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THE POLITICS OF LEGAL REFORM*

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The interrelations of law, development (doing well) and democratization (doing good) in the many “transition” countries found in the Third World and Eastern Europe, are fascinating in their complexity.¹

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1. Paul Kennedy, *The Real Culture Wars*, N.Y. TIMES, JAN. 27, 2002, at 9 (book review of BERNARD LEWIS, *WHAT WENT WRONG: WESTERN IMPACT AND MIDDLE EASTERN RESPONSE* (2001)) (countries “are marching, however briskly or reluctantly, in lock step with an America of laissez-faire economics, cultural pluralism and political democracy.”). See Ken Ringle, *Bank Shot*, WASH. POST, Mar. 30, 2002, at C1 (analyzing WILLIAM EASTERLY, *THE ELUSIVE QUEST FOR GROWTH* (2002)). “It is governmental factors—a climate of public safety, a working financial system, courts to enforce business contracts, security against economic predation, governmental or private . . . that we’ve belatedly learned are the most important factors in permitting economic conditions to improve.” *Id.*

Democracy is an elusive concept, one both of process and outcomes, practiced in culture-specific ways and dependent upon historical experiences, the distribution of wealth, ethnic composition, and size of territory and population. Jeffrey Atik, *Democratizing the WTO*, 33 GEO. WASH. INT’L L. REV. 451 (2001). The “genius” of democracy (like capitalism) is “that it continually reinvents itself.” David Rothkopf, *After This*, WASH. POST, Jan. 20, 2002, at B1. The secrets of American power are the ability of liberal democracy to withstand assault, and “principles that transcend far beyond lower transaction costs.” Thomas Donnelly, *Altered States*, WASH. POST, June 9, 2002, at T4. Democracy relies on an identifiable polity and territory, which makes it difficult to conceptualize a (“postmodern”) democratization of the institutions of globalization. Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies and Disaggregated Democracy*, 1 HARV. L. SCH. PUB. L. WORK PAP. 18, available at <http://www.ssrn.com/abstract=283976>. See also *infra* notes 34-36 and accompanying text. According to the International Monetary Fund (IMF), poverty is caused by: low levels of education, investment and savings; inadequate health care and nutrition; economic instability like high inflation and currency volatility; high budget deficits that contribute to high interest rates; wars, coups, political instability, and corruption; lack of a strong, impartial judiciary and rule of law; inefficient, uncompetitive, and corrupt financial systems; protectionist policies that discourage trade; and debts owed to foreign lenders that cannot be repaid. *What Causes Poverty?*, WASH. TIMES, Apr. 13, 2002, at B11. The Mobilization for Global Justice a critic of the IMF and the World Bank (WB), lists very different causes of poverty: (1) poor countries need assistance from rich countries through

The Law and Development Movement of the 1960s and early 1970s was widely discredited as an ethnocentrically American approach that yielded “little law and less development.”² But the “Springtime of Peoples” and “Second Independence from Colonialism” that began in 1979 offered fresh hope.³ Indeed, the intuitive connections between drives toward a vaguely-

the IMF and WB; (2) the latter impose austerity measures as a condition of receiving assistance; (3) poor countries must promote sweatshops to produce the exports needed to repay their debts; (4) this exploitation enriches large international corporations and elites in the poor country; (5) financial crises lead to further impoverishment, when the IMF forces poor countries to cut their spending on basic services so as to repay debts; (6) the IMF and WB force poor countries to deregulate and sell off state enterprises, “devastating” the public welfare; and (7) multinational corporations (MNCs) buy state enterprises and gain control over the country. *Id.*

Democratization and development in transition countries are interesting because they are contestable and hotly contested concepts. Thus, they offer a different reality for the theories of law and the social sciences. For example, the “universalization of Western liberalism, democracy, and human rights . . . is a long way from happening.” Phillip Trimble, *Globalization, International Institutions, and the Erosion of National Sovereignty and Democracy*, 95 MICH. L. REV. 1944, 1954 (1997) (reviewing THOMAS FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)). “Reform can be a catalyst of revolution rather than a substitute for it . . . {G}reat revolutions have followed periods of reform, not periods of stagnation and repression.” Robert Kaplan, *Looking the World in the Eye*, ATLANTIC MONTHLY, Dec. 2001, at 68, 78 (quoting Samuel Huntington). Democracy can become caught in “a destructive dialectic between ethnic nationalism and global commercialization.” Trimble, *supra*, at 1947 (citing Benjamin Barber). In some Middle Eastern countries, separation of religion from the State, women’s rights, free speech, etc. create “a downward spiral of hate and strife, rage and self-pity, poverty and oppression . . .” Kennedy, *supra*, at 9 (quoting Bernard Lewis). See Joel Paul, *Cultural Resistance to Global Governance*, 22 MICH. J. INT. L. 1, 7 (2000) (describing a backlash against Western democracy, market liberalization, and “the anxiety produced by globalization”); Anthony Quainton, . . . *And Nicaragua, a Case in Point*, WASH. POST, Mar. 25, 2002, at A19 (stating that after a decade of Sandanista rule and a decade of free-market democracy, Nicaragua remains deeply divided ideologically, corrupt, impoverished, and dependent on primary exports—in no small measure because U.S. aid has been meager); *No Other Way*, THE ECONOMIST, Mar. 17, 2001, at 85 (reviewing and quoting from PETER REDDAWAY & DIMITRI GLINSKI, *THE TRAGEDY OF RUSSIA’S REFORMS* (2001)) (describing “state bolshevism,” which destroyed the industrial base built at great sacrifice, and risked the “irreversible criminalization and privatisation of the Russian state.”).

2. Tony Allott, 1975 comment to the author concerning Ethiopia. See generally John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline, & the Revival of Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); Francis Snyder, *Law & Development in the Light of Dependency Theory*, 14 LAW & SOC. REV. 723 (1980); David Trubeck & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law & Development*, 1974 WISC. L. REV. 1062 (1974). The latter represents a significant reversal from the (presumably not self-estranged). Trubeck, *Toward a Social Theory of Law: An Essay on the Study of Law & Development*, 82 YALE L.J. 1 (1972). A second reversal and a limited approval of the “new” law and development movement, based on the emergence of globalization and the human rights “movement”, is Trubeck, *Law & Development Then and Now* (presented to the Am. Soc. of Int. Law, Washington D.C., Apr. 9, 1996). See also Carol Rose, *The “New” Law & Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 L. & SOC. REV. 93, 125-28 (1998); *id.* at 94 (criticizing “old” law and development for being “ethnocentric, naïve, and imperialistic”); *id.* at 135 (quoting Sarat & Silbey stating that we must be aware of the “fundamental contradiction and corrupting power of liberal legalism” that inheres in the “new” law and development).

3. Paul Brietzke, *Law, Democratization & Markets*, in LAW & ECONOMICS: NEW & CRITICAL PERSPECTIVES 31 (Robin Malloy & Chris Brown eds., 1995). This may be what Rose & Trebilcock

defined democracy and development have been usefully fleshed out by Amartya Sen.⁴ Unfortunately, many of these drives and the analyses of them have stalled, especially outside Latin America. So far, many “transitions” so far have been from the certainty of an underdeveloped kleptocracy to an uncertain future.⁵

Where do we go from here? This Article goes back to the future, by beginning where opportunities for the advance or (more frequently) the retreat of law reforms begin: with the political processes that are usually ignored by analysts. The *thesis* of law reforms in transition countries, which is called the “good governance thesis” or even the “rule of law”, is a

mean by the “new” law and development. See Rose, *supra* note 2. See Kevin Davis & Michael Trebilcock, *Legal Reform & Development*, 22(1) THIRD WORLD Q. 21 (2001) (stating that through the 1980s and 1990s, development policy consisted of “macroeconomic stabilization, privatization & ‘getting the prices right,’” but the focus has shifted to institutions and “Second-Generation Reforms” that now include legal reforms).

4. AMARTYA SEN, *FREEDOM AS DEVELOPMENT* xi, xii (2002). The freedom attained through a democratic and participatory governance is *constitutive* of development. *Id.* “[D]evelopment is thoroughly dependent on the free agency of people,” especially as this is promoted by interrelated and instrumental freedoms: economic opportunities, political freedoms, social facilities (the state, markets, legal system, parties, the media, public groups and discussions, etc.), transparency guarantees and social safety nets. *Id.* at xii-xiii, 4. Development theory should thus shift its attention from income poverty to capability deprivation. *Id.* at 20. See also *infra* note 48 and accompanying text. It is hard to reject the empirical correlation between economic growth and political freedom in favor of, e.g., Singapore’s Lee Kwan Yew’s toughness and discipline: democracy imposes more effective developmental incentives on government. SEN, *supra*, at 35, 149, 152.

5. Jonathan Power, *The Dangers of Not Going Forward After September 11*, JAKARTA POST, July 26, 2002, at 7. “Of the 81 countries that embraced full democracy in the last twenty years only 47 have gone on to become fully functioning democracies.” *Id.* While only six have returned to authoritarian rule, many others “got stalled somewhere between democracy and authoritarianism.” *Id.*

Power’s statistics admittedly lend a false precision to the process. Analysts use democracy “very loosely.” ROBERT PUTNAM, *THE BELIEFS OF POLITICIANS* 166 (1973). In transition countries, it may amount to little more than half-formed wishes. Several analysts attribute its influence to the drive towards equality in transition countries—in the French tradition. *Id.* at 164; WILLIAM WALSH, *LEADERS AND ELITES* 1 (1979). The Anglo-American tradition “of freedom for minorities, together with a constitutional system both to protect and to regulate that freedom” plays a much smaller role. PUTNAM, *supra*, at 164 (quoting George Sabine). Commentators note an incapacity in the promotion of equality and social welfare, and an inability to overcome weak civil societies and undemocratic cultures, in transition countries. John Clark, *The Constraints on Democracy in Sub-Saharan Africa*, in *AFRICA’S SECOND WAVE OF FREEDOM* 43, 49, 55 (Lyn Graybill & Kenneth Thompson eds., 1998). Since 1990 and especially in Africa, leaders rode out the democratization wave, at the price of minor reforms and elections to legitimize their rule. Where overtly autocratic rulers were ousted, democracy is not yet consolidated and serious problems of public order remain. *Id.* at 44 (quoting Samuel Huntington). A “premature” democratization only delays an African authoritarianism, and has failed to produce prosperity of the Asian variety. *Id.* at 45-46 (quoting Goren Hyden). Ultimately, democracy is a state of mind, the cultural attitude that it *can* work regardless of circumstances and a public ignorance of democratic requirements and realities. We thus owe it to democratic reformers to at least take their project seriously. *Id.* at 47, 53. Still, we must ask: is democratization simply a rotation of urban elites and an inability to regulate uncertainties? Pauline Baker, *Africa in a World of Change*, in *AFRICA’S SECOND WAVE OF FREEDOM*, *supra*, at 1, 20.

litany recited in the International Monetary Fund (IMF) and the World Bank (WB) with a religious fervor: transparency, public participation, accountability, and predictability.⁶ Unfortunately, attempts to implement these qualities call forth their *antithesis*: corruption, organized violence, such as torture or terrorism that the state directs or cannot control, and other abuses of interchangeable wealth and power by incumbent elites.⁷ Thesis and antithesis play out in a *dialectic* or *conflict* operating among values, incentives, actions, and organizations. Reforms, democratization, and development thus advance or mostly, because the conflict is an uneven one, retreat, dialectically⁸ and along many fronts at once.

After describing the important influences that politics (Section I) and globalization (Section II) on the prospects for law reform in transition countries, I will describe five ways to level the law reform “playing field” in Section III: (A.) a model of law reform, illustrated by examples from business law; (B.) the “constitutional” means of stabilizing politics and strengthening the state; (C.) administrative law reforms; (D.) strengthening other legal personnel; and (E.) the desirability of legal planning. My rather broad topic requires a generalized approach. The reader should test my analyses against what she knows about particular transition countries. Without an elaborate empiricism to back it up, my sense is that the analyses that follow fit many, perhaps most, transition countries.

I. INCUMBENTS VERSUS REFORMERS

If we keep in mind the dangers of using it, a theory or model is useful for organizing complex facts and interpretations and accounting for many of the relevant issues.⁹ We are fortunate to have a well-elaborated,

6. See *infra* notes 34-56 and accompanying text.

7. See *infra* notes 10-23, 22-33 and accompanying text.

8. Dialectics was Aristotle’s term for a kind of argumentation like that in Plato’s Dialogues, a system of natural sequences. Hegel (as well as Fichte and Marx) saw it as a logic of contradictions, as fruitful collisions of ideas from which a higher truth may be derived through a synthesis. CHAIM PERLMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* 138, 163 (1963); *THE FONTANA DICTIONARY OF MODERN THOUGHT* 169-70 (Allan Bullock & Oliver Stallybrass eds., 1977).

9. The dangers are best described in C. LOWELL FIELD & JOHN HIGLEY, *ELITISM* vii (1980), “People commonly interpret factual matters according to their preferences and then spend most of their time arguing that these preferred interpretations are or should be fine.” *Id.* The proliferation of models is best explained, somewhere, by the poet William Blake: “I must either create my own model or be dominated by someone else’s.” *Id.* Because “you can’t beat something with nothing,” an entrenched theory—of democratization and development, for example—will survive contrary empirical evidence.” HERBERT SIMON, *THE ECONOMICS OF ORGANIZATION* 509 (1979).

Careless conceptualization is best avoided by defining your terms carefully. WALSH, *supra* note 5, at 16. Walsh thus defines power as a special case of influence, involving the threat or use of sanctions; authority as a legitimate power; charisma as a personal following independent of the substantive

century-old, Italianate model that, when updated, effectively describes much of what transpires during actual “transition” processes: the *elitism* of Gaetano Mosca, Wilfredo Pareto, Antonio Gramsci, Robert Michels, and C. Wright Mills.¹⁰

Elites go by many names: “the *chaebol* of Korea, the former appatchiks of Russia, the kleptocrats of Indonesia, or the family-owned groups of Latin America, the elites . . . in the international financial community [who] benefitted most from the reforms of the 1990s.”¹¹ The autonomy of economic elites is guaranteed by protections of private property. The autonomy of intellectual elites is guaranteed by protections of a freedom of thought. As a result of elites’ desires, resources, skills, position, and control over many aspects of education and the media, they exercise a regular and overwhelming power over policies and people. Their power is limited by the corruption and weakness of particular elites, by competition (if any) among rival elites, and by non-elite electoral preferences and the policies and institutions which credibly embody non-elite preferences, such as the Warren Court. A rigid hierarchy breeds manifest inequalities—especially in an access to power. Public participation (part of the IMF/WB litany) seldom goes beyond periodic electoral ratifications of “deals” elites concoct for this purpose. Elites have

positions taken on policy issues; and leadership as an authority implying legitimacy. *Id.* at 16-27. *See also* Wai-Man Liu and Xiokai Yang, *Effects of Political Monopoly of the Ruling Elite on the Extent of the Market, Income Distribution, and Development* 26 (2002), at <http://papers.ssrn.com/ssrnPaperNo269068> (stating that many economics models are too simple to account for many cultural, political and even economic factors); KATHERINA PISTOR & PHILIP WELLONS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN DEVELOPMENT 1960-95* (1999) (devising their own, serviceable model after discussing “simple” models—Durkheim’s repressive and restitutionary laws and Weber’s categories of persuasive, prescriptive and prohibitory); PUTNAM, *supra* note 5, at 239 (stating that comparativists can be terrible simplifiers).

10. *See, e.g.*, ETTORE ALBERTONI, *MOSCA AND THE THEORY OF ELITISM* 109, 111, 115, *passim* (1987); FIELD & HIGLEY, *supra* note 9, at 1-4; *id.* at 3, 18 (stating that we can not merely resurrect these old theories but must determine their contemporary relevance, where some find elitism irrelevant because equality, liberty, and freedom have become universal and objective); MAURICE FINOCCHIARO, *BEYOND RIGHT AND LEFT: DEMOCRATIC ELITISM IN MOSCA AND GRAMSCI* (1999); ROBERT PUTNAM, *THE COMPARATIVE STUDY OF POLITICAL ELITES* 122 (1976) [hereinafter PUTMAN, *POLITICAL ELITES*] (citing Mills on the proposition that the structure of capitalism is one of overlapping institutional interests or an interdependence among corporate and bureaucratic organizations); *id.* at 132 (stating that the unity necessary for effectiveness destroys responsiveness, leading to Michels’ “iron law of oligarchy”); WALSH, *supra* note 4, at 2-11 (adapting “traditional views” for contemporary purposes). Based on C. Wright Mills’ ideas, elites gain an interlocking money, power, and prestige in the economic, political and/or military order. Rachael Thomas, *The Power of Elites by L. Wright Mills* (1997), at <http://falcon.tamuce.edu/~whatley/PADM5302/Theo106.htm>. The “masses” often trust “these experts that . . . run the show.” *Id.*

11. Rothkopf, *supra* note 1.

established techniques to combat the disadvantages of their small numbers, especially through an organization against a disorganized majority. These techniques include control over a dominant party, public and/or corporate bureaucracy, and the patron-client networks that span these and other organizations to connect elites with sub-elites.¹²

Democracy is impossible where the elite is homogenous, self-conscious, largely autonomous, and self-perpetuating. Democracy can survive, but not prosper under so manifest an inequality, where elites are socially heterogeneous and compete with each other. In the United States for example, although they might seem quite similar, voters can choose between rival (Republican and Democratic) conceptions of the public interest. Elites are thus held partly accountable (within the IMF/WB litany), but the poor and powerless are often overlooked because they seldom have a viable way to express and pursue their needs and desires.¹³

12. FIELD & HIGLEY, *supra* note 9, at 18 (stating that elitism should not be a determinist analysis); *id.* at 20; ROBERT KLITGAARD, ELITISM AND MERITOCRACY IN DEVELOPING COUNTRIES: SELECTION POLICIES FOR HIGHER EDUCATION 33-34 (1986) (stating a high correlation between higher education and elite status, and patronage or sponsorship as a means of recruitment into the elite); PUTNAM, POLITICAL ELITES, *supra* note 10, at 5-13; WALSH, *supra* note 5, at 131 (citing Anthony Downs, elitism is hierarchical in the bureaucratic sense of formal authority, communication and rules which constrain and frustrate the lower orders); *id.* at 32 (stating that patterns of personal loyalties and career attachments are a major basis for patron-client networks); *Does Inequality Matter?*, THE ECONOMIST, June 16, 2001, at 9. “Resentment at ‘fat-cat’ salaries for bosses has been strikingly muted during the boom years.” *Id.*

Clearly, some degree of elitism exists in all societies. See FIELD & HIGLEY, *supra* note 9, at 34 (stating “there must be hierarchies of power in all large and complex organizations”, and a rewarding and punishing to secure obedience); KLITGAARD, *supra*, at 1 (stating that elites are constrained by many institutions and policies in theory). True, but the point is that such institutions and policies must still be created, or strengthened against elite attacks, in the transition societies where they had not previously developed under autocratic conditions.

13. EDGAR BODENHEIMER, JURISPRUDENCE 125 (1962) (describing danger of autocracy “when democratic freedom degenerates into license or lack of discipline, producing general disrespect for law, general laxity . . . , and destroying the moral stamina of society.”); FINOCCHIARO, *supra* note 10, at 22-23 (stating that Mosca called an elite rivalry “pluralism”, even though the majority never really participates); *id.* at 32; Liu & Yang, *supra* note 9, at 1, 17 (stating that competition among elite groups decreases elite rents, lessens the barriers to entry into markets, reduces the explicit or implicit price of government services and/or increases their quality, reduces the inequality of income distribution; and creates a higher division of labor, productivity, and prosperity); *id.* at 20 (stating that an elite political monopoly ends if the public’s intolerance for an inequality of income distribution grows high enough); CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY 81 (1996) (quoting Hannah Arendt, stating that under oligarchy, “it is doubtful that any group . . . , having enhanced power over others, has the capacity to represent faithfully the interests of others, rather than giving priority to its own interests.”); PUTNAM, POLITICAL ELITES, *supra* note 10, at 3-4, 129-30; *id.* at 130-31 (stating that despite elite rivalries, there is typically an elite unity over international affairs and economic structures, and apathetic voters are frequently deceived); WALSH, *supra* note 5, at 10, 30-33; *id.* at 12 (stating that if the public participation of a mass sovereignty is essential, democracy is implausible, but if democracy is the procedures by which elites make choices with a public accountability, democracy is plausible).

Some commentators have observed a recent growth in both elitism and inequality worldwide, chiefly as a result of globalization.¹⁴ The significance of elitism is usually overlooked by development economists because they focus on income inequalities and neglect many other, necessarily related, inequalities; meaningful participation and dissent are constitutive of development.¹⁵ Kamil Yilmaz shows how the political actions of elites in Argentina, Brazil, and Turkey delayed economic stabilization, by provoking high rates of inflation, large budget deficits, and devaluations of currencies.¹⁶ The antithesis of elitism is usually termed “populism.”¹⁷

It proved all too easy for independence-era elites in many third world countries to step into the shoes of their former colonial masters. The existing law was geared toward operating an extractive state and the extortion of what economists call “rents.” A recent biography sees Congo’s/Zaire’s Mobuto as a Colonel Kurtz, from Conrad’s *Heart of Darkness*.¹⁸ All of the countries under discussion began their transitions without a revolution. While revolutions seldom achieve their avowed aims, they usually overthrow much of the incumbent elite and usually install another elite in its place. It is the continuing influence of incumbent

14. See *infra* notes 34-58 and accompanying text. *But see also* PUTNAM, POLITICAL ELITES, *supra* note 10, at 131 (quoting Raymond Aron, a unified elite means the end of freedom, but disunity means the end of the State). See also *infra* notes 95, 112-14 and accompanying text; *infra* notes 130, 136-37, 147-49 and accompanying text; *infra* note 158 and accompanying text (the poor and powerless).

15. SEN, *supra* note 4 at 36, 107. See Robert Wade, *Winners and Losers*, THE ECONOMIST, Apr. 28, 2001, at 72; *id.* at 73 (stating that the Gini coefficient of world inequality has increased markedly in recent years); *id.* at 74 (stating that the poorest two-thirds of the world’s population suffers a “double marginalisation”, through incomes and prices); *id.* (stating that “another kind of polarisation” is “between a zone of peace and a zone of turmoil.”); *infra* notes 34-56 and accompanying text.

