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Brian Z. Tamanaha

Efforts at law and development have now spanned more than half a century. The labels have changed over time: In the fifties, sixties and seventies it was called the Law and Development Movement;[2] in the eighties it continued without a name; in the nineties and through the turn of the century it morphed from "good governance programs" to "rule of law and development." In the first few decades, modest financial support was supplied by a few aid agencies and foundations; in the 1990s the funding spigot burst open, with financial support from a multitude of organizations that cumulatively amounts to several billion dollars.[3]

This law and development effort has involved an untold number of projects around the world, focusing on enhancing legal education, implementing judicial reform, constitution or code drafting, transplanting laws and institutions, law enforcement training, combating corruption, educating lay people about law, providing access to law for the poor, and supplying material assistance for legal institution building (including basics like office supplies, computers, and legal material). There are innumerable project reports, local or state studies, national or transnational studies, and comparative studies, that run the gamut from project assessments, to anthropological studies, to historical accounts, to statistical studies, to broad overviews.

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[1] Keynote Address, Conference on the Rule of Law, Nagoya University, Japan, June 13, 2009.
[2] See David M. Trubek & Marc Galanter, Scholars in Self-Estrangement: Reflections on the Crisis of Law and Development Studies in the United States, 1974 Wis. L. rev. 1062 (1974).
[3] See Alvaro Santos, The World Bank's Uses of the 'Rule of Law' Promise in Economic Development, in David. M. Trubek & Alvaro Santos, eds., The New Law and Economic Development (New York: Cambridge Univ. Press 2006)(pegging the World Bank's contribution alone at $3.8 billion) 253.

Law and development work is funded or carried out by major international and national institutions, public and private, prominently including the World Bank, the Ford Foundation, the Carnegie Endowment for International Peace, the American Bar Associate, the UN Development Program (UNDP), the U.S. Agency for International Development (USAID), the Inter-American Development Bank, the European Bank for Reconstruction and Development, the United Kingdom's Department for International Development, the Asian Development Bank, the Japan International Cooperation Agency, and many more.

What are the fruits of this lengthy and costly effort? There are two distinct aspects to this question. The first aspect looks at how much law and development has been accomplished on the ground. The second aspect focuses on the body of knowledge accumulated about what works in law and development.

An honest evaluation compels an unhappy conclusion on both. By most accounts, the actual improvements in law realized from these efforts have been meager. Thomas Carothers, director of the rule of law project for the Carnegie Foundation, offers this assessment:

> The effects of this burgeoning rule-of-law aid are generally positive, though usually modest. After more than ten years and hundreds of millions of dollars of aid, many judicial systems in Latin America still function poorly. Russia is probably the single largest recipient of such aid, but is not even clearly moving in the right direction. The numerous rule-of-law programs carried out in Cambodia after the 1993 elections failed to create values or structures strong enough to prevent last year's coup. Aid providers have helped rewrite laws around the globe, but they have discovered that the mere enactment of laws accomplishes little without considerable investment in changing the conditions for implementation and enforcement….

> Efforts to strengthen basic legal institutions have proven slow and difficult. Training for judges, technical consultancies, and other transfers of expert knowledge make sense on paper but often have only minor impact.[4]

Matters are worse than this passage lets on, unfortunately, because he omits mention of the most disheartening failure.[5] During the same period, in excess of a hundred million dollars was spent in Africa on law and development, with results that have been characterized as "pretty depressing."[6] Throughout the law and development literature there is "a strong current of disappointment."[7]

Carothers also offers a sobering assessment of what has been learned about law and development from this effort. A long-time participant confided in him that "we know how to do a lot of things, but deep down we don't really know what we are doing."[8] Work in this field operates

> from a disturbingly thin base of knowledge at every level—with respect to the core rationale of the work, the question of where the essence of the rule of law actually resides in different societies, how change in the rule of law occurs, and what the real effects are of changes that are produced. The lessons learned to date have for the most part not been impressive and often do not actually seem to be learned.[9]

Carothers' discouraging assessment of the fruits of law and development efforts appears to be widely shared among those who engage in this work. A review of three

[4] Thomas Carothers, The Rule of Law Revival, in Thomas Carothers, Promoting the Rule of Law Abroad (Wash. D.C.: Carnegie Endowment 2006) 11-12.
[5] A catalogue of the widespread and persistent failures is Stephen Golub, A House Without a Foundation, in Promoting the Rule of Law Abroad, supra.
[6] Laure-Helene Piron, "Time to Learn, Time to Act in Africa," in Promoting the Rule of Law Abroad, supra 289.
[7] Bryant G. Garth, Building Strong and Independent Judiciaries Through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results, 53 DePaul L. Rev. 383384 (2002).
[8] Thomas Carothers, The Problem of Knowledge, in Promoting the Rule of Law Abroad, supra 15.
[9] Id. 27.

recent notable books on law and development observed, "Although the contributions to these volumes reflect decades of both practical experience with and scholarly reflection upon legal reforms in developing countries, at the end of the day they are remarkably inconclusive. None of the authors represented in these volumes seem strongly optimistic about whether legal reforms are likely to promote development (at least early in the development trajectory)."[10]

The most an optimist can say is that it is premature to draw overly pessimistic conclusions.[11] It "will take many years or even decades before it becomes clear whether and to what extent sustained impact transpires."[12]

One clear lesson, at least, shines through the haze: society is the all-consuming center of gravity of law and development. The term "society" is used here in a capacious sense—encompassing the totality of history, culture, human and material resources, religious and ethnic composition, demographics, knowledge, economic conditions, and politics. No aspect of law or development operates in or can be understood in isolation from these surrounding factors. The qualities, character, effects and consequences of law are thoroughly and inescapably influenced by the surrounding society. Because every legal context in every society involves a unique constellation of forces and factors, there can be no standard formula for law; a good law in one location may have ill effects or be dysfunctional elsewhere; unanticipated consequences are to be expected.

Law and development practitioners and scholars recognize this fundamental truth. "Context matters," "local conditions are crucial," "circumstances on the ground shape

[10] Kevin Davis & Michael J. Trebilcock, "The Relationship between Law and Development: Optimists Versus Skeptics," 56 Am. J. Comp. L. 895,897 (2008)
[11] I have previously urged patience. Brian Z. Tamanaha, The Lessons of Law and Development Studies, 89 Am. L. Int'l. L. 470,473,484 (1995).
[12] Golub, A House Without a Foundation, supra 125.

how things work"—variations of this insight has been repeated so often it is nearly a cliché.[13] What stymies law and development projects time and again is the "the extreme interrelatedness of everything with everything else in a society."[14] For the sake of convenience, I will call this the "connectedness of law principle."[15]

The recognition that law is interconnected with everything in society can easily lead to one of two opposite temptations. Because it is impossible to know or consider everything, one path is to give up in despair at the enormity of the task. The other path is to shrug and plough ahead anyway, using general templates on transplanting legal codes, bolstering courts, training lawyers, and hoping for the best. Law and development practitioners have largely done the latter. Going forward surely is better than walking away.

The objective of this essay is to draw out the implications of the primacy of society for law and development. At the outset, it helps put matters in the proper perspective to recognize that the central insight identified above—law is interconnected with everything in society so everything matters—applies full force to *all* legal systems. This is *the* fundamental insight of law and society research, which was the original home for the work that now goes under the law and development label.[16]

"LAW AND DEVELOPMENT" IS NOT A FIELD

[13] An article that focuses on the failure to recognize this insight is Cynthia Alkon, The Cookie Cutter Syndrome: Legal Reform Assistance Under Post-Communist Democratization Programs, 2002 J. Disp. Resolution 327 (2002); see also Stephen Troope, Legal and Judicial Reform Through Development Assistance: Some Lessons, 48 McGill 357, 387-390 (2003).

[14] David Kennedy, The 'Rule of Law,' Political Choices, and Development Common Sense, in The New Law and Economic Development, supra 153. Kennedy uses this phrase in connection with policy making, but it perfectly fits law as well.

[15] An outline of the thick social milieu which law operates in can be found in Brian Z. Tamanaha, A General Jurisprudence of Law and Society (Oxford: Oxford Univ. Press 2001) 213-221.

[16] See Lawrence Friedman, On Legal Development, 24 Rutgers L. rev. 11 (1969).

Many of those who write on law and development appear to consider it a "field" of some sort. "With a recognizable set of activities that make up the rule-of-law assistance domain," Carothers writes, "…rule-of-law assistance has taken up the character of a coherent field of aid."[17] To the contrary, I will begin by arguing that it is misleading to conceive of law and development in this fashion.

