

# REBUILDING THE FOUNDATIONS OF IRAQ: COMPARISONS TO THE REVIVAL OF DEMOCRACY IN CENTRAL EUROPE

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## I. INTRODUCTION

The daunting task before the United States and the United Nations is the reformation of a country and the creation of a working democracy in Iraq. An Iraqi democracy must reflect the image of its ethnically diverse population and stand as a clear vision and represent the strong foundations required for the establishment of a unifying constitution. An Iraqi democracy must For a society to begin the journey towards a developed democracy, “there is a need first to have a constitution, to have a government, to re-establish Iraq as the Iraqi people would like to have it.”<sup>1</sup> The constitution *must* be supported by a legitimate representative government with enforceability power, or, like the constitutions of so many nations, it will be worth nothing more than the paper it is printed upon. The challenge is to form a government for the people of Iraq that will restore faith in the political process and unify a nation currently in flux with competing minorities. Such a task is complicated but imperative to return stability to the Middle East.

The movement towards freedom and democracy is already progressing as the United States presses for the eventual creation of a three-hundred member National Assembly in Iraq.<sup>2</sup> The assembly should be endowed with the power to draft a new constitution, re-invigorate a beleaguered judiciary, and empower a free market of trade.<sup>3</sup> While the United States delayed the institution of actual policies and procedures for creating an Iraqi National Assembly, the Coalition Provisional Authority, prior to national elections, formed a temporary governing

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<sup>1</sup> *See generally Is the Price, in Blood and Money Too High*, ECONOMIST, Aug. 9, 2003, at 38.

<sup>2</sup> *Out of the Ashes*, ECONOMIST, May 10, 2003, at 37.

<sup>3</sup> *Id.*

council represented by the country's various political, ethnic, and sectarian demographics.<sup>4</sup>

At the same time, the governing council sought to restore order in Iraq, following the United States' overthrow of Saddam Hussein. They face not only fear of possible reprisals against themselves,<sup>5</sup> but also must mend the fractured rifts between the ethnic and sectarian groups.<sup>6</sup> In addition to resolving past differences between the minorities, the new government must adhere to the essential elements of a prosperous democracy by ensuring that both economic and political reforms are developed equally towards the eventual goal of creating a national government of the people, driven by a free market economy.<sup>7</sup>

Following the fall of communism in 1989, Sir Ralf Dahrendorf<sup>8</sup> expressed that reformation of Central Europe would be a difficult task. He believed that "[i]t will take six months to reform the political systems, six years to change the economic systems, and sixty years to effect a revolution in the peoples' hearts and minds."<sup>9</sup> The situation in Iraq is a more tenuous task, and time is not a luxury. However, due to the resurgence of democracy in Central Europe, the world has access to a working model from which to draw its experience.

Reformation is difficult to accomplish but not impossible to achieve. It would be wise for the world to not only unite in support of a free Iraq, but also to utilize the Central European models to define the structures and institutions necessary to rebuild the foundations of an independent nation. However, considering the volatile political and religious climate often recognized in the Middle East, its progress will be varied from the Central European reformation and, therefore, must be advanced with utmost care. Should the newly elected government ignore this fact, there is a strong possibility that it will dissolve into a regime of elected

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<sup>4</sup> *The New Men, and Women in Charge*, ECONOMIST, July 19, 2003, at 19. The governing council, composed mostly of exiled former leaders, includes many of the political trends and religious affiliations of Iraq and includes both men and women from all demographic groups. *Id.*

<sup>5</sup> *Cursed by Crime and Numbers*, ECONOMIST, Sept. 27, 2003, at 44.

<sup>6</sup> *The Rise of a Radical*, ECONOMIST, Oct. 18, 2003, at 45.

<sup>7</sup> *See Rebuilding Iraq*, ECONOMIST, Apr. 19, 2003, at 9.

<sup>8</sup> Sir Ralf Dahrendorf, a sociologist and distinguished academic, was born in Hamburg, Germany in 1929. As a social democrat during Nazi Germany, he was sent to a concentration camp in 1933. After his release from the camp, Sir Ralf fought with the resistance. After the war, he authored many books and theoretical essays on social democracy and political theory. Interview by Harry Kreisler with Sir Ralf Dahrendorf, Warden of St. Anthony's College, Oxford, England (Apr. 4, 1989), in *Conversations with History: Straddling Theory and Practice*, <http://globetrotter.berkeley.edu/Elberg/Dahrendorf/dahrendorf1.html>.

<sup>9</sup> Vojtech Cepl, *The Transformation of Hearts and Minds in Eastern Europe*, 17 CATO J. 229, 229-30 (Fall 1997).

officials who will ignore “constitutional limits on their power and deprive[d] their citizens of basic rights,” thus repeating the historical agony of the region but, this time, under the guise of democracy.<sup>10</sup>

## II. BRIEF POLITICAL HISTORY OF IRAQ

At the conclusion of the First World War, under a mandate from the British government, the kingdom of Iraq was established.<sup>11</sup> Accompanying the development of the kingdom, British state builders instituted a political system that included a monarchy, a parliament, a Western-style constitution, and a standing military.<sup>12</sup> However, the British were also responsible for creating many of the current problems faced by Iraqis today, including an in-state minority dilemma and border disputes with neighboring states, primarily because their governmental policies were established in an indecisive manner.<sup>13</sup> Due to a lack of enforcement power delegated to the Iraqi government, after the British left the territory, the process of decolonization left the Middle East with a nation suffering from an undefined political identity; weakened by a destabilized and diverse population, which failed to assimilate itself into a cohesive political community.<sup>14</sup>

Following the foundation of the Iraqi state in the 1920's, conflicts arose over the political ideals of various leaders desiring to control the future of Iraq.<sup>15</sup> The political command structure shifted during the period of transformation following the British mandate, resulting in power being passed from tribal sheikhs under the initial democracy, to Arab nationalists, to the Iraqi Communist Party, to Kurdish leaders, and finally to the Ba'thist regime of Saddam Hussein.<sup>16</sup> Each group within the country had different visions for the future of Iraq and sought to assert dominant control over the entire population with disastrous results.<sup>17</sup> These visions each reveal the path that various internal ethnic groups sought to self-identify by attempting to gain complete control over the state and eventually resulting in one community's assertion of supremacy and power over another.<sup>18</sup> Throughout its existence, Iraq has experienced a “powerful tendency for politics to be seen mainly as a way

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<sup>10</sup> FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 17 (2003).

