourish in a time of decolonization.

For the field of rule-of-law development, *Mythology* thus offers a way of understanding theoretically, and analyzing empirically, its mythological constitution. It offers a way of understanding and analyzing the work that the field is doing even as it "fails" to achieve its purported goals; it offers a way of understanding and analyzing how the apparent omnicompetence of "the rule of law" is not a sign of its meaninglessness, its vacuity or quackery, but rather of its very mythological potency. It offers a way of understanding and analyzing how both the scientific knowledge of "indicators" and cultural knowledge of "legal pluralism" can, and have, become part of this mythology. The aim of this Article is to show this: to show how the mythology of modern law endures—centrally, ordinarily—in the field of international rule-of-law development, in order to show the racialized imperialism that constitutes it as a field.

4. The question of why "law as mythology" and not "law as ideology" was also raised in reviews by Goldberg (1995, 543–44); Kerruish (1994, 264–65); Moynihan (1993, 193); and Paliwala (1994, 316).

5. The rise of New Legal Realism since the 1990s is one example of this; see, e.g., Law & Social Inquiry (2006); Mertz, Macaulay, and Mitchell (2016); Klug and Merry (2016). On the possibilities of sociolegal studies today, see also Davies (2017).

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To do that, Part I of the Article reconfigures *Mythology* in order to deploy it in the remaining parts of the Article. The aim in this first part is to keep as close to the original text as possible, in keeping with the genre of mythology and the practice of mythmaking. The result is unfortunately partial and schematic, not unlike what you would expect from pulling threads out of an intricately woven tapestry. Nonetheless, by drawing out these threads in Part I, they might be rewoven through the remaining parts of the Article. The first of these (Part II) introduces the argument about the mythology of international rule-of-law promotion through analysis of the World Justice Project's Rule of Law Index.® Part III then analyzes the United Nations' work to provide rule-of-law assistance to nation-states. Part IV repeats the analysis one final time through a brief reading of the World Bank's *World Development Report 2017* on "Governance and the Law." In each instance, the analysis shows how the mythology of modern law, in its racialized imperial form, is integral to the work that is being done to promote "the rule of law" around the world. One especially concerning consequence of this is the denial of "local" law by a rule of law that obtains its authority by purporting to be responsive to "legal pluralism." Instead of being responsive to local law, rule-of-law development can be seen to localize "modern law," particularly in the form of international human rights law, through the mediating concept of the "nation." This concept of the nation, as I elaborate in Part III, works to simultaneously represent the local while constituting the international, enabling the excision of the troubling plurality of laws encountered on the ground, while also enabling the universalization of modern (international) law as local (national) law. While the World Bank, the World Justice Project, and the UN agencies that are providing rule-of-law assistance by no means cover the field, as I discuss in the conclusion, the analysis nonetheless points beyond these organizations to a problem with the field as a whole—as well as to the mythological possibilities of decolonization.

THE MYTHOLOGY OF MODERN LAW

Before I get to the mythology of international rule-of-law promotion, however, first *The Mythology of Modern Law*. Beginning in a similar vein as Theodor Adorno and Max Horkheimer's *Dialectic of Enlightenment*, which sought to show the dialectical relation between myth and reason (that "myth is already enlightenment, and enlightenment reverts to mythology") (Adorno and Horkheimer 2002, xviii), Fitzpatrick's book sets out to show how myth remains "vibrantly operative" in a modernity that is defined by its opposition to mythology (Fitzpatrick 1992, ix). That is, unlike the operation of myth for "non-moderns," for whom mythology might be embraced as a positive aspect of their social identity, Fitzpatrick shows how "modernity" takes its identity in opposition to myth. Mythological, to put it sharply, is what modernity resolutely is not. But this gives rise to a puzzle. If myth remains "vibrantly operative in modernity," then the "obvious conundrum" is "how this presence of myth can be reconciled with its denial" (Fitzpatrick 1992, ix). "The answer," Fitzpatrick shows, "is that the denial is the myth" (Fitzpatrick 1992, ix). The denial is what makes "modernity" coherent: to identify modernity with mythology, as a positive aspect of it, would be to contradict modernity's very being (as the ultimate overcoming of the mythological); and so, to

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secure modernity's coherence, any contradictory sign of myth within it is obliviated.[6] In this way, by denying mythology any constitutive role, the identity of modernity as being opposed to mythology can remain intact. The denial thereby provides the grounds for moderns to continue their work of Enlightenment even while Enlightenment reverts to myth, which is also precisely the function of mythology: to resolve contradictions in a given cosmology that, if left unresolved, would leave it incoherent as a way of understanding and being in the world (see Fitzpatrick 1992, 24–25).

Of course, Fitzpatrick's book is not concerned with the mythology of modernity in general; its very particular concern is that of "modern law." Chapter 1 sets out Fitzpatrick's "suspiciously simple argument" about modern law, which *Mythology* then pursues through the remaining chapters, that is: "law as a unified entity can only be reconciled with its contradictory existences if we see it as myth" (Fitzpatrick 1992, 1). Modern law's "contradictory existences" follow from its simultaneous identities as "autonomous doctrine" and as "dependent on society" (Fitzpatrick 1992, 3). As an "autonomous" phenomenon, law in modernity is held to be separate from and to govern over its subjects (which confirms it as a "unified entity"), while as a "social" phenomenon law is also recognized as "contingent" or "dependent" upon those same subjects for its meaning and effect (which in turn contradicts the concept of law as an "entity" in itself, let alone a unified one) (Fitzpatrick 1992, x). So modern law has these "contradictory existences"—and yet, as Fitzpatrick shows, it somehow maintains a "distinct identity" that ultimately transcends its social contingency (Fitzpatrick 1992, 9, ch. 6). Despite the recognition that modern law "changes and is historically responsive," it is nonetheless imbued with the qualities of "stability and order" (Fitzpatrick 1992, x); despite being the "expression of a popular spirit," modern law is a "sovereign imperative" (Fitzpatrick 1992, x); despite being intrinsically plural, modern law remains "distinct, unified and internally coherent" (Fitzpatrick 1992, 3, 5).

What enables this contradictory concept of law to cohere? The answer is myth. The mythology of modern law is, like that of modernity more generally, in the form of a denial. Modern law's "transcendent qualities," highlighted in the previous paragraph (its autonomy, unity, coherence, and so on), cannot be a positive aspect of its concept, for that would contradict its claim to be modern, so instead they take *negative* form. Modern law thus emerges "as universal in opposition to the particular, as unified in opposition to the diverse, as omnicompetent in contrast to the incompetent, and as controlling of what has to be controlled" (Fitzpatrick 1992, 9–10). Modern law as such has its perfection in the final overcoming of its "contradictory existences," traces of which can be seen to remain only because modernity is a constant "process of becoming" and not an "achieved state" (Fitzpatrick 1992, 28, 51). The contradictions in this concept of law thereby only confirm the urgency of the project of modernity as an ongoing struggle against a premodernity that lingers like an ugly stain on the world.

That modern law coheres in myth is not the critical issue, however. As emphasized already, Fitzpatrick's concern is not that law in modernity has a mythological character as such; his concern is that this particular mythology is *essentially* racist, having been forged and sustained in the experience of European colonialism (Fitzpatrick 1992, xii).

6. "Oblivion," Fitzpatrick notes, "extend[ing] Nietzsche's conception somewhat," "is a constructive forgetting which serves to constitute what is remembered, what is real and effective" (Fitzpatrick 1992, x).