Law and development is a poorly constructed category that lacks internal coherence. Every legal system everywhere undergoes development (or regression) so there is nothing special about this; meanwhile, the multitude of countries that have been targeted for law and development projects differ radically from one another. Hence there is no uniquely unifying basis upon which to construct a "field." Law and development work is better seen, instead, as an agglomeration of projects perpetuated by motivated actors supported by funding. This is not meant as a cynical characterization but an accurate description that puts law and development activities in a more adequate frame. A quick glance at a few countries will help make the point.

Russia is an industrialized country run by a semi-authoritarian polity, with a formidable military, struggling to make the transition to global capitalism from decades of communism. Russia's economy collapsed after the transition and has grown haltingly since. It enjoys ample natural resources, including significant natural gas reserves. It has a well-educated populous, a sizable body of lawyers, a small group of ultra-rich, a notable organized crime presence, and an outmanned police force plagued by corruption. It covers a huge territorial expanse reaching from Eastern Europe to the Pacific, encompassing large sub-populations of different ethic groups and different religions, cultures, and languages.

[17] Carothers, The Problem of Knowledge, supra 28.

Pakistan is a populous Islamic nation in the mountainous region of East Asia, with teeming modern cities bustling with economic activity, as well as vast rural stretches where people live in conditions similar to those centuries ago. The military is independent from the executive branch of government and has a strong say in domestic affairs. Since achieving independence from British rule in 1947, then separating from India as an Islamic nation in 1956, the reins of government have traded back and forth between democratic elections and military coups. In recent years, Pakistan's manufacturing for export and service sectors have grown at an enviable pace, exceeding that of most advanced capitalist countries, although suffering intermittent set backs. The legal profession and courts are well established in the cities, but state courts in rural areas are negligible, corrupt, and suffer long delays, and there are few lawyers to serve the rural population. The Taliban control certain regions of the country outside the cities, where they impose a harsh brand of Sharia.[18]

Many nations in sub-Sahara Africa have weak (or failed) states, little industrial development or manufacturing, unreliable electrification, an inadequate infrastructure of communication, transportation, and sewerage, miserable educations systems, and poor public heath (including a devastating AID epidemic). A substantial proportion of the population lives in impoverished agricultural sectors. Government jobs are the main source of employment. Many African countries have relatively few trained lawyers and judges. (For example, with a population of 7.5 million, Rwanda is served by about fifty lawyers, twenty prosecutors, and fifty newly recruited judges;[19] Malawi has 300 lawyers

[18] See Pamela Constable, Taliban Style Justice Stirs Growing Anger, Washington Post, May 10, 2009, at http://www.washingtonpost.com/wp-dyn/content/article/2009/05/09/AR2009050902518.html
[19] Piron, Time to Learn, Time to Act in Africa, supra 275.

for 9 million people.[20]). African nations, many with relatively small populations (under 20 million), inherited a colonial legacy that combines an uneasy mix of rival African tribal or ethnic groups, along with descendants of white settlers and other immigrants. Tension among groups occasionally erupts into violence, as occurred on a massive scale in Rwanda in the mid-1990s between the Tutsis and Hutus. African countries have been plagued by recurrent civil wars and coups that reflect underlying tribal or ethnic rivalries. Several countries have rich reserves of natural resources controlled by government heads or by oligarchic firms with close ties to the government. Autocratic rule is common, with rulers dedicated to maintaining power, siphoning off wealth, and rewarding supporters.

Russia, Pakistan, and Rwanda have certain aspects in common—if observed from a mile high vantage point that renders all detail invisible. But what do Russian, Pakistan, and Rwanda share in common with Argentina, Bolivia, Chile, China, Costa Rica, Ecuador, Egypt, El Salvador, Honduras, Malawi, Morocco, Paraguay, the Philippines, and Romania? All of these countries are addressed in some detail in Carothers' book on the rule of law and development.[21] Also mentioned in the book are Bangladesh, Bulgaria, Cambodia, Indonesia, Kenya, Peru, Romania, South Africa, Venezuela, and Vietnam. The list goes on. In virtually every respect these various countries differ from one another: population, natural resources, history, culture, mix of religions and ethnic groups, political system, degree of industrialization, agricultural production, competitive position in global trade, extent of urbanization, per capital income, proportion of middle class, number of lawyers, compensation and status of judges—to name a few

[20] 291.
[21] See Carothers, Promoting the Rule of Law Abroad, supra.

characteristics. The only obvious trait these varied countries share is that they have been on the receiving end of law and development projects or research.

No advanced capitalist country—Anglo-America, Western Europe, Japan, and more recently Korea and Taiwan—is on the law and development list. Thus eligibility for law and development is defined in negative terms: any country not admitted to the advanced capitalism club. A wholly negative criterion for inclusion deprives "law and development" of shared qualities upon which to build insights. The interconnectedness of law in society exacerbates this problem by making it hazardous to draw inferences or apply experiences from one situation to the next. The success or failure of a judicial reform project in Russia will have little bearing on the same project in Rwanda or the isolated hills and valleys of Pakistan.

The lack of internal coherence, furthermore, is worsened by deep contestation over the orientation of "law and development." The three main ways of construing this phrase, taken up in order below, are legal development, law and economic development, and comprehensive law and development.

LEGAL DEVELOPMENT

"Legal development" concentrates on creating, expanding, solidifying, or enhancing the efficiency of institutions that make law, apply the law, and enforce the law. In the development context, the "rule of law" frequently narrows down to court reform (training, material assistance, research on).[22] This is because judicial institutions are

[22] See e.g. Erik G. Jensen & Thomas Heller, Beyond Common Knowledge: Empirical Approaches to the Rule of Law (Stanford, Ca.: Stanford Univ. Press 2003).

uniquely dedicated to and occupy a pivotal position in legal systems, and because courts typically are weak by comparison to other governmental institutions.[23]

The fundamental problem is that reform does not work if it focuses just on courts, or indeed if it focuses only on law. Training judges accomplishes little by itself. A group of legal practitioners are needed to handle criminal and civil cases and to help develop stable legal practices and shared legal knowledge. Legal material must be available. Clerks and transcribers are necessary to process and record proceedings. Judicial compensation must be set at level sufficient to attract qualified individuals and to lessen the temptation to supplement pay with other sources of income that compromise their judicial role. Judges must resist the influence of prejudices, class or group loyalties, the calls of friendship or extended networks of relations, or other inappropriate factors. Judges must have job security and personal security. They must not be subject to intimidation or threats from war lords, drug lords, organized crime, or other dangerous elements within society. The public must generally comply with judicial rulings and judicial orders must be backed by effective sanctions when compliance is not forthcoming. Political leaders, military leaders, the economic elite, the police, and government officials must generally abide by judicial rulings, including rulings that go against their interests or frustrate their desired objectives.

This basic list of the conditions necessary for a functioning state judicial system exposes the daunting extent of the task. Each aspect is contingent upon on other factors that reach into realms beyond law itself. No single piece works in isolation. The idealized model of well functioning legal institutions (which are never perfectly achieved

[23] See e.g. Steven L. Taylor, Democratization in Latin America, 37 Latin American Research Rev. 162,172 (2002)(a consensus that judiciaries are the weakest pillars of Latin American democracies).

in any system) that reformers attempt to reconstruct operate properly because a host of secondary supportive conditions are also in place, involving a confluence of social, economic, cultural, and political factors.

The rule of law, put in the most basic terms, exists when government officials and citizens are generally bound by and abide by the law.[24] An essential component of the rule of law is a prevailing ethic of voluntary compliance with judicial rulings. This depends upon the presence of a widespread cultural attitude of respect for the law and judges that cannot be secured by the threat of coercion alone. Cultural attitudes, however, are immensely hard to deliberately shape or change.

The difficulty in encouraging and entrenching a pervasive cultural attitude of respect for law and judges is magnified when judges are widely distrusted or avoided—perceived as corrupt, identified with the elite, seen as puppets of the regime, or believed to favor one group at the expense of others; or when the populace is alienated from the law because it is stained by a colonial or authoritarian past or present, or is written in a language they do not understand, or was transplanted from elsewhere and is considered obscure or alien; or when judges are seen as inept or the judicial system is prohibitively expensive or suffers from long delays or other inefficiencies. When these problems exist separately or in combination state courts may be ineffective, marginalized, or despised by citizens.

