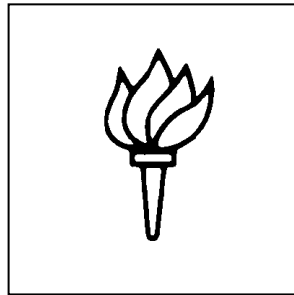


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### The Relationship between Law and Development: Optimists Versus Skeptics

*Kevin E. Davis and Michael J. Trebilcock*

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OPTIMISTS VERSUS SKEPTICS

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## THE RELATIONSHIP BETWEEN LAW AND DEVELOPMENT:

### OPTIMISTS VERSUS SKEPTICS\*

#### *Abstract*

Over the past two decades there has been a resurgence of interest, on the part of both academics and practitioners, in using law to promote development in Latin America, sub-Saharan Africa, Central and Eastern Europe, and Asia. The level of academic interest in the topic is reflected in the publication of three recent books on law and development by prominent American scholars: Thomas Carothers (ed.), *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE*, Kenneth Dam, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT*, and David Trubek and Alvaro Santos (eds.), *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*. In this Essay we suggest that these books (or at least some contributions to them) reflect insensitivity to the ambiguities surrounding the relationship between legal reform and development. We show that there is ongoing debate about fundamental questions such as whether law is an important factor in determining social or economic outcomes in developing societies given the existence of informal methods of social control; whether there are insurmountable economic, political or culture obstacles to effective legal reform; as well as, assuming effective legal reform is feasible, what types of reforms are conducive to development and what types of actors ought to implement them. We argue that although there are some reasons for optimism about the potential impact of legal reforms upon development, the relevant empirical literature is inconclusive on many important issues and counsels caution about the wisdom of continuing to invest substantial resources in promoting legal reform in developing countries without further research that clarifies these issues.

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## I. INTRODUCTION

According to Thomas Carothers, in a widely cited essay, “The Rule of Law Revival”:

One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world’s troubles. How can U.S. policy on China cut through the conundrum of balancing human rights against economic interests? Promoting the rule of law, some observers argue, advances both principles and profits. What will it take for Russia to move beyond Wild West capitalism to more orderly market economics? Developing the rule of law, many insist, is the key. How can Mexico negotiate its treacherous economic, political and social transitions? Inside and outside Mexico, many answer: establish once and for all the rule of law.<sup>1</sup>

Consistent with Carothers’ claim, over the past two decades or so western nations and private donors have poured billions of dollars into rule of law reform in Latin America, sub-Saharan Africa, Central and Eastern Europe, and Asia.<sup>2</sup> In other words, in the poorest countries of the world, billions of dollars that could be devoted to projects such as vaccination programs, primary school education and water and sanitation facilities are instead being put into the pockets of lawyers.

The widely chronicled resurgence of interest in supporting legal reforms in developing countries reflects a fundamentally optimistic perspective on the role of law (and lawyers) in development. In fact, supporters of legal reforms are typically optimistic on at least three different levels. First, they are optimistic about whether specific

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<sup>1</sup> Thomas Carothers, *The Rule of Law Revival*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 3 (Thomas Carothers ed., 2006); see also Brian Tamanaha, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 1-4 (2004).

<sup>2</sup> David Trubek, *The Rule of Law in Development Assistance: Past, Present and Future*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 74 (David M. Trubek & Alvaro Santos eds., 2006).

characteristics of a society's legal system play a significant causal role in determining its prospects for development – in short, law matters. Second they are optimistic about the possibilities for meaningful reform. In other words, they believe that legal systems change in response to deliberate efforts at reform. Third, they are optimistic about their ability to identify the legal reforms that will ultimately promote development.

Although optimism about legal reform seems to dominate the world of practice, and has done so for at least two decades, in the world of ideas optimistic views have come under attack from a variety of directions. The mildest of those attacks challenge the assumption that law and development practitioners are capable of identifying and implementing the legal reforms that promote development. More forceful attacks challenge the notion that would-reformers can reasonably expect to effect meaningful legal change given the obstacles posed by various historical, economic, political or cultural factors. The most thoroughly skeptical approach challenges the claim that law plays a significant causal role in development. These challenges – which, incidentally, have direct parallels in the literature on the relationship between law and social change in the United States<sup>3</sup> – are important because so long as they remain unanswered we cannot know whether it makes sense to continue to devote substantial resources to legal reforms in developing countries. This problem, which Thomas Carothers calls “the problem of knowledge,” makes law and development a ripe field for academic research.<sup>4</sup>

The revival of academic interest in the relationship between law and development is reflected in the publication of three recent books on law and development by prominent American (predominantly) scholars: Thomas Carothers (ed.), *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE*,<sup>5</sup> Kenneth Dam, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT*,<sup>6</sup> and David Trubek and Alvaro Santos (eds.), *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*.<sup>7</sup> Taken together, these works represent some of

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<sup>3</sup> See generally, Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 938 (2007) (describing and critiquing dominant assumptions about the limitations of law as a means of effecting social change in the United States).

<sup>4</sup> Thomas Carothers, *The Problem of Knowledge*, in *PROMOTING THE RULE OF LAW ABROAD*, *supra* note 1, 16.

<sup>5</sup> *PROMOTING THE RULE OF LAW ABROAD*, *supra* note 1.

<sup>6</sup> Kenneth Dam, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* (2006).

<sup>7</sup> *THE NEW LAW AND ECONOMIC DEVELOPMENT*, *supra* note 2.

the best current thinking on the part of American lawyers about the relationship between legal reforms and development.

Although the contributions to these volumes reflect decades of both practical experience with and scholarly reflection upon legal reforms in developing countries, at the end of the day they are remarkably inconclusive. None of the authors represented in these volumes seem strongly optimistic about whether legal reforms are likely to promote development (at least early in the development trajectory). However, their views range from mild optimism to mild skepticism and it is not immediately apparent how to resolve the differences in points of view and resulting uncertainties. Although some of the contributors to the volumes by Trubek and Santos and Carothers refer to a new orthodoxy or consensus about the role of law in development, we are struck by the lack of consensus.<sup>8</sup>

Given what is at stake for the inhabitants of developing countries – not to mention legal professionals – the legal academy’s failure to resolve uncertainty about the validity of basic assumptions underlying efforts to promote legal reform is unsettling. Our main purpose in writing this Essay is to describe the dimensions of the problem of knowledge as reflected in the books under review in the hope of stimulating further efforts to solve it.

The Essay begins by outlining the various types of optimistic claims that have been made about the role of legal reforms in promoting development, both in the books under review and elsewhere. Then we turn to the grounds for skepticism and their implications for the practice of law and development. We consider in turn claims that, legal reformers lack the ability to identify appropriate legal reforms, legal reformers must overcome potentially insurmountable economic, political or cultural obstacles to reform, or legal reform is irrelevant because informal alternatives to law are of overriding importance as mechanisms of social control. We suggest that the third and most radical form of skepticism has been unduly neglected. We conclude by surveying the

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<sup>8</sup> See David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 2. In this respect the Trubek and Santos volume is highly equivocal. For instance, elsewhere in their essay Trubek and Santos claim that what distinguishes the current intellectual moment is the salience of critique. *Id.*, 8. Meanwhile Santos’ individual contribution to the volume is devoted to describing and explaining lack of consensus about the role of law in development just within the World Bank. See generally, Alvaro Santos, *The World Bank’s Uses of the “Rule of Law” Promise in Economic Development*, in THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 2, 253.

empirical evidence bearing on these debates, the directions that further empirical research ought to take, and the role that legal academics might play in such research.

## II. THE LAW OPTIMISTS

Even among legal optimists there is a wide range of views, some of which are mutually incompatible, about both the meaning of development and the types of legal reforms that are likely to promote development. We briefly discuss the first question but most of this Part is devoted to describing the main approaches to the second question. In our view, most of the contributions to the works under review either attempt to work out the implications of or criticize one or more of these optimistic approaches.

### A. What is development?

To a certain extent disagreements about appropriate legal reforms reflect more fundamental disagreements about the ends sought to be achieved through legal reform, or in other words, about the meaning of development. Hints of this disagreement can be observed in the books under review here. Dam, following a line taken by many of the economists whose work he surveys, focuses on the relationship between law and *economic* development, which he generally seems to equate with economic growth. By contrast, most of the contributors to the Trubek and Santos volume and some of the contributors to the Carothers volume are interested in the implications of legal reform for a broader range of social outcomes, including respect for human rights, gender equality and, more generally, distributive justice.<sup>9</sup> To some extent these differences in objectives explain the difference in the types of legal reforms the authors favor, with Dam emphasizing corporate law, commercial law, property rights and the financial sector, while contributors to the Trubek and

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<sup>9</sup> Trubek & Santos, *supra* note 8, in THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 2, 1, 15-17. Kerry Rittich claims that the more holistic conception of the objective of legal reform has now been “normalized,” noting that it has been endorsed by leading scholars such as Amartya Sen as well as influential actors such as the World Bank. Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, in THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 2, 203, 208. See also Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in PROMOTING THE RULE OF LAW ABROAD, *supra* note 1, 31 (arguing that the rule of law ought to be viewed as an end rather than a means by legal reformers).



Santos collection, including most notably Kerry Rittich, focus on the regulatory and redistributive functions of the state.

## B. The Law and Development Movement

Scholarly interest in the relationship between law and development has a long pedigree.<sup>10</sup> In fact, 18<sup>th</sup>, 19<sup>th</sup> and early 20<sup>th</sup> century scholars such as Montesquieu, Maine and Weber were deeply interested in various aspects of this relationship in the European context. Western scholars have also long been interested in the role played by law during the great period of colonization in the 18<sup>th</sup> and 19<sup>th</sup> centuries.<sup>11</sup> Moreover, since the 19<sup>th</sup> century scholars from developing countries have been deeply concerned about the role that law might play in their countries' social and economic development (although as Scott Newton points out these voices are often ignored in North American academic discourse).<sup>12</sup> Much of this literature is surveyed in the illuminating intellectual history that Duncan Kennedy has contributed to the Trubek and Santos collection.

Notwithstanding the work of these earlier scholars, in the United States at least, the best known optimistic perspective on law and development is one that emerged in the 1960s and is known simply as 'the law and development movement'.

The intellectual background to this movement lies in the post-World War II period which witnessed an increase in the number of scholars and policymakers interested in the poor nations of the world. Following in the footsteps of the American economic historian Walt W. Rostow, theorists of the 1950s and early 1960s contended that the process of development could be seen as a series of successive stages of economic growth through which all countries must pass.<sup>13</sup> This school of thought came to be known as modernization theory.

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<sup>10</sup> See generally, Duncan Kennedy, *Three Globalizations of Legal Thought: 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 2, 19. Cf. Brian Tamanaha, *The Lessons of Law and Development Studies*, 89 AM. J. INT'L L. 470, 470 (1995) ("Law and development has been a field of academic study for about 30 years.")

<sup>11</sup> See for example, J. S. Furnivall, *COLONIAL POLICY AND PRACTICE: A COMPARATIVE STUDY OF BURMA AND NETHERLANDS INDIA* (1956). For additional references to the literature on colonial administration see John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 468 (1977).

<sup>12</sup> Scott Newton, *The Dialectics of Law and Development*, in THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 2, 178-9, 181.

<sup>13</sup> Rostow identified five such stages: the traditional society, the preconditions

Modernization theorists contended that a society's underdevelopment was both caused by and reflected in its traditional (as opposed to modern) economic, political, social and cultural characteristics or structures. In order to advance, underdeveloped societies would have to undergo the same process of evolution from traditionalism to modernity previously experienced by more developed societies. However, while the impetus to modernize in the now developed countries had resulted from endogenous changes, the transformation of developing nations would come about primarily from exogenous stimuli. That is, the modernization of the Third World would be accomplished by the diffusion of capital, institutions, and values from the First World.<sup>14</sup>

More specifically, this would involve the emergence of a free market system, the rule of law, multi-party politics, the rationalization of the authority and growth of the bureaucracy, and protection of human rights and basic freedoms. It was presumed that Westernization, industrialization, and economic growth would generate the preconditions for the evolution of greater social equality and consequently the rise of stable, democratic institutions and a welfare state. Throughout this process the state would serve as the primary agent of social change.

Drawing on modernization theory, the first wave of law and development theorists that emerged in the 1960s presumed that the diffusion of Western law to the Third World would aid in its modernization. Indeed, modern law was believed to be the "functional prerequisite of an industrial economy."<sup>15</sup> Influenced by Weber, a strong instrumentalist conception of law underlay this view of the relationship between law and development. As defined by Burg, this conception

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for takeoff, the takeoff, the drive to maturity and the age of high mass consumption. See W.W. Rostow, *STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* (1960).

<sup>14</sup> Tamanaha, *supra* note 10; Peter F. Klarén, *Lost Promise: Explaining Latin American Underdevelopment*, in *PROMISE OF DEVELOPMENT: THEORIES OF CHANGE IN LATIN AMERICA* 3, 11 (Peter F. Klarén & Thomas J. Bossert eds., 1986). As Cyril Black, a noted historian and modernization theorist put it: "Although the problems raised by generalizations from a rather narrow base (the now modern countries) must be acknowledged, the definition of modernity takes the form of a set of characteristics believed to be applicable to all societies. This conception of modernity, when thought of as a model or ideal type, may be used as a yardstick with which to measure any society." Cyril Black, *THE DYNAMICS OF MODERNIZATION: A STUDY IN COMPARATIVE HISTORY* 68-75 (1966).

<sup>15</sup> David M. Trubek, *Toward A Social Theory of Law: An Essay on the Study of Law and Development*, 82 *YALE L. J.* 44 (1972).

“sees law as a force which can be molded and manipulated to alter human behaviour and achieve development.”<sup>16</sup> It “focuses above all on substantive rules of law, looking to the state for the promulgation of these rules and reserving for the legal profession a prominent role in formulating them.”<sup>17</sup> Such a conception of law as an instrument of and not merely a response to development, as well as the view of the lawyer as a ‘social engineer,’ was entirely in line with the “perceived need for rapid, directed change” underlying the modernization school’s notion of development.<sup>18</sup>

Armed with this instrumental model of the role of law in development, the movement adopted a top-down approach. It emphasized the reform of legal education and the legal profession, and to a lesser extent the reform of formal legal rules. The assumption was that lawyers trained to use law as an instrument for change would promote the developmental goals of the state.<sup>19</sup> It was presumed that reform of legal education and the legal profession would stimulate other forms of modernization, including the emergence of other institutions integral to an effective modern legal system, such as those responsible for administering and enforcing legal rules. There was some recognition that there might be a “gap” or lack of perfect correspondence between “law on the books” and “law in action.” In these cases, the response of law and development scholars was still to rely on legal education reform and better “penetration,” defined by Friedman as “the degree to which a rule,

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<sup>16</sup> Elliot M. Burg, *Law and Development: A Review of the Literature and a Critique of ‘Scholar in Self-Estrangement,’* 25 AM. J. COMP. L. 492, 505-6 (1977).

<sup>17</sup> *Id.*

<sup>18</sup> Burg, *supra* note 16, 492, 505-6. See also Thomas Heller, *An Immodest Postscript*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Erik Jensen & Thomas Heller eds., 2003).

