

## BOOK NOTE

### MEASURING THE COSTS OF HUMANITARIAN EFFORTS

*THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM.* By David Kennedy.<sup>1</sup> Princeton and Oxford: Princeton University Press. 2004. Pp. xxix, 368. \$29.95 (cloth).

While the humanitarian movement has undoubtedly done much good, does it also have dark sides? (p. 3). Do humanitarian activists concentrate on too narrow a set of topics, diverting attention from issues of economic injustice and privileging form at the expense of substance? (pp. 10–13). Professor David Kennedy begins a wide-ranging and provocative critique with such questions, describing diverse facets of increasingly powerful humanitarian movements. In each chapter, Kennedy highlights activists' and policymakers' willingness to privilege particular tools — such as specific humanitarian vocabularies, the rule of law, and treaties and multilateral institutions. Humanitarians' failure to examine the relationship between such tools and particular ends in specific situations, he argues, leads not only to waste but also to harmful and perverse effects. While the book is provocative and brilliant in many ways, Kennedy's methodology of personal narrative, introspection, and theorization is ultimately insufficient to substantiate his claims. Empirical analysis is essential for a successful examination of the costs of the humanitarian movement and for a thorough exploration of the viability of conventional humanitarian instruments.

Kennedy the narrator traverses the globe and in his travels encounters a diverse array of humanitarian projects. He sometimes treads on land familiar to human rights scholars and activists — he tells of protecting refugees (pp. 199–234) and documenting torture (pp. 37–83). He also describes phenomena such as military expeditions and trade agreements, illustrating why analyzing these projects through the lens of humanitarianism is helpful (pp. 169–97, 235–323). Kennedy's argument is replete with nuance and deliberate ambiguity — summaries, including the one made here, necessarily transmit an impoverished version. Nonetheless, Kennedy's critique of diverse humanitarian efforts has a well-developed bottom line: humanitarians avert their eyes from the consequences of their actions, taking cover in familiar forms and institutions and, in so doing, risk causing grave damage. In choosing their preferred tools reflexively, they may generate inefficient and even pernicious results. Although Kennedy acknowledges that his

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means-ends critique is a familiar one,<sup>2</sup> he insightfully advances the debate by connecting humanitarian outcomes to humanitarian agents' personal motivations through the concept of "rulership." "Too often," he writes, "we have become rulers in flight from rulership" (p. xxiv); "blindness . . . begins at the moment the humanitarian averts his eyes from his own power" (p. 329).

Kennedy's book, much of which has previously appeared in academic publications,<sup>3</sup> is smoothly written and accessible to a lay audience. Its opening, middle, and concluding chapters are theoretical: they examine major traditions of international humanitarian thinking, especially the self-critical ones, and position Kennedy's contribution. Six empirical cases make up the evidentiary body of the work.

"Spring Break" tells of three activists' travels to Uruguayan prisons and introduces doubts about the effectiveness of short-term interventions in foreign environments (pp. 37-83). A doctor, a lawyer (Kennedy), and a writer are working together, but also as representatives of their respective professions, to interview torture victims and, upon their return, to publicize their discoveries and free their interviewees. Kennedy complicates this tale of heroisms. A lawyer's plea with a powerful military judge illustrates the ambiguities Kennedy introduces (pp. 73-76). A foreign lawyer, lacking a client, circumvents established trial and appeal procedures, and the Uruguayan judge accepts the procedural, though not the substantive, validity of these efforts. They both partake and take comfort in the same ritual of legal discourse, setting aside their conflicting goals. Although the expedition is modestly successful, "Spring Break" plants doubts about the motivations and commitments of activists who can always retreat to their foreign homes or take shelter in professional training that limits their involvement to a narrow slice of victims' problems.

