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Legal Universalism: Persistent Objections

Kevin E. Davis*

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Abstract

This essay addresses the question of whether there is any set of legal institutions that invariably promotes development. 'Universalistic' arguments answer this question in the affirmative. The essay begins by rehearsing classic objections to legal universalism. It then shows how those objections apply to even relatively sophisticated examples of legal universalism that can be derived from the Legal Origins school of thought, the Doing Business project, and advocacy of greater reliance on randomized controlled trials.

Keywords: law and development; legal universalism; Legal Origins; legal experiment; randomized controlled trial; Doing Business project.

I. Introduction

There is a natural urge to search for 'what works' in promoting development. The value of finding a cure for under-development, in terms of avoided suffering and greater opportunities for human flourishing, is on par with the value of finding a cure for cancer. A conundrum though is: How seriously should we take the possibility that there is no single cure? This issue is probably worth considering in relation to every kind of policy

* Beller Family Professor Business Law, New York University School of Law. This article is based on the Inaugural Lecture for the Beller Family Professorship of Business Law, delivered on February 3, 2009 under the title, "Law, Lawyers and Global Development: Can Lawyers Change the World?" I am grateful to Richard Epstein, Mariana Prado, Michael Trebilcock, Karen Knop (the editor) and two anonymous reviewers for helpful comments on earlier drafts.

initiative, whether it happens to be a HIV/AIDs program or an irrigation system.[1] The scope of this essay is limited though to legal reforms. In that context the question becomes, how seriously should we take the possibility that there is no set of legal institutions that invariably tend to promote development? I am honoured to present an essay devoted to this question as part of a tribute to Michael Trebilcock and his scholarship because it is a question with which I know he, like every other serious scholar in the field, has grappled in thinking about the relationship between law and development.

My own position is simple: all claims that any specific feature of the legal system invariably has a causal and positive relationship to development are inherently suspect. The supporting logic is straightforward. Universal claims about the role of law in development necessarily deny the significance of local variations. However, I believe that the role of law in a given society depends upon its interaction with local values or aspirations, local institutions, and local geography (both physical and social). Because societies vary in innumerable ways along some or all of these dimensions, the impact of any given law will vary as well. Moreover, because variations in social context are often difficult to observe and their significance is often difficult to appreciate, it can be difficult to predict the impact of any given law in any given context.

These are old arguments. As far back as 1748 Montesquieu famously asserted:

> [The political and civil laws of each nation] should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another. They should be in relation to the

[1] For a discussion of the broader topic see Albert O. Hirschman, 'Obstacles to Development: A Classification and a Quasi-Vanishing Act,' (1965) 13 Econ. Dev. & Cult. Change 385.

> nature and principle of each government; whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions. They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs.[2]

Notwithstanding Montesquieu, attempts to identify universally desirable laws are remarkably popular.[3] The simplest examples of legal universalism posit causal relationships between specific substantive legal rules – such as limited liability for shareholders of corporations – and presumptively beneficial outcomes, such as economic growth.[4] More sophisticated universalist theories of law and development describe 'good' laws in terms of the functions they perform rather than their formal characteristics, and sometimes focus on the processes by which laws are made rather than their substantive characteristics.

The primary goal of this essay is to show that Montesquieu's basic argument can apply with full force to sophisticated contemporary forms of legal

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[2] Charles De Secondat & Baron De Montesquieu, *The Spirit of the Laws* 6 (Book I) (Anne M. Cohler et al. trans. and eds.) (New York: Cambridge University Press, 1989). For more recent expositions of similar arguments see, Otto Kahn-Freund, On Uses and Misuses of Comparative Law, (1974) 37 Mod. L. Rev. 1; Katharina Pistor, The Standardization of Law and Its Effect on Developing Economies, (2002) 50 Am. J. Comp. L. 101; Dan Berkowitz, Katharina Pistor & Jean-François Richard, 'Economic Development, Legality, and the Transplant Effect,' (2003) 47 Eur. Econ. Rev. 165; Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth* (Princeton NJ: Princeton Univ. Press, 2007); Brian Z. Tamanaha, 'Primacy of Society and the Failure of Law and Development,' available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406999.

[3] For interesting effort to trace the origins of the idea that 'Western' laws ought to be applied as widely as possible, which I interpret as a very generally expressed version of legal universalism, see James Q. Whitman, 'Western Legal Imperialism: Thinking About the Deep Historical Roots,' (2009) 10 Theoretical Inq. in L. 305.

