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**Law and Development Economics: Toward a New Alliance  
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**I. Introduction: Law Embedded in Development Policy**

Over the last decade or more, experts in economic development policy have lost confidence in the neo-liberal package of policy ideas once promoted with enthusiasm across the globe. The results of those policy prescriptions differed widely and were, on the whole, not as salutary as had been expected. Many regions and countries which followed alternative paths did well – often better than those who followed the neo-liberal prescriptions to the letter. At the same time, economists, sociologists and others launched important intellectual criticisms of the economic ideas which underlay the neo-liberal policy set. These criticisms opened new paths for thinking about development policy, often focused on institutions and modes of regulation and administrative action. They also brought with them a new vernacular for arguing about development policy – how extensive are market failures, where are the binding constraints or bottlenecks and how can they be softened, how important are public goods, and so forth. Much of this volume is devoted to elaborating those once heterogeneous, now ever more mainstream, economic ideas and assessing their significance for policy-making in the Chinese context.

Our economic and sociological ideas about development routinely have ideas about law embedded within them. Economists share a set of background ideas about what law is, what it can do, and how it might be used. Often these ideas about law lie hidden in assumptions about the state and the appropriate instruments for policy making. These assumptions can be difficult to see when economists share a strong consensus about what development is and how to bring it about, as they did in the postwar period and again during the heyday of neo-liberalism. When the unity and self-confidence of development economics ebbs, as occurred in the nineteen seventies and is again the case today, and the details and context for policy seem more salient, ideas about law and institutions often lie closer to the surface in discussions of development policy.

Indeed, it is quite striking that as confidence in the once dominant neo-liberal economic prescriptions has faltered, attention has turned ever more to the importance of getting the institutions and legal arrangements right as a pre-condition for successful economic policy making. As a result, development economists and policy makers now speak about law all the time and arguments about law – how it works, what it can and cannot do -- have become part of the common repertoire of development practitioners. Reforming the legal system itself has become an important development policy prescription, and policy makers routinely call for a relatively standard set of law reforms to strengthen property and contract rights, ensure transparency or good governance, and build the “rule of law.” Something similar took place in the nineteen sixties and seventies as confidence in the set of economic policies associated with the first phases of import substitution industrialization waned among economists and

sociologists. They began talking about legal reforms, both domestically and at the international level.

The turn to law is important. Capital is, after all, a legal institution – a set of entitlements to use, risk and profit from resources of various kinds. Law defines what it means to “own” something and how one can successfully contract to buy or sell. Financial flows are also flows of legal rights. Labor is also a legal institution – a set of legal rights and privileges to bargain, to work under these and not those conditions, to quit, to migrate, to strike, to retire and more. Buying and selling are legal institutions – rooted in what it means to own or to sell in a given legal culture, in the background legal arrangements in whose shadow people bargain with one another over price. Markets are built upon a foundation of legal arrangements and stabilized by a regulatory framework. Each of these many institutions and relationships can be defined in different ways – empowering different people and interests. Legal rules and institutions defining what it means to “contract” for the “sale” of “property” might be built to express quite different distributional choices and ideological commitments. One might, for example, give those in possession of land more rights – or one might treat those who would use land productively more favorably.

The particular legal arrangements in a society are terribly important for the success of economic policy. They influence the routine distribution of consequences from changes in policy or other economic adjustments. They can make policies possible – and completely ineffective. They can establish incentives and set bargaining powers in ways conducive to economic exchange and growth – or inimical to it. More importantly, legal arrangements can influence the *path* for economic development. Among many possible paths to growth or stable equilibria, the one to be found in a given society will be a function in important part of the legal arrangements in place.

For all these reasons, it is important to understand how ideas about law have been and might be brought to bear in development thinking. This would be easier if the best ideas about law could simply be added to economic wisdom about development. Unfortunately, it is not that simple, first because the best economic thinking about development already has assumptions about law and institutions embedded within it, and they are often not the best legal ideas. Second, legal experts, like economists, disagree about what the “best” ideas are. They are rarely be of one mind about what law is, how it works and what it can be expected to do, let alone about the details of institutional design. In this respect, legal science is no different from economics or sociology – there are schools of thought, mainstream ideas and more heterogeneous tendencies. As in economics, ideas about law travel in packs. There have been moments of broad consensus and moments of greater doubt and uncertainty about just how law functions in society. Within the range of available professional arguments, individual jurists or whole sections of the profession may have preferences and intellectual habits.

Moreover, these disagreements are unlikely to be cleanly resolved by empirical study or more precise theoretical reflection. Indeed, legal expertise is better understood as a framework of opposed arguments about legal design than as a set of recipes or best practices. The kinds of choices which must be made in designing and operating a legal system return us repeatedly to

social and political choices which may be discussed in the more professional sounding vernacular of the legal profession, but are rarely resolved by decisive legal argument one way or the other.

Over the last twenty or more years, thinking about development issues in the field of legal science has in some ways paralleled that in economics and sociology. There was a set of dominant ideas about law during the neo-liberal period, even as policy makers focused more insistently on macroeconomic stability, privatization, a shock to world prices, and the rest of the now classic neo-liberal development program. Among other things, this set of ideas downplayed the potential for public law and regulation while foregrounding private law. It extolled the benefits of legal formality and stigmatized many economic activities which occur in the borderlands of formal law as “corruption.” In this set of ideas, “property rights” had pride of place and were understood in rather formal and absolutist terms.

In more recent years, a range of heterogeneous ideas long present in the legal field have become more significant for thinking about development issues. In methodological terms, these ideas share a great deal with heterogeneous thinking in the social sciences during the same period. They focus on context, on informality, unpredictability, on institutions other than private arms length contract, and so on. Among other things, public law and regulation have become more salient, ideas about corruption have become more precise, while the benefits and inevitability of informal economic and legal arrangements have come to be more fully recognized. The significance of choices among various possible background private law regimes and corporate governance regimes have come to be discussed more prominently. In this view, “property rights” are far more nuanced. There are many forms of property entitlement which may be bundled and parceled out in numerous ways, all of which permit some uncompensated injury to the property holder for one or another social purpose.

The interesting thing is that these heterogeneous ideas about law have not penetrated the world of development policy as firmly as have their methodological allies from economics or sociology. In this chapter I argue for an alliance between the new strands of economic thinking found throughout this volume, and the long tradition within law of skepticism about legal formality, about the autonomy and absolute nature of private law, and about other legal ideas closely associated with neo-liberal policy reforms. The reasons for thinking such an alliance may be helpful are two. First, as a practical matter, once the specific structure of regulatory arrangements and institutions are fore-grounded by economic thought, it will be important to benefit from the most nuanced contemporary thinking about the range of choices available in arranging institutions and regulations in particular contexts.

The second basis is more a matter of rhetorical and political affinity. Development expertise, however it presents itself, has never been a simple matter of theories, from economics or elsewhere, “applied” in a national context. Expertise about development is far more a constellation of associated commitments, favorite ideas, typical strategies and ideological associations. The work of development policy making is often argument – generating reasons to push political initiatives in one or another direction, or to favor one type of intervention over another. As in other rhetorical domains, styles of argument clump together and can support one

another by loose analogy. As economists argue more vigorously for modes of analysis that endogenize social arrangements and matters of political economy, they will find in legal science a parallel set of arguments for endogenizing factors of this type into our understanding of legal arrangements themselves. On the rhetorical field of battle, it can often be useful to have your homolog from an adjacent discipline near at hand.

## **II. The postwar development state: legal instrumentalism and its discontents 1950-70**

The potential significance of such an intellectual alliance is perhaps easier to see with the wisdom of hindsight. A brief return to the dominant development ideas and policies of the nineteen fifties and sixties illustrates the presence of ideas about law beneath a dominant policy set – here that of import substitution industrialization and modernization. As confidence in import substitution faltered, in part under the pressure of critical work from within the fields of economics, political science and sociology, confidence in the legal paradigm undergirding the postwar approach to policy remained high within the development field. Looking back, we can see ways in which dominant ideas about law and institutional structure may have hampered efforts to render import substitution policies as flexible, context specific and effective as they might have been. Meanwhile, however, within the legal field, heterogenous criticisms of these dominant legal ideas emerged which could have been useful but were by and large not engaged.

At the same time, we can see that the prevailing wisdom of neither the economic nor legal profession provided a compelling scientific analytic for making the detailed institutional choices necessary to build an effective import substitution development state. Doing so required choices, political choices, taken on the basis of argument and debate – all the more so as confidence in postwar growth and modernization theories ebbed. In arguing for choices which departed from the import substitution orthodoxy of the postwar period, policy makers might well have drawn on arguments rooted in heterogenous thinking about law as well as economics, sociology or political science. As it happened, however, the opportunity for a productive interdisciplinary alliance between critical strands of thinking in both fields was lost. Lawyers with heterogenous sensibilities left the field in what two leading scholars famously termed “self-estrangement.”<sup>1</sup>

### *Legal ideas embedded in postwar economic ideas.*

Postwar development texts focused on the relationship between economic theories about development and policy objectives. They had far less to say about the *instruments* through which policy choices were to be made effective and even less about the legal and institutional context within which those instruments would operate. Often, the instrument and the objective were used interchangeably, as if the objective to “restrict imports” and the instrument “tariff” were synonymous. A tariff, of course, is a legal rule, and law is generally the medium through which policy instruments are – or are not -- made effective. The idea that a tariff will, in fact,

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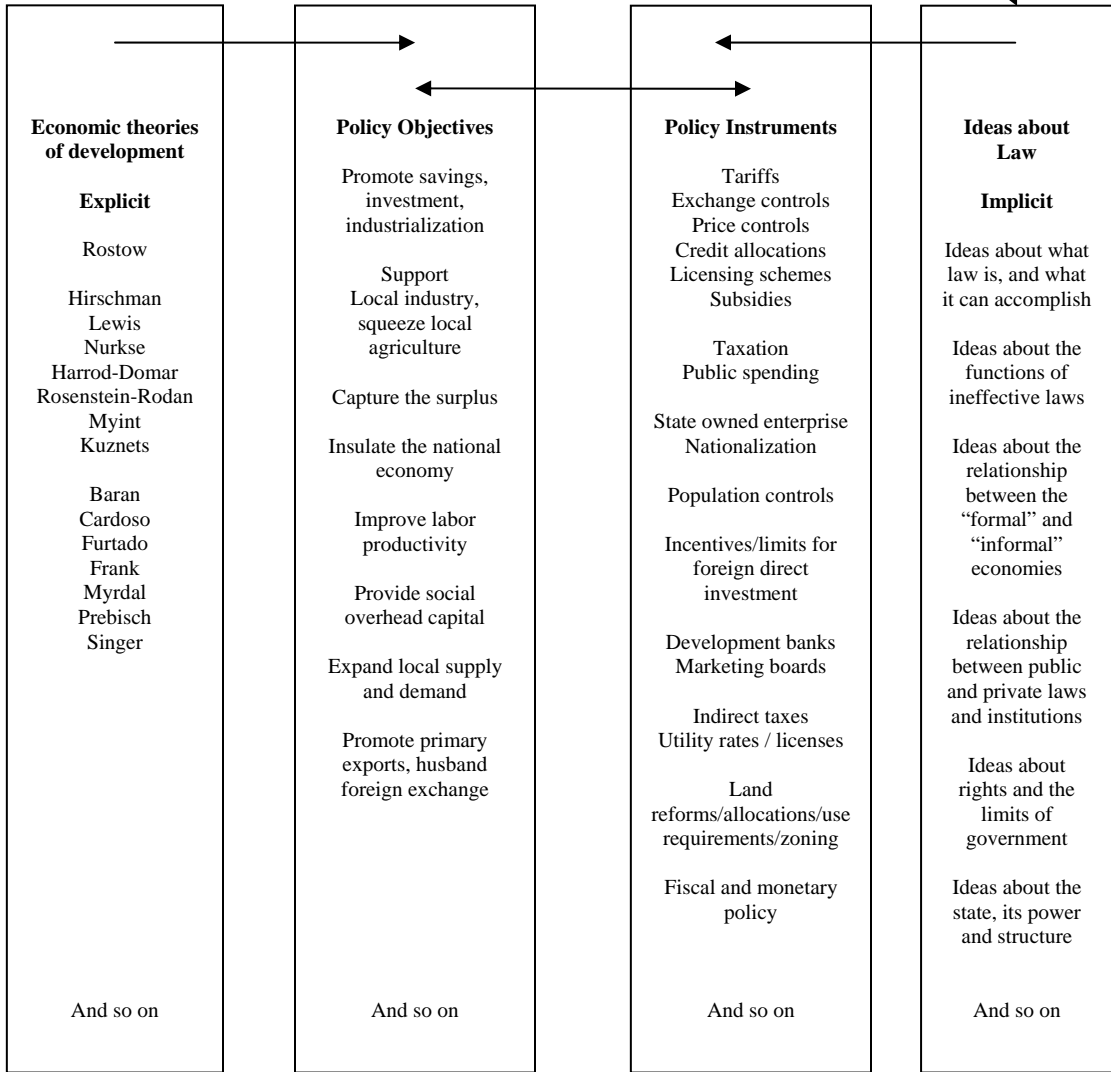
<sup>1</sup> Trubek and Galanter, “Scholars in Self-Estrangement...” See also, Roberto Unger, *Law and Moderization*.....

restrict imports relies upon assumptions about, among other things, the effectiveness of law in a particular context. In their focus on economic theories and objectives, rather than the design and effectiveness of legal instruments, postwar development experts were not unique. Throughout the development field, we are used to considering the relationship between economic theories – of growth or development or efficiency – and policy objectives. The point of applied economic analysis is to translate economic models into objectives to be pursued by those with (usually public) power to make policy for an economy.

Were we to add legal instruments and ideas to the story, we might imagine the relationship among economic theory, policy and law as a series of translations of this kind. Economic theories are translated into objectives for policy makers, and translated in turn into legal instruments whose selection might be informed by implied or explicit ideas about law. In both fields, the translation of ideas into action relies on some broad or narrow sense for the specificity of the context for which these policy objectives are appropriate or in which these legal instruments will operate. I use the word “translation” to highlight the gaps which must be overcome to apply legal or economic ideas. The word aptly evokes sense in which the application of such ideas is a matter of argument and persuasion, making an analogy between the context to be addressed and the theoretical framework within which the ideas were developed and refined. Like all such matters of language and disputation, the argumentative links which experts forge as they move among the columns in **FIGURE A** can be far less stable than experts are prone to assert.

FIGURE A

**Theories, Objectives, Instruments and Law: 1950-1970**



In the event, a great deal of law was required to translate the leading postwar economic theories of development into policy. Import substitution industrialization drew on every element of the legal regime. The structure of public finance and budgeting, the authority and structure of institutions, whether public or private, possible modes for regulation, the military and criminal justice system all came into play. Import substitution industrialization demanded the creation of numerous public law institutions, established by statute and implemented by public law bureaucracies: exchange controls, credit licensing schemes, tariffs, subsidy programs, tax incentives, price controls, national commodity monopolies and so forth. There needed to be a revenue service, a mode of assessment and of payment. Borders needed to be controlled, requiring a customs service, itself mandated and organized. Legislation was necessary to establish exchange controls, marketing boards and all the other elements of the system. A vastly expanded administrative apparatus, with rule making, licensing and other legal authority would need to be set up.

Looking back, we can reconstruct the legal theory implicit in development expertise of the period. Although postwar development experts rarely placed their ideas about law front and center, they did have ideas about law. The relative invisibility of law reflected the common assumption that law had little potential as an independent variable for generating development. Law was a tool for development policy makers, and as the instrument of economic policy, law was assumed to work more or less as advertised.

At the international level, the predominant legal idea was an absolute and formal state sovereignty shielding national political autonomy to pursue the development strategy of choice. The significance of private legal arrangements at the international level was largely overlooked, while the symbolism of legal sovereignty often led to an overestimation of state capacity and autonomy. These economic assumptions about the legal context had their correlatives in legal thought: international legal positivism and formalism.