16. See generally Kamil Yilmaz, *Political Elites and the Delay in Stabilization* (2001) (text on file with author).

17. “Populism” is an equalitarian optimism about the ordinary people’s ability to make decisions, a governance by public opinion, and a wide participation in choosing local community standards—rather than having them chosen by the World Bank, for example. In particular, populism targets “money” elitism in banking and manufacturing. JEFFREY BELL, POPULISM AND ELITISM: POLITICS IN THE AGE OF EQUALITY 3-5, 24, 61 (1992); FINOCCHIARO, *supra* note 10, at 25.

18. MICHAELA WRONG, IN THE FOOTSTEPS OF MR. KURTZ (2001). A “neighborhood thug”, Mobuto benefitted from much outside interference, as he moved from high ideals to a “febrile corruption.” “Why kill your enemies,” Mobuto said, “when, with a bit of financial encouragement, they would willingly sell their souls?” Paul Blustein, *A Tighter Hand in Doling Out Global Aid?*, WASH. POST, Sept. 20, 2001, at H1 [hereinafter Blustein, *Tighter Hand*] (quoting Easterly stating Mobuto got nine IMF and WB loans, despite everyone knowing that he was corrupt and trying to destroy his country’s economy). See also Baruch Kimmerling, *Elites and the Construction of Civil Society in the Middle East* 2 (1997), <http://msanews.mynet.net/MSANEWS/199706/19970609.10.html> (stating that preconditions for the formation of elites are a deep knowledge of institutions and bureaucrats able to implement the elite schemes).

elites in transition countries—*apparatchiks* and the *nomenklatura* in Eastern Europe, and their functional equivalents elsewhere—that many perceive to destroy, deflect, or delay legal reforms. Many of these incumbents are also predatory or parasitical, consuming much more than they produce and continuing to dominate a state or military which is more of a protection racket than a protective agency.¹⁹

What these elites have in common is their *political* rather than their economic productivity. Rather than creatively organize land, labor, capital, technology, and entrepreneurship to produce goods and services, such incumbent elites use their patron-client networks to curb reforms and thus to maintain their interchangeable wealth and power. Their tactics are those of the Florentine Medici, whose motto loosely translated was: “Use wealth to gain power and use power to protect and increase the wealth.” The main source of incumbent elite power is the huge discretion officials possess under colonial, post-colonial, and communist party-state laws—especially the discretion whether or not to apply those laws.

Such laws reflect a passion for law less personal control or the arbitrariness backed by threats that make people uncertain,²⁰ insecure, and thus easier to rule. For themselves, for domestic and foreign business people, and even for international aid donors,²¹ elites in transition

19. FIELD & HIGLEY, *supra* note 9, at 74; Boaz Mozelle & Benjamin Polak, *The Model of a Predatory State*, 17 J.L. ECON. & ORG. 1, 4 (2001); *id.* at 5 (stating that such states demonstrate the need for investments in the instruments of repression with periodic outbreaks of violence, caused by public frustrations or organized by elites and sometimes getting out of control).

20. See Vince Hooper, *The Washington Consensus & Emerging Economies* 7 (2002) (SSRN Pap. No. 297181), <http://papers.ssrn.com> (quoting Paul Krugman).

In all of the countries that are currently in crisis, there was a fuzzy line at best between what was public and what was private; the minister’s nephew or the president’s son could open a bank and raise money . . . with everyone believing their money was safe because official connections stood behind the institution.

Id. Yilmaz, *supra* note 16, at 37 (reducing budget deficits in Argentina, Brazil, Turkey, etc. would reduce elites’ incomes, and a rationalization of government spending would reduce their self-serving arbitrariness). See also *infra* notes 123-24, 147 and accompanying text.

21. See Daron Acemoglu & James Robinson, *Economic Backwardness in Political Perspective* 1-3 (2001) (Centre for Economic Policy Research (CEPR) Discussion Pap. No. 3251 SSRN Pap. 307140), at <http://papers.ssrn.com> (stating that elites may block technological or institutional development because such reforms erode the elites’ incumbency advantage and increase the likelihood that the elites will be replaced); *id.* at 2 (stating that monarchies and landowning interests thus opposed a European industrialization); KIMMERING, *supra* note 18, at 3 (stating that in a socially-unequal Middle East, elites thus preserve the status quo rather than promote an economic growth); *id.* at 6-7 (stating that elites often adopt the rhetoric of dependency theory and state the need to defend against the cultural and economic neo-colonialism of the reformers); BRIAN TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY 74 (2001) (stating that Max Weber notes that law encounters resistance from elites at the interpretation and application stages); TAMANAHA, REALISTIC SOCIO-LEGAL THEORY 253 (1997) (asserting that doing without law serves those powerful enough to command other resources—I would add that elites win either way); *id.* at 133 (citing HLA Hart, there

countries “grease the wheels” and even use coercion to “produce” favorable governmental actions. They do this for example, to obtain the many licenses required by governments in most transition countries. The political orientation of incumbent elites is purely pragmatic, doing whatever works under the circumstances. Usually too clever to overtly oppose such legal reforms as are created, incumbent elites intervene at the implementation stage to promote “business as usual,” by robbing reforms of much of their force. Incumbents typically justify their actions with an outmoded truth—“this is the (traditional) way we do things here”—in an attempt to immunize their conduct from scrutiny by citizens, foreign elites, and World Bank officials.²² Democratizing and developmental trends put incumbents’ political productivity under the threat of a growing irrelevance, and the resulting combination of their smugness and insecurity is extremely dangerous—especially for the poor and powerless.

Law is an important form of political, economic, social, and moral thought, and the failure to change the behavior of a predatory elite through law reflects the limits of law, as well as a lack of thought, consensus, and political creativity and power.²³ Always fragile, opportunities for democratization and development tend to disappear quickly, in the absence of effective, step-by-step reforms. For example, dedicated and competent *reformers* in transition countries are small in number, and poorly organized, and mostly lacking the incumbents’ patron-client networks. Perhaps over time more reformers can be identified or provoked into action by the pressure of events; perhaps younger reformers will get the chance to prove that they are more competent and less dedicated to the status quo than their elders; and perhaps reformers will learn better ways of using the levers of power. Some reformers are found in the government and the bureaucracy, usually insulated from the more strategic positions, and more are located outside politics, such as practicing lawyers, economists, academics, journalists, some clergy, social activists, and even students. These “progressives” and outsiders of various types offer the kind of skilled labor that is needed, but lack the other resources needed to produce reforms among themselves. However, the emergence of a civil

is no necessary connection between legal efficacy and validity). *See also infra* notes 34-56 and accompanying text (globalization).

22. While reforms might make elites better off in an absolute sense, reforms would erode their status, their *relative* wealth and power and their control exercised through patron-client networks.

23. *See* TAMANAHA, SOCIO-LEGAL, *supra* note 21, at 45. A supposedly value-free social science is common in development studies and dependent on naïve views of social thought. *Id.* But many economists are now paying more attention to the political dynamics of reform. *Time to Roll Out the New Model*, THE ECONOMIST, Mar. 1, 1997, at 71-72.

society and a large and ambitious legal profession creates irrepressible demands for legal reforms in some transition countries.²⁴

As a rival elite that mirrors existing social structures through its privileged access to education, reformers tend to be more ideological than the incumbents. Reformers typically include quasi-Marxists, social democrats, liberal democrats, neoconservatives, among others. This diversity makes it difficult for them to form a consensus over how to battle the incumbents, and to then offer a consistent leadership to potentially sympathetic politicians, legislators, judges, and NGO and media figures. This is especially likely when international donors make demands that are unacceptable to many or most of the reformers.²⁵ Most potentially sympathetic people lack the independence from incumbent power and bribes, the expertise, and, sometimes, the interest in pursuing reforms, without a great deal of direction from reformers. Necessity may transform reformers into “pseudo-liberal democratizers,” who try to mobilize support from the public and civil society with egalitarian arguments. But such reformers may later undermine the rights they created, and NGOs and even the public will then oppose them.²⁶ This phenomenon is part of the seemingly dialectical paradox of the reformers’ task which is that they must use massive governmental intervention to reduce massive governmental intervention by incumbents, without eventually becoming the kind of incumbents they are empowered to transform or defeat.

Elite political struggles to maintain status necessarily take into account the frequently apathetic reactions of the broader public. A few of the more promising citizens are recruited by incumbents or reformers through sponsorship, political parties, and other patron-client networks. Incumbents often seem to pursue populist concerns, while proving unwilling or unable to implement these ‘reforms’ effectively. Channels of political communication are frequently new and imperfect in transition countries, and incumbents take advantage of such imperfections to leave

24. BELL, *supra* note 17, at 61-64; Robert Fatton, *Civility, Incivility, and Democratization: The Politics of Civil Society in Africa*, in *AFRICA’S SECOND WAVE OF FREEDOM*, *supra* note 5, at 23, 30, 38 (noting an “explosion of counterpredatory rule”, after having to keep quiet for so long); FIELD & HIGLEY, *supra* note 9, at 74; Andrew Harding, *Global Doctrine & Local Knowledge: Law in Southeast Asia*, 51 INT. & COMP. L.Q. 35,52 (2002); KIMMERLING *supra* note 18, at 2; WALSH, *supra* note 5, at 1, 131; *id.* at 8 (stating that Mosca distinguishes the governing elite from a political elite, and from intellectual elites manipulating ideas and symbols); *id.* at 30-33 (distinguishing varying combinations of divided and unified, and permeable and impermeable elites).

25. See *infra* notes 34-56 and accompanying text (globalization).

26. Fatton, *supra* note 13, at 28-30 (attributing this tendency to Francophonic Africa in particular). See *id.* at 26-27; FIELD & HIGLEY, *supra* note 5, at 35-37; KLITGAARD, *supra* note 12, at 1, 34.

themselves free to negotiate complex power-sharing arrangements. Incumbents often take refuge in the centralized, top-down policies of a bureaucracy unreconstructed from the previous regime²⁷—except, perhaps, at the very top. Incumbents frequently manipulate class, religious, and ethnic tensions and conflicts. The civil society organizations and media outlets in transition countries are usually new and shallowly-rooted, so elites are frequently successful in co-opting or manipulating them. Among incumbents, the goal is to keep the wider public disorganized, misinformed, and uncertain, so as to leave an insulated, but isolated, incumbent elite free to pursue “business as usual.”²⁸

Elitism is only one of many political tendencies, of course.²⁹ Its dominance in transition countries reflects the fact that countervailing trends have yet to develop or become effective. For example, many analysts are rather pessimistic about what newly-enfranchised voters will do. Under such circumstances, democratization often involves a *partial* substitution of elite reformers for incumbents, who remain in place because a revolution has not occurred, rather than a firm embedding of new values and institutions into the political culture. This amounts to a quasi- or authoritarian democracy, or a democracy of procedure without much democratic substance, that can easily slide back into the politics of

27. See *infra* notes 115-30 and accompanying text.

28. BELL, *supra* note 17, at 69; Clark, *supra* note 1, at 51; Fatton, *supra* note 24, at 24-25; *id.* at 27 (stating that Somalia, Liberia, Angola, and Mozambique show fears of Hobbes’s “war of all against all” do not compel democratization); *id.* at 34 (stating that in Africa, a Western democratic individualism is implausible, where the individual is largely subsumed by religious, ethnic, and communal forces which, along with corruption, form a defensive opposition to predation); FIELD & HIGLEY, *supra* note 9, at 35, 39; FINOCCHIARO, *supra* note 10, at 37, 93; KLITGAARD, *supra* note 12, at 33-34, 43, 153; Mozelle & Polak, *supra* note 19, at 4-5; PUTNAM, POLITICAL ELITES, *supra* note 10, at 18, 47, 134, 140; *id.* at 138 (discussing Mosca’s “mere quackeries aptly invented to trick the masses into obedience”); WALSH, *supra* note 5, at 6, 18, 21, 131; *id.* at 156 (distinguishing the mass public from “attention groups”—which are perhaps poorly informed but which exhibit a knee-jerk sensitivity to certain words and symbols).

29. Consider the U.S., for example. Electoral participation (to the extent the Supreme Court permits, after *Bush v. Gore*), serves both to improve a “circulation” among elites and to lessen the dominance of an elitism. See, e.g., NINO, *supra* note 13, at 79-83; Jonathan Schell, *Slouching Toward Washington*, WASH. POST, Sept. 23, 2001, at BW2 (Book Review); Thomas, *supra* note 10. Still, somebody has to run political, economic, social, and cultural organizations, and the Founders and delegates to the Constitutional Convention were an “elite . . . that sought to protect its property from the masses.” *Id.* (quoting Susan Welch. Didion, quoted by Schell, *supra*, notes a “permanent professional political class”—a “new self-crafted and self-referring class, a new kind of managerial elite” that emphasizes “moral values” and dropped in as voters were dropping out). Kimmerling, argues that “elite” has a more favorable connotation in other “Western” cultures as possessors of exceptional and scarce knowledge and skills who are expected actively to transform the political, economic or social order. Kimmerling, *supra* note 18, at 1-2.

the past. For example the wider public will, as best it can, supports aims persuasively justified by reformers—through reinterpretations of national values. Some political outcomes desired by incumbents will be defeated or delayed with aid from the public, but the net effect is often that politics limps along without imagination or direction. In the future, reforming elites may build trust among themselves and come together to solve their conflicts of interest through well-designed institutions which take account of the interests of non-elites. Such practices, however, take time to develop, as the modest progress in the Czech Republic demonstrates.³⁰

The economic effects of this kind of politics have been frequently described: the “energies of modernization” are not harnessed for public purposes but dissipated in pursuit of private gain or in struggles among elites.³¹ Amartya Sen puts in the past tense what frequently belongs in the present tense in transition countries, stating “The unchallenged power of governance was easily translated into an unquestioned acceptance of unaccountability and nontransparency (condemned by the IMF/WB litany), often enforced by strong family links between the government and the financial bosses.”³² The “opportunity costs” of such politics are those of a “bad capitalism,” of development opportunities foregone. “Political monopoly (or oligopoly) by the ruling elite generates unfair relative prices of government services to other goods and inefficient inequality of income distribution, which results in a narrow market (politically as well as economically), thereby generating inefficient . . . levels of division of labor and aggregate productivity.”³³

30. Graybill & Thompson, *supra* note 5, at 20; BELL, *supra* note 17, at vii-viii; FIELD & HIGLEY, *supra* note 9, at 20, 58, 72, 76, 118; *id.* at 50 (stating that under conditions of elitism, mistaken assumption that Third World countries could move toward a liberal democratic stability through universal suffrage and formal protections of personal liberties); FINOCCHIARO, *supra* note 10, at 56; KLITGAARD, *supra* note 12, at 168, 180; WALSH, *supra* note 5, at 160.

31. PUTNAM, POLITICAL ELITES, *supra* note 10, at 126. See SEN, *supra* note 4, at 265 (stating that Russia’s current *mafija* economy is best understood in terms of previously established rules of behavior—which vary greatly among countries).

32. *Id.* at 185-86.

33. Liu & Yang, *supra* note 9, at 24. See SEN, *supra* note 4, at 120-21. Small markets do not give adequate economic room for ordinary people; rather, artificially propped-up production creates insulated, inflated profits. *Id.*

II. GLOBALIZATION³⁴

This political narrative gets even more depressing when we inquire into the unequal international economic relations of transition countries. George Soros argues that “It is in our enlightened self-interest to make sure that the losers in this global system—and right now there are billions of them—get a chance to participate Why? Because otherwise the people who are disadvantaged will use their political clout to capture the

34. “Globalization” is a fuzzy reference to the worldwide integration of transport, communications, and distribution networks, trade and industrial development, capital and money markets, flows of technology, aid, weaponry, and many aspects of culture. TAMANAHA, JURISPRUDENCE, *supra* note 21, at 121-22. “Law travels with politics and economics, especially in transactions between relative strangers”; *id.* at 122, and even if it conflicts with local cultures or international human rights norms. Paul, *supra* note 1, at 2; TAMANAHA, JURISPRUDENCE, *supra* note 21, at 237. Most legal assistance projects are designed to help transition countries cope with globalization. Rose, *supra* note 2, at 94. They have the effect, if not the purpose, of closing off alternative roads to development and of solidifying a global inequality. *Id.*

In globalization, nation-states compete with non-state entities above and below them in ways which offend traditional notions of sovereignty in international law. TAMANAHA, JURISPRUDENCE, *supra* note 21, at 121; Paul, *supra* note 1, at 4. Phillip Bobbit argues that a “market-state” will manage and stabilize the world economy, unaccountable to nations or their citizens and unresponsive to justice claims or other human needs beyond reducing transaction costs. Donnelly, *supra* note 1, at T4 (quoting Bobbit). See James Anderson, *Letter to the Editor*, THE ECONOMIST, Nov. 3, 2001, at 26 (stating that globalization creates peace through the quest for profitability); Richard Holt, *Looking Ahead: The Future of Post Keynesian Economics*, 3 (2001), http://csf.colorado.edu/pkt/pktauthors/Holt.Ric/Looking_Ahead:Post_Keynesian_Economics.html (stating that neoclassical trade policies will result in a growing economic instability); Slaughter, *supra* note 1, at 2 (describing this process as one of “multiple parallel networks of private and public actors” that create “prosaic accountability problems”); *Monsters Still, But Prettier*, THE ECONOMIST, Jan. 5, 2002, at 59 (writing that the entry of “multinational giants” into transition country markets that used to be protected means that local consumers can no longer be held captive). Some would argue that consumer captivity grows as multinationals enter.

The events of September 11, 2001 will have dramatic effects on “global governance.” Kanishka Jayasuriya, *September 11 and the New ‘Anti-Politics’ of ‘Security’*, 1 (2001), <http://www.econ.usyd.edu.au/drawingboard/digest/0112/jayasuriya.html>. Globalization “has changed the internal architecture of the state”, especially with regard to “risk” and “security”; dangers have accelerated since September 11. *Id.* at 2-3. Security now permeates every field, including finance, the environment, and the ways in which some ethnic/religious groups are treated, *id.* at 3. Spurred on by a media-stimulated climate of fear, a transnational criminalization of conduct proceeds apace. *Id.* at 4. See Blustein, *Tighter Hand*, *supra* note 18 (stating that investors, banks, and mutual funds were already pulling their money out of emerging countries as a global growth slowed, but this tendency accelerated after September 11 as did a marked reduction in tourism); Paul Blustein, *A Pakistan Setback*, WASH. POST, Dec. 26, 2001, at A1 [hereinafter Blustein, *Setback*] (stating that as a result of September 11, 68,500 Pakistani workers have been laid off and 177 establishments closed, 70% percent of them in textile-related businesses); Blustein, *Turning Point Seen in War on Poverty*, WASH. POST, Mar. 22, 2002, at A21 (stating that “economic and social despair provides a fertile environment for terrorist groups.”); Jared Diamond, *Why Must We Feed the Hand that Bites Us*, WASH. POST, Jan. 13, 2002, at B1 (stating that globalization “isn’t just a matter of ‘us’ being able to send ‘them’ good things”; it is also “easier for ‘them’ to send ‘us’ bad things.”); see generally *infra* note 50.

system.”³⁵ The World Bank’s Branco Milanovic persuasively argues that we are now living through the *Third* Globalization—following those of the Roman and British Empires.³⁶ He points out some striking similarities among these three Globalizations. These similarities are (1) leadership by a *relatively* benevolent hegemon (currently, an outward-looking American elite reacting to the end of the Cold War); (2) most of the countries affected do not participate on an equal footing; (3) a necessary but not sufficient dominance in technical progress by the hegemon; (4) “imperialism,” currently, a total disregard of the U.N., and establishing a presence throughout the world, sometimes through regional allies); (5) globalization as a complex cause and effect of an increased global inequality; (6) attempts at an ethnocentric cultural integration; and (7) strong but initially baffled reactions, by and on behalf of those who have been uprooted and displaced.³⁷

35. Steven Pearlstein, *A New Politics Born of Globalization*, WASH. POST, Oct. 1, 2002, at H1 (quoting Soros). See Sebastian Mallaby, *Helping the Rich, Harming the Poor*, WASH. POST, Nov. 5, 2001, at A23 (stating that “Taxpayer support for farmers in rich countries is six times larger than all development assistance to poor countries”); Rothkopf, *supra* note 1 (stating that “According to Canadian Feed the Children, the richest 358 people have a net worth equal to the combined income of the poorest 2.3 billion.”); see generally ALAN TONELSON, *THE RACE TO THE BOTTOM: WHY A WORLDWIDE WORKER SURPLUS AND AN UNCONTROLLED FREE TRADE ARE SINKING AMERICAN LIVING STANDARDS* (2000); *Is it at Risk?*, THE ECONOMIST, Feb. 2, 2002, 65-66 (stating that “the emerging market bubble has clearly deflated”—in 2001, the 29 largest emerging economies saw a net outflow of more than \$30 billion in finance). *But see* PAUL KRUGMAN, *PEDDLING PHILOSOPHY: ECONOMIC SENSE AND NONSENSE IN THE AGE OF DIMINISHED EXPECTATIONS* 21, 145 (1994) (stating that globalization is the most popular explanation of an increased inequality in the United States, but the numbers don’t bear out this argument—trade is still too small a percentage of GDP in the U.S.); *Going Global*, THE ECONOMIST, Dec. 8, 2001, 67 (explaining a Dec. 2001 World Bank Report which showed that “more globalized” poor countries had a higher GDP growth rate than rich countries, while “less globalized” poor countries had growth rates lower than that in rich countries); *Is Globalization Doomed?*, THE ECONOMIST, Sept. 29, 2001, at 14 (rejecting John Gray’s notion that globalisation has “melted down”—it does not undermine democracy or the welfare state, it is consistent with sound environmental policies, it reduces poverty, and does not conquer cultures because it is voluntary.). Many would dispute these conclusions.

36. Branco Milanovic, *On the Threshold of the Third Globalization: Why Liberal Capitalism Might Fail* (1999), at <http://papers.ssrn.com> (SSRN Paper No. 262176). See TAMANAHA, *JURISPRUDENCE*, *supra* note 21, at 69 (explaining that instead of a slow evolution, colonialism involved conquest and the imposition of a system of laws as a means of consolidating external rule); Harding, *supra* note 24, at 38, 41 (asserting that as with London’s “imperial legislation, which was global doctrine in a very big way,” Islamic Law was “in practice modified by local knowledge in its application”); Paul, *supra* note 1, at 83 (asserting that globalization has replaced colonialization as the dominant theme of inter-state relations.”).