[4] See, for example, Hernando de Soto, *The Other Path: The Economic Answer to Terrorism* (New York, NY: Basic Books, 1989) at 169-170, 180-182 (discussing the role of limited liability in reducing uncertainty and thereby promoting investment).

universalism as well as the simpler forms. Part II summarizes the objections to universalism. Part III examines three prominent examples of universalistic claims about the relationship between law and development and shows how each of them is vulnerable to the standard objections. The examples are intended to be illustrative rather than exhaustive. Part IV concludes with some thoughts about how the potential weaknesses of universalistic legal theories ought to affect both the study of law and development and the practice of legal reform in developing countries.

II. The essence of the argument

The essence of the case against legal universalism is as follows. Universalistic claims about law and development are those which take the form, 'The presence of Law *X* invariably promotes development.' The idea is that in some fundamental sense the functional relationship between law and development – that is to say, the extent to which particular laws promote development – does not vary across societies. Or to put it another way, societies do not vary in ways that cause variations in the impact of laws on development. Correlatively then, if societies vary in ways that cause the impact of a particular law to vary, then universalistic claims about that law cannot stand.

There are three relevant ways in which societies might vary. First, their development may be measured in different ways. This idea will make no sense to anyone who believes that there is only one universally applicable measure of development, whether it happens to be per capita GNP or the Human Development Index. However, a respectable body of opinion holds that the development of any given society ought to be measured according to standards established through legitimate domestic political

processes.[5] This approach to measuring development admits the possibility that people will legitimately disagree about development. For example, societies may legitimately disagree about how to balance economic growth and income inequality, or what compromises to strike for the sake of reducing unemployment, or even, as I show, about whether certain kinds of legal institutions have such overriding intrinsic value that they must be embraced at all costs. As a consequence, societies may legitimately be assessed according to different *conceptions of development*.

Differences in conceptions of development pose a direct threat to claims of legal universalism. Such differences create the possibility that even if a particular law has identical material effects in different societies – for example, it has the same impact on economic growth, inequality and employment – its impact on development will be measured differently.[6] Similarly, once we admit the possibility that societies will have different conceptions of development the fact that a particular law has different tangible effects in different societies does not mean that its impact on development in each society will be different.

Societies might also vary in ways that alter the causal connections between law and social or economic outcomes. The idea here is that law is just part of a complex system that determines social or economic outcomes. The system is complex in the sense that even if there is a causal connection between a particular law and a particular development outcome, that connection will be sensitive to interactions with other features

[5] See generally, Amartya Sen, *Development as Freedom* (New York, NY: Alfred A. Knopf, 1999). I will leave to another day the question of what counts as a legitimate political process.
[6] The text here ignores the fact that to the extent that societies truly embrace different conceptions of development it becomes less likely that any particular law will have identical long-term effects across societies. This is because in some societies the immediate effects will be more politically palatable than in others and accordingly will generate different political reactions.

of the society (which may include prevailing conceptions of development). Those interactions can take two basic forms. First, the law may not be necessary to induce the outcome in question because the presence of certain other factors is sufficient. In other words, there may be *substitutes* for the law. A second possibility is that the law is not sufficient to generate the outcome in question. In other words, there may be *complements* for the law, in the absence of which it has no impact.

The most interesting universalistic claims about law and development assert that particular laws are either necessary or sufficient, or both, to cause particular development outcomes. However, if the law in question has substitutes, and those substitutes are present in some societies but not in others, then the law will be necessary to promote development in some societies but not in others. Similarly, if the law in question has complements that are not universally distributed, adopting the law will be sufficient in some places but not in others.

In principle universalistic claims can be qualified in ways that avoid these problems, but then they tend to lose their practical value. For example, one might say that individualized freely alienable legal title to land promotes economic development and then add the qualification, *all other things being equal*. But what is the use if all things are never equal? An alternative is to list all of the conditions that must be satisfied in order for the claim to be true. For example: 'a formal system of individualized title is both necessary and sufficient to promote development so long as there are no substitute methods of providing security of tenure and providing collateral, and it is complemented by functioning credit markets, a trusted judiciary, a functional land registry, skilled land surveyors, etc…' Unfortunately, there may be no end to the list of qualifications. And

even if the list of qualifications is finite, working through the list and checking off whether or to what extent each item is present may be completely impractical, whether the goal is to test the validity of the claim or determine whether it applies to a particular case.

In short therefore, the main objections to universalistic legal theories are that they cannot accommodate variations across societies in either conceptions of development or the presence of substitutes or complements for the components of the legal system upon which they focus.

