

Critical Legal Perspectives on Global Governance

Liber Amicorum David M Trubek

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The Globalisation of Critical Discourses on Law: Thoughts on David Trubek's Contribution

DUNCAN KENNEDY

When Gráinne de Búrca asked me whether I would like to participate in a conference to honour David Trubek, I said yes as a matter of course. Some time later, I asked what I should talk about, thinking that I would tell some stories about being his student in first year property at Yale Law School in the spring of 1968, a little anecdote about Critical Legal Studies (CLS) early days, a bit on his late 80s year at the 'Beirut of legal education', as he called my dear school. The short emailed answer was: 'We'd like you to speak on the globalization of critical discourses on law.' Huh? 'That was what Dave said he wanted.' I said yes as a matter of course, with just a little tremor of angst. Putting it off, putting it off, I finally realised that Dave had bitten off more than I could chew. Then a moment of insight: Dave was asking me to speak not on my topic, but on his!

This will be an attempt to tell the story of one of Dave's most important life projects. First, the critical discourses on law that he has been globalising are not just any and all such discourses, but, I'm thinking, more the discourses loosely joined in critical legal studies, a legal academic movement or school whose origin dates to 1977. Dave was one of the key planners and the site organiser of the first Conference on Critical Legal Studies held in Madison, Wisconsin, where he was teaching law.

The 'critical' in CLS in general, as well as in Dave's particular version, was always ambiguous, in fact doubly so. 'Critical' meant left criticism of the existing legal order on the ground that it was implicitly or explicitly conservative, and should be changed to make it more promotive of egalitarian, communitarian and participatory values. As I will explain, Dave's leftism is not just American liberalism, or even just American left-liberalism, but something more radical, more 'progressive', without being radical in the full-out American New Left sense.

'Critical' also meant a position affirming connection to critical theory, in the European sense. 'Critical theory' was capacious, stretching to include everything from Western Marxism to Max Weber's sociology of law. Marcuse's Freud/Marx/Hegel synthesis, phenomenology, structuralism and existentialism were all important to me as an early participant, though not so much, I think, to Dave. Foucault and Derrida were around the corner but not yet in the room. For Dave, American law and society (that is, the sociology of law) has always been a critical discourse, and he has continually affirmed its at least possible coherence with the more Frankfurt Schoolish varieties of critique.

Dave was one of those who developed from these various strands a number of specific ways to criticise particular legal regimes, and I will be passing these under review in a bit. The

second part of the project was to globalise these strands, including both the 'left' part and the 'critical theory' part. This aspect has a very clear origin in Dave's experience in Brazil in the mid 1960s, and went through several quite different phases before gelling in the late 1990s. Again, there is an ambiguity: the globalisation of critique is the critique of globalisation.

Dave has not been mainly interested in finding ways to apply the routines we developed to criticise US legal rules and institutions to the legal rules and institutions of other countries (a first meaning of globalising a critical discourse). Although that is sometimes a part of the analysis, the critique is almost always directed I think, at some aspect or fragment or sector of the global 'system', understood as linking countries all over the world in relationships that have a dimension of power or domination.

Briefly: this is neither classic Marxist analysis of imperialism—the highest stage of capitalism—nor Wallerstein's world system theory, but a much more chastened, small-bore, tentative insistence that we attend to something that should be obvious but is usually ignored. What happens in the global South, as well as in regional peripheries in the North, as well as in the poor parts of large urban areas in the North, is not just a function of what the inhabitants do on their own and for themselves. There are flows of goods and money and equally important flows of ideas, policies and legal norms: in short interdependence, *between the weak and the strong*. It is not just a question of relative advantage in exchange, but also a matter of relative advantage in the project of structuring exchange over time. This advantage of the strong is crucially important to the outcomes for the weak.

Dave's version of globalising critical discourses includes the diagnosis of the undesirable results (from a left point of view) of the systems that are globalised from the strong to the weak, and he always has proposals for changes that should make the system better (from a left point of view), or an idea of an already ongoing change that could have that effect. It is striking that from early in his career he has been committed, as we will shortly see, to the autonomy as well as to the welfare of the weak.