<sup>11</sup> See Arab.net, [http://www.arab.net/iraq/iq\\_british.htm](http://www.arab.net/iraq/iq_british.htm) (last visited Oct. 11, 2005).

<sup>12</sup> PHEBE MARR, *THE MODERN HISTORY OF IRAQ* 29 (2d ed. 2003).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 5.

<sup>15</sup> CHARLES TRIPP, *A HISTORY OF IRAQ* 1-2 (2d ed. 2002).

<sup>16</sup> *Id.* at 2.

<sup>17</sup> *Id.* at 1-2.

<sup>18</sup> *Id.* at 3.

of disciplining the population in order to ensure conformity with the rulers' vision of social order."<sup>19</sup>

### III. ETHNICITIES WITHIN IRAQ

While a significant majority of the Iraqi population is Shi'a,<sup>20</sup> they have never been able to define themselves as a single political community. The Shi'a leadership is restricted by the *mujahids*,<sup>21</sup> whose views generally differ regarding the various economic and social foundations of the state. These conflicting viewpoints create a split within the Shi'a community. Some leaders choose to identify with the ideals found in theoretical Arab nationalism.<sup>22</sup> Arab nationalism is founded on the belief that by supporting the Arabs such actions may eventually lead to obtaining more rights and, ultimately, bridge the gap between the Sunni Arabs and the Shi'as.<sup>23</sup> However, other factions of Shi'a leaders oppose Arab nationalism and demonstrate a need to strive for a self-identification of sectarianism.

The dominant culture of ethnic Arab nationalism has effectively widened the gap between idealists by forcing the populous to choose between supporting the respectful leadership of the *mujahids* or following the path towards the creation of a unified Iraqi state.<sup>24</sup> The underlying issue for the Shi'a, and for most other Iraqis, is that the choice has never been theirs to make. Rather, in the past, such a decision was forced upon them to accept the wishes of the dominant power or face the fear of death or retribution.

The defining split within Iraqi politics and social groups is caused by the strength of influential authoritarianism, the ability of the dominant powers to exploit the fractured relations of the populous, and by the immense distrust Iraqis have in political officials. This allows for the status quo of fear and societal suspicions to exist on a grand scale in Iraqi society. The mere fact that these elements are allowed to survive under the guise of a totalitarian society would tend to be the logical reasoning behind why a strong political and social movement towards gathering the people into a unified society has taken so long to develop. Any new attempts by the Democratic government to break the cycle of fear must first seek to dissolve patrimonialism, or allowing those in

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<sup>19</sup> *Id.* at 2.

<sup>20</sup> Shi'as represent fifteen million, or sixty percent, of the entire population of Iraq. *The Rise of a Radical*, *supra* note 6, at 44.

<sup>21</sup> A *mujahid* is an Islamic Fighter or "someone who is active and fights for Islam." Islamic Glossary, <http://www.usc.edu/dept/MSA/reference/glossary/term.MUJAHID.html> (last visited Oct. 11, 2005).

<sup>22</sup> TRIPP, *supra* note 15, at 3.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 5.

power to change the belief that supporters of a régime must share the inevitable fate of the leaders they choose to follow.<sup>25</sup> Otherwise, the cycle of ruthless violence will continue to persist, becoming a mainstay in Iraqi political culture.

The manufacturing of fear as a tool of dominance within the society has resulted in the elite ruling class's ability to forge the foundations of a civilized Iraq under a demented notion of political order. The use of violence to suppress the dissident factions of a fractured community has left Iraq with an opposition whose influence has been silenced and left a nation lacking a voice of opposition loud enough to effectuate change amongst the various political groups.<sup>26</sup>

The rising emergence of pan-Arabism amongst the Arab speaking community has led to a successful attempt by the Sunnis to unify an Arab identity by creating a connection with the region's glorious past that seems to transcend the new national borders of Iraq.<sup>27</sup> However, pan-Arabism failed to have the same effect on the Kurdish community, which still harbors ambitions of nationalism. Additionally, the Shi'a continue to challenge the core significance of pan-Arabism by following their system of complex sectarianism.<sup>28</sup>

The Shi'a majority called for the formation of an electorate, rather than the American appointed Governing Council, to draft a new Iraqi constitution.<sup>29</sup> Shi'a clerics declared that nothing less than an elected National Assembly would carry enough legitimacy with the people to draft a suitable constitution.<sup>30</sup> Legitimacy must be won in an election in order for the people to accept the representatives who will define the future of their nation and individual rights.<sup>31</sup> However, the ethnic minority Kurds are fearful of nationwide elections, stating that "[d]emocracy does not mean that Arabs should decide the fate of the Kurds."<sup>32</sup> The fear being that, should the Shi'as mobilize politically, they could effectively gain a super majority in the proposed electorate, thus drafting the constitution in a manner denying fundamental rights to minority populations.<sup>33</sup>

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<sup>25</sup> *Id.* at 6.

<sup>26</sup> *See id.* at 275.

<sup>27</sup> JOSEPH BRAUDE, *THE NEW IRAQ* 38 (2003).

<sup>28</sup> *Id.* at 39.

<sup>29</sup> *First Give Them Power of a Kind, Then Let's Discuss Democracy*, *ECONOMIST*, Nov. 22, 2003, at 43.

<sup>30</sup> *The Rise of a Radical*, *supra* note 6, at 44.

<sup>31</sup> *The New Men and Women in Charge*, *supra* note 4, at 19.

<sup>32</sup> *Can Kurds and Arabs Be Reunited?*, *ECONOMIST*, Sept. 20, 2003, at 45.

<sup>33</sup> *Cursed By Crime and Numbers*, *supra* note 5, at 44.

