THE WAR ON CIVIL LAW? THE COMMON LAW AS A PROXY FOR THE GLOBAL AMBITION OF LAW AND ECONOMICS

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I. INTRODUCTION

In 1997 Chile began a sweeping reform of its criminal procedural system, effectively replacing its traditional inquisitorial system with an adversarial one.[1] Motivated by post-Pinochet demands for democratic governance, the reforms seek to replace a system closely associated with the corruption and oppression of Chile's military dictatorship with one that will both symbolize and propel the country's democratic future. *La Reforma* drew strong support from both local and international human rights activists, who felt that the introduction of adversarial procedure would establish the kind of transparent and accountable criminal justice system required by a newly democratic Chile. At the same time, the reform found favor with neo-conservative groups who argued that the common law tradition would result in a more efficient pursuit of public safety, which, in turn, would lead to the rule of law necessary for increased economic growth. Both goals—the promotion of human rights and efficiency—were supported by multinational and donor organizations.

While Chile's ambitious judicial reforms represent a laudable attempt to improve the character and quality of the country's justice system, the government's decision to discard the inquisitorial procedural

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1 *See* Carlos Rodrigo de la Barra Cousino, *Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedural Reform in Chile*, 5 SW. J.L. & TRADE AM. 323, 325-26 (1998) [hereinafter de la Barra].

system wholesale can also be seen as representative of a broader trend. Around the world civil law is increasingly coming under attack as inherently untransparent and unaccountable—a legal system that is too amenable to the political machinations of corrupt and oppressive political regimes, and that puts up too many legal roadblocks to the free flow of capital. Common law, by contrast, is upheld as efficient, democratic, and business-friendly. The pursuit of economic growth as well as administrative and political modernization, developing countries are told, depends on the implementation of an adversarial common law system of justice.

Viewing the Chilean initiative in this context requires a reconsideration of the nature of the country's reforms. Why did the Chileans decide to adopt a procedural system completely foreign to their legal history, rather than attempt to modernize their traditional legal procedure? What can adversarial procedure achieve that inquisitorial models—equally outfitted with public courtrooms, victims' services staff, and computerized data management systems—cannot? More broadly, where do the dual goals of efficiency and transparency come from, and how closely associated are they with any one legal tradition? As the Chilean government moves forward with the implementation of its reforms, some actors in the "old" system question why the government did not provide the opportunity and resources to improve the inquisitorial system rather than dispose of it entirely.

Chile's experimentation with common law is only one example of what is arguably a global war on civil law. The ascendancy of common law is most clearly visible in developing countries where a robust judicial system has come to be seen as a core element of the rule of law and a necessary foundation for economic growth. In the development industry, loans, foreign aid, and admittance to multinational organizations are frequently used as levers to promote reform measures. Indeed, at the World Bank a new field of comparative economics appears to have found great purchase, taking as its central thesis that a country's legal institutions—and, more significantly, its underlying legal system—can determine its prospects for development.[2] Rather than being an isolated instance of what I will call a "common law transplant,"[3] Chile's

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[2] *See, e.g.*, Simeon Djankov et al., *Appropriate Institutions* (May 20, 2002), http://rru.worldbank.org/Documents/DoingBusiness/Overview.doc (paper presented to the World Bank Conference on Appropriate Institutions for Growth).

[3] The term "transplant" has, since it was first coined by Alan Watson, sparked a large debate about the nature of influence between legal systems. ALAN WATSON, LEGAL TRANSPLANTS: AN

reform can be seen as part of a broader global pattern. The purpose of this Article is not, therefore, to judge the accuracy of the claim that common law is more democratic and efficient than civil law, but rather to examine the roots of the trend to replace civil law mechanisms with common law ones, and its underlying normative assumptions.

The Article proceeds in five parts. The first part conducts an overview of the main theoretical arguments, outlining the influence of the law and economics movement on the discourse of legal reform, and briefly surveys the difficulty of drawing strict comparisons between common law and civilian legal traditions. The second part focuses on three empirical examples where common law has been promoted as superior to civil law: (i) the promotion of judicial independence in Poland; (ii) the quest for accountable and efficient criminal procedure in Chile; and (iii) the development of a new comparative economics at the transnational level, exemplified in particular by the work of the World Bank. The third part of the Article examines the normative assumptions underlying each of these empirical studies and traces the influence of the law and economics movement on the development industry and judicial reform initiatives. Finally, in the fourth part, the Article concludes by asking whether it is possible to distinguish civil and common law legal traditions from their national legal cultures, political systems, and power structures. In the abstract categorization of legal systems, "common law" and "civil law" become artificial ideals that seem to bear little resemblance to their varied applied realities. In this context the contest between civil law and common law can be seen as a proxy for an ideologically informed debate about the purpose of law in state formation, the flow of capital, and the regulation of markets.

APPROACH TO COMPARATIVE LAW (2d ed. 1993). Alternate metaphors, such as "legal translation," Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 5 (2004); and "legal irritant," Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998); have also been proposed. Throughout the paper, I use the term "common law transplant" to refer to reform initiatives specifically aimed at importing a legal practice or procedure that has grown out of the common law tradition or adversarial criminal procedure to a country that follows the civilian legal tradition.

II. OVERVIEW

A. LAW AND ECONOMICS AND THE DISCOURSE OF JUDICIAL REFORM

The contest between civil law and common law is an old one. In the late nineteenth century, A.V. Dicey suggested that while "lawlessness" and the "evils of despotism" were inherent to the French system, British common law was characterized by the principle of legality, or "the universal subjection of all classes to one law."[4] Max Weber, in contrast, argued for the superiority of civil law because of the rationality and predictability of legal codes.[5] In the 1960s and 1970s, the debate was resurrected by proponents of the law and development movement, which sought to improve economic performance in poor countries by modernizing legal institutions and building the rule of law.[6] Yet, as much as some comparative scholars sought to contrast common law and civil law, others pointed out the fallacies of promoting one legal tradition over the other—a comparison, they argued, which tended to rely on legal mythologies rather than on empirically sound analysis. In a well known critique of the law and development movement, David Trubek and Marc Galanter argued that the movement failed largely because it ignored the empirical reality of local contexts and domestic power structures which considerably altered the outcome of development initiatives.[7]

Trubek and Galanter's argument draws support from the observation that as countries have continued to borrow practices from other jurisdictions, the utility of forcing legal systems into abstract taxonomies has become less and less obvious.[8] Indeed, more recent comparative scholarship instead focuses on the possibility of legal

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4 A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 192-93 (10th ed. 1959). *See also* John K.M. Ohnesorge, *China's Economic Transition and the New Legal Origins Literature*, 14 CHINA ECON. REV. 485, 488 (2003).

5 Weber argues that the common law is a kind of "empirical justice," which is not subsumed under rational concepts. Empirical justice, moreover, tends towards either "strict traditionalism" or "a sphere of free arbitrariness and lordly grace." MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 216-17 (H.H. Gerth & C. Wright Mills eds., trans., 1946).

6 For a critical evaluation 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*, 4 WIS. L. REV. 1062, 1074-78 (1974).

7 *Id.*

8 Ohnesorge, *supra* note 4, at 486.

convergence and/or the development of a unified global legal system.[9] As one observer notes, "close inspection invariably reveals that countries firmly at the cores of the common law and civil law 'families' have inevitably borrowed legal rules, institutions or practices from outside their family, so that cross-fertilization and hybridization are rampant."[10]

In recent years, a global trend to promote common law institutions and practices over civilian ones has once again become apparent. Alternatively referred to by observers as a process of legal transplant,[11] "translation,"[12] "Americanization,"[13] or legal imperialism,[14] this new iteration of legal development tends to focus on the "new democracies" and transition economies of Eastern Europe, Latin America, and parts of Asia—countries with highly developed formal legal systems inherited from socialist and/or civilian legal traditions. Arguments made in support of such reform initiatives vary. For some, the common law proffers greater transparency and accountability; for others it promises improved efficiency and a better business climate. Civil law, by contrast, appears as an antiquated, inefficient, overly-regulatory system unable to protect individual rights or private property interests.[15]

On the surface, therefore, the "war on civil law" looks like just that—a series of increasingly frequent attempts to replace civil legal practices with common law ones. Closer examination of instances of common law transplant, however, indicate that a considerable part of

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[9] For a discussion of the barriers to convergence presented by political economy *see, e.g.*, John C. Reitz, *Doubts About Convergence: Political Economy as an Impediment to Globalization*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 139 (2002). For an analysis of convergence in European public law, *see, e.g.*, Chris Hilson, *The Europeanization of English Administrative Law: Judicial Review and Convergence*, 9 EUR. PUB. L. 125 (2003). For a critical review of convergence in corporate governance, *see, e.g.*, Brett McDonnell, *Convergence in Corporate Governance—Possible, But Not Desirable*, 47 VILL. L. REV. 341 (2002).

[10] Ohnesorge, *supra* note 4, at 486.

[11] WATSON, *supra* note 3, at 21.

[12] Langer, *supra* note 3, at 5, 29.

[13] *Id.* at 3, 26.

[14] Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383, 420 (2003).

[15] In a notable exception to this is trend, Charles Koch argues that civil law—in particular the civilian approach to "judicial design"—is particularly advantageous for developing countries because it relies on a professional cadre of judges who are more closely monitored than their common law cousins, thus ensuring a more independent judiciary. Charles Koch, *The Advantages of the Civil Law Judicial Design as the Model for Emerging Legal Systems*, 11 IND. J. GLOBAL LEGAL STUD. 139, 145-148 (2004). Moreover, the civil law's use of specialized tribunals, Koch argues, provides for more efficient adjudication and allows the regular judiciary to refrain from engaging in politicized decision making. *Id.* at 149-152.

what looks like an argument about civil law versus common law is actually a proxy for a different kind of ideological debate—one which counter-poses different conceptions about the function of law and the role of the state. Indeed, the critique of civil law arguably stems less from a contest between two opposing legal traditions than from the growing influence and ambition of the law and economics movement. As the field of law and economics has grown in theoretical scope, it has shifted its attention from particularistic, descriptive analyses of commercial laws or "rent-seeking" behavior, to sweeping prescriptive theories about legal systems as a whole. The application of the premise that individuals make rational, wealth-maximizing decisions to the law itself has had fundamental consequences for legal reform and the development industry. Legal systems are not measured by the kinds of principles they put forward, but rather by how efficiently they facilitate market interactions and prevent unnecessary and burdensome state regulation.

International actors play a particularly important role in this debate, seeing in the diffusion of common law an important element in a larger narrative about progress, capitalism, democracy, and modernization. The development industry is, of course, made up of a number of different kinds of organizations, varying significantly in size, budget, ideology, and purpose. However, critiques of civil law are playing a conspicuous role in shaping a wide range of judicial reform initiatives. Expending millions of dollars on judicial reform in the form of loans, grants, and technical expertise, international organizations, donors, nongovernmental organizations, and private consultants—frequently based in the United States—are under pressure to articulate coherent approaches to development and to demonstrate that their dollars are achieving results. Closer attention to the rhetoric adopted by international actors, as well as by the local lawyers, economists, and government officials who drive the reform process, reveals the dominance of the law and economics paradigm. Terms like *rule of law* and *judicial independence* have become the shibboleth of the development industry,[16] while *efficiency*, *transparency* and *predictability* appear to have acquired intrinsic value that requires no elaboration. These terms, resting on particular assumptions about rational choice and

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[16] *See, e.g.*, Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar./Apr. 1998, at 95; Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* (Carnegie Endow. for Int'l Peace, Working Paper No. 30, Sept. 2002), *available at* http://www.carnegieendowment.org/files/wp30.pdf.

the purpose of law, have become universal goods, leading reformers to adopt what has been called a "rigid template" both for diagnosing the causes of economic stagnation and for providing legal solutions.[17]

In this context, the critique of civil law cannot be understood simply on its own terms; instead, it appears to act as a channel for other kinds of arguments that are largely historically unrelated to legal practices or procedures. In the current debate, the real question is not whether the common law is in some way superior to civil law but how certain ideological assumptions about the role of the state and law, informed by the law and economics movement, have influenced the discourse and practice of legal reform.