These objections are powerful but not irrefutable. First, there may be conceptions of development that have virtually universal appeal – proponents of the universality of human rights would certainly make this argument. Second, in principle, complex systems that vary in their details but are made up of the same basic components – e.g. human beings living in post-industrial society under conditions of scarcity and inter-dependence – might exhibit persistent regularities, including regular relationships between certain laws on the one hand and social or economic outcomes on the other.[7] As a result, as a theoretical matter, we cannot completely rule out the possibility that somewhere out there we will find a valid universal theory of law and development.

III. Three examples of legal universalism

A. Common law universalism

The first example of a universalistic claim is one that emphasizes the importance of common law (as opposed to civil law, especially French law) to development. In the

[7] For an example of this line of argument see, Richard A. Epstein, *Simple Rules for a Complex World* (Cambridge, MA: Harvard, 1995) at 22-23 ("it is commonplace in writings about comparative law to stress the endless differences between the laws of one country and those of another. But the similarities in the underlying problems dwarf any differences in the responses to them").

literature on law and development it is virtually impossible to escape this claim. In the contemporary literature it has most famously been elaborated in a series of papers by a group of economists whose core members are Andrei Shleifer, Rafael La Porta and Florencio Lopez-de-Silanes. They have conducted cross-country statistical analyses of the relationship between countries' legal heritage on the one hand, and the performance of their legal systems on the other hand. Here is how they sum up the results of over ten years worth of research:

> Compared to French civil law, common law is associated with (a) better investor protection, which in turn is associated with improved financial development, better access to finance, and higher ownership dispersion, (b) lighter government ownership and regulation, which are in turn associated with less corruption, better functioning labor markets, and smaller unofficial economies, and (c) less formalized and more independent judicial systems, which are in turn associated with more secure property rights and better contract enforcement.[8]

In other words: common law good, civil law bad – needless to say, these are fighting words to the French.[9]

The argument that the common law is universally superior to the civil law is vulnerable to all of the fundamental objections to legal universalism. To begin with, there is the issue of whether the claim accounts for different conceptions of development. The point here is that even if we accept the empirical claims summarized above, there may be different perspectives on whether they count as proof that common law does a

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[8] Andrei Shleifer, Rafael La Porta and Lopez-de-Silanes, 'The Economic Consequences of Legal Origins,' (2008) J. Econ. Lit. 285, 298.

[9] Association Henri Capitant des Amis de La Culture Juridique Francaise, *Les Droits de Tradition Civiliste en Question: Á Propos des Rapports* Doing Bbusiness *de la Banque Mondiale*. (Paris: Société de Législation Comparée, 2006). See generally, Bénédicte Fauvarque-Cosson & Anne-Julie Kerhuel, Is Law an Economic Contest ? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law, (2009) 57 Am. J. Comp. L. 811; Catherine Valcke, 'The French Response to the World Bank's Doing Business Reports,' (2010) U.T.L. J. (in this volume).

good job of promoting development. In other words, there may be disagreement about the ends that law is designed to promote.

These differences of opinion can take at least two different forms. In the simpler form, law is viewed merely as a means of achieving certain economic ends (outcomes) and the disagreement is about how to evaluate those outcomes. The idea that such disagreement exists seems eminently plausible. Not everyone cares about access to finance and ownership dispersion or obsesses about lighter government regulation. Why should they? (You might say that we care about these and other outcomes because they tend to be associated with economic development, as measured by growth in GDP per capita. Interestingly though, no matter how hard they tried, the authors of this study could not show that the common law was causally connected with higher growth rates.)[10]

Common law universalism also ignores a second way in which conceptions of development might differ. Sometimes people treat laws not as means to an end but as ends in themselves. This possibility radically expands the scope for disagreement about both what forms of social change represent development and whether particular laws contribute to development. For example, the French might object that having judges make law is inherently undesirable and that having a lawmaking process that relies exclusively on the legislature to make law is an intrinsically valuable end.[11] On this view, even if the common law is associated with all of the economic outcomes that its

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[10] Shleifer et al, supra, at 302. See also, Curtis J. Milhaupt and Katharina Pistor, *Law and Capitalism: What Corporate Crises Reveal About Legal Systems and Economic Development Around the World* (Chicago, IL: University of Chicago, 2008) at 23-25. Ahlering and Deakin also show that neither English nor French legal origin is positively correlated with the Human Development Index, an alternative measure of development. See, Beth Ahlering and Simon Deakin, "Labor Regulation, Corporate Governance, and Legal Origin: A Case of Institutional Complementarity?" (2007) 41 L & Soc. Rev. 865 at 891.

