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B. Reason's Lure: The Enchantment of Subordination: *Enchantments of Reason/Coercions of Law*

Kerry Rittich

Enchantments of Reason/Coercions of Law

KERRY RITTICH*

The growing eminence of law and rights must count among the most salient characteristics of our time. The need for rule-based reforms is propounded at every turn; issues formerly understood to be matters of policy and politics, culture, and choice, are now recast as questions of rights and fidelity to the rule of law. Both domestically and internationally, transformational claims are advanced in the name of rights, whether human rights or property rights. Nowhere is this more evident than in the emerging international economic order. Here, law is figured as the instrument of progress and modernity, the mechanism to mediate and manage a universe of difference and change.[1]

The enchantment of reason lies at the center of the new reliance on law. Because law is governed by reason rather than ideology, politics, culture, religion, or tyranny, law provides an exit from the intractable conflicts and dilemmas of social life that impede the path of progress. Yet, the paradox is that while the reason of law seduces with promises of peace, progress, and closure, the legal rules that follow do real work on the ground, reordering social power, creating winners and losers, and disrupting established networks of provision and security as they make way for new productive activities. The result is sometimes a sharp disjuncture between the narratives of progress through law and the sense of upheaval, dislocation, and general uncertainty that marks the global present. As the categories and institutions—nation state, community, workplace, family—by which people have traditionally assessed their well-being are disrupted,[2] vast numbers of people seem unable to securely locate themselves in the future, whatever their current situations. So far, law has been unable to mediate this tension.

While the fate of these projects is still unfolding, it is already clear that the process of juridification has changed how we think and talk about ourselves and reconceived the options for social ordering. As we seek to remake our society with greater fidelity to the liberal image,

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* Assistant Professor, Faculty of Law, University of Toronto. My thanks to Robert Wai, Michael Fischl, Robert Abel, and the editors of the University of Miami Law Review for their assistance and patience.

1. *See* Jean Comaroff & John L. Comaroff, *Millennial Capitalism: First Thoughts on a Second Coming*, *in* MILLENNIAL CAPITALISM AND THE CULTURE OF NEOLIBERALISM, 39-40 (Jean Comaroff & John L. Comaroff eds., 2001).

2. *Id.* at 12.

there are no longer better or worse solutions to political disputes. Now what law does—and does not—authorize is at the center of the debate. There are "right" and "wrong" answers to social conflict; moreover, we repose responsibility in higher authorities, either technocrats or judges, to decide the nature of those answers.

The distributive stakes of this shift are unclear, but among its effects may be a loss of nuance, contingency, and complexity about questions of social ordering. Otherwise desirable options may be foreclosed; solutions that frankly broker interests are displaced by those that resolve them behind the doors of law.

THE TURN TOWARDS MORALS/ETHICS

The juridification of social and economic life thus turns out to be not only the enactment of a social vision but a complex political choice in and of itself. The attraction of law lies in its difference from politics. Politics is figured as an impediment to, rather than the instrument of, progress; law is positioned as "not politics," thus law is a privileged mode of settling the terms of social life. The animating rationale behind the resort to law is that conflict among different social groups can be held at bay through reliance on rules, while competing values and goals can be ranked and ordered by reference to a timeless, universal hierarchy of norms.

If law were positioned merely against politics or power, it would hardly be remarkable; however problematic the idea that law is uncontaminated by the touch of power, law is commonly figured as power's only antidote. What is distinctive about the present is the additional moral register in which claims about law now sound.[3] Not for nothing has the rule of law been described as "a new rallying cry for global missionaries."[4] From both the left and the right, specific entitlements are defended not merely as superior to political determinations, but also as essential, foundational, and canonical to progress and civilization. From this vantage point, it is unsurprising that public discourse over the direction of reform takes on the character of a religious war, with each side claiming the moral high ground in the debate.

On the right, moralizing about law is partly a ruse of power, one that effectively disguises the interests at stake. On the left, moralizing

3. For a series of explorations of the ethical turn, see THE TURN TO ETHICS (Marjorie Garber et al. eds., 2000). Its relevance has already been noted in connection with international law in Martti Koskenniemi, *'The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159 (2002).

