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Law and Development Economics: Toward a New Alliance

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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, 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. Sometimes ideas about law lie very close to the surface in economic analysis. That is our situation today. 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.

Indeed, 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." It may be coincidence, but 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. 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.

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.

The important point, however, is that lawyers and legal scholars are not at all of one mind about what law is, how it works and what it can be expected to do. Legal science is, in this respect, much like economics or sociology – there are schools of thought, mainstream ideas and more heterogeneous tendencies, and 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. Over the last twenty or more years, thinking 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. 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.

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.

I. The law behind development economics 1950-1970: legal instrumentalism and its discontents.

The potential significance of such an intellectual alliance is perhaps easier to see with the wisdom of hindsight. The economic ideas of the nineteen fifties and sixties which underlay early policies of import substitution industrialization and modernization by large scale development states rarely placed their ideas about law front and center. The relative invisibility of law and legal ideas in the development expertise of the period reflected an assumption that law had little independent relevance for development other than as a tool. And as a tool, law was assumed to work more or less as advertised. Although post-war development professionals said relatively little about the role of law in development, the policies they chose to achieve the objectives suggested by the economic theories of the day say a great deal about what they imagined law to be able to achieve.

The development economic texts of the period slid easily between theories about development and policy objectives. They had far less to say about the *instruments* through which policy choices were to be made effective. Often, the instrument and the objective were used interchangeably, as if the objective to "restrict imports" and the instrument "tariff" were synonymous. Policy-making, however, is often about choosing among instruments – *how* to encourage savings, *how* to support domestic industry, *how to* capture the returns from primary exports. It is impossible to choose among policy instruments without at least an implicit idea about how these instruments work to generate results and law is generally the medium through which policy instruments are –

or are not -- made effective. A tariff is a legal rule. The idea that a tariff will, in fact, restrict imports relies upon assumptions about, among other things, the effectiveness of law.

In the postwar period, a great deal of law was required to translate the leading economic theories of development into policy. "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. Legislation was necessary to establish tariffs, subsidies, 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.

In constructing this vast apparatus, policy makers faced choices. As legal arrangements, the policy tools for import substitution industrialization were complex and could be assembled in different ways with different results. 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. Even the simplest policy tools – taxes or tariffs or subsidies or licenses – required the construction of quite complex legal and institutional regimes. Tariffs must be adopted, by legislation or administrative decree. Someone must be authorized to do so. There must be a bureaucracy with a mandate and a margin of discretion. There must be a revenue service, a mode of payment. Borders must be controlled – there must be a customs service, itself mandated and organized. There will be some level of enforcement, prescribed penalties and modes of adjudicating infractions and collecting penalties. At various points in the process, some officials will have discretion – to set the tariff, to revise it, to exempt from it, to collect or fail to collect, to prosecute, to penalize, to enforce. At these and other points, there will also be slippage --- a tolerated or not tolerated residuum of non-compliance.

In thinking about how to make choices among the many legal possibilities, it is common to imagine that there is a "most effective" or "best practice" way to set up a legal regime so as to accomplish, as smoothly as possible, a policy objective. The goal is simply to ensure that one has and uses "good law." Historically, however, choices among legal instruments have been debated in a variety of other terms. It is rarely clear just what *kind* of licensing structure or tariff administration best expresses a policy objective. Where there were more than one policy objective, the conflict between them could be continued into the details of policy design. In debates about what to do, alternative legal arrangements may come to stand in for competing policy objectives. 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. Most importantly, experts often also share a set of

legal ideas about how legal institutions and norms *ought* to be put together. Experts may debate building a tariff regime one way rather than another as a matter of legal science, just as they may do so in the vernacular of economic policy or political significance.

Legal experts have their own 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. Some of their ideas are unique to the development context, but most are not – 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. And of course, they also have ideas about the strategic use of legal arrangements, both in the pursuit of policy objectives, and on behalf of the legal process itself. Like the policy instruments, these ideas 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.

