Experimental Justice Reform: Lessons from the World Bank and Beyond

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Abstract

Rule of law orthodoxy—legal transplants from high- to low-income countries—has endured despite persistent critiques. A key reason for this, we argue, is the absence of positive theories of praxis that can instantiate essentially contested concepts such as rule of law. We discuss the emergence of one nascent alternative, the World Bank's Justice for the Poor program, locating it within broader turns to experimental approaches to development. In doing so, we argue that rule of law reform must be understood in the context of the politics of the relationship between development experts and the domestic political forums in and through which rules systems emerge. As such, a primary task of external agencies is to help forge and sustain such forums, to recognize the deep imbrication between the process norms of these forums and the nature of the rule of law being produced, and to ensure that the empirical foundations on which ensuing deliberations rest are both sound and accessible. We conclude with an exploration of the challenges of this approach, from methodological challenges in building an empirical foundation to political accountability concerns with respect to rule of law reformers themselves.

> Compliance with law depends most heavily on the perceived fairness and legitimacy of the laws, characteristics that are not established primarily by the courts but by other means, such as the political process. An effort to improve compliance thus might more fruitfully take a completely different approach.
>
> Tom Carothers (2006, p. 21)

> Skepticism toward *other* people's claims to spectacular theoretical discoveries is, of course, not a particularly noteworthy trait. It is, however, more unusual to develop this sort of reaction to *one's own* generalizations. . . . At some point of one's life, self-subversion may in fact become the principal means to self-renewal.
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> Albert Hirschman (1995, pp. 87, 92)

INTRODUCTION

There has been recognition, founded or otherwise, since ancient times that countries possessing effective justice systems and what we now call the rule of law were likely to be more prosperous than those that did not, and indeed that for a country (or larger entity) to attain such defining characteristics was a desirable end in itself (see Bingham 2011). Adam Smith famously declared in 1755 (two decades before the publication of *The Wealth of Nations*) that little more was required "to carry a state to the highest degree of opulence from the lowest barbarism but peace, easy taxes and a tolerable administration of justice."[1] More recently, a remarkably broad set of actors have come to agree that the primary challenge facing almost every country is building or maintaining the rule of law. Indeed, as legal scholar Brian Tamanaha has proclaimed, "No other single political ideal has ever achieved global endorsement" (*The Economist* 2008). Reflecting and consolidating these presumptions, former World Bank president Robert Zoellick declared in 2010 at a major conference that "[t]he rule of law must be at the center of the development agenda" (Zoellick 2010). Contemporary grandees of the global North—and indeed the South—have followed suit, with David Cameron (2012) declaring the rule of law a Diceyan "golden thread" and George Soros and Fazle Abed ascribing to it the status of the "lifeblood of democracy" (Soros & Abed 2012). In pursuit of this goal, an assortment of professional accoutrements—dedicated research centers, journals, conferences, data sets, global rankings, working groups, degree programs, and the like—have emerged in recent years. They give institutional form to a practice whose credentials to being a field are often challenged (indeed, often by critics who themselves constitute an important reference point for the field; see, among others, Tamanaha 2011 and Carothers 2006). As of the time of writing it is very possible that, despite resistance from a handful of countries, when the votes are tallied in the General Assembly in late 2015 some version of a global "access to justice" target may be enshrined as one of the United Nations' Sustainable Development Goals for 2030.

This general enthusiasm for "building the rule of law" as a signature development objective is matched only by the absence of a coherent track record on which it might be realized. One might imagine that an ambitious policy agenda ostensibly uniting an otherwise unlikely assortment of constituencies would be grounded in a robust foundation of theory, method, and/or evidence,

[1]The exact source of this passage from Smith appears to be a letter he wrote to clarify his views and to prevent from being plagiarized ideas that he had otherwise presented only in lectures; this letter was later cited by Dugald Stewart in his memoirs of Smith (Irwin 2014). For Smith, Irwin (2014, p. 3) writes, justice was

> more than just a means of enabling individuals to "secure the fruits of their own labor" and provide an incentive for productive effort; it was also a matter of peacefully adjudicating disputes and ensuring just relations between individuals. And such justice was absolutely essential for society to subsist at all; without the "administration of justice," society itself would disintegrate and dissolve. The administration of justice did not have to be perfect, just tolerable, and an independent judiciary was critical, in Smith's view, to ensuring that this would happen.

or perhaps a steadily expanding record of practical achievement. If anything, however, the field has been beset, from the outset, by trenchant critiques of what has come to be seen as its long-standing approach, namely "legal transplanting," in which codes and procedures from one country (usually those of a high-income country sponsoring the initiative) are introduced into another (a low-income country). Its track record has yielded, at best, a "fragile path of progress" (Trebilcock & Daniels 2008). Echoing misgivings dating back to at least the 1970s (Trubek & Galanter 1974), Haggard et al. (2008, p. 221) concluded in a recent review that

> [n]otwithstanding the passion of the development policy community for spreading judicial best practice, caution should be exercised in the introduction of an alien legal system. . . . [I]t is a grave error to think of law as a technology that can be readily transferred elsewhere. Rather than a movable technical apparatus, law is a set of institutions deeply embedded in particular political, economic, and social settings.

But these concerns have not been ignored. Indeed, highlighting and lamenting them has become a constitutive act of the field of practice. Since roughly 2000, an array of different organizations have sought to heed Carothers's call (cited in this paper's epigraph) to explore a "completely different approach" to justice reform and the broader task of building the rule of law. In this article, we do not explore why this might be the case.[2] Rather, we begin with the observation that, for these organizations, the aspirational goal has been (*a*) to explore the experience of justice-seeking from diverse perspectives, incorporating in particular the experiences and aspirations of "users" (e.g., those seeking to access a prevailing justice system), mid-level public authority, sovereign administrative authority, and transnational private interests, among others; (*b*) to help forge and protect a political space wherein locally generated evidence can inform (more) equitable contests between those representing these multiple voices; and (*c*) to engage in iterative problem-solving (as opposed to solution-selling) in response to concerns nominated and prioritized by these users (as opposed to foreign experts).[3] These shared goals underpin what we call a "new experimentalist" approach. Experimentalism itself, of course, is not new; what is new, we argue, is its particular instantiation into a set of theoretical and ontological frames rooted in transnational praxis that take seriously the inherent flaws and critiques of both development and experimentalism. In doing so it aims to produce supportable alternatives to the orthodoxy—and perhaps a basis for an alliance of heterodox approaches to justice reform. This review seeks to embody these principles in the very way it is presented: We use this review as a political space to debate between us the strengths and limits of new experimentalist approaches to building the rule of law in general, and local-level justice reform in particular.