37. Milanovic, *supra* note 36. See Harald Baum, *Globalization, Capital Markets and Possible Regulatory Responses*, in *LEGAL ASPECTS OF GLOBALIZATION* 77, 78 (Jurgen Basedow & Kono Toshiyuki eds., 2000) (explaining that the focus is on the results rather than the process of globalization—which is treated as inevitable and irreversible, the focus for xenophobic anxieties, and the excuse for domestic policy failures); BELL, *supra* note 17, at 51 (stating that North Italian city-states defined republicanism not as equality but as the means of independence from the Holy Roman

According to Milanovic, the first two Globalizations prompted powerful Christian and Marxist counter-movements. He suspects that the Third Globalization will end with a nationalistic/romantic rejection of liberal capitalism, perhaps through Islam,³⁸ but we can project an alternative, or the revival of a more compelling social democracy/welfare statism. French leaders of the Left and Right speak of the need to better share the fruits from a “tamed” and “humanized” globalization.³⁹ Four demands characterize an emerging anti-globalization “ideology.” These demands are that (1) globalization agencies must open meetings to the public and the media; (2) the IMF and WB must cancel the debts owed to them by poor countries; (3) globalization agencies must end policies that hinder people’s access to food, clean water, shelter, health care, education, and the right to organize (demands which are also projected as international human rights); and (4) the WB must end support for socially and environmentally destructive projects involving mining, oil and gas, and large dams.⁴⁰ But the “appetite for helping poor countries may give

Empire); FIELD & HIGLEY, *supra* note 9, at 96-99 (explaining that in 1980 at least, we worried about a North-South conflict, of unaddressed grievances and dependence in the peripheries of a “world system”—the residue of five centuries of history); PISTOR & WELLONS, *supra* note 9, at 14 (finding “convergence” in due process for international commercial transactions, in the tendency to democracy, in global markets, and in perceptions of the state’s role).

38. Milanovic, *supra* note 36. See TAMANAHA, JURISPRUDENCE, *supra* note 21, at 124 (competing globalization theories of a “liberal internationalism”, a unified world order versus a “new medievalism” of supra-state, sub-state, and especially non-state actors); Jim Chen, *Globalization and its Losers*, 9 MINN. J. GLOBAL TR. 157, 163 (2000) (asserting that like communist internationalism, globalization asserts the irrelevance of place); Donnelly, *supra* note 1 (asserting that some see a withering away of the state through globalization, but we should question the durability and utility of an order “indifferent to moral values and justice or even culture.”); Rothkopf, *supra* note 1 (stating that “somewhere in the world today walks the next Marx,” creating “a competitor to ‘American Capitalism’ that the disenfranchised in nations around the world can embrace.”); *id.* (stating that “globalization is reversible, by war (in 1914), or recession, during the 1930s”).

39. Seattle, Prague, Nice, Quebec, and Genoa show “that you can’t have a meeting of ideas behind a cordon of police officers.” Jamey Keaten, *World Bank Cancels Poverty Meeting*, WASH. POST, May 22, 2001 (quoting the WB’s Elkern Chapparo). After Genoa, Prime Minister Jospin said: “France rejoices in the worldwide citizen’s movement . . . [expressing] the wish of the majority of mankind better to share the potential fruits of globalisation.” *Putting the Brakes On*, THE ECONOMIST, Aug. 4, 2001, at 43. French President Chirac added: “Our democracies . . . cannot be mere spectators of globalisation. They must tame it, accompany it, humanise it, civilise it.” *Id.* at 44. While these attitudes reflect a French dislike for “free” markets and other aspects of the “American hegemonialism” that destroyed the dominance of French language and culture, *id.* at 43, it contains the seeds of a likely anti-globalisation ideology, based on similar dislikes. See *infra* note 40 and accompanying text.

40. Manny Fernandez, *DC Group Demands Reforms of IMF, World Bank*, WASH. POST, Aug. 29, 2001, at B3; Noreena Hertz, *I’m on Their Side, to a Point*, WASH. POST, July 29, 2001, at B1 (adding a distrust of the power of multinational corporations, of the overriding emphasis on economic growth, and of the “trickle-down” that doesn’t work; capitalism cannot solve the problems it creates); Robert Weissman, *Why We Protest*, WASH. POST, Sept. 10, 2001, at A1.

way to the conviction that helping them is impossible.”⁴¹

While neoclassical economists praise it under their rather dubious theory of comparative advantage, the World Trade Organization (WTO) is thought by many to be contrary to the interests of transition countries. The likely effects of a new, Doha (Qatar) Round of trade talks looks doomed as of this writing. In this Round 142 member-nations agreed to negotiate, which may amount to a dissensus deferred, and thus save the WTO from possible oblivion. But the United States may be unwilling and unable to negotiate, in the face of many, American interest groups. Poor countries chafe under the WTO’s intellectual property regime especially with regard to AIDS, malaria, and tuberculosis drugs, erected by the Uruguay Round of the WTO, and under the trade barriers in agriculture and textiles that the United States, the European Union (EU), and Japan are still permitted to erect. Whether these issues will be genuinely negotiable, and whether progress can be made toward a genuine global competition and the related relaxation of rich-country anti-dumping rules, seems unlikely at this point. Investment and environmental issues pushed by the EU worry the poorer countries, which will seek special trade preferences and subsidies through the Doha Round.⁴²

41. Sebastian Mallaby, *Our New Defeatist Attitude*, WASH. POST, Jan. 7, 2002, at A17. *See id.* (stating that the first sign of this pessimism is Argentina’s crisis, “a blow to the ‘Washington Consensus’”); *See infra* notes 42-48 and accompanying text; Steven Pearlstein, *Globalization Regaining Impetus*, WASH. POST, Dec. 7, 2001, at A12 (“Seattle now looks like the high-water mark for the anti-globalization movement.”).

42. Kym Anderson & Shanli Yao, *How Can South Asia & Sub-Saharan Africa Gain From the Next WTO Round?* (2002), at <http://papers.ssrn.com> (SSRN Pap. No. 300705); Paul Blustein, *142 Nations Reach Pact on Trade Negotiations*, WASH. POST, Nov. 15, 2001, at A1; Helen Dewar, *Bush Loses a Vote on Trade*, WASH. POST, May 15, 2002, at A8; William Drozdiak, *Poor Nations May Not Buy Trade Talks*, WASH. POST, May 15, 2001, at E1; *Seeds Grown for Future Growth*, THE ECONOMIST, Nov. 17, 2001, at 65; *The Senate’s Trade Torpedo*, WASH. POST, May, 13, 2001, at A14. *See* Atik, *supra* note 1, at 1-2 (stating that the 1999 Seattle riots brought the WTO’s legitimacy crisis and structural weaknesses to public attention); Paul Blustein, *Cause, Effect and the Wealth of Nations*, WASH. POST, Nov. 4, 2001, at H1 (quoting Harvard Trade economist Dani Rodrik’s criticisms of the WTO ideas of an aptly-named World Banker, David Dollar. Dollar “made ‘truly extravagant claims’ about the benefits of free trade, thereby ‘creating expectations that cannot be fulfilled.’”); *id.* (estimating at \$150 million the costs a typical developing country must pay to implement WTO agreements domestically); Holt, *supra* note 34, at 3 (stating that Post-Keynesians challenge the “gospel truth” of the theory of comparative advantage that underpins the WTO—this theory holds true only under the limited cases rarely seen in the real world); John McGinnis & Mark Movesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 512 (2000) (“In a blinkered pursuit of free trade, an unaccountable WTO will block important programs that properly elected governments have adopted to promote the public welfare.”); *id.* at 517 (stating that some think the WTO should “balance environmental, labor, health and safety values against free trade”, but we favor a “jurisprudence” enabling the WTO to “invalidate covert protectionism” without endangering these national values); Mallaby, *Helping the Rich*, *supra* note 35 (asserting that the intellectual property regime created by the Uruguay Round threatens to transfer \$20 billion a year from poor to rich countries); Robert Wade,

In any event, the IMF, the WB, their regional allies like the Asian Development Bank, and bilateral donors, like USAID, are much more relevant to our topic. The IMF's "structural adjustment" programs have created misery among the poor and powerless for decades, while half-hearted domestic implementations of poorly thought-out adjustments have had little overall effect on the underlying economic problems.⁴³ Incumbent elites need the multilateral IMF and WB loans to remain in power domestically, but the harshness and short time horizons of the legal and other reform conditions attached to these "loans" create much political instability; Argentina and Turkey are examples.⁴⁴ It is almost impossible

Letter to the Editor, THE ECONOMIST, Nov. 24, 2001, at 22 [hereinafter Wade, Letter] ("there is no clear statistical relationship between the level of trade barriers and a country's subsequent economic growth, once other influences on growth are held constant"); *id.* (stating that the people and capital released from domestic activities as a result of trade liberalization cannot always be recombined to produce goods which are competitive internationally); Wade, *Winners and Losers*, *supra* note 15, at 74 (asserting that the prices of goods and services exported from high-income countries are increasing faster than the price of goods exported by low-income countries, and much faster than the prices of goods and services produced in low-income countries that do little international trade); *id.* (stating that this creates a "marginalisation" through divergences in income, prices, and lack of access to capital and technology). *But see* Paul Blustein, *New Faith in Free Trade*, WASH. POST, Apr. 11, 2002, at E2 (reporting that Oxfam announced support of a world trade less tilted in the rich countries' favor).

43. *No Other Way*, *supra* note 1 (quoting Peter Reddaway & Dmitri Glinski). *See* Baker, *supra* note 5, at 8 (stating that multilateral loans have turned Africa into a "debtor's prison"); *id.* at 20 (IMF structural adjustment programs may re-integrate peasants into the local economy, but not into the polity—especially with health and education benefits); Clark, *supra* note 1, at 56-57 (stating that the WB strengthened the *zeitgeist* of the collapse of East European regimes, but the fate of democracy now turns on the generosity of multilateral and foreign donors); Fatton, 25 note 24, at 29; Wade, *supra* note 15, at 74; *id.* (asserting that among other things, the IMF/WB ignores unequal income distributions, environmental issues, world inflation, foreign exchange rates, and interest rates). Wrong, *supra* note 18 ("the intervention of the U.S., France, and Belgium, of the World Bank and IMF, locked Mobuto's Congo/Zaire . . . into one slow-motion economic collapse" and locked the country's leadership in a 1960s "ideological time-warp.").

For Baum, *supra* note 37, at 84-85, IMF/WB policies give rise to a regulatory "trilemma": preserving national sovereignty, creating sensible regulation and supervision, and enjoying the advantages of a globalized capital market. Only two of these three policies can be achieved. Also, globalized competition makes national weaknesses more transparent and creates pressures for a "regulatory arbitrage" that undermines national market designs. *Id.* at 85-86. Corporate lawyers might call this a "race to the bottom" or a competition in having no regulations other than those which favor capital—in hopes that this will prompt foreign capital inflows. *See* Pearlstein, *Globalization*, *supra* note 41 (quoting Daniel Tarrillo, a Clinton advisor "without a sustained commitment meant to . . . protect the losers, I'm afraid many Americans are going to remain skeptical about globalization and come to believe that it's all really for the companies."); Weissman, *supra* note 40 (discussing "a worldwide global justice movement in industrialized and developing countries.").

44. Argentina did all the "correct" things in the 1990s, eliminating hyperinflation and opening itself to foreign investment, but these gains were ultimately offset by chronic government deficits, tax evasion, a weak entrepreneurial class, and uncompetitive wages. Robert Samuelson, *Do Cry for Argentina*, WASH. POST, Jan. 16, 2002, at A19. *See* Yilmaz, *supra* note 16. Even so and despite the IMF's new-found ability to "spin" the news, Argentina's subsequent crisis had the IMF's fingerprints all over it. Mark Weisbrot, *Argentina's Crisis, IMF's Fingerprints*, WASH. POST, Dec. 25, 2001, at A33. The U.S. and the IMF fumbled for a response, and the IMF began to play "chicken" with

to implement democratization and a radical economic restructuring at the same time, but the IMF and WB seem remarkably unconcerned about this and many other effects of their policies. In Russia, the effect was a “‘market bolshevism’, which . . . destroyed Russia’s industrial base (built at great sacrifice over decades), triggered alarming demographic trends and created a risk of ‘irreversible criminalisation and privatisation of the Russian state.’”⁴⁵ Former World Bank Chief Economist Joseph Steiglitz argues that IMF/WB-sponsored incentives promoted an “asset stripping” rather than productive capitalism.⁴⁶ In Indonesia, the effect was to hang

Argentina’s Government a game involving which strings to attach to a loan. Paul Blustein, *IMF, White House Fumble for a Strategy as Argentina Flounders*, WASH. POST, Jan. 18, 2002, at A20; Blustein, *IMF’s Stony Silence on Austerity Plans Worries Argentina*, WASH. POST, Feb. 7, 2002, at A20; Peter Hakim, *Aid to Argentina: Strings Attached*, WASH. POST, Mar. 5, 2002, at A19; *Waiting for IMF to Tango*, THE ECONOMIST, Mar. 30, 2002, at 31. Argentine Government officials contend the crisis was caused by the corrupt 1990s IMF-mandated market liberalization that increased a dependence on the IMF; Anthony Faiola, *Growing Crisis Leaves Argentines Feeling Helpless*, WASH. POST, May 3, 2002, at A1. Among other acts of violence, “protesters ransacked U.S.—and Spanish-owned banks, a McDonalds and other symbols of globalization . . .” Anthony Faiola, *Argentina’s Peso is Free to Float, and Quickly Sinks*, WASH. POST, Jan. 12, 2002, at A14. Neighboring Latin American Governments such as Uruguay’s are trying to distance themselves economically from Argentina. *Semi-Divorced*, THE ECONOMIST, Apr. 6, 2002, at 33. Argentina shows why the gains from globalization have been fairly modest in Latin America, especially given Argentine psychological fatigue and disenchantment. See Samuelson, *supra*.

The IMF similarly played “hardball” in Turkey, delaying loans until the many IMF conditions were met and public unrest occurred. *Hardball from the Fund*, THE ECONOMIST, July 7, 2001, at 70. In particular, Government can no longer subsidize and forgive the debts of farmers, so as to (in the IMF’s words) restore domestic and foreign faith in the economy. Molly Moore, *Desperate Farmers in Turkey Put Their Village up for Sale*, WASH. POST, May 15, 2001, at A10. The Village of Calli is thus selling 112 baked mud homes, 24,000 farming acres, and a mosque and a school for \$1.2 million—cash only. *Id.*

45. *No Other Way*, *supra* note 1 (quoting Peter Reddaway & Dmitri Glinski). At the other end of the spectrum, Japan, the second largest contributor to the IMF, resisted IMF requests to look at the bad loan portfolios of Japanese banks. Paul Blustein, *Japan Resists IMF Look at Banks*, WASH. POST, Sept. 1, 2001, E1; *No Other Way*, *supra* note 1 (quoting Steiglitz, IMF teams contain “second rate economists from first rate universities” who measure performance against a remarkably reactionary economic dogma.).

47. Robert Borosage, *The IMF, Peddling Misery*, WASH. POST, Sept. 22, 2000, at A25 (quoting Steiglitz). “We’re here to help,” coming from the IMF or WB, is more incendiary than a Molotov cocktail, triggering riots in Bolivia, a general strike and riots in Nigeria, denunciations as a “death plan” in Haiti, and demonstrations against a growing hunger and desperation in Tanzania. *Id.* Had the U.S. followed the advice of a 1999 IMF Report, it would have plunged the world into a deeper recession. *Id.* But see Blustein, *Turning Point*, *supra* note 34 (reporting that globalizing nations increased their annual growth rates from 2.9% in the 1970s to 3.5% in the 1980s and 5% in the 1990s, while unglobalizers saw annual growth decline from 3.3% in the 1970s to 0.8% in the 1980s, recovering to only 1.4% in the 1990s).

For Baum, *supra* note 37, at 84-85, IMF/WB policies give rise to a regulatory “trilemma”: preserving national sovereignty, creating sensible regulation and supervision, and enjoying the advantages of a globalized capital market. At most two of these three policies can be achieved. Also, globalized competition makes national weaknesses more transparent and creates pressures for a “regulatory arbitrage” that undermines national market designs. *Id.* at 85-86. Corporate lawyers might

onto President Soeharto too long and then to create the largest nationalization in history as an IMF/WB-sponsored response to the Economic Crisis of the late 1990s, or rather the moral hazard-laden Indonesian Bank Restructuring Agency (IBRA).⁴⁷

This nationalization was so bizarre because it flew in the face of the central IMF, WB, and AID policy of rapid privatization. These agencies consistently demand implementation of an exhausted political model which is the centerpiece of neoclassical economics: a 19th century liberal democracy and weak state—apart from a military and police strong enough to deal with “radicals”, of course. This state is unable to intervene in the “free,” unregulated markets that are expected to be the engines of development. Concerns about the poor and powerless are often voiced by high-level IMF/WB/AID officials, but seldom included in actual donor policies or the activities of program officers in the trenches. These officers are preoccupied with quickly checking off another on a long list of domestic legal reforms, regardless of its viability. Globalization could be made less destructive of employment and of traditional livelihoods in particular, but the donors rarely think along these lines.⁴⁸ Perhaps needless

call this a “race to the bottom”—a competition to have only those regulations that favor capital—in hopes that this will prompt foreign capital inflows.

47. Paul Brietzke, *Securitisation and Bankruptcy in Indonesia: Theme and Variations*, in *BANKRUPTCY, LAW REFORM AND THE COMMERCIAL COURT* 61, 68-71 (Tim Lindsey ed., 2000).

48. Drozdiak, *supra* note 42 (quoting a Moroccan fruit grower—“We could double our sales almost overnight if we had access to free markets in Europe.” The broadest charge by globalization’s critics is that the system evolved to benefit rich countries and companies—at the expense of the poor); *id.* (stating that the cost of a western trade protectionism to developing countries is much greater in lost export opportunities than the amount of foreign aid they receive); FINOCCHIARO, *supra* note 6, at 158 (stating that laissez-faire is a form of state regulation by legislation and coercion; groups which do not ‘consent’ are “disciplined”); SEN, *supra* note 4, at 125-27 (stating that single remedies like “open markets”, “liberalization” or “get the prices right” won’t work without a complementary broadening of social opportunities—but broader approaches are “harder to sell”); *id.* at 185 (stating that the WB “discipline” of reform is prompted by a lack of disclosure by the unscrupulous—behavior which creates “unacceptable” risks for investors); *id.* at 240.

See Paul Brietzke, *New Wrinkles in Law & Economics*, 32 *VAL. U. L. REV.* 105, 125 (1997) (asserting that a neoclassical economics does not operate in developing countries or the ghettos of American cities; such equilibria as can be discovered usually perpetuate a stagnation); *id.* at 129 (the inability of neoclassical economists to identify a coherent and compelling “public interest” will exacerbate democratic crises); *id.* at 131 (describing the dehumanizing abstractions of neoclassical economics—a natural rate of unemployment, the advantages of a “balanced” budget, free trade, endowing welfare for the poor, and the downsizing and trickle-down distributions that are identified with efficiency—as opposed to an adequate number of jobs at a living wage and other recognitions of the dignity interest); Hooper, *supra* note 20, at 5 (asserting that a major drawback of liberalization is that governments in emerging economies interpret deregulation to mean no regulation); Jayasuriya, *supra* note 34, at 4 (stating that under globalizaton, the regulatory state moves toward an economic constitutionalism, which attempts to insulate key policy institutions from a political bargaining); Rothkopf, *supra* note 1 (“We must create stakeholders in globalization, in capitalism, and in democracy, by reforming local systems so that the disenfranchised have access to capital, education,

to say, predatory elites and multinational corporations (MNCs) are usually able to create market failures for their own profit in the new, fragmented, and thin markets⁴⁹ that the donors' policies help to create in transition countries. The IMF and WB constantly try to re-invent themselves with little to no results.⁵⁰

legal institutions, market efficiencies and other benefits"); Kevin Watkins, *Letter to the Editor*, THE ECONOMIST, Nov. 3, 2001, at 26 ("Developing countries need less free-market advice and more access to protected northern markets"). *The African Exception*, THE ECONOMIST, Mar. 30, 2001, at 68 (stating that Botswana, the poster child of development theory, is not a laissez faire regime; government spends a "hefty" 40% of GDP); *Aiding and Abetting*, THE ECONOMIST, Mar. 30, 2002, at 74 (citing William Easterly, there is no simple market solution; government must get things right, and especially not get things wrong); *Putting the Brakes On*, *supra* note 39 (asserting that while demanding that transition countries shrink their governments, OECD countries spend an average of 37% of GDP on government—compared to 25% in 1965).

49. See *infra* notes 162-67 and accompanying text.

50. "There will be much talk of new global financial architecture at next week's annual IMF and World Bank meetings. It will not lead to much." *Don't Wait Up*, THE ECONOMIST, Oct. 3, 1998, at 83. In 1996, WB President Wolfensohn announced a "comprehensive programme of renewal" that would be judged by "smiles on the faces of children. *Id.* But beyond a request for \$420 million to revamp WB administration, it is difficult to determine what this programme contained. *Time to Roll Out the New Model*, *supra* note 23. The IMF's Michel Comdessus similarly and constantly lobbies for more Special Drawing Rights (SDR) to be lent transition countries in financial crisis. *Fight for the Fund*, THE ECONOMIST, Oct. 8, 1994, at 8. See also Stanley Fisher, *Lessons From a Crisis*, THE ECONOMIST, Oct. 3, 1998, at 2).

WB Managing Director Ramphel felt it necessary in 2000 to tell WB employees to "rethink the old patterns"; the "social and economic sides must go together and listen to the people rather than the elites." John Burgess, *Giving the World Bank an Outsider's View*, WASH. POST, Sept. 27, 2000, at E1 (quoting Ramphel). The WB's 2000 Report calls for more emphasis on developing better government institutions, safety nets to protect the poor, and a gradual phasing-in of trade and investment policies. Steven Pearlstein, *World Bank Rethinks Poverty*, WASH. POST, Sept. 13, 2000, at E1. But few program changes resulted from these sensible recommendations. WB and IMF policies in Mozambique, including a limited debt relief, have had little effect. Jon Jeter, *When Cutting Debt Brings Little Relief*, WASH. POST, June 5, 2001, at A14. Cashew processors there are demanding \$15 million in compensation, in a ground-breaking attempt to force the WB to pay for its mistakes. Joseph Hanlon, *Can Mozambique Make the World Bank Pay For Its Mistakes?* (1997), <http://www.ige.org/afjn>.

