Review Essay

The Ethics of Empire, Again

WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION BUILDING
By Noah Feldman†
Princeton: Princeton University Press, 2004. Pp. 154. $19.95 cloth.

Jedediah Purdy††

INTRODUCTION

Noah Feldman has emerged as one of the most serious and thoughtful contributors to U.S. strategy in the age of terrorism and counterterrorism. Professor Feldman spent a good chunk of 2003 in Baghdad as a constitutional advisor to the Iraqi Governing Council, which was established under the occupation government of Ambassador Paul Bremer. Since then, Feldman has become an important commentator on U.S. policy in Iraq.[1] Many young political operatives cycled through Iraq in 2003 and 2004, but Feldman was unusually well qualified for his position. He holds a degree in Islamic thought, speaks fluent Arabic, and specializes in the constitutional status of religion. Before the Iraq invasion, he was already at work on his first book, *After Jihad*,[2] a brief for the compatibility of Islam and democracy and the importance of promoting democratic reform in Muslim countries. He also distinguished himself from his contemporaries in Iraq as a self-described political liberal in an occupation government with a distinctly rightward tilt.

Copyright © 2005 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

† Professor of Law, New York University School of Law.

†† Assistant Professor of Law, Duke University School of Law; A.B., Social Studies, Harvard College; J.D., Yale Law School. I am indebted to James Boyle, David Grewal, and Jeff Powell for comments on an earlier draft, and to Pratap Bhanu Mehta for years of conversation on these themes.

1. *See* Noah Feldman, *Iraq Can Wait for Democracy*, N.Y. TIMES, Sept. 24, 2004, at A27; Noah Feldman, *A Third Way for Iraq*, N.Y. TIMES, Feb. 20, 2004, at A25; Noah Feldman, *A New Democracy, Enshrined in Faith*, N.Y. TIMES, Nov. 13, 2003, at A31; Noah Feldman, *Democracy, Closer Every Day*, N.Y. TIMES, Sept. 24, 2003, at A27.

2. NOAH FELDMAN, AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY (2003) [hereinafter AFTER JIHAD].

Feldman is one of few liberals working to develop a robust and principled foreign policy that can respond to the challenge of terrorism, the rumblings of conflict between civilizations, and the quandaries of "promoting democracy" and "building nations." Despite intermittent calls for a new, progressive foreign policy, the most recent presidential race amply demonstrated that liberals have mostly ceded the terrain of "democratic change" to conservatives and neoconservatives who formulate and pursue a newly aggressive foreign policy.[3]

The liberal response has been either to deny that the new problems demand novel solutions or to criticize the present administration's pursuit of its aims without expressly rejecting the aims themselves.[4] Absent from the debate has been an affirmative, liberal account of the purposes and instruments of U.S. foreign policy.[5] Feldman's second book, *What We Owe Iraq*, offers one chapter of such an account. Read alongside *After Jihad*, *What We Owe Iraq* shows Feldman as a distinctive voice in his generation of liberal scholars and policy makers. As a result, Feldman's work may be a harbinger of things to come, and not only from him. At the same time, however, Feldman's project faces serious difficulties, some new and others as old as the problem of empire itself.

In Part II of this Essay, I describe the challenge facing Feldman's generation of scholars: the revival of the questions of whether, when, and how one political community may assume partial or complete sovereignty over another—in short, how to understand the legitimacy of empire. Feldman is well aware of historical and theoretical scholarship that details the material and psychological depredations, ethical evasions, and intellectual obscenities of imperialism. He writes in a time when imperial problems, in the form of nation building, have become inescapable. This situation confronts scholars and policy makers with a new challenge: to attempt a constructive account of the legal and ethical constraints on imperial power without losing track of decades of critical insight into imperialism.

In Parts III, IV, and V, I present and assess Feldman's response to this problem. As I explain in Part III, he proposes that a powerful nation may undertake governance of another when the objectives of the stronger nation

---

3. *See, e.g.*, JOHN B. JUDIS, THE FOLLY OF EMPIRE: WHAT GEORGE W. BUSH COULD LEARN FROM THEODORE ROOSEVELT AND WOODROW WILSON (2004); SEYMOUR M. HIRSCH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB (2004); LAWRENCE F. KAPLAN & WILLIAM KRISTOL, THE WAR OVER IRAQ: SADDAM'S TYRANNY AND AMERICA'S MISSION (2003); DAVID FRUM & RICHARD PERLE, AN END TO EVIL: HOW TO WIN THE WAR ON TERROR (2003).

4. *See, e.g.*, Arthur Schlesinger, Jr., *The Making of a Mess*, N.Y. REV. OF BOOKS, Sept. 23, 2004, at 39; Arthur Schlesinger, Jr., *Eyeless in Iraq*, N.Y. REV. OF BOOKS, Oct. 23, 2003, at 23; Jedediah Purdy, *Liberal Empire: Assessing the Arguments*, 17 ETHICS & INT'L AFFAIRS 2, 35 (2003).

5. For two calls for such a liberal program, see Peter Beinart, *A Fighting Faith: An Argument for a New Liberalism*, NEW REPUBLIC, Dec. 13, 2004, at 1, and Todd Gitlin, *Liberalism's Patriotic Vision*, N.Y. TIMES, Sept. 5, 2002, at A23.

are compatible with the interests of the subject nation. In Part IV, I explore his effort to give content to this formula through the legal metaphor of trusteeship: he proposes that the governing country must understand itself as holding in trust the subject people's capacity for democratic self-government. Feldman argues that this standard assigns the nation-building country a specific, bounded duty: to prepare the subject country for self-rule and then depart, without further trying to direct the subject country's development. In Part V, I discuss Feldman's account of the specific role of the trustee country: to share in sovereignty by maintaining a monopoly on the legitimate use of force and to serve as an "honest broker" in constitutional disputes, all the while seeking to make itself superfluous and then leave.

In Part VI, I assess Feldman's project in terms of the intellectual and political context that I outline in Part II. Here, I first develop a line of criticism that contrasts Feldman's project with two great predecessors in the tradition of trusteeship thought: the Dominican theologian and jurist Vitoria and the Victorian philosopher John Stuart Mill. Feldman's intellectual regard for scholarship critical of imperialism pushes him into a lacuna: he resists developing an account of why subject peoples are not presently capable of self-government, and of how occupation can prepare them for independence. The resulting theory is chaste and minimalist, shorn of distastefully ethnocentric theories of progress, but may, ironically, be for this very reason too thin to provide meaningful grounds for either justification or criticism of neoimperial policy.

In the concluding Part, I begin by observing that Feldman straddles a dilemma: he concedes that according to his criteria, before the 2003 invasion Iraq was not a compelling candidate for imperial occupation and reconstruction. Nonetheless, if the United States were not already in Iraq, Feldman's own theory suggests that aggressive nation building anywhere in the world would be difficult to defend as both strategically sound and ethically appropriate. The intellectual urgency, even plausibility, of Feldman's project may therefore depend on the existence of an occupation that fails his own criteria.

Finally, I show how the conceptions of religion, sovereignty, and democracy that Feldman employs in both *What We Owe Iraq* and *After Jihad* are not just incidentally, but profoundly indebted to his membership in the postcolonial generation of scholars; above all, they are meant to be flexible and non-essentialist, pragmatic concepts responsive to empirical circumstances and minimalist ethical considerations, rather than hard and fast conceptions. Indeed, even Feldman's concept of "ethical theories" is pragmatic and flexible, and thus open to revision in ways that invite charitable evaluation of the argument in *What We Owe Iraq*.

II
FELDMAN AND POSTCOLONIAL IMPERIALISM

Feldman confronts what has been widely described—and celebrated by some—as a new age of empire through the peculiar lenses of a post-colonial education.[6] The 1980s and 1990s ushered in a period of retrospective scholarly fascination with the legacy of empire—its ideological foundations, its political and economic consequences, even its psychological residue.[7] The moral evaluation of empire that permeated that discourse was almost axiomatic condemnation, denouncing imperialism as an immense crime, a series of evils for which Western civilization was to be condemned or from which it had to be saved.[8] As a student of Near Eastern Languages and Civilizations, Feldman took in such thought as mother's milk.[9] He lets the careful reader know as much, invoking Edward Said's semi-epochal *Orientalism* early in *After Jihad* and dropping a precise use of "orientalist," in Said's sense, on the first page of *What We Owe Iraq*.[10] This is a scholar, and consultant, who is not oblivious to the hazards and ambiguities of exercising power across cultures or the intimate relationship between power and knowledge in imperial settings. In this, Feldman is quite unlike conservative enthusiasts of empire, who regard the

6. I address the significance of the term "postcolonial" in more detail *infra* Part VI.D.2.

7. *See, e.g.*, UDAY SINGH MEHTA, LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT (1999); ASHIS NANDY ET AL., CREATING A NATIONALITY: THE RAMJANMABHUMI MOVEMENT AND FEAR OF THE SELF (1995); ASHIS NANDY, THE ILLEGITIMACY OF NATIONALISM: RABINDRANATH TAGORE AND THE POLITICS OF SELF (1994); EDWARD W. SAID, CULTURE AND IMPERIALISM (1993). Of course these authors vary widely in their concerns and methods. Said famously insists upon appreciating the extent to which imperial status shaped both the consciousness and the political economy of Europe, with particular attention to the construction of European ideas of "the Orient" and subject peoples generally, which seemed to justify imperial domination. Mehta seeks to demonstrate the plural character of Western thought about imperialism; the chief theme of his book is a contrast between what he regards as the rationalistic and universalistic utilitarian liberalism of James and John Stuart Mill, which served as a major justificatory scheme for imperialism, and the skeptical, pluralist, prudential political thought of Edmund Burke, whom Mehta regards as a pioneering critic of imperialism. Nandy is interested chiefly in the effects of imperial experience on the psychology of colonized peoples, especially in their self-definition as moral and political collectivities. At the heart of his thought is the idea that colonized peoples set aside pluralistic and flexible ideas of self and culture in favor of hard-edged, exclusive identities in response to, and in imitation of, their imperial rulers.

8. For the first view, see GAYATRI CHAKRAVORTY SPIVAK, THE SPIVAK READER: SELECTED WORKS OF GAYATRI CHAKRAVORTY SPIVAK (Donna Landry & Gerald MacLean eds., 1996); for the latter, see NANDY (1994), *supra* note 7; MEHTA, *supra* note 7.

9. New York University School of Law Faculty Profiles, http://its.law.nyu.edu/faculty/profiles/index.cfm?fuseaction=cv.main&personID=19907.

10. "The task [of studying Iraq at the beginning of the occupation] felt classically orientalist, in the sense of gathering knowledge in order to exert control" (1-2).

"orientalist" episode in the study of empire as a fit of unnecessary bad conscience at best or a cloyingly effective left-wing ploy at worst.[11]

What distinguishes Feldman from liberal scholars of Said's era is his perception that the same imperatives that drove imperialism in the past have returned today. Consequently, as Feldman sees it, the habit of moral disdain for imperial projects was a luxury of past decades, when the independence of postcolonial states in Africa and Southeast Asia created the felicitous impression that imperialism was over. Today's nation building responds to ethnic warfare in the Balkans; failed states in Liberia, Sierra Leone, and Somalia; and regime-changing U.S. in Afghanistan and Iraq. These episodes raise afresh stark problems of political morality: how, and how far, may one people take major decisions on behalf of another? How does a state or international body acquire the power to do so? What are the legitimate purposes of that power? Where and when must it end? In the early 1990s, these questions would have appeared to belong in the same dustbin of macabre history as principles governing the relations of masters and slaves. Now they are back at the center of the agenda.

That said, ethical self-awareness about imperialism has left its mark. Feldman is determined that his generation of imperial theorists and administrators shall not repeat the ethical mistakes of the past. The program he outlines in *After Jihad* is orientalism for the period of *Orientalism*. His effort at an ethics of nation building in *What We Owe Iraq* is postcolonial imperialism.

In his first section, "Objectives," Feldman lays out an account of the legitimate motives on which an imperial, or nation-building, power may act in governing another nation. In his second section, "Trusteeship," he proposes a model of the limits on the actions of the nation-building power, drawn from the law of trusts. In his third section, "Elections," he addresses when and how a nation-building power should withdraw. In each section he moves, often deftly but sometimes unconvincingly, between the specific problem of Iraq and the general question of the ethics of nation building.[12] Feldman's project inevitably invites a two-part inquiry: first, is the synthesis he seeks possible? Can imperial projects—those in which one people

11. *See* Stanley Kurtz, *Hearing Both Sides of Title VI*, NAT'L REV. ONLINE, June 23, 2003, at http://www.nationalreview.com/kurtz/kurtz062303.asp (last visited Jan. 31, 2005) (arguing that Said's influence remains central to academic area studies programs and makes them systematically hostile to the interests and policies of the U.S. government); Daniel Pipes, *"The Majesty That He Was": Columbia Colleagues Remember Edward Said*, Oct. 2, 2003, at http://www.danielpipes.org/blog/101 (last visited Jan. 31, 2005). Although both are internet citations, Kurtz and Pipes are prominent voices in the neoconservative movement. Both have been particularly front and center in a systematic attack on the politics of academic programs influenced by Said and other postcolonial scholars, which they, along with other neoconservatives, regard as anti-American and sympathetic to terrorist movements.

12. As I note later, this approach raises some difficulties because of the likelihood that Iraq is a particularly pathological case.

makes major decisions on behalf of another—be ethically salvaged by some conceptual updating, or are they irremediably flawed? Second, if they can indeed be salvaged, does Feldman pull it off?

III

FELDMAN'S "OBJECTIVES": A LIBERAL HARM PRINCIPLE FOR NATIONS?

