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LAN CAO*

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INTRODUCTION

Lawyers and legal scholars in law and development have failed to understand that law is peripheral, not central, to the development problem of poor countries. Even as legal scholars in other fields increasingly

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recognize the need to study norms and the interaction of norms and law,¹ law and development scholars remain seemingly blind to this phenomenon. In this Article, I argue that norms matter, or more controversially, culture matters to law and development. The observation, that culture matters, and the proposal, that it be examined and evaluated, run counter to the tradition of public and private international law. Law and development, however, must disassociate itself from this long-standing tradition.

In this Article, I seek to address how culture aids or retards economic development and propose that the field of law and development pursue the objective of purposive culture change. Law and development scholars have yet to ask the key question: after so many years of drafting new laws to spur development, why is the field still characterized by failure? Does it need more laws, especially if “law” is viewed in essentially instrumentalist terms, that is, as a means to an end—whether it be to lower transaction costs or protect parties’ expectations or restrain state power.

I propose that law and development move beyond law and the technical dimensions of the “rule of law.” As slippery a concept as culture may be and as complex and controversial as the notion of culture change undoubtedly is, particularly given the history of colonialism, I argue that we must enter the cultural milieu and ask whether certain cultural attributes in a given society are an impediment to that society’s economic development. Law may still be relevant, but only if it is *also* viewed culturally, and not just instrumentally, “as the embodiment of norms...and the repository of social meanings.”² If law embodies or reflects norms, then norms must accordingly be addressed, especially those that may be at odds with development objectives.

Law and development assistance must therefore confront even issues that seem to be part of a country’s proclaimed cultural identity. Examples include specific practices: India’s caste system and the preferences of many generations of high caste Indians for economic and social segregation; restrictions on education for girls in many poor countries; the prohibition on charging interest because it is an essential part of the “Islamic way of life”; personalistic and group-focused relationships as well as patterns of authority that discourage individual wealth accumulation,

1. For an examination of law/norm interaction, see Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841, 857–74 (1999).

2. Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973, 973–74 (2005).

especially by those not from the traditional ruling elites. Additionally, this Article advocates confronting not just specific practices but also general inclinations, values, preferences or mindsets that do not contribute positively towards economic development. Examples include views about authority and dominance, status as an inherited rather than acquired attribute; the relationship between the collective and the individual; superstitions and the tendency to exalt the past. My argument to focus on culture rests on the following claim—that economic development is not only an economic or legal process but also a “cultural process.”³ A “rule of law” project as such will be insufficient to reduce poverty or implement the other objectives of law and development.

This Article proceeds as follows. Part I sketches the field, its supposed demise and its revival in recent years. This resurrection is due partly to the events of September 11, 2001, whereby law and development is viewed in a new light, in the United States in particular, not just as a do-good effort but as a crucial component in the fight against terrorism. I argue this effort will fail without a cultural focus. Part II examines how international law has focused on states and ignored culture, except as a byproduct of the colonial project and its civilizing mission. To the extent culture is now incorporated at all, it is presumed that cultures cannot be changed or interfered with but rather are to be protected as part of the right to self-determination. Part III argues that notwithstanding colonial history, law and development must go beyond market initiatives and legal reforms to include a cultural component, especially where “cultural lock-in”⁴ is a contributing cause of continuing poverty.

In making this argument, I refer to various historical instances of culture transformations, in response to both internal and external ferment, to suggest how a culture change agenda may be undertaken. Japan’s modernization is one such example. I also examine current efforts to transform practices and attitudes that are cultural but are also detrimental to economic development. In the process, this Article wrestles with the following dilemmas: whether and how these practices and beliefs should be changed, in a manner that may begin with passing the necessary laws but also has to go beyond “mere” laws; and how new norms can be introduced, especially those that run counter to patterns of

3. Mariano Grondona, *A Cultural Typology of Economic Development*, in *CULTURE MATTERS* 44, 46 (Lawrence E. Harrison & Samuel P. Huntington eds., 2000).

4. Timur Kuran, *Cultural Obstacles to Economic Development: Often Overstated, Usually Transitory*, in *CULTURE AND PUBLIC ACTION* 115, 117 (Vijayendra Rao & Michael Walton eds., 2004).

thought and behavior that people have experienced most of their lives. Accordingly, this Article will address complications that may arise when culture change is externally influenced or induced.

Part III is only the beginning of a larger scholarly project in which I address both the normative and prescriptive dimensions of culture change. In addition to the “how to” or “tool kit” aspects of culture change, there are also normative implications. Clearly, a disturbing tension runs through the proposal. On the one hand, development ideally should have grassroots participation and support,⁵ and development objectives should be subjected to “informed choice, aided by public discussion, critical scrutiny, and a participatory political environment.”⁶ On the other hand, participatory development in communities characterized by hierarchical patterns of authority may also be susceptible to capture by the traditional elites themselves, calling for a return to, not surprisingly, traditional culture.

In the age of globalization, culture is not likely to remain “pure” (even assuming it once was), and arguments about cultural purity and autonomy are not convincing. Culture is neither homogeneous nor monolithic; indeed, even within a culture, people are dissenting from and contesting inherited cultural norms and meanings.⁷ As the noted economist and 1998 Nobel Laureate in Economics Amartya Sen remarked, “the cultural dimension of development requires closer scrutiny in development analysis. It is important to investigate the different ways...in which culture should be taken into account in examining the challenges of development, and in assessing the demands of sound economic strategies.”⁸

Although law does have an expressive function and thus certain laws make certain statements which could in turn influence social norms,⁹

5. The World Bank has recently initiated a Comprehensive Development Framework which promotes greater local participation in development projects, particularly from Nongovernmental Organizations. See Lan Cao, *An Evaluation of the World Bank's New Comprehensive Development Framework*, in *PRIVATISING DEVELOPMENT* 27 (Michael B. Likosky ed., 2005); see also Amartya Sen, *How Does Culture Matter?*, in *CULTURE AND PUBLIC ACTION*, *supra* note 4, at 37, 53 (“An overarching value must be the need for participatory decision making on the kind of society people want to live in, based on open discussion....”).

6. Sen, *supra* note 5, at 55.

7. See generally Madhavi Sunder, *Cultural Dissent*, 54 *STAN. L. REV.* 495 (2001) (arguing that law should recognize the heterogeneity within a culture and should not reflexively privilege the cultural authenticity claims of elites against dissenters who wish to transform aspects of that culture).

8. Sen, *supra* note 5, at 37.

9. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 *U. PA. L. REV.* 2021, 2022–25 (1996).

this capacity to affect preferences and beliefs through law is questionable in countries where the rule of law is itself weak. For those countries, law is insufficient and culture change will be needed.

I. A BRIEF HISTORY OF LAW AND DEVELOPMENT

A. *Law and Development After 9/11: Development as National Security*

Law and development as a field has been revived after many years of decline and disillusionment.¹⁰ The crisis was partly fueled by the events of the 1960s when Western institutions were deemed flawed¹¹ and many, particularly those intimately associated with the movement, questioned the objectives of law and development¹² and the institution of law itself.¹³ In other words, if law and development scholars aimed to assist poor countries in establishing Western style markets and laws,¹⁴ and if the integrity of the latter is questioned even in developed, Western societies,¹⁵ then the essence of the movement itself must be questioned as well.¹⁶

10. See, e.g., LAW AND CRISIS IN THE THIRD WORLD (Sammy Adelman & Abdul Paliwala eds., 1993); John H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); David Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WISC. L. REV. 1062 (1974).

11. For a critique of the law and development movement and its self-proclaimed crisis and despair, see Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L L. 470, 472 (1995) (reviewing LAW AND DEVELOPMENT (VOL. 2, LEGAL CULTURES, Anthony Carty ed., 1992) and LAW AND CRISIS IN THE THIRD WORLD, *supra* note 10.).

12. David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 4, 23 (1990) (characterizing the law and development movement as one aimed at "exporting democratic capitalism" to countries "too poor or benighted to grasp the possibilities of this superior form of civilization").

13. Trubek & Galanter, *supra* note 10, at 1083–84.

14. See David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 6–7 (1972) (describing how law is necessary to the establishment of markets because law provides predictable, universal rules, thus ensuring that economic activities and fruits generated therefrom will be protected). More specifically, law and development scholars supported the establishment in developing countries of capital market programs to foster Western-style regulatory and private property regimes. *Id.* at 45–46.

15. See Trubek & Galanter, *supra* note 10, at 1083 (claiming that, even in the United States, law is instrumental in perpetuating "domination by elite groups" and "arbitrary actions by government"). For a compelling criticism of Western disillusionment, see Tamanaha, *supra* note 11, at 474.

16. See Trubek & Galanter, *supra* note 10, at 1070, 1080 (condemning the liberal-legalism model previously advocated as "ethnocentric and naïve" because the model is ignorant of the re-

Law and development was revived by the demise of the Soviet Union and the need to aid transitional or post-crisis countries. Despite professed concerns about the project's basic premise—to modernize developing countries—the thrust of law and development continues to be about modernization,¹⁷ which is essentially to establish working markets and construct a rule of law framework.¹⁸ Since September 11, 2001, law and development has taken on an even greater sense of urgency. International security experts view it as a necessary component of terrorism prevention.¹⁹ Some argue that the United States has traditionally combated terrorism by using a “supply-side” only approach that is ineffective, that is, by “regarding terrorism as the product of organized groups that could be confronted and destroyed, without regard to their aims or to the reasons that they succeed in recruiting many willing members.”²⁰ These commentators suggest that the United States should also engage the “demand side” of terrorism, that is, by understanding that “[p]ublic despair and humiliation are often fertile ground for terror organizers to exploit”²¹ and by addressing those underlying factors through support for economic development and political change.²² One reason “the Middle East is a prime target for terrorist recruiters”²³ is “its exceedingly high unemployment rate, evaporating gross domestic product growth,

alities of Third World countries).

17. Modernization theory holds that “development was an inevitable, evolutionary process of increasing societal differentiation that would ultimately produce economic, political and social institutions similar to those in the West. The outcome of this process would be the creation of a free market system, liberal democratic political institutions, and the rule of law.” Tamanaha, *supra* note 11, at 471; *see also* Lan Cao, *Law and Economic Development: A New Beginning?*, 32 TEX. INT'L L.J. 545, 549 (1997) (describing how modernization theory views development as a sequential process similar to that experienced by the West).

18. Often “rule of law” is used synonymously with “law and development.” That is because rule of law is the legal component of market development. Development increasingly means market development (or at least reliance on the market as an engine for growth and development) and rule of law is the institution, at the very least, of laws that will support such market development and, among other objectives, restrain arbitrary governmental actions. *See, e.g.* John Hewko, *Foreign Direct Investment: Does the Rule of Law Matter?* (Carnegie Endowment for Int'l Peace, Working Paper No. 26, 2002), available at <http://www.carnegieendowment.org/files/wp26.pdf>; Stephen Holmes, *Can Foreign Aid Promote the Rule of Law?*, E. EUR. CONST. REV., Fall 1999, at 68 (“Essentially, law is seen as a springboard to economic development,” and therefore efforts have been devoted at providing a secure contracts and property framework in order to develop a free market.).

19. *See, e.g.*, COUNCIL ON FOREIGN RELATIONS, IRAQ: THE DAY AFTER (2003).

20. Shibley Telhami, *Conflicting Views of Terrorism*, 35 CORNELL INT'L L.J. 581, 586 (2002).

21. *Id.* at 587.

22. *Id.* at 598.

23. Kevin J. Fandl, *Terrorism, Development & Trade: Winning the War on Terror Without the War*, 19 AM. U. INT'L L. REV. 587, 599–600 (2004).

and lack of free markets and stable financial institutions.”²⁴

The idea that economic development is part of a wider political solution resonated after September 11 and was embraced not only by scholars²⁵ but also by governments and aid agencies. At the highest level of the U.S. government, officials such as then Secretary of State Colin Powell drew the connection between the national security of the United States and economic development of poor countries. As Secretary Powell put it, in considering the Bush Administration’s foreign policy record, there are “issues...that tend to dominate the headlines, and issues of equal or greater long-term strategic significance that rarely generate as much interest. Among these latter issues, none is more important than economic development in the world’s poorest societies.”²⁶ Although poverty is not a direct cause of terrorism, “[p]overty breeds frustration and resentment, which ideological entrepreneurs can turn into support for—or acquiescence to—terrorism, particularly in those countries in which poverty is coupled with a lack of political rights and basic freedoms.”²⁷ According to Secretary Powell, “[d]evelopment is not a ‘soft’ policy issue, but a core national security issue,”²⁸ and “[t]he United States cannot win the war on terrorism unless we confront the social and political roots of poverty.”²⁹

Since September 11, 2001, U.S. actions have reflected the recognition that “development, democracy, and security [are] inextricably linked.”³⁰ The United States, for example, passed the Export-Import Bank Reauthorization Act of 2002 with new guidelines that require the Bank, in determining whether to accept an application for credit from a foreign nation, to take into consideration the cooperation of the host government in the fight against terrorism.³¹ The United States Agency for In-

24. *Id.* at 599.

25. See, e.g., Fandl, *supra* note 23, at 609 (“Eradicating poverty is the single most potent solution to the problem of terrorism.”); Oren Gross, *Mending Walls: The Economic Aspects of Israeli-Palestinian Peace*, 15 AM. U. INT’L L. REV. 1539 (2000); Brink Lindsey, *The Trade Front: Combating Terrorism with Open Markets*, TRADE POL’Y ANALYSIS, No. 24 (CATO Inst. Center for Trade Policy Studies, Washington, D.C.), August 5, 2003, <http://www.freetrade.org/pubs/pas/tpa-024.pdf> (arguing that the United States should pursue a broad trade strategy as a component in the war on terror); Telhami, *supra* note 20.

26. Colin L. Powell, *No Country Left Behind*, FOREIGN POL’Y, Jan.–Feb. 2005, at 28.

27. *Id.* at 30.

28. *Id.*

29. *Id.*

30. *Id.*

31. Export-Import Bank Reauthorization Act of 2002, Pub. L. No. 107–189, § 17, 116 Stat. 698, 706 (2002) (to be codified at 12 U.S.C. § 635); see also 148 CONG. REC. H1771, at H1786 (daily ed. May 1, 2002) (statement of Rep. J.C. Watts) (“[W]e must reach out to developing na-

ternational Development (USAID), with a history of fighting poverty long before September 11, now aims to have “a major role in minimizing the conditions that foster terrorism, instability, and other global threats,” according to Deputy Assistant Administrator Gordon West.³² The United States National Security Strategy targets global economic development as a key factor in enhancing national security,³³ drawing an explicit link between development and threat reduction.³⁴

The National Security Strategy was implemented after a historic conference in Monterrey, Mexico. Six months after September 11, 2001, in Monterrey, Mexico, at the United Nations Conference on Financing for Development, the United Nations (UN), the International Monetary Fund (IMF), the World Bank, the World Trade Organization (WTO), non-governmental organizations (NGOs) and private businesses reaffirmed the need to encourage private capital flows to poor countries in order to achieve the UN Millennium Development Goals, which includes the resolution “[t]o halve, by the year 2015, the proportion of the world’s people whose income is less than one dollar a day and the proportion of people who suffer from hunger....”³⁵ Part of the Monterrey Consensus is that “[u]nderdevelopment and extreme poverty are breeding grounds for violence and despair, thus undermining peace and security for developed and developing countries alike.”³⁶ Consequently, President Bush pledged to raise American official development assistance progressively from 10 to 15 billion dollars, with assistance tied to the recipients’ anti-terrorism record³⁷ and with the establishment of a new Millennium Challenge Account (MCA).³⁸ The MCA not only pro-

tions across the globe, often beset by forces of terror, and demonstrate how free markets, open trade, and private enterprise under the rule of law can lead to prosperity for their citizens. Our national security improves when global stability prevails.”).

32. U.S. DEP’T OF STATE, USAID STRIVES TO MINIMIZE CONDITIONS THAT FOSTER TERRORISM (2003), <http://usinfo.state.gov/ei/Archive/2004/Jan/06-495201.html>.

33. *Id.*

34. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, iv-vi (2002), <http://www.whitehouse.gov/nsc/nss.pdf>.

35. Jens Martens, *Global Development Cooperation After Monterrey, Results and Perspectives from the Financing for Development Process*, at 1, 4, 7, available at <http://www2.weed-online.org/ffd/doc/martens-monterrey-results.rtf> (last visited Feb. 27, 2007).

36. International Conference on Financing for Development, Monterrey, Mex., Mar. 18–20, 2002, *Report of the International Conference on Financing For Development*, 82, U.N. Doc. A/CONF.198/11 (Mar. 22, 2002) (statement of Han Seung-soo, President of the General Assembly of the United Nations).

37. Martens, *supra* note 35, at 6–7.

38. Stephen Marks, *The Human Right to Development: Between Rhetoric and Reality*, 17 HARV. HUM. RTS. J. 137, 156–57 (2004). On January 23, 2004, the Millennium Challenge Corporation (MCC) was signed into law. The MCC will administer the MCA. Initial funding for the

motes the standard objectives favored by traditional development projects but also conditions financial disbursement on the recipient's implementation of certain prerequisites.³⁹

The United States is also promoting a trade agenda that is part of its overall strategy for combating terrorism. In the immediate post-September 11 environment, then U.S. Trade Representative Robert Zoellick described the Bush Administration's trade agenda as one integral to the country's counteroffensive against terrorism. "Trade is about more than economic efficiency. It promotes the values at the heart of this protracted struggle."⁴⁰ The United States, for example, is pushing to develop a Middle East Free Trade Area (MEFTA) by 2013.⁴¹

After the terrorist attacks on September 11, 2001, law and development has been resurrected and transformed from an important, but second-tier-level project to a critical component of the United States' long-term anti-terrorism, national security strategy.⁴² Fighting terrorism now includes at the forefront a focus on market and rule of law reform efforts long proposed by standard development scholars.⁴³ What is still missing is a concerted effort to address the cultural foundations without which markets and rule of law projects are likely to fail.

