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ACCOUNTABILITY IN THE “BRAVE NEW WORLD” OF DEVELOPMENT*

Paul H. Brietzke**

Rip Van Winkle, whose experiences are echoed in myths throughout the Third World, slept for decades and awoke to find a New York State he never made or even knew. If we imagine a Rip who became an expert (always a risky thing to become) in development before snoozing for, say, two decades, he would now awake in a Brave New World:

Command economies are unworkable; only free markets can provide incentives for growth and development. That is today’s conventional wisdom as Poland, Hungary and even the Soviet Union lurch toward private enterprise. It has been the rationale for many years as the International Monetary Fund along with the World Bank has required the governments of poor countries to liberate their markets as a condition for continuing aid.¹

It was almost two decades ago when, learning that I was researching law and development in Ethiopia, Professor Tony Allott remarked: “little law and less development.” His comment stung my (then-)youthful enthusiasm, but it is perhaps a fitting epitaph for the 1970s and 1980s.

The often-bitter fruit of a Brave New World has grown out of two decades of disenchantment with developmental failures worldwide, failures that are both causes and effects of a militant neo-conservatism. One book with a title which could describe the “development” efforts in many places, *Tropical Gangsters*, shows how Equatorial Guinea became

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1. Wallich, *The Analytical Economist: Markets Unbound?*, Scientific American, Nov. 1989, p. 80. I hope the reader treats my pun as intended; Aldous Huxley’s *Brave New World* (1932) was not a very nice place to live, chiefly because politicians and technocrats were able to convince most ordinary people of its desirable inevitability.

one of the most hopeless economies on earth. Taken one by one, many of the ministers he dealt with were both honest and competent, Klitgaard says; but their country's history, and their degrading relationships with international aid organizations tempted nearly all of them to act in their own interests first. In Japan, those who have sacrificed their own interests for the nation's welfare have been seen as cultural heroes; whereas in the Philippines they have been easy prey for the likes of the Marcoses.²

Worldwide, "ill-intentioned individuals can always be found to buy the honesty of honorable politicians and bureaucrats," but the problem grows more serious when a government intervenes more extensively in the economy and society.³ A 1986 ILO Survey of Ethiopia found an arrogance of power which exists throughout the world: "The interaction between the community and the government appears . . . to be bureaucratic in style, dominating over people" and stifling initiative.⁴ Goren Hyden concludes that, by hiding from the State in their "precapitalist economy of affection," peasants were able to thwart the rural transformation on which Tanzania (and many other countries) staked their reputations as well as their economies.⁵

Examples could be multiplied endlessly. There has been a worldwide decline in what might be called a developmental morale; diminished opportunities and prospects have fomented increased rent-seeking behavior (the extraction of unwarranted benefits from government) almost everywhere; and a rising sense of injustice and frustration has contributed to the policy failures that eroded the credibility of policymaking processes. Elite smugness and insecurity are both on the rise — a combination which is dangerous for the poor and powerless. Unrealistic planning targets have been poorly implemented. "Growth pole," "basic needs," and "institution building" (creating an overlay of

2. Fallows, *Wake Up, America!*, *New York Review of Books*, Mar. 1, 1990, p. 14, discussing Robert Klitgaard's *Tropical Gangsters*, forthcoming from Basic Books.

3. H. Lepage, *Tomorrow*, *Capitalism* 34 (S. Ogilvie, trans. 1982).

4. J. Harbeson, *The Ethiopian Transformation* 199 (1988) (quoting the ILO).

5. *Id.* at 11, 202, 228 (discussing G. Hyden, *Beyond Ujamaa in Tanzania* (1980) and *No Shortcuts to Progress* (1983)).

new institutions which work little better than the ones they supposedly replace or circumvent) strategies have been poorly designed and/or blocked politically. Mechanisms of accountability have regularly failed in their countries of origin, as well as in the Third World countries to which they were transplanted: bills of rights, judicial review, ministerial responsibility to parliament, separation of powers, socialist legality, democratic representativeness, committed cadres representing the proletariat, and so forth.⁶

It is difficult to generalize, but the rising trend is for law to take a back seat in a "new" growth economics that is a recycling of the "old" growth economics only in part: "devaluation, removal of [some, politically less sensitive] subsidies, privatization, cutbacks in social services and [in some countries] mass sacking of government employees."⁷ Insurgent strategies like "another" development and the "right" to development seem all but swamped by this neo-conservatism, which reinforces right-wing intuitions with counterfactual speculations and the powerful logic of a neoclassical economics.

While this theory has definite biases, against the poor (people or countries) and governmental activism, it shares with other economics theories a substantial ideological power of giving political choices the appearance of neutral techniques. Kendall and Louw can thus argue, presumably in good conscience, that a "free-market liberalism" in a liberated South Africa requires adoption of the Swiss Canton model: turning the existing 305 magistrates' districts into self-governing units. This would of course prevent Africans from controlling South Africa, by making it impossible for anyone to control it, yet Winnie Mandela, Alan Paton, and Bayard Rustin have endorsed this nonsense. The "notion that every country, whatever its history and circumstances,

6. *Id.* at 192-202; K. Nagatani, *Political Macroeconomics* 256 (1989); Fallows, *supra* note 2, at 16. See G. Meier, *Emerging from Poverty* 84-85, 107 (1984); Cline, *Distribution and Development*, 1 *J. Dev. Econ.* 359, 375-76 (1975).

7. Nelson, *Human Face 'Sweetens' Upside-down World of Global Economics*, *New Straits Times* [Malaysia], Mar. 15, 1988, p. 12.

should have the same extremely limited government and the same kind of freedom of enterprise is every bit as unrealistic, and potentially as disastrous, as the contrary notion that centralized state socialism is the only path to prosperity.”⁸

Unrealistic and disastrous it may be, but the full scope of this neo-conservative agenda is perhaps best illustrated by the wild popularity in the U.S. of Francis Fukuyama’s *End of History*.⁹ From the weakest of beginnings — support for Hegel’s notion that history ended in 1806 — Fukuyama goes on to argue that “the basic *principles* of the liberal democratic state could not be improved upon. The two World Wars . . . and their attendant revolutions and upheavals simply had the effect of extending these principles spatially, such that the various provinces of human civilization were brought up to the level of its most advanced outposts” Lenin, Mao, Nyerere, *et al.* were apparently playing right into neo-conservative hands the whole time.