The aim of defining an ethical perspective to evaluate nation building requires Feldman first to engage in a modicum of meta-ethical thinking about the terms in which ethical thought ought to proceed. His method is a pragmatic one, giving the impression that he believes ethical systems predate neither the problems that they purport to resolve nor the agents who confront those problems. On the contrary, in this view, agents generate ethical systems in response to the problems they encounter; those systems reflect both the values and interests that people bring to the problems and the constraints the problems impose on them.[13]

This is a touchy business, if not a paradoxical one, because one of the distinctive purposes of ethical thinking is that it distinguishes between those motives and interests that legitimately guide our actions and those that would trample impermissibly on the interests or rights of others. Thus, while it is "a virtue of an ethical approach to be capable of shaping discourse and decisions in the world of actual politics" (27), a strongly pragmatic criterion, an approach that simply lends systematic excuse to our existing motives provides no ethical guidance at all.[14] For purposes of thinking about the occupation and reconstruction of Iraq, Feldman judges that this standard obliges him to take as given the U.S.-led invasion of that country and only to ask what we ought to do in light of having broken and thus acquired that country.[15]

Which motives are legitimate in nation building in general and in Iraq? Feldman proposes this principle: "[a] government may permissibly set its goals on the basis of its own citizens' interests *whenever those goals*

---

13. For an account of the pragmatist attitude, see generally LOUIS MENAND: THE METAPHYSICAL CLUB (2001); CORNEL WEST, THE AMERICAN EVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM (1989); and RICHARD RORTY, CONSEQUENCES OF PRAGMATISM: ESSAYS 1972-1980 (1982).

14. Feldman argues, "It should be an attractive feature of my account . . . that it corresponds to a possible reality." (26) He continues:

> [I]f we pose a moral standard that cannot be satisfied in practice, we can expect to hear the familiar argument that morality should be irrelevant to our foreign policy. . . . absolutist morality is out of place in situations where we are never starting from scratch . . . . What we need is an ethic that acknowledges both the politically immovable impulse to serve national security and also the moral principles that most, or perhaps nearly all, Americans would be willing to adopt if those principles were put to the public clearly and directly. . . . It will be above all a practical ethic, one admitting that even if the invasion of Iraq was unwise or immoral, we are still stuck with its actual consequences (28).

15. Robert Kagan, Book Review, *'What We Owe Iraq': We Broke It, We Bought It*, N.Y. TIMES, Nov. 14, 2004, at L12.

do not fundamentally conflict with the interests of people whom the government does not represent" (24) (italics in the original). He identifies as the source of this principle's strength two contrasting features: (1) its realistic acknowledgement that most national actions proceed on the basis of perceived self-interest and (2) its ethical claim to distinguish between those interests which a country may legitimately act on and those it may not (24).

Feldman's proposal is of course a translation of the famous "harm principle" of John Stuart Mill into international politics: one may act freely so long as one's actions do not harm another, or, more colorfully, one's right to swing one's fist stops at (and only at) another's nose.[16] Such a principle presents two basic difficulties, both of which relate to defining the relevant boundary in cases where the interest at stake is less palpable than nasal cartilage. First, what interests should one understand others to have when one cannot have perfect knowledge of what those others actually regard their interests as being?[17] Second, given that the world is not set up to dissolve or avert competition among interests, which interests must one regard as authoritative and ethically immune from invasion, and against which competing interests may one throw elbows?

The first is a problem about how to formulate guiding hypotheses about the interests of others, the other a problem to do with the definition of the baseline of entitlement and immunity that defines a "harm." In any legal or political system, cases not rendered obvious by shared attitudes or practices tend to be resolved by reference to a third issue of application: who decides? It is not just the specification of interests and baselines, but also the designation of authoritative decision makers for contested cases that gives content to a harm principle.

Feldman does not take on these questions in any detail. He instead contends that, in the context of nation building, certain broadly stated interests may be imputed to occupied peoples. No matter how self-interested the occupying power's motives may be, the nation-building occupation will count as legitimate so long as its goals are compatible with those interests of the occupied. For instance, though Feldman characterizes the Allied occupations of Germany and Japan after World War II as motivated not by altruism but by the U.S. strategic interest in building wealthy, capitalist countries as allies against the Soviet Union, he insists that this self-interest "coincided with the German and Japanese interests in becoming

16. JOHN STUART MILL, ON LIBERTY 143 (Geraint Williams, ed.) (1993) (1859) [hereinafter ON LIBERTY].

17. Even if one could attain such knowledge, gathering it would hardly be cost effective to a given individual. I am assuming that the people with whom we are concerned here exhibit no gap between what they believe their interests to be and what interests they in fact have. This is both a meta-ethical and an epistemological point of significant difficulty, which Feldman does not address and which I will also leave untouched for the time being.

prosperous" (25). Similarly, according to Feldman, "living under a democratically legitimate government that respects basic rights coincides with a people's interests" (25). So long as a nation-building project aims at one of these results for the people subject to it, it is legitimate. He contends that this is a plausible account of the U.S. aim in Iraq, and indeed the one that the United States must adopt if its nation-building effort is to be legitimate (32).

As Feldman is well aware, there are two major problems with his criteria for legitimate nation building. The first is historical: the United States and the major European powers consistently asserted from the first occupation of North America,[18] through the colonization of India and Southeast Asia,[19] and even during the most stunningly brutal episodes of imperialism in Africa,[20] that they acted in the interests of their subject peoples. This point might not pose a problem for a genuinely self-assured contemporary imperialist, certain that the United States has overcome the old errors and temptations of governing far-away peoples.[21] Feldman, to his credit, is not that kind of imperialist. As he puts the matter, "It is not merely that the West does not know better than the rest; it is that one of the West's

18. *See* HERNAN CORTES, LETTERS FROM MEXICO 336 (Anthony Pagden trans. & ed., 2001) (collection of correspondence from Spanish imperial expeditions) ("[I]t is my duty to make the best arrangements I am able for the colonization of this land, and so that the natives and the Spanish settlers may maintain themselves and prosper."); EDMUND S. MORGAN, AMERICAN SLAVERY AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 22-23 (1975) (explaining that the first colonists of *Virginia* predicted that Native Americans would eagerly join their endeavor to the mutual enrichment and advancement of both peoples); ANTHONY PAGDEN, PEOPLES AND EMPIRES 61-72, 83-98 (2001) (describing the religious and cultural civilizing mission of the Spanish empire in the Americas and the British idea of an empire founded on universal principles of commerce and liberty).

19. *See* MEHTA, *supra* note 7 at 77-114 (discussing the logic of imperial ideology and its relationship to liberal universalism and to the theories of progress of the eighteenth and nineteenth centuries); PAGDEN, *supra* note 17, at 83-98 (British imperial ideology of commerce and liberty); *Id.* at 131-52 (explaining the interaction of racial theory with imperial ideology); JAMES MILL, THE HISTORY OF BRITISH INDIA 476-95 (arguing that traditional Indian social structure, political order, and property regime together impede progress, and that certain imperial institutional reforms have promise of spurring progress) (William Thomas ed., 1975) (1820) [hereinafter JAMES MILL]; JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 415-16 (Geraint Williams ed., 1993) (1861) [hereinafter CONSIDERATIONS] ("[T]here are [peoples] which . . . must be governed by the dominant country, or by persons delegated for that purpose by it. This mode of government is as legitimate as any other if it is the one which in the existing state of civilisation of the subject people most facilitates their transition to a higher stage of improvement. There are . . . conditions of society in which a vigorous despotism is itself the best mode of government for training the people in what is specifically wanting to render them capable of a higher civilization . . . . The ruling country ought to be able to do for its subjects all that could be done by a succession of absolute monarchs.").

20. *See* ADAM HOSCHCHILD, KING LEOPOLD'S GHOST, A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA 115-39 (1998) (explaining the humanitarian, anti-slavery agenda that justified the near-genocidal exploitation of Congolese labor when the colony was, in effect, the personal plantation of King Leopold II of Belgium).

21. *See, e.g.*, KAPLAN & KRISTOL, *supra* note 3.

cardinal errors is thinking that it does know better" (69).[22] What assurance can he offer that he is not recommending another version of the same, seemingly perennial moral error?

The second major problem is analytic. Feldman's criteria refer to the "goals" of the nation-building power and the "interests" of the occupied people. I have already identified the difficulty in specifying and ranking the interests of others, and sketched Feldman's response. Specifying "goals," however, is also a fairly subjective and often slippery enterprise, particularly when the specification is in the hands of those whose "goals" are up for evaluation. The same action can be plausibly dressed in many different goals, and the selection of that dress by the party seeking to justify the action is all but certain to be opportunistic. No clearer example is necessary than the public justification of the U.S. invasion and occupation of Iraq, around which rationales have proliferated. It is true that a rationale somewhat like Feldman's seems to have emerged as the Bush administration's resting place, but does that mean this rationale either actually motivated the invasion or is likely to bind future decisions? Or, more cynically, is it simply the last one still standing—for now? The point is not to impugn the Bush administration's motives, but rather to suggest that "goals" of broad policy actions are likely to be multifarious and not at all self-defining, and that their formulation will likely be tailored to the convenience of the party defining them, not to objective accuracy—so far as the latter is even possible in characterizing motives.

The only credible response to these difficulties is the same one that fills out harm principles generally: an account of who is to decide, and on what criteria. Who defines the subject people's interests, judges whether they have been violated, and ascertains and assesses the goals of the occupying power? For most of the shadowed and often bloody history of imperialism, the answer was simple and damning: the occupying power. Feldman attempts a more credible solution. I take that up in the next Part.

22. Feldman is characterizing a putative objection to his position here, but he appears to accept this objection wholeheartedly:

> To nation build successfully and ethically, we need to *abandon* the paternalistic idea that we know how to produce a functioning, successful democracy better than do others. This change in thinking is an extremely tall order . . . . The paternalistic impulse runs deep in the project of nation building; one might even wonder whether we would be able to motivate ourselves to go on building in its absence (70) (italics in the original).

This last is an odd and provocative admission, which hints at a troubling possibility: that even if nation building is a worthy project, we would be unmotivated to pursue it without the false and hazardous sensation of practical and moral superiority that it provides.

IV
"TRUSTEESHIP": FELDMAN'S ACCOUNT OF A GOVERNANCE MODEL FOR NATION BUILDERS

To give ethical criteria to nation building, Feldman selects a trusteeship model, in which an agent is designated by a principal to hold and manage some resource in trust for the interest of a beneficiary (57-68). As he readily concedes, there is nothing original about his choice: the Spanish Dominican theologian Vitoria proposed that Spain's governance of its U.S. colonies could be understood through the model of a trustee protecting the interests of a child not yet mature enough for autonomy (57-58)[23] and British accounts of the legitimacy of colonial government in India took the same tack (58).[24] Moreover, on Feldman's account, two versions of trusteeship in international law, by which powerful countries assumed control of less powerful nations for a period of oversight and development, reflected earlier, now unpalatable views of sovereignty and relations among nations.

The Hague Regulations of 1907 established authority for emergency oversight of one sovereign's patrimony by another.[25] A temporary governing power could hold a subject nation in the classic manner of the trustee, on behalf of its sovereign, the beneficiary, to which the trustee was to return the nation, without intervening pillage, reform, or other disruption, upon cessation of whatever hostilities or other disaster had ousted the beneficiary sovereign (58-59).[26] In Feldman's view, this idea of trusteeship, essentially an emergency caretaking exercise by one Westphalian sovereign on behalf of another, does not comport with the contemporary commitment to national self-determination: the idea of holding a people and its land in trust for whatever sovereign governed them before the trusteeship arose disregards the idea that a people rules itself, and is not simply the property of its sovereign (58-60).[27]

Under the mandate system of the League of Nations, established in the aftermath of World War I, the responsibilities of the trustee power assumed a more Wilsonian character. As Feldman describes it, that system

---

23. *See* Anthony Pagden, *Dispossessing the barbarian: the language of Spanish Thomism and the debate over the property rights of the American Indians*, *in* THE LANGUAGES OF POLITICAL THEORY IN EARLY-MODERN EUROPE 79 (Anthony Pagden ed., 1987).

24. *See* CONSIDERATIONS, *supra* note 18, at 238. A fairly extensive discussion of these themes appears at VI.B, below.

25. HAGUE IV: CONVENTION RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND, Art. 43 (1907).

26. The Hague Regulations applied a roughly usufructuary standard to power. For instance, they allowed taxation necessary for the support of the state, but no expropriation or major exploitation of resources. *See id.*

27. Feldman does not make the more concrete point that contemporary nation-building exercises generally arise from state failure or from invasion; in neither case will it be plausible to return power to a sovereign that has either shown itself unable to rule or behaved so egregiously as to invite international overthrow.

"conceptualized the power receiving the mandate . . . as charged with developing the political situation of the country in question to the point where it would satisfy the characteristics necessary for assuming its own sovereignty" (59).

It is hard at first glance to distinguish this aim from Feldman's proposed goal of establishing "a democratically legitimate government," but for him the difference is in the inflection. As he reminds readers, the mandate system was styled "a sacred trust of civilization," implemented by "advanced nations" for the "tutelage" of politically, economically, and, one infers, culturally immature peoples (59-60). It was, he contends, "long associated with colonialism and connected to the vague idea of benefiting the natives" (60). The mandate system was therefore inextricably connected to Western arrogance and a condescending view of the capacities of the mandates' subject peoples. Feldman seems to suggest that these cultural and psychological dimensions of the system contributed to the perennial temptation of colonial governors to confuse their own interests or prejudices with the interests of their subject peoples.

Feldman's conception of trusteeship is a hybrid of these two predecessor conceptions. From the Hague Regulations, he invokes the idea that what the trustee holds in trust is sovereignty. In this move Feldman aims at articulating a minimalist idea of trusteeship, purified of any definite (hence, potentially paternalistic) idea of the future the trustee power ought to bring about in the course of nation building. From the Wilsonian mandate system, he adopts the precept that those on whose behalf the trustee holds sovereignty are the presently existing people of the country (and not the ruler or his successors). The consequence of this minimalist theory is that the trustee should hand over sovereignty to the beneficiary people at the moment when they become capable of self-governance, regardless whether the specific content of their politics is likely to appeal to the trustee. As Feldman puts it, "[T]he thing held in trust under conditions of occupation and nation building may simply be the authority to govern," held until such time as a "democratically legitimate government" can be established in the hands of the beneficiary people (62).