[11] For a recent discussion of legal traditions that are viewed as intrinsically valuable in France see, *Rapport sur les professions du droit*, (March 2009), 6-7, available online at: http://www.justice.gouv.fr/art_pix/rap_com_darrois_20090408.pdf.

proponents suggest, and those outcomes are regarded as desirable, there may still be disagreement about whether replacing the civil law with the common law would promote development.

Now some might say that aside from a few legal theorists, no real people, and especially not real people in poor countries, are sufficiently committed to abstract ideas like the notion that particular laws are intrinsically valuable to justify using them as criteria for determining what makes good law. All that most people care about is peace and prosperity. I am not persuaded by these arguments.

Take the example of the English-speaking Caribbean. Over the past decade or so the most pressing legal issue in the region has been whether to retain the Judicial Committee of the Privy Council as the appellate court of last resort or to replace it with a local institution known as the Caribbean Court of Justice.[12] A number of pragmatic arguments weigh in favour of abandoning the Privy Council in favor of the Caribbean Court of Justice, including arguments about relative travel costs and familiarity with local values. But the expertise of the Privy Council – it is after all the quintessential common law court – and its independence from local governments in the Caribbean cut in the other direction.[13] Interestingly enough though, in addition to these pragmatic arguments, a prominent argument in the debate – perhaps even the *most* prominent argument – was

[12] See generally, Michael de la Bastide, 'The case for a Caribbean Court of Appeal,' (1995) 5 Caribbean L. Rev. 401; Hugh Rawlins, *The Caribbean Court of Justice: The History and Analysis of the Debate* (Bridgetown, Guyana: CARICOM Secretariat, 2000);

[13] For an effort to test these competing claims empirically using cross-country data see, Stefan Voigt, Michael Ebeling, Lorenz Blume, 'Improving credibility by delegating judicial competence—the case of the Judicial Committee of the Privy Council,' (2007) 82 J. Dev. Econ. 348.

about the intrinsic value of having final judicial decisions made by local judges rather than foreign judges.[14] One lawyer summed it up this way:

> Every nation aspires to its own institutions. It has been said very often in public life that self government is better than good government.[15]

Think about the ramifications. The implication is that the best law ought to be selected without regard to its tangible social or economic impact, but rather on the basis of its pedigree. Think also about the ramifications of taking this *kind* of argument seriously. If creating a legal system with a particular pedigree is considered a legitimate objective of legal reform then we open a tremendous amount of room for disagreement. Some people may think the ultimate end is home-grown law.[16] Others who want to escape the shackles of traditional society may think that the most pressing concern is the development of modern law. Others might be pre-occupied with a legal system they believe manifests due process or the rule of law. Others think that none of those sentimental concerns are relevant and that all that matters is economic growth. No single legal model, and certainly not one premised on the inherent superiority of the English common law, is compatible with all of these divergent conceptions of the purposes of legal reform.

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[14] Rawlins, supra. The court was inaugurated in 2005 but as of August 2009 only two countries, Barbados and Guyana, had used it to replace the Privy Council as their court of last resort. BBC, 'Privy Council's Complaint,' 9 September 2009, available online at: http://www.bbc.co.uk/caribbean/news/story/2009/09/090922_privyccjphillips.shtml.

[15] Fenton Ramsahoye, 'A Caribbean Court of Appeal for Caribbean Peoples' (Unpublished 1991, Law Library University of the West Indies, Reserve Collection), cited in Rawlins supra at 14.

[16] Frederick Schauer, 'The Politics and Incentives of Legal Transplantation' (Center for International Development at Harvard University: CID Working Paper No. 44, June 2000).

Common law universalism is also vulnerable in some straightforward ways to the objection that legal universalism ignores the significance of potential substitutes.[17] France and Belgium are rich countries. They are wonderful places to live. It is difficult to argue with a straight face that their civilian legal systems place more of a drag on their development than America's common law system. The most plausible conclusion is that France and Belgium have ways of achieving development that serve as effective substitutes for a common law legal system.[18]

Finally, there is the objection that the universalistic theories have to account for complements. The common law arguably places a premium on having good judges.[19] In other words, good judges are complements to reforms that increase reliance on judge-made law. On this view, trying to adopt a common law system in a jurisdiction without competent or trustworthy judges seems like a recipe for disaster.[20]

B. *The Doing Business project – functional universalism*[21]

A second and somewhat more sophisticated universalistic take on law and development is embodied in some recent research conducted by the World Bank as part of a project called the Doing Business Project. The premise of the project is that law promotes economic development by facilitating certain key economic activities such as starting a business, collecting on a debt, transferring real property or moving goods across borders.