What makes the neo-conservatives think they can succeed where Marxists, African Socialists, etc. have *apparently* failed? Fukuyama’s answer is that “we” have a superior ideology linked to a universally popular “consumer culture” defined as “easy access to VCRs and stereos.” But can we end history by throwing VCRs and stereos at it, especially among people who do not have a house for their stereo or the electricity to plug it into? Fukuyama does admit that “the vast bulk of the Third World remains very

8. Fredrickson, *Can South Africa Change?*, *New York Rev. of Books*, Oct. 26, 1989, pp. 48, 52-53, reviewing F. Kendall & L. Louw. *After Apartheid* (1989). See H. Lepage, *supra* note 3, at 31, 89; C. Veljanovski, *The New Law and Economics* 7-18, 13 (1982); Cooter, *The Best Right Laws: Value Foundations of the Economic Analysis of Law*, 64 *Notre Dame L. Rev.* 817, 833 (1989).

9. *The National Interest* (Summer 1989), p. 1.

much mired in history,”¹⁰ but neo-conservative missionaries hope to have it out of the muck soon.

Markets and Governments

“Dependence” theorists would rightly excoriate this neo-conservative “funeral for social revolutions,” this “eternal age of capital”¹¹ as developed by and for Thatcher’s Britain, Kohl’s Germany, a Reagan-Bush America, and even Mitterand’s France. Future Second and Third World development “experts” are now being trained to this neo-conservative canon, which seems to have the diplomatic and financial muscle to get itself adopted in any event. Past failures have dissipated the intellectual capital of development studies, and the collapse of ostensibly Marxist regimes has discredited Marxism itself — including the humane and revolutionary strands that have been consistently repudiated by communist party-states and that play no small role in social democratic and developmental thinking.

Temporarily at least, we are left with the neo-conservative totem of the “free market,” defined by a World Bank economist as a small percentage of industrial production coming from government-owned plants and a small percentage of agricultural production flowing through governmental marketing boards.¹² A useful point is being exaggerated here: since public enterprises are

10. *Id.* at 15. He adds (*id.*) that: “For our purposes, it matters very little what strange thoughts occur to people in Albania or Burkina Faso.” In Eastern Europe, they say that: There is no “socialist democracy,” only multi-party, parliamentary democracy, and no “socialist legality,” just the rule of law guaranteed by an independent judiciary. In large part, events there reflect “the atomizing impact of developed consumerism, one of the most potent weapons known to man.” Ash, *Eastern Europe*, *New York Rev. of Books*, Feb. 15, 1990, pp. 17, 21-22.

11. Kaye, *The Concept of the ‘End of History’ Constitutes a Challenge to the Liberal Consensus in Scholarship and in Public Life*, *Chron. of Higher Educ.*, Oct. 25, 1989, p. A48.

12. Wallich, *supra* note 1, citing an unidentified World Bank economist. The “free market . . . is the latest Central European utopia,” Ash, *supra* note 10, at 21. Shapiro, *Richard Posner’s Praxis*, 48 *Ohio St. L.J.* 999, 1006 n. 33 (1987) notes the “quite staggering offhand confidence” of Posner’s *Economics of Justice* 67 (1981): “It is almost the universal opinion of economists (including Marxist economists) that free markets, whatever objections can be made to them on grounds of equity, maximize a society’s wealth.”

almost universally unaccountable, they are likely to be neither efficient nor equitable. They tend rather to build an elite power and thus an inequality. But the current passion for shrinking the public sector through “privatization” often leads to a net loss of wealth (welfare), frequently through such “leakages” as the corruption and political favoritism that lead to further inequalities. Yet Indians, Nigerians, and others are beginning to demand the creation of a market economy, while the implementation of the neo-conservative agenda in Chile has made it impossible to return to Allende’s *status quo ante*.¹³

A free market ideology would replace government bureaucracy with the “invisible hand” of individuals’ self-interest that, critics add, often amounts to some expert’s or elite’s sleight-of-hand. The market is the original source of an economic pluralism, but all marketplace activity — elite luxuries as well as housing for the poor — is deemed indistinguishably valuable under the amoral criterion of creating wealth. This criterion quickly becomes a canon of distributive justice popular among neo-conservatives: from each according to his ability, to each according to his marginal productivity. If rewards do not thus depend on productivity, there may indeed be too few material incentives to produce goods and services and thus to generate the economic growth that may fuel future redistributions. But markets themselves do not redistribute, since productivity is measured by the strictly allocative criteria of the willingness *and* the ability to pay. The wealthy are usually *unwilling* to forego consuming luxury goods, so as to reward the poor for their produce, and the poor are *unable* to reward each other out of their poverty. Yet neo-conservatives expect foreign capital, technology, managerial skills, etc. to receive whatever rewards (fragmented and uncompetitive) Third World markets will bear, or else prompt, adequate, and effective compensation must be paid.

Government could transfer income and other resources such as education to the poor, and then rely on generations of a

13. Tully, *Correspondent’s Report*, BBC World Service, Jan. 20, 1990, 2010 G.M.T.; Paper by Joseph Thome, INTWORLSA Panel, San Francisco, Jan. 4, 1990.

marketplace efficiency to increase productivity in the things poor people are willing and increasingly able to buy. This is the strategy of a West German or a Swedish capitalism (or social democracy). But for very different reasons, neo-conservative theorists and many Third World leaders refuse to trust and to empower the poor. In the many countries ruled through a complex balancing of elite factions, a genuine empowering of the poor (as distinct from their virtual representation by elites) would so unbalance the regime as to make its collapse likely. Neo-conservative theorists fear that the poor would use such power as they gain to procure the collapse of markets by political means, markets which must be defended at *any* cost. (This is a replay of Alexander Hamilton's fear of the Jeffersonian and Jacksonian Democrats.) There may be a growing community of interest here: Some Third World elites will be able to subvert the new "free" markets for elite purposes and then blame the poor's plight on "foreign devils" like the World Bank and the IMF, while neo-conservatives play along out of ignorance of what is going on or from the belief that elites will do less damage to markets than would the poor.

