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# Jam Tomorrow: Distributive Justice and the Limits of International Economic Law

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# JAM TOMORROW: DISTRIBUTIVE JUSTICE AND THE LIMITS OF INTERNATIONAL ECONOMIC LAW

BARBARA STARK\*

**Abstract:** The chasm between the rich and the poor has become unfathomable. This Article asks whether existing international economic law can bridge this chasm and effectuate distributive justice. "Distributive justice" itself is an ambiguous goal. This Article inquires, as a threshold question, what, exactly, is required for actual "distributive justice". It takes as a starting point the relatively modest objective of the Millennium Development Goals—to halve the number living in extreme poverty by 2015. It argues that this objective is not going to be achieved under the aegis of international economic law for two reasons. First, distributive justice is not an objective of international economic law. Second, even if the political will existed, distributive justice would be unattainable because "international economic law" is not a coherent legal subject with the capacity to make it happen. Neoliberalism cannot be relied upon to produce distributive justice, but neoliberalism is not the only game in town.

"I'm sure I'll take *you* with pleasure!" the Queen said. "Twopence a week, and jam every other day."

Alice couldn't help laughing, as she said "I don't want you to hire *me*—and I don't care for jam."

"It's very good jam," said the Queen.

"Well, I don't want any *to-day*, at any rate."

"You couldn't have it if you *did* want it," the Queen said.

"The rule is, jam to-morrow and jam yesterday—but never jam *to-day*."

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"It *must* come sometimes to 'jam to-day,'" Alice objected.

"No, it ca'n't," said the Queen. "It's jam every *other* day: to-day isn't any *other* day, you know."

—Lewis Carroll, *Through the Looking Glass and What Alice Found There*<sup>1</sup>

## INTRODUCTION

The chasm between the world's rich and poor has become unfathomable. As a recent UN study explains, global wealth is distributed so that "the richest 2 per cent of adult individuals in the world own half of all global wealth."<sup>2</sup> While the number of people living in poverty has increased by almost 100 million, there are more billionaires than ever before—people who, as Barack Obama put it, "make more in 10 minutes than a worker makes in 10 months."<sup>3</sup> Even more disturbing, "the assets

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<sup>1</sup> LEWIS CARROLL, *Through the Looking Glass and What Alice Found There*, in THE ANNOTATED ALICE: THE DEFINITIVE EDITION 128, 196 (Martin Gardner ed., W.W. Norton & Co. 1999) (1871). "Socialists often used to ridicule the capitalist system as offering the empty promise of 'Jam tomorrow.'" The Phrase Finder, Jam Tomorrow, <http://www.phrases.org.uk/meanings/211400.html> (last visited Nov. 11, 2009). In fact as Labour politician Tony Benn said in 1969, "Some of the jam we thought was for tomorrow, we've already eaten." The Phrase Finder, *supra*.

<sup>2</sup> James B. Davies et al., *The World Distribution of Household Wealth* 7 (United Nations Univ. World Inst. for Dev. Econ. Research, Discussion Paper No. 2008/03, 2008). This distributive inequity has been going on for some time. See, e.g., The U.N. High Comm'r for Human Rights, *Report of the U.N. High Comm'r for Human Rights to the Econ. and Soc. Council*, ¶ 4-6, U.N. Doc. E/1999/96 P (July 29, 1999), reprinted in HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 239 (2d ed. 2000) (noting growing economic polarization, in which the poorest increasingly lose ground). In the U.S. alone, "from 1997 to 2001, the top 1 percent captured far more of the real national gain in wage and salary income than did the bottom 50 percent." Clive Crook, *The Height of Inequality*, ATLANTIC MONTHLY, Sept. 2006, at 36, 37. Until recently, the rate of polarization in the U.S. was increasing. See David Cay Johnston, *Report Says That the Rich Are Getting Richer Faster, Much Faster*, N.Y. TIMES, Dec. 15, 2007, at C3 (noting that the increase in income of the top one percent was greater than the total income of the bottom twenty percent). Whether those at the bottom are nevertheless better off is an open question. The bottom line is unclear. "Most likely [globalization] has helped some to escape poverty and thrown others deeper into it." PETER SINGER, ONE WORLD: THE ETHICS OF GLOBALIZATION 89 (2d ed. 2004).

<sup>3</sup> See Eric Konigsberg, *A New Class War: The Haves vs. the Have Mores*, N.Y. TIMES, Nov. 19, 2006, at WK1 (explaining that the "superrich"—the \$20 million a year households—"are getting richer almost twice as fast as the rich"—the top one percent of households with an average income of \$940,000); Jeff Zeleny, *Obama Proposes Tax Cut for Middle Class and Retirees*, N.Y. TIMES, Sept. 19, 2007, at A22; see also Jenny Anderson & Julie Craswell, *Make Less Than \$240 Million? You're Off Top Hedge Fund List*, N.Y. TIMES, Apr. 24, 2007, at A1 (noting that "the top 25 hedge fund managers last year earned \$14 billion—enough to pay New York City's 80,000 public school teachers for nearly three years"); Stephen Taub, *The Top 25 Money-makers: The New Tycoons*, ALPHA, Apr. 24, 2007, at 39, 41-42 (noting that the

of the world's richest three individuals exceeded the combined Gross National Products of *all* of the least developed countries, with a population totaling 600 million people."<sup>4</sup>

This Article asks whether distributive justice can be realized through existing international economic law. "Distributive justice" is an ambiguous goal. If we simply mean "more fair than what we have now," "distributive justice" is within easy reach because we could hardly do worse. Merely rolling back some of the generous de-regulation and outright gifts that have brought us here would be a start, and has already begun.<sup>5</sup> The global economic crisis has certainly toppled some of the mighty, but the worst-off may be even worse off, and many are likely to join them.<sup>6</sup>

As a threshold question, it should accordingly be established what, exactly, is required for actual "distributive justice." I take as a starting point the relatively modest objective of the Millennium Development Goals (MDGs)—to halve the number living in extreme poverty by

more than \$14 billion earned by the top twenty-five hedge fund managers was equivalent to the GDP of Jordan or Uruguay). An additional 100 million people live in poverty, even as total world income has increased by 2.5%. JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 5 (2003); *see also Oxfam Faults Response to Famine in Africa*, N.Y. TIMES, July 24, 2006, at A10 (noting that "the number of food emergencies has nearly tripled in 20 years").

<sup>4</sup> SINGER, *supra* note 2, at 81 (citing UNDP, *Human Development Report* 1999, at 3) (emphasis added).

<sup>5</sup> *See* David Leonhardt, *A Bold Plan Sweeps Away Reagan Ideas*, N.Y. TIMES, Feb. 27, 2009, at A1 (describing President Obama's ten-year budget which, "[m]ore than anything else . . . seek[s] to reverse the rapid increase in economic inequality over the last 30 years" by increasing taxes on the wealthiest). The budget also allocates \$51.7 billion for the State Department and foreign aid, which puts the United States "on a path to double foreign assistance," according to the White House. Sheryl Gay Stolberg, *Help Abroad*, N.Y. TIMES, Feb. 27, 2009, at A17.

<sup>6</sup> *See* Edmund L. Andrews, *Report Projects a Worldwide Economic Slide*, N.Y. TIMES, Mar. 9, 2009, at B1 (citing economists for the World Bank predicting that "the global economy and the volume of global trade would both shrink this year for the first time since World War II . . ." with grim consequences for the world's poor); Editorial, *The Crisis at Home and Abroad*, N.Y. TIMES, Mar. 5, 2009, at A30 (urging "leaders of industrial nations . . . to provide large-scale financial assistance to avert an economic catastrophe in the developing world"); *see, e.g.,* Vikas Bajaj, *Household Wealth Falls by Trillions*, N.Y. TIMES, Mar. 13, 2009, at B1 (noting that while American households lost \$5.1 trillion in the last quarter of 2008, "the loss was concentrated among the most affluent"); Andrew E. Kramer, *The Last Days of the Oligarchs?*, N.Y. TIMES, Mar. 8, 2009, at B1 (noting that "few businessmen anywhere have fallen as hard or as fast in recent months" as Russia's richest men, the top twenty-five of whom lost \$230 billion between May and October); Donald G. McNeil Jr., *Global Fund Is Billions Short as Downturn Cuts Pledges from Donor Nations*, N.Y. TIMES, Feb. 3, 2009, at D6 (noting that pledges from donor states "are running about \$5 billion short of what is needed through 2010").

2015.<sup>7</sup> As economist and Director of the MDG Jeffrey Sachs points out, the wealth is there.<sup>8</sup> It is just a matter of moving it around.<sup>9</sup>

My thesis here is that this will not happen under the aegis of international economic law for two reasons. First, distributive justice is not an objective of international economic law. Rather, its objective is to maintain the neoliberal economic order, grounded in free markets and individual autonomy.<sup>10</sup> Second, even if the political will were there, it

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<sup>7</sup> See DEP'T OF ECON. & SOC. AFFAIRS, THE MILLENNIUM DEVELOPMENT GOALS REPORT 2009, at 4 (2009). Although the goal of "development" has not always been so specific, the general objective of reducing poverty and inequality has characterized a part of the World Bank called the International Development Association ("IDA") since its inception in 1960. See *infra* note 12. The extremely poor consist of 1.1 billion humans subsisting on less than one dollar a day. See The World Bank, Dramatic Decline in Global Poverty, but Progress Uneven, Apr. 23, 2004, <http://go.worldbank.org/84RMEOWD20>.

<sup>8</sup> See JEFFREY SACHS, THE END OF POVERTY 26–50 (2005) (describing the growth of the global economy). The 2008 global gross domestic product was \$60,587,016. WORLD BANK, WORLD DEVELOPMENT INDICATORS DATABASE 4 (2009). As recently as February, 2009, Sachs insisted that the wealth was *still* there, although the wealthy states refused to honor their earlier pledges: "The poor are refused \$5 billion, while wealthy countries have found \$3 trillion for bank bailouts and Wall Street bankers awarded themselves \$18 billion in . . . bonuses while accepting those bailouts. This is absolutely in violation of the life and death pledges that the rich world made to the poor." McNeil, *supra* note 6. But see, e.g., Sanjay Reddy & Antoine Heuty, *The End of Poverty?* 1, <http://www.columbia.edu/~sr793/endofpoverty.pdf> (last visited Nov. 21, 2009) (noting that Sachs accepts a "questionable orthodox prescription for economic development").

<sup>9</sup> See THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS 7 (2002) (noting that a meaningful reduction of global poverty could be accomplished through a redistribution of just "1.2% of the aggregate annual gross national incomes of the high income economies."); see also Note, *Never Again Should a People Starve in a World of Plenty*, 121 HARV. L. REV. 1886, 1892 (2008) (urging law students—and presumably everyone else—to "[d]o the [r]ight [t]hing at [e]very moment," that is, if, "with a donation of \$200, a child's life can be saved," you have a moral obligation to do so). But see PAUL COLLIER, THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT, at xi (2007). Collier notes:

Unfortunately, it is not just about giving these countries [where "the bottom billion" live] our money. If it were, it would be relatively easy . . . [but] aid does not work so well in these environments, at least as it has been provided in the past. Change in the societies at the very bottom must come predominantly from within; we cannot impose it on them.

*Id.*

<sup>10</sup> I use "neoliberal" here to distinguish a global economy in which "the value of stock markets has lost all grounding in materiality," replaced by "casino capitalism," as opposed to earlier forms of liberalism, grounded in more concrete notions of property. See Jean Comaroff & John L. Comaroff, *Millennial Capitalism: First Thoughts on a Second Coming*, in *MILLENNIAL CAPITALISM AND THE CULTURE OF NEOLIBERALISM* 1, 7–8 (Jean Comaroff & John L. Comaroff eds., 2001). Additionally, a crucial aspect of these fundamental values, as Carol Gould notes, is a human rights framework that inadequately recognizes basic economic and social rights. See Carol Gould, *Approaching Global Justice Through Human Rights*:

would not happen because “international economic law” is not a coherent legal subject with the capacity to make it happen.<sup>11</sup> Rather, “international economic law” is a loose collection of international organizations (IOs) used by states to further a range of shifting objectives.<sup>12</sup> Most recently, states have sought to realize these objectives through the cluster of premises referred to as the “Washington Consensus.”<sup>13</sup> These include, according to Kerry Rittich: “[T]hat the implementation of efficiency enhancing rules is an uncontentious goal, that everyone stands to gain from free trade, that property and contract rights are the paramount legal entitlements, and that rule-based regimes ‘level the playing field’ and ensure fairness among otherwise unequal parties.”<sup>14</sup>

The first argument, that these premises are fundamentally at odds with distributive justice, draws on Marxist theory.<sup>15</sup> The second argu-

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*Elements of Theory and Practice*, in *DISTRIBUTIVE JUSTICE AND INTERNATIONAL ECONOMIC LAW* (Chios Carmody et al. eds., forthcoming 2009).