The review proceeds as follows: First, we array the contemporary rule of law field to situate how and why space has emerged for a new experimentalist moment. Our specific focus is on suggesting why 40 years of frequent and trenchant critiques of the presumed dominant approach to implementing legal reform in developing countries has, for the most part, failed to dislodge it. We argue that the explanation lies in the absence of a theory of praxis: On the one hand, practitioners may not reach adequately for theory, but on the other hand, theorists and critics

[2]We note, however, that these initiatives are contemporaneous with—and possibly a response to—the heavy investment in rule of law reform as a counterinsurgency strategy in Iraq, Afghanistan, and other "fragile states" subject to international military intervention (see generally Porter et al. 2013, Rajagopal 2008).

[3]Our primary experience in this regard comes from the World Bank—in its work on legal pluralism (e.g., Tamanaha et al. 2012); justice in fragile and conflict-affected states (e.g., Desai et al. 2012); and the Justice for the Poor program itself (see Sage et al. 2010). This is not the forum for an assessment of the quality and impact of its operational work; rather, we focus on the ideas and forms behind the strategies of these initiatives.

somewhat ironically engage with the form of rule of law efforts without considering their function within bureaucratic and professional imperatives shaping what counts as a question and what counts as an answer. We suggest that the rule of law is an instance (albeit a glaring one) of a broader class of transactional and political problems with which such organizations have routinely (perhaps inherently) struggled. As such, any programmatic alternative must have a coherent strategy for subverting—or at least transcending or containing—these imperatives.

We next summarize recent instantiations of a new theory of praxis that we call new experimentalism, found most pertinently with respect to law in the work of Andrews et al. (2013) and De Búrca et al. (2012, 2014). Finally, we take up and exemplify the Hirschmanian "propensity to self-subversion" (Hirschman 1995) on which we suggest this mode of experimentalism might rely, structuring an exchange in which we anticipate and explore the limits of today's new experimentalist approaches to justice reform. We reflect on our own experiences with the World Bank's Justice for the Poor (J4P) program as one manifestation of an attempt to articulate and actually implement an alternative approach to justice reform within a major development agency. We explore the broader principles on which it draws, and the ways in which it is informing (and being informed by) similar reform initiatives in other fields of development practice. In doing so we use the platform of the review to exemplify the idea of an empirical feedback loop (and its challanges), designed to stimulate critical self-reflection and more robust theories of praxis. We look in particular at the role of professional subjectivity in structuring the perennial challenge of accommodating contentious political and distributional (who wins, who loses) issues when "building the rule of law" is both a means and end of "development."

THE DURABILITY OF RULE OF LAW ORTHODOXY (OR, HOW PERSISTENT CRITIQUES HAVE FAILED)

The topic of "building" or "reforming" the rule of law—the relationship between the rule of law as a historical-political ideal and the policies and programs that might instantiate it—is no stranger to the pages of Annual Reviews (see Hadfield & Weingast 2014, Haggard et al. 2008, Halliday & Osinsky 2006, Helmke & Rosenbluth 2009, Ohnesorge 2007). This makes our task much simpler, but also much more difficult. We neither need nor seek to rehash these erudite maps of the philosophical, analytic, and empirical debates that frame how we talk about the rule of law and its relationship to development interventions. However, when observing the veritable cottage industry that has arisen lamenting our inability to build the rule of law (along with the aforementioned reviews, other exemplars of this literature include Armytage 2012; Golub 2003; Peerenboom et al. 2012, pp. 308–9; Marshall 2014b), we note that they all without fail point to—and attempt to resolve—deep first-order conceptual or methodological faults, something rotten in the state of Denmark. There is much marshy ground in the field, and what small islands there are on which to build alternatives remain fragile and unmoored. For example, as the most recent Annual Review article on rule of law reform argues, all of the literature to date is "ultimately unhelpful" because of a deep foundational failing, namely "the absence of a more careful theoretical account of how law functions to achieve legal order in a way that is responsive to policy goals" (Hadfield & Weingast 2014, p. 22). In other words, the link between the ideal and its instantiation fails because we lack an adequate theory to bind them, despite many decades of work on the subject.

As a result we are required to ask why such critiques persist. Why does the field of rule of law reform seemingly remain impervious to these insights? Indeed, what work might such critiques do actually to sustain the old and failed ways of doing business, or to push policy and programming in a direction that might always already be unsuccessful (whatever such an evaluative judgment might mean)? To explore these questions, we begin by conducting a selective structural meta-review of

the literature on rule of law reform. In so doing, we shift the target of intervention, of hope and ire. Rather than develop a theory of the rule of law, or of its relationship to institutional change, we seek to set out a theory of the rule of law as an artifact within the field of development policy making, programming, and practice. This is, of course, heavily influenced by the literature on the rule of law already canvassed elsewhere. But it is also framed and directed by the literature on the practice of development.

This, we argue, performs two functions: First, it provides fruitful analytic terrain, and second, it opens up a series of new spaces for inquiry. As for the former, we explore how existing literature on the rule of law and development rightly draws on a range of material but blurs their function. We attempt to differentiate and categorize the modes of knowledge claiming made in reviews of and prescriptions for rule of law reform, clarifying three different types of function that studies of rule of law reform are supposed to perform: theory, applied theory, and theory of application. As for the latter, we draw on arguments about the role of ambiguity and contest in policy making (influenced by Bruno Latour's work) to suggest that we need to inquire not just into the value of clarifying and determining the rule of law, but into making it ambiguous and indeterminate as a function of policy making and programming. Taken together, this line of inquiry suggests the need for an approach that links both applied theory and theory of application—i.e., a theory of praxis—rather than oscillating between them as a means of producing (yet more) critique.