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As a phenomenon with "negative origins," Occidental modern law is an overcoming of a certain otherness, or "certain 'others' who concentrate the qualities it opposes" (Fitzpatrick 1992, 10). Modern law is not arbitrary; it is not mere habit; it is not ritualistic; it is not brute force; it is not familial or tribal subservience; and it most certainly is not magical, spiritual, or mythological. Modern law is the overcoming of such premodern qualities. At the same time, this otherness, which gives modern law its identity and impetus, is the creation of modernity (Fitzpatrick 1992, 45). As Fitzpatrick writes, "[e]nlightenment creates the very monsters against which it so assiduously sets itself," such as the "monsters of race and nature" (Fitzpatrick 1992, 45). Lawlessness too: by creating an image of the world in which law is absent—a savage world "typified by lacks," riven by conflict, marked by disunity, in which power is exercised arbitrarily—modern law can emerge "in a negative exaltation" as the opposite, securing and unifying society through its rule (Fitzpatrick 1992, 10, 72–73, 85). Fitzpatrick gives an example from Eliade:

> a scene of "wild, uncultivated regions and the like" which in myths "are assimilated to chaos; they . . . participate in the undifferentiated, formless modality of precreation" (Eliade 1965: 9). Onto this scene enter original colonists: "Their enterprise was for them only the repetition of a primordial act: the transformation of chaos into cosmos by the divine act of Creation. By cultivating the desert soil, they in fact repeated the act of the gods, who organized chaos by giving it forms and norms." (Eliade cited in Fitzpatrick 1992, 19–20)

Such mythological origin stories provide both a grounds ("a foundation and ultimate reference") and a creative force for bringing about transformation (Fitzpatrick 1992, 18–19). In these sacred narratives, the origins are the "source of continuing creation or influence" (Fitzpatrick 1992, 16), "something to be departed from and negated" (Fitzpatrick 1992, 63). But as such, the negative qualities also remain integral to the resulting identity, as its ever-present potential (Fitzpatrick 1992, 131). The traces of modern law's "contradictory existences" are a reminder of what will benight humanity if the projects of Enlightenment are not advanced around the world. To be sure, modern law might be "impelled in a progression away from aberrant origins" (Fitzpatrick 1992, ix), but there is no progression without hard work—a creative force that "is often transferred in part to agents" who are capable of bringing about the transformation on behalf of others, agents "such as the first man made in the image of the god" (Fitzpatrick 1992, 16). This also helps to explain why progress is not uniform. The obvious empirical differences between societies, which might rationally raise doubts about this teleology of modernity, are accounted for in the notion of developmental "stages" through which a society must progress with hard work and guidance (Fitzpatrick 1992, 70–71, 107; see also Pahuja 2011, 186–87).

These "mythic dynamics," Fitzpatrick shows, were "massively confirmed in the experience of colonialism" (Fitzpatrick 1992, 70–71, 107). However, the experience of colonialism also gave rise to another paradox: "[a]n advanced Occidental law, wedded in its apotheosis to freedom and a certain equality, becomes thoroughly despotic when shipped to the rest of the world"—a paradox that is "compounded in the claim of a civilizing law to bring order through the constant infliction of violence" (Fitzpatrick

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1992, 107–08). The contradiction is resolved in the mythology of modern law through the negative equation of order, freedom, and equality (along with the other standards of "modernity") with what has to be overcome in these societies. "Order," "freedom," "equality": these become the very opposite of what is "discovered" to be the condition of the non-European world (chaotic, its inhabitants bound by superstition and ignorance, at the mercy of brute hierarchy and animal inequality).

As such, the violence inflicted upon these abject subjects is authorized as the unfortunate but necessary means for overcoming the multifarious forms of "anarchy, sorcery and terror" that define their existence as premodern (undeveloped) or not sufficiently modern (underdeveloped) (Fitzpatrick 1992, 108). In this way, modern law not only takes its identity in the encounters between the peoples of the "Old" and the "New" worlds, but it also becomes "a prime justification and instrument of imperialism," a means of raising the stagnating societies of the incipient world to the higher stages of civilization (Fitzpatrick 1992, 107). Likewise, a lack of adequate institutions, proper education, and professional agents who might guide the process of transformation all work to explain the unequal development of societies, and all authorize intervention—to build institutions, to educate people—by the god-like heroes of modernity. In short, modern law possesses the mythological qualities of an "Eternal Object" (Fitzpatrick 1992, 49–50). Such objects provide the universal "forms and norms" of achieved being,[7] as well as the means of "becoming." Put another way, they both express a universal "mode of being" in the world and provide a particular "guide" for realizing that state of existence (Fitzpatrick 1992, 20–21). And with that, modern law, like myth, might "venture forth to create the real, to endow it with 'forms and norms'" (Eliade cited in Fitzpatrick 1992, 42).

The main threads of the mythology of modern law are now laid out. There are *negative origins* that give identity and impetus through their overcoming. There is *progression*, a constant but not unmediated process of becoming, requiring god-like force and agents to initiate and sustain development. There is, as such, an *Eternal Object*: a representation of "being" toward which development is aimed, as well as "an exemplary model, a configuration of rules" and technologies to guide and facilitate the process and ensure progress (Fitzpatrick 1992, 42). At the same time there must be *subjectification* on the part of the developing subject, who through education and self-discipline becomes responsible for their own development. There are also a number of other significant characteristics of modern law only touched upon here: it is omnicompetent, "able to intervene at any point" (Fitzpatrick 1992, 57); it is equated with order and security; it is set against custom, which is "yet to be transformed" (Fitzpatrick 1992, 60); and it authorizes violent intervention.

One final thread remains to be drawn before I turn to show the operation of this mythology in the field of international rule-of-law development: the "mutuality of myths" (Fitzpatrick 1992, ch. 5). Fitzpatrick's argument here is that every myth, such as the mythology of modern law, is in itself but a fragment of a "mythical field" composed of a potentially infinite range of myths. This mythical field is "one of mutual relations of opposition and support, of autonomy and dependence" (Fitzpatrick 1992, 146). Thus,

7. Above all, the form of modern law, but also the other forms of so-called "civilization" (from the forms in which government and religion might take, to the forms of education, knowledge, the family, and so on); while the norms are those of post-Enlightenment Christian Europe.

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on one hand, each myth is "distinct" and "different" from the other myths in the field (hence the opposition and autonomy); while on the other hand, at crucial junctures, the different myths "compensate for the shortfall" in each other, especially when such shortfalls are exposed by a "resistant reality" (Fitzpatrick 1992, 146). In this way the contradictory existences of the individual myths are resolved by and in a field that works to maintain overall coherence. Fitzpatrick demonstrates this argument by considering the mutuality (opposition and support, autonomy and dependence) of "law" and "administration," and of "law" and "popular justice." In both instances, the existence of administrative discretion and of popular justice is seen to undermine "the rule of law," exposing a potentially fatal contradiction in its concept; and yet in both instances, Fitzpatrick shows, there is a "mythic mutuality" that sustains the myth of the rule of law (Fitzpatrick 1992, ch. 5).

Having drawn out these threads from *Mythology*, the purpose of the remaining parts of the Article is to show how they also hold together the field of international rule-of-law development—to show how this mythology is operative in both its identity as a "rule-of-law development" field as well as in its work to promote the rule of law around the world.

RULE OF LAW AROUND THE WORLD

Progression from Aberrant Origins

The map shown in Figure 1 was produced by the World Justice Project, an organization founded in 2006 as an initiative of the American Bar Association and now a self-described "independent, multidisciplinary organization working to advance the rule of law worldwide" (WJP 2018a). As its heading suggests, the map purports to show "rule of law around the world" based on an index that has been designed to measure, compare, and track the progress of states in establishing "the rule of law."[8] The premise for this Index® is summarized in the World Justice Project's 2016 annual report: "The rule of law provides the foundation for communities of peace, opportunity, and equity—underpinning development, accountable government, and respect for fundamental rights" (WJP 2016, 8, 202). Or more simply, as the World Justice Project put it in the first report on the Index®: the rule of law is the "foundation for thriving communities" (WJP 2008, 4).