<sup>11</sup> This Article draws on critical and postmodern approaches which some commentators perhaps prudently eschew in the context of international economic law. See, e.g., John Linarelli, *What Do We Owe Each Other in the Global Economic Order?: Constructivist and Contractual Accounts*, 15 J. TRANSNAT'L L. & POL'Y 181, 184 (2006) (“No critical or postmodern approaches are undertaken.”).

<sup>12</sup> These IOs include the International Monetary Fund (IMF), the World Trade Organization (WTO), and the International Bank for Reconstruction and Development (World Bank). Articles of Agreement of the International Bank for Reconstruction and Development art. I, Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134 (setting out mission of the World Bank to alleviate poverty).

<sup>13</sup> World Economic Forum, *Death of the Washington Consensus?*, Jan. 29, 2009, [http://www.weforum.org/en/knowledge/Events/2009/KN\\_SESS\\_SUMM\\_26943?url=/en/knowledge/Events/2009/KN\\_SESS\\_SUMM\\_26943](http://www.weforum.org/en/knowledge/Events/2009/KN_SESS_SUMM_26943?url=/en/knowledge/Events/2009/KN_SESS_SUMM_26943) (summarizing a panel discussion at the World Economic Forum in Davos). This panel discussion concluded that “[t]alk of the death of the Washington Consensus is exaggerated, although parts of it will need revision in light of the global economic crisis. The core principles of consensus—good economic governance, trade liberalization and fiscal discipline—remain valid . . . [b]ut, given the controversy surrounding it, the Consensus may need a new name.” *Id.*

<sup>14</sup> Kerry Rittich, *Enchantments of Reason/Coercions of Law*, 57 U. MIAMI L. REV. 727, 739–40 (2003); see also David Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 95, 129 (David M. Trubek & Alvaro Santos eds., 2006) (“[Under the Washington Consensus,] [a]n economy was now imagined as a ‘market’ in which individual economic actors transact with one another . . . . Government is there less to manage the economy than to support the market. Moreover, there is no reason to think of economies in *national* terms.”); David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra*, at 1, 17 (discussing critical analyses of development theory). Yet, Aaron James suggests a fundamental shift in this paradigm toward “structural fairness.” See Aaron James, *Global Economic Fairness: Internal Principles*, in *DISTRIBUTIVE JUSTICE AND INTERNATIONAL ECONOMIC LAW*, *supra* note 10.

<sup>15</sup> Marxist theory, of course, is a vast terrain. For a comprehensive introduction to the subject, see LESZEK KOLAKOWSKI, *MAIN CURRENTS OF MARXISM: THE FOUNDERS, THE*

ment, that “international economic law” could not produce distributive justice if all of the participants at the World Economic Forum burst into *The Internationale*, draws on postmodern theory.<sup>16</sup> But I propose neither a Marxist nor a postmodern “solution” to the problem.<sup>17</sup> Rather, I simply hope to show that neoliberalism cannot be relied upon to produce distributive justice and further that it is not the only game in town.<sup>18</sup> Margaret Thatcher’s edict, “There is no alternative,” is nonsense worthy of Alice’s Queen.<sup>19</sup>

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GOLDEN AGE, THE BREAKDOWN (P.S. Falla trans., W.W. Norton & Company 2005) (1978). My discussion focuses particularly on Marxist theory as recently reassessed by a new generation of theorists, including international legal scholars such as Susan Marks and Anthony Carty. See generally INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES (Susan Marks ed., 2008).

<sup>16</sup> The *Internationale* is the international song of both Marxist and non-Marxist socialist parties, written in French by Eugene Pottier after the fall of the Paris Commune of 1871, and set to the music by P. Degeyter. The Modern Sourcebook, The Internationale, Aug. 1997, <http://www.fordham.edu/halsall/mod/internat.html>. The World Economic Forum, even in happier years when Bono attended, has been unlikely to burst into song. Indeed, the group of world leaders and financiers that the German economist Klaus Schwab invited to Davos was markedly somber this year. See Nelson D. Schwartz, *At Davos, Economic Crisis Culls the Guest List*, N.Y. TIMES, Jan. 26, 2009, at B1.

<sup>17</sup> See *infra* Parts II–Conclusion (explaining, respectively, why Marxism, like other Enlightenment metanarratives, is suspect, and why postmodernism does not provide “solutions”). My arguments are not cumulative, as my aim is not to construct a new metanarrative.

<sup>18</sup> See also Barbara Stark, *Theories of Poverty/The Poverty of Theory*, 2009 BYU L. REV. 381, 391–407 (explaining why traditional liberal theory cannot be relied upon for this purpose).

<sup>19</sup> See, e.g., CLAIRE BERLINSKI, “THERE IS NO ALTERNATIVE”: WHY MARGARET THATCHER MATTERS 148 (2008) (noting that from 1972 to 1992 the average income of the richest tenth rose sixty-one percent, while the income of the poorest tenth decreased by eighteen percent). As Gardner notes, “In a sense, nonsense itself is a sanity-insanity inversion. The ordinary world is turned upside down and backward; it becomes a world in which things go every way except the way they are supposed to.” CARROLL, *supra* note 1, at 142 n.5 (commentary of Martin Gardner, ed.). This is not to downplay, or underestimate, the hegemony of neoliberalism, which many scholars concede. See, e.g., Robert Howse, *The End of the Globalization Debate: A Review Essay*, 121 HARV. L. REV. 1528, 1529 (2008) (arguing that “by the end of the Cold War, the old struggle between right and left over the governance of the economy and the redistribution of wealth within the advanced liberal democracies had yielded to a new pro-market consensus.”) There is, however, a loyal opposition. See, e.g., José E. Alvarez, *Interliberal Law: Comment*, 94 AM. SOC’Y INT’L L. PROC. 249, 250 (2000) (expressing “extreme skepticism” regarding “any attempt to draw distinctions between ‘liberal’ and ‘non-liberal’ states”). There are also outliers, ranging from the “new new left,” to globalization’s discontents, to the barbarians at the gate. See MICHAEL HARDT & ANTONIO NEGRI, *MULTITUDE: WAR AND DEMOCRACY IN THE AGE OF EMPIRE*, at xi–xii, 34 (2004); STIGLITZ, *supra* note 3, at 1–7; Thomas N. Hale & Anne-Marie Slaughter, *Hardt & Negri’s Multitude: The Worst of Both Worlds*, OPEN-DEMOCRACY, May 25, 2005, [http://www.opendemocracy.net/globalization-vision\\_reflections/marx\\_2549.jsp](http://www.opendemocracy.net/globalization-vision_reflections/marx_2549.jsp).

## I. A MARXIST CRITIQUE

*"Face it: Marx was partly right about capitalism."*

—Rowan Williams, Archbishop of Canterbury<sup>20</sup>

### A. *Why Marx Now?*

My first argument draws on Karl Marx—not as an economist, but as a political theorist.<sup>21</sup> I draw on Marx because, as Tony Judt points out, "From first to last, Marxism's strongest suit was . . . 'the moral seriousness of [his] conviction that the destiny of our world as a whole is tied up with the condition of its poorest and most disadvantaged members.'"<sup>22</sup> In addition, as Judt further notes, "Marxism . . . is now once again, largely for want of competition, the common currency of international protest movements."<sup>23</sup>

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<sup>20</sup> Rowan Williams, *Face It: Marx Was Partly Right About Capitalism*, SPECTATOR, Sept. 27, 2008, <http://www.spectator.co.uk/essays/all/2172131/face-it-marx-was-partly-right-about-capitalism.thtml>.

<sup>21</sup> Marx has been many things to many people. Carol Gould, for example, provides an original and provocative perspective on Marx. See CAROL C. GOULD, MARX'S SOCIAL ONTOLOGY, at xi (1978) (proposing a new approach to Marx as a "great systemic philosopher in the tradition of Aristotle, Kant, and Hegel"). Marx remains a useful tool for critique, although the limits of Marxist critique are well-known. As Tony Judt observes, "the predictive powers of Marxian economics have long been discounted even by the left." Tony Judt, *Goodbye to All that?*, N.Y. REV. BOOKS, Sept. 21, 2006, at 88 (reviewing JACQUES ATTALI, KARL MARX OU L'ESPRIT DU MONDE (2005); KOLAKOWSKI, *supra* note 15; and LESZEK KOLAKOWSKI, MY CORRECT VIEWS ON EVERYTHING (Zbigniew Janowski ed., 2005)).

<sup>22</sup> Judt, *supra* note 21, at 92. For a rigorous and compelling analysis of the challenge of attaining both distributive justice and democratic governance, see Chantel Thomas, *Democratic Governance, Distributive Justice and Development*, in DISTRIBUTIVE JUSTICE AND INTERNATIONAL ECONOMIC LAW, *supra* note 10.

<sup>23</sup> Judt, *supra* note 21, at 92. Naomi Klein recently observed, "This is a progressive moment: it's ours to lose." Larissa MacFarquhar, *Outside Agitator: Naomi Klein and the New New Left*, NEW YORKER, Dec. 8, 2008, at 61, 62; see also NAOMI KLEIN, THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM 466 (2007) ("[L]ocal people's renewal movements begin from the premise that there is no escape from the substantial messes we have created and . . . do not seek to start from scratch but rather from scrap, from the rubble that is all around."). As Stiglitz notes, Klein is no economist. Joseph E. Stiglitz, *Bleakonomics*, N.Y. TIMES BOOK REV., Sept. 30, 2007, at 12. But she may be right. As Judt observes:

What Marx's nineteenth century contemporaries called the "Social Question"—how to address and overcome huge disparities of wealth and poverty, and shameful inequalities of health, education and opportunity—may have been answered in the West (though the gulf between poor and rich, which once seemed steadily to be closing, has for some years been opening again, in Britain and above all in the U.S.). But the Social Question is back on the international agenda with a vengeance. What appears to its prosperous beneficiaries as worldwide economic growth . . . is increasingly perceived and re-



Marx has been anathema in the United States for decades.<sup>24</sup> Before Senator Joseph McCarthy fell from grace, he eviscerated the American left; disillusionment with the Soviet brand of Marxism finished the job.<sup>25</sup> As the anti-globalism activist Naomi Klein explains,

My grandparents were pretty hardcore Marxists, and in the thirties and forties they believed fervently in the dream of egalitarianism that the Soviet Union represented . . . . They had their illusions shattered by the reality of gulags, of extreme repression, hypocrisy, Stalin's pact with Hitler . . . . The left has been held accountable for the crimes committed in the name of its extreme ideologies, and I believe that's been a very healthy process.<sup>26</sup>

The demonization of Marxism has been costly, though. It has chilled debate, prevented labor, civil rights activists, and feminists from taking bold positions, and generally inhibited the development of any robust,

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sented by millions of others as the redistribution of global wealth for the benefit of a handful of corporations and holders of capital.

Judt, *supra* note 21, at 92.

<sup>24</sup> Marxism is "out-dated, oversimplified and wrong." Hale & Slaughter, *supra* note 19; see also Mark Leibovich, "Socialism!" *Boo, Hiss, Repeat*, N.Y. TIMES, Mar. 1, 2009, at WK1 (noting that "the socialist bogey-mantra has made a full-scale return after a long stretch of relative dormancy" as conservatives attack bank bailouts and stimulus bills).