More recently, the IMF and WB have been successfully recruited in the "war" against terrorism. With more money, Wolfensohn and IMF Managing Director Horst Kohler call the impact of September 11 "manageable." Paul Blustein, *World Bank, IMF Pledge Extra Aid to Poor Nations*, WASH. POST, Nov. 18, 2001, at A32; *Bribing Allies*, THE ECONOMIST, Sept. 29, 2001, at 71 (discussing the prompt rewarding of Pakistan, India, Jordan and Uzbekistan). But there is no agreement over how this should be done, not least between Bush's then-Treasury Secretary O'Neill and economics advisor Lindsey. Paul Blustein, *Overseas Bailouts May Split Bush's Team*, WASH. POST, Jan. 26, 2001, at E1.

But see Paul Blustein, *The Right Aid Formula This Time Around*, WASH. POST, Mar. 24, 2002, at A27 [hereinafter Blustein, *Aid Formula*] (quoting the IMF's Horst Kohler, "There is an unprecedented degree of agreement over what is required."). Bush apparently wants to convert many of the WB/IMF loans into grants, but European States oppose this. Paul Blustein, *U.S.-Europe Clash Stalls World Bank Aid*, WASH. POST, Jan. 16, 2002, at E1. He also promises U.S. contributions to the WB—"we fight against poverty because hope is an answer to terror"—provided countries hit certain "performance targets", especially the reduction of corruption. Karen DeYoung & Kevin Sullivan, *Bush Urges Nations to Use Aid as Tool Against Corruption*, WASH. POST, Mar. 23, 2001, at A14. (discussing how these "performance targets" would differ from IMF/WB "conditions" is unclear.). An

These donor policies would be amusing eccentricities, but for the fact that the reform consensus that is created in a transition country almost always forms around the legal reforms demanded by the international donors. This is because these donor demands are tied to the grants and “loans” that incumbent elites need to remain in power. Much democratization and development could thus be accomplished if the donors’ legal and other reforms were carefully planned, well thought-out, carefully adapted to local circumstances (local social fields),⁵¹ and monitored and evaluated during their implementation. However international donor reforms are usually the *antithesis* of such a process. These donors quickly pay their money and then move on to the next “crisis”, leaving a political, economic, social, and legal jumble in their wake. This process has the effect, if not the purpose, of strengthening incumbent domestic elites *and* foreign elites, in their struggles against “genuine” reformers.

A good illustration is the rapid, *ad hoc* privatizations of public enterprises that are demanded by international donors from transition countries. Indonesia’s IBRA is an aberration in this process.⁵² These privatizations result in economic chaos and the very cheap acquisition of valuable assets by the incumbent elites and the MNCs which will use these assets to build up market power and resist subsequent reforms. Much like the state and the incumbents it typically represents, MNCs and foreign investors are both the problem of and the solution to many aspects of development in roughly equal measure. But international donors leave domestic reformers with too few leverage points which can be used to minimize problems through negotiation. At the very least, international donors should pay attention to the policies and strategies of domestic

innovative IMF proposal, which would enable a country to declare “bankruptcy” and reorganize during a crisis, fell afoul of wrangling with Bush Administration officials and may be implemented in a form too attenuated to do much good. Paul Blustein, *IMF Crisis Plan Torpedoed*, WASH. POST, Apr. 3, 2002, at E1; *See generally Sovereign Bankruptcies*, THE ECONOMIST, Apr. 6, 2002. A WB plan, Education for All, is looking for donors among the rich countries, and especially a U.S. sponsorship. Blustein, *Global Education Plan Gains Backing*, WASH. POST, Apr. 22, 2002, at A15.

In the 1960s and 1970s, development meant alleviating capital shortages, so that domestic industries could be built up behind protective trade barriers. *Time to Roll Out the New Model*, *supra* note 23, at 71. This model frequently failed and, in the early 1980s, Reagan, Thatcher, and General Pinochet helped to propagate the IMF/WB “Washington Consensus:” “Fiscal prudence, which often amounts to harsh ‘structural adjustments’, and free trade (augmented by the WTO), privatisation and deregulation . . .” *Id.* *See* Hooper, *supra* note 20, at 2. The central idea is that emerging economies all suffer from the same problems and must adopt the same remedies that are grounded in a neoclassical economics. *Id.*; *see supra* note 48 and accompanying text.

51. *See infra* notes 59-73 and accompanying text.

52. *See supra* notes 46-48 and accompanying text.

reformers and empower and otherwise legitimate these efforts wherever possible. If democratic processes seem to be workable in a transition country, the IMF/WB should allow decisions to be taken at the national level in order to strengthen democracy and hold elites accountable, even if the policy outcomes are not exactly what the donors seek. In the donors' language, domestic reformers and the general public must feel that they "own" the usually painful reforms, for example structural adjustment, being carried out in their name.⁵³ If this does not happen, a 'donor' capitalism will simply succeed a "crony" or "state" capitalism, with few democratization or developmental benefits—especially for the poor and powerless.

The main point for the purpose of this Article is that domestic incumbents and the elites from international donors reinforce each other. They usually dislike each other's tactics, but a self-interest in "getting things done quickly" binds them together. This operates to the net disadvantage of domestic reformers, who are assigned many, frequently unpalatable, reform tasks attached to the "loans" and grants that international donors proffer. The resulting legal "reforms" are usually rushed, poor in quality, and unimplemented or unimplementable. The WB/IMF time frame for legal reforms is usually four to six months, while democratization and development often take decades. Yet these reforms "poison the well" for more sensible reforms later. For example, WB employees continue to make loans to countries they know to be corrupt. These employees fear losing their jobs, because their jobs are defined in

53. BELL, *supra* note 17, at 76-77 (stating that globalization makes debate, decision-making, and attaining a measure of equality even more difficult in transition countries); Blustein, *Aid Formula*, *supra* note 50 (quoting the Dutch Development Minister, "the only thing that does work is home-grown reforms", and international donors should look for these); FIELD & HIGLEY, *supra* note 9, at 98-99 (asserting that the "world systems" terms of trade favor the economically *and* militarily more efficient countries, plus a "semi-periphery" in Middle Eastern Oil States); *id.* at 115 (stating that the question is whether the international system will permit elites in transition countries the discretion to negotiate favorable settlements); *id.* at 123 (stating that because "outsiders" in developing countries perform few needed tasks, they lack leverage—especially as their interests are frequently opposed by the working classes in developed societies); *id.* at 128 (describing neglect of the naturalistic conclusions of Machiavelli and Hobbes, in favor of objective and obligatory universal values—such as "markets" and "liberal democracy", I would argue); Fred Thompson, *Public Economics and Public Administration* 12, 14 (2000), at www.willamette.edu/~fthompso/ECON+PA.html (last visited Oct. 21, 2003) (stating that privatization advocates offer a simplistic and rarely-applicable choice "between rule-governed, often over-regulated monopolistic public bureaucracy and freely-competing private firms."); Weissman, *supra* note 40 (describing the forced privatization of things that usually remain in the public section in the U.S., water and sanitation services for example, despite evidence that this leads to higher charges, decreased access for the poor, and the spread of disease). *But see Privatisation*, THE ECONOMIST, July 14, 2001, at 97 (asserting that total world proceeds from privatisation have been falling since about 1996). WALSH, *supra* note 5, at 12, 142.

terms of making loans. Despite the IMF/WB's litany of transparency, public participation, accountability, and predictability, the IMF and WB themselves are among the world's poorest performers. If Amartya Sen and others are right firmly to link democratization and development, we would have to count these international institutions as underdeveloped, their regression analyses composed on laptops notwithstanding.⁵⁴ Jessie Jackson says that "reform begins at home,"⁵⁵ but this is too complex a topic to treat here.⁵⁶

III. SOME SOLUTIONS

Many of us are prisoners of our experiences, and mine are from, Asia recently, Eastern Europe a few years ago, and Africa many years ago. These experiences convince me that the narrative just concluded is an accurate, if too general, rather than an excessively pessimistic assessment. Even if the reader disagrees, she will acknowledge some serious problems

54. TAMANAHA, JURISPRUDENCE, *supra* note 21 (stating that an "international intelligensia", "priests of the law" like Ulpian's jurists, are suspect when they are also a social and economic elite, and any such "triumph of the professional" is resented by citizens); TAMANAHA, SOCIO-LEGAL, *supra* note 21, at 250 (stating that transplanted laws, especially in developing countries, "keep rulers in power and dissenters quiet, facilitate commerce, and give the appearance of modernity," rather than contributing to the social order); Bell, *supra* note 17, at 51; Blustein, *Tighter Hand*, *supra* note 18, at A1 (stating that IMF and WB loans, "though financially beneficial in the short run to the governments receiving them, have a dismal record of boosting growth and living standards in the long run."); Hooper, *supra* note 20, at 1 (stating that Washington Consensus type policies promote "the poor sequencing of financial and economic liberalization", little that is of use in accounting and corporate governance, and a capital market volatility); Liu & Yang, *supra* note 9, at 4 (asserting that the patronage of domestic incumbents is necessary to protect larger undertakings—including those of the WB); Pearlstein, *New Politics*, *supra* note 35 (discussing Sylvia Ostry's new "globeratti" in trade matters); Wade, *Winners and Losers*, *supra* note 15, at 74 (stating that because "elites in developing countries, like their counterparts in the rich world, are content to believe either that world inequality is falling, or that inequality is good because it is the source of incentives," most of the organized opposition to globalization comes from outsiders in developed countries). *But see* Harding, *supra* note 24, at 52 ("[T]he international community seeks to compel transplantation of law and reform of legal institutions, primarily to secure the commercial and property rights of foreign investors."). This may mean that there is little intention to affect the domestic legal systems of transition countries, but I argue that such "reforms" create the incoherence and inconsistency of the "jumble" described in the text.

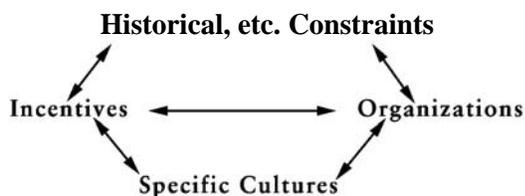
55. *See generally* Rev. Jessie Jackson, *Measuring Human Rights & Development by One Yardstick*, 15 CAL. W. INT'L. L.J. 453 (1985).

56. Many minor reforms of multilateral donors have recently been proposed. *See, e.g., Huff, Puff and Pay*, THE ECONOMIST, May 5, 2001, at 70; *supra* note 50. But the dependence and unaddressed grievances that have accumulated in poor countries since colonial times will require concessions that go far beyond those based on the rich world's humanitarian concerns. If these concessions do not occur, political instabilities and flows of migrants based on burgeoning inequalities will harm well-being and stability in the rich world. FIELD & HIGLEY, *supra* note 9, at 99, 111; Wade, *Winners and Losers*, *supra* note 15, at 74. On the effect of underdeveloped institutions in the United States, see Paul Brietzke, *Urban Development & Human Development*, 25 IND. L. REV. 741 (1992).

in the transition process and have an interest in thinking through solutions. Five solutions are sketched below; more are clearly possible and probably necessary.

A. *A Model of Law Reform, With Business Law Examples*⁵⁷

The first questions to consider are *whether* legal reforms can promote developmental and democratizing behaviors and, if so, *how* this can be done?⁵⁸ Law reform will add another layer of law and legal culture, rather than result in a monolithic progression from one conception of law to another. Law transplanted from another country will work only if care is taken. Africa and Southeast Asia have been remodeling their law in this fashion for hundreds of years, although the purposes and effects of the transplant will change when it is exposed to “local knowledge.”⁵⁹ Imagine a law reform “field,” similar to a social science “field theory,”⁶⁰ that looks like this:



What this diagram says is that everything is interrelated: effective law reform mainly involves getting the incentives and organizations right⁶¹

57. See generally Paul H. Brietzke, *Governance & Companies Law in Indonesia*, 2 AUSTL. J. OF ASIAN L. 193, 194-98 (2000). All models use different simplifying assumptions in an attempt to be clear and understandable. The relevant question is how useful is a model for our particular purposes and does it get us where we want to go? Other, more economics-informed models are cost-benefit analyses, Pareto or Wealth-Maximizing analyses, and transaction cost analyses. These can be and are selectively incorporated, as circumstances require.

58. See *infra* notes 146-57 and accompanying text (describing the changing of the “legal terms of trade” among economic “sectors”). A theory is needed about how law can change individual behavior and institutions and how these variables interact. This contrasts with the conventional view of law, as promoting stability and thus retarding change after the fact of basic social arrangements.

59. Harding, *supra* note 24, at 44-45.

60. See KURT LEWIN, *FIELD THEORY IN SOCIAL SCIENCE: SELECT THEORETICAL PAPERS* 1 (1951).

61. Anna Schwartz, *Review*, KEY REP. Fall 2001, at 13 (reviewing WILLIAM EASTERLY, *THE ELUSIVE QUEST FOR GROWTH: THE ECONOMISTS’ ADVENTURES AND MISADVENTURES IN THE TROPICS* (2001) (“[g]etting incentives right for governments, donors, and people isn’t easy, the author notes, but . . . four decades of experience have taught economists what worked and what didn’t”); Yilmaz, *supra* note 16, at 1 (quoting Alberto Alesina) “Once the political incentives and constraints are correctly taken into account, policies that appear to be mistakes are perfectly rational responses to distorted and imperfect political incentives.” *Aiding & Abetting*, *supra* note 48 (reviewing Easterly,

after taking account of the specific cultures and the past constraints that shaped the existing legal system. There is a historical “path dependence” to law, and the other “givens” of reform include ethnic composition, patterns of national wealth distribution, and size of population and territory.⁶² While people live in a society rather than an economy, business incentives should be to make enterprise-favoring decisions quickly, to take calculated risks accordingly, to enable each participant’s protection of her own interests—without the excessive veto powers that lead to organizational “gridlock,” to build a valuable enterprise reputation for honesty and fair dealing, and to obey the law creatively and otherwise try to escape the attention of possibly corrupt and incompetent bureaucrats and judges.⁶³ The relevant specific cultures are those of businesspeople from different countries, regions, ethnic groups, and religions; and those of the politicians, bureaucrats, police, lawyers, accountants, and others who interact with businesspeople.

These cultures, and thus preferences in business and law, will differ significantly among, for example, a WB bureaucrat (an “internationalist,” who may nonetheless retain an ethnocentric approach to law and business), a politician with economic nationalist leanings, a Muslim Batak businessperson (in Indonesia), and a lawyer whose fondness for archaic, colonial-era laws is reinforced by the rent-seeking opportunities offered to lawyers who understand such arcane matters. The same law reform will not suit all of these people, so choices must be made about whose culture(s) to favor, and how. If the choice turns on who will pay the most for the reform,⁶⁴ the initial winner will be the WB bureaucrat—who commands the “loans” that the regime needs to survive. However, it will turn out that his reform cannot be implemented once his “loans” are

supra) (stating that openness to trade, investment and technology matter, but “incentives matter most”); *African Exception*, *supra* note 48 (stating that Botswana’s success shows “that poor countries must try to align the incentives of the elite with those of the masses”). See TAMANAHA, JURISPRUDENCE, *supra* note 21, at 62-63 (stating that successful reforms turn on a frequently self-interested consent, and also on culture, social obligations, and institutions).

A frequent complaint in transition countries is that they have good laws, that are badly implemented. This contradiction in terms reflects poor incentives and poorly-designed organizations which thus rely too heavily on frequently corrupt and incompetent political, bureaucratic, and judicial enforcers, to secure the public interest. The remedy is to know more about how and why individuals behave and organizations function in a particular country.

62. See Atik, *supra* note 1, at 454.

63. See Bernard Black & Reiner Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1914-16, 1940 (1996).

64. See Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (stating that there are markets for legal outcomes, frequently auction-markets, just as there are markets for other goods and services.).

dispersed, because it does not serve the needs and desires of other, more relevant “players.” Good political incentives are those which align politicians’ and bureaucrats’ self-interests with the promotion of democratization and development, and which minimize the squabbling among elites that wastes scarce resources.⁶⁵

Both the business and public laws of most transition countries are over-criminalized, and this is a mistake. Trivial misbehaviors should not be made penal matters, because selective non-enforcement is the order of the day. Elites are almost always able to escape punishment, and non-elites view such laws as invitations to bribe the relevant enforcement officials. Criminalization should follow only from a clear injury to the public interest. Such a reform would make the supervision of criminal enforcement more manageable.

On the “organizations” side of the reform “equation” above, the key design choices are what, where, and who to control, before or after the subject acts.⁶⁶ Such choices require a lighter touch than is common in transition countries where there is much over-regulation or rather an over-determination by law⁶⁷ that staunches incentives without aligning them with democratization and development and keeps the parties from customizing their transactions through contracts. The economics of information offers design guidance, because maximizing the use-value of information flows (a scarce and valuable resource) within and around an organization is conducive to efficiency, and because requiring an easily-

65. Paul H. Brietzke & Thomas A. Timberg, *An Economic Reform Agenda for Indonesia*, 31 L. & POL’Y IN INT. BUS. 1, 16-18 (1999). See Acemoglu & Robinson, *supra* note 21, at 1 (“Government policies and institutions shape economic incentives that have a first-order impact on economic development”—typically, discouraging investment and promoting economic backwardness because this furthers the interests of incumbent elites.); Yilmaz, *supra* note 16, at 4 (stating that in many developing countries, “the social, legal, and institutional environment lacks the control mechanisms that will prevent political elites from transforming themselves into an interest group” which will engage in wasteful “wars of attrition” with other groups); See *infra* notes 92-130 and accompanying text (discussing constitutional and administrative law reforms).

66. Thompson, *supra* note 53, at 23; See Davis & Trebilcock, *supra* note 3, at 21 (“the focus of attention” among development theorists “has recently shifted to institutions, which Douglas North . . . defines as ‘the rules of the game of a society.’”); Robert Seidelsky, *The World on a String*, N.Y. REV. BKS 10, 13 (Mar. 8, 2001) (reviewing GEORGE SOROS, *OPEN SOCIETY* (2001) (“a tragic sense . . . made the postwar German and Austrian liberals (including Friedrich Hayek) devote so much attention to the institutional underpinnings of a free market order.”); Thompson, *supra* note 53, at 22 (avoid inflexible and incomprehensible control rules, like multipage procurement regulations for many American soldiers’ supplies); *Roll Out*, *supra* note 23 (“development economics, mark three, has rediscovered that institutions matter”; even a “free” market economy “requires a complex web of effective institutions, from basic property rights, and well-run legal systems to effective and uncorrupt bureaucracies.”).

67. See *infra* notes 73-75 and accompanying text.

enforceable disclosure to the *relevant* actors promotes transparency and participation that is a part of the WB litany.⁶⁸ In contrast, most transition countries require that numerous reports be filed with many governmental agencies, each in a different format. Officials merely file these so that rats can chew them. The public has little meaningful access to such files.

Organizational design must strike the balance appropriate to the particular institution between independence and accountability, predictability and flexibility, transparency and confidentiality, and efficiency and a due process not defined in ethnocentrically American ways. Criteria and methods must be tailored to organizational aims and their efficient pursuit.⁶⁹ As Oliver Williamson puts it, “align transactions (which differ in their attributes) with governance structures (the costs and competences of which differ) in a discriminating (mainly transaction cost economizing) way.”⁷⁰ Because organizations of different types interact regularly, they cannot be understood and designed in isolation from each other. Indeed, this is a major justification for the careful planning of legal reforms⁷¹. Many organizations take time to develop, and transition governments must nurture them without interfering in their operations.

Field theory also shows why successful law reform is much more complex than the diagram above suggests. The elements in this diagram are frequently hidden by the thick, almost-primordial “soup” (the field) that the diagram swims in. Some of the ingredients of this ever-changing soup can be described for transition countries: the interplay of a general culture and various ideologies, which often encourages opportunistic behavior and discourages certain profit-making activities in our business example; the perceived business conditions and opportunities (in markets

68. See *supra* note 6 and accompanying text.

69. Michael Trebilcock, antitrust presentation, heard by the author at the Canadian Law & Economic’s Assn. Conf., Toronto, Oct. 2001. *But see* J. WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAWS OF THE UNITED STATES 1780-1970*, 10-11 (1970) (“Corporation Law has always been an instrument of wants and energies derived from sources outside the law. However, means can materially affect the context of ends to which they are put . . .”).

70. NICHOLAS MERCURO & STEVEN MEDEMA, *ECONOMICS & THE LAW: FROM POSNER TO POST-MODERNISM* 55 (1997) (quoting Williamson, “Organize transactions so as to economize an bounded rationality while simultaneously safeguarding them against the hazards of opportunism.”). UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* 239 (1998) (stating that different degrees of resistance to legal change impose different levels of transaction costs that retard “the incremental evolution of the legal system toward efficiency.”); Thompson, *supra* note 53, at 26 (citing Williamson, in the privatization of public enterprises, the choice of institutional design should “depend upon minimizing the sum of production costs and transaction costs”); *id.* at 24 (discussed in *supra* note 53).

71. Richard L. Abel, *Law as Lag: Inertia as a Social Theory of Law*, 80 MICH. L. REV. 785, 808 (1982) (review of ALAN WATSON, *SOCIAL AND LEGAL CHANGE* (1977)). See also *infra* notes 143-67 and accompanying text (law reform planning).

that are frequently fragile, fragmented, and thin)⁷² which prompt a disobedience toward formal legal rules; the corruption that flows from this disobedience and leads to the selective non-enforcement of laws; and the political will to reform (or not) that is a compound of leadership qualities and of how these qualities relate to the rest of the soup.

In other words, it is *relatively* easy to reform a law, and difficult to then implement it effectively—to get through the soup. The constraints in the diagram above are thus perpetuated. With few exceptions, bodies of law in transition countries consist of under-categorized and over-determined rules.⁷³ Because legal change has lagged far behind political, economic, and social changes over time in transition countries, the categories of status permitted by most laws are insufficiently rich to facilitate the many “niche” activities that are entry points into a complex modern economy and society. This is an example of under-categorization.