4. Yves Dezelay & Bryant G. Garth, *Introduction*, *in* GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY 1 (Yves Dezelay & Bryant G. Garth eds., 2002).

about law can be a symptom of political paralysis,[5] a tactic of those who are uncertain how to engage with the rules and institutions arrayed against them other than by exercising the trump of rights.

Here, I want to reflect on the implications of these developments—the juridification of politics and the moral tone of legal argumentation—for those in the discipline of law, and to consider their effects on the creation of the subjectivity of the lawyer or legal academic. The new place of law holds evident attractions and perils. It represents an enormous increase in the power and professional cachet of the lawyer, and it provides expanded opportunities for participation in governance and rule under cover of disciplinary expertise. Yet, while it makes lawyers and other professionals priests in the emerging global order, it limits the use of the tools of the trade; it may also enlist such professionals in dubious projects.

Thus, the following questions arise: Is there another role of the lawyer or legal academic in such ventures? How else might he or she respond in the face of the aggressive deployment of claims about law in the name of good governance, economic rationality, or indeed, a variety of other ends, including human rights and democracy? Are there options other than disengagement?

Before exploring these questions, however, it is worth rehearsing the elements of professional formation that cause lawyers to become embroiled in such ventures in the first place.

THE ROLE OF THE LEGAL ACADEMIC: ON BEING NORMATIVE

One of the tasks with which legal academics are charged is the reconciliation of conflicts that are evident on the face of the law. In the analysis and critique of adjudicative decisions, legal academics are in the business of generating a coherent narrative about how the myriad values and interests manifested in official rules, decisions, and policies can live plausibly, if not always comfortably, together, if only we can "get it right," "it" being the correct interpretation of the law.

As *The Enchantment of Reason* details, there is a deep compulsion to "be normative" in this process.[6] It is not enough to analyze a legal decision in terms of its expected consequences, coherence, historical antecedents, or fidelity to the principles and established doctrines that structure the field. Legal scholars are expected to generate and defend the "right" answer to a legal issue. So, legal scholars routinely plot the proper path of the law and evaluate judicial decisions accordingly,

5. WENDY BROWN, POLITICS OUT OF HISTORY 29 (2001).

6. PIERRE SCHLAG, THE ENCHANTMENT OF REASON (1998).

assigning them to their appropriate place in the scale of rightness in virtue of how closely they either approach or deviate from the ideal. Rejecting this role may provoke outrage or moral indignation, even charges of professional incompetence or *mala fides*.

Although legal scholars use a wide variety of methods and analytics by which to evaluate the adequacy of judicial decisions, almost all of them accept the prescriptive dimension as central to their task. Most also attribute the varying conclusions they reach to differences in either the skill of the legal analyst or the frameworks that they employ. For many, acceptance of this prescriptive role grants not only stature to the legal academic, but legitimacy to the enterprise of legal scholarship as a whole. Indeed, the discipline of law constitutes its professionals as purveyors of the normative and the prescriptive, even as legal education is, above all, training in the capacity to generate persuasive arguments in a variety of different directions.

However, the task goes farther. As Schlag notes,

> The discipline of American law, from its very beginnings (and without much critical reflection), has been committed to the rationalization of official government actions that are themselves not obviously the product of reason or rationality, but also an admixture of all sorts of forces, to wit: tradition, experience, power politics, rent-seeking, utopian hopes, dystopian fears, expediency, practicality.[7]

To this we might add, in the present era, ideological fealty to particular economic models.

In other words, in the course of representing law as the embodiment of reason, legal analysts must simultaneously efface law's (often messy) political origins. This is an alchemical process, one that involves the production of coherence through a series of translations and transformations. "Making sense" of the law often slides into explaining in rational terms elements of the law that have extra-rational roots and aims, translating into the logic of law what stands outside the law. Legal scholars often end up engaged in an ex post facto discussion of why the reason of law compels conclusion x rather than conclusion y, already having excised all traces of the controversies out of which the law was born.

This leaves legal scholars with two invaluable skills. First, they are firmly situated in the prescriptive mode: they are used to saying what the law ought to be and why a proper or reasonable understanding of the law compels it. Second, they are practiced in weaving tales of coherence about legal rules that exclude references to elements which cannot be acknowledged and accommodated within the reason of law. Both well serve the current good governance agenda.

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7. *Id.* at 12.