## IV. REUNIFICATION AND THE KURDS

One major problem with the unification of Iraq is the relationship between the Kurdish population in Northern Iraq and the rest of the country. Following the Iran-Iraq war, Saddam Hussein turned his attention to the dissident Kurdish communities of the north, launching the infamous *anfal*,<sup>34</sup> or spoils of war.<sup>35</sup> During this period of conflict, the assault on the Kurdish people became an action of genocide,<sup>36</sup> which, with the aide of chemical weapons, led to the murder of over 100,000 people.<sup>37</sup> The end result of the *anfal* was the displacement of hundreds of thousands of Kurds from their homes and villages, all in the name of Arabization.<sup>38</sup> The Arabization of Northern Iraq aided in the dominant control by the Ba'hist government because "when an individual is deprived of his private property, he loses his economic independence and so is more easily and completely controlled and oppressed by the state."<sup>39</sup>

The current situation, with respect to the relationship of the Kurds and the newly elected Iraqi government in Baghdad, is a complex one. Many Kurds consider the territory that they were forced to flee to as a newly formed nation of "Kurdistan."<sup>40</sup> In fact, "Kurdistan" maintains the basis of a quasi-nation, which observes a culture vastly different from what would be considered Iraqi.<sup>41</sup>

While some Kurds sought independence from a unified Iraq, others had a significant power base in the provisional governing council because they were the most organized ethnic group within Iraq.<sup>42</sup>

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<sup>34</sup> *Anfal* is the name given by the Iraqis to a series of military actions, ordered by Saddam Hussein following the Iran-Iraq war, which lasted from February 23 until September 6, 1988 against the Kurdish population in Northern Iraq. Khaled Salih, *Anfal: The Kurdish Genocide in Iraq*, 4 DIGEST OF MIDDLE EAST STUDIES 2, 24-39 (Spring 1995), available at <http://www.xs4all.nl/~tank/kurdish/htdocs/his/Khaledtext.html>.

<sup>35</sup> BRAUDE, *supra* note 27, at 40.

<sup>36</sup> G.A. Res. 96 (I), at 188-89, U.N. Doc. A/64/Add. 1 (Dec. 11, 1946).

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscious of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.

*Id.*

<sup>37</sup> BRAUDE, *supra* note 27, at 40.

<sup>38</sup> *First Give Them Power of a Kind, Then Let's Discuss Democracy*, *supra* note 29, at 44.

<sup>39</sup> Vojtech Cepl, *The Road Out of Serfdom*, 12 VERA LEX 4, 6 (1992).

<sup>40</sup> *We've Never Had It So Good*, ECONOMIST, Aug. 9, 2003, at 38.

<sup>41</sup> *Id.* The Kurds actually speak another language, live underneath a different flag, and trade in an alternative currency. See *First Give Them Power of a Kind, Then Let's Discuss Democracy*, *supra* note 29, at 44.

<sup>42</sup> BRAUDE, *supra* note 27, at 44.

However, it is unclear whether the Kurds will seek democratic unity with Iraq or demand independence. Many Kurds are disturbed by the lack of stability in the South, thus questioning the creation of a future democratic state of Iraq.<sup>43</sup> However, the reclamation of property lost during the *anfal* seems to be proceeding in a promising matter as Kurds are seeking restitution from the courts, rather than with Kalashnikovs.<sup>44</sup>

#### V. FEDERALISM

A relevant question for the future of Iraq, as was the case in Central Europe,<sup>45</sup> is whether the concept of federalism will prove to be a source of irreconcilable conflict between the various political factions. Federalism is a way to limit the dissension in a divisive state in favor of cooperation between the majority and the minority with the intended result being unification. Ultimately, federalism allows for “fuller satisfaction of separate tastes.”<sup>46</sup> However, should the gap between the majority and the minority become too vast, the possibility of tyrannical action resulting in the confiscation or denial of ordinary civil rights against the minorities increases.<sup>47</sup> Even though federalism is an acceptable option for a society’s transition into a democracy, it is not the “perfect solution when the number of [minority] groups within a nation is increased to three or more [as in Iraq], because the problems of local oppression and domination do not disappear simply because more groups are subject to a common federal government.”<sup>48</sup>

The difficulties faced by European nations following communism in relation to federalism were similar because even though the territories were small, “the racial, linguistic, and national diversity within their tight boundaries” were high in many instances.<sup>49</sup> In the United States, the problems related to federalism were limited to instances of “regionalism within a common language and a common culture.”<sup>50</sup> “Even the prospects for geographical separation within a federation are limited” because minorities are often found “nested within minorities, or widely diffused throughout a larger population, so that short of a

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<sup>43</sup> *Id.* at 45.

<sup>44</sup> *Id.*

<sup>45</sup> Vojtech Cepl, *Constitutional Reform in the Czech Republic*, 28 U.S.F. L. REV. 29, 32-33 (1993).

<sup>46</sup> Richard A. Epstein, *All Quiet on the Eastern Front*, 58 U. CHI. L. REV. 555, 566 (1991).

<sup>47</sup> *Id.* at 556-57.

<sup>48</sup> *Id.* at 567.

<sup>49</sup> *Id.* at 566.

<sup>50</sup> *Id.* at 565.

migration, any set of boundaries will leave at least some group[s] exposed to the depredations of its historical enemies.<sup>51</sup>

The difficulties in Iraq that differ from the application of federalism within the United States and Eastern Europe are such that Iraq has no dominant culture or single language to serve as a unifying theme for the opposing parties to build from.<sup>52</sup> As with the division of Eastern Europe, Iraq has similar problems relating to the critical lines of division between the ethnic populations, namely the border conflicts between the Kurds and the Turks. This border conflict was artificially created during the initial declaration of an Iraqi nation-state, at the hands of the Europeans as they sought to carve up the world as they deemed proper following the First World War.<sup>53</sup> However, if the situation in Iraq is not resolved in a peaceful manner, it could deteriorate into another Yugoslavian conflict,<sup>54</sup> which resulted from World Powers defining borders and forcing the cohabitation of historically ethnic enemies.