I. Critical Discourses in Dave's Project: Domestic Origins

During 1961–62, Dave was law clerk to Judge Charles Clark on the US Court of Appeals for the Second Circuit in New York City. Clark had been the Dean of Yale Law School in the 1930s at the height of the legal realist moment in American legal academia. He was not a polemicist in the manner of Thurman Arnold or Jerome Frank. His project was the drafting of the new Federal Rules of Civil Procedure, a monumental attempt to put the ideas of sociological jurisprudence into practical effect, against the pre-existing nineteenth-century procedural regime of classical legal thought. He was a reformer rather than a radical, but one with a very firm commitment to the generational advances of the pre-war period.

While Dave was clerking, Karl Llewellyn published what was supposed to be the crowning work of his career, *The Common Law Tradition: Deciding Appeals*.¹ Clark was an obvious choice to review the book for the *Yale Law Journal* (of which Dave had been an editor), and he delegated the task to his clerk, as was not uncommon in those far-off days. The

¹ K Llewellyn *The Common Law Tradition: Deciding Appeals* (Boston-Toronto, Little, Brown, 1960).

review was called 'The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition'.² The review critiqued Llewellyn for ignoring the creative role of the judge, his freedom, in other words, and of thereby backsliding from the realist accomplishment to which Llewellyn himself had been a central contributor. (Twenty-five years later I called an article of mine 'Freedom and Constraint in Adjudication' without conscious adversion to Dave's article which I read and loved as a law student.)

The importance of the article is that it carries forward realist anti-formalism into a period in which Legal Process belief in 'reasoned elaboration' and 'neutral principles' seemed to have won the day. The reader understood that although 'creative' sounded good, and 'freedom' was neutral, both terms opened or re-opened the possibility of analysing the outcome in terms of the judge's politics. 1962 was before the 60s had properly begun and 15 years before the first Crit conference. The article acts as a kind of missing link between pre-World War II legal America and post-Vietnam legal America.

II. Critique as Leftist Legal Discourse

While 'Constraint and Freedom' seems a very good starting point, as soon as we are beyond it things become suddenly and forever-after complicated because Dave always has several projects going, without strong obvious links between them, although they clearly influence one another over time. Here I am just doing what I was told to do, talking about the globalisation of critical discourses, so I will have to slight numerous other dimensions of Dave's work (most notably the civil litigation projects). Sticking to the plan, here is a kind of quick walk-through of Dave's domestic projects that are critical in the sense of leftist, ranging from straightforward American liberalism leftward into the outskirts of radicalism. The topics are familiar, and I will simply list the titles to give a sense of his approach in the 1970s and early 1980s. I should mention at the beginning, his and Louise Trubek's roles as plaintiffs in the federal litigation leading up to *Griswold v Connecticut*, striking down statutes which criminalised the sale of contraceptives and note in passing that Dave is already a collaborator (very often with Louise).³

² CE Clark and DM Trubek, 'The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition' (1961) 71 *Yale Law Journal* 255-76.

³ On exclusionary zoning, see DM Trubek, B Cohen and E Branfman, 'Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor' (1972) 82 *Yale Law Journal* 483-508; and DM Trubek, 'Law and the Politics of Justice: Rethinking the Open Suburbs Movement' in DH Moskowitz, *Exclusionary Zoning Litigation* (1977). On the environment, see DM Trubek, 'Allocating the Burden of Environmental Uncertainty: the NRC Interprets NEPA's Substantive Mandate' (1977) *Wisconsin Law Review* 747-76; DM Trubek, 'Environmental Defense: Interest Group Advocacy in Complex Disputes' in BA Weisbrod, JF Handler and NK Komesar, *Public Interest Law* (University of California Press, 1978) 151-217. On Consumer protection, see DM Trubek, K McNeil, JR Nevin and RE Miller, 'Market Discrimination Against the Poor and the Impact of Consumer Disclosure Laws: The Used Car Industry' (1979) 13 *Law & Society Review* 695-720; DM Trubek, LG Trubek and JB Zorn, 'Coordinating Consumer Law and Policy in the American Federal System' in T Bourgoignie (ed), *European Consumer Law* 307-59 (1982). On Legal services and public interest law, see DM Trubek, 'Public Advocacy: Administrative Government and the Representation of Diffuse Interests' in M Cappelletti and B Garth (eds), *Emerging Issues & Perspectives in the Access to Justice Movement* 447-94 (1979); DM Trubek, LG Trubek and J Becker, 'Legal Services and the Administrative State: From Public Interest Law to Public Advocacy' in E Blankenburg (ed), *Innovations in the Legal Services* (1980) 131-60.

