1-1-2009

A Law of No Gods, No Masters - Developing and Defending a Participatory Legal System

Matt Halling
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By Matt Halling

Argentina was facing one of the worst economic crises in its history at the beginning of this decade, leading to millions of lost jobs and thousands of factory closures. In response, over fifteen thousand Argentine workers to date have taken over the closed factories and are operating them themselves. Workers manage all of the complexities of the enterprise without a corporate hierarchy or professional management. The Zanon ceramics factory, closed in 2001 and “recuperated” by the workers soon after, is illustrative: every worker is paid the same wage (with a limited seniority exception), there are no hierarchies of personnel or administration, workers select representatives at assembly meetings, and the factory is run as a direct democracy. The Argentine State has been hostile

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* J.D. Candidate, University of California, Hastings College of the Law, May 2009. Thanks to all my professors, activists, and friends: Naomi Roht-Arriaza, Omar Dajani, Joel Paul, Chimene Keitner, Ethan Lieb, Steve Shalom, Chris Fredrich, and Jed Berry. Thanks also to the Hastings International and Comparative Law Review edit team for their time and patience in preparing this note for publication: Ted Garey, Blaine Bookey, and Alicia Miller. Special thanks to Susan Halling – a great editor and a better mom. None of these people are responsible for the views in this note.


4. Trigona, supra note 1.
4. Id.
towards these worker collectives,\textsuperscript{5} which is not surprising given that the workers did not pay for the property they seized.

Several activists have characterized the recuperated factory movement, somewhat idealistically, as a movement for a self-managed society. University of Buenos Aires Professor Andrés Ruggeri emphasizes that the movement is motivated more by worker desperation than a new political vision.\textsuperscript{6} Ruggeri also speculates that one reason the Argentine government is not violently repressing the recuperated factories is because the movement is not intended as a direct threat to the state.\textsuperscript{7} The end goal of a recuperated factory is to try and compete in the same capitalist market as everyone else.\textsuperscript{8} However, it is premature to categorize the movement in Argentina as a temporary self-management arrangement that will inevitably evolve back into corporate hierarchies.\textsuperscript{9} Maybe these new factories do represent something new. In any event, the courage of the workers in Argentina has inspired others to consider the viability of a self-managed society.

The factory recuperation movement in Argentina has not gone unnoticed by the International Project for a Participatory Society ("IPPS"), an activist organization focused on developing a vision for a new and fairer society.\textsuperscript{10} The group, which includes Noam Chomsky, Howard Zinn, and lesser known activists and professors from all over the world, believes that a participatory society, ("parsociety"), has four core values: (1) solidarity, (2) diversity, (3) equity, and (4) self-management.\textsuperscript{11} These values are interpreted as a rejection of centralized states, privately owned property, and any form of political or economic elite.

IPPS is using the word "participatory" in a more radical way than typical political science literature. Participatory institutions are

\begin{itemize}
  \item \textsuperscript{5} Trigona, \textit{supra} note 1.
  \item \textsuperscript{7} Id.
  \item \textsuperscript{8} Id.
  \item \textsuperscript{9} Id.
  \item \textsuperscript{10} International Project for a Participatory Society, http://www.zmag.org/zpar econ/ippstop.htm (last visited Oct. 21, 2008). IPPS is currently renovating their website; in the meanwhile, all membership inquiries should be directed to Znet Policy Editor Chris Spannos at chris.spannos@zmag.org.
  \item \textsuperscript{11} Id.
\end{itemize}
generally advocated for as an improvement to, rather than a replacement for, modern representative democracy.\textsuperscript{12} This work adopts the IPPS' use of "participatory": a vision of a \textit{new} society with \textit{new} institutions. In short, a parsociety attempts to create as much individual empowerment and freedom "as one can imagine short of trampling on the comparative freedom of others."\textsuperscript{13}

Some members of IPPS have already developed a participatory vision for certain elements of society. Longtime activist Michael Albert, a founder of IPPS, wrote in his book \textit{Parecon} (participatory economics) that parsociety's values suggest a rejection of both capitalism and communism.\textsuperscript{14} Parecon instead advocates a new economic model with worker and consumer councils deliberating together to shape production and consumption in industrialized society.\textsuperscript{15} In 2005, Professor Stephen Shalom introduced a vision for a parpolity (participatory politics) in which local councils make decisions, federate into larger communities, and in so doing build up the political structure in a radically new way.\textsuperscript{16} Although Shalom sets up a basic judicial structure,\textsuperscript{17} Shalom has yet to discuss a parpolity's legal implications.

The courage of the workers in Argentina and the participatory theory of IPPS inspire an idea: What would the legal system of a parsociety look like? What existing legal tools can be used to help understand the consequences of "participatory law?" An activist alternative worldview, such as a parsociety, may be treated with

\textsuperscript{12} E.g., Kevin O'Leary, \textit{SAVING DEMOCRACY} 19-22 (2006) (noting that a big society requires elites, so the goal for new political visions should be to allow greater participation in the national representative system). O'Leary says that removing all political and economic inequality to improve participation "is both highly improbable and unwise," because eliminating these inequalities would "trample on basic civil and economic liberties." \textit{Id.} at 53. Parsociety is indeed trying to remove elites and inequalities, difficult to achieve though that may be. For responses to O'Leary's implication that a parsociety would trample over human rights laws protecting civil and economic liberties, see Part III of this note. For a law journal article using the term participatory in the non-activist sense of the word, see Christiana Ochoa, \textit{The Relationship of Participatory Democracy to Participatory Law Formation}, 15 \textit{IND. J. OF GLOBAL L. STUDIES} (forthcoming 2008).

\textsuperscript{13} Michael Albert, \textit{PARECON} 263 (2003). Though Albert is talking only about a participatory economy, this idea resonates throughout parsociety theory.

\textsuperscript{14} \textit{Id.} at 78-85.

\textsuperscript{15} \textit{Id.} at 91-102.


\textsuperscript{17} \textit{Id.} at \S\S 13-14.4.
skepticism; admittedly many such visions tend to clothe a particular interest or preference in universal language. However, even if lawyers doubt the stated advantages of parsociety, it may nevertheless be possible to benefit from discussing and developing a theory of participatory law.

Part I of this note develops a legal vision for parsociety: participatory law or “parlaw.” Part II will then examine parlaw’s remarkable similarity to existing international law. Finally, Part III will analyze a threshold question raised by parlaw: why would individuals obey laws if there is no state demanding compliance? In order to answer the threshold question, Part III will look to international treaty compliance research to estimate if and why people would comply with parlaw.

The issues are relevant to both participatory activists and the legal profession. If parlaw resembles international law, then participatory activists could counter critics by showing that the legal system behind their vision is possible at a global level. If participatory (and, by extension, international) law is built on a more just and fair foundation than domestic law, then international law may serve as a model for challenges to and changes in domestic laws. This counterintuitive proposition suggests a new approach to international law that may help justify or explain the workings of the international legal system.

This note develops an overarching vision for a participatory legal system, rather than detailing how particular branches of law might change in a parsociety. There are many questions beyond the general scope of this work that would be interesting for further contemplation. How would corporate or property law change in a world where private ownership of the means of production is “removed from the economic picture?” Would intellectual property law cease to exist altogether, or would it retain some application? How would procedural and evidentiary law change in the courtrooms of a parsociety? What kinds of constitutional rights are protected? These are all intriguing questions, but a basic framework has to be

19. Albert, supra note 13, at 90.
designed and explained before this more concrete discussion can take place. This note merely aspires to propose a legal system based on participatory values and to show how many of its distinctive features have already been implemented in the legal world.