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[17] On cultural substitutes for legal institutions see, Kenneth Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Washington, DC: Brookings Institutions Press, 2006) at56-69.
[18] In fact, this possibility is suggested by Shleifer et al., *supra* at 302.
[19] Several scholars have argued that the superior performance of common law systems rests on the fact that they give judges greater power to review government action. See, Paul G. Mahoney, 'The Common Law and Economic Growth: Hayek Might be Right,' (2001) 30 J. Legal Stud. 503; Shleifer et al, at 303-305.
[20] *Cf.* Merryman who implies that talented judges are also important in civilian systems: John Henry Merryman, 'The French Deviation,' (2006) 44 Am. J. Comp. L. 109.
[21] This subsection draws on Kevin E. Davis and Michael Kruse, 'Taking the Measure of Law: The Case of the *Doing Business Guide*' (2007) 32 L. & Soc. Inq. 1095.

A large part of the project involves simply collecting data. For example, using surveys sent to local lawyers they collect data on how long it would take and how much it would cost to start a generic hypothetical business in each of 183 countries. Or, using the same sorts of surveys, they ask how long it would take and how much it would cost for a seller to enforce a contract for sale of goods against a buyer who fails to pay the purchase price, taking into account the entire process from filing a lawsuit to collecting on a judgment.[22]

But the Doing Business project is more than just a data collection exercise. It is clearly also designed to encourage countries around the world to reform their business laws to make basic legal transactions such as enforcing contracts, starting and closing businesses, clearing customs, or obtaining secured credit, faster, cheaper, and simpler. To this end, the Doing Business team does not simply publish data. It also compiles it into an 'ease of doing business index' and then rank countries according to their performance on the index. Then they publish features on 'who reformed and who didn't' as well as 'the top 10 reformers.' There is clearly a message here about what counts as good business law and what doesn't. And it is clear that faster, cheaper, simpler laws are viewed as being universally desirable.[23]

One of the hallmarks of the material produced by the Doing Business project is that its prescriptions for legal reform are framed in blunt unequivocal terms. They are undeniably universalistic. A heading in the first Doing Business report says it all:

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[22] World Bank, *Doing Business in 2010: Reforming through Difficult Times* (Washington, DC: World Bank, 2009), v-x.
[23] See generally, Davis & Kruse, supra __.

"One Size Can Fit All—in the Manner of Business Regulation"[24]

At first glance though, the Doing Business team's brand of legal universalism seems invulnerable to the standard objections. In the first place, since the focus is on business law the room for emotionally-inspired disagreement seems attenuated – will anyone really take to the streets over commercial law reform?[25] In any event, the stated objectives of the Doing Business project – faster, cheaper, simpler law; increased employment; greater economic growth – seem inoffensive.

I believe, however, that there is a great deal of disagreement about whether the ends that the Doing Business project seeks to achieve are universally desirable. Take for example the law of secured credit. The Doing Business project assumes that it is best to permit debtors to grant security interests in a broad range of collateral, to make it is a fast and as cheap as possible for a secured creditor to foreclose in the event of default, without going to court, and to give secured claims priority over all other claims, including tax claims and claims of employees.

This may make sense if you think that the purpose of debtor-creditor law is to minimize the cost of credit. But if you are concerned about issues such as due process for debtors, or protecting the welfare of vulnerable creditors such as employees, then you may have a very different take on what qualifies as an optimal law of secured transactions. Again, the concern is that there may be legitimate grounds for disagreement about the ends to be served by any particular law.

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[24] World Bank, *Doing Business in 2004: Understanding Regulation* (Washington, DC: World Bank, 2004), xvi.

[25] Schauer suggests that nations and their political and legal leaders "may perceive bankruptcy, securities, and other corporate and commercial laws as largely technical and non-ideological" (although he goes on to note that those perceptions may not be accurate). Schauer, *supra*.

The Doing Business approach also offers a superficially appealing defense to concerns about the roles of substitutes and complements. The defense is that the project defines its preferred legal instruments in functional rather than formal terms. Instead of recommending specific laws that make it easy to start a business, they simply recommend making it easy. This functional way of describing the recommended law makes it unnecessary to list all of the alternative combinations of legal instruments that are both necessary and sufficient to make it easy to start a business. Consequently, they can defend the claim that their recommended package of legal reforms is an indispensable method of promoting development without denying the existence of legal substitutes and complements or claiming that any particular kind of law is either necessary or sufficient to promote development.