If the rule of law is foundational of achieved society, then what sort of foundation is it? To grasp this—what the rule of law "is"—the World Justice Project invites us to imagine five scenarios from "everyday life" (WJP 2016, 14). *First*: "Imagine an investor seeking to commit resources abroad. She would probably think twice before investing in a country where corruption is rampant, property rights are ill-defined, and contracts are difficult to enforce." *Second*: "Consider the bridges, roads, or runways we traverse daily—or the offices and buildings in which we live, work, and play. What if building codes governing their design and safety were not enforced, or if government officials and

8. For other critiques of the Rule of Law Index®, see Rajah (2015); Urueña (2015). For a critique of the commodification of "rule of law," symbolized here by the registered trademark affixed to the index, see Taylor (2016).

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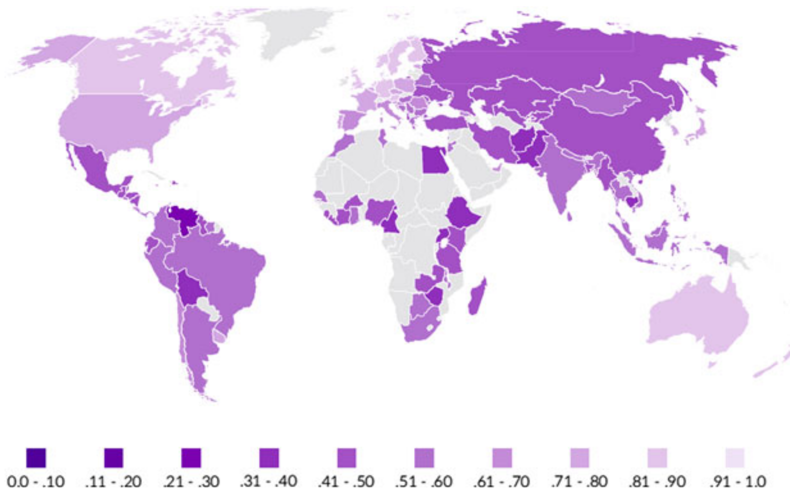

FIGURE 1.
"Rule of Law Around the World" (WJP 2016, 20)

contractors employed low-quality materials in order to pocket the surplus?" *Third*: "Consider the implications of pollution, wildlife poaching, and deforestation for public health, the economy, and the environment. What if a company was pouring harmful chemicals into a river in a highly populated area and the environmental inspector turned a blind eye in exchange for a bribe?" *Fourth*: "What if residents of a neighborhood were not informed of an upcoming construction project commissioned by the government that would cause disruptions to their community? Or what if they did not have the opportunity to present their objections to the relevant government authorities prior to the start of the construction project?" *And finally*: "Imagine an individual having a dispute with another party. What if the system to settle the dispute and obtain a remedy was largely inaccessible, unreliable, or corrupt?" *This*, then, is "the rule of law": opposed to corruption, poverty, disease, hunger, and danger. To achieve this, "effective rule of law"—to lay the foundation for a thriving community—is to overcome these conditions (see also WJP 2016, 8).

Where are these negative conditions found? As can be seen on the map, the answer is mostly, and most drastically, in non-Western states (the "Western" states being the lightened ones on the map, while the non-Western states are almost exclusively the darkened ones, or else the ones shrouded in a nebulous grey, the ones marked by a total absence of data). Although traces of these negative conditions are also found in Western states. That no state has ever achieved full realization of the rule of law, and that even the West is prone to going backward, is very much part of the story, confirming the urgency of this project of modernity. As the World Justice Project emphasizes:

> No society has ever attained—let alone sustained—a perfect realization of the rule of law. Every nation faces the perpetual challenge of building and renewing the structures, institutions, and norms that can support and sustain a rule of law culture. (WJP 2016, 17; see also WJP 2008, 4)

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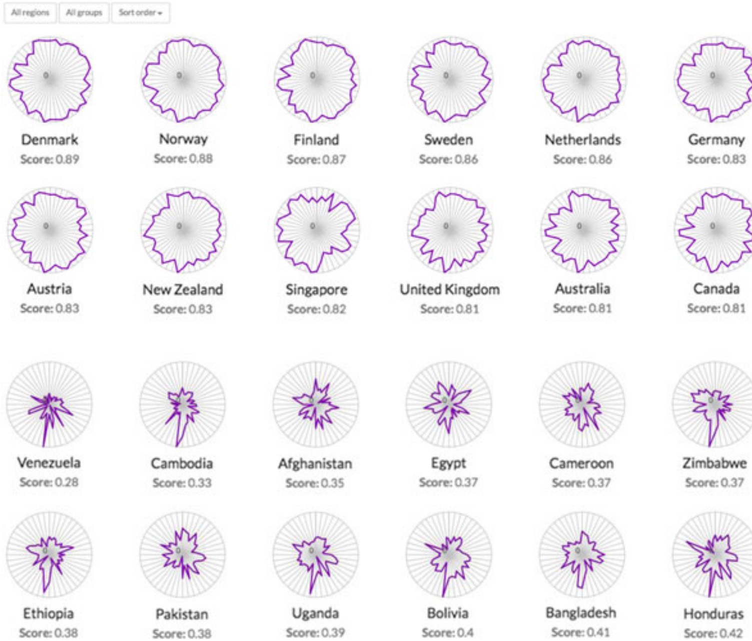

FIGURE 2.
Rule of Law Index® 2016 Country Profiles (WJP 2018b)

This "perpetual challenge," this ongoing process of becoming, is illustrated in the individual country profiles, or "portraits of the rule of law" (WJP 2016, 8),[9] some of which are shown in Figure 2. The "0" at the core of each circle in the profiles signifies complete absence of rule of law, while the outer limit signifies perfect rule of law. In 2016, no country was in either the top bracket or the bottom bracket (WJP 2016, 20), and according to the World Justice Project no state has ever been in either of these pole positions—although the promise of perfectibility is there, as is the risk of totally imploding. To help the world move in the right direction, one of the "features" of the Index® is that it tracks change over time: "[a]n arrow pointing up indicates a statistically significant improvement, while an arrow pointing down represents a statistically significant decline" (WJP 2016, 27). Movement thus occurs in one of two directions: ascending or descending (recalling that "modern myth" involves "the ascent from savagery") (Fitzpatrick 1992, 63).

So there are *negative origins*: the identity of the rule of law is arrived at through negation (we grasp "the rule of law" by imagining scenarios from "our" everyday life in which it is absent, scenarios that depict "our" world turned upside-down). And there is the possibility of *progression*: effective rule of law is achieved by overcoming the negative conditions—an ascension from anemic to fulsome nation-statehood that is measured and tracked, and thus enabled, by the Index®. At the same time, the aberrant

9. For a very different "portrait of the rule of law," see Chalmers (2018, 146–51).

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FIGURE 3.
"Hercules and the Hydra" (Pollaiuolo, ca 1475) and "Hercules Holding Up the Cosmos" (1550)

origins that give identity and impetus to this project are found to be concentrated in non-Western societies, creating a whole world of deficient societies in need of development.

But how exactly are these deficient societies the "creation" of this Index®? Are the deficiencies not *empirical*? The forty-four indicators that are used to create the "portraits" of the rule of law no doubt reflect an existing actuality to some extent. The surveys used to gather the data capture actual perceptions,[10] while the third-party data used to cross-check the survey findings (sourced for example from the World Bank) likewise have some empirical basis. But that is a moot point. The critical question is not whether this global instrument produces scientifically valid findings (WJP 2016, 17); the critical question is how the "findings" are given *meaning and effect*. While the conditions reflected in the Index® might be real, they are nonetheless the creatures of mythology to the extent that they are represented as deficiencies in the rule of law, a representation of reality that is authorized (authored and given authority) by its avowedly scientific methodology. Recall, "Enlightenment creates the very monsters against which it so assiduously sets itself" (Fitzpatrick 1992, 45), monsters which are projected onto real places and peoples. Now looking at these places and peoples, over which the scientifically grounded representational framework of the Rule of Law Index® has been laid, one sees a truly monstrous reality—which only confirms the universal truth of "the rule of law" as the opposite of this reality, and therefore the imperative of building it where it is absent and strengthening it where it is weak.