A prominent political scientist who has studied the region for decades observed, "Across most of Latin America, the judiciary is too distant, cumbersome, expensive, and slow for the poor and vulnerable event to attempt to access it. And if they do manage to

[24] See Brian Z. Tamanaha, On the Rule of Law: History, Politics, Theory (Cambridge: Cambridge Univ. Press 2004).

obtain judicial access, the available evidence often points to severe and systematic discrimination."[25] Likewise, judges in a number of countries across East Asia are perceived as biased (partial to the state) or corrupt; in Indonesia, for example, where polls show low levels of respect for courts,[26] people take the majority of their disputes to informal community mechanisms or religious leaders.[27] Similarly, more "than 80 to 90 percent of day-to-day disputes in Africa are said to be resolved through nonstate systems such as traditional authorities."[28] The UK Department for International Development estimates that "in many developing countries traditional or customary legal systems account for 80% of total cases,"[29] which is likely an understatement.[30]

A study of failed judicial reform efforts across Latin America concluded, "In sum, good judging can only be expected when all elements of the justice system are reformed, when civil society actively supports reform, and when the political culture places a high value on a reformed judiciary."[31] Legal institutions require social stability, ample human resources, sufficient economic resources, favorable cultural attitudes toward law, and political stability. In the absence of these surrounding conditions it will be hard for legal reforms to take.

These factors cluster together in a mutually supportive fashion in well functioning situations—although each particular combination is unique and an infinite variety of

[25] Guillermo O'Donnell, Why the Rule of Law Matters, 15 Journal of Democracy 32,40-41 (2004).
[26] See Daniel Fitzpatrick, Disputes and Pluralism in Indonesian Law Law, 22 Yale J. Int'l L. 171,204 (1997). A superb account of systemic judicial corruption in Indonesia is Sebastiaan Pompe, The Indonesia Supreme Court: A Study of Institutional Collapse (Ithaca, NY: Cornell Southeast Asia Program Publications 2005).
[27] See Maria Dakolias, Methods for Monitoring and Evaluating the Rule of Law (2005)(Lead Counsel, World Bank Legal Development), 18, available at http://www.cilc.nl./Conference -publication-2005.pdf.
[28] Piron, Time to Learn, Time to Act in Africa, supra 291.
[29] Quoted in Golub, A House Without a Foundation, supra 118.
[30] An estimate offer by one World Bank unit is 90%. See World Bank Social Development Unit, Forging the Middle Ground: Engaging Non-State Justice in Indonesia, May 2008.
[31] Michael Dodson, Assessing Judicial Reform in Latin America, 37 Latin Am. Research Rev. 200,202 (2002).

possible combinations can function positively. A cluster is all the more resilient when it comes together (evolving over time in a given society), but the lack of a supportive cluster magnifies the difficulty of the task because it is enormously hard to bring the full complement of supportive strands on line. Dysfunctional situations can amount to a structural trap that defeats legal reform efforts.[32] This is the connectedness of law principle in action. Many legal reform efforts are undercut by a tenacious paradox: the populace must identify with and respect the law and judges if the legal system is to function properly, but the legal system must function properly if the populace is to identify with and respect the law and judges.

This is not a fatalistic view. Legal development (and legal regression) has occurred many times following a variety of different pathways, from organic growth to imposed or voluntary transplantation, and there is no single or standard arrangement for a functioning legal system that meets the needs of its citizenry. "The one 'precondition' that seems to exist in almost all cases is indigenous demand for legal and judicial reform, be it driven by an elite (the common pattern) or by broad popular sentiment."[33] It follows from the connectedness of law principle that it is essential to examine surrounding circumstances to determine what kind of reform is necessary and practicably achievable, and to remember that non-legal factors matter at least as much as to the success of reforms as legal factors. Prospects for successful legal development will be enhanced by building local capabilities—by training and supporting members of that society who will be committed to long term efforts at legal reform—and by encouraging positive orientations toward law (although the legal system must produce positive results for this

[32] Paul Collier develops severed kinds of "traps" in The Bottom Billion, supra.
[33] Troope, Legal and Judicial Reform Through Development Assistance, supra 393.

to take hold). How a legal system develops, its shape and character within a given society, is always fundamentally a local matter.

LAW AND CAPITALISM

The desire to facilitate economic development is the primary motivation behind the generous attention given to law and development today. Sound legal systems, in this view, are an essential prerequisite to sustained economic development. The massive influx of resources allocated to law and development in the past decade-plus has been provided by institutions whose primary mission is to advance economic development.[34] The development of law is thus justified as a *means* to the economic development *end*. The standard package includes laws on incorporation, securities, antitrust, banking, intellectual property, commercial transactions, protections for foreign investors, and property rights and contract enforcement. This was the "Washington Consensus" plank of market friendly reforms actively promoted around the world in the 1980s and 1990s.[35]

A more accurate label for this stream is "law and capitalism," for its orientation is to develop legal regimes suited for participation in the global market economy. The fall of communism, particularly of the Soviet Union, with the ensuing transitions of many nations to market economies, precipitated a clamoring (from legal sellers and legal buyers) in the 1990s for legal reforms deemed necessary to domestic and international capitalism. In the rush to embrace global capitalism, formerly government-held economic assets (utilities, factories, natural resources, public transportation) were sold

[34] See Robert C. Effros, The World Bank in a Changing World: The Role of Legal Construction, 35 Int'l Lawyer 1341 (2001).
[35] For an excellent account of this program and its harmful consequences, see Paul H. Brietzke, The Politics of Legal Reform, 3 Wash. U. Global Stud. L. Rev. 1 (2004).

into private hands, often at low prices to insiders or their families or friends, raising cries of unfairness and corruption. This asset grab prompted additional calls for better laws and legal institutions. Additionally, blame for the 1997 Asian financial crisis was placed on lax financial regulation and enforcement, renewing the call for economic related legal reform.[36]

Another motivation for the turn to law was the stubborn failure to develop of a large swath of nations in sub-Sahara Africa and Central Asia—the desperate "Bottom Billion."[37] While countries around the globe, led by China and India, were making dramatic strides in economic development, these forlorn countries were falling further behind. Each failure has its own complex of reasons, but most have suffered under unstable or venal governments. Aid money given to these countries to fund economic development projects too often ended up in the overseas bank accounts of government officials or was spent on purchasing arms for the military.[38] Improving the legal system offered the hope that constitutional restraints and anti-corruption laws would temper this bad behavior.

Even countries experiencing a spurt of economic improvement continue to have large numbers of poor, located in rural areas or clustered in makeshift urban housing developments (Manila, Mumbai, Mexico City). Residential squatters have no legal ownership rights of their abode and many work in the illegal (or under the table)

[36] See Maria Dakolias, Methods for Monitoring and Evaluating the Rule of Law (2005)(Lead Counsel, World Bank Legal Development), 13-14, available at http://www.cilc.nl./Conference -publication-2005.pdf.
[37] Paul Collier, The Bottom Billion: Why the Poorest Countries are Failing and What Can be Done About It (Oxford: Oxford Univ. Press 2007)
[38] Id. 103.

economy; urban crime is rampant. Legal rights and protection, it was thought, would help improve their living circumstances and economic prospects.

The supportive role law plays in capitalism has been a recurring theme for more than a century, with a seminal early contribution from Max Weber.[39] Property rights encourage productive activity by allowing people to reap the rewards of their labor. Contract law allows people to conduct transactions at a distance over time, allowing them to reliably anticipate the costs and benefits of proposed exchanges. Criminal law maintains social order, bringing general security, saving people from having to expend effort and resources to protect themselves or their property. Certainty, predictability, and security, according to these views, are the essential benefits law provides for economic activity. This basic corpus of ideas was supplemented in the 1990's by the rise of New Institutional Economics (NIE), led by Nobel Prize winning economic historian Douglass North, who argued that the development of legal institutions, particularly the protection of property, are an essential concomitant of economic development.[40]

A prominent voice from the South, Peruvian economist Hernando de Soto, similarly highlighted the significance of property rights in development. In developing countries, he pointed out, a great deal of property is not officially titled or registered, or there are clouds on the title, and titling is a lengthy and costly process. As a consequence, this property cannot be used as collateral to secure loans, people are less inclined to improve the property (fearing they will lose it), and the market for property is

[39] See David Trubek, Toward a Social Theory of Law: An Essay on the Study of Law and Development, 82 Yale L.J. 1 (1972).
[40] Douglass C. North, Institutions, Institutional Change and Economic Performance (New York: Cambridge Univ. Press 1990).

artificially constrained. Much of the potential wealth and capital in developing societies is thus locked up unproductively.