<sup>19</sup> David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, WISC. L. REV. 1062, 1075-6 (1974); see also Burg, *id.* at 509-11. As noted by Trubek and Galanter: “The legal development scholars produced critical appraisals of the law schools in Asia, Africa, and Latin America, arguing that by training lawyers to think more instrumentally, the schools could initiate change that would narrow the gap between the present performance of the legal profession and its developmental possibilities. Thus it was proposed that law schools study and explain the relationship between specific legal rules, doctrines, and procedures on the one hand, and national developmental goals on the other, urging their students to work to reform those laws and institutions that failed to further the goals.”

code, or law takes hold in a population.”<sup>20</sup> Key to closing the gap and improving penetration was better communication of law to the populace.<sup>21</sup>

For better or worse, strands of all these ideas about law and development survive in contemporary scholarship. For example, in his contribution to the Carothers collection Wade Channell argues that the views that animate the World Bank’s current legal and judicial reform programs are not only similar to those endorsed by the original law and development movement but also equally flawed.<sup>22</sup> On a more positive note Stephen Golub’s optimistic contribution to the Carothers volume (the collection also includes an essay by him that is much more skeptical) recommends a program of legal reforms that sounds very similar in approach to at least some of the programs associated with the law and development movement.<sup>23</sup> Golub’s “legal empowerment alternative” emphasizes reforming legal education to include opportunities for law students to assist the poor through legal clinics and other programs, altering the structure of the legal profession to enable paralegals to play a greater role in delivering legal services, and communicating legal information directly to the populace.<sup>24</sup>

### C. The New Institutional Economics

In the American legal academy interest in the legal systems of developing countries declined significantly in the mid-1970’s (for reasons we explore below).<sup>25</sup> Shortly thereafter, however, economists re-discovered the subject. Their interest coincided with the emergence of the so-called New Institutional Economics, which views the design and functioning of public sector institutions and private sector organizations that interact with these institutions as critical determinants

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<sup>20</sup> Lawrence Friedman, *Legal Culture and Social Development*, 4 L. & SOC’Y REV. 29, 43 (1969).

<sup>21</sup> Robert B. Seidman, *The Communication of Law and the Process of Development*, WISC. L. REV. 686 (1972).

<sup>22</sup> Wade Channell, *Lessons Not Learned About Legal Reform*, in PROMOTING THE RULE OF LAW ABROAD, *supra* note 1, 137, 139 (“In many if not most cases the lessons of the law and development movement have simply not been learned by practitioners in the new rule-of-law reform enterprise of the last two decades.”)

<sup>23</sup> Stephen Golub, *The Legal Empowerment Alternative*, in PROMOTING THE RULE OF LAW ABROAD, *supra* note 1, 161.

<sup>24</sup> Golub *supra* note 23 164-165, 169-177. See also David Mednicoff, *Middle East Dilemmas*, in PROMOTING THE RULE OF LAW ABROAD, *supra* note 1, 251, 268 (endorsing application of Golub’s approach in the Middle East).

<sup>25</sup> Trubek & Galanter, *supra* note 19.

of countries' development prospects through the incentives they create to engage in either socially productive or socially unproductive activities.<sup>26</sup>

Proponents of this view have made extremely bold claims about the potentially beneficial impact of legal reforms. For example, in his influential book, *THE OTHER PATH*, Hernando De Soto makes claims such as:

“The legal system may be the main explanation in the difference in development that exists between industrialized countries and those that are not industrialized.”<sup>27</sup>

“Development is possible only if efficient legal institutions are available to all citizens.”<sup>28</sup>

“The law is the most useful and deliberate instrument of change available to people.”<sup>29</sup>

Similar, although perhaps slightly less extravagant claims, can be found in documents produced by influential agencies such as the World Bank.<sup>30</sup>

Kenneth Dam's book is explicitly devoted to describing the implications of the new institutional economics for legal reform.<sup>31</sup> Many of those implications resemble the ones advanced by modernization theorists in an earlier era.<sup>32</sup> In terms of substantive law, from this perspective, core priorities should attach to well-defined and alienable private property rights; a formal system of contract law that

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<sup>26</sup> Douglass North, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990) [hereinafter *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE*]; North, *UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE* (2005) [hereinafter *UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE*]; World Bank, *WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD*.

<sup>27</sup> Hernando De Soto, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* 185 (1989).

<sup>28</sup> *Id.* at 186.

<sup>29</sup> *Id.* at 187.

<sup>30</sup> See, e.g., World Bank, *WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS* (2002); World Bank, *WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD* (1997); World Bank, *WORLD DEVELOPMENT REPORT 1996: FROM PLAN TO MARKET* (1996); World Bank, *DOING BUSINESS IN 2004: UNDERSTANDING REGULATION* (2004).

<sup>31</sup> Dam, *supra* note 6, 6.

<sup>32</sup> For examples of illustrative works in this genre see the World Bank documents cited above, *supra* note 30, and Philip M. Nichols, *A Legal Theory of Emerging Economies*, 39 VA. J. INT'L L. 229 (1999). For another useful survey of the literature see Frank B. Cross, *Law and Economic Growth*, 80 TEX. L. REV. 1737 (2002).

facilitates impersonal contracting; a corporate law regime that facilitates the capital investment function through ease of incorporation and limited liability of small and medium sized enterprises and minimizes agency costs faced by shareholders in general in the case of non-owner managed firms or by minority shareholders in firms with controlling shareholders; a system of secured lending that makes it easy for creditors to take a broad range of assets as collateral, identify competing claims to those assets, and seize and sell the assets in the event of default; a bankruptcy regime that induces the exit of inefficient firms and redeployment of their assets to higher-valued uses; and a non-punitive, non-distortionary tax regime. In order to ensure the enactment and enforcement and administration of these substantive laws, priorities include designing law making institutions that are transparent and stable in their commitment to basic legal norms and inclusive in the stakeholders to whom they are responsive and law enforcement and administrative institutions that are competent, non-corrupt, free of undue political influence, procedurally transparent, and effectively resourced.

Not all proponents of the New Institutional Economics endorse the view that developing countries are best served by adopting Western legal models.<sup>33</sup> For example, scholars such as Robert Cooter and Hernando de Soto claim that it is generally useful for formal legal norms to mimic the content of local non-legal norms so as to ensure that informal mechanisms associated with non-legal norms work to enhance the potency of legal norms.<sup>34</sup> On a slightly different tack, Katharina Pistor and her co-authors have argued that it is difficult to transplant Western legal norms (or any other norms for that matter) from developed

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<sup>33</sup> See, e.g., Robert Cooter, *The Rule of State Law and the Rule of Law State: Economic Analysis of the Legal Foundations of Development*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 212 (Michael Bruno & Boris Pleskovic eds., 1998); De Soto, *supra* note 27; Kathryn Hendley, *Rewriting the Rules of the Game in Russia: The Neglected Issue of the Demand for Law*, E. EUR. CONST. REV. 89 (1999); and, Douglass North, *supra* note 26 at 89-91 and 140-141. Of course, these contemporary analyses track Trubek and Galanter's complaints about the "ethnocentric quality of liberal legalism's model of law in society." See David N. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis of Law and Development in the United States*, WISC. L. REV. 1062 (1974). A much earlier exponent of similar views was Montesquieu, who stated, "[Laws] should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another." See Charles de Secondat & Baron de Montesquieu, *THE SPIRIT OF THE LAWS* 6 (Book I) (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone trans. and eds., 1989).

<sup>34</sup> See especially, Cooter, *supra* note 33 and de Soto, *supra* note 27.

to developing societies because legal norms are often expressed largely in terms of references to other legal norms or concepts, and so they are difficult for members of the receiving society to understand without a sound comprehension of large portions of the legal system from which they originate.<sup>35</sup> Like a number of other scholars Pistor et al. argue that the potency of legal norms depends heavily upon them being well understood by both members of society and agents of the state. For his part, Dam is sympathetic to the view that one size may not fit all. He devotes a significant amount of space to rebutting claims that one particular set of Western legal institutions, namely those associated with the common law as opposed to the civil law, is inherently superior.<sup>36</sup> He also observes that in general when it comes to developing countries transplanting legal institutions from developed countries, "...not even world best-practice solutions will work if the society will resist them or ignore them."<sup>37</sup>

#### D. The New Constitutionalism

As an empirical matter, a great deal of the resurgence of interest in the law of developing countries involves interest in the *constitutional law* of those countries.<sup>38</sup> Over 56 per cent of the 188 member states of the United Nations made major amendments to their constitutions in the decade between 1989 and 1999 and of these states at least 70 per cent adopted completely new constitutions. At least one quarter of all the member states of the UN introduced bills of rights and some form of constitutional review into their constitutional regimes during this period. As a result at least 92 countries, or approximately 50 per cent of member states, have incorporated bills of rights, fundamental rights or some form of individual and/or collective rights into their constitutional orders. Prior to 1989, approximately ten countries had effective systems of constitutional review in which a constitutional court or the courts in general regularly struck down proposed or enacted legislation as contrary to the state's constitution. Ten years later, at least 70 states or

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<sup>35</sup> Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 101 (2002); Dan Berkowitz, Katharina Pistor & Jean-François Richard, *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 165 (2003).

<sup>36</sup> Dam, *supra* note 6, 24.

<sup>37</sup> Dam, *supra* note 6, 224.

<sup>38</sup> Heinz Klug, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* 66 (2000). *See also* Carothers, *supra* note 1 at 8 (describing constitutional reforms in Eastern Europe and Latin America).

approximately 38 per cent of all member states of the UN had adopted some form of constitutional review.<sup>39</sup> Similarly, many states have ratified a variety of international treaties and conventions on human rights.<sup>40</sup>

To a certain extent the extensive attention being paid to constitutional reform can be justified without resorting to instrumental conceptions of the role of law in development. On some views, constitutions that embody human rights protections, democracy, etc. are ends in and of themselves, manifestations of a society's moral commitments<sup>41</sup> On another view, such constitutional reforms are merely costly commitments that political elites undertake in order to signal to investors the strength of their commitment to the rule of law and economic liberalization.<sup>42</sup>

Constitutional reform can also be justified in more directly instrumental terms. It is not at all uncommon to justify constitutional reform as a means of ensuring the existence of institutions capable of promulgating and enforcing substantive norms that will ultimately lead to peace and prosperity. Even Kenneth Dam, who devotes the bulk of his book to analyzing the relationship between various substantive areas of private law – corporate and commercial law, property law etc. – and economic development, ultimately claims that public law is more important than private law to economic growth.<sup>43</sup>

Generally speaking, optimism about the instrumental potential of constitutional norms focuses upon and endorses constitutional arrangements that display three attributes: democracy, separation of powers, and freedom of the press.

### 1. Democracy

Many development theorists take the view that democracy – which we define narrowly here to mean the selection of political leaders in free, fair and competitive elections – is generally conducive to

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<sup>39</sup> Klug, *supra* note 38.

<sup>40</sup> Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1936 (2002).

<sup>41</sup> Kleinfeld, *supra* note 9, 34-47 (explaining why respect for norms such as equality and human rights and the rule of law are worthwhile ends); Alvaro Santos, *supra* note 8, 253, 261-263, 265-266 (summarizing claims that the rule of law is intrinsically valuable).

<sup>42</sup> Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83 (2002).

<sup>43</sup> Dam, *supra* note 6, 41.



development.<sup>44</sup> Some of these theorists focus on the connection between democracy and orthodox measures of development such as economic growth, levels of education and infant mortality.<sup>45</sup> However, others claim that there is a positive relationship between democracy and broader definitions of development. For example, Sen has famously argued that it is not merely a coincidence that there has never been a famine in a functioning multiparty democracy.<sup>46</sup> Similarly, beginning with Immanuel Kant, a number of political scientists have claimed that democracies are highly unlikely to go to war with one another.<sup>47</sup>

Many of these thinkers rely heavily upon the idea that democracies generate relatively strong incentives for political leaders to promote development.<sup>48</sup> For example, in *POWER AND PROSPERITY*,<sup>49</sup> Olson distinguishes between three basic political regimes: roving bandits, stationary bandits, and democracies, assuming that in all cases political leaders are motivated by self-interest. Roving bandits (recent examples of which might be rebel groups in Sierra Leone, the Sudan, Angola, and the Congo, plundering the countries' natural resources) have extremely high time discount rates because of their insecurity of tenure, and will predate on the local population to the limit by confiscating all their wealth.<sup>50</sup> Stationary bandits, in contrast, fully control a particular territory and, depending on their security of tenure and hence time discount rates, may have an incentive to adopt less confiscatory

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<sup>44</sup> For a recent exposition of this viewpoint and survey of the relevant literature see Jagdish N. Bhagwati, *Democracy and Development: Cruel Dilemma or Symbiotic Relationship?*, 6 REV. DEV. ECON. 151-162 (2002); for a discussion of why democracy requires more checks and balances than merely periodic competitive elections, see Paul Collier, *THE BOTTOM BILLION* 146-149 (2007).

<sup>45</sup> See, e.g., Surjit Bhalla, *Freedom and Economic Growth: A Virtuous Cycle?*, in *DEMOCRACY'S VICTORY AND CRISIS* 195 (Axel Hadenius ed., 1997).

<sup>46</sup> Amartya Sen, *RESOURCES, VALUES AND DEVELOPMENT* (1984); Amartya Sen & Jean Drèze, *HUNGER AND PUBLIC ACTION* (1989); Amartya Sen, *DEVELOPMENT AS FREEDOM* (1999).

<sup>47</sup> Immanuel Kant, *Perpetual Peace*, in *THE ENLIGHTENMENT: A COMPREHENSIVE ANTHOLOGY* 784 (Peter Gay ed., 1974); Michael Doyle, *Kant, Liberal Legacies and Foreign Affairs, Part I*, 12 *PHIL. & PUB. AFF.* 323 (1983).

<sup>48</sup> For overviews of the empirical debate see Adam Przeworski & Fernando Limongi, *Political Regimes and Economic Growth*, 7 *J. ECON. PERSP.* 51 (1993); Przeworski et al, *DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD 1950-1990* (2000); Bhagwati, *supra* note 44.

<sup>49</sup> Mancur Olson, *POWER AND PROSPERITY: OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS* (2000).

<sup>50</sup> *Id.* at 6-7.

measures. The strategy of adopting less than maximal amounts of confiscation creates incentives for the citizenry to be productive in future time periods and thus may increase total returns to a despot with a relatively low discount rate.<sup>51</sup> Democratic leaders however, have stronger incentives to promote broader conceptions of the social interest and concomitant laws and legal institutions than either roving or stationary bandits. According to Olson, this is because, unlike autocratic rulers, democratically elected rulers can often realistically anticipate returning to power at a future date even after being defeated in an election. This prospect may induce them to place a relatively high value on enhancing the future welfare of their citizens.<sup>52</sup>

Several other arguments that have been made in favour of democracy do not rely upon claims about incentive effects. For instance, Dani Rodrik has argued that participatory political institutions are the most reliable “meta-institutions” from a developmental perspective because they are best suited to elicit and aggregate the local knowledge required to develop other norms and institutions. Following thinkers such as John Stuart Mill and Immanuel Kant, Rodrik has also argued that the deliberative processes typically associated with democracy tend to make people more public-spirited and willing to compromise. He has buttressed these arguments with empirical evidence that democracies exhibit superior qualities than autocracies in managing social conflict and in fashioning social compromises to deal with adjustment to macroeconomic shocks.<sup>53</sup>

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<sup>51</sup> *Id.* at 7-12.

<sup>52</sup> Cf. Avinash Dixit, Gene M. Grossman & Faruk Gul, *The Dynamics of Political Compromise*, 108 J. POL. ECON. 531 (2000) (the prospect of an indefinite sequence of reasonably frequent changes in power may also give democratically elected leaders an incentive to cooperate with political opponents in the hopes of receiving reciprocal treatment when they are out of power). Other scholars have observed, and Olson readily acknowledges, that democracies are vulnerable to interest group pressures, voter ignorance and misinformation, and majoritarian forms of oppression of minorities, and that some democratic regimes are likely to be weak, unstable or corrupt. Mancur Olson, *Dictatorship, Democracy and Development*, 87 AM. POL. SCI. REV. 567, 571 (1993). See also Thomas Carothers, *The End of the Transition Paradigm*, 13 J. OF DEMOCRACY 5 (2002).

<sup>53</sup> Dani Rodrik, ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS AND ECONOMIC GROWTH chap. 5 (2007) (Institutions for High-Quality Growth).