I. How Law Works Within a Parsociety

A. Justification for a Participatory Polity

1. The Current System: Modern Democracy

To understand why parsociety advocates reject the traditional power relations in a modern democracy, it is worth briefly exploring the current system's ground rules. A fundamental assumption of democratic philosophy is that a government cannot be legitimate unless the people freely consent to empower it. Freedom and consent are now considered central values in good government; no serious thinker today advocates for the old days of subservience to a king, even a benevolent king. Inviting deliberation to secure consent for every political problem is impossible in a large society, so representatives are elected to enact the people's will. Even if one did not get the representative of choice, consent to be bound is implied by continued membership in the state. These points merely restate the classical social contract theory; men hypothetically consent to an absolute power, which, while it constrains their behavior, forms states

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21. These values overlap with each other. There is not absolute freedom in democracy, but the limits of freedom are consented to. Rousseau, supra note 20, at 53 (men can be legitimately compelled to obey the law when they resign their free will to the general will).

22. This idea goes back to Plato's Crito. “If any one of you stands his ground when he can see how we administer justice... we hold that by so doing he has in fact undertaken to do anything that we tell him.” Plato, The Collected Dialogues of Plato, Including the Letters 37 (Hugh Tredennick trans., Princeton University Press 1964) (360 B.C.E.). Cf Phillip Pettit, Republicanism: A Theory of Freedom and Government (Oxford University Press 1997).
for the greater good of all.\textsuperscript{23}

Every American high school student is given this tidy explanation for why modern democracy works, but consent is not preserved so neatly in practice. First, the complexity of the issues, the necessity of technical knowledge, and the secrecy involved in national security decisions all separate the representatives from the people. The end result is an "elective guardianship" rather than a democracy.\textsuperscript{24} Second, unlike a principal-agent relationship, an individual voter can only vote their specific preferences to the extent their views conform to a limited number of party platforms (platforms the voter did not participate in making). It is extremely difficult for displeased constituents to recall their representatives, and even if successful, the voter must again choose from the same party platforms. Third, any hypothetical consent to a social contract fails if people lack the freedom to not enter the contract.\textsuperscript{25} Instead, a person's only "choice" is to forfeit freedom and obey, or resist and bear the consequences.\textsuperscript{26}

This situation is democracy in name alone; a "benevolent elective kingship" could create a comparable relationship between governors and governed.\textsuperscript{27} Representatives can vote independently of their constituents on any number of issues. Members of the public endeavoring to keep track of their representatives are unable to because of the complexity of the issues and classified information. This power structure creates an escalating disconnect with the public as political issues become more complex. Being denied relevant information and access to politics causes people to become more dependent on their representatives' judgments and less able to verify

\textsuperscript{23} This idea is first stated in the mid 1600s. Thomas Hobbes, Leviathan (Richard Tucker ed., Cambridge Univ. Press 1996) (1651). As Professor Joanne Wright describes, "[t]he foundation of Hobbes's social contract is consent. Men make a choice to consent to absolute power rather than to continue to exist in an unlivably insecure condition of war." Joanne H. Wright, Origin Stories in Political Thought: Discourses on Gender, Power, and Citizenship 58 (University of Toronto Press 2004).

\textsuperscript{24} Wolff, supra note 20, at 31.

\textsuperscript{25} See Lysander Spooner, No Treason: The Constitution of No Authority (1867), available at http://www.lysanderspooner.org/notreason.htm (arguing that state membership is not a contract because the government will enforce laws even against people who do not wish to enter such a contract).

\textsuperscript{26} Wolff, supra note 20, at 69-70 ("all states achieve their legitimacy only by means of the citizens' forfeit of their autonomy, and hence are not solutions to (making autonomy compatible with state authority)").

\textsuperscript{27} Id. at 30.
if the government is responding to their concerns. The public is forced to rely on the unwavering benevolence of their leaders; thus the law created by such a system cannot meaningfully be said to derive from consent.

There are two responses to these critiques: i) "so what?" and ii) the current system is a necessary evil. As for the first response, the argument would be that, even if democracy is not preserved, a benevolent king (or the intelligentsia, or the vanguard party, etc.) could be a good thing so long as well-intentioned, well-educated leaders are put in charge. Professor Shalom describes the mistake of those who justify non-democratic rule by a better qualified elite as follows:

[The error is] not in thinking that there is lots of ignorance out there; nor in thinking that debilitating life circumstances often interfere with people understanding their true interests. Their mistake [is] in assuming that they were free of self-interest or ignorance, and that they knew the interests of others, with enough certainty to warrant suppressing those who disagreed.

Defending a lack of democratic process by pointing to the public's ignorance or false consciousness has justified horrific tyranny and untoward bloodshed for centuries. The "So what?" argument is severely lacking.

The second response, that the current system is a necessary evil, is more compelling and will take the rest of this note to answer. Even though representation may offer more freedom in theory than in practice, no better alternative presently exists. Reform proposals note these issues, but think the system can be saved by giving the public a more deliberative say in society. For example, political scientist Kevin O'Leary advocates for deliberative Assemblies and a national People's House to complement the American House of

28. The reliance on government secrecy in the United States has been "unprecedented" during the George W. Bush administration, according to the highly respected Secrecy Report Card created by Open the Government. OPEN THE GOVERNMENT, SECRECY REPORT CARD 2007 5 (2007), http://www.openthegovernment.org/otg/SRC2007.pdf. Though sometimes government secrecy may be necessary, secrecy needs to be used in "strictly limited and specified contexts" in order to prevent the aforementioned representative-public disconnect. Id.

29. Stephen Shalom, Parpolity: A Political System for a Good Society, in REAL UTOPIA: PARTICIPATORY SOCIETY FOR THE 21ST CENTURY 25 (Chris Spannos ed., AK Press 2008). Shalom was speaking of how Leninists justified nondemocratic rule in Russia, but the quote has broader application than revolutionary Russia.

30. E.g., O'Leary, supra note 12.
Representatives and Senate. These bodies would involve more citizens in the political process in an attempt to create a more representative government. However, O’ Leary’s Assemblies can only make advisory opinions and the People’s House lacks the full power of the House or Senate. In all meaningful respects, the hierarchy of power remains unchanged. This proposal does not and cannot fully solve modern democracy’s consent problems until people have the maximum authority possible to manage the diversity of their interests.

2. Creating a Participatory Polity

Parsociety attempts to address modern democracy’s shortcomings by radically redistributing societal power. Society would primarily be run by local councils in which all citizens are entitled to a direct say in their governance. Councils would decide how to manage basic social services and production-consumption patterns. Shalom estimates that the smallest unit would be a “primary council” comprising only 25-50 people. These councils would then join with councils from other communities and set regional policy. Consequently, society is rebuilt from the “bottom up.” The basic idea is to have decentralized authority; the new arrangement is organized more like a honeycomb rather than a spider web. No state currently embodies this vision, but it is theoretically possible. If a state is just a particular set of relationships then, as Professor Thom Holterman suggests, “[w]hy not have the relationships structured differently?”