It would seem to be an obvious truth that law facilitates economic development. The World Bank has produced detailed statistical studies which show a correlation between "the rule of law" and a host of development indicators.[41] Former World Bank President James Wolfensohn "said that the empirical evidence shows a large, significant and causal relationship between improved rule of law and income of nations, rule of law and literacy, and rule of law and reduced infant mortality."[42] Owing to this belief, the World Bank dramatically reallocated its development funding. "Thirty years ago," observed the General Counsel of the Bank, "the Bank had 58% of its portfolio in infrastructure; today it is reduced to 22% while human development and law and institutional reform represent 52% of our total lending."[43]

There are reasons to question the wisdom of this shift, however. Although statistical studies have shown a positive correlation between the rule of law and economic development,[44] these results must be read with caution. The "rule of law" is not easy measure, and different indicators have been used.[45] The correlations found, moreover, do

[41] See Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, Governance Matters VI: Aggregate and Individual Governance Indicators, 1996-2006 (World Bank Policy Research Working Paper Series No. 4280, July 2007); Kirk Hamilton, et.al., Where is the Wealth of Nations? Measuring Captial for the 21st Century (2006).
[42] Press Release No: 2002/013/S, Rule of Law Central to Fighting Poverty, World Bank President Calls on Governments to Recognize the Link Between Law and Development, http://web.worldbank.org/WBSITE/EXTERNAL/NEWS.
[43] Robert Danino, The Legal Aspects of the World Bank's Work on Human Rights (Oct. 2006), http://www1.worldbank.org/devoutreach/october06/article.asp?id=386.
[44] See Frank B. Cross, Law and Economic Growth, 80 Tex. L. Rev. 1737 (2002).
[45] See e.g. mark David Agrast, Juan Carlos Botero, Alejandro Ponce-Rodriguez and Claudia Dumas, The World Justice Project Rule of Law Index: Measuring Adherence to the Rule of Law Around the World, American Bar Association, 2008. For a critical study of such measures, see Melissa A. Thomas, What Do the Worldwide Governance Indicators Measure?, Oct. 2006, http://siteresources.worldbank.org/INTWIBGOVANTCOR/Resources/1740479-114912210081/2604389-1167941884942/what_do_wgi_measure.pdf.

not identify the underlying causal relationships.[46] It might be that economic development (initially building on informal sources of security and certainty[47]) is what prompts or leads to an improvement in law; or perhaps both economic development and the rule of law are caused by a deeper complex of underlying factors which explains their coincidence.[48] Or perhaps different situations or stages of economic and legal development manifest dissimilar causal relationships—it's fantastic to imagine that there is just one way of economic development and legal development which holds for all places and all times. The Western situations in which legal institutions evolved in sync with advances in capitalism are totally unlike what developing countries face today in their attempt to leap into the global capitalist marketplace while nurturing legal institutions still at a nascent stage.

These possibilities must be kept in mind because if they are correct, sinking money into legal development will not necessarily result in the desired economic development. A recent World Bank study asserted that increasing the rule of law is one of "the most important" means to increase total wealth;[49] a one percent increase in the rule of law index contributes more to intangible capital than a one percent increase in school years.[50] If policy makers, relying upon this finding, were to shift funds away from schooling into legal development, they would commit a serious error, as economic development and legal development are both facilitated by and depend upon a substantial pool of educated citizens.

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[46] One of the leading producers of these studies, Daniel Kaufmann of the World Bank, acknowledges that questions about causality remain unresolved. See Daniel Kaufmann, Rethinking Governance: Empirical Lessons Challenge Orthodoxy, March 11, 2003, 17 at

[47] See Rodrik, One Economics, Many Recipies, supra.

[48] See Haggard, MacIntyre, & Tiede, Rule of Law and Economic Development, supra 206-09.

[49] Hamilton, Where is the Wealth of Nations? Supra xviii.

[50] Id. 94.

Skeptics of the claim that the rule of law is essential to economic development are quick to point out that this proposition is belied by actual economic events. If the "rule of law" is taken to include property rights, contract enforcement, and independent courts applying the law, then the claimed connection is hard to square with the fact that the most spectacular recent examples of economic development—China especially[51]—did not fully meet these legal prerequisites.[52] Much of the productive property during the boom in China has been collectively owned. Networks of relations among business people are more important to transactions than contract law. China, Korea and Taiwan made early economic strides by ignoring intellectual property rights (reverse engineering products, selling knock-offs or pirated goods).[53] Judicial decisions in China are subject to review by political authorities. Korean and Taiwanese judges during their boom period were also far from independent.[54]

These counter-examples remind us that to perceive the connection with economic development one must observe differentiated spheres of legal and economic operation. The standard recipe for economic success in contemporary global capitalism (on the first rung of economic development) is to mass produce low cost goods for export. To attract transnational investors who will supply capital and technology for production facilities, countries must offer a large pool of low-wage, disciplined labor with a basic education, low taxes, an adequate transportation infrastructure, and protections for foreign

[51] See Donald Clarke, Peter Murrell, Susan Whiting, The Role of Law in China's Economic Development, available at http://ssrn.com/abstract=878672.
[52] See Tom Ginsburg, Does Law Matter for Economic Development? Evidence from East Asia, 34 Law & Soc'y Rev. 829 (2000); Frank Upham, Mythmaking in the Rule-of-Law Orthodoxy, in Promoting the Rule of Law Abroad, supra.
[53] See John K.M. Ohnesorge, Developing Development Theory: Law & Development Orthodoxies and Northeast Asian Experience, 28 U. Pa. J. Int'l Econ. L. 219 (2007).
[54] Id.

investment.[55] The latter factor can be satisfied by agreements to resolve disputes in international tribunals or in private arbitration—bypassing the national court system—and by credible assurances from government officials that production facilities and earnings will not be expropriated.[56] Protection against government seizure of assets, it must be noted, is more a matter of political stability and credibility than legal restraints (which can be trampled). Economic processing zones (EPZs) have successfully attracted investment to a number of lesser developed countries through this formula.

Countries that provide these conditions—delivering the specific types of legal support that matters for foreign investors—can undergo rapid economic development even if the legal system generally fails to meet rule of law criteria. East Asia's development successes, which took place under semi-authoritarian governments, have demonstrated that "centralized systems are capable of creating a stable, predictable, and therefore credible regime for investors even if corruption is a component of the operating environment."[57]

These counter-examples expose a significant point easily obscured by the emphasis on the rule of law. The functions that law provide for capitalist development—especially security and certainty—perhaps can be filled by other informal or formal mechanisms in given social contexts.[58] De Soto's work shows that economic transactions do occur based upon informal forms of ownership, although he argued that legalizing ownership would be superior. Studies also suggest, moreover, that while

[55] See generally Jeffry A. Friedan, Global Capitalism: Its Fall and Rise in the Twentieth Century (N.Y. : W.W. Norton 2006).
[56] See Collier, The Bottom Billion, supra 153-154.
[57] Stephan Haggard, Andrew MacIntyre, & Lydia Tiede, The Rule of Law and Economic Development,11 Annual Rev. Pol. Sci. 205,212 (2008).
[58] See Avinash K. Dixit, Lawlessness and Economics (Princeton: Princeton Univ. Press 2004).

stable legal institutions correlate positively with economic development, a range of different substantive legal regimes can work.[59] Real property need not be privately held or alienable, as China demonstrated, to be used productively for economic purposes. Conversely, empirical studies of titling projects (of the type de Soto advocated) show mixed results—sometimes they facilitate economic activities and sometimes not.[60]

The variability of legal arrangements in connection with economic development is yet another iteration of the connectedness of law principle, played out in connection with economic performance. This principle is built into NIE, which recognizes that legal institutions operate within and are supported by surrounding social, cultural complexes of norms and beliefs—economic performance is ultimately a product of this totality. NIE is frequently cited for showing that law is necessary for economic development, but that ignores this more fundamental point, drawn out by North:

> It is the admixture of formal rules, informal norms, and enforcement characteristics that shapes economic performance. While the rules may be changed overnight, the informal norms usually change only gradually. Since it the is the norms that provide 'legitimacy' to a set of rules, revolutionary change is never as revolutionary as its supporters desire, and performance will be different than anticipated. And economies that adopt the formal rules of another economy will have very different performance characteristics than the first economy because of different informal norms and enforcement.[61]

Another important contributor to NIE, Oliver Williamson, emphasizes similarly that formal legal institutions operate within a more fundamental "social embeddedness level.