## 2. Separation of powers

Setting aside the debate surrounding autocracy and democracy, another important line of literature, which can be traced at least as far back as Montesquieu's *THE SPIRIT OF THE LAWS*,<sup>54</sup> emphasizes the role of constitutional and political checks and balances as methods for constraining the state to act in the general social interest rather than in the narrow interest of small distributional coalitions.<sup>55</sup> Many scholars assert that constitutional separation of powers is critically predicated on the existence of a credible referee, *i.e.* an independent judiciary to enforce the prescribed allocation of powers and to command respect for its rulings, often from agencies of the state itself. Unfortunately, the exact definition of judicial independence is a matter of debate.<sup>56</sup>

The literature has identified a number of ways in which separation of powers helps to enhance the likelihood of socially beneficial laws being enacted, but three arguments are most prominent. First is the argument that separation of powers increases the cost to special interest groups of 'capturing' political or legal institutions. The basic intuition behind this argument is that the more institutions that must be dealt with in order for an actor or group of actors to further their narrow interests, the more likely it is that transaction costs and strategic behaviour will prevent an agreement from being concluded.

A second argument commonly used to justify separation of powers is that it makes it difficult for governments to opportunistically renege upon prior commitments. For instance, North and Weingast note that following the Glorious Revolution in England, the powers of parliament were greatly augmented, but the monarchy was not abolished

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<sup>54</sup> Montesquieu, *THE SPIRIT OF THE LAWS*, chapters XI and XII. See also, James Madison, *Federalist No. 51*, in Alexander Hamilton, James Madison & John Jay, *THE FEDERALIST PAPERS*.

<sup>55</sup> James D. Gwartney & Randall G. Holcombe, *Economic Freedom, Constitutional Structure and Growth in Developing Countries*, in *INSTITUTIONS AND COLLECTIVE CHOICE IN DEVELOPING COUNTRIES* 33, 39 (Mwangi Kimenyi & John Mukum Mbaku eds., 1999); Jean-Jacques Laffont & Mathieu Meleau, *Separation of Powers and Development*, 64 *J. DEV. ECON.* 129 (2001). See also Albert Breton, *COMPETITIVE GOVERNMENTS: AN ECONOMIC THEORY OF POLITICS AND PUBLIC FINANCE* (1996); Torsten Persson, Gerard Roland & Guido Tabellini, *Separation of Powers and Political Accountability*, 112 *Q. J. ECON.* 1163 (1997); Roumeen Islam & Claudio Montenegro, *WHAT DETERMINES THE QUALITY OF INSTITUTIONS?* (2002); Daniel Lederman, Norman Loayza & Rodrigo Reis Soares, *ACCOUNTABILITY AND COMPETITION: POLITICAL INSTITUTIONS MATTER* (2001).

<sup>56</sup> See *e.g.* Martin Shapiro, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981).

altogether.<sup>57</sup> Creating a balance of power between institutions served to enhance the predictability of government policies: “Increasing the number of veto players implied that a larger set of constituencies could protect themselves against political assault, thus markedly reducing the circumstances under which opportunistic behaviour by the government could take place.”<sup>58</sup> In a variant upon this argument, Stephenson, building upon an earlier suggestion by Ramseyer, suggests that review by an independent judiciary can help to enforce commitments to behave moderately while in power made between risk-averse political rivals.<sup>59</sup>

Finally, a third argument in favour of separation of powers is that it tends to promote competition between different institutions. In some circumstances, the performance of one institution serves as a yardstick for the performance of others. The competition can take place either horizontally, as in the case of competition between executive, legislative and judicial branches, or vertically, as between national and sub-national levels of government.<sup>60</sup> For example, Weingast has espoused the virtues of what he refers to as “market preserving federalism.” The main attributes of a market preserving federal system are that primary authority over the economy is vested with regional governments rather than the central government but regional governments are barred from erecting barriers to the free movement of labour and goods and are faced with a hard budget constraint, so that they are unable to print money, and do not have access to unlimited credit.<sup>61</sup> According to Weingast, within a market preserving federal system the regional units of government compete for capital and labour by implementing the most efficient economic rules. Meanwhile, the central government does not have the authority to accommodate economic interests that have been displaced and that promise political support in return for government intervention to halt or reverse the changes accompanying economic growth.<sup>62</sup>

Kenneth Dam acknowledges the arguments in favor of separation of powers and the importance of an efficient and independent judiciary but points out that these concepts seem to mean different things in

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<sup>57</sup> Douglass North & Barry Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England*, 49 J. ECON. HIST. 803, 831 (1989).

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

<sup>59</sup> Matthew C. Stephenson, ‘When the Devil Turns...’: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59 (2003).

<sup>60</sup> See generally, Albert Breton, *supra* note 55.

<sup>61</sup> Barry Weingast, *The Economic Role of Political Institutions: Market Preserving Federalism and Economic Development*, 11 J. L. ECON. & ORG. 1 (1995).

<sup>62</sup> *Id.* at 9.

different countries or are at least embodied in very different legal institutions.<sup>63</sup> For one thing Dam shows that the constitutional structures of three prominent developed countries, England, France and the United States, assign very different amounts of power to the legislature relative to other branches of government.<sup>64</sup> He also shows that these and other countries differ considerably in terms of the mechanisms governing judicial appointment and termination; criteria for judicial appointment and promotion; and judicial compensation.<sup>65</sup> Moreover, these issues are all matters of contention, even in developed Western democracies, and pose even more severe problems in many developing countries with weakly developed democratic and civil liberties traditions and few highly trained legal professionals uncompromised by political affiliations.

### 3. Freedom of the press

Another body of literature emphasizes the importance to development of a free – that is to say, independent of government influence – and competitive press, particularly as a check on abuse of power by prominent officials.<sup>66</sup> For instance, Amartya Sen has argued that famines do not occur in societies with access to free press because an aware population can utilize the media to pressure the government to enact policy change that deals with the problem at hand.<sup>67</sup> More generally he suggests that an institutional framework supporting free speech and its pursuit through media venues can bring about further institutional change by drawing the attention of the population and, hence, public officials, to controversial issues which the officials need to address.<sup>68</sup>

In a similar vein, other scholars have suggested that a free press can play an important role in controlling abuse of power by state

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<sup>63</sup> Dam, *supra* note 6 at 107 (“While many countries believe that the structure of their government is based on that principle [separation of powers], the content of the principle differs across countries to the point that two fully incompatible versions of that principle exist in the world.”), 111-18 (discussing ‘behavioral independence’ of judges in various countries).

<sup>64</sup> Dam, *supra* note 6, 106-111.

<sup>65</sup> *Id.* at 111-8.

<sup>66</sup> See generally, Timothy Besley, Robin Burgess & Andrea Prat, *Mass Media and Political Accountability*, draft chapter for THE RIGHT TO KNOW: INSTITUTIONS AND THE MEDIA 6 (World Bank); Simeon Djankov, Caralee McLeish, Tatiana Nenova & Andrei Shleifer, *Who Owns the Media?*, typescript (2001).

<sup>67</sup> Amartya Sen & J. Drèze, *THE POLITICAL ECONOMY OF HUNGER* (1990).

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

officials. The theory is that if the press is free and competitive, journalists will have an incentive to uncover and report instances of abuse. Brunetti and Weder claim that this theory is confirmed by cross-country regression analyses of the relationship between measures of freedom of the press and corruption, although they do not specify which types of corruption are most affected.<sup>69</sup> Freedom of the press may also impede abuse of power by limiting the state's ability to manipulate the media. For example, in some societies there is concern about state-controlled media being used to foster enmity toward ethnic minorities. A free press may be less vulnerable to such manipulation.<sup>70</sup>

#### E. The Internationalists

The focus of the Carothers and Dam books is on domestic legal institutions and their effects on the welfare of the inhabitants of developing countries. However, as most of the contributors to the Trubek and Santos collection acknowledge, many policymakers and scholars concerned with improving the lot of developing countries and their inhabitants focus on international as opposed to domestic legal institutions. In the 1960s and 70s the focus of attention was the United Nations and calls for the creation of a 'New International Economic Order' resulted in the passage of a number of landmark resolutions in the United Nations General Assembly.<sup>71</sup> More recently attention has shifted to other prominent features of the international legal system such as international human rights law, the World Trade Organization, the OECD Anti-Bribery Convention, and bilateral investment treaties.

Optimism about the role of reforms to international economic law is based in part on their potential effects on international trade and investment, which in turn influence prices faced by local consumers, opportunities for local producers to market their products, and incentives for local producers to innovate. This kind of analysis clearly underpins calls for reforms to WTO provisions that govern matters such as trade in agricultural products and trade in the services of low-skilled laborers as well as certain aspects of bilateral investment treaties.

Optimism about legal reforms at the international level is also based in part on the potential effects of such reforms on domestic legal

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<sup>69</sup> See, e.g., Aymo Brunetti & Beatrice Weder, *A Free Press is Bad News for Corruption*, (Working Paper: University of Basel, April, 1999); see also Roumeen Islam & Claudio Montenegro, *WHAT DETERMINES THE QUALITY OF INSTITUTIONS?* (2002).

<sup>70</sup> Besley et al, *supra* note 66 at 6.

<sup>71</sup> See generally, Antony Anghie, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 196-244 (2005).

institutions.<sup>72</sup> To begin with, some aspects of the international legal regime directly regulate the content of domestic law. For instance, various aspects of the WTO agreements prohibit certain types of domestic legal arrangements on the theory that they constitute disguised barriers to trade. However, the international regime may also shape domestic legal institutions indirectly by altering the domestic political landscape. For example, reforms that reduce barriers to trade may cause export-oriented sectors of the economy to expand and increase in political power. They may then use that power to demand legal reforms that promote the economic interests of both themselves and, possibly, other members of society.

Alternatively, Brunetti and Weder argue that reforms that liberalize international flows of goods, capital and labor may induce domestic legal reforms by enhancing opportunities for members of society both to exit and to exercise voice.<sup>73</sup> They argue that “openness increases the mobility of footloose factors presenting a credible threat of exit. Therefore, governments concerned about maintaining their tax base would have incentives to improve basic government services.”<sup>74</sup> They also argue that within more open economies individuals are exposed more frequently to the political systems of other nations, “and learn from observation how beneficial a working rule of law is for doing business.”<sup>75</sup> Such observations provide individuals with benchmarks against which to assess the quality of their own government’s services,

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<sup>72</sup> Dani Rodrik, ONE ECONOMICS, MANY RECIPES, *supra* note 53, chap. 8 (The Global Governance of Trade As if Development Mattered) (recommending that the WTO be viewed as an institution that allows developing countries autonomy to pursue institutional innovations required to stimulate economic growth); Kevin E. Davis, *How to Make the Doha Round a Genuine Development Round*, 100 ASIL PROC. 226 (2006) (identifying channels through which reforms to WTO regime might influence domestic legal institutions); see also Collier, *supra* note 44, chap. 9 (arguing for various international charters setting out norms for government conduct in a number of areas).

<sup>73</sup> Aymo Brunetti & Beatrice Weder, *More Open Economies Have Better Governments*, 18 (Working Paper: University of Saarland Economic Series 9905, 1999); Silvio Borner, Aymo Brunetti & Beatrice Weder, POLITICAL CREDIBILITY AND ECONOMIC DEVELOPMENT 91-95 (1995). See also Roumeen Islam & Claudio Montenegro, WHAT DETERMINES THE QUALITY OF INSTITUTIONS? (2002); Daniel Treisman, *The Causes of Corruption: A Cross-National Study*, 76 J. PUB. ECON. 399 (2000); cf. Dani Rodrik, Arvind Subramanian & Francesco Trebbi, *Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development*, 9 J. ECON. GROWTH 131 (2004).

<sup>74</sup> Brunetti & Weder, *id.*

<sup>75</sup> Brunetti & Weder, *id.*

putting pressure upon government to improve those services found wanting.

#### F. Rule-of-law optimists

Most of the theories canvassed so far emphasize the relationship between one aspect of the legal system – public law or private law, international law or domestic law etc. – and development outcomes. However, many modern day legal optimists take a more holistic view of the matter. As the epigraph from Carothers suggests, these optimists focus on the extent to which the overall legal system manifests respect for “the rule of law,” rather than the attributes of any single component of the system, as a determinant of development.<sup>76</sup>

For some scholars, the rule of law denotes a set of intrinsically valuable characteristics of a legal system, an end rather than a means of development. For other scholars, however, focusing on the rule of law is justified by the notion that law and legal institutions perform crucial social functions and that they must take a particular form in order to do so. Rachel Kleinfeld’s contribution to the Carothers collection is an exemplary statement of this viewpoint.<sup>77</sup> In taking this view she draws upon ideas that are deeply embedded in modern Western legal theory.<sup>78</sup> One of the leading exponents of this view was Lon Fuller. In one of his most famous works, Fuller identified eight distinct desiderata in the design of a legal system. Stated in summary form those desiderata were that laws should: (1) be of general application, (2) be publicized or at least made available to affected parties beforehand (3) be prospective in application, (4) be understandable, (5) be coherent (*i.e.* not contradictory) (6) not require conduct beyond the powers of the affected party, (7) not be subject to frequent changes, and (8) reflect congruence between rules as announced and their actual administration. Somewhat

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<sup>76</sup> See, Thomas Carothers, *The Rule-of-Law-Revival*, in PROMOTING THE RULE OF LAW ABROAD, *supra* note 1, at 3, 7 (“Although its wonderworking abilities have been exaggerated, the desirability of the rule of law is clear.”) Both Upham and Santos attribute this view to the World Bank, citing the writings of its former general counsel and senior vice-president, Ibrahim Shihata. See Santos, *supra* note 8, 269-73; Upham, *Mythmaking in the Rule of Law Orthodoxy*, in PROMOTING THE RULE OF LAW ABROAD *supra* note 1, 77-79 . For a collection of Shihata’s writings see Ibrahim F.I. Shihata, COMPLEMENTARY REFORM: ESSAYS ON LEGAL, JUDICIAL AND OTHER INSTITUTIONAL REFORMS SUPPORTED BY THE WORLD BANK (1997).

<sup>77</sup> *Competing Definitions of the Rule of Law*, in PROMOTING THE RULE OF LAW ABROAD 31.

<sup>78</sup> See generally, Santos, *supra* note 8, 259-66 (discussing alternative conceptions of the rule of law and its relation to development).



controversially, Fuller argued that a legal system that failed to satisfy these desiderata would not merely be bad, but could not properly be called a legal system at all.<sup>79</sup> He seemed to take the position that a legal system that failed along some or all of these dimensions would not be capable of serving any useful social purpose (partly because it would be unlikely to elicit citizens' voluntary co-operation) and that the social purposes performed by law are crucial.<sup>80</sup>

In more recent times it has become fashionable to refer to the fundamental virtues of legal systems compendiously as manifestations of "the rule of law". In a famous essay Joseph Raz suggested that the basic idea underlying the rule of law can be derived by starting from the simple premise that law must be capable of guiding the behaviour of its subjects. From this basic idea Raz went on to produce a list of principles that serve as indicia of the rule of law. Raz's list overlaps with Lon Fuller's to the extent that it includes the principles that "all laws should be prospective, open and clear", "laws should be relatively stable" and, "the making of particular laws...should be guided by open, stable, clear and general, rules". However, the most interesting feature of Raz's list is that it also includes principles that refer as much to the institutions that enforce the law as to legal norms themselves. In fact, these principles of institutional design make up five out of the eight items on his list. Specifically, Raz says that "the independence of the judiciary must be guaranteed", "the principles of natural justice must be observed", "the courts should have review powers over the implementation of the other principles" and "the courts should be easily accessible".<sup>81</sup> Like Fuller, Raz suggests that conformity to the rule of law is "virtually always" of instrumental value as it enables a legal system to perform useful social functions.<sup>82</sup>

Focussing explicitly upon developing countries, Brian Tamanaha also defends the view that the rule of law is of instrumental value.<sup>83</sup> However, his "minimalist" version of the rule of law "would require only that the government abide by the rules promulgated by the political

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<sup>79</sup> See, e.g., Lon L. Fuller, *THE MORALITY OF LAW* 39 (rev. ed. 1969).