B. "COMMON LAW" AND "CIVIL LAW" TRADITIONS: COMPARING TWO STRUCTURES OF MEANING

A number of scholars have explored the essential differences between the civil and common law traditions;[18] this Article will not re-examine such well-covered ground. However, most comparative legal literature also notes the fallacy of describing common law and civil law systems as coherent and fixed categories.[19] Several factors undermine the rigid categorization of the two legal traditions.[20] The vast heterogeneity of civil law countries, for example, is particularly evident. While common law countries manifest significant variation in the evolution of their shared British heritage, civil law countries share neither a common national origin nor even a common language.[21]

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[17] Kathryn Hendley, *The Rule of Law and Economic Development in a Global Era, in* THE BLACKWELL COMPANION TO LAW AND SOCIETY 605, 609 (Austin Sarat ed., 2004).

[18] *See, e.g.*, Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009 (1974).

[19] *See, e.g.*, Ohnesorge, *supra* note 4.

[20] John Merryman helpfully points out the difference between judicial "systems" and "traditions". JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 1-2 (2d ed. 1985). A legal "system," he observes, "is an operating set of legal institutions, procedures, and rules," while a legal "tradition" is "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught." *Id.* Thus, while it is difficult to speak of a singular and unvarying adversarial or inquisitorial "system," we can speak of two distinct traditions, each marked by a particular approach and theory of law. Throughout the Article I will follow Merryman's distinction and use "system" to refer to the broader set of institutions and practices developed in different jurisdictions, and "tradition" to refer to the shared characteristics of an historical family.

[21] For a detailed comparative analysis of civilian and common law traditions *see* COMPARATIVE LEGAL TRADITIONS (Mary Ann Glendon et al. eds., 1994); ARTHUR TAYLOR VON MEHREN &

Further, at the same time as civil law displays considerable internal heterogeneity,[22] common law and civil legal traditions look more alike than they are often portrayed. Both traditions distinguish between legal institutions and other kinds of religious, political, and customary institutions.[23] Both entrust legal institutions to a specialized, professional elite, and both support the idea that law is binding upon the state itself.[24] Indeed, some argue that in the contemporary world, the main differences between common law and civil legal tradition lie "more in the area of mental processes, in styles of argumentation, and in the organization and methodology of law, than in positive legal norms."[25]

Most comparative scholars, moreover, point out that there is no such thing as a purely civil law or common law country. Although there is considerable debate about the extent to which the two legal traditions are converging,[26] there is little doubt that all systems display some degree of hybridization. Such mixing is the result both of historical processes of borrowing, colonization, and imitation, and—at least in the developed countries of the North—of the growth of the modern administrative state. In the social welfare state, case law has given way to modern statutes, civil law judges more openly engage in creative judicial interpretation, and the doctrine of precedent has deteriorated.[27] At the same time, as one scholar observes, the explosion of administrative law has "encroached on *all* preexisting sources of law."[28] Thus, civil law and common law countries alike "have entered the age of legislation triumphant, the judge militant, and bureaucracy rampant."[29]

Because of the considerable heterogeneity existing within each tradition, as well as the ongoing processes of mixing and borrowing

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JAMES RUSSELL GORDEY, THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW (2d ed. 1977); RAYMOND YOUNGS, ENGLISH, FRENCH AND GERMAN COMPARATIVE LAW (1998).

[22] For example, the historical development of the civil law in Germany differs significantly from that of the civil law in France, resulting in key variations in the modern-day legal systems of the two countries. For a comparison of the civil law in France and Germany, *see* VON MEHREN & GORDEY, *supra* note 21, at 48-96.

[23] HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 7-8 (1983).

[24] *Id.* at 7.

[25] Glendon et al., *supra* note 21, at 64.

[26] *See supra* § II.A.

[27] Mary Ann Glendon, *The Sources of Law in a Changing Legal Order*, 17 CREIGHTON L. REV. 663, 683 (1984).

[28] *Id.*

[29] *Id.*

between the two traditions, any attempt to define common law and civil law according to a fixed group of characteristics has only limited descriptive power. A mechanical approach of this kind risks focusing on the presence or absence of a single legal procedure or actor, such as the jury system or investigative magistrate, without recognizing the variety of roles this mechanism can serve under different legal models. Under such a system of classification, moreover, every time a country undertakes a reform measure, either the country must be "reclassified" or the definition of the legal tradition must be amended.[30]

Rather than attempting to define the differences between common law and civil law traditions as strict categories, some have suggested that examining the basic philosophical differences between the two traditions—what Máximo Langer refers to as two different "structures of interpretation and meaning"[31]—may be a more fruitful approach. While the two legal traditions share many of the same outward characteristics, their basic orientation—their sense of purpose and internal logic—remain quite distinct. This difference is constituted by, and has important consequences for, the distribution of power amongst legal actors. For example, while common law and civilian legal traditions share a number of legal actors, they respond differently to such basic questions as who is authorized to initiate a complaint, decide on the charge, and set the agenda for the case. The structures of interpretation that characterize each legal tradition have important consequences for how the legal actors understand both the purpose of the criminal justice system and their role within it.[32]

Moreover, in both systems the production and reproduction of structures of meaning occurs primarily through the socialization of legal actors.[33] Legal education is, of course, a primary means by which legal actors internalize a particular understanding of the shape and purpose of "the law." As one commentator observed about the differences between legal education in common law and civil law countries, "While the common law student is taught to mistrust generalization and is expected to ferret out individually whatever patterns and structure are there to be found, the civil law beginner is kept at a certain distance from the facts and starts out with a ready-made version of the organization, methods

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[30] Langer, *supra* note 3, at 7.

[31] *Id.* at 10.

[32] *Id.*

[33] Langer refers to this process as the "dimension of individual dispositions." *Id.* at 11-12.

and principles of the system."[34] The socialization of legal actors—the development of a kind of common "legal consciousness"[35]—equally occurs through firms, legal associations, judicial colleges, and government ministries.[36] This legal consciousness is further crystallized to the extent that legal actors begin to self-identify in opposition to each other. Thus, for example, common law lawyers know that they operate in an adversarial system because they do not participate in an inquisitorial system—a legal tradition that is commonly caricatured in the common law world as authoritarian and corrupt.

Framing common law and civil law as "structures of meaning" helps to focus attention not only on the different ways in which each tradition distributes power and responsibilities amongst the legal actors,[37] but also on the resilience of the traditions to legal transplants. While a system can be broken down into component parts, such that any one part can be replaced or reproduced, the internal logic and orientation of legal traditions cannot be so easily modified or replicated. Legal systems are therefore far less likely to replicate an external legal procedure than they are to resist, appropriate, adapt, and modify it. Legal actors—who have internalized a particular structure of meaning and interpretation—may resist the importation of a new practice or procedure, or may modify the new legal procedure in order to make sense of it.[38] Significantly, they may also have a vested interest in defending the scope of power accorded to them by the current legal system and will therefore resist attempts to redistribute power.[39] Thus, even identical legal rules will function very

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[34] Glendon et al., *supra* note 21, at 133.

[35] The term "legal consciousness" has been used to describe the ways in which ideas about (official) law, both conscious and unconscious, affect the way that people experience the law in everyday life. For a discussion of the development of the concept and its differing meanings in North America and Europe, *see* Marc Hertogh, *A 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich*, 31 J. L. & SOC'Y 457 (2004).

[36] Langer suggests that the socialization of lawyers occurs through interactions with the legal community, for example in law school, judiciary school, in articling positions, and through interaction with courts. Langer, *supra* note 3, at 12. Applying a Bourdieuian analysis, Dezalay and Garth observe that law schools play an important role in the perpetuation of the ruling elite by providing "a means for the exchange, conversion, and reproduction of social or relational capital of the dominant families." YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES 19 (2002).

[37] Langer, *supra* note 3, at 13.

[38] Langer, relying on Pierre Bourdieu's concept of *habitus*, refers to this as the "dimension of individual dispositions." Langer, *supra* note 3, at 11-13.

[39] Equally, they may have a vested interest in pursuing a legal transplant precisely because they are likely to benefit from the reallocation of power within the legal system. This is further explored in the case study on judicial reform in Chile in Part II, *infra*.

differently in different legal cultures. As John Ohnesorge, a comparative legal scholar, observes, "This realization greatly complicates intellectually honest projects to remake societies by transplanting legal rules and institutions; indeed, if one defines law in a more sociological sense, as law in action rather than law on the books, it is arguable that there is no such thing as a legal 'transplant,' because law does not exist except as experienced in a particular society."[40]

While this exploration of the common law and civil legal traditions has been brief, it raises several key points for our examination of the critiques of civil law. First, "civil law" and "common law" countries can neither be fitted into homogenous categories nor rigidly contrasted as archetypal opposites. Second, the differences between civil and common law traditions may ultimately come down to the internal logic of the traditions rather than to any one specific practice. Third, these insights have important consequences for the dynamics of legal transplants; attempts to export or import legal practices are likely to meet resistance or, if adopted, to evolve into a wholly new practice in the recipient country.[41]

III. WAR STORIES: EMPIRICAL STUDIES OF THE WAR ON CIVIL LAW

In examining the war on civil law, this Article focuses on developing countries. While some countries, such as Italy and Spain, have also experimented heavily with common law transplants,[42] it is in the context of development that we see most clearly the economic pressures and incentives to adopt aspects of common law or adversarial procedure. This section therefore describes three empirical examples of the critique of civil law: two country-specific case studies and a policy initiative from an international organization. The two country studies,

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[40] Ohnesorge, *supra* note 4, at 486.

[41] Langer observes that a significant problem with the metaphor of legal "transplant" is that it doesn't capture the possibility that "even when the reformers try to imitate a legal idea or practice as closely as possible, this new legal idea may still be transformed by the structure(s) of meaning, individual dispositions, institutional and power arrangements, systems of incentives, etc., present within the receiving legal system." Langer, *supra* note 3, at 31.

[42] *See, e.g.*, Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, 62 LAW & CONTEMP. PROBS. 233 (1999); Stefano Maffei, *Negotiations "on Evidence" and Negotiations "on Sentence": Adversarial Experiments in Italian Criminal Procedure*, 2 J. INT'L CRIM. JUST. 1050 (2004).

focusing on Chile and Poland, are in many ways prototypical examples of common law transplants that have been undertaken in a number of other countries. For example, Chile's criminal procedural reform parallels similar projects undertaken by Guatemala and Bolivia, and on a smaller scale by Venezuela, Honduras, El Salvador, Peru, Ecuador, Colombia, Nicaragua, and Costa Rica.[43] Similarly, attempts to promote judicial independence in Poland have also been undertaken in Russia, Bulgaria, Moldova, and a number of other Eastern European and Latin American countries.[44] These case studies were chosen, therefore, both because of the particular insights they afford and because they exemplify the reform efforts of a larger number of countries.

The third empirical example takes a different tack. Rather than focusing on a judicial reform initiative in a single country, this example closely examines *Doing Business in 2004: Understanding Regulation*,[45] a policy report published by the World Bank that has gained considerable attention since its publication. By focusing on the World Bank, rather than a third country-specific case, the Article explores the hypothesis of a war on civil law at a transnational level. Specifically, it examines the development of a new field of study that takes as its subject the relationship between legal systems and economic performance.

Each of the empirical studies is used to highlight a different aspect of the war on civil law, although some common threads run through all three. In examining efforts to strengthen judicial independence in Poland, we see the rising dominance of the rule of law movement in the development industry. The Chilean criminal procedural reforms highlight the role that young "Americanized" elites play in

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[43] The U.S. Agency for International Development [USAID] has been particularly active in supporting legal reform in these countries. *See, e.g.*, USAID, CRIMINAL JUSTICE & LEGAL REFORM,http://www.usaid.gov/locations/latin_america_caribbean/democracy/rule/dg_rule4.html (last visited Mar. 9, 2007) (hereinafter USAID, CRIMINAL JUSTICE); Steven E. Hendrix, *Innovation in Criminal Procedure in Latin America: Guatemala's Conversion to the Adversarial System*, 5 SW. J.L. & TRADE AM. 365 (1998); Steven E. Hendrix, *USAID Promoting Democracy and the Rule of Law in Latin America and the Caribbean*, 9 SW. J.L. & TRADE AM. 277 (2003).