#### VI. ECONOMIC INEQUALITY

Beginning in August of 1990 and continuing after the First Gulf War, the United Nations imposed economic embargos upon Iraq,<sup>55</sup> which drastically affected its national economy. The embargos lead to an extreme deterioration of Iraqi society, increasing poverty and causing widespread hunger throughout the civilian population.<sup>56</sup> The embargos were initially viewed to be in compliance with the United Nations guidelines, however, upon seeing the plight of the Iraqi people, the nations of the world agreed to specific terms, which would allow Iraqi government to exchange oil for food.<sup>57</sup> While Saddam Hussein counted on the world's dependence on oil, he bypassed the embargos by developing

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<sup>51</sup> *Id.* at 566.

<sup>52</sup> *Id.*

<sup>53</sup> See World War I and the British Mandate, <http://reference.allrefer.com/country-guide-study/iraq/iraq15.html> (last visited Oct. 11, 2005).

<sup>54</sup> The creation of Yugoslavia left a nation with eight distinct minorities forced to exist in cohabitation. Epstein, *supra* note 46, at 567. Following the death of Tito, the former Yugoslavia deteriorated into a civil war of ethnic cleansing between Croats, Bosnian Serbs, and Muslims where hundreds of thousands died. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 198 (2d ed. 2001). During the conflict Serbian aggressors forcibly raped Muslim women with the intent of genocide, whereby Serbian babies would be born, rather than Muslims. *Id.* at 43.

<sup>55</sup> BRAUDE, *supra* note 27, at 40.

<sup>56</sup> See TRIPP, *supra* note 15, at 269. After 1990, the Iraqi population suffered from the United Nation backed sanctions.

<sup>57</sup> In 1996, the United Nations, under Security Council Resolution 986, allowed for the exchange of oil for food in the amount of two billion dollars every six months, until UN SC Resolution 1153 in 1998, increased the amount to \$8.3 billion. *Id.* at 262.



trade relations with other countries in the Gulf, the eastern-Mediterranean region, Russia, China, and France.<sup>58</sup>

During this period of embargos, Ba'th party elites were able to defy the international sanctions and increase their own accounts while the rest of the country and its populous continued to live in poverty.<sup>59</sup> Thus, the Ba'thist's were able to increase their hold on the population because "[i]f the great majority of a society's wealth is controlled by a single group, that group can easily dominate society."<sup>60</sup> The differential between the elite and the impoverished in Iraq during the years of international pressure created an atmosphere in which the elites of the Saddam regime feared that a loss of power could result in a backlash of bloody proportions.<sup>61</sup> This fear of a revolt by an immense lower class population increased the frequency of terror initiated by Ba'th party apparatchiks and intelligence service enforcers, who felt that terrorizing the population would control its social direction and avoid the possibility of revolution.

#### VII. DISTRUST OF THE REGIME

The totalitarian rule of Saddam Hussein and Ba'th party elites subjected Iraqis to nearly four decades of "brutally enforced silence."<sup>62</sup> Under the Ba'thist regime, Hussein successfully inhibited the people from participation in the governmental decision-making process, denying them self-determination and preventing the population from developing the necessary social skills that are essential for the advancement of a modern civilization.<sup>63</sup> Thus, the years of tortured silence, poverty, and isolationism have left a nation of brutalized and humiliated citizens who remain scarred and distrustful of government control.<sup>64</sup> After the Ba'th party took power in 1968, the intelligence community grew to include over 500,000 government collaborators.<sup>65</sup> The Ba'th party regime kept detailed records of their security and intelligence apparatus, which included a complex "web of serial snitches" in an organization known as the *Mukhabarat*.<sup>66</sup> These secret officials assisted internal security

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<sup>58</sup> *Id.* at 279.

<sup>59</sup> See BRAUDE, *supra* note 27, at 52.

<sup>60</sup> CepI, *supra* note 39, at 6.

<sup>61</sup> *Ferment of Freedom, Fear and Fantasy*, ECONOMIST, Apr. 26, 2003, at 38.

<sup>62</sup> *Id.*

<sup>63</sup> IRIS MARION YOUNG, INCLUSION AND DEMOCRACY, 156 (2000).

<sup>64</sup> *Id.*

<sup>65</sup> See BRAUDE, *supra* note 27, at 48. The 500,000 collaborators were within five principle government agencies: special security, general security, general intelligence, military intelligence, and military security.

<sup>66</sup> *Id.* at 58. The Iraqi Intelligence Service ("IIS"), also known as the *Mukhabarat*, is the "most notorious and possibly the most important arm of the state security system." It is

officials, civil police authorities, and the Special Security Organization<sup>67</sup> by spying on government officials, tracking down “enemies of the state,” and freely imprisoning and torturing anyone in the population outside the power and protection of the authoritative government.<sup>68</sup> During the decades in which the Ba’th party controlled the Iraqi government, it instituted two youth programs: the *tala’i* and the *futuwwa*. These youth groups were founded on a system which awarded its young members for turning in community leaders, oftentimes including their own parents, who criticized the Saddam regime, even within the privacy of their own home.<sup>69</sup>

The Ba’th party’s terror network was primarily located in the larger territories, providing for the greatest coercive power and intimidation to be levied upon the areas of dense population.<sup>70</sup> Under the control of the Ba’th party, many families, at the hands of party elites, were victims of theft or lost loved ones who were kidnapped in the middle of the night never to be seen again.<sup>71</sup> During the Shi’a uprising in 1991, several rebels were able to experience first-hand the extent of which the torture was carried out against Iraqi citizens:

As I wandered around the jail, I saw some of the instruments that were used to torture people, with instruction manuals posted on the wall. I saw huge, human meat grinders that fed into a septic tank. I saw chemical pools in which people were dissolved. I saw rooms for sexual abuse, and human ovens. The smell in these rooms was putrid, smell only decades of torture can create.<sup>72</sup>

The power to inflict terror was also applied against government informants who feared that they too would be turned in and subjected to the same fate of torture, or even death.<sup>73</sup> This deep rooted element of fear and distrust within the Iraqi psyche has many Iraqis fearing that certain elements of the former regime will not be rooted out and that these actions will continue to reside in the pillars of any new government.<sup>74</sup>

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the main state intelligence responsible for political and security problems. “It is the equivalent of the CIA and the FBI rolled into one.” Global Security Agency, Explaining the Iraqi Intelligence Service, <http://www.globalsecurity.org/intell/world/iraq/mukhabarat.htm> (last visited Oct. 11, 2005).