Two large ideas were taken for granted about the international legal order – the local nature of public law and the global validity of private law arrangements. Sovereignty seemed to imply that every national state could have whatever public institutional arrangements it desired, and could manage its “own” economy in whatever way seemed sensible. This was the meaning of self-determination, and the focus for thinking about the public international law status of the newly independent nations of the colonial world. At the same time, it was equally clear that if you took something you owned from one place to another, you still owned it. You would be subject to the law of the place when it came to remedies and obligations, but the global economy was possible because the property and contract relationships entered into in one place would, in one or another way, hold elsewhere. These two principles could certainly come into conflict – a local government could expropriate, for example. In the early years, this was regarded as a political, rather than a legal problem. In that sense, speaking quite generally, sovereignty trumped property as a matter of law.

It is now apparent, of course, that neither of these ideas was fully accurate. Private rights are both qualified – and enforced -- by sovereign power, not only in their place of origin, but in their transnational exercise. At the same time, sovereign powers to insulate and manage the

national economy are everywhere compromised by the juridical and practical effects of transnational economic flows. Moreover, international law restrictions on sovereign policy autonomy are routine in the global trading regime, the system of bilateral investment treaties, and, more recently, through the globalization of human rights norms and standards. The interpenetration of international public and private arrangements and the qualification of national sovereignty have both grown in the last decades.

But it is just as important that *awareness* of these limitations and interpenetrations has also grown among development experts. Expectations, about both national public authority and the transnational stability of private rights have changed. These changes have been strengthened by a tacit confluence of legal ideas critical of an absolutist conception of sovereignty and of a formal separation of public and private authority at the international level, and by heterogeneous strands of economic and political thought which unbundled the state, strengthened the analogies and overlaps between public and private actors and stressed the significance of public regulatory capacity whether exercised globally or nationally, for the stability of transnational economic flows.

The national legal regime in most newly independent states expanded dramatically as national development plans for import substitution industrialization were implemented. Colonial law was replaced, customary law overturned or ignored, and a large public law framework was erected to mobilize the nation for economic development. This expansion also came with a set of implicit and explicit legal ideas. Postwar development professionals were quite optimistic about public law and about the capacity of complex administrative systems to translate policy objectives into action – to control borders, implement tariff schedules, suppress black markets, control prices or collect taxes. When they designed legal institutions, they thought of public entities, linked to the state apparatus, whether the state owned enterprise, or the licensing or marketing board. Law was understood to be an instrument of sovereign power, the means to accomplish a policy objective. In short, law was about enabling the state.

As a result, public law was more salient than private law in the imagination of development experts. The key actors were legislatures and administrative bureaucracies as the creators, consumers and interpreters of law. When people thought of legal instruments, they thought first about *legislation* and administrative decrees: the pronouncements of the legislature or executive, rather than customary law, contract or property law and the pronouncements of judges. A wide range of previously settled fields of law were opened to new legislation and interpretation in furtherance of the social objectives of national solidarity and national economic development.

This instrumental or pragmatic approach to law stressed the importance of purposive reasoning to link legal arrangements with social needs and objectives. The purposes came from elsewhere – from the society, from government, from the legislature. Law was subordinate to social purposes – implementing the objectives of the society, rather than expressing a priori limits or historic commitments to be respected or purposes of its own to be achieved. Indeed, the purpose of the legal order itself was the consolidation of national economic and political authority – often associated with national self-determination and decolonization – rather than,

say, the integration of local economic life into a global economy, or the facilitation of private exchange and private ordering through supplemental regulatory interventions.

Once legal arrangements were understood to have a social purpose, law was to be interpreted strictly or flexibly so as to achieve that developmental purpose. Where purposes were not express, they could be derived from analysis of the social and economic needs of the society, given its stage of economic development. Legal arrangements would need to remain flexible and open to reinterpretation in light of a changing policy objective. Legal norms were imagined to be quite context specific, in need of careful elaboration in particular cases, rather than fitting together in a tight logical structure. At the same time, individual norms were often constructed so as to maximize the possibility for discretion in implementation – as a principle, for example, rather than a tight rule. Here, the correlative idea in legal science was an instrumental strand of anti-formalism.

Of course, all these new legal arrangements were unsettling to existing legal entitlements – think of land reform and the property rights of large landowners. Yet, the law was understood to place few limits on development policy. It is worth noting that distribution was understood to be central to the work of law – allocating resources among social and economic groups – from agriculture to industry, from foreign to local financial institutions – to implement national economic policy objectives. The legal vocabulary of “rights” has often been used to slow the emergence of new economic policies. During this period, however, this was infrequent. The state was thought able to regulate as it pleased, altering private rights, without judicial review. Neither constitutional rights nor private law seemed important restraints on the state. Constitutional law was about the organization of executive and legislative power. Judicial review was rare. Both public order and private arrangements were to be coordinated with national policy objectives. Judicial bodies were subject matter specialized and often internal to administrative structures, or in any event subordinated to the national policy and political apparatus – their job less to check the state than to ensure the implementation of policy. The legal difference between military command structures and state apparatuses committed to development was often not large – both were public administrations, often responsive to presidential authority. These assumptions also had their correlatives within the legal science of the day: functionalism, positivism and legislative or executive supremacy.

In this general vision, context or culture seemed relevant predominantly as potential limits to effective policy implementation. The idea that the context offered resistance or friction to the smooth translation of policy into practice led to the emergence of ideas within legal theory about how could policy could be rendered more effective by narrowing the “gap between law in the books and law in action.” In this sense, the sociological study of law was harnessed to legal instrumentalism, rather than offering an alternative perspective qualifying legal instrumentalism or encouraging a more dynamic analysis of the interactions between policy instruments and the context for their deployment.

This tendency may have been reinforced by the fact that with national independence and sovereignty came amnesia about the formal and customary law of the colonial legal regime. The new regimes in Asia and Africa marked their break with the past by foregrounding their

commitment to national development and the new legal regimes required to that end, and downplaying any continuity with the legacy of colonial law, associated with exploitation. In Latin America, import substitution oriented administrative and legislative regimes had already been put in place before the war – in the 1920s in Mexico, the 1930s in Brazil – both informal and indigenous legal arrangements long since having been disregarded. Development planners from the North arriving in the South tended to imagine a national legal culture similar to that they had left behind at home, if, in some way “more primitive.” Legal arrangements were simpler, perhaps more formal, and often seemed to run parallel to a separate world of custom and informal practice. In the North, at the time, the informal world of business dealings was coming to be understood as worthy of emulation and support by the law – legal rules should honor business judgment and reflect commercial practice. In the South, the legal environment was imagined otherwise – the goal was to assimilate the informal to the formal, eventually to bring the traditional sector into “modern” modes of legalization. This was not yet a development priority, but it seemed natural to expect that with industrialization and modernization, more births would come to be registered, more property transactions recorded, more income reported, and so forth. And with the subordination of the customary world would come more effective development policy.

By and large, traditional and customary law seemed irrelevant, or at most an obstacle, for development policy. Those who studied the local legal culture of developing societies – largely legal anthropologists from the North --- were not particularly interested in law as a development tool. Legal anthropologists and sociologists studying traditional or primitive societies tended to search for functional equivalents to the legal institutions familiar in the developed world – legislation, dispute resolution, contract and so forth. If anything, their work supported the background notion that traditional societies were functionally similar, if more primitive versions of modern societies, suggesting that there was no inherent reason they could not come to function along modern lines.

Many of these widely shared legal ideas were not confined to import substitution development regimes. During the first half of the twentieth century, many of these ideas had become widespread among legal elites in the developed world, starting in Europe and spreading to the United States during the Roosevelt New Deal. Expressed differently in different national traditions, the emphasis on public law and administration, and on the need to temper nineteenth century private law with more “social” elements reflecting national interdependence and solidarity was widespread.<sup>2</sup> Development economists influenced by New Deal style welfare states in the United States and Europe doubtless brought these ideas with them to the development context. These ideas seemed modern – a workable substitute in many places for the more rigid seeming thought associated with the colonial legacy of the Commonwealth. They had been enthusiastically adopted by the international institutions most associated with development in the pre-war period, the International Labor Organization and the League of the Mandates Commission or the Bruce Report. In Latin America, they had entered legal consciousness from France, often through the emerging fields of both labor law and international law, and were often understood to reflect a particularly “American” or national revolutionary identity.

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<sup>2</sup> Insert cite: Duncan Kennedy’s “Two Globalizations.”

Nevertheless, social, purposive, pragmatic and antiformal legal ideas resonated differently in the development context. Some antiformal ideas about the structure of legal rules – an openness to or even preference for standards – and an embrace of social custom and informal private ordering by the official legal order advanced more slowly in the South, coming into their own only in the nineteen sixties and seventies, as they were also absorbed by mainstream public international law. More often, instrumentalism was linked to a more formal tradition, rooted in a public law positivism which ensured legislative and executive supremacy.

Where antiformalism had seemed essential in the North, and particularly in the United States, to unravel the limits thought to have been placed on the emergence of a welfare state by a formalist private law, in the absence of judicial review, such a critical antiformalism was not necessary. In the United Statesean tradition, antiformal and sociologically inspired legal ideas are generally associated with criticism of necessitarian styles of legal argument and interpretation, whether rooted in rights or social purposes. In this critical form, these ideas have always had a heterogenous feeling about them, even when they have been mainstream. In the developmental context during this period, this was simply far less often the case, perhaps because strong assumptions of legislative and administrative positivism and the absence of judicial review made American traditions of interpretive criticism an unnecessary import. Formalism was already operating in the service of the development state.

As a result, where antiformal ideas did have purchase in the South, they were mobilized less to question than to reinforce the top-down authority of the national developmental state, less to highlight the juris-generative dimensions of local culture and private arrangements than to assist the state in penetrating the legal and cultural context more effectively. Private law ideas and elements of the consciousness of classical legal thought would only later be mobilized to resist mainstream development policy.

Thus, the problem was not that critical strands of legal science were unavailable. It is that they did not seem to penetrate the world of development expertise sufficiently to have been mobilized to check the excesses or fine-tune the machinery of the postwar development state. The most promising legal ideas for criticizing the excesses and rigidities of the postwar development state -- critical of legal formalism, positivism and instrumentalism --- were already well known in the North, having been developed over two generations by sociologically oriented jurists, those associated with the American “legal realists” and their progeny in the legal process school after the war. Unfortunately, these ideas got into the development discussion only much later. Even as confidence in the dominant economic paradigm receded, heterogenous ideas about law remained marginal. Even those who tried to bring sociologically informed legal ideas to the field through the “law and development” movement of the nineteen sixties and seventies found themselves harnessed to the project of perfecting the operations of the instrumental development state.

This was all the more true for legal ideas lying further to the left or right, all of which would enter the development field over the next decades. From the right, legal scholars were already elaborating the ideas which would animate the neo-liberal period – priority of private law, international rights and commitments as a check on the state, legal institutions tested by a standard of market efficiency, supporting rather than regulating markets or distorting prices. But these ideas were not prominent in the development literature of the period. Legal scholars associated with one or another strand of Marxism, who did focus on the political and social role of law and on the dynamic interaction between social and institutional context and policy. For these thinkers, Polanyi was particularly significant. In this view, development was rooted in a political process, through which the changes necessary for modernization needed to be rendered politically and socially sustainable. Law might serve as an antidote to rapid economic change, allowing disruption to be metabolized by the society. From this perspective, much that seemed like friction or resistance could be reimagined as productive, calibrating the degree of acceptable change. For these ideas to be turned into policy would have required an agent – a legislature, a court, a president, who could stand against the implementation of the plan in the name of its long term sustainability. In the postwar period, thinking of this kind was rare. It would only be later, under the influence of economic institutionalism that such heterodox thinking about law would gain purchase.

#### *How legal ideas influence economic policy design*

We know that development policy making is never the mechanical translation of an economic theory into action. There are disagreements among economists about how to proceed, questions of emphasis, of the relative importance of various development objectives, and of how to allocate costs and benefits over time. Even if there were no differences of opinion among economists, however, it would not be simple. Unanticipated consequences are ubiquitous. General analytics, as one might expect, are better at generating broad propositions about policy direction than specific institutional recipes. They have more to say about objectives than instruments, still less about the fit of instruments into particular institutional, legal and cultural contexts. And, of course, there turn out to be lots of ways to skin a cat, and once you focus on these choices, ideas from outside the field of economics begin to crowd into the discussion.

In principle, it is easy to see that there would often be reason to turn to experts in matters of legal and institutional design. Although every elementary course in the economics of trade teaches analytics for determining when to use tariffs or subsidies to protect markets, translating this wisdom into institutional recipes for particular contexts raises questions unable to be answered by these analytic models. What seem the simplest policy tools – taxes or tariffs or subsidies or licenses – require legal and institutional arrangements which must be embedded in already existing institutional, social and political contexts. We need to know about that context to understand the effect – and particularly the dynamic effect – of specific changes in the legal regime.

Moreover, many questions of institutional design raised in constructing the apparatus

to implement policy fall outside the obvious ambit of economic expertise. New bureaucracies require a legal mandate and a permissible margin of discretion. Policy instruments require methods for enforcement, prescribed penalties and modes of adjudicating infractions and collecting penalties. A tariff schedule must be adopted – should it be done by legislation or administrative decree? Someone must be authorized to set the tariff, revise it, exempt from it, collect or fail to collect, prosecute, penalize and so on. How much discretion ought they to be given at each point to maximize the chances of achieving the policy objective?

In making choices about these questions, development experts then, as now, were prone to speak as if the economic policy objective determined the way forward – and as if the matter was less one for argument than science. In making these assertions, policy makers often restated the overall objective as a reason to pick one, rather than the other institutional design. We want an effective tariff policy to restrict imports, raise revenues and protect domestic industry --- let us therefore have the most draconian penalties, the most rigid and mechanical customs service, the most powerful legislative act or presidential decree. Or, to ensure the effective policy implementation, we should give local administrative agents the power to adjust terms as conditions change, even tolerating non-compliance where this serves a developmental objective – as when black markets in currency function as tariffs.

It quickly becomes apparent, however, that one can only rarely deduce the optimal legal and institutional arrangements from broad policy objectives. Where there were multiple policy objectives, the conflict among them could be continued into the details of policy design. Even agreement on the objective rarely determines precisely how it ought to be achieved – precisely *how* to encourage savings, *how* to support domestic industry, *how to* capture the returns from primary exports. Which instrument shall we use – tariffs or subsidies? What *kind* of licensing structure or tariff administration best expresses a policy objective? How should we design the instrument – with larger or smaller exemptions, for example? On such questions, economics tends to offer rules of thumb, taxonomies of factors to consider or values to maximize which are useful in arguing for one rather than another legal tool, but rarely decisive when it comes to institutional design. Context – and the rest of the legal order – are too important.

Legal ideas are important when they influence these choices. They can do this by short-circuiting analysis of alternative legal instruments with received wisdom, offering an alternative professional analytic for designing policy tools, suggesting alternative tools or focal points, or by contributing to the repertoire of useful arguments about whether to use this or that policy instrument. In the postwar period, unfortunately, among development experts, the most significant and widely shared legal ideas remained below the surface, ensuring that their influence would predominantly be of the first type. It was only after the economic policy consensus began to break down and previously heterogenous economic and legal ideas entered the conversation, that the field of law could play a more constructive role.

Of course, legal experts in a given period may imagine that there is a “most effective” or “best practice” way to set up a legal regime. Given the prevailing ideas about law, for example, it may simply be obvious that some things *are* best understood and addressed as crimes, while other things ought to be addressed using civil liability, incentives or other arrangements. Moreover, legal experts also share broad brush maxims or rules of thumb about what works. For example, experts might share the belief that discretion at low levels improves compliance and fine-tunes policy or that strict rules render policy more precise while harsh penalties ensure compliance.

The ideas legal experts bring to the table will rarely be specific to the development context. They have a sense for how rules and legal institutions function, how they are best assembled, how and when the integrity of the legal system itself is at stake in particular arrangements. Their preferences will be influenced by widely shared professional ideas about things like the relative roles of public and private law, the institutional strong suits of various administrative arrangements, the appropriate relationship between tight rules and broader standards in drafting statutes, decrees or judgments, or the best allocation of discretion among actors in and outside public authority. Indeed, choices among policy instruments often present classic issues of constitutional structure which legal experts will reflect on in very general terms. What are the *appropriate* roles for courts, legislature, or administrative agencies? An expert’s own sense for the strategic value of different legal arrangements, both in the pursuit of development policy objectives and on behalf of the legal process itself may also play a role.