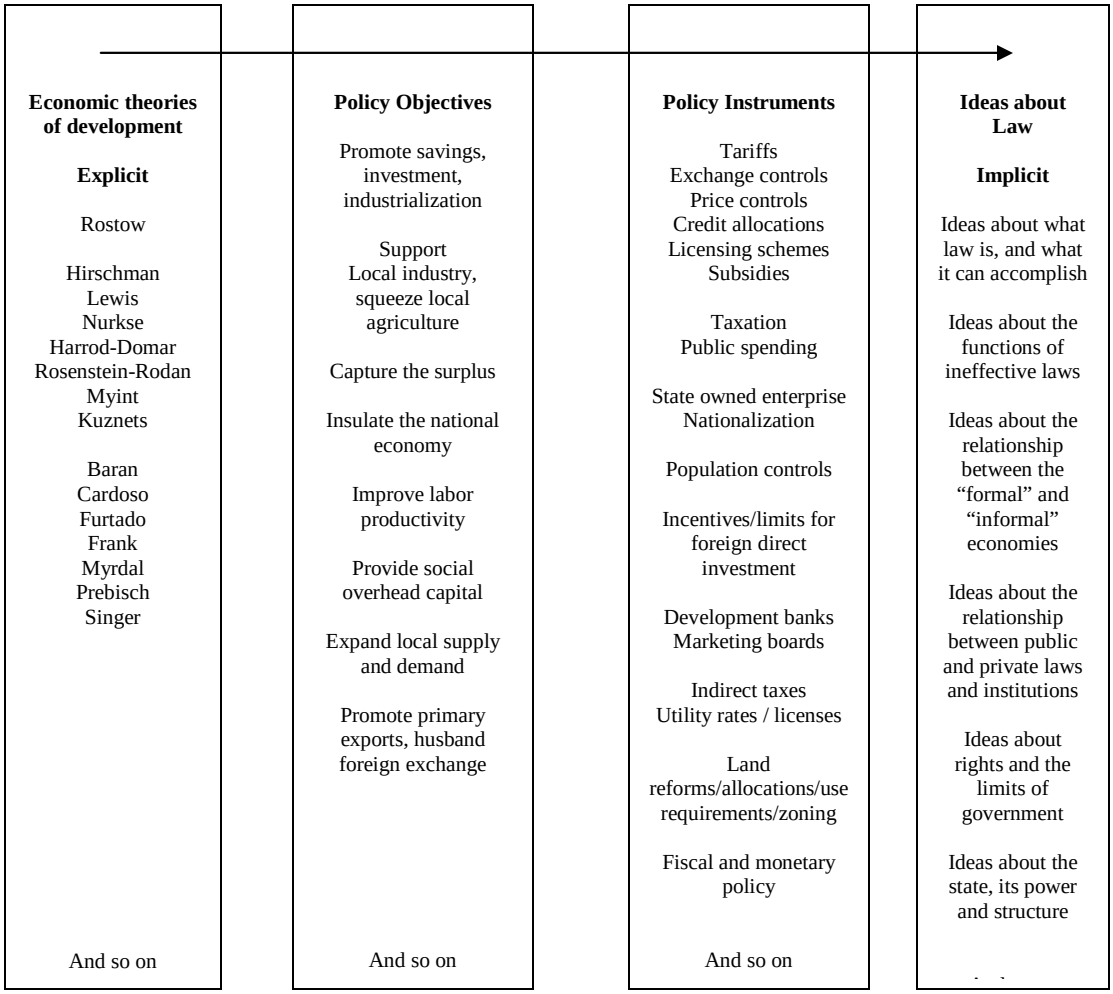
What roles for various legal institutions – courts, legislature, administrative agencies? What kinds of legal instruments – statutes, guidelines, decrees? Issued by whom? Enforced how and by whom? What role for political parties and other quasi-public entities? All these issues present classic issues of constitutional structure about which legal experts have views. They could *also* be debated in the key of development policy, as alternative methods to tax, alternative instruments for allocation of credit or subsidy. Presented this way, it is easier to think of the answers in instrumental terms – what is the most effective way to organize revenue generation. The existing array of legal ideas and arrangements may well cut short careful instrumental calcuations. Some options will seem familiar, others will seem unthinkable. Private taxation? Adopting a tariff is more familiar. Private causes of action? It seems more obvious to just make it a crime. As a result, many development policy decisions were taken on the basis of poorly articulated background assumptions about how legal systems should be put together.