<sup>25</sup> See Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1071, 1075 (1989). For more information on McCarthyism and its effect on culture, see generally RICHARD M. FREELAND, *THE TRUMAN DOCTRINE AND THE ORIGINS OF MCCARTHYISM* (1972); THOMAS C. REEVES, *THE LIFE AND TIMES OF JOE MCCARTHY: A BIOGRAPHY* (1982); and DALTON TRUMBO, *The Time of the Toad, in THE TIME OF THE TOAD: A STUDY OF INQUISITION IN AMERICA* 3, 9-63 (1972) (discussing "blacklisted" Hollywood writers).

<sup>26</sup> MacFarquhar, *supra* note 23, at 71; see also David Lodge, *Goodbye to All that*, N.Y. REV. BOOKS, May 27, 2004, at 6 (reviewing TERRY EAGLETON, *AFTER THEORY* (2003)) (noting that Eagleton fails to "explicit[ly] acknowledge[ ]" that Marxism, as implemented in Russia and Eastern Europe, was "inimical to people's free development."). If such an acknowledgement is required here, this footnote is it.

Klein argues that neoliberals should similarly be held accountable:

When you start issuing policy prescriptions, when you start advising heads of state, you no longer have the luxury of only being judged on how you *think* your ideas will affect the world. You begin having to contend with how they actually affect the world, even when that reality contradicts all of your utopian theories.

MacFarquhar, *supra* note 23, at 71.

homegrown American socialism.<sup>27</sup> As David Richards observed almost twenty-five years ago:

[T]he painfully evident bankruptcy of coherent political philosophy of the American left may have both political and legal consequences. To address this problem, the American left must develop a philosophically articulate conviction of the justice of its political ideals. To achieve this development, the left must understand and publicly acknowledge both its continuities and discontinuities with the socialist and Marxist perspectives on political philosophy. Unfortunately, these perspectives have traditionally been excluded from serious political discussion in this country. This lacuna, exacerbated by recurrent red-baiting, deprives us of serious discussion of the full range of democratic political alternatives on the left.<sup>28</sup>

Europeans have not been hobbled in the same way. In 2004, for instance, in response to the American invasion of Iraq, a group of prominent European legal scholars convened the Symposium, *Marxism and International Law*, to explore the causes of the “material economic woes of international society.”<sup>29</sup> Like them, I draw on Marx to explore what Martti Koskenniemi calls “a sense of the loss of international law’s emancipatory promise, [and] a creeping scepticism about whether there ever was any such project to begin with.”<sup>30</sup>

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<sup>27</sup> See, e.g., Ansley, *supra* note 25, at 1075 (“All progressive movements for social change in the United States have been buffeted and weakened by these [anti-communist] winds.”); Jon D. Michaels, *To Promote the General Welfare: The Republican Imperative to Enhance Citizenship Welfare Rights*, 111 YALE L.J. 1457, 1458 (2002) (“[S]ubstantive welfare rights are completely anathema to the Lockean tradition.”). American resistance to welfare rights has affected the international standing of such rights. See generally Philip Alston, *Economic and Social Rights*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 137, 149 (Louis Henkin & John Hargrove eds., 1994) (describing international neglect of economic, social, and cultural rights).

<sup>28</sup> David A.J. Richards, *Book Review*, 60 N.Y.U. L. REV. 1188, 1188 (1985) (reviewing ALLEN E. BUCHANAN, *MARX AND JUSTICE: THE RADICAL CRITIQUE OF LIBERALISM* (1982); STEVEN LUKES, *MARXISM AND MORALITY* (1985); and KAI NIELSEN, *EQUALITY AND LIBERTY: A DEFENSE OF RADICAL EGALITARIANISM* (1985)) (footnotes omitted).

<sup>29</sup> Anthony Carty, *Marxism and International Law: Perspectives for the American (Twenty-First) Century?*, 17 LEIDEN J. INT’L L. 247, 247 (2004); Matthew Craven et al., *We Are Teachers of International Law*, 17 LEIDEN J. INT’L L. 363, 363 (2004) (stating that a group of European legal scholars came together in reaction to impending war). Some of the essays in the Symposium were revised and reprinted in *INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES*, *supra* note 15.

<sup>30</sup> Martti Koskenniemi, *What Should International Lawyers Learn from Karl Marx?*, 17 LEIDEN J. INT’L L. 229, 229 (2004). Like Koskenniemi, I am “using Marx in an instrumental

### B. Ideology

The important concept here is Marx's idea of ideology, that is, the notion that power relations shape the way we think.<sup>31</sup> As Marx succinctly put it, "The ruling ideas of each age have ever been the ideas of its ruling class."<sup>32</sup> Today, the "ruling class" is made up of those who drive the neoliberal economic order, including industrialized states and transnational corporations. As Peter Singer notes,

One hundred and fifty years ago, Karl Marx gave a one-sentence summary of his theory of history: "The hand mill gives you society with the feudal lord; the steam mill, society with the industrial capitalist." Today he could have added: "The jet plane, the telephone, and the Internet give you a global society with the transnational corporation and the World Economic Forum."<sup>33</sup>

Singer's observation rings true because, from a Marxist perspective, international law has supported the ruling class for a long time. As Susan Marks explains, in the 1920s the Russian jurist E.B. Pashukanis described how capitalist states banded together, dividing the world into states which were "civilized" and those which were not.<sup>34</sup> The former, consisting of those states which had adopted capitalism, were entitled to the protection of international law. The latter, "the remainder of the world," were "considered as a simple object of [the capitalist states'] completed transactions."<sup>35</sup> Susan Marks also discusses the work of Antony Anghie, who has shown how colonialism shaped international

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and heretical fashion, in order to assist in a project that can scarcely be called Marxian in any traditional sense." *Id.* at 230.

<sup>31</sup> Critical legal scholars, critical race scholars, and feminists, among others, have gotten considerable mileage from this idea. "Marxism, in short, was the 'deep structure' of much progressive politics. Marxist language, or a language parasitic upon Marxist categories, gave form and an implicit coherence to many kinds of modern political protest: from social democracy to radical feminism." Judd, *supra* note 21, at 8; see also Slavoj Žižek, *The Spectre of Ideology*, in MAPPING IDEOLOGY 1, 1-3 (Slavoj Žižek ed., 1994).

<sup>32</sup> Karl Marx & Frederick Engels, *Manifesto of the Communist Party*, in THE MARX-ENGELS READER 469, 489 (Robert C. Tucker ed., 2d ed. 1978). As Susan Marks points out, "[T]he problem with ideology is not that it involves error, but that it sustains privilege." Susan Marks, *Introduction to INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES*, *supra* note 15, at 1, 8.

<sup>33</sup> SINGER, *supra* note 2, at 10.

<sup>34</sup> See Susan Marks, *Empire's Law*, 10 IND. J. GLOBAL LEGAL STUD. 449, 456-57 (2003).

<sup>35</sup> *Id.*

law.<sup>36</sup> The influence of colonialism can be gleaned from the example of Francisco de Victoria, who “legitimate[d] Spanish conquest and dispossession in the Americas by defining the peoples of the region as non-sovereign.”<sup>37</sup> Marks concludes by urging scholars of globalization not to neglect the manner in which its “processes intersect with and reproduce pre-existing forms of exploitation and exclusion.”<sup>38</sup> Failure to note these underlying motifs would perpetuate a “long and inglorious tradition in international legal scholarship . . . of covering up for international law,” as revealed through the works of those like Pashukanis and Anghie.<sup>39</sup>

Just as capitalist states shaped international law in the 1920s, and colonialism shaped early international conceptions of sovereignty, today neoliberal ideology shapes the institutions, such as the IMF, the World Bank, the WTO, and even the non-binding MDG, that purport to restrain it.<sup>40</sup> These institutions, whose policies collectively account

<sup>36</sup> See *id.* at 547; see also ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* 223–25 (2005) (arguing that international law is deeply grounded in colonialism).

<sup>37</sup> See Marks, *supra* note 34, at 458. Marks demonstrates her point with a historical example: empire. She sets out a detailed account of Hardt and Negri’s description of empire, which she agrees is qualitatively different from earlier forms of imperialism. See *id.* at 461–62. Marks’s admonition is buttressed by Hardt and Negri’s, finding that a primary difference between empire and its imperial predecessors was a change in the “structures of domination,” in part through a process of “deterritorialization.” *Id.* at 463–64.

<sup>38</sup> *Id.* at 464.

<sup>39</sup> *Id.*; see Howse, *supra* note 19, at 1529. Howse discusses Jürgen Habermas’s definition of globalization, stating:

[T]he cumulative processes of a worldwide expansion of trade and production, commodity and financial markets, fashions, the media and computer programs, news and communications networks, transportation systems and flows of migration, the risks generated by large-scale technology, environmental damage and epidemics, as well as organized crime and terrorism.

Howse, *supra* note 19, at 1529 (quoting JÜRGEN HABERMAS, *THE DIVIDED WEST* 175 (Ciaran Cronin ed. & trans., 2006)).

<sup>40</sup> See DEP’T OF SOC. & ECON. AFFAIRS, *supra* note 7; José E. Alvarez, *Factors Driving and Constraining the Incorporation of International Law in WTO Adjudication*, in *THE WTO: GOVERNANCE, DISPUTE SETTLEMENT, AND DEVELOPING COUNTRIES* 611, 611 (Merit E. Janow et al. eds., 2008); Chios Carmody, *A Theory of WTO Law*, 11 J. INT’L ECON. LAW 527, 527 (2008) (stating that there is a general political liberal theory behind the WTO but no established legal theory); ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* 72 (1995) (explaining how the Bretton Woods institutions supported the private sector by expanding domestic and foreign markets); Fernando Tesón, *Free Trade*, in *DISTRIBUTIVE JUSTICE AND INTERNATIONAL ECONOMIC LAW*, *supra* note 10 (providing a thought-provoking defense of free trade). For a comprehensive and groundbreaking critique, see FRANK J. GARCIA, *TRADE, INEQUALITY, AND JUSTICE: TOWARD A LIBERAL THEORY OF JUST TRADE* (2003).

for what we understand to be international economic law, arose post-World War II. In fact, the World Bank was established by those who met at Bretton Woods in 1944 to finance reconstruction in Europe after World War II.<sup>41</sup> In 1960, the International Development Association (IDA) was established within the World Bank to focus on the needs of the poorest states.<sup>42</sup> Although that objective was expressly defined, it is clear that distributive justice has never been the focus of international economic law. Rather, that law, operating through the institutions of the IMF and the WTO, has focused more on trade.<sup>43</sup> The premise behind this fixation on trade is that “boosting economic growth” through trade is key to reducing “poverty and inequality.”<sup>44</sup>

This premise, however, has been criticized as the self-serving ideology of the developed states. Indeed, according to Arturo Escobar, liberal ideology has shaped development discourse for its own purpose beginning with the “discovery” of poverty after World War II.<sup>45</sup> Accord-

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<sup>41</sup> Elizabeth A. Mandeville, *United Nations Development Programme*, in 5 OXFORD ENCYCLOPEDIA OF HUMAN RIGHTS 150, 150–51 (David P. Forsythe ed., 2009) (“[Post World-War II, there were] two new grand efforts in international cooperation and relations—the human rights movement, which sought to assure that these political and civil rights were globally afforded and protected, and the development movement, which sought to create standards of living and institutions of support in the development world to foster economies (and thus societies) in which these freedoms could be guaranteed.”). See generally BARRY CARTER ET AL., *INTERNATIONAL LAW* 483–84 (4th ed. 2003); STIGLITZ, *supra* note 3, at 11–12 (explaining the economic theory behind the Bretton Woods institutions).

<sup>42</sup> CARTER ET AL., *supra* note 41, at 485.