Admittedly, neo-conservatives are reacting to an excessively altruistic model of development that has its origins in Whitehall, the Kremlin or the Frankfurter/Landis model of a New Deal liberalism: good people who are clever and well-informed (i.e., an elite) can be given wide legal and political discretion because they will promote the public or proletarian interest zealously. In its extreme form, neo-conservatism denies the existence of a public interest that is not a simple summation of the private interests (arbitrary preferences) that are more efficiently agglomerated by markets than by bureaucrats.¹⁴ Those Third World economists

14. J. Buchanan, *Explorations into Constitutional Economics* 61 (R. Tollison & V. Vanberg, eds. 1989) (winner of the 1986 Nobel Prize in Economics); Musgrave, *The Public Interest*, in *Nomos V: The Public Interest* 107 (C. Friedrich, ed. 1962). See R. Dias, *Jurisprudence* 504 (4th ed. 1976); Ogus, *Law and Spontaneous Order: Hayek's Contribution to Legal Theory*, 16 *J.L. & Soc.* 393 (1989). In "traditional economics, government is considered a nonproductive activity, an inevitable burden to be discouraged wherever feasible." All "that the politicians . . . decide is who is to be exploited by whom. The best guarantee against exploitation is the market," since government "is always more available as a tool for

who are trained to trust markets are seldom able to beat market results by applying planning techniques and fads. Neo-conservatives have at least shown that many of government's interests and values are so poorly defined and pursued in so inefficient a fashion that they cannot be implemented at a cost the public would and should accept.

The proposed cure is for government to mimic efficient markets through deregulation, privatization, and the elimination of subsidies, plus simple assertions of the validity of the "trickle-down" causal theory of development. In legal terms, this is an abolition of preexisting legal duties in the name of the (wide) "open" legal system pioneered by Popper, Kelsen, and Hayek.¹⁵ Traditional accountability mechanisms in law and politics are thought to be unnecessary and dangerous because they counteract abundant and effective marketplace accountabilities. Entrepreneurs, whose importance is declining in other economics theories which give greater weight to elite and organizational imperatives, can be given their heads because they are subject to market controls, but the absence of analogous controls in political "markets" dictates curbs on governmental bureaucrats.

The neo-conservatives' would-be government is far more utopian, contractarian, and libertarian than any seen in the Third World. Government would be restricted to the "nightwatchman" roles of providing background (property and tort) rules, and enforcing the contracts resulting from marketplace exchanges.

the strong and the exploiters" The "more the state grows, the more pressures there are for it to grow even more. [Yet] a bureaucratic solution to any social problem can only be regarded as second-best" H. Lepage, *supra* note 3, at 82, 101, 212.

15. C. Veljanovski, *supra* note 8, at 14; Malloy, *Invisible Hand or Sleight of Hand?*, 36 *Kan. L. Rev.* 209, 245-46 (1988); Michelman, *Politics and Values or What's Really Wrong with Rationality Review*, 13 *Creighton L. Rev.* 487, 492-94 (1979). See J. Harbeson, *supra* note 4, at 13, 224. This may be a Manichean view, of vicious state and virtuous market, but neoconservatives have shifted the burden of proof to require that interventionists show the market solution to be more costly. See H. Lepage, *supra* note 3, at 84. Human nature is the same in and out of government, but private market constraints are more rigorous than those on government. In any event and even "in its present inflated form, the state is merely an organization that produces and sells certain products, chiefly security and justice." *Id.* at 67, 88.

This is the ultimate privatization: of public law. The "common law" that would get applied reflects values of a nineteenth century capitalism and individualism, but it has not accommodated communitarian and "republican" values or the realities of the mixed economy. Further, little would presumably change in colonial combinations of common and administrative laws with criminal laws, combinations used to defend an inequality of privileged positions that are perpetuated in varying degrees to this day. In any event, how could a Third World Government decentralize an unstable politics, liquidate large chunks of a still-weak state, reorient itself towards markets, and still cause its writ to run broadly among diverse constituents?¹⁶ Neo-conservatives might deem this an irrelevant question, but leaders for whom a physical survival may require their survival in office will be quite concerned.

Neo-conservative rights are based on the inherent justice of marketplace exchanges. The right and the good must emerge from agreement among "free men," from playing your cards as they fall and regardless of inequalities in the players' skills, wealth, and bargaining power. Competitive exchanges will limit the actions and the power of each relative to others. A multinational corporation, for example, is merely a nexus for individuals' contracts. These contracts limit the MNC's power internally, and external limits come from the MNC's need to contract with numerous outsiders. There is thus little or no need for government to control exploitation. (The neoclassical economics of neoconservatism was formulated in 1880-1900, just before the

16. R. Bork, *The Tempting of America* 223-30 (1990); H. Lepage, *supra* note 3, at 26, 159; M. Olson, *The Rise and Decline of Nations* 52-55 (1982); Cotterrell, *Feasible Regulation for Democracy and Social Justice*, 15 *J.L. & Soc.* 5, 10 (1988). See Jenson & Meckling, *Theory of the Firm*, 3 *J. Finan. Econ.* 305 (1976); Ogus, *supra* note 14, at 399; Shapiro, *supra* note 12, at 1013 (quoted *infra* note 19). Democracy "is suffering from a fundamental internal disequilibrium in which the benefits of public action are being concentrated and the distribution of costs is being diluted. . . . We must frame a new political technology . . . that will suppress this disequilibrium . . . and enable us to put the brakes on bureaucracy." H. Lepage, at 18.

massive growth of a private and public bureaucratization that it thus accounts for poorly if at all.)

The neo-conservative expectation is one of government's rigorous enforcement of broad property rights, so as to curb the many forms of governmental intervention that serve to redistribute wealth. This must be so because redistributions are thought to make market allocations less efficient and thus to retard an economic growth. Unfortunately, the other-worldliness of these neo-conservative narratives gets forgotten when they are posed as bases for reform. They speak of a society so simple that it can be coordinated by isolated and fragmented contracts and markets, a society integrated by a single code of behavior and one where the self-interests of some almost never have to be subordinated to the well-being of others. Third World realities are always going to suffer in comparison with this ideal-type, at least in neo-conservative eyes.¹⁷

As recent events in China show, it is not always or often the case that "liberal" politics automatically follow a "liberal" economics, or that market allocations are necessarily a by-product of "economic liberties." But neo-conservative theory does give an accurate picture of the functioning of the international "aid" and trade arrangements that the neo-conservatives have recreated in their own image. In these "negotiations democracies" but not within the nation-states of the Third World, none are forced to participate or to accept the outcome of negotiations. (Pareto-optimal outcomes are thus unlikely because of the abundance of opportunities to act as a holdout.) Wealthy countries will negotiate to the extent that participation quiets their social

17. See K. Nagatani, *supra* note 6, at 53. A "state will grow more if its system of property rights defines and protects, precisely and exclusively, people's rights to the fruits of their own efforts." H. Lepage, *supra* note 3, at 72. Of course, this does not answer the questions: who are "people" and what are "fruits." Further, the "immediate 'common sense' answer to the question 'What will an economy motivated by individual greed and controlled by a very large number of different agents look like?' is probably: 'There will be chaos.'" Sen, *Rational Fools*, 6 *Philo. & Pub. Afs.* 317, 321 (1977) (quoting Arrow & Hahn). Hobbes would add that life then becomes "nasty, mean, solitary, brutish and short," because of what we call a lack of accountability and centralized management. See K. Nagatani, at 39.