For example, how should statutes and administrative decrees be interpreted and enforced? Should judges be part of the administrative apparatus, substantively responsible to the national development objectives, or independent, responsible to a legal culture with its own priorities? In the postwar period, it seemed obvious that by and large judges should be close to and share the substantive objectives of the national development plan. The whole point of interpretation and enforcement was to implement the plan, mobilize national resources to that end – the last thing you needed was an independent judicial actor deciding how to interpret things based on a different set of values. As a matter of institutional design, it might seem that this would favor the development objective over other considerations, and 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." But there were also consequences for the policy itself. In many places, 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 the economic objective, but rooted more in habits, background assumptions about what works, and the political and ideological pull of various interests committed to one or another legal form.

We might imagine the relationship among economic theory, policy and law as the movement from left to right in the following diagram.

Theories, Objectives, Instruments and Law: 1950-1970



Looking back, we can reconstruct the legal theory implicit in development economics of the postwar period. National law was understood to be an instrument of sovereign power, the means to accomplish a policy objective. Public law was more salient than private law in the imagination of development experts. Law was about enabling the state. Neither constitutional rights nor private law seemed important restraints on the state. Both public order and private arrangements were to be coordinated with national policy objectives. Judges were often administrative 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. Within the legal science of the

day, the correlative ideas were functionalism, positivism and legislative or executive supremacy. At the same time, legal arrangements were flexible and purposive – open to reinterpretation in light of a policy objective. Here, the correlative legal idea was anti-formalism. 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.

At the international level, the predominant legal idea was an absolute and formal state sovereignty shielding national political autonomy. 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. The correlative legal ideas were international legal positivism and formalism.

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. Sociologists and economists substantiated the intuition that local political economy matters, 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. 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. States might 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. 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. International public policy, in the form of a New International Economic Order would be necessary.

At the same time, within the legal field, sociologists and lawyers were working together to criticize the legal ideas associated with the early developmental state. Law rarely operated as a straightforward instrumental translation of legislative intention into social practice. There was a gap between law in the books and law in action – law often failed to penetrate the economic or cultural terrain it was intended to regulate. People related to the law strategically – using or avoiding legal institutions in their economic and social life. The informal arrangements outside the official legal framework ought to be seen as part of the legal fabric itself, in a relationship to the background norms in whose shadow parties bargained. 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. 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 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.

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.

The following diagram 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.

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. 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 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 banner of "antiformalism" and see the antiformal tradition as the legal analog to economic institutionalism. 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.

II. The law of neo-liberalism 1980-2000: private "rule of law" formalism and its discontents.

After a decade or more of drift, contestation and invention, broad consensus returned to field of development study in the nineteen eighties and nineties. At the national and international level, law was now to be the instrument for neoliberal policy. Building down import substitution regimes required legislative and administrative changes. Structural adjustment, conditionality, and the GATT were legal regimes. At the same time, new legal regimes were 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

In this sense, the neoliberal program was as *instrumentalist* and *positivist* about law as had been modest interventionism. National import substitution regimes were to be unbuilt 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.

In this sense, law remained a pragmatic and purposive instrument of policy, and many of the heterogeneous ideas critical of an instrumental law which had emerged in the sixties and seventies were put to one side. Again, an opportunity for alliance between those skeptical of neoliberal economic policies and those thinking heterogenous thoughts about law was missed.

Like their predecessors, moreover, neo-liberals understood their normative regimes to be compelled by the facts of global social organization – this time the requirements of markets and the priority of individuals, rather than the requirements of interdependence and the priority of social groups. Where there were anti-formal opportunities for discretion, a set of background assumptions about legal purpose and social necessity, if a different one, was ready at hand. You can't wring an ought from an is, the "needs" and "purposes" of social arrangements are notoriously multiple and contradictory, arguments from the nature of factual arrangements often turn out to be arguments in a circle. Within the legal field, criticisms of this sort of deduction from social fact, introduced in the late nineteen thirties by legal realist critics of socially oriented anti-formalism had long since become routine elements in legal analysis. Yet these strands of legal thought were largely ignored by those critical of neoliberal efforts to exercise legal discretion in the name of supposedly univocal market needs.