Exclusionary zoning: 'Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor' (1972); 'Law and the Politics of Justice: Rethinking the Open Suburbs Movement' (1977).

The environment: 'Allocating the Burden of Environmental Uncertainty: the NRC Interprets NEPA's Substantive Mandate' (1977); 'Environmental Defense: Interest Group Advocacy in Complex Disputes' (1978).

Consumer protection: 'Market Discrimination Against the Poor and the Impact of Consumer Disclosure Laws: The Used Car Industry' (1979); 'Coordinating Consumer Law and Policy in the American Federal System' (1982).

Legal services and public interest law: 'Public Advocacy: Administrative Government and the Representation of Diffuse Interests' (1979); 'Legal Services and the Administrative State: From Public Interest Law to Public Advocacy' (1980).

III. Critique in the Sense of Critical Theory

Dave's scholarly engagement with critical theory begins, I'd say—but what do I know—in his years as an assistant professor at Yale (friendships with Rick Abel there, and with Unger and Steiner at Harvard were key), specifically in his famous Law and Modernisation seminar, and even more specifically in his passionate engagement with the ideas of Max Weber. To summarise:

1. During the cold war, Weber was mainly known for his views on religion and the rise of capitalism, ingenuously or idiotically or tendentiously interpreted as the anti-Marx manifesto because it supposedly claimed that ideas, particularly religious ones rather than material forces were the main movers of history.
2. At the beginning of the law and modernisation project, Trubek's revisionist story was that Weber was a theorist of how law, rather than religion, played a major role in capitalist economic development. European high formalist legal thought, which protected the autonomy of rational actors from official meddling, guaranteed 'calculability' which encouraged them to grow the economy.
3. In the next stage of the project, there were three big problems:
 - (a) the English were the champion developers with a relatively uncertain and unsystematic legal system that Weber regarded as primitive at best;
 - (b) we (Dave and his students) thought the legal realist common lawyers had shown that Weber's beloved high formalist system was internally incoherent at the normative level and highly uncertain and biased at the level of legal administration, rather than calculably rational; and
 - (c) Weber had nothing but contempt for the post-formalist social law that almost everyone in Europe and America (in 1970) regarded as far superior, both ethically and practically, to its predecessor.⁴

⁴ See DM Trubek, 'Max Weber on Law and the Rise of Capitalism' (1972) *Wisconsin Law Review* 720; DM Trubek, 'Max Weber's Tragic Modernism and the Study of Law in Society' (1986) 20 *Law and Society Review* 573-98.

'Max Weber on law and the rise of capitalism' (1972);

'Max Weber's tragic modernism and the study of law in society' (1986).

So Weber couldn't be 'the man'; there were just too many problems. The encounter with Weber, however, framed the subsequent encounter with the tradition of Marxist and post-Marxist ideology critique. Ideology critique is the idea that what we loosely call consciousness everywhere mediates between 'facts' and us, structuring perception of the world including our understanding of why bad things are bad and what can and can't be done about them. The critical idea is that elements of consciousness that are false have the effect of restricting people's capacity to act in the interest of their own emancipation. The ideology is 'relatively autonomous' but also serves the interests of those who profit most from the status quo, and is passionately defended, in good faith, by the 'organic intelligentsia' of the privileged strata. All parts of this idea were anathema to American liberal intellectuals in the post-war period, but were revived by the new left in the late 1960s and 1970s.