The Critical Canon

Any critical moves in the field of rule of law reform are plagued by foundational challenges with respect to scope and content. If the rule of law is "essentially contested" (Waldron 2002), if we indeed "know how to do a lot of things, but deep down we don't really know what we are doing" (Carothers 2006, p. 15), we cannot draw neat lines around our field (Desai 2014) even though we might believe that there is some determinate content to the rule of law itself (Krygier 2015). Indeed, some question whether or not rule of law reform is indeed a bona fide field in the absence of "a well-grounded rationale, a clear understanding of the essential problem, a proven analytic method, and an understanding of results achieved" (Carothers 2006, p. 28).[4]

As a result, many critiques of the rule of law are founded on a story of fundamental deficiency that inevitably results from—and is easy to find in a field structured around—a concept that eludes definitional consensus. The primary modality of such critiques is "taking into account": They require us to (*a*) generate more precise definitions of the rule of law by taking into account insights from conceptual, analytical/discursive, and practical thinking (respective examples can be found in Raz 1977, Humphreys 2010, and Kratochwil 2014); (*b*) take into account other genres of literature that might tell us more about the rule of law (Comaroff & Comaroff 2004, Krygier 2012); and (*c*) take into account stories about the structures and individual actors who "build" or "reform" it in particular contexts (Desai & Woolcock 2015, Golub 2003, Isser 2011). Efforts to coalesce and move forward, then, are structurally impeded by a combination of repeated first-order questioning and an inadequate consensus on conceptual foundations.

Upon closer inspection, however, we identify a structure to the field of critical argumentation with respect to rule of law reform. The Bourdieusian insights of Dezalay & Garth (2002, 2010, 2011, 2012) suggest that the rule of law reform field is constituted by the deployment of pairs of arguments structured around theory and practice as a means of struggling for position (see

[4]See also Tamanaha (2011, p. 220), contrasting Peerenboom (2009), for whom the ambiguity at the core of the field is a strength, not a weakness.

also Desai 2014, Kennedy 1991). These pairs of arguments seem to be ordered around poles that we might call theoretical lament and practical lament. Both poles have at their core an analytic agreement that rule of law reform is in essence conceptually inadequate, inconsistent, and indeterminate, as well as an unarticulated normative consensus that rule of law reform is highly impoverished as a result. Between these poles, the units of analysis and languages of lament differ from critique to critique. Some focus more on concepts of the rule of law, often in the vernacular of political and legal philosophy and political science, or drawing on other vernaculars (e.g., game theory) to intervene in a political-philosophical debate (notably Hadfield & Weingast 2014, Haggard et al. 2008). Others focus on why a particular concept of the rule of law is not instantiated by the global machinery designed to do so, often in the vernaculars of organizational and discourse analysis, as well as legal anthropology and sociology (Halliday & Osinsky 2006, Ohnesorge 2007).

Along this basic spectrum, we order the field so that we can distinguish between three types of critical intervention:

1. Theory. These critiques draw on theories and concepts of the rule of law. At the fictional terminus of this pole, we might engage with the classic texts to which many concerned with rule of law reform refer [e.g., Dworkin 1986, Fuller 1964, Hart 2012 (1961), Raz 2009, Weber 1947] to rework debates on the rule of law as, for example, negative/positive, instrumental/intrinsic, or formal/substantive. At this pole, we might see arguments for some coalescing core of the rule of law (Tamanaha 2004). These commit to the enduring worth of the rule of law (Thompson 1975), acknowledge its messy contestedness (Manderson 2012), and in full knowledge of both continue a struggle to find meaning (Selznick 1999, Sen 2006).

2. Applied theory. At this level, critiques draw on the abstract and theoretical in a dialog between positive and normative. They either undermine the validity of the concept by exposing it to the fractured Real [for example, through relativistic invocations of "context" at the micro level (Isser 2011, Tamanaha 2011) or through articulations of global *dispositifs* functioning to produce and maintain the concept in the face of internal inconsistency and external injustice (Duffield 2007)] or draw on it as a cure for those fractures and their normatively unpleasant impacts (for a sober version of this, in full recognition of social difference, see Krygier 2012). They tend to operate on two distinct levels of scale: the application of theory at a highly abstract or generalized level [for example, the rule of law as the handmaid to global capital (Marks 2000)] or at a level of individual particularity from which normative prescriptions are gleaned and generalized (e.g., Maru 2006).

3. Theory of application. At the fictional terminus of this pole, these critiques draw on literature that engages with development—or externally driven institutional change more generally—as a practice (Pritchett & Woolcock 2004). In so doing, they must stabilize their argument with reference to a theory of the rule of law (Kleinfeld 2012, Magen 2009, Trebilcock & Daniels 2008), often following a brief canvassing of the theoretical literature. Others find a fixed point by moving away from theory. They shift emphasis from the uniqueness of law or the particularity of law as a social institution, turning instead to the ins and outs of expertise (Kennedy 2006, Santos 2006), policy making, and programming (Armytage 2012, Carothers 2006, Desai & Woolcock 2015, Desai et al. 2012). At a new governance-inflected extreme (identified by Cohen 2008), this inward turn to practice might manifest itself in narratives and analysis of bureaucratic form and operation, with little to say of the substantive politics of reform.

