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LETTING GO OF ‘THE NORMAL’ IN PURSUIT OF AN EVER-ELUSIVE REAL: A PROPOSAL FOR INNOVATION IN INTERNATIONAL LAW AND ECONOMICS THEORY AND SCHOLARSHIP


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Letting go of ‘the normal’ in pursuit of an ever-elusive real: a proposal for innovation in international law and economics theory and scholarship

Dan Danielsen*

Since the early 1990s, building on the work of law and economics scholars of the domestic law of the United States from the 1970s and 80s, a body of international law and economics scholarship has emerged comprising a distinct strand of international legal theory. While the volume of international law and economics scholarship is considerable, the work to date has been primarily driven by two goals. The first is to demonstrate that a number of issues of traditional concern to international lawyers—such as the sources and legitimacy of international rules, the scope of legitimate jurisdictional authority of states, international institutions and other international actors, the relative merits of national rules, international rules, private ordering and international institutions to address pressing issues of global concern—can best be explained and understood through the application of one or more existing economic choice frameworks mainly associated with ‘new institutional’ economics such as transaction cost analysis, comparative institutional analysis, game theory, rational choice theory and

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public choice theory. The second goal is to suggest that the actual behavior of international actors will approximate the behavior predicted by the economic choice analysis, and therefore this form of analysis can offer policy solutions to complex questions of international regulation and governance—such as when and under what circumstances national regulatory competition will be more effective than other institutional options such as private ordering, informal state cooperation, treaties, harmonized international norms or international institutions at enhancing efficiency or welfare or what system of jurisdictional rules and techniques for resolving jurisdictional conflicts will best preserve legitimate sovereign interests without unduly interfering with economic activity globally.

To a large extent, then, international law and economics scholars have sought to demonstrate the virtues of certain forms of economic modeling techniques for answering questions of institutional arrangement and the limits of jurisdictional authority that have posed challenges central to the discipline of international law. More specifically, international law and economics scholars have focused their analytic attention on determining which institutions should make which rules in the global order and whose rules ought to apply in what circumstances in a global economy lead by private economic actors based on an economic assessment of which institutions or rules will increase efficiency and consequently maximize general welfare. Borrowing traditional conceptions from both international law and neo-classical economics, these scholars describe a world comprised primarily of two types of actors—individuals and states—that are presumed to know their interests and to pursue them through

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3 The term “new institutional economics” was first coined by Oliver Williamson in Markets and Hierarchies: Analysis and Antitrust Implications (New York: Free Press, 1975). In many ways, “new institutional economics” comes to have shape as a field in part in relation to its focus on “institutions” in dynamic economic processes and in part in relation to the methods of institutional economic analysis it leaves behind. As to the analytic focus of the field, Claude Ménard and Mary Shirley offer a useful description: “For new institutionalists the performance of a market economy depends upon the formal and informal institutions and modes of organization that facilitate private transactions and cooperative behavior. NIE [New Institutional Economics] focuses on how such institutions emerge, operate, and evolve, how they shape different arrangements that support production and exchange, as well as how these arrangements act in turn to change the rules of the game.” Claude Ménard & Mary Shelly, eds., Introduction, in Handbook of New Institutional Economics, (Heidelberg: Springer, 2002): pp. 1—2. One prominent scholar of institutional economics, Thrainn Eggertsson, has suggested the field of ‘new institutional economics’ may be divided into two distinct sub-schools—a ‘neo-institutional school’ and a ‘new institutional school’ with the former staying closer to the classical rationality assumptions of homo oeconomicus and the later advocating more heterogeneous influences in economic decision-making including political, cultural and psychological influences that challenge more orthodox economic assumptions about the rational basis of choice. See Thrainn Eggertsson, Economic Behavior and Institutions (Cambridge: Cambridge University Press, 1990): pp.7—10. International law and economics scholars tend to the ‘neo-institutional’ end of Eggertsson’s typological range—paying little or no attention to political or cultural differences in their analyses of economic behavior of either states or private actors.

4 See eg, Aceves, Transaction Cost Economics and State Practice (n 1) (seeking to bring together insights from international law, international relations and economics for the interdisciplinary study of international cooperation); Guzman, How International Law Works (n 1) p. 23 (“This book is interested in questions relating to compliance with international law and cooperation in international affairs.”); Trachtman, The Economic Structure of International Law (n 1) p. ix (seeking to elaborate a law and economics-based account of the structure of the international legal system “including the rise, stability and efficiency of custom; compliance with treaty; the establishment of international organizations; the use of dispute settlement in international treaty structures; and host of other topics). Compare Lori F. Damrosch et al., eds., Chapter 1. The Nature of International Law, in International Law Cases and Materials 4th ed. (St. Paul, MN: West, 2001): 1—55 (providing an introduction to the central concerns of the discipline of international law including the structure and organization of the international political system, sovereignty and the inter-state relations, the binding character of international law, enforcement of and compliance with international law, among others).
self-interested bargaining. The outcomes of these bargains (private economic transactions or inter-state cooperation, treaties, or bi-lateral or multi-lateral institutions) or refusals to bargain (no private economic transaction or state non-cooperation or regulatory competition) are generally thought to be welfare enhancing for the bargainers themselves (as no bargainer would freely enter into or refuse a bargain unless it advanced the bargainer’s interest to do so) and, with some caveats, for the aggregate welfare of the globe as a whole. Thus, international law and economics theory reflects a general view that whether the bargainers are individuals in pursuit of economic gains or states in pursuit of power, prestige or economic benefits for their constituents, the gains from unimpeded bargaining will generally exceed the losses and negative externalities and therefore lead to a net increase in both individual and aggregate welfare.\textsuperscript{5}