Like development theories or favorite policy instruments, ideas about legal structure also go in and out of fashion, and often spread from more to less developed contexts, often without regard to whether the same answers are appropriate here or there in the developing world. In this sense, the existing array of legal ideas may well cut short careful instrumental calculations about the effectiveness of one or another approach to development policy – just as economic ideas about development may short-circuit analysis of the institutional alternatives available in a particular context. In the postwar period, the result was often a familiar one – policy decisions taken on the basis of very poor assessments of the alternative institutional and legal choices available. The priority accorded public law meant that private ordering was rarely thought of as an instrument of development policy. The disconnect between national and international legal arrangements wrought by the priority given to *sovereignty* in the legal assumptions of policy makers made a variety of transnational cooperative policy arrangements more difficult to imagine or pursue.

Moreover, so long as the background assumptions about how legal systems might be put together remained unexamined, it was not surprising that the links between broad policy objectives and specific institutional arrangements often came to feel more necessary or inevitable than they actually were. For example, it seemed obvious that judges should be institutionally subordinate to the national development plan. The whole point of interpretation and enforcement was to implement the plan. The last thing you

needed was an independent judicial actor deciding how to interpret things based on a different set of values. Indeed, the later campaign to build an “independent judiciary” across the developing world was fueled by the desire to place exogenous limits on the developmental state’s policy making capacity in the name of “rights.” In many places, however, the integration of administrative decision-makers into the substantive chain of command led to *less* effective implementation, precisely because an opportunity was lost for an independent control mechanism checking administrative decisions which began to gather path-dependent momentum. So long as these considerations are not brought above ground for articulation, decisions about the structure of the policy instrument will be made in ways loosely guided by intuitions about what works, and by the political and ideological pull of various interests committed to one or another legal form.

There seem two obvious ways out of this difficulty. Either one brings the legal analysis to the surface where it can be made more theoretically satisfying and empirically verified, or one returns to economics, rendering economic analytics precise enough to assess the choice of legal instrument in a more satisfyingly determinative fashion. Certainly, given the chance, legal science can sometimes guide the choice of policy instrument. More often, however, legal science also turns out to be under-determinative, primarily because it contains ideas and arguments which cut in different directions. Although legal experts often do share in a consensus about the right answers to questions of constitutional or institutional design, more often, the “best legal practice” is disputed. At its most robust, legal expertise is composed of arguments and counterarguments for particular approaches to institutional design and interpretation.

On the economic side, in principle, we could translate legal preferences – criminalization or civil liability, judicial or administrative control – into alternative methods of taxation, credit or subsidy allocation, with different winners and losers, and different static and dynamic effects on growth or efficiency and then select among them on the basis of an improved economic analytic, bypassing the stubborn prejudices of legal and institutional experts, and improving the effectiveness of development policy. It would often be helpful to develop a more nuanced analysis of the likely distributional impact of institutional designs in a particular context and feed these back into our economic development theory. It is hard to say exactly why, but this kind of analysis is rarely undertaken, particularly during periods in which the legal arrangements and ideas implicated by a given development strategy remain beneath the surface. It is as if standard ideas about appropriate legal institutions substitute for or stymie this kind of analysis.

More importantly, however, it is not at all clear that one could get to the bottom of things this way. We are all familiar with the tendency, as the analysis becomes ever more contextually precise, for economists to differ more among themselves and for the implications of their analytic models to become less decisive. What you get from both professions are precisely rules of thumb and stock arguments – reduce the length of agency chains, place decisions close to those with information, and so forth. Indeed the maxims about institutional design extracted from economic analysis are often quite

familiar from those one finds in legal theory, although lawyers may be more familiar with the ubiquity of counter-maxims. At the same time, not everything in the legal context is, in fact, plastic. There remain questions of legal and institutional structure which may be determined, or thought to be determined, by the overall institutional and legal context, and therefore not amenable to rearrangement in the name of an economic policy objective. Just where these limits lie will usually be a matter for dispute among economic, legal or political experts.

Once it becomes clear that the choice among policy instruments is underdetermined by economic and legal theory, the door is open to debate in many other terms. Alternative institutional arrangements may come to stand in for competing economic policy objectives or alternative constitutional ideals, re-opening differences of opinion about which way to go. They may also seem freighted with political significance, either because different groups will benefit from setting things up one way rather than another, or because they echo larger ideological commitments. Local institutional history, imitation and the influence of foreign models also played a role. Indeed, the legal materials of the day were far more a set of polarized arguments for more and less discretion, more and less severe penalties, more and less reliance on private initiative, and so on.

Within the developing South, debates about the structure of policy instruments were generally carried on in a political or ideological vernacular, as implicating in some way the *nature* of the state. Given the complexity of the policy apparatus necessary to implement import substitution industrialization, it is odd that there was so little professional debate about these matters of design. Moreover, at a time in which development policy was understood to be all about distribution, it is surprising that more attention was not paid to the distributive effects of various policy instruments, constructed in different ways. It is as if there is something in the instrumental idea about law which foregoes these assessments of its instrumental potential.

In consequence, it is difficult to imagine that a more precise economic or legal analytic will offer an escape from the terrain of argument about how to pursue development policy. It is in this context – when both economists and legal experts are engaged in argument about what to do – that the possibility for a productive alliance between heterogenous (or mainstream) approaches to law and economics arises.

*The parallel worlds of legal and economic argument: the examples of discretion, penalties and the significance of context.*

In arguments about institutional design, moreover, it is surprising how often tendencies in economic and legal thinking run parallel to one another. For example, by the nineteen fifties, legal experts had developed quite standardized debates about the appropriate level of official discretion to build into a policy instrument, the role of penalties in maximizing compliance with policy instruments, and the desirability of interrupting versus harnessing ongoing social patterns when designing legal instruments.

All these issues are of significance in the design of import substitution style policies. Economists also had things to say about each. It should not be surprising that there would be a parallel between the stock arguments made in the two fields about such issues. Nevertheless, in the postwar period, all the possible arguments were not made. In most import substitution regimes, for one or another reason, there seemed to be a default preference for relatively strict rules, strong penalties and a disinclination to develop a dynamic understanding of the role of context when designing policy instruments. It was with the advent of more heterogenous inclinations in economics which fore-grounded the instability and importance of context and institutions that more nuanced legal arguments found an ally.

The issue of discretion comes up in a variety of ways, but is probably best known to lawyers as the choice faced by those who establish norms between using relatively strict rules and broader standards to achieve a given legislative objective. Ought the statute to set objectives to be achieved, leaving the means to those who must implement, or ought it to spell things out with more precision? Should the legislator express the substantive objective in vague terms – “reasonable,” “proportional,” “productive” – or be more precise about what is intended? The more precisely things are spelled out, of course, the less discretion administrative agents or judges will seem to have. Lawyers have generated a number of conventional arguments for and against the use of rule or standards, as well as for and against endowing legal agents with discretion. Indeed, it is also conventional to argue that firm rules may sometimes lead to unpredictable discretion when agents jump the rails of a framework which has lost all link to changing circumstances, and that standards can, in a climate of social consensus, often be more constraining than rules.

The question of how great a penalty or how easily obtainable a remedy will best ensure compliance has also generated a range of conventional arguments in legal science. The death penalty for smuggling – will this reduce smuggling or drive smuggling out of the prosecutorial system all together? A private right of action with punitive damages – will this generate the socially desirable level of compliance or ought we hold people to obligations from which they should better be allowed free? Whether compliance is enhanced by punitive sanctions, and whether agents will respond to rules with discretion and standards with obedience, will depend upon the context, the agents, the expectations and strategies of those outside and inside the legal system, as will the question whether some level of violation other than zero might, over time, actually be optimal to the social purpose. To determine whether we ought to interrupt or reinforce existing social practices, harness custom to our policy objective or break the back of custom, requires a strategic sense about the responses officials and others working in the rule system will make. Will the work-around be more or less effective in mobilizing savings or generating development than compliance with the rule itself would have been?

Once one begins to think about the strategic significance of the context, it will also be clear that whatever strategy is adopted, there will always be some slippage. The rule will seem too tight, and officials will look the other way at its violation. Or discretion will be

exercised wisely, but conditions will have changed. Those outside the legal machinery may game or evade the system. As a result, we will also face a set of choices about when and how to tolerate a residuum of non-compliance. We will need tools to argue about the dynamic interaction of actors making strategic use and non-use of the legal order and the efforts of state actors to implement policy.

Legal experts then and now know that both these issues are matters of degree. Legal arrangements can usually be designed to be more or less rule-like and combined with a more or less forceful remedy. Between any two proposed norms or enforcement mechanisms, moreover, legal experts are trained to deploy the full range of arguments one way or the other – by definition, one alternative will be “less” enforcement or “less” discretion, the other more. They also know that legal science has no one size fits all answer to these questions. Instead, we have a range of repeating arguments which seem both scientific and vaguely ideological, rooted in context specific sociological data and reflective of professional attitudes about what generally makes a legal system effective or just. Arguments for stricter rules, less discretion, stricter penalties, less deference to context, all seem to hang together with politically conservative, ethically individualistic and professionally positivist and formalist preferences. Throughout the twentieth century, arguments on the other side, for standards, more discretion, softer penalties and more sensitivity to the reactions of context, have all seemed heterogenous by comparison – even when they have been hegemonic within the legal field.

In designing specific policy instruments, it seems sensible to work across the entire spectrum of available arguments to be as nuanced and precise as possible in matching legal instruments to policy objectives and the conditions of context. Although laymen often think first of criminal sanctions, professionals should understand that there are many other ways to enforce a legal entitlement, and objectives which might be served by allowing violations. It may be that those who trade currency outside the national bank are committing a crime, come under the authority of the police and prosecutorial authorities, and ultimately the penal or other sanctioning system. But there are other ways to structure the restriction on currency trading. The bank’s monopoly authority in a fixed exchange rate regime may be enforced through private remedies instead, through torts or property or other civil regulatory machinery. Various private rights of action may be created for those harmed by the illegal trade, with various penalties, including the payment of damages measured in various ways. Credit or other services may be denied those who cannot show that their funds have been procured through the appropriate channels. Moreover, whatever system is devised, penalties may be more or less --- death penalty for black market trading? Punitive damages? Fines? Re-education? A sharp warning and surveillance? Or perhaps amnesty and recruitment to the state apparatus.

The severity of the punishment and the degree of prosecutorial or judicial discretion ought to be matters of development strategy. Prosecutorial discretion, in the right hands, may mobilize the population to national objectives more effectively than strictly enforced criminal rules. This is particularly true where baseline rules capture an enormous number of potential violators in their net. If everyone in the society is always already in

violation of tax rules, selective prosecution, or the threat of selective prosecution, can be an instrument of mobilization, of incentivizing engagement in the development plan. Similarly, the tolerated level of non-compliance presents opportunities for strategy, rather than simply lamentation about “resistance” or a “failure to penetrate.” As economists well understand, a tolerated black market may be an effective and administratively simple way to maintain a dual exchange rate. Those who change money on the black market are, in effect, paying a tariff on their imports – the tariff revenues go not to the state, but to the moneychanger. Informal fee structures for administrative service may be more effective than other taxing schemes to harness earnings for investment. In political terms, slippage between the regulation and its implementation can allow the room necessary to permit politically significant constituencies to accept development policies which might otherwise be so adverse to their interests that they could not be implemented. If the upper middle class can bribe the customs official once in a while to bring consumer goods from abroad, or change money on the black market to purchase luxury imports, they might well tolerate a quite restrictive regime, and the price they pay, if not as high as the tariff wall, will still go to the state employees managing the border. Moreover, between the death-penalty for black market trade and tolerated non-compliance lie a range of middle positions. Some money changers could be given a privilege to violate the normal rule. These privileges might be formalized through a licensing process, managed as a discretionary grant or by auction, and so forth.

The interesting thing about the postwar period is how rarely the full range of legal possibilities was exploited in most import substitution regimes. Development planners often simply assumed that the most “effective” policy instrument would be the one which minimized discretion and heightened penalties so as to maximize compliance. Nor were most import substitution regimes designed with a fine-tuned sense of strategy about the dynamic significance of context for the operation of policy. Development planners and economists seemed to share a favorable attitude towards more precise rules and a disinterest in context which was at odds with much of the contemporary legal theory in the North, if consistent with professional attitudes among lawyers in many developing societies.

It would be the heterogenous traditions of structuralist and institutionalist economics, from dependency theory through to public choice theory with their focus on the context of international and national political economy and the dynamic interaction of policy with the strategic behavior of agents both inside and outside the state which would sharpen attention to alternative possibilities. Argumentative tools to support these tendencies were available within legal science at the time – but were not heard.

One explanation would simply be that a top down legal order of precise rules seemed to “fit” with favorable economic attitudes towards Fordist mass production, just as an inattention to context seemed to fit with images of underdeveloped societies as “primitive.” The equation of industrialization with development and modernization arose from the observation that productivity gains came from the specialization and routinization of work made possible in modern factories. Although it was certainly

possible to imagine substituting labor for capital in the industrialization process, this was generally thought to be a dead end – the point was to make a small number of workers more productive, slowly drawing down the surplus labor stock as they could be absorbed into industry. As a result, discretionary models of organization were stigmatized as ‘traditional,’ filled with slack, unable to translate the policy objectives faithfully into practice. The less discretion, the more automaticity in the process, and the more effectively resources could be mobilized for social objectives. It was common, moreover, for economists to remark on the cultural obstacles to disciplined rule following which seemed an obstacle to industrialization. Attitudes would need to become more rational, consequentialist, if people were to have the discipline to step up to the productivity levels made possible by the modern factory. Traditional culture would have to give way to new habits of mind and behavior. It seemed natural to apply this set of ideas by analogy to administrative bureaucracy. In factories you needed an assembly line, in the bureaucracy you needed rules. If you were trying to transform local culture, you would not think first about harnessing traditional cultural expectations and behavior to policy management.

Hirschman was the most prominent development economist to speculate about the impact of the organization of work on cultural attitudes. He famously argued that one should not wait for traditional attitudes to change, one should implement modes of organization which allowed as little “latitude in performance standards” as possible, with catastrophic consequences for failure, to ensure there would be incentives for those involved to discipline themselves into having the right attitudes. To this end, developing economies should “skip steps” to import more advanced industrial processes in which the process itself left less room to tolerate deviation without provoking the kind of failures which would be noticed and opposed by everyone else in the system.

...the greater or smaller extent of latitude in standards of performance (or tolerance for poor performance) [is] a characteristic inherent in all production tasks. When this latitude is narrow the corresponding task has to be performed *just right*; otherwise, it cannot be performed at all or is exposed to an unacceptable level of risk (for example, high probability of crash in the case of poorly maintained or poorly operated airplanes). Lack of latitude therefore brings powerful pressures for efficiency, quality performance, good maintenance habits, and so on. It thus substitutes for inadequately formed motivations and attitudes, which will be *induced* and generated by the narrow-latitude task instead of presiding over it. .... According to my way of thinking, the very attitudes alleged to be preconditions of industrialization could be generated on the job and “on the way,” by certain characteristics of the industrialization process.<sup>3</sup>

According to Hirschman, just as one should not expect attitudes to precede their usefulness, it would be a mistake to imagine that a well functioning public administration could emerge before the habits of bureaucratic regularity had had the opportunity to be learned in industry. Looking back, of course, it is easier to see how this might have been

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<sup>3</sup> Hirschman, *The strategy for Economic Development*, postscript at page 227.

translated into a preference for a quite authoritarian administrative style. It is possible to communicate and instill administrative discipline by routinely lining up those who miss their targets before a firing squad. This general preference for tight rules and severe penalties was often shared, however, by legal professionals in the developing world, who were often trained to think of their work in formal and instrumental terms.