B. *Development as Human Rights*

Law and development remains a priority for traditional development organizations such as the World Bank, as secure property and contract rights are deemed necessary for the development of a robust, rule-bound

2004 fiscal year is \$1 billion. Millennium Challenge Corp., MCC Accomplishments at Three, <http://www.mcc.gov/features/mccatthree/index.php> (last visited Feb. 27, 2007); *see also* Editorial, *The President's Millennium Challenge*, N.Y. TIMES, Nov. 11, 2004, at 32 (hailing the MCA as "a new approach to development aid that links American assistance to a poor country to its progress in key areas").

39. The MCC administers the MCA. Its board determines eligible countries, relying on sixteen indicators grouped into three categories. Under category one, "Ruling Justly," the indicators include "civil liberties," "rule of law," and "control of corruption." Under category two, "Encouraging Economic Freedom," the indicators include "country credit rating," "fiscal policy," "trade policy," and "days to start a business." *Id.* Under category three, "Investing in People," indicators include "public expenditures on health as percent of GDP," "public primary education as percent of GDP," and "immunization rates." Millennium Challenge Corp., REPORT ON THE CRITERIA AND METHODOLOGY FOR DETERMINING THE ELIGIBILITY OF CANDIDATE COUNTRIES FOR MILLENNIUM CHALLENGE ACCOUNT ASSISTANCE IN FY 2004, available at http://www.mcc.gov/selection/reports/FY04_Criteria_Methodology.pdf (last visited Feb. 27, 2007).

40. Robert B. Zoellick, *Countering Terror with Trade*, WASH. POST, Sept. 20, 2001, at A35.

41. Fandl, *supra* note 23, at 622; Lindsey, *supra* note 25, at 1.

42. *See* Thomas Carothers, *The New Aid*, WASH. POST, Apr. 16, 2002, at A19.

43. *See generally id.*

market.⁴⁴ Even charitable NGOs such as Oxfam, which may disagree about the appropriate strategies for market development and reforms, generally acknowledge that a working market (and the rule of law necessary to support it) is imperative for poverty reduction.⁴⁵ The UN, which has traditionally been statist in orientation and suspicious of global markets, now recognizes the need to engage the market and promote trade, through greater coordination with the WTO⁴⁶ and the international business community.⁴⁷ As UN Secretary-General Kofi Annan remarked:

A fundamental shift has occurred in the UN-business relationship. The United Nations has developed a profound appreciation for the role of the private sector, its expertise, its motivated spirit, its unparalleled ability to create jobs and wealth.... In a world of common challenges and common vulnerabilities, the United Nations and business are finding common ground.⁴⁸

44. See Hewko, *supra* note 18, at 3; Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar./Apr. 1998, at 95, 97 ("Basic elements of a modern market economy such as property rights and contracts are founded on the law and require competent third-party enforcement. Without the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government's many involvements in the economy—regulatory mechanisms, tax systems, customs structures, monetary policy, and the like—would be unfair, inefficient, and opaque."); Carothers, *supra* at 98 ("[E]conomic globalization is feeding the rule-of-law imperative by putting pressure on governments to offer the stability, transparency, and accountability that international investors demand.").

45. See OXFAM, A CASE FOR REFORM: FIFTY YEARS OF THE IMF AND WORLD BANK 2 (1995).

There is today a growing consensus that markets have a critical role to play in development, and that chronic budget deficits and balance of payments deficits must be addressed. It is also recognized that, in the creation of the crisis of the 1980s, the impact of external forces was compounded by internal factors, such as ill-conceived forms of State intervention.

Id.

46. The United Nations Millennium Declaration, approved by the largest gathering of states since the UN's founding, aims for "greater policy coherence and better cooperation between the United Nations, its agencies, the Bretton Woods Institutions and the World Trade Organization, as well as other multilateral bodies, with a view to achieving a fully coordinated approach to the problems of peace and development." United Nations Millennium Declaration, G.A. Res. 55/2, at 9, U.N. Doc. A/Res/55/L.2 (Sept. 18, 2000).

47. At the 1999 World Economic Forum held in Davos, Switzerland, Secretary Annan promised that the United Nations would "make the case for and maintain an environment which favors trade and open markets." Rorden Wilkinson & Steve Hughes, *Labor Standards and Global Governance: Examining the Dimensions of Institutional Engagement*, 6 GLOBAL GOVERNANCE 259, 266 (2000) (quoting Press Release, The Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos, U.N. Press Release No. SG/SM/6881/Rev.1 (Feb. 1, 1999)).

48. Kofi Annan, *Message to the Business Humanitarian Forum* (Jan. 27, 1999),

Those enthusiastic about markets and the rule of law are now numerous and include entities that do not ordinarily form part of a common alliance, such as development NGOs, businesses, human rights groups, and the UN. This is partly because there is credible evidence to support the notion that countries that have achieved a certain level of wealth—an objective of development—are likely to have a good human rights record as well. For example, an empirical study focusing on twelve Asian countries shows that although there is wide variation among them with respect to human rights and quality of life indicators, such as infant mortality, life expectancy, expenditures on education and health, what is most important in explaining differences in rights observance and quality of life is wealth.⁴⁹ As the author of the study concluded, “In the subtle and complex interplay of economics, politics, culture, law and institutions in determining rights performance, what matters most is wealth. Put bluntly, if somewhat too simply, if you want better performance across a range of rights and indicators of human wellbeing, *show me the money*.”⁵⁰ This finding that wealth, one measure of economic development,⁵¹ correlates with an improvement in the protection of rights, whether political or economic, has been duplicated and supported by many other studies.⁵²

A UN report shows that there is also a positive relationship between wealth and women’s rights as measured by the UN Gender Development Index, which correlates almost perfectly with the Human Devel-

http://www.bhforum.ch/default.aspx?frame=/documentation/message_from_un_secretary_general.htm.

49. Randall Peerenboom, *Show Me the Money: The Dominance of Wealth in Determining Rights Performance in Asia*, 15 Duke J. Comp. & Int’l L. 75 (2004).

50. *Id.* at 81 (emphasis added).

51. Economic growth is not nor should it be the sole determinant of economic development. One approach to development is to view it as

a process of expanding the real freedoms that people enjoy.... Viewing development in terms of expanding substantive freedoms directs attention to the ends that make development important, rather than merely to some of the means (for example, growth of the GNP) that, inter alia, play a prominent part in the process.

AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 3 (Oxford 1999).

52. See, e.g., GEERT HOFSTEDE, *CULTURE’S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS AND ORGANIZATIONS ACROSS NATIONS* 248, 251–53 (2d ed. 2001) (finding that wealth mattered the most in terms of rights compliance); William H. Meyer, *Human Rights and MNCs: Theory Versus Quantitative Analysis*, 18 HUM. RTS. Q. 368, 393–94 (1996) (showing that GNP is the biggest factor in countries’ observation of political, civil, social, and economic rights); UNITED NATIONS DEV. PROGRAMME, *HUMAN DEVELOPMENT REPORT 2003, MILLENNIUM DEVELOPMENT GOALS: A COMPACT AMONG NATIONS TO END POVERTY* (2003), http://hdr.undp.org/reports/global/2003/pdf/hdr03_complete.pdf.

opment Index (HDI).⁵³ Other studies have corroborated this result, showing that a higher GDP is positively correlated with better observation of women's rights.⁵⁴ Moreover, a country's economic development correlates not only with rights observation but also with democracy. Theorists who have studied the conditions necessary for democracy to take root have noted a strong correlation between economic development and democracy,⁵⁵ with the latter, in turn, providing more rights protection than non-democracies.⁵⁶ In fact, one could credibly argue that economic development, in the long run, translates into better protection for human rights than other indicators, such as ratification by states of human rights treaties.⁵⁷

53. UNITED NATIONS DEV. PROGRAMME, UNDP GENDER-RELATED DEVELOPMENT INDEX (2003), http://hdr.undp.org/statistics/data/pdf/hdr05_table_25.pdf. The HDI is a summary measure of human development. It measures the average achievements in a country in three basic dimensions of human development: First, a "long and healthy life," as measured by life expectancy at birth; second, "knowledge," as measured by the adult literacy rate (which accounts for two-thirds of the score) and the combined primary, secondary and tertiary gross enrollment ratio (accounting for one-third of the score); and finally, a "decent" standard of living, as measured by GDP per capita in U.S. dollars. UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2006, BEYOND SCARCITY: POWER, POVERTY, AND THE GLOBAL WATER CRISIS 263 (2006), <http://hdr.undp.org/hdr2006/pdfs/report/HDR06-complete.pdf>.

54. Clair Apodaca, *Measuring Women's Economic and Social Rights Achievement*, 20 HUM. RTS. Q. 139, 160 (1998).

55. For example, Seymour Martin Lipset noted that the most important variable that correlated with democracy was a basic level of economic development. See Seymour Martin Lipset, *The Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SCI. REV. 69, 75 (1959). Lipset observed that the usual indices of economic development—average wealth, degree of industrialization, education level—were higher in democratic countries than non-democratic countries. *Id.* at 75–79. Others have noted that once democratization occurs, it tends to survive in countries that have attained a certain minimum level of economic development, Adam Prezworks & F. Limongi, *Modernization: Theories and Facts*, 49 WORLD POLITICS 155, 165 (1997), or at least that once a more economically developed country democratizes, it is more improbable that it will revert to authoritarianism. See Barbara Geddes, *What Do We Know About Democratization After Twenty Years?*, 2 AM. POL. SCI. REV. 115, 117–19 (1999); Peerenboom, *supra* note 49, at 100 ("Whether or not economic development is the cause of democratization, in the long term, economically advanced countries are likely to be, and to remain, democracies.").

56. Sen has observed that "no famine has ever taken place in the history of the world in a functioning democracy—be it economically rich (as in contemporary Western Europe or North America) or relatively poor (as in postindependence India, or Botswana, or Zimbabwe)." SEN, *supra* note 51, at 16.

57. See Linda C. Keith, *The United Nations International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behavior?*, 36 J. PEACE. RES. 95, 112 (1999) (finding in a study of 178 countries from 1976 to 1998 that signing the International Covenant on Civil and Political Rights and even the Optional Protocol allowing individuals the right to initiate complaints against a state did not cause the ratifying countries to alter their actual behavior, such as to improve their human rights record); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1941, 1978 (2002) (finding in a study of 166 countries that

It is widely acknowledged that despite billions of dollars in aid spent over the years, law and development has been characterized by more failure than success.⁵⁸ Considerable time and effort have been expended in establishing a formal framework, focusing, for example, on issues related to the formal economy and the writing and enactment of formal laws necessary to support it. Thus the “law” in “law and development” has meant formal laws. The “development” in “law and development” has meant, for the most part, the development of a functioning formal economy. As observed by Tom Carothers, founder and co-director of the Democracy and Rule of Law Project at the Carnegie Endowment for International Peace, the “Rule of Law Assistance Standard Menu,” as he coined it, includes “reforming institutions” such as reform of the judiciary, the legislatures, the police and prison system, “rewriting laws,” including modernization of criminal and commercial laws, “upgrading the legal profession through support for stronger bar associations and law schools,” and “increasing legal access and advocacy.”⁵⁹ The focus is clearly on formal institutions and statutes.⁶⁰

Simply speaking, these projects have not been enough but yet are repeated.⁶¹ There are several reasons why the current standard menu of

states ratifying human rights treaties have only a slightly better compliance record than non-ratifying countries, and that countries with the worst human rights records have higher rates of ratification than countries with a better record).

58. See Carothers, *supra* note 44, at 96; Linn Hammergren, *Do Judicial Councils Further Judicial Reform? Lessons from Latin America* (Carnegie Endowment for Int’l Peace, Working Paper No. 28, 2002) (finding that efforts to free the judicial system in many Latin American countries of nepotism and corruption have failed) available at <http://www.carnegieendowment.org/files/wp28.pdf>; Holmes, *supra* note 18, at 1 (“[Despite] a multimillion-dollar effort to promote the ‘rule of law’ in the Russian Federation...[w]hat we have in Russia today, in short, is an incoherent state tenuously connected to a demoralized society. This pattern explains why there is little of the rule of law, despite foreign efforts to promote it, and why the problems facing legal-development programs seem so immense and intractable.”).

59. THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 165–168 (Carnegie Endowment 1999).

60. Carothers, *supra* note 44, at 99. Law and development assistance for the Russian Federation, for example, has a similar focus. Projects “include everything from study visits and continuing-education programs for judges to the coaching of court administrators in docket management and the establishment of alternative dispute-resolution mechanisms.” Holmes, *supra* note 18, at 1. Others focus on “legal codification [and] the modernization of legal information systems..., [particularly] legislative drafting assistance in commercial-law areas, such as securities, bankruptcy, corporate governance, and banking.” *Id.*

61. In evaluating judicial reform efforts, Tom Carothers has observed that aid advisors “seem determined to repeat mistakes made in other places.” CAROTHERS, *supra* note 59, at 176; HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRUMPS IN THE WEST AND FAILS EVERYWHERE ELSE* 12 (2000) (“Since the nineteenth century, nations have been copying the laws of the West to give their citizens the institutional framework to produce wealth. They continue to copy such laws today, and obviously it doesn’t work.”).

ferred by law and development assistance is off the mark. First, although this formalistic approach emphasizing rule of law and market development is necessary, it is far from sufficient. Much more attention needs to be paid to the non-law framework, norms,⁶² and culture that influence the efficacy of formal laws. Second, the majority of the poor in developing countries live in a parallel, “extralegal” universe defined by informality.⁶³ A call by the noted Peruvian economist, Hernando De Soto, to address the informal sector—in brief, to discover “their informal norms and arrangements” and “find ways to integrate them into the formal property system”⁶⁴—has already been proposed and I will not discuss it here. Suffice it to say that De Soto does not place high hopes on the drafting of new laws—often imposed by governments with the help of foreign experts.⁶⁵ As he puts it, “if lawyers want to play a role in creating good laws, they must step out of their law libraries into the extralegal sector....”⁶⁶ Whether one agrees with De Soto’s recommendation to study and formalize informal arrangements⁶⁷ for the purpose of my Article, what is important is the fact that he goes beyond the usual law and development emphasis on formal laws and rules to include the norms and custom of the informal economic sector.

I would go further still. In Part II below, I examine the glaring gap in law and development studies—a blind spot to culture, norms, and custom and how they influence a country’s laws and its economic development. The gap may be derived from an acultural framework law and development inherited from international law generally; or from a general reluctance to touch culture because of a history of cultural imperialism and current sensitivities associated with it; or from the sense that culture is hard to quantify and thus cannot be legislated into being the ways laws and rules can.

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

63. Hernando De Soto defines an extralegal system as one where many of the world’s poor live and work—“outside the official law, using their own informally binding arrangements to protect and mobilize their assets.” DE SOTO, *supra* note 61, at 21.

64. *Id.* at 179.

65. Often, foreign development experts believe they’ve achieved great success if “their advice is swallowed whole and the laws they draft are actually passed by parliament.” Holmes, *supra* note 18, at 7. Yet this is often the case if the country at issue is one where formal laws are virtually unenforced.

66. DE SOTO, *supra* note 61, at 186–87.

67. For a critique of De Soto’s ideas, see for example Jonathan Manders, *Sequencing Property Rights in the Context of Development: A Critique of the Writings of Hernando De Soto*, 37 CORNELL INT’L L.J. 177 (2004).

II. CULTURE AND INTERNATIONAL LAW

The term "culture" carries many meanings and has been subjected to many definitions.⁶⁸ As I am not an anthropologist, I use the term loosely, so that a community's culture means simply the "beliefs, preferences, and behaviors of its members, along with the mechanisms that link these traits to one another."⁶⁹ Culture may be used in this sense "to summarize the way in which groups distinguish themselves from other groups"⁷⁰ through "shared histories, traditions, values, and beliefs."⁷¹

For the most part, international law, international relations, and law and development have neglected to address culture.⁷² Some have suggested that international relations' acultural stance may have to do with the perception that culture is too imprecise a concept for analysis.⁷³ This bias against culture is compounded by international relations' view of itself as an empirical science grounded in facts, not values,⁷⁴ and its roots in the positivist tradition.⁷⁵ Furthermore, the discipline adopts a theoretical model that presents theories as being universally applicable

68. Two influential anthropologists have documented more than 161 formal definitions of culture. ALFRED LOUIS KROEBER & CLYDE KLUCKHOLN, *CULTURE: A CRITICAL REVIEW OF CONCEPTS AND DEFINITIONS* (1952). See also ADAM KUPER, *CULTURE: THE ANTHROPOLOGISTS' ACCOUNT* 56 (1999), for select definitions: for example, "the total way of life of a people"; "the social legacy the individual acquires from his group"; "a storehouse of pooled learning"; "a set of standardized orientations to recurrent problems"; "a mechanism for the normative regulation of behavior."

69. Kuran, *supra* note 4, at 115, 117. One could call this a "thin" conception of culture—encompassing only "subjective terms as the values, attitudes, beliefs, orientations, and underlying assumptions prevalent among people in a society." Samuel P. Huntington, *Foreword: Cultures Count*, in *CULTURE MATTERS*, *supra* note 3, at xv. By contrast, the noted anthropologist Clifford Geertz, it has been said, subscribes to a "thick description" of culture, using it "to refer to the entire way of life of a society: its values, practices, symbols, institutions, and human relationships." *Id.*

70. Jacinta O'Hagan, *Re-framing International Law for the 21st Century: Conflict, Convergence or Co-existence? The Relevance of Culture in Reframing World Order*, 9 *TRANSNAT'L L. & CONTEMP. PROBS.* 537, 538 (1999).

71. *Id.* at 539. Despite the ethnic and religious differences among European countries, one might observe that "[t]he expansion of the West, as a civilization, has been one of the most significant features of this millennium." *Id.* at 541.