"Autumn Weekend" moves from individual to collective humanitarian efforts (pp. 85-108). Here, Portuguese activists gather their counterparts from around the world to a conference to create a Platform of Jurists for East Timor's liberation. The conference culminates in a resolution expressing the jurists' commitment to the cause (pp. 102-07). Kennedy describes two moments of tension that illustrate the dedication of activists to activism itself rather than to any particular

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<sup>2</sup> "Three quite different intellectual traditions have influenced my own thinking about the dark sides of humanitarianism and what might be done about them. None is new to the humanitarian tradition. . . . Rather than offering an integrated program of my own for renewing international humanitarianism, I draw on these traditions in various ways . . ." (p. xx).

<sup>3</sup> In particular, Chapter Two, originally published in 1985, has influenced the fields of humanitarian policy and critical legal studies. See David Kennedy, *Spring Break*, 63 TEX. L. REV. 1377 (1985). Indicatively, Westlaw and the Social Science Citation Index reveal that over thirty law review and journal articles cite *Spring Break*.

cause. First, Kennedy recounts a failed amendment to the resolution of the Platform of Jurists. As a participating lawyer, he asks that the resolution's preamble express "frustration at the limitations of traditional institutional and doctrinal means of addressing [their] concerns" (p. 106). Second, immediately following Timorese independence, he receives an invitation from his East Timor advocate-colleagues to join in an effort for the people of West Sahara (p. 107). Kennedy sees the failure of his proposed resolution as evidence of the activists' attachment to the conventional tools of their work and unwillingness to examine the potentially damaging effects of those tools. Moreover, Kennedy worries that the ease with which the activists move from project to project reveals that they value activism itself over the causes such activism ostensibly supports. "Autumn Weekend" suggests that desire for continuity and a love for the trappings of activism may come at the expense of stated goals.

Four more stories follow, elaborating different aspects of these same fundamental queries. Where and how do the ends and means of humanitarian efforts connect, and when is this connection problematic? How is an activist to perceive, understand, and react to the disconnect? Kennedy attempts to answer these questions in the remainder of his book. Following a theoretical chapter, Kennedy discusses the empirics of development (pp. 149-67). He explains how the establishment of the rule of law contributes to development and examines efforts to give life and force to this rule by stamping out corruption. Kennedy cautions that focusing on preferred means is likely to produce disorienting results here as well; increasingly rigorous rules and enforcement can impede development. Enforcing patent law at the expense of AIDS patients is a particularly clear example of personal and societal suffering for the sake of what should be but a means to an end (p. 166). Kennedy further suggests that less clear instances of private exercise of market power may be just as damaging as public corruption (pp. 166-67).

Kennedy next turns to Europe, concentrating on relationships between the new and old member states of the European Union (pp. 169-97). After the collapse of communism, hard decisions about how to help new democracies flourish had to be made. Well-meaning Brussels bureaucrats, Kennedy reports, stunted this development by conceiving of a single, narrow way forward.<sup>4</sup> Although concerned about

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<sup>4</sup> A more critical reader might ask why the European Union is even included in a book on humanitarian efforts. Is it sensible to think of EU bureaucrats as humanitarian workers, rather than as civil servants in a trade agency interested in the smooth operation of markets? For a classic formulation of the argument that EU integration is a market-driven rather than a political or humanitarian project, see ANDREW MORAVCSIK, *THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT* (1998). For more recent

Eastern Europeans' well-being and quite supportive of corporatist arrangements for Western Europe, they saw the East as the less developed "other," to be disciplined through tight regulation designed by and for different societies (pp. 184–89).

In the next chapter, Kennedy illustrates how the use of categories such as refugees, asylum, and nonrefoulement can limit rather than facilitate humanitarian efforts (pp. 199–233). Lawyers struggle to reconcile nations' claims to rule on asylum applications with individuals' rights to asylum. By participating in these debates about rights, humanitarians distract themselves from the causes of and solutions to the refugee problem. Instead, they focus on "an ever finer set of distinctions among terms which share something doctrinally with these issues but do not address them. Choice among these terms comes to be made out of fealty to the coherence of the doctrinal structure rather than out of concern for refugees or asylum conditions" (pp. 228–29). Legal coherence, Kennedy implies, is but a means to an end. Although regularity, predictability, and horizontal equity might often result from legal coherence, a means-ends evaluation is needed before applying this or any other principle in particular situations.