Once confidence in the economic theories supporting postwar development policy began to wane, opening the field to heterogenous strands of thought, legal science had arguments to offer. Jurists had already developed critical perspectives on legal theories which seemed to overvalue formal rules and restraints on discretion or ignored the potential significance of social customs, legal privileges to injure others, and tolerated non-compliance. Arguments for the productive exploitation of economic disequilibrium had analogies in legal arguments for policy instruments which broke with custom or strategized about the dynamic reactions of economic actors inside and outside the state. Of course, these were only analogies --- it might well turn out that a more flexible instrument would be the more effective tool for bringing about a rupture or exploiting a disequilibrium. Nevertheless, as economic ideas became more diffuse, there may have been an opportunity to open up the legal fabric to include more nuanced tools while training legal elites in the arts of pragmatic policy making. Indeed, this was the program of the “law and development movement” from the North which sought to bring heterogenous strands of legal analysis to development policy making in the South, and which lost heart (and funding) precisely as the range of economic ideas was about to open up.

*The moment of reckoning: chastening postwar economic ideas*

We all know that the economic ideas of the postwar period, with their focus on stages of growth and modernization, came under increasing criticism in the nineteen sixties and seventies from both the left and the right. Economic growth and growth through industrialization came under fire as exclusive development objectives. The number of possible development models increased – much depended upon the specifics of local political and social arrangements, resources and position in the world economic order. The international context for development seemed newly important. Sociologists and economists substantiated the intuition that modes of insertion in the global economy differ and are significant, that there are structural limits to national economic development imposed by world political and economic structures, and that the most important questions of development policy reside in identifying and using wisely the room to maneuver at the national level left open within these structural limits. At the same time, local political economy mattered. Development seemed a function of a dynamic interaction with local political and institutional forms. Monopoly interests, foreign investors, local elites, might all become entrenched by development in ways which came to blunt the potential for further development. At the same time, states might also be an obstacle to development, particularly where they stifled entrepreneurial potential or locked in static relationships between foreign and local interests antagonistic to industrialization. States might be captured by rent-seekers, at home and abroad.

Under the impact of these analyses, policy makers were terrifically inventive, ushering in a range of “second stage” import substitution approaches to development. Constructive engagement with the trading system would need to be managed. It might be necessary to limit the state or bust up congealed local interests protective of enclave economies or inimical to an appropriately dynamic insertion into the world economy. A larger regulatory framework would be necessary to prevent dynamic relations between leading and lagging sectors, advancing and declining regions or states from accelerating the decline of the less developed areas. At the global level, development also required new public policy, in the form of a New International Economic Order, new development initiatives across the UN system, and new focal points (such as “basic needs” and poverty reduction) on the part of the international financial institutions.

In legal or institutional terms, however, these new policy initiatives were far less inventive. The key remained an instrumental conception of law, top-down regulation, public administration, all now turned to somewhat different objectives. This was particularly pronounced at the international level, where the project for a New International Economic Order sought to recapitulate for the world the policy instruments of the national welfare state.

Meanwhile, within the legal field, sociologists and lawyers were working together to criticize the positivist and instrumentalist legal ideas associated with the early developmental state. As in economics, this critical work came from a variety of political and methodological points of view. Critical strands in pragmatist and antiformal legal thought made their way from North to South. Legal process scholars focused on the indeterminate potential in substantive regulation and legislation, stressing the importance of private ordering and institutional process. Private ordering was often more important than public law and could fulfill or frustrate public functions. The legal and quasi-legal process for adjustment and settlement might be more important than the substantive norms purporting to govern the result. Legal sociologists emphasized the extent to which law rarely operates as a straightforward instrumental translation of legislative intention into social practice. The gap between law in the books and law in action was not only a failure to penetrate the economic or cultural terrain. People related to the law strategically – using or avoiding legal institutions in their economic and social life. They bargained in the shadow of the law – and also about what law to use and how. An appreciation for legal pluralism made decisive top-down policy implementation seem less likely and less virtuous, even totalitarian. The informal arrangements outside the official legal framework ought to be seen as part of the legal fabric itself. Moreover, law might serve not only as the instrument of state power, but as an important restraint on executive and administrative authority.

At the international level, formal and absolute sovereignty came under attack. State power was itself a legal arrangement. States were part of an international legal community with duties and responsibilities, as well as rights. The new conditions of international economic and social life called for a more interdependent and social

conception of international law. The vocabulary of international human rights placed limits on national sovereignty. The new rhetoric of economic and social rights pushed against growth based definitions of development. At the same time, the top-down welfare state model no longer seemed a useful model for the international legal regime – the General Assembly as legislature or the Specialized Agencies as proto-welfare state agencies.

Common assumptions about the internal structure of law were also questioned. The failures of instrumentalism often resulted from the presence within the normative materials of competing goals. Interpretation would be required to balance considerations in specific cases not only to achieve a pre-determined objective, but also to determine the objective to be pursued. Legal scholars focused on the range of purposes and principles immanent in legal materials, and on the significance of private as well as public processes for the resolution of conflicts. More attention was paid to the role of exceptions in the legal fabric and to the role of non-compliance, as in the obvious case of prosecutorial discretion. The decision not to enforce a rule could also be a policy tool. Legal procedures and institutions seemed more important than substantive rules. Familiar legal categories – public and private, criminal law and contract – began to blur into one another. Thinking instrumentally, there seemed ever more ways to arrange legal duties and permissions so as to achieve given results. As legal professionals worked with legal materials they increasingly understood to be uncertain, they brought all manner of policy arguments and slogans drawn loosely from other fields, including economics, into the legal realm. Unsurprisingly, these ideas often meant something rather different when ripped from their original scientific context for deployment by lawyers. At the international level, sovereignty was unbundled into a range of powers and capacities to be shared out with international institutions – just as new legal forms for public-private partnerships sprang up at the national level.

**Figure B** contrasts the mainstream, if implicit, ideas about law in the development profession of the period with these emerging heterogeneous strands of thinking about what law is and what it can achieve.

**Figure B**

**Ideas and Assumptions about Law: 1950-1980**

**Mainstream Ideas and Assumptions**

Legal Pragmatism  
Law as the instrument of power  
Functionalism

Administrative Law / Bureaucracy  
Priority of Public law  
Focus on formal regulation

Positivism  
Sovereign Authority  
Legislative or executive supremacy

Little judicial review  
Judges as administrative agents of sovereign purpose

Interpretive discretion  
Antiformalism  
Standards and principles more significant than rules  
Expertise

Law as policy

Economic and social rights

International law formalism  
National sovereignty and self determination

United Nations

**Heterogeneous ideas and assumptions  
(from left and right)**

Legal sociology  
Gap between law in the books and law in action

Criticism of legal instrumentalism

Legal pluralism  
More than one legal order  
More than one function or purpose  
More than one applicable rule

Significance of informal arrangements, private ordering, customary practices and norms  
Importance of exceptions and non-compliance  
Strategic use of non-enforcement, non-compliance, legal permissions and privileges

Loss of faith in expert discretion  
A more emphatic anti-formalism

Appreciation for the significance of private ordering and dynamics of private reaction to legal rules and institutions  
Strategic uses of law by social actors

Importance of restraints on public power  
Rise of legal rights as restraints on the state  
International human rights

Pessimism about law as an instrument of social and economic change

Judicial review and autonomy

Public choice theory – rent-seeking  
Irrationality of the state

Loss of confidence in public international law as mechanism for distributive justice

Rise of interest in international private ordering, private finance, trade law, the GATT, Central bank cooperation

In the emerging heterodox economic development literatures of the nineteen sixties and seventies, however, there was little reference to these various strands of heterodox thinking about law. This is unfortunate – an opportunity for alliance was missed. Critical traditions within the field of law which might have been useful in qualifying or fine-tuning professional expectations about what legal tools could accomplish were largely ignored. For example, recent studies have identified nuanced administrative control mechanisms as among the most important factors in the success of those economies which pursued second stage policies to best effect.<sup>4</sup> Structured neither to ensure the top-down penetration of government objectives into the social context nor to limit the state in the name of private interests, these control mechanisms aimed to provide a technically competent mechanism for ensuring a sensitive back and forth between private action and public objective, through the calibrated use of incentives, permissions and regulations. Neither the instrumental positivism of the fifties and sixties nor the valorization of private rights characteristic of the neo-liberal period offered a useful theorization of such mechanisms. The heterogenous legal thinking of the post ISI and post neoliberal periods, by contrast, focused precisely on this kind of interactive state machinery, which has recently come into vogue under the terms “new governance” or the “new developmental state.”<sup>5</sup>

At the international level, a bit more skepticism about the international legal order might have turned the political energy devoted to the New International Economic Order project in more useful directions. The infatuation with sovereignty which understandably followed decolonization led development experts to underestimate the significance of transnational institutions and private ordering. The legal dream of an international social welfare state, centered on the institutional machinery of the United Nations, distracted attention from the rising significance of the international financial institutions. In the debt crisis, the extraterritorial legal significance of first world central banks – and of private banks – would come as a surprise. At the national level, faith in an instrumental law may have contributed to the sclerosis of the developmental state. Attention to the interactions between public and private or formal and informal modes of legal organization would have made a more nuanced policy possible, while strengthening understanding of the structure of local political economy.

Inattention to the limits of legal instrumentalism made it more difficult to correct course when policies did not operate as intended. If you think of law as a relatively transparent instrument for policy, it is more difficult to see policy instruments and legal regimes as the product of social and political struggle, or as an independent variable in the policy process. You may not notice the ways parties use and ignore legal arrangements, changing their impact. Or to strategize about the way rules may function not only as top-down regulations, restraints or incentives, but as background entitlements in private and public bargaining. Missing these things, policy makers often responded to disappointment with one initiative by adding another, rather than diagnosing the ways in which the disappointment may have been functional to the array of political and social

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<sup>4</sup> Alice Amsden, *The Rise of the Rest*

<sup>5</sup> Cites – trubek/sable/etc

forces responsible for the initiative. Rather than understanding and harnessing these social forces, experts tended to refine and amend their policy apparatus, multiplying rules and administrative agencies.

The impact of implicit legal ideas is extremely difficult to identify. The implicit legal theory of postwar development professionals may have encouraged policy makers to overestimate the ease with which social purposes could, in fact, be realized through law – how easily public law initiatives could be implemented, how effective state bureaucracies were. These implicit legal ideas may have made it more difficult to imagine alternative development strategies. The focus on public law may have made it more difficult to imagine how private arrangements might have been harnessed to development objectives. Belief that the price system would not work effectively became something of a self-fulfilling prophecy. Faith in the effectiveness of public administrative intention made it seem unreasonable to think the amount of investment and the place for its application could be better managed by disaggregated private decisions. It seemed obvious that one needed to jump start the market, draw the private actors to the table, in effect. Using incentives meant using public licenses, tax credits, subsidies and the like. The sheer scale of infrastructure investment reinforced the sense that only public expenditure and management could do what was necessary. The tendency to lean toward more formal legal instruments, and to focus on their effective penetration of the social context may have made it more difficult to imagine strategizing about the use of legal permissions and privileges or mobilizing non-compliance in the informal sector toward development objectives. Legal pluralism – the existence of more than one overlapping legal orders or rules – can have strategic possibilities which may have been overlooked. The plasticity and usefulness of the background rules of private law and the informal arrangements of ongoing commercial life may also have been underestimated. And perhaps most strikingly, the significance of legal arrangements as limits on state action, whether as individual rights or as a safety valve for social opposition and a pacing mechanism for social change were all underestimated.

Taken as a whole, the heterogeneous strands within postwar economic and legal thinking are worth revisiting. In the economic field, these are the strands associated with institutionalism, structuralism and dependency theory. In the legal field, they are the strands associated with the critiques of legal instrumentalism. Although their work was not central in development thinking, legal sociologists were already focused on the gap between legal enactments and legal results. Legal theorists had long since understood the potential significance of informal arrangements, the strategic possibilities opened up by the toleration of non-compliance, and the uses for legal pluralism. We might group all these heterogeneous ideas under the diverse banners of pragmatism, realism, the sociological study of law or antiformalism and see them as the legal analog to economic institutionalism, structuralism or dependency theory. Conspicuously absent were ideas about the priority of private law and individual rights, which would emerge as heterogeneous alternatives in the nineteen seventies, and become dominant by the nineteen eighties.

### **III. The law of neo-liberalism: private “rule of law” formalism and its discontents 1980-2000.**

With hindsight, we can see that a more successful mobilization of heterogeneous ideas about law might have both helped to fine-tune the postwar development state and contributed to our understanding of the institutional and contextual weaknesses of the post-war import substitution program. It is with that lesson in mind that I turn to the current moment, in which the neo-liberal program, once dominant among development experts, has been widely criticized in economic and political terms. This time around, ideas about law have been closer to the surface. Yet it remains true that as heterogeneous economic thinking has edged the neo-liberal consensus off stage, little use has been made of insights from critical thinking in the legal field which may have been helpful in understanding the weaknesses of the neo-liberal vision and fine-tuning post-Washington Consensus policy-making. Moreover, many of the legal ideas and law reform projects of the neo-liberal era continue to be promoted, long after skepticism about the broader economic and political program of which they were a part has become common.

#### *The legal program and legal theory of neo-liberalism*

As is well known, after a decade or more of drift, contestation and invention, a broad consensus returned to field of development study in the nineteen eighties and nineties. The neo-liberal program, at the national and international level, began as an effort to un-build the postwar developmental state, constraining its policy autonomy, disciplining its economic management, transferring its economic functions to the private sector and embedding it in the global trade and financial system. The goal was not an improved exercise of state power but to disentangle the state from the market and establish more effective restraints on government rent-seeking and public choice bickering. All this was to be done by law. As the instrument of neo-liberal policy, national legislation and administrative action would be used to build down the import substitution regime. At the international level, structural adjustment, conditionality, the GATT and the global banking system were all legal regimes to which a country could sign up, tying its economic policy arms to the mast.

At the same time, new legal regimes were also necessary, domestically and internationally, to support markets – financial regimes, intellectual property regimes, regimes of commercial law. New statutes and administrative rules were required to structure the privatization of state owned enterprises, to establish financial institutions, to support new capital markets. Banking and payments systems, insurance schemes – all required a new legal framework. Investment laws, corporate laws, insurance and securities laws were needed, and were promoted across the developing world through

legal reform programs. At the international level, neo-liberalism shifted attention away from the United Nations to the General Agreement on Tariffs and Trade and to what would soon become a dense regime of bilateral investment treaties. These treaty regimes were intended to harness a political process of bargaining – through either multilateral “rounds” of tariff reduction or more dispersed bilateral efforts by leading economies to force compliance with standard “best practice” investment treaties --- toward the progressive elimination of national regulatory barriers to trade and the liberation of the global market from political interference. This international project required both formally binding treaty commitments and an apparatus – at the national and international level — for interpreting of their central commitments in the spirit of market liberalization.

Managing the neo-liberal regime in all these dimensions required enormous skill and precision in rule-making and interpretation. National trade regimes would need to identify and sanction foreign unfair or corrupt practices, by private and public entities alike, without descending into protectionism or rent-seeking, or becoming captive to the interests of local exporters. Throughout the third world, government agencies responsible for industrial policy would need to support commerce and trade, while avoiding price distorting interventions and rent-seeking. National and international agencies would need to offer technical assistance to explain privatization, as they had once explained marketing boards. Buffer stocks were out – but commodity futures markets were in, and programs were implemented to train farmers across India in the use of the internet to check prices on the Chicago exchanges. Private arbitrators would need to distinguish contractually intended obligations from fraudulent, self-dealing, coercive arrangements of disguised rent-seeking. Judges would need to rework private law to eliminate the effects of distortive “social” objectives, shrink opportunities for discretion which could be used by national officials to discriminate, and in general to orient private law so as to encourage or mimic the pareto-optimal arrangements private parties would arrive at were they able to transact without costs. All this would require a new style of legal reasoning.