[59] See Dani Rodrik, One Economics, Many Recipes: Globalization, Institutions, and Economic Growth (Princeton: Princeton Univ. Press 2007); Kevin E. Davis & Michael J. Trebilcock, Legal Reforms and Development, 22 Third World Q. 21,26-27 (2001).
[60] Davis & Trebilcock, Legal Reform and Economic Development, supra 27; Cross, Law and Economic Growth, supra 1772.
[61] Douglas North, Economic Performance Through Time, 84 Am. Econ. Rev. 359,366 (1994).

This is where the norms, customs, mores, traditions, etc. are located."[62] The forces and influences at this more fundamental level change slowly over the course of decades in ways that elude deliberate design or manipulation.

An irony hovers over the current popularity of rule of law for development. Turning to rule of law reform to overcome failures in economic development might be substituting one set of seemingly intractable problems for an even tougher set of problems. Improving the law depends upon a multitude of supportive social, culture, political, *and* economic conditions—setting up EPZ's appears easy by comparison.

The recent economic crisis produced by the risky (highly leveraged) practices of U.S. financial enterprises (banks, investment houses, insurance companies) raises an additional irony. Brazilian President Luis Ignacio Lula da Silva observed in a recent trip to India, "It's unacceptable that we will pay for the irresponsibility of speculators that transformed the world into a gigantic casino and at the same time they gave us lessons on how we should govern our countries. We are the victims of a financial crisis generated by the rich countries."[63] Beyond the irony that in recent events it was *Western* regulations and enforcement that proved inadequate, it bears serious contemplation whether Asian style neo-merchantilism and economic nationalism—which include state control of natural resources and state run investment funds, and export oriented industry combined with various types of import barriers that protect national industrial production—are superior to Western market capitalism and its supportive legal package

[62] Oliver E. Williamson, The New Institutional Economics: Taking Stock, Looking Ahead, 38 J. of Econ. Literature 595,596 (2000).
[63] Quoted in Kevin Phillips, Bad Money: Reckless Finance, Failed Politics, and the Global Crisis of American Capitalism (NY; Penguin Books 2009) 224.

for the purposes of rapid economic development.[64] After all, Western nations also practiced merchantilist strategies in their early stages of economic development.[65]

THE PROGRESSIVE LAW AND DEVELOPMENT PACKAGE

The third stream within law and development moves beyond just economic development to encompass other integrated reforms as well.[66] A comprehensive approach to development has been forcefully promoted by Amartya Sen:

> The claim here is not so much that, say, legal development causally influences development tout court, but rather that development as a whole cannot be considered separately from legal development. Indeed, in this view, the overarching idea of development is a functional relation that amalgamates distinct developmental concerns respective in economic, political, social, legal and other spheres. This is more than causal interdependence: it involves a constitutive connection in the concept of development as a whole.[67]

Sen's vision includes equitable development (a fair distribution of wealth), an adequate social safety net, protection from violence and insecurity, democracy and political liberties, a free media, and women's rights—all in the furtherance of enhancing people's capabilities and freedom. This puts in issue the very meaning of "development"—challenging assumptions that this can be understood or measured exclusively in economic terms.

When the momentum of neo-liberal economic reforms receded at the turn of the century, the World Bank gradually embraced a broader vision: "The rule of law is

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[64] Id. 225.
[65] Erik S. Reinert, How Rich Countries Got Rich and Why Poor Countries Stay Poor (NY: Public Affairs 2007) Chap. 3.
[66] Thomas Carothers, Rule of Law Temptations, 33 The Fletcher Forum of World Affairs 49,49 (2009)
[67] Amartya Sen. What is the Role of Legal and Judicial Reform in The Development Process, World Bank Legal Conference, Wash. D.C., June 5, 2000. 8.

essential to equitable economic development and sustainable poverty reduction…Vulnerable individuals, including women and children, are unprotected from violence and other forms of abuse that exacerbate inequalities."[68] Law and development initiatives began to address a broader package that included "economic development, poverty reduction, democracy, human rights, due process, equity, etc."[69]

In contrast to the conservative cast of the law and capitalism stream discussed above, the broader law and development stream is decidedly left-progressive. The former's private law emphasis on property rights and commercial law gives way, in the latter, to greater attention to public law—to constitutional protections and political and civil rights. A conspicuous tension lurks just beneath the surface of these respective emphases. Proponents of the broader view are skeptical of the unchecked spread of global capitalism, they raise concerns about its adverse human and environmental consequences, and they doubt its fairness in the selection of winners and losers and the distributions of benefits.

Confusion arises because both conservatives and progressives pitch their programs under the umbrella of "rule of law" development. In the development context the rule of law has been variously indentified with property rights, contract enforcement, low crime rates, minimal corruption, well-functioning judiciaries, independent judiciaries, legal formalism, legal limits on government officials, democracy, civil rights, and welfare rights.[70] This capacious use of the phrase threatens to empty it of meaning.

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[68] World Bank Annual Report, 2002, p. 77, quoted in Alvaro Santos, The World Bank Uses of the 'Rule of Law' Promise in Economic Development, " in The New Law and Economic Development, supra 276.
[69] Dakollias, Methods for Monitoring and Evaluating the Rule of Law, supra 1.
[70] Many commentators have commented on the variety of inconsistent ways the "rule of law" is used in the development context. See Haggard, MacIntyre, and Tiede, Rule of Law and Economic Development, supra; Rachel Kleinfeld, Competing Definitions of the Rule of Law, in Promoting the Rule of Law Abroad, supra.

A study that compared commonly listed rule of law variables found a "relatively low level of correlation both within and across categories,"[71] and in some instances they were negatively correlated. These findings suggest that different, perhaps inconsistent, factors are being measured in various studies that purport to rate "rule of law" achievement levels.

There is an element of faith and an element of opportunism in the progressive law and development package. The faith element is the belief or hope that the liberal democratic package hangs together. A mutually reinforcing circle exists, according to this faith, in which the rule of law begets democracy begets social welfare capitalism begets liberal rights. The causal arrows presumably go in all directions, each assisting the other, with the rule of law bearing substantial weight and responsibility for the whole.[72] This faith helps explain the eagerness of the U.S. to promote rule of law reform in China, in the optimistic hope that legal reform would naturally "seep into other areas,"[73] eventually including greater democracy and human rights.

The opportunistic element arises when those who do not share this faith nonetheless strategically reason that their own preferred part of the package can be advanced by hitching a ride on the rule of law bandwagon. In this vein, David Trubek, a long-time law and development scholar who is openly skeptical of the rule of law, nonetheless urges that "progressive intellectuals should engage constructively with the ROL enterprise" because it provides a vehicle to fight for progressive goals.[74]

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[71] Haggard, MacIntyre, & Tiede, The Rule of Law and Economic Development, supra 222.
[72] A realistic articulation of the supportive interconnections can be found in O'Donnell, Why the Rule of Law Matters, supra.
[73] Matthew Stephenson, A Trojan Horse in China, in Promoting the Rule of Law Abroad, supra 200.
[74] David M. Trubek, The 'Rule of Law' in Development Assistance: Past, Present, and Future, in The New Law and Economic Development, supra 93-94.

The promise that developing the rule of law will bring these other goods has not been borne out by events, at least not thus far. As Carothers points out, China and Russia have loudly embraced the rule of law while tightly controlling democracy and rights; and they are not alone.[75] "In all these countries," he observed, "strong-hand rulers have found that the rule of law works well as an alternative objective to democratization, not one that complements it but rather one that will help preserve authoritarian or semi-authoritarian rule."[76] The rule *of* law—law setting limits on government—can be easily transposed into rule *by* law—law as an instrument of government rule.[77] A number of Latin American countries combine democratic elections, powerful executives, weak courts, and harsh legal systems.[78] A Latin American scholar made "the regretful observation that at times the rule of law (or at any rate the rhetoric of the rule of law) has been employed in the service of authoritarian regimes."[79]

The abiding faith in courts as the final bulwark of liberty, democracy, and rights has also suffered repeated disappointments. In an effort to promote the enactment of a new criminal code in Russia that provided due process and fair trial protections for defendants, the U.S. government hosted training seminars and conferences for numerous judges and lawyers (in the "thousands"), and paid for Russian judges to come to the U.S. for seminars and dinners, hoping they would be advocates for the reform. When the Code came up for action, however, most judges and lawyers "were part of the chorus that opposed the reform."[80] A USAID sponsored program in El Salvador to improve judicial