[44] For a discussion of judicial independence initiatives in post-communist countries, *see generally* ANDRÁS SAJÓ, JUDICIAL INTEGRITY (2004). For a discussion of efforts to promote judicial independence in Latin America, *see* Linn Hammergren, *Judicial Training and Judicial Reform* (USAID, Series no. PN-ACD-021, 1998), *available at* http://www1.worldbank.org/publicsector/legal/Judicial%20Training.pdf; Linn Hammergren, *Institutional Strengthening and Judicial Reform* (USAID, Series no. PN-ACD-020, 1998), *available at* http://pdf.dec.org/pdf_docs/PNACD020.pdf; José E. Alvarez, *Promoting the "Rule of Law" in Latin America: Problems and Prospects*, 25 GEO. WASH. J. INT'L L. & ECON. 281 (1992).

[45] WORLD BANK, DOING BUSINESS IN 2004: UNDERSTANDING REGULATION (2004), *available at* http://rru.worldbank.org/Documents/DoingBusiness/2004/DB2004-full-report.pdf.

importing American legal practices, which some have argued indicates a broader process of American hegemony. The World Bank report illustrates the rise of a new comparative economics, which links civil law with heavy regulation, corruption, and inefficiency. In Part III of the Article, the common normative assumptions underlying all three cases will be examined further, tracing the connections between the law and economics movement and the development industry.

A. THE PROMOTION OF "JUDICIAL INDEPENDENCE" IN POLAND: DONORS, DOLLARS AND THE RULE OF LAW

Like many other "new democracies" in Eastern Europe and Latin America, since the late 1990s Poland has engaged in a series of extensive initiatives to strengthen the independence of the judiciary.[46] These reforms received considerable support from international financial institutions, unilateral donor organizations, and private philanthropies, which vigorously supported the establishment of the rule of law in transition countries.[47] Much-coveted membership in the European Union

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[46] *See* Regular Report of the Commission on Poland: The Judicial System, http://www.fifoost.org/polen/EU_Poland_2002/node19.php (last visited Oct. 29, 2006). In 1989, the so-called "Round Table Agreement" between the Solidarity Party and the Communist Party established the framework for Poland's transition to democracy. Stanislaw Frankowski, *The Independence of the Judiciary in Poland: Reflections of Andrzej Rzeplinski's Sadownictwo W Polsce Ludowej* (*The Judiciary in People's Poland*), 8 ARIZ. J. INT'L & COMP. L. 33, 47 (1991). A principal aspect of the agreement was the constitutionalization of an independent judiciary. *Id.* That same year, the Sejm amended the constitution providing, among other reforms, for life tenure for Supreme Court judges and protection against removal except under conditions provided by law. *Id.* at 50. The Sejm also passed the Act on the National Judicial Council, which took as its central premise the apolitical nature of the judiciary. *Id.* at 49. The act promoted the idea of self-governance by, for example, removing the supervisory powers of the Minister of Justice and placing significant responsibility for the appointment and discipline of judges in the hands of the Judicial Council, with final approval by the President. *Id.* at 49-50. While an interim constitution was passed in 1992, and a final constitution was implemented in 1997, the protections for the judiciary were maintained, and new statutory provisions have since been introduced. *See* Regular Report of the Commission on Poland: The Judicial System, http://www.fifoost.org/polen/EU_Poland_2002/node19.php (last visited Oct. 15, 2006).

[47] From the 1980s to the early 1990s, international donors like the World Bank and the U.S. Agency for International Development [USAID] spent an estimated one billion dollars on legal reform efforts. Upham, *supra* note 16, at 8. Thomas Carothers estimates that hundreds of millions of dollars have been spent specifically on rule of law efforts. Carothers, *supra* note 16, at 104. In Russia alone, Carothers points to extensive aid provided by the United States and German governments, as well as a fifty-eight million dollar loan from the World Bank. *Id.* at 103. In addition, the Russian government and Russian NGOs received loans, grants and technical expertise from the governments of Great Britain, the Netherlands, and Denmark, as well as the European Union, the European Bank for Reconstruction and Development, USAID,

has also provided a major incentive to implement rule of law reforms, and the EU continues to track progress towards judicial independence in post-communist countries.[48] While it would be simplistic to assert that the goal of strengthening the independence of the Polish judiciary originated entirely in the activities of outside agencies, a number of scholars have commented on the powerful influence on developing countries of a "global industry promoting the import and export of the 'rule of law.'"[49] Indeed, some have gone so far as to describe the promotion of rule of law doctrine as a key vehicle for the spread of American imperialism. "Imperialism requires an 'imperial idea,'" argues Ugo Mattei, "a stronger ideological apparatus that can be reached only by means of strong and well-developed 'ideological institutions.' The ideas of a global market, of international human rights, of freedom throughout the world, and most notably of the 'rule of law' perform this ideological role."[50]

The premise of the rule of law is that sustainable growth and democratization cannot occur without, in the words of the late senior vice president and general counsel to the World Bank, Ibrahim Shihata, a "system based on abstract *rules* which are actually applied and on functioning *institutions* which ensure the appropriate application of such rules."[51] Good governance requires a known set of rules that are enforced, effective mechanisms to ensure the legitimate application of these rules, and an independent third party to resolve disputes in their application.[52] This emphasis on transparency and predictability resonates with the law and economics movement, which argues that, to the extent that people know and can predict the rules that govern their behavior, they will be able to behave efficiently.[53] It is only with a "perfect market

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the U.S. Justice and Commerce Departments, and the U.S. Securities and Exchange Commission. *Id.*

48 The European Union Accession Program monitors efforts at strengthening judicial independence in Eastern Europe. EU Accession Monitoring Report on Judicial Independence, Preface, http://www.eumap.org/reports/2001/judicial/sections/front/preface (last visited Oct. 29, 2006) [hereinafter Monitoring Program]. The Monitoring Program is funded by the Open Society Institute, a New York-based private philanthropy group. *Id.*

49 DEZALAY & GARTH, *supra* note 36, at 3. *See also* Carothers, *supra* note 16.

50 Mattei, *supra* note 14, at 401.

51 Upham, *supra* note 16, at 9.

52 *Id.*

53 As one scholar explains, "[t]he economic analysis of law is an application of this "efficiency" perspective to legal rules. The underlying supposition is that jurisprudence ought to evaluate legal rules and norms according to a criterion that determines whether or not they heed or hinder the efficient use of resources." HANS-BERND SCHÄFER & CLAUS OTT, THE ECONOMIC ANALYSIS OF CIVIL LAW 3 (2004). General consensus dates the origin of the law and economics

of information" that individuals can make rational choices, enter into agreements, or determine under what circumstances they are willing to break agreements. If decisions are made behind closed doors, they are more open to corruption and inconsistent reasoning, which may result in rent-seeking behavior and increased transactional costs.[54]

According to the rule of law paradigm, a robust judiciary is essential to ensure that rules are applied fairly and impartially and that they develop appropriately over time. Rule of law proponents have argued that judicial independence contributes to the enforcement of contracts and private property rights, the reduction of corruption, the protection of civil and political rights (particularly for minorities), and restraints on arbitrary government action.[55] For example, in its policy document *Guidance for Promoting Judicial Independence and Impartiality*, the United States Agency for International Development (USAID) states:

> In democratic, market-based societies, independent and impartial judiciaries contribute to the equitable and stable balance of power within the government. They protect individual rights and preserve the security of the person and property. They resolve commercial disputes in a predictable and transparent fashion that encourages fair competition and economic growth. They are key to countering public and private corruption, reducing political manipulation, and increasing public confidence in the integrity of government.[56]

Instruments for achieving judicial independence include a number of constitutional and administrative measures, such as guaranteed tenure until retirement, protection against unwarranted interference from the executive, and freedom of expression and association for the judiciary.[57] These principles have been affirmed in a multitude of international documents, including the United Nations Basic

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movement to 1960, with the publication of R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

[54] Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 236-38 (1988); Richard Posner, *The Law and Economics Movement*, 77 AM. ECON. REV. 1, 5 (1987).

[55] Richard A. Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1, 2 (1998).

[56] USAID, Office of Democracy and Governance, *Guidance for Promoting Judicial Independence and Impartiality* 6 (Jan. 2002) (hereinafter USAID, Office of Democracy), http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf.

[57] Office of the U.N. High Comm'r for Human Rights, Basic Principles on the Independence of the Judiciary, http://www.ohchr.org/english/law/indjudiciary.htm (last visited Oct. 29, 2006) (referring to Principles 4, 8, 9, and 12).

Principles on the Independence of the Judiciary, which was adopted by the General Assembly in 1985.[58]

In short, an independent judiciary has come to be seen as a "norm of vital importance" to growth and stability in developing countries.[59] The concept is doubly powerful because of its appeal both to those concerned with economic growth and to those concerned with the protection of human rights. This potent combination holds great appeal for donor organizations, which come under their own pressure to compete for grant-making opportunities. The goal of judicial independence has a certain rhetorical force. Who would argue that having an impartial, objective judge is a bad thing, particularly when it can also be framed as a necessary condition for investment and growth?

Strengthening judicial independence is also, at least when defined in purely procedural terms, an achievable goal—one that can be gauged by "indicators of success" at the program officer's next board meeting. The ability to prove a causal relationship between a crime-reduction program and an actual decrease in crime is complicated by time delays, external, unrelated events, and inadequate measurement techniques, making it difficult for program officers to measure the success of the programs they support.[60] Progress towards judicial independence, however, can be much more easily marked by the successful introduction of constitutional and administrative safeguards for judges, such as immunity measures, protection of judicial budgets, increased and regulated salaries, and constraints on the executive's ability to remove judges. Regardless of whether the program has actually strengthened judges' ability to mete out justice, the program officer's target—the passage of new legislation, for example—has been achieved. Judicial independence is therefore a popular goal for program officers faced with the pressure of proving that aid dollars were well spent.

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[58] *Id.* *See also* Central Council of the Int'l Ass'n of Judges, Universal Charter of the Judge (adapted Nov. 17, 1999), http://www.iaj-uim.org/ENG/07.html; 6th Conf. of the Chief Justices of Asia and the Pacific, Statement of Principles of the Independence of the Judiciary, Beijing (Aug. 19, 1995), http://www.legislationline.org/legislation.php?tid=112&lid=5545.

[59] Terri Jennings Peretti, *Does Judicial Independence Exist? The Lessons of Social Science Research*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 103, 103 (Stephen B. Burbank & Barry Friedman eds., 2002).

[60] EMMA PHILLIPS & TODD FOGLESONG, VERA INST. JUST., COMMON GROUND AND CROSSCUTTING THEMES ON FUNDING PUBLIC SECURITY INITIATIVES IN LATIN AMERICA 8-10 (2003).

The importance of measurement in the development industry is a relatively recent trend, and one that has had considerable impact. A number of organizations have created programs to monitor judicial independence initiatives in Eastern Europe. For example, the Central European and Eurasian Law Institute (CEELI), a branch of the American Bar Association, has created a "Judicial Reform Index" to monitor the progress of Eastern European countries towards strengthening the judiciary.[61] The European Union Accession Monitoring Program similarly conducts evaluations of judicial independence in the new democracies of Eastern Europe.[62] The creation of such measurement practices and oversight bodies is arguably part of a larger global explosion in monitoring. As Michael Power argues, the trend towards "meta-regulation" is rooted, in part, in the neo-liberal preference for "'managerialist' instruments of accounting, budgetary control, auditing, and quality assurance."[63] The rise of monitoring has had a profound impact on the behavioral patterns of organizations, as individuals and institutions reconstruct themselves to be more easily auditable.[64] Thus the very type of data that organizations like CEELI collect is closely tied to the same neo-liberal logic that feeds law and economics, and may have a significant influence on local strategies for judicial reform.

Yet for all this attention, some observers suggest that judicial independence initiatives in Poland have not only failed to improve the quality and neutrality of the judiciary but have in some respects enlarged the potential for corruption and biased decision making. In describing the mixed success of the Polish reform efforts, Polish legal scholar and reformer Wiktor Osiatynski observes, "While it is true that the courts are less dependent on governments than other branches of the state, they seem to be much more dependent on private pressures by organized

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[61] According to CEELI's website, the Judicial Reform Index (JRI) "is proving essential as CEELI, its funders, and . . . emerging democracies themselves target judicial reform programs and monitor progress as they work toward establishing accountable, effective, and independent judiciaries." Am. Bar Ass'n, *The Judicial Reform Index*, www.abanet.org/ceeli/publications/jri/home.html (last visited Feb. 8, 2007). The JRI tracks thirty different factors, including educational and professional training of judges, case management, physical and technological infrastructure, adequacy of compensation, tenure, and system of appellate review. Am. Bar Ass'n, *The Judicial Reform Index: Overview*, http://www.abanet.org/ceeli/publications/jri/jri_overview.html (last visited Feb. 8, 2007).