Toward a Theory of Praxis of Rule of Law Reform

So far, we have argued that the highly fluid and reconfigurable nature of the rule of law reform field is at the heart of the difficulties inherent in moving forward and developing new approaches. Clearly, any attempt by us to order the field of rule of law reform is susceptible to the same dynamics. However, we believe that the mode of ordering outlined above is worthwhile as both an analytic and normative intervention. Normatively, we believe that the field has struggled as it has not found an effective way to bridge applied theory and theory of application—the former being a way to stake out a clear, often normative position on the rule of law, and the latter incorporating not just determining practices but undetermining ones as well. In other words, no theory has effectively linked the policy value of making the notion of the rule of law more ambiguous to attempts to define and instantiate it (Latour 2004, Mosse 2004). Many of the laments for the field have noted the paucity of good theoretical thinking on the part of implementers (Kleinfeld 2012 offers a useful summary); we would add to this the absence of a robust political economy of (non-)implementation (Mosse 2004) on the part of (applied) theorists. This, we believe, is important—where theory and applied theory have an anxiety of content, seeking to coalesce around and instantiate a rule of law, a theory of application has as part of its toolkit moves to stoke that very anxiety, strategically making the rule of law less clear and less well defined. Any adequate attempts to stake out an "applied theory of application" of the rule of law will thus have to engage with the dialectic between determining and undetermining, between the policy value of clarifying and obscuring.

Analytically, the fluidity between our three categories means that critiques can assert that they have a theory of application when they actually provide theory or applied theory (and vice versa). This helps us unpick how knowledge claims within the field inhibit the production of that missing bridge. Hadfield & Weingast (2014, p. 21) presume to offer in their review the missing microfoundational account of the rule of law needed to rectify the "gaps" that have led to "two decades of largely failed efforts to build the rule of law in poor and transition countries and continuing struggles to build international legal order." Indeed, they present their practical bona fides by including a subsection on applied theory of the rule of law (a critique of the definitions used by the World Bank, the World Justice Project, and others), enabling them to conclude that there are "several problems with the applied world of rule-of-law assistance, including its tendency to use the concept as a cover for projects to achieve particular political goals or establish specific institutions" (p. 37). Yet their new institutionalist account is highly limited on the applied side. It is open to critiques from applied theory—the absence of any recursive relationship between the production of subjectivity (that is, a way of producing the subject as someone who makes meaning of the world) and the "classifications [i.e., legal/illegal] emanating from the [legal] institution" (Gauri et al. 2013), along with the absence of power more generally from their account. And it is certainly lacking in a theory of application. In fact, the authors suggest as much: "We do not yet have an answer to the question of how to build legal order in places in which it does not currently exist" (p. 23).

More generally, separating the three might help us link applied theory and theory of application. We might identify, for example, that seemingly systematic critiques of rule of law reform from the Foucauldian or postcolonial traditions (Pahuja 2004, Rose & Valverde 1998) exist as applied theory but do not help us speak to the application of reforms by the system—as "'new functionalist' sociology…[it] substitutes false objects with real ones—development with social function (for instance, the extension of bureaucratic power)—and therefore destroys its object. Once the substitution is complete, there is nothing to say" (Mosse 2004, p. 644, citing Latour 2000). At the same time, in seeking a general theory to explain the stabilization, consequent

application of, and frequent collapse of something as unstable as the rule of law (Latour 2004), we might risk losing something that is particular or special about the law in the heady theoretical mixture of the sociology of knowledge, bureaucratic function, and expert style (Donaldson & Kingsbury 2013, Frederickson 2000, Hull 2012, Weber 1968).

It is within this tripartite space—constructing an applied theory of application of rule of law, acknowledging the dialectic between determining and undetermining moves, and allowing space for the particular value of law—that we situate the lessons from J4P and the turn to new experimentalism. We argue below that new experimentalism—a process of structured experimentation with a transnational component and a role for development professionals—attempts to produce a theory of praxis and is designed as a framework for concretizing and unmaking (or making fluid) in equal measure. It is intended to engage with development problems that are essentially socially contested and yet have to instantiate real power and authority (public administration, governance)—which we take as fundamental to any particularities of law.

THE EMERGENCE OF THE NEW EXPERIMENTALISM

If a single characteristic seems to define, implicitly or explicitly, the current vanguard of rule of law reform in developing countries, it is an emphasis on taking context and the rules of the game seriously (see Sage et al. 2010), doing so by adopting an experimental approach to "finding and fitting" solutions that respond to locally nominated and prioritized problems.[5] Such an approach is juxtaposed and legitimated against orthodox approaches in which universal best-practice solutions (i.e., the legal texts, procedures, and institutional structures that prevail in developed countries) are imported in response to problems determined by external experts. Faced with the challenge of building or enhancing a legal system in the aftermath of a civil conflict, for example, orthodoxy as funded by international donors may focus on implementing constitutional reform, redrafting legal codes, overseeing elections (to deem them sufficiently free and fair and to thereby imbue the ensuing domestic political apparatus with the legitimacy needed to implement substantive legal reforms), building courthouses and jails, training police officers and prosecutors, and upgrading administrative systems (e.g., providing the latest software for tracking cases).[6]

Although such an approach to legal reform might sometimes have its place, its track record of effectiveness is, unfortunately, far from exemplary. It has been faulted, early (Trubek & Galanter 1974) and often (see Carothers 2006, Haggard et al. 2008, among others), on the grounds that it routinely fails to achieve its stated goals, and yet for the most part it has successfully withstood each generation's critical assault. Two factors might explain this: first, that orthodoxy's durability in the face of such persistent critique has itself been inadequately explained (suggesting that factors beyond orthodoxy's notional effectiveness must be addressed if it is to be superseded), and second,

[5]The broader framework on which such approaches rest is articulated in Andrews et al. (2013). Similar approaches to institutional reform are outlined by, among others, Booth & Unsworth (2014) and Levy (2014). Early examples of this approach include work by Rondinelli (1983).

[6]Such a description aptly characterizes the initial response to the civil war in the Solomon Islands (see Craig & Porter 2014, Dinnen 2014) and to building a state (essentially from scratch) in newly independent South Sudan (Larson 2013). Marshall (2014a) documents one frontline practitioner's deep frustrations with implementing such strategies in various fragile states (including South Sudan and Afghanistan). Similar laments abound, highlighting the persistence of and frustration with modernization projects on law and security in postconflict contexts, as well as their attendant rationalities. For a flavor culled from across the political and analytical spectrum, see Mani (1999), Rajagopal (2008), Pouligny (2005), Sannerholm (2007), Brinkerhoff (2005), Samuels (2005), Stromseth (2007), and Suhrke (2007). Thoughtful extended reflections on the strengths, weaknesses, and inherent limits of such top-down political and legal "interventions" are provided by Stewart & Knaus (2011).

that a programmatically compelling alternative to orthodoxy has never gained sufficient scale or traction to dislodge (or at least seriously compete with) it.