72. See *infra* notes 73–91 and accompanying text.

73. Philip Darby & Albert Paolini, *Bridging International Relations and Post-Colonialism*, 19 *ALTERNATIVES* 371, 382 (1994); R.B.J. Walker, *The Concept of Culture in the Theory of International Relations*, in *CULTURE AND INTERNATIONAL RELATIONS* 3, 7–8 (Jongsuk Chay ed., 1990).

74. HANS MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 3 (3d ed. 1964); see also Stanley Hoffmann, *An American Social Science: International Relations*, 106 *DAEDALUS* 41 (1977).

75. Robert Keohane, *International Institutions: Two Approaches*, 32 *INT'L STUD. Q.* 379 (1988); Dominique Jacquin et al., *Culture in International Relations: An Introduction to the Special Issue*, 22 *MILLENNIUM* 375, 375 (1993).

and proposes rules that are to be universally appropriate, transcending local or cultural differences.⁷⁶ For example, states are presumed to act in a certain culture-neutral way while in pursuit of power and security.⁷⁷

International law too tends to insist that its rules are universally valid, in other words, “that a body of doctrine, a common history, a common cosmopolitan ‘college’ of international legal colleagues, a common language, bind international lawyers to one another across different national cultures or legal traditions....”⁷⁸ Indeed, international law, whether “public” or “private,”⁷⁹ generally aims for universality, not difference—and a focus on culture usually tends to highlight differences⁸⁰ that are problematic to the objective of the discipline—“to empower an international public order above the nation, an international private order below or outside the state, or a complex regime of transnational order.”⁸¹

76. Robert Cox, *Social Forces, States and World Order: Beyond International Relations Theory*, 10 *MILLENNIUM* 126, 132 (1981); Richard Ashley, *The Poverty of Neo-Realism*, 38 *INT’L ORG.* 225, 286 (1984); Barry Buzan, *The Timeless Wisdom of Realism?*, in *INTERNATIONAL THEORY: POSITIVISM AND BEYOND* (Smith et al. eds., 1996).

77. KENNETH WALTZ, *THE THEORY OF INTERNATIONAL POLITICS* 80 (1979). For the view that international relations is not culture neutral but instead rooted in Western culture, see Richard Falk, *Culture, Modernism, Postmodernism: A Challenge to International Relations*, in *CULTURE AND INTERNATIONAL RELATIONS* 267, 268 (Jongsuk Chay ed., 1990); David Kennedy, *The Disciplines of International Law and Policy*, 12 *LEIDEN J. INT’L L.* 9, 118 (1999) (“The insistence on the universality of international law often denied the roots of international law in Western projects of conquest and understated the obvious density of legal and political relations within cultural, economic, or ideological blocs.”).

78. Kennedy, *supra* note 77, at 17.

79. For a critique bemoaning the false dichotomy between “public” and “private” international law, see Lan Cao, *Toward a New Sensibility for International Economic Development*, 32 *TEX. INT’L L.J.* 209, 222–33 (1997).

80. In contrast to international law, for example, comparative law specializes in differences.

81. Kennedy, *supra* note 77, at 62. Internationalists ignore culture also because it “may break the internationalist frame in two related ways: by generating solidarities which cross the neat boundaries of nation-states or by empowering smaller entities within states to erupt into international consciousness.” *Id.* at 63. For a discussion of international law’s marginalization of culture, see *id.* at 62–69, 66 (describing how international law’s approach to dealing with culture is “to render cultural differences internal to the sovereign form, outside the arena of international governance, as local matters of politics or culture”); *id.* at 85 (“governance is international while culture is local”); *id.* at 86 (“service of the disciplinary desire carries with it an erasure of particularist projects, sands them down, harnesses them to a universal project”); *id.* at 98 (international law considers itself a cosmopolitan project, “more universal, rational, pragmatic, and expert than what goes on nationally or locally. Brussels is better than Bonn and Bonn is better than Bremen. The International Monetary Fund is better than the Russian Central Bank as that Bank is better than the government budgetary process in Uzbekistan.... [T]he international is agnostic about how one conducts oneself at home—international law bridges between states by providing a space above cultural differences.”); *id.* at 126 (for international law, “culture [is] a set of local or particularist commitments, a different language altogether from the communicative methods of cosmopolitan

Public international law is statist in orientation⁸² and prefers to deal with states, governments, and other sovereignty-related issues, relegating culture to the side.⁸³ Private international law, or international economic law,⁸⁴ deals with nonstate—specifically market—actors and aims to protect normal market activities from the irrationality of culture.⁸⁵ Private international law has aimed to construct an international liberal regime of WTO rules to transcend the prejudices of the local.⁸⁶ Indeed, the often vehement opposition to globalization⁸⁷ may be understood in part as a reaction against the universalist claims of internationalism and a defense of local cultures.⁸⁸ Opposition to private international law and

governance”); *id.* at 127 (“[C]osmopolitanism...needs to be defended against outbreaks of more primitive sensibilities when those sensibilities challenge the possibility of a universal pragmatism, and to be more tolerant of diverse cultural differences when they do not threaten that hegemony.... Where this line should be drawn remains...a matter of controversy, but the frame is stable: culture can be managed by exclusion or assimilation.”); *id.* at 127 (international “cosmopolitanism is not itself a culture, but comes after culture, emerges from the defeat of the particularism of culture, and must be ‘tolerant’ of cultural differences...., precisely to retain distance from the cultural”).

82. Kennedy, *supra* note 77, at 44 (“Whatever its various qualifications, public international law still begins with sovereign states.... The job of public international law is to bring governance to sovereign....”).

83. See *supra* notes 72–82.

84. As used in the United States, “private international law” is concerned with international business transactions and related commercial and trade matters. Joel Richard Paul, *The Isolation of Private International Law*, 7 WIS. INT’L L.J. 149, 151 n.4; Kennedy, *supra* note 77, at 38–39.

85. See, e.g., Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 MICH. J. INT’L L. 2, 80 (2000) (“The whole legal structure of the free trade norm rests on a rational economic model.... Cultural claims threaten that rationality argument.”).

86. Commentators have described the rise of international economic arbitration as the attempt by private international law to develop “in appropriate cases, a *jus gentium* or *lex mercatoria* of a new type, free of the contingencies and prejudices which dominate the scene in the various States.” RENE DAVID, *ARBITRATION IN INTERNATIONAL TRADE* 3 (1985). “[W]hen parties request that arbitrators adjudicate their dispute in accordance with international law or with the general principles of law, their intention is to escape from the national systems of law.” *Id.* at 350–51.

For example, Article 19 of the North American Free Trade Agreement (NAFTA) “creates a binding, supranational arbitration scheme accessible directly by private business parties through which businesses may overturn final anti-dumping and countervailing duty decisions of domestic trade regulators.” G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 887 (1995). Similarly, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, creates a system where domestic courts of signatory countries are bound, subject only to a minimal “public policy” exception, to enforce arbitration decisions rendered by private international commercial arbitrators.

87. I have elsewhere characterized globalization as a “hyper state of internationalization.” Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CAL. L. REV. 402, 415 (2002).

88. Nationalists opposed to the universalist and homogenizing inclinations of international

to what critics view as its agenda—globalization of markets—has been increasingly staked on cultural grounds.⁸⁹ Private international law, however, continues to maintain an international economic system oblivious to cultural particularities.⁹⁰

However, in recent years, culture has been injected into the national and international mainstream due to certain political and intellectual developments. The end of the Cold War meant a surge in identity politics⁹¹ both at the subnational and transnational level.⁹² An intellectual interest in identity and culture issues has accompanied this political shift as well, with some scholars seeing a cultural world order of increased cohesion within and clashes among civilizational groups⁹³ and with others anticipating modernization and convergence along a Western, liberal model.⁹⁴

law stake their claims on national and local projects that speak the people's language: "the emotionalism, the vulgar populism, the highly-colored romanticism of most national ideology (all the things intellectuals have always held their noses at)." TOM NAIRN, *THE BREAK-UP OF BRITAIN* 354 (2d exp. ed. 1977).

89. See Elisabeth Lasch-Quinn, *Democracy Should Not Have Losers*, 9 MINN. J. GLOBAL TRADE 589, 592 (2000) (describing economic internationalism as being devoid of "any conception of a world beyond the market—the political or civic or cultural world in which ideas, beliefs, traditions, even innovations have meaning beyond their salability"); Robert Wolf, *The Regionalist Answer*, 9 MINN. J. GLOBAL TRADE 610, 621 (2000) (describing "globalization of world trade and culture [as] a process of homogenization which an increasing number of people perceive as soulless and dehumanizing" and decrying "world-wide monoculture now being created by the corporations").

90. See generally Paul, *supra* note 85, at 2 (discussing efforts to seek cultural exceptions to free trade rules—for example, Europe's call for exemption from trade rules prohibiting barriers to the importation of American films, music, and television because American culture may overwhelm local European cultures; such claims are generally rejected).

91. Culture is necessarily implicated in identity politics. There are many definitions of culture, see *supra* note 68. One definition focuses on identity: "[c]ulture is concerned with identity, aspiration, symbolic exchange, coordination, and structures and practices that serve relational ends, such as ethnicity ritual, heritage, norms, meanings, and beliefs." Vijayendra Rao & Michael Walton, *Culture and Public Action: Relationality, Equality of Agency, and Development*, in CULTURE AND PUBLIC ACTION, *supra* note 4, at 4. Kennedy, *supra* note 77, at 111 (referring to the end of the Cold War as unleashing "outbreaks of primitive or pre-ideological cultural passions frozen by the Cold War").

92. Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359, 362 (1996) ("The term nation or tribe suggests an affinity group that has placed certain values high on its agenda: shared genealogical origins, language and historic myths, as well as cultural and, perhaps, religious compatibility.").

93. Huntington, *supra* note 69. In a similar vein, in contemporary, post-Cold War world politics, a heightened sense of cultural awareness and identity has resulted in ethnic turbulence in Kosovo, Bosnia, and Chechnya, expressed not just in terms of national ethnic identity (Kosovar, Bosnian, Chechnyan), but also civilizational identity (Slavic, Orthodox, Islamic). O'Hagan, *supra* note 70, at 553, 560.

94. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* iv, xv, 77 (1992) ("All

Generally speaking, however, international law remains ambivalent about engaging culture directly despite the recent surge in identity politics. There are at least two reasons for this continued ambivalence. First, while nationalism is associated with particularism, such as language, ethnicity, religion, or culture,⁹⁵ internationalism disassociates itself from “particularism and parochialism” and is instead allied with “universalism and cosmopolitan sophistication.”⁹⁶ When faced with particularistic claims, international law has sought to develop a framework to harness or contain them, for example, by recognizing the right of a “people” to self-determination and by implication their own nation-state,⁹⁷ or the right of a culture to self-determination and by implication to be left alone within their own self-defined borders. International law, in other words, sidesteps cultural issues and, having endowed culture with the right to self-determination, abstains from any claim to engage with or influence its development within any defined community.

Second, international law has for years been in the strange position of having to defend itself as worthy of being considered “real law,”⁹⁸ wrestling with the perpetual question of “is international law, law,”⁹⁹ and thus is interested, even if claiming not to be, in proving to other disciplines that it too has all the usual attributes of law. Although international lawyers have emphasized that centralized enforcement is not es-

countries undergoing economic modernization must increasingly resemble one another,” as such changes wrought by modernization “blur the boundaries between civilizations and promote a homogeneous set of political and economic institutions among the world’s most advanced countries.”) *Id.* at xv; see also Michael Mazarr, *Culture and International Relations: A Review Essay*, 19 WASH. Q., Spring 1996, at 177, 178 (discussing how cultural clashes are part of the transition undergone by countries moving from one stage of economic development to another).

95. Lea Brilmayer, *The Moral Significance of Nationalism*, 71 NOTRE DAME L. REV. 7, 10 (1995).

96. Anne-Marie Slaughter Burley, *Nationalism Versus Internationalism: Another Look*, 26 N.Y.U. J. INT’L L. & POL. 585, 585 (1994). See *supra* notes 78–81 and accompanying text.

97. Cao, *supra* note 87, at 411–12 n.32.

98. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 214 (2d ed. 1994) (stating that international law is not real law because of the absence of a “unifying rule of recognition” and “secondary rules of change and adjudication which provide for legislatures and courts...”).

99. See, e.g., Ruth Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 EMORY INT’L L. REV. 819, 837 n.43 (2003) (“The organizing inquiry of international law is ‘is international law law?’”); Ruti Teitel, *The Future of Human Rights Discourse*, 46 ST. LOUIS U. L.J. 449, 459 n.47 (2002) (addressing the positive/natural law debate in international law, “namely framing the question: to what extent is international law, law?”). The question endures because critics are not convinced that international law, without strong enforcement mechanisms, can qualify as law. International lawyers have thus spent considerable time and energy defending the field. See, e.g., LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 13–27 (2d ed. 1979); J.L. BRIERLY, *THE OUTLOOK FOR INTERNATIONAL LAW* 5 (1944).

sential to a determination of whether something is or is not law, pointing to international law's compliance features instead,¹⁰⁰ they have also worked to make international law more like domestic law by strengthening international law's enforcement features.¹⁰¹ In that respect, international law has shored up its positive law aspects and neglected to consider seriously the "soft" law attributes of the discipline—norms and custom (the ingredients of culture in the sense used in this Article)—even while, ironically, scholars in the domestic law area are increasingly exploring their significance.¹⁰²

Similarly, culture remains a non-issue in law and development, as the discipline is intransigently law-centered.¹⁰³ My critique of the tradition of law and development follows in Part III.

III. LAW AND DEVELOPMENT, CULTURE AND DEVELOPMENT

A. *A Cautionary Tale*

At the risk of overgeneralizing, most law and development scholars come from an international law tradition that is, in the United States at least, part of a liberal framework of cosmopolitanism.¹⁰⁴ Unlike the nationalist whose primary identification is with his or her nation, the cosmopolitan's "allegiance is to the worldwide community of human be-

100. Lori F. Damrosch, *Enforcing International Law Through Non-Forcible Measures*, 269 REC. DES COURS 9, 19–24 (1997) (discussing how international law is in fact enforced in different ways); Detlev F. Vagts, *United States and Its Treaties: Observance and Breach*, 95 AM. J. INT'L L. 313, 323–29 (exploring five possible grounds for compliance by countries of their treaty obligations).

101. The desire to be more like domestic law has meant crafting strong enforcement mechanisms, such as creating ad hoc international criminal tribunals, the International Criminal Courts, and the Dispute Settlement Body of the World Trade Organization.

102. I have elsewhere written about the powerful impact community norms play in facilitating the production of social capital and the conversion of such social capital into economic capital. See Cao, *Looking at Communities and Markets*, *supra* note 1. For a discussion of norms and their interaction with law, see *id.* at 864–74.

103. See Trubek & Galanter, *supra* note 10, at 2071 (describing the core attributes of legal liberalism in highly law-centered ways).

104. See Kennedy, *supra* note 77, at 23 ("International law in the United States after 1945 provided a congenial intellectual home for a large number of immigrants, among them European and Jewish refugees, whose American patriotism was cosmopolitan rather than jingoistic and who have been among the field's strongest intellectual leaders."); *id.* at 11 ("Legal internationalists in the United States for most of the last 50 years have linked their status to the reputational ups and downs of a broadly liberal cosmopolitanism...."); Slaughter Burley, *supra* note 96, at 585; see also *supra* notes 78–81 and accompanying text.

ings.”¹⁰⁵ The cosmopolitan tends to

hold to a vision that accepts, even celebrates, the diversity of social and political systems in the world, taking pleasure in the existence and the products of peoples and places other than our own homes. Thus, what is distinctive about cosmopolitans is that we display our concern for our fellow humans without demanding of them that they become like ourselves.¹⁰⁶

Law and development scholars steeped in the international cosmopolitan tradition are passionate about alleviating poverty in poor countries but reluctant to tinker with or condemn norms or cultural attributes that impede economic progress.

After Vietnam, as skepticism about American power and motives rose, so did “loss of faith in liberal legalism as a picture of United States society” or “doubts about the universality or desirability of the American experience.”¹⁰⁷ Indeed, law and development scholars became vocal in their charges that the movement was ethnocentric and naïve,¹⁰⁸ and as some adopted the perspective of the critical legal studies movement (CLS), denounced the liberal legal paradigm they had favored as “inherently problematic.”¹⁰⁹

Thus, there are two strands in law and development: first, an international cosmopolitanism that celebrates cultural diversity and loathes to criticize or be perceived as criticizing any particular culture, and second, a CLS inclination that is both appropriately critical of the failed promises of the liberal law and development model and also devoid of practical alternatives. Add to this mix an awareness among these scholars of colonial history and the concomitant Orientalist tradition of defining the colonizing West as the privileged “self” against which the colonized Orient (or Third World), the “other,” is to be contrasted against and improved upon.¹¹⁰

105. Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in FOR LOVE OF COUNTRY 4 (Joshua Cohen ed., 1996).

106. Kwame Anthony Appiah, *The University in an Age of Globalization*, Lecture at the Princeton-Oxford Conference on Globalization at Oxford University (June 2002), quoted in Anne-Marie Slaughter Burley, *The International Dimension of the Law School Curriculum*, 22 PENN ST. INT’L L. REV. 417, 419 n.4 (2004).

107. Trubek & Galanter, *supra* note 10, at 1089.

108. *Id.* at 1080.

109. *Id.* at 1099. For a critique of this shift in law and development, see Brian Z. Tamanaha, *Law and Development*, 898 AM. J. INT’L L. 470, 474–75 (1995).

110. EDWARD SAID, *ORIENTALISM* (1978); see also Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201, 210 (2001) (describing the “impulse to universalize Eurocentric norms and values by repudiating, demonizing, and ‘other-

For the West, the Orient, according to the noted scholar Edward Said, is not a geography but a European creation and Orientalism the “enormously systematic discipline by which European culture was able to manage, even produce, the Orient politically, sociologically, militarily, ideologically, scientifically, and imaginatively during the post-Enlightenment period.”¹¹¹ Notable Western scholars have engaged in Orientalism, suggesting, for example, that the Orient (and its equivalent) is frozen in time and incapable of progress or change,¹¹² whereas by implication the West is dynamic and progressive. For change to occur, the impetus must come from Europe, even if via the shock of colonial encounter.¹¹³ Similar denunciations include the charge that the “Orient” (China in particular) is incomprehensible (or inscrutable),¹¹⁴ illogical

ing’ that which is different and non-European”). Note that Orientalism is not limited to the “Orient” but extends to other locales as well. DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* 27 (2000) (“‘Europe’ remains the sovereign, theoretical subject of all histories, including the ones we call ‘Indian,’ ‘Chinese,’ ‘Kenyan,’ and so on.”).