While asserting that net ‘gains from trade’ should normally result from free self-interested bargaining whether among states or individuals, international law and economics scholars acknowledge that beneficial bargaining sometimes are not concluded and that bargaining is sometimes neither free nor unimpeded. In the case of individuals, the obstacles to welfare-enhancing bargains are usually attributed to high transaction costs that may reduce or overwhelm the benefits of the bargain or to regulation that restricts or impedes beneficial bargains that would otherwise have been made. In the case of states, the obstacles to welfare-enhancing bargains may result from high transaction costs, regulatory interference from international rules (or domestic rules extra-territorially applied) or from interest-group capture that may lead state bargainers to advance the interests of political leaders or powerful organized groups rather than the aggregate interests of their individual constituents. These scholars also acknowledge that bargains between individuals or states that enhance the welfare of the parties may produce adverse externalities or spill-over effects that harm third parties. While international law and economics scholars may differ on whether they see these obstacles to or adverse effects from bargaining as pervasive, occasional or exceptional, these scholars nevertheless generally treat these obstacles and adverse effects as ‘distortions’ from the welfare-enhancing benefits that normally should result from unimpeded, self-interested bargaining.\textsuperscript{6}

\textsuperscript{5} With respect to individuals, see eg Cooter, New Law Merchant (n 1) (individual businesses and business groups will generate more efficient norms for business transactions than states); Steven Choi & Andrew Guzman, National Laws, International Money: Regulation in a Global Capital Market, Fordham Law Review 65 (1996-1997): 1855 (allowing issuer choice among national securities law regimes is more likely to lead to efficient global capital markets than extraterritorial application of state securities regimes). With respect to states, see eg Guzman, How International Law Works (n 1) p. 17 (‘[T]he book adopts a set of rational choice assumptions. States are assumed to be rational, self-interested, and able to identify and pursue their interests. Those interests are a function of state preferences, which are assumed to be exogenous and fixed. States do not concern themselves with the welfare of other states but instead seek to maximize their own gains or payoffs.’) (citations omitted); Trachtman, The Firm and International Economic Organization (n 1) pp. 473-74 (‘The main hypothesis of this paper suggests that states use and design international institutions to maximize the members’ net gains (NG), which equals the excess of transaction gains from engaging in intergovernmental transactions (TG), minus the sum of transaction losses from engaging in intergovernmental transactions (TL), and the transaction costs of intergovernmental transactions (including transaction costs of international agreement or of creating and running institutions, TC). Thus, stated mathematically, they maximize the present value of NG = TG – (TL+TC). “Intergovernmental transaction” is a kind of transaction in power, including prescriptive jurisdiction, between states.’) (citations omitted).

\textsuperscript{6} See eg Cooter, New Law Merchant (n 1) pp. 215-216 (suggesting that states will not behave in economically efficient ways when regulating, Cooter states: ‘Central planning is a way of making law, as well as commodities. To implement a central plan, officials must have the power to allocate resources. To possess this power, the orders issued by planning officials at the top must trump the rights of property and contract enjoyed by people and
As one might expect from these background presuppositions and premises, the policy prescriptions international law and economics scholars advance most often seek to facilitate freer bargaining by reducing the perceived distortions identified with their models. While the details of these policy prescriptions are diverse, they tend to evidence certain general preferences and values—decentralized, bottom-up normative frameworks are usually preferred to centralized, ‘command-and-control’ legal regimes, ‘private’ forms of international ordering are usually preferred to ‘public’ ones, and ‘national’ rulemaking is generally preferred to ‘international’ rulemaking. These preferences and values notwithstanding, as with law and economics scholars in national contexts, most international law and economics scholars recognize, at least in theory, that a regime of rules and/or institutions may be justifiable in circumstances where their models suggest that states are likely to over-regulate private economic actors or each other through unnecessary or illegitimate extra-territorial assertions of regulatory jurisdiction or under-regulate through sub-optimal amounts of inter-state cooperation or regulatory competition. In such limited circumstances, international rules or institutions may be useful to the extent they create incentives that induce states to use their regulatory power to increase rather than reduce global welfare.