One of the ways ideology critique came to us early Crits was through the Pashukanis version of the Marxist legal theory of the 'commodity', which was that modern Western capitalist law derived analytically from the capitalist form of property, namely the commodity which has an absolute owner who can do with it whatever he wants and contract about it without any form of regulation. The legal rules were simply the 'reflection' of the supposed underlying truth that in fact, in capitalist society capitalists own the means of production, can do anything they want with them, and compete 'freely' among themselves while contracting 'freely' with propertyless workers. There was a striking structural similarity between Marx and Weber, both of whom accepted that modern law was a coherent working out of a few basic ideas, and that it played the role of facilitating the autonomous dynamic functioning of the economy.

In the very early days of CLS, this Marxist theory had considerable currency among the post-Marxists, who were an important group, allied with but also fighting against the post-liberals, each group having undergone a generationally similar early 1970s disillusionment with what had once seemed their natural reference group. (Due to the descent of Marxists into sectarianism and of liberals into Vietnam and paralysis in the face of racism.)

Dave became a critical theorist in the strong sense when he wrote 'Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought' (1977).⁵ In short, a Marxist social theory of law, like Weber's theory or classical late nineteenth-century legal formalism, that starts from the idea that it has a coherent inner logic and institutions that 'just apply' that logic, ignores everything we've learned from the realist and post-realist critique of law. As a result, the Marxist theory of law as simply the legal reflection of the inner logic of the capitalist commodity, will be weak or simply wrong when it comes to understanding how the social order works through law. Complexity and contradiction, normative and administrative, have to be taken into account, and that will bring the scale of generalisation and dogmatic assertion way down into the lower atmosphere or all the way to the ground. At the same time, complexity and contradiction open law up to emancipatory projects that seem implausible if you think it has an intrinsic oppressive coherence.

⁵ DM Trubek, 'Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law' (1977) 11 *Law & Society Review* 529-69.

I would say Dave was looking for a synthesis including legal realism, Marx, Weber, law and society, and the insights of nascent CLS. The Balbus article was the first version of this. He refined and extended it later, in his encounters with Crits who thought the empirical institutionally-oriented side was unlikely to pay off, and with more radical non-lawyer legal sociologists who wanted more evil systematicity.⁶

'Where the Action Is: Critical Legal Studies and Empiricism' (1984);

'Critical Empiricism in American Legal Studies: Paradox, Program or Pandora's Box?' (1989).

IV. The Globalisation of Critique as the Critique of Globalisation

As we turn to Dave as a globaliser of critical discourses about law, the key word is *Brazil*. We began his early story with his year as clerk to Charles Clark, denouncing Llewellyn's sell-out of the realist legacy. Then he went to the United States Agency for International Development (USAID) in Washington, as a desk officer, for two years, then into the field in Brazil. He arrived in Brazil in 1964, at the moment of the Castelo Branco coup of the generals against the left/populist Joao Goulart, whose regime the Brazilian elite and their American private and public backers had come to see as a threat. Dave stayed in Brazil for two years, met Roberto Unger and Henry Steiner, then went off to be an assistant professor at Yale Law School, arriving with a pocket full of money from his former government employer for the study of 'law and modernisation'.

When I first met Dave and Louise in the spring of 1968, they still had a kind of post-Brazil glow about them: bright colours, samba beat, modernist art, feijoada, the sshh sshh sshh'ing of conversation in Portuguese, the aftertaste of splendor and misery as imperial envoys, memories of wild parties and wild politics with violence at right and left extremes, the ferment of native elites eager for collaborators in their struggle for economic development within the fantasy of national greatness.