31. O’Leary, supra note 12, at 89-100.
32. Id. at 89, 98-99.
33. For an excellent collection of essays on how parsociety affects all aspects of life (not just legal or political), see Spannos, supra note 29.
34. Albert devises an ingenious allocation method where consumer councils interact with worker’s councils to create a decentralized economic plan that balances production and consumption. Albert, supra note 13, at 118-47. Within this plan, worker’s salaries are determined by their effort and sacrifice, in contrast to salaries being determined by worker’s physical assets or human capital. Id. at 28-38, 112-18. Consumer councils also serve as the political councils referred to throughout this note. Shalom, supra note 16, at ¶ 10.2.1.
35. Shalom, supra note 16, at ¶ 5.2.
36. This language is taken from Professor Thom Holterman’s essay on the legal implications of anarchism. Thom Holterman, Anarchist Theory of Law and the State, in LAW AND ANARCHISM 16 (Thom Holterman & Henc van Maarseveen eds., Black Rose Books 1984).
37. Id.
B. The Legal Structure of a Participatory Society: Parlaw

Any societal restructuring poses challenging questions, including how a parsociety’s legal order would work. Council democracy with collective resource ownership implicates several types of law: constitutional law for the society’s organization, contract law for inter-council agreements, customary law for the development of norms and rules, and procedural law to tie it all together. Parlaw is designed to realize modern democracy’s unfulfilled promise: law is only legitimate if it flows freely from the people.

Any legal system underpinning a parsociety will have a few signature principles: (1) the primacy of voluntary association, (2) an increased role of custom, and (3) a new federal division of political power. Each of these aspects will be analyzed in turn.

1. Voluntary Association

Like modern democracy, parlaw’s obligations are founded on consent. However the latter more carefully reflects consent because it is based upon the public’s informed and deliberative decisions. Parlaw’s legitimacy comes from the fact that citizens, via councils, directly debated and shaped how the law should function. Thus if the law is violated, the violator has directly consented to any legal penalty through mutual association. Unlike the American Constitution, participatory law privileges local council laws over federal laws unless the law’s effect extends beyond the local area. Laws of local or individual impact could vary from one primary council to the next.

38. Although criminal punishment is consistent with a parsociety, other stateless society advocates have emphasized both a rehabilitative approach and the fact that crime should drop if wealth is shared. Specifically, “[in an anarchist society], criminals being now only aberrations, they are to be regarded as sick and demented; the issue of crime, which today occupies so many judges, lawyers, and jailers, will diminish in social significance and become a simple entry under the philosophy of medicine.” James Guillaume, IDEAS ON SOCIAL ORGANIZATION (1876), reprinted in NO GODS, NO MASTERS: AN ANTHOLOGY OF ANARCHISM 261 (Daniel Guerin ed., Paul Sharkey trans., AK Press 2005) (1980), available at http://www.marxists.org/reference/archive/guillaume/works/ideas.htm.

39. The idea that federal law has preemptive power over state law is in the Constitution’s Supremacy Clause. U.S. CONST. art. VI, cl. 2. The “Federalism” heading in this section better explains how higher level councils handle laws of non-local effect.

40. How a court would decide the scope of a law’s impact is currently unresolved at IPPS. Courts could demand weighted votes so that local interests count more but could be superseded by a non-local supermajority. Another option is for courts to do a qualitative analysis balancing the local and regional interests similar to the one used
euthanasia, surrogate motherhood, drug legalization, and abortion are all possible examples. Furthermore, parlaw better protects consent by making secession a "constitutional right."\textsuperscript{41}

In a system of parlaw, the right of secession, though constitutional, is not absolute.\textsuperscript{42} For example, a small community with vast oil resources should be unable to secede without first promising to equitably share that resource.\textsuperscript{43} An apt analogy can be made to divorce law, where a wealthier spouse is required to share certain resources.\textsuperscript{44}

Given the broad right of secession, why would parlaw not descend into mere power struggles among competing factions? The answer is that parsociety's relative wealth equality (resources are shared as per parecon) creates a community interdependence so deep that withdrawing from society risks marginalization from the rest of the world.\textsuperscript{45} Nation states giving up power for the sake of interdependence historically stems from economic forces: the post-war European integration, for example, was primarily a byproduct of economic necessity.\textsuperscript{46} Likewise, a parsociety is not based on altruism and sunshine: though secession is permitted, a small federation of communities forbidden from possessing disproportionate wealth has considerable incentive to negotiate any differences.

\textit{2. Custom}

While much of the previous discussion of parlaw focuses on creating law through a stream of voluntary contracts, another basis of obligation must be customary practice. The only way to order such an infinitely complex group of communities is to emphasize in procedural due process cases. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (evaluating whether due process is met by looking at the government's interest, the risk of erroneous deprivation, and the individual's interest).

\textsuperscript{41} Shalom, \textit{supra} note 16, at ¶ 6.7.  
\textsuperscript{42} \textit{Id.} at ¶ 6.9.1.  
\textsuperscript{43} \textit{Id.}  
\textsuperscript{44} \textit{Id.} at ¶ 6.8.  
\textsuperscript{45} Other scholars have spoken of the negative relationship between interdependence and secession. Clayton P. Gillette, \textit{The Exercise of Trumps by Decentralized Governments}, 83 VA. L. REV. 1347, 1415 (1997) ("the existence of substantial interdependence simultaneously diminishes the need for secession").  
unwritten, or even unarticulated, customary practices. When people engage in customary practice because they feel legally obliged to do so, the practice becomes customary law. 47

Customary law is legitimate because communities, absent state coercion, have endorsed particular conduct that is considered fair and reasonable. In other words, customary law rests on implied consent. 48 Because parlaw is likewise predicated on consent, it is possible to abstain, withdraw, or alter customary law, provided there is advance notice and a consistent objection to the practice. 49 For example, traffic laws in a parsociety will likely change little from the present; people will drive on the same side of the street as before out of convention and for the sake of safety. However, if a community wanted to drive on the other side of the road, they could by making a clear objection in a reasonable timeframe.

3. Federalism

Parlaw is based on a type of federalism where one has control over decisions proportional to the degree to which one is affected. 50 In this note, federalism is defined simply as the division of power between a federal government and regional governments. 51 However,

47. This definition of custom law is taken from the international law, which defines custom as Opinio juris sive necessitatis (state practice that is accepted as law). Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6-11 (6th ed. 2003).

48. This implied consent basis for customary law is accepted in both older and modern times. See Monsieur de Vattel, THE LAW OF NATIONS, preliminaries § 27 (1758), available at http://www.constitution.org/vattel/vattel_pre.htm (custom law is based on “tacit consent”); see also Jianming Shen, The Basis of International Law; Why Nations Observe, 17 DICK. J. INT’L L. 287, 317 (1997) (rejecting arguments against implied consent in international law). The main argument against an implied consent theory is that some states may be forced adopt customs due to power politics rather than out of some sort of implied equitable discourse. However, a deeply interdependent parsociety is designed to maximize free consent and redistribute political power to prevent this kind of “bullying” from happening.

49. This is often called the Persistent Objector Problem in international law. See Louis Henkin, INTERNATIONAL LAW, CASES AND MATERIALS 87-91 (3d ed. 1993). Parlaw’s solution is to declare the problem overstated. The legitimacy of customary law is actually better preserved by giving people the opportunity to withdraw their consent to the practice at issue. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 102, reporter’s note 2 (1987) (“That a rule of customary law is not binding on any state indicating its dissent during the development of the rule is an accepted application of the traditional principle that international law essentially depends on the consent of states”).


parsociety flips the traditional federalist balance of power on its head; local communities now have substantially more power relative to regional representative bodies. This framework creates a floating hierarchy, as opposed to a pyramidal structure where the people at the top develop the law for everyone else.\(^2\)

In this structure the first level councils would choose a representative to attend the second level council. This second level council would then choose a representative to participate in the third level council and so on. In this way, the number of people represented at each level of counsel increases exponentially, as shown in the table below. The size of the first level council is a number chosen for illustrative purposes but is within the range of 25-50 that Shalom indicated.\(^3\)

<table>
<thead>
<tr>
<th>Table 1</th>
<th>Council Level</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>People Represented</td>
<td>40</td>
<td>1600</td>
<td>64000</td>
<td>2.56M</td>
<td>102.4M</td>
<td>4.096B</td>
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</table>

Each representative would be accountable directly to the council who elected him and be recallable at will.\(^4\) This representational structure is much more similar to an agency relationship than that of a modern democracy.\(^5\) The representative either conforms to the council constituency or, absent good justification, is replaced.