If one approaches international law and economics theory from the perspective of the mainstream international lawyer or the neo-classical or new institutional economist, the world view, presuppositions, assumptions and expectations embedded in international law and economics scholarship would be familiar. To some, the world depicted in international law and economics scholarship made up of public and private, state and individual, interest-based bargaining and a general tendency toward increased total welfare to the extent bargains are freely undertaken and regularly enforced may seem more like a description of the world as it is (or perhaps as it would be if ‘distortions’ from what would otherwise be welfare-enhancing bargaining could be reduced or eliminated). Moreover, a focus on distortions that may result from sub-optimal institutional arrangements or

enterprises at the bottom. Thus, public law crowds out private law... An advanced economy involves the production of too many commodities for anyone to manage or regulate. As the economy develops, the information and incentive constraints tighten upon public policy. These facts suggest that as economies become more complex, efficiency demands more decentralized lawmaking, not less.’; Paul B. Stephan, The Political Economy of Choice of Law, Georgetown Law Journal 90 (2001-2001): 957, p. 960 (discussing the appropriate framework for determining whether inter-state cooperation is likely to increase or decrease global welfare, Stephan states: ‘In any particular case, we must ask whether the benefits of a potentially desirable agreement, discounted by the likelihood of a particular institutional structure achieving it, is greater than the costs generated by a potentially undesirable agreement, discounted by the likelihood of that structure producing such an agreement. Rarely is the answer to this question obviously in the affirmative. There are two categories of reasons why international cooperation may produce undesirable outcomes. First, negotiators may give excessive weight to the preferences of private groups with unrepresentative preferences but especially low organizational costs... Second, persons with an interest in the institutions established or promoted by international cooperation may seek the adoption of agreements that expand the competence, discretion and authority of those institutions at the expense of desirable regulatory outcomes.’).

7 For representative examples of these ‘general preferences and values’ at work, see Aceves, Transaction Cost Economics and State Practice (n 1) (focusing on the role of ‘state practice’ in facilitating ‘endogenous governance structures’ and the general positive attributes of such structures, including reduced transaction costs, party-negotiated solutions to problems and changed circumstances, informality, flexibility and adaptability); Cooter, New Law Merchant (n 1) (focusing on the general superiority of decentralized lawmaking rather than ‘command-and-control’ regulations and the potential efficiency gains to be had from deriving business norms from actual business practices); Stephan, Accountability and International Lawmaking (n 1) (focusing on a general difference in accountability between national and international lawmaking and inferring a higher likelihood of welfare-reducing rules at the international level justifying a skeptical attitude toward international regulation in general).
inefficient jurisdictional rules may seem an appropriate focus for scholars looking to economic theory to provide answers to some important global challenges that have traditionally been preoccupations of international law scholars generally. Doubtless, exploring methods for analyzing the relative efficiency of different institutional arrangements for international rulemaking and different regimes for allocating jurisdiction and managing legal conflicts among sovereigns seems a useful and potentially important enterprise.

Yet, without denying the importance of the issues international law and economics scholars have studied, it remains surprising that many of the significant global issues that international law and economics scholars do not address are ones that receive regular research attention from economists and international legal scholars working in other theoretical traditions. For example, issues of poverty, income inequality, economic growth and the role of law in the distribution of wealth and power globally are generally not addressed, except perhaps indirectly in connection with general assertions that increasing individual welfare gains through legal rules that facilitate unimpeded arm’s length bargaining will ordinarily increase global efficiency and welfare in the aggregate. Also avoided are questions regarding the impact of culture, institutional context or power asymmetries on the behavior of different public and private actors in the global order. Also absent is an exploration of the role of economic actors play in shaping the structure of regulatory institutions and the behavior of states and international institutions or the effects of this public/private bargaining on individual or general welfare. In short, left behind are much of the struggle, crisis, conflict and complexity that comprise the global legal and economic order we see all around us and read about in the daily press.

For example, little or no attention is given to issues of distribution—whether of economic resources among private actors or power among public ones. Even retaining the focus on institutional arrangements that have preoccupied international law and economic theorists, one might expect them to theorize and explore questions such as: how regulation at one or another level of the international system might affect the distribution of resources among different constituencies or groups around the world? How might one or another regime of jurisdictional rules or limits shape the ability of different actors to capture a more equitable share of resources in the global economy? What is the role of particular legal arrangements in the production or reduction of income inequality?

In this same vein, international law and economics scholars have given very little attention to the substantive rules that could be expected to result from their proposed policy reforms with respect to the institutional level of rulemaking or jurisdictional power of particular regulators or the relative welfare impact of those reforms on various global constituencies. Instead, these scholars tend to predict that the prescribed institutional or jurisdictional reform will generally result in the production of sub-rules with certain characteristics (more flexible, reflective of actual state or business practice, facilitative of regulatory competition or party choice) that will bring about more efficiency or general welfare.8

Assuming, as I suspect most lawyers and economists would, that there are numerous possible combinations of institutional arrangement and sub-rules that could theoretically result in the a similar increase in aggregate efficiency gains in the global economy, it would be difficult to decide which among them was superior as a theoretical or a policy matter without knowing much more particularly which substantive rules would emerge from which institutional arrangement or jurisdictional regime, the relative net welfare effects from each and the relative distribution of welfare effects of each on different

8 See n 7 above.
constituencies. For example, efficiency gains being roughly equal, some might assert a preference for the institutional arrangement and rule combination that leads to the most equitable distribution of those gains. Of course, such a preference is neither a logical implication of the theory itself nor the only imaginable option as a normative matter. An alternative position might favor the institution and sub-rule combination that allocated efficiency gains to the actors best able to redeploy the gains to generate future growth. In other words, in order to justify a particular policy reform based on the welfare effects predicted by a particular international law and economics choice model, the theory would need both an effective method for assessing the cumulative welfare effects of the proposed institutional arrangement and sub-rule combination relative to others and some normative frame for adjudicating better and worse distributional outcomes in the event of more than one efficient combination. Without both of these analytic and the normative components it would be difficult to justify a preference for one arrangement over another either analytically or as a matter of policy.