I imagine that Brazil has stayed so much a part of Dave's life and work because living there combined the thrill of the exotic other with the moral ambiguities of Kennedy-era American liberalism. Liberalism was our dominant national elite ethos, hardly challenged by the Barry Goldwater types. This was not a humanist style. It practised *realpolitik* style covert action against communism and Castro, capitalist economic development through sophisticated New Deal-inspired economic policy without challenging Third World plutocracy (the Alliance for Progress), and the merciless ostracism of liberals who were either too 'soft' for the task or tainted even a little by sympathy for radical leftism. In the period we are discussing, it turned even more brutal, but also simple minded and obtuse, in a way that had been unimaginable in the age of Adlai Stevenson, the losing liberal democratic

⁶ DM Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism' (1984) 36 *Stanford Law Review* 576; DM Trubek and J Esser, "'Critical Empiricism' in American Legal Studies: Paradox, Program, or Pandora's Box?" (1989) 14 *Law and Society Inquiry* 3.

candidate for president in 1952 and 1956. (But this may be more my own story than it is Dave's.)

V. Critique of Liberal Globalisation

The economists ruled policy in 'underdeveloped countries', and Dave and a few others in the US and in the former British Empire took on the project of working out a legal component of development policy. The inspiration, perhaps, was the central place of lawyers, legal concepts and legal reforms in the New Deal. This model was, of course, intimately connected with the rise of sociological jurisprudence and legal realism, at the Yale Law School in particular.

Applying the model in Brazil involved two odd complexities. First, the economists really and truly thought law was irrelevant, it was not even a shadow within their consciousness: all that counted was a system of modern property rights and markets. Second, the legal order of Brazil, as of most of the global South, was as far as you could possibly imagine from that of the post-New Deal US. First, legal formalism had been challenged in the teens and thirties by social legal thought, but the challenge had largely failed throughout the legal culture, and, second, formal law seemed stunningly irrelevant to what happened in practical life.

Dave's contribution to a liberal project of law and development had two parts, one practical and one theoretical. First, a book in Portuguese called *O Mercado de capitais e os incentivos fiscaes* co-authored with Sa and Gouvea Viera and published in Rio in 1971.⁷ And second, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development',⁸ in the *Yale Law Journal* in 1972.

This was tenure time at Yale for Dave and also for Rick Abel, Robert Hudec and Larry Simon. (John Griffiths had already been fired.) Dave and the others in the 'slaughter of the innocents' were underestimated academically by their senior colleagues (to put it as delicately as possible) and they also came across as unreliable in the generational cultural and political war that the students had initiated at the school beginning in 1968. These were the famous 'dark ages' of Yale, in the words of the 'restore order' dean who took over in 1970. (See Laura Kalman.⁹) Dave was fired, the Law and Modernisation grant from the state department was not renewed, and Dave moved to Wisconsin in 1973.

These intensely painful events were also a liberation (I imagine), and led directly to Dave's justly famous article with Marc Galanter, 'Scholars in Self-Estrangement: Reflections on the Crisis of Law and Development Studies in the United States' (1974).¹⁰ This is a work of critical theory as well as a leftist critique of the liberal internationalist project of

⁷ English translation, DM Trubek, *Law, Planning and the Development of the Brazilian Capital Market* (New York, NYU Institute of Finance, 1971).

⁸ DM Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972) 82 *Yale Law Journal* 1-50.

⁹ *Yale Law School and the Sixties: Revolt and Reverberations* (University of North Carolina Press, 2005).

¹⁰ DM Trubek and M Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' (1974) *Wisconsin Law Review* 1062.

the Kennedy and Johnson years. The liberals had, of course, already suffered their historic defeat of 1968, Nixon had intensified the war in Vietnam, and the US was in full cold war mode. But the critique was not of Nixon but of his predecessors, and of the co-authors themselves, as participants in a project that was bad from the beginning.

To grossly oversimplify (I mean that), bad because it was imperialist and culturally chauvinist and because it chose reactionary allies as its instruments, against the interests of the supposed beneficiaries. What made it a work of critical theory was that this was explained by a world view, a complex set of preconceptions about the Third World, about the political beneficence of the US as an actor, and, crucially, about law and about economics as they would work 'abroad.' Although quite vulgar Marxist analysis of material interests was a common mode of the time, what counted here was something more like 'consciousness'.