<sup>67</sup> See BRAUDE, *supra* note 27, at 48-49. The Special Security Organization is an elite Iraqi information institution headed by Quasy Hussein, son of Saddam Hussein, which specialized in beatings and executions.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 47.

<sup>70</sup> *Out of the Ashes*, *supra* note 2, at 37.

<sup>71</sup> BRAUDE, *supra* note 27, at 57.

<sup>72</sup> Interview with Zainab a-Suwaij, Executive Director of the American Islamic Congress, Cambridge, MA (February 2003), in BRAUDE, *supra* note 27, at 58.

<sup>73</sup> *Id.* at 49.

<sup>74</sup> *Id.* at 58.

Concerns arise because moles from the *Mukhabarat* will inevitably exist within the government offices of the new Iraqi republic, and something must be done to ensure that this does not occur.

The new democratic authority must regain control of the population not only through political and economic reform, but through the individualized trust of a people scarred from years of lacking faith not only in the government, but in each other. Essentially, in the grander scheme of developing a unified nation, the new government must “transform the hearts and minds” of the Iraqi people from a deeply seeded hatred to an acceptance of all Iraqis.

#### VIII. TRANSFORMATION

The “transformation of hearts and minds” of a citizenry refers to the societal doctrine that governs human conduct or values.<sup>75</sup> In order for Iraq to successfully transfer power, it must repair the societal community or “social capital,” which is the cornerstone of any modern civilization.<sup>76</sup> Social capital is a community-based support system which facilitates mutual cooperation for the benefit of the larger group through the rules of basic human conduct.<sup>77</sup> The rules of basic human conduct consist of customary norms existing in the minds of the people and standing as the derivation of their behavioral patterns and shared values.<sup>78</sup> This standard of behavior is the foundation for informed self-thought as to “what is right and wrong, proper and improper, appropriate and inappropriate in particular situations, or even what they must do to get by in life.”<sup>79</sup>

The importance of a civilization to overcome past distrust of a government, and society in general, is of great importance for the creation of a new structural government because it teaches the population that without the support and trust of another, failure exists as a possible result. David Hume further explains the need for social capital in his use of the parable of the two farmers:

Your corn is ripe today; mine will be so tomorrow. ‘Tis profitable for us both, that I should labour with you today, and that you should aid me tomorrow. I have no kindness for you, and know you have as little for me. I will not, therefore, take any pains upon your account; and should I labour with you upon my own account, in expectation of a return, I know I should be disappointed, and that I should in vain depend upon your gratitude. Here then I leave you to labour alone; You treat me in

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<sup>75</sup> Cepl, *supra* note 9, at 229-30.

<sup>76</sup> See Robert D. Putnam, *The Prosperous Community: Social Capital and Public Life*, 13 THE AMERICAN PROSPECT 1 (Spring 2003).

<sup>77</sup> *Id.*

<sup>78</sup> Cepl, *supra* note 9, at 230.

<sup>79</sup> *Id.*

the same manner. The seasons change; and both of us lose our harvests for want of mutual confidence and security.<sup>80</sup>

When the farmer above sought the aid of another in his community, he sought a trust that had never existed before, but that farmer was denied the support he desired out of a deep-rooted communal distrust of others. However, after the other farmer viewed the existence of a potential benefit that would outweigh his distrust, his interest in social capital drove him towards acceptance. In Iraq, similar events will occur as the people slowly move further away from the distrust that was the result of many years of government supported divisiveness, and more towards supporting the existence of social capital in their local communities. However, this will only occur if the nation is opened to the “marketplace of ideas” for free speech and the spontaneous interaction between the citizens towards acceptance of each other.

Societal norms develop and are internalized gradually in an evolutionary fashion after many years of unimpeded social interaction between the people.<sup>81</sup> In order for actual change to be accomplished, there must be a true change in the actual lives of the people, such as a political democracy replacing a totalitarian regime, but for some, no matter how massive a transformation occurs, old habits of normal life are difficult to break.<sup>82</sup> Habits become increasingly difficult to break depending on the amount of time the prior regimes existed in a dominant position of control over the people. Eastern Europe, for example, remained under the control of the communist powers for only two generations, leaving a large portion of the people under the age of fifty without any knowledge of life without a dominant government.<sup>83</sup> However, because the communist system rose to power following the Nazi occupation of Eastern Europe, those over the age of fifty understood the differences and benefits associated with a democratic tradition of government and could easily aid communities in returning to the former societal norms.<sup>84</sup>

Time is an important factor when establishing such a sweeping change in government, as is currently occurring in Iraq, because, should the change not occur rapidly, the risk of the population returning to the normal patterns of behavior under the prior regime increases. Should

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<sup>80</sup> DAVID HUME: A TREATISE OF HUMAN NATURE, VOL. II, BOOK III: OF MORALS 288 (T.H. Green & T.H. Grose eds., 1898).

<sup>81</sup> Cepl, *supra* note 9, at 230.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 231.

<sup>84</sup> *Id.* Unfortunately, countries such as the Baltic states (Estonia, Latvia, and Lithuania), had a more challenging time during the transfer of sovereignty in the 1990s because communism had been the norm for seventy-five years, leaving a population with little or no understanding of a prior free traditional government. *Id.*

this happen, the new government risks losing all legitimacy in the creation of a new democratic state. In order to adapt a society to a large change in government, the transformation of social order must also be advanced to coincide with the revolutionary ideals of a democratic government. Thus, because the rules of human conduct are learned by observing societal behavior and social interactions, rather than by the development of laws, the government must develop a legal system that allows for self-enhancement, rather than forced modification.<sup>85</sup>

Therefore, a short discussion on the various legal theories is warranted. Essentially, “[l]aws in their most general signification, are the necessary relations arising from the nature of things.”<sup>86</sup> As such, laws are dependent on the theoretical ideal a nation chooses to adopt for their legislation. The basic ideals of a legal society based on the structure of laws are predicated on the belief that two fundamental structures of law exist. These theories are best known as legal positivism and natural law.<sup>87</sup>