conscience and/or pragmatically furthers their ends. As these ends revolved around a rolling back of the “communist menace” that is now rolling back on its own motion, we can expect Western participation to decline. Certainly none but the most altruistic of Western nations will consent to negotiate under “preemptory” international law rules such as those of the New International Economic Order. Third World governments are also free in theory to refuse to participate or to break off negotiations, but doing this would leave most of them unable to export and to meet elite consumption demands — conditions likely to lead to the regime’s collapse. Neo-conservative strategies have for years revolved around the manipulation of East-West tensions. A marked reduction in these tensions is likely to prompt a switch to a neo-conservative manipulation of North-South tensions. The hope of bringing order and accountability to a chaos of domestic and (underdeveloped) international law rules thus seems remote at present.¹⁸

18. *Id.* at 56; H. Van Den Doel, *Democracy and Welfare Economics* 61-63 (1979); Fukuyama, *supra* note 9, at 8; Shapiro, *supra* note 12, at 1006; and Wallich, *supra* note 1. We used to contrast “socialist internationalism” with “bourgeois nationalism.” But what

we have seen in practice is the rise of socialist nationalism and bourgeois internationalism . . . — IMF, NATO, GATT, OECD [I]f you ask what is the basic, underlying model for the new relations between these [Eastern European] states, and for the resolution of their outstanding national, ethnic, and economic conflicts, then the answer is . . . the European Economic Community — the one and only, real existing common European home.

Ash, *supra* note 10, at 22. If this is what it will take in the Third World, ASEAN, the OAU, and so forth are far behind the EEC. While many ASEAN members pay lip-service to the NIEO, etc., the poorer members offer foreigners lavish (and often neoconservative) incentives and guarantees under bilateral treaties, domestic laws, and agreements with particular foreign investors. Raul Prebisch finds that there “is no dispute about the need for a rule of law in world trade. The question is: what should be the character of that law.” G. Meier, *supra* note 6, at 40 (quoting Prebisch). Unfortunately perhaps, the answer almost certainly is: it *will* be of a neoconservative character, regardless of what it *should* be.

But Everything Fails . . .

If neoconservatism is anything like the juggernaut I describe, its opponents are relegated to probing for weak points in the armor. The main chink discovered so far is the neo-conservative admission against interest that market “failures” justify governmental interventions. They quickly add that markets are (assumed to be) so perfect that such failures almost never occur. This is, in fact, their main bone of contention with welfare economists, who see such failures as occurring regularly. Unlike a utopian neo-conservative analysis of a preconstitutional choice of rules, the focus of welfare economists is useful for pragmatic developmental purposes: working within the “system” to get the incentives right and to attempt to meet targets desired by citizens and officials alike.

Arguing on the neo-conservatives’ own turf, their critics can point out that Third World markets are much more prone to fail than are the imperfect markets found in the West. Ostensibly holding everyone to account, failing or failed markets constrain few or none. Principals are unable to hold their agents accountable, and elite “agents” of the broader public can thus accumulate wealth and power by ping-ponging between economic and political sectors. Legal and political accountabilities force some elites to be somewhat circumspect. But weakening or abolishing these accountabilities in favor of markets enables elites to flaunt their wealth and power, while fobbing responsibility off on the “blind” market forces that serve to legitimate their robber-baronies. A failing market means that its disciplining, efficiency-enhancing functions are lost to the public, a loss that licenses thoughtful governmental interventions. Market failures are proved by demonstrating the falsity under the circumstances of one or more of the assumptions on which the neo-conservative market model is based: perfect competition in fully-integrated markets, where everyone has complete knowledge of all alternatives, where

all resources are fully mobile, and where there are no “spillovers” — “externalities,” including problems with “public goods.”¹⁹

There is little competition in a Third World market, sometimes because of the public enterprises or regulations neo-conservatives disdain but more frequently because the market is “thin”: too small because of a low consumer purchasing power to support more than one or a very few companies at an efficient scale of production. In such a thin market, imports (subject to modest tariff barriers) or a governmental regulatory “jawboning” are the only alternatives to consumers subsidizing corporate inefficiency (or some other form of taking monopoly profits) for a long time to come. The typical Third World economy is also badly fragmented; as in ancient Rome, the economy typically consists of reciprocity, redistribution, and market systems in roughly equal measures.²⁰ The persistence of such tendencies is

19. See R. Haveman, *The Economics of the Public Sector* 12-40 (2d ed. 1976); H. Lepage, *supra* note 3, at 210. Market failures are “the overriding rationale for government intervention. Market failure is any departure from the ideal conditions that would prevent an unfettered market from achieving a Pareto-efficient allocation of resources.” C. Veljanovski, *supra* note 8, at 44. A spillover or externality is any incidental rendering of services or disservices to those not parties to the “contract.” These are situations where payment or compensation cannot be exacted. It is thus “a divergence between private costs (which influence individual actions) and social costs (which determine economic efficiency).” *Id.* at 44-45 (citing A.C. Pigou). See text accompanying note 22, *infra*. For neoconservatives like Richard Posner,

the existence of government is something that needs to be explained, ultimately in terms of economies of scale and market failures. There is no room for a view of a public sector having intrinsic merit or value, or of it having an historical lineage independent of the private sector; the logic of all law is ultimately the logic of private law.

Shapiro, *supra* note 12, at 1013.

20. See K. Greene, *The Archaeology of the Roman Economy* (1986). We can only guess at neoconservative attitudes toward Third World “reciprocity” sectors, since theorists seem to have little interest in or understanding of them. But some neoconservative studies of a European feudalism offer important clues. These hold that serfdom was an economically-rational response to the absence of markets and a money economy. Serf labor was therefore not as bad as is popularly supposed; it “fulfilled the role of modern municipal taxes: it insured internal order in the community.” H. Lepage, *supra* note 3, at 46-51 (quote from p. 49). Presumably, Third World subsistence (in good years) sectors are thus deemed inevitable and thus useful stopgaps, pending the growth of markets.

illustrated by the fact that this fragmentation inhibits development in Italy to this day. Yet neo-conservatives play down the difficulties and costs of the public good (*infra*) that is integrating a Third World economy. The neo-conservative policy prescription for building Third World markets by immediately and fully linking them with (failing) international markets seems a recipe for further disintegrations.