Also absent from international law and economics theory is any sustained attention to the impact that differences in culture, local institutional context, relative wealth or bargaining power might have on the on the ways in which different private and public actors behave or bargain in either individual transactions or in the system as a whole. If the world were a culturally and institutionally homogenous place made up of relatively equal bargainers with regard to wealth and bargaining power, one might perhaps more safely assume that individuals or states would likely make similar decisions and behave in similar ways when faced with similar economic or legal incentives or adversities. In such circumstances, an economic choice model might be devised to describe the most prevalent economic behavior patterns and predict, based on those ‘normal’ patterns, the expected welfare effects of particular economic or legal changes. Such an assumption would be much more risky if one were trying to describe or predict the effects of an economic or legal change as it interacts with the numerous and diverse institutional arrangements, legal systems, cultural contexts and power asymmetries that can be readily observed in the functioning global system.

These issues might be important to the work of international law and economics theorists in a variety of ways. For example, different cultural expectations or understandings about the background institutional, cultural or power context might shape the way in which local economic actors, institutions or even states might respond to policy reforms or economic or institutional changes elsewhere in the system. Or differences in cultural norms or practices or local institutional arrangements could lead to ‘blind spots’ that could make it more difficult for particular actors, whether private or public, to recognize the extent to which an economic or institutional change elsewhere in the system could affect them and whether or how they should respond. A third possibility is that cultural expectations or established institutional structures may lead private actors or policy-makers to over- or under-value the

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9 The possibility that different legal rules might be ‘efficient’ in a particular situation while producing radically different distributional consequences for affected constituencies was recognized in law and economics theory in the early and canonical piece of law and economics scholarship. Guido Calabresi & Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, *Harvard Law Review* 85, (1970): 1089. Calabresi & Melamed went on to argue that if multiple, efficient rules were possible, then choosing among them was inherently normative and could not be made on the basis of efficiency criteria alone. *Ibid*, pp. 418—21.

10 The possible exception might be the public choice scholars, though their work seems more oriented to articulating general potentialities and tendencies within states than to analyzing the particular political structure or institutional orientation of any particular state. See eg Stephan, Barbarians (n 1) p. 746 (‘Public choice theory seeks to apply certain insights derived from the study of private economic behavior to collective action problems, including the form of concerted activity that constitutes government.’); Stephan, Accountability and International Lawmaking (n 1).
benefits (or costs) of a particular economic or institutional change based on familiarity with their own system and/or bias against change.

Just as differences in cultural expectations, norms and institutions seems likely to shape how individuals or state actors might interpret or react to economic conditions, disparities in wealth might also affect the way poorer or wealthier players experience the impact of adverse or positive effects of a particular institutional change or economic event, leading to over- or under-reactions that deviate from the responses predicted in the ‘normal’ case. Moreover, differences in bargaining power may lead to suboptimal distributions of the costs and benefits of particular institutional changes or events from the standpoint of maximizing total welfare. In bargains struck in reaction to an institutional change in the global system, powerful players may be able to extract more of the gains from or displace more of the costs to weaker players even if the powerful actually value the gains or suffer the losses less than the weak resulting in lower aggregate welfare gains than might have resulted from the change or event if bargainers were able to achieve deals that reflected their interests absent power asymmetries.

In sum, the basic notion here, which is hardly a controversial one in the social sciences, is that differences in culture, institutional structures or customary practices, or asymmetries in resources or power may shapes an actor’s preferences and values, and in turn, the way in which that actor might respond to institutional or economic change. If, as seems likely, this is not infrequently the case, then the predictive usefulness of international law and economics choice models that assume similar reasoning and responses by actors across the global system to similar stimuli would be significantly affected and the policy prescriptions put forward based on those models would be harder to justify on empirical grounds. Moreover, if more than a negligible number of different global actors or constituencies in different contexts make economic choices differently with respect to similar stimuli, how do we decide which choices are ‘rational’ or ‘normal’ and which ‘deviant’ or ‘aberrational’ in general or with respect particular institutional or economic changes? It would seem that some implicit cultural or normative choices would be necessary prerequisites both to use the economic choice models for analysis and to permit any policy inferences to be drawn from the analytic results. As we shall see, the limitations of international law and economics choice models articulated here do not eliminate the potential usefulness of these models for analytic or policy purposes. However, these limitations do undermine assertions of value-neutrality and universal applicability as regards both the assumptions that animate the models and the analytic conclusions that might be draw from them.

Another aspect of the current global legal and economic order that is readily observable at the local, national and transnational level but largely avoided by international law and economics theory is the ubiquitous phenomenon of bargaining between public and private actors over the content of rules and the structure of regulatory and governance institutions, as well as the role of dynamic adjustments by public and private actors individually and in the aggregate to changes in other parts of the system. Public and private bargaining poses a range of possible issues that one might expect would be of interest to international law and economics scholars even if they retained their focus on questions of increasing the efficiency of international institutional arrangements and jurisdictional rules. For example, if individual economic actors bargain to maximize economic gain and states bargain to maximize political power or prestige or the welfare of some or all of their national constituents, how can we measure the relative efficiency or welfare gains of institutional changes brought about through public/private bargains when the factors the bargainers are economizing or maximizing are not analytically or normatively commensurate?