Another colonial, post-colonial, and communist party-state desire that is the source of much bureaucratic power and many bribe-opportunities is the passion to regulate everything in detail. Thus, relatively little “customizing” of enterprises or transactions is permitted by contracts among the relevant parties. Such legal over-determination echoes the old joke about Prussia: everything not forbidden is mandatory. Without more legal categories that pay attention to local contexts, the deregulation popular among multilateral donors⁷⁴ will have only modest effects on incentives, organizations, and a genuine freedom of choice. A greater number of side-effects that tend to favor incumbent elites will also be evident. For example, the Indonesian *Crismon* (the Economic Crisis that began in 1998) was largely caused by the deregulation demanded by multilateral donors: the deregulation of the financial sector without accompanying improvements in supervision and without a reform of the real (production) sector, which proceeded to misuse bank loans. Reform of the real sector is the goal of enterprise law reforms.⁷⁵

Returning to the “incentives” and “organizations” part of the above diagram, getting them right in business law means designing them so that business people, or any other “target” of a law, will pursue the public interest as often as possible, while avidly pursuing their own self-interest at the same time. Ideally, good incentives will suggest and contribute to good organizations, which provide better incentives in turn. This kind of

72. See *infra* notes 162-67 and accompanying text.

73. Brietzke & Timberg, *supra* note 65, at 16-18.

74. *Id.*; see *supra* notes 48-49 and accompanying text.

75. See *infra* notes 76, 87-91 and accompanying text.

“virtuous cycle” may sound trite until you compare the “vicious cycle” of bad incentives and organizations interacting under the under-categorized and over-determined business laws seen in almost all transition countries. Enterprise laws can be reformed as a package, so as to create incentives and organizations which are appropriate to successive stages of business growth—informal (near-subsistence) producers, individual proprietorships, partnerships, small companies, companies selling shares on a stock market, multinational corporations (MNCs), the state-owned enterprises that will remain despite (the efforts of the IMF/WB), and mixed enterprises consisting of companies, MNCs, and/or state enterprises. Development can then be seen in legal terms as taking the first, proprietorship step and then (*pace* Mao) “a long march through the institutions”, as a business hopefully adjusts to market changes and outgrows the incentives and organizations appropriate to simpler organizations and smaller scales of production.⁷⁶ All of this is overlaid by a bureaucratic regulation.⁷⁷

These and other law reform proposals are criticized by some analysts, who accord primacy to certain cultural explanations of law.⁷⁸ Their

76. See Clark, *supra* note 5, at 44 (quoting Goren Hyden, development requires that the “economy of affection”—pre-industrial, non-rational—be overcome); PISTOR & WELLONS, *supra* note 9, at 4-5 (creating a useful legal model of four “ideal types”, based on allocative factors—whether by the state or markets—and procedural factors—whether rule-based or discretionary); *id.* at 5 (stating that in state-led development strategies, property rights are marginalized and corporate law plays only a minor role); *id.* at 7-8 (“[C]hanges in the structure of the economy led to changes in the demand for law.”); PUTNAM, POLITICAL ELITES, *supra* note 10, at 122 (stating that the structure of capitalism is an overlapping interdependence among enterprise and public bureaucratic organizations); SEN, *supra* note 4, at 142 (“Our opportunities and prospects depend crucially on what institutions exist and how they function.”); *infra* notes 115-30 and accompanying text (bureaucratic reforms); *infra* notes 143-167 and accompanying text (law reform planning).

77. See *infra* notes 117, 120-23, 125, 164-67 and accompanying text.

78. See, e.g., TAMANAHA, JURISPRUDENCE, *supra* note 21, at 112-14 (stating that anthropologists see a mismatch between colonial laws and local customs, which makes it impractical and inefficient to extend Western laws to the entire population); *id.* at 114 (asserting that attempts to codify customary laws for native courts failed); Paul, *supra* note 1, at 2 (“We often frame the debate over global governance as a conflict between some set of legal norms, like free trade or human rights, and something we posit as national ‘culture’ and which serves as a strategy for opposing globalization.”). Culture is seen as pre-political and the state is seen as the means of protecting culture from the anxiety produced by outside influences. *Id.* at 4, 7. (stating that the same can be said about opposing democratization and development because of the adverse cultural effects of domestic legal reforms.). But it is by no means clear whether certain behaviors are authentically “cultural”, in ways that trump new legal norms. *Id.* at 3. Human rights advocates, for example, ignore these arguments of a cultural relativism by not acknowledging the contested practices as cultural. In any event, our modern understanding of culture reflects the instability of that ill-defined concept. *Id.* at 4. It originally served as a justification for colonialism—in exchange for territory and wealth, the “uncivilized” got European culture. *Id.* at 5. See *Is Globalization Doomed?*, *supra* note 35 (stating that globalization hasn’t “masked” the United States, France, Italy, Germany, Sweden and Japan into homogenous cultural putty”). *But see* Kaplan, *supra* note 1, at 82 (quoting Samuel Huntington, “In the emerging world of

argument is that legal reforms will inevitably fail if local cultures are undemocratic, uncompetitive, and/or inhospitable to the entrepreneurial spirit.⁷⁹ The latter argument ignores the fact that economically successful incumbent elites bear a strong resemblance to the Robber Barons of late nineteenth-century America. These cultural views typically exaggerate the extent to which particular values are deeply embedded in local cultures. In reality, many of these values are mere adaptations to an autocratic and subsistence lifestyle that erode quickly if economic and participatory opportunities materialize during the transition. In other words, cultural differences flatten out and often give way to new opportunities to earn money or to pursue democratic goals over incumbent objections.

If the “strong culture” explanations were correct, it would be impossible to reform family laws in order to enhance women’s and children’s rights, because the family involves much in the way of religious, expressive, and affective values and behavior. But many countries such as Tunisia and parts of Southeast Asia have been successful in that area, although some studies still show that women are poorly informed about their rights and reluctant to enforce them in formal courts. It is precisely because appropriate legal reforms are not rooted in tradition that makes them more open to self-interested choices, in a more than incremental fashion. Such choices are often driven by transactions and other relations with strangers, perhaps from abroad and often in an attempt to reduce uncertainty in an atmosphere of disorienting changes. Some will take refuge from such changes in the traditional ways of doing things, but many, perhaps most, will adapt to a freer cultural “market.” For example, like Japan and China, they may adopt Western technology and some

ethnic conflict and civilizational clash, Western belief in the universality of Western culture suffers from three problems: it is false, it is immoral, and it is dangerous.”).

79. See, e.g., Clark, *supra* note 5, at 55 (“Traditional Islam, like medieval Christianity, usually carried with it the largely anti-democratic values of paternalism, deference to authority and reservation of political rights to believers.”); PISTOR & WELLONS, *supra* note 9, at 33 (stating that “Asians are united” in a religious view which contrasts an idealized authority with a primitive power that may cause its breakdown, and this leads to a cultural emphasis on preserving order); PUTNAM, SOCIO-LEGAL, *supra* note 10, at 86 (stating that Morocco, Algeria and Iran are characterized by a politics of conspiracy, mutual suspicion, cynicism, and distrust of all competitors. This leads to a defensive use of power, high political tension, stalemate, and a lack of initiative); *id.* (stating that in Italy and Austria, enmities are narrowly focused and the emphasis is on a morality play between “us” and “them”).

While the public in a transition country may not understand or even like many democratic practices, they may be drawn to a democracy a quasi-democracy by their disdain for the corrupt autocracy it seemingly replaces. See Clark, *supra* note 5, at 53. Political authority turns on social ethics, which is only partly determined by culture. See SEN, *supra* note 4, at 228-30 (discussing Kant’s imperfect obligations in part); *id.* at 242 (stating that analysts must strike a balance between ignoring cultural uniqueness and pursuing a ubiquitous cultural insularity and self-sufficiency).

Western legal methods, but reject many Western values. Legal transplants from abroad have succeeded in Southeast Asia for hundreds of years, especially when the laws concern business.⁸⁰ In this respect, Brian Tamanaha's "typology" is instructive.⁸¹

Even if a cultural opposition were to defeat certain law reforms, they may still have a significant "educative" effect. Reforms will reinforce the behavior of their supporters and opponents, but these groups typically account for small percentages of the general public. From this mostly uncommitted majority, the law reforms will elicit marginal, self-interested changes in behavior that will have large cumulative effects over time. Consider the slow and dialectical progress toward democracy and development in Iran, for example.⁸² Nonetheless, reformers should carefully adapt and adjust law reforms to maximize their effects on

80. MATTEI, *supra* note 70, at 237; TAMANAHA, JURISPRUDENCE, *supra* note 21, at 122; Brietzke, *Wrinkles*, *supra* note 48, at 125; Davis & Trebilcock, *supra* note 3, at 30 (citing Charrod and Armstrong); Harding, *supra* note 24, at 41, 53; Kimmerling *supra* note 18, at 3 (discussing Jurgen Habermas' "ideas"). See MATTEI, *supra* note 70, at xiii ("at zero transaction costs, all countries would have the same efficient laws; diversity results from the sets of different and transaction costs introduced by legal tradition and legal ideology"); TAMANAHA, JURISPRUDENCE, *supra* note 21, at 127 (stating that as a result of overseas legal training a "worldwide community" of legal discourse is emerging); Hooper, *supra* note 20, at 8 (stating that legal or cultural impediments to financial development are not as serious as the recent literature suggests).

81. See TAMANAHA, JURISPRUDENCE, *supra* note 21, at 213-22 ("typology of sources of social order"). Tamanaha gives six categories in "presumptively descending order of contribution to the coordination of behavior", but admits a blurring of these categories in the real world: (1) elements that operate beneath the level of awareness (a) shared habits, practices, and an unthinking rule following; and (b) shared language, ideas, concepts and beliefs; (2) shared norms and roles that lead to reciprocal expectations and the sense of "ought" that leads to guilt or social disapproval when violated; (3) self-interested, instrumental behavior; (4) consent; (5) the love, altruism, sympathy, group identification, and social instinct stressed in ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (1759); and (6) coercion or the threat of it. TAMANAHA, JURISPRUDENCE, *supra* note 21, at 213-22. Note how low category 3 ranks, yet it is the main category reformers can manipulate in the short run—especially by institutionalizing it in various organizations appealing to a self-interest. If implemented in more than a cursory fashion, reforms will have significant effects on the first two categories in the medium and long term. Marc Galanter's study of India offers a complex picture of society adapting to law and law adapting to society in this fashion. *Id.* at 110. The role of custom (category two) is small because it is based on what is fair rather than legal rules, and it is thus unclear enough to permit many choices—including those offered by legal reforms. *Id.* at 108. We should not exaggerate the certainty category 2 offers or the conformity it produces. It is, rather, negotiable and amenable to a strategic use by the parties. *Id.* at 217. Consent (category 4) is the basis for the contracts that customize transactions and other relations, generating reciprocal expectations and trust in the process. Category 5 is the means by which social behavior becomes "natural." *Id.* at 219. It plays a greater role in law reform than economists expect. Coercion (category six), like over-criminalization, is much less effective than is commonly believed. Even the most repressive regime can do little where disobedience is widespread, especially if it is rather passive; voluntariness is the order of the day.

82. See John W. Anderson, *Iranian Village Shapes a Model of Democracy*, WASH. POST, Sept. 2, 2001, at A1 (describing grass-roots democracy in Lazaar, while religious conservatives and reformist politicians battle in Tehran—in a combination authoritarian theocracy/liberal democracy).

behavior under local cultures. Law cannot be transplanted *intact* from another country, even though this is the cheapest law reform in the short run.

Rather than traditional cultures, major reasons for a resistance to reform are the elitist behaviors discussed earlier⁸³ and the insufficient attention law pays to the economics of business, now and in the past.⁸⁴ I once criticized a draft of what became the Indonesian Fiduciary Transfer (secured transactions) Law because it failed to reduce creditor risks and transaction costs as much as is possible under “international-standard” legal regimes. Indonesian debtors will thus pay higher interest rates and have access to fewer loans I argued, in textbook economics fashion. “So what: if banks don’t want to lend money in Indonesia, they don’t have to,” came the response from an influential leader of the Law’s Drafting Team—a talented and sensitive Indonesian lawyer trained in the Dutch tradition. This kind of approach to law and its possibilities is a prime constraint on reform.

As is fashionable, I will draw some analogies between good (public-sector) governance⁸⁵ and enterprise (private-sector) governance. These come together in good citizenship, in the checks and balances running from a stronger civil society to government and to business alike, in a clear demarcation of what is “public” and what is private”, and in a properly-defined “freedom of enterprise” essential to a citizen’s democratic autonomy. This autonomy consists of the right to do it yourself, rather than wait for a paternalistic state to perhaps do it for you.⁸⁶ But a Robinson Crusoe clearly has no need for good governance or, more specifically, a transparent, participatory, predictable and accountable parliament, bureaucracy, and judiciary. Similarly, a *kaki lima* owner (vendor from a pushcart) in Indonesia, who attempts to move beyond

83. See *supra* notes 10-23, 27-33 and accompanying text.

84. MATTEI, *supra* note 70, at 77-78 (stating that while “economists speak the same language all over the world”, many lawyers suffer from a “cultural parochialism”—they often attend to political peculiarities but rarely to economics).

85. See *infra* notes 92-130 and accompanying text (political, constitutional and bureaucratic reforms).

86. See Anderson & Yao, *supra* note 42. Countries are penalized heavier and faster for bad economic governance more for capital flight than for bad political governance—by capital flight. Kathleen Day, *Trades by Enron Recall Earlier Crisis Over Risky Investments*, WASH. POST, Jan. 11, 2002, at E2 (reporting for Long-Term Capital Management and Enron, “[t]here was little market transparency . . . so the market had to take their word on the value of derivatives”, and there was no legal requirement that they “hold sufficient cash as a cushion against possible losses”); Hooper, *supra* note 20, at 7 (quoting Paul Krugman); Thompson, *supra* note 53, at 22 (stating that the categories of problems mentioned in public sector governance are also present in corporate governance— asymmetric information, agency, moral hazard, and adverse selection).

subsistence by supplying all of her own labor and capital, has little need of an enterprise governance.

While it has never lacked for critics, the Berle and Means thesis⁸⁷ explains this phenomenon. It is the separation of ownership and control that makes the rules of enterprise as well as public-sector governance necessary. Just like a citizen in a democracy, who votes or abstains from doing so, a shareholder ‘owns’ the corporation in theory but rarely controls it in practice. Our *kaki lima* owner experiences no such separation; she easily holds herself accountable because she experiences none of the “agency problems” that preoccupy economists, political scientists, and lawyers. If she decides not to work—to implement the economists’ “leisure preference” that constitutes a “shirking” by employees or managers in more complex organizations—she immediately feels the consequence of a reduced income. Unlike managers or controlling shareholders in more complex enterprises, she cannot engage in “rent-seeking behavior:” any rents come as direct deductions from her income.⁸⁸ But she likely experiences some or many deductions from income because she has to pay off rent-seekers who operate from outside of her enterprise: the police, bureaucratic licensers, and the like. If she sells *kreteks* (clove cigarettes) and the manufacturers have enough market power to keep the price at higher than competitive levels, she will have to pay rents to these manufacturers as well.

Why, then, does a separation of ownership and control occur, exposing the owner to a costly shirking and rent-seeking behavior—in politics as well as in business? It is because owners seek an expanded scale of operations, in a necessarily more complex organization with additional employees and sources of capital. The more complex the enterprise, the higher the transaction costs of curbing behavior which is pathological from the citizens’/owners’/organizations’ perspective. The means of reducing these costs, and thus promoting efficiency by reducing shirking and rent-seeking, are found in sensible rules of (private and public) governance, as well as in sensible organizational designs: typically, the (costly) hierarchies that exist to monitor and sanction the behavior of would-be shirkers and rent-seekers. Such designs in turn give rise to two other problems, which law reformers should also deal with creatively:

87. ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

88. A “rent” is that part of a reward paid to a resource which exceeds the value of its *economic* productivity: a bribe paid to a politician that reflects his perceived *political* productivity, for example.

flow-of-information problems within and around the organization,⁸⁹ and the issue first raised by lawyers in ancient Rome—“Who monitors the monitors?” For small businesses with few separation of ownership from control problems, like *kaki lima* owners, the key issue becomes “formalizing the informals” and registering them (as proprietorships) to make them more immune to demands for bribes from police, while keeping other transaction costs as low as possible.

Legal reforms should also meet high standards of coherence and consistency, to counter the effects of the fragmented and confusing laws that are seen in most transition countries. This colonial, post-colonial, and communist party-state heritage enables incumbent elites to benefit by manipulating the law, thus creating even more confusion. From the standpoint of creating incentives in transition countries, laws typically contain too few “carrots” and too many “sticks” or rather excessively-criminalized rules which are rarely applied to incumbents. A richer “menu” of better-enforced incentives and disincentives would encourage some behaviors, tolerate but not encourage some, discourage but not prohibit some, and prohibit only those behaviors that create clear and direct threats to the public interest. Among other things, such gradations are more respectful of a democratizing citizen autonomy. Where there is corruption and incompetence among bureaucrats and judges, these incentives should be directly enforceable by those who benefit from them, wherever possible, like shareholders and creditors. This can be accomplished through the creative use of enterprise and contract laws, if the wider legal system permits this it is not over-determined by too many bureaucratic regulations⁹⁰

In sum, reformers will have to decide which motives and social structures are important enough, from the standpoint of democratization and development, to be designed into legal incentives and organizations.

89. See MATTEI, *supra* note 70, at 119-20 (stating that rules that increase simplicity often reduce transaction costs, but they may not be the winners in a law reform “competition”, especially in light of the path dependence of law—matters are “too complex” for a legal evolution in the direction of efficiency.); SIMON, *supra* note 9, at 508-09 (stating that theories of the business firm—Baumol’s maximize sales subject to a minimum profit constraint, Maris’ goal of growth, Leibenstein’s *x*-inefficiency, and Cyert and DeGroot’s adaptive learning—all depart from the neoclassic economics assumptions of rationality and short-term profit maximization, to adopt “satisficing” targets); Hooper, *supra* note 20, at 7 (stating that “bank-based systems of corporate governance are good at reducing information asymmetries,” because banks are good at evaluating huge amounts of accounting data); *Id.* (stating that the moral hazard problem during the Southeast Asian crises of the late 1990s was fueled by a lack of accounting disclosure—due to a lack of a legal and regulatory underpinning.).

90. Black & Kraakman, *supra* note 63, at 1915-16. See *supra* notes 73-78 and accompanying text; *infra* notes 115-30 and accompanying text.

As citizen interactions grow more complex and interdependent, so should the concepts describing them in law. If there is insufficient pressure for law reform now, it will grow as more rapid changes in interactions and power relations throw the unreformed law increasingly out of phase with the real world. In part through the fixity of the mundane that is conducive to a stable social order, law will grow more autonomous and professional to better insulate it from elite meddling and from changes in personnel and process. Ascription and an Asian-style rule of relationships (rather than a rule of law) still play a role in Western societies, as they will in transition countries. However, the transition countries should see a slow but pronounced shift from status-based to contract-based and institutionalized relations, with more of an emphasis on rights and rewards than on duties and punishments, and the kind of clearer distinctions between law and religion and between what is public and private which promote a citizen autonomy.⁹¹

*B. Empowering Reformers; 'Constitutional' Dimensions*⁹²

Once we have some ideas about the nature and means of reforms, what is the next step? The Whitehall/Quai D'Orsay/Kremlin/American New Deal approach to reform still has some advocates in transition countries: good reformers, who are clever and well-informed, can be given wide political and legal discretion free from accountability⁹³ because they will zealously promote the public or proletarian interest. The wreckage caused by this antithesis of the Rule of Law is visible worldwide and in secret Swiss bank accounts. Kenyatta's and Moi's Kenya, Nkrumah's Ghana, and Mugabe's Zimbabwe are examples of this phenomenon from recent African history. Even so, reformers must seek a consensus⁹⁴ and be

91. See MICHAEL BARKAN, LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY 153 (1968); MATTEI, *supra* note 70, at 285; TAMANAHA, JURISPRUDENCE, *supra* note 21, at xvi (citing Joseph Raz); *id.* at 118-20, 222-24.

92. See generally Paul H. Brietzke, *The "Seamy Underside" of Constitutional Law*, 8 LOY. L.A. INT. & COMP. L.J. 1 (1985) [hereinafter Brieteke, *Seamy Underside*].

93. See *infra* notes 103-06 and accompanying text. Coherence means more than it does in the "dogmatic reasoning" of civil law judges, mechanically insuring that the parts fit with the whole. See MATTEI, *supra* note 70, at 82.

Such broad discretion stems from the desire to promote decisive changes, where law is seen as a means of promoting stability, forestalling change in an established social order. A more viable view is a change-oriented approach to law that promotes transparency, public participation, accountability, and predictability along the way. See *supra* notes 6, 59-72 and accompanying text.

94. "Consensus" is used here in the sense of abandoning previously-intransient positions, in order to augment your power through coalitions and/or to avoid conflict. FIELD & HIGLEY, *supra* note 9, at 120-21.

empowered to do “battle” against incumbents or predators, in what is usually a protracted, agency-by-agency, and sector-by-sector struggle; sometimes-rapid advances will often be followed by some or much (dialectical) backsliding.

Scarce reform resources must be used creatively to establish political incentives and organizations that promote democratization and development. Incumbent elites will grab as many of these resources as possible in order to oppose reforms: the legitimacy conferred on a compelling reform plan that has been ratified by democratic means, the administrative capacity to implement it effectively, and the strategic doses of coercion to overcome incumbent opposition. Reformers must act boldly, before there are many true “democrats” or “capitalists” to rely upon: people capable of a large-scale democratic and economic entrepreneurship. But reformers’ efforts must also be limited or constrained through public participation and accountability⁹⁵, for two reasons: (1) so that the needs of the poor and powerless do not get lost during struggles for dominance with the incumbents, and (2) so that reformers do not become, over time, an elite much like the incumbent elite they are being empowered to change and even destroy. A delicate balance is required. Reformers have few resources, and excessively handicapping them will simply result in victory by the more experienced and less scrupulous incumbents.