The market sector in most Third World countries is dominated by the imported capital, technology, and (in some countries) managerial skills that are traded in failing international markets, and that are usually rewarded far beyond their productivity because they can extract monopoly rents from failed domestic markets. These rents are usually “earned” at the expense of the poor, as are rewards to indispensable but usually invisible (and classified as such in balance of payment accounts) foreign middleman roles. The People’s Economy, on the other hand, uses family resources in efforts to make a living, without congenial economic institutions, sophisticated infrastructures or extravagant incentives. The People, and their proprietorships and cooperatives, are denied access to the market sector by their inability to tempt scarce domestic resources away from following imported resources in the pursuit of monopoly rents. In other words, the invisible hand keeps the poor out of the rich men’s institutions and locked into low productivity and pay in the informal sector. Owing to numerous market failures among other things, the neo-conservative vision of markets as the “great reconciler” among rational economic men is simply not a credible theory of mass behavior in the Third World.²¹

The neo-conservatives’ market model assumes perfect information among all players, and their hope is that capitalism can be saved in the Third World by improving information flows. But this turns out to be an extraordinarily costly policy, where many people have never received or used market information

21. See R. Haveman, *supra* note 19, at 21, 26; K. Nagatani, *supra* note 6, at 4, 19. In failing and unstable Third World markets, investments cannot really be based on concrete long-term expectations, *id.* at 32.

before, or even seen others using such information successfully. Media sources of such information are underdeveloped and censored, and elites have the power to keep information and the wealth it generates to themselves. Knowledge is power, and redistributing it will be opposed by the private and public bureaucrats whose passion for secrecy is a major source of their power. The market model can thus exacerbate inequalities by generating informational “barriers to entry,” barriers which are only partly accounted for by the political command over the economy criticized by neo-conservatives. The high costs of information in the Third World increases transaction costs in the marketplace, and this causes a *pro tanto* reduction in marketplace efficiencies.

Similarly, the neo-conservative assumption of an absolute resource mobility, of resources forever on the move in search of the best price, is belied by a variety of geographic, ethnic, occupational, educational, licensing, and informational barriers. Present in all countries, such barriers are higher and more numerous in the Third World. These barriers mean that many people and resources can do little or nothing other than what they presently do, and they are thus unlikely to attain the use having the greatest value to themselves and society.

A “spillover” or “externality” is a situation where the acts of one person result in costs or benefits realized by another, realized in ways which markets account for imperfectly if at all. For example, unless restrained by government, a steelmaker will produce pollution among other things and at a great social cost. Yet most neo-conservatives will not even attempt to rectify this kind of market failure; they would, rather, insist on a strict enforcement of the steelmaker’s “property rights,” including the *de facto* right to pollute. The less perfect markets are, the more spillovers there will be; many costs and benefits will be unpriced or wrongly priced and thus remain unaccountable through the marketplace.

“Public goods,” national security and justice for example, are merely extreme forms of spillovers, things which many will consume and which no one thus wants to pay for. The time-

honored solution to the problem of public goods is for government to provide them “free” or in a subsidized fashion, through a compulsory taxation. But this solution is resisted by neo-conservatives because it looks like an inefficient redistribution from richer taxpayers to the poor, who cannot be excluded from the consumption of *some* public goods. Economic growth is seen to result from a private “internalizing” of these externalities, from installing a burglar alarm or hiring a guard rather than relying on the “inefficient” public police. This is nonsense on stilts in the Third World, despite the fact that elites often hire guards, because the vast majority of people are unable to pay to internalize one externality after another. Collective “action, usually through a government, becomes necessary if efficient performance is to be secured.”²²

The mere existence of a market failure does not license whatever interventions a political leader can dream up. This is especially so when the market is only marginally defective, although everything lives and dies at the margin in neoclassical economics. It takes far less regulation to guide markets than many Third World economists seem to assume. The information costs of a market bypass surgery — planning, government ownership or a quiet nationalization (joint ventures with government) — can be higher than are information costs in markets; over-production by government officials facing little competition can be as big a problem as under-production by private monopolists and oligopolists. Statist or thorough-planned strategies set up a heavy presumption against market solutions, and neo-conservatives certainly do well to set up the market ideal as a standard of

22. R. Haveman, *supra* note 19, at 38. See Cowen, *Public Goods and Externalities*, in *The Theory of Market Failure* 1, 5, 10 (T. Cowen, ed. 1988); *supra* note 19. I once heard a neoconservative law and economics paper, in which the (male) presenter argued that rape occurs because the rapist does not want to pay the price of a consensual intercourse, and that criminal penalties should be adjusted accordingly. The first question from the audience was: “Does this mean that every woman has her price?” The presenter reluctantly answered that it must be so, in an “externality” theory of rape. So in Pakistan, where some employers beat and rape employees who can be sent to jail if they complain, this neoconservative would presumably devise better ways to price employee “services” and thus internalize this externality.

comparison for government actions in a mixed economy. But this does not justify their attempt to establish a strong presumption against government interventions, especially in the face of frequent and massive market failures.

More pragmatic policies seem to be called for, those free of ideologically-determined presumptions for or against markets. Such policies can be made fairly plausible to IMF or World Bank neo-conservatives as rectifications of market failures, even if their reality is one of “constantly monitoring the economy out of an unsatisfactory equilibrium.”²³ A fairly explicit management of any social transformation is needed in the Third World, where politicians will simply refuse to trust such a task to business elites, foreign or domestic. The adoption and expansion of markets is a *radical* transformation; Eastern Europeans are only now learning of the high costs of devising original solutions to unique problems. A developmental pragmatism revolves around the realization that everything fails sooner or later: markets, government programs and enterprises, and ultimately governments and their constitutions. The goal should be to minimize the net costs of failure, while realizing that politicians will sacrifice everything else before they will countenance a regime failure.

With only a bit of subterfuge, the reregulation of a Third World economy can be sold to neo-conservatives as a selective deregulation. A greater attention to market dynamics will often show that multinational corporations are under-regulated, while licensing, etc. requirements serve to over-regulate domestic companies, proprietorships, and cooperatives. Reregulation should tighten controls over specific abuses like fraud and promote an accountability for the actual production of something useful, as distinct from the manipulation of short-term paper profits and losses. Public enterprises should be assigned enforceable tasks and have some of these tasks split up; the “economies of scale” arguments used to justify huge public enterprises are hardly ever borne out in practice, and public enterprises have hitherto escaped

23. K. Nagatani, *supra* note 6, at 1. See H. Lepage, *supra* note 3, at 85, 95, 99; Sen, *supra* note 17, at 320 (citing F.Y. Edgeworth); Wallich, *supra* note 1.

accountability, by being empowered to do anything “expedient or reasonably necessary.” A “lighter” planning, one which pays greater attention to market signals, can be instituted, and quite a few countries are now experimenting with this. Almost any “lighter” rural development policy can be justified as speeding the lengthy transition to an integrated market economy, provided an individualized land tenure is offered and the monopoly rents of agricultural marketing boards are eliminated or substantially reduced.