During the neo-liberal period, many millions were spent by the development community on projects to promote what was routinely referred to as “the rule of law” in developing societies, and to train national elites for participation in the international institutions and legal arrangements of the new global market. The specific national legal reforms promoted under this banner varied with time. In the first phases of neoliberal enthusiasm, becoming a “normal” developed country meant having familiar market institutions --- a stock exchange, a banking system, a corporate law regime – interoperable with global market institutions. Later, the favored legal institutions shifted to elections, courts, judicial review, local human rights commissions and the legal framework for a robust “civil society.” Those promoting the rule of law have supported criminal prosecutors, built administrative capacity to operate new corporate and financial regulatory institutions, and trained local officials to participate in global trade negotiations and institutions. By the end of the neo-liberal era, it was common to say that the “rule of law” defines the good developed state, just as compliance with

“international human rights” defines human freedom and human flourishing.

The important point is that throughout the period, the term “rule of law” was routinely used to refer to a quite specific set of reforms. Sometimes the point was to introduce a legal institution (the stock market, the corporation) familiar in the developed West. At other times, the laws promoted for developing societies under this rubric were quite different from those prevailing in the industrialized West --- by turns more formal, more constraining of public authority over the economy, less open to institutional variation and less well embedded in the local institutional, social and economic context. Across the period, “rule of law” enthusiasm promoted stereotypes about what law is and how it works in the developed West, occluding points at which developed societies themselves differ or have managed to combine a variety of rules and institutional forms pulling in different directions. It was difficult to remember that the legal order in every developed nation reflects that nation’s history of struggle and compromise over questions of political economy and distribution, rather than any one recipe for establishing and regulating a market.

The legal theory implicit in these reform efforts was, in some ways, quite familiar from the postwar period of import substitution industrialization. In many respects, the neoliberal program was as *instrumentalist* and *positivist* about law as had been that of the postwar development state. National import substitution regimes were to be *un-built* by treaty, by statute, by administrative decree. Particularly in the first phase, the statutes proposed to accomplish these goals were quite standardized – offered to one country after another as a kind of global “best practice.” The foreign experts bringing new statutes for securities regulation, corporate law, insurance, banking or commercial law, and more, were every bit as dependent upon legislative positivism and as unconcerned about the relationship between law in the books and law in action as their modest interventionist predecessors in the immediate post-war years.

Nor were they interested in the dynamic play between contextual interests and legal change. Particularly in states making the “transition” from socialism to the market, the entire point was to dis-establish the prior institutional and economic arrangements. With the right political, economic and legal framework, a new set of interests and actors would emerge, responding to the possibilities opened up by participation in a global and national market. Neoliberal reformers tended to assume that potential market actors were waiting for the right rules – once in place, they would be made use of. If that didn’t happen, they were not the right rules. One didn’t need to worry too much about the gap or the implementation. The result was a kind of *literalism* about law and legal reform.

Like their postwar predecessors, moreover, neo-liberal development experts were drawn to relatively formal ideas about law. They tended to imagine clear rules as the antidote to official discretion run amok in the development state. Again like their predecessors, they realized that discretion would sometimes be necessary. At those moments, everything would depend upon the spirit which officials brought to the task of interpretation. They would need to be trained to share a commitment to the technical and

broader political or economic axioms of the neo-liberal vision. They would then be able to see that neo-liberal institutional arrangements were, in the final analysis, compelled by the facts of global economic life, the requirements of markets and the significance of undistorted prices for the efficient allocation of resources. Where there was discretion, it could be exercised by reference to these broader social facts and needs. Although the content is quite different, this approach to expert discretion is quite similar to that of the import substitution period. At that time, it was widely imagined that the requirements of interdependence, industrialization, national mobilization and solidarity could guide the exercise of expert discretion.

The legal theory of the neo-liberal development policy also introduced new elements and points of emphasis. The focus shifted from public to private law. Law emerged as a *limit* on the state – on the discretion of administrators and the mandate of legislators. Private rights, constitutional procedures, judicial review, international obligations – all were intended to constrain the neoliberal state. The focus shifted from sovereignty and administrative or legislative positivism to private rights and private ordering, both nationally and transnationally. In thinking about the legal profession, attention shifted from those who would operate the developmental state to those who would represent private interests in the international corporate bar. The goal was less to ensure that state functionaries understood the needs of national development, than that both public and private experts understand the needs of (largely foreign) capital and are able to formulate rules to “open markets” and encourage its arrival. Where there was formalism, it was a formalism about rights and the limits of public law. Where there was antiformalism about social needs, it was the needs of a (international) market of undistorted prices.

Within the legal field, both strands of this approach to interpretation had been strongly criticized for some time. Reliance on formal rules for overestimating both their ability to restrain interpretive discretion and the predictability with which they can be expected to translate into results on the ground. The anti-formal reliance on social needs and functions had also been criticized for underestimating the difficulty of conjuring an ought from an is by deduction rather than choice. Social arrangements are notoriously multiple and contradictory, and themselves reflect prior legal choices. Arguing from the nature of markets is, in this sense, analogous to arguing from social solidarity or the needs of national development. Markets have many needs and their nature will depend upon the legal arrangements one chooses to put in place. As a result, jurists schooled in this critical tradition are apt to see arguments from social need as opportunities for ideology to displace analysis or for the unacknowledged introduction of diverse subjective preferences into the work of legal analysis.

In the North, these critical strands of legal thinking had helped to chasten agents of the welfare state, opening legal interpretation to engagement with economic, social and ethical analytics, while focusing legal attention on the legitimacy of legal procedures and institutional arrangements rather than the substantive enthusiasms of the interpretive elite. A century of criticism had undermined confidence that private right could be unfolded as logic against the state. More often, what presented itself as the assertion of private right

represented a choice for one rather than another policy, one rather than another approach to governmental engagement with conflicting private interests. (I develop this argument in more detail in my essay on property rights as a recipe for development elsewhere in this volume).

This tradition might have been helpful to those suspicious of neoliberal enthusiasm for limiting state policy autonomy and discretion in the name of supposedly univocal market needs and private entitlements. Indeed, it must have been an ironic moment for those who had participated in the “law and development movement” in the nineteen sixties and seventies. Ideas about law which would have been useful in making developmental states more responsive and effective were again being set to one side by those who sought to dis-establish those states precisely because they had become rigid and ineffective. Another vast program of legal reform would be mounted in the developing world without the benefit of a sociologically informed, critical and anti-formal legal science.

Over the last decade or more, economists and other development experts have criticized neoliberal ideas about development in a variety of ways. In broad terms, these criticisms have often focused on the need for context specific policies, for fine-tuning, sequencing, and careful attention to local institutional arrangements, as well as the structures of social, political and economic power. In part, development policy making has been rendered more nuanced – attentive to the details of local market failures, public goods problems, agency costs. At the same time, it has become more attentive to the dynamics of interaction between social or political forces and economic change --- focused on structures influencing bargaining power in the international trade system, the impact of political economy on the sequencing of reforms, and the ability to harness or dismantle monopoly capacity to extract rents and mobilize resources. Experts have stressed the availability of alternative development paths – different institutional and distributional arrangements which may be compatible with equivalent levels of growth. In all these ways, as the neoliberal consensus has eroded, experts have stressed that development policy is not a matter of one size for all, and that what might be termed the politics of development policy cannot be replaced by careful analytics.

These broad themes have been echoed in the criticisms levied within the legal field against prominent elements in the neoliberal law reform program. Three short examples will suffice to illustrate the intellectual affinities between legal and economic styles of critique. Scholars working in critical and sociologically oriented traditions of legal science have criticized the neoliberal preoccupation with stronger judicial power, with private law formalization, and with a campaign against corruption.

*Example: judicial review and judicial reform.*

The most important and visible institutional object of neo-liberal reform energy has been the judiciary. More reliable courts with enhanced powers to review legislative and administrative decisions seem like a good idea for lots of reasons, and it often seems

that there is little to be said on the other side. Developed countries often have, or are at least thought to have, reliable judicial systems. They seem promising agents for enforcing private arrangements, supporting criminal prosecution, fighting administrative corruption, and ensuring government respect for human rights, including the right to property.

In the neoliberal picture, courts seemed central to the enforcement of market transactions and the limitation of public discretion. Court enforcement of private law was thought necessary to enable market actors to make use of the new rule systems being put in place. The focus on courts also accompanied a retreat from the legislative and administrative positivism of the modest interventionist period. With powers of *judicial review*, courts could enforce property rights against the executive, restraining its ability to mobilize resources for development and encouraging a retreat from interventionism. Indeed, by strictly enforcing contracts and property rights, it seemed that courts could both support market transactions and resist encroachment by the state. As a result, if the administrative failures of the postwar development state suggested deregulation, adjudicative weakness called for judicial reform. Millions of aid dollars were devoted to judicial training, upgrading judicial infrastructure and reforming public law arrangements to encourage judicial review. Once reformed and rendered independent of executive and legislative interference, national courts promised to stand behind the new limits of state authority and enforce private ordering arrangements.

Of course, even if improved judges could do all these things – and if judicial reform programs could create judges able and willing to take this on – the connection to economic growth is less obvious. Although there was some empirical evidence that a reputation for good judging correlated with investment and economic performance, it was hardly compelling. As we might imagine, investment and economic performance correlate with many things. In assuming that private market actors would need reliable courts before they would invest or transact, neoliberal development experts ignored a lengthy tradition of sociological study drawing this assumptions into question. That tradition had demonstrated that private parties use the legal system strategically, shopping for modes of dispute resolution suitable for their needs. More importantly, their needs differ – for everyone who calls on the state to enforce his contract, there is someone else who hopes the state will be unavailable or unwilling to comply.

Moreover, sociological legal study had long demonstrated that markets do work in the absence of judicial enforcement. This is not only true of black markets and informal markets, but also of most functioning markets in developed economies where litigation is, in fact, quite rare. Indeed, in many places one also hears that overactive judges and overly litigious market actors pose a threat to efficiency and growth. As comparative legal study quickly confirms, nations have developed with quite different allocations of power between administrative, legislative and judicial authorities. Moreover, developed economies vary in the degree to which economic life is embedded in formal legal institutions. Administrative agencies may also be tasked with responsibility for enforcing commercial arrangements or implementing neo-liberal reforms. Private actors

often prefer to make their own way, enforcing their reciprocal rights extra-legally, through reputation or informal private sanctions. Or they may be willing to lump their losses rather than seek court enforcement.

Nevertheless, strong courts loomed large in the neoliberal picture of what foreign capital required. Development professionals became convinced that the reputation of national judges was an important element in the investment decisions of foreign investors. If true, this is a puzzling criteria on which to base investment decisions. We know that there is extensive foreign investment in places without functioning judiciaries – even in war zones. As one international oil executive told me when I asked about the legal arrangements his company preferred, “its all a matter of rate of return.” After all, it is not clear that foreign investors in fact use courts at home that often – or that they expect to when investing abroad. Indeed, there is little reason a priori to imagine that courts would be any less subject to local prejudices, incompetence or rent-seeking than administrators – or any easier to reform. International investors are generally careful to locate dispute resolution in privately organized arbitration schemes, or in judicial systems with which they are familiar. Nevertheless, for a period at the turn of the century, having a ‘reformed’ judiciary with powers of judicial review became a sign for national willingness to respect investors’ rights and allow profit repatriation.

As I remember speaking with development experts and financiers in the South during this period, there was always something oddly disconnected about the way they would frame their interest in judges. After a lengthy discussion about economic strategy, in which government had hardly figured, let alone judges, when I would ask if there were any legal or institutional changes which would strengthen their strategic hand, they would often say “reform the judiciary.” Yet it was hard to avoid the thought that this was a kind of free floating ideological commitment, a ready answer to questions about law reform, but not something they could link in any way to their own economic strategy. Although potential foreign investors often *said* they wanted better courts during this period, a view reinforced by international financial institutions, private consultants and the international corporate bar, it would take more study to understand whether this was accompanied by actual use of courts by these actors, either abroad or at home in the industrialized north. It would take still more to discover if this was a significant factor for other market actors, or was rather a collective prejudice of potential foreign investors of the day.

At the time, part of the appeal of courts was the promise that, unlike national executives or legislatures, they would be relatively independent of ideological predilections. They would enforce rights and contracts and statutes in ways which would be predictable because they would track what was *written*, rather than introducing the ideologically driven purposes of the government’s development strategy or the subjective preferences of the judge or administrator. In part, this appeal depends upon the clarity of the written law. For a century, it has been a common, if often heterogenous or critical, observation within the legal field that doctrinal materials have far more gaps, conflicts and ambiguities than this image of relatively mechanical judicial application suggests. Texts are often intentionally vague, circumstances change, various rules and rule systems may be applicable to a single problem, unanticipated applications present themselves. Moreover, the purposes and principles which might be thought to stand behind the texts,

guiding their interpretation, are themselves quite general and often in conflict with one another.

As a result, the image of the judiciary as an escape from ideology also depends on ideas about how judges *reason* under these conditions. Which rights do they choose to enforce, what meanings do they give them, what arguments do they find persuasive? This might be a matter of simply relying upon judges to share a neoliberal – or, a generation earlier, a developmentalist – sensibility. But the image of a non-ideological, and yet reliable, judiciary also suggests that judges might share a method of reasoning capable of figuring out how to deal with gaps and conflicts and judgment calls within the legal fabric without relying overtly on the kind of ideological commitment more appropriate for a legislature or executive.

The types of question which call for such reasoning in the neoliberal program are easy to identify. Take judicial review of legislative acts in the name of pre-existing rights. This could easily be a two edged sword. After all, the modest interventionist regime had also generated a wide range of entitlements – to quotas, subsidies, special licensing and welfare arrangements, which were to be undone by neo-liberal reforms. For judicial review to support the neo-liberal reform process, courts would have to distinguish inappropriate price distorting entitlement claims of the past regime from “real” property rights. To entrust judges with this task required both a faith in the formal distinctiveness and clarity of market supporting entitlements, and confidence that judges, on the whole, could be relied upon to distinguish between property rights which pre-exist the interventionist state and entitlements which are the product of interventionist action by the state. Legal scholars have puzzled over this distinction for decades, and many feel that they have, in different ways, resolved it. But there remains a strand of legal thought which has generated a variety of internal and external analytic criticisms of these proposed resolutions, undermining confidence in the ability of judges to make these distinctions confidently if they do not come to the problem as committed neoliberals.

The basic problem here is that development experts are turning to law, and judges in particular, to make distinctions for which there is no decisive or compelling economic analytic. After neo-liberalism, mainstream economic wisdom instructs us to support, but not to distort, private ordering – and to supplant or regulate private ordering where markets fail, unless the market imperfection, disequilibrium or monopoly power can be harnessed for developmental purposes. These distinctions are terribly hard to model or to measure. They are no easier to sort out when transformed into legal standards for judges to apply.

This is true whether the rights to be enforced come from conventional private law or from internal corporate administrative regimes, private standard setting and corporate codes of conduct. As globally uniform and “consensual” substitutes for both national regulation and international standards, private codes were often applied first in global manufacturing as a quality control device, ratified by global standards setting bodies, and managed by professional inspectors and complaints procedures. At whatever level they

are enforced, all these schemes require interpretive talent to align their terms as applied in practice with market imperatives and avoid entrenching anticompetitive advantages or compounding public goods and agency problems. Doing so requires a mode of legal reasoning which had come under increasing pressure from heterogeneous strands of legal thought over many decades.

This is easily seen at the international level, where the legal regime was also being rethought. Take the GATT. It combines a set of rather vague core legal obligations (“national treatment” and “most-favored nation”) with a broad range of vague exceptions (such as “national security”). A great deal will depend upon the spirit with which it is implemented – and on the political/legal process through which that implementation will take place. A large legal literature sprang up demonstrating the room for maneuver left open by these texts and the dramatic ways in which the normal practices of developed industrial economies departed from the formulaic “best practice” recipes advocated for the developing world. But this literature did not translate into a marked relaxation in the neoliberal common sense about what these treaty obligations required of developing countries.

Moreover, these international regulatory regimes were notoriously ambivalent in their core requirements and posed stark choices among alternative economic models. Transposing these choices into questions of routine legal interpretation meant leaning heavily on background political and economic assumptions about what is normal or appropriate – on ideologies of one or another sort. This drift from legal analysis to ideology as the need for political choice became apparent had long been a theme in heterogeneous writing about international law, but was rarely part of the discussion among those critical of neo-liberal trade policy prescriptions.