Consensus over reforms is always difficult to build, and it ultimately requires a political entrepreneur or entrepreneurs to organize the production of reform successfully. With regard to development, such consensus requires a careful diagnosis of specific problems that revolve around an interrelated poverty, vulnerability, and poor governance—within the social fields⁹⁶ unique to each transition country. Much of what follows argues in support of this assertion, after discussions about a consensus over democratization policies—which is probably easier to achieve. Even incumbent elites will agree the importance of political stability and state strength, and agree that there have been failures to attain these goals by undemocratic means in the past. Even Hitler’s and Stalin’s regimes were too unstable to outlast the death of their creator; other autocracies often die even before the autocrat dies. An incumbent elite sometimes dies with the autocrat who heads it, and most incumbents will

95. See *infra* notes 100-06 and accompanying text.

96. See *supra* notes 59-73; *infra* 143-67 and accompanying text.

gamble on trying to dominate a more stable regime, even if it is relatively democratic.

1. *Political Stability*

Political stability seems to require four things, things which can be the building blocks of democracy within constitutional and administrative laws: (1) the authority to challenge authority, (2) the “Social Contract” of stability, (3) public participation, and (4) the accountability of powerholders to persons and institutions they cannot control. At the very least, stability requires a proportional representation of all social groups, but this is a difficult feat to manage while isolated elites are struggling to maximize their power and wealth.⁹⁷

The authority to challenge authority basically involves the freedoms of speech and organizing opposition political parties to compete for public attention. These rights are written into constitutions in most transition countries, but are seldom implemented effectively. This authority is closely related to what might be called a grand *Social Contract* of political stability: legally-institutionalized means of insuring that an elected official will leave office when that official loses a *periodic* election because that official knows her successor will leave office when another turn of the electoral wheel ousts her from power. This Contract is as much a matter of developmental changes in political culture as of law.⁹⁸ Also required are culturally and legally institutionalized means of minimizing military interference through coups. As Latin Americans recognize, this is one important feature of a civil society.⁹⁹ The sad recent histories of Nigeria, Pakistan, and Myanmar, demonstrate the importance of civilianization.

Public participation is the democratic alternative to manipulation of the public by elites. It helps to insure that the public gives informed consent (legitimacy) to government policies, even when these involve some tough and unpopular decisions. There is a long list of requirements for a meaningful participation that should be built into various laws, including the right to meet, to form self-managed organizations, to federate with other domestic and international nongovernmental organizations (NGOs)—Amnesty International, Greenpeace, and their local affiliates for

97. PUTNAM, *POLITICAL ELITES*, *supra* note 10, at 44, 134. Interestingly, the Anglo-American emphasis on reasoned discussion and the liberal democratic protection of civil liberties plays a *relatively* small role in transition countries. *See id.* at 162-63.

98. *Id.* at 71 (stating that the crucial variable is whether opponents are seen as legitimate and trustworthy competitors in a common game); WALSH, *supra* note 5, at 134.

99. *See infra* notes 101-02 and accompanying text.

example, to possess a “corporate” status and thus be able to sue (and be sued) and raise money, to have a private communications system—although the Internet and e-mail typically exceed the security forces’ capability to monitor partly-coded messages, to have ready access to an activist media, whose investigative and publicity powers are guaranteed by law, to receive accurate information promptly from government, and to demonstrate and electioneer non-violently.¹⁰⁰ This amounts to the law of a civil society.¹⁰¹ The public, media, and “experts” can then provide much of the raw material for government’s policies, and provide “feedback” on how well the policies are implemented and operate in practice. Reform laws should mandate public participation at crucial junctures, and require officials either to adopt policies emerging from such participation or to explain the failure to do so in writing.

Civil society largely consists of non-governmental organizations (NGOs), of students, lawyers, women, sporting enthusiasts, workers, and charitable, religious, and ethnic groups. The more of these groups the merrier. NGOs lobby, demonstrate, monitor, evaluate, and collaborate with the media to create an informed public opinion, with both a civic purpose and a “street knowledge” of how government and business operate. Ideally, these activities are earned out in ways which cut across the ideological, religious, and ethnic differences that otherwise prevent a reform consensus from emerging. Such NGOs are thought to be so important that governments and foreign and multilateral donors frequently support them financially. A paradox arises here between supporting groups that will later try to hold the government and the donors accountable. Unfortunately, this support can make NGOs dependent on the wills and the techniques of the donors. In Kenya, for example, there are some courageously independent NGOs, but there are even more NGOs, which are frequently organized by incumbent elites, that try to siphon off scarce donor resources and a scarce public enthusiasm for reform. Too much of this dependence and corruption leads not to democracy, but to the corporatism or even the fascism pioneered by Mussolini, Juan Peron, and Malawi’s Kamuzu Banda.¹⁰² An equal but opposite danger is illustrated by

100. James C.N. Paul, *Rural Development, Human Rights, & Constitutional Orders in Sub-Saharan Africa, 1989*, THIRD WORLD LEGAL STUD. 57. Lack of transparency dilutes the ability of a democratic system to judge and correct policy, cloaks the activities of incumbent elites, and creates rent-seeking opportunities for those with the necessary information. Tara Vishwanath & Daniel Kaufmann, *Towards Transparency in Finance & Government*, 5 (1999) (text on file with the author).

101. See *infra* note 102 and accompanying text.

102. See FINOCCHIARO, *supra* note 10, at 99, 102 (for Gramsci, there may be a “withering away of elites” through their absorption by a civil society, and the replacement of coercion with persuasion),

a “gridlock” in the United States: NGOs become well-organized special interest or veto groups, whose consent to policies favored by the majority must be purchased at a high price before anything can change.

Accountability is frequently defined to mean the same thing as the Rule of Law as opposed to a rule *by* law used in a place like today’s undemocratic China.¹⁰³ It assumes that officials and businesspeople

NINO, *supra* note 3, at 83 (elitism becomes “polyarchy” when power and authority are distributed among relatively autonomous organizations, some constitutional and some inaptly called “private”); *id.* at 80-82 (“intermediate groups” may link elites and non-elites, mitigating problems caused by ambition, competition, and the scarcity of information); Fatton, *supra* note 24, at 24 (civil societies are often not peaceful, especially when they are involved in class formation, ethnic inventions, or religious revelations); *id.* (in Africa at least, civil societies lead to a Hobbesian “war of all against all”, of mutually-exclusive projects which make politics a calculus of uncertainties); Human Rights Watch, *Uganda: Freedom of Association at Risk* (Oct. 2, 2001), <http://www.hrw.org/background/africa/uganda/index.htm> (stating that a bill would make registering a NGO more difficult and suspending it easier—for not conforming to any “government policy or plan”, thereby endangering a freedom of association); Kanishka Jayasuriya, *The Political Economy of Democratization*, in *TOWARDS AN ILLIBERAL DEMOCRACY IN PACIFIC ASIA* 107, 115 (Daniel Bell, et al. eds., 1995) (stating that under Schmitter’s definition of corporatism and in exchange for government being able to select leaders and articulate demands for the group, it becomes compulsory and attains a representational monopoly within a particular category); Kimmerling, *supra* note 18, at 2, 5 (stating that civil society as incubator of elites and counter-elites, an “alternative public sphere”); *id.* at 3 (to avoid a Western bias, we should include in “civil society” the underground or deviant economy and the political activities of minorities); *id.* at 4 (stating that when Tunisian elites came to Palestine to “make-a-state”, they overcame local elites and thus weakened a new and fragile Palestinian civil society); Judith Nagata, oral presentation heard by author at the Asian Law Conf., Victoria, B.C. Oct. 2001 (stating that Indonesia is known for a rich variety of NGOs, but these are fragmented along ethnic, religious, and/or gender lines and are poorly linked together); *The Fun of Being a Multinational*, *THE ECONOMIST*, July 20, 1996, at 51 (stating that such critics of multinational corporations as human rights and environmental lobbyists have become better organized); *id.* (describing better coordination of their campaigns through e-mail,—e.g., the Confederation of Indigenous Nationalities of Ecuador and the Cordillera Peoples’ Alliance in the Philippines). *But see* Collin Skelly, *Chomsky’s Weakness*, (1998), <http://worldsocialism.org/SPGB/Aug98/chomsky.html> (quoting Noam Chomsky, Western Capitalism is “a privatized system of propaganda”).

103. Like liberty and equality, the rule of law is much praised, but its meaning is much contested. Examination of the evolution of *Rechtsstaat*, *Etat de droit*, and the Anglo-American concept exposes vaguenesses, conflicts, and paradoxes which suggest that it plays an important but insufficient role in legitimating constitutional democracy. Michael Rosenfield, *The Rule of Law and the Legitimacy of Constitutional Democracy*, (2001), at <http://papers.ssrn.com> (SSRN Paper 26235). A workable definition is offered by WALSH, *supra* note 5, at 142-43 (stating that the widespread commitment to values transcending the decision maker’s personal rule). This gives rise to systematic and potential as well as actual constraints.

See TAMANAHA, *JURISPRUDENCE*, *supra* note 21, at 96, 101 (stating that the rule of law represents a shift from substantive morality towards a procedural rationality that is conducive to predictability and planning; this leads to more transactions and more freedom); *id.* at 102-03 (stating that through democratic enactments, the rule of law reflects public morality and preferences); Jayasuriya, *September 11*, *supra* note 34, at 123 (stating that in the Third World, the rule of law is typically introduced through a human rights activism. It increases chances for a coalition among business people, “new elites,” and less powerful pro-democrats, and offers opportunities for political reform); *African Exception*, *supra* note 48, at 68 (stating that Botswana shows “that the rule of law is as important as are the laws of economics.”)

frequently make the mistakes that few of them are willing to admit in practice. Markets in transition countries are usually too fragile, fragmented, and thin to provide much accountability,¹⁰⁴ and the failure of the more formal accountability devices is the proximate cause of past failures in democratization and development. As an accountability device, the *judiciary* in most transition countries suffers from delays, corruption, and low levels of power and competence.¹⁰⁵ The very expensive French and American model of an accountability-through-judges is thus unlikely to work without reforms more far-reaching than the extensive training recommended, and paid for, by foreign and multilateral donors.

Many transition countries have thus been experimenting with ombudsmen or procurators. Achievements have been mixed and quite modest to date because a consistent political support for such devices has been lacking. The long-term potential for an accountability through parliament is somewhat greater, because the power to grant or withhold funds and legislation makes parliament able to wield the disincentives that most other accountability devices lack. However, monitoring and evaluating governmental and private behavior is hard work, requires much expertise, and angers incumbent elites while delivering few benefits for members of parliament on election day. Perhaps explanations of why civil society *and the media* have failed in so many transition countries, and explanations leading to legal reforms appropriate to local social fields¹⁰⁶ hold the greatest promise for accountability. Finally, lawyers can play important roles in accountability. If they do not concern themselves with accountability, and with citizen rights, who will? Certainly not the politicians and bureaucrats engaged in activities they hope will remain undetected or unaccountable. Most politicians ultimately accept that such accountability exists, because these devices are prime sources of the

104. See *infra* notes 162-67 and accompanying text.

105. Davis & Trebilcock, *supra* note 3, at 28 (stating that the empirical literature on the importance of enforceable property and contract rights is pretty inconclusive, but there is strong evidence that a predictable judiciary increases investment and economic growth).

106. See R.M. O'DONNELL, KEYNES: PHILOSOPHY, ECONOMICS & POLITICS I (1989) (stating that the state's primary concern is society rather than the individual, and an individualism that emerges from expanded personal choices is the best safeguard against an authoritarian state); John Braithwaite, oral comment at the Asian Law Conf., Victoria, B.C., Oct. 2001 (stating that top-down law reforms only give you a tool for weeding out the worst offenders); *id.* (stating that the educative effects of top down legal reforms are much broader and potentially more significant, especially if there are credible threatening institutions in the background); Chris Lehmann, *Nationalism for Smarties*, WASH. POST, Feb. 5, 2002, at C2 (Reviewing ROBERT WIEBE, A HISTORY OF POPULAR NATIONALISM (2002)) Wiebe is "unfashionably preoccupied with the question of how ordinary citizens can wrest some control over their lives from an increasingly impersonal state." *Id.* (danger, under Naziism, of the state as both the object and the agent of a nationalist fervor); *supra* notes 59-73 and accompanying text.

legitimacy of governmental policies. Legitimacy is a very scarce and valuable resource, because laws and policies regarded as legitimate need fewer scarce resources of other types to secure public and official obedience: coercion for example.

2. *State Strength*

Typical of most transition countries is an uneven state bureaucracy—a compound of “soft state” elements which are far from soft on the poor and powerless, and artifacts of a “hard state.”¹⁰⁷ The latter consist of official arbitrariness in applications of the criminalization and heavy punishment of trivial misbehaviors and also an arbitrary violence by the military and police. Incumbents are usually free to ignore both hard and soft state strictures, unless they fall from grace—which is usually evidenced by the state attacking them harshly. One kind of “reform” involves feeding a few of the most visibly unscrupulous incumbents to “the wolves,” in the hope that this will satisfy the public. The goal is a “defensive modernization” or that minimum of change which allows the remaining incumbents to survive more or less untouched.

The state will remain as an incompetent yet autocratic hangover, even in the face of limited democratic and developmental reforms, unless thorough state reforms (which endanger incumbents) are implemented under constitutional and administrative laws.¹⁰⁸ Pragmatically, the state is the problem and the solution for democratization and development in roughly equal measures, so reforms should aim at suppressing state mischief and advancing state remedies.¹⁰⁹ In any event, reformers will want to strengthen such parts of the state as they manage to “capture”, to

107. Timothy Lindsey, *Black Letter, Black Market and Bad Faith* (2000, MS on file with the author) (“hard state”); Timothy Lindsey, *Corruption as a Rational Response in the ASPAL State, The Failure of Reformist Hukum, in INDONESIA AFTER SOEHARTO* 176, 182 (Drew Duncan & Timothy Lindsey eds., 1999) (contrasting “soft” and “hard” law); GUNNAR MYRDAL, 2 *ASIAN DRAMA* 1126, 1132, *passim* (1968) (“soft state”). Mozelle & Polak, *supra* note 19, at 11-29, trace the history of the state from an organized banditry onwards.

108. See *infra* notes 115-30 and accompanying text.

109. Pearlstein, *Rethinks Poverty*, *supra* note 50 (according to “experts,” a 2000 WB Report “seemed to strike the right balance between those who see free markets as the answer to all problems and those who see it as the source of them.”); Schwartz, *supra* note 61.

Governments . . . can be the problem rather than the solution if they create incentives that destroy economies and free markets through bad policies or corruption. Governments that act in the interest of a particular class or ethnic groups may choose destructive policies. Acting in the interest of the nation requires governments to supply health, education, and infrastructures services.

Id.

do battle against incumbents who have other elements of the state (often the military and police) at their command.

Like political stability, state strength revolves around increasing the supply of the scarce political resource of legitimacy: reform politicians have little long-term bargaining power through a transition country's uneven state and little to exchange for the loyalty of the broader public. The public sees bureaucrats as venal, parasitic, and capricious. Citizens simply want to be left alone by a State that does nothing for them. State authority seldom penetrates most rural areas or pockets of urban opposition, to collect taxes and provide such necessary services as transport, communications, health care, education, and a basic order.

Although international donors like the WB and IMF would deny it,¹¹⁰ the easiest way to provide such services, and thus increase state legitimacy, is to create a *Sozialrechstaat* rather than a mere *Rechtstaat*. By this, the Germans mean both freedom from the state and freedom within the state through law. Authoritarianism and a liberal democracy have both exhausted themselves from the standpoint of further legal, political, and economic development, so hoped-for futures in transition countries seem to lie in such social democratic directions.¹¹¹ More specifically, a planned,¹¹² participatory, and accountable¹¹³ bartering of effective “welfare” programs for public loyalty to the state, if not always the government in power, will require significant improvements in the administrative capacity to be of “service.”¹¹⁴ This is another scarce

110. See *supra* note 48 and accompanying text.

111. Brietzke, *Seamy Underside*, *supra* note 92, at 48-55.

112. See *infra* notes 143-67 and accompanying text.

113. See *supra* notes 100-06 and accompanying text.

114. Like many other transition countries, Indonesia succeeded as a *nation* while it failed as a *state*, Nagata, *supra* note 102. Indonesia has more than 300 ethnic groups, and Malaysia 178; most Southeast Asian countries follow *pancasila* (the Indonesian ideology) in effect: implementing acts of common faith, which somehow have worked. Harding, *supra* note 24, at 53. But the rule of law is needed to insure social stability in the future. *Id.*

The minimal state offers internal law and order, a legal system, and protection against external threats, in exchange for taxes, conscription for the military, and monetary and fiscal policies, Kimmmerling, *supra* note 18, at 2. The maximal state also redistributes wealth, educates and socializes, provides “welfare” and infrastructures and often intrudes into the private realm. *Id.* But the implementation of these tasks requires “bureaucratic mechanisms . . . and institutionalized knowledge.” *Id.* As Henri Lefevre (quoted by Annelise Riles, *The Empty Place: Legal Formalities and the Cultural State* 9 (2002) (text on file with the author)) states The modern state promotes and imposes itself as the stable center—definitively—of (national) societies and spaces. As both end and the meaning of history . . . it flattens the social and ‘cultural’ spheres. It enforces a logic that puts an end to conflicts and contradictions.” *Id.* The category of public authority is contestable, since it clothes the actors in the claim that they are above private struggles. TAMANAHA, JURISPRUDENCE, *supra* note 21, at 66. It is not difficult to seize control of a weak state and its law, *id.* at 68, and people turn to alternative ethnic and religious communities where the state is weak. Shaun Narine, Oral presentation

“political” resource, and achieving it will require reductions in the conventional and arbitrary military and police functions that are hangovers from a colonial, post-colonial, and communist party-state autocracy.

C. *Reforming the Bureaucracy*¹¹⁵

Predictability—no sudden, non-evolutionary changes in the “rules of the game”—is particularly important for promoting public confidence and other such investments as can only be recouped over a number of years. Democratizing and developmental trends neither create nor strengthen a state, which remains as an incumbent-favoring, colonial or communist party-state hangover. Without broad reforms in administration and administrative law, nothing will work the way a democratizing government hopes.¹¹⁶ Many administrative law rules in transition countries are both too soft—they create so much discretion that the bureaucratic power to do nothing is frequently exercised—and too hard. That is, they criminalize even trivial misbehaviors by people who simply want to plan their private conduct according to calculations of what bureaucrats will do in fact. This hard law is largely a futile exercise anyway, because would-be violators heavily discount its prohibitions by the low likelihood of

at the Asian Law Conf., Victoria B.C., Oct. 2001. Elites are thus preoccupied with building a stronger state. *Id.* Political survival is pursued by using public expenditures and manipulating public policy, to build coalitions. Political stability is thus linked to a stronger state. It is pursued by claims of law as self-legitimizing, through formal rationality or by symbolic means, and through social welfare functions, acting alongside private actors and using law as a means of norm enforcement. TAMANAHA, JURISPRUDENCE, *supra* note 21, at 235, 238.

115. This Section is relatively brief because interested readers can consult my fuller analyses elsewhere, and because the advantages of the strong state and the IMF/WB litany have already been discussed. Paul H. Brietzke, *Administrative Reform in Indonesia?*, in *Corruption in Asia: Rethinking the Good Governance Paradigm* 109 (Tim Lindsey & Howard Dick eds., 2001); Brietzke, *Democratization and . . . Administrative Law*, 52 OKLA. L. REV. 1 (1999). Paul Brietzke, *Administrative Reform in Indonesia?*, in *CORRUPTION IN ASIA: RETHINKING THE GOOD GOVERNANCE PARADIGM* 109 (Tim Lindsey & Howard Dick eds. 2001); Brietzke, *Democratization and . . . Administrative Law*, 52 OKLA. L. REV. 1 (1999).

116. *See* Bell, *supra* note 17, at 68-69 (stating that even administration by “experts” becomes attractive when compared to a discretionary rule by elites); FINOCCHIARO, *supra* note 10, at 89 (and the rise of a particular elite, career bureaucrats, serves to reinforce elite power); KLITGAARD, *supra* note 12, at 153 (stating that bureaucracy is not merely a fact but an ideology—rigid, centralized, repressed, and imposed from the top down); PISTOR & WELLONS, *supra* note 9, at 51 (describing need to avoid a “self-perpetuating bureaucracy, which thrives its accumulation of information and regulatory power”); TAMANAHA, JURISPRUDENCE, *supra* note 21, at 101 (stating that predictability emerges from the formal and rational aspects of law and results in better planning, more freedom, and more transactions); Ringle, *supra* note 1, at C1 (William Easterly states, “a climate of public safety, a working financial system, courts to enforce business contracts, security against economic predation, governmental or private . . . we’ve belatedly learned are the most important factors in permitting economic conditions to improve”).

getting caught, prosecuted, and convicted—unless, of course, a violator falls out of political grace and favor.

Ideally, administrative law is like a good newspaper article because it describes who does what, when, where, and why. Revising legal content should enable government in a transition country to get the state under control by punishing *and* rewarding bureaucratic behavior in nuanced ways such as on the basis of what administrative law and policy encourages, tolerates, discourages without prohibiting, and prohibits outright. Prohibition should be used only where the injury to the public interest is clear and serious. Such a planned redirection of incentives and organizations¹¹⁷ would help create a culture of bureaucratic professionalism and creativity, that of a *civil service*. The evolution of such a culture also requires time and the growth of a media-informed public opinion. Improved public education, especially in a “civics” and a “street knowledge” of bureaucratic rules, is thus essential. Both the legislature and the bureaucracy itself should monitor and evaluate bureaucratic performances, and explicitly “link pay and promotions, and agency jurisdictions and budgets to bureaucratic performance and evaluations.”¹¹⁸ Even President James Wolfensohn advises his 11,000 World Bank staffers to “break up the old bureaucratic culture,” speak their mind, and do more to help the poor.¹¹⁹ Such justice, rather than charity, properly begins at the Bank’s opulent homes.

Most bureaucratic activity can be defined as specific tasks, which permit ongoing and relatively neutral evaluations of performances by a bureaucrat’s superiors. Most bureaucratic jobs are like those of grass cutters in a park, rather than like those of cabinet ministers. Ministers obviously need more discretion, but they are also more likely to be called to account, politically or by the media. The main reason for requiring specific bureaucratic performances under an administrative law is to reduce the major bureaucratic discretionary power, which is the power to do nothing, unless bribes or threats overcome the bureaucrat’s lethargy.

117. See SIMON, *supra* note 9, at 500 (stating that subgoals lead to different resource allocations. A park is a physical asset to be maintained for a public works administrator, but a place where kids can play together for a recreation administrator); *supra* notes 61, 66-71, 76 and accompanying text (incentives and organizations).