More pragmatic policies would have decisionmakers seeking answers to a series of questions. Will the outcomes of governmental interventions be better or worse than market results? Should policy-makers try to beat market results or to establish or reform markets, and then allow these markets to generate the desired results? To what precise extent is private initiative held accountable by real-world markets, and when should public initiatives defer to it? In particular, do real-world markets provide too little or (what is more likely) too much reward for *political* skills and productivity? What accountability-promoting reforms are entailed by answers to these and other questions? These are tough questions but, if the answers plausibly favor governmental intervention, all but the most doctrinaire of neo-conservatives should understand the reasons for new policies. The main weakness of this tactic is that it may reinforce a dichotomy between markets and governments, a dichotomy irrelevant to the real world of “maintaining the flow of goods and services and keeping the government show on the road.”²⁴

24. Jenkinson-Neave, *Policy, Planning and Markets*, in *Market Socialism* 17 (I. Forbes, ed. 1986) (Fabian Society Tract No. 516). See H. Lepage, *supra* note 3, at 67 (quoted *supra* note 15); Ash, *supra* note 10, at 21. As Brennan and Buchanan, *Is Public Choice Immoral?*, 74 *Va. L. Rev.* 179, 188 (1988) warn, “the delusion that political agents are saints becomes costly folly.” But the neoconservative canonization of markets and of business elites is also a costly folly, as costly as the delusion that the poor and powerless will be allowed to organize things in their own interest. For example, inflation is not a random event; it is induced by those who benefit from it and who hold power in the economy. In part, these business Gullivers succeed because of the companies and commercial laws designed for Lilliputians. Yet tax laws and other government subsidies provide a free, no fault insurance against business casualties, an aspect of governmental intervention typically ignored by neoconservatives. K.

Distributive Justice

Even if the neo-conservative agenda of markets for the Third World is implemented, the outcome is likely to be a state capitalism which exacerbates inequalities through rent-seeking activities by elites. A right-wing regime may deregulate capital markets but it typically retains a tough stance against higher wages and labor's political interests, policies which receive tacit or explicit support from neo-conservatives. There is no reason why an undesirable distribution of wealth and income should not be deemed a major externality arising from market failures, except that neo-conservatives will not have it so. Like workers' families during the Industrial Revolution, the poor and powerless have borne much of the "social" cost of a transition to market economies in the Third World to date. It may be ethically, biologically, and perhaps even politically impossible to force them to bear more. This point is illustrated in very different ways by South Africa and by Malaysia,²⁵ which opted for growth policies under a state capitalism rather early. A major outcome of this decision was creating the structural problems that seem insoluble by merely tinkering with markets and "getting government off their backs." The economic base has to be broadened, away from the property/ construction/stock market bubble and overprotected heavy industries, and toward both higher value-added industries and those meeting the needs of poorer consumers and regions.

The neo-conservative tautology of basing a distributive justice on the willingness and ability to pay in the marketplace merely

Nagatani, *supra* note 6, at 64, 66, 124.

25. On Malaysia, see Jomo, et al., *Crisis and Response in the Malaysian Economy* (1987); Khor, *Malaysia's Economy in Decline* (1987); D. Snodgrass, *Inequality and Economic Development in Malaysia* (1980); Brietzke, *Development and Distributive Justice in Malaysia* (forthcoming). On South Africa, see F. Wilson & M. Ramphela, *Uprooting Poverty* (1989), reviewed by Fredrickson, *supra* note 8, at 53: While South Africa exports food and supports a very high standard of living for whites, it has the world's most unequal distribution of income. A rapidly-growing population puts pressure on the eroding lands of an arid region, and rates of infant mortality are among the highest in Africa. Nationalist government policies have brought about this state of affairs, and "radical changes in . . . power relations . . . are preconditions for a successful campaign against poverty." *Id.*

means that a rock star gets paid more than a teacher because the rock star gets paid more. The time for a “natural” redistribution through a “trickle down” never seems to arrive. Admittedly, Taiwan, South Korea, and the city-states of Singapore and Hong Kong have managed both high growth and a fair measure of equality in the distribution of income. But the capitalism in these countries was heavily managed by dictatorial governments, which kept “a lid on the welfare of . . . consumers by discouraging imports, encouraging high savings and long working hours, and limiting investment in such luxuries as housing stock.”²⁶ The fact that even dictatorial governments can compel a measure of distributive justice sets it apart from many other forms of justice. This is encouraging, especially as these economic feats are now translating into serious demands for a democratization of the countries concerned.

Neo-conservatives cannot take credit for Taiwan and South Korea, and they can properly be excoriated for the possessive individualism that ignores communitarian values and the extent to which ostensibly efficient marketplace outcomes are dictated by existing distributions of wealth and power. Defending property rights against all comers has the effect, if not always the purpose, of exalting the privileges of an economic elite, privileges which limit the will of the majority and that of the political elite which purports to represent the masses. For that majority, the neo-conservative’s universal goodness of the individual getting more is usually constrained by concerns about concentrations of wealth and power, and about society’s moral ambience.²⁷ But these

26. Fallows, *supra* note 2, at 18. See G. Meier, *supra* note 6, at 58-78; Cline, *supra* note 6, at 374, 380; Wallich, *supra* note 1.

27. K. Nagatani, *supra* note 6, at v, 31; Michelman, *Microeconomic Appraisal of Constitutional Law*, in *Essays on the Law and Economics of Local Government* 137, 159 (1979).

The neoconservative Richard Posner assumes that wealth gets redistributed automatically since, to enjoy it, you must share it with others. But what “is being maximized is the wealth of those individuals who have the capacity to maximize wealth without reference to anyone else, except to the extent that they are instrumental in that goal.” There is no evidence that a “trickle down” actually occurs. Shapiro, *supra* note 12, at 1007-08. Posner “hides from” the “inegalitarian distributive implications [of neoclassical economics] by pretending that they are

arguments may go nowhere if neo-conservatives have the power and the doctrinal determination to make their views stick.