Iraq, under the Ba’thist regime, chose to follow the theory of legal positivism. The theory of legal positivism is based on the belief that law is the order of an expression of the ruler.<sup>88</sup> Thus, such a policy places the entire authority of legislative lawmaking and enforcement in the hands of a single individual, such as a king, or, in this situation, a dictator, similar to Saddam Hussein. Some believe that positivist laws represent a choice of vice over virtue and that such law is “not founded on the general constitution of human nature, but purely on the will of the legislature.”<sup>89</sup> The positivist line of legal tradition follows the concept of *lex dura sed lex*,<sup>90</sup> which increases the possibility of a corruptible and totalitarian regime to imprison an entire population under the demented visions of one individual. For “[a]ny societal institution which gives an individual or body of men an advantage of which others are deprived therefore violates the rights of natural equality.”<sup>91</sup>

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<sup>85</sup> *Id.*

<sup>86</sup> DAVID W. CARRITHERS ET AL., *MONTESQUIEU’S SCIENCE OF POLITICS: ESSAYS ON THE SPIRIT OF LAWS* 49 (2000).

<sup>87</sup> *Id.* at 41.

[I]t makes sense to speak of natural, that is to say of a law that which defines an immutable and universal standard of justice by which all positive laws should be judged, or whether in fact there is no such thing as natural law (at least not in the sense of moral law) and that positive laws are simply to be seen as a matter of convention.

*Id.*

<sup>88</sup> *See generally id.*

<sup>89</sup> *Id.* at 44-45.

<sup>90</sup> Latin translation: A bad law is still law.

<sup>91</sup> CONDORCET, *CONDORCET: FOUNDATIONS OF SOCIAL CHOICE AND POLITICAL THEORY* 267 (Iain McLean & Fiona Hewitt eds., trans. 1994).

The opposing view, natural law, espouses the belief that when “[m]en have joined together in order to preserve their natural rights, and their rights are the same for all, society must therefore ensure that everyone has an equal enjoyment of these rights.”<sup>92</sup> Natural law is the theoretical understanding that our notions of the difference between right and wrong are derived from a belief in a higher power or from learned behavior resulting from the interactions of people living in coexistence, or a combination of the two. The social interactions between people create a learned understanding of right and wrong through trial and error resulting from the spontaneous development of human conduct, believing in the principle of *lex injusta non est lex*.<sup>93</sup> “[People] know when they are bound to keep their promises, [and] when it is appropriate to ignore a legally prescribed rule.”<sup>94</sup>

Natural law principles are predicated on the essential foundation of allowing criticism of the existing political and economic status to effectuate legitimate change, and in a situation where “profound changes in a society are carried out, such [principles] are justified . . . .”<sup>95</sup> By simply employing natural law as the background for a new society in Iraq, which has known only totalitarian rule for the past four decades, “it will be possible to give perspective to a people who have known only one specific system” and allow the new leaders to persuade the people that a new constitution in Iraq is required or else the efforts towards creating a new society were for nothing.<sup>96</sup> Such a belief allows for the people to establish their own sense of inner justice and morality without the forced interference of a solitary dictator.

The theoretical legal principles, combined with the intent of the population to effectuate change in behavioral patterns, must work in tandem to ensure that the transformation of the hearts and minds of the people of Iraq allow for unification behind a new democratic nation. The most efficient manner to create such change in the hearts and minds of the population is through three banner principles: condemnation of the former regime, lustration of the new government, and restitution of those wronged as a result of the former regime.<sup>97</sup>

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<sup>92</sup> *Id.* “In the state of nature indeed, all men are born equal; but they cannot continue in this equality: society makes them lose it, and they recover it only by the protection of the laws.” CARRITHERS ET AL., *supra* note 86, at 52 (citation omitted) (quoting CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF LAWS*, VIII, 3 (Thomas Nugent, trans., 1750)).

<sup>93</sup> Latin Translation: An unjust law is not a law. “A good law should be good for all men, just as a true proposition is true for all.” CARRITHERS et al., *supra* note 86, at 58.

<sup>94</sup> Cepl, *supra* note 9, at 230.

<sup>95</sup> Cepl, *The Road Out of Serfdom*, *supra* note 39, at 4.

<sup>96</sup> *Id.*

<sup>97</sup> Cepl, *supra* note 9, at 230.

## IX. CONDEMNATION

Often the motivation for political change in society, such as the overthrow and collapse of Saddam's Ba'thist regime, is a desire for revenge rather than an actual revolution. However, in order to transform a society, what was wrong must be changed, and those responsible must be named and condemned before the eyes of the people. Responsibility and accountability must be public and can manifest under many different procedures, such as show trials or truth commissions.<sup>98</sup> One proper manner to condemn a totalitarian regime is with the use of televised Nuremberg style war crimes trials. A full-scale trial allows a newly formed democracy to publicly condemn, before the eyes of the masses who suffered greatly at the bottom of the society, those responsible for the years of torture and torment under the former regime. Such action is best utilized following a totalitarian regime because criminal responsibility ultimately belongs to one person.

Condemnation helps to prevent people from claiming at sometime in the future that Ba'thist principles are somehow compatible with newly identified democratic principles.<sup>99</sup> "The punishment of crimes committed under [a totalitarian regime] helps deter the possib[ility] of such outrageous behavior in the future."<sup>100</sup> The Iraqi Governing Council took the first steps toward condemnation by announcing a decision to cancel all public holidays previously celebrated under the former regime and by declaring April 9th<sup>101</sup> a new national holiday.<sup>102</sup>

Following the capture of Saddam Hussein on December 13, 2003, the people and the new government of Iraq are finally able to seek retribution against the man who directly caused their agony.

This is a great day in Iraq's history. For decades, hundreds of thousands of you suffered at the hands of this cruel man. For decades he threatened and attacked your neighbors. Those days are over forever. Now it is time to look to the future, to a future of hope, to your future of reconciliation. Iraq's future, your future has never been more full of hope. The tyrant is a prisoner. The economy is moving forward. You have before you the prospect of a sovereign government in a few months. With the arrest of Saddam Hussein, there is a new opportunity for the members of the former regime, whether military or civilian to end their bitter opposition. Let them now come forward in a spirit of reconciliation, and hope, lay down their arms, and join you in

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<sup>98</sup> See RATNER & ABRAMS, *supra* note 54, at 154-55.