Public/private bargaining also poses a challenge to the general tendency among international law and economics theorists to prefer private over public ordering and market allocation over regulatory
allocation of economic resources in the absence of special circumstances. Since the functioning global order includes ‘public’ and ‘private’ bargainers, ‘public’ and ‘private’ rule-makers and rules and institutions that are the result of some or all of public/public, private/private or public/private bargaining, it becomes much more difficult to distinguish even as a matter of theory between ‘public’ rules and ‘private’ transactions or between ‘market’ adjustments or ‘rule-based’ adjustments to economic incentives or institutional reforms. As a consequence, the tendency by international law and economics theorists to assert a general preference for private, market allocations of resources based on establishing a predictable correlation between the analytically indeterminate ‘public’ or ‘private’ origins of an institutional or economic change and the positive or negative welfare effects resulting from that change seem speculative at best and, in any event, reliant on norms and premises brought to rather than deriving from their analyses.

A third issue with regard to public/private bargaining arises from the law and economics insight based on the work of R.H. Coase that private actors will bargain to adjust or ameliorate the adverse economic consequences of legal rules if the transaction costs of doing so do not exceed the benefits to be gained from the bargain. 11 If this insight is correct, it seems equally likely that public authorities would also seek to adjust or ameliorate the perceived or anticipated adverse effects of an economic or institutional change elsewhere in the global system by making adjustments in their own rules or institutional practices. Moreover, if the transaction costs of achieving a legislative or institutional change at home might be high, public authorities could be expected to seek to alter the adverse effects of the change by bargaining with other public or private actors in the system, both at home and abroad. In other words, we might imagine public adjustments to include passing new legislation, adopting new administrative rules, altering executive, judicial or administrative enforcement or interpretive practices, or bargaining with other public regulatory entities or private actors to limit, deflect or compensate for the real or anticipated adverse effects of the change elsewhere in the global system.

From these examples, one might expect that international law and economics theory itself would predict both public/private bargaining and other institutional adjustments to ameliorate welfare-reducing adverse effects resulting from an institutional reform (and adjustments to that reform) among public and private actors whenever the adverse effects of the reform and/or adjustments were likely to exceed the costs of ameliorating them. As a consequence, it would seem that modeling such behavior would require an understanding both of how a reform would affect the initial bargaining behavior of diverse public and private actors in the system in response to the reform as well as how the impact of original change and ameliorating bargains might themselves be ameliorated or altered through further bargaining and adjustments. Moreover, a decision to exclude any or all of these theoretical predictions and readily observable bargaining and adjustment behaviors by actors in the functioning global economy would itself require a number analytic and normative choices as to the interests and effects that are or should be included in a simplified analytic model as well as assumptions about the limited impact of the exclusions on the validity or usefulness of the behavioral predictions resulting from the model and any policy prescriptions based on those predictions.

From this brief exploration of the research questions, methods and policy conclusions international law and economics theorists have generated as well as a range of the important issues and questions they have tended not to address, we can see that at least at this stage in its development, international law and economics theory deploys a quite limited range of analytic methods to analyze a quite narrow and particular set of international problems, at least when judged in relation to the much broader range of questions and methods deployed by international legal theorist and economists

working in the global context. There may be many possible explanations for particular choices of research questions among a group of scholars working in or towards a theoretical tradition ranging from a kind of path dependence based on the focus or methodological preoccupations of disciplinary forebears to a ‘learning by doing’ iterative process of research development based on modest expansions from prior work or methods to the idiosyncratic interests or political projects of the scholars doing the work to ‘you’ve got to start somewhere’ randomness. In the case of international law and economics theorists, my intuition is that the choice of research topics, analytic methods and policy prescriptions has been guided and supported, often implicitly, by a shared set of background principles, assumptions, presuppositions and teleological expectations about the normal unfolding of economic behaviors and processes and the adverse consequences of disruptions to that normal unfolding derived from “new institutional economics”. In a sense, international law and economic theory seems to rest on a kind of faith—in the truth of the particular economic premises asserted and the correlative truth that actors will (generally? on average? more often than not?) behave in predictable ways in accordance with those economic premises. As a consequence, whether the accounts resulting from international law and economics theory seem analytically compelling comes to depend in large part on the extent to which one shares the often implicit teleological implications of the presuppositions and assumptions that comprise the background ‘normal’ case against which efficiency and distortions are measured and the often unacknowledged normative values reflected in the choice of research topics studied or in the policy prescriptions advanced.

Earlier in this essay, I described some of the most common presuppositions, assumptions and expectations that I have found in much of international law and economics scholarship. To the extent that these choices of assumptions, methods and expectations are taken up in this scholarship, they are most often explained or justified on the grounds that simplifying models and assumptions are necessary to reach analytic conclusions because the complexity of ‘real world’ economic life is impossible to capture. This would seem to be particularly the case for theorists trying to analyze legal and economic processes on a global scale. After all, the complexity and diversity of interests, institutional forms, cultural and political practices, and public and private actors operating in the global legal and economic system could never be captured fully in any model or account. In such circumstances, it would seem to be inevitable that a necessary part of any useful analysis of global social phenomena would involve analytic choices and simplifying assumptions based on the interests, normative values and provisional viewpoints. But the inevitable need for some analytic choices, assumptions and normative views to guide social science research at the global level would not say anything about the validity or usefulness of particular choices of research topics, methods or values. Rather, the validity or usefulness of such choices would (or should) depend on the extent they reflect or predict more accurately (or more