118. Burgess, *supra* note 50.

119. *Id.*; ANN & ROBERT SEIDMAN & NALIN ABEYSEKERE, LEGISLATIVE DRAFTING FOR SOCIAL CHANGE: A MANUAL FOR DRAFTERS, 14.9 (2000) (forthcoming, text on file with author). See Davis & Trebilcock, *supra* note 3, at 33 (stating that lawyers’ typically over-emphasize courts and neglect the importance of administration); *id.* (stating that the emphasis should be on improving the qualities of drafting, administration, and enforcement).

Some bureaucrats have mastered the fine art of appearing busy: shuffling papers and drinking endless glasses of coffee or tea, depending on the colonial tradition. Other bureaucrats seem content to sit idle, in between chats, reading newspapers or taking turns playing Solitaire on a computer that typically lacks an Internet connection or software appropriate to the bureaucratic task.

Devising and enforcing bureaucratic tasks would markedly reduce this vast idleness, but how should these tasks be defined? Discretion should be reduced by decreasing the number of issues to be decided, and by requiring written, reasoned decisions wherever possible. Resources and decision-making inputs should also be described clearly such as those the bureaucrat must have in order to do her job, those she may use, and those she is prohibited from using (such as prejudicial matters). Outputs should also be clearly defined, leaving the bureaucrat free to maximize outputs from given inputs, subject to obeying procedures which promote public participation and accountability creatively.¹²⁰ Audits and information management systems should be improved, jurisdictional conflicts among ministries and agencies should be resolved, and joint responsibilities and hierarchies of evaluation should be clarified.¹²¹ Many citizens in transition countries are close to being behind John Rawls' "veil of ignorance,"¹²² rationally uncertain of their position in the new society that emerges

120. See Thompson, *supra* note 53, at 19 (stating that Contemporary models of bureaucracy stress the "informational endowments of bureaucrats, the implicit and explicit contracts that link their actions to rewards, and their discretionary powers."); *id.*, at 21 (citing Robert Behn, public administrators should "focus on big questions, such as how public managers can break the micromanagement cycle of procedural rules and how can they measure the achievements of their agencies in ways that will help to increase those achievements"); *id.* (stating that practitioners are often more interested in saying what cannot be done, rather than what should be done); *id.* at 22-23 (noting that we cannot afford to impose direct controls over widening government activities; otherwise the result is a massive growth in rule-bound governance mechanisms, a multiplication of reporting requirements, and more auditing and regulations); *supra* notes 100-06 and accompanying text (participation and accountability). My approach arguably satisfies Thompson's criteria.

121. Davis & Trebilcock, *supra* note 3, at 30 (citing R.J. Barro, "aggregate studies" emphasize "the connection between the quality of bureaucracy and economic growth.").

122. JOHN RAWLS, A THEORY OF JUSTICE *passim* (1971). See PISTOR & WELLONS, *supra* note 9, at 50 (for Max Weber, the nature of law is linked to the nature of political governance, especially the emergence of a trained, rational, and professional bureaucracy and the related, permissive private law that capitalism requires); SEIDMANS & ABEYSEKERE, *supra* note 119, ch. 14.2; SEN, *supra* note 4, at 249 (but the absence of consensus means that no coherent framework exists for reasoned social assessments—as under Kenneth Arrow's "Impossibility Theorem"); *id.* at 250-53 (we then cannot go much beyond a marketplace consensus, unless we relax Arrow's assumptions by improving public information—an important facet of transparency, and by pursuing partial agreements); Brietzke, *New Wrinkles*, *supra* note 48, at 125; Holt, *supra* note 34, at 1 (stating that Keynes did not see the problem as efficient resource allocation in a predictable and certain world, but as involving an uncertain social, institutional, and political setting).

fitfully. Bureaucratic reforms should replace this uncertainty with predictability wherever possible, because uncertainty slows down democratization and development.

A major means of reducing uncertainty involves the bureaucracy in acquiring and disseminating information. People will voluntarily disclose information when the marginal benefit of doing so is greater than the marginal costs; this typically means a less than full disclosure. Where this information benefits large numbers of people, it becomes a “public good.” In other words, insufficient resources will be devoted to acquiring this information (a precondition to monitoring and enforcement, by Parliament for example) unless the bureaucracy enforces regulations requiring disclosure of certain categories of information, with a certain degree of frequency and accuracy. While this is a costly process, it mandates a transparency, are part of the IMF/WB litany, conducive to an eventual self-regulation by those who disclose the information.¹²³

An improved administrative law drafting process would encourage everybody to define their ends and means carefully, prompt the political resolution of jurisdictional and value conflicts that otherwise would remain hidden from view, and improve the coordination and fit among old and new agencies. Under a re-regulation, rather than the simple deregulation sought by the IMF and WB,¹²⁴ a careful balance should be struck between creating rules that correct market failures and those that impose unnecessary costs on beneficial transactions.¹²⁵ The agencies and individual bureaucrats with no real purpose or task would then stand out like sore thumbs, and could be cashiered, reorganized, or reassigned accordingly. However, organizations and individuals forced out of their longstanding sinecures will likely fight back.

Adequately publicized, bureaucratic performance criteria enable citizens to know when to demand action and/or complain to the bureaucrat’s superior.¹²⁶ This superior should also be evaluated on how

123. Vishwanath & Kaufmann, *supra* note 100, at 5-7, 26. *See also supra* notes 6, 117, 120-22 and accompanying text, and *infra* notes 125, 164-67 and accompanying text (transparency and regulation). *But see* Antonio Ciceone, *Resistance to Reform: Reconsidering the Role of Individual-Specific Uncertainty* (2002), at <http://papers.ssrn.com> (SSRN Pap. No. 273424) (stating that typically, the majority loses a little and the minority gains a lot from a reform. The reform will thus be rejected under conditions of certainty, but uncertainty may convince a loser to support it because he thinks he may be a winner).

124. *See supra* note 48 and accompanying text.

125. Baum, *supra* note 37, at 86. *See* PISTOR & WELLONS, *supra* note 9, at 284 (stating that regulatory agencies are path-dependent. If formed during a period of broad State interventions, they will retain this flavor even after policy shifts).

126. *See* TAMANAHA, JURISPRUDENCE, *supra* note 21, at 235 (stating that if specialists

effectively she deals with such complaints. A cluster of such criteria, adjusted into a reasonable workload, constitutes the bureaucrat's job description that is amenable to relatively objective performance evaluations by a superior. In contrast, most evaluations as occur in transition countries are currently based on services performed for incumbent elites and their patron-client networks, regardless of whether these fit rudimentary job descriptions. Promotion and demotion and salary changes should be based on reformed evaluations of the bureaucrat's job performance, subject to internal procedures safeguarding the fairness of the process. A premium should be offered for the bureaucratic ability to distinguish essential tasks like improved rural healthcare from merely desirable ones like creating more leisure facilities for the wealthy.

Publishing enforceable codes of conduct—guides to a civil service culture, and to reconciling private interests and public duties in non-corrupt ways¹²⁷—and publishing administrative regulations in draft form are useful beginnings. The drafters of these regulations should be required to consider oral and written comments by citizens, not just from elite lawyers and special interest groups. Bureaucrats should then be required to either re-draft the regulations in light of comments received or justify their refusal to do so in a written opinion. The “Australian process” offers a useful supplement in that a regulation takes effect, unless one or more MPs introduce a resolution to set it aside.¹²⁸ These rather elaborate, and admittedly costly, procedures would encourage everyone to take the regulatory process seriously, but the consensus is that formal accountability procedures are also required. Unfortunately, these procedures are fragile or outright failures in most transition countries.¹²⁹

monopolize knowledge of state law, there will be low access and control by non-legal actors); *id.* at 238 (proceduralism and formalism distance state law from custom and morality).

127. The Blair Government in Britain “created a committee of the great and good”, initially chaired by Lord Nolan, and the Committee drew up “principles of public life.” *Seven Neglected Principles*, THE ECONOMIST, Feb. 23, 2002, at 64. In view of subsequent political and administrative misbehavior, “they make an amusing read.” *Id.* They are:

selflessness (holders of public office should serve the public interest, not seek gains for their friends); integrity (they should not place themselves under financial obligation to outsiders who might influence their duties); objectivity (they should award public appointments and contracts on merit) accountability (they should submit themselves to the appropriate scrutiny); openness (they should give reasons for their decisions); honesty (they should declare conflicts of interest); and leadership (they should support these principles by personal example).

Id. These principles seem quite good but, as British experiences show, making them part of political culture and ‘enforcing’ them somehow—such as through an *Economist* article—are the real problems that are also seen in corporate governance codes.

128. SEIDMANS & ABEYSEKERE, *supra* note 119, at 25, 37-38.

129. *See supra* notes 104-05 and accompanying text.

One policy set that should be deeply embedded in administrative laws concerns the “safety nets” that serve the poor and the few modest subsidies which serve to build political support within the frequently shrinking middle class. Such policies respond to forceful political demands, and they also help to reduce the uncertainties that hamper development and democratization alike. Bad luck and an initial poverty can trap the poor, especially if they have few skills. In this situation markets do not coordinate their expectations adequately, women are poorly integrated into the economic system, children work rather than go to school, and government policies are poor. For example, there may be little public participation and perverse incentives in safety-net programs.¹³⁰

An acute shortage of the resources needed to fund and implement such worthy projects in transition countries creates opportunities to build efficiency concerns and policy direction into administrative reforms. The question becomes how to direct bureaucratic incentives and organizations to allocate scarce resources to their most useful end. In other words, how can subsidies be kept out of incumbent elites’ hands?

*D. Strengthening Legal Personnel*¹³¹

In transition countries, lawyers, politicians, bureaucrats, parliaments, and courts sometimes lack reforming expertise, power, or independence from incumbent elites and their bribes. Legal personnel thus (in the tradition of a British amateurism, widely seen in colonial practices) simply “muddle through” such reforms that rise to the top or are forced by the IMF/WB. Many multilateral and foreign donors are willing to expend vast

130. TAMANAHA, REALISTIC, *supra* note 21, at 257; Davis & Trebilcock, *supra* note 3, at 24; Schwartz, *supra* note 61 (discussing William Easterly’s ideas); Vishwanath & Kaufmann, *supra* note 101, at 1, 27. See Davis & Trebilcock, *supra* note 3, at 24 (stating that welfarist perspectives on development challenge the idea that a conventional economic growth captures all important aspects of human well-being); *id.* at 31 (stating that welfare programs in developing countries typically consist of direct provision of goods and services; while this reduces poverty and promotes economic growth, it is often poorly targeted and often does not reach those whose need is greatest); Diamond, *supra* note 34 (stating that there is a need to combat the poverty and hopelessness on which terrorism feeds by providing basic healthy care, family planning, and antidotes to environmental problems such as deforestation); Rothkopf, *supra* note 1 (asserting that for the last 200 years, the crucial issue has been—“How do you achieve the just distribution of wealth in society?”); Quainton, *supra* note 1 (stating that Nicaragua’s Sandanistas did not pursue the “irrelevant bourgeois preoccupation” of freedom; rather, they pursued “justice” through literacy, education, and rural healthcare); Vishwanath & Kaufmann, *supra* note 100, at 27 (stating that research is urgently needed on how the poor, women, and children can make their “voice” heard); see *infra* notes 136-37, 146-47 and accompanying text. *Infra* note 158 and accompanying text.

131. See generally Paul H. Brietzke, *Accountability in the “Brave New World” of Development*, 1992 THIRD WORLD LEGAL STUD. 99, 120-22.

resources at an on-the-job training for these legal personnel. This is certainly an important effort, but it cannot succeed without changing the structure and function of law-jobs, especially by reforming the bureaucracy and the judiciary, and by reducing corruption. This is a long-term process, ultimately involving changes in legal and other cultures. The law schools are thus a good starting point. Especially in the civil law tradition, law schools can play important reform roles. Also, students in transition countries frequently display political courage, and the hope is that this can be converted into a professional courage; that is, an interest in, and taking responsibility for, the reform process, rather than merely pursuing the interests of wealthy clients. Comparative law techniques and the selected laws of other countries can be taught from a local reformer's perspective and students can become involved in faculty reform efforts.

Legal personnel can play at least five reform roles: technical problem- and dispute-solver, troublemaker, ideologist, drafter, and legal planner.¹³² A certain amount of dissimulation will be required while playing these roles, but lawyers are often good at this. Solving problems and resolving disputes is standard legal fare of course, but a clever reformer will try to bias the outcomes in democratizing and developmental directions. Asking awkward questions and "speaking truth to power" are commonly seen as a troublemaker's role although, as political and legal systems grow more tolerant during the transition, this is no longer treason. It merely results in career handicaps.

Troublemaker-lawyers may try to help a transition country live with, and even benefit from, globalization and its elitist law.¹³³ Along with troublemakers from other transition countries, insurgents may even succeed in reforming a profoundly undemocratic and underdeveloped international law and politics. This can be done, for example, through creative advocacy for a stroke of ideological genius: the *human* right to a *sustainable* and *participatory* development. This is a "platform" around which insurgent NGOs of many types can unite, for mutual benefit.¹³⁴ Insurgents could also advocate programs that bypass governments and give aid directly to NGOs which help the poor. As international human rights advocates do, insurgents could build the substance of international law, rather than attend almost exclusively to process matters that interest

132. See *infra* notes 133-67 and accompanying text.

133. See *supra* notes 34-58 and accompanying text.

134. Paul H. Brietzke, *Insurgents in the "New" International Law*, 13 WIS. INT'L L.J. 1 (1995) (stating that sustainability speaks to environmental concerns and participation to more democratic international processes that attend to more than the "establishment" concerns of developed countries).

“establishment” lawyers. Theirs could be a sustained legitimacy-based critique of international institutions in an attempt to build a global rule of law which draws on European Union or other federal governance structures and information agencies, and which requires consultations with elected national representatives on important matters.¹³⁵

An activist representation of the poor and powerless is a closely related reform task. The poor and powerless cannot organize and represent themselves effectively. The main “assets” the poor and powerless have are their distrust of elites and the discontent that arises from a sense of relative deprivation. Acting as troublemakers or “trustees,” lawyers may be able to build trust and organize these assets in ways that benefit the poor and powerless—enhancing democratization and development in the process. The paternalism or corruption that might otherwise accompany such a process can be reduced by making it broadly participatory and accountable.¹³⁶ For example, the wealthy are unwilling to buy much of the produce of the poor, and the poor are unable to reward each other out of their poverty. But through a planned redistribution of rights,¹³⁷ the poor and powerless can gain the means to generate their own incomes far into the future. Absent a determined advocacy for the poor, most leaders in transition countries (and elsewhere) are reluctant to trust and empower the poor.

As ideologists, legal personnel can help institutionalize the reformist role. For example, a participatory and accountable German *Rechtskultur* was promoted among popular cultures, after World War II and in opposition to the Nazi “duty-culture” that is similar to popular legal cultures in some transition countries today. All of these techniques can be taught in law schools, especially through the example teachers provide. The percentage of lawyers committed to democratic and developmental tasks is small in any country. They can succeed only if they gain support and “cover” from law schools, NGOs, and especially from the semi-governmental organization(s) of the lawyers themselves.¹³⁸

135. See Atik, *supra* note 1, at 458-59; Blustein, *Aid Formula*, *supra* note 50; Jayasuriya, *supra* note 34, at 5; Slaughter, *supra* note 1, at 4, 41; Trimble, *supra* note 1, at 1948-49; Hertz, *supra* note 40 (stating that anti-globalizers are disillusioned with traditional politics); Rothkopf, *supra* note 1; Weissman, *supra* note 40.

136. See *supra* notes 100-06 and accompanying text.

137. See *infra* notes 146-47 and accompanying text.

138. See *supra* notes 101-02 and accompanying text. *But see* Harding, *supra* note 24, at 52-53 (noting that in Southeast Asia, “the emergence of the civil society and a large and ambitious legal profession all over the region give voice to an irrepressible demand for legal reform.”).

Without appropriate and effectively-implemented legislation, which applies good *drafting* solutions to carefully-defined social problems, state power tends to remain incoherent, inconsistent, diffuse, and often corrupt. This is the uneven state, described earlier.¹³⁹ Hard legal *content* (substance) should create reformed rights and duties for real people, and the incentives and organizations appropriate for particular social fields.¹⁴⁰ This should result in behavioral changes that transform or abolish the organizations responsible for an underdeveloped and autocratic past.

Politicians and reformers should be told that the technical requirements of legal drafting—of concrete rules which can be implemented and enforced by ordinary mortals—require that politicians and reformers be very precise about their means and ends. Drafters can thus serve as a professional check-and-balance against an often fuzzy and wishful thinking among politicians and reformers. Drafters should formulate issues precisely, help discover the value conflicts hidden in various laws, help negotiate politically-acceptable compromises where these conflicts cannot be eliminated, otherwise help to build a consensus around sensible policies, especially among reformers, and deal with rapid changes in imperfect institutions by improving a legal coordination and “fit” wherever possible. The rest of the legal system must be adapted to receive the new law. This reception of law broadens reform needs considerably.

The drafter’s job is thus not merely to use good grammar and form. It also requires extensive research into the relevant social problems and the incentive and organizational opportunities and constraints available in particular social fields,¹⁴¹ seeking public (especially NGO) participation and support in the reform process and incorporating public inputs into draft reforms, devising implementation strategies that circumvent the resistance of incumbent elites whenever possible, calculating the political potential for a particular reform, preparing documents describing the social problems addressed and justifying the legal approach taken—to build public and legislative support for the draft,¹⁴² and developing the means to monitor and evaluate the reform after it becomes law.

139. See *supra* notes 107-08 and accompanying text.

140. See *supra* notes 59-73 and accompanying text.

141. See *id.*

142. TAMANAHA, JURISPRUDENCE, *supra* note 21, at 241 (stating that in order to build connotations of authority, every rule, practice or claim should be justified as good or right, with a strict scrutiny being applied to anything that increases human misery). See SEIDMANS & ABEYSEKERE, *supra* note 119, *passim*.

E. Legal Planning

Just as politics and the economy are too important to be left to politicians and economists, planning is too important to be left to the planners. Admittedly, planning has an unsavory image in many transition countries: poor results flowed from defective thinking, theories, and implementation strategies, leaving a Stalinist or Maoist image of a heavy rigidity. But a lighter planning is now in vogue among many development experts,¹⁴³ and lawyers can play their accustomed roles of generalists and synthesizers in this process. No matter how well drafted individual laws are, an existing legal jumble should not be made worse while reforming it: first, do no harm, as the doctors say. Reforms should fit into a *sequence* which is justified as making significant contributions to democratization and development—within a coherent and consistent legal system and through a wise allocation of scarce reform resources. (IMF/WB demands for quick, poorly thought-out reforms can disrupt a careful sequencing).¹⁴⁴ Among other things, this process would reduce the massive business and public *uncertainty* that significantly retards development and democratization. Much uncertainty results from a law reform process that is necessarily long, uneven, partial, and even opportunistic. The public sense should be that all of this going in predictable and politically-agreed directions.¹⁴⁵

Vital to this process is a planned redistribution of rights, privileges (in the specific circumstances in which they should be granted), and duties. This amounts to a redistribution of wealth and power that flows from redistributing these means for obtaining them. If this does not happen, an *ad hoc* (“invisible hand”) proliferation of rights, privileges, and duties during reforms will automatically favor the incumbents and the owners of imported resources that are simultaneously the problem and the solution to many of the problems of development and democratization. Few positive benefits will then flow to the poor and powerless, who are the “targets” of democratization and development according to many theories.¹⁴⁶ Clever

143. See, e.g., ROBERT WADE, GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION (1990).

144. See Hooper, *supra* note 20, at 1-2 (commenting on poor sequencing of financial and economic liberalization by the IMF and WB).

145. Vishwanath & Kaufmann, *supra* note 100, at 5-7, 26. See *supra* notes 6, 122 and accompanying text; See *infra* note 144 and accompanying text. But see Ciceone, *supra* note 123 (stating that typically, the majority loses a little and the minority gains a lot from a reform; the reform will thus be rejected under conditions of certainty, but uncertainly may convince a loser that he may be a winner).

146. See MATTEI, *supra* note 70, at 238; TAMANAHA, SOCIO-LEGAL, *supra* note 21, at 252

lawyers can disguise these redistributive techniques well in so many different bodies of law that even suspicious multilateral donors will be unable to spot many of them.

Amartya Sen provides valuable guidance in this area, in order to develop as well as to transition countries legal policies should focus on capability deprivations rather than on only one manifestation of inequality—income poverty. Guaranteed access to health services, education, and land (a minimal access where society’s resources are limited), and the freedom to act under conditions of disclosure, create developmental incentives to venture beyond cultural constraints. This system will enhance the ability to take advantage of other incentives and organizations. Where law makes claims to political attention and open and credible participation, this increases the likelihood of a favorable policy response from government. For example, famines do not occur in democracies. With their real chances enhanced by this “human capital” approach, people are able to live valued lives with a degree of dignity and diversity. They may then choose to contribute to the rapid social changes that democratization and development require.¹⁴⁷

At this point, analyses should become quite specific, in response to the opportunities, constraints, and social fields in a particular transition country.

Tom Timberg and I attempted such an exercise, an “economic reform agenda” for Indonesia.¹⁴⁸ Rather than simply compile a list of *patent nostrums*, we began by creating a nine-sector model of the Indonesian

(stating that a “liberal rule of law” enforces and perpetuates an “inequality” in the distribution of wealth and opportunity.); Brietzke, *New Wrinkles*, *supra* note 48, at 128 (stating that jurisprudence and law and economics face the same basic question—“how do we justify one assignment of rights rather than another?”); *id.* at 129 (stating that on distributive issues, the neoclassical economists’ injunction to legislators is unhelpful for transition countries—do nothing or you risk succumbing to your baser instincts). *See also supra* notes 95, 112-14, 136-37 and accompanying text; *infra* note 158 and accompanying text (the poor and powerless). Many of the legal reforms discussed here fall under Tamanaha’s “liberal rule of law,” and the justification for departing from it is the promotion of a development defined as going beyond a simple economic growth to incorporate a few welfarist goals.