<sup>43</sup> This focus is consistent with its liberal roots. Those who shaped post-Cold War approaches to poverty similarly drew on a wide range of well-known liberal philosophers. John Rawls, a leading American moral and political philosopher, is conspicuously absent in part because he did not address the concerns of internationalists. See, e.g., SINGER, *supra* note 2, at 8–9 (recalling his astonishment that John Rawls could completely ignore “extremes of wealth and poverty that exist between different societies [and in] the most influential work on justice written in twentieth-century America, this question never even arises”); see also Joel P. Trachtman, *Welcome to Cosmopolis, World of Boundless Opportunity*, 39 CORNELL INT’L L.J. 477, 488–98 (2006) (providing an incisive critique of Rawls). When Rawls eventually did address global justice issues, he contemplated closed societies that generally did not have obligations to aid each other. JOHN RAWLS, *THE LAW OF PEOPLES* 115–19 (1999) (defending closed societies on “moral hazard” grounds; that is, if people may freely migrate to more prosperous places, they will have no incentive to invest their time and effort in the poorer places where they are born).

<sup>44</sup> See ESCOBAR, *supra* note 40, at 21–24.

<sup>45</sup> See *id.* at 21 (describing the “discovery” of mass poverty in Asia, Africa, and Latin American after World War II); see also Marks, *supra* note 32, at 13. (“[T]he production of ‘under-development’ is not simply spontaneous. . . . [I]t entails the use of coercive force.”). As Majid Rahnema has noted,

[N]obody . . . seems to have a clear, and commonly shared, view of poverty. For one reason, almost all the definitions given to the word are woven around the concept of ‘lack’ or ‘deficiency.’ This notion reflects only the basic relativ-

ing to Escobar, although development promises a “kingdom of abundance[,] . . . the discourse and strategy of development [has] produced its opposite: massive underdevelopment and impoverishment, untold exploitation and oppression, [including] [t]he debt crisis, the Sahelian famine, increasing poverty, malnutrition, and violence.”<sup>46</sup> Although there have been isolated successes, the failures of development have been well-documented as Escobar describes.<sup>47</sup> These shortcomings include the failure to improve the material lives of the world’s poor, to get twelve cent medicines to children to prevent malaria, and to provide four dollar bed nets to poor families despite spending \$2.3 trillion on foreign aid.<sup>48</sup> Even worse, some critics believe development has continued the destructive processes of colonialism by eviscerating local cultures and by draining least developed countries (LDCs) of their most valuable resources, from oil and gold to the best educated young people and even healthy babies.<sup>49</sup> Development has been a failure, these

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ity of the concept. What is necessary and to whom? And who is qualified to define all that?

Escobar, *supra* note 40, at 21 (quoting MAJID RAHNEMA, *GLOBAL POVERTY: A PAUPERIZING MYTH* (1991)).

<sup>46</sup> ESCOBAR, *supra* note 40, at 4. This apparent paradox of development is nothing new. *See id.* But see WILLIAM EASTERLY, *THE WHITE MAN’S BURDEN: WHY THE WEST’S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* 271 (2006) (citing Harvard historian Niall Ferguson for the proposition that there is “such a thing as liberal imperialism and that on balance it was a good thing . . . . In many cases of economic ‘backwardness’ a liberal empire can do better than a nation state.”) (quoting NIALL FERGUSON, *COLOSSUS: THE PRICE OF AMERICA’S EMPIRE* 198 (2004)); Amartya Sen, *The Man Without a Plan*, *FOREIGN AFFAIRS*, Mar./Apr. 2006, at 174 (acknowledging Ferguson’s proposition). *See generally* 50 YEARS IS ENOUGH: *THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND* (Kevin Danaher ed., 1994) (collecting a number of works which criticize the World Bank’s “progress”).

<sup>47</sup> *See* ESCOBAR, *supra* note 40, at 21; Sen, *supra* note 46, at 172 (describing “success of many international aid efforts”); *see also* MUHAMMAD YUNUS, *BANKER TO THE POOR: MICROLENDING AND THE BATTLE AGAINST WORLD POVERTY* 62–63, 110–12 (2003) (describing origins and successes of the Grameen Bank and its microfinancing projects).

<sup>48</sup> Virginia Postrel, *The Poverty Puzzle*, *N.Y. TIMES*, Mar. 19, 2006, at A12 (“The West is not stingy. It is ineffective.”); *see* EASTERLY, *supra* note 46, at 13–14 (2006). “[W]hen agencies hand out free nets, they are often diverted to the black market . . . [and] wind up being used as fishing nets or wedding veils.” EASTERLY, *supra* note 46, at 13. In Zambia, for example, seventy percent of the recipients of free nets did not use them. *Id.* Yet, in contrast, in Malawi, a program through which nets were sold for a nominal amount increased the number of young children who slept “under nets from 8 percent in 2000 to 55 percent in 2004.” *Id.* Almost all of those who paid for the nets used them. *Id.*

<sup>49</sup> *See, e.g.*, Jane Jenson & Boaventura de Sousa Santos, *Case Studies and Common Trends in Globalization: Introduction*, in *GLOBALIZING INSTITUTIONS: CASE STUDIES IN REGULATIONS AND INNOVATION* 9, 11 (Jane Jenson & Boaventura de Sousa Santos eds., 2000) (defining globalization as “the process by which a given local condition or entity succeeds in . . . extending its reach over the globe and, in by doing so, develops the capacity to designate a

critics contend, but only for the LDCs. It has been quite profitable for the West.<sup>50</sup>

### C. Money Flows Uphill

It has been argued that development has not only benefited the industrial Western states more than it has benefited the LDCs, but that it has done so at the *expense* of the LDCs. First, as Oxfam and others have pointed out, a significant portion of aid dollars never leaves the developed states.<sup>51</sup> Rather, it is spent on paying the salaries of consultants, bureaucrats and technical advisors.<sup>52</sup> Even aid dollars that actually arrive in the LDCs may not reach their intended beneficiaries.<sup>53</sup> Paul Collier describes a 2004 survey tracking funds intended for rural health clinics in Chad:

The survey had the extremely modest purpose of finding out how much of the money actually reached the clinics—not whether the clinics spent it well, or whether staff of the clinics knew what they were doing, just where the money went. Amazingly, less than 1 percent of it reached the clinics—99 percent failed to reach its destination.<sup>54</sup>

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rival social condition or entity as local"); Edward W. Said, *Yeats and Decolonization*, in NATIONALISM, COLONIALISM, AND LITERATURE 69, 69–71 (Terry Eagleton et al. eds., 1990) ("By the beginning of World War I, Europe and America held 85 percent of the earth's surface in some sort of colonial subjugation. This . . . did not happen in a fit of absent-minded whimsy or as a result of a distracted shopping spree."); Robert S. Gordon, *The New Chinese Export: Orphaned Children—An Overview of Adoption of Children from China*, 10 TRANS-NAT'L LAW. 121, 129 (1997) (describing the perception of babies as exports); *see also infra* text accompanying notes 147–151 (describing the New International Economic Order). Nevertheless, others view babies as the most vulnerable refugees. *See* ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 143 (1993); Howard Altstein & Rita J. Simon, *Introduction to INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE* 1, 13 (Howard Altstein & Rita J. Simon eds., 1991).

<sup>50</sup> *See, e.g.*, OXFAM AM., SMART DEVELOPMENT: WHY U.S. FOREIGN AID DEMANDS MAJOR REFORM 19, 22, 24 (2008).

<sup>51</sup> *See id.* at 24.

<sup>52</sup> *See id.* at 19, 22, 24 (pointing out that the United States frequently includes clawback provisions in aid packages); *see also* COLLIER, *supra* note 9, at 4 ("The World Bank has large offices in every major middle-income country but not a single person residing in the Central African Republic.").

<sup>53</sup> *See* COLLIER, *supra* note 9, at 66.

<sup>54</sup> *Id.*; *see also* Jan M. Rosen, *Ensuring That Gifts Go Where They're Needed*, N.Y. TIMES, Nov. 11, 2008, at F26. As Easterly argues, "[i]t's time for the rich-country public to insist that aid money actually reaches the poor." EASTERLY, *supra* note 46, at 207.

Even where corruption takes less of a bite, Collier and Anke Hoeffler estimate that about eleven percent of aid is diverted to the military, and in Africa, such aid supports approximately forty percent of military spending.<sup>55</sup> Finally, even when aid actually reaches its intended beneficiaries, it is subject to diminishing returns.<sup>56</sup> In other words, “the first million dollars is more productive than the second, and so on.”<sup>57</sup> Generally, when aid exceeds about sixteen percent of GDP, it is no longer effective.<sup>58</sup> In 2007, aid to Africa was approaching that figure.<sup>59</sup> This statistic suggests that soon “we [will] have broadly reached the limits to aid absorption, at least under existing modalities.”<sup>60</sup>

Second, loans to developing states have often been more beneficial to their lenders than to the recipient states.<sup>61</sup> While credit has been extended, even when it has not been sought, it is invariably given on the creditor’s terms.<sup>62</sup> During the financial crises in East Asia and Latin America, for example, the IMF provided money for what Nobel prize-winning economist Joseph Stiglitz describes as a “bail-out for Western banks.”<sup>63</sup> That is, Western banks and investors were repaid but the debtor states were left with the loans.<sup>64</sup> These loans were often conditioned on rigid structural adjustment plans (SAPs), under which borrowing states were required to tighten their belts and slash social safety nets.<sup>65</sup> In addition, most risks remained with the borrower. This condi-

<sup>55</sup> COLLIER, *supra* note 9, at 103; see also Elizabeth Powers, *Greed, Guns and Grist: U.S. Military Assistance and Arms Transfers to Developing Countries*, 84 N.D. L. REV. 383, 383 (2008) (explaining the billions in military assistance money spent each year and that many recipients use this money, not for military assistance purposes, but instead for “international antagonism and repression of their citizens”).

<sup>56</sup> See COLLIER, *supra* note 9, at 100.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (citing The Center for Global Development).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> JOSEPH STIGLITZ, *MAKING GLOBALIZATION WORK* 216 (2007).

<sup>62</sup> *Id.* at 217.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See, e.g., DAVID HARVEY, *THE NEW IMPERIALISM* 167 (2003) (describing “literally hundreds of protests against IMF-imposed austerity programmes . . .”); Rogers M. Smith, *Beyond Sovereignty and Uniformity: The Challenges for Equal Citizenship in the Twenty-first Century*, 122 HARV. L. REV. 907, 911 (2009) (reviewing LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2008); HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006); and PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* (2008)) (noting that international financial institutions have “restricted and sometimes restructured” domestic institutions and policies); Galit A. Sarfaty, Note, *The World Bank and the Internaliza-*



tion was equally damaging because when exchange rates or interest rates changed, the borrowing state still had to meet its obligation. Indeed, because most loans were payable on demand, those obligations often became due precisely when they were hardest to pay.<sup>66</sup>

Third, the current system of global reserves is an ongoing source of low cost loans for the West, especially the United States, but a formidable obstacle to investment in infrastructure for LDCs. After the credit crises in Asia and Latin America during the 1990s, LDCs began to hold reserves to back their currencies.<sup>67</sup> Before the 1970s, the conventional wisdom was that states needed gold to back their currencies. Now, the idea is that they need "confidence," which can be grounded in a strong currency such as the U.S. dollar.

LDCs used to hold reserves of three to four months' imports, but now, they generally hold reserves worth up to eight months of imports.<sup>68</sup> China, for example, has \$900 billion reserved, mostly in U.S. Treasury bills.<sup>69</sup> These are low interest investments, and more importantly, represent capital that China cannot invest in its own infrastructure.<sup>70</sup> If an Asian enterprise borrows \$100 million from a U.S. bank, the state adds \$100 million to reserves.<sup>71</sup> Thus, because the state has to have currency reserves equal to the debt, the loans are a wash. For this reason, Stiglitz concludes: "The global financial system is not working well . . . especially for developing countries. Money is flowing uphill, from the poor to the rich. The richest country in the world, the United States, . . . borrow[s] \$2 billion a day from poorer countries."<sup>72</sup> This influx of wealth to the United States is part debt repayment and part global reserves. Consequently, development schemes promoted by

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*tion of Indigenous Rights Norms*, 114 YALE L. J. 1791, 1796–800 (2005) (explaining how the World Bank shapes the domestic law of borrowing states).

<sup>66</sup> STIGLITZ, *supra* note 61, at 218–19.

<sup>67</sup> See *id.*; see also Paul Krugman, *Revenge of the Glut*, N.Y. TIMES, Mar. 2, 2009, at A23 (explaining that after the Asian financial crisis of 1997–1998, the emerging Asian economies "began protecting themselves by amassing huge war chests of foreign assets, in effect exporting capital to the rest of the world").