The formulation, then, is a Goldilocks principle: neither too paternalistic nor too formalistic, but "just right." What, though, are its distinctive consequences for nation building? Specifically, can Feldman distinguish this formulation from older systems that often excused abuses by occupying powers?

Feldman asserts that his conception of trusteeship is closely aligned with the principal-agent relationship between a democratic people and its representative government, in which, by election, the people turn over political decisions and the administration of the state to designated

representatives (61-63).[28] From this analogy, Feldman draws a principle: "[T]he occupying force owes the same ethical duties to the people being governed that an ordinary, elected democratic government would owe them. It must govern in their interests; and it must not put its own narrow interests ahead of the interests of the people being governed" (64).

That claim is striking in both its strength and its pure formality. The principle has meaning in functioning democratic polities—assuming that it in fact describes their self-government—only because elections provide frequent checks on representatives' activities (65). During occupation and nation building, that check is absent. Taking a broad cue from trust law, Feldman proposes other, less robust ways that the beneficiary, without actually assuming control, might enforce its interest.[29] The chief enforcement device is freedom of speech and assembly, which Feldman contends the occupier must preserve even—especially—when it is inconvenient, to ensure that the occupied population can bring discontent to the attention of both the occupier and the rest of the world (66-67). Also potentially important, although fraught with top-down dangers of favoritism and bottom-up dangers of capture, are consultative relations with representatives of the occupied population. Such relations may include the representation of independent and influential leaders like Iraq's Shia cleric Ali Sistani, interim ministers appointed to administrative positions under the occupation government, or unelected members of councils like the transitional Iraqi Governing Council (67-68). On the supposition that a transition to democratic government will emerge from occupation, whoever among these figures holds long-term political ambitions will have incentive to cultivate domestic constituencies, and thus, like Sistani, to speak for a part of the public even to the displeasure of the occupation government (67-68).[30]

In the end, though, with no power to throw out the occupation government, the "beneficiary" people will have to rely on the good faith of that government. Here, Feldman must gamble on the power of benign ideas to constrain interests, passions, and pernicious beliefs. If, as he asserts, "the only way to nation build successfully is to recognize that there is nothing in our comparative advantages of wealth and power that gives us any special ability to identify the institutional structures that will succeed in producing democracy in a particular place" (71), then paternalism is not just a

---

28. Feldman invokes for this idea a view from a very different time in self-governance: Edmund Burke's account of the duty of the representative to exercise independent judgment on behalf of his constituents. *See* Edmund Burke, *Speech at the Conclusion of the Poll 3 November 1774*, *in* 3 THE WRITING AND SPEECHES OF EDMUND BURKE 63 (Warren M. Elofson & John A. Woods eds., 1996).

29. Feldman writes, "The law of trusts . . . is realistic about who has the greatest interest in enforcing the terms of the trust: the beneficiary herself, who is authorized to come into court and challenge the trustee's management" (66).

30. This may be a less realistic expectation of appointed ministers and council members than of independent and ambitious figures like Sistani.

distasteful or unfashionable attitude; it is a factual error, likely to redound poorly to projects of nation building. Inculcating this belief is integral to Feldman's case for a minimalist version of the nation builder's role as trustee. By his account, making the institutions of occupation comport with his ethical criteria will require staffing those institutions with personnel already substantially convinced of his perspective. This is not a damning paradox but instead a feature of the difficulty and precariousness of regulating governments that are in no way directly answerable to the people they oversee.

Having appropriately instructed its senior personnel on the hazards of paternalism, avoided serious constraints on free speech and assembly, and set up consultative relations with more or (at best) less dodgy locals, what is an ethical trustee government to do? Feldman's answer, again following the Goldilocks principle, is that the occupier should avoid paternalistic overreach while nurturing the political development of the occupied population. First, the occupier must secure order (72). Second, it must "preside over the formation of the basic institutions necessary for a stable, democratic state" (81). Consistent with the anti-paternalist principle, this second role is a formal one that in some ways extends the basic task of providing order: outsiders "can, under the right conditions, serve as impartial mediators between [] different factions and interest groups" (83). As an "honest broker," the occupying power "can guarantee that all Iraqis get a seat at the table, and [] can facilitate the process of negotiation by our presence" (83). Feldman understands this mediator's role as all but neutral, imagining the occupier as expressing preferences but not adjudicating disputes or otherwise putting a thumb on the scale of local decision making (83-84).

Feldman's argument for this account of the occupier's duties is among the most interesting portions of *What We Owe Iraq*. It reveals the author as one part Max Weber and three parts Thomas Hobbes, with one part Benedict Anderson added for leavening.[31] Drawing on Weber, Feldman asserts that the sovereign must first secure order by achieving a monopoly on violence.[32] The purpose of this monopoly, however, is not static, not simply to provide security by occupying the position of sovereignty. Rather it is dynamic, in that the achievement or failure of a state monopoly on

31. Although "Hobbism" was long abhorred in *bien pensant* circles, I mean the characterization as a compliment. For a discussion of this issue, see Istvan Hont, *The language of sociability and commerce: Samuel Pufendorf and the theoretical foundations of the 'Four-Stages Theory'*, *in* THE LANGUAGES OF POLITICAL THEORY IN EARLY-MODERN EUROPE 253-76 (Anthony Pagden ed., 1987).

32. It is essential here to appreciate that Feldman's concern, following Weber, is with *legitimate* violence, that is, violence purportedly exercised on behalf of the community or in enforcement of the standards of the community. This should be distinguished from "merely social" interpersonal violence. Thus, vigilantism punishing thieves would breach the state's monopoly, as might honor killings. The state could not reasonably hope to "monopolize" other sorts of violence, such as barroom fights or spousal abuse.

violence directly affects the social groupings and political culture that come into being during the crucial period of nation building.

The crux of Feldman's analysis concerns the consequences of pervasive insecurity, that is, of potential anarchy that accompanies the lack of an effective state. This was also the starting point of Hobbes's argument for the necessity of a univocal state in *Leviathan*.[33] Absent a state to protect them from one another, people must decide whom to trust and then form organizations of the trustworthy for mutual protection (73-75). Hobbes identified the question of whom to trust as insoluble without a lawgiving sovereign to set and enforce rules, which subjects could then rely on one another to obey.[34] Feldman, however, adds a note from the theory of socially constructed nationality, signally associated with Benedict Anderson.[35] Pessimism about the prospects of stable, democratically legitimate government in countries such as Iraq often rests on the pervasiveness of "tribal" divisions within the population.[36] But suppose, Feldman asks, we inquire into how people in a Hobbesian situation, without a sovereign and justly afraid of each other, would go about judging others as relatively trustworthy and thus forming provisional associations for mutual aid?

> Under these conditions, any prior social bond may be useful in forming one's own mutual protection association faster and better than others. . . . It follows that, with the pressure on, individuals will take advantage of whatever markers of identity they already had—the bigger the better—to form mutual protection associations. Here the ideology of identity comes into play. After all, people are being called upon to make a crucial, possibly life-or-death decision about whom they will join. They will want, reasonably enough, to join an association whose members will feel the highest possible degree of loyalty and attachment. Brand-new identities are a bad bet, because it is hard to know in advance how much loyalty they will generate. That leaves so-called "traditional" identities, which may be local, familial, ethnic, or denominational. Among these, and leaving room for overlap, the citizens of a failed state will search for options (74).[37]

---

33. THOMAS HOBBES, LEVIATHAN (Richard Tuck ed., 1991) (1651).

34. *Id.* at 86-115.

35. *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1991).

36. *See, e.g.*, ROBERT D. KAPLAN, BALKAN GHOSTS: A JOURNEY THROUGH HISTORY (1993) (arguing that the failed states and civil wars of the Balkans reflected ancient conflicts, simmering and sometimes exploding).

37. It is worth noting that Feldman's account here is in many ways compatible with that of Hobbes, who believed that the features of "human nature" that made conflicts inevitable in the absence of a sovereign would reform themselves under a "well-founded commonwealth" and produce much more peaceable and mutually congenial persons. *See* HOBBES, *supra* note 33, at 483-91.

Essentially, even at the most basic, functional level of providing security, the state operates in a dynamic relationship with the social forces it confronts. Is Iraq an ersatz country driven by Shia, Sunni, and Kurd identities? It depends, and one independent variable is the success of the state in making Iraq secure. Multiple identities exist in most polities; so do conflicts over distribution of resources and access to power. How those will translate into the most basic questions of politics—unity versus secession, loyalty versus civil war—is not determined by the existence of the divisions as social and economic facts, but by the way in which they are translated into *political* facts. However, that translation takes place in, and in important respects takes the shape of, the political order—or disorder—already in place.

To say that states fail because of political divisions among ethnicities reports the flipside of the fact that political divisions among ethnicities arise and become salient because states fail. Indeed, because the latter is susceptible to collective, political intervention, focusing on the former may be perverse in that it will tend to obscure imperatives for constructive political action.

V
"ELECTIONS" OR NOT: WHEN IS IT TIME TO GO?

When has a nation-building power finished the job? When may it go home? Feldman would answer: when a stable and democratically legitimate state is in place, and not earlier (127-29). Each part of Feldman's inquiry reaches the same conclusion: a nation-building power may legitimately aim to create a stable and democratically legitimate government; it may exercise its power to secure order and build a democratically legitimate government; and its work is done when such a government is securely in place.

The affirmative part of this argument is familiar: when it undertakes to secure a country and oversee the growth of a legitimate state, the nation-building power assumes a responsibility to the people of that country, which it cannot abandon at will. This may be particularly intuitive in the case of invasion. "You break it, you own it" became a slogan of common sense responsibility in the 2004 presidential election.[38] Feldman would extend the principle to any nation builder, even when that power did not induce chaos in the subject country but arrived after, as it were, the thing was already broken.

The negative part of the argument—*and not earlier*—expresses the ambition of *What We Owe Iraq* to encompass both general ethical principles and the specific problem of what to do with the United States' unruly

38. *See* Kagan, *supra* note 15.

new protectorate. Feldman sets out to unseat the most likely rationale for withdrawal before his standard of completion is met: the argument that once elections are held, the government is then by definition safely in the hands of its people, and the occupier may depart. Declaring victory for democracy and then going home one step ahead of ensuing chaos is the most politically plausible exit strategy for Iraq, and might tempt any nation builder. To block this possibility, Feldman tries to show that even successful elections cannot alone form a plausible basis for calling the job "done."

Feldman makes the case through a combination of elementary political science and clever, yet accurate, postcolonial theorizing. To begin with the latter: "Its own obsolescence built into its structure, nation building aspires to consume itself" (94). Feldman is invoking a paradox as old as the idea of imperial trusteeship itself, but which is sharpened and accelerated by the impatience and the strong democratic commitments of today's politics.[39] Nation building sets as its goal a democratically legitimate state—which, as such, will be substantially defined by holding elections (94). Nation building is legitimate only if it makes that goal its touchstone. Nation building necessarily fails to attain a standard of democratic legitimacy while it is in process: the nation-building process is unsanctioned by elections, imposed by circumstances or by invasion, and at best consultative in its interactions with the subject people.

Nation building, then, is legitimate for the same reason, and to the same extent, that it is illegitimate—that is, because nation builders recognize the need for genuine democratic legitimacy and try to bring that condition about *by liquidating their own nation-building project as soon as possible* (94).[40] There is thus an instability and impatience for closure built into the psychology of nation building: elections become a kind of fetish, carrying the psychic energy of this charged paradox. In Feldman's almost psychoanalytic take, elections thus "seduce with the promise of release" (95). The intense wish for elections to resolve the tension of paradox and deferral, of course, also expresses the weight western democrats place on elections, which we tend to associate, at least in the imagination, with decisive acts of collective self-definition (103-04).

In his political science voice Feldman proposes a "chastened" view of elections that will not support the idea that they are evidence of popular

39. The sharpest historical instance is John Stuart Mill's endorsement of British rule over the Indian colonies, which eventually brought about conditions under which the colonized could govern themselves. Colonial government thus enjoyed a kind of provisional legitimacy conditional on its bringing about circumstances compatible with the full legitimacy of self-government. *See infra* VI.B.

40. "[T]he ideology of nation building implicitly recognizes the illegitimacy of the structure of governance that prevails prior to [successful] elections. In this way, nation building undercuts itself by denying its own legitimacy" (94). Feldman illuminates this concept of deferred, provisional legitimacy by invoking the concept of *difference*, associated with the late Jacques Derrida, a point of exposition that I find more ornamental than essential.

government achieved (96). Elections, he points out, tend at best to be fairly close, and thus do not constitute a univocal "people" as much as they give rough-grained expression to the allegiances and divisions already present; a divided population cannot jump over its own shadow into unity by the magic of an election (100).

Further, in the trusteeship model, elections do not provide anything like detailed monitoring or assessment of the government's performance. Electoral contests are too blunt for that purpose (100).[41] Instead, elections are good chiefly for two purposes: evaluating the government's performance in a very broad-gauge way and selecting leaders whose character, judgment, or demographic profile the majority wants at the heart of decision making (100-02). These are important feedback mechanisms for a government that accepts the trusteeship model Feldman has already emphasized, but they can function only when a government *already* enjoys a Weberian monopoly on the legitimate use of force and commands the broad allegiance of the population. Absent these conditions, elections are a cart with no horse in sight. A nation builder cannot ethically leave a dependent people with a horseless cart.

Feldman therefore endorses a hybrid conception of sovereignty. In this conception, decision-making authority belongs to a democratically legitimate local government while the indispensable task of maintaining security—the business end of the monopoly on legitimate use of violence—remains with the occupying power even after elections take place (126). The local government, at least nominally, will make policy decisions and authorize major uses of force, while the occupying power will enforce those decisions.