111. SAID, *supra* note 110, at 3. Note that although the United States usually equates East Asia (China, Japan, for example) with the “Orient,” Said’s use of the word “Orient” is derived from a European understanding of the word and thus focuses on the Middle East.

112. Hegel, for example, declared that:

Early do we see China advancing to the condition in which it is found at this day, for as the contrast between objective existence and subjective freedom of movement within it, is still wanting, every change is excluded, and the fixedness of character which recurs perpetually takes the place of what we should call the truly historical.

GEORG WILHELM HEGEL, *THE PHILOSOPHY OF HISTORY* 116 (J. Sibree trans., Dover 1956). Weber too wrote that “Chinese intellectual life remained completely static, and despite seemingly favorable conditions modern capitalism simply did not appear.” MAX WEBER, *THE RELIGION OF CHINA* 55 (Hans H. Gerth trans., Free Press 1951). Marx made a similar observation about China: Its “isolation having come to a violent end by the medium of England, dissolution must follow as surely as that of any mummy carefully preserved in a hermetically sealed coffin, whenever it is brought into contact with the open air.” KARL MARX, *MARX ON CHINA, 1853–1860: ARTICLES FROM THE NEW YORK DAILY TRIBUNE* 4 (Dona Torr ed., 1951). Maine also described “the East” as static: in “those great and unexplored regions which we vaguely term the East...the distinction between the Present and the Past disappears.” HENRY SUMNER MAINE, *VILLAGE COMMUNITIES IN THE EAST AND WEST* 7 (John Murray, 2d ed. 1872). Nietzsche described China as a “country in which large-scale dissatisfaction and the capacity for change have become extinct centuries ago.” FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* 99 (Walter Kaufmann trans., Random House 1974) (1887); *see also* Edward H. Parker, *The Principles of Chinese Law and Equity*, 22 L.Q. REV. 190, 209 (1906) (stating that China is nothing more than a “monotonous history”).

113. Karl Marx, *The Future Results of British Rule in India*, in *THE MARX-ENGELS READER* 659 (Robert C. Tucker ed., 1978) (describing the two functions of colonial rule, “one destructive, the other generating, the annihilation of old Asiatic society, and the lying of the material foundations of Western society in Asia”).

114. Foucault wrote the following of China: “at the other extremity of the earth we inhabit, a culture devoted entirely to the ordering of space, but one that does not distribute the multiplicity of existing things into any of the categories that make it possible for us to name, speak, and think.” MICHEL FOUCAULT, *THE ORDER OF THINGS*, at xix (1993). Hegel described China as “a

and developmentally stunted,¹¹⁵ with “laws”¹¹⁶ that are equally static and unchangeable.¹¹⁷ Assuming modernization is even possible under those circumstances, it would have to culminate in a Europeanized one.¹¹⁸

Given the awareness among most law and development scholars of this history, it is no wonder that many are uncomfortable with the project they have embarked upon as privileged subjects, often Western-educated experts, working to develop or modernize the object of their project, the primitive Third World. Indeed, there may very well be a whiff of Orientalism in the very objectives and assumptions of law and development itself. Referring to China specifically, although his observations are equally applicable to other developing countries, the historian Paul Cohen noted that there is a tendency for the West to play “Beauty to China’s Beast, transforming by its kiss the torpor of centuries, releasing with its magical power the potential for ‘development’ that must otherwise remain forever locked up.”¹¹⁹

My proposal to go beyond law and modernizing law to culture and culture change will undoubtedly smack some of Orientalism. If even legal liberalism—instituting laws to support a liberal market society—may be suspect for some law and development scholars, then certainly “cultural liberalism” promoting cultural attributes that would facilitate the establishment of a liberal market society would be as well, or even more so.¹²⁰

Indeed, until recently, even in disciplines other than international relations and international law, culture is irrelevant or marginalized: it can

dull half-conscious brooding spirit.” HEGEL, *supra* note 112, at 142.

115. WEBER, *supra* note 112, at 125 (charging that the Chinese writing system, by ideographic or pictorial representation, has led to unfortunate results: “The power of logos, of defining and reasoning, has not been accessible to the Chinese,” so that “[t]he very concept of logic [has] remained absolutely alien” to them.).

116. For an examination of how the West has characterized Chinese law as “not law,” see Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179 (2002).

117. Edward Harper Parker, *Comparative Chinese Family Law*, 8 CHINA REV. 67, 69 (1879) (stating that to study Chinese law is to study “a living past, and converse with fossil men”).

118. HEGEL, *supra* note 112, at 116 (“The history of the world travels from East to West, for Europe is absolutely the end of History, Asia the beginning.”).

119. PAUL A. COHEN, *DISCOVERING HISTORY IN CHINA: AMERICAN HISTORICAL WRITINGS ON THE RECENT CHINESE PAST* 151 (1984).

120. Promoting culture change may even be viewed as forcing Western culture on others while simultaneously denying that this is in fact the agenda. See RUTH BENEDICT, *PATTERNS OF CULTURE* 6 (1952) (The “world-wide...diffusion of [Western culture] has protected us as man had never been protected before from having to take seriously the civilizations of other peoples; it has given to our culture a massive universality that we have long ceased to account for historically, and which we read off rather as necessary and inevitable.”).

be described, compared, and appreciated, but not critically appraised. For example, culture is a non-issue in economics because economists generally believe that the right economic policy will produce the desired economic result without regard to culture. Moreover, culture is an uncomfortable realm for economists to operate in, perhaps because “it presents definitional problems, is difficult to quantify, and operates in a highly complex context with psychological, institutional, political, geographic, and other factors.”¹²¹ By contrast, anthropologists study cultures but are often unwilling to evaluate cultural norms and practices of another society.¹²² As a noted sociologist observed,

In the humanities and liberal circles generally, a rigid orthodoxy now prevails that can be summarized as follows: Culture is a symbolic system to be interpreted, understood, discussed, delineated, respected, and celebrated as the distinctive product of a particular group of people, of equal worth with all other such products. But it should never be used to explain anything about the people who produced it.¹²³

Other reasons why cultural explanations may be disfavored in certain intellectual circles include concerns about cultural determinism,¹²⁴ that is, relying on culture as an “over-determining”¹²⁵ factor, the possible misuse of culture “by reactionary analysts and public figures” as a way to “blame the victim”¹²⁶ or to avoid examining structural causes of pov-

121. Lawrence E. Harrison, *Introduction: Why Culture Matters*, in CULTURE MATTERS, *supra* note 3, at xxv.

122. See, e.g., Richard A. Shweder, *Moral Maps, “First World” Conceits, and the New Evangelists*, in CULTURE MATTERS, *supra* note 3, at 160 (“[T]he assertion that ‘culture matters’ is a way of saying that some cultures are impoverished or backward, whereas others are enriched or advanced.”). In a similar vein, in 1947, the Executive Board of the American Anthropological Association declined to endorse the United Nations Universal Declaration of Human Rights because it viewed the Declaration as ethnocentric. Huntington, *supra* note 69, at xxvi.

123. Orlando Patterson, *Taking Culture Seriously: A Framework and an Afro-American Illustration*, in CULTURE MATTERS, *supra* note 3, at 202–03.

124. Sen, *supra* note 5, at 46–50 (criticizing cultural comparisons between Ghana and South Korea as an example of cultural determinism because such comparisons often ignore other differences: class, politics, the educational system, the relationship Korea had with Japan and the United States, etc.); *id.* at 38 (criticizing the belief by some that “the fates of countries are effectively sealed by the nature of their respective cultures”) (emphasis in original).

125. Patterson, *supra* note 123, at 203. This means relying on a “simplistic or untenable conception of culture” and using it “in a crudely deterministic way” to explain certain groups’ problems, so that culture is viewed as “a fixed, explanatory black box invoked to explain anything and everything about the group.” *Id.* In contrast, Professor Sen favors a different approach, “[c]ultural interrelations within a broad framework,” in which “culture, seen in a dynamic and interactive way, is one important influence among many others.” Sen, *supra* note 5, at 52, 55.

126. Patterson, *supra* note 123, at 204. Professor Patterson rejects the argument that cultural

erty,¹²⁷ and the desire to promote cultural diversity and ethnic pride.¹²⁸ Thus, the following statement is an accurate description of the ambiguous role ascribed to culture: “We all realize that before we resort to culture today to explain the differences in economic progress or political attitudes among nations and ethnic groups, we prefer to find other explanations.”¹²⁹

Despite a general reluctance to study and appraise culture, increasingly, it is being recognized in one way or another as an important factor in economic development and in related areas.¹³⁰ In fact, some have asserted that culture plays a primary role, “culture makes almost all the difference. Witness the enterprise of expatriate minorities—the Chinese in East and Southeast Asia, Indians in East Africa, Lebanese in West Africa, Jews and Calvinists throughout much of Europe, and on and on.”¹³¹ Others acknowledge the link between cultural influences and economic

explanations amount to blaming the victim. If a person who has low self-esteem and behaves in self-defeating ways as a result of having been abused is told by someone to go to a psychologist to seek therapy, “[i]t would be absurd to accuse that person of blaming the victim. Yet this is exactly what happens when a sympathetic analysis is condemned for even hinting that some Afro-American problems may be the tragic consequences of their cultural adaptation to an abusive past.” *Id.*

127. *Id.*; see also Rao & Walton, *supra* note 91, at 10.

128. Patterson, *supra* note 123, at 204.

129. Nathan Glazer, *Disaggregating Culture*, in CULTURE MATTERS, *supra* note 3, at 220.

130. Multi-country studies have revealed cultural or regional differences in rights observation. See Layna Mosley & Saika Uno, *Racing to the Bottom or Climbing to the Top? Foreign Direct Investment and Human Rights*, Paper Presented at the Annual Meeting of The American Political Science Association, Boston, Aug. 28–Sept. 1, 2002, <http://apsaproceedings.cup.org/Site/papers/045/045008WayLucan.pdf> (finding a correlation between regions and labor rights, with the Asian and Pacific regions not as supportive of labor rights as Europe, though more protective than the Middle East, North Africa and Latin America). There is also a differentiation as to women’s rights, see Clair Apodaca, *Measuring Women’s Economic and Social Rights Achievement*, 20 HUM. RTS. Q. 139, 163–65 (1998) (showing that regional differences in women’s rights may be explained by “culturally specific attitudes towards women’s status, developed under differing historical and economic conditions.”); and rule of law and good governance, see Amir Licht et al., *Culture Rules: The Foundations of Rule of Law and Other Norms of Governance* (November 22, 2004) (showing linkage between culture and adherence to good governance norms, with cultures that emphasize individual autonomy and egalitarianism scoring better generally).

131. David Landes, *Culture Makes Almost All the Difference*, in CULTURE MATTERS, *supra* note 3, at 2. See generally DAVID S. LANDES, *THE WEALTH AND POVERTY OF NATIONS* (1999). I have elsewhere examined the market dominance of certain ethnic groups, some recent immigrants in the United States and other countries, and other historical “middlemen minorities” throughout the world. See Lan Cao, *The Diaspora of Ethnic Economies: Beyond the Pale?* 44 WM. & MARY L. REV. 1521 (2003); see also AMY CHUA, *WORLD ON FIRE* (2003) (describing the market dominance of ethnic minorities such as the Chinese in Southeast Asia, the Jews in Russia, and the Ibos in Africa). For a review of Chua’s book, see Lan Cao, *The Ethnic Question in Law and Development*, 102 MICH. L. REV. 1044 (2004).

success¹³² even as they caution that a cultural exploration must be balanced and examined “within a broad framework,”¹³³ so that we neither neglect culture nor privilege it “in stationary and isolated terms.”¹³⁴

B. *A Brief Look at Markets and Culture*

As culture scholars have observed, “culture is not an independent variable. It is influenced by numerous other factors, for example, geography and climate, politics, the vagaries of history.”¹³⁵ Culture influences institutions even more strongly, “culture is the mother and...institutions are the children,”¹³⁶ or vice versa. For example, according to the noted Jamaican-born sociologist, Professor Orlando Patterson, Afro-American cultural models of “compensatory sexuality” and “unsecured paternity,”¹³⁷ celebrating early marriage and high fertility, had roots in the economic institutions of slavery and sharecropping. Similarly, even though the Japanese insist that eating whale meat has deep cultural significance, and thus they should be exempt from the international ban on whaling,¹³⁸ this cultural preference has economic

132. Sen, *supra* note 5, at 40.

133. *Id.* at 52.

134. *Id.* Professor Sen warned against seeing culture as all-determining, cautioning that Max Weber had claimed that Confucianism did not promote rational instrumentalism and was unsuitable for an industrial economy. *Id.* at 48.

135. Harrison, *Why Culture Matters*, *supra* note 121, at xxviii; see also JARED DIAMOND, GUNS, GERMS, AND STEEL 417–18 (1997) (“[C]ultural factors and influences...loom large.... Some of that cultural variation is no doubt a product of environmental variation.... A minor cultural factor may arise for trivial, temporary local reasons, become fixed, and then predispose a society toward more important cultural choices....”).

136. Daniel Etounga-Manguelle, *Does Africa Need a Cultural Adjustment Program?*, in CULTURE MATTERS, *supra* note 3, at 75; see also DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 117 (1990). In explaining the different developments that have taken root in the former colonies of Britain and Spain in the Americas, North noted that “[i]n the former, an institutional framework has evolved that permits the complex impersonal exchange necessary to political stability and to capture the potential economic gains of modern technology. In the latter, personalistic relationships are still key to much of the political and economic exchange.”

Similarly,

[a]lthough formal rules may change overnight as the result of political or judicial decisions, informal constraints embodied in customs, traditions, and codes of conduct are much more impervious to deliberate policies. These cultural constraints not only connect the past with the present and future, but provide us with a key to explaining the path of historical change.

Id. at 6.

137. Patterson, *supra* note 123, at 212.

138. In 1982, the International Whaling Commission adopted a moratorium on whaling. Japan was one of the few countries that opposed the ban. See Int’l Whaling Comm’n, Thirty-fourth Report of the Int’l Whaling Comm’n, at 1 (1982).

roots in the postwar period, when non-whale protein sources were scarce and the Japanese began to rely on whale meat for school lunches.¹³⁹ In a similar vein, Japan's lifetime employment system and its high savings rate, generally deemed to be an essential component of the country's cultural characteristics, came out of the post-World War II experience; lifetime employment was instituted to control labor strife, while first-hand experiences of deprivation and shortages led to a general practice of saving.¹⁴⁰ "Thus it is difficult to disentangle culturally derived behaviors from behaviors that have been enhanced or encouraged by the economic system."¹⁴¹

Although development policy has emphasized formal laws and formal institutions,¹⁴² Douglass North's work defines institutions broadly, as the "rules of the game in a society or, more formally,...the humanly devised constraints that shape human interaction,"¹⁴³ thus making room for culture. North suggests that informal constraints, derived "from socially transmitted information [that is] a part of the heritage that we call culture," can have a profound impact on institutional development.¹⁴⁴ Such informal constraints are part of the "governing structure," "codes of conduct, norms of behavior, and conventions" that shape our "daily interaction with others, whether within the family, in external social relations, or in business activities."¹⁴⁵ In this respect, "[c]ultural norms and beliefs can be seen as the deepest level of institution, and thus the same framework can illuminate the role of cultural differences in economic performance."¹⁴⁶ Rather than study only formal institutions and

139. Suvendrini Kakuchi, *Tokyo Persists with Bid to Lift Whaling Ban*, INTER PRESS SERVICE, Nov. 13, 1997.

140. Michael Porter, *Attitudes, Values, Beliefs, and the Microeconomics of Prosperity*, in CULTURE MATTERS, *supra* note 3, at 24.

141. *Id.*

142. *See supra* notes 59–68 and accompanying text.

143. NORTH, *supra* note 136, at 3.

144. *Id.* at 37. For a discussion of new institutional economics and how different types of institutional arrangements or governance structure will play a part in determining the cost and benefit associated with the transaction, see Cao, *supra* note 1, at 865 n.86.

145. NORTH, *supra* note 136, at 36.

146. Christopher Clague & Shoshana Grossbard-Shechtman, *Preface* to 573 ANNALS 8, 10 (JAN. 2001) (citations omitted). For an example of the relationship between culture and informal institutions, information transmission and economic development, see, e.g., Clifford Geertz, *The Bazaar Economy: Information and Search in Peasant Marketing*, 68 AM. ECON. REV. 28 (1978). Others have studied how informal institutions, including cultural norms and practices, may be adapted to cope with problems of coordination and information asymmetry. See Karla Hoff & Joseph E. Stiglitz, *Introduction: Imperfect Information and Rural Credit Markets—Puzzles and Policy Perspectives*, 4 WORLD BANK ECON. REV. 235, 243 (1990) (discussing an indigenous solution to an imperfect legal system, the "usufruct loan" allowing the lender to occupy and use the

laws and how to change them, North has focused on informal institutions, cultural norms and practices and whether they present informal constraints to the achievement of economic objectives. The question is whether such informal constraints, if they exist, can be transformed.¹⁴⁷

There are many instances in which such efforts have been attempted, historically and currently. For example, scholars have found that the vast cultural differences between the Italian North and South, and the pervasive lack of trust manifested in the latter, are a contributing factor to the economic discrepancy between the two regions.¹⁴⁸ At the same time, they have observed that Italy's efforts to decentralize public policy and administration and promote civil society in the 1970s were key to the successful advancement of trust in the South and consequently relatively efficient economic exchanges.¹⁴⁹ In other words, culture may be influenced by a combination of many factors, including the type of policies and institutions put in place, as well as historical, economic and political circumstances.