One concern created by parlaw's federalism is what to do when a local community refuses to honor a broader agreement. Parlaw is hostile to the notion of a centralized judiciary and rather resembles a huge network of agreed upon dispute resolutions.\(^6\) An independent distribution of power in a federation between the central authority and the constituent units).

52. Holterman, *supra* note 36, at 58.

53. All representatives 2nd level and up are paid (as part of a "balanced job complex," which is a concept beyond the scope of this note) and have some sort of staff assigned to them. Shalom, *supra* note 16, at ¶¶ 5.12-5.13.

54. Shalom, *supra* note 16, at ¶¶ 5.11-5.11.4, 5.5.

55. This relationship is not a pure principal-agent relationship in that the representative does have some discretion in how issues are resolved at the higher level council. Shalom talks of every council level being a deliberative body where no one has an automatic mandate to vote a certain way. *Id.* at ¶ 5.4. However, representatives are much easier to recall in parsociety than at present.

56. This hostility also extends to judicial experts; Shalom advocates that elected or appointed judges should be replaced with randomly selected citizens (analogous to...
judiciary still exists, but parties would have to agree to jurisdiction. Even with a dispute resolution forum in place, there is still the issue of what happens when an individual or group refuses to abide by the judicial settlement.

The best answer is that parsociety’s nearly equal status of communities means that reputation damage is much more effective in creating pressure for compliance. Reputation damage is not to be taken lightly. For example, even with colossal power disparities and weak threat of sanctions in the international realm, states still largely comply with World Court decisions. A small local community, so much more dependent on others than a centralized state, could risk being cut off from society if they did not comply with judicial decisions. This compliance question will be explored in much greater detail in Part III, but at this point it would be more instructive to set up an example of parlaw to see how all these principles might work together.

C. Applying Parlaw: Mandatory Minimum Drug Sentencing

US federal law currently imposes a mandatory minimum sentence for certain drug related offenses. Justice Breyer lamented the need to uphold mandatory minimum statutes because they “are fundamentally inconsistent with Congress’ simultaneous effort to create a fair, honest, and rational sentencing system.” A recent study concludes that many Americans favor eliminating mandatory

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juries). Shalom, supra note 29, at 31. This seems to be an evolution in his thinking, as Shalom’s earlier essay indicates that judges in the law should be elected by councils with advisory input from attorneys. Shalom, supra note 16, at ¶13.7.

57. The World Court’s (aka International Court of Justice or ICJ) overall rate of compliance has been measured as high as 80 percent, though more rigid definitions of compliance can create a sizeable percentage decrease. Colter Paulson, Compliance with Final Judgments of the International Court of Justice Since 198798 AM J. INT’L L. 434, 460 (2004) (concluding that ICJ compliance has increased or stayed roughly the same over the last 20 years, despite his statistics showing a 60 percent compliance rate in 1987-2004 versus an 80 percent rate over 1946-1987 found by another study). See also Constanze Schulte, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE (Oxford University Press ed., 2004). This research contrasts with recent highly publicized American case law regarding and enabling non-compliance with ICJ judgments. See Medellin v. Texas, 128 S.Ct. 1346 (2008).


59. Id. at 570.
minimum laws.\textsuperscript{60} Despite this support for repealing the laws, Congress has shown reluctance in changing them. The end result is that many Americans are forced to obey a law with which they do not agree.

Parlaw can sidestep the gap between Congress and the public by having a mandatory minimums policy decided by local councils. For example, I currently live on Guerrero Street in San Francisco. If my street’s council is against mandatory minimums for drug sentencing, then we can deliberate and vote not to have such a law.\textsuperscript{61} Let us say that the No Mandatory Minimums vote passes, but the council the next block over on Valencia Street votes in support of these minimums. Both laws coexist side by side, and everyone consents to the law of their council. In order to avoid a conflict of laws, Guerrero and Valencia streets send representatives to the next highest council (which I will call the Mission Neighborhood Council) to decide a policy for Guerrero, Valencia, and all other streets in Mission District. Let us say that the No Mandatory Minimum vote passes at this higher council, despite the minority voice of Valencia Street.

In terms of enforcement, it is important to mention that the Mission District’s vote does not invalidate the Valencia Street Council law. Valencia Street has the right to choose to have tougher drug sentencing, if they so desire. However, Valencia’s mandatory minimum law only applies to Valencia residents who commit their crime on Valencia Street.\textsuperscript{62} A minority member of the Valencia Street Council could also attempt to challenge the law on constitutional grounds.

Conflicts in the law’s application are resolved by the next highest council. Should someone from Guerrero Street be arrested on Valencia Street for a drug crime, the conflict in laws is resolved by having the regional Mission District Council law govern the case. If that same person gets arrested in a neighborhood other than the


\textsuperscript{61} Guerrero Street has more people in it than that (it would be at least several Level 2 Councils), but it is easier to have simple names to clarify the example.

\textsuperscript{62} A minority member of the local council (who would be against mandatory minimums) could also attempt to challenge the law by seeking an advisory opinion from a local court asking if the new law conflicts with an old law. The court’s opinion does not nullify the new law, but the local council may reassess their decision if they inadvertently repealed an old law with their decision.
Mission District and the two regional laws conflict, then the interregional council (the San Francisco Council) vote would govern.

Notice how parlaw is more reflective of people’s opinions. People on both Guerrero and Valencia streets get to select their legal vision and have it enforced as they see fit. Representative decisions are only used to the extent that broader representation is needed. Uniformity of results is sacrificed for a true government by the people.

This example raises a few other points. First, under parlaw an individual does not have to deliberate or have their opinion heard on all of society’s minutiae. This perfectly natural impulse is consistent with parsociety; despite the emphasis on deliberation, every member of every council need not actively decide every issue. The society member who has no energy on mandatory drug sentencing may not show up for this council meeting, but he or she may want to show up at the abortion vote the following week. The key point is that the council member is invited to both meetings; there is a meaningful opportunity for every person to express their opinion.

Second, this example raises the question of whether a parsociety would have so many different laws that parlaw would end up a bureaucratic morass. Admittedly, parlaw does depend heavily on coordination between groups. Even though a multiplicity of laws may coexist in a single neighborhood, ease of movement is preserved if one knows his or her council’s position and the relevant regional law. However, these coordination issues are mere technical problems, as distinguished from more serious ideological problems like the ones embedded in the current system. These technical issues are also more surmountable than at any other point in history: internet and current cellular phone technology alone can alleviate many of parlaw’s coordination concerns.

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63. Shalom makes this point very well:
Just as people vary in their preferences and capacities for music or crafts or mathematics, so too will they vary in their attitude toward and talent for politics. So we don't want a polity that requires everyone to value political participation as much as full-time political activists do today, or that penalizes those without a flair or an interest in politics by somehow denying their interests equal consideration. But some degree of participation – less than that of political fanatics, but more than that of most citizens of capitalist democracies – is essential.
Shalom, supra note 16, at ¶ 4.41.

64. Robert Putnam, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 179 (2000) (noting that both the history of the telephone and
Finally, although parlaw's increased fairness may decrease efficiency in some ways, it also includes the freedom to adjust the balance between these two values. If a council desires higher efficiency, parlaw can accommodate. For example, on less polarizing decisions, the Valencia and Guerrero councils could just agree to follow the broader Mission District policy. Society may well prefer efficiency to fairness sometimes, but parlaw is the only legal system that allows for a meaningful choice between these two values. In contrast, rejecting an unfair law in 2008 America will not get you a fairer law—it will get you arrested.