<sup>68</sup> STIGLITZ, *supra* note 61, at 247.

<sup>69</sup> *Id.* at 248.

<sup>70</sup> See *id.* But see David Barboza, *China Unveils Sweeping Plan for Economy*, N.Y. TIMES, Nov. 9, 2008, at A1 (describing China's plan to invest \$586 billion in infrastructure over the next two years).

<sup>71</sup> Stiglitz, *supra* note 61, at 249.

<sup>72</sup> *Id.* at 245.

these same Western neoliberals who rely on these low cost loans are not likely to reverse this inequitable flow.<sup>73</sup>

Fourth, global trade regimes likewise continue to benefit developed states at the expense of LDCs. Contrary to presumptions otherwise, trade liberalization does not “make everyone better off.” Rather, even when it makes “the country as a whole better off, it results in some groups being worse off.”<sup>74</sup> The rules for world trade are established through periodic negotiations or “rounds” of talks among the members of the WTO, whose agendas are set by the wealthy industrialized states. The Uruguay Round, for instance, promised a “Grand Bargain” in which the LDCs would accept new rules on intellectual property, investments and services in exchange for a reduction of agricultural subsidies and textiles quotas in the industrialized states.<sup>75</sup> In reality, only the industrialized states benefited from the Grand Bargain. Sub-Saharan Africa lost \$1.2 billion.<sup>76</sup> Industrialized countries made no concessions on agricultural subsidies and left textile quotas in place for ten years.<sup>77</sup> Nonetheless, Eleanor Fox has observed that the elimination of subsidies by the WTO Member States would be the single most effective and far-reaching measure to improve human welfare in the developing world. She explains:

“The human costs of unfair trade are immense. If Africa, East Asia, South Asia, and Latin America were each to increase their share of world exports by one per cent the resulting gains in income could lift 128 million people out of poverty. . . .”

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<sup>73</sup> See Audre Lourde, *The Master's Tools Will Never Dismantle the Master's House*, in THIS BRIDGE CALLED MY BACK 98, 99 (Cherrie Moraga & Gloria Anzaldua eds., 1981) (“The master's tools will never dismantle the master's house.”). Development schemes promoted by China, in contrast, may well limit the flow of credit to the West. See Barboza, *supra* note 70.

<sup>74</sup> STIGLITZ, *supra* note 61, at 68.

<sup>75</sup> *Id.* at 77.

<sup>76</sup> *Id.*

<sup>77</sup> The United States opened its markets to African cotton producers in 2005. *Id.* at 80–81. Though the U.S. does not import cotton, cotton subsidies make it the world's largest cotton exporter and effectively make competition by the LDCs impossible. *Id.* at 85–86; see also Kenneth A. Bamberger & Andrew Guzman, *Keeping Imports Safe: A Proposal for Discriminatory Regulation of International Trade*, 96 CAL. L. REV. 1405, 1445 (2008) (arguing that encouraging competition among United States and foreign companies, while simultaneously enforcing safety regulations, would significantly benefit U.S. consumers).

If the nations of the WTO were to adopt one and only one human welfare measure, elimination of [subsidies in trade barriers] should be the measure.<sup>78</sup>

Indeed, “[r]ich countries have cost poor countries three times more in trade restrictions than they give in total development aid.”<sup>79</sup>

Five years after the WTO’s Uruguay Round, protesters disrupted the next round scheduled to begin Seattle in 1999. Following the debacle of the “Battle in Seattle,” the WTO convened in a more remote location—Doha, Qatar—to avoid large protests.<sup>80</sup> The Doha Round was touted as a “development round,” but again, there were few real concessions to the LDCs.<sup>81</sup> This seemingly unalterable trend would not have surprised Marx, who concluded his monograph *On the Question of Free Trade*: “To sum up, what is Free Trade under the present condition of society? [It is] Freedom of Capital.”<sup>82</sup>

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<sup>78</sup> Eleanor M. Fox, *Globalization and Human Rights: Looking Out for the Welfare of the Worst Off*, 35 N.Y.U. J. INT’L L. & POL. 201, 211 (2002) (quoting OXFAM INT’L, RIGGED RULES AND DOUBLE STANDARDS: TRADE GLOBALISATION, AND THE FIGHT AGAINST POVERTY 5 (2002)). But see DEP’T OF ECON. & SOC. AFFAIRS, THE MILLENNIUM DEVELOPMENT GOALS REPORT 2007, at 28 (2007) (noting that the elimination of trade barriers benefits some LDCs at the expense of others).

<sup>79</sup> STIGLITZ, *supra* note 61, at 78.

<sup>80</sup> See *The Battle in Seattle*, ECONOMIST, Nov. 27, 1999, at 21; Paul Reynolds, *Eyewitness: The Battle of Seattle*, BBC NEWS, Dec. 2, 1999, <http://news.bbc.co.uk/2/hi/amercias/547581.stm> (last visited Oct. 1, 2009). See Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT’L ECON. L. 61, 61–89 (2001) for a perceptive account of what was at stake. Various scholars have analyzed the “Battle of Seattle” in the larger context of global governance. See, e.g., Michael A. Livermore, *Authority and Legitimacy in Global Governance: Deliberation, Institutional Differentiation, and the Codex Alimentarius*, 81 N.Y.U. L. REV. 766, 779 n.62, 780 n.63 (2006); Richard B. Bilder & Richard Falk, *Recent Books on International Law Book Review*, 96 AM. J. INT’L L. 264, 267 (2002) (reviewing SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY, AND THE CRITIQUE OF IDEOLOGY* (2000) and GREGORY H. FOX & BRAD R. ROTH, *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* (2000)).

<sup>81</sup> Some argued that the collapse of the Doha Round of WTO talks precluded agreement on effective measures to “lift millions out of poverty, curb rich countries’ ruinous farm support and open markets for countless goods and services.” *The Future of Globalisation*, ECONOMIST, July 29, 2006, at 11.

<sup>82</sup> Karl Marx, *On the Question of Free Trade* (Jan. 9, 1848), in MICHELINE R. ISHAY, *THE HUMAN RIGHTS READER* 228, 228 (2007). Marx stated:

But, generally speaking, the Protective system in these days is conservative, while the free trade system works destructively. It breaks up old nationalities and carries antagonism of proletariat and bourgeoisie to the utter-most point. In a word, the Free Trade system hastens the social revolution. In this revolutionary sense alone, gentleman, I am in favor of free trade.

*Id.* at 229.

Finally, the West has benefited politically as well as economically from the fiasco of development. During the Cold War, for example, aid was used to buy political support. As a result, a brutal lineup of dictators and crooks, whose only redeeming quality was their opposition to the Soviets, received aid from the West.<sup>83</sup> Thus, as Stiglitz notes, although most of those dictators are gone now, their people continue to struggle with the specter of their “odious debts.”<sup>84</sup> Under Mobutu, for example, then-Zaire took on \$8 billion in debt while its leader amassed a fortune estimated to be between \$5–10 billion.<sup>85</sup> As Stiglitz notes, “Chileans today are repaying the debts incurred during the Pinochet regime, South Africans the debts incurred during apartheid.”<sup>86</sup>

Marx probably would have been critical of the ideology of aid, just as he was critical of the ideology of rights.<sup>87</sup> As noted above, he explic-

<sup>83</sup> See *Mobutu's Xanadu*, N.Y. TIMES MAG., Sept. 26, 1999, at 82 (describing Gbadolite, a remote village in the Congo as an eerie wasteland which dictator Mobutu once filled with three palaces, a high-rise luxury hotel and conference center). The Soviets, of course, were likewise buying support. See, e.g., Barry Bearak, *In Crisis, Zimbabwe Asks: Could Mugabe Lose?*, N.Y. TIMES, Mar. 7, 2008, at A1 (describing the decades of Mugabe's rule, during which he mutated from a revolutionary leader to a tyrant who has led his country to a surreal national inflation rate of 100,000%).

<sup>84</sup> See STIGLITZ, *supra* note 61, at 238–41; see also RAYMOND FISMAN & EDWARD MIGUEL, ECONOMIC GANGSTERS: CORRUPTION, VIOLENCE AND THE POVERTY OF NATIONS 3–15 (2008) (explaining how corrupt regimes thrive and their effect on economic development); David A. Skeel, Jr., *Governance in the Ruins*, 122 HARV. L. REV. 696, 697–99 (2008) (reviewing CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD (2008)) (noting links between corporate crises and economic development).

<sup>85</sup> STIGLITZ, *supra* note 61, at 229.

<sup>86</sup> *Id.* Examples of Western leaders fraternizing with corrupt and tyrannical regimes are not limited to the distant past. During Bill Clinton's presidential campaign, for example, he criticized George H.W. Bush, for “coddl[ing] dictators[,] stand[ing] aside from the global movement toward democracies [and] prefer[ing] a foreign policy that embrace[d] stability at the expense of freedom.” Harold Hongju Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 YALE L.J. 2391, 2427 n.206 (1994) (quoting President William Clinton, Speech to the University of Wisconsin Institute of World Affairs (Oct. 1, 1992)).

<sup>87</sup> As Marx explained:

None of the supposed rights of man, therefore, go beyond the egoistic man, man as he is, as a member of civil society; that is, an individual separated from the community, withdrawn into himself, wholly preoccupied with his private interest and acting in accordance with his private caprice. Man is far from being considered, in the rights of man, as a species-being; on the contrary, species-life itself—society—appears as a system which is external to the individual and as a limitation of his original independence. The only bond between men is natural necessity, need and private interest, the preservation of their property and their egoistic persons.

itly equated "free trade" with "freedom of capital."<sup>88</sup> But as Susan Marks notes, "international law was not part of his project."<sup>89</sup> Nevertheless, no one today argues that global capitalism is monolithic. In fact, as explained in Part II, a growing number of legal scholars recognize that the World Bank, the IMF, the WTO, and the MDG might not be able to agree upon objectives, or coordinate their efforts, even if they wanted.<sup>90</sup>

## II. A POSTMODERN CRITIQUE

While "many doubt whether the term [postmodernism] can ever be dignified by conceptual coherence," two well-known definitions are pertinent here.<sup>91</sup> First, as Jean-François Lyotard defines it, "*Postmodernism* [is] incredulity toward metanarratives."<sup>92</sup> Like Marxists, postmodernists challenge the metanarrative of development and the broader metanarrative of liberalism of which it is a part. For postmodernists, it is not that liberalism is the wrong metanarrative, but that *all* metanarratives—including Marxism, liberalism, religion, and the Enlightenment itself—are suspect.<sup>93</sup> Second, as Fredric Jameson suggests, "postmodernism is the cultural logic of late capitalism."<sup>94</sup> Examining the metanarra-

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Karl Marx, *On the Jewish Question*, as reprinted in HUMAN RIGHTS, at 54, 56 (Louis Henken et al. eds., 1999).

<sup>88</sup> See Marx, *supra* note 82, at 39. As Marx notes, "[The Bourgeoisie] has resolved personal worth into exchange value, and in place of the numberless infeasible chartered freedoms, has set up that single, unconscionable freedom—Free Trade." KARL MARX, COMMUNIST MANIFESTO 82 (Penguin Books 1985) (1888).

<sup>89</sup> Marks, *supra* note 32, at 16.

<sup>90</sup> See, e.g., Andrew Guzman, *Trade, Labor, Legitimacy*, 91 CAL. L. REV. 885, 885–89 (2003) (discussing the dilemmas within the integration of the ILO Core Rights Labor Standards into the WTO); Chantal Thomas, *Should the World Trade Organization Incorporate Labor and Environmental Standards?*, 61 WASH. & LEE L. REV. 347, 379–86, 401–03 (2004) (explaining some of the difficulties in negotiating common agreements); Elissa Alben, Note, *GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link*, 101 COLUM. L. REV. 1410, 1411–20 (2001) (putting the relationship between labor and trade in historical perspective).

<sup>91</sup> Roy Boyne & Ali Rattansi, *The Theory and Politics of Postmodernism*, in POSTMODERNISM AND SOCIETY 1, 9 (Roy Boyne & Ali Rattansi eds., 1990).