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12 Malcolm Rutherford, the eminent economic historian of institutional economics, describing common critiques of ‘new institutional economics’ by economists from other strands of institutional economics, states: ‘They argue that its theory is often too abstract and formal; that it sometimes adopts an extreme, reductionist, version of individualism; that the individual is seen as an overly rational and overly autonomous being, constrained, but not otherwise influenced by, his institutional and social setting; that orthodox welfare criteria are not appropriate for appraising institutional change, and that a complacent attitude prevails concerning the efficiency characteristics of markets and of institutions that emerge spontaneously. The NIE [New Institutional Economics] is thus portrayed as more formalist, (particularly in its neoclassical and game theoretic manifestations), individualist, reductionist, oriented toward rational choice and economizing models, and generally anti-interventionist. [These labels apply to some more than others, but . . . they are labels that new institutionalists have willingly applied to themselves, in part in order to clearly distinguish themselves from [old institutional economics].’ Malcolm Rutherford, *Institutions in Economics: The Old and the New Institutionalism* (Cambridge: Cambridge University Press, 1996), p. 4 (citations omitted).
convincingly) than alternative methods or accounts aspects of the behaviors, institutional practices or substantive preferences of actual actors in the functioning global system.

If I am correct in my intuition that the shared background worldview of ‘normal’ economic processes has limited the range of research questions engaged, the methods used and the policy reforms prescribed in international law and economics work, then engaging issues and questions previously left out such as poverty, distributional equity, cultural or institutional difference, the implications of public/private bargaining over rules and institutions to name only a few, will not be simply a matter of applying existing theory to new areas of study. Rather, innovation in international law and economics both at the level of theory and of substantive research will require better methods for identifying and foregrounding the assumptions and normative values that animate the research choices and policy conclusions in both existing and future scholarship on the one hand, and for tracing and comparing the analytic and normative implications of different research choices and values by reference to their usefulness in reflecting or predicting the observable behavior of actors in the world around us. In short, a new critical practice of self-conscious analytic introspection and normative transparency would be useful to move international law and economic theory beyond its prior limits.

The goal of such a critical practice would be to place into the frame of disciplinary analysis not only the social phenomenon under observation, but also an assessment of the relative merits of the researcher’s choice of values, assumptions and premises based on their usefulness and limits as compared with alternative choices in illuminating the causal complex of processes at play in the social phenomenon being studied. Moreover, to the extent policy inferences or prescriptions are drawn from the research, their ideological persuasiveness or normative legitimacy would be subject to contestation based, in part, on the relative persuasiveness of the values, assumptions and premises on which the justifying research is based. Implicit in such a disciplinary practice would be an acknowledgement that all accounts of social phenomena are partial, tentative and conjectural, that the causal ‘reality’ of any social phenomenon can never be fully known, and that ‘theories’ are provisional hypotheses proffered to guide research toward the formulation of better hypotheses, not incontrovertible truths to be defended. While the conventions of social science scholarship require scholars to articulate analytic assumptions and to justify them on methodological grounds, certain background understandings and practices can become so common as to ‘go without saying.’ Moreover, even among scholars that attempt to articulate their analytic assumptions, it is much less common to examine the normative implications of one’s choice of analytic assumptions and justify them in normative terms. I have argued thus far that unarticulated (and perhaps unconscious) assumptions and normative commitments have precluded the application of international law and economics theory to some of the most important questions in international law and global political economy—questions of distribution, inequality and power.

In arguing for a turn in international law and economics theory to theoretical introspection and normative transparency, I build on a long tradition of similar critical interventions in the history of the social sciences in general and economics in particular. In fact, controversies and critical reflections on the costs and benefits of simplifying assumptions and conscious (and sometimes unconscious) analytic or normative biases in social science theory, research methods and policy conclusions are as old as the disciplines themselves. In the field of economics, this tradition of theoretical introspection has been primarily the province of heterodox institutional economic theorists who have challenged the generalizing and normalizing tendencies of classical and neo-classical economic theory based on an assertion that the analytic conclusions and policy prescriptions these theoretical traditions generate
bear little resemblance to the behavior of economic actors in everyday life that the theories purport to explain or influence.\textsuperscript{13}

In the pages that remain, I will draw attention to two such heterodox institutional economists, Thorstein Veblen and Gunnar Myrdal, whose work seems particularly helpful in suggesting how an introspective critical practice of attention to viewpoints and values in research topics, methods and policy conclusions might expose and open to challenge the normalizing assumptions, premises and tendencies that seem to pervade and limit innovation in international law and economics theory. In addition, the work of Veblen and Myrdal provides evidence of an established alternative tradition in economic theory dedicated to the importance of including history, cultural diversity, institutional specificity, distributional effects and power in economic analysis that might suggest methods for bringing these additional variables into international law and economics theory and thereby enabling it to address some of the important issues and questions that currently seem beyond its analytic scope.\textsuperscript{14}

The American economist, sociologist and forebear of ‘old’ institutional economics, Thorstein Veblen, provides an excellent example of the type of critical intervention I have in mind for international law and economics theory in his challenge to the disciplinary practices of classical economics in an 1898 essay, Why Economics is not an Evolutionary Science. He states:

The standpoint of classical economists, in their higher or definitive syntheses and generalizations, may not inaptly be called the standpoint of ceremonial adequacy. The ultimate laws and principles which they formulated were laws of the normal or natural, according to a preconception regarding the ends to which, in the nature of things, all things tend. . . . It is a projection of the accepted ideal of conduct. This ideal of conduct is made to serve as a canon of truth, to the extent that the investigator contents himself with an appeal to its legitimation for premises that run back of the facts with which he is immediately dealing, for the “controlling principles” that are conceived intangibly to underlie the process discussed, and for the “tendencies” that run beyond the situation that lies before him. . . .