II. Connecting Parlaw and International Law

Parlaw is certainly more complex than the law of a modern democracy: how can we speculate whether this kind of law could work on a global scale? What is the international law of a parsociety? Well, the short answer is that it functions quite similarly to the international legal system we have now.

In order to draw the comparison between international law and parlaw, it is necessary to analyze the theory behind international law as well as how international law actually functions. Several of the leading international legal theories of the last century wrote favorably of voluntary association, custom, and federalism. Kelsen, Scelle, Lauterpacht, and Morgenthau all wrote in favor of these features embedded in parlaw to one degree or another, as will be explored below.

International law is described as being different in kind from state-made law because of its reliance on voluntary association. German theorist Carl Bergbohm, writing in 1876, believed that international law emanated not from moral ideals but from self-legislation. Morgenthau also spoke in this vein when he said that the only sources of international law are necessity and mutual consent. Laws of necessity are fundamental to belonging in the given (state centered) legal order, such as respect for territorial sovereignty.

the early evidence on Internet usage strongly suggest that these technologies will complement face-to-face community).

limits. The “main bulk of the rules” creating binding obligations in international law are the laws of mutual consent – the ones member states voluntarily choose to make and enforce.

On the other hand, the United Nations is predicated on being more than voluntary association. The U.N. Charter demands that even non-member states act in accordance with the principles of the Charter if international peace and security is at issue. Under Chapter VII of the U.N. Charter, actions in response to aggression or other threats to the peace can be initiated without consent of the affected state; however, Article 33 states that voluntary mechanisms should be tried first. In addition, the General Assembly often declares legal obligations regardless of whether the relevant parties consent to be bound by them. Finally, certain norms are considered so universal that they cannot be derogated from, whether or not the violator has signed the relevant treaty. These *jus cogens* norms include, for example, bans on genocide and slavery.

In practice, these rules are far from universal; even in the presence of a clear violation, the United Nations is habitually unable to enforce its proclamations. International courts almost never have jurisdiction to hear a contentious case without first obtaining state consent (including the International Court of Justice and the International Criminal Court). Chapter VII missions are selectively

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68. *Id.*
69. UN Charter art. 2, para. 6.
70. UN Charter art. 33 (“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice”) (my emphasis). The Security Council has authority to bypass this language under Article 42 of the Charter, which says that action can be taken if solutions not involving armed force are “inadequate or have proven to be inadequate.” *Id.* at art. 42.
71. One recent example is where the General Assembly, after receiving an ICJ advisory opinion, demanded in 2004 that Israel cease constructing their settlement wall and make reparations. G.A. Res. A/ES-10/L.18/Rev.1 (July 20, 2004).
73. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1060 [hereinafter Statute of the ICJ]; Rome Statute of the International Criminal Court, adopted on July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002). The ICC does allow for the UN Security Council to refer cases without party consent, but the Security Council can only do this under the aforementioned Chapter VII. *Id.* at art. 13(b). Of course (and as the Supreme Court has recently decided), even agreeing to
enforced and solely determined by the U.N. Security Council ("UNSC"); thus, a veto by any single permanent member will forestall enforcement. The General Assembly is only permitted to discuss issues, initiate studies, and make recommendations; their declarations of law are non-binding, however well intentioned or well reasoned they may be. Even \textit{jus cogens} violations are not universally prosecuted; compare the work done by the International Criminal Tribunal for Rwanda with the absent accountability for genocide in Guatemala.

International law is enforced in such a selective fashion that it is inaccurate to call it a binding set of rules analogous to domestic law. International law is (excepting times when the UNSC invokes Chapter VII) more accurately described as voluntarily undertaken obligations that risk becoming distorted and abandoned because of state-to-state politics. Voluntary association better describes the UN system's reality, if not the stated goal.

The reliance on custom in parlaw is also reflected in international law. Customary law is recognized as a primary source of international law in the Statute of the International Court of Justice. Customary law's primacy naturally follows from international law's decentralized nature. Lauterpacht recognized customary law's role in the international realm and advocated for "flexible approaches" to ascertain it. In the absence of a binding international legislature, customary practice is needed to supplement treaties and create the jurisdiction of an international court does not give that court judgment the effect of domestic law. Medellin, 128 S.Ct. at 1359 (explaining that a "bare grant of jurisdiction" says nothing about the effect of an international court judgment).


75. UN Charter art. 10.
76. Id. at art. 13.
77. Id. at art. 14.
78. UNSC 955 (Nov. 8, 1994); no comparable tribunal was set up in Guatemala, despite a UN Truth Commission determining that "acts of genocide" had occurred there between 1981-83. Historical Clarification Commission, \textit{Guatemala, Memory of Silence, §§108-123, Vol 3, Sec 3204}, (February 1999), available at http://shr.aaas.org/guatemala/ceh/report/english/conc2.html.
79. Statute of the ICJ, supra note 73, art. 38.
80. Hersh Lauterpacht, \textit{Development of International Law by the International Court} 368 (Grotius Publ'n Ltd. 1982) (1958).
necessary array of binding obligations.

As an alternative to the state centered view of the world, international theorists also argued for world governments run on federalist principles. Scelle spoke fondly of a federal phenomenon that would interconnect the world and allow for the end of empires. Scelle further characterized individuals as the only real legal subjects; this federalism is thus bottom-to-top like in parlaw. Lauterpacht's stateless vision is also heavily dependent on federalism, so much so that it has been described as a "federalist utopia." The values embedded in parlaw (voluntary association, custom, and federalism) are all key components in the international legal system as envisioned by some of its principal theorists. Although these theorists were not specifically using participatory language, international law demonstrates that there can be functioning decentralized law. Rather than criticizing international law as being powerless to enforce its own principles, the discipline can be reframed (like parlaw) as being a tradeoff of efficiency for fairness. Seen in this way, the problem becomes not international law's lack of power, but rather domestic states' excessive power. The nation-state world need not be the only reality: As Professor Koskenniemi notes, "[t]he limits of our imagination are a product of a history that might have gone another way."

Despite similarities, parlaw and international law do not perfectly overlap with each other. The most significant difference between the two systems is the issue of sovereign territory. Parlaw emphasizes collective ownership and cooperative economic planning. In contrast, international law is vigorously protective of state control over their territory. However, state sovereignty has been criticized by some of international law's most prominent scholars. Lauterpacht labeled the prevailing conception of liberal statehood in his day as "an insurmountable barrier between man and the law of mankind." He also depicts states as the veil between international law and human beings. Morgenthau, often regarded as a paragon of

81. Koskenniemi, supra note 65, at 332.
82. Id.
83. Id. at 405.
84. Id. at FM15.
85. UN Charter art. 2, para. 7.
86. Hersh Lauterpacht, INTERNATIONAL LAW AND HUMAN RIGHTS 77 (1950).
87. Koskenniemi, supra note 65, at 365.
nationalism, actually stressed that a set of tragic choices created the thirst for national power in international relations. 88 His preference was a world government with an international police force able to move across national borders. 89 Kelsen also did not accept state sovereignty as being essential to international law; he noted how advocates of state sovereignty attempted to lend a purely political argument the appearance of an irrefutable logical argument. 90 Sovereign states are not necessary in Lauterpacht, Morgenthau, or Kelsen's international legal visions. These men's passionate arguments suggest that state sovereignty is not a necessary condition of international law, or even a desirable one.