<sup>80</sup> *Id.*, especially at 200-224.

<sup>81</sup> Joseph Raz, *The Rule of Law and its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210-29 (1979). For a similar melding of formal and institutional components in the course of defining the rule of law see Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 *RATIO JURIS* 127-42 (1993). Summers provides a more elaborate specification of the institutional components of the rule of law.

<sup>82</sup> *Id.* at 226.

<sup>83</sup> See Tamanaha, *supra* note 10; see more generally, Tamanaha, *On the Rule of Law*, *supra* note 1.

authority and treat its citizens with basic human dignity, and that there be access to a fair and neutral (to the extent achievable) decision maker or judiciary to hear claims or resolve disputes.”<sup>84</sup> According to Tamanaha, so-defined the rule of law serves an important role in protecting individuals from oppressive or rapacious authoritarian governments.

An interesting feature of Fuller’s, Raz’s, Tamanaha’s and Kleinfeld’s analyses is their abstraction from legal and institutional details. All four scholars make it reasonably clear that in their view a variety of legal and institutional arrangements are compatible with most of their prescriptions. For example, Fuller writes of seven of his eight desiderata that “...the most we can expect of constitutions and courts is that they save us from the abyss; they cannot be expected to lay out very many compulsory steps toward truly significant accomplishment.”<sup>85</sup> Similarly, Raz makes it clear that “[M]any of the principles which can be derived from the basic idea of the rule of law depend for their validity or importance on the particular circumstances of different societies.” He also mentions that “[the principles] must be constantly interpreted in light of the basic idea.” As for Tamanaha, he takes pains to point out that his minimalist conception of the rule of law is “compatible with many social-cultural arrangements.”<sup>86</sup> Similarly, Kleinfeld states, “[E]nd goals of the rule of law can be achieved even when institutions vary widely.”<sup>87</sup>

The fact that Fuller, Raz, Tamanaha and Kleinfeld attempt to formulate universal propositions about the characteristics of socially desirable legal systems places them squarely in the camp of the law optimists. This suggests that legal optimists who also make claims about the merits of specific legal institutions, like, for example, Kenneth Dam, would endorse the claim that the rule of law is important to development.<sup>88</sup> However, these scholars’ reluctance to endorse specific means of achieving legal excellence sets them apart from many legal optimists and may make his work appealing to some of the law skeptics whose views we canvass below.<sup>89</sup>

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<sup>84</sup> *Id.* at 476.

<sup>85</sup> Fuller, *supra* note 79 at 44.

<sup>86</sup> Tamanaha, *supra* note 10, 476.

<sup>87</sup> Kleinfeld, *supra* note 9, 61.

<sup>88</sup> Dam seems to view the specific legal reforms that he recommends as means of achieving the rule of law, which he defines in much the same manner as the legal theorists discussed in this subsection. See Dam, *supra* note 6, 13-17, 24. We characterize him as an optimist because he ultimately endorses the assumption that legal institutions matter as a valid basis for policymaking. Dam, *supra* note 6 at 230-231.

<sup>89</sup> Part III, *infra*.

### III. THE LAW SKEPTICS

#### A. The landmark critique

The first wave of optimism about law and development in the post-war period was short-lived; scarcely begun in the mid-1960s, Trubek and Galanter – two founding figures in the field - announced its demise in their widely-cited 1974 article, “Scholars in Self-Estrangement”.<sup>90</sup> To a certain extent they trace the movement’s decline to uniquely American experiences with the civil rights movement and the Vietnam War. Those experiences led to an awareness of the discrepancy between American ideals and the reality of the American legal system. In other words, as Americans began to question their ideals at home they also began to question their value as models for other countries. They also note skepticism about the motives of the United States government and its local collaborators in many developing countries during the Cold War period. However, the most fundamental reason for the decline of the law and development movement was that it was widely perceived to have been a failure in enhancing appreciably most developing countries’ state of development. This unfavourable assessment in turn played a role in causing sponsors of law and development initiatives to reduce or withdraw financial support for law and development programs.<sup>91</sup>

According to Trubek and Galanter in “Scholars in Self-Estrangement,” the notion that American liberal legalism could be successfully transplanted to LDCs was completely misguided. This idea was deemed “ethnocentric and naïve,” as the pre-conditions to the successful implementation of the liberal legal model contrasted sharply with reality in developing countries. As Trubek and Galanter stated:

Empirically, the model assumes social and political pluralism, while in most of the Third World we find social stratification and class cleavage juxtaposed with authoritarian or totalitarian political systems. The model assumes that state institutions are the primary locus of social control, while in much of the Third World the grip of tribe, clan, and local community is far stronger than that of the nation-state. The model assumes that rules

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<sup>90</sup> Trubek & Galanter (1974), *supra* note 19.

<sup>91</sup> John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 459-60 (1977).

both reflect the interests of the vast majority of citizens and are normally internalized by them, while in many developing countries rules are imposed on the many by the few and are frequently honored more in the breach than in the observance. The model assumes that courts are central actors in social control, and that they are relatively autonomous from political, tribal, religious, or class interests. Yet in many nations courts are neither very independent nor very important.<sup>92</sup>

Because of the divergence between the conditions in developing countries and those in the developed world, reform of legal institutions had little or no effect on social or economic conditions in the former set of countries. This was due in part to the fact that the formal legal system – the main focus of liberal legalism – was not accessible to the majority of the populace in most developing countries. In this respect, the first law and development movement could be faulted for paying too little attention to customary laws and other informal legal institutions.<sup>93</sup> Worse yet, to the extent that it emphasized the instrumental potential of law the law and development program had the effect of reinforcing pernicious inequalities and enabling legal institutions to serve as tools of domination in developing societies. Furthermore, the development of instrumental skills of local lawyers might have actually reinforced social and economic inequalities by raising the cost of legal services and by reducing participation in decision-making through formalization of legal decision-making. An improvement in the instrumental skills and capacity of lawyers could simply lead to more effective resistance by elites toward development efforts; they would hire those in the conservative group of legal professionals for such ends.<sup>94</sup>

The skeptical approach to law and development advanced in “Scholars in Self-Estrangement” can be regarded as a synthesis of a number of disparate schools of thought, including legal pluralism, historical materialism, dependency theory, critical legal studies, and cultural determinism. The synthesis that Trubek and Galanter created continues to be extremely influential and has recently been rearticulated in many respects in the book by Dam and contributions to the collections edited by Carothers and Trubek and Santos. However, it is important to recognize that its underlying intellectual components in many cases pre-existed the publication of “Scholars in Self-Estrangement” and have

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<sup>92</sup> Trubek & Galanter, *supra* note 19.

<sup>93</sup> *Id.* at 1078-9.

<sup>94</sup> *Id.* at 1076.

continued to develop independently. In the interests of analytical clarity it is useful to distinguish those components. It is particularly important to keep in mind that Trubek and Galanter's critique encompasses at least three distinct forms of skepticism, namely: skepticism about whether the actors who have engaged in legal reform to date are able to identify and implement appropriate reforms; skepticism about whether the legal system is truly an independently manipulable feature of a society; and, perhaps most importantly of all, skepticism about whether there is any causal relationship between legal reforms and development;

### B. Implementation Problems

A great deal of the present debate about law and development is not about whether legal reform is feasible or whether it has the potential to promote development, but instead, about the appropriate types of legal reforms. In other words, a large portion of the debate is about how to pursue legal reform, rather than whether pursuing legal reform is likely to do any good.

To some extent the salience of these controversies reflects the success of optimistic law and development scholarship as an intellectual enterprise. Given the number and variety of conflicting claims about the meaning of development, and the types of legal reforms that will lead to development, there is more than enough fuel for skepticism about whether any particular set of reforms will succeed in achieving their objectives. So, for instance, many of the contributors to the Trubek and Santos volume worry about whether current reform projects are likely, other than indirectly, to achieve social justice.<sup>95</sup> In the Carothers volume, Kleinfeld criticizes rule-of-law projects for treating legal reforms as ends rather than means; Golub criticizes programs for failing to focus on the objective of poverty alleviation and over-estimating the importance of the legal profession and state actors;<sup>96</sup> and Mednicoff criticizes US rule of law programs in the Arab world for focusing on

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<sup>95</sup> See, e.g., David Kennedy, *The "Rule of Law," Political Choices, and Development Common Sense*, in THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 2, 173 ("development strategy requires a detailed examination of the distributional choices effected by various legal rules and regimes to determine, as best one can, their likely impact on growth and development"); Rittich, *supra* note 9, 228 ("the fact that the development agenda has been reformulated to include the social is almost completely unreflected in the core legal and institutional agenda"); Trubek & Santos, *supra* note 8, 16 ("A very central objective of our effort has been reinstate distributional issues on the development agenda.").

<sup>96</sup> Golub, *supra* note 23, 109-11.

judicial reform rather than civic and professional education;<sup>97</sup> and many contributors complain about the failure of foreign-based reformers to recognize the importance of local knowledge and adaptation to local conditions in promoting rule of law reform.<sup>98</sup>

Other critiques of the implementation of legal reforms focus on the competence of the foreign actors that sponsor many legal reforms and the extent to which their activities are undermined by unchecked conflicts of interest and intellectual or ideological biases. For example, Santos suggests that competition for power, resources and prestige within the World Bank combine with a lack of accountability to induce units within the Bank to support legal reform projects without reflecting on their impact on development, either before or after the fact.<sup>99</sup> Similarly, legal professionals in developing countries, including judges, consultants and activists, may have a personal interest in promoting legal reforms without regard to their impact on the broader society.<sup>100</sup> Santos also suggests that intellectual and ideological biases affecting officials of both the World Bank and the governments of its borrowers contribute to those institutions' pre-occupations with certain kinds of legal reform.<sup>101</sup>

Many of these complaints are also voiced by contributors to the Carothers volume.<sup>102</sup> In addition, Kleinfeld points out that some legal reforms are prompted by foreign actors attempting to promote their own interests in matters such as global security or exporting particular values as opposed to helping poor countries to develop.<sup>103</sup> Channell also notes the problems caused by development agencies' practice of relying on external consultants who are presumed to be experts in their field, thereby creating limited incentives to invest in acquiring context-specific

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<sup>97</sup> Mednicoff, *supra* note 24, 251, 262-6.

<sup>98</sup> For an eloquent and persuasive articulation of the more general importance of local knowledge in policy making, see James C. Scott, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (2002).

<sup>99</sup> Santos, *supra* note 8, 290-1.

<sup>100</sup> Santos, *supra* note 8, 297-8.

<sup>101</sup> Santos, *supra* note 8, 296-7.

<sup>102</sup> Golub, *supra* note 23, 127-31 (discussing role of incentives created by bureaucratic structures, self-interests and biases of legal professionals); Laure-Hélène Piron, *Time to Learn, Time to Act in Africa*, in *PROMOTING THE RULE OF LAW ABROAD*, *supra* note 1, 275, 294-7 (identifying problems posed by internally-generated incentives to approve poor projects, lack of relevant experience on part of justice sector experts assigned to development projects and conflicts between donors).

<sup>103</sup> Kleinfeld, *supra* note 41, 56-8. See also Channell, *supra* note 22, 156 (discussing range of reasons why donors might sponsor rule of law reforms).

knowledge, to formulate novel solutions and to share information.<sup>104</sup> Piron points out that many of the difficulties associated with implementation of foreign-sponsored legal reforms are paralleled by problems faced in the delivery of other sorts of development aid by external actors. She suggests that proponents of legal reforms would benefit from drawing on the expertise of other aid practitioners and scholars.<sup>105</sup>

Acknowledging the potential implementation problems associated with legal reforms does not necessarily imply that legal reform projects in developing countries should be abandoned. It does, however, suggest that expectations about the impact of those reforms should be modest. The existence of ongoing theoretical disagreements implies that many reforms should be viewed as experiments designed to generate knowledge about the relationship between law and development rather than applications of best practices founded upon uncontroversial theoretical principles. Meanwhile, the consistent complaints about reforms sponsored by foreign actors implies some degree of modesty on the part of external actors (or ‘outsiders’) in promoting rule of law or other legal reforms in developing countries and correspondingly a larger role for ‘insiders’ with detailed local knowledge of both local values and the innumerable factors that determine the consequences of adopting or adapting specific legal institutions.

Finally, the combination of absence of theoretical consensus about the appropriate direction of reform and concerns about reforms supported by actors based in developed countries suggests that reference points for legal reforms in many developing countries need not be legal institutions that prevail in developed countries. Instead it may be more appropriate to adapt legal arrangements that prevail in other developing countries that share important aspects of the values, history, culture and institutional traditions with countries embarking upon such reforms.

### C. The Problem of Legal Determinism

The problem with law and development as it is currently practiced may be more than just a problem of implementation or political sensibility. The reason why legal reforms have not delivered on their promise may not be simply that people have failed to identify the right package of reforms. Another possibility is that would-be reformers are

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<sup>104</sup> Channell, *supra* note 22, 149-56.

<sup>105</sup> Piron, *supra* note 102, 298. For a general discussion of shortcomings of the institutions that deliver development aid see William Easterly, *WHITE MAN’S BURDEN: WHY THE WEST’S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* (2006).

necessarily incapable of effecting meaningful legal change. It may be the case that legal systems change only in response to fundamental historical, economic, cultural or political factors and are largely immune to top-down attempts at reform.

This sort of skepticism about whether legal institutions play an independent role in promoting social change plays a prominent role in the works under review and has a long and distinguished intellectual pedigree.

### 1. Path dependency

Some scholars seem to believe that institutional changes typically occur by accident rather than by design. For example, Dam devotes a great deal of sceptical attention to a wave of attempts to explain various important characteristics of contemporary legal systems by reference to whether they are most strongly connected, in a historical sense, to one of several major legal families, namely, the common law or, German, French or Scandinavian civil law.<sup>106</sup> The reader of these studies is left with the impression that the fate of many contemporary societies was

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<sup>106</sup> Simeon Djankov et al., *Courts*, 118 Q.J. ECON. 453 (2003) (showing relationship between legal origin and enforcement of contracts); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997) (legal origin and protection of investors); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998) (same); Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, *The Regulation of Entry*, 117 Q. J. ECON. 1 (2002) (legal origin and regulation of entry); Juan Botero, Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Regulation of Labor*, Q. J. ECON. (2004) (legal origin and regulation of labor); Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might be Right*, 30 J. OF LEGAL STUD. 503 (2001) (legal origin and economic growth). Cf. see Daron Acemoglu, Simon Johnson & James A. Robinson, *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369 (2001) (finding that correlation between legal heritage and measures of institutional quality disappears once one takes into account the impact of variations in the policies of colonizing powers); Daniel Berkowitz, Katharina Pistor & Jean Francois Richards, *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 165 (2003) (finding that correlation between legal heritage and measures of institutional quality disappears once historical extent of transplantation with adaptation in the 19<sup>th</sup> is taken into account).



sealed in the 19<sup>th</sup> century when somebody decided whether they would be governed by French civil law or English common law.<sup>107</sup>

Douglass North has devoted a great deal of effort to attempting to explain the relationship between historical events and contemporary institutions. He draws upon theories of path dependence first formulated in the context of technological change,<sup>108</sup> and argues that institutional change is similarly path dependent.<sup>109</sup> North claims that the path of institutional development, once set, is reinforced by increasing returns that are characteristic of the initial institutional structure: “Once a development path is set on a particular course, the network externalities, the learning process of organizations, and the historically derived subjective modeling of the issues reinforces the course.”<sup>110</sup> Hence, institutional development is unlikely to be disrupted even by a revolutionary transformation in the political or legal order.<sup>111</sup>

However, while at one level compelling, at another level North’s concept of path dependency is insufficiently specified to be very helpful in the real world. Without more, his theory cannot explain the limits of path dependency, yet those limits evidently exist. For example, in 1974, only 39 countries – one in every four world-wide – were democratic. As

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<sup>107</sup> In a similar vein, Olson argues that “autocracy is prevented and democracy is permitted by the accidents of history that leave a balance of power,” or stalemate - a dispersion of force and resources that makes it impossible for any one leader or group to overpower all of the others. In such circumstances the leaders of the competing groups have an incentive to create institutional arrangements which prevent any one group from monopolizing power. (Olson also notes two further necessary conditions for democracy to emerge. In order to prevent the emergence of ‘mini-autocracies,’ competing groups should be dispersed over the entire region. There must also not be any imminent possibility of conquest by neighbouring regimes.) This view seems to render serious political change contingent upon the accidents of history. Olson, *supra* note 49 at 33, 573.