With later writers especially, this terminology is no doubt to be commonly taken as a convenient use of metaphor, in which the concept of normality and propensity to an end has reached an extreme attenuation. But it is precisely in this use of figurative terms for the formulation of theory that classical normality still lives its attenuated life in modern economics[.] . . . By their use the theorist is enabled, without misgivings, to construct a theory of

\textsuperscript{13} See eg Ronald Coase, The Firm, the Market, and the Law, paperback ed. (Chicago: University of Chicago Press, 1990) p. 3 (‘The preoccupation of economists with the logic of choice, while it may ultimately rejuvenate the study of law, political science, and sociology, has nonetheless had, in my view, serious adverse effects on economics itself. One result of this divorce of the theory from its subject matter has been that the entities whose decisions economists are engaged in analyzing have not been made the subject of study and in consequence lack any substance. The consumer is not a human being but a consistent set of preferences. The firm to an economist, as Slater has said, “is effectively defined as a cost curve and a demand curve, and the theory is simply the logic of optimal pricing and input combination.” Exchange takes place without any specification of its institutional setting. We have consumers without humanity, firms without organization, and even exchange without markets.”) (internal citations omitted). For an historical discussion of these debates among various strands of institutional economists, see Rutherford, Institutions in Economics, pp. 27-50.

\textsuperscript{14} Some additional institutional economists whose work builds on diverse economic theoretical traditions to bring more complexity, particularity, culture, history, values, ideology, and psychology into institutional economic thought include Clarence Ayers, John Commons, Thrainn Eggertsson, Alexander Field, Avner Grief, Wendall Gordon, Alan Grunchy, Westley Michell, Douglass North, Warren Samuels, A. Allan Schmid and Marc Tool.
such an institution as money or wages or land-ownership without descending to a consideration of the living items concerned, except for convenient corroboration of his normalized scheme of symptoms. . . . In all this the agencies or forces causally at work in the economic life process are neatly avoided. The outcome of the method, as its best, is a body of logically consistent propositions concerning the normal relation of things—a system of economic taxonomy. At its worst, it is a body of maxims for the conduct of business and a polemical discussion of disputed points of policy.  

The Nobel prize-winning economist Gunnar Myrdal strikes a similar note regarding the challenges and inevitability of values in economic research and the correlative need to strive to make one's economic assumptions and normative perspectives explicit in the 1968 prologue to his great work of development economics, “Asian Drama: An Inquiry into the Poverty of Nations.” He states:

The problem of objectivity in research cannot be solved simply by attempting to eradicate valuations. . . . On the contrary, every study of a social problem, however limited in scope, is and must be determined by valuations. A “disinterested” social science has never existed and never will exist. For logical reasons, it is impossible. A view presupposes a viewpoint. Research, like every other rationally pursued activity, must have a direction. The viewpoint and the direction are determined by our interest in the matter. Valuations enter into the choice of approach, the selection of problems, the definition of concepts, and the gathering of data, and are by no means confined to practical or political inferences drawn from theoretical findings. . . .

The value premises that actually and of necessity determines approaches in the social sciences can be hidden. The student himself may be unaware of them. In fact, most writings, particularly in economics, remain in large part ideological. Some two centuries ago, the modern social sciences branched off from the metaphysical philosophies of natural law and utilitarianism. As our heritage from these philosophies, we continue to attempt to “objectify” and “neutralize” the valuation viewpoints and the value-loaded concepts used in scientific analysis. . . . Throughout the history of social studies, the hiding of valuations has served to conceal the inquirer’s wish to avoid facing real issues. . . . I have seen few efforts in recent years by economists to reform themselves on this score, least of all among those devoting themselves to abstract economic theory. . . .

Efforts to run away from valuations are misdirected and foredoomed to be fruitless and damaging. The valuations are with us, even when they are driven underground, and they guide our work. When kept implicit and unconscious, they allow biases to enter. The only way in which we can strive for objectivity in theoretical analysis is to lift up the valuations into the full light, make them conscious and explicit, and permit them to determine the viewpoints, approaches, and concepts used. In the practical phases of a study the stated value premises should then, together with the data—established by theoretical analysis with the utilization of those same value premises—form the premises for all policy conclusions.  