[75] Carothers, Rule of Law Temptations, supra 51,54.
[76] Id. 54
[77] See Stephenson, A Trojan Horse in China, supra ; see generally Tamanaha, One the Rule of Law, supra 91-94.
[78] See Dodson, Assessing Legal Reform in Latin America.
[79] O'Donnell, Why the Rule of Law Matters, supra 45.
[80] Spence, The Complexity of Success in Russia, in Promoting the Rule of Law Abroad, supra 227.

administration and reform the criminal justice system "came to grief" owing to "powerful resistance to reform" from judges.[81] Reforms in Brazil were implemented to grant judges substantial institutional independence, including protections against removal, guaranteed salaries, control over staffing, discipline, and their budget. What observers found was that the "sweeping increases in the autonomy of the judiciary led to rampant nepotism and other opportunities for corruption."[82] The judiciary came to be seen as a "privileged enclave" widely scorned by the public.[83]

The results of reform efforts depend upon how they interact with the surrounding complex of factors—the connectedness of law principle—and this can go in any direction. It depends upon surrounding cultural views; it depends upon the incentives at play (who stands to gain or lose money, status, or power); and it depends upon many other factors. There is no doubt that the rule of law, democracy, civil rights, and social welfare capitalism can exist in a mutually supporting fashion, as they do in liberal democracies. Nothing inherent to the rule of law, however, leads to the replication of this arrangement in the countries that are the targets of law and development projects, which have vastly different social-cultural-economic-political-legal dynamics. Human rights and democracy, when they are taken seriously, lean on the rule of law for support; but the rule of law in itself does not automatically or necessarily produce human rights and democracy.[84]

People involved in the law and development enterprise already know this. Few people familiar with actual conditions in target countries can sanguinely believe that the

[81] Dodson, Assessing Judicial Reform in Latin America, supra 207, 204.
[82] Id. 215.
[83] Id.
[84] See Tamanaha, On the Rule of Law, Chaps. 3 & 8.

rule of law itself has the power to remake societies around world to resemble the desired the progressive vision. It is perhaps obvious, though still worth saying, that much law and development activity and talk—in both conservative and progressive variants—is advocacy. This is where the elements of faith and opportunism come together.

THE LAW AND DEVELOPMENT ENTERPRISE

The preceding analysis has examined failures on the receiving end of law and development activities. Because law and development is best apprehended not as a "field" but as a collection of activities funded and promoted by advanced capitalist countries, as argued earlier, it is also essential take a close look at the delivery end.

Legal development activities ramped up in the early 1990's when the World Bank embraced rule of law building. Before this could happen, however, a big obstacle had to be overcome. A specific limitation on expenditures is written into the World Bank's Articles of Agreement (the charter that created and controls the Bank): "Loans made or guaranteed by the Bank shall, except in special circumstances, be for the purpose of specific projects of reconstruction or development."[85] Another clause prohibits the Bank from engaging in political activities: "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions[.]"[86] These provisions were in keeping with the purpose for which the World Bank—officially the International Bank for Reconstruction

[85] IRBD Articles of Agreement, Article III, Section 4(vii). The official name for the World Bank is the International Bank for Reconstruction and Development.
[86] IRBD Articles of Agreement, Article IV, Section 10.

and Development—was created in the mid-1940s, amidst the wreckage brought by World War II, to help finance economic recovery.[87]

In the early 1990's, World Bank General Counsel Dr. Ibrahim F.I. Shihata issued a series of legal opinions that effectively re-wrote the stated limits in the Articles restricting funding to economic development projects to more broadly allow funding for rule of law projects.[88] He subtly accomplished this in the following passage: "Under normal circumstances, Bank loans and guarantees are to finance specific projects in the broad sense of this term, which, in my view, includes all well-defined productive purposes whether these are served directly (such as in industry and agriculture) or indirectly (such as in infrastructure, *institution building*, social services, etc.)."[89] This inclusion of support for "institution building" opened the door for legal development.

World Bank money thereafter began to flow into rule of law projects. Without Shihata's handiwork these projects would not have been possible in the absence of an amendment of the Articles of Agreement by signatory countries, which would not have been easy to achieve, as the Bank and its activities have long been controversial.

There is a discomfiting incongruity in the fact that projects to build the rule of law are now funded on a grand scale, amounting to billions of dollars, thanks to a de facto amendment of the Bank's "constitution" engineered by its top lawyer[90] (although others in the organization undoubtedly concurred about the value of legal reform projects). Shihata's supporters applaud his "suppleness of interpretation" as necessary to keep the

[87] See Friedan, Global Capitalism, supra 58-60, 69.
[88] This account is taken from an admiring account, Robert C. Effros, The World Bank in a Changing World: The Role of Legal Construction, 35 Int'l Lawyer 1341 (2001).
[89] Id. 1345.
[90] See John K.M. Ohnesorge, On Rule of Law Rhetoric, Economic Development, and Northeast Asia, 25 Wisc. Int'l. L. J. 301,306 (2007)

Bank's activities in sync with changing times.[91] Perhaps so, but it is dubious as a matter of sound legal interpretation. Notwithstanding this inauspicious start, his initiative has proven a resounding success in securing financial support for legal development activities.

Once the door was opened for rule of law reform, initially with a narrow concentration on property rights, commercial law, and judicial reform, it was gradually pushed wider to include aspects of the progressive development package. As the scope of rule of law projects expands, and with funding for economic projects increasingly conditioned on acceptance of rule of law requirements, these actions push up against the Bank's prohibition against interfering in the political affairs of recipient nations.

This event has been recounted at length not to cast aspersions on Shihata's motives, but to concretely illustrate that rule of law promotion is result of the efforts of individuals—well meaning and dedicated—who aggressively moved it to the center of the development agenda. Lawyers propose, organize and carry out the projects—independent law and development consultants, creators or employees of NGO's, staff lawyers in development organizations, and law professors. From the standpoint of lawyers, rule of law projects are undoubtedly worthwhile. Thanks to the unparalleled prestige the rule of law enjoys in contemporary global political discourse, funding sources are enamored with rule of law projects, providing financial support for these activities. It adds to the attraction that law and development work offers travel to exotic lands while engaging in good deeds, helping others in need. On the surface it appears to be flourishing.

[91] Effros, The World Bank in a Changing World, supra 1348.

But participants in this enterprise have exposed its internal flaws. Because the projects are run and carried out by lawyers, they naturally center on what lawyers are familiar with—judges, lawyers, police, and legal codes. As a critic of land reform in Africa emphasized, it is essential to take account of the agency of lawyers—"the entrepreneurial activities of legal professionals"[92]—in the shape and orientation of law and development activities. "Unlike the development professionals who dominate many other areas of development, many Western rule-of-law aid practitioners have little or no prior experience in developing and transitional societies."[93] It would not immediately occur to lawyers that law itself might be a part of the problem or that a more effective solution might lie elsewhere; nor would lawyers easily know where to look to find alternatives to law. Often the people sent are inexperienced in or uninformed about how law operates in radically different situations. "Senior judges, ambitious young lawyers, or retired police officers are often placed in positions of designing or managing projects, providing advice to local counterparts, or delivering training."[94]

Another common flaw is that the people who carry out these projects frequently know little about the circumstances on the ground. It can take six months to a year living in a society for an outsider to acquire a feel for the social-political-cultural dynamics, building trust and relationships that will help in the implementation process.[95] One rule

[92] Ambreena Manji, The Politics of Land Reform in Africa: From Communal Tenure to Free Markets (London: Zed Books 2006) 82.
[93] Golub, A House Without a Foundation, supra 217; Piron, Time to Learn, Time to Act in Africa, supra 295.
[94] Piron, Time to Learn, Time to Act in Africa, supra 294.
[95] My two-year sojourn in Yap bears this out. See Brian Z. Tamanaha, Understanding Law in Micronesia: An Interpretive Approach to Transplanted Law (Leiden: Brill Pub. Co. 1993). A cautionary tale may illustrate the point. During my tenure there, two external education consultants came to Yap for a two week visit, interviewed a number of officials (including me, in my capacity as legal advisor of the Education Department), and subsequently wrote a report outlining proposed reforms of the education system. The report was based upon an inaccurate understanding of the actual dynamics of the situation,

of law project coordinator revealed, however, that "In ten years of recruiting and fielding consultants…I have generally had to fight for permission to provide those consultants with more than two days of preparation time[.]"[96] "It is not surprising then that many of these consultants show up insufficiently prepared for the specific setting, though well versed in their subject matter specialty."[97] Staff rotations within donor agencies and among practitioners in the field routinely move out people who have learned the lay of the land and developed social relations, replacing them with people who must start all over gaining familiarity and contacts.[98]

Projects run in this fashion have a severely reduced chance of success from the start. One veteran practitioner put the fundamental flaw in terms captured by the connectedness of law principle: "Particularly during project development, when the very nature of the project is decided, many agencies rely on visiting consultants rather than in-country staff. This can lead to a superficial analysis of what ails a legal system and what legal issues confront the disadvantaged. To put the point mildly, a society seen from a hotel is far different from one experienced every day."[99]

Additional problems are created by the ways projects are funded, designed and assigned.[100] Donor institutions, development agencies, or NGOs have run co-existing

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and to my knowledge it came to nothing (although the consultants earned a handsome sum for their efforts).