III. Compliance With International Law and Parlaw

Parlaw and international law certainly share each other's virtues, but they may share each other's faults as well. One critical question in particular presents itself: If international law is so impressively constructed, why are legal commitments so routinely ignored? Related to this question, why would parlaw communities comply with their legal agreements with no state enforcing the rules?

The legal systems of modern democracy ensure compliance by their centralized and unitary nature; decentralized legal systems like parlaw and international law sacrifice efficiency in the interest of preserving consent and autonomy. Parlaw is designed to be more fair than modern democracy's laws, but this means little if the former is so inefficient that no one obeys the fairer laws.

This section will analyze this issue by narrowing the focus to one area of international law with appalling noncompliance: human rights laws. Compliance for purposes of this note is defined as: agreement to be bound by a law (through treaty, contract, or customary practice) and then obeying that law. 91 This note will analyze only patterns of

88. Koskenniemi, supra note 65, at 444.
89. Id. at 469.
91. This definition is just a rewording of the one in a recent collection of compliance essays. COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 5 (Dinah Shelton ed., 2000) ("compliance refers to whether countries in fact adhere to the provisions of the accord and to the implementing measures that they have instituted").
compliance with agreed upon laws, and thus does not consider compliance with human rights norms generally or commitments identified as non-binding. The preliminary answer is not that the international legal system is fatally flawed, but rather that treaties are often violated because of state motivations that do not exist to the same degree in a parsociety.

A. Theories of Compliance

There is a wide array of theories for why countries comply with international law absent top down enforcement. This section provides a very brief summary of some of the leading theories.

First, the managerial model holds that managers (states) comply because of "an iterative process of discourse among the parties, the treaty organization, and the wider public." States comply with treaties because their reputations will be damaged otherwise and they will have less negotiating power in the future. One criticism of this model, as noted even by its creators Chayes and Chayes, is that the approach depends on some level of equality and fairness to work. A loss in reputation is meaningless if one country is so powerful that others have to continue contracting with it anyway.

Second, legal scholar Thomas Franck influentially suggests that countries comply with treaties because treaties are perceived as inherently legitimate. Belief in a law’s legitimacy leads to extremely efficient enforcement due to the moral compulsion to obey.

93. See COMMITMENT AND COMPLIANCE, supra note 91.
94. An excellent collection of compliance theories is contained in an anthology compiled by Harold Koh and Oona Hathaway. FOUNDATIONS, supra note 18.
96. Id. at 127 ("fairness considerations can hardly fail to play a major role in this process"). Harold Koh highlights this issue in his review of Chayes' model when he emphasizes "what remains unspecified is precisely how the process should account for such fairness considerations." Harold Koh, Why Do Nations Obey?, 106 YALE L.J. 2599, 2641 (1997).
98. Ian Hurd, LEGITIMACY AND AUTHORITY IN INTERNATIONAL POLITICS (1999), reprinted in FOUNDATIONS, supra note 18, at 149.
According to this theory, compliance is derived from a synthesis of two elements: the law's procedural fairness and its distributive justice. More specifically, legitimate laws: i) convey a clear message; ii) come from some validating symbol (e.g., a courthouse or flag); iii) treat like cases alike; and iv) have a nexus between secondary and primary rules (e.g., a specific tax law's nexus with the tax code).

Franck emphasizes how communities continuously interact with each other to develop legitimate laws that they will later comply with for reasons beyond cost-benefit calculations. While appealing in theory, the model can be criticized because there is no reason why continuous group interactions are going to change everybody's minds into compliance. This criticism is similar to the one levied against the managerial model: A treaty's legitimacy depends not just on its process or its terms, but also on the intentions of actors involved in negotiating a treaty.

Third, Harold Koh tries to navigate past the flaws in the previous models by suggesting that people comply with treaties because the rights contained in them slowly become internalized in the domestic legal system. Koh argues that treaties create interactions between all kinds of transnational actors; thus the self-interest of states is balanced with the interests of non-governmental organizations, activists, and economic forces to name but a few. All of these actors exert pressure upon domestic lawmakers to incorporate the terms of the treaty. This theory may well be an accurate depiction of how international law can work, but practically this norm internalization may be a slow road to travel if the treaty is not in the state's interests.

Fourth, a liberal theory of compliance has been developed by Franck, supra note 97, at 152-53. Id. at 161-64. Franck calls to the values of determinacy, symbolic validation, coherence, and adherence. Id. at 155-56. Id. at 2599-659. Id. at 2645-46. Id. at 2645-46. Thomas Risse and others have prepared a careful study that, among other things, analyzes why norm transformation takes so long and how to quicken the internalization process. Thomas Risse & Stephen C. Ropp, Conclusions, in THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 258-66 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999).
In this context, liberalist theory argues that democracies should have better human rights treaty compliance than other political arrangements. The notion that compliance depends on political conditions rests on the idea that international problems have domestic roots and that, therefore, the "levers of progressive change in the international system lie in state-society relations." The liberalism idea extends Kant's "democracies do not go to war with each other" idea by suggesting that democracies better comply with law than non-democracies. Some have criticized this distinction between liberal versus non-liberal regimes as being too simplistic; the distinction may understate international cooperation by some (non-democratic) countries while overstating such cooperation by democratic countries.

Fifth, the realist school is based on the premise that states create alliances and comply with treaties only when it serves their own self-interest. Realist scholars say that states join human rights treaties and institutions only to play lip service to them; realists would predict little relationship between ratification and compliance. A critique of the realist school is that it assumes state interest is solely focused on power-maximizing behavior; many strands of realist thought rigidly dismiss the notion that states cannot be taught to have more enlightened interests.

A related theory, institutionalism, slightly redirects the realist argument by emphasizing that (in the present context) that human rights legal institutions do have some value and are not mere lip

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107. Id.

108. Id. at 100-01.


110. FOUNDATIONS, supra note 18, at 108.


112. See generally id. at 27-48.


114. This critique is called constructivism in international legal scholarship - state identities are constructed from a variety of sources. See Martha Finnemore, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY (1996), as reprinted in FOUNDATIONS, supra note 18, at 112-20.
service, but the institutions only serve the limited function of coordinating states' self-interested responses to common problems. Institutionalist theorists propose that countries ratify human rights treaties solely to get reputation benefits; compliance only occurs when the costs do not interfere with state interest.116

When parlaw is viewed through any of these theories, the expectation is that compliance with decentralized law would increase in a parsociety. In a system of federated participatory councils, actors would bargain from positions of closer equality than the current system. The managerial and Franck models suggest compliance with parlaw because a participatory economy creates more resource sharing and interdependence than current economic/political regimes. A community in a parsociety would run a great risk by being indifferent to its reputation or a treaty’s legitimacy because of the deep interdependence inherent in the model. Under Koh’s approach, norm internalization happens as before, but, with state self-interest, is removed from the calculation. It is possible that treaties will incorporate into parlaw faster and more efficiently when state interest affects the process. Consistent with liberalism’s domestic democracy emphasis, a parsociety is intended to be the most democratic form of society reasonably possible. Finally, with respect to the realist and institutionalist schools, a parsociety’s self-interests are more consonant with their population’s interests, creating more pressure to comply with certain treaties (like human rights treaties) than the incentives influencing today’s states.

B. Empirical Evidence on Human Rights Compliance

While theoretically parsociety sounds promising, Oona Hathaway’s landmark 2002 study on human rights treaty compliance can aid in answering the question of whether there is any empirical support for a parsociety.117 Her basic method was to look at rates of ratification and compliance for the subjects of five human rights treaties: genocide, torture, fair trials, civil liberties, and women’s political equality.118 While Hathaway has done the most

116. This prediction is also Hathaway’s after reviewing institutionalist theory. Hathaway, supra note 113, at 1963.
118. Id. at 1968-76.
comprehensive study on this topic, Linda Keith also did a study highlighting the lack of compliance with the International Convention on Civil and Political Rights ("ICCPR").