A recent set of contributions seek to squarely address both these factors. Noting that the orthodoxy characterizing legal reform efforts has its direct counterpart in education, health, and public financial management (see Andrews 2013, Pritchett 2013), Pritchett et al. (2013) argue that a key dynamic underpinning orthodoxy's persistence in the face of indifferent performance (at best) is its cultivation of a pernicious form of "isomorphic mimicry"—i.e., the adoption of the forms of other functional states and organizations that camouflages a persistent lack of function. In other words, legal reform orthodoxy creates the illusion of success. It does so in two ways: by merely changing what legal systems look like without altering what they can actually do, and by having as its core metric of success not the attainment of substantive outcomes but the timely, process-compliant delivery of inputs (laws passed, people trained, computers provided, buildings erected). All of these tasks, importantly, can be funded, procured, and implemented in ways entirely consistent with bureaucratic imperatives back in the capital cities of donor countries: They will reliably generate a seemingly impressive array of discrete deliverables that can be readily photographed, counted, tracked, aggregated, and compared. From both an accounting and accountability perspective, such tasks raise few red flags and, after a time, enable senior managers to present a coherent (even compelling) narrative to skeptical politicians and voters of how public resources were spent in sensible ways in response to a clear and present development challenge.

For Pritchett et al. (2013), isomorphic mimicry is pernicious because it delegitimizes the very idea of reform when inevitably the reformed systems prove unable and/or unwilling to carry out the tasks demanded of them and thus squander precious time, effort, and resources. But for bureaucratic systems that measure an intervention's success by the faithful delivery of inputs and compliance with procurement rules, the subsequent failure of the outcomes barely registers. The core logic of orthodoxy is so compelling from a public management standpoint that it is effectively impervious to change. In such circumstances, development resources can continue to flow for years, concerns about corruption can be genuinely minimal, and credible completion reports can continue to be written, all without any real improvement in the capability of the legal system to respond to even the everyday concerns of everyday citizens (let alone more complex and contentious tasks, such as taxation, regulation, and land reform).

In response, Andrews et al. (2013) draw on the language of institutional experimentation and design to recognize the contingency of policy and its implementation (and indeed, that the space between the two ought to be problematized or collapsed) and build a process that maintains the possibility of constant rearticulation of means and ends. They call this Problem-Driven Iterative Adaptation (PDIA). They articulate four principles:

1. Local Solutions for Local Problems: transitioning from promoting solutions (determined by external experts) to allowing the local nomination and articulation of concrete problems to be solved.
2. Pushing Problem-Driven Positive Deviance: creating environments within and across organizations that encourage experimentation and positive deviance, accompanied by enhanced accountability for performance in problem solving.
3. Try, Learn, Iterate, Adapt: promoting active experiential (and experimental) learning with evidence-driven feedback built into regular management and project decision making, in ways that allow for real-time adaptation.
4. Scale through Diffusion: engaging champions across sectors and organizations who ensure reforms are viable, legitimate, and relevant.

These principles overlap with the project of De Búrca et al. (2012, 2014). They articulate an emerging approach to transnational governance, all of the examples of which have a five-part ideal type process (2012, p. 780):

1. openness to participation of relevant entities ("stakeholders") in a nonhierarchical process of decision making;
2. articulation of a broadly agreed common problem and the establishment of a framework understanding setting open-ended goals;
3. implementation and elaboration by lower-level actors with local or contextualized knowledge;
4. continuous feedback, reporting, and monitoring; and
5. established practices, involving peer review, for regular reconsideration and revision of rules and practices.

For present purposes we frame this general approach new experimentalism. New experimentalist approaches share an emphasis on hard, deeply contested problems and the concomitant belief that the gravamen of their resolution lies in letting these contests play out in a "good"—generally institutionalized—way. They are thus clearly indebted to theories of networked forms of new governance from the late 1990s and early 2000s, including "democratic experimentalism" (Dorf & Sabel 1998; Unger 1996, 2000) and "collaborative governance" (Ansell & Gash 2008, Freeman 1997). We frame the experimental dimensions of these theories as the old experimentalism, rooted in a pragmatic sensibility emphasizing local solutions, the possibilities of public-private partnerships, and deliberative production and formation of interests (Simon 2004, pp. 173–98).

The old experimentalism was subject to several critiques, the most trenchant of which pointed out the grave nature of power asymmetries that could not be assumed away.[7] The old experimentalism, in this view, relied on "the bracketing of self-interest and distributive claims to focus attention on common interests and values" (Simon 2004, p. 182, citation omitted). It is, then, important that the new experimentalism emerges out of a critique of the practice of global governance and development. In making the scalar move to incorporate the global level into the experimental process, new experimentalism brings to the fore a series of global institutions and agents designed to produce allocations of power, from legal regimes of sovereignty to the political power of the technocratic expertise of global governance actors. The new experimentalism, then, recognizes the vexed issue of balancing a recognition of the possibilities of political agency with a need to take seriously its structural conditions. At its best it should seek to avoid the "bypass[ing of] the most desperate and the most deviant" (Simon 2004, p. 174) by introducing a theory of praxis of global governance as a means of leveling the playing field (or at least striving to make it a little more level than it would be otherwise).