In his final descriptive chapter, Kennedy turns from the preferred instruments of humanitarians — laws, courts, and multilateral fora — to one they typically abjure: war (pp. 235–323). He carefully traces the origins of the laws of war, arguing that they may have legitimized, rather than limited, the use of deadly force (p. 240). Not only does Kennedy make apt comments about the way the current conflict in Iraq is being fought (pp. 300–09), but he also traces the shift from no law of war, to different types of laws of war, to a language on the law of war shared across countries and by humanitarians and military strategists alike (pp. 237–66).<sup>5</sup> Although these actors have come to develop a common set of criteria to evaluate interventions, Kennedy observes that humanitarians remain reluctant to apply these shared standards:

Perhaps the strategist will ask precisely how many civilian deaths one should accept to protect one soldier. . . . At this point, the humanitarian is likely to pull back, perhaps reasserting the standard "it must be proportional" rather than applying it, or perhaps returning to the vocabulary of

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work on the consequences of EU enlargement, see Frank Schimmelfennig et al., *Costs, Commitment and Compliance: The Impact of EU Democratic Conditionality on Latvia, Slovakia and Turkey*, 41 J. COMMON MARKET STUD. 495 (2003).

<sup>5</sup> He is less successful in demonstrating that this shift in language has causally altered the behavior of warring states.

absolute normative commitment: "civilians may never be targeted." (pp. 331-32)<sup>6</sup>

In *The Dark Sides of Virtue*, Kennedy performs the formidable task of critiquing diverse humanitarian projects in a consistent manner: humanitarians, he explains, prize their tools in ways that blind them to the potentially negative consequences of their actions. Given a humanitarian crisis, they should not respond by calling for their preferred tools.<sup>7</sup> Instead, they should evaluate the relationships between particular strategies and particular situations, and act on the basis of this careful evaluation of the consequences of particular actions and inactions. Although Kennedy's argument is compelling, developing it through personal narrative alone is likely impossible. Indeed, personal narratives cannot offer a clear assessment of the costs and benefits of humanitarian efforts, nor can they serve as blueprints for reform.<sup>8</sup> An

<sup>6</sup> However, Kennedy himself seems equally unwilling to apply the standards that he has carefully developed. Like the humanitarian who hesitates to give an estimate of the acceptable casualties for reaching particular military targets and thus becomes irrelevant to the strategist, Kennedy hesitates to estimate the costs of humanitarian efforts and thus cannot help identify efforts that should be abandoned because they do more harm than good.

<sup>7</sup> Nor should they only pick crises that suit their preferred tools, "Autumn Weekend" implies. Presumably, none of the problems of lack of fit between ends and means would result if humanitarians stuck to their preferred tools, but selected ends that could be appropriately addressed by these tools. However, Kennedy's failure to discuss this possibility, and his reference to the shifting allegiances of his Portuguese colleague, suggest that he may not consider it an appropriate solution.