THE SECOND WAVE OF LAW AND DEVELOPMENT: GOOD GOVERNANCE AND THE RULE OF LAW

Good governance has become a central preoccupation of international financial and economic institutions as those institutions have concluded that both growth and its absence can be located in the laws, institutions, and governance practices of states.[8] As part of the promotion of good governance, rule of law projects—and therefore legal expertise—gain a special status in the field of development.[9] Predictably, the compulsion for lawyers and legal academics to "be normative" in this context remains and, arguably, even intensifies. The distinct normative role of the legal scholar within contemporary law and development efforts goes well beyond the call to generate the right answer to a legal question. Now, it is understood to be the generation or ratification of the legal baseline itself, the frame within which legal questions themselves will arise. Where legal scholars formerly constructed narratives of coherence out of rules and policies originating from legislative, administrative, or executive acts, now setting the legal frame itself is presented as a matter that can be solved with professional tools. The importance of this function is directly linked to the governance project itself. As diverse goals such as human rights, peace, and freedom are linked to economic development governed by law, law becomes a linchpin in a nexus of political, social, and economic arguments about modernity and progress.[10]

Good governance and rule of law projects are specific in their temporal and geographic focus; they emerged in the 1990s in the effort to further global economic integration and as a mode of "solving" the dilemmas of development of transitioning or developing economies. The discourse of good governance is thus directed at a particular audience: those societies that need to be developed, modernized, or other-

8. For a classic articulation of the World Bank's position on governance, see WORLD BANK, GOVERNANCE: THE WORLD BANK'S EXPERIENCE (1994). *See also* INTERNATIONAL MONETARY FUND, GOOD GOVERNANCE: THE IMF'S ROLE (1997).

9. For a survey of these developments, see IBRAHIM F.I. SHIHATA, COMPLEMENTARY REFORM: ESSAYS ON LEGAL, JUDICIAL, AND OTHER INSTITUTIONAL REFORMS (1997).

10. See, for example, the following statement from the outcome document of the International Conference on Financing for Development:

> Good governance is essential for sustainable development. Sound economic policies, solid democratic institutions responsive to the needs of the people and improved infrastructure are the basis for sustained economic growth, poverty eradication and employment creation. Freedom, peace and security, domestic stability, respect for human rights, including the right to development, and the rule of law, gender equality, market-oriented policies, and an overall commitment to just and democratic societies are also essential and mutually reinforcing.

Report of the International Conference on Financing for Development, U.N. Doc. A/Conf/198/11 (2002), http://www.un.org/esa/ffd/.

wise reconfigured to better comport with the demands of the contemporary political and economic world. The claim that law provides an exit from the political controversies and interests that plague developing countries has surfaced before. The first wave of law and development aimed primarily to diffuse a culture of legality, and to promote modernization through the reform of legal education and the judiciary.[11] Although the current era also is clearly associated with the export of American professional practices,[12] the second wave is just as concerned with diffusing the content of the legal regimes, particularly the rules that govern economic transactions.[13]

Governance, rule of law, and legal reform projects aim not merely to institute law-based societies; it is not love of the law in the abstract that motivates these efforts. Rather, as the conditions of their emergence suggest, such projects are instruments by which to re-order social and economic relations along a pre-ordained path, a means to achieve concrete political objectives. The reason of law stands largely in the service of a vision of economic progress, with the protection of human rights now introduced as a minor theme to respond to the "social" dimension of the agenda.[14]

The result has been described as an odd coupling, one that places law in the service of libertarianism and endorses deregulation in the name of constitutionalism.[15] While "good governance" itself might be taken as a cipher, an essentially open and contestable term, it currently incorporates and reflects a particular ideology and a related set of arguments about the institutional preconditions of economic growth.[16] In practice it refers to a quite specific list of demands, conditions, rules, and institutions. These typically include: transparency and accountability on the part of the state, respect for the rule of law, safeguarding of property and contract rights, fiscal austerity, low taxes, and an investment-friendly regulatory environment.[17]

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11. For a retrospective on the first wave of the law and development movement, see David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062.

12. *See, e.g.*, YVES DEZELAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTITUTION OF A TRANSNATIONAL LEGAL ORDER (1996).

13. *See* YVES DEZELAY & BRYANT G. GARTH, *Legitimating the New Legal Orthodoxy*, *in* GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY 306 (Yves Dezelay & Bryant G. Garth eds., 2002).