<sup>92</sup> JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE*, at xxiv (Geoff Bennington & Brian Massumi trans., 1984) (1979). "Metanarrative" refers to an all-encompassing story that promises to explain everything. See, e.g., KOLAKOWSKI, *supra* note 15, at 356 (describing the "orthodox majority" which "maintained that Marxist doctrine itself contained the answers to all or most of the problems of philosophy").

<sup>93</sup> See Judt, *supra* note 21, at 91 ("The Marxist project . . . was one strand in the great progressive narrative of our time: it shares with classical liberalism, its antithetical historical twin, that narrative's optimistic, rationalistic account of modern society and its possibilities.").

<sup>94</sup> FREDRIC JAMESON, *POSTMODERNISM, OR THE CULTURAL LOGIC OF LATE CAPITALISM*, at xv (1991).

tive of development with Lyotard's incredulity exposes its theoretical flaws. Then analyzing development in Jameson's terms shows how this flawed metanarrative actually plays out in contemporary global culture.

### A. Incredulity Toward Metanarratives

The metanarrative of the Enlightenment replaced God with Reason, and religion with science.<sup>95</sup> Although the Enlightenment was deeply committed to humanism, reason and science do not inevitably lead to progress and human good.<sup>96</sup> Indeed, some have noted the role of the Enlightenment itself in the Holocaust.<sup>97</sup> After all, the "final solution" was not a barbarian rampage, but an orderly, systematic, "scientific" program of genocide, bureaucratic and perversely "rational."<sup>98</sup>

For postmodernists, all metanarratives have their own "will to power."<sup>99</sup> They tell us more about the ambitions of their proponents than about the world they claim to explain. For liberalism, the "univer-

<sup>95</sup> The substitution of Reason for God, of course, was not so neat. It has been suggested, for example, that God was not entirely replaced by reason. See, e.g., Pierre Schlag, *Law as a Continuation of God by Others Means*, 85 CAL. L. REV. 427, 427-28 (1997) (explaining how legal arguments replicate various proofs of the existence of God).

<sup>96</sup> See Peter Gay, *The Science of Man and Society*, in THE ENLIGHTENMENT: A COMPREHENSIVE ANTHOLOGY 479, 481 (Peter Gay ed., 1973) (observing that "[t]he philosophers were aware that their enterprise concealed a deep tension: knowledge did not always lead to improvement") (emphasis omitted).

<sup>97</sup> See MAX HORKHEIMER & THEODOR W. ADORNO, DIALECTIC OF ENLIGHTENMENT 168-69 (John Cummings trans., The Continuum Publ'g Co. 1987) (1944). According to John Gray, the Enlightenment contemplated "the creation of a single worldwide civilization." JOHN GRAY, FALSE DAWN: THE DELUSIONS OF GLOBAL CAPITALISM 2 (1998). Hence the United States, "the last great power to base its policies on this enlightenment thesis," seeks the global domination of democratic capitalism, a "single universal free market." *Id.*

<sup>98</sup> See JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 2-10 (1998) (arguing that states seek to make the life of society "legible" in order to make it controllable by political power); see also Judt, *supra* note 21, at 92 ("As for those who dream of rerunning the Marxist tape, digitally remastered and free of irritating Communist scratches, they would be well advised to ask sooner rather than later just what it is about all-embracing 'systems' of thought that lead inexorably to all-embracing 'systems' of rule.").

<sup>99</sup> The phrase is Nietzsche's. See GILLIAN ROSE, THE MELANCHOLY SCIENCE: AN INTRODUCTION TO THE THOUGHT OF THEODOR W. ADORNO 19 (1978) ("Nietzsche, according to Adorno, refused 'complicity with the world' which . . . comes to mean rejecting the prevalent norms and values of society on the ground that they have come to legitimise a society that in no way corresponds to them—they have become 'lies.'"). This includes those who view "universalism," or secular Western universalism, as a Western "will to power" or quest for hegemony. This critique may be addressed to radicals as well as liberals. See, e.g., Eve Darian-Smith, *Power in Paradise: The Political Implications of Santos's Utopia*, 23 LAW & SOC. INQUIRY 81, 86 (1998) (concluding that Santos' goal "is, above all, modernist: it conceals relations of power in the march toward emancipation of the oppressed").

sal" subject turns out to be a Western white man.<sup>100</sup> As Pierre Schlag explains,

[P]ostmodernism questions the integrity, the coherence, and the actual identity of the humanist individual self. . . . For postmodernism, this humanist individual subject is a construction of texts, discourses, and institutions. The promise that this particular human agent would realize freedom, autonomy, etc., has turned out to be just so much Kant.<sup>101</sup>

The liberal metanarrative of "development," similarly, may sustain liberals but its value for its purported beneficiaries is less clear.<sup>102</sup> As Bob Sutcliffe explains, the metanarrative of development is captured in the metaphor of a journey—nation states start from roughly the same place, but at different times.<sup>103</sup> Thus, the LDCs are today where Europe was in the fourteenth century. For Sutcliffe, "The form of travel is characterized by the transfer of labour from low-productivity agriculture to higher-productivity industry and modern services."<sup>104</sup> But everyone ends up at the same place, with high consumption matching high productivity. Economic progress brings electricity, toilets, education, urbanization, medical services, longer lives, democracy, and human rights—in short, modernization.

The metanarrative of development has given rise to three major critiques. Each challenges one of its underlying premises. First, the polarization critique argues that everyone does not end up in the same

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<sup>100</sup> See, e.g., Hilary Charlesworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 379, 383 (1999) ("International law asserts a generality and universality that can appear strikingly incongruous in an international community made up of almost two hundred different nationalities and many more cultural, religious, linguistic and ethnic groups.").

<sup>101</sup> PIERRE SCHLAG, *Normative and Nowhere to Go*, in LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND 24 (1996).

<sup>102</sup> See, e.g., Sen, *supra* note 46, at 2 (noting that "Easterly's critique is not confined to foreign aid as it is usually defined; it is a critique of all grand plans to save the world hatched in Washington or London or Paris").

<sup>103</sup> See Bob Sutcliffe, *The Place of Development in Theories of Imperialism and Globalization*, in CRITICAL DEVELOPMENT THEORY: CONTRIBUTIONS TO A NEW PARADIGM 135, 135 (Ronald Munck & Denis O'Hearn eds., 1999). Chin Leng Lim seems to eschew the development metanarrative in favor of empirical analyses of actual claims. See Chin Leng Lim, *The Conventional Morality of Trade*, in DISTRIBUTIVE JUSTICE AND INTERNATIONAL ECONOMIC LAW, *supra* note 10. This approach resonates with the New Legal Realism. See Howard Erlanger et al., *Is It Time for a New Legal Realism?*, 2005 WISC. L. REV. 335, 339, 357–58 (2007).

<sup>104</sup> Sutcliffe, *supra* note 103, at 135. Varun Gauri, Senior Economist at the World Bank, suggests that now the transfer of labor is from low-productivity agriculture to high-productivity agriculture. Varun Gauri, Comment Made From the Audience at Symposium on Distributive Justice and International Law at Tillar House (Nov. 7, 2008).

place. Rather, Europe developed, and as a result, nations polarized into developed and underdeveloped states. This was set and unalterable by the end of the nineteenth century. As Sutcliffe explains, "Underdevelopment is, like Dorian Gray's portrait, development's alter ego."<sup>105</sup> The underdeveloped states can never catch up, in part because of all the trash—from environmental degradation to corrupt regimes—the developed states have left in their way.

Second, the attainability critique is grounded in the realization that it is physically impossible for the whole world to reach the same destination, to enjoy the level of consumption enjoyed by those in the West. Rather, because of greenhouse gases, contaminants, and nonrenewable resources, "development" "cannot be generalized . . . without causing an apocalypse."<sup>106</sup>

Third, and finally, a broad range of desirability critiques suggest that not everyone aspires to such levels of consumption. These critiques are diverse, ranging from those who seek spiritual, rather than material fulfillment, to those living off the land or off the grid, who seek a different kind of material fulfillment. What these critiques have in common is their rejection of high consumption/high productivity. They see "[rich developed states] full of needy, oppressed and unfulfilled people."<sup>107</sup> In short, even if it were possible for the entire world to live like Americans, many would rather not.

The metanarrative of development raises more questions than it answers. It is economically, politically, and normatively problematic. While there are some inspiring success stories, overall the story of development is dismal.<sup>108</sup> It is jarringly out of sync with the liberal metanarrative of progress.

### B. *The Cultural Logic of Late Capitalism*

Even if distributive justice was its objective, 'international economic law' could neither mandate nor further distributive justice be-

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<sup>105</sup> Sutcliffe, *supra* note 103, at 136 (emphasis omitted).

<sup>106</sup> JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* 498 (2005); Sutcliffe, *supra* note 103, at 137. Daniel Butt suggests a sensible response to this critique with his notion of "sufficientarianism." Daniel Butt, *Global Equality of Opportunity as an Institutional Standard of Distributive Justice*, in *DISTRIBUTIVE JUSTICE AND INTERNATIONAL ECONOMIC LAW*, *supra* note 10.

<sup>107</sup> Sutcliffe, *supra* note 103, at 138.

<sup>108</sup> See, e.g., ESCOBAR, *supra* note 40, at 103–211 (discussing the transformation of strategies for development and those strategies' new problems and successes); *supra* notes 2, 10–12, and Part I.C.



cause 'international economic law' is not a legal subject with the capacity to do so. Almost twenty years ago, Schlag identified this dilemma in American law as "the problem of the subject."<sup>109</sup> At that time the question of "who or what it is that thinks or produces law"<sup>110</sup> became a major focus of domestic legal theory.<sup>111</sup> In contrast, it has not been a focus of international law because the authority of international law is not taken for granted in the same way.

In fact, the authority of international law has been under relentless attack in this country. During the Cold War, as Harold Koh explains, self-described "realists" in the U.S. saw international law as "naive and virtually beneath discussion."<sup>112</sup> Those who defended international law in the U.S. were more inclined to circle the wagons, to insist that international law really *was* law, than to question its fundamental premises.<sup>113</sup> Indeed, under the popular logic of the day such questioning could only aid the enemy.<sup>114</sup>

<sup>109</sup> See Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1629 (1991).

<sup>110</sup> *Id.*

<sup>111</sup> See, e.g., Drucilla L. Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135, 1135-37 (1988); Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97, 98-100 (1991); Mary Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1019-55 (1991); Pierre Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEX. L. REV. 1195, 1195-243 (1989); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 167-90 (1990); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1442-69 (1990).

<sup>112</sup> Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2616 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) and THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)). For a post-Cold War example of such an attack, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 834-38 (1997) (arguing that the *Restatement* incorrectly elevates customary international law).

<sup>113</sup> See, e.g., Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1861 (1998) (concluding that international law, the "law of nations," is more properly viewed as the supreme law of the land).

<sup>114</sup> This ironically reproduced the silencing of proponents of international law by the "realists." See Koh, *supra* note 112, at 2615 (describing the view that, "utopian moralizing about world government . . . like the strategy of appeasement, played into the hands of the Communist bloc"). Koh himself, for example, while noting the postmodern proliferation and fragmentation of "international law, transnational actors, decisional fora, and modes of regulations [which] mutate into fascinating hybrid forms," firmly grounds his analysis in Anglo-American liberalism. *Id.* at 2630.