<sup>8</sup> One potential response to this critique is that Kennedy argues much less than this Book Note claims. One might, for example, argue that Kennedy merely highlights certain deficiencies of humanitarian tools and that a list of such deficiencies does not imply anything about their relative costs and benefits. Kennedy's critique of the humanitarian movement does sometimes consist of a series of lists (pp. 3-35). He certainly does not argue that, on balance, humanitarians do more harm than good. Similarly, although he critiques favored humanitarian tools, he does not reject these in place of a different set of tools; he does not contend that humanitarians should systematically prefer unilateralism to multilateralism. Kennedy does claim, however, that he wants to help find ways "to avoid or minimize" the costs of humanitarianism (p. xix). Some capacity to estimate cost is a prerequisite for this endeavor. Moreover, it is not possible to count certain strategies as costly without accurately accounting for their benefits. For example, Kennedy deplores the blinders that methodological commitments put on problem solvers (pp. 112-15). Almost by definition, methodologies focus attention on certain facts to the detriment of others. Thus, what would be required is an evaluation of the benefits that looking at a problem through a particular lens brings, relative to the costs of this strategy. Finally, Kennedy's book contains many statements that imply that he has already performed this cost-benefit analysis — but the analysis itself is not visible. For example, he claims that "[s]pecialists in all fields . . . underestimate the possibilities for political contestation within the domain of private and economic law — and overestimate the military's power to intervene successfully while remaining neutral or disengaged from background local political and culture struggles" (pp. 126-27). Making such a claim requires that one have an estimate of the objective possibilities for contestation, something that does not seem possible solely through examination of the psyches of humanitarians.

The book's final part, entitled "What International Humanitarianism Should Become," suggests that Kennedy aims his criticisms as constructive suggestions to reform the humanitarian

empirical evaluation of the costs and benefits of particular interventions, and of the relative merits of systematically prioritizing particular tools as opposed to making case-by-case evaluations of the means appropriate to particular ends, would be necessary to sustain the type of claim Kennedy develops.

How could one examine arguments such as Kennedy's in more empirical and systematic ways? And what would one gain from such an effort? Below is one example of a literature that intersects with Kennedy's concerns. As Kennedy discusses, treaties and other international legal instruments are among the preferred instruments of humanitarians. But how do they actually work? A large literature on compliance and implementation debates this issue.<sup>9</sup> In this literature, authors argue either that international law has substantial civilizing effects or that it has little or no positive effects.<sup>10</sup> Kennedy helpfully goes beyond this dichotomy and advances the debate by looking at significant negative consequences of a focus on legal instrument implementation. But even this type of argument lends itself to empirical study. For instance, Professor Oona Hathaway argues that human rights treaties have negative consequences.<sup>11</sup> Professors Ryan Goodman and Derek Jinks contest her analysis.<sup>12</sup> In both cases, however, the authors move from a fascinating hunch to a testable theory and then to a test of that theory.<sup>13</sup> Quantitative analysis is by no means necessary for methodological rigor; other recent works show that it is possible to select and analyze cases to systematically study the effects of humanitarian instruments.<sup>14</sup>

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movement. Even if the author had not set himself up for this task, it seems fair to hold him to the standard of proposing something that is at least as good as the alternative he rejects.

<sup>9</sup> For a helpful review of this literature, see Beth A. Simmons, *Compliance with International Agreements*, 1 ANN. REV. POL. SCI. 75 (1998).

<sup>10</sup> George Downs and his collaborators are good representatives of the thesis that international law does not alter state behavior substantially, while Abram and Antonia Chayes argue that international law can critically shape what national governments do. Compare George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379 (1996), and George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. 595 (2002), with ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995), and Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT'L ORG. 175 (1993).

<sup>11</sup> Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2002 (2002).

<sup>12</sup> See Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171 (2003).

<sup>13</sup> Similarly, many others have approached these critiques in more structured ways. For instance, Professor David Moore analyzes the costs of international humanitarian efforts through a framework of agency costs. See generally David H. Moore, *Agency Costs in International Human Rights*, 42 COLUM. J. TRANSNAT'L L. 491 (2004).

<sup>14</sup> See, e.g., *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999).

Is it unfair to criticize Kennedy for failing to complete a project he does not claim to undertake? One could read his book as a thought piece intended to provoke and generate hypotheses, but not intended to answer questions. One could evaluate Kennedy's argument, for instance, by asking how novel and interesting, or how sharp and meaningful, his critiques are.<sup>15</sup> One could also ask whether a synthesis of critiques that may have surfaced in diverse fora is much needed. Or one might speculate about how a critique coming from the inside of the humanitarian movement differs from the criticism outsiders might offer.<sup>16</sup> Undoubtedly, Kennedy's work would perform well on each of these tests. However, a critique about method is essential because of the central thesis Kennedy develops.