Unfortunately, the robustness of the Doing Business recommendations is illusory. The essential problem is that their analysis accounts for only some but not all possible factors that may affect the performance of their recommended legal reforms. This stems from the fact that the project, reasonably enough, proceeds by dividing each country's legal system into functional sub-systems – e.g. the sub-system responsible for civil enforcement of contracts or the sub-system responsible for starting a business –
and then formulating recommendations designed to enhance the performance each of those sub-systems. This approach makes it difficult to account for either substitutes or complements, whether legal or non-legal, that lie outside each sub-system.[26] Let me give two examples to illustrate what I mean.

[26] For similar criticisms of the Doing Business project see Valcke, *supra* note ___; Benito Arruñada, 'Pitfalls to avoid when measuring institutions: Is *Doing Business* damaging business?' (2007) 35 J. Comp. Econ. 729 (focusing on regulation of entry); World Bank Independent Evaluation Group, *Taking the Measure of the World Bank-IFC Doing Business Indicators* (Washington, DC: World Bank, 2008); and,

A few years ago I was teaching a course on law and development to a very international group of LLM students in Singapore. I asked the students to take a look at the Doing Business data from each of their home countries. There was an African student in the class who took exception to the data on the number of days it took to start a business in her country. At the time it reportedly took 30 days, placing the country in the bottom half of the countries in the world on the World Bank's league table.[27] She claimed that it could be done in two or three days. The objection was to the fact that the World Bank researchers had asked how long it would take without using a lawyer. But if you used a lawyer, it could be done in two or three days, in part because the lawyers all knew one another and could simply call up the lawyers working in the registry office and arrange to have their clients' files expedited. In other words, there was already an informal substitute for the kind of formal reforms that the World Bank would advocate for the country.

Here is another example. Believe it or not there was a brief period of time when the US government thought it had something to brag about in Afghanistan. For a period of time USAID lawyers bragged about the fact that as a result of reforms they had helped usher in it only took 8 days to start a business in Afghanistan. Eventually though, Afghan entrepreneurs asked them to stop bragging about it. While it was true that it only took 8 days to incorporate a business, it still took up to 18 months to get it up and running because all of the delays had been shifted to the licensing stage.[28] The reforms were no doubt helpful in some sense. But they would have been more helpful if they had been

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Alvaro Santos, 'Labor Flexibility, Legal Reform, and Economic Development,' (2009) 50 Va. J. In't L. 43, 65-73 (focusing on labour law).

[27] World Bank, *Doing Business in 2007: How to Reform* (Washington, DC: World Bank, 2006).

[28] Arruñada, supra __, 732 (citing Wade Channel).

complemented by an efficient set of licensing laws. As it stands, they may not have been worth the investment.

C. *Legal experimentalism – procedural universalism*

> "Government should embrace randomized trials of different laws and regulations as a tool for testing what works. Just as a random assignment of treatments is the most powerful method of testing for the causal impact of pharmaceuticals, randomly assigning individuals or firms to different legal rules can help resolve uncertainty about the consequential impacts of law. We propose the presumptive use of "Randomized Impact Statements" as prerequisites for regulations and even statutes to systematically assess the likely impact of legal change."[29]

The final example of a universalistic theory I would like to discuss is a novel one that I call legal experimentalism. In its weak form experimentalism is simply a call for lawmaking to be based on evidence showing which legal instruments work and which ones don't. Naturally, the idea is that we should keep the laws that work and scrap the ones that don't. There has recently been a turn towards evidence-based medicine; the claim here is that we should turn toward evidence-based lawmaking.

For the time being I am interested in a somewhat stronger form of experimentalism. This form of experimentalism says that we shouldn't rely on just any old kind of evidence as a basis for designing a legal system. Instead we should rely principally on evidence derived from randomized trials, the gold standard of scientific research. This strong form of experimentalism says that, just like the FDA usually insists upon randomized clinical trials before it will approve a new drug for general use, lawmakers usually should insist on evidence derived from randomized trials before determining whether, for example, to adopt a new bankruptcy law.

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[29] Ian Ayres and Yair Listokin, 'Randomizing Law' (unpublished, October 2008, available online at http://kids.law.yale.edu/ayers/randomizing%20law.pdf).