10. The Index® is based primarily on data collected using "household" and "expert" surveys. See WJP (2016, 17). For a critique of the methodology, see Taylor (2016). More generally see Merry, Davis, and Kingsbury (2015).

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Eternal Object

At the same time as the Index® creates this new *terra nullius* around the world, it also provides the world with a way up. The brilliance of the Index® is that, by offering a particular model of being (according to "the rule of law") that simultaneously transcends its particularity, it is able to provide a universal guide for carrying out the work of building and strengthening the rule of law worldwide. How does one construct such a model, which is sufficiently particular to serve as a guide, but also sufficiently general to serve as a guide in any society, no matter how different? The designers of the Index® recognized the problem. As they wrote in their first report:

> The design of the Index® began with the effort to formulate a set of principles that would constitute a working definition of the rule of law. Having reviewed the extensive literature on the subject, the project team was profoundly conscious of the many challenges such an effort entails. Among other things, it was recognized that for the principles to be broadly accepted, they must be culturally universal, avoiding Western, Anglo-American, or other biases. (WJP 2008, 6)

But just as the Index® must be "culturally universal," the designers recognized that it must also be "culturally competent" (WJP 2016, 17; WJP 2008, 4). That is, to be a "global instrument that looks at the rule of law comprehensively" (WJP 2016, 17), the Index® must be capable of being "applied in countries with vastly different social, cultural, economic and political systems" (WJP 2016; WJP 2008, 4). This means not only accounting for differences across state systems; the Index® also, and even more challengingly, "must take into account existing traditional and informal systems," "the variety" of which "is enormous" (WJP 2008, 23). In other words, the World Justice Project recognized that, in order for the Index® to provide a universal representation of the rule of law that can guide its development globally, the Index® would have to be capable of responding to an enormous variety of social contexts (satisfying the need for particularity), without becoming mired in the particularities of those contexts (satisfying the need for generality).

As discussed, one of the contributions of *Mythology* is to show how "contradictions cohere in myth" (Fitzpatrick 1992, x–xi). There is no shortage of contradictions in the field of international rule-of-law development, as I return to discuss in a moment, but perhaps the most important is the contradiction in the very concept of the "international," which maintains a free-floating universal quality while retaining a grounded connection to local realities. It does this through the concept of the "nation," which mediates between the "local" and the "universal" by purporting to represent the former in the creation of the latter (the nation, and by extension the international, is in consequence both "local" and "universal"). By simultaneously avoiding the detached conceit of a speculative idealism (a pure "universalism"), while also avoiding the grubby particularities of a determined parochialism (a pure "localism"), the concept of the international thereby satisfies that "double demand of modernity," as Fitzpatrick puts it: "the demand for assured position integrated with a responsiveness to all that is beyond position" (Fitzpatrick 2001, 2). Thus, to return to the problem of how the Rule of Law

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Index® can be both "culturally universal" and "culturally competent," the answer offered by the World Justice Project is that "the principles" on which the Index® is based have been "derived to the greatest extent possible from established international standards and norms" (WJP 2008, 6). In other words, by fusing both general and particular qualities in universal principles, the "international" makes the Index® coherent.

The operation of this resolution can be seen in a telling passage in the World Justice Project's 2016 report. The passage appears in a footnote that explains what is meant by legal "fairness." The general principle is set out in the first sentence:

> The laws can be fair only if they do not make arbitrary or irrational distinctions based on economic or social status—the latter defined to include race, color, ethnic or social origin, caste, nationality, alienage, religion, language, political opinion or affiliation, gender, marital status, sexual orientation or gender identity, age, and disability. (WJP 2016, 11n4; see also WJP 2008, 9)

The next two sentences then acknowledge a problem with this general principle:

> It must be acknowledged that for some societies, including some traditional societies, certain of these categories may be problematic. In addition, there may be differences both within and among such societies as to whether a given distinction is arbitrary or irrational. (WJP 2016, 11n4; see also WJP 2008, 9)

Here is that "double demand of modernity" (Fitzpatrick 2001, 2): for an assured position (a definitive principle with an inclusive list of categories) as well as for responsiveness to all that is beyond position (to what is not included within the limits of these categories, to what contradicts the concrete application of the principle). The fourth and final sentence in the footnote provides the resolution to the paradoxical demand:

> Despite these difficulties, it was determined that only an inclusive list would accord full respect to the principles of equality and non-discrimination embodied in the Universal Declaration of Human Rights and emerging norms of international law. (WJP 2016, 11n4; see also WJP 2008, 9)

And with that invocation of the "international," the problem becomes mute. Or almost mute. While grounding the concept of the rule of law on "universal human rights" and other "international norms" is supposed to resolve the contradiction and make the Index® both culturally universal and culturally competent, a shortfall remains exposed by a resistant reality. As noted above, for the Index® to be "culturally competent" it must be capable of being "applied in countries with vastly different social, cultural, economic and political systems" (WJP 2016, 17; WJP 2008, 4), which means taking into account not only differences across state systems but also an "enormous variety" of "traditional and informal systems" (WJP 2008, 23). While the differences across nation-states can be made commensurate as mere variations of the universal form

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of the nation-state,[11] it is not so easy to absorb these "traditional and informal systems" within the model. Indeed, it would seem that their radical difference from the universal form makes them incommensurable, forcing the World Justice Project to drop "informal justice" from its "aggregated scores and rankings" in 2016 (WJP 2016, 8, 12, 15). The reason is found in another footnote:

> WJP has devoted significant effort to collecting data on informal justice in a dozen countries. Nonetheless, the complexities of these systems and the difficulties of measuring their fairness and effectiveness in a manner that is both systematic and comparable across countries, make assessments extraordinarily challenging. Although the WJP has collected data on this dimension, they are not included in the aggregated scores and rankings. (WJP 2016, 12n10 and 15n1)

Thus the reality of "informal justice," the particularities of which resist assimilation into this universal model of "the rule of law," and therefore remain as a sign of the contradiction that continues to mar it, is effectively cut from the Index®.

Having removed that miring particularity from the model (and along with it, the experience of law, and indeed of the rule of law, for the vast majority of the world's peoples), the "result" is no longer a troubling paradox but, true to the World Justice Project's original ambition, "a global definition" of the rule of law that is "deeply rooted in universal principles and is generally applicable across countries, cultural backgrounds, professional disciplines, and levels of economic development" (WJP 2008, 23). While "informal justice" is not essential to this model, "fundamental rights" as enshrined in international law are of course essential ("the Index® recognizes that a system of positive law that fails to respect core human rights guaranteed under international law is at best 'rule by law' and does not deserve to be called a rule of law system") (WJP 2016, 9, 11). So too is "security" and "order" (which are also "defining aspects of any rule of law society") (WJP 2016, 11).

In short, the result is an Eternal Object: a Rule of Law Index® that expresses a universal mode of being (according to "the rule of law") while providing a guide (an exemplary model, a configuration of rules) for realizing it in societies worldwide. And with *that*, international rule-of-law promoters might "venture forth to create the real"—to endow the world with their universal "forms and norms" (Eliade cited in Fitzpatrick 1992, 42).