A culture change project should be considered if certain cultural attributes are "harmful to economic productivity."¹⁵⁰ For example, regimes committed to Islamization, or Islamic economics, ban interest because they believe devout Muslims must resist Mammon—the evils flowing from immoral economic gain.¹⁵¹ Even assuming this practice enjoys real support on cultural or religious grounds,¹⁵² banning interest

borrower's land during the term of the loan); Karla Hoff and Joseph E. Stiglitz, *Modern Economic Theory and Development*, in *FRONTIERS OF DEVELOPMENT ECONOMICS: THE FUTURE IN PERSPECTIVE* 389 (Gerald M. Meier & Joseph E. Stiglitz eds., 2000).

147. In reference to a cultural model in the black community that does not condemn early marriage or high birth rates, Professor Patterson also cautioned that this model is not static because "although cultural continuities certainly exist, people are not slaves to them. They use them and they can change them if they really want to." Patterson, *supra* note 123, at 218; *see also* Rao & Walton, *supra* note 91, at 17.

148. *See, e.g.*, ROBERT PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993). Putnam found that civic culture made all the difference in Northern Italy, where networks of associations and ties and the norms of trust they produce and sustain helped overcome collective action problems and made individuals and groups more productive. *Id.* at 182. *See also* EDWARD BANFIELD, *THE MORAL BASIS OF A BACKWARD SOCIETY* 85 (1958) (describing the people of the Montegrano district in southern Italy as subscribing to a norm of "amoral familism" whereby one should "[m]aximize the material, short-run advantage of nuclear family; assume that all others will do likewise"); ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 345–46 (2000).

149. PUTNAM, *MAKING DEMOCRACY WORK*, *supra* note 148; FRANCIS FUKUYAMA, *TRUST* 97–111 (1995).

150. Kuran, *supra* note 4, at 120.

151. TIMUR KURAN, *ISLAM & MAMMON: THE ECONOMIC PREDICAMENTS OF ISLAMISM*, at ix (2004).

152. TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES* 230 (1995) (discussing "cultural prefer-

has economic consequences. Certainly equity-based and interest-free financial instruments serve a useful economic purpose;¹⁵³ however, it does not follow that interest-bearing lending should be banned on economic grounds.

The ban on interest was imposed fourteen centuries ago on an agrarian and nomadic economy, perhaps due to Islam's prohibition of an ancient Arabian practice whereby defaulting debtors were penalized by having their debt doubled and redoubled, resulting in the enslavement of many poor people.¹⁵⁴ More than sixty countries now have Islamic banks that do not offer or charge interest and some among them, Pakistan and Iran, outlaw interest, forcing even foreign subsidiaries to adopt Islamic methods of deposit taking and lending.¹⁵⁵ But from an economic standpoint, the ban is unnecessary because of vastly different conditions that exist in today's economy. For example, instead of enslavement, we have bankruptcy laws. The ban is not only anachronistic but also economically detrimental. Given the fact that interest plays a central role in the modern economy, shunning interest is likely to mean non-participation in the global economic system¹⁵⁶ and prohibitions on economic arrangements such as mortgages, credit cards, currency hedging or futures contracts.¹⁵⁷ An interest ban is also damaging because it is economically inefficient. The ban prohibits people from making choices about the degree of risks they are willing to take, forcing people to engage in "time-consuming stratagems to disguise interest charges..., [raising] the costs of negotiating and monitoring financial agreements."¹⁵⁸ When viewed

ence falsification" by the public); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 929, 937 (1996).

153. Kuran, *supra* note 4, at 123. Proponents of Islamic banking argue that by forcing financiers to invest directly in a venture, rather than merely charge interest for the capital loaned, the system encourages more prudent lending and prevents "future Enrons and Argentina," presumably because everyone would have to spend within his or her means. Jerry Useem, *Banking on Al-lah*, FORTUNE, June 10, 2002, at 154 (the downside of profit-and-loss sharing is that it tends to attract high-risk ventures from entrepreneurs).

154. Kuran, *supra* note 4, at 133.

155. Timur Kuran, *The Genesis of Islamic Economics: A Chapter in the Politics of Muslim Identity*, 64 SOC. RESEARCH 301, 301-02 (1997).

156. KURAN, ISLAM & MAMMON, *supra* note 151, at ix.

157. Jerry Useem, *supra* note 153, at 154. Other financial arrangements such as derivatives and stock options may also be prohibited. Currency hedging would not be allowed because of *gharar*, a principle that prohibits one from profiting off another's uncertainty. Nor would futures contracts be allowed. *Id.* There is disagreement about whether Islam allows the issuance of bonds. Stocks are allowed. *Id.*

158. Kuran, *supra* note 4, at 124. Through the *murabaha*, parties may get around the interest ban. For example, a bank may buy a computer for a client who agrees to buy it back with a markup as a form of interest. Virginia Postrel, *Islamic Economic Principles May Sound like Just*

within an overall context of economic development in the Middle East, some scholars from the region have argued that this and other practices have contributed to the “commercial crisis” in the Middle East, as “the West developed commercial institutions more efficient than those of Islam.”¹⁵⁹

Other examples of economically detrimental cultural traits include ethnic or caste segregation and schooling restrictions for girls. These practices may enjoy widespread public support, even from members of the negatively affected group,¹⁶⁰ even though they are harmful to the group’s own economic advancement (and violate norms of human rights). India’s caste system is rightly viewed as a human rights issue but also increasingly as a hurdle to the country’s socioeconomic development.¹⁶¹ By perpetuating the notion of deserved and inherited inequality, the system extinguishes the aspirational capacity of the lower caste members, limits their occupational choices, closing off possibilities for upward mobility and “hinders efforts to escape from poverty....

What the Middle East Needs. In Practice, Things are More Complicated., N.Y. TIMES, Aug. 12, 2004, at C2. For a discussion of economic arrangements that can be put together to comply with the interest ban, see *Islamic Banking Comes of Age—But What Next?*, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=944> (login required). Islamic finance has grown and there is now a Dow Jones Islamic Index, which includes companies that do not produce items forbidden by Islam and have a low level of debt or earnings from interest. *Id.* at 3. Despite the inefficiencies involved, clerics have generally endorsed the ban, partly because “the elevation of religious values would enhance their own authority. Weak governments...have had their own reasons to support Islamist efforts to define, articulate, and, where necessary, invent an Islamic way of life” to stay in power. Timur Kuran, *The Religious Undercurrents of Muslim Economic Grievances*, <http://www.ssrc.org/sept11/essays/kuran.htm> (last visited Feb. 27, 2007).

159. Timur Kuran, *The Islamic Commercial Crisis: Institutional Roots of Economic Underdevelopment in the Middle East* 39 (USC Center for Law, Economics and Organization, Research Paper Series, Research Paper No. C01-12), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=276377 (last visited Feb. 27, 2007); see also Timur Kuran, *Why the Middle East is Economically Underdeveloped: Historical Mechanisms of Institutional Stagnation*, 18 J. ECON. PERSP. 71 (Summer 2004), available at <http://www.atypon-link.com/AEAP/doi/abs/10.1257/0895330042162421> (describing Islamist opposition to interest and insurance). But see Jack A. Goldstone, *Islam, Development, and the Middle East: A Comment on Timur Kuran’s Analysis* (Mercatus Center, George Mason University, Forum 7, 2003) http://www.usaid.gov/our_work/economic_growth_and_trade/eg/forum_series/f7_comments_on_kuran.pdf (generally agreeing with Kuran but arguing that his thesis is incomplete). For a positive assessment of Islamic banking, especially its compatibility with microfinance, see Rahul Dhumale and Amela Sapcanin, *An Application of Islamic Banking Principles to Microfinance* 1 (Regional Bureau for Arab States, United Nations Dev. Programme, in cooperation with the Middle East & North Africa Region, World Bank, Technical Note 23073 1999), available at <http://info.worldbank.org/etools/docs/library/128748/An%20Application%20of%20Islamic%20Bank%20Principles.pdf>.

160. Kuran, *supra* note 4, at 130.

161. B.S. Sule, *Illiteracy in India*, CHI. TRIB., Apr. 17, 1996, at 21.

It thus causes economic harm through mechanisms that shape Indian beliefs, preferences, and behaviors.”¹⁶² An important work by the noted economists George Akerlof and Rachel Kranton demonstrates how an individual’s understanding of his or her own self, which is in turn tied to his or her socially constructed being as a “Hindu,” an “untouchable,” determines access to education, trading group, and social network and is critically connected to his or her economic performance and success.¹⁶³ The caste system continues “to limit economic efficiency by distorting educational and occupational choices.”¹⁶⁴ As studies have shown, economic growth has not weakened the rigidity of the caste system. It has remained remarkably durable, partly because the system rests on cultural beliefs that the lower castes are simply where they are because of past sins.

Similarly, schooling restrictions for girls, often founded on cultural preferences favoring boys, have significant implications for economic development. Studies have shown that “when a society denies girls an education it loses economic competitiveness, if only by condemning all children, including boys, to be raised by ignorant mothers in households deficient in intellectual stimulation.”¹⁶⁵ Along a similar line, it is increasingly clear that “[g]ender equality is not only a goal in its own right, but an essential ingredient for achieving all other Millennium Development Goals to eradicate extreme poverty and hunger, reduce child mortality, combat AIDS, malaria, and other diseases, etc., as declared by the United Nations in 2002.”¹⁶⁶ Gender is clearly a human rights issue as well as a development issue. A World Bank study reported that as the Middle East and North Africa are embarking on an export-oriented, market-based development that would necessarily rely less on natural resources and more on human resources, women’s participation would be crucial to economic development there, as it was in East Asia. Yet, women are currently “an untapped reservoir of human potential for countries in the region.”¹⁶⁷

162. Kuran, *supra* note 4, at 118.

163. *Id.* at 119; see also George Akerlof & Rachel Kranton, *Economics and Identity*, 115 Q.J. ECON. 715 (2000); George Akerlof, *The Economics of Caste and of the Rat Race and Other Woe-ful Tales*, in AN ECONOMIC THEORIST’S BOOK OF TALES 23–44 (Cambridge U. Press) (1984) (explaining how a caste economy may be self-perpetuating).

164. Kuran, *supra* note 4, at 134.

165. Kuran, *supra* note 4, at 132.

166. WORLD BANK GENDER AND DEV. GROUP, GENDER EQUALITY & THE MILLENNIUM DEVELOPMENT GOALS 21 (2003).

167. THE WORLD BANK, MENA DEVELOPMENT REPORT: GENDER AND DEVELOPMENT IN THE MIDDLE EAST AND NORTH AFRICA, at xiii (2004) [hereinafter WORLD BANK, MENA

A comprehensive study on India demonstrates that “female education is the single most important determinant of any improvement (change) in living standards in health and education.”¹⁶⁸ The results of this study have been replicated in empirical studies from different countries and confirm that education for girls produces huge rippling effects, such as “improved birth spacing, lower infant and child mortality and morbidity, and enhanced educational attainment of children.”¹⁶⁹

Although the World Bank recognized that “gender and family values are likely to be treated as the ultimate test of cultural authenticity,”¹⁷⁰ it also stressed that “gender is ultimately also an economic issue.”¹⁷¹ As such, addressing the “gender agenda” is not only a cultural, social, or anthropological issue,¹⁷² but also an economic development issue¹⁷³ with significant implications for economic growth, productive employment and poverty reduction.¹⁷⁴ Unfortunately, as the study noted, most of the efforts on schooling girls have focused on overcoming external constraints, such as lack of schools, teachers, and textbooks, and thus “on *supplying* education for girls.”¹⁷⁵ But as I have argued in this Article, more needs to be done to address internal constraints, or as the World Bank puts it, on increasing “girls’ *demand* for education.”¹⁷⁶ This

DEVELOPMENT REPORT]. Other studies show that gender inequality in education has a direct, negative impact on economic growth by lowering the quality of human capital; interestingly, the data also suggests that differences in growth rates between East Asia and Sub Saharan Africa, South Asia, and the Middle East are attributable in part to gender differences among the regions. Stephan Klasen, *Does Gender Inequality Reduce Growth and Development? Evidence from Cross-County Regressions* 17–20 (The World Bank, Dev. Research Group, Working Paper Series, Paper No. 7, 1999).

168. Surji S. Bhalla, Suraj Saigal & Nabhojit Basu, *Girls’ Education is It: Nothing Else Matters (Much)* (World Development Report 2003/04), at 2. For example, there is a consistent and strong correlation between higher levels of educational achievement among adult females and lower infant mortality rates. *Id.* at 40. By contrast, there is no such positive correlation between increased state expenditures and improvements in living standard—in fact, the opposite, that state spending has “a statistically significant and negative effect on improvement in living standards.” *Id.* at 57.

169. WORLD BANK, MENA DEVELOPMENT REPORT, *supra* note 167, at 28.

170. *Id.* at xiv; *see also id.* at 20 (discussing how gender-related reforms “became an important symbol of resistance to modernization and—westernization”).

171. *Id.*

172. *Id.* at 1.

173. *Id.* at xiv; *see also id.* at 1–4 (discussing the costs of low participation of women in the economy and the benefits of enhanced participation).

174. *Id.* at 14. *See also id.* at 18 (discussing how discrimination against women impedes economic efficiency); WORLD BANK GENDER AND DEV. GROUP, *supra* note 166, at 6 (“Investment in human capital, especially girls’ and women’s education and health, raises productivity.”).

175. WORLD BANK, MENA DEVELOPMENT REPORT, *supra* note 167, at 38.

176. *Id.*

will necessarily involve efforts at culture change, that is, to change the widespread perception especially among rural and poor urban families that boys have a right to education but not girls, because girls should prepare themselves for marriage, not jobs.¹⁷⁷ As the authors of a one-hundred-country study concluded, underinvestment in girls and their education “is not an efficient economic choice” and, to a large extent, “can be explained by religious preference and underlying characteristics of societies.”¹⁷⁸ Law and development must change such preferences.

Where the objectives of economic development are incompatible with some cultural practice, what should, from a development perspective, be done to address this conflict? Clearly, there is no uniform solution applicable to all countries. In recent years, some nationals of Latin American, African, and Asian countries¹⁷⁹ have themselves opted to address the culture question to alleviate what they believe to be cultural obstacles to development, working specifically to promote a “cultural reorientation”¹⁸⁰ of their countries by exploring whether certain values may be “development-prone” and “development-resistant.”¹⁸¹ Indeed, as Amartya Sen noted, there is now plenty of evidence to suggest that “[c]ultural influences can make a major difference to work ethics, responsible conduct, spirited motivation, dynamic management, entrepreneurial initiatives, willingness to take risks, and a variety of other aspects of human behavior which can be critical to economic success.”¹⁸²

Although culture and its relationship to economics has been explored

177. *Id.* at 39.

178. David Dollar & Roberta Gatti, *Gender Inequality, Income, and Growth: Are Good Times Good for Women?* 2 (The World Bank, Dev. Research Group, Working Paper Series, Paper No. 1, 1999).

179. To the extent that evaluations of culture and the movement for culture change come from those “within” the culture, it may alleviate the concern that the push for culture change is itself an act of cultural imperialism.

One reason is that we are chary of intervening in a culture to change its characteristics, assuming we knew how. At a time when we think of all cultures as worthy of equal respect, what justification would we have to intervene—whether that intervention is public or private—and change a cultural feature that we think limits economic development?

Glazer, *supra* note 129, at 222.

180. Etounga-Manguelle, *supra* note 136, at 66.

181. Mariano Grondona, an Argentinean scholar, sets forth a list of twenty cultural factors and evaluates each in accordance with whether it is favorable or resistant to economic development. Grondona, *supra* note 3, at 47.

182. Sen, *supra* note 5, at 40; *see also* Kuran, *supra* note 4, at 120 (“Some elements of any given culture are clearly harmful to development; others are manifestly beneficial. Some promote intercommunal mistrust and hatred; others fuel peaceful interactions. The persistence of a cultural trait may enrich certain groups while keeping others impoverished.”).

in different periods of Latin American history,¹⁸³ the school of thought which maintains that “economic development is a cultural process”¹⁸⁴ has gained intellectual ground in Latin America in recent years, due perhaps to the collapse of dependency theory.¹⁸⁵ As the celebrated Peruvian writer Mario Vargas Llosa observed, reforms, economic or otherwise, in Latin America cannot be successful

unless they are preceded or accompanied by a reform of our customs and ideas, of the whole complex system of habits, knowledge, images and forms that we understand by ‘culture.’ The culture within which we live and act today in Latin America is neither liberal nor is it altogether democratic. We have democratic governments, but our institutions, our reflexes and our mentality are very far from being democratic. They remain populist and oligarchic, or absolutist, collectivist or dogmatic, flawed by social and racial prejudices, immensely intolerant with respect to political adversaries, and devoted to the worst monopoly of all, that of the truth.¹⁸⁶

That is to say, “[t]he paradox of economic development is that economic values are not enough to ensure it. Economic development is too important to be entrusted solely to economic values. The values accepted or neglected by a nation fall within the cultural field.”¹⁸⁷ One could ask, for example, if certain values and attitudes may be an obstacle to economic progress and whether elite groups—the politicians, the military, business-people, clergy, intellectuals, and leftists— in Latin America subscribe to such values and attitudes.¹⁸⁸

In a provocative article, a Cameroonian scholar questions the African mindset¹⁸⁹ that subscribes to values not conducive to economic pro-

183. For a discussion of the various efforts in Latin America towards effectuating changes in values and attitudes, see Lawrence E. Harrison, *Promoting Progressive Cultural Change*, in CULTURE MATTERS, *supra* note 3, at 297–99 (discussing works by eminent writers from Venezuela, Argentina, Chile, Nicaragua, Spain, Peru, among others, that question whether traditional Ibero-American values have a retarding effect on economic change in the region).