Kennedy makes a claim about the relative costs and benefits of various strategies. Yet he systematically sets aside the benefits both of humanitarian efforts themselves and of adherence to rules and procedures in their implementation. Indeed, Kennedy fails to recognize that there are advantages to relying on default rules. For instance, following rules often permits people to make decisions quickly in the face of limited and ambiguous information, while guaranteeing consistency and predictability. Additionally, proceduralism can legitimize humanitarian actions in the eyes of both participants and external observers.<sup>17</sup> Prior to the beginning of the current Iraq war, for example, humanitarians may have had too little information with which to evaluate the threat Iraq posed, the interests of the major international players, and the possible consequences of different intervention and nonintervention options. Insisting on multilateralism may have been better than taking an agnostic position; for instance, it may have deterred hasty action that served the interests of one international power at the ex-

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<sup>15</sup> Kennedy himself notes that these critiques have been heard before. For illuminating parallel arguments on the development of international law, see MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW, 1870-1960* (2002). For other accounts of how human rights scholars must move toward the inclusion of political and distributional concerns, see Charles R. Beitz, *Human Rights as a Common Concern*, 95 AM. POL. SCI. REV. 269 (2001). For an alternative account of the interaction between humanitarian work and the military establishment, see Michael Pugh, *Military Intervention and Humanitarian Action: Trends and Issues*, 22 DISASTERS 339 (1998).

<sup>16</sup> For a helpful account of how different critics of humanitarianism have approached their subject, see Joanna Macrae, *The Death of Humanitarianism? An Anatomy of the Attack*, 22 DISASTERS 309 (1998).

<sup>17</sup> Debates on the relative usefulness of rules as opposed to standards in domestic jurisprudence could serve as a helpful starting point for a systematic evaluation of the costs and benefits of adhering to international legal texts and international institution procedures. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (discussing the circumstances under which rules, understood as ex ante structures, are preferable to standards, understood as more flexible ex post evaluations, and highlighting the frequency of the proscribed conduct as an important criterion in this judgment).

pense of everyone else. Or it may not have been. The question is not one that can be resolved by delving deep into the hearts and minds of humanitarian activists — undoubtedly, the most sophisticated of them would have had doubts about both options.

Even if Kennedy had carefully listed and explored both the costs and benefits of various default rules, he would have left an unresolved problem. The reader would want to know how big the relative costs and benefits were in particular situations of applying rules as compared to focusing on results. Listing costs may be useful if these were peripheral to and clearly separable from the beneficial humanitarian action itself; the more difficult it is to extricate the cost from the benefit, the more necessary it becomes to list the benefit as well. Ultimately, however, even if one took seriously every cost Kennedy listed, would that make one want to end or double the funding for any given project he critiques?

For what kinds of arguments might Kennedy's method be more suitable? Could one connect empirical results about the consequences of particular actions on the ground, at the macro-level, to empirical research about what happens in the hearts and minds of humanitarian activists? This would be an extremely challenging task given the gap between macroeconomics and social psychology. But investigating these types of linkages between areas of research that provide solid, if limited, results may be the perfect task for thinkers who prefer big-picture research to number-crunching on narrowly defined topics.

Kennedy's use of personal narrative to highlight tensions between the ends and means of humanitarian efforts succeeds in verbalizing a deeply shared sentiment among activists and in provoking a broader audience to reconsider uncritical support of humanitarian efforts. However, Kennedy's choice of narrative form limits his ability to substantiate his central argument. A more systematic study on the relationship between ends and means is needed to sustain Kennedy's critique that current humanitarian efforts privilege humanitarian instruments at the expense of humanitarian goals and to guide future humanitarian efforts.