UN RULE-OF-LAW ASSISTANCE

Progression from Aberrant Origins

It should not surprise readers of *The Mythology of Modern Law* that the United Nations' work to realize the rule of law in countries around the world has a beginning in the Congo, and that this beginning is defined by an absence:

11. On how international law creates and sustains this "nation-state" formation, see Eslava and Pahuja (forthcoming).

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> *Noting with deep regret and concern* the systematic violations of human rights and fundamental freedoms and the general absence of the rule of law in the Congo … . (UN 1961, preambular para. 2, italics in original)

Written in 1961, this sentence is the first mention of "the rule of law" in a UN Security Council Resolution. By 2018, most Security Council-mandated peace operations include a "rule of law" component (see Farrall and Charlesworth 2016), while most UN rule-of-law assistance is directed at what the organization calls "conflict societies" and "post-conflict societies" (see UN 2018), which, in all major UN documents on the subject, are likewise defined by absence. To cite one example from the UN Secretary-General's definitional 2004 report on "the rule of law and transitional justice in conflict and post-conflict societies":

> helping war-torn societies re-establish the rule of law and come to terms with large-scale past abuse, all within a context marked by devastated institutions, exhausted resources, diminished security and a traumatized and divided population, is a daunting, often overwhelming, task. It requires attention to myriad deficits, among which are a lack of political will for reform, a lack of institutional independence within the justice sector, a lack of domestic technical capacity, a lack of material and financial resources, a lack of public confidence in Government, a lack of official respect for human rights and, more generally, a lack of peace and security. (UN 2004a, para. 3)

Or, as the President of the Security Council reminded the Council in introducing its February 2014 open debate on "the promotion and strengthening of the rule of law in the maintenance of international peace and security" (citing Dwight Eisenhower's much more succinct formulation): "The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law." (The President then proceeded to recall "events in the Central African Republic and Syria" as a "shocking example of what happens when there is no rule of law" and to "highlight the critical importance of restoring the rule of law" (UN 2014a, 3).)

"Absences"; "deficits" (UN 2004a, para. 3; UN 2011c, paras. 6, 8, 32; UNDP 2015, 28); "lacks" (UN 2004a, para. 28; UN 2011b, para. 40; UNDP 2008, 31; UNDP 2015, 28, 32); "vacuums" (UN 2004a, paras. 27, 28); "lacunae" (UN 2004a, para. 30); "failures" (UN 2009b, para. 54; UN 2011c, para. 44): in describing "conflict and post-conflict societies," the UN could be describing that proverbial state of nature that is likewise "typified by lacks" (Fitzpatrick 1992, 73). In the mythology of modern law, such states of nature, being "completely wild and lawless" (Fitzpatrick 1992, 79), provide the aberrant origins that give identity and impetus to modern law. The same can be seen here in the mythology of international rule-of-law promotion, the aim of which is "filling a rule of law vacuum" (UN 2004a, paras. 27, 28). And yet what is remarkable about these modern states of nature is that they are *relapsed* states rather than an absolute starting point. As the President of the Security Council stated in his address quoted above, this is about "restoring the rule of law" (UN 2014a, 3). The UN consistently describes its work in this way, as assisting with "the progressive restoration of the

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rule of law" (UN 2014b, para. 23). The premise for this restoration work is expressed by the United Nations Development Programme (UNDP) in its description of its development approach:

> In the final analysis, the development approach is steered towards the full respect for human rights as a means of achieving the rule of law. But, as a development agency, the universality of human rights is approached *from within a society*, rather than from outside. It assumes that every society possesses deeply rooted ethics and social codes of conduct, which, once, contributed to the articulation of universal human rights standards. The search and revival of these norms, therefore, constitutes one of the most single important—and yet most complex—factors in strengthening the rule of law in conflict- and post-conflict environments. (UNDP 2008, 33, italics in original)

It is hard not to read in these lines a professionalized rendition of the nineteenth-century justification of colonialism, such as this one, provided by the American Colonization Society in explanation of its project to develop Africa through the creation of Liberia:

> When she [Liberia] shall have done the work, Sir, it will be seen that the new world will have sent back to the old, the most sublime empire of reason and law, ever known to mankind. She will have planted in a land, once illustrious, but long darkened by superstition and despotism, the institutions of civil and religious liberty (ACS 1833, xvii).

For the UNDP, as for the American Colonization Society, "once," sometime in the past, every society, including on that "long darkened" continent, possessed the universal norms that authorize an intervention to restore the rule of law; the task now is only to revive that normative basis in societies that have since fallen down.

Thus, in truly "speculative Hegelian" fashion, a universal form precedes its particular realization at the same time as it is held to have emerged from the particular (Žižek 2008, 29). And yet, despite the apparent transcendentalism at work here—despite the fact that what is said to come from "within" appears to come from "without"—the keyword that authorizes the UNDP's development approach, as it did the civilizing missions of earlier centuries, is *immanence* and not transcendence. As in the mythology of modern law, this is an ascent from savagery, not a descent from gods (Fitzpatrick 1992, 63). The UN, like other international development agencies, is supposed to assist the governments of nation-states to achieve their own national priorities, not impose a foreign agenda (see the Paris Declaration on Aid Effectiveness and the Accra Agenda for Action). That is why it is so important for the UNDP to emphasize that "the universality is approached *from within a society*, rather than from outside" (UNDP 2008, 33, italics in original). If the universal forms and norms that are essential to the rule of law are immanent to a society, then that society is the author and authority of its own development—which in turn grants the UN authority to intervene on their behalf when they are supposedly no longer capable of realizing their own authorship or of acting on their own authority.

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Again, we have origins, with "the rule of law" defined negatively and the task of restoring the rule of law defined as overcoming these negative conditions (hence it obtains its identity and impetus through negation). And again the premise is that this rule of law is the foundation of all societies—"the basis on which just and fair societies are built" (to quote the UN General Assembly's 2012 Declaration on the rule of law) (UN 2012d, preambular para. 1). At the same time, the rule of law is said to be a force for transformation, "an engine for progress" (UN 2015a, para. 29), "critical to lifting societies out of cycles of conflict and fragility" (UN 2012c, para. 49); while rule-of-law assistance is said to be "key to facilitating complex processes of social, political and institutional transformation that break cycles of violence and activate economic recovery" (UN 2011c, para. 8; to help support this claim, the Secretary-General refers to the findings in the World Bank's 2011 World Development Report). More expansively, the rule of law is said to be

> essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law. (UN 2012d, para. 7)

Add to this list the capacity to "generate investment" (UN 2012d, para. 8; UN 2005, para. 25; UN 2012b, paras. 26–27; UN 2013b, para. 70), to "facilitate entrepreneurship" (UN 2012b, para. 8; UN 2012b, paras. 26–27; UN 2013b, para. 70), to foster "democracy" (UN 2017, preambular para. 3; UN 2016b, preambular para. 3; UN 2015b, preambular para. 3; UN 2014c, preambular para. 3; UN 2013c, preambular para. 3; UN 2013a, preambular para. 3; UN 2012d, para. 5; UN 2012a, preambular para. 3; UN 2011a, preambular para. 3; UN 2010a, preambular para. 3; UN 2009a, preambular para. 3; UN 2008a, preambular para. 3; UN 2006; UN 2005, para. 119; see also UN 2008c, 2), while addressing "climate change" (UN 2009b, para. 2; UN 2015a, para. 29), "financial crises" (UN 2015a, para. 29), "forced displacement" (UN 2009b, para. 2; UN 2015a, para. 29), and "terrorism" (UN 2009b, para. 2; UN 2015a, paras. 29, 40). The list goes on, with the rule of law "linked to virtually all areas of United Nations engagement" (UN 2009b, para. 2; UN 2015a, para. 40; see also UN 2017, para. 19; UN 2016b, para. 16; UN 2015b, para. 14; UN 2014c, para. 10; UN 2013c, para. 9; UN 2013a, para. 9; UN 2012a, para. 7; UN 2011a, para. 5; UN 2010a, para. 4; UN 2009a, para. 4), exhibiting that mythological quality of omnicompetence. Indeed, as every article on international rule-of-law promotion seems to note at some point in its analysis, this "rule of law" appears to be capable of anything. Or as Martin Krygier describes this "predictable adornment of every contemporary article on the subject: The rule of law now means so many different things to so many different people … that it is hard to say just what this rhetorical balloon is full of, or indeed where it might float next" (Krygier 2016a, 200). The omnicompetence of the rule of law could be easily lampooned as vacuous (indicating a concept full of "warm air") (Krygier 2016a, 200); or else, to recite another cliché, it could be just as easily derided as a "magical elixir," a modern-day snake-oil, "touted" as providing a "panacea" for all of the world's ills (Kleinfeld 2006, 32; Carothers 2006, 3). But if we are to interpret international rule-of-law promotion mythologically, then these claims to omnicompetence, rather

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than presenting evidence of vacuity or quackery, indicate the concept's very potent mythological character.