184. Grondona, *supra* note 3, at 46.

185. Dependency theory generally holds that given the structural power system endemic to the international economic framework, developing countries are consigned to a perpetual position of dependency on the industrialized, economically advanced country. See Lan Cao, *Law and Economic Development: A New Beginning?*, 32 TEX. INT’L L.J. 545, 551–54 (1997).

186. Harrison, *supra* note 183, at 297–98 (citation omitted).

187. Grondona, *supra* note 3, at 46.

188. Carlos Alberto Montaner, *Culture and the Behavior of Elites in Latin America*, in CULTURE MATTERS, *supra* note 3, at 56.

189. Despite the immense “diversity—the vast number of subcultures” in Africa, the author

gress, for example, exalting the past rather than the future,¹⁹⁰ associating authority and dominance with birth status rather than merit,¹⁹¹ subordinating the individual to the community,¹⁹² excessively celebrating conviviality and rejecting open conflict,¹⁹³ and “attribut[ing] very little importance...to the financial and economic aspects of life.”¹⁹⁴ Although African culture, according to him, is “one of the most—if not *the* most—humanistic cultures in existence,”¹⁹⁵ “peaceful cultural revolutions”¹⁹⁶ must be undertaken “to change Africa’s destiny”¹⁹⁷ by “asserting the absolute preeminence of education, by suppressing the construction of religious structures and other palaces to the detriment of schools, and by modifying the content of the curricula, accenting not only science but especially the necessary changes of the African society.”¹⁹⁸ The educational system in Africa must promote critical thinking, dissent, the importance of creating “businesspeople, and therefore job creators,”¹⁹⁹ and changes in the role of women in African society.²⁰⁰ To transform the economic culture, “[w]e must accept profit as the engine of development.”²⁰¹

Not just in African countries but in many traditional village societies, “other-regarding and redistributive norms” as well as strong authority

believes that it is possible to generalize about African culture because “there is a foundation of shared values, attitudes, and institutions that binds together the nations south of the Sahara, and in many respects those to the north as well.” Etounga-Manguelle, *supra* note 136, at 67.

190. This means an absence of “dynamic perception of the future.” *Id.* at 69.

191. This means that “[i]n Africa, you must be born dominant; otherwise you have no right to power except by coup d’état.” *Id.* at 70.

192. One of the byproducts of this norm is that “[t]he concept of individual responsibility does not exist in our hyper-centralized traditional structures. In Cameroon, the word ‘responsible’ translates as ‘chief.’” *Id.* at 71. Another byproduct is that without the notion of individual responsibility, “those that occupy an intermediate position in the hierarchy” are held in contempt, as it is understood that the one to solve a problem is only the minister himself. *Id.*

193. This means “[f]riendship comes before business” and differences, even legitimate ones, are suppressed in order to maintain social harmony. “In some African societies, the avoidance of conflict means that justice cannot be rendered in the daytime.” *Id.* at 72.

194. *Id.* This means that “[o]ther than some social groups like the well-known Bamileke of Cameroon or the Kamba of Kenya, the African is a bad *H. economicus*.” *Id.*

195. *Id.* at 75. African humanistic values include “the solidarity beyond age classification and social status; social interaction; the love of neighbor, whatever the color of his skin; the defense of the environment, and so many others.” *Id.*

196. *Id.* at 76.

197. *Id.* at 75.

198. *Id.* at 76.

199. *Id.*

200. *Id.*

201. *Id.* at 77.

patterns are among the most cherished and widely accepted norms.²⁰² Close-knit village communities characterized by strong kinship and other personalistic ties tend to be “‘group-focused’ societies,” which nurture a presumption against individualistic pursuits that may elevate an individual above his or her group or threaten the traditional pattern of authority.²⁰³ Norms against individual accumulation of wealth are either internalized or enforced by severe sanctions that run the gamut from public humiliation and ostracism to even more outlandish accusations, for example, that individuals who violate such norms will either be punished by a supernatural power or are themselves exploiting others through witchcraft or other treacherous means.²⁰⁴ To make amends, such enriched individuals are expected to comply with the community’s redistributive norms by sharing their surplus with others.²⁰⁵ Norms of solidarity are useful as they ensure the survival of all. In such societies, “[p]rivate wealth accumulation is perceived as an antisocial behavior because it is an attempt to break away from traditional solidarity networks.”²⁰⁶ Yet such norms of “‘[f]orced mutual help’”²⁰⁷ can also prevent the accumulation of wealth, capital investment, and growth and suppress individual initiatives.

Even more insidiously, such norms also tend to favor a status quo maintenance, further entrenching traditional elites—chiefs, elders, priests, typically “old men belonging to the dominant lineages”²⁰⁸—who “do not accept that commoners rise above them by acquiring old or new symbols of wealth and status.”²⁰⁹ Witchcraft accusations, hurled against dynamic upstarts who dare challenge the traditional hierarchical structure, are of course prohibited if uttered against traditional elites.²¹⁰

Development agencies that introduced projects which might disturb the status of traditional elites have encountered strong resistance.²¹¹ For example, in Guinea Bissau, when an NGO instituted a program to train

202. Anita Abraham & Jean-Philippe Platteau, *Participatory Development: Where Culture Creeps In*, in *CULTURE AND PUBLIC ACTION*, *supra* note 4, at 211.

203. *Id.* at 212–13.

204. *Id.* at 213, 216.

205. *Id.* at 215.

206. *Id.* at 215; *see also id.* at 215–16 (“[R]edistributive norms that enjoin economically successful individuals to share their surplus appear as a form of taxation designed to curb positional race for status.”).

207. *Id.* at 215.

208. *Id.* at 217.

209. *Id.* at 216.

210. *Id.*

211. Examples in this paragraph are drawn from *Id.* at 220–223.

professional fishermen and distributed fishing equipment to groups of village youths, the local king objected to young members receiving assets when he did not. In a northeastern region of Burkina Faso, an NGO helped a women's group acquire a mill, which was confiscated by the local chief who viewed it as a status symbol that should be bestowed upon him instead. In the same general area, a local chief who engaged in various mischiefs was nonetheless chosen, because he was chief, to be the chairman of a village-wide association created by an NGO to improve irrigation. When the chief awarded preferential dealings to his brother and pursued other dubious activities, the members did not remove him as chairman out of deference to his identity and status.

Such commitment to authoritarian pattern, status and personal relationships are likely to conflict with the values of equality, whether it be in terms of participation or economic opportunities. Since the currency crisis in Asia in 1997, for example, there is a similar effort to change "the traditionally particularistic personal relationships that have dominated the East Asian economies"²¹² because of the possibility that such relationships can impede individual initiatives²¹³ or even foster corruption.²¹⁴ Other cultural traits, the tradition of taking a "long view," for example, has meant that many East Asian businesses neglected periodically to monitor the profitability of enterprises. "The supposed virtue of such long-term perspectives was reinforced by the cultural propensity to

212. Harrison, *supra* note 121, at xxiii.

213. Though personalistic and kinship ties can facilitate economic growth, at some point they can also be a drag on economic development, dampening individual incentives to invest and accumulate wealth. Max Weber, of course, argued that the spread of Calvinism, which emphasized "individualistic motives of rational legal acquisition by virtue of one's own ability and initiative," MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 179 (1930), *quoted in* ALAN MACFARLANE, *THE ORIGINS OF ENGLISH INDIVIDUALISM* 47 (1979), "had the psychological effect of freeing the acquisition of goods from the inhibitions of traditionalistic ethics." WEBER, *supra*, at 171, *quoted in* MCFARLANE, *supra*, at 47. By elevating rational thought over superstition and magic and the pursuit of individual over communal interests, Protestantism helped to "shatter the fetters of the kinship group." WEBER, *supra*, at 139, *quoted in* MCFARLANE, *supra*, at 50. Subsequent scholars have echoed Weber's warnings of the fetters of kinship. *See, e.g.*, PETER T. BAUER & BASIL S. YARNEY, *THE ECONOMICS OF UNDERDEVELOPED COUNTRIES* 64 (1957) ("[T]he extended family...is an example of an institution which has many advantages in one stage of economic achievement, but which may later become a drag on economic development."); ARTHUR LEWIS, *THE THEORY OF ECONOMIC GROWTH* 114 (1955) ("The extended family system has tremendous advantages in societies living at a subsistence level, but it seems not to be appropriate to societies where economic growth is occurring. In such societies it is almost certainly a drag on effort.").

214. ARTHUR LEWIS, *supra* note 213, at 114 (noting that strong group ties may facilitate bureaucratic corruption and nepotism because bureaucrats may be bound first by obligations to traditional networks rather than to outsiders with superior credentials).

see great virtue in delayed gratification and the willingness to suffer in the short run in the expectation that in time there would be greater rewards for steadfastness.”²¹⁵ Such values and behaviors were useful at the initial stages of development but produced problems at the later stages.

There are efforts underway to confront cultural issues and their relationship to economic development. In the section below, I examine how a positive relationship between the two can be produced, focusing specifically on the catalyst question, that is, on the ways in which change may be effectuated, through internal or external pressure, or by bottom-up or top-down implementation.

IV. TO CHANGE A CULTURE

A. *Opposition to the Project*

There are preliminary issues to consider in the course of deliberating culture change. First, one is sure to encounter resistance, based on a claim of cultural integrity, from culture defenders or multiculturalists who oppose what they consider to be an assault on cultural identity. Second, opponents of culture change are likely to be even more opposed to the project if change is externally imposed or influenced based on the notion of cultural self-determination. In the section below, I examine those two objections and explore the implications they have for my proposal.

With respect to the claim that cultures should be defended from change, the response is simple: Cultures have always changed—Orientalist stereotypes about the unchanging nature of the non-West notwithstanding.²¹⁶ As Amartya Sen observed, culture is not “independent, unchanging and unchangeable.”²¹⁷ History shows that encounters initially viewed as threats may transform one’s very perceptions and preferences. Something deemed foreign in origin may in fact become domesticated and indigenous over time; Turks, for example, no longer view as “un-Turklike” French transplants such as specialized secular courts to hear commercial disputes.²¹⁸ Along more mundane lines, al-

215. Lucian W. Pye, “Asian Values” *From Dynamos to Dominoes?*, in CULTURE MATTERS, *supra* note 3, at 253.

216. See *supra* notes 111–18 and accompanying text.

217. Sen, *supra* note 5, at 44.

218. Kuran, *supra* note 4, at 131–32.

though chili is not an indigenous Indian spice but was brought to India by the Portuguese in the 16th century, it is now considered very much Indian.²¹⁹

It is often presumed that a particular culture, “Indonesian,” for example, is “simply Indonesian.” Yet, history suggests more complexity. Indonesian history reveals not just Islamic tradition but strong Hindu, Buddhist, and Confucian cultural presence and influence.²²⁰ Contrary to claims by Hindu nationalists, India has a long history of cultural diversity—a thousand years of Buddhist dominance, with Christians present since the fourth century and Parsees and Muslims since the eighth century. Thus, even when one invokes culture as an identity issue, the term often embodies great historical variations and heterogeneity even within an individual culture itself.²²¹

Culture is all the more “nonhomogeneous, nonstatic, and interactive”²²² in today’s globalized world. Anthropologists have noted this shift²²³ and the resulting similarities *across* societies as well as the resulting heterogeneity *within* societies.²²⁴ The modern world is no longer “tightly territorialized, spatially bounded...[and] culturally homogeneous.”²²⁵ Thus, “the boundaries of cultural systems are leaky, and that traffic and osmosis are the norm, not the exception.”²²⁶ Cultures move and interact, and from this process, undergo change. Modern cultures are characterized by cracks, fissures, change and transformation. As Salman Rushdie described the mongrelized selves spawned from this modern condition:

219. Sen, *supra* note 5, at 44.

220. *Id.* at 42.

221. *Id.* at 43 (“Cultural determinists often underestimate the extent of heterogeneity within what is taken to be ‘one’ distinct culture.”).

222. *Id.* at 44.

223. See, e.g., JAMES CLIFFORD, ROUTES: TRAVEL AND TRANSLATION IN THE LATE TWENTIETH CENTURY 246 (1997) (remarking that “[s]eparate places become effectively a single community ‘through the continuous circulation of people, money, goods, and information’”).

224. ARIF DIRLIK, THE POSTCOLONIAL AURA: THIRD WORLD CRITICISM IN THE AGE OF GLOBAL CAPITALISM 72 (1997) (discussing “global motions of peoples (and, therefore, cultures), the weakening of boundaries...[and] simultaneous homogenization and fragmentation within and across societies...”); Arjun Appadurai & Carol A. Breckenridge, *Why Public Culture?*, 1 PUB. CULTURE 5, 7 (1988) (“The world which cultural anthropologists have so far taken for granted is in the process of vanishing. More and more societies are characterized by profound internal cultural debates....” (citation omitted)).

225. ARJUN APPADURAI, MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION 48 (1996).

226. Arjun Appadurai, *The Capacity to Aspire: Culture and the Terms of Recognition*, in CULTURE AND PUBLIC ACTION, *supra* note 4, at 61; see also *id.* (describing the critical elements of culture in globalization as “mixture, heterogeneity, diversity...and plurality.”).

I was born an Indian, and not only an Indian, but a Bombayite—Bombay, that most cosmopolitan, most hybrid, most hotchpotch of Indian cities. My writing and thought have therefore been as deeply influenced by Hindu myths and attitudes as Muslim ones.... Nor is the West absent from Bombay. I was already a mongrel self, history's bastard, before London aggravated the condition.²²⁷

If cultures have always changed and continue to change, what does it mean, then, to defend “authentic” cultures? At its best, it may simply mean understanding the lessons of colonialism. And it may simply reflect a legitimate concern about repeating the nineteenth century quest to civilize the Third World, not justified as it was then, on the basis of superior Western morality, but rather, in more sophisticated and acceptable language of today—as an imperative of modernity. While global trade has also meant global diffusion of cultures, one might be concerned that countries with greater power could also overwhelm those with lesser power, not just economically but also culturally, with the latter finding itself in a position of “submissive supplication.”²²⁸

On the other hand, defenders of local cultures may also be quite misguided, and attempts to keep out foreign cultures motivated by much less justifiable concerns. A confrontational or hostile stance against the influence of foreign cultures—described by proponents as bravely standing up to Western domination—may in fact be “deeply foreign-dependent in a negative and contrary form.”²²⁹ In other words, this movement defines itself as the “Other,” that which the West is not, in a vein not that dissimilar, ironically, from that of the Orientalist tradition. Local culture, thus, is understood to be oppositional to or different from whatever Western culture is deemed to be. Quite simply, “[s]eeing oneself as ‘the other’ does less than justice to one’s free and deliberative agency.”²³⁰ Moreover, often under the banner of protecting local culture, these defenders “rule out certain choices, on traditionalist grounds, because of their ‘foreignness’ (irrespective of what people decide to choose, in an informed and reflected way).”²³¹ Citizens, therefore, are denied the exercise of cultural options by “political authorities, or by re-

227. SALMAN RUSHDIE, *In Good Faith*, in IMAGINARY HOMELANDS 393, 394, 404 (1991).

228. Rao & Walton, *supra* note 91, at 20; see also EDWARD SAID, *CULTURE AND IMPERIALISM*, at xi (1993) (describing the European view of their colonial enterprise as “bringing civilization to primitive or barbaric peoples...[who] deserved to be ruled”).

229. Sen, *supra* note 5, at 54.

230. *Id.*

231. *Id.* at 53.

ligious establishments, or by grand guardians of taste.”²³²

With the force and leverage of public international law behind them, defenders of culture cast their project in cultural self-determination language²³³ and disparage internal challenges to cultural traditions as foreign and inauthentic.²³⁴ Public international law thus puts its force and weight into preserving cultures and insulating them from change, assuming in essence that international law must favor cultural integrity over cultural change, committing the discipline to “the old-world view of cultural diversity as existing across cultures, but not within them.”²³⁵ This is because the right to cultural self-determination has been “interpreted to defend cultural groups against the forces of modernization and change. Internal cultural ferment is suppressed as law authorizes the exclusion of dissenters who threaten to dilute a culture’s distinctiveness.”²³⁶

Yet a view that privileges that particular understanding of cultural self-determination ignores change and diversity within every culture. Anthropologists have noted, for example, that “dissensus...is part and parcel of culture and...a shared culture is no more a guarantee of complete consensus than a shared platform in the democratic convention.”²³⁷ Culture is not only about affiliation or loyalty, but also about dissensus or dissent, challenge by members who seek to contest and reinterpret traditional cultural norms.²³⁸ Far from being intrinsically stable or in-

232. *Id.*; see also THOMAS M. FRANCK, *THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM* 250 (1999) (“It often turns out that oppressive practices defended by a state or group as essential to its survival are no more than the self-interested preferences of its current power-elite.”).

233. The International Covenant on Civil and Political Rights endows minority cultures with rights such as the “right...to enjoy their own culture, to profess and practise their own religion, or to use their own language.” International Covenant on Civil and Political Rights art. 27, Dec. 16, 1966, 999 U.N.T.S. 171; see also International Covenant on Economic, Social and Cultural Rights art. 3, adopted Dec. 16, 1966, 993 U.N.T.S. 3, 5 (declaring that all state parties must ensure the social and cultural rights of their people); Universal Declaration of Human Rights art. 27(1), G.A. Res. 217A, at 76, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (asserting that all persons have a right to participate in the cultural life of the community).

234. Richard T. Ford, *The Repressed Community: Locating the New Communitarianism*, 65 *TRANSITION* 96, 99 (1995) (describing how the claim that there is “a singular, ‘authentic’ or essential identity...involves more than ignoring the claims of dissenters and marginalized subgroups, it requires representing those claims as dishonest or illegitimate”).

235. Sunder, *supra* note 7, at 500. This stance also allows public international law to sidestep cultural issues because culture has to be preserved and insulated from the critical eye of law under the name of cultural integrity, authenticity and self-determination. See *supra* text and accompanying notes 220-34.