The legal theory implicit in neo-liberal develop policy also differed from that implicit in the development thinking of the previous periods. 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 constrained the neoliberal state. The focus was less legislative positivism and sovereignty than private rights and a neo-formalism about the limits of public law. Focus shifted from administrative rule making or legislation to private ordering, both nationally and transnationally. Horizontal law replaced vertical law, just as a law of rights limited the law of sovereignty. Within the legal field, 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.

Development reformers in the nineteen sixties had often sought to strengthen the legal profession itself, particularly in its ability to identify and make this kind of choices among interests which seemed implicated in efforts to build a modern legal order. The focus was not only on improving the implementation of administrative and legislative law, but also on the ability of judges and jurists to think like legislators – to weigh and balance competing considerations clearly and pragmatically. For the neoliberal generation of development specialists, the structure and thinking of the legal profession held little interest – particularly lawyers who worked for the state. The goal was not an improved exercise of state power but more effective restraints on government rent-seeking and public choice bickering. If the legal profession was important, it was the international corporate bar, able to articulate the needs of foreign capital and formulate the rules most likely to encourage its arrival. 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.

This general set of legal prescriptions came to be referred to as the "rule of law" and many millions were spent by the development community on projects to build and inject and support the "rule of law" in developing societies. It became 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.

As a result, implementation of familiar legal institutions and constitutional forms has become central to development policy making. 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. As faith in the neoliberal transition waned, the legal institutions that functioned as marks for "normal developed country" shifted to elections, courts, judicial review, and local human rights commissions and the legal framework for a robust "civil society." Rule of law injection projects have generally been promoted in loosely instrumental terms – as necessary for markets to operate effectively and to attract foreign investment for development. But more than that, it also has simply seemed obvious that a liberal constitutional order was a good thing to have – an aspect of what it meant to be developed – regardless of its impact on economic indicators. 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.

The enthusiasm for these legal institutions reflects a stereotype about what law is and how it works in the developed West and can occlude points at which choices might be made within these legal regimes which may themselves have significant developmental or distributive significance. The most important and visible institutional object of attention has been the judiciary. Judges and reliable courts seem like good

ideas for lots of reasons: to enforce private arrangements, to support criminal prosecution, to fight administrative corruption, and to review government actions for their respect of human rights, including the right to property. Moreover, many development professionals became convinced that the reputation of national judges was an important element in the investment decisions of foreign investors. 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. There was some empirical evidence, however, that a reputation for good judging correlates with investment and economic performance, but it was hardly compelling. 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.

At the same time, courts loomed large in the picture of what foreign capital required – they would be the institutional home for this literalism. In general terms, courts seemed central to the enforcement of market transactions and the limitation of public discretion. If administrative failure suggested deregulation, adjudicative failure called for judicial reform. Once reformed and rendered independent of executive and legislative interference, national courts could stand behind the new limits of state authority and enforce private ordering arrangements. 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.

This is not an obvious idea for several reasons. First, of course, administrative agencies might as well have taken responsibility for enforcing commercial arrangements or implementing neo-liberal reforms. Alternatively, private actors might have been willing to make their own way, enforcing their reciprocal rights extra-legally, through reputation or informal private sanctions. Or they might have been willing to lump their losses rather than seek court enforcement. 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. Nevertheless, neoliberal development policy makers did seem to assume that private market actors needed to see reliable courts before they would invest or transact. Again here, a lengthy tradition of sociological study in the developed legal systems of the North drawing these assumptions into question was set to one side. 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.

Of course, even when utilized, judicial review can be a double edged sword. A great deal depends upon the way judges *reason*, the rights they choose to enforce, the arguments they find persuasive. 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 need to be able to distinguish inappropriate price distorting entitlement claims from "real" property rights.

Routine judicial interpretation within schemes of private ordering would require similar analytic capacities. Courts would need to be able to distinguish marketing distorting efforts to entrench or exercise monopoly power from market supporting efforts to ensure transparency, overcome information problems and enhance competitive opportunities. 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. The United Nations of the nineteen seventies "new international economic order"had relied upon international public law to transform global economic life -- treaties, General Assembly resolutions, ICJ judgments, new administrative arrangements. These legal tools were intended to address political concerns about the global distribution of wealth and the fairness of international bargaining. It did not take long to realize that these tools were not up to that task – a realization made simultaneously in political science and law.