Eternal Object

This ability "to intervene at any point" (if not "at every point") (Fitzpatrick 1992, 57) clearly makes the task of building and strengthening the rule of law a big one. God-like, even. As the UNDP concedes:

> In the final analysis, the Herculean task of re-establishing the rule of law requires a comprehensive definition that addresses interrelated justice and security institutions and good governance with due attention to political, economic, social and, even, psychological factors. (UNDP 2008, 30)

Invoking that "mortal god,"[12] Hercules, is necessary not only because of the long list of labors; such a mythological figure, at once human and deity, is needed because international rule-of-law development is grounded on a fundamental contradiction. The problem can be seen in the passage just quoted. UN rule-of-law assistance must be based on a comprehensive definition of the rule of law that advances "universal" principles *and* it must be responsive to the particularities of "local" contexts. Like Hercules, the UN must get its hands dirty in the field, tackling the multi-headed beast of underdevelopment, *and* it must uphold the global order (see Figure 3).

This is the problem discussed above in relation to the Rule of Law Index®.[13] On one hand the UN is responsible for international law, and on the other hand it must be responsive to the needs and interests of the local constituencies to whom the organization provides assistance. To quote the UN Secretary-General's 2012 report on "delivering justice": UN rule-of-law assistance "must be in line with the internationally agreed normative framework, but must also be led by national aspirations and anchored in the national context" (UN 2012b, para. 5). Or again, as the Secretary-General put it in his definitional 2004 report on the rule of law: "Security Council resolutions and mandates" should "respect, incorporate by reference and apply international standards" but at the same time "avoid the imposition of externally imposed models" in "determining the course" for "restoration of the rule of law" (UN 2004a, para. 64).

How does the UN reconcile this double demand? How does it uphold the "universal" *and* remain responsive to the "local" in the provision of rule-of-law assistance? The answer is in *Mythology*: "Law's claims to universal, objective, impersonal (and so on) rule are made palpable and plausible through the mythic mediation of the nation" (Fitzpatrick 1992, 114). As in the World Justice Project's Rule of Law Index®, the nation-state mediates between the paradoxical demands by representing the "local" in the creation of the "universal." Thus, it is possible for the UN to provide rule-of-law assistance to a nation-state in a way that meets both demands because the nation-state simultaneously represents the "local" and constitutes the "international" (Fitzpatrick 1992, 115–17).

12. Compare the description of Hobbes' Leviathan as a "mortal god" in Fitzpatrick (1992, 54, 73–75).
13. See pages 16–18 above.

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But if the nation, and national law, comes to represent the local, and local law, what then becomes of the "other" forms of law encountered on the ground that are not identical with the national law? The answer is that these forms of law (sometimes called "custom," sometimes "informal justice," sometimes "traditional law") present a "resistant reality" that exposes what is arguably the most fatal shortfall in the mythology of international rule-of-law promotion.

Mutuality of Myths

The World Justice Project dealt with this shortfall by effectively cutting these forms of law (under the name "informal justice") from their model of the rule of law.[14] The UN, no longer able to do this, instead draws upon three further myths to ensure coherence. One is "democracy," which supports international rule-of-law development by giving greater credence to the claim that the nation-state represents the local in the constitution of the international. Now most, if not all, international interventions to build and strengthen the rule of law include components to build and strengthen democracy (through, for example, supporting elections) (see also Pahuja 2011, 183–84). The second is "human rights," which again mediates between the local and the international by providing universal principles that are supposedly grounded in all humans. It is beyond this Article to examine the mutuality of these particular myths any further, but such an analysis might begin by considering how, since the World Summit Outcome in 2005, the UN General Assembly has included a ritual "reaffirmation" in its annual Declaration on the rule of law, that "human rights, the rule of law and democracy are interlinked and mutually reinforcing" (UN 2017, preambular para. 3; UN 2016b, preambular para. 3; UN 2015b, preambular para. 3; UN 2014c, preambular para. 3; UN 2013c, preambular para. 3; UN 2013a, preambular para. 3; UN 2012a, preambular para. 3; UN 2011a, preambular para. 3; UN 2010a, preambular para. 3; UN 2009a, preambular para. 3; UN 2008a, preambular para. 3; UN 2006; UN 2005, para. 119).

The third mutually supporting myth, and the one that concerns me here, is what Fitzpatrick analyzed in terms of "popular justice." The argument, in short, is that by characterizing the resistant forms of law as forms of alternative, popularly accessible justice, their opposition to national (and thus international) law becomes integral to "the rule of law" that is being promoted.[15] Thus, to begin with, international interveners can no longer ignore the fact that "80 per cent" of legal disputes around the world are "handled by traditional or customary legal systems," to recite "a figure widely cited (if drawn from God knows where)" (Krygier 2016b, 18). This is the resistant reality of "legal pluralism," which clearly poses a problem for "the rule of law."[16] Now if this legal pluralism can no longer be ignored (if "due regard must be given to indigenous and informal traditions for administering justice or settling disputes"), then these "other" forms of law must be brought into a relation of mutual support with national and

14. See pages 19–21 above.

15. As discussed at page 12 above, this draws on Fitzpatrick's analysis in Chapter 5 of *Mythology* of the mythic mutuality of "popular justice" and "the rule of law."

16. On the problematic relation between "legal pluralism" and "rule of law," see Chalmers (2017).

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international law ("to help them [the other forms of law] to continue their often vital role and to do so in conformity with both international standards and local tradition") (UN 2004a, para. 36). How is this mutuality achieved? On one hand, these laws are found to be "flexible and open to change," ensuring their progressive assimilation, or "harmonization" as it is often called, with national and international law (a finding that also "moves the UN closer to a coherent approach to rule of law assistance in the context of legal pluralism") (UN 2010b, para. 69); while on the other hand, and in the meantime, they are found to provide an essential additional service, a form of "alternative dispute resolution" that is cheap, efficient, timely, accessible, and effective (UN 2008b, para. 39; UN 2011c, para. 39; UN 2013b, para. 57). In other words, and to be clear, while "these systems can play an important part in the delivery of justice services" as they are, work must be done to ensure that they are brought "in line with international norms and standards" and under the rule of (national) law (UN 2012b, para. 23; see also Pahuja 2011, 197). As Sundhya Pahuja puts it: "these local means of ensuring social order need to be preserved because they will ultimately ensure the success of the 'legal' order that must eventually come" (Pahuja 2011, 208).

This resolution to the problem involves a truly remarkable reversal of the European colonial judgement that "traditional law" is static and unchanging and therefore outmoded in modernity. Now such law is found to be especially "flexible and open to change" and therefore perfectly capable of developing into "modern law"—thus turning the dynamism of these forms of law, the denial of which in colonialism had been used to authorize their transformation, into the very thing that authorizes their postcolonial transformation. And in doing so, to recall Fitzpatrick, "law as a unified entity" is "reconciled with its contradictory existences" (Fitzpatrick 1992, 1). That is, despite the recognition that law "changes and is historically responsive," its variations become mere moments in a teleological progression toward the universal form of law; despite being the "expression of a popular spirit," law becomes exclusively the "sovereign imperative" of the nation-state; despite being intrinsically plural, law becomes "distinct, unified and internally coherent" (Fitzpatrick 1992, 3, 5). In "mythic style" the law that is to rule thus transcends its social contingency, its contradictory existences resolved by and in a field that works to maintain overall coherence (Fitzpatrick 1992, 49–50).

Subjectification

There is one final thread to all of this: subjectification. For the ultimate aim of rule-of-law assistance is for every society to become responsible for, and capable of sustaining, their own development. As the UN Secretary-General acknowledged in his 2004 report on the rule of law: "Ultimately, no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable."