<sup>108</sup> See Brian Arthur, *Self-Reinforcing Mechanisms in Economics*, in THE ECONOMY AS AN EVOLVING COMPLEX SYSTEM (Phillip Anderson, Kenneth Arrow & David Pines eds., 1988); W. Brian Arthur, *Competing Technologies, Increasing Returns and Lock-in by Historical Events*, 99 ECON. J. 116 (1989); Paul David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. 332 (1985).

<sup>109</sup> INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE, *supra* note 26; UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE, *supra* note 26.

<sup>110</sup> INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE, *supra* note 26 at 99.

<sup>111</sup> *Id.* at 101.

of 1997, 117 countries – nearly two in three – were democratic<sup>112</sup> (recognizing that many of these regimes are fragile, weak, or corrupt).<sup>113</sup> Over this time period, most former socialist and communist economies also embarked upon transitions to more market-oriented economies with varying degrees of success. And some developing countries, especially in East Asia, have pursued remarkably successful economic (and often political and legal) transformations over only a few decades. These changes have been accompanied or effectuated by a proliferation of new laws and political, legal, and economic institutions, often despite longstanding antithetical traditions. Clearly, path dependency is neither absolute nor permanent. Recognizing the importance of historical events in shaping present-day legal institutions still leaves open the question of whether reformers can deliberately alter the course of current events to induce legal changes that ultimately benefit society. Thus, we turn to theories that identify more specific economic, political and cultural factors that limit the scope of legal reform in any given context.

## 2. Economic theories

It seems intuitively plausible that the very fact of their lack of economic development may prevent developing countries from successfully undertaking legal reforms without external support. There are real costs associated with the operation of sophisticated legal institutions, including, most notably, the costs of training and retaining the skilled personnel required to staff courts and other legal institutions, draft legislation and to disseminate information about the content of the law.<sup>114</sup> It is also clear that some developing countries have been unwilling or unable to bear those costs. In her contribution to the Carothers volume Piron describes situations in Nigeria where judges had to rely upon counsel appearing before them for access to law reports, or in Rwanda when at one point in time (1997) there were about fifty judges, twenty prosecutors and fifty lawyers for a population of 7.5 million.<sup>115</sup> She concludes that “massive investments” are required in the justice sector in Africa.<sup>116</sup>

On the other hand, there are reasons to pause before assuming that lack of economic development per se poses an insurmountable

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<sup>112</sup> World Bank, *supra* note 26.

<sup>113</sup> Thomas Carothers, *The End of the Transition Paradigm*, 13 J. DEMOCRACY 5 (2002).

<sup>114</sup> Daniel Kaufmann & Aart Kraay, *Growth Without Governance*, (World Bank Policy Research Working Paper No. 2928 July 2002).

<sup>115</sup> Piron, *supra* note 102, 281-282.

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

obstacle to the creation of high quality legal institutions. First, the proportion of a society's wealth allocated to maintenance of its legal institutions depends in part upon the nature of those institutions. Most obviously, the amount of public resources available to fund legal institutions depends heavily upon the quality of the institutions responsible for collecting taxes.

A second reason why wealth need not be a pre-requisite to institutional quality is that high quality institutions may not actually be very expensive. As noted above, the principal costs associated with operating legal institutions are the costs of personnel. However, personnel costs tend to be determined principally by the supply of workers with the relevant skills rather than simply by national wealth. Some countries that are poor in the sense of having low levels of national income and/or limited endowments of natural resources nevertheless have relatively low-paid but well-educated populations. In those countries the costs of maintaining high quality legal institutions may not be prohibitive.<sup>117</sup> Moreover, in some cases the quality of institutions is manifested in their ability to limit rather than expand the role of the state. For example, legal norms that limit the government's ability to imprison political opponents or to regulate the media are possible examples. These types of high-quality institutions will tend to conserve upon human and physical resources and so may be less expensive than institutions of poorer quality.

A third reason to question the assumption that institutional quality is strongly determined by wealth is because it is possible that good legal institutions pay for themselves. In other words, it may be possible to recoup the benefits of investing in legal institutions by taxing the increased economic activity that is stimulated by the improved institutions. In this case, so long as the government has access to credit, wealth constraints should not affect either its ability or its incentives to invest in high quality institutions.

### 3. Political theories

A common refrain throughout the Carothers volume is that political factors are crucial determinants of whether legal reforms can be undertaken successfully.<sup>118</sup> Similarly, at least some of the contributors to

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<sup>117</sup> Amartya Sen, *DEVELOPMENT AS FREEDOM* (1999) *supra* note 46, at 48.

<sup>118</sup> *See*, Kleinfeld, *supra* note 41 at 55-6 (“Achieving rule-of-law ends requires political and cultural, not only institutional, change.”); Matthew Stephenson, *A Trojan Horse in China*, in *PROMOTING THE RULE OF LAW ABROAD* *supra* note 1, 191 (arguing that China's political elite is likely to thwart or co-opt legal reforms that threaten their interests); Matthew Spence, *The Complexity of*

the Trubek and Santos volume take it to be self-evident that underlying various struggles about the direction of legal reform are competing political ideologies and interests.<sup>119</sup> (Dam acknowledges the point but indicates that political issues are outside the scope of his book).<sup>120</sup> Unfortunately, none of the books makes a sustained effort to generalize about the circumstances in which political factors are likely to be more or less conducive to particular types of reforms. There is, however, a large body of literature that addresses this issue.

Many scholars suggest that the quality of legal institutions ultimately depends on whether those who exercise political power are interested in creating legal institutions that enhance the overall welfare of society or instead are primarily interested in extracting rents for their own benefit.

Some scholars claim that the answer to this question is often determined by political traditions shaped in the colonial era. They trace the emergence of predatory authoritarian states back to similarly designed colonial institutions.<sup>121</sup> In a recent extension of this line of argument, Acemoglu, Johnson and Robinson suggest that whether or not Europeans attempted to set up an “extractive state” as opposed to a “neo-Europe” in any given colony was influenced significantly by geographic factors which in turn determined the feasibility of European settlement:

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*Success in Russia*, in PROMOTING THE RULE OF LAW ABROAD *supra* note 1, 217 (attributing success of U.S. supported reforms in Russia to propitious political conditions); Mednicoff, *supra* note 24, 269 (noting that successful reform in the Middle East will depend on cooperation of political elites); Piron, *supra* note 102, 287-90 (rule-of-law assistance must be sensitive to the political context); Lisa Bhansali & Christina Biebesheimer, *Measuring the Impact of Criminal Justice Reform in Latin America*, in PROMOTING THE RULE OF LAW ABROAD, *supra* note 1 at 301, 303-4 (noting that reforms in Latin American were associated with efforts to consolidate political transition from authoritarianism to democracy);

<sup>119</sup> See Kennedy, *supra* note 95 at 95 (tracing changes in experts’ discourse about development policy since 1945 and noting how contemporary law and development discourse obscures political issues that underlie choices about legal rules and regimes); Rittich, THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 2 at 248, 252 (emphasizing that the task of rehabilitating institutional reforms that promote social justice is a political task).

<sup>120</sup> Dam, *supra* note 6, 69.

<sup>121</sup> See, for example, Mahmood Mamdani, CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM (1996) (tracing despotic features of post-colonial African governments to despotic colonial rule); Matthew Lange, *British Colonial Legacies and Political Development*, 32 WORLD DEV. 905 (2004) (same).

“in places where the disease environment was not favourable to European settlement, the cards were stacked against the creation of Neo-Europes, and the formation of the extractive state was more likely.”<sup>122</sup> They corroborate their theory using a multi-country regression analysis that shows strong positive relationships between measures of mortality rates of European settlers, the quality of colonial institutions, the quality of current institutions and per capita income.

Other scholars focus on the power that foreign actors continue to wield over developing countries. For example, dependency theorists focus on the power that metropolises wield over peripheral societies as primary determinants of the shape of legal institutions in dependent societies. Rather than exploring methods of reforming legal institutions most dependency theorists have focused their attention on methods of bringing about fundamental changes in the balance of economic and political power in dependent societies. They typically advocate the replacement of regimes dominated by foreign actors or a relatively small local elite with more populist governments that would adopt socialist economic policies. In these theories, it is often simply presumed that the introduction of socialism will inevitably lead to a series of institutional reforms designed to induce significant redistributions of wealth and power.<sup>123</sup>

Taking a somewhat different tack, other scholars have explored how geographic factors influence whether predatory or benevolent political institutions emerge.<sup>124</sup> For instance, Engerman and Sokoloff

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<sup>122</sup> Daron Acemoglu, Simon Johnson & James A. Robinson, *The Colonial Origins of Economic Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369 (2001).

<sup>123</sup> To the extent that descriptions of such reforms were provided they would typically include restrictions on foreign investment and import-substitution policies; reform of oppressive land tenure regimes; granting workers a significant role in the governance of enterprises; worker and farmer co-operatives; state-owned enterprises and creating economic and social rights, i.e. constitutionally enshrined rights to education, health services, food, housing, employment, and income. See generally, Samir Amin, MALDEVELOPMENT: ANATOMY OF A GLOBAL FAILURE (1990), *Socialist Models of Development*, 9 SPECIAL ISSUE OF WORLD DEV. (1981); Adamantia Pollis, *Human Rights, Third World Socialism and Cuba*, 9 WORLD DEV. 1005 (1981).

<sup>124</sup> Another important school of thought, of which Jared Diamond and Jeffrey Sachs are perhaps the best-known modern proponents, examines the ways in which geography influences economic development through its impact upon agricultural and industrial productivity rather than institutional quality. Taking a long-run perspective, Diamond suggests that geography has determined agricultural productivity and relative susceptibility to disease by influencing the

claim that societies with large endowments of resources whose exploitation involves economies of scale tend to have unequal distributions of income, wealth and political power.<sup>125</sup> Referring to the experience of the New World (the Americas), they go on to argue that the elites in New World societies characterized by extreme inequality during the colonial era have subsequently been reluctant to adopt institutions that would provide widespread access to economic opportunities, including institutions likely to facilitate industrialization.<sup>126</sup>

In a similar vein, Auty argues that in societies that are well-endowed with natural resources that generate large and easily appropriable economic rents the government is likely to be captured by

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availability of animal and plant species suitable for domestication. See Jared Diamond, *GUNS, GERMS AND STEEL: THE FATE OF HUMAN SOCIETIES* (1997). Focusing on more recent history, Sachs and his co-authors claim that countries that are located in the tropics and which have a high population density in areas more than 100 kilometers from the coast are at a severe natural disadvantage. They argue that tropical regions bear a higher disease burden and have lower agricultural productivity. Meanwhile, the proximity of a country's population to the seacoast is an important determinant of its ability to promote economic growth by exporting labour-intensive goods. See, John L. Gallup, Jeffrey D. Sachs & Andrew D. Mellinger, *Geography and Economic Growth*, 22 INT'L REG. SCI. REV. 179 (1999). We do not focus upon these theories of how geography influences development because there is compelling cross-country evidence that in the modern era geography has influenced development principally through its impact upon institutional quality. See William Easterly & Ross Levine, *Tropics, Germs and Crops: How Endowments Influence Economic Development*, 50 J. MON. ECON. 3 (2003); Rodrik et al., *supra* note 73.

<sup>125</sup> Kenneth L. Sokoloff and Stanley L. Engerman, *History Lessons: Institutions, Factor Endowments, and Paths of Development in the New World*, 14 J. ECON. PERSP. 217 (2000); Stanley L. Engerman & Kenneth L. Sokoloff, *Factor Endowments, Inequality, and Paths of Development Among New World Economies*, (NBER Working Paper No. 9259, October 2002).

<sup>126</sup> This argument is foreshadowed by Baldwin's earlier claim that capital-intensive extractive industries in which ownership tends to be highly concentrated and which rely upon a large class of low-income, unskilled labourers, typically generate few forward or backward 'linkages', meaning that they generate little demand for local inputs or processing services, little additional spending upon locally produced consumer goods, and limited tax revenues. Most importantly for present purposes, Baldwin suggested that the dominant groups in such societies tend to erect "social and economic barriers" to limit the upward mobility of the low-income group. See, R. E. Baldwin, *Patterns of Settlement in Newly Settled Regions*, 24 MANCHESTER SCHOOL OF SOC. & ECON. STUD. 161 (1956).

individuals or groups interested in predation rather than development, implying that resource-rich countries will tend to have relatively poor governments (the so-called resource curse).<sup>127</sup> By contrast in resource-poor societies the state is less likely to be able to sustain inefficient transfers and more likely to resist redistributive pressures. In these societies a developmental state characterized by a commitment to improving productivity is likely to emerge.

Still other theories focus on the ways that enduring divisions along ethnic, religious, linguistic or economic lines thwart the emergence of truly benevolent government. The basic ideas are that in divided societies each group will strive to encourage the state to act in ways that support its own special interests at the expense of broader and more encompassing interests. For instance, it is often said that politics in many sub-Saharan African countries is essentially an inter-ethnic battle for control of the state motivated by the fact that control of the state apparatus creates the opportunity to transfer wealth from one group to another.<sup>128</sup> Because a high-quality legal system has many of the characteristics of a public good, diffuse citizen commitment to ideals such as the rule of law may not translate into effective political mobilization for reform.<sup>129</sup> Along these lines, O'Donnell argues that severe inequality prevents the most privileged members of society from recognizing the underprivileged as equal members of society who are

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<sup>127</sup> Richard M. Auty, *Natural Resource Endowment, The State, and Development Policy*, 9 J. INT'L DEV. 651 (1997); Richard M. Auty & Alan H. Gelb, *Political Economy of Resource-Abundant States*, in RESOURCE ABUNDANCE AND ECONOMIC DEVELOPMENT 3-10 (R.M. Auty ed., 2001). See also, Jeffrey D. Sachs & Andrew M. Warner, *Natural Resource and Economic Development: the Curse of Natural Resources*, 45 EUR. ECON. REV. 827 (2001); Collier, *The Bottom Billion*, *supra* note 44; Macartan Humphreys, Jeffrey Sachs & Joseph Stiglitz eds., *ESCAPING THE RESOURCE CURSE* (2007) (providing evidence that countries that are well-endowed with natural resources often experience relatively low rates of economic growth). Auty notes that a predatory state may also arise in an ethnically divided peasant society.

<sup>128</sup> William Easterly, *Can Institutions Resolve Ethnic Conflict*, 49 ECON. DEV. & CULT. CHANGE 687 (2001); Patrick Chabal & Jean-Pascal Daloz, *AFRICA WORKS: DISORDER AS POLITICAL INSTRUMENT* (1999).