The theory proposes that once local security forces are sufficiently strong and loyal, the fledgling government can bid its foreign protectors farewell (126). Such a relationship inevitably raises difficult questions. Will the occupying power, especially one as historically reluctant as the United States to put its troops under foreign command, actually submit to being the neutral executor of the local government's decisions? When nominal power is in one set of hands and real power in another, can the holder of nominal power prevail in a conflict over policy? And, particularly salient in Iraq, when hostility to the occupying power is intense and widespread, can a local government build up enough popular legitimacy to break its reliance on the occupier, or will that dependence make itself permanent by impeding the development of indigenous loyalty to the nominal government?

41. Feldman takes pains to note that he does not deny in principle the possibility that elections can crystallize "constitutional moments" of the sort that Bruce Ackerman has described in his *We the People* series (103). *See generally* BRUCE ACKERMAN, WE THE PEOPLE II: TRANSFORMATIONS (1998).

Feldman is surely correct that "elections are not a ticket home for the nation builder, nor are they the magic bullet of true sovereignty for the nation being built" (97). Yet by the end of his exposition, the question remains whether there *is* any ticket home, any way to conclude the nation-building exercise that does justice to the legitimate interests of both the occupying power and the people whose nation is ostensibly being built. In short, can Feldman's theory work in practice?

In the next Part, I address this pragmatic question by contrasting Feldman's project with that of his predecessors, Vitoria and Mill. With their legacies in mind, does Feldman succeed in his ambition to develop a postcolonial account of nation building that overcomes the ethical hazards of old imperial theory and practice?

VI

FELDMAN IN THE TRADITION OF TRUSTEESHIP THOUGHT

A. The Vitorian Origins of Trusteeship

Feldman alludes in passing to the tradition of trusteeship in international law, noting its origins in the thought of sixteenth-century Dominican jurist and theologian Vitoria (57). Feldman does not observe, however, that his account of divided sovereignty has long been intimately related to the trusteeship concept in international law, and has been central to efforts to make normative sense of imperial projects.[42] Locating Feldman's thought within this tradition is helpful both in understanding his project and in evaluating the U.S. enterprise in Iraq, which he sets out to defend.

The theory of divided sovereignty goes back more than four centuries. Its formal structure has been constant, but critical substantive elements

42. Divided sovereignty can be shared between a trustee and a beneficiary nation, with the trustee assuming the roles (such as constitutional brokering and maintenance of a monopoly on the legitimate use of violence) that the beneficiary is incapable of maintaining. For a particularly ambitious discussion of this theme, and reconstruction of the history of international law along these lines, see generally EDWARD KEENE, BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS (2002). Keene argues that the conception of international law, as founded on the principle that each state possesses inviolable and undivided sovereignty, seriously mischaracterizes the history of international law. In his view, international law has been structured since the beginning of the colonial period by two quite distinct principles: on the one hand, reciprocal tolerance among equal sovereigns; and, on the other hand, an idea that all sovereigns are bound by certain universal norms. Those in dereliction of such norms may be supplanted by more legitimate sovereigns in the interest of the violative sovereigns' subjects. Keene argues that these two principles were divided into geographic and, effectively, racial domains of application, with the first governing relations among the European and white-colonial states of the North Atlantic, and the second governing relations between those countries and the rest of the world. World War II and the end of colonialism broke down this neat bifurcation because full and inviolable sovereignty was extended nominally to the world's newly independent countries. Keene thus characterizes the present situation as one in which two incompatible principles coexist: the principle of tolerance manifest in the express legal structure of the United Nations Charter and most of international law, and the principle of universal norms expressed in the language of human rights, the practice of humanitarian intervention, and the U.S.-led nation-building adventure in Iraq.

have changed tellingly. Under the formal structure of the theory, all sovereigns are regarded as bound by a minimal set of universal norms. Where a sovereign egregiously violates one of these norms, another may legitimately enter the domain of the violator and assume certain of its sovereign functions. The set of functions that the outsider, or "trustee," sovereign fulfills is the set that the local sovereign cannot—such as brokering among competing groups in constitutional framing or maintaining a monopoly on the legitimate use of force. The remainder of the sovereign functions fall to the local sovereign, creating a structure of divided sovereignty. The trustee sovereign is not a conqueror; that is, it may not expropriate the resources or indefinitely determine the fate of the territory for which it assumes responsibility. Rather, it must secure adherence to universal norms so long as its presence is necessary to ensure that adherence. Within this formal structure the substantive content of the universal norms—whose protection requires and legitimates the authority of the trustee sovereign—has changed over time.

Francisco de Vitoria originated the formal structure of the argument in a novel historical situation: Spain's ascent to domination of much of the Western Hemisphere and, at the same time, to a consolidation of internal rule that made what Anthony Pagden has called "the first early-modern nation state."[43] Enjoying international hegemony and unchallenged domestic authority, Spanish political thought turned its attention from day-to-day crises to "its self-appointed role as the guardian of universal Christendom."[44] This necessarily involved serious inquiry into the principles on which the Spanish crown governed, specifically in its newly acquired territories in the West Indies and the Americas.[45]

Vitoria did not actually endorse a trusteeship arrangement between Spain and the Amerindians. Rather, he raised the possibility as one of the only conceptually tenable accounts of Spanish authority in the Americas in light of the Dominican philosophical-cum-theological position. Vitoria began from two premises indispensable to his overall aims and to those of his school. Vitoria's position first required an understanding of *dominium*—ownership of real property and of one's own body, actions, and liberties[46]—as a natural right, universally held by all who enjoyed sufficient rationality to exercise it.[47] If *dominium* were not a natural right, then rights

43. Pagden, *supra* note 23, at 79.

44. *Id.* at 80.

45. *See id.*

46. *See id.* at 80-81. This expansive account of "property," as *dominium* is usually translated, has of course much in common with the account that John Locke would later give as a basis for resistance theory. For a discussion of the long line of influence and repudiation that links Locke to the Dominicans by way of Hugo Grotius and John Selden, see RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGINS AND DEVELOPMENT 45-50, 58-100, 143-73 (1979).

47. *See* FRANCISCO DE VITORIA, POLITICAL WRITINGS 249-51 (Anthony Pagden & Jeremy Lawrance eds., 1991) [hereinafter POLITICAL WRITINGS]. Here Vitoria contends that it is heresy to

of freedom and property would have depended on being Christian and sinless, that is, depended on a state of grace.[48] On this latter premise, Lutheran defenders of the right of popular resistance against unjust kings argued that rulers who fell from a state of grace lost their political *dominium*, or right to govern.[49] The Dominicans resisted this position, instead committing themselves to a view of *dominium* as a natural right attached to rationality, not grace.[50] The immediate political consequence of this commitment was that, contrary to the Lutherans, European rulers did not need to be sinless to be legitimate.

Vitoria's second essential premise opposed both the Lutheran view that temporal authority derives from divine principles of government and the Vatican's claim that the Pope was the temporal as well as the spiritual ruler of the world.[51] According to this aspect of the Dominican position, political societies may constitute and govern themselves without regard to their relationship to Christianity, and political *dominium*, or government, is as much a product of natural right as personal *dominium*.[52]

On this account, Amerindian sinfulness or paganism could provide no title for Spanish authority in the Americas, nor could putative grants from the Pope. On the contrary, Spanish entitlement to operate in the Americas had to arise from the exercise or defense of natural rights.[53] Vitoria rejects the most straightforward defense: the claim that Native Americans had

---

argue that Native Americans lack *dominium* because they are pagans or because they are sinful. As, he points out, kings routinely govern, and Christians retain property rights, even after they fall into a state of sin.

48. *See id.* Varieties of this argument, against which Vitoria struggles, were associated with Palacios Rubios, who preceded Vitoria by several decades, and with Juan Gines de Sepulveda, who addressed the issue somewhat after Vitoria. *See* Pagden, *supra* note 23, at 81-95.

49. *See* Pagden, *supra* note 23, at 83, 93. For a discussion of the relationship between Lutheran thought and the theory of resistance, see 2 QUENTIN SKINNER, THE FOUNDATIONS OF EARLY MODERN POLITICAL THOUGHT 70-140 (1979). The Lutheran idea that all earthly authority derives from God founded a doctrine of nonresistance to earthly authority. At the same time, however, it instituted the idea of the "godly prince," in other words, that temporal governors have duties to their subjects that follow from the divine origins of their authority. This idea of the ruler's duty supports resisting kings who fall from the state of grace.

50. *See* SKINNER, *supra* note 49, at 139-50 (on the origins of the Dominicans' revival of Thomist natural-law thought in the aim of refuting the Lutheran doctrine of the godly prince).

51. For Vitoria's rejection of this claim of Papal power, see POLITICAL WRITINGS, *supra* note 47, at 260-64. On the Dominicans' perception of the weakness of this basis for claims of Spanish power in the Americas, see Pagden, *supra* note 23, at 82.

52. *See* POLITICAL WRITINGS, *supra* note 47, at 251-54; SKINNER, *supra* note 49, at 139-50.

53. *See* Pagden, *supra* note 23, at 80 (explaining that Vitoria's theory was "the first to claim that 'the affair of the Indies' . . . was a question neither of the limits of papal jurisdiction, nor of Roman Law, but of the law of nature . . . and that the issue was consequently one . . . of *natural* rights.") (italics in the original). Vitoria classified these natural rights as *jus gentium*, or the law of peoples, by which he understands that portion of the laws agreed upon by all peoples that are derived from natural reason and so, by convention, not subject to revision. *Id.* at 86. One might therefore regard such rights as a component of the liberty that constitutes *dominium*. Vitoria also includes in this category the liberty of the Spanish to spread the gospel, although not to impose conversion. *See* POLITICAL WRITINGS, *supra* note 47, at 286-88.

voluntarily alienated their *dominium* over their realms to the European discoverers. In Vitoria's view, the claim that Native Americans had legitimately and bindingly transferred their lands ignores the coerced and fearful condition in which they struck any bargains with their Spanish occupiers.[54]

This leaves open two possible justifications of Spanish power on the basis of natural rights. The more modest basis, which Vitoria endorses, holds that the Spanish—*qua* human beings—had a natural right to travel and engage in voluntary trade with any other persons anywhere in the world, and were allowed to enforce this right by forcibly overcoming any restrictions on it.[55] This claim, however, provides scant foundation—probably none at all—for a Spanish claim to govern or expropriate the Americas. Vitoria's argument requires that the right to use force in defense of the natural liberties of *jus gentium* be purely defensive in character and that the defensive use of force be proportionate to the Native American incursion against the liberty being enforced.[56] No credible account of the incursion made conquest and foreign rule a proportionate response.

The second basis—which Vitoria sketched rather than endorsed outright, and on which he seemed to sound ambivalent notes—was the theory of trusteeship. In the course of rejecting arguments that the Amerindians could be excluded from *dominium* on the basis of their supposed inferior status, Vitoria analogized them to children. He argued that, even if Native Americans were properly regarded as children, this status would not exclude them from *dominium*: "[T]he foundation of dominion is [] that we are formed in the image of God; and the child is already formed in the image of God."[57] Vitoria thus insisted on a category of person whose *dominium* is

---

54. *See* POLITICAL WRITINGS, *supra* note 47, at 275-76 (noting that the putative transfers "have been made in fear and ignorance, factors which vitiate any freedom of election . . . . The barbarians do not realize what they are doing; perhaps, indeed, they do not even understand what it is the Spaniards are asking of them. Besides which, the request is made by armed men, who surround a fearful and defenceless crowd.").

55. *See id.* at 278-85. Vitoria contends that the rights to travel and free exchange are residual from the original, communist stage of human history, when all goods were held in common by all persons, with no power of exclusion. The division of property by the exercise of *dominium* and by convention did not eliminate these rights. Thus, the rights at the crux of the theory that market relations express inviolable and inalienable aspects of liberty are here imagined as rights retained from primitive communism under divine grant. On the Dominicans' view, at least, it was something more complex than the influence of Herbert Spencer's social statics that led the U.S. Supreme Court to invoke a market-preserving conception of liberty in *Lochner v. New York*, 198 U.S. 45 (1905).

56. Vitoria insists that defensive retribution be proportionate to the *motive* of the violation as well as its substance. That is, violations of *jus gentium* motivated by ignorance or fear, as he supposes Native American violations tend to be, are to be regarded as less culpable than willful and knowing violations. *See* POLITICAL WRITINGS, *supra* note 47, at 282-83 ("[W]hat we may suppose were understandable fears made them innocent . . . . The provocations of the Pharisees are to be met with quite a different response from the one appropriate to weak and childish foes.").

57. *Id.* at 249. This is an interesting and in some ways novel argument in the Thomist tradition. Aquinas had previously argued that no difference exists between a child before the age of reason and a "natural slave," an inhabitant of a human body lacking reason.

actual but whose ability to exercise it is at present only potential. Like *dominium*, such a person's rights and property claims are inviolable; they are not subject to expropriation on the basis of incapacity.

At the same time, however, fully reasonable others must manage such a person's *dominium* on her behalf, for she is unable to do it herself. The stand-in manager—the trustee—must conduct himself in anticipation of the time when the presently incapable person enters fully into reason. The dependent person's *dominium* cannot be supplanted, but neither can she exercise it unaided. Her *dominium* thus occupies what Feldman identifies as the status of trust corpus, the property a trustee manages in the interest of the beneficiary.

Applying this theory to Native Americans, however, Vitoria was ambivalent at best, suggesting he had raised it merely "for the sake of argument."[58] After all, he had already in the same discourse rejected the closely-related argument that Native Americans lacked reason, and hence *dominium*, by analogy to madmen. He wrote in connection with that argument:

> *The barbarians* . . . are not in point of fact madmen, but have judgment like other men. This is self-evident, because they have some order (*ordo*) in their affairs: they have properly organized cities, proper marriages, magistrates and overlords (*domini*), laws, industries, and commerce, all of which require the use of reason. They likewise have a form (*species*) of religion, and they correctly apprehend things which are evident to other men, which indicates the use of reason. . . . The conclusion of all that has been said is that the barbarians undoubtedly possessed as true dominion, both public and private, as any Christians. That is to say, they could not be robbed of their property, either as private citizens or as princes, on the grounds that they were not true masters[59] (italics in the original).