For both Andrews et al. (2013) and De Búrca et al. (2012, 2014), global governance actors alter the playing field in two ways: stewarding an inclusive process and ensuring its equitable function through the use of feedback loops of data. Taken together, these are a theory of political agency on the part of global governance actors: These actors are supposed to be highly flexible in their notion of rules and design, and they are supposed to produce and use knowledge of local conditions to ensure that everyone who needs to be is incorporated into the process, taking into account their relative power. The ontological burden is diffused—where the old experimentalism had a pragmatic orientation when describing the nature of its participants (Sabel 1993), the new experimentalism incorporates this but also produces an image of the global governance actor

[7] Rodríguez-Garavito (2005); see also Simon (2004), even though Sabel (1993) attempted to bracket some power asymmetries self-consciously as part of a normative and ontological project to claim an ideal mode of interaction between good and creative people.

or the development professional as largely nonideological (with some commitment to liberal process norms), muscularly critical or skeptical, and able to produce information and translate it into politically salient action. In other words, s/he reflects the Gramscian Modern Prince or institutional entrepreneur (Levy & Scully 2007), choosing to translate some political contests into institutional strategy through the use of "evidence."

New experimentalism thus places a great deal of stress on the figure of the expert as a means of responding to the political critique of old experimentalism and the technocratic/isomorphic critique of complex development problems. Analyzing this dimension is not without its challenges. How might such a professional consciousness come into being? How might it be institutionalized, and what are its ramifications? And as a first-order question, how is it possible to write assertively and affirmatively about a "propensity to self-subversion" (Hirschman 1995)?

INSTANTIATING NEW EXPERIMENTALISM IN RULE OF LAW REFORM: A DIALOGICAL CRITIQUE

In this section, we seek to embody the practices of evidence generation, deliberation, and feedback loops. We produce the process of lesson learning and internalization of critique (for good or for ill) on which the appeal of experimentalism rests by engaging in an exchange about the merits and limits of the experimentalist enterprise in rule of law reform and development practice more generally. We draw on our experiences, including with J4P. A group within the World Bank whose work has been funded by the Bank and a range of donors, J4P has worked in twenty countries alongside both justice and (mostly, by design) mainstream development interventions, employing perhaps 50 people since its beginnings in Indonesia in 2002. Michael was one of the cofounders of the program; Deval has worked with it on and off since 2009 and set up a justice and conflict program at the World Bank along similar lines.

Deval Desai: The idea of experimentalist approaches rests on the construction of a deliberative space in which to generate, assess, or disseminate knowledge; articulate ends; and keep disparate people moving toward a moving target. In other words, experimentalism should produce and internalize its own critique. In light of that, I thought it would be important to have the critical analysis of experimentalism in law take place as a discussion—a different format from orthodox academic style—as a way of moving from experimentalism as a theory of praxis to a critical praxis. (Moreover, I think it's poignant that this exchange is taking place between two people who are development "experts" or "professionals," but I'll get to that later.)

Michael Woolcock: Okay.

Deval: Experimentalism as we've set it out lays the blame for failure at the feet of structure (i.e., bureaucratic imperatives and the incentives to which they give rise) and seeks to reclaim some measure of agency on the part of development professionals and "end users." In other words, experimentalism wants to shift the balance away from closure to openness, from templates to possibilities of the new. As a result, we development professionals are meant to be responsive, political, smart facilitators who help people articulate what is important; we try out different pathways to get there, and we evaluate what works and doesn't along the way.

I think you'd agree that there's a profound challenge in scaling up from small, flexible institutional spaces to formalizing the processes by which flexibility and responsiveness get produced. This was and remains a challenge for J4P—and for others, such as the current attempts by the UK's Department for International Development (DfID) to roll out a justice sector reform project influenced by PDIA principles. Fundamentally, we have to deal with the paradox that we wanted to structure a high degree of agency, to institutionalize creative disorder and relegate destructive disorder. We want to institutionalize creative disorder and relegate destructive disorder.

You often emphasize in your work the bureaucratic fight, the institutional imperatives, within organizations such as the World Bank. But how much of this actually and simply relies on getting the "right" people on board? We might talk about new ways of doing development, new structures, new processes, but are we actually talking about finding a group of people who share a similar professional sensibility, an informed skepticism structuring their engagement with theory, method, and practice? How did you see it?

Michael: Yes, getting the right people on board was (and remains) absolutely crucial. But the criterion of what exactly constitutes the "right" people has varied over time, as the nature and extent of our engagement with the rest of the World Bank (and our counterparts in client governments) have changed. In my experience, however, it was essential throughout this evolving process to have people who not merely understand the core principles by which we operate but are willing and able to negotiate the passage of those principles into activities supportable by operational colleagues and those in more senior management positions. It takes a certain type of skill set and a certain type of team to create an opening for something new within a large and powerful bureaucracy, and then to fill it with substantive, useable content; it takes a different type of skill set and team to take that initial "something" and turn it into something bigger—to consolidate and "routinize," as Max Weber would say. In my experience, through a combination of good luck, good strategy, and brave support (by donors, counterparts, and our immediate managers) we've been able to attract an evolving group of extraordinary people who've had both these skill sets. But the bureaucratic constraints are real and they remain in place, even if we've been able to show that large organizations aren't always the "iron cages" (Weber again!) they appear to be. Bureaucratic entrepreneurs figure out where the potentially fruitful openings in those structures are located and then seek to use the organization's strengths to push a new approach.

Having said that, I think it's neither possible nor desirable for J4P or new experimentalist projects like the DfID one to become a "Walmart" within development institutions: To switch metaphors, we've figured out how to design a new piece of software, but the operating system remains largely the same as ever, so there's only so far we can go. The goal should be to influence at scale rather than operate at scale, to both ride and create a wave of change—within development institutions and beyond—about what is thinkable, sayable, and doable regarding how external agents (and agencies) engage in local justice reform, and articulating the intellectual foundations on which this approach rests. Given orthodoxy's erstwhile dominance in this field, I like to think that the advances we've made in these areas are nontrivial accomplishments.

Deval: Experimental groups might work well as an insurgency—as a normative foundation they might say they are complementing the orthodoxy while gently trying to shift it. As an insurgency, the challenge is strategy and tactics. But what happens when the insurgency takes over, or at least transitions from a position of defense to one of offense? For this to work, is the production of a different individual professional sensibility and collective professional consciousness required?