147. SEN, *supra* note 4, at 130-34, 143-44, 150, 180-82, 293-94, 297-98. *See id.* at 39-40 (stating that transparency builds trust and reduces financial irresponsibility and corruption); *id.* at 40 (in addition to the other requirements, a separate “safety net” is still required); *id.* at 114 (stating that denial of a labor market freedom is largely responsible for the failure of “bureaucratic socialism” in Russia and Eastern Europe); *id.* at 144 (stating that such capability policies would empower women to reduce their fertility rates); *id.* at 146 (stating that tigers are protected in India, unlike the people who get mauled by them while collecting honey, to escape poverty); *id.* at 155 (stating that the capability deprivation of African-Americans leads to their low political participation). *See also Does Inequality Matter?*, *supra* note 12, at 10 (echoing Sen’s ideas).

148. Brietzke & Timberg, *supra* note 65. While some Indonesian reformers expressed interest in this Agenda, there has been no systematic attempt to implement it.

economy, based on the effects of differences in economic incentives and organizations over time. These nine sectors are:

1. Markets;
2. Foreign-dominated (especially multinational—MNC) corporations, some with participation from politicians, bureaucrats, and/or Government itself;
3. domestic companies, some with participation from foreign investors, politicians, bureaucrats and/or Government;
4. Government-controlled or -regulated enterprises;
5. individual proprietorships;
6. cooperatives and “foundations” that were often vehicles for an incumbent elite power;
7. subsistence and near-subsistence farming, fishing, forestry, and handicrafts;
8. international economic relations—trade and aid, debt, and equity inflows; and
9. labor and consumers.

Analogous sectors can be devised for other transition countries. The different bodies of law applicable to each sector give these Weberian “ideal types” sharp outlines and make them into “real types” in their economic effects¹⁴⁹ which relates to the earlier discussion of enterprise laws.¹⁵⁰

Briefly, the Dutch colonial pattern of a dualistic economy seen in Indonesia and throughout the colonial world (Sectors 2, 4, and 8 versus Sector 7 in Indonesia) created a dualistic system of state-sanctioned law versus a customary law.¹⁵¹ This pattern then fragmented, as post-colonial

149. *Id.* at 4-5.

150. *See supra* notes 76, 87-91 and accompanying text (enterprise laws).

151. MATTEI, *supra* note 70, at 236 (stating that dualism must be taken into account by law and economics, even if it has begun to evolve into a pluralism—two parallel economies, one scarcely monetized or articulated, with interactions involving localized monopolies and an imperfect competition generally); TAMANAHA, JURISPRUDENCE, *supra* note 21, at 69 (stating that rather than a legal evolution, the paradigm is the imposition of Roman law after conquest); TAMANAHA, SOCIO-LEGAL, *supra* note 21, at 136 (stating that as in many other countries, Tamanaha’s study of the Yap in Micronesia shows that vast portions of code law were known only to a few and never applied; problems were dealt with traditionally, with few resorts to state courts); Brietzke, *New Wrinkles*, *supra* note 48, at 132-33 (stating that a legal and economic dualism exacerbates inequality in the U.S. as well

elites used their wealth and power to “buy” the kinds of laws and legal implementation that enabled them to flourish. As Ronald Coase demonstrates, there are markets for laws, their enforcement, and organizations, as well as for other goods and services.¹⁵² Each of the nine sectors developed its own supply and demand for different laws, based on its ability to pay or barter with lawmakers. For example, the subsistence sector got left behind even further because it had nothing to pay or barter with—other than a disorganized discontent. MNCs, on the other hand, like the IMF and the WB today, had and have much money that incumbent lawmakers want. This money translated into political access and desirable laws, but not into implementation of these laws—even after further “bribes” if implementation was contrary to incumbent elite desires. While the economic efficiency of each sector obviously influenced its performance over time, some sectors had and have legal and political privileges owing to their political productivity. These privileges exacerbate wealth and power inequalities, and reduce efficiency and production by promoting transfers from more to less efficient sectors.¹⁵³ Similar tendencies can be seen in almost all transition countries.

Tom and I then assembled these nine sectors into an “input-output matrix,”¹⁵⁴ to describe the skewed “legal terms of trade” that emerged among sectors over time, and to show how a more rapid development would flow from the nine sectors growing more equal in performance and exchanges of output over time. This greater economic and legal “pluralism,”¹⁵⁵ or changes in the sectors’ relative positioning on a hopefully rising tide of economic activity, would: (1) better diversify risks; (2) take better advantage of the differing abilities among the sectors to adjust to crises and other changes; (3) make better use of various technologies and better mobilize different sources of capital and entrepreneurship; (4) make it more difficult for a particular elite to

as the Third World, given the absence of an “economic constitution” to deal with the disputes arising; dualistic ghetto markets certainly cannot deal with such matters effectively in the U.S.); Harding, *supra* note 24, at 41 (stating that these are “the problems of global doctrine and local knowledge which have so exercised the English judiciary, the Dutch scholars, and the Muslim jurists.”).

152. Coase, *supra* note 64.

153. TAMANAHA, JURISPRUDENCE, *supra* note 21, at 110-11 (stating that Marc Galanter’s descriptions of India are more mixed—a legal system emerged from an adapted British common law and a revived traditional system; this system is sufficiently independent of social and cultural values that a “dissonance” with Indian cultures will be maintained for long periods).

154. Brietzke & Timberg, *supra* note 65, at 9-13.

155. TAMANAHA, JURISPRUDENCE, *supra* note 21, at 115-16 (stating that there are many legal orders and all legal systems are pluralistic, in the sense that corporations, universities, unions, community associations, and even families have rule-making and enforcing power.)

dominate both government and the economy; and (5) increase the number of viable niches in the economy—especially for the poor and powerless. Statistics in many transition countries are already conveniently “packaged” for purposes of creating an analogous input-output matrix. We believe that such a treatment of the sectors discovered in a particular country would yield quite specific policy recommendations about where developmental problems lie, and about specific legal solutions. Obviously, precision is unattainable and a mechanistic approach should be avoided.

We then examined the state of Indonesian law sector-by-sector, trying to spot specific inadequacies and remedies, with a view toward winding up with a more coherent and consistent legal system.¹⁵⁶ Our findings are too complex even to summarize here, but our reforms are designed to improve efficiency in resource use, to reduce the under-categorization and over-determination of law,¹⁵⁷ to improve incentives and Indonesians’ contractual and organizational capacities,¹⁵⁸ and reduce barriers to entering and exiting markets. Ideally, exit occurs through improved bankruptcy laws, so that scarce resources can be freed up and recombined more efficiently and relatively painlessly. The overall goal would be to create a “level playing field” economically, subject *to* an affirmative action for previously-disadvantaged groups—where the efficiency tradeoffs for doing this are not too severe. The regulatory burden (part of Indonesia’s Sector 4, as we describe it)¹⁵⁹ should be reduced overall, especially where it falls on the poor and powerless who feel it most keenly. Transition countries should get in the habit of regulating after the fact, after the relatively few serious harms to the public interest become readily apparent. In particular, government regulatory functions should be firmly segregated from the government enterprising functions (state-owned enterprises, the rest of Sector 4 in our Indonesia model) that are the prime beneficiaries of regulation. Many sectoral reforms can be implemented in any order, as political circumstances permit, provided attention is paid to the coherence and consistency of the legal system as a whole. But improving political, bureaucratic, and judicial functioning, especially through a reduced corruption, are preconditions to the effective implementation of other reforms.

A few comments about a particular Indonesian sector and sub-sector seem to be of general relevance throughout transition countries.

156. Brietzke & Timberg, *supra* note 65, at 23-27.

157. *See supra* notes 73-78, 90-91 and accompanying text.

158. *See supra* notes 61, 66-71, 76 and accompanying text.

159. *See supra* text accompanying notes 148-49.

“Intermediaries” form a sub-sector that spans Sectors two, three, and four in Indonesia,¹⁶⁰ and that is particularly underdeveloped in most transition countries. Examples of intermediaries are banks, smaller-scale lenders like credit unions, insurance companies, equity brokers operating through stock and commodities exchanges, financial contracts such as derivatives, and even the IMF and the WB. Such organizations price, spread, diversify, and otherwise manage risks, communicate relevant information cheaply, help to hold other organizations accountable, and strengthen markets and improve access to them.

Such intermediaries can be stimulated by the creative use of a reformed contracts law, to lengthen time horizons and facilitate an enterprise planning. A separate reformist treatment is warranted, informed by the relatively new economics of information and of risk management, and through parallel reforms in administrative law.¹⁶¹

“Markets” (Sector 1 in Indonesia)¹⁶² warrant separate comment because markets are the main, verging on the only, means of development chosen for transition countries by multilateral and foreign donors. Briefly, markets in transition countries do not arise as quickly and automatically, or function as flawlessly, as is assumed by the neoclassical economics that the donors cherish. Apart from stock exchanges, places where subsistence produce is exchanged, and the like, markets have no physical embodiment. Rather, they are mere ideas that get mystified and reified by neoclassical economists. They frequently have a “mafia-like quality” in their early stages,¹⁶³ owing especially to the behavior of incumbent elites and their

160. *Id.*

161. Davis & Trebilcock, *supra* note 3, at 29 (citing a study by R. Levine, “[C]ountries which give a high priority to secured creditors receiving the full present value of their claims have both better developed financial intermediaries and higher rates of economic growth”); Day, *supra* note 86 (stating that as with Enron and Long-Term Capital Management, where there is no “market transparency . . . the market had to take their word on the value of derivatives” that are not required by law to be backed by sufficient cash); Jayasuriya, *September 11*, *supra* note 34, at 3 (“New forms of risk management apply risk profiles to a set of relationships, institutions, and even geographic sites, rather than endeavouring to manage or transform the behaviour of individuals.”). *See also Markets as Watchmen*, THE ECONOMIST, Feb. 23, 2002, at 80 (reporting deposit-taking banks are inherently risky—borrowing in the short-term and lending in the long-term); *see id.* (illustrating the importance of “apparently endless efforts” to craft the Basle 2 “capital-adequacy standards” that create a better balance among regulation, supervision, and market discipline); *supra* notes 115-30 and accompanying text (administrative reforms). On the WB as an intermediary, *see* Ringle, *supra* note 1 (stating that in the 1960s and 1970s, large projects were financed such as dams, irrigation schemes, and power plants, but now a wider approach involves lending money for schools, hospitals, family planning, even legal planning).

162. *See supra* text accompanying notes 148-49.

163. Michael Trebilcock, *What Makes Poor Countries Poor?: The Role of Institutional Capital in Economic Development*, in THE LAW AND ECONOMICS OF DEVELOPMENT 15, 47 (Edgardo Buscaglia

organizations. A re-regulation rather than a deregulation is thus required, to nourish markets and fix market failures. But, as the mess over electrical power in California demonstrates, it is easier to deregulate than to re-regulate. The policy issue is whether bureaucrats can beat market and non-market results by a wide enough margin to justify the higher transaction costs that the bureaucrats inevitably create.¹⁶⁴

Failures common in many transition countries are that markets are fragile—new and extremely vulnerable to anti-competitive conduct by incumbent elites or MNCs, thin—incapable of supporting more than one or a few producers at an efficient scale of production, and fragmented by poor transport and communications networks. A good example of fragmentation is Indonesia, where thousands of islands and sub-regions are so isolated that they form separate geographic markets which can be dominated by one or a few relatively small producers, middlemen, or dealers. Much of the opposition to marketplace competition in transition countries, opposition that some analysts ascribe to cultural factors, is in fact created by incumbents who properly see vibrant markets as eroding their power to allocate resources. The best solution is a restrained enforcement of a sensible competition (antitrust) law, against government (subject to narrow exemptions) as well as private businesses and with the policy goal of reducing the barriers to entering markets. Creating such barriers is a favorite tactic of incumbent elites and MNCs. Many small changes in property and contracts laws will also magnify marketplace incentives.¹⁶⁵ The IMF/WB/AID fondness for unregulated markets is seen

et al. eds., 1997). See SEN, *supra* note 4, at 120-21. See also PISTOR & WELLENS, *supra* note 9, at 138 (noting that one-third of the Fortune 500 firms in the U.S. are still family-controlled, and historical patterns in the U.S. are not very different from those seen in Asia today).

164. Pearlstein, *Rethinks Poverty*, *supra* note 50; *id.* (quoting Michael Kreiner stating that economists “oversold the benefits of market liberalization and growth.” Many countries that marketized ran into as much trouble as countries that did not marketize); Sidelsky, *supra* note 66, at 13 (countries that privatized their state-owned enterprises eliminated a built-in barrier to investment declines during a slump—investing state funds to keep these enterprises going); *African Exception*, *supra* note 48; *Monsters Still*, *supra* note 34, at 60 (“some countries take many generations to acquire efficient markets”).

165. MATTEI, *supra* note 70, at 237-38; TAMANAHA, JURISPRUDENCE, *supra* note 21, at 237 (stating that markets presuppose the “predictability of transactions . . . , the ability to possess and transfer property . . . , and the ability to adjust relations under conflict”); Brietzke, *New Wrinkles*, *supra* note 48, at 132-33; Davis & Trebilcock, *supra* note 3, at 23 (noting that early growth theorists assumed that market failures were endemic and the state had a major role in fixing them. Neoclassical economists shrink this role of the state substantially and expand that of markets); Donnelly, *supra* note 1 (stating that the “market-state” is indifferent to justice issues and other moral values—an indifference that *may* be unacceptable in a democracy); Holt, *supra* note 34, at 1 (stating that for Keynes and “in an economy where the future is unknown, contractual agreements through institutional arrangements are needed to incur the factor inputs necessary for efficient production”—needs which

as simplistic after analyses of the relevant issues in transition countries.¹⁶⁶ Amartya Sen offers a more useful perspective.¹⁶⁷

IV. CONCLUSION

The quality of democratization (doing good) and of development (doing well) are deeply dependent on each other. They form a long and complex series of interrelated perspectives and choices that are called “collective action problems” by economists.¹⁶⁸ Most of the relevant choices are driven by civic and private actions, but some are organized and even planned politically. Legal reforms play important roles in these processes, especially in the efficient growth, allocation, aggregation in various organizations, and use and enjoyment of economic and political resources. Such resources are scarce everywhere, especially in transition

require “money and liquidity”); Hooper, *supra* note 20; Seidelsky, *supra* note 66, at 12 (stating that in contrast to the rational expectations theory in economics, George Soros argues that, within limits, participants make markets what they want them to be); *id.* (stating that markets can thus be wrong while validating themselves, “self-enforcing but ultimately self-defeating,” and in a “dynamic disequilibrium”); Schwartz, *supra* note 61; *African Exception*, *supra* note 48 (stating that Botswana’s success suggests that its property institutions played a major role); *Aiding and Abetting*, *supra* note 48 (discussing William Easterly’s ideas, “there is no simple market solution”—governments must get things right, and especially not get things wrong); *Monsters Still*, *supra* note 34 (“some countries take many generations to acquire efficient markets”); *Roll Out*, *supra* note 23 (stating that capital favors only a few foreign countries, not including all of those which have made significant free-market reforms); *id.* (as discussed in note 23); *supra* notes 73-75, 90-91 and text accompanying (contractual remedies for legal under-categorization and over-determination). *But see* Davis & Trebilcock, *supra* note 3, at 28 (stating that empirical studies cast doubt on the developmental merits of particular property and contract law reforms).

166. *See supra* note 48 and accompanying text.

167. “As Adam Smith noted, freedom of exchange and transaction is itself part and parcel of the basic liberties that people have reason to value.” SEN, *supra* note 4, at 6. But this clearly does not obviate social support, public regulation, statecraft, or remedying capability deprivations among the poor and powerless. *Id.* at 7, 90, 92. Markets economize on information. *Id.* at 27. Each actor does not have to know much, and her incentives will be compatible with others’ incentives and the freedom to do as they like. *Id.* The denial of labor market freedoms was largely responsible for the failure of “bureaucratic socialism” in Eastern Europe and Russia. *Id.* at 114. With open discussions in a democracy, the “public interest may have excellent prospects of winning.” *Id.* at 123.

Until recently, economics textbooks listed the “defects” of markets. But one set of prejudices has given way to another; unexamined faith becomes heresy and yesterday’s heresy becomes today’s superstition, and the Buddha’s “middle path” is now required. *Id.* at 111. There is no general formula concerning the extent or reach of markets, and critical scrutiny is required instead, especially when “public goods” are at issue. *Id.* at 124, 128-29. In particular, market and non-market institutions must be integrated better, *id.* at 178, an important task for law I would add.

168. *See, e.g.,* PISTOR & WELLONS, *supra* note 9, at 285. There is a divergence among Asian legal systems: “different parts of a legal system behave differently, with some parts showing convergence and others developing along a more idiosyncratic path.” *Id.* There is a strong convergence in the shift from State to market (allocative law), but with a path dependence in procedures, just as comparative law would predict. *Id.*

countries. The nature and pace of these choices are clearly for the citizens of a particular country to determine. This Article merely speculates about the phenomena, interactions, and overall consistency of some of these choices, especially about the opportunities and constraints these choices create in various circumstances.¹⁶⁹

Nevertheless, this Article supports four strong recommendations. *First*, people in transition countries are trying to fight free of the colonial or Marxist preoccupations of their past, and they should thus be reluctant to subscribe to pat reform techniques from some multilateral or foreign donor. It is almost always possible to reform along your own lines and receive the donors' money anyway, provided you appear serious and use a bit of subterfuge. One example would be using the language but not the substance of donors' reforms. But even staunch critics of the IMF and the WB admit that their litany of transparency, public participation, accountability, and predictability is a serviceable and relatively culture-neutral focus for reforms.¹⁷⁰ This litany is a fit replacement for decisions based on elite desires or various forms of a "guided" democracy. The essence of this good governance thesis is that the best possible policies must be formulated and implemented through law, simply to attain coherence and consistency, to promote policy-favoring behaviors, and to suppress those behaviors that circumvent or negate democratization and development. The legal design question is how to create the best incentives and organizations for these purposes, given the local "social field" the law reforms will operate in.¹⁷¹

Second, my partly-dialectical analyses show that many things are both the problem and the solution to democratizing and development in roughly

169. Davis & Trebilcock, *supra* note 3, at 32 (illustrating that "there is a great deal of room for debate about the relationship between legal reforms and development."). I have tried to narrow the scope of debate by focusing on the rarely-treated politics of legal reforms. In his study of Southeast Asia, Harding properly notes: "The tasks before us are immense and urgent. Moreover they are primarily for Southeast Asians themselves to undertake", perhaps within the ASEAN university network. Harding, *supra* note 24, at 46. Law reform is "where the general and the particular meet", the "proper arena for all scholarly disciplines." *See id.*

170. *See* Donnelly, *supra* note 1; Lehmann states that

"[the] Soviet Union and America waged their lumbering face-off in the rhetorical service of socialism and democracy", Third World "polities clamored to throw off the yoke of colonialism under a new generation of nationalist leaders, and recombined into disheartening states-for-their-own-sakes: cults of personality, kleptocracies, 'ethnic cleansers'—and, all too often, fusions of all three."

Lehmann, *supra* note 106 (discussing the ideas of Robert Webe). Schwartz, *supra* note 61 (discussing William Easterly proposal for "publicly visible 'aid contests' in which governments vie for loans from a common pool that will help the poor the most."). *See also supra* note 6 and accompanying text.

171. *See supra* notes 59-73, 76 and accompanying text.

equal measures: the state, its bureaucracy and courts, markets, many types of private organizations (especially multinational corporations and nongovernmental organizations), and foreign investors.¹⁷² In each case, the pragmatic legal reform goal should be to suppress the mischief and advance the remedy that these entities offer. *Third*, effective reform requires that the dominance of incumbent elites, stemming from autocratic and underdeveloped practices in the past, be transformed, neutralized, or even destroyed. If incumbents are not controlled, democratization and development opportunities will quickly dissipate and get translated into the “defensive modernization” that means the incumbents’ “business as usual.”¹⁷³ Reformers must thus form a consensus among themselves, over the nature, pace, and sequence of reforms, and then develop the political entrepreneurship and leadership to implement this consensus democratically and to foster a culture or ideology where the reformist whole is a public inspiration greater than the sum of its parts.¹⁷⁴

Fourth, focusing on the needs of the poor and powerless is central to many theories of development and to a social democracy. This emphasis should take the legal forms of planned redistributions of rights and privileges, and “affirmative action” in some sectors of the economy in favor of the poor and powerless. Such policies will also lessen an elite dominance, and economize on the use of the very scarce resources that are available for “welfare” programs. But some “safety nets” should be established for the poor and powerless nevertheless, for humanitarian reasons and to increase political stability by reducing uncertainty, even if international donors object.¹⁷⁵

These processes are bound to be slow and imperfect, advancing and retreating on many fronts at once in an arguably dialectical fashion. Ideally, reformers will learn by doing, learn from past successes and failures while applying an “experimental,” comparative, and economics-

172. See *supra* notes 8-11 and accompanying text.

173. See FIELD & HIGLEY, *supra* note 9, at 50 (“As it was historically before the appearance of liberal and semi-liberal states, politics in much of the world has again become a dangerous but unavoidable activity that tends to degrade, humiliate, and sometimes destroy all but the most fortunate of those who engage in it.”); PUTNAM, POLITICAL ELITES, *supra* note 10, at 126 (quoting Samuel Huntington, on Latin American countries where “social forces confront each other nakedly . . . no agreement exists as to the legitimate and authoritative means for resolving disputes,” and governments reign briefly but do not rule). See also *supra* notes 10-23, 27-33 and accompanying text (the roles of incumbent elites).

174. See *supra* note 138 and accompanying text.

175. See Davis & Trebilcock, *supra* note 3, at 24-25 (describing feminist and environmentalist perspectives on development that incorporate the poor and powerless and future generations). See also *supra* text notes 95, 112-14, 130, 136-37, 146-47, 157 and accompanying text.

informed jurisprudence to this new, unprecedented, and exciting process.¹⁷⁶

176. See TAMANAHA, *SOCIO-LEGAL*, *supra* note 21 (stating that formalism is on the rise in U.S. courts and legal analyses, but pragmatism offers the most serviceable solutions); *id.* at 255 (stating that only if academics and other reformers can emulate judges in curbing their bias can we determine what is wrong with law and how to fix it); Harding, *supra* note 24, at 53 (quoting Nietzsche, I imagine future thinkers in whom European-American indefatigability is combined with the hundred-fold inherited contemplativeness of the Asians: such a combination will bring the riddle of the world to a solution."); *Roll Out*, *supra* note 23, at 71 ("Superficial answers are easy."). Reforms have just begun, are too piecemeal, or have consequences slow to emerge. But why do certain reforms succeed in certain countries?. This is a question I have tried to answer.