To have "judgment like other men" is to be more than a madman or a child. Vitoria, it seems, did not believe that the theory of trusteeship deserved more than hypothetical interest in the colonial context. It further appears that he hoped that no theory of legitimate Spanish government would be necessary. By securing the rights of voluntary trade under *jus gentium*, he anticipated that Spain would secure its legitimate interest in the wealth of the Americas and eventually achieve widespread voluntary conversion to Christianity among the Amerindians.[60]

---

58. *Id.* at 291.

59. *Id.* at 250-51 (citations omitted). It was in the course of this argument that Vitoria propounded an interpretation of Aristotle's notorious idea of "natural slavery" that anticipates modern humanitarian attitudes: that Aristotle did not intend to justify enslavement, but meant rather to highlight that some persons lack rational capacity and so must be looked after by those who enjoy capacity.

60. *See id.* at 291-92.

Purposely or not, Vitoria had laid the foundations for a developmental account of society, in which "primitive" peoples would be regarded as children awaiting the future already inhabited by "mature" peoples: an account of history as a progression out of childhood and into adulthood. Such an account makes plausible the theory of trusteeship by analogy to the oversight of a dependent child. As Pagden notes, Vitoria's account of the minimal social institutions of the Native Americans—the basic regulation of family life, the rudiments of commerce, some form of government—denied them *otium*, the life of contemplation that the Thomists, following Aristotle, regarded as the highest existence.[61] It would be "an act of charity," Vitoria wrote, for a European sovereign to assume responsibility for the improvement of such a people, not because they lacked reason, but because, as human beings, they were properly heirs to a higher refinement of reason than they had yet achieved.[62]

B. John Stuart Mill and the Apex of Trusteeship Thought

It is not my aim in this Essay to provide an encyclopedic account of trusteeship theory. Therefore, I feel only a slight chagrin at moving directly from Vitoria to John Stuart Mill, the eminent Victorian theorist of liberty and representative government, and second-generation employee of the East India Company.[63] Vitoria, in defending Native American rights during the early-middle decades of the sixteenth century, fell rather far toward the counter-imperial end of the jurisprudential spectrum of his time.[64] By the beginning of the nineteenth century, colonial projects were increasingly imbued with "the belief that Europeans had a responsibility to promote 'civilization' and 'good government' in the countries under their imperial authority."[65] This view contributed to considerable elaboration on the theory of divided sovereignty, which "began to be employed [] in accordance with the principle that indigenous rulers should hold only those prerogatives which they were competent to exercise," where competence included the capacity to promote progress toward "civilization."[66]

The policies that followed frequently reflected the influence of a line of post-Vitorian thought, beginning with Grotius and developing through

---

61. *See* Pagden, *supra* note 23, at 85-86.

62. *See id.* at 86.

63. On the connection of both James Mill and John Stuart Mill to the East India Company, see MEHTA, *supra* note 7, at 4-8 (detailing the deep biographical implication of most British political theorists in the British Empire). The Mills' theoretical commitment to imperialism gave a normative defense to an institution of colonial government that structured their working lives and underlay their financial security. Taking these relationships seriously need not imply a vulgar "follow the money" Marxism, but the Mills' associations with imperial practice are reminders of how deeply concrete experience can shape ideas about what is desirable, practicable, and conceivable in politics.

64. *See* KEENE, *supra* note 42, at 55-56.

65. *Id.* at 78; *see also* MEHTA, *supra* note 7, at 77-114.

66. KEENE, *supra* note 42, at 78.

the theory of John Locke[67] and the jurisprudence of William Blackstone.[68] For Locke, the advancement of societies toward complexity, wealth, and refinement hinged upon private property ownership because the acquisition of property could occur in an unmodified state of nature, in which it expressed natural rights exercised in pursuit of natural need.[69] Once so acquired, property created, on the one hand, a need for means of resolving disputes and enforcing agreements, which produced formal law, courts, and civil government, and, on the other hand, efficiencies that increased social wealth and refinement.[70] From this view of private property as the seed of progress arose a series of imperial reform programs in which the British government instituted approximations of fee simple property regimes in its East Indian dependencies, on the theory that these would spur those benighted regions toward liberal, commercial modernity.[71]

---

67. On Locke's influence on theories of how colonial governments could induce progress in subject populations, see JAMES TULLY, AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS 137-76 (1993) (arguing that Locke's conception of private property as a necessary precondition of sovereignty meant that Native Americans, who supposedly had not developed a conception of property rights, (1) were stuck at an early stage of development, and (2) had no sovereignty with which they could legitimately resist the incursions of European settlers).

68. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1-9 (1979) (outlining an account of universal history, progressing from a hunter-gatherer society through a herding economy to settled agriculture, and eventually to commerce and complex institutions, with a specific property regime corresponding to each stage).

69. The precise account of the status of property acquired in the state of nature varies from thinker to thinker. For Grotius, the natural right of occupation (*occupatio*) and use of resources was converted to full *dominium* only by the advent of civil society and the express legal recognition of rights in property. *See* RICHARD TUCK, THE RIGHTS OF WAR AND PEACE 58-63 (1999) (describing Grotius' view of natural property rights as a kind of weak claim converted to full legal strength by enshrinement in positive law). Blackstone, on this point a utilitarian conventionalist with a strong view about the psychology of natural justice, would strictly have said the same thing, although he agreed with Grotius that people naturally recognize in others the privilege of not being disturbed in what they presently possess. *See* BLACKSTONE, *supra* note 69, at 3-9 (noting that property rights are enshrined in conventional law, but "by the law of nature and reason, he who first began to use it, acquired therein a kind of transient property [recognized by others], that lasted so long as he was using it, and no longer."). For Locke, the right of property actually arose *as a right* by natural acquisition in the state of nature, and retained its integrity within a system of conventional law. *See* TULLY, *supra* note 68, at 96-117 (describing the framework of natural rights in which Locke's account of property and political legitimacy is set).

70. Locke discusses the inconveniences of the State of Nature in chapters II and III of the *Second Treatise on Government*. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 309-26 (Peter Laslett ed., 1960) (1689). William Blackstone describes the role of property as the catalyst of a social, economic, and institutional course of progressive development in BLACKSTONE, *supra* note 69, at 8 ("Necessity begat property; and, in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, government, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labor, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.").

71. Prominent examples are the 1793 "Permanent Settlement" in Bengal, in which British administrators replaced a complex system of annual revenue collection, which created considerable economic uncertainty for all who collected or paid rents in Bengal's quasi-feudal system, with rights approximating fee-simple ownership (prominently including assurances against future fluctuations in

John Stuart Mill changed the emphasis in the account of progress from economic to political arrangements, providing a robust and novel version of the theory of sovereign trusteeship. In *Considerations on Representative Government*, Mill argued that the best form of government is one that fosters the maximum feasible level of political participation by its subjects.[72] Such a government is most likely to take into account the interests of all sectors and classes of society.[73] Furthermore, this government would be "effect[ive] in improving or deteriorating [the] faculties" of its population, including their "moral, intellectual, and active faculties."[74]

By Mill's account, human beings have a fundamental and universal interest in developing the "active" character: "that which struggles against evils, [not] that which endures them; [not] that which bends to circumstances, [but] that which endeavours to make circumstances bend to itself."[75] The active personality, Mill contends, is the type responsible for all practical improvement in the world, all reforming rebellion against ignorance, oppressive custom, and human incapacity: it is the Promethean spirit flung in the face of fatalism.[76] Moreover, in Mill's view, the active type is *morally* superior, as well as practically more productive and beneficial to society. It is an optimistic, initiative-taking, and self-responsible character, which in keeping faith with its own self-making capacity, does not begrudge others their success.[77]

In contrast, Mill believed that passivity and lack of opportunity for initiative and participation fostered the very opposite of this moral excellence: the personality shaped by impotent resentment of whatever goods it cannot enjoy. The passive are thus "incessantly grumbling that fortune does not do for them what they do not attempt to do for themselves, or overflowing with envy and ill will toward those who possess what they would like to have."[78]

---

tax obligations), and the 1811 Java reforms, which attempted to create a peasantry with stable expectations of profit from productive use of the land. *See* KEENE, *supra* note 42, at 83-88. On the ideology of property and progress that gave rise to the Permanent Settlement, see RANAJIT GUHA, A RULE OF PROPERTY FOR BENGAL: AN ESSAY ON THE IDEA OF PERMANENT SETTLEMENT (1996). For a criticism of the Permanent Settlement as insufficiently egalitarian in its distributional policy and as excessively indebted to British aristocratic ideas of society, see JAMES MILL, *supra* note 18, at 476-96.

72. CONSIDERATIONS, *supra* note 18, at 217-34.

73. *See id.*

74. *Id.* at 224.

75. *Id.* at 227.

76. *Id.* at 226-28.

77. *Id.* at 228-29. Mill writes:

> The person bestirring himself with hopeful prospects to improve his circumstances is the one who feels good-will towards others engaged in, or who have succeeded in, the same pursuit. And where the majority are so engaged, those who do not attain the object have had the tone given to their feelings by the general habit of the country, and ascribe their failure to want of effort or opportunity, or to their personal ill-luck. *Id.* at 229.

78. *Id.*

Mill argued that representative government—broadly speaking, democracy with a participatory element—fostered the active type of personality in several ways. First, by eliminating petty legal restrictions on personal activity and the political exclusion of the majority, both of which characterized less democratic governments, representative government fostered citizens' confidence in their own powers in both private and public affairs.[79] Second, in keeping with Mill's view of the healthy personality as overcoming cramped self-interest and welcoming the success of others, the obligation and opportunity to participate in collective self-government fostered belief in the common good.[80] This experience constituted a kind of moral education that Mill doubted was available in merely private life, where "[a] neighbour, not being an ally or an associate, since he is never engaged in any common undertaking for joint benefit, is therefore only a rival."[81]

Mill's account of progress, then, centered on the universal human interest in developing a certain kind of healthy personality: self-confident, initiative taking, willing to wrest circumstances away from custom, free of resentment, and with the ordinary sense of self-interest tempered and elevated by a concern for the common good. This position is closely tied to Mill's endorsement in *On Liberty* of "the permanent interests of man as a progressive being."[82] He identified these interests with "the highest and most harmonious development of his powers to a complete and consistent whole," which he termed "the end of man."[83] On this basis he endorsed his famous principle that "the only purpose for which power can be rightly exercised over any member of a civilized community, against his will, is to prevent harm to others."[84] His endorsements of participatory democracy and a strong brand of liberal freedom had a common basis in what one

79. *Id.* at 231-32. It is important to appreciate that a good deal of the force of the argument comes not so much from any remarkable affirmative features of participatory government, as from the emancipation of citizens from the often small but typically pervasive abuses and constraints of despotic government.

80. *Id.* at 232-34.

81. *Id.* at 234. One can appreciate here Mill's debt to Alexis de Tocqueville's view of the importance of voluntary civic institutions in educating Americans out of narrow self-interest toward "self-interest properly understood," which incorporated some recognition and consideration of collective good. For this discussion in Tocqueville, see ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 520-28 (J.P. Mayer ed., George Lawrence trans., 1969) (1850) (on the role of voluntary associations in mitigating and educating selfishness). Mill's conception of participation in his political thought is rather more exclusively concerned with the state than is Tocqueville's. It is also notable that Mill, educated in a kind of secular classicism, seems to have discounted any positive role in moral education for religious life.

82. ON LIBERTY, *supra* 15, at 79.

83. *Id.* at 125. Here, Mill quotes with approval the language of Baron Wilhelm von Humboldt, from his *Sphere and Duties of Government.*

84. *Id.* at 78.

might call liberal perfectionism or liberal virtue, a picture of human personality fully realized.

Mill's liberal and democratic commitments rest upon an indispensable modifier: *civilized.* A civilized community is fit for representative self-government and can observe the liberal "harm principle." Other communities, however, are not ready for either self-government or personal liberty because in uncivilized societies neither of these will serve "the permanent interests of man as a progressive being," that is, the development of human powers and thus of civilization itself.

The chief reasons that certain nations cannot yet undertake self-government are a pair of antipodes in political culture. At one pole, a people may have too little respect for public authority, that is, they may "have still to learn the first lesson of civilization, that of obedience."[85] At the other pole, a people may be "unfitted for representative government by . . . extreme passiveness and ready submission to tyranny."[86] In either case, Mill notes that "the people, in order to advance in civilization, have some lesson to learn, some habit not yet acquired."[87] Self-government in such situations will only replicate and amplify the existing defects in political culture. Therefore,

> [S]ubjection to a foreign government . . . is often of the greatest advantage to a people, carrying them rapidly through several stages of progress, and clearing away obstacles to improvement which might have lasted indefinitely if the subject population has been left unassisted to its native tendencies and chances.[88]

A civilized polity, having achieved a measure of liberty and self-government, may properly serve the interests of a less developed people by governing them.

The task of giving political instruction to a subject people carries "the highest moral trust which can devolve upon a nation." Although Mill's vocabulary is less juristic than Vitoria's, he incorporates the image of the fiduciary[89] obligation of the trustee and is quite specific about the general duty of trusteeship: to carry the subject people through an accelerated history into a level of civilization that will allow them to achieve independence. "The ruling country ought to be able to do for its subjects all that could be done by a succession of absolute monarchs . . . qualified by their genius to anticipate all that experience has taught to the more advanced nation."[90] At this level of abstraction, the prescription is clear: the history

85. CONSIDERATIONS, *supra* note 18, at 238.

86. *Id.*

87. *Id.*

88. *Id.* at 242.

89. *Id.* at 416. This is unsurprising, given that Mill was a political theorist and moral philosopher rather than a legal theorist like Vitoria.