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To sum up these insights so far, the argument is not that we can do without theoretical viewpoints, simplifying assumptions or normative values, but rather, that because we can’t, we should make every effort to place those viewpoints, assumptions and values at the center of our analytic and critical practice as part of the social phenomena we study. Moreover, the usefulness of particular viewpoints, assumptions and values should be a function of the extent to which they bring us closer to the ‘real world’ we hope to capture or describe, even as we acknowledge that ‘reality’ is always, to some extent, beyond our capacities for description or comprehension. Myrdal makes these points as follows:

[Science] always begins a priori but must constantly strive to find an empirical basis for knowledge and thus become more adequate to the reality under study. This is also the reason why we can never achieve perfection—merely an approximate fitting of theory to facts. As such, acknowledging and defending our particular theoretical viewpoints and analytic methods, does not reduce the validity of our work, but it does require us to justify our choices and our conclusions based on their accuracy in relation to the data or phenomena we are studying and usefulness relative to accounts based on alternative viewpoints and methods. Moreover, our work becomes “objective” in Myrdal’s terms and “evolutionary” in Veblen’s only to the extent we are willing to adjust our accounts and conclusions in recognition of alternatives that seem more accurate or useful at capturing the ‘reality’ we are studying.

Returning to Veblen, he helpfully connects the critique of the usefulness of a notion of ‘normal processes’ or ‘general tendencies’ in economic activity to an expansion of the range of activities that should be included to generate a more dynamic and therefore realistic conception of economics based on cumulative change in culture and institutions. He argues:

The notion of a legitimate trend in the course of events is an extra-evolutionary preconception, and lies outside the scope of an inquiry into the causal sequence in any process. The evolutionary point of view, therefore, leaves no place for the formulation of natural laws in terms of definitive normality, whether in economics or in any other branch of inquiry. Neither does it leave room for that other question of normality, what should be the end of the developmental process under discussion? . . .

The economic life history of any community is its life history in so far as it is shaped by men’s interest in the material means of life. This economic interest has counted for much in shaping the cultural growth of communities. Primarily and most obviously, it has guided the formation, the cumulative growth, of that range of conventionalities and methods of life that are currently recognized as economic institutions; but the same interest has also pervaded the community’s life and its cultural growth at points where the resulting structural features are not chiefly and most immediately of an economic bearing. . . . The economic interest does not act in isolation, for it is but one of several vaguely isolable interests on which the complex of teleological activity carried out by the individual proceeds. . . . The is, therefore, no neatly isolable range of cultural phenomena that can be rigorously set apart under the head of economic institutions, although a category of “economic institutions” may be of service as a convenient caption, comprising those institutions in which the economic interest most immediately and consistently finds expression, and which most immediately and with the least limitation are of an economic bearing.

17 Myrdal, Asian Drama, p. 25.
From what has been said it appears that an evolutionary economics must be a theory of a process of cultural growth as determined by the economic interest, a theory of a cumulative sequences of economic institutions stated in terms of the process itself.\textsuperscript{18}

With these ideas in mind, and in the spirit of Veblen and Myrdal, a productive ‘next move’ in the development of international law and economics theory could be a more thorough critical investigation of the analytic limits and normative consequences of the predominant predilections, tendencies and assumptions that have served as the often unstated background ‘normal’ against and through which international law and economic scholars have characterized the global order and justified calls for policy reform in the name of increased global efficiency and welfare enhancement as well as a critical practice of making such predilections, assumptions and tendencies as explicit as possible in our work in the future. Doing so could lead to innovation and expansion of international law and economics theory and its focus of study in several ways. First, it could make us more aware of the ways in which our worldviews, habits of mind and normative predilections shape our research choices and analytic methods as well as our policy conclusions and thereby make us more attentive to trying to incorporate into our theory and scholarship the analytic costs and benefits and normative consequences of the choices we make relative to others we might make. Second, remaining focused on the fact that our work is always an approximation of the social phenomena we study, made up in part of the numerous choices that often unconsciously animate our theory, could perhaps open more space for exploring the possibilities and effects of relaxing or replacing some of those choices and assumptions on our theories and methods. Such experimentation may lead to alternative accounts of the workings of global economic processes that, in turn, lead us to further experimentation on the one hand, and revision of past analytic choices and methods on the other. From these alternative accounts, different theoretical viewpoints, hypotheses and values might emerge that could suggest new research methods perhaps better suited to taking up some of the many important issues of global concern that have been avoided or excluded from international law and economics analysis thus far.

Bringing these practices of critical introspection and normative transparency to bear in and on international law and economics theory and scholarship will likely result in more limited and tentative analytic conclusions based on the particular assumptions and values employed, more modesty in drawing concrete policy conclusions from theoretical work, more normative justification for preferring one set of assumptions or policy prescriptions over another, and more uncertainty about what we know and what can be known from our analytics about the global legal and economic order. Yet from the multiplicity of tentative and limited accounts, assumptions, research methods and conclusions that should emerge from this critical practice (and from the need to develop methods for comparison of the strengths and weaknesses of each in relation to alternative choices and conclusions), we may find ourselves more able to engage with the dynamic complexity and diversity of behavior we observe in the global economy we see all around us. It would seem, then, that if we seek to get closer to understanding the ever-elusive and ever-changing ‘reality’ of global legal and economic life, we may need to let go of the notion that the objective of the study of law and economy is the identification of ‘general’ economic tendencies based on ‘normal’ economic behavior and legal rules that shape economic behavior in accord with such general tendencies across differences in culture, wealth, power or values.

\textsuperscript{18} Veblen, Economics and Evolution, pp. 76-7.