Neo-liberalism shifted attention away from the United Nations to the General Agreement on Tariffs and Trade and to what would soon became 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.

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 heterogenous 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. 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 Interpreting these standards – to determine what counted as a "non-tariff barrier" – requires more than a formal application of treaty definition. As the WTO's own interpretive machinery became increasingly juridical in nature, it would also require interpretive facility with the distinction between an unfair barrier to trade and a normal national background regulation. At the international level, neo-liberalism brought with it an enthusiasm for adjudication capable of making this kind of distinction.

It turns out, however, that it is extremely difficult to identify unfair barriers to trade – to distinguish, say, between "subsidies" and "non-tarriff barriers" -- with any logical precision. A "free trade" regime requires more than the elimination of tariffs. 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." 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 – an unfair "subsidy." Are Mexican manufacturers who benefit from non-enforcement of local law are "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 face an unfair "non-tariff barrier," an unfair or 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.

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.

One might have thought that the range of nuanced judgments called for to make these distinctions would have stimulated further thinking in the legal field about the judicial discretion and the need for careful weighing and balancing of factors to achieve the objective of market support, say, rather than price distortion. One might, in other words, have expanded the precision of what had originally been a heterogeneous

antiformal instrumentalism in legal thought. In the event, however, this was not the path taken.

With the focus on courts, on private law enforcement, and on judicial review to protect property entitlements from interventionist rent-seeking, pragmatic and flexible antiformalism – let alone move overt reference to political choice -- was replaced by various forms of default neo-formalism. 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.

We might understand neo-liberalism's implicit theory of legal reasoning as a kind of neo-formal importation of policy analytics borrowed from neo-liberal economics – or at least of the spirit and ideological temperament which accompanied that economics. This was not the subtle analytics of second-best welfare economics, but a curious amalgam of slogans from welfare economics, more 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 – or the reputations of these institutions — with economic performance to identify "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 provided a kind of loose reference point and target, against which to compare various judicial approaches. So whether the market failure is big or small, whether the new policy corresponds to and will correct for a transaction cost, is a matter of degree, on a continuum, in particular cases. Will the enforcement of this right, given our hunches, our economic theories, our empirical awareness, put us on the track to Kaldor-Hicks efficiency or not? The legal discourse produced as answers were sought for such questions sometimes presented itself as a technical machine of formal deduction or economic analytics, but it was usually a puzzling blend of the two, interspersed with loose empirical or sociological hunches.

As neo-liberalism advanced, moreover, two large default ideas about law became more salient – useful to guide interpretation in this new juridical policy vocabulary –

private law *formalization* and *anti-corruption.* 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 and the elimination of corruption. As the evolving neo-liberal policy vocabulary became ever more hazy and multifaceted, these two ideas provided a reassuring stability. Each has a long history in literature about economics and law, and each suggests a set of tactics for policy making. Each heightens the sense that the rule of law can be enhanced – and policy choices necessary for interpretation made — 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 became more so in the last decade – there is no question that the focus on formalization and anti-corruption 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 and anti-corruption 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 and anti-corruption as *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.

A second 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.

In fact, it is probably more sensible to think of both the formalism and the anti-corruption campaigns as a political, than as an 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, for judicial review. Projects to formalize small scale rights to "empowering" those in the informal sector to participate in the formal economy were extremely popular across the ideological spectrum, at least in the North. Formalization 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 of left wing analyst. What was fascinating, however, was the relatively

swift loss of a voice for "social" legal ideas as a vocabulary for the left – as well, of course, for the center and right.

The legal vocabulary of neo-liberalism, however capacious ideologically, had its blind spots as well. As a policy analytic, it 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. It does seem, that the formalization and anti-corruption campaigns had the effect of pushing even neo-liberal policy analytics to one side, let alone the legal policy vocabularies of the "social," or of "modest interventionism." Development policies rooted in distributional analysis were more difficult to imagine and propose. The legal projects necessary to create a small economic state while strengthening the 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.