Government interventions, and thus administrative laws, must obviously take the leading role, if the distributive justice ignored by neo-conservatives is to be advanced. But the relevant formulae of distributive justice are unfortunately imprecise and controversial: to each according to need, how hard (s)he tries, some other moral or social merit such as contributions to a political stability, and so forth. A strong public sector and the passion for a political control can easily swamp private economic activity, even if politics is used to pursue distributive justice. Such a swamping erodes a valuable institutional pluralism (*infra*), and the operative formula of distributive justice too frequently becomes "to each according to his or her ethnicity and political influence." Many governmental interventions redistribute in favor of the wealthy, as a perverse and formally-unintended consequence. For example, the main beneficiary of a "rural development" project is sometimes the construction company that builds the facility or the merchant who supplies the fertilizer. Many governmental redistributions are responses to political pressures or to policies which seem good ideas in isolation from each other. There thus seems a clear need for the overarching industrial and agricultural policy that only a few developed countries are now beginning to manage.

The main asset the poor and powerless have is their discontent arising from a relative deprivation of rewards (due to rent-seeking behavior by elites). Their traditional sense of justice is usually difficult to describe, but it often seems to revolve around

mere by-products of his scientific theory of allocation." *Id.* at 1046. Yet neoconservatives can maintain with some plausibility that: "Improvement, what little there is of it, in the relative situation of the underprivileged is attained at the price of a fantastic coming and going of money . . . for which society must pay heavy transaction costs (salaries of welfare officials and so on)." H. Lepage, *supra* note 3, at 125. Where the consuming masses have no value to capitalists except as sources of cheap labor in, for example, a monocultural economy for export, labor relations and politics will become strained, and the economy will lack "integrity." K. Nagatani, *supra* note 6, at 45. The economy then becomes a bit-player in the international economy, a role "free trade" theorists would never choose for their own economies.

something like John Locke's (not Marx's) labor theory of value. Many governments try to avoid giving offense to this sense of justice because it is the stuff of guerrilla movements, while no one will fight and die to make the world safe for marketplace efficiencies.

Given their unspecialized skills and lack of credentials, the poor and powerless are particularly vulnerable in labor markets. They are thus entitled to special protections, which can be sold to neo-conservatives as investments in "human capital" (primary education, health care, housing) rather than as species of a consumption subsidized by government. Even then, the poor and powerless will be unable to implement the powerful ideology of equal opportunity for themselves, and they will grow ever more mistrustful of elites bargaining for a cynical trusteeship over their interests. In any event, a genuine equal opportunity cannot exist where near-absolute property rights in key resources are assigned to a few individuals, resources which earn monopoly rents when they are thrown into failing and failed markets. In sum, distributive justice may be the only issue that necessarily places neo-conservatives into serious conflict with those who take Third World interests to heart. Trials of strength and subterfuge will likely determine the issue.

Lawyers in This Brave New World

There is much more that can and should be said about distributive justice, especially about issues unrelated to the technical breakdown of markets, but I will move on to law before the reader's patience is worn even thinner. What can lawyers do *ex officio*, when neo-conservatives would restrict them to defending property rights and promoting an easy access to stereos and VCRs? There are at least three roles lawyers can usefully play in the Third World: troublemaker, ideologist, and planner. Lawyers sometimes are, and always should be, trained and acculturated into an institutionalized (*infra*) troublemaking role, an asking of the hard and awkward questions that neo-conservatives and many

politicians and bureaucrats would like to ignore. This role amounts to a professionalized check and balance on economists' and politicians' pipe dreams. Lawyers can force the dreamers to become specific through the need to devise concrete rules which can be implemented by ordinary mortals, and lawyers can give the lie to marketplace dreams by aggressively representing the poor people who get hurt by the outcomes of these dreams.

In particular, lawyers can constantly ask: What authorizes and legitimates the application of a neo-conservative efficiency, in preference to legal criteria such as fairness? This question revolves around rights other than those of property (although the property right of the poor in their own labor-power should be emphasized), and it can be used to respond to the suffering of the poor. If a lawyer does not constantly raise the rights and the suffering (s)he is or should be trained to respect, other players will forget them or relegate them to the neo-conservative conundrum of: "How much are you willing and able to pay for, say, free speech?" Needless to say, this is an unhelpful perspective on a distributive justice; the poor are by definition unable to pay for their rights, and government must therefore guarantee *some* procedural regularities and *some* coherent balance between the values of equality and those of the neo-conservatives' liberty.

Lawyers become ideologists when they seek to institutionalize their troublemaking role. This is best illustrated by the German lawyers' popularization of a *Rechtskultur*, an idea whose time had come by the end of World War II. The Nazis had taken advantage of a traditional duty-culture, much like the one some Third World leaders have tried to inculcate with varying degrees of success, so German lawyers saw the need to propagandize for new institutions and public attitudes which revolve around rights rather than duties. Attempts to promote accountability in this fashion have largely failed in the Third World so far. Among other failings, most Third World lawyers have made no attempt to anchor their efforts in popular cultures. But this does not mean that more energetic and creative efforts will fail in the future and over the long run. Lawyers can now take advantage of a worldwide tide of democratization and a neo-conservative fondness

for liberal democracy, even if the lawyers' work-product looks rather more like a social democracy. Lawyers are trained to dissimulate, and they might as well use this training for a good purpose: "Just as politics is too important to be left to politicians, so too is economics too crucial to be left solely to economists or perhaps worse still to a combination of only economists and politicians."²⁸

Planning is too important a role to be left to the politicians and economists, or to a negation of planning by neo-conservatives. Lawyers should, for example, advocate a planned redistribution of rights and privileges, and of the wealth that flows from them. If this is not done, a casual ("invisible hand") proliferation of economic rights and privileges favors domestic elites and the owners of imported resources. Neo-conservative and other allocative institutions should always be linked with redistributive techniques. These techniques can be so deeply embedded in property, contracts, companies, and administrative laws, and even in highly-visible constitutional and international laws, that only the most alert of neo-conservatives will spot the techniques. A redistribution of rights in this fashion does not merely redistribute incomes, as the tax and "welfare" systems do; it redistributes a control over resources which can be used to *earn* incomes far into the future.

A complex and evolving economy is, in effect, a dialectic operating among institutions, values, and incomes. This makes distributive justice into a developing canon, defined in terms of what can reasonably be done from time to time, and it shows a dichotomy between free markets and central planning to be totally false. Pragmatically, we would choose the combination of policies that minimizes the net costs of market, bureaucratic, etc. failures. The neoclassical economics of the neo-conservatives pays almost no attention to the nature of institutions or of their interactions in sectors other than markets. One facet of the lawyers' planning role is thus to help design the right institutional "mix": ideal

28. Khor, *supra* note 25, at 154. See R. Haveman, *supra* note 19, at 43; K. Nagatani, *supra* note 6, at 50.

"justice enters into non-ideal politics by way of the natural duty to establish just institutions"29 This is a task lawyers can usefully perform because most of them give little thought to adjusting the world so that it fits some ideal model. Dealing so often with the world as it is, many lawyers know that the State is the problem and the solution in roughly equal measures, and that there are frequently worse problems and better solutions which call for a sensitive balancing. Searching for balanced solutions, lawyers can over time improve the "fit" of rules, sectors, and institutions.