While postmodernism has been criticized in the domestic context for similar reasons, no one credibly argues that "might makes right" in the domestic context. See, e.g., *infra* note 122. Critical theorists are constrained by the self-limiting social contract of the liberal state. In the international context, in contrast, that constraint evaporates. See Noah Feldman, *Cosmopolitan*

The decade following the end of the Cold War, bracketed by the first Iraq war and 9/11, was a tumultuous period for international law. In 1999, the *American Journal of International Law* published a *Symposium on Method in International Law*.<sup>115</sup> The organizers, Steven R. Ratner and Anne-Marie Slaughter, sought to “provide a greater grasp of the major theories of international law currently shared by scholars.”<sup>116</sup> They described the often jerky crossover of scholarly innovations from domestic law to international law and the Symposium showed how seven such “methods” had successfully made the leap.<sup>117</sup> Postmodernism was conspicuous by its absence from this list—an absence attributable, at least in part, to ongoing ontological challenges to international law. Such challenges include ongoing charges that international law is not ‘law’ at all.<sup>118</sup>

Thus, American internationalists have been reluctant to recognize the problem of the subject—that is, that there may be no identifiable subject, or coherent principle, that “makes or produces” international economic law—since this might be construed as support for the broader, far more dubious, proposition that international law is whatever the United States says it is.<sup>119</sup> But this conflates a normative project

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*Law?*, 116 YALE L.J. 1022, 1033–37 (2007) (reviewing KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (2006); KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* (2005); and MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006)) (explaining the problems of extrapolating from state-centered liberal theory).

<sup>115</sup> *Symposium on Methods in International Law*, 93 AM. J. INT’L L. 291 (1999).

<sup>116</sup> See Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT’L L. 291, 292 (1999).

<sup>117</sup> See *id.* at 292–93. The seven methods selected, with many lawyerly disclaimers and caveats, were: “legal positivism, the New Haven School, international legal process, critical legal studies, international law and international relations, feminist jurisprudence, and law and economics.” *Id.* at 293.

<sup>118</sup> I have explained the reasons for postmodernism’s absence from the Symposium, and the ways in which it nonetheless characterized the Symposium itself in other scholarship. See Barbara Stark, *After/word(s): ‘Violations of Human Dignity’ and Postmodern International Law*, 27 YALE J. INT’L L. 315, 317 (2002). There may be additional reasons, however. See, e.g., Lodge, *supra* note 26, at 43 (explaining how “the excruciating effort of construing this jargon-heavy [postmodern] discourse far exceeded the illumination likely to be gleaned from it, so [general readers] stopped reading it”).

<sup>119</sup> See, e.g., Curtis A. Bradley et al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 891–909 (2007) (arguing that *Sosa* rejects the position that customary international law (CIL) has the status of self-executing federal common law); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2091–102 (2005) (arguing for an extremely expansive executive role); Julian G. Ku, *Gubernatorial Foreign Policy*, 115 YALE L.J. 2380, 2410–15 (2006) (arguing for an expansive view of executive power); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 744–75 (2004) (defending the Bush Administration’s use of force). But

(that international law, in general, should serve the interests of the West) with a descriptive project (that international economic law, in particular, may have no coherent objective at all).

Rather, international economic law's objectives are shaped by the "cultural logic of late capitalism."<sup>120</sup> For Jameson, this means the commodification of *everything*, including art and human well-being. Everything has a price, and everything is for sale. As Schlag points out: "[O]urs is a world . . . where the value of freedom implies at once the downfall of the Berlin Wall and the imbibing of Pepsi."<sup>121</sup> The problem of distributive justice becomes a marketing problem.

This cultural logic not only allows us to recognize the problem of extreme poverty, it ironically commodifies it by generating a range of money-making responses, two of which are especially pertinent here. First, a personal charity became the "must-have" commodity of the hyper-rich.<sup>122</sup> As journalist Alessandra Stanley observed, "After 25 years of ever-escalating exorbitance, the pendulum has swung towards conspicuous nonconsumption. Extravagance is measured not by how much is

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see MARY-ELLEN O'CONNELL, AMERICAN SOCIETY OF INT'L LAW, THE MYTH OF PREEMPTIVE SELF-DEFENSE 3 (2002), available at <http://www.asil.org/taskforce/oconnell.pdf> (stating "the United States as a government has consistently supported the prohibition on such preemptive use of force"); Koh, *supra* note 112, at 2659 ("By interpreting global norms, and internalizing them into domestic law, [participation in the transnational legal process] leads to reconstruction of national interests and eventually national identities."). I do not mean to suggest that internationalists are not interested in the question of "who or what makes or produces" international law. Indeed, there is large and growing scholarly literature, including works on: cosmopolitanism, see APPIAH, *supra* note 114; NUSSBAUM, *supra* note 114; global networks, see ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Anne-Marie Slaughter, *America's Edge: Power in the Networked Century*, 88 FOREIGN AFFS. 94 (2009); deliberative democracy, see SLAUGHTER, *supra*, at 194; Richard Falk, *What Comes After Westphalia: The Democratic Challenge*, 13 WIDENER L. REV. 243 (2007); Andrew Strauss, *Considering Global Democracy An Introduction to the Symposium: Envisioning a More Democratic Global System*, 13 WIDENER L. REV. i (2007); Symposium: *Envisioning a More Democratic Global Democracy*, 13 WIDENER L. REV. 1 (2007).

<sup>120</sup> JAMESON, *supra* note 94, at xv.

<sup>121</sup> SCHLAG, *supra* note 101, at 47. See generally Said, *supra* note 49, at 9–13 (explaining why imperialism must be understood in cultural, as well as political and economic terms).

<sup>122</sup> See, e.g., James Traub, *The Celebrity Solution*, N.Y. TIMES MAG., Mar. 9, 2008, at 40 (explaining how "Hollywood celebrities have become central players on deeply political issues like development aid"); Action Without Borders, *How We're Funded*, <http://www.idealists.org/en/about/funding.html> (last visited Nov. 21, 2009) (discussing earned income from "Idealist Consultant and Vendor Directory" and "Idealist Nonprofit Career Fairs"). The point is not that such projects are necessarily suspect. In fact, some of these projects may well involve the kind of "piecemeal problem solving" suggested *infra* note 145. There is, however, always the risk that such projects will become *too* successful. See, e.g., Elisabeth Malkin, *Microloans, Big Profits*, N.Y. TIMES, Apr. 5, 2008, at C4 (noting that, while "[p]rofit is not a dirty word in the microfinance world," a return of 19.6% raises questions).

spent, but by how much is given away.”<sup>123</sup> Bill Gates, for example, vowed to eradicate polio.<sup>124</sup>

Second, multinational corporations agreed to donate a portion of their profits. Bono’s charity enlisted companies, including Dell and The Gap, to market lines which donate a portion of their profits to aid Africa.<sup>125</sup> Pursuant to the cultural logic of late capitalism, global poverty would be addressed by *shopping*, that is, by the very overconsumption that perpetuates it.

Just as conspicuous consumption became a status symbol in Theodore Veblen’s day, conspicuous philanthropy became a status symbol in ours.<sup>126</sup> Getting photographed with African children makes celebrities look “good”—not only attractive, but moral as well. It also distracts the public from negative publicity.<sup>127</sup> Angelina Jolie, for example, starred in an MTV documentary on *The Poverty Crisis in Africa*.<sup>128</sup>

The idea that the extremely well-off should give some of their wealth to the needy became part of the *zeitgeist*, the air we breathe and the coffee we drink.<sup>129</sup> This was true at least until the current economic crisis.<sup>130</sup> A recent article in *Fortune* magazine recognized this truth when

<sup>123</sup> Alessandra Stanley, *Humble Celebrity and Eager Interviewer*, N.Y. TIMES, June 22, 2006, at E7.

<sup>124</sup> See BILL GATES, BILL & MELINDA GATES FOUNDATION, 2009 ANNUAL LETTER FROM BILL GATES 14 (2009), available at <http://www.gatesfoundation.org/annual-letter/Documents/2009-bill-gates-annual-letter.pdf>. Gates recently helped raise \$600 million to do so. See *id.*

<sup>125</sup> See Ron Nixon, *Bottom Line for (Red)*, N.Y. TIMES, Feb. 6, 2008, at C1.

<sup>126</sup> See generally THEODORE VEBLEN, *THE THEORY OF THE LEISURE CLASS* 69–101 (1899).

<sup>127</sup> See, e.g., Cate Doty, *Who’s the Most Charitable of Us All? Celebrities Don’t Always Make the List*, N.Y. TIMES, Sept. 10, 2007, at C7 (noting Jolie’s acknowledgement that her charitable work distracts the public from her “colorful” personal life).

<sup>128</sup> Bill Saporito, *The Jeff Sachs Contradiction: Celebrity Economist*, TIME, Mar. 14, 2005, at 50; “Diary”: *The Diary of Angelina Jolie and Dr. Jeffrey Sachs in Africa* (MTV television broadcast, Sept. 14, 2005). Sachs has been called the “macroeconomist to the stars.” Daniel W. Drezner, *Brother Can You Spare \$195 Billion?*, N.Y. TIMES BOOK REV., Apr. 24, 2005, at 18.

<sup>129</sup> See, e.g., Starbucks Coffee Company Advertisement, *We Have Something in Common*, N.Y. TIMES, Aug. 27, 2006, at N17 (“[In the clean water campaign to raise \$10 million, Starbucks partnered with] non-governmental organizations to bring clean water, improved sanitation, and hygiene education to villages in need. What’s amazing is that once these basic needs are fulfilled, opportunities for education, agriculture, and commerce emerge—children go to school, women start businesses, and the whole community begins to look forward to the future, which, it should be said, is another thing we all have in common.”).

<sup>130</sup> Jan M. Rosen, *In Uncertain Times, Donors Hold Back*, N.Y. TIMES, Feb. 26, 2009, at G4 (noting that charities “have suffered in the economic maelstrom, while their services are needed more than ever”). But see Matthew Bishop, *A Tarnished Capitalism Still Serves Philanthropy*, N.Y. TIMES, Nov. 11, 2008, at F25 (noting that the need for philanthrocapitalism is greater now than before, and philanthrocapitalists are looking to make “high performance” and “strategic” donations).

it reported that “leaders of the hedge fund world have banded together to fight poverty—taking gobs of money from the rich . . . and making philanthropy cool among the business elite.”<sup>131</sup> The almost \$65 billion in aid pledged by Buffet and Gates dwarf the contributions of many donor states, and they do not come with the same strings. As Singer observes, “Unconstrained by diplomatic considerations or the desire to swing votes at the United Nations, private donors can more easily avoid dealing with corrupt or wasteful governments. They can go directly into the field, working with local villages and grass-roots organizations.”<sup>132</sup>

Indeed, private charity may well be more effective than public rights, especially if the former means billions of dollars and the latter means empty promises. But while charity can be a force for good, it is not a particularly dependable force. In the face of a global economic crisis, donors may simply change their minds with regard to past, present, and future pledges.<sup>133</sup> Even though the impact of the current global economic crisis on international donors is an open question, we can see that no one is more vulnerable to shifting social mores than the

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<sup>131</sup> See Andy Serwer, *The Legend of Robin Hood*, *FORTUNE*, Sept. 18, 2006, at 103; see also Jim Dwyer, *Out of Sight, Till Now, And Giving Away Billions*, *N.Y. TIMES*, Sept. 26, 2007, at B1 (describing how Chuck Feeney, who made billions from duty-free airport shops, had anonymously given \$4 billion to projects ranging from AIDS clinics in South Africa to plastic surgery for children with facial deformities in the Philippines; and \$600 million to his alma mater, Cornell). Feeney says that he went public to inspire other billionaires to discover the pleasures of philanthropy. See MATTHEW BISHOP & MICHAEL GREEN, *PHILANTHROCAPITALISM: HOW THE RICH CAN SAVE THE WORLD* 13, 45, 145–47 (2008) (discussing Feeney’s secret and ground-breaking philanthropic efforts); Dwyer, *supra*.

<sup>132</sup> Peter Singer, *What Should a Billionaire Give—and What Should You?*, *N.Y. TIMES MAG.*, Dec. 17, 2006, at 58, 62. (noting that, adjusted for inflation, the contributions of Buffet are “more than double the lifetime total [of Carnegie and Rockefeller combined]”). The “consequences” of these contributions are generally imposed on recipient states. See, e.g., DEP’T OF SOC. & ECON. AFFAIRS, *supra* 78, at 30 (describing programme under which LDCs can obtain debt relief after meeting “certain criteria”). Donor states, in contrast, merely face an increasingly disappointed Ban Ki-Moon, U.N. Secretary General, when they fail to meet promised goals. *Id.* at 3; see also Celia Dugger, *U.S. Agency’s Slow Pace Endangers Foreign Aid*, *N.Y. TIMES*, Dec. 7, 2007, at A1 (noting that the Millennium Challenge Corporation, a federal agency established almost four years ago, has spent only \$155 million of the \$4.8 billion approved for aid projects).