There is a whole movement in development economics that is dedicated to developing techniques for using randomized trials to evaluate the impact of different kinds of policy interventions.[30] And the idea has already been picked up by lawyers, including Ian Ayres and Yair Listokin of Yale Law School who argue (at least in the American context) that new legislation should normally be accompanied by a randomization impact statement that describes the causal impact of legal changes estimated by randomized trials.[31]

So how would this work? Say, for example, you are trying to decide whether to adopt a new bankruptcy law that gives debtor firms time to propose a plan of reorganization which involves creditors' rights being modified without their consent, subject to court approval. What I think the experimentalists would propose is that you randomly select 1/10th of the companies in the economy and tell them that if they go bankrupt, they will be subject to a bankruptcy regime that includes the new reorganization law. Those firms will be your treatment group. The remainder of the companies will be the control group. Then you wait and see what the impact is on outcomes such as the cost of credit, levels of employment, rates of bankruptcy filings, and the cost of bankruptcy proceedings. More specifically, you would figure out the impact of the bankruptcy law by comparing the experiences of the treatment group and the control group. The idea is that before enacting any new law you would run this kind of controlled experiment.

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[30] See generally, Esther Duflo, Rachel Glennerster, and Michael Kremer, 'Using Randomization in Development Economics Research: A Toolkit,' in T. Paul Schultz and John Strauss (eds.), *Handbook of Development Economics Vol. 4,* p. 3895 (Amsterdam: North Holland, 2007).
[31] Ayres and Listokin, supra __.

Ayres and Listokin do not recommend universal adoption of experimentalism as a method of lawmaking; for a variety of sound reasons they merely recommend a presumption in favour of experimentalism.[32] Nonetheless, for the purposes of illustrating my broader argument about the limits of legal universalism it is instructive to imagine what would happen if experimentalism was promoted as a universal lawmaking strategy. The value of this thought experiment lies in the fact that experimentalism would be a particularly sophisticated, yet still accessible, example of a universalistic theory of law and development, in the following senses. First of all, unlike the common law theory it is highly functional in nature. As long as you perform the functional equivalent of a randomized trial you will have satisfied the requirements of the experimentalist theory, not matter what you call the procedure. By contrast, the common law theory arguably attaches some importance to the idea of explicitly adhering to the common law legal tradition and has not yet identified critical functional attributes of the common law that promote development. Second, experimentalism is more sophisticated than the Doing Business theory because it does not claim that any substantive law is optimal. Instead it claims that there is an optimal lawmaking process. This seems like quite a concession to the claim that the optimal law can vary according to context. Third, it is somewhat easier to specify what is entailed in adopting strong form legal experimentalism than it is to specify the practical ramifications of other procedural theories, which tend to refer to relatively abstract concepts such as transparency, or even contradictory concepts such as predictability and adaptability or independence and

[32] Ayres and Listokin, supra __, 8-14.

accountability.[33] The relative accessibility of the idea of legal experimentalism makes it particularly useful for illustrative purposes.

Despite the sophistication of legal experimentalism as a general approach to lawmaking, any claim that experimentalism should be adopted universally would still fall prey to all three of the standard objections to legal universalism.

First, divergent conceptions of what is right and good can lead to disagreements about the virtues of experimentalism. Legal experiments involve using people as guinea pigs, typically without their consent. In particular, the members of the treatment group are used as a means to the end of generating information for their fellow citizens.[34] Reasonable people can easily disagree about the ethics of that kind of exercise. Experimentalists might try to finesse this issue by proposing to conduct only experiments that are expected to help rather than harm the treatment group. But if experimenters are confident that the treatment will be helpful, then how do they justify failing to make it available to everyone else in the society? Of course it is possible that the experimenters are genuinely uncertain whether the reform is better than the status quo.[35] But what if one of the subjects disagrees? Can we really justify subjecting someone to what they believe to be a harmful treatment purely for the sake of generating information? It seems plausible that reasonable people will disagree.

The value of legal experiments will also depend on the availability of substitutes. In some countries it may be unnecessary to experiment because there are more effective

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[33] See, for example, the 'procedural' conception of law outlined by Trebilcock and Daniels, which requires the greater part of a book to develop. Michael J. Trebilcock and Ronald J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Northampton, MA: Edward Elgar, 2008).
[34] Ibid, at 28.
[35] Ibid. ("The case for randomized testing is at its strongest when the evidenc is truly in equipoise about which of two policies is the best.")

ways of trying to figure out what works and what doesn't. The most obvious way is to look at the experience of other countries. For instance, if Grenada is trying to decide whether to adopt a new bankruptcy law and Barbados reformed its bankruptcy laws five years earlier, then, if one believes that relevant conditions in Barbados and Grenada are reasonably similar, it might be easier to examine the Barbados experience than to conduct an expensive randomized trial that will delay the implementation of universally applicable legislation.