<sup>99</sup> Cepl, *supra* note 9, at 233.

<sup>100</sup> *Id.*

<sup>101</sup> The date of the momentous occasion in which the citizens toppled a bronze statue of Saddam Hussein, with the aid of United States Army vehicles, to the ground in Ferdous Square, Baghdad.

<sup>102</sup> *The New Men, and Women in Charge*, *supra* note 4, at 18.

the task of building the new Iraq. Now is the time for all Iraqis—Arabs and Kurds, Sunnis, Shi'as, Christian and Turkomen—to build a prosperous and democratic Iraq, at peace with itself and with its neighbors.<sup>103</sup>

For the government, this arrest symbolizes the resolve of the new government, and his eventual conviction will result in the public condemnation of not only Saddam Hussein, but all of the ranks of the former regime, and gives the new democratic government a legitimacy that it so desires from the people. Furthermore, such action serves as a political message to demonstrate to remaining Ba'hist supporters, hiding within the new Iraqi authority, that the former regime no longer retains any semblance of power.<sup>104</sup>

#### X. LUSTRATION

Perhaps the most logical path to follow when purging a new political system of an anti-freedom workforce produced by the former regime, would be to establish a lustration<sup>105</sup> certification process.<sup>106</sup> This process of elimination would be aided by the lustration models used in the national reconciliation of former communist countries. During the reconciliation of East Germany in the 1990s, the newly established government declared that *all* citizens deserved the opportunity to view their files in the *Stasi*<sup>107</sup> headquarters.<sup>108</sup> This allowed people to learn of

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<sup>103</sup> Paul Bremer, Address Briefing the Iraqi People on the Capture of Saddam Hussein (Dec. 14, 2003), [http://news.bbc.co.uk/1/hi/world/middle\\_east/3317861.stm](http://news.bbc.co.uk/1/hi/world/middle_east/3317861.stm) (follow "Watch and Listen" video hyperlink).

<sup>104</sup> *See id.*

<sup>105</sup> Derived from the Latin term *lustratio*, lustration refers to laws, which when enacted; serve to discharge the influence of the former political structures upon entering a new era of democracy. Roman David, *Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland 1989–2001*, 28 LAW & SOC. INQUIRY 387-88 (Spring 2003).

<sup>106</sup> "Lustration law is a special public employment law that regulates the process examining whether a person holding certain higher public positions worked or collaborated with the repressive apparatus of the communist regime." *Id.* at 388.

<sup>107</sup> Cold War: Espionage, CNN Special Report, <http://edition.cnn.com/SPECIALS/cold.war/experience/spies/spy.files/intelligence/stasi.html> (last visited Oct. 11, 2005).

East Germany's Ministry for State Security, known as the Stasi, featured probably the most comprehensive internal security operation of the Cold War. The Stasi built an astonishingly widespread network of informants—researchers estimate that out of a population of 16 million, 400,000 people actively cooperated. The Stasi kept files on up to 6 million East German citizens—one-third of the entire population.

*Id.*

<sup>108</sup> BRAUDE, *supra* note 27, at 63.



their accusers, confront them, and to ultimately have a chance to forgive them.<sup>109</sup>

However, during the Czechoslovakian transformation, the government initially sought to publicly name those responsible as collaborators during the Communist era and allow the people of the country to have the opportunity to forgive and forget the past transgressions. However, after it was discovered that many collaborators and officials of the secret police remained as high officials in the newly created democratic government and had already positioned themselves in a manner to block proposed democratic changes, President Vaclav Havel adopted a policy of no tolerance, initiating the era of lustration.<sup>110</sup> Immediately following Havel's mandate, the Czech Republic government instituted the Act on Lawlessness of the Communist Regime,<sup>111</sup> condemning the former communist government, its actions, and the principles that motivated it.<sup>112</sup> The lustration certification requirement applied to all former officials, agents, and collaborators who held a relationship of any kind with the former regime.<sup>113</sup>

Advocates of lustration point out that such a declaration allows a new government the ability to regain control over the state apparatus by blocking old networks from forcing a return to old ways under the former regime.<sup>114</sup> This "declaration of values is far more effective than any detailed and precisely worded legal provisions [found] in a statute, [because] it speaks more directly to [the needs and desires of] the

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<sup>109</sup> *Id.*

<sup>110</sup> See David, *supra* note 105, at 390-91.

We had free elections . . . then we elected a free parliament, we have a free press, we have a democratic government. Yet . . . [t]here still exist and work the powerful structures of the former regime . . . . Many places are governed by the same people as before. They are connected to managers of industrial enterprises. There exist immense bureaucratic colossuses that preclude rational economic behavior of individual enterprises and firms. The old bureaucracy persists at all levels.

*Id.* (citing Vaclav Havel, *Vyroci okupace Ceskoslovenska vojsky Varsavskeho paktu (Anniversary of the Occupation of Czechoslovakia by the Warsaw Pact Armies (1990))*).

<sup>111</sup> The Act on Lawlessness of the Communist Regime and Resistance to It, Act No. 198/1993 Sb.

An individual, who holds, applies, or stands for a position specified by the act, is required to submit both a certificate issued by the Ministry of the Interior about her work for, or collaboration with, the secret police, and an affidavit that she did not belong to other groups specified in the act (§§ 4[1] and 4[3]). If an individual belongs to any group specified in the act, the organization is required to terminate her employment contract or transfer her to a position that is not specified by the act (§ 18(2)).

*Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See David, *supra* note 105, at 388.