<sup>129</sup> The adverse impact of ethnic diversity upon the production of public goods might also be manifested, for instance, in inability to agree upon a common language of instruction in schools, the communities that should benefit from investments in roads, schools, healthcare and telecommunications or the sectors to which industrial assistance ought to be channelled. Alberto Alesina, Reza Baqir & William Easterly, *Public Goods and Ethnic Divisions*, 114 Q. J. ECON. 1243 (1999).

entitled to respectful treatment in their interactions with the legal system.<sup>130</sup>

More dynamic theories of how political conditions are related to legal change focus less on whether political power is exercised in a predatory or a benevolent fashion and more on the extent of competition for and conflict over political power. The resources lost to this kind of competition could presumably be channeled into the improvement of legal institutions. Moreover, chronic political conflict and competition prompted by deep social divisions may lead to political instability. For instance, Alesina and Perotti argue that extreme income inequality fuels social discontent and so exacerbates political instability.<sup>131</sup> Similarly, Amy Chua argues that socio-political instability is likely to result when economic inequalities track ethnic divisions so that wealth is concentrated in the hands of ethnic minorities. According to Chua, in many cases this phenomenon tends to persist or even be exacerbated by the operation of free market forces and tends to foment inter-ethnic envy and hatred. As a result certain types of societies, specifically, societies that simultaneously attempt to endorse free markets and democracy are inherently unstable.<sup>132</sup> Political instability may in turn lead to legal instability which, as we have already observed, is widely viewed as being incompatible with the rule of law.<sup>133</sup>

#### 4. Cultural theories

All three of the books under review contain acknowledgements of the role that of social or cultural factors play in shaping both legal

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<sup>130</sup> Guillermo O'Donnell, *Polyarchies and the (Un) Rule of Law in Latin America*, in THE (UN) RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA 303 (Juan Mendez, Guillermo O'Donnell & Paulo Sérgio Pinheiro eds., 1998). He also argues that economic inequality undermines respect for the rule of law by limiting the capability of the most impoverished members of society to exercise their legal rights. See also, Seymour Martin Lipset, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 51 (1963).

<sup>131</sup> Alberto Alesina & Roberto Perotti, *Income Distribution, Political Instability and Investment*, 40 EUR. ECON. REV. 1203, 1204 (1996).

<sup>132</sup> Amy Chua, *Markets, Democracy and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1 (1998); Amy L. Chua, *The Paradox of Free Market Democracy: Rethinking Development Policy*, 41 HARV. INT'L L. J. 287 (2000); Amy Chua, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* (2003).

<sup>133</sup> Political instability is an important component of the most popular measures of institutional quality, on the grounds that it tends to act as a deterrent to investment. See, Alesina & Perotti, *supra* note 131.



institutions and the overall course of development.<sup>134</sup> However, only Dam's book offers a sustained discussion of the skeptical claim that culture is of overriding importance.<sup>135</sup>

This brand of skepticism actually has a distinguished pedigree. Over the centuries a number of scholars have suggested that social and cultural factors play the most significant role in determining relative levels of development.<sup>136</sup> One of the most influential arguments to this effect has been Max Weber's suggestion that the values associated with Western European Protestantism are particularly conducive to capitalism.<sup>137</sup> David Landes in his contribution in *CULTURE MATTERS* states: "Max Weber was right. If we learn anything from history of economic development, it is that culture makes all the difference."<sup>138</sup> More recently, drawing on a typology created by Mariano Grondona in a contribution in *CULTURE MATTERS*, Harrison has prepared an complex typology of Progress-Prone and Progress-Resistant Cultures, describing how they vary in terms of factors such as attitudes toward ability to control one's destiny, punctuality, saving, education, risk and identification with people beyond the family.<sup>139</sup>

Evidence that high quality institutions are causally connected to development does not necessarily undermine culturally oriented theories. Cultural determinists can claim that even though measures of institutional quality may be the proximate determinants of levels of development, institutional quality itself is in turn determined principally by cultural factors. Following this line of argument, some studies find that predominantly Protestant countries have persistently better government than predominantly Catholic or Muslim countries, suggesting an hypothesis that church and state are more sharply separated in Protestant countries, enhancing checks and balances, and that Protestantism is more individualistic and less hierarchical and

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<sup>134</sup> See, for example,

<sup>135</sup> Dam, *supra* note 6 at 60-9.

<sup>136</sup> See generally, *CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS* (Lawrence E. Harrison & Samuel P. Huntington eds., 2000); Lawrence Harrison, *THE CENTRAL LIBERAL TRUTH: HOW POLITICS CAN CHANGE A CULTURE AND SAVE IT FROM ITSELF* (2000).

<sup>137</sup> For a recent detailed interpretation of Max Weber's views, see Chantal Thomas, *Max Weber, Talcott Parsons and the Sociology of Legal Reform*, 15 *MINN. J. INT'L L.* 383 (2006).

<sup>138</sup> David Landes, *Culture Makes All the Difference*, in *CULTURE MATTERS supra* note 136.

<sup>139</sup> Harrison, *supra* note 136 at 36-47; for a much more eclectic range of views on the relationship between culture and development, see contributions in *Culture and Public Action* (Vijayendra Rao & Michael Walton eds., 2004).

familistic than some other religions, increasing the likelihood of dissent from undesirable government policies or practices.<sup>140</sup>

Robert Putnam offers another perspective. In his celebrated study of civic traditions in Italy contrasting Southern and Northern Italy, Putnam argues that certain deeply embedded social attitudes and practices can either enhance or undermine legality. According to Putnam, a civic community, “marked by an active, public-spirited citizenry, by egalitarian political relations, by a social fabric of trust and cooperation”<sup>141</sup> is better able to overcome dilemmas of collective action, and to pursue what Alexis de Toqueville referred to as “self-interest rightly understood” -- namely, goals which serve the broader interests of society.<sup>142</sup> Putnam argues that a civic community has greater stocks of “social capital.” Social capital consists of those aspects of social organization, including norms of reciprocity and horizontal networks of civic engagement, which facilitate cooperation amongst the members of the community.<sup>143</sup> Reciprocity encourages social trust and discourages opportunistic behavior, since defection from a transaction in the present entails punishment in the future.<sup>144</sup> Putnam goes on to argue that norms of reciprocity and networks of civic engagement enhance legality by creating a demand for higher quality institutions and facilitating the

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<sup>140</sup> See Rafael La Porta, Florencio Lopez-De-Silanes, Andrei Shleifer & Robert Vishny, *The Quality of Government*, 15 J. L. ECON. & ORG. 222 (1999); Daniel Treisman, *The Causes of Corruption: A Cross-National Study*, 76 J. PUB. ECON. 399 (2000).

<sup>141</sup> Robert Putnam, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 15 (1993).

<sup>142</sup> *Id.* at 88.

<sup>143</sup> *Id.* at 167. Putnam argues that norms of reciprocity are harder to maintain in vertically structured societies. Higher-ranking members will not fear punishment from their subordinates, since it is unlikely that such punishment will be forthcoming. As a result, the exploitation of subordinates will be more frequent. Meanwhile, the subordinates themselves, who depend for their welfare upon the favor of their superiors, “hold nothing hostage to one another” and are thus more likely to engage in opportunistic behavior amongst themselves. Putnam argues that a horizontal structure is more conducive to the norms of reciprocity which characterize a civic society. Thus, he theorizes that the greater the number of horizontal networks linking community members together, the greater the losses suffered by a member who defects from an individual transaction. Putnam *supra* note 141 at 173-175. See also, Ronald J. Oakerson, *Reciprocity: A Bottom-Up View of Political Development*, in RETHINKING INSTITUTIONAL ANALYSIS AND DEVELOPMENT 141 (Vincent Ostrom, David Feeny & Hartmut Picht eds., 1988).

<sup>144</sup> *Id.* at 172.

collective action required to create them.<sup>145</sup> These norms also enhance the performance of institutions by creating an expectation that others will follow the rules. He rejects arguments (often associated with Public Choice theory) that networks in which such norms prevail should be viewed as ‘distributional coalitions’ which attempt to redistribute wealth to themselves rather than seeking to improve the condition of society as a whole.<sup>146</sup>

Some of the most recent work in this vein has been enriched by insights derived from cross-cultural psychology. Cross-cultural psychologists have compiled an impressive body of evidence suggesting that there are important cross-country variations in “cultural values”.<sup>147</sup> One of the strengths of this literature is the fact that it characterizes cultures by reference to analyses of responses to internationally standardized survey questions, thus making it possible for cultures to be described in objective rather than subjective terms. Drawing upon this literature, Amir Licht and his co-authors have argued that cross-country variations in cultural values are correlated with variations in respect for the rule of law, corruption and democratic accountability.<sup>148</sup> For example, they argue that emphases on the cultural values of autonomy or individualism, as opposed to embeddedness and collectivism, are compatible with the rule of law - which they define simply as the extent to which rules are respected and enforced - absence of corruption and democratic accountability. Part of the logic behind this argument seems

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<sup>145</sup> Putnam, *supra* note 141 at 182.

<sup>146</sup> This perspective is typically associated with Public Choice theorists. See also, Frances Fukuyama, *Social Capital, Civil Society and Development*, 22 *THIRD WORLD Q.* 7 (2001).

<sup>147</sup> See, e.g., Gert H. Hofstede, *CULTURE’S CONSEQUENCES: INTERNATIONAL DIFFERENCES IN WORK-RELATED VALUES* (1980) (comparing cultures in terms of uncertainty avoidance, power distance (a measure of preference for autocratic as opposed to consultative exercise of authority), individualism, and masculinity) Shalom H. Schwartz, *Cultural Value Differences: Some Implications for Work*, 48 *APPLIED PSYCHOLOGY INT’L REV.* 23 (1999) (comparing cultures in terms of respect for autonomy as opposed to embeddedness, hierarchy as opposed to egalitarianism, and mastery as opposed to harmony). In this literature the values that constitute a culture have been defined as “the implicitly or explicitly shared, abstract ideas about what is good, right, and desirable in a society.” Amir Licht, Chanan Goldschmidt & Shalom H. Schwartz, *Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance*, (unpublished working paper dated June 9, 2002, available online at [ssrn.com](http://ssrn.com)), citing, Robin M. Williams, *AMERICAN SOCIETY: A SOCIOLOGICAL INTERPRETATION* (3<sup>rd</sup> ed 1970).

<sup>148</sup> Licht et al., *supra* 147.

to be that the rule of law and the absence of corruption tend to provide individuals with certainty as to their legal entitlements and thus allow them to pursue their own goals. By contrast, a society that values embeddedness or collectivism is likely to encourage people to seek guidance from non-legal sources such as tradition and family.

Another set of culturally-oriented theories focuses, however, on the role played by a more narrowly defined aspect of a society's culture, specifically the culture prevailing among the society's legal professionals. This body of literature can also be traced back to the 19<sup>th</sup> century. For example, scholars such as Maine and Savigny attributed the brilliance of Roman law to the fact that, for whatever reason, Roman culture glorified jurists who, for a long period of time, were dedicated to the aim of continually improving Rome's legal institutions.<sup>149</sup> Writing more recently, Alan Watson has offered numerous examples in support of his claim that laws do not necessarily adapt to reflect prevailing social, political or economic conditions. He cites legal rules that benefit no one within society, but which have nevertheless persisted for centuries -- surviving social, political and economic upheaval.<sup>150</sup> Watson suggests that rather than being determined by economic or political factors, legal change is driven primarily by lawyers who, because of the peculiar characteristics of the legal profession, typically either borrow laws from other nations or develop them by analogy to existing laws within their own system. This transplant bias, claims Watson, often blinds lawyers to the poor quality of a given rule, or its inappropriateness for the borrowing society.<sup>151</sup>

Unfortunately, although scholars like Savigny, Maine and Watson all identify legal culture as the primary determinant of legal development, they are rather vague when it comes to identifying - much less explaining the existence of - cultural traits that determine whether or not a society will create institutions that embody high or low levels of legality. For example, Maine does not offer any explanation for why the ancient Romans were so much more absorbed by jurisprudence than were other civilizations. Similarly, Watson does not offer much guidance on how to explain or assess the prevalence or intensity of a transplant bias among a society's lawyers.

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<sup>149</sup> Henry Sumner Maine, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 75-78 (1861); Friedrich Karl von Savigny, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* 48 (Abraham Hayward trans., 1831).

<sup>150</sup> Alan Watson, *SOCIETY AND LEGAL CHANGE* 8 (1977).

<sup>151</sup> See, e.g., Alan Watson, *Legal Change: Sources of Law and Legal Change*, *U. PENN. L. REV.* 1121, 1146-7 (1983).

A notable contrast is Paul Mahoney who has suggested that the cultural traits typically associated with English common law and French civil law are distinct and that the distinctions are economically significant. Building on Hayek's earlier work, Mahoney claims that the ideology underlying the English common law promotes individual liberty and freedom from government intervention.<sup>152</sup> By contrast, the ideology underlying the French civil law, which is embodied in a state-sponsored code, promotes collective rights, and contemplates greater government activism. According to Mahoney, because of the common law's ideological resistance to interference by government, the degree of formal separation between the judiciary and the other branch or branches of government is ordinarily greater in common than civil law countries. Greater insulation from political influence enhances the predictability, and thus the stability, of the common law. By contrast, the more interventionist tradition of the French civil law offers greater scope for the alteration of property and contract rights. This, in turn, may reduce citizens' confidence in the formal legal order.<sup>153</sup> Mahoney supports this argument on empirical grounds through regression analysis showing that countries with common law rather than civil law traditions have on average enjoyed significantly higher economic growth rates over time.<sup>154</sup> Thomas Heller argues in a similar vein that too many recent rule of law reform efforts in developing countries have been court-centric and have focused too narrowly on increasing the throughput of existing countries (doing more of what they have traditionally done) and paid too little attention to aspects of legal and political culture that constrain their mandate and functions. He argues that promotion of competitive alternatives to the formal court system may be more effective in disrupting traditional legal culture.<sup>155</sup>

Of course, to qualify as skeptical theories for our purposes cultural theories of legal evolution must claim not only that culture influences legal institutions, but also that culture is not itself influenced by changes in legal institutions. In fact, the questions of what drives

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<sup>152</sup> Paul Mahoney, *The Common Law and Economic Growth: Hayek Might be Right*, 30 J. LEGAL STUD. 503 (2001).

<sup>153</sup> However, see Daniel Treisman, *The Causes of Corruption: A Cross-National Study*, 76 J. PUB. ECON. 399 (2000) (suggesting that legal culture is determined by colonial heritage as opposed to merely whether a country qualifies as common law and civil law).

<sup>154</sup> Cf. Daniel Kaufmann, GOVERNANCE REDUX: THE EMPIRICAL CHALLENGE (2004) (challenging findings that there is a strong relationship between legal heritage and economic development).

<sup>155</sup> Thomas Heller, *An Immodest Postscript*, in BEYOND COMMON KNOWLEDGE (Erik Jensen & Thomas Heller eds., 2003), *supra* note 18.

cultural change, the extent to which culture is path dependent, whether cultural change can be intentionally induced by policy and institutional changes, and whether and in what circumstances cultural changes are socially desirable are matters of intense controversy.<sup>156</sup> For example, Gillian Hadfield has recently argued that significant variations in legal culture, including those commonly attributed to common law versus civil law heritage, might be explained by institutional factors such as strategies for selecting and rewarding judges or trial procedure.<sup>157</sup> There is certainly room for further research on these topics and, perhaps, optimism about the potential role of legal institutions. But for the time being the problem of knowledge remains.

#### D. The Informal Alternative

The most thoroughly skeptical approach to the question of whether legal reforms are worthwhile is to argue that there is virtually no connection between the nature of a society's legal system and its development prospects. In other words, law does not matter, not even as a medium through which non-legal economic, cultural or political factors exert their influence. Curiously enough, this radically skeptical perspective receives relatively little attention in the books under review.

This form of skepticism is typically grounded in a belief that a legal system – which it will be recalled we define as a system that involves administration of norms by state actors – is simply one of several potentially viable means of social control. This idea is foreshadowed by Trubek and Galanter's statement that, "The [liberal legal] model assumes that state institutions are the primary locus of social control, while in much of the Third World the grip of tribe, clan, and local community is far stronger than that of the nation-state." In other words, informal norms and institutions associated with tribe, clan and community might either undermine or supplant legal norms and legal institutions.<sup>158</sup> This opens up the possibility that in a wide range of contexts norms supported by either internalized moral codes or the fear of sanctions imposed by non-legal actors – informal norms for short – can induce the kinds of behaviour essential to the operation of a

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<sup>156</sup> See contributions in Rao & Walton (eds.), *supra* note 139, especially Amartya Sen, HOW DOES CULTURE MATTER?