Hathaway found that there was often a direct correlation between better human rights records and more human rights treaties ratified (specifically with those countries who signed more demanding Optional Protocols). However, surprisingly, worse human rights abuses sometimes occurred in countries with high levels of treaty ratification.

Similarly, Keith concluded that ratifying the ICCPR, after accounting for other factors, had no "explanatory power" for why states complied with human rights norms. Both studies found a level of compliance with human rights treaties that turned out to be much lower than compliance with economic treaties, such as International Monetary Fund agreements.

The results of both Hathaway and Keith's studies can be seen as partial rejections of all five compliance theories mentioned above. That human rights treaty ratification often precedes greater human rights abuse cuts against the results expected from the managerial and Franck theories. Countries routinely ignore potential reputation damage from disobeying a legitimate treaty. The realist and institutionalist schools cannot fully explain this data either. Treaty ratification is not cheap talk or costless compliance: Hathaway found that ratification had an effect, just more of a negative effect than anticipated. Koh's transnational theory seems consistent with the findings, but domestic internalization of human rights treaties is moving at a glacial pace.

The liberal position is partially undermined by Hathaway's finding that democracy does not always lead to increased compliance,
but full democracies did tend to have better compliance with human rights treaties. So, the degree of democracy may be relevant in assessing human rights compliance. In fact, several other studies show a correlation between the degree of democracy and respect for human rights generally, although this correlation may be weaker in the economic world.

Hathaway and Keith both note that many compliance theorists ignore the fact that states use treaties not just as instruments of change, but also as political expressions. When treaties have minimal enforcement provisions, countries can ignore the treaty while still getting the public relations boost from ratification. This explains why countries with particularly bad human rights records may ratify treaties at a similar rate as countries with good human rights records. It also explains the degree of democracy correlation: public pressure may be more effective in societies with more entrenched democracy.

Certainly, Hathaway and Keith’s results can be interpreted in a variety of other ways. For example, it is entirely possible that the ratification-compliance gap is because governments may not have the requisite authority or legitimacy to enforce treaties. It is also possible that other factors alter human rights compliance rates and

126. Simmons concluded that participatory democracy has “little to do” with monetary policy compliance. Simmons, supra note 122, at 832. But see Alvarez, supra note 111, at 106 (also disagreeing with democracy being “the explanatory (compliance) factor,” but commenting that the three prime examples of American treaties being enforced in domestic courts are all economic/trade in character). Other empirical studies have concluded that democracies better comply with trade agreements than other states. Edward D. Mansfield, Helen V. Milner & B. Peter Rosendorff, Why Democracies Cooperate More: Electoral Control and International Trade Agreements, 56 INT’L ORG. 477, 479 (2002).
128. Id.
130. Id. at 2010-11.
cloud the data.\textsuperscript{131} Despite these possibilities, the studies, when interpreted conservatively present three relevant conclusions: i) there is a tendency to comply less with human rights treaties than international economic agreements; ii) Koh's transnational internalization may be taking longer than expected because states ratify treaties as mere expressions with little intention of implementing them; and iii) more developed democracies lead to greater respect for human rights and better human rights treaty compliance.

\textbf{C. Applying the Empirical Results to Parlaw}

The three conclusions drawn from Hathaway and Keith's studies support the proposition that a society governed by parlaw would more effectively implement signed human rights treaties. Participatory principles push a society in the direction of improved human rights compliance.

Economic treaty compliance is greater than human rights treaty compliance because, in the former case, the parties with large stakes in the agreement tend to weigh in on or be present in developing the treaty. The key beneficiaries of a human rights treaty are generally vulnerable and abused portions of humanity who, in a bitter irony, are often third parties to agreements drafted by others.\footnote{132} Human rights treaties are more like "charitable enactments,"\footnote{133} whereas states or companies making economic agreements have more direct substantive payoffs for complying. This suggests that treaty compliance would be greater if people negotiated human rights treaties in a more participatory way.\footnote{134} Treaty negotiations under parlaw are more directly representative of vulnerable people's interests than the negotiators of any currently existing society.

\begin{footnotes}
\item[131] Keith did a better job of addressing this issue by using a multivariate analysis with seven factors (Political Democracy, Population Size, Econ Development, Civil War Experience, International War Experience, British Cultural Influence, Military Control, and Leftist Regimes). Keith, \textit{supra} note 119, at 107-09. \textit{See also} Hathaway, \textit{supra} note 113, at 2037.
\item[133] \textit{Id.} at 2007.
\item[134] This idea does not necessarily clash with Simmons finding that participatory democratic society does not have a large effect on economic agreement compliance. The relevant question regarding why nations comply is whether there is participation by the particular members of society most affected by the agreement. Maybe a parsociety is not needed to get all the key economic actors represented in a treaty negotiation, but it may be more necessary with human rights treaties.
\end{footnotes}
Human rights charitable enactments evolve into agreements where the actors have direct incentives to comply.

Parlaw provides a more direct connection between the affected people and the negotiators of a human rights treaty, and thus more transnational actors participate in the treaty building process. In current states, only legislatures (and sometimes only executives) approve treaties. Koh emphasized that the “first step” to better compliance is to “empower more actors to participate.” Parsociety is designed to create this empowerment: NGOs, activists, community economic interests, and “moral entrepreneurs” are all given a greater voice in parlaw. Therefore, the norms of a treaty should be expected to internalize into domestic law faster with parlaw. Representatives taking empty expressive positions are also harder to sustain than ever before because of transnational pressure to make the treaties binding.

Finally, the established correlation between compliance and the degree of democracy supports parsociety. Parsociety is democratic theory taken to its outermost limit and the research implies that this new society would be more likely to have better human rights compliance than modern democracies. “Implies” is the operative word in the last sentence; it cannot be said with certainty that the correlation between fuller democracy and human rights compliance will continue in a parsociety. However, the trend identified in the Hathaway study is encouraging for parsociety advocates.

D. Applying Parlaw Example 2: The Hutu-Tutsi Conflict

Parlaw’s potential on the international stage can be assessed using a recent historical case: the 1994 Rwanda genocide. How could a parsociety in Rwanda have addressed the ethnic violence in ways government models like modern democracy could not? Ethnic hatred cannot be contained by any law, but the forces at work in 1994 Rwanda are an illustrative challenge for parsociety.

The Rwandan genocide was largely caused by colonial interference and powerful extremist groups. Hutu and Tutsi co-existed relatively peacefully until colonization. When Belgium issued Hutu/Tutsi identity cards, an ethnic hierarchy was established that set

137. Id.
the stage for violence several decades later. Tutsis were considered by Belgium, for race and other reasons, to be superior to the majority Hutus. After a protracted civil war, the Hutu government responded to a power stripping peace settlement by working with extremist groups to foster hatred of Tutsis and preserve Hutu power. In early 1994, Tutsi Rwandan Patriotic Front troops poured into the country and Hutu President Juvenal Habyarimana was assassinated, sparking the violence that left over 500,000 dead.

A parsociety in Rwanda with non-discrimination embedded in their parlaw could have responded to Belgium's actions before genocidal forces even materialized. This answer is a cheap solution, though; a functional modern democracy in Rwanda could similarly have challenged or prevented the racial discrimination before the genocide occurred. The better question is: given the ethnic hatred in early 1994, how would a parsociety have responded better than a modern democracy?