[62] Monitoring Program, *supra* note 48.

[63] Michael Power, *Evaluating the Audit Explosion*, 25 LAW & POL'Y 185, 191 (2003).

[64] *Id.* at 189-91. *See also* MICHAEL POWER, THE AUDIT SOCIETY: RITUALS OF VERIFICATION 1 (1997).

groups, by money interests, and by the mafia."[65] Judicial councils, rather than acting as the quality control mechanisms they were intended to be, "use the principle of judicial independence to tame criticism and . . . [the] confidentiality in disciplinary proceedings to avoid accountability."[66] Rather than placing checks on judicial accountability, Osiatynski notes, "Judicial councils tend to act as if they were the judges' union, protecting members' interests at all costs."[67]

A principal cause of increased corruption may be the very reform effort that was designed to strengthen judicial independence. Specifically, the notion of an independent judiciary depends on judges being qualified by characteristics of "personal maturity, the ability to doubt one's own assumptions, and to weigh various values."[68] In the common law tradition, these qualities are fostered through years of practice or teaching before a candidate is eligible for the bench.[69] In the civil law tradition, however, the judiciary is generally a professional career path requiring specialized higher education for judges or passing a state examination.[70] As a result, Osiatynski observes, "Young judges, with no life experience, maturity, tact, and other personal skills are vested with almost unlimited power."[71] With heavy dockets and little supervision, young judges are quickly overwhelmed.[72] Traditionally, the inexperience of new judges has been countered by the appellate courts' close scrutiny over the work of the lower courts.[73] This relationship, however, was considerably attenuated by the reforms in the 1990s, which were designed to increase judicial independence by limiting the control of higher courts.[74] The result, Osiatynski concludes, was inevitable: "a

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[65] Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 INT'L J. CONST. L. 244, 264 (2003).

[66] *Id.*

[67] *Id.* In Russia, President Putin has been strongly critical of the Judicial Qualification Commissions, suggesting that they are too lenient and treat fellow judges as "a corporate caste." Eugene Huskey, 'Speedy, Just and Fair'? Remaking Legal Institutions in Putin's Russia 13 (2002) (unpublished article, on file with author). Dimitrii Kozak, Putin's main legal advisor, commented on the finding that 15 of 20,000 Russian judges had taken bribes in 2000, that "[o]ne of two things is going on here: either judges are angels or there's not a mechanism for fighting judicial corruption." *Id.*

[68] Osiatynski, *supra* note 65, at 264.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 265.

[72] *Id.*

[73] *Id.* at 264.

[74] *Id*. at 265.

growing number of inexperienced, poorly trained young judges who try to draw rewards from the power of their offices."[75]

Osiatynski's observations about the perverse consequences of legislative and institutional initiatives to improve judicial independence may, of course, only be evidence that these particular initiatives were poorly planned rather than that judicial independence itself doesn't work. Or, his insights may be evidence that, regardless of whether judicial independence is an admirable goal, attempts to import common law mechanisms into civilian legal culture can have adverse consequences. The idea that judicial integrity depends on the structural independence of the judiciary is deeply rooted in the logic of the adversarial tradition: the adjudicator of a dispute should be a neutral third party who ensures a level playing field on which the two parties can effectively and zealously marshal their arguments. The independence of the adjudicator is considered to be central to his or her ability to remain objective and impartial before the interested parties. The presence of an independent adjudicator is thus not only essential for justice to be done but also, as the common law maxim goes, for justice to be *seen* to be done.

This concept fits awkwardly into the civilian legal tradition. While a civil law judge should be disinterested, in the sense of not having a personal stake in the outcome of a case, he or she is specifically supposed to represent the state in the search for the truth, rather than be independent from it. The state, in this paradigm, is not the object of suspicion but rather an entity with a legitimate interest in pursuing factual truth. This does not, however, mean that civilian judges are subject to "undue" interference by the executive. "Sitting" judges (*magistrats du siège*) under French civil law, for example, are protected from being removed from office except in accordance with the law.[76] All decisions by the administrative courts are subject to appeal, and errors of law can be appealed to a *Cour de Cassation*, which functions to ensure the consistent application of the law across France.[77] Other measures successfully ensure the impartiality of judges in the French system, including immunity from liability[78] and *incapacités*—prohibitions from adjudicating in particular situations that may give rise to conflicts of

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[75] *Id.* at 265.

[76] CHRISTIAN DADOMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM 135-40 (1993).

[77] *Id.* at 227-28.

[78] Judges do not have immunity in cases of abusive conduct, and litigants can sue the state for a wrongful act by an individual judge (including but not limited to abusive conduct). *Id.* at 136.

interest.[79] Litigants may also request that their case be transferred to another court or undertake a civil action against the court to require a judge to recuse him- or herself.[80]

These are only some of the ways in which the relationship between a judiciary and executive in a civil law system has evolved to ensure judicial integrity. What is clear is that France, like other civil legal systems, has established a relatively fair, objective, and impartial judiciary "despite" its structural position in relation to the executive. The successes of Western European countries therefore require us to question whether the corruption of civil law judges in some jurisdictions relates to some inherent characteristic of the civilian legal system itself or rather to the political culture or historical development of the specific country. By introducing common law mechanisms to insulate civil law judges, as Osiatynski illustrates, reformers risk upsetting existing checks and balances and creating a situation in which judges are removed both from the scrutiny of the state and from the norms of the judicial community. This does not mean, of course, that countries that experience a high level of judicial corruption would not benefit from specific reform measures. However, these measures need not attempt to replicate the concept of "judicial independence" that originates in, and is appropriate to, common law.[81]

B. EFFICIENCY AND DEMOCRACY: THE QUEST FOR ACCOUNTABLE CRIMINAL JUSTICE IN CHILE

Chile, like Poland, has undertaken sweeping judicial reforms as part of its transition to democracy. Perhaps the most ambitious of these initiatives has been the reform of the Chilean criminal procedural code,

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[79] *Id.* at 139-40.

[80] *Id.* at 137, 139-40.

[81] Frank Upham also points out that the goal of securing an independent judiciary may be both unobtainable and undesirable. Upham, *supra* note 16, at 7. Rule of law proponents, Upham observes, equate politics with corruption, such that a "clean, procedurally transparent" and fundamentally apolitical judiciary is the only way to ensure impartial decision making. *Id.* at 19. This positivist conception of the law resonates with the law and economics movement, which similarly frames economic approaches to law as non-political and value-free. Yet politics, Upham argues, "is the lifeblood of all regimes, especially democratic ones." *Id.* Instead of focusing on the depoliticization of the judiciary, Upham concludes, "international financial institutions and other international purveyors of the new rule of law orthodoxy should be concerned with the judiciary's legitimacy and effectiveness, not its political purity." *Id.* Judicial independence is a rule of law ideal, which, Upham concludes, the United States has not even attempted to implement and which would be detrimental if it did. *Id.* at 7.

which began in 1995. This has been a particularly symbolic effort; in any country, the criminal justice system represents the coercive arm of the state and is a major tool through which the state organizes power and distributes punishment.[82] After seventeen years under military dictatorship, the criminal justice system in Chile figured closely in the public imagination with secret trials, corrupt judges, and state oppression.[83] Many in the post-Pinochet government recognized that democratization could not occur without radically reconstituting the scope, purpose, and power of the criminal justice system.[84] As Carlos Rodrigo de la Barra, a professor of law at Diego Portales University, comments, "The basic idea of the reform was to 'democratize' the judiciary by opening its structures to a new institutional framework."[85] The legal framework reformers looked to was an explicitly adversarial one.

In 1997 the Chilean Congress amended the constitution to create a new National Office of the Public Prosecutor (*Ministerio Público*), which is responsible for overseeing police investigations, deciding on appropriate charges, and presenting the state's case against the accused.[86] At the same time, the reforms substantially expanded the National Public Defender's Office, implemented protections for the accused (such as the presumption of innocence and the right to remain silent) and public oral trials.[87] Judges in the new system, now sitting in panels of three, more closely resemble the common law ideal of a neutral arbiter rather than that of the active inquisitor.[88] At the same time, the reforms were accompanied by victims' services programs, new information technology, and the construction of bright, modern offices and courtrooms.[89] Professional standards were raised, requiring trained lawyers to carry out many of the functions filled by clerks under the old system.

Implementation of the reforms began in two regions of the country in 2000 and has been instituted in several regions in each

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[82] De la Barra, *supra* note 1, at 363-64.

[83] Carlos Rodrigo de la Barra notes that concerns about, for example, the absence of an independent judge, lack of access by defendants to their files, and lack of control over the police, contributed to low public confidence in the system. *Id.* at 325-26.

[84] *Id.* at 324.

[85] *Id.*

[86] For a description of the creation of the National Prosecutor's Office, *see id.* at 332-48.

[87] *Id.* at 350.

[88] *Id.* at 359.

[89] *Id.* at 360-63.

following year.[90] In June 2005, implementation of the reform began in the last region of the country, greater Santiago, where 40 percent of the population lives.[91] Because of this staged implementation, the "new" adversarial system and the "old" inquisitorial one co-existed in Chile for over five years, operating under different procedural norms. This allowed actors in both systems to consider each other's practices and progress. In particular, some actors in the old system, faced with the prospect of extinction, began to ask why the goals of efficiency and accountability required the wholesale rejection of the inquisitorial model. To what extent could Chile's traditional inquisitorial system be modernized and reformed without abandoning its central premises altogether? As a clerk in a *juzgado* (criminal court) in Santiago commented, "If we had that kind of budget . . . we too could fix people's lives."[92] While it is impossible to know how a reformed inquisitorial system would have fared as compared to the system Chile ultimately adopted, the clerk's comment calls into question what theories, beliefs, and incentives motivated the adoption of an adversarial model.[93]

The decision to adopt an adversarial procedural model can be traced to two public concerns. The first, as previously indicated, was a desire to promote accountability and transparency in a criminal justice system deeply implicated in a corrupt and oppressive political history.[94] As de la Barra observes,

> The spirit of the Reform was very strong, which reflected the desire to review and rebuild important parts of the State, such as the judiciary. The movement towards Reform was initiated by the reaction to the traumatic human rights abuses in the 70's and 80's. During this period, the Chilean State displayed its inability to protect the most basics [sic] human rights, which were being violated by the Security Forces under the dictatorship.[95]

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[90] ANTONIO MARANGUNIC & TODD FOGLESONG, VERA INST. JUST., CHARTING JUSTICE REFORM IN CHILE: A COMPARISON OF THE OLD AND NEW SYSTEMS OF CRIMINAL PROCEDURE, INTRODUCTION 4 (2004), *available at* www.vera.org/publication_pdf/254_498.pdf.

[91] *Id.* at 2; U.S. Department of State, *Background Note: Chile*, http://www.state.gov/r/pa/ei/bgn/1981.htm (last visited Mar. 30, 2007).

[92] Joe Hirsch, *Access to Justice for Victims and Defendants in Chile*, JUSTICE INITIATIVES, Feb. 2004, at 36, *available at* http://www.justiceinitiative.org/db/resource2?res_id=102064 (last visited Feb. 27, 2007).

[93] For a comparative study of the effectiveness of the old and new systems, *see* MARANGUNIC & FOGLESONG, *supra* note 90.

[94] De la Barra, *supra* note 1, at 324-25.

[95] *Id.* at 324.

For those concerned with the protection of human rights, the appeal of the adversarial reform lay primarily in the protections it offers the accused. Where the old inquisitorial system made people vulnerable to its whims, the new system is based on the idea of guaranteed rights. The introduction of public trials and panels of judges, for example, greatly reduces the opportunity for corruption or the arbitrary application of the law. As one judge working in the "old" system explains, she supports the reforms because she is a *garantista*.[96] She worries, however, that the public will have a difficult time accepting the need for such protections and foresees some conflict. For Chileans, she comments, public security is almost a national obsession, so that letting accused persons go free in order to protect their rights may encounter considerable resistance.

The judge's comments highlight the second concern addressed by the reform: the need for a criminal justice system that will effectively and efficiently reduce crime and maintain law and order.[97] While the fall of Pinochet was a triumph for some, for others the transition to democracy raised the specter of economic and political instability. Less concerned with protecting the rights of the accused, this faction was more interested in building a modern criminal justice system that would efficiently punish and deter criminal activity.[98] For the "efficiency" camp, the adversarial tradition also appeared to hold the solution. In the language of USAID, the "modern and efficient[] adversarial and oral style" seemed far removed "from the often laborious and paper-based trial procedures"[99] of the inquisitorial tradition. In particular, critics hoped that the adversarial model would prove more effective at "managing and reducing the backlog of the criminal courts and minimizing the number of cases ending without adjudication or

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[96] The term "*garantista*" refers, in Chile, to the need to "guarantee" the rights of the accused. Interview with Judge, Criminal Courts, Santiago, Chile (Mar. 5, 2003) (Vera Institute of Justice, Inc., internal memorandum on file with author). Interestingly, the concept of "*garantismo*" is already becoming a point of tension within the new system, highlighting the uneasy relationship between the goals of protection and efficiency. A senior prosecutor in Temuco, one of the most successful of the reform regions thus far, anxiously distanced himself from the term "*garantista*," which he felt the public equates with being soft on crime. Interview with Prosecutor, Office of the Public Prosecutor, Temuco, Chile (Mar. 7, 2003) (Vera Institute of Justice, Inc., internal memorandum on file with author). Interviews were conducted as part of a collaborative effort between the Chilean Ministerio Público and the Vera Institute of Justice, supported by the Tinker Foundation, to evaluate the success of Chile's penal reforms.

[97] De la Barra, *supra* note 1, at 328.

[98] *Id.* at 326.

[99] USAID, CRIMINAL JUSTICE, *supra* note 43.

sentence."[100] President Eduardo Frei himself suggested that the introduction of an adversarial procedural model would both result in a more equitable criminal justice system and help facilitate the country's socio-economic development.[101]

The reforms thus appealed both to "the foundational spirit of democratization and improving human rights standards," and to the demand for a more efficient, effective, and modern system for the reduction of crime.[102] More precisely, reformers believed that the importation of the adversarial model would find an appropriate balance between both sets of goals. As Cristian Riego, a professor of law at Diego Portales University and one of the principal architects of the reform, comments:

> While suppressing the inquisitorial system, the reform should result in the establishment of the basis for a new definition of rules in the criminal justice system. This definition may take different specifics [sic] directions, but the sole existence of three different institutional actors such as Judges, the Prosecutors and the Public Defenders are bases on which it is possible to build a more sophisticated system that may develop a balance between effectiveness and respect of individual rights.[103]

By distributing power more evenly between the three main legal actors—judge, prosecutor, and defender—the reformers hoped to transform the trial "from a mere inquest to a debate."[104]

The reforms in Chile are not taking place in a vacuum, however. A defining characteristic of the Chilean reforms is the strong influence of American legal practices. In restructuring the criminal justice system,

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[100] De la Barra, *supra* note 1, at 328.

[101] *See* MARANGUNIC & FOGLESONG, *supra* note 90, at 1 (citation omitted).

[102] The dual goals of transparency and efficiency also drew the support, as they did in Poland, from rule of law proponents. Indeed, the reforms were often framed as a move "towards the rule of law." For example, some reformers argued that a principal advantage of the adversarial model is that it makes the exercise of discretion by prosecutors and judges more explicit, and therefore more easily controlled. As de la Barra observes, "In a civil law country, an important set of assumptions and legal principles contribute in hiding the real exercise of discretion." De la Barra, *supra* note 1, at 326, 329. Principles such as the full enforcement of all criminal law, the judge as a mere voice of the written law, and the denial of the police discretion, have already created a dangerous distance between the law in the codes and the actual occurrences inside the courts." *Id.* By creating a "façade of legality," de la Barra concludes, the civil law allows legal actors to "gain power in the shadow of the legal regulation where the discretion leaks in silence." *Id.* By embracing the reality of discretionary decision making, and at the same time regulating its use, the adversarial tradition satisfies the demand for predictability and consistency at the heart of the rule of law movement.

[103] *Id.* at 331.

[104] *Id.*

Chilean reformers looked not to some abstract notion of "common law" or the "adversarial tradition" but to a specifically American adversarial model.[105] This raises the question, therefore, whether the kind of common law transplant that occurred in Chile is indicative of an increasing "Americanization" of legal practices around the world. Langer, for example, observes that there is an ongoing process by which American legal practices are being translated into civil law jurisdictions.[106] While Langer rejects a "strong" thesis of Americanization—that is, that the influence of American legal practices is resulting in the *re-creation* of American law in civil law jurisdictions—he suggests that Americanization is leading to the increasing fragmentation of the civil law world.[107] As civil law countries adopt, modify, resist, and transform American legal practices, they are likely to produce very different outcomes from each other as well as from the United States.[108]

Of course, the United States also sometimes provides negative points of reference for civil law reformers.[109] Chile's public defense system, for example, avoids many of the infamous fallibilities of the American system. Unlike in the United States, public defense in Chile is available to any defendant, regardless of income.[110] More significantly, access to justice in Chile is built around an institution, the National Public Defender's Office, rather than as a patchwork of pro bono

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[105] For de la Barra, for example, the American adversarial experience provides rich material from which to mold the Chilean reforms, particularly in the way the U.S. model distributes power between the three "legs" of the criminal justice system—prosecution, judiciary and defense. *Id.* at 332, 354.

[106] Langer prefers the term "legal translation" to "legal transplant" because, he argues, the metaphor more accurately describes the process of transformation that legal practices undergo "as they encounter the structural differences that exist between the adversarial and inquisitorial 'languages.'" Langer, *supra* note 3, at 5-6, 29-35.

[107] *Id.* at 3-4.

[108] *Id.* at 4, 62.

[109] In an analogous discussion, Kim Scheppele illustrates how, in the process of constitution-making, certain constitutional instruments or traditions may provide a "negative model". Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296, 298 (2003). As she puts it, "*rejecting* a constitutional option may be in some ways *more* crucial to the development of a constitutional sensibility than positively adopting a particular institutional design or constitutional clause." *Id.*

[110] Richard J. Wilson, *Growth of the Access to Justice Movement in Latin America: The Chilean Example*, JUST. INITIATIVES NEWSL. (Open Society Inst., New York, N.Y.), Feb. 2004, at 31, 32, *available at* http://www.justiceinitiative.org/db/resource2?res_id=102064 (last visited Feb. 27, 2007).

services, not-for-profit clinics, and ad hoc lists of counsel.[111] However, even while consciously trying not to recreate the pitfalls of the American system, the Chilean reformers retained the United States as their primary point of reference. American practices, procedures, and concepts provide both negative and positive models against which reforms are measured. As such, the United States continues to set the terms of debate for judicial reform.

The dominance of the United States in shaping the agenda of common law transplants is, for some, an indication of American hegemony. Mattei argues that the ascendancy of American law entails more than a pattern of transplantation of legal rules—it constitutes a change in legal *consciousness*.[112] Legal transplants, he asserts, are not simply "a mechanical import-export exercise," but involve a "diffusion of professional ways of thinking about the law."[113] American law schools are a primary vehicle for the diffusion of American legal consciousness. As we have seen, law schools are a primary means through which legal actors internalize the structure of meaning associated with a particular legal tradition. Because the United States is one of the few countries that offers primary legal education as a graduate degree, it is a popular destination for law students and young professionals from other countries who want to improve their marketability. Moreover, while in the past many colonial or post-colonial elites might have looked to the metropolises of Europe to build their international strategies, the center of gravity has shifted—for economic, political, and historical reasons—to the United States.[114] Thus, "American academia," Mattei observes, "can well be seen today as the global lawyer's graduate school in the sense that ambitious lawyers worldwide complete their graduate legal education in the United States."[115]

Not only do American law schools provide an opportunity for foreign lawyers to further their legal education, but they are also a source of international prestige that can be traded in for lucrative opportunities in the home country. Yves Dezalay and Bryant Garth refer to the process by which legal actors use foreign education and work experience to

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[111] *Id. See also Defensoría*, http://www.defensorialpenal.cl (last visited Mar. 21, 2007).
[112] Mattei, *supra* note 14, at 407-08.
[113] *Id.*
[114] DEZALAY & GARTH, *supra* note 36, at 6.
[115] Mattei, *supra* note 14, at 390.

garner prestige at home as "international strategies."[116] Scholarship, they point out, can be used as a "weapon in international competition," such that national legal actors "seek to use foreign capital, such as resources, degrees, contacts, legitimacy, and expertises . . . to build their power at home."[117] Thus part of the dominance of the rule of law paradigm was achieved by providing young American-trained professionals with opportunities for work and advancement, often on internationally-funded projects, or with non-governmental organizations or multinational corporations. Moreover, in using international capital to build a career locally, legal actors use the ideas they have gained abroad to invest in the transformation of local institutions and the state. In this way, American concepts and debates gain currency in local contexts.[118]

The development of judicial reform in Chile amply illustrates this process. Many of the young practitioners and legal academics who drafted the Chilean criminal procedural reform studied in the United States at some point in their careers, receiving masters degrees from elite law schools such as Yale, Berkeley, and Columbia. Armed with the credibility of American training, these young lawyers were able to secure positions of considerable influence in the Chilean legal community and take control of the process of judicial reform. This "international strategy" was successful both because of the prestige and legitimacy attached to American education by the broader Chilean community and because the ideas the reformers brought with them were already gaining ground domestically. The visions of judicial reform they proposed, moreover, were met with approval from international donors whose own recipe for judicial modernization involved the adoption of a U.S.-style criminal justice system.

The shift in power and authority from Europe to the United States has also been accompanied by the weakening of law itself as a source of authority.[119] While law was the chosen profession of the old elite in the developing countries of the South, economics has become the source of power and prestige for the new generation of "technopols"—

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[116] DEZALAY & GARTH, *supra* note 36, at 7.

[117] *Id.* at 7, 8.

[118] Dezalay and Garth add a further dimension to this analysis by describing how elites in the North also invest in "international strategies" in the South to gain legitimacy at home. For example, in the 1960s and 1970s, Chicago economists formed alliances with conservatives in Chile at a time when their position was relatively weak in the United States. By "winning" the neo-liberalism debate in the South, the "Chicago Boys" were able to gain considerably in legitimacy and status at home. *Id.* at 45.

[119] *Id.* at 17.

professionals who combine technical expertise and political involvement.[120] With the rise of neo-liberalism in the second half of the twentieth century, and in particular after the crisis of capital accumulation in the 1970s, technical expertise in economics became a legitimate and sought-after source of authority.[121] As the rise of the law and economics movement demonstrates, lawyers themselves were not immune to this trend. The idea that law can fruitfully be approached through the science of economics—and that law can serve to facilitate market forces rather than stand outside them—has had far-ranging impact. Even those who disagree with the idea that economics can help model human behavior in ways that are relevant to the law do not deny the dominance of the movement. [122]

Interestingly, as lawyers have come increasingly to look to economics as a source of expertise, some economists are once again putting law at the center of analyses about development. The ascendancy of a new comparative economics that looks to the legal origins of a country as a major predictor of its economic performance is the focus of the last empirical study.

C. "DOING BUSINESS IN 2004": LEGAL ORIGINS AND THE NEW COMPARATIVE ECONOMICS

In 2004 the World Bank released its annual report *Doing Business*, which received significant attention from media, development professionals, and academics around the world.[123] *Doing Business in 2004: Understanding Regulation* ("the report") suggests that the civilian legal tradition is a handicap for developing countries when compared to the common law tradition. Specifically, the report argues that a country's choice of legal system influences its regulatory scheme. As the authors of the report ask, "Is the level of regulation an outcome of

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[120] *Id.* at 28.

[121] For a detailed analysis of the rise of the field of economics and its relationship to law in this period, *see id.* at 73-94.

[122] *See* Richard A. Posner, *Law and Economics in Common-Law, Civil-Law, and Developing Nations*, 17 RATIO JURIS 66, 67 (2004) (quoting Anthony Kronman, former dean of the Yale Law School and a prominent critic of the law and economics movement, referring to it as "the single most influential jurisprudential school in this country").

[123] S*ee, e.g.*, *World Bank on Poland's Business Regulation*, POLISH NEWS BULL., May 25, 2004; *World Bank Lists Jamaica as Among Top Places to Do Business Globally*, BBC WORLDWIDE MONITORING, May 17, 2004; *NZ Easiest Place to Do Business, Says World Bank*, NEW ZEALAND HERALD, Sept. 9, 2004.

efficient social choice, or has it persisted because of inertia and a lack of capacity for reform?"[124]

The report begins from the premise that excessive regulation is bad for economic growth. "Heavier regulation of business activity generally brings bad outcomes," observe the authors, "while clearly defined and well-protected property rights enhance prosperity."[125] Regulation is associated with corruption and inefficiency as well as "cumbersome entry procedures, rigid employment laws, weak creditor rights, inefficient courts, and overly complex bankruptcy laws."[126] These negative ramifications drive businesses into the informal market, resulting in a reduced tax base, weak quality control of products, and poor economic outcomes.[127]

The report concludes that good regulation follows two key guidelines. The first is that government intervention should occur only where mechanisms for private ordering, mainly market forces and private litigation, have failed.[128] The second guideline is that regulations should only be implemented where there is sufficient capacity to enforce them.[129] This enforcement theory holds that an appropriate level of regulation exists at the point where the social costs resulting from state intervention are balanced against those resulting from private injuries—the harm done by private citizens by stealing, cheating, or otherwise unfairly taking advantage of each other.[130] The optimal balance between state intervention and private injury will vary depending on the type of activity being regulated and the state's administrative capacity. In countries with poor enforcement capacity—generally poorer countries—the social costs of state intervention are likely to be considerably worse and will not outweigh the social costs of private injuries. As a consequence, regulation should be more limited in these countries.[131]

The report identifies a number of factors that are associated with the level of regulation in a country, principal among which is the

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[124] WORLD BANK, *supra* note 45, at 83.
[125] *Id.*
[126] *Id.* at 87.
[127] *Id.*
[128] *Id.* at 92.
[129] *Id.*
[130] *Id.* at 91.
[131] *Id.* at 92.

country's legal tradition.[132] "Across all sets of indicators," the authors observe, "income and legal origin are the most important variables for explaining different levels of regulatory intervention, together accounting for more than 60 percent of the variation in regulation among the 133 *Doing Business* countries."[133] Specifically, countries with a French civil law tradition appear to be more interventionist than common law countries.[134] The report attributes this to a number of characteristics of the French civil legal tradition, such as mandatory legal representation and the requirement that complainants cite relevant parts of the law when filing a complaint, which can be expensive and onerous.[135]

While many of the observations and suggestions made by *Doing Business 2004* make instinctive good sense, they do not necessarily support the thesis that civil law imposes more obstacles to business than does common law. For example, the report suggests that the creation of specialized commercial courts can help resolve commercial disputes faster and more efficiently, thereby creating a favorable business climate. Yet two examples that the report cites are the specialized commercial courts in France and the colonial *consulados* of the Spanish empire—both of which are civil law countries.[136] Similarly, the report observes that the costs of proceedings vary considerably across countries and can significantly impede the effective functioning of courts. Yet, in the examples provided by the report, legal origins seem to bear little relationship with costs of proceedings; countries noted for affordable legal fees include the Netherlands, Taiwan, Brazil, and Uzbekistan, while India is cited as a country that imposes high costs of proceedings.[137] Moreover, many of the report's recommendations relate more to the administration of courts than to the country's specific legal tradition.[138] For example, establishing a system for tracking caseload and judicial statistics has more to do with adopting an innovative case management system than with some inherent characteristic of civil law. While the report's findings should not be entirely discounted, therefore, further

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[132] *See id.* at 86-87 (noting that countries with more representative governments have lighter regulation; other factors may include democracy, geographic location, the mortality rates of European settlers, and the openness of countries to trade).

[133] *Id.*

[134] *Id.* at 87.

[135] *Id.* at 43-44.

[136] *Id.* at 51.

[137] *Id.* at 118-20.

[138] *Id.* at 49.

consideration should be given to whether the associations it identifies bear a *causal* relationship with civil law.

Doing Business in 2004 is not the first study to seek to establish a causal relationship between legal traditions and economic outcomes. Indeed, the World Bank's report reflects the influence of a growing body of scholarship sometimes referred to as the *new legal origins* literature[139] or the *new comparative economics*.[140] This scholarship, largely centered in the economics department of Harvard University, takes as its central thesis that a country's legal system is a significant influence on the nature of its economic and political institutions and therefore on its economic performance, or good governance. While the traditional field of comparative economics appeared to expire with the end of the Cold War, proponents of the new comparative economics argue that legal systems may provide the key to understanding the variation in economic success amongst developing economies.[141]

In transition economies, the new comparative economists argue, governments must determine how best to protect property rights both from public and private expropriation.[142] State strategies for the protection of property reflect a tradeoff between two goals: controlling "disorder," which requires greater state intervention, and controlling "dictatorship," which constrains state power.[143] Legal systems have the effect of "limiting [the ratio of] dictatorship [to] disorder in fixed proportions," and the ratio of disorder to dictatorship is the result of historical development.[144] In the twelfth and thirteenth centuries, when the core of the two legal systems evolved, France was relatively disorderly, and England was relatively stable. Thus, "To counter disorder," Djankov et al. argue, "it was efficient for France to adopt a

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[139] *See* Ohnesorge, s*upra* note 3, for a critical review of the new legal origins literature.

[140] S*ee, e.g.*, Simeon Djankov et al., *The New Comparative Economics*, 31 J. COMP. ECON. 595 (2003) [hereinafter Djankov et al., *The New Comparative Economics*]; Simeon Djankov et al., *Courts*, 118 Q. J. ECON. 453 (2003); Edward L. Glaeser & Andrei Shleifer, *Legal Origins*, 117 Q. J. ECON. 1193 (2002); Rafael La Porta et al., *Legal Determinants of External Finance* (Nat'l Bureau Econ. Res., Working Paper No. 5879, 1997).

[141] *See* Djankov et al., *The New Comparative Economics*, *supra* note 140, at 596. Djankov et al. explain the development of the new comparative economics according to three historical events: the transition from socialism, the Asian financial crisis, and the European economic and political integration. *Id*. at 604.

[142] Simeon Djankov et al., *The New Comparative Economics* 15 (World Bank Pol'y Res., Working Paper No. 3054, May 2003), *available at* http://rru.worldbank.org/PapersLinks/Open.aspx?id=7185 (last visited Mar. 9, 2007) [hereinafter Djankov et al., Working Paper].

[143] Djankov et al., *The New Comparative Economics*, *supra* note 140, at 596-97.

[144] Djankov et al., Working Paper, *supra* note 142, at 15.

legal system with higher dictatorship than England, even at the cost of greater scope for sovereign abuse of power."[145] As a result, the common law has relatively more disorder while the civil law has relatively more dictatorship. Countries that follow the French legal tradition today are therefore much more likely to heavily regulate than common law countries.[146] The consequence of heavy government intervention, Djankov et al. suggest, is more bureaucracy, more onerous provisions for new entrepreneurs, and more widespread corruption.[147] The French legal tradition is overly formalistic, which is associated with longer delays "but not with greater efficiency, consistency, fairness or accessibility."[148]

Moreover, the new comparative economists argue, poor countries *need* less regulation than wealthier countries. "[L]ess developed countries . . . cannot buy much order with regulation. As a consequence, less developed countries need *relatively* less dictatorship in equilibrium, i.e., less regulation."[149] Like the World Bank report, the new comparative economists conclude that not only is civil law an inefficient legal system but also it is particularly inefficient for poorer countries.[150]

The findings of the World Bank and the new comparative economists have been met with considerable skepticism. The French Ministry of Justice, for example, devoted a recent issue of its research newsletter to *Doing Business in 2004*, calling on French jurists to focus their efforts on examining the economic efficiency of the French legal system.[151] Some economists have also criticized the emerging field, arguing that it is "logically flawed to analyze institutional formation and change solely in terms of the principle of the market" and that we cannot assume that individualistic rationality is causally related to institutional efficiency without further empirical study.[152] Other criticisms have been

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[145] Djankov et al., *The New Comparative Economics*, *supra* note 140, at 605.

[146] *Id.* at 610. *See also* Djankov et al., Working paper, *supra* note 142, at 15.

[147] Simeon Djankov et al., *The New Comparative Economics: A First Look* 11 (Apr. 1, 2002) (hereinafter Djankov, *A First Look*), http://siteresources.worldbank.org/INTABCDEWASHINGTON2002/Resources/Schleifer.pdf.

[148] *Id.* at 17 (emphasis omitted).

[149] Djankov et al., Working Paper, *supra* note 142, at 15.

[150] *Id.* at 15.

[151] *See* Yann Aguila, *Editorial*, LETTRE DE LA MISSION DE RECHERCHE DROIT ET JUSTICE [Research Mission of Rights and Justice Newsletter], Spring 2004, at 1, for a discussion of how the newsletter does not question the approach of the new comparative economists, but rather seeks to demonstrate the quality of French justice on the economists' own terms.

[152] Dic Lo, *Globalisation and Comparative Economics: Of Efficiency, Efficient Institutions, and Late Development* 5 (U. London Dept. Econ., Working Paper No. 137, June 2004). *See also* Bruno Dallago, *Comparative Economic Systems and the New Comparative Economics*, 1 EUR. J.

more scathing, questioning the underlying purpose of the methodology. One French scholar, for example, suggests that the ultimate goal of the World Bank report is to propose a unified international legal system—a goal that should be approached with great caution.[153] Economist Albert Breton—a native of Canada, which has a bi-juridical legal system—expresses similar skepticism, arguing that legal systems contribute only a fraction to economic development, and thus any difference in legal "efficiency" will ultimately have only a marginal effect on the country's economic performance. "We can't do other than to ask," Breton concludes, "why intellectuals waste so much time and effort trying to demonstrate that the common law is more efficient than the civil law."[154]

Other scholars have questioned the methodology employed by the new comparative economists. Ohnesorge worries that the quantification of legal phenomena is methodologically unsound and is designed largely to "meet the scientific demands of the modern economics profession."[155] In "assigning values to variables," the new comparative economists rely primarily on formal legal rules and judgments rather than on empirical studies showing how the law actually functions on the ground.[156] As over sixty years of socio-legal scholarship has established, there is a significant gap between law "on the books"—as it is formally described in texts, codes, and judgments—and law "in action."[157] Thus, for example, the common argument put forth by new comparative economists that the civilian legal tradition is overly

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COMP. ECON. 59, 78 (2004), for a critique of the "new comparative economics" suggesting that legal transplants will ultimately be relatively *more* inefficient. Paralleling Langer's critique of the "transplant" metaphor, Dallago writes, "[i]f an institutional organism (the receiver) is diverse compared to another organism (the transplanter), individual features too in the former (including capabilities, cognitive processes and organizational competences) are different from those that the transplanted institutions require. . . . [Therefore] the transplanted institutions would impose upon that organism exceptional adaptation and learning and resistance costs. . . . Inefficiency is the most obvious consequence." *Id.*

[153] Bertrand du Marais, *Répondre à la Banque Mondiale* [Response to the World Bank], LETTRE DE LA MISSION DE RECHERCHE DROIT ET JUSTICE [Research Mission of Rights and Justice Newsletter], Spring 2004, at 12.

[154] Francis Plourde, *Vers Une Malbouffe Juridique?* [Towards a "Fast-Food" Judiciary?], JOURNAL DU BARREAU 18 (Oct. 15, 2004) (Francis Plourde trans.) (quoting Albert Breton).

[155] Ohnesorge, *supra* note 4, at 488.

[156] *Id.*

[157] *Id. See, e.g.*, Tom Baker, *Blood Money, New Money and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275 (2001). For a recent example of socio-legal scholarship comparing "law on the books" with "law in action," sometimes referred to as "gap studies," *see* Austin Sarat, *Legal Effectiveness and Social Studies of Law: Unfortunate Persistence of a Research Tradition*, 9 LEGAL STUD. FORUM 23 (1985). *See also* Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 LAW & POL'Y 97 (1988) for a critique of "gap studies."

formalistic[158] may be based on an abstract and unrealistic version of how the law works in actuality. This artificial view of how legal systems function is aggravated by an over-reliance on particular legal scholars whose writing has provided an important, but highly partisan, contribution to legal scholarship. As Ohnesorge writes, while A.V. Dicey and Friedrich von Hayek "certainly said interesting things about law, no serious student of legal thought views these authors as providing neutral, scientific criteria for comparing legal systems."[159] In failing to take advantage of the insights of comparative law, the new comparative economists appear to be operating in a vacuum of legal scholarship.

While the reliance of the new comparative economists on legal mythologies created by Dicey and Hayek may be methodologically unsound, they provide us with some insight into the normative assumptions underlying the field. The writings of both Dicey and Hayek—and the pictures they drew of the common law and civilian legal traditions—were motivated by a desire to limit government intervention in the form of social regulation.[160] The new comparative economists take a similarly anti-regulatory stance—one which, as we have seen, may bear little causal relationship with the civil law. The next section explores the ways in which the war against civil law has become a proxy for other kinds of ideological conceptions about the role of government and law.

IV. THE GLOBALIZATION OF EFFICIENCY: EXPLORING THE NORMATIVE ORIGINS OF THE WAR ON CIVIL LAW

The common law transplants in Poland, Chile, and those prescribed by the World Bank are not isolated incidences. Rather, they represent a broader, global pattern that this Article has termed a "war on civil law". Whether motivated by a desire for increased transparency or improved efficiency, a concern about the protection of human rights or strengthening international investment, justice officials in civil law countries are turning increasingly to the common law tradition as a source of innovation and reform. This is not the first time that countries have borrowed legal practices from each other, nor is the process likely

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[158] Djankov, *A First Look*, *supra* note 147, at 17.
[159] Ohnesorge, *supra* note 4, at 489.
[160] *Id.*

to end. What, then, distinguishes the current pattern of legal development from a longer historical process of competition and cooperation between civil law and common law?

The current contest between common law and civil law can be distinguished by two key characteristics. First, the debate is characterized by the central role of the development industry in fostering common law transplants. Leveraging billions of dollars in loans and grants as well as technical expertise and international prestige, international donors exert immeasurable influence in determining the framework for judicial reform—its guiding principles, assumptions, and goals—and thus what kinds of initiatives will be implemented. Second, proponents of common law reform promote a methodological, rather than substantive, justification for reform. As the three case studies illustrate, since the late 1980s, common law transplants have been characterized by frequent reference to particular themes: the rule of law, transparency, efficiency, and deregulation. These terms and concepts signal an important shift from past efforts to assert the superiority of one legal tradition over the other. The common law tradition is not being upheld as a model for advancing a set of legal principles on the basis that they are morally superior to the civilian tradition; little attention, if any, is paid in the legal development literature to the substantive legal principles espoused by the two traditions. Rather, common law is perceived as a more efficient vehicle for facilitating a particular kind of economic and political reality. This Article concludes, therefore, with an examination of the influence of the law and economics movement on the discourse and practice of judicial reform.

The influence of the law and economics movement on North American law and jurisprudence has been discussed and dissected at length.[161] Over the past twenty years, the economic analysis of law has been used to analyze everything from tax shelters[162] and property rights[163]

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[161] S*ee, e.g.*, Eric M. Fink, *Post-Realism, or the Jurisprudential Logic of Late Capitalism: A Socio-Legal Analysis of the Rise and Diffusion of Law and Economics*, 55 HASTINGS L.J. 931 (2004); Gregory Scott Crespi, *The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Nonfalsifiability and Normative Bias*, 67 NOTRE DAME L. REV. 231 (1991); Richard A. Posner, *Values and Consequences: An Introduction to Economic Analysis of Law* (U. Chi. Law Sch., John M. Olin Prog. in Law and Econ., Working Paper No. 53, Mar. 1998), *available at* http://www.law.uchicago.edu/Lawecon/WkngPprs_51-75/53.Posner.Values.pdf.

[162] David A. Weisbach, *Ten Truths About Tax Shelters* (U. Chi. Law Sch., John M. Olin Prog. in Law and Econ., Working Paper No. 122, May 2001), *available at* http://www.law.uchicago.edu/Lawecon/WkngPprs_101-25/122.DAW.TLR.pdf.

to sexual harassment,[164] the rights of animals[165] and human emotion.[166] Indeed, far from restricting itself to purely economic areas of the law, proponents of law and economics have argued that the premise that "rational individuals pursue preference-maximizing actions and exchanges"[167] can be applied to the entire range of human behavior. In its broad scope, the diffusion of law and economics doctrine has had a considerable impact on legal discourse and legal consciousness. As Eric Fink points out, the movement's influence on the "terms and categories of legal discourse" has been particularly significant:

> That is, Law and Economics is most fully understood in socio-legal terms as constitutive of neo-Liberal ideology in and through legal theory and practice. In this sense, Law and Economics does serve to "legitimate and justify the newly emergent forms of domination" of late capitalisms. Yet it does so not in a blunt instrumental way, but by contributing to the hegemony of neo-Liberal ideology such that pro-corporate capitalist outcomes come to appear universal, rather than particular, and as common sense, rather than contested.[168]

This hegemonic influence informs, as we have seen, not only the legal discourses in North America but also the discourse of judicial reform prevalent within the development industry.

Some proponents of law and economics have argued that the common law is inherently more efficient than civil law because of its fundamental impulses. The process of codification at the heart of civil law, the argument goes, leads to overly theoretical, hyper-rationalist elaborations of the law, which do not bear out on the ground. Common law, by contrast, grows organically out of judge-made law—pragmatic

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[163] Douglas Licthman, *Property Rights in Emerging Platform Technologies* (U. Chi. Law Sch., John M. Olin Prog. in Law and Econ., Working Paper No. 97, Apr. 2000), *available at* http://www.law.uchicago.edu/Lawecon/WkngPprs_76-100/97.DGL.PlatformTech.pdf.

[164] Gertrude M. Fremling & Richard A. Posner, *Status Signaling and the Law, With Particular Attention to Sexual Harassment* (U. Chi. Law Sch., John M. Olin Prog. in Law and Econ., Working Paper No 69, Mar. 1999), *available at* http://www.law.uchicago.edu/Lawecon/WkngPprs_76-100/97.DGL.PlatformTech.pdf (follow "Social Science Research Network" hyperlink).

[165] Cass R. Sunstein, *The Rights of Animals: A Very Short Primer* (U. Chi. Law Sch., John M. Olin Prog. in Law and Econ., Working Paper No. 157, Aug. 2002), *available at* http://www.law.uchicago.edu/Lawecon/WkngPprs_151-175/157.crs.animals.pdf.

[166] Eric A. Posner, *Law and the Emotions* (U. Chi. Law Sch., John M. Olin Prog. in Law and Econ., Working Paper No. 103, Sept. 2000), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=241389 (follow "Social Science Research Network" hyperlink) (last visited Mar. 30, 2007).

[167] Fink, *supra* note 161, at 934.

[168] *Id.* at 945-46.

decisions based on real-life scenarios and reasoning that continue to resonate from the past.[169] Thus, judge-made law more closely resembles the free exchange of ideas at the center of the market paradigm.[170] Regardless of whether common law does, in fact, operate like the "invisible hand" of the marketplace, law and economics and common law share a neo-liberal inheritance that they continue to perpetuate. As Fink argues, "In this sense, Law and Economics not only 'codi[fies] the biases and dominant ideology, the common sense, of the historical period in which the common law developed, but also crafts and codifies the biases, dominant ideology, and common sense of a new historical period as it unfolds."[171]

Law and economics analyses generally take one of three forms. In its positive, or descriptive, form, the movement explores how laws affect human behavior and how individuals will respond to particular laws.[172] In seeking to identify the underlying "economic logic" of the law and legal institutions, proponents argue that law and economics is

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[169] Richard B. Cappalli, for example, describes the process of codification central to the civil law as "magnificent exercises in logic, starting with the most general purposes, propositions, and definitions, and logically elaborating their implications and interactions in a network of increasingly detailed rules. . . . Through logical reasoning, deductive and analogic, the civilian lawyers and judges extract the code's solutions to myriad human conflicts." Richard B. Cappalli, *At the Point of Decision: The Common Law's Advantage Over the Civil Law*, 12 TEMP. INT'L & COMP. L.J. 87, 90 (1998). Yet however well-reasoned they are, Cappalli argues, codes "are based upon general and incomplete constructs of reality and must necessarily be comprised of high level abstractions, even when elaborated by the ruminations of doctrinalists. This means that large spaces exist in the civil law system between relevant statements of law and the specific facts of actual human categories." *Id.* at 102. The common law doctrine of precedent, by contrast, "thrives in the reasons behind the rules" and adopts a more purposive approach to the elaboration of the law. *Id.* at 90-91 (emphasis omitted). Ultimately, Cappalli concludes, the common law method can achieve a greater degree of predictability and certainty. *Id.* at 93.

[170] Interestingly, although Posner argues that common law may be more efficient for the economic conditions of the United States, he proposes a "rules-first" approach for poorer countries that more closely resembles the codification of the civil law. Posner, *supra* note 55, at 2. The "capitalist rule-of-law ideal," Posner argues, may be prohibitively expensive for poorer countries, which end up in a "chicken and egg" debate about whether they need a strong legal system to be able to promote economic growth, or economic growth to be able to afford a strong legal system. *Id.* at 3. In response to this debate, Posner proposes that poor countries should first implement a system of rules, rather than "standards" which require interpretation. *Id.* at 4. Determining whether these rules have been violated does not require an exercise of discretion or the determination of numerous facts, so concerns about allowing weak and corrupt judiciaries too much discretion are lessened. *Id.* at 5.

[171] Fink, *supra* note 161, at 946-47 (citation omitted).

[172] Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1475. Posner describes these categories somewhat differently, arguing that law and economics has a heuristic, descriptive and normative mode. Posner, *supra* note 122, at 67.

fundamentally apolitical and positivist in its analysis.[173] It is in this heuristic function that law and economics has made its greatest contribution. In its prescriptive form, however, law and economics goes beyond the illumination of human behavior to ask how law can be used to achieve specific ends.[174] Here, the positivist claim is harder to maintain. Although proponents argue that the movement is fundamentally methodological, applying behavioral assumptions drawn from economic theory, critics have been quick to point out that these assumptions rest on an ideologically informed model of human behavior.[175] Finally, in its normative form, the movement asks how to assess the ends of a legal system.[176] This move has also been the subject of criticism, as some scholars have argued that in its promotion of the market paradigm, the law and economics movement "distort[s] the purposes of law and threaten[s] its very existence."[177]

From the point of view of the development industry, law and economics has had the greatest impact in its prescriptive and normative modes. The very project of judicial reform requires some normative sense of what a law, legal institution, or practice *ought* to look like—although this normative conception may be articulated in relation to a specific, local context. Justice Richard Posner of the U.S. Court of Appeals for the Seventh Circuit, perhaps the most influential law and economics theorist, identifies this broader normative goal with the construction of a unified economic theory of law. According to this theory, "Law's function is understood to be to facilitate the operation of free markets and, in areas where the costs of market transactions are prohibitive, to 'mimic the market' by decreeing the outcome that the market could be expected to produce if market transactions were feasible."[178] Laws can achieve this either by facilitating free individual exchange—by enforcing contracts, for example, or preventing expropriation by the state—or by intervening to restore "a dysfunctional market to efficiency."[179] By implication, too, a free market is often

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[173] Fink, *supra* note 161, at 933.

[174] Jolls et al., *supra* note 172, at 1474.

[175] Fink, *supra* note 161, at 937. Arthur Leff, in particular, critiqued the conception of a *homo economicus* at the heart of Richard Posner's theory. Arthur Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 462-77 (1974).

[176] Jolls et al., *supra* note 172, at 1474.

[177] Fink, *supra* note 161, at 939 (citing Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 1 (1987)).

[178] Posner, *supra* note 122, at 68.

[179] Fink, *supra* note 161, at 935.

promoted by the very absence of law. Laws, according to economic logic, either "impose prices on (or subsidize) individual action,"[180] thereby altering otherwise unfettered behavior. A poorly designed law can therefore result in rent-seeking behavior as some individuals take advantage of the privileged positions afforded to them. Thus, it is in removing bad, or overly-interventionist, legal regulation—in minimizing law *itself*—that a legal system can most efficiently facilitate market operation.

It is precisely this logic that informs the World Bank report *Doing Business in 2004*. The report, as previously discussed, begins from the assumption that regulation impedes economic growth, particularly in poor countries, which lack the capacity for consistent enforcement. Common law, the authors of the report argue, is superior to civil law because it tends to be less interventionist and procedurally formal, more efficient in its regulation of judicial procedures and entry into the market. In this analysis, the law's function in enforcing civil and political rights, or its aspirational dimensions,[181] nearly disappears from view. For example, in discussing the importance of a strong judicial system, the World Bank report observes that courts have four main functions:

> They encourage new business relationships, because partners do not fear being cheated. They generate confidence in more complex business transactions by clarifying threat points in the contract and enforcing such threats in the event of default. They enable more sophisticated goods and services to be rendered by encouraging asset-specific investments in their production. And they serve a social objective by limiting injustice and securing social peace.[182]

The courts' "social objective" of "limiting injustice" comes in a distant fourth, after the courts have succeeded in encouraging new contracts, enforcing old contracts, and enabling investment. Admittedly, *Doing Business in 2004* was written with the express purpose of comparing which countries provided the best business environments in 2004. Yet this statement does more than describe the role that courts can play in facilitating commercial transactions; it reflects a strongly neo-liberal stance about the role of the state in governing human interaction and the purpose of law in facilitating and validating this political model.

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[180] *Id.* at 934.

[181] "Law is a narrative of belief and aspiration." Roderick A. MacDonald, *Epistles to Apostles*, 39 ALBERTA. L. REV 668, 671 (2001).

[182] WORLD BANK, *supra* note 45, at 41.

Posner's argument that the purpose of law is to facilitate the operation of the free market reflects the growing ambition of the law and economics movement. Where proponents of the movement once used the science of economics as a heuristic device to better understand how rules about, for example, tort liability, will affect human behavior, some now seek to apply economic logic to legal systems as a whole. As Posner asks, "When doctrines are found to differ across countries, should the difference be ascribed to relevant economic differences or to the fact that some countries do not have efficient legal doctrines?"[183] Arguably, such a question reflects the imperialistic nature of economics itself, in which "the concept of supply and demand [is used] to explain the diffusion of economic theory into law."[184] Mattei makes a similar observation, arguing that

> The notoriously expansionistic and universalistic blend of neoclassical economic analysis, together with the very thick layer of ideological assumptions that are imbedded in economic reasoning and that produce the development of the evolution towards economic efficiency as a sort of second nature, are all behind the intellectual success of this line of reasoning about the law.[185]

However, this application of law and economics to comparative law is vulnerable to the same critiques that the law and economics movement has met elsewhere.[186] Do individuals really operate according to rational choice theory? Does the market paradigm govern all aspects of social relations? And, most importantly for this discussion, is the role of law really so limited that we can compare the relative value of common law and civil law in the degree to which they, in a sense, step out of the way of market forces?

The hegemony of law and economics is reflected in the rhetoric of judicial reform initiatives. Particular terms, such as *efficiency* and *transparency*, surface repeatedly both in the language of development agencies and of the recipient local actors. In their constant usage, such

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[183] Posner, *supra* note 122, at 69.

[184] Fink, *supra* note 161, at 942 n.74.

[185] Mattei, *supra* note 14, at 411.

[186] *See, e.g.*, Nicholas Mercuro, *Toward a Comparative Institutional Approach to the Study of Law and Economics*, *in* LAW AND ECONOMICS 17 (Nicholas Mercuro ed., 1989); Arthur Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974) (reviewing RICHARD A. POSNER, THE ECONOMIC ANALYSIS OF LAW (1973)); Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481 (1985), *available at* http://www.stanford.edu/dept/soc/people/faculty/granovetter/documents/Embeddedness1985AJS.pdf.

terms have almost become goals in themselves, such that the underlying assumptions they represent are no longer questioned. The efficiency of common law, for example, is a constant theme in judicial reform initiatives. As one socio-legal theorist notes, "The predominance of economists in the legal reform efforts aimed at the economy makes efficiency the most prized quality to be achieved in the reformed systems. This desire for efficiency is not limited to outcomes, but permeates the entire process."[187] In Chile, for example, the adversarial reforms garnered significant support because they promised to bring about a more efficient criminal justice system that would better preserve law and order.[188] This connection between efficiency and public safety requires further scrutiny, however. Posner argues that substantive and procedural efficiency are essential components of legal rules: "A rule is substantively efficient if it sets forth a precept that internalizes an externality or otherwise promotes the efficient allocation of resources. . . . A rule is procedurally efficient if it is designed to reduce the cost or increase the accuracy of using the legal system."[189] Yet if deterrence were the goal, wouldn't harsher punishments or the expansion of law enforcement agencies be more effective than an "efficient" justice system? The idealization of efficiency seems as much related to the rhetoric of legal reform circles as it does to the stated goals of the reform process.

Transparency has equally acquired a universal appeal, drawing a conceptual link between judicial reform and corporate reform, economists and human rights activists. The USAID guidelines on judicial independence, for example, observe that the goal of transparency is so important that it is "highlighted in nearly every approach outlined in the guide."[190] The policy document, furthermore, draws an explicit link between transparency and adversarial procedure, stating that "[o]ral, adversarial, and public proceedings have increased transparency in criminal proceedings in many countries."[191] While on the one hand

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[187] Hendley, *supra* note 17, at 612.

[188] De la Barra, *supra* note 1, at 328.

[189] Posner, *supra* note 55, at 4.

[190] USAID, Office of Democracy, *supra* note 56, at 2.

[191] *Id.* More fully, the document explains the importance of transparency as follows: "The courts' organization and procedures, if transparent, can make interference in court operations more difficult. Good records management is essential, as is a mechanism to ensure that assignment of cases is party-neutral. Publishing judicial decisions can help to deter rulings based on considerations other than law and facts. Oral, adversarial, and public proceedings have increased transparency in criminal proceedings in many countries. Court monitoring by NGOs, academics,

transparency conveys the idea that laws should be publicly promulgated, on the other hand it is also used to refer to the requirement that lawmaking be subject to public scrutiny and accountability. The emphasis on transparency is therefore of particular interest because of the way it combines the twin values of predictability, central to the rule of law doctrine, and public accountability, required by human rights advocates. In Poland, for example, both these values infused initiatives to strengthen judicial independence, on the assumption that independent judges, free from undue influence, would enact more consistent and predictable decision making. This reasoning appealed both to human rights activists, concerned about the abuse of state power, and neoconservatives, interested in establishing a productive business climate. For example, in an address to the Committee on International Relations of the U.S. House of Representatives in May 2005, a top USAID official commented that "[a] prerequisite for trade integration is a rule-based system where contracts are honored, where governments provide legal infrastructure needed for transparent enforcement, and where information can be exchanged openly and freely."[192] Former secretary of state Colin Powell accurately zeroed in on the problem when he remarked that "[p]rivate capital is a coward, a chicken. It flees from corruption and bad policies. . . ."[193]

The concept of "transparency" therefore bridges the rhetoric of the law and economics movement and human rights discourse, managing to make common ground between those who would not normally agree. This discursive link helps to highlight the underlying relationship between the two camps. While human rights advocates and law and economics proponents rely on different tools conceptually and analytically—and, indeed, frequently construct themselves in opposition to each other—they also facilitate one another.[194]

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and the media can expose and deter abuses. Annual disclosure of judges' assets and income can provide an impediment to bribery." *Id.*

[192] Adolfo A. Franco, Assistant Adm'r, Bureau for Latin America and the Caribbean, USAID, Testimony before the Committee on International Relations, U.S. House of Representatives Subcommittee on the Western Hemisphere: Transparency and Rule of Law in Latin America (May 25, 2005).

[193] *Id.*

[194] This relationship is rooted in neo-liberalism and the Cold War. In the 1980s, President Reagan actively sponsored human rights advocacy abroad—particularly in the Soviet Union and Soviet-controlled areas—where the burgeoning human rights movement fed the political and economic agenda of overthrowing communism. At the same time, Reagan drastically reduced funding for public interest law in the United States. For an analysis of the struggle of the Legal Services Corporation under the presidency of Ronald Reagan, *see* Phil Heymann & David Kennedy,

As this discussion has illustrated, the law and economics movement has had a profound impact on the discourse and practices of judicial reform. Economic logic informs the key concepts framing judicial reform initiatives, and the assumptions these concepts reflect have become so pervasive that they no longer require examination or explanation. At the same time, the theoretical ambition of law and economics—to provide a unified theory of law based on the market paradigm—has, arguably, colonized the development industry. Laws are not measured by the substantive principles they assert, but by the economic performance they facilitate. In this latest iteration of law and development, *development* is envisioned as an efficient, unfettered market. While the concept of development has undergone intense, and frequently highly critical, scrutiny since the birth of the development industry in the 1960s,[195] the notion that states must follow a nonlinear progression to achieve "development" persists. The "imperialism" of law and economics does not allow for alternate conceptions of development or means of achieving them. As a result, development agencies tend towards dogmatic diagnoses of political and economic problems and cookie-cutter solutions. "The expectation," observes one scholar, "is that countries desirous of assistance will adapt themselves to the standard format, rather than adapting the format to the specific conditions of a given country."[196]

V. CONCLUSION: LEGAL CULTURE IN CONTEXT

This Article presents a critical examination of the law and economics movement and its influence on the discourse and practice of legal reform. It has, perhaps, presented both the law and economics movement and the development industry as two monoliths, unvaried and without theoretical or empirical nuance. This is, of course, not the case. The law and economics approach has been employed very productively by a number of scholars to gain insight into the ways in which laws produce effects on human behavior. Development agencies differ

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Legal Services Corporation under the Reagan Administration (Case Studies in Pub. Pol. & Mgmt., John F. Kennedy Sch. of Gov't, Jan. 1, 1983).

[195] *See, e.g.*, ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD (1995); MICHAEL TODARO & STEPHEN C. SMITH, ECONOMIC DEVELOPMENT (8th ed. 2003); AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

[196] Hendley, *supra* note 17, at 609.

considerably in their goals, operating methods, expertise, budget, guiding ideology, and formal ties to the foreign policy of their home state. Yet the increasing frequency of common law transplants, accompanied by the development of new economic and legal theories promoting the common law, requires greater scrutiny of how these two communities interact. The theory that civil law is an impediment to developing countries has found purchase in the World Bank, and through this powerful organization, to the governments, media, and legal reformers in a large number of countries. Yet, as we have seen, the arguments against civil law tend to fall apart upon closer examination. Instead, they reveal ideologically informed assumptions about the role of the state, the value of regulation, and the purpose and limitations of the law. This raises a fundamental question. As Mattei asks:

> [W]hat is the legitimacy of a scholarly paradigm when applied outside of the cultural context in which it has been developed? What are the political implications of using law and economics outside of the cultural environment in which it has developed? Is a new legitimacy necessary for the context of reception, or is the one captured in its original environment also sufficient for the new one?[197]

Mattei's question points to the need to refocus reform initiatives on specific legal cultures and the power structures that inform them. It also requires us to reconsider, again, the concept of development and the law's role in achieving it. A failure to do so, as Upham remarks, can cause active harm. "Although it is highly unlikely that the transplanted system will operate as it did in its country of origin or as intended by the borrowing country," Upham observes, "it does not follow that it will have no social effect. . . . [I]f the social context of a legal system is not able to support the individual exercise of rights or if the incentives governing the utilization of the resources are not finely calibrated, the results can be far from those intended."[198] Legal systems are constitutive of the cultures that produce them. Efforts to improve legal practices must be attuned to the applied realities of the law—the institutional dynamics, power structures, and "lived experience" of legal systems.

As the logic of economics gains ground, the space allowed for law and legal expertise will shrink until, as Posner suggests, the purpose of law itself is subsumed under the goal of market efficiency. To this

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[197] Mattei, *supra* note 14, at 412.
[198] Upham, *supra* note 16, at 32.

extent, the war on the civil law may, at bottom, be a war on the law *tout cour*. It is not only civil law that fails the efficiency requirements of the market paradigm but also alternate understandings of law and legal systems altogether.

Finally, to the extent that the contest between common law and civil law is, in fact, a proxy for a neo-liberal critique of the state, the debate has left open the question of the relative merits of contemporary civil and common law. The consequences, if any, of these legal traditions for the expansion of human capabilities[199] still remains to be discussed in a more empirically-based framework.

[199] SEN, *supra* note 195, at 3.