Michael: I think the connotation of "insurgency" or "radical agency" is too strong; I've never regarded what I'm doing in that frame, even if some may have occasionally perceived it that way. On the contrary, pretty much everything I've tried to do in my career at the Bank is based on mainstream social theory and social research methods—it only seems unusual if you've never heard of Charles Tilly or Barrington Moore or Albert Hirschman or Karl Polanyi! All these thinkers stress how contested institutional change inherently is, how economic success (let alone failure) can shift the balance of power between distributional coalitions and lead to profound changes in group identities, individual aspirations, and political loyalties. And with that change and contention goes the need for rules to manage it. So J4P, for example, is not based on some esoteric ideas; it merely asks that the scholarship—the theory and methods—that has long addressed issues pertaining to institutional change be taken seriously. If development agencies had actually done that along the

way, it's hard to see how we would have ended up with rule of law orthodoxy. But you have to understand why we're stuck with what we have if you want to change it, so in that sense we are certainly calling for a different approach. Making our approach less strange, less intimidating, and in fact quite normal to those unfamiliar with this branch of scholarship is a key part of what I think I do. So my task is as much pedagogical as anything else; it's about challenging the "disciplinary monopoly" (Rao & Woolcock 2007) at the Bank, and elsewhere, that otherwise doesn't realize that it is one, with all the attendant inefficiencies economists otherwise associate with monopolies.

Take my experience with J4P. J4P was based in the Legal Vice Presidency from 2005 until June 2014, which is an administrative rather than operational part of the Bank—that is, it has only a handful of its own discrete projects.[8] Personally, I think J4P had some success in bringing out the justice aspects associated with "mainstream" operational projects—resource extraction, community development, land reform, infrastructure—and bringing a measure of both analytical framing and local empirical content to pervasive development issues (such as legal pluralism and the multiple barriers confronting most poor people seeking justice). Since July 2014, J4P has been relocated into the Governance Global Practice; this was a choice to move to a large and overtly operational part of the Bank. It remains to be seen how it will fare in this new institutional space.

Has all this required a change in our professional sensibilities? Perhaps, but I think they've evolved as our individual and collective experience has matured. We began this enterprise when we were relatively young, and no doubt a measure of "youthful enthusiasm" was needed to sustain the energy required to get things started. Many of the founding members of J4P are still with the Bank in some capacity, but to this day I think we all strive to maintain a healthy balance between being legitimately proud of what J4P has done and not letting the marketing department get too far ahead of the production department: J4P is different by design, but that almost inherently consigns it to perpetual marginal status. If a broader sea change occurs, it will be because historical events, new political imperatives, and a global social movement combine to make it possible. We can't do much about the first two, but helping build a global social movement is definitely the next frontier.

Deval: You call it a global social movement, but this new experimentalist mode is about deliberation in the context of technocracy. And the role of the technocrat is (*a*) institutional design and (*b*) setting a shared method or language of talking about problems and evaluating solutions. As a result, everyone has to be (*a*) skeptical about everything; (*b*) good enough at everything methodological—be "mixed-methods enough"—to simultaneously be a knowledge producer, broker, and consumer; and (*c*) adept enough at process design to ensure productive deliberation—that is, to ensure there is enough of a shared basis and language for discussion without it being overdetermined—and thus a process that can become any shape over time. This places a lot of power and responsibility in the hands of the professional. S/he has a great deal of choice regarding which language counts and does not, what forms are effective and are not, what is speech and what is not. Who would want to be a rule of law reform professional in this world?

Michael: All professionals are members of epistemic communities that jealously guard the contours of acceptable speech and practice. The disciplines discipline, and the dominant discipline at the Bank is economics, even (or especially) when the organization as a whole is wrestling with topics like "good governance" or "institutional reform." And yet, my experience of justice reform in

[8]Most of the Legal Vice Presidency's work is concerned with ensuring the coherence, veracity, and enforceability of the contracts and loan agreements established between the Bank and a given government, and with providing legal advice. It is only quite recently that it has found itself in the business of actually engaging in explicit programmatic attempts to enhance the quality and scope of a given country's justice system, or the justice aspects of orthodox development projects, such as health (see Hall et al. 2014).

the Bank has been of an "authorizing environment" (to borrow more PDIA language)—whether in Washington or in country offices—that permitted and enabled (if not required) different language and practice. That said, I suspect this dynamic played itself out somewhat differently in different places.

In Washington, the challenge was to raise funds, to prepare summary reports for funders, to structure a broad narrative that conveyed what made this sort of justice reform work distinctive (but not too distinctive!) with regard to how it was engaging with key development problems and policy agendas, and to find both country directors and sector specialists who were enthusiastic about (as opposed to merely tolerant of) the people and work. Doing this well, especially when one is starting out and the "compelling evidence base" on which to make claims is of necessity rather thin, requires not only a deft facility with Bank discourse and scholarly research but also a capacity for forging strong social relationships, asking senior colleagues to make a calculated wager that our diagnosis of justice problems and our proposed process for generating solutions were worth backing.

The challenge for in-country staff, by contrast, seemed to be building social and professional relationships of mutual utility with country office colleagues and government counterparts, yielding usable and valued insights for country teams, and making a credible business case for the work. At the same time, to combine this with a serious engagement with context means investing—over many years—in people with the necessary linguistic, cultural, and political knowledge, while committing to the procedures and standards of contemporary social science research. Although frontline staff might not worry too much about translating all their work into "development speak" for Washington purposes, in their own milieu they're explicitly being asked to mediate between very different vernaculars.

Deval: As we come to scale and move beyond being counter-hegemonic, institutional strategy is no longer enough. We have to prise apart means from ends—we're being asked to articulate our political commitments as well as our strategic moves. As a result, we need not just a theory of praxis but a critical praxis. And given the emphasis experimentalist approaches place on the individuals involved, we might need to shift from institutional structure and politics to the production of professional consciousness and technologies of the self. I know you see a chain from the graduate courses that you teach at university to the emergence of a group of development professionals with a particular sensibility toward practice. We might also have to focus more on hiring practices, the gut feeling of hiring managers and so on. But these are hard to pinpoint, to render legible, and to make accountable. How do you see this professional accountability happening in a new experimentalist world?