236. Sunder, *supra* note 7, at 500.

237. Appadurai, *supra* note 226, at 61.

238. Sunder, *supra* note 7, at 498; see also Seyla Benhabib, *Cultural Complexity, Moral In-*

ert²³⁹ or bounded by geographical demarcations, cultures, especially in the modern globalized world, are alive and changing, challenged and shaped by an ongoing process of internal as well as external pressures.²⁴⁰

This radically different understanding of culture as dynamic and heterogeneous, whether in response to internal or external change, leads to a different understanding of law and development and its relationship to culture. In a globalized world characterized by transnational cultural exchanges and internal cultural challenges, the argument that culture must be protected from change is not convincing. As transnational influence becomes all the more inevitable, it is also not convincing to claim that external influence is per se normatively illegitimate. Indeed, to argue otherwise is to concede that certain values, such as egalitarianism, are external to certain societies,²⁴¹ or that certain societies are uniformly characterized by certain values only and not other values.²⁴² This assumption that the world is divided into “impenetrable civilizational camps” viewed in oppositional terms, such as an Islamic versus a Western camp, obscures the fact that certain values are shared by both.²⁴³ Islam, for example, has had a history of celebrating religious freedom, tolerance and pluralism; Akbar, a Muslim emperor of India, ordered that “no one ‘should be interfered with on account of religion’ and that ‘anyone is to be allowed to go over to a religion that pleases him.’”²⁴⁴ During the same time period in the 1590s, Europe was in the midst of the Inquisitions. Given this history, it is inaccurate to characterize pluralism as solely a Western value²⁴⁵ and to reject attempts to influence the de-

terdependence, and the Global Dialogical Community, in WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES 235, 240 (Martha C. Nussbaum & Jonathan Glover eds., 1995) (“Very often, cultures are presented as hermetic and sealed wholes; the internal contradictions and debates within cultures are flattened out; the different conceptual and normative options which are available to the participants of a given culture and society are ignored.”). Thomas L. Friedman, Op-Ed., *Brave, Young and Muslim*, N.Y. TIMES, Mar. 3, 2005, at A31 (describing efforts by Arab-Muslim youth to bring about democracy in the Middle East, to reform Islam, and to rediscover its pluralistic tradition).

239. To the extent that culture defenders wish to preserve cultures from change, their position is eerily similar to that of the Orientalists who see non-Western cultures in unchanging, static terms. See *supra* notes 110–18 and accompanying text.

240. ARJUN APPADURAI, MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION 27–65 (1996).

241. Madhavi Sunder, *Enlightened Constitutionalism*, 37 CONN. L. REV. 891, 892–93 (2005).

242. See Amartya Sen, *A World Not Neatly Divided*, N.Y. TIMES, Nov. 23, 2001, at A39.

243. *Id.*

244. *Id.*

245. NOAH FELDMAN, AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY 6 (2003) (demonstrating that liberty, equality, and democracy are compatible with

velopment of pluralism in Muslim societies as illegitimate external imposition.²⁴⁶

Not only is pluralism part of Islam's history, it is currently part of the "internal struggle within Islam to re-examine its texts and articulate a path for how one can accept pluralism and modernity."²⁴⁷ Shirin Ebadi, for example, received the Nobel Peace Prize in 2003 for her efforts to achieve freedom and equality for women within Islamic Iran.²⁴⁸ The Arab Human Development Reports issued in 2002, 2003, and 2004 proclaimed pluralism to be vital to human development.²⁴⁹ Cultures are increasingly characterized by internal challenges and debates about cultural meanings, identities and values,²⁵⁰ and contrary to the claims of those who defend cultures on the grounds of cultural preservation, there is no "singular, 'authentic' or essential identity"²⁵¹ that needs to be preserved or protected from external influence.

Besides the fact that seemingly oppositional values are indeed reconcilable internally within one culture, so that Islam, for example, can incorporate egalitarian and pluralistic commitments, one could also simply view certain basic values as universal. The Constitution of India incorporated rights and reflected values that were drawn from many constitutions in the world,²⁵² provoking critics to charge that as such, it "will break down soon after being brought into operation."²⁵³ Yet, many of India's Constitution drafters insisted that "India should be rightfully able to benefit from the world's intellectual heritage."²⁵⁴ "What the Indian Constitutionalists recognized is that the Enlightenment ideals of democracy, equality, reason, and dissent are not and cannot be the intellectual properties of Western nations alone, but are rightfully the

Islam).

246. Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857, 888 (2005) (arguing that external Western influence is external imposition which will lead to a distortion of the very values the West wishes to develop, such as equality and liberty, in nascent Islamic democracies).

247. Thomas L. Friedman, *The Real War*, N.Y. TIMES, Nov. 27, 2001, at A19.

248. Scott MacLeod, *One Woman's Way*, TIME INTERNATIONAL, Dec. 15, 2003, at 44, available at www.nobelprize.org/nobel_prizes/peace/laureates/2003/press.html.

249. See, e.g., UNITED NATIONS DEV. PROGRAMME, ARAB HUMAN DEVELOPMENT REPORT 2003: BUILDING A KNOWLEDGE SOCIETY 121.

250. See *supra* notes 217–47 and accompanying text; see also Friedman, *supra* note 238, at A31. Neil MacFarquhar, *Unexpected Whiff of Freedom Proves Bracing for the Mideast*, N.Y. TIMES, Mar. 6, 2005, at A1.

251. Ford, *supra* note 234, at 99.

252. Sunder, *supra* note 241, at 899.

253. GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 325 (1966) (citation omitted).

254. Sunder, *supra* note 241, at 899.

treasures of the world.”²⁵⁵ In this sense, culture is understood and judged not by its source or geography but “by its manifest use and enjoyment.”²⁵⁶ As Rabindranath Tagore, who received the Nobel Prize in literature in 1913, put it:

Whatever we understand and enjoy in human products instantly becomes ours, wherever they might have their origin. I am proud of my humanity when I can acknowledge the poets and artists of other countries as my own. Let me feel with unalloyed gladness that all the great glories of man are mine.²⁵⁷

But if certain desirable values have not been part of a particular society’s cultural fabric, what then? From a universalist perspective,²⁵⁸ the issue is not whether a value is internal or external to a society, or promoted by insiders or outsiders. Salman Rushdie put it this way:

[I]f by chance there were a universal value that might, for the sake of argument, be called freedom, whose enemies—tyranny, bigotry, intolerance, fanaticism—were the enemies of us all; and if this “freedom” were discovered to exist in greater quantity in the countries of the West than anywhere else on earth; and if, in the world as it actually exists, rather than in some unattainable Utopia, the authority of the United States were the best current guarantor of that “freedom”; then might it not follow that to oppose the spread of American culture would be to take up arms against the wrong foe?²⁵⁹

A cross cultural or transnational perspective can make a culture receptive to critical thinking, deliberation and dissent. “The exclusion of slaves in one society, untouchables in another, and women in still another may be much harder to sustain when other societies show the way

255. *Id.*

256. Sen, *supra* note 5, at 54.

257. *Id.* at 55; see also Amartya Sen, Speech at the Nobel Banquet, (Dec. 10, 1998), <http://nobelprize.org/economics/laureates/1998/sen-speech.html> (last visited Feb. 27, 2007). (referring to Tagore, Sen noted that, “[h]is universalist, tolerant and rationalist ideals were a strong influence on my thinking, and I often recollect them in these divisive times”). Sen has also noted elsewhere that Tagore firmly believed “in the ‘non-fragility’ of Indian culture and civilisation; he believed that it was broad and of many parts, each related to and influenced by the other. Tagore, said Sen, did not believe that there was a conflict between the cultures and civilisations of the East and the West, and was against ‘closing the shutters’ to outside influences.” Parvathi Menon, *A Special Homecoming*, FRONTLINE, Jan. 2–15, 1999, available at <http://www.frontlineonnet.com/fl1601/16011300.htm>.

258. See *supra* notes 252–57 and accompanying text.

259. SALMAN RUSHDIE, STEP ACROSS THIS LINE 268–69 (2002).

to different types of social arrangements.”²⁶⁰ Cultures that sanction such practices will be defended, predictably, by self-interested elites who elevate self-determination over other values, for example, equality, reason, freedom.²⁶¹ But in recent years, liberals and feminists have critiqued attempts to elevate cultural rights on many grounds, for example, that they preserve the status quo at the expense of women and children;²⁶² that they tend to “enforce cultural orthodoxy over progressive cultural dissent”;²⁶³ and that they are preserved often by suppressing individual autonomy.²⁶⁴

In the section below, I push this critique further and ask if cultural attributes that constrain economic development should be changed, whether by insiders or outsiders, from the top down or the bottom up. On this issue I look to Tagore, who while rejecting Western domination also rejected the brand of nationalism that would erect walls and close off borders. As Tagore said, “we neither have the right nor the power to exclude this people [the British] from the building of the destiny of India.”²⁶⁵

B. *How To Change a Culture*

This section is but the beginning of future works that will provide a more detailed, prescriptive agenda addressing the complex normative issues involved in culture change. Some of the questions to be explored include how culturally-based choices can be altered by governments, individuals, NGOs and development agencies; how the social meaning of an undesirable practice, refusing education for girls, for example, can be changed; the methods of change that may be useful, whether it be education, information, persuasion, coercion, or the provision of economic incentives; and the institutional arrangements, such as public-

260. Martha C. Nussbaum & Amartya Sen, *Internal Criticism and Indian Rationalist Tradition*, in *RELATIVISM: INTERPRETATION AND CONFRONTATION* 299–320 (Michael Krausz ed., 1989).

261. See Sunder, *supra* note 241, at 894 (“[F]ar from one uber value—democratic self-determination—the globe pulsates with commitments to a number of incommensurable, universal values.”); see also Sen, *supra* note 5, at 53.

262. Janet E. Halley, *Culture Constraints*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 100, 103–04 (Joshua Cohen et al. eds., 1999); Susan Moller Okin, *Reply*, in *IS MULTICULTURALISM BAD FOR WOMEN?*, *supra*, at 115.

263. Yael Tamir, *Siding with the Underdogs*, in *IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 262, at 47.

264. Halley, *supra* note 262, at 100 (noting how cultural preservation claims focus on the liberation of a culture from external coercion and ignore claims that it constrains and suppresses).

265. RABINDRANATH TAGORE, *NATIONALISM* 131 (Greenwood Press 1973) (1917).

private partnerships, that would best accomplish the desired objectives.

Japan is the most obvious example of a country that has successfully launched culture change campaigns. When it realized it was militarily and economically inferior to Europe, it committed itself to change, not just by adopting new legal codes, but also by implementing a systematic culture change project.²⁶⁶ During the period known as the Meiji Restoration of 1860, the Japanese saw that they were not equal to “the more progressive powers of the world”²⁶⁷ and decided to modernize by bringing foreign experts to Japan and sending Japanese agents abroad to study European ways. The Meiji Restoration was a “revolution from above” to learn “the ways of the West in order to reform virtually every aspect of national life,”²⁶⁸ and through this reformation, defend the country from Western threat.²⁶⁹ The Japanese government modeled its military and its legal codes after those of Germany. It adopted measures to create a sense of nationhood which had been virtually nonexistent during the quarter millennium of Tokugawa rule, for example, establishing a national postal service, public education for boys and girls, universal military service, etc., to “imbue its subjects with a sense of higher duty to the emperor and country and to link this patriotism to work.”²⁷⁰

Throughout its history, Japan took extraordinary efforts to involve the Japanese people in various national cultural projects.²⁷¹ The process included interaction and cooperation between Japanese private groups and an interventionist Japanese state to formulate and implement programs to manage society.²⁷² From the 1600s to the mid 1800s, authorities of the shogunate, through “kyoka,” or “moral suasion,” “exhorted peasants to work hard, pay their taxes, and avoid luxury.”²⁷³ Thus, bureaucracies from various ministries were established to run moral suasion campaigns, many of which aimed to instill changes in customary habits, and through such changes to encourage the formation of capital and produc-

266. Unless otherwise stated, the discussion of Japan’s Meiji Restoration is drawn from Landes, *Culture Makes Almost All the Difference*, *supra* note 131, at 7–10; see also Cao, *The Ethnic Question in Law and Development*, *supra* note 131, at 1071–75.

267. Sidney D. Brown, *Okubo Toshimichi: His Political and Economic Policies in Early Meiji Japan*, 21 J. ASIAN STUD. 183–190 (1961/1962).

268. Tom Ginsburg, *Dismantling the “Developmental State”? Administrative Procedure Reform in Japan and Korea*, 49 AM. J. COMP. L. 585, 588 (2001).

269. Bill Ong Hing, *Nonelectoral Activism in Asian Pacific American Communities and the Implications for Community Lawyering*, 8 ASIAN PAC. AM. L.J. 246, 248 n.16 (2002).

270. Landes, *Culture Makes Almost All the Difference*, *supra* note 131, at 10.

271. SHELTON GARON, *MOLDING JAPANESE MINDS* 6 (Princeton Univ. Press 1997).

272. *Id.*

273. *Id.* at 7.

tive investment.²⁷⁴ The Ministry of Education introduced “daily life improvement campaigns” to teach “scientific budgeting, better nutrition and hygiene, and avoiding wasteful spending on festivals, alcohol, and tobacco.”²⁷⁵ The Home Ministry and the Ministry of Education, which were responsible for campaigns to reform norms and habits of the poor,²⁷⁶ routinely received reports from district chiefs containing detailed “village-by-village information on the time spent on funerals and weddings and, in the case of weddings, the numbers attending, the type of ceremony [sic], and what was served.”²⁷⁷

To ensure success, the government sought the involvement of community leaders of women and youth groups, religious organizations and other civic associations. It used all available methods—motion pictures, handbills distributed to households, posters exhorting savings and frugality²⁷⁸—to supplement moral suasion, promote “middle-class commitments to the modernization of popular beliefs, daily habits, and gender relations,”²⁷⁹ and “eliminate the ‘evil customs of the past.’”²⁸⁰ In some instances, the government joined forces with “Western-educated Protestant social reformers...to teach the poor the virtues of hard work, savings, and self-help”—all with the aim “to improve the diet, hygiene, work habits, housing, consumption patterns, and ritual life of the Japanese people.”²⁸¹ Indeed, as some have put it, “[t]he cultural values underlying Japan’s successful strategy in catching up with the West were nurtured and manipulated by the elites in the interest of the developmental state.”²⁸²

To be sure, efforts at culture change are less likely to be controversial

274. In development economics, the elimination of wasteful spending is a necessary step towards capital formation, accumulation, and investment. W. Arthur Lewis, *Economic Development with Unlimited Supplies of Labour*, in *PARADIGMS IN ECONOMIC DEVELOPMENT: CLASSIC PERSPECTIVES, CRITIQUES, AND REFLECTIONS* 59, 75 (Rajani Kanth ed., 1994). Given the traditional tendency in many societies to spend surplus capital on “tombs, country houses, temples,” and other economically unproductive activities, a key issue in development is to “tempt capital into productive channels rather than into the building of monuments,” or *spending* on funerals, weddings and other lavish ceremonies. *Id.* at 73.

275. GARON, *supra* note 271, at 11.

276. *Id.* at 15–16.

277. *Id.* at 12–13.

278. *Id.* at 13.

279. *Id.* at 19.

280. *Id.* at 20.

281. *Id.*

282. Charlotte G. O’Kelly, *The Future of Hong Kong: Prospects*, 547 *ANNALS* 176, 177 (Sept. 1996) (reviewing CHALMERS JOHNSON, *JAPAN, WHO GOVERNS? THE RISE OF THE DEVELOPMENTAL STATE* (1995) and WILLIAM K. TABB, *THE POSTWAR JAPANESE SYSTEM: CULTURAL ECONOMY AND ECONOMIC TRANSFORMATION* (1995)).

within law and development circles if the underlying cultural norm is at odds with modern notions of human rights. Turkey, for example, had required midwife and nursing students to be virgins and testing could be performed to ensure compliance. In 2002, in an effort to be admitted to the European Union, Turkey issued a directive banning forced virginity testing.²⁸³ As a ratifier of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Turkey is obligated to abolish not only discriminatory laws but also “to promote equality by breaking down commonly held stereotypes impacting culture and tradition.”²⁸⁴ Although human rights groups applaud this decree, commentators rightly warn that because Turkey “faces a tension between enduring cultural norms and international human rights standards,” legislation is likely to be inadequate unless the government follows up with a nationwide educational campaign.²⁸⁵ Such is the situation in South Africa as well. South Africa’s 2005 ban on virginity testing is vociferously opposed by tribal leaders “who saw the legislation as an attack on ancient tribal culture and family values.”²⁸⁶ A women’s rights leader observed: “For the majority of women who live in rural areas, customary law basically consigns them to be minors all their lives, under their fathers, their husbands, their brothers....”²⁸⁷

Other CEDAW member countries, such as Nigeria, Zimbabwe, and Indonesia, acknowledged that implementing CEDAW has been difficult because of “entrenched traditional attitudes regarding women.”²⁸⁸ Given “the persistence of cultural norms that give preference to men,”²⁸⁹ experts in this area have suggested “‘massive awareness campaigns’ at both the national and local levels.”²⁹⁰ Similarly, although there are efforts to alter inheritance patterns that exclude women and that are “deeply embedded in notions of cultures and tradition,” these efforts have occurred primarily at the statutory level.²⁹¹ Yet unless cultural

283. Chante Lasco, *Virginity Testing in Turkey: A Violation of Women’s Human Rights*, 9 HUM. RTS. BRIEF, Spring 2002, at 10, 10.

284. Hadar Harris, *Current Processes for Assessment of Women’s Human Rights in International Law*, ASIL INSIGHT, March 2005, www.asil.org/insights/2005/03/insights050316.html; see also Lasco, *supra* note 283, at 13.

285. Lasco, *supra* note 283, at 10.

286. Sharon LaFraniere, *Women’s Rights Laws and African Custom Clash*, N.Y. TIMES, Dec. 30, 2005, at A1.

287. *Id.*

288. Valerie A. Dormady, *Status of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1998*, 33 INT’L LAW. 637, 639–41 (Summer 1999).