For example, most free trade arrangements discourage or prohibit regulatory arrangements which are *equivalent* to tariff barriers or subsidies in the name of free trade. As tariffs came down in the postwar era, industrial nations began to contest elements of one another’s background legal regime by asserting that the regulatory environment of their trading partner constituted an unfair “non-tariff barriers to trade.” National trade law regimes are always tempted to interpret any foreign impediment to their imports as an unfair barrier to trade – they would need a vocabulary of self restraint. For the broad GATT provisions defining “non-tariff barrier” to serve as such a vocabulary requires more than the formal application of the treaty. It also requires interpretive facility with the distinction between an unfair barrier to trade and a normal national background regulation, and neoliberal development professionals were enthusiastic about turning this task over to the new adjudicative machinery of the WTO.

It turns out, however, that it is extremely difficult to identify “unfair” trade practices in legal terms, or to distinguish, say, between “subsidies” and “non-tariff barriers” with any logical precision. It is an old legal realist insight that the reciprocal nature of a comparison between two legal rules – or legal regimes – makes it impossible to say which *causes* the harm – or which is “discriminatory.” Is Mexico’s low

minimum wage – or failure to implement its own minimum wage scheme – a prohibited “subsidy” or an “unreasonable” extraterritorial extension of its employment law into the American economy? Are Mexican manufacturers who benefit from non-enforcement of local law “dumping” when they export to American markets? Or, on the other hand, were the United States to impose a compensatory tariff or block import of Mexican goods which did not comply with American or Mexican regulatory provisions would Mexico face an unfair “non-tariff barrier” or an unreasonable extraterritorial reach of US law? What seemed a technical question of legal interpretation quickly becomes a question of political economy about the sustainability of a low wage development strategy and about American sovereignty to demand and protect high labor standards for production of goods to be imported to its market.

Legal analysts might, at least in the first instance, draw the distinction in formal terms – if the foreign rule takes the form of a tariff or subsidy, it is an unfair barrier to trade, if not, not. But early on it was recognized that national regulators could use “non-tariff barriers” to equally market restrictive effect. One might be tempted to preclude all *public* regulatory price distortions, while using antitrust to attack parallel private market distorting arrangements – but too many neo-liberal regulatory initiatives might also fall under this ax. What is required is a mode of distinction that analyzes regulations for their actual market restricting or enabling potential. In the early stages, background ideas about what is “normal” served the purpose – if farmers *normally* grow wheat, a new railroad may appear to impose the cost, if the difference between American and Mexican wages is “normal,” American efforts to raise Mexican standards will seem an abnormal non-tariff barrier. As ever more national regulations were contested for their compatibility with national and global trade standards progressed, such default ideas seemed ever less plausible.

Within the legal field, scholars are divided in their response to this difficulty. For some, the answer is an ever more precise analytic model or empirical assessment, perhaps imported from economics. Others understand these interpretive problems to be beyond the reach of intellectually satisfying resolution. Here there are two tendencies. For some, the goal is to muddle through, tacking this way and that, to provide a workable interface between national regimes with different ideas about an appropriate level for regulation, guided by the spirit of trade liberalization. For others, the absence of a satisfying interpretive resolution opens up the possibility for political choice, for assessment of alternative economic and social trajectories and different distributive outcomes. In different ways, each of these responses ought to be useful to post-neoliberal development economists seeking to fine-tune neoliberal recipes in specific situations and open development policy to social and political choice.

In fact, the result was not an ever more nuanced mode of legal reasoning, still less one rooted in careful economic analytics or case specific empirical study. Instead, the focus on courts, on private law enforcement, and on judicial review to protect property entitlements from interventionist rent-seeking gave way to a new mode of legal *argument* about policy. This was not the formalism of judicial passivity or deference to plain

textual meaning – the spread of judicial review placed courts in a far more central role. To distinguish property entitlements whose enforcement supported the market from entitlements whose enforcement would extend the distorting effects of modest interventionism required a more robust mode of reasoning. A rather sharp formal distinction between private rights and publicly created entitlements seemed a good place to start, but it would not be the end of the story. Judges would need to determine *which* property rights to enforce in cases of conflict, and how extensively to interpret exceptions. *Some* administratively created rights – concessions to foreign investors exploiting natural resources, tax incentives, exemptions from zoning or local regulation, eminent domain powers – were also part of the neo-liberal order. Judges would need to be able to distinguish rights which must be enforced for the market to succeed, and rent-seeking or corrupt entitlement claims which needed to be rejected. In making these distinctions, judges would need to align their interpretation of property rights with good policy sense – participating in the new discourse about the existence, extent and prognosis for market failures and the justifications for regulation and intervention.

In specific cases, professionals would argue for upholding or overturning a rule by framing it using a new legal vernacular. This new mode of legal reasoning borrowed its language and general spirit from contemporary economic theory. However, instead of a subtle second-best welfare economic analytics, for example, we find a curious amalgam of welfare economic slogans, informal ideas about the type and extent of possible market failures, default ideas about likely governance failures, sporadic empiricism correlating national legal institutions and legal rules with economic performance to identify rule of thumb “best practices,” informal deference to the attitudes of the foreign investor community, a literalism about law’s instrumental potential and professional conventions of interpretive restraint. The image of a perfectly competitive Kaldor-Hicks efficient end state provides a kind of loose reference point and target against which to compare various judicial approaches. Legislative or administrative actions are understood to be “more” or “less” interventionist, and then judged by whether market failures or public goods problems or agency problems or transaction costs seem relatively large or small.

The extent to which confidence in the judiciary as an economic manager has outlived confidence in neoliberal economic management is surprising. Economists during and after the neoliberal moment seem to share an overestimation of the judicial capacity both to adopt economic analytics and to remain detached from ideological commitment. It is certainly true that a modern judiciary can adopt the language of post-neoliberal economic analysis. But adjudication remains an interpretive activity. For economists interested in opening development planning either to more fine-grained empirical and theoretical analytics or to more locally informed political choice, it would seem that heterogenous strands of legal thinking developed to unravel this kind of policy vernacular, revealing elements of ideology and opportunities for political choice within the “rule of law” as practiced by the modern judiciary would be useful.

*Example: formalization*

During the neo-liberal period, the conviction grew among development professionals that economic performance in the third world required a formalization of private legal rights. As the evolving neo-liberal policy vocabulary became ever more hazy and multifaceted, this idea continued to resonate, in part because it, like judicial reform, promised a way to make policy choices congenial for economic development without making the sort of overtly political choices about distribution of resources which characterized both modest interventionism and the international proposals of the NIEO.

Although the policy vocabulary of neo-liberal interpretation was extremely flexible – and has become more so in the last decade – there is no question that the focus on formalization narrowed the range for interpretive maneuver from the more open-ended socially oriented discourse of the preceding periods. The implicit – and sometimes explicit – legal theory of neo-liberalism seemed to forget much of what had been commonplace within the domain of legal theory for more than a century about both the limits of law as an instrument of social change, and the plasticity of legal rules and standards. To observers who remained committed to the legal theories of prior periods, it could often seem that neo-liberalism asked the legal order to perform feats it was unlikely to accomplish, and to remain neutral in making distinctions in ways it seemed unlikely to sustain.

One might say that neo-liberals promoting formalization seemed to deny the necessity for interpretation, and for the difficulty of making precisely the sorts of distinctions between market ordering and market distorting made salient by their economic ideas. Indeed, the focus on formalization as a *legal* strategies for development seemed to substitute both for the subtle exercises of welfare economic analytics and for the more open-ended juridical policy analysis that emerged from efforts to link identification of market failures with broader empirical hunches and default assumptions.

Theorists had long toyed with the idea that there might be a connection between legal formality and industrial capitalism. The precise economic justifications for legal formality remained vague – it had something to do with improving the rationality and effectiveness of bureaucratic instrumentalism, with ensuring reliability and predictability, with openness and transparency and price signaling, with the reduction of transaction costs, and it carried some of the moral fervor of individualism and responsibility. It emerged as a strategy for opposing acts of administrative discretion associated with import substitution – in calls for the judicial annulment of relevant legislation or administrative decrees in the name of private rights – at first to property or freedom of contract, and then to other human rights.

Formalism meant many things. On the instrumental side, neoliberal development policy makers sought to replace regulatory standards with rules so as to restrain bureaucratic discretion, to implement schemes for clear registered titles, to simplify contracts and strengthen enforcement, to eliminate judicial discretion in the interpretation

of statutes – and to encourage judicial review of agency discretion. When it came to rights, formalism meant strict enforcement of property and contract, the priority in general of private over public law, and the formalization of existing informal rights (squatters to receive title). In one strand, associated with parts of the North American “law and economics movement,” a formal approach to private law rules was thought most likely to unleash the productivity gains of movement towards a Pareto-optimal allocation of resources.

At the international level, formalism meant strict construction of free trade commitments, the harmonisation of private law so as to eliminate “social” exceptions susceptible to differential judicial application, the insulation of the international private law regime from national judiciaries, (often through the conclusion of Bilateral Investment Treaties restricting the regulatory capacity of developing nations when they could be seen to alter the settled expectations of foreign private rights holders), the simplification and harmonization of national regulations, the substitution of privately adopted rules for public law standards, the development of a reliable system of bills of lading and insurance to permit contracts “for the delivery of documents” rather than goods – eliminating rejection for nonconformity, and the formalization and standardization of international payments systems and banking regulations.

Since at least Weber, people have asserted that “formalization” of legal entitlements, in one or another sense, is necessary for development. Necessary for transparency, for information and price signaling, to facilitate alienation of property, to reduce transaction costs, to assure security of title and economic return, or to inspire the confidence and trust needed for investment. From the start, legal formalization has meant a wide variety of different things – a scheme of clear and registered titles, of contractual simplicity and reliable enforcement, a legal system of clear rules rather than vague standards, a scheme of legal doctrine whose internal structure was logical and whose interpretation could be mechanical, a system of institutions and courts whose internal hierarchy was mechanically enforced, in which the discretion of judges and administrators was reduced to a minimum, a public order of passive rule following, a priority for private over public law, and more. These ideas are all associated with the reduction of discretion and political choice in the legal system, and are defended as instantiations of the old maxim “not under the rule of man but of god and the law.”

It is easy to imagine, from the point of view of a particular economic actor, that legal formalization in any of these ways might well enhance the chances for successful economic activity. A clear title may make it easier for me to sell my land, and cheaper for my neighbor to buy it. A clear set of non-discretionary rules about property, credit or contract might make a foreign legal culture more transparent to me as a potential foreign investor. The reliable enforcement of contracts might make me more likely to trust someone enough to enter into a contract. Indeed, it seems hard to imagine “capital” except as a set of enforceable legal entitlements – a first lesson of law school is that property is less a relation between a person and an object than a relation between people with differing entitlements to use, sell, possess, or enjoy an object. The developing world

is full of potential assets — but they have not been harnessed to productive use. Why? Because no one has clear title to them, nor are there predictable rules enforcing expectations about the return on their productive use.

The association of legal formalization with development, however, has always seemed more problematic than this, also since at least Weber. It is from this intuition that a parallel heterogenous tradition in legal thought has emerged. For starters, it has also been easy to imagine, from the point of view of *other* economic actors, that formalization in each of these ways might well eliminate the chance for productive economic activity. A clear title may help me to sell or defend my claims to land – but it may impede the productive opportunities for squatters now living there or neighbors whose uses would interfere with my quiet enjoyment. A great deal will depend on what we *mean* by clear title – which of the numerous possible entitlements which might go with “title to property” we chose to enforce. Clear rules about investment may make it easy for foreign investors – but by reducing the wealth now in the hands of those with local knowledge about how credit is allocated or how the government will behave. An enforceable contract will be great for the person who wants the promise enforced, but not so for the person who has to pay up. As every first year contracts student learns, it is one thing to say stable expectations need to be respected, and quite another to say whose expectations need to be respected and what those expectations should legitimately or reasonably be. To say anything about the relationship between legal formalization and *development* we would need a theory about how assets in the hands of the title holder *rather than* the squatter, the foreign *rather than* the local investor will lead to growth, and then to the sort of growth we associate with “development.”

Moreover, the urge to “formalize” law downplays the role of standards and discretion in the legal orders of developed economies. We might think here of the American effort to codify a “Uniform Commercial Code” to reflect the needs of businessmen – an effort which returned again and again to the standard of “reasonableness” as a measure for understanding and enforcing contractual terms. We might remember Weber’s account of the “English exception” — the puzzle that industrial development seemed to come first to the nation with the most confusing and least formal system of property law and judicial procedure. Or we might think of Polyani’s famous argument that rapid industrialization was rendered sustainable, politically, socially and ultimately economically in Britain precisely because law slowed the process down.

The focus on legal formalization downplays the role of the informal sector in economic life – the sector governed by norms other than those enforced by the state or which emerges in the gaps among official institutions. It is not only in the post-transition economies of Eastern or Central Europe that the informal sector provided a vibrant source of entrepreneurial energy. The same could be said for many developing and developed economies. Think of the mafia, or of the economic life of diasporic and ethnic communities. But think also of the “old boys network,” the striking demonstrations in early law and society literature about the disregard businessmen in developed economies often have for the requirements of form or the enforceability of

contracts. One need only visit a contemporary “free trade zone” to experience the economic vibrancy which can emerge from the relaxation of formal regulatory requirements. At the same time, it has become routine within legal science to reflect upon the potential economic efficiency of breaching contracts, and the need not to set penalties in ways which will discourage the movement of assets away from arrangements which seemed likely to be profitable some time back but no longer are. Or think for a moment about the usefulness of incomplete and vague contracts – the room for maneuver left by unstated, unclear or ambiguous terms. In the field of property law, similar ideas guide thinking about the economic efficiency of trespass, adverse possession and the privilege to use adjoining properties in economically productive ways even when they injure a neighbor’s quiet enjoyment of his property. In short, the informal sector is often an economically productive one. There is also often security, transparency and reliability in these informal or extralegal sectors – the question is rather security for whom, transparency to whom? And it is difficult for judges, even when focusing on the holy grail of economic efficiency, to avoid exercising discretion in adjudicating between conflicting ways to protect property or alternative modes for interpreting and enforcing contracts.

The story of development-through-formalization downplays the range of possible legal formalizations, each with its own winners and losers. In a world with multiple potential stable and efficient equilibria, a great deal will depend upon the path one takes, and much of this will be determined by the choices one makes in constructing the system of background legal norms. Does “being” a corporation mean having an institutional, administrative or contractual relationship with one’s employees? With their children’s day care provider? And so forth. Looking at the legal regime from the inside, we encounter a series of choices, between formality and informality, between different legal formalizations – each of which will make resources available to different people. What is missing from enthusiasm for the formalization as a development strategy is both an awareness of the range of choices available and an economic theory about the developmental consequences of taking one rather than another path.

In a particular developing society, for example, it might be that the existing – discretionary, political, informal or extralegal – system for allocating licenses or credit is entirely predictable and reliable for some local players even where it is not done in accordance with published legal rules. At the same time it might not be transparent to or reliable for foreign investors. This might encourage local and discourage foreign participation in this economic sector. We might well have a political theory of development which suggests that one simply cannot have access to a range of other resources necessary to develop without pleasing foreign direct investors. Or we might have an economic theory suggesting that equal access to knowledge favors investment by the most efficient user and that this user will in turn use the profits from that investment in ways more likely to bring about “development,” perhaps based on a projection of how foreign, as opposed to local investors will invest their returns. But the need for such theories — which would themselves be quite open to contestation – is obscured by the simpler idea that development requires a “formal” rule of law.

Indeed, formalization is not only a substitute for subtle neo-liberal policy analysis – it also replaces more conventional questions of development policy and planning which demand decisions about distribution. Traditional questions about who will do what with the returns they receive from work or investment, how gains might best be captured and reinvested or capital flight eliminated. Or about how one might best take spillover effects into account and exploit forward or backward linkages. Or questions about the politics of tolerable growth and social change, about the social face of development itself, about the relative fate of men and women, rural and urban, in different stable equilibria, along different policy paths.