Legal ideas and assumptions: 1980-2000

Mainstream – neoliberal ideas and assumptions	Heterogeneous ideas and assumptions
Instrumentalism and faith in legislative effectiveness continued	Legal sociology / limits to legislative effectiveness
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	Private rent seeking Failures of private decision making and management Legal pluralism
Property rights yes, price distorting entitlements no	Critiques of formalization and anti-corruption as coherent strategies for legal implementation
Private standard setting and codes of conduct Government failure	Significance of background norms for private bargaining power Market prices a function of background legal entitlements
GATT / TRIPS Formalism about international obligations Bilateral investment treaties	Critiques of informality and private dispute settlement – ubiquity of unequal bargaining power, information asymmetries and agency problems
Formalization of private law and of entrenched rights	Distributional and cultural significance of alternative corporate governance models
Anticorruption campaigns Transparency	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
Kaldor-Hicks for judges Efficiency as adjudicative target	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
Corporate law reform Investor protection and guarantees	reinterpretation of private law arrangements as regulatory
International human rights as a development strategy	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 the ability of translating 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 and heterogeneous traditions seems promising. 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.

The opportunities for this kind of collaboration, moreover, will only be possible once the routinized forms of legal/economic argument which have come to substitute for careful legal or economic analysis are pushed aside. Doing so will require reliance on the critical traditions from both disciplines.

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." How broadly or narrowly should we interpret these regulations? Sociological reasoning attunes legal thought to considerations of context, culture and institutional form. Policy reasoning itself has become part of legal analysis – are there lots of market failures, or few? Is this one? Will this measure correct it or make it worse?

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.

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 regulations 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 d more overtly political frame for debate.

Law offers the opportunity to make these decisions without confronting them as naked political alternatives, while accepting that no economic or interpretive analytic is available to determine which way to proceed. This has revitalized the law and development field. It is difficult, however, to understand the politics of this move to law. Legal determinations present themselves as operations of logic, policy analysis, procedural necessity, economic insight or constitutional commitment. In the background, however, lie a set of choices that are difficult to identify and contest. Legal norms and institutions define every significant entity and relationship in an economy – money, security, risk, corporate form, employment, insurance. Law defines what it means to "own" something and how one can successfully contract to buy or sell. In this sense, both "capital" and "labor" are themselves legal institutions. 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.

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 largely been the politics of politics denied.

III. Critical and heterogeneous ideas from law and economics: opportunities for a new post-neo-liberal alliance.

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. Of course, there are favorite policy ideas. Anti-corruption and transparency remain popular, 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 was 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.

Law is also seen as the primary vehicle for managing the relationship among both 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 supportive of market transactions of remedying market failure, rather than distorting prices and disrupting markets. 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.

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. C*onstitutions* 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.

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 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.

My argument is that there are as 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.

An alliance of heterogeneities

Political and Economic Thought	Legal Thought
Institutionalism in Economics Endogeneity of social and institutional factors	Legal sociology Gap between law in the books and in action
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	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
Social disaggregated powers Public choice theory Power/knowledge – identity constitution Foucault	American legal realism Criticism of legal instrumentalism, pragmatism, deduction from social form and purpose Dualing principles and purposes Legal pluralism Overlapping legal regimes
Social structures and dynamics Dualism -- Myrdal Leading and lagging sectors	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
World Systems Analysis Center and Periphery Dependency theory	Criticism of modern liberal modes of adjudication rooted in economic analytics, ethical theory or political philosophy
Dependent development Modes of insertion in the global economy Significance of bargaining power, opportunities to capture rents	Criticism of expertise, blind spots and biases The institutional and normative fetishism of best practice
Decisionism – foregrounding the political and ethical choices inherent in policy The experience of deciding / ubiquity of unknowing critiques of expertise	Attention to distributive choices Politics and economics of legal science
Critiques of human rights as universal ethical or economic models	Critiques of human rights

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. One theme which is common to all these heterogeneous or critical traditions is an impulse to recover the experience of political choice in the application of economic or legal expertise. The goal of contextualization in all these ways is to disrupt the claims to universal value or function which accompany efforts to theorize a best practice for development policy. 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 been rendered routine. The aim of all these theoretical innovations is to open space 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. The need to carry this work of criticism into the field of law has become more urgent over the last decade as law and legal reform has come to be treated an end in itself by many development policy makers.