<sup>133</sup> See, e.g., Rosen, *supra* note 134. Some charities are criticized. See, e.g., Christopher Dickey, *‘I Was Transformed’: Angelina Jolie on Refugees and Fame*, *NEWSWEEK*, Mar. 11, 2007, <http://www.newsweek.com/id/34023> (asking Jolie, “Do you worry about people who say this is celebrity tourism?”, to which Jolie responded, “At the end of the day . . . a lot of criticism could keep a lot of people from doing this kind of work. [A] lot of people . . . just don’t want to combine artists with foreign policy. And hey, I understand.”).

poor.<sup>134</sup> Furthermore, charity does not mandate a careful distribution of costs or benefits, or provide an antidote for donor fatigue.<sup>135</sup>

Finally, even in the case of these private charities, the lion's share of benefits raised remains in the developed states. Western advertising firms, for example, have been the major beneficiaries of the widely recognized "Red" campaign. Red companies spent as much as \$100 million in advertising to raise \$18 million for Africa.<sup>136</sup> Moreover, the Red companies stop giving as consumers stop spending.<sup>137</sup> Each of these variables make evident that private charity is no panacea for the problem of global poverty.

### CONCLUSION: WHAT ABOUT TODAY?

This is a question that neither Marx nor the postmodernists deign to answer, for similar reasons. For Marx, any answer is subject to the "false consciousness" that inspires it; that is, the futile hope that there is a possibility of authentic "species-life" within capitalism. For the postmodernists, the question shows the questioner's inability to let go of the Enlightenment metanarrative. Surely reason and science, pumped up by our unprecedented ability to generate and manipulate data, will lead to a solution. Alice cannot stop arguing with the Queen.<sup>138</sup>

Perhaps, this Article suggests, she is wasting her time. As Schlag observes, "One might think that destruction is inherently bad and con-

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<sup>134</sup> See POGGE, *supra* note 9, at 2; Stephanie Strom, *Bracing for Lean Times Ahead*, N.Y. TIMES, Nov. 11, 2008, at F1 (asking whether philanthropy, "like the housing and financial markets, [was] riding a bubble that has finally burst?"). Some of these pledges have already been paid, hopefully in cash. Louise Story, *Hedge Funds' Steep Fall Sends Investors Fleeing*, N.Y. TIMES, Oct. 23, 2008, at A1 (noting that hedge funds, which defined "the era of Wall Street hyper-wealth," have lost \$180 billion in the last three months).

<sup>135</sup> Stephanie Strom, *Big Gifts, Tax Breaks, and a Debate on Charity*, N.Y. TIMES, Sept. 6, 2007, at A22 (noting that "roughly three-quarters of charitable gifts of \$50 million and more . . . went to universities, private foundations, hospitals and art museums").

<sup>136</sup> Nixon, *supra* note 129.

<sup>137</sup> See David Leonhardt, *Buying Binge Slams to a Halt*, N.Y. TIMES, Nov. 12, 2008, at A1.

<sup>138</sup> Alice seems to find restraining herself from the fruitless squabble particularly hard as she is, in essence, a lawyer for the poor, the female, or the otherwise subordinated. In a 2003 Symposium on Professor Schlag's work, those who focused on such groups were generally critical. See, e.g., Jane B. Baron, *Romancing the Real*, 57 U. MIAMI L. REV. 573, 574-80 (2003); Joanne Conaghan, *Schlag in Wonderland*, 57 U. MIAMI L. REV. 543, 544-58 (2003) ("[A]s a feminist, I cannot help but be struck by the total lack of engagement with feminist and critical race scholarship."); Deborah Maranville, *Building a Better Sandcastle: Fantasy, Growth, and the Enchantment of Reason*, 57 U. MIAMI L. REV. 1007, 1008-25 (2003); Daria Roithmayr, *Easy for You to Say: An Essay on Outsiders, the Usefulness of Reason, and Radical Pragmatism*, 57 U. MIAMI L. REV. 939, 939-41 (2003) (critiquing Schlag because his argument fails "to take into account the needs and concerns of women and people of color").

struction inherently good; but . . . it all depends on what is being destroyed and what is being constructed.”<sup>139</sup> As Roy Boyne and Ali Rattansi point out, there is a “postmodernism of ‘resistance’ as well as a postmodernism of ‘reaction.’”<sup>140</sup> Neither should be left unprobed.

You do not have to be a Marxist to share Marx’s conviction that “the destiny of our world as a whole is tied up with the condition of its poorest and most disadvantaged members.”<sup>141</sup> Nor do you have to be a Marxist to realize that the playing field is not level, and that the winners may not even notice.<sup>142</sup> Likewise, you do not have to be a postmodernist to reject the metanarrative of development or to doubt that rich celebrities and more shopping will promote distributive justice. Nor, must you accept the metanarrative of development to believe that the lives of the poorest should, and can, be better. Indeed, it may be necessary to destroy that metanarrative, or “turn it inside out” as Jeffrey Dunoff suggests, to even imagine what might actually work.<sup>143</sup>

Dunoff urges would-be reformers to step aside and leave “development” to those who would be developed.<sup>144</sup> Rittich takes a similar position by urging the would-be developers to “create space for local alternatives.”<sup>145</sup> She reminds us that her advice is grounded in the foundational norm of self-determination, “the intuition behind [which] . . .

<sup>139</sup> PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 68 (1998).

<sup>140</sup> Boyne & Rattansi, *supra* note 91, at 29.

<sup>141</sup> Judt, *supra* note 21, at 9.

<sup>142</sup> See, e.g., THOMAS L. FRIEDMAN, *HOT, FLAT, AND CROWDED: WHY WE NEED A GREEN REVOLUTION—AND HOW IT CAN RENEW AMERICA* 26–52, 72–100 (2008); THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* 48–172, 225–75 (2005).

<sup>143</sup> See Jeffrey Dunoff, *The Inside-Out Logic of the WTO’s Distributive Justice Debate*, in *DISTRIBUTIVE JUSTICE AND INTERNATIONAL ECONOMIC LAW*, *supra* note 10; see also Muna Ndulo, *Imagine a World Without Hunger: The Hurdles of Global Justice*, 39 CORNELL INT’L L.J. 779, 783 (2006) (arguing that human rights are necessary but not sufficient to “implement the fundamental economic right to survival”); Marius Pieterse, *Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited*, 29 HUM. RTS. Q. 796, 797, 819–22 (2007).

<sup>144</sup> Dunoff, *supra* note 143. As Easterly concludes: “Aid won’t make poverty history, which Western aid efforts cannot possibly do. Only the self-reliant efforts of poor people and poor societies themselves can end poverty, borrowing ideas and institutions from the West when it suits them to do so.” EASTERLY, *supra* note 46, at 382–83; see also Skeel, *supra* note 84, at 699 (citing Milhaupt and Pistor for the proposition that “[i]nternally generated changes will prove more successful than pure transplants . . . and the effectiveness of transplants will vary depending on how well the local interests adapt them to local circumstances.”). See generally Samantha Powers, *For Terrorists, a War on Aid Groups*, N.Y. TIMES, Aug. 19, 2008, at A19 (discussing the “nationaliz[ation]” of foreign field operations by “sending conspicuous Westerners home”).

<sup>145</sup> Rittich, *supra* note 14, at 738; see also COLLIER, *supra* note 9, at 191 (“Westerners have to give up our grand ambitions. Piecemeal problem-solving has the best chance of success.”) (citing William Easterly).

is that important . . . legal reforms . . . should be made . . . by those who will have to live with the consequences."<sup>146</sup>

Taking such advice does not mean that the rich North should disengage from the poor South, however, because the time for that has passed.<sup>147</sup> Neither should reformers forget earlier efforts and earlier failures. In the 1970s, for instance, the industrialized states attempted to block a major initiative by the former colonies of the European powers to establish a New International Economic Order (NIEO).<sup>148</sup> Their numbers enabled the former colonies to pass resolutions in the General Assembly over the objections of the Western industrialized states. Nevertheless, when Libya tried to nationalize Western property without adequate compensation, as the NIEO would have allowed, it was firmly rebuffed.<sup>149</sup>

But it is not too late to ask whether, as Marxists suggest, international economic law's most important client is the neoliberalism that created it, or whether as the postmodernists might argue, "international economic law" is not a subject with the capacity to change direc-

<sup>146</sup> See Rittich, *supra* note 14, at 738. This might include simply ignoring the advice of Western experts. Malawi, for example, went from famine to surplus by helping farmers buy fertilizer, contrary to the advice of the World Bank. Celia W. Dugger, *Ending Famine, Simply by Ignoring the Experts*, N.Y. TIMES, Dec. 2, 2007, at A1.

<sup>147</sup> See, e.g., Jonathan Harr, *Lives of the Saints: International Hardship Duty in Chad*, NEW YORKER, Jan. 5, 2009, at 47 (describing vast refugee camps entirely dependent on foreign aid for daily sustenance). Easterly, too, recognizes the need for aid "in the meantime": "But aid that concentrates on feasible tasks will alleviate the sufferings of many desperate people in the meantime. Isn't that enough?" EASTERLY, *supra* note 46, at 383.

<sup>148</sup> The former colonies, then newly-independent states, were known as the "Group of 77." See U.N. Declaration on the Establishment of a New International Economic Order, G. A. Res. 3201 (S-VI), U.N. Doc. A/9556 (May 1, 1974). This initiative gave light to the fact that the developing countries constituted seventy percent of the world's population, but accounted for only thirty percent of the world's income. See *id.* ¶ 1. Some argued that the developed states owed them compensation for colonialism and the benefits the developed states still reaped from it. See, e.g., Kennedy, *supra* note 14, at 126–27 (noting that for those who possess wealth, surrendering more of that wealth begins to look confiscatory); R.P. Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, 15 INT'L. & COMP. L. Q. 55, 55–56 (1966) (discussing international law and the increasing involvement of Asian and African states). Accordingly, the NIEO was interpreted very differently in different places. The American financial and corporate establishment found it confiscatory—although the liberal intellectuals were inclined to interpret it more modestly. These liberal intellectuals viewed NIEO as a global version of policies that had become politically acceptable in the United States during the New Deal. Differently, in the developing countries, the NIEO was often seen as the absolute minimum demanded by elemental standards of fairness.

<sup>149</sup> See *Texaco Overseas Petroleum Co. v. Libyan Arab Republic*, 17 I.L.M. 1 (Int'l Arb. Trib. 1978). As Anghie observes, "[F]ew of the NIEO initiatives had an enduring impact on international law and the international economic system." ANGHIE, *supra* note 36, at 245.



tion.<sup>150</sup> Rather, like normative legal thought, “[international economic law] will [simply] tell you what to do even though there is not the slightest chance that you might actually be in a position to do it.”<sup>151</sup> There may be little to lose by “laying down the law,” as Schlag suggests, and recognizing that the Queen, along with her entourage, is nothing but a pack of cards.<sup>152</sup>

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<sup>150</sup> See, e.g., Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 8 TRANS-NAT'L L. & CONTEMP. PROBS. 125, 163–64 (1998) (“[T]he paradigm of the Universal Declaration of Human Rights is being steadily supplanted by a trade-related, market-friendly, human rights paradigm . . . [This] insists . . . upon the promotion and protection of the collective rights of global capital in ways that ‘justify’ corporate well-being and dignity over that of human persons.”).

<sup>151</sup> SCHLAG, *supra* note 101, at 28; see Howse, *supra* note 19, at 1534 (finding that Stiglitz shows that “problems with global economic liberalism identified by the antiglobalizers—such as environmental commons issues, the democratic deficit, and weak and corrupt states—require solutions at the global level”); Williams, *supra* note 20, at 1 (noting that “Marx long ago observed the way in which unbridled capitalism became a kind of mythology, ascribing reality, power and agency to things that had no life in themselves”). This being said we are left asking who, exactly, *can* provide such solutions?

<sup>152</sup> See CARROLL, *supra* note 1, at 124. This is the realization, of course, with which the dreaming Alice finally awakes. See *id.*