In most countries, this dialectic of development operates (or not) through seven institutional sectors: markets; foreign-dominated corporations, some with government participation; domestic companies, some with government participation; public enterprises and other regulatory organs; individual proprietorships; cooperatives; and traditional farming, fishing, and handicrafts. As a country develops and attains a measure of distributive justice, we would expect these sectors to become more equal in size and economic influence. Such a pluralism helps foster growth, diversifies risks, increases economic opportunities by increasing the number of viable niches for the poor, and forestalls the dominance of any sector(s) that create(s) rigidities and political pressures to aid the sector(s) further. The flexibility of this pluralism means that policymakers will not be forced to choose between a larger cake with smaller slices for the poor, and larger slices for the poor taken from a shrinking cake.

Acting like the handicappers of a horse race, lawyers have a vital role to play in planning for an economic pluralism. In many countries, it will turn out both that markets are assigned too small a role and that misallocations caused by market failures have been neglected. A creative reregulation seems in order, one aiming at

29. G. Meier, *supra* note 6, at 232. See Brietzke, *supra* note 25. Planning advice from the bureaucracy often comes too late. It is usually too abstract to implement effectively, and it is frequently devoted to one "true" paradigm, such as the neoconservatives' final, rational form of society. Lawyers can thus play a useful role, particularly those who know that each paradigm deals only with issues of interest to its proponents, that no paradigm solves all problems, and that a complex, evolving truth (or economy) is best served by a competition among paradigms. See H. Lepage, *supra* note 3, at 23; K. Nagatani, *supra* 6, at 75, 153.

the maximum of equalization that can be achieved with minimal losses in efficiency, at the curbing of rent-seeking behavior, and at eliminating the barriers that keep the poor out of rich men's institutions. Inappropriate foreign models of companies law should be revised, with particular attention paid to the reregulation of MNCs and of the property and stock markets where speculation absorbs too many of the scarce resources that could find more productive uses. Proprietorships and cooperatives, the main institutional means for emerging from poverty, should be given more congenial legal forms. Coops have been unjustly handicapped and despoiled in many countries,³⁰ and proprietorships are frequently subjected to many irrelevant regulations.

An increased economic pluralism would also enhance the integration of a Third World economy. Integration requires a breaking down of the barriers to moving from one sector to another, and a permeating of institutions by national values. Absent such an integration, a half-hearted public compliance combines with a private subversion of developmental goals, and the poor will be unable to follow elites into national *economic* loyalties. Integration can be effected in part through an administrative law shorn of its tradition of "muddling through," a tradition which has too often displaced valuable marketplace activities. Administrative laws should force the bureaucracy to actually produce something useful and to control itself, under rules

30. Few countries have realized the full developmental potential of cooperatives. Coops admittedly lose out in international competitions, and they are often unable to raise capital in the marketplace. But they are less prone to swings in the business cycle or in planners' fashions, and they are less likely to enter risky fields. Rather, cooperatives tend to produce for less fickle markets of mass consumption by lower income groups, and to serve as counterweights to top-heavy public and private enterprises. Their greater labor-intensiveness economizes on the capital and technology that will always be scarce among the poor. Coops make better and more consistent use of the less specialized skills of the poor, especially the managerial skills we all possess in some degree. Cooperatives can thus be proving-grounds for entrepreneurial skills, and they generate more equal income shares than do hierarchical business organizations. Miller & Estrin, *Market Socialism*, in *Market Socialism* 3, 7-9 (L. Forbes, ed., 1986) (Fabian Tract no. 516). The coop laws of most countries ignore these functions and focus on political control and the extraction of revenue instead.

calibrated to distinguish the essential (the needs of the poor) from the merely desirable: expensive elite leisure and tourism projects, for example. In this way, all government policies and activities can be forced to compete for scarce resources under a process integrated by law, even under the lighter forms of planning currently in vogue. Accountability is enhanced by bureaucratic competitions and by matching a particular bureaucracy's power with its social responsibility.

The lawyer's planning role is that of a generalist or synthesizer, a role which requires lawyers to shed their positivism and the many other formalisms to which the profession is heir. Lawyers are trained to deal with rapid changes in imperfect institutions, to eliminate contradictions, to help set politically-acceptable priorities where contradictions cannot be eliminated, to clarify matters by framing issues more precisely, to find the bases for compromise, and to accomplish many other development-oriented tasks. There is much more conflict in Third World and other economies than neo-conservatives assume, and lawyers have a limited but important role in building a consensus around sensible policies. The neo-conservative forgets that people do not *live* in markets; they live in societies. While neo-conservatives have properly destroyed many of the illusions development theory relied on over the past two decades, they have spawned a Brave New World where there is little hope for the poor. Perhaps lawyers can offer hope in meaningful ways.³¹

31. K. Nagatani, *supra* note 6, at 44-45; Brietzke, *supra* note 25; Fallows, *supra* note 2, at 19; Gellhorn & Robinson, *The Role of Economic Analysis in Legal Education*, 33 J.L. Educ. 247, 272-73 (1983). Theodore Schultz is right: "the economics of being poor" is "much of the economics that really matters." G. Meler, *supra* note 6, at 2 (quoting Schultz). But poverty too seldom provides enough mental stimulation for neoconservatives and many Third World economists and politicians these days. The hope is that some lawyers will want to fill this gap. When, according to M. Galanter, *Competing Equalities* xviii (1986), "we see large principles illuminated by their concrete applications, we can observe the interplay of institutional routines and inventiveness that gives law its kaleidoscopic sense of simultaneous rigidity and fluidity." Paradoxically, the existence of numerous, seemingly intractable constraints often furnishes the strongest stimulus for creativity, as much appellate advocacy (and medieval painting) demonstrates. If this legal creativity is not forthcoming, the democratic ideal of an equal and free pursuit of self interest can mean that liberty destroys equality as a result of rent-seeking behavior: a concentration of democratic benefits, with the costs being borne by the poor and powerless. See H. Lepage, *supra* note 3, at 18; K. Nagatani, *supra* note 6, at 223.