<sup>157</sup> Gillian K. Hadfield, *The Levers of Legal Design: Institutional Determinants of the Quality of Law*, J. COMP. ECON. (forthcoming).

<sup>158</sup> For a survey of the literature see Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869 (1988).

developed society, such as keeping of promises, respect for shared norms governing the use of property, and non-violent resolution of disputes.

This viewpoint is related to but somewhat different from some of the deterministic theories canvassed in the preceding section. The argument of the determinists is that economic, cultural and political factors exert irresistible influences on the behavior of people who create legal norms, norms which in turn influence the behavior of other members of society. By contrast, the argument of the informalists is that economic, cultural and political factors – perhaps the same ones identified by the determinists – directly influence the behavior of a broad range of members of society, regardless of whether they influence the behavior of lawmakers or the shape of legal norms. The difference between these two theoretical viewpoints is of great practical importance because according to the legal determinists the existence of a high-quality legal system is an important pre-requisite to development and can at the very least serve as a useful benchmark for development practitioners. By contrast, for the informalists development is not necessarily associated with any particular type of legal system. On this view, achieving a high-quality legal system is not a pre-requisite to development and it would be unwise for development practitioners to use the quality of a society's legal system as a benchmark for development.

The most forceful advocates of the informalist position tend to be found among the ranks of scholars who focus upon the role of law in economic development in East Asian societies.<sup>159</sup> In an important synthetic article, Jayasuriya argues that a Western market economy is characterized by transactions between independent economic agents facilitated by the legal system.<sup>160</sup> Capitalism in East Asia, however, is characterized by networks of relationships, both between economic agents and between economic agents and the state, which operate largely outside the formal legal system. In this brand of capitalism the legal

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<sup>159</sup> See Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 L. & SOC'Y REV. 829 (2000); Amanda Perry, *Effective Legal Systems and Foreign Direct Investment: In Search of the Evidence*, 49 INT'L COMP. L. Q. 779 (2000); Amanda Perry, *The Relationship Between Legal Systems and Economic Development: Integrating Economic and Social Approaches*, 29 J. L. & SOC'Y 282 (2002); Amanda Perry-Kessaris, *Finding and Facing Facts About Legal Systems and Foreign Direct Investment in South Asia*, 23 LEGAL STUD. 649 (2003); Upham, *supra* note 76; Kanishka Jayasuriya, *Introduction: A Framework for the Analysis of Legal Institutions in East Asia*, in LAW, CAPITALISM, AND POWER IN ASIA 7 (Kanishka Jayasuriya ed., 1999); Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 L. & SOC'Y REV. 829 (2000).

<sup>160</sup> *Id.*

system plays a marginal role and so substantial investments in legal reform are of dubious value.<sup>161</sup> Along these lines, the most radical interpretations of China's recent astounding rates of economic development, despite weak ratings on most conventional criteria for quality of laws and legal institutions (the so-called "China Enigma"), suggest that formal laws and legal institutions are not central determinants of a country's economic development and that informal mechanisms that recognize and protect private property rights and ensure performance of contracts are often effective substitutes (although some scholars argue that China may now have reached a stage of economic development where the inherent limitations of these mechanisms have been reached.)<sup>162</sup>

The idea that informal norms might successfully regulate many interactions between private individuals in developed as well as developing societies is accepted by a strong contingent of contemporary Western legal scholars, including such prominent scholars as Stewart Macaulay, Robert Ellickson, and Lisa Bernstein.<sup>163</sup> As for non-legal scholars, even those whose work is sometimes associated with legal optimism appear, when their work is read carefully, to be ambivalent about the relative importance of legal and non-legal norms. For instance, Douglass North, who is generally acknowledged as one of the pioneers of the New Institutional Economics, defines institutions as "...the rules of the game of a society...They are composed of formal rules (statute law, common law, regulations) *informal constraints (conventions, norms of behaviour and self-imposed codes of conduct)*, and the enforcement characteristics of both." [emphasis added]<sup>164</sup> Due to the work of these

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<sup>161</sup> See Upham, *supra* note 76.

<sup>162</sup> Minxin Pei, CHINA'S TRAPPED TRANSITION: THE LIMITS OF DEVELOPMENTAL AUTOCRACY (2006); Michael Trebilcock & Jing Leng, *The Role of Formal Contract Law and Enforcement in Economic Development*, 92 VA. L. REV. 1517, 1554-1565 (2006) (and references therein); Dam, *The Law-Growth Nexus*, *supra* note 6.

<sup>163</sup> See e.g. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Robert Ellickson, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Sally Merry refers to this line of scholarship as the "new legal pluralism," distinguishing it from "classical legal pluralism" which focused on legal pluralism in former European colonies. See Merry, *supra* note 158.

<sup>164</sup> Douglass C. North, *The New Institutional Economics and Third World Development*, in *THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT* 17 (J. Harriss et al., eds., 1995).



and other scholars it is now well-recognized that non-legal factors determine the relevance and impact of private law, that is to say, the body of legal norms such as contract, property, tort and corporate law, that regulates interactions between private individuals.<sup>165</sup>

Informal norms seem likely to play an equally important role in determining the relevance and impact of the public law norms – that is to say, formal legal norms that govern the behavior of public officials – that tend to pre-occupy the new constitutionalists. Suppose for instance that we accept the view that democracy, separation of powers and freedom of the press contribute to development. There are still cogent reasons to believe that a society’s level of commitment to democracy and separation of powers has relatively little to do with the governing legal norms and more to do with the nature and content of various non-legal norms – including those discussed by Putnam and Licht et al. – that on the one hand define appropriate behavior for public officials, and on the other hand define appropriate levels of civic engagement for ordinary citizens.<sup>166</sup> The strength of these informal norms will depend in part on

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<sup>165</sup> See review essay by Richard McAdams & Eric Rasmusen, *Norms in Law and Economics*, in HANDBOOK OF LAW AND ECONOMICS (Mitchell Polinsky & Steven Shavell eds., forthcoming); Michael Trebilcock & Paul Erik Veel, *Property Rights and Development: The Contingent Case for Formalization*, University of Toronto, Faculty of Law.

<sup>166</sup> To cite just one example, although Weingast agrees that the purported benefits of federalist constraints mean nothing unless political actors refrain from violating those constraints, he claims that it is possible for federalism to be “self-enforcing”. He argues that even powerful political actors will be unlikely to attempt to violate a constitutional constraint if a significant proportion of the population is likely to mobilize and punish violations. This is most likely to occur if there is a consensus among citizens that the constraint is legitimate, implying that citizens hold relatively similar views about the appropriate bounds of government, and the society is sufficiently cohesive that its members are willing to punish violations that only affect other groups. See Weingast, *supra* note 61 at 10. This aspect of Weingast’s reasoning suggests that he is skeptical about the role of legal norms in sustaining federalism. To be fair, however, Weingast’s analysis also contains a more optimistic component as he argues that even if they are not enforced by formal institutions legal norms can still assist in creating the requisite societal consensus: “An appropriately chosen set of public rules embodied in a constitution can serve as a coordination device because it provides each citizen with a similar way of judging and reacting to state action” (*Ibid.* at 15), in effect by creating a set of widely agreed focal points. Weingast thus envisions an interaction between legal and non-legal norms as producing the social consensus necessary to ensure that government commits credibly to protecting property and contract rights. *Ibid.* at 25-26.

the extent to which they have been internalized and the ability of opposing factions to impose non-legal sanctions upon political actors who violate them. The potency of the non-legal sanctions will in turn depend on the distribution of political power in the relevant society and that will, as we have already discussed, depend on factors such as the relative wealth of opposing factions, the presence of resource endowments that can be appropriated by those in control of the state, the presence of deep-seated ethnic divisions, etc.<sup>167</sup>

Similarly, freedom of the press is only partly a product of formal legal norms such as libel laws and laws governing access to information.<sup>168</sup> It also depends on norms supported by non-legal factors such as traditions of investigative journalism and the structure of both the supply and demand side of the markets for media services.<sup>169</sup> As Rose-Ackerman has observed, in some less developed countries a significant portion of the adult population is illiterate and may thus not be either able or inclined to use the media (or least print media) as a means of checking government accountability.<sup>170</sup>

Given its strong theoretical underpinnings it is surprising what short shrift this highly skeptical view of legal reform receives in the books under review. To his credit Carothers explicitly raises the question of whether the rule of law is necessary for economic development and democracy.<sup>171</sup> At the end of the day, however, it is unclear how far his current beliefs diverge from the position he stakes out in his earlier essay reproduced in the collection, where he states, “Although its wonderworking abilities have been exaggerated, the desirability of the rule of law is clear.”<sup>172</sup> As it turns out, only one

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<sup>167</sup> The fact that Great Britain manifested all three of these characteristics for a very long time without a written constitution and with a formal legal commitment to parliamentary supremacy provides a compelling illustration of this point.

<sup>168</sup> Besley et al. emphasize the role that libel laws play in protecting public officials from media reports that could have detrimental effects on the careers of the public officials. More expansive libel laws tend to provide an incentive for public officials to manipulate the media and for the media to comply with the public officials due to cost savings associated with avoidance of libel suits. See Besley et al., *supra* note 66 at 7. See also Susan Rose-Ackerman, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* 166 (1999).

<sup>169</sup> Besley, *id.* at 7.

<sup>170</sup> Rose-Ackerman, *supra* note 168 at 167.

<sup>171</sup> Carothers, *supra* note 1, 17-19.

<sup>172</sup> Carothers, *supra* note 1, 7. The essay was originally published as Thomas Carothers, *The Rule of Law Revival*, 77 *FOREIGN AFFAIRS* 95 (1998).

contributor to Carothers' volume really takes him up on his invitation to question whether law matters. In his chapter, Upham – not surprisingly, a specialist in the role of law in China and Japan – forcefully points out that Japan's most impressive period of economic development coincided with a period in which the Japanese government deliberately limited the role that the legal system played in Japanese society by, among other things, drastically limiting the number of qualified lawyers.<sup>173</sup>

A similar stance is evident in the Trubek and Santos collection. Santos cites a great deal of evidence suggesting that an efficient judiciary and clearly defined formal property rights are often of limited relevance to entrepreneurs in developing countries.<sup>174</sup> However, the other contributors to the volume spend little time critically examining the assumption that law plays a significant causal role in promoting development. For instance, although she acknowledges the view that “informal norms may supplement or even supplant formal law,”<sup>175</sup> In the end, Rittich's view is that achieving social justice necessarily involves legal reform and that the best course of action for reformers concerned with achieving social justice involves “taking law even more seriously.”<sup>176</sup>

Perhaps most interesting of all is Dam's position on this question. He acknowledges the importance of the question of whether law matters and the absence of conclusive proof that it does matter. However, in a passage worth quoting in full, he states:

A reader might ask whether one should not wait for better proof that law itself truly matters before focusing on the policy implications. My background as an academic tends to make me sympathetic to such an approach. But my experience as a policymaker makes me reject it emphatically. Policy decisions on economic development issues are being made every day in every developing country and in bilateral and multilateral agencies in the developed world as well. Economy policymaking is necessarily carried out under conditions of uncertainty—uncertainty about the facts and about underlying principles and causes. So decisions about whether to

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<sup>173</sup> Upham, *supra* note 76.

<sup>174</sup> Santos, *supra* note 8 282-8.

<sup>175</sup> Rittich, *supra* note 9 at 224.

<sup>176</sup> Rittich, *supra* note 9, 216 (“...it seems unlikely that good governance and legal and institutional matters could be entirely separate from the realization of social objectives”), 247.

change legal institutions and substantive law will be taken—if only by inaction—in substantive fields, such as land, equity markets, and credit markets as well as in enforcement, including the role and nature of the judiciary. Since policymakers know that institutions matter to economic development, it would be foolish for them to assume that legal institutions—both the rules of the game and law’s organizations, especially the judiciary—do not matter.<sup>177</sup>

What Dam seems to be saying here is that his book is designed to help answer the question of what sorts of legal reforms are likely to promote economic development once the decision to undertake legal reform has been made. He does not seem inclined to address the question of whether legal reforms ought to be undertaken, saying that “proof of the correctness of the law matters premise would be an entirely different exercise, more appropriate for economists and perhaps other social scientists than for lawyers and policymakers.”<sup>178</sup> He presumably recognizes however, that so long as there is genuine uncertainty about whether law matters there is a distinct possibility that not only will legal reform not have any positive impact on development, but that the resources invested in legal reform might have been deployed in some other fashion that would have a greater impact on development.

Given the importance of the question of whether law matters, we think that it is unfortunate that Dam and most of the other legal scholars represented in recent books on law and development have sidestepped the issue. Unlike Dam we believe that legal scholars can, perhaps in collaboration with social scientists, contribute to research on these questions and would encourage them to do so.

#### IV. DOES THE EVIDENCE SUPPORT THE OPTIMISTS?

Engaging with the questions surrounding whether law matters, the economic, cultural and political circumstances under which meaningful legal reform is possible, the types of legal reforms that ought to be undertaken, and the best means of implementing them, all require empirical as well as theoretical research. The existing empirical literature on these questions provides modest support for legal optimists, but remains highly inconclusive.

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<sup>177</sup> Dam, *supra* note 6 at 231.

<sup>178</sup> *Id.* at 230.

### A. Evidence favoring the optimists

In recent years, the most prominent empirical analyses of the relationship between institutions and development (and the rule of law and development) have been a set of cross-country statistical analyses designed to investigate the extent to which various measures of institutional quality explain measures of development, such as levels of per capita income, infant mortality rates and literacy rates. These studies are now too numerous to survey individually, but generally speaking the results support the optimistic perspective.

The overall tenor of this perspective can be captured by examining one particularly influential study entitled, “Governance Matters.” This study was undertaken by Kaufmann, Kraay, and Zoido-Lobaton, all of whom are affiliated with the World Bank, as part of the World Bank’s ongoing research on governance, which has been updated on a regular basis.<sup>179</sup> The World Bank’s Governance project involves compiling a large number of subjective measures of institutional quality (scintertly? for almost 200 countries) – meaning data obtained from either polls of country experts or surveys of residents – and grouping them into six clusters: “voice and accountability”, “political stability”, “government effectiveness”, “regulatory quality”, “rule of law”, and “control of corruption”.

The authors of “Governance Matters” created indexes that measure institutional quality along each of these six dimensions as well as a composite “governance” index designed to measure the overall quality of governance in a society. They then regressed three measures of development: per capita GDP, infant mortality and adult literacy on these indices. They found strong correlations (they assert causation) between each of their sub-indices of institutional quality, including the rule of law index, as well as a composite governance index, and their measures of development, hence their conclusion that “Governance Matters.” In a more recent iteration of this work, Kaufmann reports:

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<sup>179</sup> Daniel Kaufmann, Aart Kraay & Pablo-Zoido-Lobaton, *Governance Matters*, (1999) (*World Bank Policy Research Working Papers No. 2196*) (available for download on <http://www.worldbank.org/research>); *Rethinking Governance: Empirical Lessons Challenge Orthodoxy*, World Bank, Discussion Draft, March 11, 2002; see also Kaufmann, Kraay, and Massimo Mastruzzi, GOVERNANCE MATTERS IV: GOVERNANCE INDICATORS FOR 1996-2004 (2005); GOVERNANCE INDICATORS FOR 1996-2006 (2007); *Governance Redux: The Empirical Challenge*, in THE GLOBAL COMPETITIVENESS REPORT (Xavier Sala-i-Martin ed., 2004).