It is surprising how completely disinterest in the distributional choices one must make in designing a rule of law suitable for a policy of legal “formalization” drove these heterogeneous legal considerations off the table during the neo-liberal era. Hernando de Soto’s famous discussion of the benefits of legal formalization in his book “The Mystery of Capital,” provides a good illustration. In discussing land reform, he is adamant that squatters be given formal title to the land on which they have settled. Doing so, he claims, will create useful capital by permitting them to eject trespassers, have the confidence to improve the land, or offer it for sale to more productive users. Of course, it will also destroy the capital of the current land owners – and, if the squatter’s new rights are enforced, reduce economic opportunities for trespassers and future squatters. Formalization of title will also distribute authority *among* squatters – where families squat together, for example, formalization may well move economic discretion from women to men. The implicit assumption that squatters will make more productive use of the land than the current nominal owners may well often be correct. But de Soto provides no reason for supposing that the squatters will be more productive than the trespassers, nor for concluding that exclusive use by one or the other group is preferable to some customary arrangement of mixed use by squatters and trespassers in the shadow of an ambiguous law.

None of these observations is new. Development planners and practitioners have long struggled with precisely these problems. The puzzle is how easily one loses sight of these traditional issues of political and economic theory when the words “rule of law” come into play. There is something mesmerizing about the idea that a formal rule of law could somehow substitute for struggle over these issues and choices – could replace contestable arguments about the consequences of different distributions with the apparent neutrality of legal best practice.

*Example: the anti-corruption campaign*

A third theme running through neo-liberal ideas about the potential for using law as a development strategy focuses on eliminating corruption. There is no doubt that enthusiasm for anti-corruption measures was strengthened by the widespread sense for the prevalence of “governance failure” in the third world. But this sociological and political generalization was not the only reason a strong anti-corruption campaign caught

on among development professionals in the neo-liberal era.

Like legal formalization, the elimination of corruption was linked to development in a variety of ways. Eliminating corruption was promoted to avoid squandered resources, to promote security and predictability, to inspire confidence, eliminate price distortions and promote an efficient distribution of resources. It seemed self-evident that these things would lead in some way to economic development. Many of the advantages of eliminating corruption run parallel to those of legal formalization – eliminating corruption can seem much like eliminating judicial and administrative discretion. Indeed, sometimes “corruption” is simply a code word for public discretion – the state acts corruptly when it acts by discretion rather than mechanically, by rule.

Eliminating corruption may well enhance the chances for some economic actors to make productive use of their entitlements. The state’s discretion, including the discretion to tax, and even the discretion to levy taxes higher than those authorized by formal law, may spur some and retard other economic activity. As with legal formalization more generally, however, it is also not difficult to imagine that other actors – including those who are collecting “corrupt” payments – will in turn be less productive once corruption is eliminated. As with the replacement of discretion by legal form, one must link the elimination of corruption to an idea about the likely developmental consequences of one rather than another set of economic incentives. A simple example would be – who is more likely to reinvest profits productively, the marginal foreign investor brought in as corruption declines, or the marginal administrator whose take on transactions is eliminated? In my experience, such questions are rarely asked, and yet their answer is not at all obvious. We are back to the need for a political and economic theory about which allocation will best spur development.

Enthusiasm for eliminating corruption as a development strategy arises from the broader idea that corruption somehow drains resources from the system as a whole — its costs are costs of transactions, not costs of the product or service purchased. Elimination of such costs lifts all boats. And such costs might as easily be quite formal and predictable as variable and discretionary. Here the desire to eliminate corruption goes beyond the desire for legal form – embracing the desire to eliminate all costs *imposed* on transactions which are not properly costs *of* the transaction. There are at least two difficulties here. First, the connection between eliminating corruption and “development” remains obscure. Even if the move from a “corrupt” legal regime to a “not corrupt” regime produces a one-time efficiency gain, there is no good economic theory predicting that this will lead to growth or development, rather than simply another stable low level equilibrium. More troubling is the difficulty of distinguishing clearly between the “normal” or “undistorted” price of a commodity and the “costs” associated with a “corrupt” or distortive process for purchasing the commodity or service. These were precisely the sorts of distinctions first addressed by the analytics of welfare economics, then by the looser policy vocabulary of neoliberalism, for which anti-corruption and formalization emerged as default substitutes.

Economic transactions rely on various institutions for support, institutions which lend a hand sometimes by form and sometimes by discretion. But the tools these institutions, including the state, use to support transactions are difficult to separate from those which seem to impose costs on the transaction. The difference is often simply one of perspective – if the cost is imposed on you it seems like a cost, if it is imposed on someone else for your benefit it seems like support for your productive transaction. Here the desire to eliminate corruption bleeds off in a variety of directions. But the boundary between “normal” and “distorted” regulation is the stuff of political contestation and intensely disputed economic theory. When the anti-corruption project suggests that the “rule of law” always already knows how to draw this line, it fades into a stigmatizing moralism, akin to the presentiment against the informal sector.

Hernando De Soto again provides a good illustration. He repeatedly asserts that the numerous bureaucratic steps now involved in formalizing legal entitlements are mud in the gears of capital formation and commerce, retarding development. During the neo-liberal era, he was a central voice urging simplification of bureaucratic procedures as a development strategy — every minute and every dollar spent going to the state to pay a fee or get a stamp is a resource lost to development. This seems intuitively plausible. But there is a difficulty – when is the state supporting a transaction by formalizing it and when is the state burdening the transaction by adding unnecessary steps or costs? The aspiration seems to be an economic life without friction, each economic act mechanically supported without costs. But legal forms, like acts of discretion, are not simply friction – they are choices, defenses of some entitlements against others. Each bureaucratic step necessary to enforce a formal title is a subsidy for the economic activity of informal users. Indeed, everything which seems friction to one economic actor will seem like an entitlement, an advantage, an opportunity to another. The point is to develop a theory for choosing among them.

Let us say we begin by defining corruption as the economic crimes of public figures – stealing tax revenues, accepting bribes for legally mandated services. Even here the connection to development is easier to assume than to demonstrate – are these figures more or less likely to place their gains unproductively in foreign bank accounts than foreign investors, say? Even if we define the problem narrowly as one of theft or conversion it is still difficult to be confident that the result will be slower growth. Sometimes, as every first year property instructor is at pains to explain, it is a good idea to rearrange entitlements in this way, the doctrine of “adverse possession” being the most dramatic example. Practices one could label as “corrupt” may sometimes be more efficient means of capital accumulation, mobilizing savings for local investment. Moreover, rather few economic transactions are best understood as arms length bargains – it turns out, for example, that an enormous share of international trade is conducted by through barter, internal administratively priced transactions, or relational contracts between repeat players. The line between tolerable and intolerable differences in bargaining power – between consent and duress – is famously a site for political contestation. And, just as sometimes what look like market distorting interventions can also be seen to compensate for one or another market failure, so what look like corrupt

local preferences can turn out to be efficient forms of price discrimination.

But those promoting anti-corruption as a development strategy generally have something more in mind – a pattern of economic crimes which erodes faith in a government of laws in general or actions by public (or private) actors which artificially distort prices --- unreasonable finders fees, patterns of police enforcement which protect mafia monopolies, things of that sort. Here, the focus moves from the image of public officials taking bribes outward to actions which distort free market prices or are not equally transparent to local and foreign, private and public, interests. Corruption becomes a code word for “rent-seeking” --- for using power to extract a higher price than that which would be possible in an arms length or freely competitive bargain --- and for practices which privilege locals. At this point, the anti-corruption campaign gets all mixed up with a broader program of privatization, deregulation and free trade (dismantling government subsidies and trade barriers, requiring national treatment for foreign products and enterprises). And with background assumptions about the distortive nature of costs exacted by public as opposed to private actors.

Here the anti-corruption project enters arenas of deep contestation. It has been famously difficult to distinguish administrative discretion which prejudices the “rule of law” from judicial and administrative discretion which characterizes the routine practice of the “rule of law.” It has been equally difficult to distinguish legal rules and government practices which “distort” a price from the background rules in whose shadow parties are thought to bargain. And there is no a priori reason for identifying public impositions on the transaction as distortions – costs of the transaction – and private impositions as costs of the good or service acquired. These matters might be disputed in political or economic terms. But the effort to treat corruption reduction as a development strategy substitutes a vague sense of the technical necessity and moral imperative for a “normal” arrangement of entitlements.

It is easy to interpret the arrangement of entitlements normalized in this way in ideological terms. When the government official uses his discretionary authority to ask a foreign investor to contribute to this or that fund before approving a license to invest, that is corruption. When the investor uses his discretionary authority to authorize investment to force a government to dismantle this or that regulation, that is not corruption. When the government distributes import licenses to allocate scarce foreign exchange – an opportunity for unproductive rent-seeking by those waiting in line for the license. When property rights allocate scarce national resources to unproductive users, waiting in line for estates to pass by succession – not rent-seeking. When pharmaceutical companies exploit their intellectual property rights to make AIDS drugs largely unavailable in Africa while using the profits to buy sports teams, not corruption, when governments tax imports to build palaces, corruption.

Perhaps the most telling problem is the difficulty of differentiating some prices and transactions as “normal” and others as “distorted” by improper exercises of power when every transaction is bargained in the shadow of rules and discretionary decisions,

both legal and non-legal, imposed by private and public actors, which could be changed by political contestation. This old American legal realist observation renders incoherent the idea that transactions, national or international, should be allowed to proceed undistorted by “intervention” or “rent-seeking.” There is simply no substitute for asking whether the particular intervention is a desirable one – politically and economically. In this sense, seeking to promote development by eliminating “corruption” replaces economic and political choice with a stigmatizing ideology.

*Neoliberal law and development economics: a political alliance*

Looking back, it is probably more sensible to think of the campaigns for judicial reform, the formalization of rights and against corruption as political, rather than as economic projects. They were oriented far more explicitly to the perception of governance failure than to economic performance *per se*. They responded to the widely shared sense among development professionals that third world governments simply could not be trusted with policy making, regardless of the approach taken. If neo-liberalism’s energy had come, in part, from its enthusiasm for a *small* state, campaigns for formalism and against corruption were also driven by the desire for a *strong* state, capable of enforcing public order and private rights – without messing in the economy. If we think in distributional terms, there is no question that neo-liberal legal theory accepted ideas about law more common in the foreign investor community than in most developing nations themselves. Many ideas about the law needed for development turned out to be about the law foreign investors wanted to see. In ex-socialist countries, as elsewhere, there is no doubt that some local players were better situated to play in this new legal world and to deploy this new legal vocabulary, than others.

In ideological terms, these ideas about law are quite difficult to characterize politically. Instrumentalism, positivism, literalism about the economic consequences of legal initiatives – these have characterized all manner of ideological projects. Although a commitment to “formalism” was long associated in the United States with *laissez-faire* recollections of the nineteenth century period of classical legal thought, it has certainly also served other masters. So also, of course, has judicial review. Development projects formalizing small scale rights to “empower” those in the informal sector as participants in the formal economy were extremely popular across the ideological spectrum, at least in the North. Judicial reform and anti corruption campaigns likewise. Moreover, the mode of legal reasoning about policy which developed – welfare economics, empirical observations, sociological hunches – to determine which state rules were market supporting and which were not, was used during this period by left, center and right development professionals.

It did seem, however, that at least broadly speaking, the more market failures you thought there were, the more often you thought government initiatives might well correct them, the less certain you were about defaulting to *laissez-faire*, the more faith you had in third world government initiatives, the less significant a problem you felt corruption was, the slower you felt the transition to market should proceed, the more skeptical you were

about the large scale benefits of small scale formalization, the more likely you were to be a center left or left wing analyst.

The legal vocabulary of neo-liberalism, however capacious ideologically, had its blind spots and biases as well. It was surprising how completely “social” ideas about solidarity and national economic mobilization disappeared from the legal vocabulary on the left -- as well, of course, for the center and right. As a policy analytic, the legal vernacular of the neoliberal period had little room for distributional concerns, particularly efforts to see first-order distribution as a tool for development planning. It pushed issues of redistribution, of fairness in allocation and in bargaining, off the table, and focused attention on the nature of the local public and private legal order, rather than on the international legal, political or economic system. Development policies rooted in distributional analysis were more difficult to imagine and propose. Moreover, as time went on, the world-wide campaigns of legal reform – judicial reform, formalization, anti-corruption – had the effect of pushing even neo-liberal economic analytics to one side, at least in the legal vernacular for policy making. The legal projects necessary to create a small economic state with a strengthened public order state re-emphasized distinctions between public and private legal orders and institutions which had everywhere been eroded during the same period in the North in favor of more flexible “soft law” styles of governance or public-private partnerships. This certainly responded to the stigma associated with third world governance, but it also undoubtedly reinforced it.

Within the legal field, however, experts were not all of one mind during the neo-liberal period. If we were to simplify the story, we could divide the available intellectual traditions and ideas about law into two broad groups – those associated with the mainstream neoliberal consensus, and those which in one or another way were understood to qualify or critique that consensus. **DIAGRAM C** provides a summary list of these different groups of ideas.

**Diagram C**

**Legal ideas and assumptions: 1980-2000**

**Mainstream – neoliberal ideas and assumptions**

Instrumentalism and faith in legislative effectiveness continued

Private law > public law

Law as a limit on administrative and legislative discretion

Private rights and constitutional process

Judicial review

Neo-formalism about public law limits

Property rights yes, price distorting entitlements no

Private standard setting and codes of conduct

Government failure

GATT / TRIPS

Formalism about international obligations

Bilateral investment treaties

Formalization of private law and of entrenched rights

Anticorruption campaigns

Transparency

Kaldor-Hicks for judges

Efficiency as adjudicative target

Corporate law reform

Investor protection and guarantees

International human rights as a development strategy

**Heterogeneous ideas and assumptions**

Legal sociology / limits to legislative effectiveness

Private rent seeking

Failures of private decision making and management

Legal pluralism

Critiques of formalization and anti-corruption as coherent strategies for legal implementation

Significance of background norms for private bargaining power

Market prices a function of background legal entitlements

Critiques of informality and private dispute settlement – ubiquity of unequal bargaining power, information asymmetries and agency problems

Distributional and cultural significance of alternative corporate governance models

Instability of distinctions between private law and regulation, subsidies and non-tariff barriers, costs of the transaction and costs of the product Need for discretion

Distributive significance of interpretive choices

Arguments for regulation:

compensation for market failures, for transaction costs, for information problems, for the irrationality of markets, for protection and allocation of public goods

reinterpretation of private law arrangements as regulatory

Distributional significance of choices among regulatory forms – disclosure, mandates, private liability, criminal sanction, taxation

Interactions of regulatory machinery, institutional forms and private rights

Critique of human rights as a recipe for development rather than a vernacular for distributive choice

New governance ideas – regulatory negotiations

International significance of rents for bargaining power

Lined up in this way, it is clear that there is more than a loose or accidental relationship between the various heterogeneous strands of thinking which have emerged in economics and in law as the neo-liberal consensus has faded. Sometimes the association is quite direct – legal reasoning has simply imported ideas about transaction costs and information problems into the repertoire of legal arguments in favor of regulatory or administrative restrictions on the exercise of rights. This kind of importation can run into difficulties, of course – parallel to those which accompanied the effort to transform a nuanced welfare economic analysis into the kind of formula judges could easily apply during the neo-liberal enthusiasm for Kaldor-Hicks efficiency analysis as a mode for interpreting and allocating private rights. Indeed, often what the heterogeneous traditions within law have to offer is caution about our ability to translate economic theories about “transaction costs” or “public goods” directly into legal and institutional forms. There often turns out to be more than one way to do this, a fair amount of incoherence in the distinctions themselves once you try to apply them as legal categories, and a real need for economic and political choices about who will bear the costs of making these distinctions in one way rather than another. It is precisely for this reason that an alliance among critical or heterogenous traditions from law and other disciplines seems promising in our current post-neoliberal age.

#### **IV. Opportunities for a post-neoliberal alliance: critical and heterogeneous ideas from law and development economics**

Development experts today do not share the kind of consensus, about either economics or law, which characterized the postwar and neoliberal periods. The situation is far more chaotic. The field is only just beginning to theorize China’s own astonishing recent development. The intuition that China did not play by any known book over the last decades is visible in the widespread use of the word “heterogenous” to describe Chinese development policy – a catch-all phrase for a combination of policies which seem difficult to categorize as developmentalist or neo-liberal, or to unscramble using the common policy vernaculars of the post-neoliberal period.