90. *Id.*

of the ruling nation displays to the subject nation the experiences it will need to undergo in order to achieve civilization. As to more specific prescriptions, however, Mill was agnostic, even skeptical. He conceded that "the mode of fitting the government for this purpose is by no means so well understood as the conditions of good government in a people capable of governing themselves. We may even say that it is not understood at all."[91]

A certain equivocation lingers in Mill's self-confidence about the civilizing mission of advanced countries: its outlines are vivid to him, but its inner mechanics are confessedly obscure. He does not equivocate, however, in characterizing the type of government the trustee nation provides: rule by a foreign nation "*is* despotism," he writes, despotism undertaken where "[t]he only choice the case admits is a choice of despotisms."[92] In other words, once one has undertaken to govern on behalf of a people's permanent interests as progressive beings, one must not pretend that one is, actually and presently, providing them self-government. Effective sovereignty, even in the name of their eventual sovereignty, is despotism, that is, rule by an unaccountable power.

C. The Evolution of Trusteeship Thought: From Mill to Feldman

Mill's candor highlights a fascinating contrast between Feldman's position and previous trusteeship thought in international law. Feldman has done his best to shed the distasteful qualities of the old "civilizing mission": cultural arrogance, moral condescension, and the casual assumption that one's own nation has universal jurisdiction to exercise authority over others. Mill, like Vitoria—despite the Dominican's less triumphalist tone—had no such cleansing ambition.

There is a difficulty here: can Feldman discard the distasteful inheritance of colonialism yet retain a theory of trusteeship? The trustee's role is coherent only in light of an account of the interests of the beneficiary that the trustee is to advance. Similarly, the trustee's role is necessary only if the beneficiary cannot advance its interests unaided. Just as Vitoria and Mill spelled out, then, trusteeship theory depends on two things: an objective account of interests and an account of the state in which a people is incapable of advancing its own interests. Moreover, to be a theory of *temporary* governance, rather than permanent rule by an outside power, trusteeship thought requires at least the rudiments of a third factor: an account of progress, of the institutional arrangements that will train and ultimately enable the beneficiary to recognize and advance her own interests without the trustee's oversight. The Grotian and Blackstonian view of property as the occasion of civil society's advancement often played this

91. *Id.*
92. *Id.* at 417.

role, for instance, in British colonial thought. Presumably some such idea lay behind Vitoria's cautious endorsement of an "act of charity" as well.

Feldman advances a minimalist and formal account of the first and third factors: the interest of the people is simply supposed to lie in collective self-government, while the occupier's special role is that of constitutional broker and temporary provider of a monopoly on legitimate violence. Feldman's account of the second factor—why the subject people cannot presently govern itself—is even more minimal, seemingly supposing some institutional failure such as the one he describes as giving rise to Iraq's present sectarian politics. The effect of this account is to narrow enormously the distance between a country that cannot effectively govern itself and a country that can. In contrast to Mill's and Vitoria's thought, for Feldman, history—the development of a population as a polity or a nation—plays no real role. Only the short-to-medium-term construction of institutions is necessary for a people, here and now, to govern itself democratically. This is in fact not "nation building" at all: it is simply institution building for a nation presumed to be all but present already. There is no account of the present incapacity for self-government because Feldman conceives of no such incapacity; there is only the inconvenience of lacking the institutions that will channel the assumed capacity.

Now, to call this a minimalist theory may not be quite accurate. It may rather be either (1) no theory at all, or (2) a very strong but untested and under-articulated theory. If we are to suppose that people everywhere lack only the institutions to undertake full and free self-government, then Feldman's theory is a strong one, resting on a bold hypothesis that mature democracy expresses not just eventual human potential but actually existing potential that is already a mere step from fruition. If we do not suppose this, then Feldman's theory simply omits the account of progress and the explanation of the present incapacity for self-government. In that case, it is not a theory of trusteeship at all.

These alternatives are somewhat stylized and I suspect that the reality is less rigorous and more pragmatic. Feldman surely writes in recognition that a trusteeship theory in line with the universal, progressive history that Mill invoked would be dead on arrival today for at least two reasons. First, its inevitable association with repudiated colonial projects would doom it in *bien pensant* circles, and quite possibly for sound reasons, if even Mill was not convinced that such a theory could ever be specific enough to inform the institutional design of colonial government. Second, it is difficult to imagine finding much constituency in today's political climate, characterized by short attention spans, for a multi-generational civilizing mission resting on the direct or near-direct rule of a distant people. To be viable today, a theory must suppose, as Feldman's does, that the neocolonial enterprise can be brief and quickly usher in something we recognize as

democracy. Feldman's account is best understood as a pragmatic gambit, carefully calibrated to accommodate the political constraints of its time. It is but a frame in which we are invited to understand our efforts unless and until that frame proves unsatisfactory.

This may itself seem unsatisfactory. Has Feldman really offered us an ethical theory, or instead a kind of experimental apologetics? Has he found a place for theory in a time skeptical of the sort of theory that trusteeship and nation building have historically seemed to require? Or, if the fullest theory we can have is one that deliberately evades central questions, would it be better to acknowledge that ethical theory is not so helpful in liberal colonialism? I address these questions in Parts VI and VII. Next, however, I further develop the place of Feldman's approach in intellectual history.

D. Feldman's Post-Skeptical Constructivism

Feldman aims to give a constructive account of the ways in which some nations may legitimately make decisions on behalf of others without abandoning the various forms of skepticism associated with postcolonial thought. How does that project stand up to examination?

1. Post-Skeptical Constructivism

Feldman is not the first, nor is his the first generation, to go down this path. He is following a recurrent pattern in the history of ideas: an old doctrine, richly developed and held with great confidence, fails abruptly and dramatically. Often, but not always, it is implicated in some political or ethical disaster. In the wake of failure, a profound skepticism emerges, rejecting the (now perceived) arrogance and pernicious consequences of the old doctrine and cultivating suspicion of all intellectual and moral self-confidence.[93]

---

93. This was the attitude, for instance, of the great early-modern skeptics, foremost among them Michel de Montaigne, who in the sixteenth century reacted to Europe's bloody and disastrous religious wars by rejecting Aristotelian scholasticism and the self-confident, robust approach to knowledge that they identified with it. *See generally* MICHEL DE MONTAIGNE, THE COMPLETE ESSAYS OF MONTAIGNE (Donald M. Frame trans., 1958) (1588). Particularly potent on these themes are *Apology for Raymond Sebond*, *Of Cannibals*, and *Of the Useful and the Honorable*. In Montaigne's view, those who believed they could obtain knowledge of moral and metaphysical truths were the most dangerous types, because they were inclined to impose their putative truths—violently—on others. Montaigne's great statement of this view comes in one of his final essays, *Of Experience*. *Id.* at 815. In the nineteenth century, Oliver Wendell Holmes, Jr., shaken to the core by the Civil War, rejected the morally self-certain Emersonian transcendentalism of his youth, which he came to regard as a form of fanaticism which fostered bloody conflict. For a discussion of this view of Holmes's experience, see LOUIS MENAND, THE METAPHYSICAL CLUB 3-72 (2001). His skepticism about any claim to natural law or other moral knowledge transcending the ordinary struggles of interests and passions in politics became, for all its fierce singularity, a polestar for the more programmatic skepticism of Legal Realism. In the twentieth century, the probing and humane skepticism toward all moral and political systems that marked Isaiah Berlin's genteel philosophy reflected his encounters with the twentieth century's two most violent perversions of political thought, Bolshevism and Nazism. *See* Isaiah Berlin, *The Pursuit of the Ideal*, *in*

Skepticism, though, is a resting place only for individuals, not for legal and political systems. In the ideal-typical progression, reconstruction follows the flowering of skepticism after disaster. The generation succeeding the skeptics realizes that what skepticism threw away was indispensable. For instance, even if general principles are unavoidably dangerous, there is no plausible way for governments to act, or states to interact, without them. This is why the generation of legal theorists that succeeded early-modern Europe's great resurgence of skepticism, notably Hugo Grotius, undertook what they regarded as a new legal science, starting from a handful of minimal, ostensibly universal principles about human nature and permissible actions.[94] The skeptical and anti-systematic Isaiah Berlin can count among his successors Michael Ignatieff, Berlin's biographer and a major theorist of human rights. In the latter role, Ignatieff promotes a system of minimalist, would-be universal principles devised to guide legal and political systems in the wake of the ideologically fueled humanitarian disasters of World War II and the Cold War, which spurred Berlin's skepticism in the first place.[95]

Feldman's postcolonial theory of nation building joins in the latest chapter of this cyclical narrative of ideas. After the end of formal colonialism, mostly complete by the mid-1960s, and U.S. defeat in Vietnam, the imperial enterprise was widely regarded as a closed chapter of world history, a bad episode driven by racism, paternalism, Eurocentrism, and, of course, greed. With the luxury of believing empire a relic of the past, scholars of succeeding decades were all but unconstrained in their contemptuous examination of the intellectual and moral errors of imperialism. At once condemning imperial thought and celebrating their emancipation from it, they exhibited the self-satisfaction of skeptics who have overcome unnecessary and pernicious ideas.

But the idea that the political and ethical problems of empire were gone forever depended on a kind of Wilsonian Westphalianism, a supposition that each of the world's nation states represented an exercise in self-governance within integral borders. Never better than a convenient myth, this idea became untenable with widespread state failure and civil war in the early 1990s. Once again, powerful nations began taking responsibility for, and making constitutional decisions on behalf of, weaker and seemingly less capable countries. Although the diction might be a little

---

THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS 1 (Henry Hardy & Roger Hausheer eds., 1997); *see generally* MICHAEL IGNATIEFF, ISAIAH BERLIN: A LIFE (1998).

94. For a discussion of Grotius in this light, see RICHARD TUCK, PHILOSOPHY AND GOVERNMENT 1572-1651, at 154-201 (1993).

95. *See* MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR (2004); MICHAEL IGNATIEFF, EMPIRE LITE: NATION-BUILDING IN BOSNIA, KOSOVO AND AFGHANISTAN (2003); MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY (Amy Gutmann ed., 2001); MICHAEL IGNATIEFF, VIRTUAL WAR: KOSOVO AND BEYOND (2000).

different, humanitarian intervention in Bosnia, Kosovo, East Timor, and Sierra Leone did not seem so far from League of Nations-era concern for immature nations "not yet able to stand by themselves under the strenuous conditions of the modern world" (95) (quoting Article 22 of the Covenant of the League of Nations). So also did the projects of nation building that the "international community" undertook in those countries.

Well before the Iraq crisis, the problem had resurfaced: what principles should govern relations among profoundly unequal nations when the stronger found themselves administering the weaker? Under what conditions could strong nations justify taking over administration of the weaker? Humanitarian crisis? Genocide? State failure?[96] Even if the specific formulations of the old imperial eras were pernicious, the kinds of principles they expressed could no longer be dismissed as vicious errors. On the contrary, such principles had once again become indispensable because the situations they exist to govern had become inescapable. It is in this situation, amplified by the Iraq crisis, that Feldman begins. Because the intellectual backdrop of this political situation was colored by the postcolonial movement in the academy, I now turn to a characterization of that event.

2. *Constructivism after Post-Colonialism*

Despite the hazards of generalizing about broad and diffuse intellectual events, I think it is credible to characterize the postcolonial movement in history, literature, anthropology, and political thought as the migration of postmodernist methodology and scholarly priorities to themes of imperialism. The postmodernist development, which affected all the scholarly areas just named and others, expressed critical shifts in and away from the governing questions of previous scholarship.[97]

Where earlier inquiry had focused on uncovering facts, sorting truth from fiction, and developing general explanatory theories, postmodernist scholarship explored how the questions and the criteria that guided such inquiry were formulated in the first place: in what political context, in whose interest, and implicated in what view of the world?[98] Where earlier ethical and other normative work had concentrated on justification and

---

96. For discussions of these questions in recent literature, see Purdy, *supra* note 4; Jean Bethke Elshtain, *International Justice as Equal Regard and the Use of Force*, 17 ETHICS & INT'L AFFAIRS 2, 63-76 (2003).

97. For a very productive discussion of these themes, see the exchange between Judith Butler and Seyla Benhabib in FEMINIST CONTENTIONS: A PHILOSOPHICAL EXCHANGE 17-58, 107-44 (Seyla Benhabib et al. eds., 1995).

98. Michel Foucault's "genealogical" period is in many ways the keystone to this account of the relationship between knowledge and power. For a valuable selection of Foucault's work and a lucid introductory essay, see generally MICHEL FOUCAULT, THE FOUCAULT READER (Paul Rabinow ed., 1984). Genealogical work, loosely inspired by the method of Friedrich Nietzsche's *Genealogy of Morals*, is associated with Foucault's writing in *Discipline and Punish: The Birth of the Prison*, *Madness and Civilization*, and the first volume of *The History of Sexuality*.

casuistry, postmodernist responses asked how the idea of ethics, as an inquiry conducted in the stylized rationality of high theory, had come about and acquired such authority. What idea of human beings did it express, and what aspects of personal experience and social life did it exclude from consideration by eliminating them from the very definition of "ethics"?[99] In part because of this all-pervasive suspicion, this habit of "interrogating" the suppositions behind the conventional questions, the ethical and political attitude of postmodernist work reflected an unsystematic hostility to all exercises of power and, indeed, all systems, formulas, and generalizing exercises.[100]

In counterpoint, postmodernism celebrated phenomena that inherently resisted regularization: hybrid, fugitive, interstitial, marginal, and liminal, to give a few adjectives that were almost slogans. The highest ethical place in postmodernist work went to "resistance," although that generally meant not meeting concentrated power on its own ground, but evading, confounding, or upending it in ways subtle enough that it soon became commonplace to identify fashion and television viewing as resistive.[101]

The marriage of this method to the study of empire was in the stars, or, more precisely, overdetermined by a welter of elective affinities. The several centuries of European imperialism were marked by a flowering of legal, historical, ethical, theological, political, anthropological, and other theories that made the domination of some nations and civilizations of others seem justified, even inevitable. Ideas of progress, which Europe brought to its colonies; reason, liberty, and salvation, which Europe had perfected and subject peoples had not; and humanitarianism, which obliged Europeans to take up the burden of world domination: all these at once arose from, purported to make sense of, and constituted a massive *apologia* for one of the greatest exercises of military, economic, and political power in history.[102] If ever there was a set piece demonstrating the proposition that ideas rise through and inextricably align with the workings of power, this was it. Moreover, the forms of resistance available to colonial subjects, who were almost without exception massively outgunned, fit the postmodernist picture elegantly; they were evasive and ambiguous, often involving new combinations of European and indigenous culture, a kind of creole political strategy conducted by imperialism's "subalterns."[103]

---

99. This account fairly characterizes WILLIAM E. CONNOLLY, IDENTITY/DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX (1991), which is intensely concerned with what is "left out" of conventional resolutions of conflicts of value in politics.