The effects of improved governance on income in the long run are found to be very large, with an estimated 400 percent improvement in per capita income associated with an improvement in governance by one standard deviation, and similar improvements in reducing child mortality and illiteracy. To illustrate, an improvement in rule of law by one standard deviation from the current levels in Ukraine to those “middling levels prevailing in South Africa would lead to a fourfold increase in per capita income in the long run. A larger increase in the quality of rule of law (by two standard deviations) in Ukraine (or in other countries in the former Soviet Union), to the much higher level in Slovenia or Spain, would further multiply this income per capita increase. Similar results emerge from other governance dimensions: a mere one standard deviation improvement in voice and accountability from the low level of Venezuela to that of South Korea, or in control of corruption from the low level of Indonesia to the middling level of Mexico, or from the level of Mexico to that of Costa Rica, would also be associated with an estimated fourfold increase in per capita incomes, as well as similar improvements in reducing child mortality by 75 percent and major gains in literacy.<sup>180</sup>

Drawing on the Kaufmann *et al.* data, Rodrik, Subramanian and Trebbi, in a recent paper, “Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development”<sup>181</sup> estimate the respective contributions of institutions, geography, and international trade in determining income levels around the world. The authors find that the quality of institutions ‘trumps’ everything else. Once institutions are controlled for, conventional measures of geography have at best weak direct effects on income, although they have a strong indirect effect by influencing the quality of institutions. Similarly, once institutions are controlled for, trade is almost always insignificant except for indirect effects on institutions. In their study, the authors use a number of elements that capture the protection afforded to property rights as well as the strength of the rule of law. To convey a flavour of the striking nature of their findings, the authors find that an increase in institutional quality

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<sup>180</sup> Daniel Kaufmann, GOVERNANCE REDUX: THE EMPIRICAL CHALLENGE 14 (2004).

<sup>181</sup> Rodrik et al., *supra* note 73.

of one standard deviation, corresponding roughly to the difference between measured institutional quality in Bolivia and South Korea, produces a two log points rise in per capita incomes, or a 6.4-fold difference – which, not coincidentally is also roughly the income difference between the two countries.

In another recent paper,<sup>182</sup> Fukuyama, in a brief review of some of the empirical literature on determinants of economic development, concludes: “I believe that the institutionalists have won this argument hands down.”

We also believe that the empirical literature is consistent with the optimistic view that institutions are susceptible to deliberate efforts at reform and are not shaped exclusively by economic, cultural or political forces.

To begin with, inspection of the cross-country data shows that the performance of legal institutions shows considerable variation within countries over fairly short periods of time. This is inconsistent with any suggestion that the quality of legal institutions is shaped in important ways by largely immutable economic, cultural or political features of societies.<sup>183</sup> Admittedly, however, this evidence does not get to the heart of the sceptics’ claim, which is that legal institutions are beyond deliberate manipulation. The fact that the quality of legal institutions varies over time does not rule out the possibility that they are shaped by uncontrollable impersonal forces whose effects vary over time.

However, the cross-country data do not reveal any particular exogenous cultural traits that explain such a significant proportion of international variation in institutional performance to suggest that it is futile to consider deliberately manipulating legal institutions. For instance, in the past few years the most popular cultural theories of institutional quality have been based upon claims about either the weaknesses of French legal culture or the strengths of British legal culture. But even if valid, these theories do little to explain the large variations that we can observe between countries with similar legal heritages.<sup>184</sup> For example, both Ghana and Hong Kong experienced British rule and adopted the common law, but there are marked differences in the performance of their institutions. Similarly, Costa Rica and Mexico both inherited legal institutions derived indirectly from

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<sup>182</sup> Francis Fukuyama, *Development and the Limits of Institutional Design*, Global Development Network, St. Petersburg, Russia, (January 20, 2006).

<sup>183</sup> Edward L. Glaeser et al., *Do Institutions Cause Growth?*, 9 J. ECON. GROWTH 271 (2004).

<sup>184</sup> See Dam, *supra* note 6.

France, but Costa Rica's institutions have performed significantly better than those of Mexico, not to mention other jurisdictions influenced by French legal culture.

We believe that the cross-country data are also inconsistent with the specific claim that the quality of legal institutions is determined wholly by the interaction of geographic and political factors. For example, in a series of prominent recent contributions, Acemoglu, Johnson and Robinson (AJR) interpret evidence of a negative correlation between settler mortality rates in the 19<sup>th</sup> century and the recent performance of legal institutions as evidence that the performance of legal institutions is determined by the interaction of economic and political factors that in turn determined the types of institutions that Europeans were willing and able to establish in their colonies.<sup>185</sup> In our view, however, these findings do not rule out the possibility of influencing the quality of legal institutions through deliberate intervention. In the first place, the economic and political factors that AJR identify do not explain all of the cross-country variation in institutional performance. One would expect the impact of geographically determined colonial policies to diminish with the amount of time that has passed since independence, and by the last two decades of the twentieth century most countries had obtained their independence from colonial rulers. Consistently with this hypothesis, Rodrik and his co-authors have shown that the coefficient on settler mortality rates in regressions on institutional performance declined from 0.94 in the 1970's to 0.87 in the 1980s and 0.71 in the 1990s.<sup>186</sup>

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<sup>185</sup> William Easterly & Ross Levine, *Tropics, Germs and Crops: How Endowments Influence Economic Development*, 50 J. MON. ECON. 3 (2003); Rodrik et al., *supra* note 73. Acemoglu, Johnson and Robinson also show that among the former European colonies, regions that were most prosperous in 1500 AD were generally the least prosperous and had the worst-performing legal institutions in 1995. The reversal in prosperity occurred in the late eighteenth and early nineteenth centuries, coinciding with industrialization. If legal institutions were crucial determinants of prosperity and geographic factors were the crucial determinants of institutional quality then the 'Reversal of Fortune' would not have occurred; the regions that were prosperous in 1500 should have ended up with relatively good institutions and remained prosperous. Some may argue that the fact that the Reversal of Fortune did occur suggests either that factors besides geography determine the quality of legal institutions. However, it is also possible that the legal institutions that geography does shape are not critical to prosperity because the regions that were prosperous in 1500 had poor legal institutions.

<sup>186</sup> *Id.*



More fundamentally, we do not believe that the correlations between historical settler mortality rates and measures of institutional performance, both historical and contemporary, demonstrate causation. Acemoglu, Johnson and Robinson argue that high rates of settler mortality led European powers to make two fundamental policy choices: to avoid settlement and to establish exploitative institutions consistent with “an extractive state” rather than a “Neo-Europe”. Even if we accept their characterization of the Europeans’ dilemma, we would argue that the combination of inhospitable geographic conditions and political power necessitated the first policy decision but not the second. Unless one takes the view that racism, greed and rapaciousness are fundamental and immutable features of human nature it is difficult to defend the position that exploitation of non-settler colonies was inevitable. It should be viewed as a deliberate decision on the part of the Europeans that was enabled but not wholly determined by geographic conditions and the distribution of power.

In short, though not conclusive, the cross-country data do not provide much support for the sceptics who rely upon well-known versions of economic, cultural or political determinism.<sup>187</sup> The variations in institutional performance over time are inconsistent with claims that legal institutions are shaped by immutable economic, cultural or political factors. The data also do not support claims that colonial heritage, through its influence on either legal culture or other policy choices made by European colonists, explains so much of the variation across countries that it deserves to be regarded as an irresistible influence upon the evolution of legal institutions.

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<sup>187</sup> This is by no means a comprehensive survey of the relevant empirical literature. For instance, there is evidence that political factors besides the ones we have mentioned play a role in explaining the structure of legal institutions. For example, in a sample of Stephenson finds evidence that judicial independence is associated with long-term democratic stability and a competitive political system. He suggests that this is consistent with the view that judicial independence arises when major parties reasonably anticipate alternate periods in government and in opposition and are sufficiently risk-averse and forward-looking to accept mutual restraints (judicially enforced) on their actions, and judicial doctrine that is sufficiently moderate that it avoids the appearance of political partnership. However, Stephenson’s model explains only a fraction of the variation in judicial independence across the countries in his sample (in each of his models the pseudo-R<sup>2</sup> is between 0.26 and 0.27) and, as he acknowledges, he cannot rule out the possibility that judicial independence causes rather than is caused by democratic stability and political competition. Stephenson, *supra* note 59.

## B. Skeptical observations

However, there are several reasons why the cross-country statistical analyses discussed in the preceding section should be interpreted with some caution.<sup>188</sup> We note two in particular. To begin with, even taking their results at face value, these studies go only a limited way toward overcoming the problem of knowledge. The coarse-grained nature of the data employed in these cross-country statistical studies provide very little traction on which design features of given classes of legal institutions that are causally related to particular development outcomes are of particular importance. For example, Fukuyama, in the paper noted above where he concludes that institutionalists have won the argument hands down with non-institutionalists on determinant of developments, also notes that public administration is not a science susceptible to formalization under a set of universal rules and principles<sup>189</sup> and that macro-political institutions also are not susceptible of characterization in terms of optimal formal political arrangements. Rather the full specification of a good set of institutions will be highly context-dependent, will change over time, and will interact with the informal norms, values and traditions of the society in which they are embedded.

Similarly, Rodrik, Subramanian and Trebbi, in the paper cited above, despite its perhaps triumphalist title, actually reaches rather salutary, perhaps even sobering conclusions:<sup>190</sup>

How much guidance do our results provide the policy-makers who want to improve the performance of their economies? Not much at all. Sure, it is helpful to know that geography is not destiny, or that focusing on increasing the economy's links with world markets is unlikely to yield convergence. But the operational guidance that our central result on the primacy of institutional quality yields is extremely meager...

We illustrate the difficulty of extracting policy – relevant information from our findings - using the example of property rights. Obviously, the presence of clear

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<sup>188</sup> For an extended methodological critique of the limitations of these studies, see Andrew Williams & Abu Siddique, *The Use (and Abuse) of Governance Indicators in Economics: A Review*, ECONOMICS OF GOVERNANCE (2007).

<sup>189</sup> See also Francis Fukuyama, *STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21<sup>ST</sup> CENTURY* (2004).

<sup>190</sup> Rodrik et al., *supra* note 73 at 157-8.

property rights for investors is a key, if not the key, element in the institutional environment that shapes economic performance. Our findings indicate that when investors believe their property rights are protected, the economy ends up richer. But nothing is implied about the actual form that property rights should take. We cannot even necessarily deduce that enacting a private property rights regime would produce superior results compared to alternative forms of property rights....

There is growing evidence that desirable institutional arrangements have a large element of context specificity, arising from differences in historical trajectories, geography, political economy, or other initial conditions... This could help explain why successful developing countries – China, South Korea, and Taiwan among others – have almost always combined unorthodox elements with orthodox policies. It could also account for why important institutional differences persist among the advanced countries of North America, Western Europe and Japan – the role of the public sector, the nature of the legal systems, corporate governance, financial markets, labour markets, and social insurance mechanisms among others...

Consequently, there is much to be learned about what improving institutional quality means on the ground. This, we would like to suggest, is a wide open area of research. Cross-national studies are at present just a beginning that point us in the right direction.<sup>191</sup>

Finally, in a similar vein, in a recent paper, “Institutions and Development: A View from Below,”<sup>192</sup> Rohini Pande and Christopher Udry state:

Recent years have seen a remarkable and exciting revival of interest in the empirical analysis of how a broad set of

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<sup>191</sup> See more generally, Rodrik, ONE ECONOMICS, MANY RECIPES *supra* note 53

<sup>192</sup> Rohini Pande & Christopher Udry, *Institutions and Development: A View from Below*, Yale University, November 18, 2005.

institutions affects growth. The focus of the recent outpouring of research is on exploiting cross-country variation in 'institutional quality' to identify whether a causal effect runs from institutions to growth. These papers conclude that institutional quality is a significant determinant of a country's growth performance.

These findings are of fundamental importance for development economists and policy practitioners in that they suggest that institutional quality may cause poor countries and people to stay poor. However, the economic interpretation and policy implications of these findings depends on understanding the specific channels through which institutions affect growth, and the reasons for institutional change or the lack thereof... However, we argue that this literature has served its purpose and is essentially complete. The number of variables available as instrumental variables is limited, and their coarseness prevents close analysis of particular causal mechanisms from institutions to growth... This suggests that the research agenda identified by the institutions and growth literature is best furthered by the analysis of much more micro-data than has typically been the norm in this literature.

The authors go on to illustrate the importance of this micro-perspective by describing property rights in land in four African countries (Gambia, the Democratic Republic of Congo, Ghana and Cote d'Ivoire), emphasizing the importance of the distinction between *de jure* and *de facto* land rights, the importance of customary law, the heterogeneity of land rights even within countries, and the intertwining of political and contractual institutions. Recent research on the rule of law and development is in a similar spirit<sup>193</sup>

Thus, while empirically there appears to be an increasingly firm consensus that institutions, including legal institutions, are an important determinant of economic development (and probably other aspects of development), there is much less consensus on what an optimal set of institutions might look like.

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<sup>193</sup> See the studies in Erik Jensen & Thomas Heller eds., *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW* (2003); see also Michael Trebilcock & Ron Daniels, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* (2008).

It is also worth noting that these studies shed little light on issues surrounding the means of implementing any given set of legal reforms, including the relative importance of local and foreign actors and the best ways of checking the conflicts of interest and biases that allegedly undermine the effectiveness of foreign actors such as the World Bank. There are also reasons not to take the results of these studies at face value. There have been a number of critiques of the methodologies used in these studies.<sup>194</sup>

## V. CONCLUSION

While there appears to be an increasingly firm empirically grounded consensus that institutions are an important determinant of economic development (and probably other aspects of development), there is much less consensus on which *legal* institutions are important, given the existence of informal substitutes, what an optimal set of legal institutions might look like for any given developing country, or for those developing countries lacking optimal legal institutions (however defined) what form a feasible and effective reform process might take and the respective roles of ‘insiders’ and ‘outsiders’ in that process. Optimal institutions generally, including legal institutions in particular, will often be importantly shaped by factors specific to given societies, including history, culture, and long-established political and institutional traditions. This in turn implies some degree of modesty on the part of the external community in promoting rule of law or other legal reforms in developing countries and correspondingly a larger role for ‘insiders’ with detailed local knowledge. In turn, reference points for legal reforms in many developing countries may not be legal regimes, substantive or institutional, that prevail in particular developed countries but more appropriately legal arrangements that prevail in other developing countries that share important aspects of the history, culture and institutional traditions with countries embarking upon such reforms.<sup>195</sup>

Policymakers need to think carefully and modestly about what comparative advantages ‘outsiders’, especially outsiders from the

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<sup>194</sup> See, e.g. Kevin Davis, *What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?*, 26 MICH. J. INT’L L. 141 (2004); Kevin Davis & Michael B. Kruse, *Taking the Measure of Law: The Case of the Doing Business Project*, 32 L. & SOC. INQ’Y 1095 (2007); Williams & Siddique, *supra* note 188.

<sup>195</sup> See Sharun Mukand & Dani Rodrik, *In Search of the Holy Grail: Policy Convergence, Experimentation, and Economic Performance*, 95 AM. ECON. REV. 374 (2005).

developed world, possess in inducing or assisting developing countries to embark upon legal reforms, substantive or institutional: money, obviously; purely technical expertise, e.g., in designing computer systems for court or land registry management (and training local personnel therein); perhaps knowledge of comparative experience with similar initiatives (successful and unsuccessful) in other developing countries, including suitably cautious interpretations of the pre-conditions to success or failure of these initiatives. But it is difficult to imagine 'outsiders' effectively assuming the role of chief designers or principal promoters or champions of such initiatives.

We hence conclude (rather in the spirit of Pande and Udry) that the next research frontier is likely to entail a much more labour-intensive and context-sensitive analysis of particular legal regimes and institutions (both formal and informal) in particular societies, and potential reforms thereto evaluated against some set of broad or more generalizable development goals. We believe that legal scholars can play a valuable role in this kind of research and because of its importance we encourage them to take up this challenge.