<sup>114</sup> *Id.* at 393.

people.”<sup>115</sup> Thus, the people derive a feeling of closeness through an understanding of the national principles intended to be expressed in the new constitution. “People [begin to] develop an allegiance to [new governmental] principles when they better understand that the [policies are intended to bring] the rule of law [towards the peoples’] own values.”<sup>116</sup> “As a result, the people feel more confidence that their leaders are not merely mouthing democratic ideal[s] while surreptitiously undermining the foundations of democracy.”<sup>117</sup> However, such a declaration creates a conundrum for a new democratic society by forcing those in the population who fall under the desired effect of the statute to prove their innocence by not being afforded the presumption of innocence.<sup>118</sup>

The objective of lustration in former communist countries was to exclude known communists from holding political office because they lacked the trust of the people to exercise authority consistent with newly desired democratic principles.<sup>119</sup> In Iraq, as in the former communist countries, lustration must not only apply to political officials but, in addition, concentrate on the re-establishment of a fair judicial system—one that is purged of justices who strongly believe in the former concept of law. Judicial power is so essential to a functioning democratic society and is “a dangerous weapon which can easily be used against the citizens and which, if it is not placed in honest and impartial hands, may pose more of a threat to their safety than particular crimes from which it is designed to protect them.”<sup>120</sup>

In Iraq, the process of lustration will be aided by the millions of detailed reports<sup>121</sup> that exist from the hundreds of thousands of informants responsible for the societal terrorism perpetrated against the Iraqi people, resulting in a breakdown of trust. Such documents and reports can be utilized as clear and convincing evidence against the Ba’thist supporters who ravaged a nation with fear. However, the new government must be careful not to lustrate citizens who supported the former regime out of fear, but truly back the foundations of a new society. Therefore, the new government must look equally to both the

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<sup>115</sup> Cepl, *supra* note 9, at 232.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> “Society has no right to deprive an individual of what nature has provided for his own good.” CONDORCET, *supra* note 91, at 258.

<sup>119</sup> Cepl, *supra* note 9 at 232.

<sup>120</sup> CONDORCET, *supra* note 91, at 258.

<sup>121</sup> See BRAUDE, *supra* note 27, at 58-59. The United States and its allies confiscated 2.4 million documents in northern Iraq, and believe that many more such reports exist in the intelligence nerve centers of the old regime.

merit and character of a citizen facing lustration as opposed to focusing only on their actions.

The principle of merit relates to the fact that the Iraqi workplace will be equalized by lustration, forcing out the slacking employees from the former regime and replacing them with “conscientious civil servants” intent on proving their worth to the new society.<sup>122</sup> The second principle deals with the character of ex-Ba’thist who demonstrate a defiance to the ideals of the former regime and accept the defining characteristics of the new society.<sup>123</sup> By “[h]oning [the] group dynamic[] in Iraq’s public sector” towards the ideals of establishing camaraderie,<sup>124</sup> a government is able to return the workers to a belief of confidence in each other’s abilities.

Perhaps the most important factor lustration adds to democracy is a period of time during which public support is at its maximum and the provisional government can plant the seed of a new society without a fear of reprisals from a former regime since they have been completely removed from any position of power. Since this period of peace must occur, it is fundamental that “[a]ny . . . change in . . . society . . . must be[] accompanied by a replacement of the ruling elite.”<sup>125</sup> The proper balance is only re-established by removing the wrongdoers, punishing them, and re-establishing the status quo.<sup>126</sup> This “reestablishment of a normal situation in society is closely related to the task of healing the rift between the government and the people who are alienated from it.”<sup>127</sup>

#### XI. RESTITUTION

The ownership of property not only denotes a position of status, but also represents to the owner a sense of community and closeness to governmental polices. In a sense, ownership of a small parcel of land can be considered ownership in a nation. Thus, when property is forcibly removed, restitution becomes an actionable response by the government to rectify its past misdeeds and return what it stole from the populous. “Restitution involves the return of the actual piece of property confiscated from people without compensation, or which people forfeited as [a] result of one of the [Ba’thist] laws.”<sup>128</sup> The importance of the actual deed is not the return of property, but that the government is acknowledging its “past wrongs and [attempting] to do its best to correct

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<sup>122</sup> *Id.* at 62.

<sup>123</sup> *See id.*

<sup>124</sup> *Id.*

<sup>125</sup> Cepl, *supra* note 9, at 233.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 232.

<sup>128</sup> *Id.*

them.”<sup>129</sup> If the government makes no effort in the direction of restitution, it confirms to the people that the prior regime is still alive, and, in the minds of the citizenry, a great deal of legitimacy is lost towards the new democratic principles.

“[R]estitution, as well as other privatization routes,” has the ability to cause the greatest “psychological change[] in the people” because it creates a community of “small property-holders and capitalists.”<sup>130</sup> The practical motivations for returning property to the hands of the people effectively begins the transformation of an economy into one of free trade.

The priority in Iraq, regarding restitution, should be to return the property taken under the guise of nationalization and Arabization to its rightful owner. Restitution is not complete without the return of private ownership because “only this makes possible the true operation of a market, that is, the exchange of goods between free and independent actors.”<sup>131</sup> However, restitution alone will not bring about sufficient change to adapt to a free market society; it is also “dependent on [the] gradual development . . . of human experience . . . [and] is created through the long-term development of social customs and rules of behaviour.”<sup>132</sup>

## XII. CONCLUSION

The process of transformation within an Iraqi state must develop a similar path to that of Central Europe where the governments acted promptly to develop strong political and economic influence. The importance of creating a free market economy is rivaled only with the need to establish a government the population can trust. Only then can the citizenry, with the aide of a supportive government, voice concerns and debate the policies which shape and define a modern democratic nation. Iraq must be allowed to have the opportunity to foster itself into a free-thinking society outside of a tyrannical marketplace of ideas.

Re-establishing a normal relationship between the people and the government, signals the end of the Ba’thist regime and the process of condemnation, lustration, and restitution will have specific and practical effects on the psyche of the Iraqi people. “The most elusive, invisible part of transformation, the [adaptation] of [a] moral culture, is [generally] considered [to be] secondary, if . . . thought [of] at all. People who say it is better to draw a line and start . . . from scratch [fail to realize] the

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<sup>129</sup> *Id.* at 233

<sup>130</sup> *Id.*

<sup>131</sup> Cepl, *The Road Out of Serfdom*, *supra* note 39, at 6.

<sup>132</sup> *Id.* at 7.

proper lessons from” a post-communist experiment in reconstruction.<sup>133</sup> After the period of transformation, condemnation, lustration, and restitution, the rebuilding of Iraq may truly begin as a legitimately newly elected government moves towards the adoption of a fundamentally accepted constitution and a government established for the people.

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<sup>133</sup> Cepl, *supra* note 9, at 234.