There are several ways that a parsociety with parlaw could have assisted in the immediate run-up to genocide beyond modern democracy. First, a parsociety better allows for the Tutsi community to adjust to conditions in dangerous Hutu-dominated territory. Under parlaw, new representatives can be selected, votes can be weighted on certain critical issues, new laws can be implemented quickly at the primary council level, and communities can even legally secede. Provided the constitutional structure is preserved, individual communities using parlaw can dramatically change society without having to wait for a potentially unsympathetic national legislature.

The differences do not stop there. Second, the non-extremist Hutu public in Rwanda might have been more resistant to human

141. Id.
142. Systemic racial discrimination is a current violation of customary international law. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 702, cmt. a (1987).
rights non-compliance because they would have directly participated in forming the treaties their government now threatens to violate. Third, parsociety's deliberation and collective economic planning are designed to generate solidarity. Specifically, when citizens constantly have to communicate and cooperate with each other it is nearly impossible to dehumanize people, which is exactly what occurred throughout Rwanda's genocide.\(^{143}\) Fourth, a parsociety's broad emphasis on federalism creates a cosmopolitan identity that is not rooted in national divisions; the international community would be more likely to act if there were no national boundaries "containing" interest in the conflict.\(^{144}\)

These forces in parsociety could have helped stabilize 1994 Rwanda and abate the genocidal buildup to one degree or another. However, the fourth argument on parsociety fostering a cosmopolitan identity raises a problematic side question: how can any cosmopolitan identity be forceful enough in a parsociety that would inevitably inherit the various national identities we have today? This question goes beyond the Rwanda example and is worth exploring briefly as the first of a few systemic objections to parlaw.

**E. Objections to Parlaw**

One justification for nation states is that they give their citizens a national identity.\(^{145}\) Would parsociety's cosmopolitanism be impossible because it would inevitably challenge preexisting national identities? This problem is not a theoretical challenge, but it could be a large practical problem. Identities, even national ones, are not static; they change over time.\(^{146}\) A cosmopolitan identity can evolve from the current national identities in existence - for example, the American flag can keep its symbolic value in a cosmopolitan

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144. Although neighboring countries to Rwanda were obviously affected by the genocide, a parsociety is designed to create a transnational civil society network that could spur international action beyond the literal scope of the violence, refugees, etc. For more on transnational civil society networks, see TRANSNATIONAL CIVIL SOCIETY: AN INTRODUCTION (Srilatha Batiwala ed., 2006).


146. *Id* at 6 ("the sheer possession of a given identity confers no normative authority on the kind of politics that goes with that identity").
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parsociety; it will just symbolize something different than it does at present. That said, there is the real problem that the nation states do not want to give their power to the people and will use national identities and propaganda to preserve their existence. Thus the practical question of how to transition from the current arrangement into a society governed by parlaw remains to be explored. This note does not pretend to solve the practical issues of how one gets from the current arrangement to a parsociety; it is only exploring if the destination would be a worthwhile one.

A second potential issue with parlaw is how the model adheres to its own principles. It is one thing to say that parlaw maximizes freedom and consent, but determining the "maximum" of these values is an ongoing challenge. For example, Shalom envisions a parlaw Constitution that would be more difficult to amend than normal law so as to preserve certain rights. A constitution is a significant limit on both freedom and consent because laws cannot stand if they conflict with constitutional rules. Some constitutions even have "entrenched rights" that can never be abridged. For example, the German Constitution articulates certain entrenched norms. Perhaps, similarly, the deliberative federal council structure itself may be an entrenched norm in a parsociety. Even if everyone agrees that modern democracy shamefully deprives the public of their consent and their freedom, do constitutions and entrenched norms enable or conflict with participatory principles? Does the limited secession right sufficiently preserve consent? A parlaw advocate has to clearly articulate why their consent restrictions are strictly necessary while modern democracy's consent restrictions are not.

A third objection to parlaw is the issue of what happens if only part of the world embraces the new system. A fully realized parsociety contains the institutions and incentives to handle a group of Hutu extremists, but what happens if half the world is run by parlaw and the other by modern democracies and dictators? Parlaw's decentralized structure and sophisticated coordination make having a professional, powerful army very difficult.

150. Shalom recognizes this issue by saying that a Parpolity has a citizen army.
vulnerable to external force from more ruthlessly efficient state armies. What this all means is that parsociety may be an odd theory that works at both extremes, but not in the middle. A small indigenous society with little strategic value to others could easily coordinate a parsociety, and the entire world running on the same principles could protect itself from rogue actors. The middle ground is where the problem lies. If parsociety succeeds it will be as a movement without boundaries. As Morgenthau said:

It would be useless and even self destructive to free one or the other of the peoples of the earth from the desire for power while leaving it extant in others. If the desire for power cannot be abolished everywhere in the world, those who might be cured would simply fall victims to the power of others.

IV. Conclusion

First, a decentralized state with community owned property (a parsociety) would have a legal system called parlaw. This legal system has certain key advantages over the current coercive, under-representative legal structure. Parlaw can be seen as a tradeoff of some efficiency in legal enforcement for a fairer law that better respects people's autonomy.

Second, parlaw is similar to international law. This resemblance manifests itself both in how international law was envisioned by its classic theorists and how it functions in real life. This connection can serve as a response to parsociety critics: A participatory-like legal system is both possible and presently functioning on a global scale.

Third, parlaw, like international law, could be a role model for how domestic law should function. However, to establish this point a threshold problem of international law, that states often do not obey international law, must be addressed.

To take steps towards answering this question, the fourth step examines international human rights treaty compliance. A parsociety, at least in the human rights field, would have greater compliance as compared to current states, even modern democracies.


151. Past decentralized society experiments have been destroyed this way. For a historical/social and a first hand account on the demise of the anarchist and communist syndicates in the Spanish Civil War, see Daniel Guerin, ANARCHISM 114-43 (1970); George Orwell, HOMAGE TO CATALONIA (Harcourt 2003) (1938).

152. Morgenthau, supra note 66, at 34.
Fears of parlaw leading to gross non-compliance are less persuasive if the evidence points to parsociety having a higher human rights law compliance than a modern democracy. If a parsociety complies with decentralized law better than expected, then the efficiency of legal enforcement lost from switching to parlaw is overstated. These arguments suggest that parlaw can be complied with enough to make the increase in fairness and autonomy worthwhile; if this is true, then parlaw is indeed a model for what domestic law should be.

International law rarely looks at itself through the lens of participatory values, but these values give new legitimacy and insight into this area of law. Huge swaths of U.N. reform proposals are trying to make international law more like domestic legal systems: more centralized, more coercive power, etc. Parlaw theory suggests that these reforms are unnecessary, perhaps even against the spirit of the international legal system.

Sometimes people create something with virtues beyond their own expectations. The factory workers in Argentina did not set out to inspire visions of a new society, but inspire they have. International law's virtues may exist the same way. Perhaps it is not as powerful as its framers envisioned, but for all the cruel shots international law has taken over the years, now may be the time to embrace it for what it is.

153. One example of this style of U.N. reform is expanding permanent U.N. Security Council Membership. See Simon Chesterman et al., LAW AND PRACTICE OF THE UNITED NATIONS 566 (2008). Another example is the exponentially increasing number of UN peacekeeping missions. While peacekeeping missions spring from benevolent motives and have numerous positive effects, the lack of accountability for extreme force and human rights abuses greatly undercuts the legitimacy of these missions. See Matt Halling & Blaine Bookey, Comment, Peacekeeping in Name Alone – Accountability for the UN in Haiti, 31 HASTINGS INT’L & COMP. L. REV. 461 (2008).