The value of experimentalism will also depend on the existence of complementary factors. Just as it takes good judges to operate a system of judge-made law, it takes good experimentalists to run a system of experimental law.[36] Designing and running a valid field experiment requires a great deal of insight, ingenuity and integrity, as does interpreting the results. That will be beyond the capacity of many governments. Take for example our hypothetical bankruptcy experiment.

- Who is going to ensure that experiments are not rigged to fail by groups that prefer the status quo? For instance, who will prevent banks who like the status quo from lobbying for a test of a reorganization law that is absurdly favorable to debtors?
- Who is going to set rules to prevent firms in the treatment group from 'rejecting the treatment' by starting to funnel their borrowing through firms in the control group?
- Who is going to determine whether the control group has been contaminated by the treatment? The idea behind these kinds of experiments is to compare firms governed by the status quo to firms governed by the new regime. But if the firms ostensibly governed by the status quo are actually competing with firms governed by the new

[36] Ayres and Listokin, supra __ , 13 ("There is no substitute for the judgment of the policymaker in deciding what policies to test.").

regime, then the meaning of the status quo has effectively been changed and the experiment will be invalid.

- Who is going to adjudicate disputes about whether changes in the cost of credit in the treatment group are statistically significant? Will this simply create demand for statistical experts? What if those all have to be flown in from overseas?

In short, the value of adopting experimentalism depends in a significant way on the presence of complementary institutional capacity to run good experiments.

IV. Implications for the study and practice of law and development

As I emphasized at the outset, concerns about whether universalistic legal theories can accommodate variations in either conceptions of development or the presence of substitutes and complements are not new. The purpose of rehearsing those concerns and showing how they apply to some of the most sophisticated examples of legal universalism has been merely to illustrate their potential force and breadth of application.

The next step is to ask where this all leads; what should be done with these concerns? As far as I can tell, the objections to universalism have been deployed in three distinct kinds of debates: substantive, methodological and political. First, the concerns outlined above have been raised on many occasions in substantive debates as critiques of specific examples of legal universalism. For example, critics of the Doing Business project have used versions of these arguments to criticize its findings and recommendations.[37] Concerns about universalism have also been used in methodological debates to question whether it is even worthwhile for scholars to search for or test

[37] See for example, Davis & Kruse, *supra*.

universalistic theories. This is one way, for instance, to understand claims that it does not even make sense to speak of a field such as law and development.[38] Finally, concerns about universalism have been put to political use. That is to say, they have been used to support claims that one kind expertise and one set of experts ought to be given primacy over others in lawmaking processes. In particular, for those who have faith in universalistic theories it makes sense to view the task of legal reform as a largely technocratic exercise properly assigned to experts steeped in the international literature on the impact of various reforms and insulated from less scientific influences such as personal ties, respect for tradition, or the desire to advance particular political parties or programmes. By contrast, placing a higher value on knowledge of local values or the complexities of local society weighs in favour of governance by people with much stronger attachments to and knowledge of local society.[39]

These are all valid ways of invoking concerns about legal universalism, but caution is warranted. For instance, it makes little sense to use these objections to support one universalistic theory over another. At the same time, it is also difficult to justify abandoning the quest for a universally applicable theory of law and development because there is no theoretical reason to rule out the possibility of its existence. Moreover, whether or not there are universally valid relationships between law and development, there are almost certainly some relationships that can be expected to remain constant over modest periods of time and across roughly similar societies. Forsaking input from people

[38] For a recent discussion of this topic see, Symposium on the Future of Law and Development, Nw. Univ. L. Rev. Colloq. (2009).
[39] See, for example, Kevin E. Davis and Michael J. Trebilcock, 'The Relationship Between Law and Development: Optimists versus Skeptics,' (2008) 56 Am. J. Comp. L. 895 at 946.

with insight into those potential relationships smacks of throwing the baby out with the bathwater.

In short, the claim here is not that universalistic theories of law and development should be rejected out of hand. Rather, they should be regarded skeptically, and each one ought to be tested against a powerful set of objections to which even the most sophisticated theories of this kind have proven vulnerable.