Of course, there are favorite policy ideas in the field today. Macroeconomic stability, strategic engagement with the international trade system, the pursuit of human rights as a development strategy – all remain popular. Anti-corruption and transparency remain common prescriptions for governmental reform, as does the privatization of governance through private standard setting and corporate “social responsibility.” New modes of regulation and soft governance dispersing regulatory capacity into the private sector are fashionable in many places. At the international level, there is widespread enthusiasm for one or another form of “integration,” often inspired by the model of the European Union.

Like other currently popular recipes for development, each of these combines intuitions about economics and law. At the same time, development policy today is made everywhere against the background of many generations of previous policy efforts. Arguments about what works and what doesn’t from each of those previous moments

survive and are often resurrected. Ideas about law, both mainstream and heterogeneous, from the postwar and neoliberal periods survive. Law remains instrumental, purposive – the agent of development policy. It has remained a site and vehicle for complex policy analysis – for weighing and balancing and conducting nuanced market-failure analysis. Law has also remained the repository of ontological limits to state policy. Just as neoliberalism had contested dirigiste initiatives as violations of individual – often property – rights, so neoliberalism has been contested from the start by assertions of rights acquired from modest interventionist administrative and legislative arrangements.

Neoliberal reforms to build down modest interventionist regimes have continued, as have efforts to reform corporate law, commercial, securities and bankruptcy law. Development planners have remained, by and large, enthusiastic about the spread of formal property rights and the formalization of the informal economy, particularly where formalization could facilitate the spread of small scale credit arrangements – so-called “microlending” schemes, often targeting local communities of women. But with increased attention to the positive functions of the state, attention has also gone into development of law enforcement, security and military bureaucracies, and into “capacity building” for participation in global trade, investment and currency stabilization arrangements.

This enhanced policy role for law, legal institutions and legal analysis, coupled with a more robust role for judges in weighing acquired rights against justifications for development policies, have all placed the legal system as a whole more centrally in the development story.

Law continues to be seen as the primary vehicle for managing the relationship among public and private institutions – checking against rent-seeking or capture by special interests, and ensuring that administrative agencies, courts and legislatures keep their focus on legitimate regulation stabilizing markets and supporting market transactions by remedying market failure or compensating for public goods and transaction cost problems, rather than distorting prices or disrupting markets in the name of other development objectives.

The focus on institution and state building in recent development thinking has also relied on law as a vehicle for democratic transformation – law reform, elections, checks and balances, judicial review. *Constitutions* have become development vehicles. Only through democratic checks and balances, according to some public choice theory, can the tendency to capture by special interests be blunted. The ability of national regimes to legitimate the often painful adjustment to global market conditions without succumbing to rent-seeking protectionism will depend, it is often asserted, on their constitutional character. There is much disagreement, of course, about precisely *what* constitution is required – a strong state, an open state, a limited state – but the role of law as a constitutional vocabulary of legitimacy and self-limitation for necessary economic choices is widely accepted.

At the international level, we see a similar range of legal ideas — promotion of human rights as a development strategy, democratization and legal reform as the vehicle for strengthening national economic performance, the emergence of “soft law” methods of rule-making for social legal fields in Europe and internationally, the expansion of civil society networks as discussion partners for regulatory conversation. Indeed, the international regime is itself increasingly conceptualized in liberal constitutional terms. The WTO has transformed political negotiations over the appropriate national regulatory scheme - you drop this law and I’ll drop that one – into a quasi-judicial legal process of interpretation. Commentators have promoted the WTO as a “world constitution” to facilitate the adjustment of national regulatory regimes to one another. International organizations have come to address development almost exclusively in terms of legal rights – social and economic rights, democratic rights, as well as commercial and property rights.

After more than twenty years, the most significant role played by law in current development thinking is as a *vocabulary for policy making*. Arguments that would once have been conducted in the vernacular or economics are now made in legal terms. This reflects two tendencies – the diffusion of economic analytics into broad rules of thumb, default preferences, and conflicting considerations, and the simultaneous development within law of modes of reasoning suitable for arguing about such matters. Purposive interpretation implicates legal reasoning in argument about the appropriate pathway to broad social goals like “development.”

Although one might think these questions might be better answered with a tight economic analysis, or on the basis of careful empirical study, in fact neither is usually available or decisive enough to avoid the need for a policy vocabulary more open to sociological and ideological hunches and default positions. Law, rather than economics, has become the rhetorical domain for identifying market failures and transaction costs, and attending to their elimination, for weighing and balancing institutional prerogatives, for assessing the proportionality and necessity of regulatory initiatives. Development professionals have harnessed the law to the task of perfecting the market through self-limitation – a development paralleled in the United States legal academy by the “liberal law and economics” movement.

As a vernacular for development policy analysis, law retains elements from each of the preceding periods. It puts a wide variety of different analytic frameworks at the disposal of the development professional. The education of women, for example, might be discussed in the vocabulary of anti-discrimination, perhaps to compensate for the inefficient irrationality of market actors which would otherwise distort the price of women’s labor and disrupt the efficient allocation of resources. Or it might be discussed in the vocabulary of human capital investment and capacity building, either to compensate administratively for the collective action problems and transactions costs confronting women seeking to invest in their own skills, or as a component in a national strategy of improving comparative advantage, or mobilizing an underutilized national asset. Women’s education might be discussed in a humanitarian or human rights

vocabulary, as an element in human freedom, or a responsibility of human solidarity. Or simply as the right thing to do. Traces of neo-liberalism, modest interventionism and post-neoliberal thinking, and of right-center-left ideological preferences, have all been sedimented into the legal vocabulary for discussing development.

These are all also technical issues. Will this educational initiative in fact respond to discrimination or be a further distorting affirmative action measure? Will the human capital investment be recouped – how does it compare to other investment opportunities for the society? What do human rights commitments require in the way of women’s education? How do you compare this “right thing to do” with other basic needs? What about backlash, the social and political viability of the educational reform, the costs to other development initiatives? And so on. Nevertheless, as a framework for debating such issues, law has increasingly replaced economics and politics.

The legal vernacular is not more decisive or analytically rigorous – it seems, however, to be more capacious. Moreover, economic analysis often requires baseline determinations it is not suited to make – law provides a vocabulary for debating them, rather than relying on default assumptions. In the trade context, for example, to determine whether a regulation is a “non-tariff barrier” to trade or part of the “normal” regulatory background on which market prices are set requires a decision exogenous to the economic analysis. Is Mexico subsidizing when it lowers its minimum wage or fails to enforce its own labor legislation, or is the United States imposing a non-tariff barrier when it requires Mexico to meet minimum labor standards? The WTO’s policy machinery offers an institutional and rhetorical interface between different conceptions of the appropriate answer to such questions – perhaps different national ideas about the “normal” level of wage protection. The development policy vernacular has a similar effect on issues like women’s education – providing a loose argumentative vocabulary which transforms absolute questions – women’s education, yes or no – into shades of gray. “Maybe here, to the extent it compensates for discrimination, but not there, where markets work,” and so forth.

The legal vocabulary used in discussions is not infinitely plastic, of course. It emphasizes some things and leaves others behind. The appearance of a technical and “balanced” solution to the question whether a living wage is a “normal” or “abnormal” regulatory imposition on the market, or whether we should fear “private rent-seeking” or “public rent-seeking” obscures the sense in which these issues present mutually exclusive political choices. There is no technical way to figure out what level of wage support - or women’s education - is normal or non-distortive or market correcting — or “required by human rights commitments.” In the trade context, to decide which regulations are barriers to trade and which are “normal” complements to the market, we should ask whether a regulation is part of a nation’s legitimate strategic or comparative advantage – whether we might think of a regulatory arrangement, like plentiful labor, as a factor endowment, rather than a distortion of world prices. Once we go down this road, the door is open for analysis of the distributional consequences of regulation, which would take us to a more overtly political frame for debate.

In this situation, it seems useful to recover and reinterpret the heterogeneous economic, political and social ideas about development which accompanied the emergence of each phase in the history of development policy. The modern development practitioner will want to be well versed in the broad institutionalist economic tradition, for example, understanding the struggle to endogenize social and institutional factors into economic models of growth, and to qualify images of market efficiency by reference to arguments about information costs, public goods, path dependence and so forth. We will want to remember that one size does not fit all, that everyone lives in a micro-climate and a very specific market, most of which are not competitive and are plagued by bargaining power problems of various sorts. We will want to remember that power is socially and institutionally disaggregated, an insight rooted in traditions as diverse as Foucaultian social thought and public choice theory. Development experts with heterogeneous instincts will want to attend to the structures of economic life more broadly, whether expressed through the dynamic relationship between leading and lagging regions or sectors, through world systems ideas about the relationship between centers and peripheries, within national and world economies, or through ideas about dependent development, focusing on modes of intervention in the global economy and the significance of bargaining power, monopoly rights and access to rents of various kinds.

These heterogeneous strands of economic and political thinking about development reinforce the focus on law. It is difficult, for example, to imagine how one might resurrect an interest in economic ideas about dependent development or the interactive dynamics of rising and falling sectors or national economies in a global market without reference to the legal institutions structuring the allocation of rents, bargaining power and monopoly power in the global marketplace. Similarly, economic criticisms of restraining the regulatory power of developing countries can only be strengthened by legal analysis of the incoherence of the doctrinal categories through which efforts to constrain regulatory capacity are transformed into binding obligations – “regulatory taking,” “subsidy,” “non-tariff barrier” and the like.

At the same time, there are many valuable heterogeneous traditions within law which may also be drawn upon by those with the ambition to unsettle conventional wisdom about the institutional arrangements necessary for development. They begin with the sociological criticism of law as a purposive and instrumental apparatus for bending social behavior to the will of the state – or to the will of the holder of private right. There is a gap between law and social life, informal arrangements and strategic behavior does matter. Public and private entities operate in the shadow of legal arrangements and share loose background assumptions about what those arrangements mean and require. The operations of routine legal arrangements depend heavily upon the social context within which they are embedded – including the other legal and institutional arrangements in place. Law and the top and bottom of an economic or social

order are rarely the same.

Legal formalism, in all its various meanings, is not all it has been cracked up to be. There seems an irreducible element of contradiction, incompleteness and ambiguity in legal arrangements. Legal reasoning and interpretation – and the procedures through which that interpretation occurs, including private reactions to and internalization of legal norms – is more significant than it seems in many neo-liberal accounts. More tellingly, perhaps, the styles of legal interpretation proposed during the neo-liberal heyday were rarely as robust as they may have seemed. Rather, they relied heavily on stock arguments and shared ideological commitments to slide across the conflicts and ambiguities of even the most formal regimes.

From top to bottom, moreover, legal interpretation and implementation is all about choice and strategy – it is not a substitute for them. Non-compliance often ought to be tolerated, just as contracts often ought to be breached. Permissions to use resources nominally “owned” by others run through our private law, as does the entitlement to use one’s property in ways which will damage the value of a neighbor’s holdings. Moreover, the legal regime is an amalgam of overlapping and often conflicting arrangements which are not susceptible to resolution into a single coherent scheme, even were there time and resources to pursue all disputes to a single court. It is a notorious error to imagine that the legal regime affecting the environment, for example, will all have the word environmental law in the title. People soil and cleanse the environment in the shadow of numerous legal regimes. One might change our ecology by pulling levers in legal regimes of sovereignty, property, finance, credit, criminal law, corporate governance, torts and more. Indeed, legal pluralism is an inevitable and often salutary part of modern law – many productive economic activities take place along the vague fault lines between legal regimes and in the space between clear areas of regulation and legal clarity.

Doubtless contemporary scholars working in these many traditions would describe themselves differently and would assemble different lists from those I have sketched here. The point is only to suggest an alliance, not to define its terms or limit its components. **Diagram D** illustrates the range of heterogenous ideas put in play over the last decades in law which might correspond to heterogenous thinking in the fields of economics and politics.

**Diagram D**

**An alliance of heterogeneities**

**Political and Economic Thought**

Institutionalism in Economics  
Endogeneity of social and institutional factors

Focus on information costs, public goods, path dependence, ubiquity of micro-markets, bargaining power problems, agency problems, monopoly and anticompetitive behavior, transactions costs, arguments for regulation -- Stiglitz

Social disaggregated powers  
Public choice theory  
Power/knowledge – identity constitution  
Foucault

Social structures and dynamics  
Dualism -- Myrdal  
Leading and lagging sectors

World Systems Analysis  
Center and Periphery  
Dependency theory

Dependent development  
Modes of insertion in the global economy  
Significance of bargaining power, opportunities to capture rents

Decisionism – foregrounding the political and ethical choices inherent in policy  
The experience of deciding / ubiquity of unknowing critiques of expertise

Critiques of human rights as universal ethical or economic models

**Legal Thought**

Legal sociology  
Gap between law in the books and in action

Internal critiques of formalism  
Conflicts, gaps and ambiguities in the law  
Critiques of analytic and formal legal reasoning, whether ethical or instrumental  
Significance of privileges and competing rights

American legal realism  
Criticism of legal instrumentalism, pragmatism, deduction from social form and purpose  
Dualing principles and purposes  
Legal pluralism  
Overlapping legal regimes

The semiotics of legal reasoning  
The importance of stylized argument fragments and background conceptions of the normal  
Legal consciousness and the ideological component of legal reasoning  
Internal and external criticisms of rules and of standards  
Criticism of modern liberal modes of adjudication rooted in economic analytics, ethical theory or political philosophy

Criticism of expertise, blind spots and biases  
The institutional and normative fetishism of best practice

Attention to distributive choices  
Politics and economics of legal science

Critiques of human rights

An alliance between these traditions might have at least two different advantages. First, it might offer a more robust policy analytic. A more nuanced and contextual legal analysis of institutional and doctrinal arrangements might improve our analysis of policy prescriptions which explicitly demand more of law and legal institutions. More importantly, perhaps, the critical traditions within the legal and economic fields may help to dislodge the formulaic and sloppy policy sloganeering which has so often come to replace careful analysis. Doing so will require reliance on the critical traditions from both disciplines.

At the same time, there are limits to what a more robust legal vernacular for development policymaking can achieve. All too often, law offers the opportunity to make policy decisions without confronting them as naked political alternatives, while nevertheless accepting that no economic or interpretive analytic is available to determine which way to proceed. It is this combination – escape from the choices of politics and the unsatisfying analytics of economics – which has revitalized the law and development field. But this move to law also has a politics. Legal determinations present themselves as operations of logic, policy analysis, procedural necessity, economic insight or constitutional commitment. In the background, lie a set of choices that are difficult to identify and contest. Although legal norms and institutions define every significant entity and relationship in an economy – money, security, risk, corporate form, employment, insurance, it is difficult to remember that for each may be arranged in a variety of ways.

A common theme in all these heterogenous and critical traditions is the impulse to recover the experience of political choice in the making of development policy. One goal of contextualization in each tradition is to disrupt the claims to universal value or function which accompany efforts to theorize a best practice for development policy and open a space for local political choice. The goal for internal critiques of the theories themselves, be they legal or economic, is to identify the gaps and conflicts which require interpretation, and contest as ideological the terms through which that interpretation has often been rendered routine. The aim of all these theoretical innovations is to expand the potential for institutional, doctrinal and policy experimentation – to embolden the policy class to accept the need for economic, political and ethical choice and improve the tools by which they can come to that challenge free of unhelpful professional habits and deformations.

Although some minimum level of national institutional functionality seems necessary for economic activity of any sort, this tells us very little. For development we need to strategize about the choices that go into making one “rule of law” rather than another. Attention to the role of law offers an opportunity to focus on the political choices and economic assumptions embedded in development policy making. Unfortunately, however, those most enthusiastic about the rule of law as a development strategy have treated it as a recipe or readymade rather than as a terrain for contestation and strategy. They have treated its policy vernacular of “balancing” as more analytically decisive than it is. As a result, the politics of law in the neo-institutionalist era has so far largely been the politics of politics denied.

AN EXTRA CHART – not sure if its useful:

