

PARTICIPATORY LAW AND DEVELOPMENT: REMAPPING THE LOCUS OF AUTHORITY

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Participatory Law and Development: Remapping the Locus of Authority *argues that law and development efforts have been ineffective, at least in part, because development agencies have failed to engage communities in the process of both setting agendas and instituting programs and policies. This work argues that there must be a fundamental shift in the law and international development paradigm. Scholars and practitioners must abandon the question, how can “we” change “them” and instead begin by asking a different question: in what ways, if any, does a community want to change the rules it operates by and how can external actors assist in that process? Ultimately, this Article advocates for a participatory approach to law and development, with a focus on enhancing self-determination.*

INTRODUCTION	740
I. TRANSPLANTING FORMAL LAW	746
A. <i>First-Wave Law and Development: Targeting the State</i>	747
B. <i>Rule of Law Initiatives: Targeting Institutions</i>	752
C. <i>Critiques of the Transplant Model</i>	754
D. <i>Despite Failures, the Legal Transplant Model Persists</i>	757
II. CHANGING CULTURAL NORMS.....	758
A. <i>The Link between Culture, Norms, Institutions, and the Law</i>	760
B. <i>Culture Change</i>	764
1. <i>Culture Change Theory</i>	764
2. <i>Culture Change Projects</i>	766

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C. <i>Culture Change Projects: Legal Transplants Redux</i>	768
1. Practical Limitations.....	770
2. Normative Concerns.....	772
3. Development is Political.....	774
III. PARTICIPATORY LAW AND DEVELOPMENT.....	775
A. <i>The Case for Self-Determination</i>	778
1. Shifting Authority from “Outsiders” to “Insiders”	779
2. Setting the Development Agenda	780
3. Self-Determination is Development.....	783
B. <i>Participatory Law and Development Framework: Remapping the Locus of Authority</i>	784
C. <i>Challenges and Critiques of Participatory Approach</i>	787
1. Identifying Decision-Makers.....	788
2. Confronting a Lack of Consensus	789
CONCLUSION	790

INTRODUCTION

Hence an essential question we must ask is, who makes the rules and for whom and what are their objectives.

—Douglass North¹

Haiti is one of the poorest countries in the world and the poorest country in the Western Hemisphere.² On January 12, 2010, Haiti was struck with the worst earthquake in the region in over 200 years.³ Following the earthquake, the world was bombarded with images that showed the death and destruction caused by the natural disaster. The devastation of the earth-

1. DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 15 (2005) [hereinafter NORTH, ECONOMIC CHANGE].

2. Tracy Kidder, *Country Without a Net*, N.Y. TIMES, Jan. 13, 2010, at A37, available at <http://www.nytimes.com/2010/01/14/opinion/14kidder.html> (“Hence the current state of affairs: at least 10,000 private organizations perform supposedly humanitarian missions in Haiti, yet it remains one of the world’s poorest countries.”); see also CARROL FAUBERT, UNITED NATIONS DEVELOPMENT PROGRAMME, CASE STUDY: HAITI 12 (2006), available at <http://www.undp.org/evaluation/documents/thematic/conflict/Haiti.pdf> (“Haiti is by far the poorest country in the western hemisphere.”).

3. See *Haiti Earthquake 2010*, N.Y. TIMES, July 12, 2010, available at <http://www.nytimes.com/info/haiti-earthquake-2010/>.

quake was severely compounded by the preexisting poverty and human deprivation in Haiti. Food and clean water were in scarce supply long before the earthquake struck, as were medical supplies, decent shelter, and health and sanitation services.⁴

I witnessed this poverty firsthand in 1999 when I spent time volunteering with a non-governmental organization in Port-au-Prince. The organization worked primarily in Cite Soleil, a slum abutting the coast on the outskirts of Port-au-Prince. Cite Soleil is considered by many to be the poorest and most dangerous slum in Haiti.⁵ The living conditions are deplorable. Like other shantytowns, the 200,000 to 300,000 residents of Cite Soleil are crammed into tiny structures made of tin, cardboard, and concrete, if they are lucky. There is no electricity, running water, or sanitation system. Urine and raw sewage literally run like a stream between the houses. Residents had carefully placed boards, which serve as bridges and walkways, in order to navigate around the sewage, but a single misstep would leave one standing ankle-deep in human waste.

One day a couple of volunteers and I were walking with some residents through the settlement and came upon a concrete structure that was built to be used as a public latrine. The structure looked like it had been abandoned some time ago. I could not understand why this sorely needed resource had fallen into such disrepair. As we talked, the residents explained that the community had never used the latrines. The international development agency that built the latrines never sought any input from the residents in the area about the project. The community was outraged that they had not been invited to participate in the process. In protest, the community as a whole refused to use the latrines. Through further discus-

4. See generally *Haiti Aid Effort One Month After Earthquake*, BBC NEWS, <http://news.bbc.co.uk/2/hi/americas/8509333.stm> (last updated Feb. 12, 2010); *Haiti: Country Specific Information*, U.S. DEPT OF STATE (Nov. 23, 2009), http://travel.state.gov/travel/cis_pa_tw/cis/cis_1134.html ("In some [Haitian] cities and towns ordinary services such as water, electricity, police protection and government services are either very limited or unavailable.")

5. See Orla Guerin, *Haiti's Seaside Slum Where the Gun Rules*, BBC NEWS, <http://news.bbc.co.uk/2/hi/8480015.stm> (last updated Jan. 26, 2010, 2:37 AM) (calling Cite Soleil Haiti's "most notorious slum"); Tim King, *Night Patrol in Cite Soleil, Haiti*, SALEM NEWS (Jan. 22, 2010, 9:55 PM), http://www.salem-news.com/articles/january222010/haiti_patrols_tk.php ("Cite Soleil is one of the poorest, most troubled neighborhoods in Port-au-Prince."); Patrick Burns, *A Day in the Life of Cite Soleil*, FLAK MAGAZINE, <http://www.flakmag.com/features/citesoleil.html> (last visited Feb. 15, 2011).

sion the residents explained that the community was not opposed to latrines—in fact they wanted them—but they were opposed to being completely shut out of the process. In the end, scarce and valuable resources went to waste in a community in desperate need of them.

Most would agree that the development of sanitation services, in and of itself, is not particularly controversial. On the other hand, projects that seek to develop or reform legal frameworks, herein referred to as “law and development” projects,⁶ often involve deeply contested issues that implicate cultural, political, and religious values. If communities resent being left out of the process even when the project objective is relatively uncontroversial, it is no surprise that fervent resistance, and even outright rejection, may result when projects that seek to change the very rules by which a society operates are undertaken without the intimate engagement of local communities.

This is not an exceptional story. There are numerous accounts of development efforts that have gone awry.⁷ In fact, there may be more accounts of failed development attempts than successful ones. Much of the law and development scholarship focuses on why development initiatives have not

6. This Article uses the phrase “law and development” broadly to refer to the interdisciplinary field that examines the interplay between the production, modification, implementation, and enforcement of formal and informal laws and development policy and practice. The phrase “law and development” is used elsewhere by some scholars to refer specifically to what this Article calls the “first-wave law and development movement.” One of the many problems in this field of study is the ambiguous and/or conflicting use of terms. For example, the very term “development” means vastly different things within the literature. “Development” may refer narrowly to economic development or more broadly to the development of social, political, and cultural rights. This Article adopts Amartya Sen’s expansive definition of development, which entails any activity that increases human capabilities. See AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999). The lack of consensus over terminology makes this work particularly, and sometimes unnecessarily, tedious. Of course, discourse absolutely matters. Language has the power to frame the debate. Nevertheless, this Article suggests that consensus is unnecessary so long as those writing and conversing within the field offer a “here’s what I’m talking about” preface to their work. As it stands, too much time is wasted reviewing and belaboring the inconsistencies in terminology. Eventually, rather than moving the project forward, meta-discourse may actually serve to stall instead of clarify matters.

7. See generally WILLIAM EASTERLY, *THE WHITE MAN’S BURDEN: WHY THE WEST’S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* 4 (2006) (noting that although the West has spent \$2.3 trillion on foreign aid over the last five decades, it still has not been able to accomplish seemingly achievable goals, such as providing twelve-cent medication to children that would cut malaria deaths in half).

been more effective and what, if anything, can be done to improve outcomes.⁸

This Article argues that law and development efforts have been ineffective, at least in part, because development agencies have failed to engage communities in the process of both setting agendas and instituting programs and policies. However, rather than abandoning the entire endeavor, this Article advocates for a fundamental shift in the law and international development paradigm. This Article argues that scholars and practitioners must abandon the question “How can ‘we’ change ‘them?’ ” Instead, it argues they must begin asking a different question: In what ways, if any, does a community want to change the rules it operates by, and how can external actors assist in that process? Professor Rosa Ehrenreich Brooks suggests “bracketing” such questions, arguing that they are “best suited to the philosophers.”⁹ This Article argues that this question has been put aside for too long and that failing to address this foundational issue undermines law and development initiatives.

At the most basic level, law and international development efforts strive to change *something* related to a society’s legal system in order to promote whatever happens to be the current goal of development. Until recently, attempts at change have mostly involved legal acculturation efforts, whereby legal systems, or parts thereof, were transferred from one society to another.¹⁰ Through the transfer of law, outside actors have sought to alter the existing legal culture within a society. More

8. See, e.g., PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 8–9 (Thomas Carothers ed., 2006); THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds., 2006).

9. Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law,”* 101 MICH. L. REV. 2275, 2328 (2003).

10. Norbert Rouland notes that:

The transfer of law is the operation by which, through constraint, or its absence, law is transmitted from one society to another. The acceptance of a foreign system by an indigenous system can lead to coexistence between the two systems: often the indigenous communities continue to follow their own law, the received law only being applied by the state institutions of that society. However, a more thoroughgoing process of legal acculturation may result. Either it is unilateral (only one of the legal systems is modified, or even eliminated) or it is reciprocal (each of the systems is modified through contact).

NORBERT ROULAND, LEGAL ANTHROPOLOGY 292 (Philippe G. Planel trans., Stanford Univ. Press 1994) (1988).

often than not, these efforts have produced disappointing results.

In light of these failures, scholars and practitioners have increasingly called for an approach to law reform, as well as development generally, that is more cognizant of the political, historical, and cultural context of the locality through “bottom-up,” community-based interventions. Some of these initiatives suggest changing the “hearts and minds”¹¹ of individuals rather than focusing on state or institutional reforms.

The move from macro to micro level legal reforms is appealing on many levels. Change is most likely to occur when the recipient or end-user is the direct focus of the reform efforts.¹² This Article posits, however, that while the point of intervention—the state, institutions, and individuals—might matter, a much more salient consideration is the practical and normative implications of an externally imposed law reform agenda, regardless of whether the reform targets formal laws and institutions or seeks to change the “hearts and minds” of individuals directly.

To this end, this Article advocates for a participatory approach to law reform and development, with a focus on enhancing self-determination. Law reform efforts will continue to fail unless the targeted recipients of the law reforms are also participants, from the beginning, in the process of agenda-setting. Participatory legal reform necessarily accounts for specific historical, political, and cultural considerations because it places the process of law reform in the hands of the people who understand the local context best. Of course, engaging communities in the process of setting priorities and implementing reforms is not a panacea; it does not in and of itself ensure fair, equitable,

11. Amy Cohen refers to proponents of this approach as “neocultural interventionists.” Amy J. Cohen, *Thinking with Culture in Law and Development*, 57 *BUFF. L. REV.* 511, 512 (2009) (“Neocultural interventionists argue that transplanted laws, rules, and institutions are unlikely to produce their intended social effects in divergent social contexts or, for that matter, to produce any effects at all. And they suggest changing the hearts and minds of ordinary people in order to make these institutional reforms more determinate and effective.”).

12. For an argument as to why local level interventions and enforcement is most effective, see Cass R. Sunstein, *Social Norms and Social Roles*, 96 *COLUM. L. REV.* 903, 952 (1996) (“The lowest level [of government] is closest to the people, and in that sense most responsive to it, and most likely to be trusted by it. The risk of futility or positive harm is accordingly diminished. Of course there are familiar counterarguments, and sometimes national efforts at norm management are well-justified. But a nation that is concerned about existing norms should exploit the possibilities that exist in a system committed to federalism.”).

or necessarily desirable outcomes.¹³ However, a participatory approach begins to address at least some of the practical issues and normative concerns that have plagued law and development efforts.

This Article proceeds in three parts. Part I provides a brief overview of the law and development movement. It describes the legal-transplant model, which traditionally has been the preferred approach to law and development projects. The legal transplant approach entails the importation of some aspect of a foreign legal system (i.e., the laws, regulations, or institutions) into a country's own domestic legal system. This part also explores how law and development efforts typically ignore local cultures when designing and implementing legal reforms in the form of legal transplants. Finally, this part examines why this approach has often failed.

Part II begins with a general discussion of culture, the role culture plays in the production of norms, and how norms shape institutions. Next, it explores an emerging theoretical framework within law and development, referred to herein as the "culture change" approach. This approach, recently proposed by two legal scholars, suggests that culture is determinative of how receptive societies are to particular legal reforms. Rather than ignoring culture, as other law and development efforts have, the culture change approach is keenly attuned to the importance of culture. Culture change advocates seek to modify cultures by changing the underlying attitudes, beliefs, and values that form the fabric of culture so that they conform to an externally-imposed legal regime. As such, the culture change approach is similar to earlier law and development ap-

13. How to measure "outcomes" in the world of law and development is another issue fraught with difficult normative questions. Try as one may, value judgments cannot be avoided. This discussion necessarily intersects with the cultural relativism versus universalism debate that has been waged for years, particularly within human rights, critical race, and feminist theory circles. See, e.g., Isabelle R. Gunning, *Arrogant Perception, World Traveling, and Multicultural Feminism: The Case of Female Genital Surgeries*, in *CRITICAL RACE FEMINISM: A READER* 352 (Adrien K. Wing ed., 1997); Penelope Andrews, *Violence Against Aboriginal Women in Australia: Possibilities for Redress within the International Human Rights Framework*, 60 *ALB. L. REV.* 917 (1997); Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 *HUM. RTS. Q.* 400 (1984); Michel Rosenfeld, *Can Human Rights Bridge the Gap between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities*, 30 *COLUM. HUM. RTS. L. REV.* 249 (1999); Adrien K. Wing & Monica N. Smith, *Critical Race Feminism Lifts the Veil?: Muslim Women, France and the Headscarf Ban*, 39 *U.C. DAVIS L. REV.* 743 (2006). Part III will consider how the cultural relativism versus universalism debate plays out within the development context.

proaches in that it assumes that a fixed bundle of reforms (in this case, culture reforms) will produce the same outcomes even under different conditions. In addition, by asserting that a one-size-fits-all solution exists, these two approaches veil the political and ideological dimensions of law and development projects.

Part III rejects the legal transplant and culture change models and offers instead an alternative approach: participatory law and development. Rather than outsiders attempting to change an underlying culture, which necessarily assumes that the reformer holds some privileged knowledge about the cultural attributes to be emulated, this part advocates for a model that engages communities in the reform of existing laws, institutions, and norms or the production of new ones—both formal and informal. This part examines what role, if any, external actors should play in the process of participatory development and explores both the practical and normative considerations that necessitate an emphasis on self-determination. It concludes with a brief discussion of some of the challenges that might arise in the practice of participatory law and development and critiques of the model.

I. TRANSPLANTING FORMAL LAW

The transfer of law from one society to another has occurred for as long as societies have intermingled, but starting with colonization, there has been “a proliferation of occasions where [Western] legal systems have been transferred.”¹⁴ Transfers of law between societies are referred to as “legal transplants.” The law and development movement grew out of this history of legal transplantation, but maintained a specific focus on how to create legal systems that would foster development. Through a comparison of these initiatives, Sections A and B examine how transfers of law have targeted state and institutional level reforms, often without any reference to local cultures, and without engaging local communities in the agenda-setting process. Section C highlights some of the empirical evidence that suggests that this approach has been ineffective. Finally, Section D discusses why the transplant model persists, in spite of its apparent shortcomings.

14. ROULAND, *supra* note 10, at 292.

A. *First-Wave Law and Development: Targeting the State*

A brief review of the history of the law and development movement is necessary to appreciate the present context.¹⁵ The first-wave law and development movement grew out of the Cold War era of the 1960s.¹⁶ Fueled by funding from international financial institutions (“IFIs”), foundations, and foreign national governments, legal scholars began to take a greater interest in the role of law in the political and economic development of post-colonial states.¹⁷ International development was already an interdisciplinary effort, bringing together scholars and practitioners from a variety of disciplines, such as economics, anthropology, and public health.¹⁸ Law reform was brought into the fold of development efforts for two reasons.

15. The history of the law and development field has been recounted and analyzed numerous times through a variety of lenses. *See, e.g.*, David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974); Elliot M. Burg, *Law and Development: A Review of the Literature & a Critique of “Scholars in Self-Estrangement,”* 25 AM. J. COMP. L. 492 (1977); MICHAEL J. TREBILCOCK & RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* (2008); David Kennedy, *The “Rule of Law,” Political Choices and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 8, at 95; Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 8, at 19.

Although each version varies slightly in regards to how it denotes each stage within the history, all of the histories suggest at least three primary stages: what is often referred to as the first-wave law and development movement, the rule of law stage, and the present moment. Since my purpose is not to provide a historical analysis, I have focused on what seem to be the major stages.

16. Law has been exported by countries considered more “developed” to “less-developed” societies, both voluntarily and involuntarily, for centuries. *See* Edward L. Glaeser et al., *Do Institutions Cause Growth?*, 9 J. ECON. GROWTH 271 (2004). However, it was not until the mid-twentieth century that legal scholars and practitioners became actively involved in organized development efforts aimed at poverty alleviation. *See generally* Trubek & Galanter, *supra* note 15. The flurry of law and development activity during the 1960s and the subsequent, albeit limited, scholarship that emerged from that era formed the foundation of the first law and development movement, often referred to as the “first-wave” law and development movement.

17. Burg, *supra* note 15, at 495 (“At this date, there is general awareness of the world-wide importance of the rapid and orderly economic development of the newly changing societies of Latin America, Asia and Africa. . . . On the record, there are good reasons to anticipate that the contribution of the legal profession can be of major importance, since a legal framework will be essential to the task, and its execution will involve legal processes.”) (quoting INT’L LEGAL STUDIES, HARV. LAW SCH., REPORT OF THE DIRECTOR 1954–1961, at 3 (1961)).

18. *See* Trubek & Galanter, *supra* note 15, at 1067.

First, development theorists increasingly believed that a legal system would secure property and contract rights and thereby encourage economic exchanges, which would lead to economic growth.¹⁹ Second, they believed that legal reforms that supported market-based economies would encourage the growth of capitalism and guard against the spread of communism.²⁰ Encouraging market economies would serve the interests of both developing and developed countries, or so it was believed. As Trubek contends, "Law and development was part of the West's answer to communism, part of the promise, often not fulfilled, that a Western-led economic system could deliver economic growth with freedom."²¹

In theory, legal development initiatives also sought "to protect individual freedom, expand citizen participation in decision-making, enhance social equality, and increase the capacity of all citizens rationally to control events and shape social life."²² In reality, however, law and development scholars and practitioners often set the law reform agenda without much input, if any, from local citizens in the targeted countries. Wade Channel refers to this as the "hasty transplant syndrome."²³ He notes that in the worst cases "reformers simply translate a law from one language to another, change references to the country through search-and-replace commands, and then have the law passed by a compliant local legislature. The result is generally an ill-fitting law that does not 'take' to its new environment evidenced by inadequate implementation."²⁴ Often the new laws are simply ignored.²⁵ Moreover, the imposition of a new legal regime, without a sufficient understanding of the existing system, can cause serious disruptions and instability.²⁶

19. See David Trubek, *The "Rule of Law" in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT*, *supra* note 8, at 74-78.

20. See Trubek & Galanter, *supra* note 15, at 1085-88.

21. Trubek, *supra* note 19, at 82.

22. Trubek & Galanter, *supra* note 15, at 1063.

23. Wade Channel, *Lessons Not Learned about Legal Reform*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE*, *supra* note 8, at 141.

24. *Id.*

25. See, e.g., *id.* (describing the wholesale transplantation of foreign laws into Albania's legal system and how the laws are not tailored to Albania's specific needs).

26. For example, Daniel Fitzpatrick examines the impact of national property laws on the functioning of non-state systems. He concludes:

The unfortunate experience of many Third World countries in both colonial and postcolonial times is that state law has either overridden non-

Two theories embraced by the first-wave law and development movement—modernization theory and liberal legalism—justified this one-size-fits-all approach. Each theory assumed that a universal set of policies could and should be adopted to support development, regardless of the locale.²⁷ In effect, this made input from local communities an afterthought and rendered local contextualization superfluous.

Modernization theory maintained that development is an evolutionary process that all societies move through in essentially the same manner.²⁸ Modernization theorists believed that “less developed” societies would advance more rapidly if they adopted the same systems of governance and institutional structures as their “more developed” counterparts.²⁹ Specifically, first-wave law and development theorists thought that adoption of a “Western”³⁰ legal system was a necessary compo-

state governance mechanisms or failed to facilitate adaptation to new circumstances of urbanization, migration, and commodification of rights to land. In the former case, numerous attempts to replace nonstate systems with unitary state law have succeeded only in creating a polynormative system of official law, semi-legal practice, and widespread illegality. This is a natural consequence of the fact that many nonstate systems in Third World societies are kinship-based, resistant to replacement by formal state property regimes, and quite efficient on their own terms. Despite this resilience, new economic and demographic circumstances have challenged these systems, particularly where they also face state opposition. The result in some cases has been the worst-case scenario: the partial disintegration of a viable resource governance mechanism without the provision of effective substitutes by the state.

Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L.J. 996, 1012 (2006) (citations omitted).

27. See David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1 (1972). Trubek argued that since the early law and development movement believed that the relationship between law and development was determinate, it was “more concerned with the exportation of Western systems than with efforts to understand the legal life of the Third World.” *Id.* at 11.

28. See generally *id.*

29. Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 895, 900 (2008) (“It was presumed that Westernization, industrialization, and economic growth would generate the preconditions for the evolution of greater social equality and consequently the rise of stable, democratic institutions and a welfare state.”).

30. For the sake of convenience, the Article uses the term “Western” to refer to countries, such as the United States, that have dominated the world in terms of political and economic power. While the term “Western” is an inaccurate descriptor, it does not imply the same value judgments as “developed” and “first-world.” Obviously as the world changes, and as countries outside of what has typically

ment of modernization.³¹ Likewise, liberal legalism, an outgrowth of modernization theory, assumed that the state has the power, through the law, to affect social behaviors.³²

The first-wave law and development movement was founded on the idea that “[w]ith some slippage and friction, social behavior is aligned with and guided by legal rules. Moreover, that behavior can be consciously modified by appropriate alternations of these rules.”³³ Based on these two models, the state, or some entity working on its behalf, had both the knowledge and the power to adopt laws that would lead to economic growth. Substantively, first-wave law and development movement policies focused on strengthening markets via central state planning.³⁴ The goal was to bolster the functional capaci-

been thought of as the “West” emerge as power players in the world of development (e.g., China), the term becomes even more of a misnomer.

31. Davis & Trebilcock, *supra* note 29, at 900.

32. For a more thorough discussion of the model adopted by the first-wave law and development movement, see Trubek & Galanter, *supra* note 15, at 1071–72. Trubek and Galanter suggest that liberal legalism is comprised of the following propositions:

First, society is made up of individuals, intermediate groups in which individuals voluntarily organize themselves, and the state. . . .

Second, the state exercises its control over the individual through law—bodies of rules that are addressed universally to all individuals similarly situated. . . .

Third, rules are consciously designed to achieve social purposes or effectuate basic social principles. . . .

Fourth, when the rules made through this process are applied, they are enforced equally for all citizens, and in a fashion that achieves the purposes for which they were consciously designed.

Fifth, the legal order applies, interprets, and changes universalistic rules. . . .

Finally, the behavior of social actors tends to conform to the rules: officials are guided by the rules, not by personal, class, regional, or other bases of decisionmaking; a large number of the rules will be internalized by most of the population. To the extent that they are not internalized, official enforcement action will guarantee behavior in conformity to the rules.

Id. (citations omitted).

33. *Id.* at 1072.

34. See Trubek, *supra* note 19, at 74–75. Trubek posits that the first-wave law and development movement “was the era of import-substitution industrialization, in which developing countries sought to build their own industrial capacity” *Id.* Trubek explains that “[t]he basic economic model was one of a regulated market economy in which the state played an active role, not just through various forms of planning and industrial policy but also through state ownership of major industries and utilities.” *Id.*

ty of the state and to enact a specific set of policies that would promote economic development.³⁵

Within a short period of time, however, law and development scholars began to raise questions about the assumptions underpinning the movement, as well as concerns about the unintended consequences of their efforts. For example, scholars had serious misgivings about whether and which legal reforms were likely to encourage development.³⁶ In addition, they queried whether efforts to support legal education³⁷ and legal reform in developing countries would do more harm than good by serving the interests of the elite rather than the poor.³⁸ Moreover, in the midst of the Vietnam War and increasing disenchantment around the United States' version of "justice," scholars questioned whether Western law was even a desirable model for developing countries to emulate.³⁹ Trubek and Galanter, two leading writers in the early law and development movement,⁴⁰ declared the endeavor "ethnocentric" and "naïve."⁴¹ In their widely-cited article, *Scholars in Self-Estrangement: Some Reflections on the Law and Development Crisis*, they noted that "intellectual and moral shifts have created a crisis for this small group of academics, a crisis which threatens the future of their efforts to create theories about

35. David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT*, *supra* note 8, at 5.

36. For example, Lawrence Friedman argues that "[i]gnorance about the relationship between law and development is not solely a problem of law in third world countries. There is a monumental ignorance, or misunderstanding, about law and development in our own and other modern countries." Lawrence M. Friedman, *On Legal Development*, 24 RUTGERS L. REV. 11, 13 (1969). Friedman believes that "[t]his reflects the ignorance, equally deep, about the relationship in general between the legal system and the social system." *Id.*

37. Ironically, Trubek notes that "it was assumed that change in the education system was the most effective way to bring about change in all other legal institutions." Trubek, *supra* note 19, at 77.

38. Trubek & Galanter, *supra* note 15, at 1078. Scholars "have come to see that legal change may have little or no effect on social economic conditions in Third World societies and, conversely, that many legal 'reforms' can deepen inequality, curb participation, restrict individual freedom, and hamper efforts to increase material well-being." *Id.* at 1080.

39. *Id.*

40. Davis & Trebilcock, *supra* note 29, at 899–902.

41. Trubek & Galanter, *supra* note 15, at 1080.

and to institutionalize the study of law and development.”⁴² Disillusioned, the endeavor was abandoned.⁴³

B. Rule of Law Initiatives: Targeting Institutions

Following Trubek and Galanter’s declaration that the law and development movement had been built upon deeply flawed assumptions, the field lay seemingly dormant for nearly a decade.⁴⁴ However, over the past two decades, particularly since the fall of the former communist bloc, there has been renewed interest in the role of law in matters of development.⁴⁵ This renewed interest has resulted in a reincarnation of the law and development movement under the banner of “rule of law” initiatives around the world.⁴⁶ Thomas Carothers suggests that the rule of law has “receiv[ed] so much attention now because of its centrality to both democracy and the market economy in an era marked by a wave of transitions to both.”⁴⁷ The World Bank alone has funded 330 of these so-called “rule of law” projects and spent \$2.9 billion on rule of law initiatives in Latin America, sub-Saharan Africa, Central and Eastern Europe, and Asia since 1990.⁴⁸

While the first-wave law and development movement focused on the role of the central government in strengthening a market economy, the second wave of law and economic reforms, often referred to as “the Washington Consensus,” focused on state decentralization and strengthening the capacity of formal and informal institutions that would support stronger markets and private investments.⁴⁹ Trubek notes:

42. *Id.* at 1063. See *infra* Section I.C. for more discussion of the problem with transplants.

43. See generally Trubek & Galanter, *supra* note 15, at 1089–93 (discussing criticisms of the legal liberalist model of law in development).

44. Trubek, *supra* note 19, at 81 (noting that “[s]ome declared that the L&D movement was dead”).

45. See Thomas Carothers, *The Rule-of-Law Revival*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 8, at 8–9 (describing regional moves toward democracy and/or market economies around the globe).

46. Brooks, *supra* note 9, at 2276.

47. Carothers, *supra* note 45, at 5.

48. See Trubek, *supra* note 19, at 74. Alvaro Santos reports that the World Bank has spent \$3.8 billion since 1993 on rule of law projects in more than 100 countries. Alvaro Santos, *The World Bank’s Uses of the “Rule of Law” Promise in Economic Development*, in THE NEW LAW AND ECONOMIC DEVELOPMENT, *supra* note 8, at 253.

49. Trubek, *supra* note 19, at 83. Trubek explains that

For many who promoted the project of markets, growth would be best achieved if the state stayed out of the economy except to the extent that—through law—it provided the institutions needed for the functioning of the market. These include guarantees for property rights, enforcement of contract, and protection against arbitrary use of government power and excessive regulation.⁵⁰

In addition, many second-wave legal reform efforts focused on democracy-building and good governance initiatives.

Institutions—formal and informal—provided the entry point for rule of law interventions.⁵¹ Although the precise goals of the first-wave law and development movement and the subsequent rule of law movement differed, both relied primarily upon transplanting Western-style legal systems and systems of governance.⁵²

[t]he vision of a world of partially closed national economies and state-controlled national markets gave way to a vision of a fully open global economy with minimal state involvement and free flow of goods and capital across national boundaries. This vision affected thinking about development in very profound ways . . . It implied a triple shift, from state to market, from internal to export-led growth, and from official capital flows to private foreign investment.

Id.

50. *Id.* at 85; see also *infra* Part II.A (discussing the intersection between institutions and the law).

51. See Lan Cao, *Culture Change*, 47 VA. J. INT'L L. 357, 369 (2006) (“As observed by Tom Carothers, . . . the ‘Rule of Law Assistance Standard Menu,’ as he coined it, includes ‘reforming institutions’ such as reform of the judiciary, the legislatures, the police and prison system, ‘rewriting laws,’ including modernization of criminal and commercial laws, ‘upgrading the legal profession through support for stronger bar associations and law schools,’ and ‘increasing legal access and advocacy.’ The focus is clearly on formal institutions and statutes.”) (citations omitted).

52. John Gillespie, *Towards a Discursive Analysis of Legal Transfers Into Developing East Asia*, 40 N.Y.U. J. INT'L L. & POL. 657, 657 (2007). Gillespie defines legal transfers “as the horizontal (state to state) and vertical (international organization to state) movement of laws and institutional structures.” *Id.* at 662 (citing ESIN ÖRÜCÜ, *CRITICAL COMPARATIVE LAW: CONSIDERING PARADOXES FOR LEGAL SYSTEMS IN TRANSITION* (1999)). Gillespie also explains that these transfers can be imposed or voluntary, encompass entire legal systems or single legal principles, and integrate similar or different cultures. Within recipient countries, legal transfers may permeate state and non-state social institutions; or, in the case of many developing countries, such transfers may be formulated as state law superimposed on indigenous legal structures.

Id.

C. *Critiques of the Transplant Model*

The legal transplant model operates under the assumption that all people will respond in the same, predictable fashion to a certain set of incentives, regardless of historical, political, or cultural considerations. This is an extremely questionable assumption. Critics oppose the legal transplant model primarily for two reasons: (1) legal transplants are often ineffective, and (2) legal transplants violate principles of self-determination.⁵³

Some proponents of legal transplants “argue that the correct legal code is critical for efficient financial markets, which are in turn critical for economic development.”⁵⁴ In effect, these scholars maintain that the success of a legal transplant hinges on the type of legal code, whether common law or civil law, that was initially transplanted.⁵⁵ Increasingly, however, scholars within the field of development have come to believe that “[w]hile the massive importation of legal code allows countries to quickly overhaul their statutory law in comparison to the time it took for these laws to evolve in the exporting countries, available evidence from formerly socialist countries suggests that the enforcement of transplanted law is often problematic.”⁵⁶ Empirical evidence suggests that legal transplants often fail to work in practice.⁵⁷

For transplant efforts that have a more favorable outcome, success likely turns on the ability of reformers to adapt the foreign model to the context of the host country. In one widely cited study referred to herein as the Berkowitz study, an interdisciplinary group of researchers examined data comparing countries that imported civil law versus common law. The Berkowitz study concluded that the *manner* in which a legal

53. See, e.g., Channel, *supra* note 23, at 138 (positing that lack of local input is one of the primary reasons why legal reform assistance fails).

54. See Daniel Berkowitz et al., *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 165, 166 (2003) (discussing works that support this theory).

55. *Id.*

56. *Id.*

57. See Trubek, *supra* note 19, at 78–79 (“[M]any efforts at legal transplantation proved . . . disappointing. In some cases, the transplants did not ‘take’ at all: some of the new laws promoted by the reformers remained on the books but were ignored in action. In others laws were captured by local elites and put to uses different from those the reformers intended. Finally, even when change did come about in the economic sphere, leading to more instrumental thinking, effective law making, purposive approaches to adjudication and pragmatic lawyering, the hoped-for spillover to democracy and protection of individual rights did not occur.”).

code was transplanted was far more determinative of its eventual effectiveness than the particulars of the code itself.⁵⁸ The study analyzed the “compatibility of imported institutions with initial local demand” and tested to see whether there was any correlation between the level of compatibility and the degree to which the legal reform was internalized by the local population.⁵⁹ It found that the level of receptivity turned on the extent to which the transplant was adapted to the local context, as well as whether there was an existing demand for the reform.⁶⁰ The article found that countries that adopted transplants without modification to local conditions, or transplants that contained legal norms that were unfamiliar to the local population, experienced what the researchers call the “transplant effect”: essentially, like an organ transplant that fails to take, the foreign legal transplant is rejected.⁶¹

58. Berkowitz et al., *supra* note 54, at 166–67. Berkowitz and his colleagues posit:

First, for the law to be effective, it must be meaningful in the context in which it is applied so citizens have an incentive to use the law and to demand institutions that work to enforce and develop the law. . . .

. . . Our basic argument is that for legal institutions to be effective, a demand for law must exist so that the law on the books will actually be used in practice and legal intermediaries responsible for developing the law are responsive to this demand. If the transplant adapted the law to local conditions, or had a population that was already familiar with basic legal principles of the transplanted law, then we could expect that the law would be used. However, if the law was not adapted to local conditions, or if it was imposed via colonization *and* the population within the transplant was not familiar with the law, then we would expect that initial demand for using these laws to [sic] be weak. Countries that receive the law in this fashion are thus subject to the “transplant effect”: their legal order would function less effectively than origins or transplants that either adapted the law to local conditions and/or had a population that was familiar with the transplanted law.

Id. Berkowitz cites the work of Rodrik who also “provides empirical support for his argument that a well-designed strategy for institution building should take into account local knowledge, and should not over-emphasize best practice blueprints used in developed countries at the expense of local participation and experimentation.” *Id.* (citing D. Rodrick, *Institutions for High-Quality Growth: What They Are and How to Acquire Them*, 35 *STUD. COMP. INT’L DEV.* 3, 3–31 (2000)).

59. *Id.* at 168.

60. *Id.* at 174.

61. *Id.* at 167. The authors further note:

Where the meaning of specific legal rules or legal institutions is not apparent, they will either not be applied or applied in a way that may be inconsistent with the intention of the rule in the context in which it originated. This in turn has implications for the perception and trustworthiness of the institutions applying them, and thus for the future de-

Aside from concerns about the general ineffectiveness of externally imposed legal transplants, some theorists also raise normative concerns about the transplant model. Trubek and Galanter were among the first theorists to question the motives of policymakers who supported law and development projects.⁶² Subsequently, other critics have argued that the transplant model is predominately predicated on the interests of the implementing nation, sometimes even to the detriment of the host nation. Objections have been made on the grounds that legal transplants serve the interest of the funding entity, who sets the agenda, rather than the recipient of the reforms.⁶³ Others claim that legal transplants violate a sense of autonomy or self-determination.⁶⁴ Still others claim that transplants are a reiteration of legal positivism in the sense that the “rulemakers” have discovered some sort of universal “truth” that does not vary over time or across cultures.⁶⁵ As with the original law and development movement, observers posit that the most recent interest in reviving rule of law initiatives can be traced to a number of factors that serve the political and economic interests of the United States and its Western allies with respect to post-communist and post-conflict states.⁶⁶ Commentators note that rule of law initiatives serve the United States’ inter-

mand of these institutions. However, if a transplant country adopts foreign law from origins in a way that is sensitive to its initial conditions, then the meaning of these rules becomes clearer, and it is also simpler to develop institutions . . . that enforce these rules. We conjecture that there are two reasons for this. First, when the law is adapted to local needs, people will use it and will want to allocate resources for enforcing and developing the formal legal order. Second, legal intermediaries responsible for enforcing and developing the formal legal order can be more effective when they are working with a formal law which is broadly compatible with the preexisting order, or which has been adapted to match demand.

Id. at 174.

62. Trubek & Galanter, *supra* note 15, at 1092–93.

63. See generally JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENT* (2003) (discussing how structural adjustment and trade policies served the interests of dominant countries, like the United States, rather than the recipient state).

64. See Channel, *supra* note 23, at 140.

65. See Frank Upham, *Mythmaking in the Rule-of-Law Orthodoxy*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE*, *supra* note 8, at 141.

66. STIGLITZ, *supra* note 63, at 166–72.

est in globalization, free trade, political stability, opening markets to trade, and demilitarizing areas around the globe.⁶⁷

However, to be clear, this Article does not object to the legal transplant model on the grounds that it is used to advance the political and economic interests of certain parties. As will be discussed at greater length below, the participatory law and development model proposed herein fully accepts that development, by its very nature, is political. Rather, this Article contends that what is problematic about the transplant model is that it conceals the inherently political nature of development by suggesting that there is a one-size-fits-all solution, and further, it implies that development is a science that cannot benefit from local input, debate, and contextualization.

D. Despite Failures, the Legal Transplant Model Persists

Many IFIs and national governments persist in their reliance on legal transplants as the “go-to” model for legal reform, even in the face of evidence that legal transplants often fail. At times, the “urgency” argument has been used to justify the top-down, legal transplant approach.⁶⁸ Proponents argue that some situations are so dire that a “ready made” legal system must be adopted immediately.⁶⁹ As recently as 2003, the United Nations Security Council adopted this approach in Iraq when it authorized Paul Bremer III, head of the Coalition Pro-

67. See, e.g., John K.M. Ohnesorge, *On Rule of Law Rhetoric, Economic Development, and Northeast Asia*, 25 WIS. INT'L L.J. 301, 311 (2007) (finding that the “rule of law” initiatives imposed by IFIs provide a convenient avenue for “both the NGO Left and Washington Consensus Right . . . to impose their policy preferences”).

68. See Channel, *supra* note 23, at 140.

69. René David, author of the Ethiopian Civil Code of 1960, commented: Ethiopia cannot wait 300 or 500 years to construct in an empirical fashion a system of law which is unique to itself, as was done in two different historical eras by the Romans and the English. The development and modernization of Ethiopia necessitate the adoption of a “ready made” system; they force the reception of a foreign system of law in such a manner as to assure as quickly as possible a minimal security in legal relations

René David, *A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries*, 37 TUL. L. REV. 187, 188–89 (1963) (quoted in Burg, *supra* note 15, at 506). The adoption of the Ethiopian Civil Code of 1960, however, did not prevent the unraveling of democratic rule in Ethiopia in the late 1970s. Some have suggested that the Ethiopian Civil Code was never really internalized by the general population, who continued to rely on customary law practices instead. Burg, *supra* note 15, at 522.

visional Authority (“CPA”) to enact the “100 Orders.”⁷⁰ With the stroke of a pen, Bremer abolished Iraq’s existing foreign investment law *in toto*, and replaced it with regulations favoring a free-market economy.⁷¹ One commentator noted that “[t]he actions of the Coalition Forces and the CPA set the stage for the chaotic civil, economic, and political strife that continues to plague Iraq today.”⁷²

However, there are some signs that reliance on legal transplants might be changing, at least in theory. As Michael Trebilock notes,

[o]ptimal institutions generally, including legal institutions in particular, will often be importantly shaped by factors specific to given societies, including history, culture, and long-established political and institutional traditions. This in turn implies some degree of modesty on the part of the external community in promoting rule of law or other legal reforms in developing countries and correspondingly a larger role for “insiders” with detailed local knowledge.⁷³

The next part explores this turn towards local communities and contextualizing legal reforms.

II. CHANGING CULTURAL NORMS

David Trubek and Alvaro Santos, among others, suggest that the law and development field is entering a new phase, which they call the “Third Moment.”⁷⁴ Trubek and Santos maintain that “the effort to define development as freedom not just growth, the stress on the local, the interest in participation, and the focus on poverty reduction have helped set in motion new thinking about law and have ushered in a new Moment in law and development doctrine.”⁷⁵ In addition, there

70. See Coalition Provisional Authority, Regulation Number 1, CPA/REG/16 May 2003/01 (May 16, 2003), available at http://www.iraqcoalition.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf.

71. See Coalition Provisional Authority, Order Number 39, Foreign Investment, CPA/ORD/19 September 2003/39 (Sept. 19, 2003), available at http://www.iraqcoalition.org/regulations/20031220_CPAORD_39_Foreign_Investment_.pdf.

72. Hamada Zahawi, *Redefining the Laws of Occupation in the Wake of Operation Iraqi “Freedom”*, 95 CAL. L. REV. 2295, 2998 (2007).

73. Davis & Trebilcock, *supra* note 29, at 945.

74. Trubek & Santos, *supra* note 35, at 7.

75. *Id.* Trubek and Santos maintain that the current thinking in development is due, in large part, to the “acknowledged failures of neoliberalism.” *Id.* at

has been a marked shift in the rhetoric (even if at times inconsistent with the practices and policies) of many IFIs and non-governmental organizations (“NGOs”), which suggests a move towards empowering poor people through locally tailored law and development projects.⁷⁶ In the call to contextualize legal reforms, scholars and practitioners have become increasingly interested in not only understanding the impact of culture, but also in exploring how outsiders can use culture as a tool for development.⁷⁷ Two legal scholars in particular, Professors Rosa Brooks and Lan Cao, have written articles arguing that law and development efforts should focus on changing specific cultural norms that stand in the way of development.⁷⁸

10. They explain that, “[a]s the neoliberal Moment played itself out, even those who believe that the market is the only way to allocate resources for growth came to recognize that markets do not create themselves, may sometimes fail, and cannot deal with all issues of concern to developing countries.” *Id.* at 11. If, in fact, they are correct that market failures have led to a broad reexamination of law and development theory, the recent global economic downturn may further destabilize the dominance of neoliberalism. *See also* RIGHTS AND LEGAL EMPOWERMENT IN ERADICATING POVERTY (Dan Banik ed., 2008).

76. For example, Trubek notes the following general shifts in the World Bank’s thinking around law and development:

- explicit recognition of the failures of transplants and of top-down methods;
- rejection of a one-size-fits-all approach and stress on the need for context-specific project development based on consultation of all “stakeholders”;
- awareness that legal reform requires a long time horizon and cannot be carried out quickly;
- recognition of the importance of the rule of law for poorer segments of the population;
- support for rule of law projects that deal with labor rights, women’s rights, and environmental protection; and
- acceptance of the need to make access to justice an explicit dimension of judicial reform projects.

Trubek, *supra* note 19, at 92.

77. The concept of culture, like the “rule of law,” may be deployed in the interest of quite different political agendas. Lourdes Arizpe explains:

[C]ulture . . . is used not only to describe certain kinds of empirical phenomena, but also to evoke sentiments of historical ancestry, political loyalty, and emotional attachment. This is why culture is a very sensitive issue in politics and policy debates, as anyone who has dealt with development programs will know. It also helps explain the polarized views that have considered culture alternatively as a positive instrument or as an obstacle for development.

Lourdes Arizpe, *The Intellectual History of Culture and Development Institutions*, in *CULTURE AND PUBLIC ACTION* 163, 163 (Vijayendra Rao & Michael Walton eds., 2004).

78. *See generally* Cao, *supra* note 51; Brooks, *supra* note 9.

This part begins by examining the interplay between cultural norms and the law. Next, it explores the “culture change” approach proposed by Brooks and Cao. Finally, it offers a critique of this approach.

A. *The Link between Culture, Norms, Institutions, and the Law*

While culture, norms, and the law are undoubtedly related, they are different concepts with distinct definitions.⁷⁹ If we imagine communities as weavers, culture is the fabric produced from the threads of the values, norms, attitudes, practices, and beliefs that operate in a society.⁸⁰ The fabric is neither consistent nor static. There are variations in the fabric, and at any point, a new strand may be introduced, marking out incremental changes in the overall look of the garment.⁸¹ It is through this fabric that individuals come to conceive of the world around them.⁸²

79. See generally Cohen, *supra* note 11.

80. The term “culture,” not surprisingly, has diverse meanings. For example, Lan Cao defines culture as the “beliefs, preferences, and behaviors of its members, along with the mechanisms that link these traits to one another.” Cao, *supra* note 51, at 371. Brooks defines culture as “the widely shared myths, assumptions, behavioral patterns, customs, rituals, and social and historical understandings of a group.” Brooks, *supra* note 9, at 2286 n.50. In the introductory chapter to his edited collection of essays on the subject of culture, entitled *Culture Matters: How Values Shape Human Progress*, Samuel Huntington notes that the definition of “culture” varies across disciplines. He settles on the following definition: “if culture includes everything, it explains nothing. Hence we define culture in purely subjective terms as the values, attitudes, beliefs, orientations, and underlying assumptions prevalent among people in a society.” Samuel P. Huntington, *Foreword: Culture Counts*, in *CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS*, xiii, xv (Lawrence E. Harrison & Samuel P. Huntington eds., 2000). While I ultimately disagree with Huntington on how culture and development intersect, I find his definition to be sufficient.

81. Celestine I. Nyamu, among others, notes that “culture is dynamic, responds to social change, and undergoes transformation over time.” Celestine I. Nyamu, *How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT’L L.J. 381, 393 (2000).

82. Douglass North posits that

[a]lthough a complete understanding of how the mind processes information has not yet been achieved, cognitive science has made impressive strides in recent years. Individuals possess mental models to interpret the world around them. These are in part culturally derived—that is, produced by the intergenerational transfer of knowledge, values and norms which vary radically among different ethnic groups and societies. In part they are acquired through experience which is “local” to the particular environment and therefore also varies widely with different envi-

Norms, on the other hand, are widely embraced rules that societies rely upon to understand, organize, and regulate themselves.⁸³ Norms are a strand within the fabric of culture. They reflect the attitudes and beliefs that constrain individual and group behavior within a community. Norms may be formalized into written law or remain unwritten and informal.⁸⁴ Regardless of whether norms are codified, every society operates under some regime that either directly or indirectly coerces its members to conform to a certain set of norms. The degree and the methods of coercion vary in significant and important ways, but ultimately all societies are governed by a set of norms, which conflict with or complement the formal law.

Historically, law and development scholars have focused almost exclusively on formal law.⁸⁵ However, with the advent of New Institutional Economics,⁸⁶ there has been a growing recognition that “[n]orms guide human conduct and social

ronments. Consequently there is immense variation in mental models, and as a result different perceptions of the world and the way it “works.”

Douglass C. North, *The New Institutional Economics and Third World Development*, in THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT 17, 18 (John Harriss et al. eds., 1995) [hereinafter North, *The New Institutional Economics*]. Furthermore, some NIE theorists assert that “mental models can sustain systems that are anything but efficient.” John Harriss et al., *Introduction: Development and the Significance of NIE*, in THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT, *supra*, at 1, 3.

83. Brooks defines norms as “widely shared attitudes and their associated behavioral imperatives.” Brooks, *supra* note 9, at 2286 n.50.

84. See Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 366 (1994) (“It is the admixture of formal rules, informal norms, and enforcement characteristics that shapes economic performance. While the rules may be changed overnight, the informal norms usually change only gradually. Since it is the norms that provide ‘legitimacy’ to a set of rules, revolutionary change is never as revolutionary as its supporters desire, and performance will be different than anticipated. And economies that adopt the formal rules of another economy will have very different performance characteristics than the first economy because of different informal norms and enforcement.”).

85. Davis & Trebilcock, *supra* note 29, at 932 (defining formal law as “a system that involves administration of norms by state actors”).

86. *Id.* at 902. “The NIE is, moreover, a body of economic theory which ascribes an important role to ideas and ideologies, and one which is accessible to other social scientists, seeming to open up the terrain of genuinely inter- (not just ‘multi-’) disciplinary enquiry.” Harriss et al., *supra* note 82, at 1–2; see also North, *The New Institutional Economics*, *supra* note 82, at 17 (“[N]ew institutional economics is an attempt to incorporate a theory of institutions into economics. . . . What it retains and builds on is the fundamental assumption of scarcity and hence competition—the basis of the choice theoretic approach that underlies microeconomics. What it abandons is instrumental rationality—the assumption of neo-classical economics that has made it an institution-free theory.”).

interaction as much as formal legal rules.”⁸⁷ New Institutional Economic theory maintains that the law has intrinsic value because it forms the foundation for institutions and creates the rules of the game, both of which are invaluable to a well-functioning civil society:⁸⁸

Institutions are the rules of the game of a society, or, more formally, are the humanly devised constraints that structure human interaction. They are composed of formal rules (statute law, common law, regulations), informal constraints (conventions, norms of behaviour and self-imposed codes of conduct), and the enforcement characteristics of both.⁸⁹

In this sense, New Institutional Economics helped to shift the focus from state to “institutional” interventions.⁹⁰ Exploring

87. John N. Drobak, *Introduction to NORMS AND THE LAW* 1 (John N. Drobak ed., 2006). Furthermore, Drobak asserts that norms and the law work together in a feedback loop:

Sometimes the law can be a strong influence on a change in norms, by forcing a change in conduct that gradually becomes accepted throughout society or by inducing a change in the perceptions about the propriety of certain conduct. . . . Of course, the law can rarely change norms, even over decades, without the concomitant influence of education, propaganda, peer pressure, and other similar forms of social persuasion. The influence in the other direction, however, is much stronger because much of the law reflects society’s values and norms.

Id. Brooks further argues “that there is indeed a problem with how we go about promoting human rights and the rule of law” and that

the root cause of the problem is the failure to take seriously issues of norm creation, and the complex relation between law and norms. In part, truly acknowledging this problem must involve recognizing something lawyers are often reluctant to acknowledge—that at times “the law” in its formal sense is of peripheral importance at best. Although we imagine that the trappings of formal law are central to creating order and reducing violence, there is little evidence that this is so.

Brooks, *supra* note 9, at 2289.

88. Douglass North, Nobel-Prize winning economist, posits:

All organized activity by humans entails a structure to define the “way the game is played,” whether it is a sporting activity or the working of an economy. That structure is made up of institutions—formal rules, informal norms, and their enforcement characteristics How the game is actually played depends not only on the formal rules defining the incentive structure for the players and the strength of the informal norms but also on the effectiveness of enforcement of the rules. . . . Where do the rules, informal norms, and for that matter the effectiveness of enforcement, come from? They are derived from the beliefs humans have.

NORTH, *ECONOMIC CHANGE*, *supra* note 1, at 15.

89. North, *The New Institutional Economics*, *supra* note 82, at 23.

90. See Berkowitz et al., *supra* note 54, at 171 (“A legal order is a property of every society. Norms may be formalized, i.e. embodied in written rules, or they

the intersection between norms and the law opened up a multitude of interdisciplinary queries, as well as opportunities to broaden the tools wielded by policymakers in their effort to shape, implement, and enforce rules.

As discussed in Part I.B., some rule of law initiatives focused, at least in part, on creating institutions such as the police and independent judiciaries that would in turn create the conditions in which a legal culture conducive to development would flourish. But, institutions, like legal systems, proved similarly difficult to transplant.⁹¹ “There is growing evidence that desirable institutional arrangements have a large element of context specificity, arising from differences in historical trajectories, geography, political economy, or other initial conditions.”⁹² Once again, in search of explanations as to why transplants flourish in certain contexts but fail to launch in others, some law and development theorists have identified underlying cultural norms as the key variable.⁹³ In essence,

may be based on conventions, customs, and remain informal. Most societies today have both informal and formal legal systems.”). Consequently, regardless of whether communities exist outside of “formal” legal institutions, informal institutions (norms) are at work maintaining and reinforcing the social, economic, and political order of communities. For a discussion of the extent to which some societies operate largely outside formal legal institutions, see HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 172 (2000) (“[P]roperty arrangements work best when people have formed a consensus about the ownership of assets and the rules that govern their use and exchange. Outside the West, extralegal social contracts prevail for a good reason: They have managed much better than formal law to build on the actual consensus between people about how their assets ought to be governed.”). Although I do not necessarily agree with de Soto’s assessment that the solution to this situation is to work towards formalizing existing social contracts, I think he does a good job demonstrating the significant role norms play in shaping interactions even in the absence of formal legal institutions.

91. See Brooks, *supra* note 9, at 2290 (discussing various attempts to establish institutions in post-conflict settings). Brooks further noted that “many recent rule-of-law promotion efforts have been surprisingly unnuanced and formalistic, and their shallow formalism has condemned them to irrelevance at best. At worst, such approaches may not only fail to create the rule of law—they may actually undermine the rule of law.” *Id.*

92. Dani Rodrik et al., *Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development*, 9 J. ECON. GROWTH 131, 157 (2004).

93. See, e.g., Cao, *supra* note 51, at 411 (noting “law and development has been focused almost exclusively on the formal aspects of law, on codes and legislation and courts” and advocating a shift in law and development to the “task of changing habits, mindsets, traditional ideas . . . [, and] culture”); Brooks, *supra* note 9, at 2285–86 (“Recent U.S. and international interventions to promote the rule of law (interventions through military force and through massive aid infusions designed to alter fundamental aspects of societies) have been disappointing in large part because their architects are unwilling to grapple with complex issues

these theorists argue that the plant (the laws and/or institutions) has failed to thrive because it is incompatible with the soil (the culture). Consequently, they advocate for a change in the soil.

B. *Culture Change*

Arguably, all law and development efforts have sought to change people's mindsets. In the first-wave law and development movement, theorists believed that the law could be used to create a certain legal culture, which in turn would shape the values and attitudes of people.⁹⁴ Likewise, rule of law initiatives attempted to change the way people think through reforming institutions.⁹⁵ Presently, "culture change" advocates seek to alter norms by targeting individuals directly.

1. Culture Change Theory

Some pro-culture-change theorists believe that culture is a root cause of poverty and that to tackle poverty, reformers must first reform the culture of the impoverished group.⁹⁶ In 1999, the Harvard Academy for International and Area Studies organized a symposium—Cultural Values and Human Progress⁹⁷—at which the issue of culture change was a highly contested topic. "One of the most controversial issues debated at the symposium . . . was the extent to which cultural change should be integrated into the conceptualizing, strategizing, planning, and programming of political and economic development."⁹⁸ Acknowledging that culture is a tricky subject "both politically and emotionally," Lawrence Harrison explained that

of norm creation and the relationship between 'law' and 'norms.' We have failed to define or justify our goals and we have failed to even ask, much less search for the answers, to some very basic questions about how and when societies change, what role (if any) law can play in such cultural change, whether law has any necessary correlation with order and violence, and how and when outsiders (or insiders, for that matter) can promote norm change in particular directions.").

94. See *supra* Part I.A.

95. See *supra* Part I.B.

96. See generally Huntington, *supra* note 80, at xiii, xv; Lawrence E. Harrison, *Introduction: Why Culture Matters*, in CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS, *supra* note 80, at xvii, xvii–xxxiv; Stace Lindsay, *Culture, Mental Models, and National Prosperity*, in CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS, *supra* note 80, at 282.

97. The book edited by Harrison and Huntington grew out of the symposium. See *supra* note 80.

98. Harrison, *supra* note 96, at xxx.

“[i]t is also difficult to deal with intellectually because there are problems of definition and measurement and because cause-and-effect relationships between culture and other variables like policies, institutions, and economic development run in both directions.”⁹⁹ In spite of these concerns, Harrison reported that a “substantial consensus emerged” to advocate for research that would result in “value- and attitude-change guidelines, including practical initiatives, for the promotion of progressive values and attitudes.”¹⁰⁰

While there has been a growing body of legal scholarship addressing norm creation within the United States,¹⁰¹ until recently little attention was paid toward the interplay between cultural norms and the law in international settings.¹⁰² Brooks asserts:

The rule of law is not something that exists “beyond culture” and that can be somehow added to an existing culture by the simple expedient of creating formal structures and re-writing constitutions and statutes. In its substantive sense, the rule of law *is* a culture, yet the human-rights-law and foreign-policy communities know very little—and manifest little curiosity—about the complex processes by which cultures are created and changed.¹⁰³

However, recent scholarship has opened up a dialogue about the connection between culture and law within international development discourse with two legal scholars in particular, Lan Cao and Rosa Brooks, advocating explicitly for cul-

99. *Id.* at xxxii.

100. *Id.*

101. *See, e.g.*, Drobak, *supra* note 87, at 2 (“Over the past few years, legal scholars have begun to devote more attention to the importance of norms in analyzing legal issues.”); Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 537 (1998); Sunstein, *supra* note 12, at 910–11.

102. *E.g.*, Brooks, *supra* note 9, at 2325–26 (“[W]hile a good deal of recent work on domestic legal issues takes on the descriptive project of analyzing how norms and law interact, only a few legal scholars have addressed the question of how purposive governmental or nongovernmental norm-creation projects might actually work. This lacuna is even more noticeable in the domain of international and comparative law. . . . [T]hese issues of norm creation in the complex context of modern, international interventions are located at the interstices of international law, comparative law, and domestic law, traditionally conceived. They have found no disciplinary home, and tend to slip through the cracks, always at the periphery, never at the center of attention.”).

103. Brooks, *supra* note 9, at 2285.

ture change initiatives.¹⁰⁴ Amy Cohen refers to proponents of this approach as “neocultural interventionists.”¹⁰⁵ In her view, these neocultural interventionists maintain that “transplanted laws, rules, and institutions are unlikely to produce their intended social effects in divergent social contexts or, for that matter, to produce any effects at all. [Neocultural interventionists] suggest changing the hearts and minds of ordinary people in order to make these institutional reforms more determinate and effective.”¹⁰⁶ For example, in a recent article entitled *Culture Change*, Cao proposes:

[L]aw and development [must] move beyond law and technical dimensions of the “rule of law.” As slippery as a concept as culture may be and as complex and controversial as the notion of culture change undoubtedly is, particularly given the history of colonialism, I argue that we must enter the cultural milieu and ask whether certain cultural attributes in a given society are an impediment to that society’s economic development. Law may still be relevant, but only if it is *also* viewed culturally, and not just instrumentally, “as the embodiment of norms . . . and the repository of social meanings.” If law embodies or reflects norms, then norms must accordingly be addressed, *especially those that may be at odds with development objectives.*¹⁰⁷

2. Culture Change Projects

Cao insists that more attention must be paid to the extra-legal and non-legal norms, culture, and structure that impact

104. See generally *id.*; Cohen, *supra* note 11; Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CAL. L. REV. 643 (2001); see also Cao, *supra* note 51, at 369.

105. Cohen, *supra* note 11, at 512.

106. *Id.* She further suggests that academic and programmatic versions of this project agree that development programs should inculcate a “rule of law culture” not only among legal elites but in the everyday users of the legal system: “culture” must change so that it perpetuates a readiness to turn to law and legal institutions for solutions to conflict, an expectation that law will be decisive, consistent, and fair, and a willingness to abide by legal outcomes even when they fall short of what might be imagined possible through violence. Development professionals should, neocultural interventionists propose, install these ideas in ordinary individuals by directly teaching and promoting them.

Id. at 512–13.

107. Cao, *supra* note 51, at 358 (second emphasis added).

formal laws.¹⁰⁸ She argues that law and development theorists and practitioners should undertake projects that explore the link between cultural norms and the adoption and enforcement of new legal regimes.¹⁰⁹ It is not so much the recognition of the role that norms play in reinforcing or deflating the law that sets the neocultural interventionists apart from other law and development scholars. Instead, it is the suggestion that law reformers undertake deliberate culture change projects that is so provocative.

Cao proposes “confronting not just specific practices but also general inclinations, values, preferences or mindsets that do not contribute positively towards economic development.”¹¹⁰ Her argument begins with the assertion that “[a] culture change project should be considered if certain cultural attributes are ‘harmful to economic productivity.’”¹¹¹ Brooks, on the other hand, is less clear about which norms she believes should be changed, but it is clear that she thinks that norms should be the focus of change.¹¹² Cohen argues, and this Article agrees, that neocultural interventionists seek to use culture “as a mechanism of enlisting ordinary individuals to pro-

108. *Id.* at 370.

109. *See* Cao, *supra* note 51, at 359.

110. *Id.* She further asserts that there is a “glaring gap in law and development studies—a blind spot to culture, norms, and custom and how they influence a country’s laws and its economic development.” *Id.* at 370. She goes on to suggest that this blind spot is due to one of three reasons: either “[1] from an acultural framework law and development inherited from international law generally; or [2] from a general reluctance to touch culture because of a history of cultural imperialism . . . ; or [3] from the sense that culture is hard to quantify and thus cannot be legislated.” *Id.*

111. *Id.* at 384 (quoting Timur Kuran, *Cultural Obstacles to Economic Development: Often Overstates, Usually Transitory*, in *CULTURE AND PUBLIC ACTION* 115, 120 (Vijayendra Rao & Michael Walton eds., 2004)).

112. Brooks, *supra* note 9, at 2323–24 (querying “what norms should we be trying to create, and how can we justify them? In other words, what precisely are the norms that underlie a substantive commitment to the rule of law, and that can thus enable formal law to be an effective mechanism for further cultural change and adaptation? What norms are conducive to less violent and more equitable societies? And how do we justify trying to “interfere” in other societies to create these norms?”). Brooks concedes that she believes

there are certain core values, capacities, or rights . . . that are universal.

These values act as imperatives, justifying both individual action when they are denied and, at times, concerted action by governments and intergovernmental groups, even when such concerted action involves violating state sovereignty, and even when it goes against the wishes of a majority of people affected by the intervention.

Id. at 2325.

note, but more specifically to embody, development understood as the rule of law.”¹¹³

Brooks directly challenges legal scholars to take on the question of how to effectively change norms. She implores:

Those who care about human rights and the rule of law cannot afford to leave all of the creative insights about norm creation to the anthropologists or to Hollywood—and we certainly cannot afford to leave them to the bad guys. Yet so far, that is precisely what most of us have done, and this has to change.¹¹⁴

In a section entitled, “*How to Change a Culture*,” Cao takes up Brooks’ challenge and reviews ways in which societies have successfully implemented culture change campaigns.¹¹⁵ Noting that this is only the beginning of her inquiry, Cao highlights some of the methods that might be used to change cultures, including “moral suasion campaigns,” “motion pictures,” “billboards,” and “educational reform[s].”¹¹⁶ She also looks to examples from other countries that have conducted successful culture change projects. She acknowledges that government efforts to produce norm changes “may be viewed pejoratively as propaganda” and that “[s]ome may find it all the more ‘chilling’ when undertaken by liberal states that do not as a matter of course engage in propaganda or brainwashing.”¹¹⁷ Nevertheless, she maintains that the relationship between law and culture necessitates appropriately managed culture change projects under certain circumstances.¹¹⁸

C. Culture Change Projects: Legal Transplants Redux

Acknowledging the link between culture, norms, and the law is a step forward in law and development theory. As discussed above, the transplantation of formal law that is incom-

113. Cohen, *supra* note 11, at 527.

114. Brooks, *supra* note 9, at 2327 (internal footnote omitted).

115. Cao, *supra* note 51, at 401–11.

116. *Id.* at 402–03, 406.

117. *Id.* at 408. Cao further notes that “[d]epending on the nature of the state’s efforts to produce and reshape social and cultural norms, this effort towards norm construction and management may or may not raise the specter of ‘thought control.’” *Id.* at 409. She notes, however, that this is more likely to be a concern in countries that do not otherwise allow free expression or use coercive methods to enforce a culture change agenda. *Id.*

118. *See id.* at 401.

patible with the local culture will often fail.¹¹⁹ Likewise, “culture change” projects, *imposed by outsiders without the demand for change coming from insiders*, are also highly problematic and fraught with both practical limitations and undesirable normative implications. Yes, norms and culture are critical determinants of the extent to which legal transplants will be adopted by a given society; acceptance and acknowledgement of this fact, however, does not mean that outsiders can or should impose culture change initiatives. In this sense, culture change projects are remakes of the legal transplant model.

This Article posits three main objections to the culture change approach proposed by the neocultural interventionists. These objections echo the critiques of the legal transplant model.¹²⁰ The objections are interlinked. First, transplants—of either legal systems or cultural norms—will encounter implementation and enforcement issues as long as the agenda is imposed exogenously, and unless there is an internally driven demand for the reform, it is also likely to be viewed as illegitimate. Second, the assertion that “outsiders” know what is best for any given culture and can socially engineer solutions is imperious and riddled with normative concerns.¹²¹ Finally, neo-

119. See *supra* Part I.C.

120. See *supra* Part I.C; Cohen, *supra* note 11, at 586 (“Inviting people themselves to imagine the disciplining worlds that development planners wish them to inhabit through voluntary culture change is perhaps more seductive, but likely no less illusory [than efforts to transplant legal systems], and perhaps even more so if we mistakenly frame a turn to culture as a turn to context itself.”).

121. Anthropologist Richard A. Shweder illustrates just how difficult it can be to pinpoint why development efforts were successful in one context, but not another:

It would be nice to have in hand a valid general causal explanation for the wealth and poverty of peoples, cultures, or nations, but we don't. . . . Having guns did it here. Having Jews did it there. In this case it was immigration policy; in that case it was having access to quinine. In this case it was freeing the serfs; in that case it was availability of fossil fuel. In this case it was the weather; in that case it was willingness to trade with outsiders. In this case it was having good colonial masters; in that case it was high consumer demand. In this case and that case it was luck. Singapore is not a liberal democracy, but it is rich. India is the world's most populous democracy, but it is poor. Sweden in the eighteenth century was a sparsely populated democracy, and it was poor too. People who are religiously orthodox and don't believe in “gender equality” (e.g., Hasidic Jews) can be rich. Fully secularized egalitarian societies (e.g., former communist countries in Eastern Europe) may fail to thrive from an economic point of view. In 1950, Japan had “Confucian values” (which at the time didn't look very “Western”) and was poorer than Brazil. In 1990 Japan had the same “Confucian values,” which all

cultural interventionists perpetuate the myth that law and development work is neutral and apolitical by asserting that there is consensus about which cultural values are universally superior. These critiques are explored below.

1. Practical Limitations

Exogenously designing, implementing, and enforcing a culture change project that results in a true shift in cultural values would be an enormously difficult, if not impossible task. Putting aside the normative concerns for a moment, this section argues that neocultural interventionists underestimate the practical difficulties involved with changing a culture.

First, as discussed above, there is ample evidence that legal transplants exogenously imposed regularly fail, particularly if there is not a good fit between the transplanted system and the local context.¹²² Culture change projects are *premised on* the lack of a good fit between the culture and certain desirable legal reforms. Rather than tailoring reforms to the individual culture, culture change advocates seek to actually change the underlying cultural norms. It is undeniable that cultures are dynamic and change over time. But it is highly debatable whether cultures can be manipulated through socially engineered culture-change campaigns. Unless there is some internally driven desire to change, reformers will likely encounter a great deal of resistance. Change is likely to be a more organic and incremental process.

Second, communities that are not intimately involved in the agenda-setting process may reject a set of reforms or a particular cultural change project simply because they distrust outside interventions. As Cass Sunstein argues, “a serious problem with legal efforts to inculcate social norms is that the source of the effort may be disqualifying. Such efforts may be

of a sudden seemed very “Protestant-like,” as Japan outstripped Brazil. . . . I think it is fair to say that despite many impressive post hoc historical accounts of the case-specific conditions that have promoted growth, one is entitled to feel confused about the general causes of economic success

Richard A. Shweder, *Moral Maps, “First World” Conceits, and the New Evangelists*, in *CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS*, *supra* note 80, at 158, 168–69.

122. See *supra* Part I.C (discussing the problems associated with legal transplants).

futile or even counterproductive.”¹²³ If community members do not perceive the law-imposing agents as a legitimate source of authority, there is a risk that they will refuse to comply with reform efforts. As evidenced above, local norms are a critical determinant of the degree to which local communities internalize law reforms.¹²⁴ Cohen suggests, and this Article concurs, that neocultural interventionists who propose simply changing local norms fail to appreciate the complexities of how cultures evolve.¹²⁵

Once again, this is not to say that cultures do not change; they absolutely do, just as legal systems do. But we have yet to fully understand how and why they evolve. There is not a simple “culture-change” formula that can be applied from the outside that will lead automatically and predictably to changes in culture. Instead, it seems more likely that change will occur from the inside out—driven by local demand.

123. Sunstein, *supra* note 12, at 919. He further argues:

If Nancy Reagan tells teenagers to “just say no” to drugs, many teenagers may think that it is very good to say “yes.” It is said that propaganda efforts in the former Soviet Union failed simply because the source of the propaganda was not trusted; hence the government’s effort to inculcate norms of its choosing fell on deaf ears.

Id. (footnote omitted).

124. See, e.g., Berkowitz et al., *supra* note 54, at 173; Sunstein, *supra* note 11, at 919 (“The fact that some people like to reject social norms is highly relevant to law.”).

125. Cohen, *supra* note 11, at 513. Cohen argues:

[Neocultural interventionists] reason that conscious values and beliefs can produce a set of self-disciplining rules that shape individuals’ behavior, their social relations, and their social practices in reasonably (although not uniformly) predictable ways. I call this *culture as lawlike rules*. Culture, in this second sense, is a grid of prescriptions guiding behavior. This imagines culture to be like law: culture is the set of lawlike rules that condition people to have respect for and comply with the rules of law themselves. I suggest this conceptualization of culture—constructed as the metalaw of law, if you will—is unlikely to remedy the indeterminacies and ineffectiveness of programs to promote the rule of law. Instead, it is likely to generate a new set of problems, or rather, revive old problems in new forms.

Id.

2. Normative Concerns

Cao acknowledges that her project may strike some as a modern-day move toward imperialism.¹²⁶ However, she does not seem particularly troubled by this claim.¹²⁷ She sets out some of the criticisms she anticipates to her approach, including claims that it violates cultural integrity and self-determination, but dismisses these concerns in short order.¹²⁸ Cao argues, in defense, that efforts to protect or preserve the notion of “authentic” cultures are misguided because cultures are “dynamic and heterogeneous,” particularly in our ever-globalizing world.¹²⁹ She further argues that no culture has a monopoly, so to speak, on certain values such as egalitarianism.¹³⁰ Finally, she also acknowledges that critics of her approach may raise

a legitimate concern about repeating the nineteenth century quest to civilize the Third World, not justified as it was then, on the basis of superior Western morality, but rather, in more sophisticated and acceptable language of today—as an imperative of modernity. While global trade has also meant global diffusion of cultures, one might be concerned that countries with greater power could also overwhelm those with lesser power, not just economically but also culturally, with the latter finding itself in a position of “submissive supplication.”¹³¹

Cao offers no response to this “legitimate concern” other than to say that other critics may be motivated by less legitimate concerns.¹³²

Brooks likewise acknowledges the possibility that norm-creation projects raise normative concerns, but like Cao, she

126. Cao notes, “[p]romoting culture change may even be viewed as forcing Western culture on others while simultaneously denying that this is in fact the agenda.” Cao, *supra* note 51, at 379 n.120.

127. Cf. Brooks, *supra* note 9, at 2283 (“In a sense, citizens of Kosovo, Afghanistan, Iraq, and the like must put up with some of the worst aspects of imperialism (culturally insensitive occupying armies that drive up prices, distort local economies, and push through ham-handed ‘reforms’) with few of imperialism’s benefits, such as they were; the new imperialists lack the capacity or the will to stamp out crime, pick up the trash, or make the trains run on time.”).

128. Cao, *supra* note 51, at 394–401.

129. *Id.* at 395–98.

130. *Id.* at 397–98.

131. *Id.* at 396 (footnote omitted).

132. *Id.*

sidesteps the issue and jumps instead to the question of when and how culture can be transformed.¹³³ Brooks argues:

How we answer question one—what norms are we trying to create, and how do we justify them—invariably affects how we answer this last question about the constraints on our norm-creation methods. I want to note here that the question of whether a commitment to human rights requires a commitment to democracy and self-determination is of particular importance to the question of how our norm-creation efforts should be constrained. If we believe that a commitment to human rights and the rule of law requires a simultaneous and evenly balanced commitment to democracy, the possible norm-creation methods open to us may be fewer in number than the techniques available if we decide that democracy is in fact a legitimately lower priority than human rights.

But I want to bracket this question as well—as similarly best suited to the philosophers—and return to the second cluster of questions: How do you change norms effectively? How do you create the conditions in which law matters?¹³⁴

Likewise, Cohen, who critiques the culture change approach on implementation grounds, also does not address normative objections to the neocultural interventionists' project. Instead, she seeks to move the discussion “beyond a general normative preoccupation with whether culture change is itself a good or bad thing.”¹³⁵

This Article argues that neo-cultural interventionists dismiss normative concerns prematurely. Brooks is absolutely correct: the question of whether “a commitment to human rights requires a commitment to democracy and self-

133. Brooks, *supra* note 9, at 2328.

134. *Id.* at 2325 (footnote omitted).

135. Cohen, *supra* note 11, at 515. Cohen insists:

Indeed, the culture change proposals I examine should not be dismissed on these grounds. Any development intervention is normative and non-neutral and, to their credit, neocultural interventionists are remarkable in their willingness to describe development not simply as a process of institutional reform, but rather as a cultural process aimed at constituting individual subjects themselves—here as legal subjects who want to be bound by the dictates of the rule of law.

Id. (footnote omitted). Although Cohen suggests that there is a “preoccupation” with the normative concerns attached to efforts to impose Western values, she only points to two sources over the past thirteen years that have discussed the issue. *Id.* at 515 n.7.

determination” is of vital importance.¹³⁶ The entire project collapses, or at the very least is greatly constrained, if it is determined that human rights and self-determination are of equal value. By choosing to bracket the question, Brooks seems to imply that she does not believe that human rights and self-determination go hand-in-hand. Why leave this question open if the parameters of the project hinge on the answer?

If the purpose of the culture change projects is to bolster human rights, it seems antithetical to suggest that such a project could be achieved using methods that do not enhance self-determination. The Vienna Declaration, a human rights declaration adopted at the World Conference on Human Rights in 1993, provides:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development.

. . . The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.¹³⁷

Rather than leaving to philosophers the question of how human rights could be achieved without an equal and synchronous commitment to democracy and self-determination, law and development efforts should begin with this question.

3. Development is Political

This Article posits that law and development initiatives, regardless of how defined and despite claims of neutrality, are always political in nature.¹³⁸ In the broadest sense, the decision of how to allocate scarce resources (i.e., the choice between writing laws, training judges, or funding legal aid organiza-

136. Brooks, *supra* note 9, at 2328.

137. World Conference on Human Rights, June 14–25, *Vienna Declaration and Programme of Action*, ¶2, U.N. Doc. A/CONF.157/23 (July 12, 1993).

138. Harriss et al., *supra* note 82, at 10 (“The institutions of a society—formal and informal—are created to serve those in possession of bargaining power, and the effort to uphold these institutions, even in the face of changes in transaction costs, information flows and their increasing disutility, leads to the formation of dominant interest groups. . . . Of necessity, analyses of institution-building have to deal with the exercise of political power and manipulation of economic advantage.”).

tions) is inherently political. The law, furthermore, is a tool wielded to shape social interactions and relationships. The application of the law necessarily implicates power and politics. The type of laws, the process by which laws are adopted, and the implementation of laws all involve choices about the distribution of scarce resources. Ultimately, the choices reflect normative judgments. It follows then that development is a political process and should be understood as such. If we understand development as a political process, it becomes all the more absurd to privilege outsiders' preferences in setting development agendas.¹³⁹ Like any political process, communities should have the opportunity to engage in a dialogue and adopt a process whereby political decisions can be made with their input.

III. PARTICIPATORY LAW AND DEVELOPMENT

Over the last several decades, trillions of dollars have been spent on development efforts with relatively little to show for it. As is often cited, “[o]f the world’s 6 billion people, 2.8 billion—almost half—live on less than two dollars a day, and 1.2 billion—a fifth—live on less than one dollar a day.”¹⁴⁰ In addi-

139. Of course, it would be naïve to think that development organizations and governments could ever operate without their own agenda. Realistically, when an outside funding source supports rule of law initiatives, there is an agenda, even if the program is promoted as a “participatory” or “grassroots” or “community-supported” initiative. But for those actors who take participatory development theory seriously, significant attention needs to be paid to the purpose of the project. Ideological aims should be front and center, both to encourage transparency, but also to provide guideposts to measure the effectiveness of such efforts.

140. *E.g.*, MICHAEL J. TREBILCOCK & RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS 3* (2008). Furthermore, Trebilcock and Daniels note:

With respect to health, life expectancy for the least developed countries at the end of the 1990s, despite improvements, still averages only 48 years compared to 63 years in other developing countries, and 75 years in developed countries. Infant mortality rates (the number of children who die before their first birthday out of 1,000 live births) average about 96 in the least developed countries, compared to approximately 64 in other developing countries. . . . For example, with respect to HIV/AIDS, of the 36 million who have contracted HIV/AIDS, 90% live in developing countries, almost 20 million in sub-Saharan Africa. With respect to education, among the least developed countries, literacy rates average only 45% of the population compared to 64% in other developing countries and 99% in developed countries. The vast majority of people in most developing countries live and work in rural areas. Sixty-two percent of the labour force in developing countries is engaged in agriculture compared

tion, “over three billion people currently live without legal protection.”¹⁴¹ These statistics should give pause to anyone involved with shaping development policy. Clearly something is not working.

Turning back to the example of the latrine project in Haiti,¹⁴² it is evident that something other than just resources was lacking. In that example, the community, angered by the fact that it had not been involved in the planning process for the latrines, refused to use the latrines out of protest. Upon hearing this story, some might argue that it is exactly this type of seemingly irrational behavior that keeps communities trapped in poverty. This story might provoke some to say that development efforts should be abandoned altogether. Still others might argue that this example demonstrates why outsiders should be the ones who make decisions: communities cannot be trusted to make decisions regarding matters of law and development. Instead, this Article argues that this story illustrates precisely why it is so critical that decision-making authority be located within communities.

As long as wealthier nations believe that development activities around the globe serve their political, economic, and security interest, they will most likely continue to pour billions of dollars into law and development initiatives. If, in fact, there is a genuine interest in making the best use of resources spent on development, then law and development efforts must bring local users into the process. Of course, this argument hinges on one major assumption: in addition to self-serving interests, outside funders must have a real desire to increase the capabilities of the poor. Economist Dani Rodrik argues for an approach to development that is distinctly attuned to the importance of culture and local context, but also makes no *ex ante* assumptions about how certain reforms will work in a specific

to only 7% in developed countries. While since 1972 the number of (nominal) democracies in the world has increased from about 40 to over 100, a number of these are fragile, shallow or corrupt

Id.

141. Dan Banik, *Introduction* to RIGHTS AND LEGAL EMPOWERMENT IN ERADICATING POVERTY, *supra* note 75, at 1. Furthermore, “[m]ore than 80 to 90 percent of day-to-day disputes in Africa are said to be resolved through nonstate systems such as traditional authorities. . . .” Laure-Hélène Piron, *Time to Learn, Time to Act in Africa*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 8, at 275, 291. My focus, therefore, is on the lives of people who for the most part do not interact with formal markets and legal institutions.

142. *See supra* INTRODUCTION.

setting.¹⁴³ This approach, referred to by some as participatory development, seeks to engage local communities as participants, not just recipients, in the process of development. Participatory development is not a new concept in the broader field of development,¹⁴⁴ but with few exceptions,¹⁴⁵ it has yet to move beyond mostly rhetoric within legal scholarship and law reform practice.

This part, therefore, hopes to begin a conversation about what it would mean to take seriously the idea of a participatory approach to law and development.¹⁴⁶ First, it makes the case for why self-determination should be the key organizing principle for law and development practice. Next, it proposes a framework for shifting the locus of agenda-setting authority from international donors to local law users. Finally, it addresses some of the challenges and anticipated critiques of the theory.

143. Rodrik has supported his theory that local context matters through extensive empirical research. See generally, e.g., Sharun W. Mukand & Dani Rodrik, *In Search of the Holy Grail: Policy Convergence, Experimentation, and Economic Performance*, 95 AM. ECON. REV. 374 (2005); Dani Rodrik, *Growth Strategies*, in 1A HANDBOOK OF ECONOMIC GROWTH 967 (Philippe Aghion & Steven N. Durlauf eds., 2005).

144. See, e.g., Anita Abraham & Jean-Philippe Platteau, *Participatory Development: Where Culture Creeps In*, in CULTURE AND PUBLIC ACTION, *supra* note 77, at 210, 210–33.

145. The World Bank's Justice for the Poor, a relatively new initiative, is one exception. Justice for the Poor (referred to as "J4P") appears to appreciate the value of stakeholder participation. "Dialogue" is one of the key activities of the project:

Inherent in the J4P approach is the promotion of equitable spaces for dialogue and negotiation to take place so grievances and conflicts can be aired and managed; facilitating equitable multi-stakeholder participation and managing conflicts arising out of processes of change are fundamental aspects of the program itself. Starting before the establishment of a J4P country program, covering the period of program design and continuing through operations, dialogue with partner governments, non-government organisations, citizens generally and donors forms the basis of J4P engagement. The success of the ongoing program is to a large extent dependent on the ongoing involvement of all key stakeholders.

THE WORLD BANK, JUSTICE FOR THE POOR PROGRAM 3 (2008), available at <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/J4POverviewMay2008.pdf>.

146. This Article is concerned primarily with exploring strategies that can be utilized to enhance the capabilities of severely economically impoverished communities. This, of course, is not an insignificant population.

A. *The Case for Self-Determination*

Over 30 years ago, Trubek and Galanter argued that “would-be legal developers” had to create a theory of legal development to persuade funders of the value of their work and to justify their role as interveners.¹⁴⁷ Modernization and legal formalism theory provided the justification for outside intervention by privileging the knowledge and experience of those from more economically developed countries.¹⁴⁸ Western Hegemony was further perpetuated by the reality that Western countries had more resources and, therefore, more influence to spread around, even as the authority assumed by Westerners through modernization and legal formalism was questioned.¹⁴⁹ Today, the question remains: What principles or guidelines *should* be employed when foreign governments and international organizations providing development assistance intervene in the internal affairs of a “consenting” sovereign state, particularly when the power imbalances are so significant that the line between consent and coercion becomes blurry?

This part argues that self-determination should be the guiding principle for law and development efforts. If the goal of law and development efforts is to enhance the capabilities of people living in poverty, as this Article argues it should be, then self-determination is important both as a means and an end. In other words, self-determination is a tool that can be used to help ensure the enhancement of capabilities; the exercise of self-determination also represents an achievement of enhanced capabilities in and of itself.

Self-determination is instrumentally critical to law and development initiatives for two reasons. First, as has been discussed at length, legal reforms often fail because they are not specially tailored to the unique circumstances of a locale.¹⁵⁰ Placing an emphasis on self-determination means that law reforms will be designed by “insiders” or people who will be the end-users of the reforms. This does not guarantee, but should help improve the chances that the reform is responsive to the context. Second, self-determination will foster a sense of legi-

147. Trubek & Galanter, *supra* note 15, at 1087.

148. See *supra* Part I.B for a discussion of modernization and liberal legalism theory.

149. See *supra* Part I.A.

150. See *supra* Part I.C (discussing the problems associated with legal transplants).

timacy, buy-in, and local ownership of the reforms, which will help ensure that the reforms are implemented, internalized, and enforced. For these reasons, self-determination is crucial to achieving better development outcomes.

In addition, self-determination has significant intrinsic value. Nobel prize-winning economist Amartya Sen argues in his book *Development as Freedom* that enhancing human capabilities is development's *raison d'être*.¹⁵¹ This Article takes a similar position with regard to the role of self-determination in law and development projects. The following sections explore self-determination further.

1. Shifting Authority from “Outsiders” to “Insiders”

As has been discussed, law reform agendas, historically, have been developed and implemented almost exclusively by “outsiders.”¹⁵² Certainly the insider versus outsider distinction is becoming more and more of a false dichotomy, particularly in today's world where globalization and technology have rendered national boundaries less meaningful. Nonetheless, while the line between “outsiders” and “insiders” is increasingly blurry, it should not be entirely erased. There is still an important distinction to be made between individuals and communities who must live within the parameters of a certain legal regime (insiders) and others who are not subject to the same legal regime (outsiders).¹⁵³

The most extreme example of an exogenously imposed legal system, of course, is the case of one country conquering or

151. See SEN, *surpa* note 6.

152. This Article uses the term “outsiders” to refer to entities (e.g., governments, international organizations) that are foreign, in the commonly understood form of the word, to the law receiving body.

153. See Shweder, *surpa* note 121, at 172–76, for a fascinating discussion of the complexities of how to distinguish, in today's world, between insiders and outsiders. Shweder argues:

[The insider role] has become increasingly complex, even dubious, in our postmodern world, where the outside is in and the inside is all over the place (think of CNN, VISA, and the Big Mac). . . . Consequently, one feels inclined to raise doubts about any claims to authority based on an equation of citizenship (or national origin) with “indigenous” voice. After all, whose voice is more “indigenous”? The voice of a “Western-educated” M.B.A. or Ph.D. from Dakar or New Dehli . . . ? Or the voice of a “Western” scholar who does years of fieldwork in rural villages in Africa or Asia . . . ?

Id. at 160 n.1.

colonizing another country. During colonization, the transfer of law from the “conquering” country to the “conquered” country was quite common, although certainly not without complications or resistance. It is worth remembering that the transfer of law was imposed, often violently, and with little or no input from the population. Volumes have been written detailing the history of colonization, the policies and practices used to enhance and enforce the colonizers’ power, and the lasting, devastating effects of colonization. The violent methods used to transfer law under colonization have been resoundingly rejected.

Nevertheless, foreign governments and international organizations still seek to impose Western legal and moral codes on developing nations.¹⁵⁴ Furthermore, while the methods used to pressure developing countries to adopt certain prescriptions are generally described as “voluntary,” some countries may be so desperate for assistance that they feel they have no other choice but to comply.¹⁵⁵ This Article does not suggest that outsiders have no role to play in the process of law creation/reform. Instead, it seeks to begin a discussion of how to redraw the playing field so that communities are not coerced into accepting exogenously imposed agendas, but rather have a meaningful part to play in the development process.

2. Setting the Development Agenda

The changing culture approach recognizes that law reforms will fail if there is not a good fit between the proposed policy and existing norms. But instead of asking communities

154. See *supra* Parts I and II for a discussion of how first-wave law and development reformers, rule-of-law initiatives, and neo-cultural interventionists have sought to reform legal systems and cultures through the transfer of Western legal and moral codes.

155. For example, the Structural Adjustment Programs implemented by the World Bank and the International Money Fund are technically voluntary because countries that borrow from IFIs are choosing to borrow the funds. See JASON ORINGER & CAROL WELCH, *FOREIGN POLICY IN FOCUS, STRUCTURAL ADJUSTMENT PROGRAMS* (1998), available at http://www.fpif.org/reports/structural_adjustment_programs.

However, debt crises in impoverished countries left such countries little choice but to borrow from IFIs and consequently to have structural adjustment programs implemented. *Id.* Conditions that come along with the implementation of structural adjustment programs “generally entail severe reductions in government spending and employment, higher interest rates, currency devaluation, lower real wages, sale of government enterprises, reduced tariffs, and liberalization of foreign investment regulations.” *Id.*

to set the agenda about what norms, institutions, or laws they wish to change, the changing culture approach, like the legal transplant approach, would invert the process and allow outsiders who work for the funding agencies to decide what norms (or laws) should be changed *ex ante*.¹⁵⁶ Neo-cultural interventionists would continue the practice of privileging the values and opinions of outside law and development “experts” above those of the local community. Thus, this approach to development violates fundamental notions of self-determination.

For example, Cao argues that culture change projects should be considered when local norms impede economic development.¹⁵⁷ This statement assumes that there is consensus around what constitutes development. Cao paints a picture in which scholars, NGOs, IFIs, and nation-states across the globe have come together to agree that “working markets” are the key to both wealth creation and an enhanced quality of life.¹⁵⁸ Cao maintains that the “finding that wealth, one measure of economic development, correlates with an improvement in the protection of rights, whether political or economic, has been duplicated and supported by many other studies.”¹⁵⁹ To be sure, wealth creation is an important component of development. However, there are many others who would argue that wealth is only one factor among many that should be used to measure development.

For example, Amartya Sen argues that development should be measured broadly in terms of “human capabilities” rather than merely in terms of the more narrow and traditional economic factors¹⁶⁰:

What the capability perspective does in poverty analysis is to enhance the understanding of the nature and causes of poverty and deprivation by shifting primary attention away from *means* (and one particular means that is usually given exclusive attention, viz., income) to *ends* that people have

156. See *supra* Part II.B.

157. Cao, *supra* note 51, at 368.

158. *Id.* at 365–67. Cao states: “[t]hose enthusiastic about markets and the rule of law are now numerous and include entities that do not ordinarily form part of a common alliance, such as development NGOs, businesses, human rights groups, and the UN.” *Id.* at 367.

159. *Id.* at 367.

160. See generally SEN, *supra* note 6.

reason to pursue, and, correspondingly, to the *freedoms* to be able to satisfy these ends.¹⁶¹

Under the capabilities approach, myriad factors—from literacy to infant mortality rates—are measured and compiled to produce a fuller picture that more accurately reflects the quality of life.¹⁶² In 1990, the United Nations Development Programme adopted the approach in the form of its Human Development Index (“HDI”).¹⁶³ The HDI is “a summary measure of human development. It measures the average achievements in a country in three basic dimensions of human development: a long and healthy life, access to knowledge and a decent standard of living.”¹⁶⁴

Ultimately, assumptions about what constitutes development are based on value judgments, which are informed by cultural norms that vary across communities. The neocultural interventionists appreciate the power of norms in shaping attitudes and beliefs, and they recognize that laws will not necessarily be sufficient to change norms. The changing culture approach seeks to assess what is best for a community, to identify norms that stand in the way, and to then develop strategies aimed at shifting the errant norm, *regardless of how the norm is perceived within a community*.¹⁶⁵ This approach violates the principle of self-determination. In no way is this suggesting that norm-shifting activities are wrong, per se. If a community has determined for itself, or even if only some within the community have decided that they wish to alter a certain norm, that is altogether a different matter. But it needs to be driven from the inside—not from the outside.

161. *Id.* at 90.

162. *See id.* at 109.

163. The United Nations Development Programme explains,

This way of looking at development, often forgotten in the immediate concern with accumulating commodities and financial wealth, is not new. Philosophers, economists and political leaders have long emphasized human wellbeing as the purpose, the end, of development. As Aristotle said in ancient Greece, “Wealth is evidently not the good we are seeking, for it is merely useful for the sake of something else.”

The Human Development Concept, UNITED NATIONS DEV. PROGRAMME, <http://hdr.undp.org/en/humandev/> (last visited Feb. 8, 2011).

164. *Human Development Reports: Composite Indices – HDI and Beyond*, UNITED NATIONS DEV. PROGRAMME, <http://hdr.undp.org/en/humandev/indices> (last visited Feb 8, 2011).

165. *See generally* Cao, *supra* note 51.

As a practical matter, individuals who are most closely associated with a community will have the best insight into the norms and values that shape local institutions. Therefore, if the goal is ensuring a good fit between legal reforms and the existing local context, then it follows that those who are most familiar with the local community should be charged with shaping the development agenda.¹⁶⁶

3. Self-Determination is Development

Self-determination and local ownership of law and development initiatives will increase the likelihood of success. Taking this one step further, the success of law and development projects could be measured in terms of the extent to which they enhance self-determination. In this sense, self-determination is development. As Thomas McInerney insists:

While many in the development community express their support for a participatory approach to development, the justification is usually instrumental. . . . [T]he rationale for inclusive law and development goes beyond mere instrumental reasons. Instead, inclusive and deliberative legal reform is a *sine qua non* for the creation of legitimate law and democracy. Rather than simply one of the various options available, the application of a truly deliberative participatory legal-reform process is essential to upholding the very purpose of reform.¹⁶⁷

This Article does not dispute the fact that cultures are heterogeneous and dynamic, nor does it seek to preserve an “authentic” culture.¹⁶⁸ Yet, the existence of varying points of

166. See Kennedy, *supra* note 15, at 155 (“[L]ocating decisions as close to the ground as possible reflects a hunch that those with more local knowledge will be more able to understand the cultural, institutional and political context within which development policy will need to be made . . .”).

167. Thomas McInerney, *Law and Development as Democratic Practice*, 38 VAND. J. TRANSNAT’L L. 109, 124 (2005).

168. As Sen argues:

The more serious issue, rather, concerns the source of authority and legitimacy. There is an inescapable valuational problem involved in deciding what to choose if and when it turns out that some parts of tradition cannot be maintained along with economic or social changes that may be needed for other reasons. It is a choice that the people involved have to face and assess. The choice is neither closed (as many development apologists seem to suggest), nor is it one for the elite “guardians” of tradition to settle (as many development skeptics seem to presume). If a

view within a community does not justify the intervention of an outsider to settle the differences. It would be absurd to argue that the right of self-determination only belongs to homogeneous communities who are in total agreement about how change should occur.¹⁶⁹ Of course, there will always be multiple perspectives, goals, and ambitions within a single culture.¹⁷⁰ Nevertheless, as a normative matter, members of a community ought to be able to make decisions for themselves.