14. *See generally Draft Proposal for a Comprehensive Development Framework*, from James D. Wolfensohn, to the board, management, and staff of the World Bank Group (Jan. 21, 1999), http://www.worldbank.org/cdf/cdf-text.htm.

15. *See* Comaroff & Comaroff, *supra* note 1, at 2.

16. The origins of these commitments are set out in John Williamson, *Democracy and the Washington Consensus*, 21 WORLD DEV. 1329 (1993).

17. *See generally* SHIHATA, *supra* note 9; INTERNATIONAL MONETARY FUND, *supra* note 8.

Good governance, however, also represents an effort to generate entire matrices of rules in the image of law's reason. What arguably marks the current moment is the concerted attempt to not simply rationalize existing law, but to use arguments about law's reason and difference from politics, special interests, and the strictures of culture and tradition to order and defend the content of background legal norms. Here, what we have is not the displacement of politics, but the continuation of politics by means of law, specifically, a politics that has become powerful enough to deny that it is politics. Moreover, reformers seek not just to legalize but to "constitutionalize" this project, to bind political actors in the future to these rules such that national governments will find undoing reforms or extricating themselves from institutions extremely costly, if not impossible.[18]

Good governance projects derive their authority and legitimacy from law's image as a reasoned practice that is sharply distinct from politics. Although legal reform policies are developed to pursue political and economic goals—and in the process (re)distribute power and resources—the fact that they travel as "law" obscures the fact that they remain a mode of ruling. On one level, the fact that "good governance" is about ruling should be obvious. Nevertheless, govern*ance* is distinguished from govern*ing*, which is indisputably about ruling, in the following way: governance is not top-down rule; no one is identifiably in the driver's seat. Good governance means simply instituting the matrix of "good" laws and institutions. Governance, and thus rule, occurs through the largely invisible constraints and coercions of the rules and institutions that form the background fabric of social and economic life.

In good governance projects, authority is at once assumed and denied. The authority assumed is the authority to project the framework in which all other political and legal issues are to be decided. What is beyond consideration is a baseline set of economic institutions and entitlements. The authority denied is that it is anything other than the elaboration of the reason of law and the implementation of efficiency.[19] In such a context, the injunction to "be normative" in legal analysis becomes an injunction to the lawyer or the legal academic to produce legal analysis in order to govern. Moreover, the parameters are set in advance: lawyers are invited to participate in an exercise in which the co-existence of justice and efficiency is assumed, and the primacy of

18. *See generally* David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 LAW & SOC. INQUIRY 757 (2000).

19. KERRY RITTICH, RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION, AND GENDER IN MARKET REFORM (2002).

property entitlements and contract enforcement is a fundamental part of the belief structure.

The problematic nature of the coercion and constraint comes not only from the prescriptive character of the projects but, from the fact that good governance reflects particular interests and values.[20] Efficiency is embedded in the good governance framework as a powerful regulatory ideal. The ideology about why it must prevail is simultaneously an argument about why interests and values that potentially conflict should be limited or excluded, prior to, or apart from, open political contestation over their merits.

Within this project, social justice claims have been subordinated as an independent set of values that might be pursued through legal rules and institutions; now, they are subsumed under the larger project of economic progress. Some may be cast as moral issues and achieve independent status as human rights. Nevertheless, those that cannot be successfully characterized in this way—struggles over the distribution of resources between different social groups, for example—are increasingly marginalized and excluded from consideration. In either case, the result is the separation of social and distributional concerns from the rules governing the economy.

Arguments about law can play an insidious role in this process, especially where respect for the rule of law is married to rule and policy choices that are not in any sense entailed by it. However faced with this linkage, those who are troubled by the orientation of reforms typically do one of two things. The first is simply to resist the project of rule-based reform *tout court.* The second is to attempt to insert new rules and institutions into the emerging governance and regulatory regimes, typically by framing them as human rights. Neither option seems likely to wholly respond to the concerns that motivate them. Nevertheless, other legal if not political options are available. Critical reflection on the frame of law is sorely needed and almost entirely absent, if only to trouble the arguments from reason and efficiency that serve to bolster choices that, below the patina of rights, are easily revealed as complex and contentious decisions. All position lawyers in roles other than handmaids to a process conceived and executed entirely within the optic of market-centered growth.