Michael: Anything of consequence will happen through a global social movement; one course, a few articles, and a single program aren't going to shift an entire enterprise and the logic on which it is based. But the dynamics you and I have explored in this paper don't just apply to law; my contribution to the PDIA agenda (Andrews et al. 2013) draws much of its impetus from the fact that the kinds of problems we find in justice reform infuse all manner of mainstream development interventions. So the broader movement we are cultivating, "Doing Development Differently," transcends law, transcends the World Bank, transcends a single country or region. This is being done, as it must, in partnership with a host of other development organizations and committed individuals, and doubtless its effectiveness will play out like most other social movements, which is to say, its fate is unknown.

Deval: You said before that your experience at the Bank involved asking some senior colleagues to make a calculated wager on a different approach. It's pretty challenging to make a calculated wager the basis for rule of law reform. Experimentalist approaches address this by providing a safety net of more information, knowledge, context. There's always research going on

for better targeting, and more evolution of programs. The process is, crudely, an ongoing set of evidence-based leaps of faith (whatever evidence might mean). But looked at another way, this process is an articulation of a balance between reinvention and prescription, openness and closure, principles and rules. And as any lawyer knows, that is code for law. The process of reform will in some ways be an expression of its ends—the rule of law. And if we intend experimental processes to make legal systems, might they always already be biased toward flexibility? For example, we might keep laws vague and leave a lot of regulatory discretion on the books, to be filled with monitoring and evaluation-based processes. Who wins and loses from that? And doesn't managing that balance of openness and closure place more stress on professionals—that they might not be able to resolve through the doxae of their professional community?

Michael: It probably does place a certain type of stress on people, but so does finding oneself working on an otherwise noble-sounding venture that one knows won't work. But I think it helps that experimentalism in justice reform isn't really the business of "making" laws; it's the business of crafting rules systems, some of which may indeed become laws. One of my inspirations is the Cambodian Arbitration Council: What eventually emerged from the CAC ended up having the force of law, but the starting point was focusing on the crafting of a political space wherein more equitable contests around labor disputes could take place (see Adler et al. 2009). It is this equity aspect, and the opportunities it afforded to different stakeholders to learn how to arbitrate, that we need to give more attention to. Much of what we regard as "legal work" in developing countries, and in poor communities in particular, is actually prelegal work: namely, creating conditions under which agreements that (may) come to have the force of law are (and are perceived to be) legitimate.

Deval: If we take the consciousness of the professional seriously, do we need lawyers—who understand the language and value of legal closure—to help us, or is it sufficient just to have anthropologists and social scientists? How important is a plurality of professional consciousness in the context of pushing against a large development "machine" like the World Bank?

Michael: I'm not a lawyer, but professional credibility in the justice domain often requires formal legal training. But legal training, even if necessary, is also very insufficient; in my experience, we need people who are willing and able to spend long periods (i.e., several years) in the field, to conduct intensive social research, and to communicate to diverse audiences. J4P actually began in the Social Development unit in Indonesia. It's had several bona fide anthropologists on board at various points, and they've been great, but the battles in which J4P engaged primarily required lawyers who could do social research rather than social researchers who could talk law. Even if it seems that what one studies in law school hardly prepares one at all for experimentalist-type work, the most credible advocates and spokespersons for change are heretical lawyers—within the fold, but nonetheless espousing (and showing) another way.

CONCLUSION

Broad agreement regarding the desirability of building the rule of law is unmatched by a coherent theory of how it might be accomplished or a corresponding record of policy achievement. Laments of this nature have been a mainstay of the field for at least the past forty years; indeed, rehearsing these laments, and thereby questioning whether the rule of law even warrants the status of a field, has itself become a marker of one's membership in it. In this review, we have sought an explanation of why orthodox approaches to justice reform have proved so resistant to these vehement and persistent critiques. We have argued that critiques lack an adequate theory of praxis. They must take seriously the combined forces of the deep attractiveness to broad political constituencies of building the rule of law as a policy agenda, combined with the inherently contested nature of "the law." This dynamic renders it ripe for isomorphic mimicry—that is, of privileging form over

function, of enabling ample resources to continue being provided for a method (legal transplanting) of dubious substantive utility, counting as success the provision of material inputs (buildings, computers), the dissemination of best practice legal codes, and fidelity to procurement rules. Within this dynamic, a developing country can pretend to engage in justice reform and donors can pretend to believe that reform has actually occurred.

Beyond articulating this dynamic, however, we have also sought to engage with the ideas underpinning an expanding movement of scholars and practitioners who have sought to instantiate a supportable alternative to rule of law orthodoxy. Drawing on but expanding an earlier experimentalist approach to supporting institutional change, this movement seeks to embed local research teams within a domestic political space wherein a range of stakeholders can nominate and prioritize their justice concerns, and thereby work iteratively toward specific solutions to specific problems. Even so, its primary goal thus far has been to influence at scale rather than operate at scale, mindful that such an approach can only go so far within our prevailing aid infrastructure (or "operating system"). But, ever cognizant of law's essentially contested nature, we have sought here to uphold our normative commitment to self-subversion by subjecting some of the legitimate concerns about new experimentalist approaches to justice reform to a dialogical critique. Such approaches are the second, rather than final, word in justice reform, and as such much remains to be explored and learned. It will always be thus. It is in this spirit that we invite others to continue the conversation.

DISCLOSURE STATEMENT

Deval Desai is *inter alia* a Justice, Conflict and Governance Specialist at the World Bank and has worked with the Justice for the Poor program on and off since 2009. Michael Woolcock is Lead Social Development Specialist with the World Bank's Development Research Group and cofounded the global Justice for the Poor program in 2004 (after its initial inception in Indonesia in 2002). Otherwise, the authors are not aware of any affiliations, memberships, funding, or financial holdings that might be perceived as affecting the objectivity of this review.

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