> Most importantly, our programmes must identify, support and empower domestic reform constituencies. Thus, peace operations must better assist national stakeholders to develop their own reform vision, their own agenda, their own approaches to transitional justice and their own national plans and

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> projects. The most important role we can play is to facilitate the processes. (UN 2004a, para. 17)

Because the nation-state is both the inside and the outside—embodying both the particular and the general, the local and the international—the UN is not seen to impose "from the outside" when it provides such rule-of-law assistance; it only facilitates processes that are internal to a nation-state's "own" development.[17] The same points are repeated in the Secretary-General's Guidance Note on providing rule-of-law assistance. Thus, the fifth "guiding principle" of "UN rule of law assistance" is to "ensure national ownership," because, again, "no rule of law programme can be successful in the long term if imposed from the outside" (UN 2008c, 3). Here "meaningful ownership requires the legal empowerment of all segments of society" (UN 2008c, 3), which leads to the sixth "guiding principle" of UN rule-of-law assistance: to "support and empower national reform constituencies" (UN 2008c, 4). Again, "the aim" here is "to help national stakeholders to develop their own vision, agenda, approaches to reform" from within (UN 2008c, 4; UN 2004a, para. 18).

To do this ("ensure national ownership" and "support and empower national reform constituencies" (UN 2008c, 3–4)), rule-of-law promoters use an array of programs aimed at "access and awareness" (see Sannerholm et al. 2012, 26–33), involving projects to enhance "access to justice" (UN 2008b, para. 11; UN 2011c, paras. 34, 37, 42, 46; UN 2011b, para. 38; UN 2012c, paras. 44, 45; UN 2013b, para. 51; UN 2015a, Annex I, para. 10; UN 2016a, para. 60; UN 2015b, para. 18; UN 2016b, para. 20), increase "legal empowerment" (UN 2004a, para. 17; UN 2008b, paras. 10, 19, 38, 77(c); UN 2009b, paras. 42, 47; UN 2011c, para. 44; UN 2012c, para. 43; UNDP 2008, 5), and facilitate "civic education" and "public awareness" more generally (UN 2004a, paras. 17, 24, 35; UN 2008b, para. 11; UN 2011c, paras. 37, 44; UN 2011b, paras. 27, 37; UN 2012c, para. 44; UN 2008c, 4). For example, the UN might "organize workshops and public education seminars to help sensitize the public on the new and enhanced role of the judiciary in nation-building and on the importance of the rule of law" (UN 2004b, para. 24), or broadcast radio plays that model how proper legal subjects conduct themselves in relation to each other and in relation to the state (as it has done in Liberia (on file with author)). Thus, while all societies are responsible for their own development, international actors like the UN can—and indeed have a responsibility to—teach them how to embark upon and accelerate this historical process.[18] As Pahuja writes (extending Fitzpatrick), such actors, who possess the knowledge and experience of the universal form, must take up the "pedagogical burden" of development (Pahuja 2011, 189).[19] And while all of this is of course "voluntary" and not imposed,[20] there is also no doubt that it is part of every society's destiny and therefore unavoidable. For just as the rule of law is foundational ("the basis on which just

17. On the mythic mutuality of "development" and "the rule of law," see UN (2012d, para. 7); UN (2013b, para. 70); and UN (2015a, para. 6 and Annex, paras. 29–31). See also Pahuja (2007).

18. On the acceleration of history as part of "development," see Pahuja (2011, 62, 117, 186–188).

19. For another example of a colonial project that sought to create proper modern (legal) subjects by bringing about change "from within," see Eslava (2018).

20. This is reaffirmed by the "voluntary pledges to strengthen the rule of law" made by UN member-states. See UN (2015a, Annex, para. 12); UN (2015b, para. 2); UN (2016b, para. 2).

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and fair societies are built" (UN 2012d, preambular para. 1)), so too "adherence to the rule of law requires a culture of legality and legal empowerment that addresses exclusion so that all persons know and can seek protection of their rights and entitlements" (UN 2012c, para. 43). Thus, the immanent nature of the rule of law—its universality derived from all societies—authorizes the UN's work to assist societies to overcome their aberrant cultural conditions—to revive their once-vibrant but now-atrophied culture of rule of law.

WORLD DEVELOPMENT

Repetition weaves mythology. And so one final look at the field of international rule-of-law development, as seen this time in the World Bank's *World Development Report 2017*, themed "Governance and the Law."

At the core of this World Development Report (WDR) lies a concept of the rule of law that provides an essential means for, while also marking the achievement of, development.[21] Thus on one hand, the Bank is unequivocal that, "by its nature, law is a device," "a powerful instrument"; that, "[f]ollowing Hart's classic legal theory, laws induce particular behaviors of individuals and firms through coercive power, coordination power, and legitimating power"—and that this provides a crucial technology for development (WB 2017, 13). As the WDR confirms: "Ultimately, the *rule of law*—the impersonal and systematic application of known rules to government actors and citizens alike—is needed for a country to realize its full social and economic potential" (WB 2017, 14, italics in original). If we have any lingering doubts about the role of this naturalized positive law for human development, the Bank assures us with an origin story: "Long before the Code of Hammurabi set the law for ancient Mesopotamia, people subjected themselves—sometimes by cooperative agreement, sometimes under threat of force—to rules that would enable social and economic activities to be ordered" (WB 2017, 83). This is followed by a paragraph that gives an account of how modern law emerged when "societies evolved," to the point that, "in modern states, law serves three critical governance roles" ("ordering behaviour," "ordering power," and "ordering contestation") (WB 2017, 83). Which takes us to what rests on the other hand: the rule of law as an *end* of development, brought about by "pragmatic policy design" that "moves countries on a trajectory toward a stronger rule of law" (WB 2017, 14). Reaching this end of course takes "time—sometimes a very long time" (WB 2017, 14). As the Bank notes, tongue-in-cheek, citing UK Prime Minister Gordon Brown: "In establishing the rule of law, the first five centuries are always the hardest" (WB 2017, 14). But the tongue is in the cheek for a reason: the Bank, as this latest version of the WDR reveals, knows how to accelerate "transitions to the rule of law" (so the joke is on History).

There are three basic stages to achieving such a transition (although "other paths might be possible") (WB 2017, 14). These are outlined in a table in the WDR credited to the analyst of "the end of history," Francis Fukuyama (WB 2017, Box 0.7). First there is a "shift from a customary or pluralistic system (or both) to a codified modern one,"

21. On the circularity of this (the rule of law bringing about development, development bringing about the rule of law), see Pahuja (2011, 198).

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which is seen to better serve the interests of the "elites" in society. This is the stage of "rule *by* law." The second "shift to 'rule *of* law' occurs when the elites themselves accept the law's limitations." Why would these elites take this step and "accept the law's limitations"? The answer, we are told, is that there must be "a powerful normative framework that makes elites respect the law as such." While it is far from clear what this "powerful normative framework" is, or from where or whom it comes, what is clear is that it is a temporary force. In order for the "elites" to remain docile, a third and final shift is necessary, to a stage in which the rule of law can be sustained by "independent legal institutions." At that point, the imposing normative framework can be dispelled, with the rule of law held in place by "legal institutions that persist even after their normative foundations have disappeared." However, one must keep in mind that in countries to which these institutions have been imported (as part of the acceleration process), "perhaps the most important variable determining success is the degree to which indigenous elites remain in control of the process and can tailor it to their society's own traditions."