[96] Wade Channell, Lessons Not Learned About Legal Reform, in Promoting the Rule of Law Abroad, supra 150.

[97] Id.

[98] Piron, Time to Learn, Time to Act in Africa, supra 295.

[99] Golub, A House Without a Foundation, supra 130.

[100] For an extensive account of U.S. efforts, see Jacques de Lisle, Lex Americana? United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond, 20 U. Pa. J. Int'l. Econ. L. 179 (1999).

programs in the same countries without coordination or sharing knowledge.[101] Money comes in chunks that must be spent (or revert back), preferably with something concrete to show for it (hence the allure of high profile conferences), while a continuous funding stream for projects that last years is harder to obtain.[102] Many projects supported by the United States (through USAID) are administered by private, profit seeking organizations. The process of bidding for projects, with large sums at stake, discourages innovation (untried or risky plans are less likely to be selected), and promotes secrecy within the competitive consulting community.[103] Requests by development agencies for additional grants from governments or funding sources are bolstered by citing past successes. One critic charged that "the tendency to claim enormous impact for legal and judicial reform projects is widespread," although the real benefits are hard to assess.[104] Concrete technical assistance projects—for instance, holding training seminars for lawyers or judges, computerizing court systems—are easier to check off as successfully completed at the end of the project period, even when the actual improvements in the delivery of justice achieved are minimal. When evaluating these activities, it is necessary to keep in mind that "Legal reform is a business."[105]

As indicated at the outset, few people involved appear to think these projects work in any deep sense, at least not visibly. Small improvements in institutional functioning can be achieved but the overall legal system faces down these efforts like an immovable object. Many economic development projects, it should be remembered,

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[101] Channell, Lessons Not Learned About Legal Reform, supra 151-56; Piron, Time to Learn, Time to Act in Africa, supra 296.
[102] Piron, Time to Learn, Time to Act in Africa, supra 295. Golum, A House Without a Foundation, supra 129.
[103] Channell, Lessons Not Learned About Legal Reform, supra 151-156.
[104] Troope, Legal and Judicial Reform Through Development Assistance, supra 409.
[105] Channell, Lessons Not Learned About Legal Reform, supra 153.

similarly failed to deliver results.[106] Indeed, the repeated failures of efforts at promoting economic development helped prompt the shift in attention to legal development instead, on the theory that economic development was being inhibited by the absence of a facilitative legal infrastructure.

So why do rule of law projects, with their negligible results, continue to receive generous financial support? The "rule of law" is intangible and cannot be pointed at like a broken down factory. Factories have architectural plans, are built in a determinate period, and they succeed as an enterprise or are shuttered. By contrast, the rule of law has no blueprint, no standard structure, and is not something that can be constructed on demand. There is no timetable for building the rule of law, beyond vague references to decades or generations. Judgments about the value and effectiveness of rule of law projects thus can be postponed indefinitely.

THE RISKS OF TRANSPLANTING THE BATTLE OF IDEAS

As just indicated, legal reform projects are dominated by the lawyer's perspective. The "law and development" label, reinforced by the current popularity of the rule of law banner, reinforce the lawyer-orientation. This creates blinders in situations where the best alternative might lie outside of legal institutions.

Another form of blindness arises at the level of theoretical ideas. The two rival strains of law and development discourse—law and capitalism, the progressive package—directly reflect competing conservative and liberal (respectively) ideas from Western capitalist societies. These "palace wars in the North," as one commentator put

[106] See Friedan, Global Capitalism, supra 435-456.

it, are being exported to and played out in the South.[107] Familiar Northern adversaries fight over the same set of ideas from home while shifting the battleground to law and development terrain.

These sincerely motivated protagonists commit a serious error when they fail to attend to the untoward consequences that might result from fundamental underlying differences between the exporting and the receiving societies. A prominent example of such blindness from each side will be offered to make this point.

High on the agenda of conservative law and capitalism advocates is that developing countries must title property and allow it to be freely alienable; this will enable people to borrow from banks to engage in entrepreneurial activities, using the land as collateral.[108] People will improve property, increasing its value and leading to more economically productive uses. That's how capital is freed up in the West. Things are different elsewhere, however. Property in many societies is conceived of and controlled in a variety of ways that do not match freehold ownership by individuals. In such societies, family and clan members have differentiated capacities to use land, cross it, graze their animals on it, collect its fruits, till it, and others must be consulted about what happens to the land. The process of titling property will inevitably extinguish much of this (banks do not favor encumbered collateral).

But the adverse consequences are potentially worse than that. In many societies community life is planted to and revolves around the land in ways that rootless Western societies have long forgotten. Allowing the land to be taken and disposed of by banks

[107] Garth, Building Strong and Independent Judiciaries Through the New Law and Development, supra 393-96.
[108] See Kenneth Dam, The Law-Growth Nexus: The Rule of Law and Economic Development (Wash. D.C., Brookings Inst. Press 2006).

will fundamentally disrupt social relations. In the West if you default on the loan you lose your house; in these societies the entire social life of the community is disrupted.[109] Moreover, the position of women stands to be adversely affected because claims of land ownership in many cultures (hence legal title) favor men.[110] Furthermore, the distribution and uses of land will also inevitably change, accumulating in the hands of wealthy buyers while others lose possession, bringing further dislocations. Untoward consequences will also follow from titling property in the massive shanty towns, ghettos, or favelas that now crowd major urban centers around the world. Squatters who secure title will lose their property when they default on their loans, thus ending up homeless or moving in with already crowded relatives; savvy buyers will collect property at foreclosure sales, increasing their land holdings. One must not forget that implicit within the notion of titling—in additional to the advantages it brings—is that land will be lost and redistributed.

These potential consequences must be weighed against the economic benefits that purportedly will accrue from spreading private ownership of property. An articulate advocate, Kenneth Dam, acknowledges that communal property societies will undergo significant changes from titling, but he breezily reports that this same transformation also occurred early in the history of the West and things worked out for the better there.[111] People in developing countries might not find this reassuring. Local inhabitants should at least be fully apprised of, and consulted on, the adverse social consequences of the

[109] See Fitzpatrick, Disputes and Pluralism in Modern Indonesian Law, supra 189.
[110] For an account of the detriments to women from titling, see Manji, The Politics of land Reform in Africa, supra.
[111] Dam, Law-Growth Nexus, supra 150-57.

campaign to title property. People must think about what kind of development they want, at what cost to their lives and community.

The radical left, on its part, commits a parallel mistake when carrying-over its theoretical assumptions. In the 1970s and 1980s, Critical legal theorists from elite law schools in the United States engaged in a thoroughgoing critique of "legal liberalism." Their basic argument was that the rule of law operates in the guise of neutrality which conceals that the law maintains an unjust social order in the service of the elite.[112] Critical legal theorists were especially scathing about legal formalism, which they attacked as a false claim of objective rule application, when the truth is that legal rules allow judges substantial room to maneuver. Formalistic judges, they asserted, are either deluded or deceptive. Judges are deluded if they reason mechanistically because they in fact have substantial freedom; they are deceptive when they hide behind formalist rule-bound reasoning to come to preferred ends. Critical legal theorist David Trubek, a prominent voice in law and development for decades, and others, have carried this skepticism about and antagonism toward legal formalism into the law and development context.[113]

Again, this overlooks a crucial difference. While it is healthy to expose the exaggerations of legal formalism in Western legal systems where the law functions reasonably well, it is an entirely different matter to export skepticism about legal formalism to societies in which law barely functions. Overly skeptical views of legal formalism can prevent a legal system from even getting off the ground. A legal system

[112] See Brian Z. Tamanaha, Law as a Means to an End: Threat to the Rule of Law (New York: Cambridge University Press 2006) Chapters 6 & 7.
[113] For a recent example of this skepticism, see Trubek, The 'Rule of Law' in Development Assistance: Present, and Future, supra.

cannot work if the very notion of being rule bound—formalism—is widely perceived to be a fraud. In the absence of any legal restraints, power has its way, and the powerless mass of people in developing countries will have little protection.