*B. Participatory Law and Development Framework:
Remapping the Locus of Authority*

Local communities should set the development agenda for themselves. As it stands now, governments and NGOs who provide development assistance set the development agenda for recipient countries and organizations. Projects, goals, priorities, and funding choices are made by technocrats and ideologues who work for these entities.¹⁷¹ Despite all of the recent

traditional way of life has to be sacrificed to escape grinding poverty or minuscule longevity (as many traditional societies have had for thousands of years), then *it is the people directly involved who must have the opportunity to participate in deciding what should be chosen*. The real conflict is between

- 1) the basic value that the people must be allowed to decide freely what traditions they wish or not wish to follow; and
- 2) the insistence that established traditions be followed (no matter what), or, alternatively, people must obey the decisions by religious or secular authorities who enforce traditions—real or imagined.

SEN, *supra* note 6, at 31–32 (emphasis added).

169. Under this line of thinking, residents of the United States, which is an extraordinarily heterogeneous country, should not be allowed to vote because there are too many conflicting interests.

170. See generally Nyamu, *supra* note 81 (discussing varying norms and perspectives within traditional African communities).

171. The following is a typical description of a law and justice project funded by the World Bank:

The development objective of the Demand for Good Governance Project for Cambodia is to enhance the Demand for Good Governance (DFGG) in priority reform areas by strengthening institutions, supporting partnerships, and sharing lessons. The state and non-state institutions and partnerships supported will be those that promote, mediate, respond to, or monitor to inform DFGG. The restructuring will allow for the financing of Priority Operating Costs (POC) by closing the existing disbursement category for Merit-Based Performance Incentive/Priority Mission Group; and creating a new disbursement category for POC. While no changes in institutional structure or staffing are anticipated, it is possible that an enhanced reliance on support from national and international technical advisors and consultants may be required to maintain high

rhetoric rejecting blueprints and calling for local participation, outside donors still set the agenda.¹⁷² Participation is envisioned as something that occurs later in the process, if at all. For example, an IFI might undertake a private land titling initiative and provide funding to countries or local NGOs that choose to adopt the donor's specific approach. Because resource-strapped countries and communities often are unable to implement projects without monetary assistance from external donors, legal development projects are undertaken based on available funding (which is based on the agenda set by the technocrat/ideologue), rather than on the needs and priorities as set by the law-receiving community. Kerry Rittich notes, "[a]s one recent [World] Bank publication put it, enhancing participation involves first diagnosing the problem and then designing reforms according to the relevant known best practices; at this point, it becomes important to get local buy-in as to priorities and sequencing."¹⁷³ This top-down approach puts the cart before the horse. If those involved in the field of law and development seriously believe that local context matters, then that principle should be reflected *throughout* the process, not merely at the implementation stage.

Participatory law and development would involve local communities in the agenda-setting process from the beginning. Rather than approaching communities with a predetermined agenda to fund certain projects,¹⁷⁴ funding entities would seek

quality performance standards in the affected components of the project until the interim POC scheme becomes effective. There are no changes to the appraisal summary as a consequence of this restructuring.

Demand for Good Governance, THE WORLD BANK, <http://web.worldbank.org/external/projects/main?pagePK=64312881&piPK=64302848&theSitePK=40941&Projectid=P101156> (last updated Dec. 20, 2010).

172. See, e.g., *id.*

173. Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 8, at 203, 228. Rittich further notes, "[a]lthough one of the touchstones of second generation reforms is the rejection of a one-size-fits-all template for development and the importance of wider participation in the formulation of development goals, there is surprisingly little diversity in either the discourse or the prescriptions about the legal reforms needed for development." *Id.*

174. A sampling of typical law and justice projects funded by the World Bank include: training judges, good governance projects, land sector reforms, strengthening private sector financing, and alternative dispute resolution projects. See *Projects and Operations: By Sector: Law and Justice*, THE WORLD BANK, <http://web.worldbank.org/> (follow the "Projects & Operations" link at the top of the page; then click on the "Browse by: Sector" link; then click on the "Law

out or accept proposals from governments or civil society organizations that have an interest in a law and development project, just as they do now, but without a preset agenda.

Some will argue that it is naïve to think that governments and funding agencies would ever relinquish control over how they spend their resources. This Article is not suggesting that participatory law and development requires funding sources to hand over a blank check. Funding sources should be allowed to state upfront ideological limitations on how funding may be used. For example, the United States government could state a condition that none of its funding may be used to support anti-democracy initiatives. But, these limitations should be clear and transparent so as to ensure that all parties are aware of the parameters from the outset. Once a funding agency agrees to work with a particular community, participatory law and development theory would require that the funding agency allow the community to set its own development priorities, so long as they do not conflict with the pre-stated limitations. Participation is of limited value, and may even create more resentment towards outsiders, if it is nothing more than illusory.¹⁷⁵

Participatory law and development theory does not imagine that foreign governments and funding agencies act solely or even primarily out of an altruistic impulse. To the contrary, participatory law and development recognizes that donors are motivated by activities that serve such things as their political, religious, and economic interests. The goal is simply to make the process more honest and transparent through the explicit statement of limiting conditions. Ideally, the funding would be set up through an instrument similar to a trust, allowing the donor to place limits on the funding in the initial instrument, but giving the beneficiary greater independence and freedom to choose how to spend the funds.

Presumably, donors would like to see their resources put to good use. Law and development efforts thus far have been disappointing. Participatory law and development theory

and Justice" link under the "Public Administration, Law, and Justice" heading) (last visited Feb. 8, 2011).

175. See Kevin M. Morrison & Matthew M. Singer, *Inequality and Deliberative Development: Revisiting Bolivia's Experience with the PRSP*, 25 DEV. POL'Y REV. 721, 722 (2007). The authors note a recurring criticism within the literature on deliberative development and deliberative democracy that participatory processes often fail because governments or donors insist on following their own policies or priorities. *Id.*

represents a radical departure from the current process. Given how fruitless development efforts have been thus far, it is worth exploring this approach. Nothing ventured, nothing gained. And in this case, one could argue nothing lost if nothing gained.

C. Challenges and Critiques of Participatory Approach

If participatory development is to work in practice, theorists and practitioners must also be willing to resist the temptation to focus prematurely on “scaling up” and “lessons learned.” The difference between a participatory approach and the legal transplant or changing culture approach is that it sets up no substantive agenda *ex ante*. Instead, the focus is on engaging communities in the process of agenda-setting. This will likely be a time-consuming and resource-intensive process. However, attempts to find shortcuts or “blueprints” will undermine the process. Funders should be reminded of the billions of dollars and the years that have been spent pursuing other development approaches. These other approaches have failed. Participatory law and development may be more resource intensive, but if it leads to better outcomes, then it will certainly be worth it.

In addition, the outside agency must be attuned to power relations within the community and seek to ensure that all voices are heard.¹⁷⁶ North notes, “[i]nstitutions are not necessarily or even usually created to be socially efficient; rather they, or at least the formal rules, are created to serve the interests of those with the bargaining power to devise new rules.”¹⁷⁷ Abraham and Platteau argue that where there are greater disparities in wealth, elites may position themselves to “capture” the power or resources at stake.¹⁷⁸ When such disparities exist, the facilitator’s role should be to help shift the bargaining

176. It is extremely important to consult with as broad a range of community members as possible; otherwise, a practitioner might get a perspective that does not reflect the ideas of particularly vulnerable populations. For example, I did field research in Uganda during the summer of 2009. During that time, I asked a number of men why women were underrepresented on government committees, despite a law mandating that women make up a certain percentage of each committee. The general response from some men was that women had too much other stuff to do, but almost all of the women said that they would find the time to serve on committees, if given the opportunity.

177. DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 16 (1990).

178. Abraham & Platteau, *supra* note 144, at 225.

power so that all parties may lend their voice to the process.¹⁷⁹ This is by no means a straightforward or simple undertaking.

This seemingly simple proposal triggers all kinds of concerns: Who exactly will have the authority to make decisions for a community? What if there is a lack of consensus in the community? Who then does the funder support? And, finally, what if the community wishes to use the funding in a way that is normatively objectionable to the funder? This Article cannot begin to fully address each of these concerns; instead it merely seeks to open a dialogue. However, some brief, initial thoughts follow.

1. Identifying Decision-Makers

There are multiple actors who might wish to exercise authority over development decisions. Nationally elected officials, locally elected officials, community-based organizations, non-governmental organizations, and individual citizens might all stake a claim to participate in the process of agenda-setting. Participatory law and development does not insist that funders always engage every stakeholder group. But, practically speaking, how does a funder decide who to engage? And if funders select the stakeholders, how is this any different than past law and development efforts?

Some may argue that privileging self-determination above all else is counter to the very notion of self-determination. Furthermore, is this not an imposition of a certain value system? There is simply no getting around the fact that funders will always exercise some decision-making authority. Even if funders were to provide local communities with a blank check, decisions would still have to be made regarding which communities receive funds. Rather, the point is to shift, *as much as realistically possible*, the agenda-setting authority to people who will actually be expected to implement, abide by, and enforce the reforms. The funder's role would be to identify partners either within existing structures or to help build structures that would facilitate widespread participation. For example, with the case of the Haitian latrine-building project, the outside funder would want to form relationships with existing commu-

179. A great deal can be learned from the research that has already been done in the area of deliberative democracy. See generally Simone Chambers, *Deliberative Democratic Theory*, 6 ANN. REV. POL. SCI. 307 (2003); Morrison & Singer, *supra* note 175.

nity institutions or provide assistance to develop community-based, decision-making institutions, if none exist.

2. Confronting a Lack of Consensus

Communities are often quite heterogeneous and there almost certainly will be sharp disagreements over community norms and values.¹⁸⁰ To be clear, suggesting that those closest to the ground understand local dynamics best is not the same as saying that local participation will lead to consensus. However, a lack of local consensus does not mean that an outsider needs to step in to settle the differences. Development work broadly, and law and development work specifically, should not be about avoiding conflicts. Practitioners involved with the World Bank's Justice for the Poor program note, "too often effective development programming is seen as a matter of trying to design conflict away; success is seen as perfecting the approach so that disputes do not occur."¹⁸¹ Instead, dissension and conflict should be seen as part of the development process "since the distribution of resources and power will create winners and losers."¹⁸² Conflicts present important opportunities to enhance the self-governing capabilities of communities:

Notwithstanding that eliminating disputes through design may be overly optimistic, and that conflict can clearly become tragically violent, . . . conflict can also be a good thing, a means by which the participation and voice of diverse interests in the re-ordering of society are harnessed. It is through equitable processes of contestation that new agreements and procedures are formed, and their legitimacy acquired.¹⁸³

Funders should focus on ensuring that there are opportunities for diverse parties to participate.

But what is a funder to do if the local users insist on using the funds in a way that the funder finds normatively objectionable? For example, what if a community decides that it wants

180. See generally Nyamu, *supra* note 81 (arguing that communities are neither static nor homogeneous).

181. Caroline Sage et al., *Taking the Rules of the Game Seriously: Mainstreaming Justice in Development The World Bank's Justice for the Poor Program*, in LEGAL EMPOWERMENT: PRACTITIONERS PERSPECTIVES 19, 32 (Stephen Golub & Thomas McInerney eds., 2010).

182. *Id.*

183. *Id.*

to use funding to set up community courts that would use corporal punishment for crimes such as adultery? Should the funder be able to veto this project? Or would this violate the community's right to self-determination?

As mentioned, this type of issue could be addressed through the use of a trust instrument, which could prohibit using the funds for certain activities. For example, the funder could create a limiting clause that would specifically prohibit using the funds to further gender discrimination. Of course, money is fungible and so technically, under this approach, a group could still set up a community court that discriminated against women so long as the earmarked money was not used for that purpose. Therefore, if a funder was really concerned about supporting a group that was engaged in discriminatory activities, it could refuse to financially support any group that engaged in such activities, even if the group did not use the donor's funds to support the discriminatory activity, much like how the United States federal government has structured funding for the Legal Services Corporation.¹⁸⁴

However, we must not deceive ourselves. There is no fool-proof method that will ensure that agendas will be set, reforms undertaken, and laws enforced in exactly the way we would like them to be. This will never be the case. Not in our own country or even in our own homes, let alone in distant places. Rather, the goal is to shift decision-making authority, for both instrumental and intrinsic reasons, to the end users.

CONCLUSION

This Article has explored the theory that law and development efforts have been ineffective because they have failed to take account of how the law interacts with culture and norms. Through an examination of the legal transplant model, the Article maintained that "ignoring culture" is undesirable on both a practical and normative level.

Next, the Article discussed the recent call to contextualize law reforms and the "changing culture" approach advocated by some law and development scholars. It highlighted the similarities between legal transplant and culture transplant approaches and argued that culture transplants must contend

184. Legal Services Corporation ("LSC") regulations restrict the use of both LSC funds and non-LSC funds. *See, e.g.*, 45 C.F.R. § 1608–10 (2010).

with the same practical limitations and normative concerns that have plagued legal transplants.

Finally, this Article proposed a participatory approach to law and development. It explored the theoretical considerations that dictate an emphasis on self-determination and suggested a shift in the role that external actors play in the process of participatory development.

With the emerging emphasis on the link between norms, culture, and the law, the law and development movement is entering a new phase. It will be a missed opportunity if scholars and practitioners replay the legal transplant rulebook in the form of “culture change.” It is time for the law and development movement to stop imposing agendas and instead to help facilitate the cultivation of participatory development.