100. *See generally* JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" (1993); JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990).

101. *See, e.g., id.*

102. See the discussion of Mill and Vitoria, *supra* at Parts VI.A. and VI.B.

103. *See* RANAJIT GUHA, DOMINANCE WITHOUT HEGEMONY: HISTORY AND POWER IN COLONIAL INDIA (1997); RANAJIT GUHA, A SUBALTERN STUDIES READER, 1986-1995 (Ranajit Guha ed., 1997).

3. Power's New Ally (and Persistent Critic)

This sensibility informs Feldman's project in *After Jihad*, with a single exception: his attitude to power is one of pragmatic embrace rather than resolute suspicion. That distinction makes all the difference. On the old, pseudo-insurgent postmodernist view, those at the heart of power were imagined to be deeply invested in the categorical oppositions that they supposed justified their enterprises: civilization against barbarism, reason against unreason, progress against benighted stasis, and, embodying all of these, the West against the Rest, specifically against Asian despotism and African savagery.[104] One form of the resistance that postmodernism so valued was the conceptual strategy of confounding these distinctions, revealing, on the one hand, the elements in European civilization that could be styled barbarism and unreason, and on the other, the presence elsewhere of what Europe had imagined as its sole possessions, including ideas of democracy, pluralism, and individual liberty.[105]

Feldman believes that those in power—power in the old sense of commanding armies and setting national budgets and economic policy—should avail themselves of the full postmodern, postcolonial complement of conceptual confounding and productive ambiguity. Rather than the retrospective bane of imperial policy, these tools and tactics should be the handmaidens of a new, properly chastened and humanitarian imperial policy.

Thus, neither democracy nor Islam is a fixed entity, exclusive of the other. Instead, both are flexible and multifarious, and it is possible to bring them together in a variety of ways, if only we do not insist on a single and authoritative interpretation of either.[106] Ethnic, religious, and political identity are not given facts, but political strategies devised and revised in light of exigency and opportunity (45-47, 71-75). Elections are not primordial moments of democratic self-definition, but partly mythic, partly pragmatic ways that people legitimize and discipline the institutions they invent and inhabit (116-27). Sovereignty is not the conch of *Lord of the Flies*, an emblem of authority that must be in one pair of hands or another, but a multifarious phenomenon open to a variety of classifications and divisions.

---

104. Edward Said's analysis of "Orientalism" remains the touchstone for work of this sort. *See generally* SAID, *supra* note **Error! Bookmark not defined.**.

105. Some of the most impressive efforts in this vein have been literary. *See* AMITAV GHOSH, IN AN ANTIQUE LAND (1993). Work in intellectual history has seriously confounded the alleged contrast between civilization and barbarism, in both directions. *See* Amartya Sen, *Passage to China*, N.Y. REV. OF BOOKS, Dec. 2, 2004, at 60; Amartya Sen, *East and West: The Reach of Reason*, N.Y. REV. OF BOOKS, July 20, 2000, at 32; MEHTA, *supra* note 7, at 190-217 (on the ethics of intercultural comparison). On the theme that empire both reflects and reinforces "barbaric" tendencies in the imperial governor, see Pratap Bhanu Mehta, *Empire and Moral Identity*, 17 ETHICS & INT'L AFFAIRS 2, 49 (2003).

106. *See* AFTER JIHAD, *supra* note 2, at 75-78 (arguing for the flexibility and internal diversity of both ideas).

Whether the question is between the authority of the people and the authority of the Koran, or between the authority of the Iraqi government and the authority of the United States military, the answer need not be either/or but instead can take any number of hybrid forms.[107] Power itself, as Foucault taught a generation to recite, is not a one-way street, but an all-pervasive and incessant process of negotiation and renegotiation (89-91).

It is in light of these convictions that Feldman urges a reorientation of U.S. policy toward promoting democracy in the Middle East and Muslim countries elsewhere. What we face there, by his account, is not the implacable hostility of an essential "other" (to use self-consciously a term that was always unlovely and has quickly dated itself); it is an interpretive problem, a reality susceptible to many different inflections and expressions in our apprehension of it. The stakes of this interpretation are not foremost literary or philosophical; they are counted in blood, or, less melodramatically, in lives taken in war or wasted under repressive regimes. Feldman believes, with the administration of George W. Bush, that reshaping communities of interpretation is not always a discursive business. Sometimes it begins with carpet bombing. The sword can be an indispensable ally of the pen. But a master of the pen—a scholar like Feldman—can also be an indispensable adviser to the swordsman.

One might view Feldman's attitude to power in any of three ways. First, at least as old as the slogan *la trahison des clercs*, and revived in current maxims urging us to "speak truth to power,"[108] the task of scholars is to discern and point out the inevitable dishonesty and brutality of organized power.[109] Under this view, anyone who undertakes to offer a set of critical conceptual tools to policymakers so that they can more effectively promote U.S. interests is a kind of traitor to his vocation; this is even truer when those tools were fashioned with the express view of dismantling the pretensions of power.

Under a second view, the rudiments of postmodernism were poised all along to go over to the side of power, as soon as they ended their coincidental connection with the incessant suspicion of radicalism manqué. These are, after all, ideas proposing that there are no fixed boundaries to what people may believe or do and that what boundaries we encounter we

---

107. Indeed, Feldman appears to regard sovereignty itself as more a blend of pragmatics and myth than either a fact or a normative touchstone. In his discussion of elections, for instance, Feldman presents them as both instruments and chimeras. On the one hand, elections are tactical devices to be deployed when they will contribute to legitimacy and the peaceful transfer of sovereignty, not magically accurate expressions of popular will. On the other hand, elections "seduce with the promise of release"; they "hold out the hope of successful consummation, the seed of democracy implanted and the door opened for subsequent withdrawal" (95).

108. For a fine contemporary instance of this attitude, see generally ARUNDHATI ROY, AN ORDINARY PERSON'S GUIDE TO EMPIRE (2004), and ARUNDHATI ROY, THE COST OF LIVING (1999).

109. For an account of this attitude, see MICHAEL WALZER, THE COMPANY OF CRITICS 170-209 (1989) (discussing Herbert Marcuse and Michel Foucault).

have constructed ourselves and can therefore remake with sufficient cleverness and determination. It is not hard to imagine the usefulness of such ideas to those who hold power and prefer their power unchecked. On this view, an anonymous official of the second Bush administration spoke a philosophical and political truth when he dismissed critics as members of "what we call the reality-based community" who "believe that solutions to problems emerge from [] judicious study of reality," and declared, "That's not the way the world really works anymore . . . . We're an empire now, and when we act, we create our own reality."[110] Perhaps earlier empires needed comprehensive theories of history, progress, civilization, and race to guide and justify their activity, and perhaps postmodernism is a retrospective antidote to all that. Ironically, however, wickedness being famously inventive, today's empires flourish on the skepticism, ambiguity, and piecemeal, opportunistic spirit of postmodernist political thought.

There is another, more charitable view that may be more accurate—or, if we are to take Feldman on his own, postmodernist-inflected pragmatic terms, more useful. Reflecting on the final episodes of British imperialism, George Orwell wrote of the poet laureate of the Empire, Rudyard Kipling, that "because he identifies himself with the official class, he does possess one thing which 'enlightened' people seldom or never possess, and that is a sense of responsibility."[111] Orwell, himself a trenchant critic of imperialism who was unusual in combining a commonsense leftist cynicism about the motives of the enterprise with a deep sympathy for the spiritual distortion it induced in both imperialists and the colonized, meant something like this: when one is deeply implicated in power, it is no good to pretend to stand apart from it and relish one's clear conscience; one must take a hand in shaping the way it is used, or at least try.[112] Orwell had in mind this acknowledgement that power is sometimes inescapable, and Kipling's willingness to come to grips with it, in praising Kipling's "sense of responsibility." It is difficult to say whether Feldman identifies, as Kipling did, with "the official class"; his references to its members are mildly ironic rather than reverent.[113] He does identify with power, and it is the use of power, not just the organization of ideas, that he means to influence.

This conclusion, however, returns us to ground that is both theoretically and practically recalcitrant: the occupation of Iraq. If Feldman's argument is best understood not as a timeless and universal theory of

110. Ron Suskind, *Without a Doubt*, N.Y. TIMES MAG., Oct. 2004, at 44, 51.

111. George Orwell, *Rudyard Kipling*, *in* ESSAYS 397, 400 (John Carey ed., 1996).

112. *Id.* at 397-403.

113. For instance, Feldman refers to one of his supervisors in Iraq, a New Jersey Superior Court judge on temporary assignment to Baghdad, as "a major general in the Army Reserve, and an all-around decent man with no prior experience in the Middle East" (52). I take it that his main objection is that this is not a man well qualified to exercise power in Iraq.

trusteeship and nation building, but rather as an argument addressed to present dangers and the present realities of power, then it is best evaluated in those terms. In the final Part, I consider Feldman's position in this light.

VII
PRAGMATISM IS AS PRAGMATISM DOES: DOES IT WORK?

A. The Case of Iraq

Feldman is well aware that, if one wanted to make the case for a new conception of nation building, one would not choose the U.S.-led invasion and occupation of Iraq as a beta test. He goes to great lengths to indicate in *What We Owe Iraq* that discredited justifications for war and major mistakes in occupation and reconstruction have made the situation even harder than it intrinsically is (11-13, 17-19). In *After Jihad*, Feldman's program for promoting democracy in the Muslim world was strong on linking trade and assistance to pro-democratic reforms, muted at best on knocking down tyrannical governments and building up replacements from scratch.[114] Yet, in *What We Owe Iraq* he has chosen to anchor his theory of nation building to the Iraq case, taking that occupation and reconstruction as a test of the theory's value (32-51). To the extent that he writes as a pragmatist, Feldman deserves credit for this choice, which anchors his argument in present reality at the cost of taking on board a costly, bloody, and as yet intractable situation.

The two biggest problems in the Iraq occupation pose basic challenges to the two basic goals of nation building in Feldman's account: legitimacy and security. As to legitimacy, it may prove the case that an invading power, in a political setting where it is the target of both nationalist and religious hostility, faces insurmountable difficulty in establishing a democratically legitimate regime. The taint of the foreign invader may be too damning and persistent for any transitional government to mature to legitimacy.

There are at least two possible versions of this thesis. The stronger one would contend that *jus ad bellum*, the justice of the grounds for a war, and *jus post bellum*, the justice due after a war, are inextricably linked. A power whose invasion is widely regarded as illegitimate cannot make that invasion the first step in building a legitimate local regime. A weaker version of the thesis, more congenial to Feldman's Hobbesian analysis of politics and group identity, would suggest instead that the stakes of political developments in the first weeks and months of post-invasion occupation are exceedingly high and that there is danger that mistrust of the occupier will become so intense and widespread as to make a successful democratic transition impossible. On the second view, Feldman's program might be

114. AFTER JIHAD, *supra* note 2, at 111-21.

viable up to a point, but somewhere amidst the disastrous looting before the eyes of coalition troops, the long languishing of Iraqi infrastructure under the occupation, the disbanding of the Iraqi army, and the rise of a resilient and ruthless insurgency, the occupier lost the credibility it needed to oversee a transition of authority.

The problem of security proves equally troubling to Feldman's argument. His account of the nation builder's "honest broker" role hinges on the forecast that when the various Iraqi factions recognize that they must choose between making concessions to reach a workable agreement and falling into chaos, they will concede and reach a constitutional *modus vivendi* (82-83). In this view, because no party can be sure of victory in a violent struggle for power, all will prefer to avoid that struggle and keep the peace. Under these conditions, an "honest broker" can indeed play an invaluable role in facilitating negotiations and providing a backdrop of relative security.

One could imagine, however, a more pessimistic version of the rational-choice scenario Feldman proposes. The pessimist's prospect is that none of the three major Iraqi groups—Shiites, Sunnis, and Kurds—will be able to attain the constitutional guarantees they require without intruding intolerably on the interests of at least one of the others. Kurds, and to a certain extent Sunnis, will require protection against the central state, which the Shiite majority is all but certain to dominate. That protection cannot be thin or nominal: it must assure that Sunnis and Kurds will not be subject to the kinds of expropriation, political exclusion, and violence that the deposed Baathist regime visited on the Shiite majority and the Kurdish minority. As this protection grew more robust, however, it would progressively erode the power of the central state, whose political primacy in a majoritarian nation is the Shiites' premier prize. A loose confederation with strong minorities might require too much concession for the Shiites before it provided enough for the Sunnis or Kurds, and conversely with a strong central state. If this proved true, the project of holding Iraq together could prove politically unviable; if no middle ground exists, no number of honest brokers can create such a ground.

This pessimistic thesis, like the one concerning legitimacy, has both static and dynamic versions. The static version would propose that there never was a middle ground, given the demographic makeup and pre-invasion political history of Iraq. The dynamic version could be agnostic on that point and simply insist that the growing Sunni insurgency, the emergence in response of Shiite self-defense militias, and the Sunni-Kurd clashes in Kirkuk have increased mutual mistrust in a way that has driven up the parties' respective minimum requirements of constitutional reassurance past the point of possible overlap. Both versions are speculative, and must remain so until the political process gives an answer; but at the time

of writing, recent developments are at best a weak reed for optimism. Elections have ushered in an intensified Sunni insurgency and a draft constitution whose prospect of popular approval, let alone long-term success, is uncertain at best.