CRITICAL ALTERNATIVES

The appeal of law and development projects is great, as there is no

20. The term "coercion" contains no necessary normative charge; to observe that rules coerce and constrain is only to say that they function like rules.

evidence that those orchestrating reforms have any difficulty obtaining the legal expertise they seek. Notwithstanding, there are obvious perils to involvement in governance and law reform ventures. Among them are risks that the professional talents and training of the lawyer will be enlisted in ways that implicate them in coercive social engineering projects. Many such projects have already failed to live up to their advance billing; some have gone totally awry.[21] But even where reforms appear to be desirable, the claims of legal necessity with which they are promoted might still make those familiar with the operation of law deeply uncomfortable.

For some there are competing or compensatory attractions, such as the chance to be a "player" in the game. Some can, in good conscience, participate in the belief that they are furthering a project that constitutes "the way forward," the path of human or social progress. For those who cannot take comfort there, I would like to suggest the following and, in the process, trouble the distinction between critical or "deconstructive," and positive or "reconstructive," work.

At the outset it seems important to argue for a resuscitation of critical analysis as a distinct and valuable dimension of the law and development project.[22] As a discipline, legal scholarship straddles a divide. On the one hand, it is rooted in the profession and directed towards solving concrete problems in legal policy and practice. On the other, it is an analytical and theoretical practice. Yet while the first role is well established in contemporary governance and reform efforts, with lawyers aiding in the generation of policy and rules, the second is largely absent.

To paraphrase Wendy Brown, legal analysis need not march only in the service of an immediate political dilemma; to try to make it so may be to fall into a trap. There is an important place for distanced reflection on legal rules and reforms. Although such efforts may be discounted as not immediately helpful, even beside the point, critical reflection is far from disengagement from politics or the dilemmas of the "real world."[23] Given law's intimate connection with social organization and social power, even critique is unlikely to entirely shed its normative charge.

Critical scholars have often resisted the normative move, the efforts to extrude the political and ideological from accounts about law, and the idea that particular legal conclusions follow from commitments to rights or efficiency such that "right answers" simply become a matter of pro-

21. JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS (2002).

22. For a sustained argument on the importance of separating critical analysis from political objectives, see BROWN, *supra* note 5, particularly note, *Symptoms: Moralism as Anti-Politics*. *See also* Comaroff & Comaroff, *supra* note 1, at 45.

23. BROWN, *supra* note 5.

fessional skill or craft. Indeed, resistance to the quick slippage into the prescriptive mode is central to the critical project. The basis of this resistance is not merely an uncontrolled subversive or oppositionist instinct; rather, it emanates primarily from the sense that the overwhelming compulsion to answer the question in the terms in which it is posed allows many assumptions that are crucial to the pertinence or intelligibility of the question itself to remain unquestioned and intact.[24]

Almost as often as critical scholars have made such observations, they have faced the following criticism: It is not enough to be critical of the content of legal rules or the structure of legal argumentation; you have to offer an alternative, a prescription by which it can be fixed. Otherwise, the critique is empty, even worthless.[25] Yet, as Schlag observes, "One might think that destruction is inherently bad and construction inherently good, but this view, while pervasive, is woefully inadequate. Indeed, it all depends upon what is being destroyed and what is being constructed."[26] From the standpoint of those not entirely invested in the current order, critique may be regarded as constructive; in the process of critical reflection, roads now foreclosed may be opened.

What follows are four possible critical optics or strategies, not all of which are entirely distinct. It is obvious that at least some of them may be compatible with existing reform proposals, as what they foreclose is not any particular rule or reform, but rather the arguments of entailment which, whether on the basis of the rule of law, efficiency, or even human rights, currently give them primacy and legitimacy. All are predicated on the idea that it may be more useful to try to uncover and trace what we are doing when we pursue different types of law reform than to prescribe precisely what to do, and that the role of midwife, whether to efficiency or human rights, does not exhaust the functions of those with legal expertise in the context of global law reform efforts. All propose a much chastened normative role for the legal professional and all challenge the hyper-investment in the reason of law to resolve social, political, or economic issues. At the same time, all of these proposals at least implicitly resituate law as a site of political conflict and a place in which some of the work of its resolution might take place. All, however, discourage investment in the pious or moral dimension of law, especially to

24. For a detailed exploration of the assumptions embedded in this question, see Richard Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779 (1992).