In both forgoing examples, from the right and the left respectively, theoretical ideas that grew up within Western contexts have very different implications when brought over and played out in development contexts. That is what the connectedness of law principle advises, and anyone who fails to heed it will inevitably provoke unanticipated and often undesired consequences.

Law and development theorists and practitioners should be duly chastened by the last five decades of this activity. After a steady history of uncertain results, humility is in order. What humility counsels is that the guiding attitude in law and development must be, not only to do good deeds by way of law, but perhaps more important, to do no harm by way of law.

MOVING FORWARD

"Legal development"—building and maintaining efficient state legal institutions—happens everywhere on a continuous basis in all societies. Legal development, however, tends to be more complex and challenging in developing contexts for three reasons in particular. Many of these societies must grapple with the conflicts and tensions created by the presence of a proliferation of competing and overlapping cultural, ethnic, religious, and legal orders.[114] In many of these societies, furthermore, significant portions of the law have been transplanted from elsewhere, especially in

[114] See generally Brian Z. Tamanaha, Understanding Legal Pluralism: Past to Present, Local to Global," Julius Stone Address, 30 *Sydney Law Review* 375 (2008).

connection with commercial law, and thus are unfamiliar to or distant from the social life and understandings of the populace.[115] Their legal systems, finally, are often weakly institutionalized and have limited power; they lack firmly established legal institutions and areas outside the cities often have little effective legal presence.

Despite the largely negative tenor of this essay, which is the product of the focus herein on the failures of law and development efforts, it must be emphasized that the message of this essay is *not* to turn away from legal development. That would be wrongheaded and self-destructive. Every society in the world today requires an effective legal system that can, at a minimum, manage and support the activities of modern government and modern economic systems. Moreover, the great benefit of the rule of law is in erecting legal restraints on the government, and only an effective state legal system can deliver this type of restraint.[116] Law must develop and every effort should be made to help legal institutions develop in positive ways, with the awareness that this is a never-ending project. The sustained efforts of many local people are required to build and maintain a well functioning legal system.

What matters above all else in development contexts is to be clear about the primary goal or goals at hand.

Let us assume, for instance, that the goal is to increase overall societal wealth by producing goods for export in global markets. Consulting historical, theoretical, and statistical knowledge about law and capitalism can lead astray. Even if it is true that property rights are historically associated with the growth of capitalism and that studies show a positive correlation between property rights and economic development, it does

[115] See Tamanaha, A General Jurisprudence of Law and Society, supra Chap. 5.
[116] See Tamanaha, One the Rule of Law, supra, Chap. 11.

not necessarily follow that the best short term strategy to advance the goal of economic development in a given country is to build the legal system. If the state legal system is caught in a constellation of forces—a structural trap or institutionalized corruption—that relentlessly defangs legal reform efforts, then the best strategy might well be to circumvent the state legal system and find or create some other institutional arrangements that facilitate economic activities. This option is sometimes criticized as giving up on the legal system, insuring its underdevelopment, but looking at alternatives does not mean neglecting state law. It might even turn out that as the economic performance of a given country increases, the legal system will also gradually improve—perhaps because a larger pool of educated people develops, the middle class expands and demands better essential legal services, adequate funding becomes available to support legal institutions, or economic incentives reward (and hence encourage) a more reliable and efficient legal system. None of this is guaranteed of course, for what happens is always a product of the mix of surrounding factors, but this reverse (or concurrent) causation is as plausible as current claims that improving the law will improve economic performance.

A nagging discrepancy, alluded to earlier, haunts the current emphasis on the rule of law for economic development. Developing countries want and need economic development *now*. That is what the rule of law is supposed to help provide. There is general agreement, however, that establishing the rule of law is a long term project which no one is quite sure how to accomplish. Yet recent experience confirms that explosive economic progress can occur without the rule of law. For example, analyses suggest that the rising BRIC economies (Brazil, Russia, India, and China), which have been cited for

various failures in legal development efforts, are nonetheless poised to collectively match if not surpass the advanced Western economies by mid-century.[117]

While there are numerous examples of economic progress being enhanced through deliberate policies, it is hard to identify any clear instances of the rule of law coming to prevail in a society through the implementation of *deliberate* policies. The rule of law ultimately rests upon widely shared cultural attitudes that support the law, which are hard to inculcate when missing (and harder still when the law or judges are distrusted). In light of this, it is dubious to embark on building the rule of law as an *indirect means* to facilitate economic development, when there might well be more expedient ways to advance the latter goals directly. Again, this emphatically does not mean that legal development should be discontinued. But it does insist that legal development and economic development, while interacting in various integral ways, are separate projects, each of which stands on its own merits.

Let us assume, secondly, that the goals (apart from producing steady economic growth) are to build a democratic policy, protect civil rights, create safe working conditions, have a fair and equitable distribution of wealth, engage in environmentally sensitive development, and empower women. There is little reason to think that any of these goals will necessarily be advanced by judicial reform projects or strengthening the rule of law. Law within a given society may cut against any or all of these goals; nor should one assume that judges will be sympathetic to their advancement. For this progressive package to become a reality, in many countries far-reaching social, political, and cultural transformations must occur. Law may play a role in promoting these

[117] Andrew E. Kramer, Four Nations seek More Diversity in Global Economic Order, New York Times, June 17, 2009, A10.

changes, but the combination of social, cultural, economic, and political forces will be determinative. Above all else, what matters most in the achievement of these goals is advocacy. They can better be advanced if activists work directly on behalf of each objective rather than pinning their hopes on the magical power of the rule of law (opportunists who cloak their agenda under the rule of law mantle already act on this recognition).

Let us assume, finally, that the goal is to provide the populace with effective dispute resolution fora. That is often thought to be *the* essential role of state courts. It bears keeping in mind, however, that even in the West private arbitration handles a substantial proportion of disputes. In many developing contexts courts and law are deeply problematic for all the reasons described earlier. It might make sense, therefore, to invest resources directly in existing alternatives or to create new community tribunals where none exist. More than 80% of people in developing countries already take their disputes to non-state tribunals, so supporting such alternatives will merely be catching up to reality. In response to these actions, state legal institutions faced with a potential rival for resources and prestige might even be prompted to improve their functioning; or these systems might over time merge or interact in a complementary fashion.

The penchant of many, especially lawyers, to assume that state law and state courts are the solution to the problems faced by these countries is the product of ideological beliefs about the state having a monopoly over law. In situations where the state legal system fails to deliver basic services, when attempts to reform the system persistently fail, the solution must be found elsewhere. Just as functional alternatives to law may satisfy the needs of economic development, functional alternatives to law may

serve social needs like resolving disputes, maintaining order, and coordinating behavior. Customs and customary law, religious norms and bodies, and community or informal norms and tribunals do a great deal of this work in many settings around the world. The pride of place that law jealously claims should not be a bar to finding pragmatic solutions to social problems, even if that means stepping around existing legal institutions.

The latest wave of law and development work has already turned to explore social alternatives to law.[118] This too is not a panacea, it must be said. Some of these alternatives will be corrupt or oppressive, or will be controlled by local power holders, or will impose draconian punishments, or will enforce cultural or religious inequalities (caste systems, denigration of women). These alternative systems will be especially problematic when customary and religious norms, or people acting in their names, are responsible for inflicting harm or maltreatment, or when village or religious institutions manifest abuses of power.[119] With these large caveats, non-state alternatives that function in ways that meet the needs and values of the community can provide an essential service to people who are now failed by state legal systems.

These final comments draw out once again why "law and development" is misleading: the very label suggests that law or the "rule of law" has a special ability to deliver desired development goals. That faith is bound to disappoint. Law cannot deliver in and of itself because it swims in the social sea with everything else.

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[118] See World Bank Social Development Unit, Forging the Middle Ground: Engaging Non-State Justice in Indonesia, supra; Fitzpatrick, Disputes and Pluralism in Modern Indonesian Land Law, supra; Dolores A. Donovan, & Getachew Assefa, Homicide in Ethiopia: Human Rights, Federalism, and Legal Pluralism, 51 Am. J. Comp.L. 505 2003); Kerry Rittich, The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social," in Trubek and Stantos, The New Law and Economic Development, supra.

[119] See Donovan & Assefa, Homocide in Ethiopia, supra.