By beginning his analysis with Iraq and declining to concede the possibility that outright failure will make his program moot, Feldman may have yoked his theory either to a rising star or to a sinking ship. A less daring scholar might have set aside the occupation of Iraq as an irremediable mess and engaged merrily in something nearer to ideal theory. Feldman, who gives every indication of relishing intellectual adventure, prefers to face the challenge. It remains an open question, though, whether the facts in Iraq will support an optimistic account of nation building. The crux of Feldman's argument against leaving Iraq is that, having brought the Iraqis to this grim place, the United States must help them to escape it. Alas, not every ethically desirable course of action is possible. If it turned out that we were unable to help the Iraqis save themselves in the way Feldman envisions, then a pragmatic ethics would lend no support to continued efforts to achieve the impossible. Refusing the lure of the impossible is one of the hallmarks of good pragmatist thinking.

Another paradox presents itself here. On the one hand, as noted, Iraq is perhaps the toughest case for Feldman's theory. On the other hand, his theory might not get off the ground at all were the United States not already enmeshed in Iraq. Feldman's argument on behalf of nation building cannot stop at whether nation building is ethically permissible; it must also explain why nation building is either desirable or ethically required from the point of view of the country undertaking it.[115] The occupation of Iraq makes this problem moot. The question of the *desirability* of nation building became moot, or at least muted, along the Tigris sometime late in the winter of 2003.[116]

The occupation remains, however, what it has been all along: a mission in search of a theory—a theory as to why or whether to go to war there, a theory as to how to conduct the occupation and reconstruction, and a theory as to when and how to leave. As noted, moreover, once the United States visited disorder and destruction on Iraq, it acquired considerable *prima facie* responsibility to "own" what it had broken.

---

115. Feldman concedes this upfront, giving as a reason for writing *What We Owe Iraq* that "[w]e do not yet have . . . a satisfactory account of *why we should want to do such a thing as build nations* and what the relevant principles are for making ethical sense of this goal" (5) (italics added).

116. Whether this creates a valid reason to attach one's theory to the Iraq adventure is quite another question. Rationales have fallen in this war like Iran's Martyrs Brigades in that country's own war with Iraq, driven by conviction but powerless before bullets and other unpleasant facts. To use in macabre irony a phrase that originated in graver purpose, how does one ask an idea to be the last idea to die for a mistake?

Outside the existing Iraq occupation, however, the affirmative case for nation building is harder to make. Feldman argues that nation building is desirable because promoting democratic government tends to discourage terrorism (11-20). This argument rests on two premises: (1) both "failed states," and also "[d]emocratically illegitimate states" produce recruits for terrorist organizations—the former because terrorist groups can operate freely in anarchic conditions, the latter because political discontent and despair make extremist ideologies attractive (14-16);[117] and (2) the United States should direct some of its finite resources to nation building, understood as an anti-terror tactic, because "terrorism is today the greatest threat to the United States" (8). The reason this is so, Feldman contends, is that terrorists are not susceptible to the same retaliatory deterrence as state-based enemies, because they are mobile and operate through groups with shifting personnel and allegiances, and so are difficult to find and punish (8-11).

That is Feldman's argument for the desirability of nation building. It may be that, in a short book concerned chiefly with drawing out the ethical considerations that should govern the Iraq case, it is the argument he felt constrained to make; yet it is seriously underdeveloped. The chief difficulty lies in the implicit definition of "threat." Feldman argues that the United States is more likely to be attacked by a terrorist group than by a state-based enemy. How would the formula work out, however, if one multiplied the expected *magnitude* of the attack by the likelihood of its occurrence? A one-in-ten-thousand chance of a nuclear strike in the course of a North Korean crisis or a disastrous malfunction in Russia might still constitute a much greater discounted threat to U.S. lives than a one-in-ten chance even of an attack on the spectacular scale of September 11, 2001. All this is quite apart from the possibility that the Sunni and Islamist insurgency in Iraq will spill over to the United States, increasing the risk of terrorism here.

And this calculus takes account only of military threats. If one were instead to consider the panoply of interests that constitute national security, one might well come up with other threats of equal or greater discounted magnitude: the vulnerability of a heavily indebted country to manipulation of capital and currency markets; the threat to coastal populations and the agricultural economy of global climate change; or a pandemic eruption of a drug-resistant, vaccine-thwarting strain of influenza. Any of these would jeopardize essential U.S. interests. All have some claim on the prudential, prophylactic expenditures of blood and treasure that Feldman urges us to direct to nation building.

---

117. Feldman argues, for example, "In general, Islamist terrorists have long been motivated by their grievances against the authoritarian states in which they live" (15).

Even taking as given Feldman's focus on preventing terrorism, the question of means is at least as complex as the question of ends. For instance, rather than try to control the population of terrorists, we might try to control their access to devastating weapons. As a matter of the expected returns of preventative expenditure, a massive investment in controlling the nuclear materials loose in the former Soviet Union, and similarly controlling the development of biological weapons, is *prima facie* at least as attractive as a comparable expenditure in building nations. After all, the world's stores of weaponizable nuclear material and smallpox virus are finite and, presently, knowable quantities. The number of potential terrorists is neither finite (except at the size of the existing human population) nor knowable, and is unlikely to be so at any time when it is plausible to call terrorism the foremost threat to the United States.

Specific questions remain, then, as to whether nation building can salvage Iraq, as do general questions as to whether nation building should be a preferred way to reduce the threat to the United States from terrorism. The plausibility of identifying terrorism as the leading threat to the United States also remains contestable. Feldman's ethical position has the most force if one regards it as ethics for inadvertent or reluctant imperialists, a justification for a powerful country that has painted itself into a geopolitical corner. Whether we should have come here, or whether we should ever wish to come to such places, are not questions for resolution in a short book written quickly in response to events. What to do in such a situation to minimize practical and ethical disasters and to maximize the chance of making decent use of an unwelcome position, is a fitting and even necessary question, to which Feldman proposes a credible answer, presented with a seemly balance of ambition in formulation and modesty in delivery. What, if anything, it can tell us about the desirability or ethical status of nation building in general is much less clear.

B. Not Starting from Iraq

This is not the place to develop a theory of nation building as an alternative to Feldman's. Nonetheless, in light of the reservations I have laid out, it seems fitting to say something about the structure and leading considerations of such a theory.

The major structural point is that a theory of the desirability of nation building must assess nation-building projects not in isolation, but within a general account of (1) the chief threats to national and global security and (2) the repertoire of resources with which the United States and allied nations can address these. Thus, the question to ask of a prospective nation-building project will never be simply whether it promises to reduce rather than increase the absolute level of some particular threat—for instance,

whether the invasion and occupation of Iraq will reduce the threat of terrorism (a standard by which the project has thus far been a dramatic failure).

Instead, a series of questions will aim at illuminating a multi-factored problem. First, of course, what are the chances that the nation-building project will succeed on its terms, both in itself and as an instrument for reducing certain threats? Second, what is the likely direct effect of undertaking the nation-building project on threats outside the target nation—such as the boost the invasion appears to have given to anti-American sentiment throughout the Islamic world, and to Islamic extremism in unstable polities such as nuclear-armed Pakistan?[118] Third, what is the opportunity cost of spending money and political influence on a nation-building project rather than an alternative strategy for containing threats? Consider, for instance, whether the many tens of billions of dollars sunk into Iraq so far might not have been more effectively spent against terrorism if they had gone into a global monitoring and interdiction program aimed at comprehensively eliminating stray uranium and other raw materials used to make illegal weapons. To summarize, any prospective nation-building project involves both unintended effects and tradeoffs, and a clear view of both is necessary to an evaluation of the project.

Fleshing out these questions will require some ranking of the relevant threats, in terms of both (1) the degree of the danger they present and (2) their susceptibility to influence by American or American-led actions. For instance, the rise of a nuclear-armed Islamist government in Pakistan is a terrible prospect, but whether it is much influenced by American actions in the Islamic world is not straightforward, and any answer attempted without meaningful knowledge of Pakistani politics is likely to be entirely fictive. The prospect of Chinese politics tipping over into an aggressively nationalist posture is perhaps even more alarming, but it is *prima facie* quite a bit less likely than the Pakistan scenario to depend on the actions of other countries.

In contrast, the presence of loose nuclear materials and other ingredients for illegal weapons is a problem eminently susceptible to concerted action by rich countries; perhaps even more to the point, it is certain to go unsolved, and thus very likely to produce a devastating result if those countries do not address it. Such a ranking by threat evaluation and tractability would have definite implications for the assessment of proposed actions. As just suggested, it would seem to make a monitoring and interdiction program for illegal materials a clear imperative; by the same token, it would raise more ambiguous, prudential considerations around serious but less tractable threats such as efforts to avert the rise of menacing regimes in volatile countries. What this ranking of threats meant for nation building

118. On the other side of this balance sheet would be the arguable influence of the Iraq invasion on Libya's recent announcement that it will cease pursuing illegal weapons.

would depend on the particular project under consideration, but in any case this approach would require evaluating the prospective project within a broad nexus of considerations.

Equally important would be a systematic view of the full spectrum of available strategies for reducing threats to national and global security. Take for example the threat of terrorism motivated by extremist ideology. First, stipulate that promoting broadly liberal, democratic societies is one effective deterrent of such terrorism. Holding constant for the moment the question of opportunity costs, vis-à-vis competing threats, several distinctive strategies present themselves. At one extreme is nation building from the ground up, exemplified by the American effort in Iraq: displacing an illiberal and undemocratic regime by force and setting about creating a replacement. At another extreme is the model of European Union expansion: incrementally integrating illiberal or semi-liberal countries into a complex web of political and economic ties through stages of internal political and economic reform. The signal qualities of the first are rapid results, high stakes, and the problems of legitimacy and security already discussed in connection with Iraq. Those of the second are the frustration of incremental reform, coupled with the advantages of cumulative change: relatively stable and mutually reinforcing reforms pressing in the direction of liberalization. It may well be, however, that the European Union model requires too long a wait, and too much reformist commitment on the part of the target regimes, to be an acceptable approach for short-term crises of the sort Iraq was alleged to represent in the run up to the American invasion.

A third model, which has been the chief instrument of American policy aside from military force, is exemplified by the North American Free Trade Agreement and the granting of Most Favored Nation status to China under the World Trade Organization. This approach concentrates on economic integration into a global liberal framework, on the (guarded) faith that liberal and democratic culture is broadly likely to follow from the liberalization of economies. This approach has the advantage of making relatively modest demands on all participants;[119] at the same time, the thesis that it tends toward social and political liberalization is as yet unproven.

A choice among these strategies would press decision makers inevitably back into the set of questions Feldman scrupulously avoids. How do broadly liberal and democratic cultures arise? Under what conditions do liberal and democratic institutions grow strong enough to survive without the support of occupying armies and to undergo crises without collapsing? This is, a bit polemically, the problem of how progress takes place in history, and what, if anything, can be done to induce, hasten, or secure it. To

119. This is in contrast to the extraordinarily expensive and hazardous business of military nation building and the highly involved reforms of European-style integration.

give a few more specific instances of the question: can the creation of democratic institutions precede and then foster the development of civil society, or must civic mediating institutions already be in place before democracy can be stable and effective? Does a liberalized economy promote popular demands for personal liberty, accountable government, and rule of law, or do the social disruptions that a liberalized economy may bring tend to induce political crises that threaten to disrupt democracy and give openings to authoritarian movements? In what measure is there a generalizable optimal sequence of economic, political, and social liberalization, and in what measure does the difference between peaceful change and crisis depend on context and contingency? Do certain political accommodations of social division, such as the formalized and static allocation of power among religious groups in Lebanon, which intermittently looms as a prospect for Iraq, lock in place those social divisions and impede the development of a more flexible and responsive democracy?

Careful assessment of such questions is unlikely to produce categorical answers, but any choice among the strategies of nation building sketched above involves hypotheses about them. For instance, economic liberalization without political liberalization is destabilizing in dangerous ways, and so the U.S. approach to economic integration presents serious hazards that the European Union approach avoids. Or, putting democratic institutions before civil society, as the United States has perforce done in Iraq, is so hazardous as to weigh heavily against that gambit in nation building. Clarity about the hypotheses, their content, and whatever experience and scholarship weighs for or against them, is necessary at the level of deciding not just how the United States should conduct itself in Iraq, but how it and other nations should judge whether, when, and how to undertake any strategy of nation building.

It remains an open question how much the climate of ideas, whether as a diffuse worldview or as a body of express principles, matters in the ethical discipline of imperial power. The most basic ethical difficulties of empire are not conceptual but practical: the immense asymmetry of power between the governors and the governed; the lack of viable mechanisms for democratic feedback from the governed to the governors; the cultural distance between governors whose first loyalty is never to the occupied country and a governed population, whose lives the governors can never completely understand. When an administrator appointed in a faraway capital has to keep order in a restive city, as generations of Britons did in Bombay, Madras, and Delhi, and Paul Bremer tried to do in Baghdad, or when a young soldier is surrounded by a swarm of people whose language he cannot understand, who waver between supplicating and threatening him, and his scant authority rests in his uniform and his gun—how much does it matter whether the rulers who sent him there understand themselves

to be promoting national glory, the progress of mankind toward reason, the chastened conception of trusteeship and eventual democratic legitimacy that Noah Feldman recommends? At worst, but probably at best, as well, the answer remains uncertain.

There is a great deal to be said for avoiding imperial circumstances wherever possible, precisely because the ethical challenges they present are so basic and so frequently intractable. When the choice not to exercise imperial power is unavailable or too costly to make, however, the weak reed of ethical argument takes its place among the few stays against the misdirection or abuse of that power. Feldman's challenge to a new generation of power, conducted by way of a new generation of ideas, is an important step in the continuing experiment of disciplining power with the counter power of insight and principle.