25. *Id.* For a discussion of this phenomenon, see Wendy Brown & Janet Halley, *Introduction*, *in* LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown & Janet Halley eds., 2002).

26. *See* SCHLAG, *supra* note 6, at 68.

the extent that it forecloses the exploration of competing arguments and alternatives.

A cautionary note seems in order. The relative absence of critical reflexivity to date is not accidental. The policing of alternative legal analyses comes from the fact that what is acknowledged, even emphasized, in such analyses—the distributive dimension of reforms, the ideological character of reform proposals, the cultural particularity of "universal" rules—is normally excluded. Because such elements may be excluded as a matter of the structure and integrity of claims about the role of law in development, and even the status of the discipline itself, to venture into this territory is to risk speaking the voice of unreason, the classic place to which dissenters of all stripes are consigned. Notwithstanding, there remains a useful role for legal academics in uncovering the assumptions behind reforms, reflecting on their biases, and trying to foresee their consequences along multiple axes. In particular, it seems important to try to project how rule and institutional changes might reallocate resources and power in specific contexts. Far from forays into new territory, these tasks primarily involve recuperating some of the most basic insights and techniques of legal analysis.

1. *Resisting the Project of Law Generation/Demoting the Lawyers and Economists*

One possibility is to simply state that, for reasons of legitimacy and basic democratic control, lawyers should have no privileged place in determining many of the questions that are currently cast as matters of lawyerly expertise. Put another way, there should be an active effort to disenchant the world about sole reliance on the professional tools of law and reason to solve the problems of development, and to demote the role of lawyers (as well as other technocrats) in governance ventures.

It needs to be emphasized that this is not a rejection of law, or the rule of law, or even the importance of law. "Rejecting the law" is not an option; we live in a world structured at every turn by legal rules. Nor does it necessarily compel disengagement on the part of legal academics from a process that, like it or not, is in full swing, although some are sure to find that an appropriate response. It *is* a rejection of the claims about law's insulation from politics and, in particular, a contestation of the idea that there is a broad framework of laws that is simply required to be modern or civilized, and is for that reason properly excluded from the forces of politics and democratic deliberation. To say that such questions can and should be answered by economists, lawyers, or other technocrats is to participate in the fiction that they can be successfully

divorced from questions about the organization of social life, the distribution of social power, and the allocation of social resources.

Lawyers should simply come clean about the impossibility of this. Paradoxically, such an admission is unlikely to end the role of the lawyer in the legal reform process; it may even encourage more legal advice and greater participation, though on less problematic terms. Among its salutary effects might be deeper reflection on the desirability of proposed reforms, greater skepticism toward what is offered, interrogation of the interests that are affected, for either better or worse, consideration of the expected consequences, as well as open assessment of alternatives.

Despite the tendency to dismiss those who fail to offer a well-formulated alternative, there may be considerable virtues in not having a fully articulated positive program, all of which parallel concerns that have been raised in development theory.[27] First, it can be a deliberate choice to reject the uncritical export of law and avoid the imperial tendencies present in such ventures. Second, progressive lawyers might want to create space for local alternatives. As law expands, more and more issues are moved out of the zone of democratic deliberation and into the zone governed by reason or efficiency, the expansion of law may legitimately be resisted where it represents the compression of politics. Third, lawyers may (and probably often should) feel unequipped to offer formulaic answers from afar, as there can be a deep artificiality about reform proposals which are generated by those who will not experience their effects. The intuition behind the norm of self-determination is that important social decisions, legal reforms among them, should be made not simply with attention to how they will be received and play out in given contexts and histories, but also by those who will have to live with the consequences. Such consequences impose a singular discipline on the decision maker, so much so that eliminating them fundamentally denatures the decision making process. It is simply a mistake to think that the outcomes will remain untouched, or that they will be better in some global sense, when this element is absent from the process.