289. *Id.* at 641.

290. *Id.* at 640.

291. Abby Morrow Richardson, *Women’s Inheritance Rights in Africa: The Need to Integrate*

norms are confronted and altered, through deliberate education campaigns²⁹² and other measures,²⁹³ “[t]hese statutory changes generally have no practical effect on the great majority of the population.”²⁹⁴

Indeed, after Egypt’s health minister banned the genital mutilation of girls,²⁹⁵ villagers across the country planned to continue the custom and even officials in charge of implementing the law acknowledged “that some social customs are too potent to be extinguished by law.”²⁹⁶ It was not until one of Egypt’s largest nonprofit development groups targeted the practice that female genital mutilation became virtually nonexistent in Tayeba, a village outside Cairo of mostly Coptic Christians. The group pursued an education campaign aimed at women, religious leaders, and unmarried men, portraying the issue as a literacy, family planning, and health care issue.²⁹⁷ In other words, if a cultural norm such as female genital mutilation carries a certain socially constructed meaning that is traditionally deemed desirable,²⁹⁸ the underlying meaning must be changed before the cultural norm can be successfully altered. The development group succeeded because it was able to change the meaning of female genital mutilation, moving it from a cultural or religious to a human health domain.²⁹⁹

The group enters a village only with an invitation signed by community leaders, appoints a two-person team to live in the village for as long as seven years, trains local volunteers to continue the group’s objectives

Cultural Understanding and Legal Reform, 11 HUM. RTS. BRIEF, Winter 2004, at 19, 22.

292. *Id.* at 22.

293. Japan, for example, prohibits employers from discriminating on the basis of sex in recruitment, hiring, assignment, and promotion decisions. Kelly Barrett, *Women in the Workplace: Sexual Discrimination in Japan*, 11 HUM. RTS. BRIEF, Winter 2004, at 5, 6. But the law also allows the Ministry of Labor to “‘make a public announcement’” if an employer fails to comply with the Ministry’s directive. *Id.* “Because of deep-seated cultural norms, the theory behind this sanction is that the threat of public embarrassment will be enough to prevent companies from discriminating on the basis of gender.” *Id.*

294. Richardson, *supra* note 291, at 19.

295. In Egypt, the procedure is performed by midwives or barbers, often without anesthesia and under non-hygienic conditions. Neil MacFarquhar, *Egypt Facing Defiance of Ban on Genital Mutilation of Girls*, GLOBE AND MAIL NEWS, Aug. 19, 1996, at N14.

296. *Id.*

297. John Lancaster, *Village Gives Up a Painful Ritual*, WASH. POST, June 21, 1998, at A19.

298. For example, in countries that practice female genital mutilation, the practice is justified on the grounds that girls not subject to female genital mutilation will become nymphomaniacs, and therefore those who have been subject to the procedure are “good” girls. Philip Smucker, *Egyptian Women Fight Circumcision*, PITTSBURGH POST-GAZETTE, Feb. 25, 2001, at A4.

299. See, e.g., Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. at 903, 905, 950–52 (1996) (describing efforts in the U.S. to change the meaning of smoking, from one associated with cool rebellion to one associated with lung cancer).

after the team leaves, and conducts follow-up work. Volunteers visited local houses to give women information on family planning and health care before slowly introducing the topic of female circumcision. Despite initial hostile reactions, the group has achieved a 70 percent success rate, with success being determined by asking whether girls remain uncircumcised past the age of twelve.³⁰⁰ The Egyptian education campaign, headed by the Ministry of Health, has been funded by U.S. and U.N. money and has garnered a 75 percent eradication rate even in Egypt's more remote villages.³⁰¹ Similar successes have been reported elsewhere, for example, Senegal. There, a nonprofit organization, along with local women enrolled in a course on health care, launched a campaign of "information and persuasion" to convince more than 400 villages to end genital cutting.³⁰²

China, too, has tried culture change. In an effort to address the growing problem of "missing" girls in China, resulting from abortion of female fetuses due to the traditional Chinese preference for boy children, the Chinese government has instituted a massive campaign, including subsidies, to reverse the trend.³⁰³ Under this program, families of girl students receive free tuition for their children. Additionally, because preference for boy children, especially in rural areas, reflected the family's desire for male farm laborers and old-age care traditionally provided by sons, the government introduced a pilot program under which 300,000 rural elders are entitled to receive a general annual pension of \$180 if they had only one child or daughters.³⁰⁴ To change traditional attitudes, the government urged schools to hold parades in a "Care for Girls" program, and billboards announce a "Respect Girls" campaign.³⁰⁵

Current efforts undertaken in many developing countries to effectuate culture change have appropriately targeted educational reform. For example, after determining that Japanese children learned progressive values and Peruvian children did not, a Peruvian businessman established the Institute of Human Development in 1990 in Peru to promote the "Ten Commandments of Development: order, cleanliness, punctuality, responsibility, achievement, honesty, respect for the rights of others, re-

300. Lancaster, *supra* note 297.

301. Smucker, *supra* note 298 (describing 75 percent eradication of the practice in remote Egyptian villages as a result of a community-based propaganda campaign).

302. Thomas Gagen, *Social Change in Senegal*, THE BOSTON GLOBE, Dec. 28, 2001, at A26.

303. Jim Yardley, *Fearing Future, China Starts to Give Girls Their Due*, N.Y. TIMES, Jan. 31, 2005, at A3.

304. *Id.*

305. *Id.*

spect for the law, work ethic, and frugality.”³⁰⁶ The Institute’s works have been adopted by Nicaragua’s Minister of Education in his own educational reform projects and by Mexico’s prestigious Monterrey Institute of Technology and Higher Studies.³⁰⁷

Lest one too blithely disparage efforts to institute change through the educational system, it is important to note that scholars have long studied how “education constructs culture.”³⁰⁸ The works of Pierre Bourdieu demonstrate that “the central role that schools have in both changing and in reproducing social and cultural [structures]...from one generation to the next.”³⁰⁹ As Bourdieu explains,

If it be accepted that culture...is a common code enabling all those possessing that code to attach the same meaning to the same words, the same types of behavior and the same works, then it is clear that the school...is the fundamental factor in the cultural consensus in as far as it represents the sharing of a common sense which is the prerequisite for communications.³¹⁰

Education would play a vital role in the construction and reshaping of such cultural traditions—whether to promote frugality, trust, delaying gratification, sacrificing for the national interest, the time value of money—by adopting “a process of formalization and ritualization”³¹¹ and “organizing cultural productions,”³¹² as undertaken by Japan during the Meiji restoration period.

Although the degree of the state’s involvement may vary, in terms of “official encouragement, outright subsidies, and governmental coordination,”³¹³ there is clearly a concerted effort in some developing countries to engage in culture change—whether as a human rights matter, as in efforts to eradicate female genital mutilation, or as an economic development issue. This process includes the construction of social capital through educational reform and various forms of civic participation

306. Harrison, *Promoting Progressive Cultural Change*, *supra* note 183, at 303.

307. *Id.*

308. Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 974 (1996).

309. *Id.* at 973 (citation omitted).

310. *Id.* at 973 (internal quotations omitted) (citation omitted); *see also id.* at 975 (describing how education is a vehicle for government norm management: “[e]ducation thus proceeds (1) through a practice, (2) directed by an authority, (3) that coerces without appearing to coerce”).

311. *Id.* at 978 (citations omitted).

312. *Id.* at 982 (quoting Mary Crain, *The Social Construction of National Identity in Highland Ecuador*, 63 ANTHROPOLOGY Q. 43, 56 (1990)).

313. GARON, *supra* note 271, at 235.

which resemble, in broad strokes at least, the earlier efforts towards social management adopted by the Japanese. One could also imagine other forms of government involvement in culture change, for example, the government as a “meaning manager or meaning architect who has identified a social meaning that is to be transformed and must find the techniques to achieve this transformation.”³¹⁴

This could be accomplished through the technique of tying, as Lawrence Lessig puts it, by associating one act with “another social meaning that conforms to the meaning that the architect wishes the managed act to have.”³¹⁵ Through education in schools and coordination with other civic organizations, these governments could promote certain virtues, such as saving and frugality necessary for capital accumulation; a future-oriented mindset that encourages individuals to stop defining themselves primarily as occupiers of inherited social status; or a norm that makes individual accumulation of wealth acceptable or even desirable. This can be done by tying or associating the desired attributes, for example, with national unity or patriotism. When South Korea faced a currency crisis in 1997 and a record \$60 billion USD bailout by the IMF, a national drive, dubbed the “Nation-loving Gold Collection Campaign,”³¹⁶ succeeded in inducing, within the first two days, more than 133,000 people to sell or donate over 22,000 pounds of gold to the government.³¹⁷

Certainly any effort by governments to change cultural meanings may be viewed pejoratively as propaganda, as a troubling form of “industrial policy for norm generation” resulting in “boundless and oppressive state efforts to manipulate social norms.”³¹⁸ Some may find it all the more “chilling”³¹⁹ when undertaken by liberal states that do not as a matter of course engage in propaganda or brainwashing. Yet such efforts may already be pursued by governments, even in the United States.³²⁰

314. Lessig, *supra* note 308, at 1008.

315. *Id.* at 1009.

316. Hyewook Cheong, *S. Korea Gold Campaign Mum on Details*, UNITED PRESS INT’L, Jan. 13, 1998.

317. Kyong-Hwa Seok, *South Koreans Answer the Call: Citizens Turn in Their Gold to Aid Besieged Nation*, HAMILTON SPECTATOR (Ontario), Jan. 7, 1998, at D7.

318. Richard H. Pildes, *The Destruction of Social Capital Through Law*, 144 U. PA. L. REV. 2055, 2057, 2060 (1996) (internal quotations omitted).

319. Lessig, *supra* note 308, at 1008, 1016.

320. Even in the United States, for example, despite proclamations that the government does not “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,” *id.* at 945 (quoting *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 327–28 (7th Cir. 1985)), the U.S. government, as well as governments elsewhere, regularly do.

[G]overnments, as well as others, act to construct the social structures, or social norms,

“Governments trade on standing social meanings to advance state ends,” which have ranged from promoting “family values” to exclude homosexuals from social integration in the United States, for example, to constructing race and ethnic identities to build up nationalism in the former Yugoslavia.³²¹ Depending on the nature of the state’s efforts to produce and reshape social and cultural norms, this effort towards norm construction and management may or may not raise the specter of “thought control.”³²² It may if the government allows few other channels for citizens to be exposed to alternative or competing value systems, or if the government backs up its agenda with coercive forms of state action, as in North Korea or Cultural Revolution China.

It is important at this point to clarify what it is I am *not* arguing. I am not claiming “that cultural managers could construct any culture they wish...or that ‘given the right social context, any social activity can be turned into a ritual at the whim of ritual specialists.’ Rituals, and the reality they construct, depend upon the values of the parties to that ritual.”³²³ I am also not arguing that “backward” cultures are the cause of economic underdevelopment. But I am suggesting that there is some relationship between culture and economic productivity—the degree to which a relationship exists will depend upon the particularities of history, economics, and politics. Acknowledging that such a link exists, however, does not mean that culture should be used to “deflect[] attention from other factors which might provide an equally compelling explanation of underdevelopment.”³²⁴ The World Trade Organization and other institutions of the international economic system may in fact be structurally problematic, as evidenced by the exclusion from WTO rules, until recently, of textiles and agriculture: two areas in which developing countries have a comparative advantage.

I will end this section with a look at how an indigenous Third World

or...the social meanings that surround us. For these social meanings are what is orthodox. They constitute what is authority for a particular society, or particular culture. To the extent that they are built, or remade, or managed by government, then to that extent government is “prescribing” the orthodox.

Id. at 947. One example of government transformation of norms for progressive purposes is the passage of the Civil Rights Act, which altered the cultural landscape by providing a cultural and legal safe harbor for businesses that served black customers; by making discrimination illegal, the law allowed a business who served blacks to be viewed as doing so in order to obey the law, not necessarily to favor blacks. *Id.* at 966.

321. *Id.* at 957.

322. *Id.* at 945 (internal quotations omitted).

323. *Id.* at 986 (citation omitted).

324. Chantal Thomas, *Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development*, 9 TRANSNAT’L L. & CONTEMP. PROBS. 1, 8 (1999).

institution—the Grameen Bank founded by an economist from Bangladesh—encourages certain cultural change in its borrowers. Unlike traditional banks which make loan determinations based on the borrower's access to collateral or his or her general creditworthiness, the Grameen Bank does not require collateral of the conventional kind. Instead, it relies on social collateral. The bank lends to a circle of five members, typically women. It grants a loan to the first two borrowers. If the first two repay their loans, the other individuals in the circle are entitled to loans. Those who received a loan are responsible, by their repayment or non-repayment, for whether or not others are qualified to borrow.³²⁵

In addition, the bank undertakes to introduce a social development agenda to its borrowers, as reflected in the “Sixteen Decisions” which Grameen borrowers are expected to adopt.³²⁶ The purpose of the bank is to help people in poor countries cross the poverty line economically and also to live “a life of dignity and honour.”³²⁷ The bank believes that although “credit is an efficient instrument that can quickly augment income, poverty has many dimensions,”³²⁸ which include social and political consciousness; Grameen Bank's “Sixteen Decisions” reflect the bank's effort to address the social elements of poverty.

At weekly meetings, borrowers agree to follow and advance these principles of Grameen Bank: “Discipline, Unity, Courage and Hard Work.”³²⁹ The purpose of the sixteen decisions is to encourage sound financial discipline as well as to instill in borrowers certain social goals.³³⁰ Borrowers are encouraged to memorize and recite the Sixteen Decisions, some of which deal with mundane subjects such as sanitation (“We shall build and use pit latrines”), nutrition (“We shall grow vegetables all year round”), as well as more sensitive topics.³³¹ Examples of the latter include the pledge to educate their children; not take any dowry at sons' weddings and not give any dowry at their daughters'

325. Grameen Bank Credit Delivery System, <http://www.grameen-info.org/bank/cds.html> (last visited Feb. 27, 2007).

326. *Id.*

327. *Alleviation of Poverty is a Matter of Will: Hearing on Aid Targeted to Small Enterprise Development Before the H. Comm. on Int'l Rel.*, 104th Cong. (1995) (testimony of Professor Muhammad Yunus, Managing Director, Grameen Bank).

328. *Id.*

329. The 16 Decisions of Grameen Bank, www.grameen-info.org/bank/the16.html (last visited Feb. 27, 2007).

330. Irene Tinker, *Alleviating Poverty*, 66 J. AM. PLANNING ASS'N, 229, 232 (2000).

331. Rone Tempest, *Breaks Many Rules; Bangladesh: A Bank Just for the Poor*, L.A. TIMES, Nov. 28, 1987, at 1.

weddings; not practice child marriage;³³² and not overspend on weddings and funerals.³³³ The underlying principle behind the Sixteen Decisions is nurturing pride³³⁴ and discipline,³³⁵ including a “deferral of selfish gratification by saving and educating children for example.” This effort is in fact not different from that taken by Japan, when it pursued culture change, in the 1800s, as I described above.

CONCLUSION

In the post-September 11 world, with development elevated into a national security issue, it is especially important to assess the field’s overarching principles. I have demonstrated that law and development has been focused almost exclusively on the formal aspects of law, on codes and legislation and courts. It has neglected the less quantifiable, though crucial, task of changing habits, mindsets, traditional ideas, or what I call, in this Article, culture. This Article advocates a fundamental shift in law and development work—a reinvigoration that focuses on culture and on culture change.

I have provided several explanations for the neglect of culture in law and development. First, other scholarly fields most directly connected to law and development also shun culture. International law, public and private, has historically avoided culture. For public international law, culture is subsumed within each state’s domestic jurisdiction. Public international law purports to articulate universal rules; as culture is particularistic, reflecting the history and tradition of individual states, public international law sidesteps internal cultural issues. Private international law, or international economic law, also disregards culture, but on different grounds. Private international law is about business and economics; its stated aim is to establish an international economic framework that is stable, predictable, and rational. To the extent that culture is generally considered “messy,” non-tangible, or arbitrary, inherited or not freely chosen, it is not equated with rationality and thus not a matter private international law wishes to address or incorporate in its domain. To the contrary, private international law would prefer that culture be “cabined” and segregated from economic deliberations.

Law and development as a scholarly field inherits the framework

332. The 16 Decisions of Grameen Bank, *supra* note 329.

333. Tinker, *supra* note 330, at 232.

334. Tempest, *supra* note 331.

335. William H. Simon, *The Community Economic Development Movement*, 2002 WIS. L. REV. 377, 421–22.

erected by international law and thus is similarly reluctant to address cultural issues. In addition, most law and development scholars are from the liberal or critical tradition and thus are all too aware of the Orientalist tradition that misinterprets and belittles non-European cultures.

My aim in this Article is to examine culture and markets and to assert that there is, in fact, a link between the two. Where certain cultural attributes retard the economic development of a country because it is economically dysfunctional, I propose that deliberate efforts be taken to alter such attributes. The Article, in other words, proposes that law and development take on the issue of culture change. This suggestion is based on a limited proposition—that if economic development is linked to culture and may be aided or impeded by culture, changing certain cultural practices and beliefs would facilitate economic development. It does not involve normative evaluations of any culture, nor does it attempt to assess the intrinsic worth of any culture (beyond the relationship between culture and economic development), nor does it preclude examination of historical and structural impediments to development.

The field of human rights recognizes that certain human rights violations are rooted in cultural traditions. Such traditions must be altered in ways that reach deeper than legislation or codification. Ratified by 179 states, the Convention on the Elimination of Discrimination Against Women, for example, requires that signatory states promote equality by passing any necessary laws to eliminate discrimination against women and to promote the principle of the equality of men and women. But it also requires states to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes.”³³⁶ Culture change—changing cultural patterns of conduct as proposed by some human rights advocates—should be actively pursued in the field of law and development.

336. United Nations Convention on the Elimination of All Forms of Discrimination Against Women art. 5, Dec. 18, 1979, 1249 U.N.T.S. 13.