As this brief excerpt shows, the Bank is convinced that "development" requires "the rule of law" while "the rule of law" is brought about through "development," and that achieving this requires realizing certain institutional forms and legal norms. These forms and norms are of course immanent to every society, emerging, the Bank tells us, "from a home-grown (endogenous) process of contestation"; and yet the resulting "ideal of the rule of law" that "emerges" from this process is also transcendent, providing a universal mode of being as well as a guide to its realization that is without regard for the particularities of any society (WB 2017, 14). Thus, the rule of law is achieved with the overcoming of law's contradictory existences: a law that is pluralistic and customary gives way to a "unified, modern one"; a law that changes and is historically responsive gives way to one that is stable and orderly; a law that expresses a popular spirit gives way to one that is "independent" (WB 2017, 14). In short, a law that is initially socially contingent emerges in the end as an autonomous phenomenon, its rule involving "the impersonal and systematic application of known rules to government actors and citizens alike" (WB 2017, 84, also 83). And while the Bank is aware of "the many diverse, strange and even paradoxical ways" in which scholars have sought to answer "the question 'What is law?'" (WB 2017, 84, citing H. L. A. Hart), it overcomes these contradictory existences of law by "us[ing] the term *law* or *formal law* in its most conventional sense to mean positive state laws—that is, laws that are officially on the books of a given state" (WB 2017, 84, italics in original). This is law as autonomous doctrine *par excellence*. "Law here means the de jure rules"; it is, as the Bank repeats frequently, simply a "rule system" that "order[s] behavior, authority, and contestation" (WB 2017, 84). And so, as autonomous doctrine, law can be separate from and govern over its subjects: in the end law, not humans, can rule. And yet, despite this attempt to render the problem mute by turning to an oblivious and obliviating "common sense" (common, and yet informed by Hart's very particular concept of law), the question of course remains: how does this rule of law ground the Bank's world development project if *its* grounds are so evidently uncertain? (see also Chalmers 2017). The answer, we will find, is in *The Mythology of Modern Law*: "law as a unified entity can only be reconciled with its contradictory existences if we see it as myth" (Fitzpatrick 1992, 1).

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CONCLUSION

The analytical aim of this Article has been to show how the mythology of modern law, as described by Fitzpatrick in 1992, endures today in the field of rule-of-law development, and by extension, to show the enduring importance of *Mythology*. To do this, the Article has focused on one index (that of the World Justice Project), one diffuse organization (the United Nations), and one aspect of a report (by the World Bank), which far from cover the field. Nonetheless, this should be sufficient at least to raise a strong suspicion that the mythology of modern law is integral to this renewed field of "law and development." Pahuja's study of "development and the rule of (international) law," which traces many of the themes focused upon here in analyzing the work of the International Monetary Fund and the World Bank from the 1990s into the early 2000s, provides another compelling reason to suspect this (Pahuja 2011, ch. 5).

The importance of this finding is that it draws attention to a racialized imperialism that denies the laws of societies around the world along with the ways in which those laws already rule, while at the same time denying this denial. *This* is the mythology of international rule-of-law promotion. The "rule of law" that is promoted is supposed to be constituted by and responsive to local forms of law (through the medium of the nation)—a supposition that denies the ways in which this universalized international rule of law obliviates the particular laws that are actually in place along with their modes of rule. The enduring value of Fitzpatrick's account of the mythology of modern law is that it exposes the operation of this double denial, showing the violence of an intervention that purports to act in the name of the world's peoples while denying their laws and how those laws rule.

But if this analysis is correct, then it would seem to confirm the point made by Douglas and Sarat in their review of *Mythology* that this mythology appears impervious to critique (Douglas and Sarat 1994, 533). If myth in Fitzpatrick's account is defined by its ability to *endure*, by mediating and resolving contradictions, then, as Douglas and Sarat observe, "to reveal contradictions within the fabric of the myth would do little to discredit its claims" (Douglas and Sarat 1994, 533). Unlike more traditional ideology critique, for example, which might achieve change by exposing the illusory to the real, Fitzpatrick's account of myth seems to present a totalizing regime that only expands when confronted with a "resistant reality," drawing whatever contradicts it within its mythical field. Indeed, Fitzpatrick's account, as Douglas and Sarat emphasize, does not allow for myth to be transcended—so what then is "the normative consequences of the work"? (Douglas and Sarat 1994, 534) What is the value of *Mythology* if modern law cannot be "demythologized"? (Douglas and Sarat 1994, 541) And by extension, what is the value of this Article, to the extent that it is an exercise in showing the endurance of this mythology today?

One answer is that the mythology of modern law is not as impervious to critique as Douglas and Sarat thought. Writing in a recent article on how *Mythology* might be received today, the international legal scholar Adil Hasan Khan observes that our present moment is one of "crisis," and that "this crisis represents the tearing of the very order of colonial mythology that Fitzpatrick magnificently 'accorded recognition to', and thus disrupted, with his book, over 25 years ago" (Hasan Khan 2017, 274). According to Hasan Khan, the mythology of modern law in the second decade of the twenty-first

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century "is now past," or has "died," or is at least mortally wounded, and it is "works like *The Mythology of Modern Law* [that] have undoubtedly worked to bring about its decline" (Hasan Khan 2017, 274). While the analysis in this Article shows that the mythology of modern law is, far from dead or dying, still thriving in the field of rule-of-law development, Hasan Khan is no doubt correct more generally.[22] While the extent of the demise of the mythology of modern law might be uncertain, the scholarship on decolonization undertaken in the past three decades, much of it informed by *Mythology*, has demonstrated that this mythology *is* vulnerable to critique. The question then is *how*: how do works such as *Mythology* help to make a mythology lose its authority? The answer, already alluded to here, is that *Mythology* works to *decolonize*, not to demythologize. Douglas and Sarat were correct when they observed that there is no way to transcend myth. The critical point, however, is that *Mythology* does not aim to demythologize reality, to give us access to the real through an act of disenchantment. The opposite: the value of *Mythology* is that it enables a *re*mythologizing of reality. *Mythology* was, and is, a "counter-myth" (Fitzpatrick 1992, xi), a negative mythology that shows the racist, imperial violence that is at the heart of the mythology of modern law. The critical act of showing this can make the mythology of modern law lose its authority, not by showing it to be a *myth*, but by showing it to be a *monstrously violent* myth. In other words, the critical work that *Mythology* performed in 1992 was not to expose the contradiction in modern law, to show that what was supposed to be resolutely non-mythological is actually mythological; the critical work was to do this in order to reveal the violence of that mythology.

Discrediting a mythology in this way, by showing its normative failure rather than its rational failure, does not create the conditions for finally achieving the Enlightenment promise of a truly rational reality. Rather, it creates the conditions for other mythologies to flourish. As Hasan Khan observes, crisis, as a threshold time in between the death of the old and the birth of the new, is precisely the time when a plurality of mythologies might "flourish," for worse (with "monstrous mythologists" able to reorganize the remnants of the old mythology "in order to authorize their own mythologies"), but also for better (Hasan Khan 2017, 274). Fitzpatrick points to both of these consequences in his own 2017 review of *Mythology*, in observing that the report of the death of God in *The Gay Science* draws two responses from Nietzsche, one a foreboding of "deep darkness" closing over Europe, the other a heartfelt anticipation of the creative possibilities opened by the deicide (Fitzpatrick 2017, 233–34). Our time of decolonization, as such an in-between time, is ripe for such mythological pluralism, especially of the legal kind. The wealth of scholarship on "legal pluralism" that has been undertaken increasingly over the past thirty years is a testament to this openness. This is the "for better" consequence, especially for those who are Southern oriented: we are living through a potentially fruitful crisis in the global order, in which those who have been silenced by a dominant and dominating mythology of modern law might give voice to their own mythologies of law (see, e.g., Black 2017). There is of course no

22. Anglophone legal theory is now especially fertile for radically different myth-making; see, e.g., Davies (2017). For a collection of essays that explore different strategies for engaging with, and decolonizing, modern law, see Buchanan, Motha, and Pahuja (2012). The important influence of *Mythology* in the field of international law is also emphasized in Hasan Khan (2017, 273–74).

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guarantee that these new mythologies will be good—new "monstrous mythologists" are also at work (Hasan Khan 2017, 274). But creating the conditions for a mythological pluralism in which everyone can participate as mythologists—and not just provide the vacuous material for another's mythology—might at least ensure the particular imperial violence of the mythology of modern law is no longer operative.

All of that is to say, if the analytical aim of this Article has been to show how the mythology of modern law endures in the field of rule-of-law development, then its normative aim is to contribute to the work of decolonization by redeploying Fitzpatrick's negative mythology in this field—to help create the conditions for a mythological legal pluralism that is attentive to how the world's plurality of laws already rule, in their own, different ways.

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