2. *Critical Readings/Multiple Readings*

As compared to discussions in domestic contexts, debates around

27. *See generally* ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD (Sherry B. Ortner et al. eds., 1995); ALBERT O. HIRSCHMAN, A PROPENSITY TO SELF-SUBVERSION (1995); Balakrishnan Rajagopal, "International Law and the Development Encounter: Violence and Resistance at the Margins," 93rd ASIL Proceedings, 16 (1999).

law reform "for export" to date have been remarkably flat and one-dimensional. Right now, the economic lens predominates. Even from within the economic optic, efficiency concerns control, crowding out distributive considerations, although redistribution is a persistent and inevitable effect of reform. Thus, one useful role lies in simply deepening and complexifying the accounts of the legal reform process; much more attention could be profitably paid to the multiple dimensions of legal rules. These efforts also might aid rather than impair the law and development project, if only because they may provide insight into why and how reforms routinely produce unforeseen outcomes.

There is a range of methods that could be employed to this end. Law and development projects need to be looked at in cultural terms. Specific claims should be analyzed empirically. The path of reforms should be traced historically and genealogically. Dominant arguments could be analyzed semiotically, with attention to the narrative they project about the world. Historical work is particularly valuable in tracing the contingency of even the most well-entrenched legal rules and uncovering the rhetorical and ideological shifts in the structure of legal argumentation over time. Multiplying the types of legal analyses would permit us to detail the different functions and properties of laws, even where greater efficiency is the motivation behind their implementation. In sum, it would enable us to better trace the flow of resources, the creation of new powers through law, and the emergence of new social groups and political constituencies.

Critical analysis directs our attention to the role of law in constituting social relations and practices, rather than merely regulating them after the fact; it reminds us that legal rules stand to be implicated in the production of the very social phenomena to which law is called to respond. Attention to this role raises a whole series of inquiries in the context of reform. How might reforms affect existing social groups? Workers? Women? Ethnic or national minorities? How might they affect sexual identities, racial affiliations? What new social formations might they produce?

Critical readings should aim to bring to the surface, rather than repress, the tradeoffs that are involved in different reform paths. One of the most pernicious dimensions of simplistic rule of law and good governance narratives is the claim that there are no conflicts among desirable values and ends. Resistance is sure to arise from contesting what is dogma, to wit, that the implementation of efficiency enhancing rules is an uncontentious goal, that everyone stands to gain from free trade, that property and contract rights are the paramount legal entitlements, and that rule-based regimes "level the playing field" and ensure fairness

among otherwise unequal parties. Treating such claims as interrogatories rather than simply facts, however, is likely to engender better attention to the actual effects of reforms. Although transformative projects backed by law are often imagined as inherently progressive, they are not necessarily so. In addition, there is inevitable uncertainty and risk in law reform. If there is a comparative advantage that lawyers bring to the table, it is familiarity with the varied and unpredictable path of legal rules in operation. Indeed, no one else can be expected to possess the intimate knowledge of the fate of legal rules that lawyers and legal academics acquire in the course of their professional lives.

In short, to the extent that we get involved in law and development ventures, at a minimum we should export the critique too. It seems at best negligent, at worst disingenuous, to fail to speak candidly about the conflicts within the discipline, and to suppress the wide variety of opinions about whether particular reforms are a good or bad idea. To do so is patronizing and unnecessarily mystifying; it also seems unlikely to be persuasive, at least for long.

3. *Alternative Institutional Possibilities*

Another possibility is to trace alternative futures, by positing regulatory and institutional scenarios that are equally compatible with the rule of law.[28] To put it another way, lawyers could play a role in countering the "false necessity" of reforms, whether advanced in the name of law or growth *simpliciter*.[29] Some of these alternatives may be defended in the name of furthering the project of progress-through-economic-growth, although they are different from those conventionally put forward. But whether or not they are congruent with the aims of current governance and market reform projects, a central task should be to resist the idea that the rule of law, good governance, and market reform are institutionally interchangeable, or that any one configuration of laws is required to create market regimes based on the rule of law. Lawyers have a useful professional role to play in detailing the myriad ways in which market norms have been institutionalized in different contexts and at different periods of time in the same jurisdiction. Perhaps at the present time, one of the most important tasks is to simply point out the variety of different legal rules that might be available to respond to the challenges and dilemmas posed by globalization.

Fetishism about particular rules and institutions may stand in the

28. For arguments to this effect from economists intimately acquainted with current development and market reform projects, see DANI RODRIK, THE NEW GLOBAL ECONOMY AND DEVELOPING COUNTRIES: MAKING OPENNESS WORK (1999); STIGLITZ, *supra* note 21.

29. *See generally* ROBERTO MANGABEIRA UNGER, POLITICS: FALSE NECESSITY (1987).

way of some otherwise needed or desired social transformation. For example, changes may be foreclosed because they are said to trespass on property rights, because they differ from the rules and institutions conventionally found in model market societies, or because they overtly further a particular social or distributive interest rather than a "general" or "universal" interest. All such claims, however, rest on assumptions that close analyses of law easily disturb. Legal scholars might point out that property rights, for example, are routinely disaggregated and allocated among different groups, reconstituted by a variety of regulatory structures, and restrained by the operation of other legal rules both "private" and "public."

Actively exploring alternatives mitigates the risk already emerging in current governance and market reform schemes that regulatory diversity will be foreclosed, even as the proposed rules are manifestly unable to deliver on all of their promises, and even as there is increasing evidence that they produce varied, rather than predictable, results. In some contexts, critical lawyers actually might want to put forward relatively well-fleshed-out reconstructive projects. Such proposals might be advanced strategically, as a counterpoint to reform models already in play; they may also represent truly viable alternatives. Nevertheless, any such proposals could not be represented as timeless and universal in their value or general in their effects. Rules and institutions may exhaust their utility; even the most well-intentioned and well-crafted may be used for perverse purposes. Such possibilities should be foreseen and acknowledged up front, so that excessive and ultimately counterproductive investments in particular reform paths may be avoided. Put another way, even counter-proposals require a certain modesty, contingency, and revisability.

4. *Local Alliances*

While critical analysis is unlikely to assist ventures that simply seek to proliferate, or impose, boilerplate laws, lawyers may wish to work with those who are engaging in, or resisting, institutional reforms or legal transformation on the ground. These are likely to be constituencies who are currently excluded from or disadvantaged within law reform processes, whether particular groups within states, states themselves, or regions whose interests are currently not well-represented in regime-building processes. For example, developing states are persistently underrepresented in such processes at the international level, with predictably deleterious results to their welfare and interests.[30]

30. *See generally* G. Helleiner, *Markets, Politics, and Globalization: Can the Global Economy be Civilized?*, United Nations Conference on Trade and Development, 10th Raul

In such contexts, the content of reform proposals is not something that can be fully specified in advance. As the alternative development literature stresses, development can be radically particular in its effects.[31] Lawyers and legal scholars of all stripes should be prepared for challenges to, even rejections of, their own notions and ideals in the process; they may turn out to be at odds with the perceptions and desires of those that they seek to assist.

Caution is clearly warranted with respect to simple reliance on human rights to alter the path of reform, although the language of rights may be the most immediately available way of framing demands in politically intelligible terms.[32] Economic rights—rights with (re)distributive objectives—are often distinguished from "real," that is to say civil and political, rights. In a world of competing claims and demands, many of which are also increasingly framed as fundamental rights,[33] new rights claims may fail to deliver the hoped-for results. At the current moment, the risk is that they will be consigned to the realm of moral or ethical claims and distinguished from legal entitlements altogether.

For those with transformative aims, it may be more important to interrogate the effects of existing rights and proposed reforms, although contesting the background rules of economic transactions is often unfamiliar terrain and, in any event, it is terrain that has already been claimed as the proper territory of economic analysis. Those advancing efficiency arguments hold a significant advantage because many of their arguments have entered into the belief structure concerning law and the new economy and have been institutionalized in a variety of ways. Nevertheless, there remain enough puzzles about the path of reform to provoke interest in alternative analyses. If law is a constitutive power in social life, one with particular ideological force at the present moment, then the generation of critical accounts of law and development may itself help remake the future, in ways both modest and more far-reaching.

Prebisch Lecture, Palais des Nations, Geneva (2000), http://www.unctad.org/en/docs/prebisch/Oth.en.pdf.

31. *See, e.g.*, CRITICAL DEVELOPMENT THEORY: CONTRIBUTIONS TO A NEW PARADIGM (Ronald Munck & Dennis O'Hearn eds., 1999); A POST-DEVELOPMENT READER (Majid Rahnema & Victoria Bawtree eds., 1997).

32. For a collection on articles of the complexities and perils of pursuing progressive political transformation through law, see THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 3d ed. 1998).

33. Property rights are given pride of place with human rights as the new fundamentals of development. *See generally* Wolfensohn, *supra* note 14.