It is important to stress, not just for Dave's story as a globaliser of critical discourses about law but for a whole generation of Critics, that the target here was not the right wing, not Nixon; it was the liberal elites described by Halberstam in *The Best and the Brightest*.¹¹ Their project was discredited at home, for young left liberals, by the Vietnam War and by racial and youth revolt. Its international version was further challenged by the rise of Third World national liberation movements and the theorisation of neo-colonial dependency. Liberal hegemony slowly dissipated, but none of us realised to what an extent 'it was all over' for our frenemy, not because of critique from the left but because of the rise of the right.

Dave, and many others of us, turned away from the international. Between 1974 and the return of law and development around 1993, I count only a couple of forays outward, continuous with the Brazilian moment but no more than that.¹²

'Unequal Protection: Thoughts on Legal Services, Social Welfare and Income Distribution in Latin America' (1978).

'Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs' (1983).

Consultancy: 1982, Guinea-Bissau and Cape Verde (USAID, Portuguese language)

Rather than leading to an alternative international initiative, the deep critique of liberal globalisation of 'Scholars in Self-Estrangement' went to prepare the ground for 'Complexity and Contradiction in the Legal Order' in 1977,¹³ which as I tried to explain, was a crucial moment in figuring out the role of law in a critical social theory. Dave turned to major organising roles in CLS and in the law and society movement.

VI. Critique of Neo-liberal Globalisation

Dave's turn to the critique of neo-liberal globalisation was, according to me, the result of a confluence of highly unpredictable events, and full of ironies. In 1986–87, Dave visited

¹¹ D Halberstam, *The Best and the Brightest* (Random House, 1972).

¹² On unequal protection, see DM Trubek, 'Unequal Protection: Thoughts on Legal Services, Social Welfare and Income Distribution in Latin America' (1978) 13 *Texas International Law Review* 243–62; on Human Rights see 'Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs' in T Meron (ed), *International Protection of Human Rights* 206–70 (Oxford University Press, 1984). David Trubek acted as a Consultant to Guinea-Bissau and Cape Verde (USAID, Portuguese language) in 1983.

¹³ Trubek, 'Complexity and Contradiction in the Legal Order' (n 5).

at Harvard Law School, in the midst of the controversies we Crits had provoked there. The establishment decided that they had to make some kind of concession to us, since they had recently fired first Daniel Tarullo, currently a Governor of the Federal Reserve Bank, and then Clare Dalton, feminist icon of the time. It seemed a done deal when the faculty voted by more than the required two-thirds majority to hire Dave, but the deal went south when the right protested to Derek Bok, the Prexy of the University, who had a 'crush them before they multiply' attitude toward CLS. He appointed an outside review committee that killed the appointment.

In 1990, Dave accepted the post of Dean of International Studies for the University of Wisconsin, signalling the beginning of his withdrawal from active politics in the law school, and a renewed interest in 'abroad', and he kept at administration of university international matters for the next 15 years. In the meantime, CLS was winding down, through a series of internal conflicts and outward attacks, until by 1993 it was pretty much over. The network of progressive academics remained, although fragmented, and many of them went through a turn toward Europe and or the Third World as the opportunities for fruitful trouble-making in the US more or less disappeared. Paradoxically, as US global military, economic and cultural hegemony surged, and American legal influence along with it, leftists in other parts of the world came looking for possible left legal imports from the US.

At this point there was another surprise. The triumph of the right over the liberals, and particularly over the liberal internationalists of the 1950s and 1960s, had produced from 1980 a dramatic turn in Western development prescriptions for the global South. Since 1945, the dominant Western development prescriptions had been interventionist, albeit staunchly capitalist, and the post-colonial regimes had balanced them against the even more interventionist policies advocated by the Soviet Union. The Washington Consensus (of Reagan, Thatcher and Kohl) required them to dismantle the whole developmental apparatus they had constructed from the end of World War II through the 1970s, to privatise, deregulate and open their markets internationally. A strong background claim was that the globalisation process had reached a historic new stage, presenting developing countries with a clear choice between integration into the world market with the promise of boundless wealth, and 'starving in the dark' of isolation combined with internal economic self-strangulation.

The results of the neo-liberal turn were bad in Latin America, catastrophic in sub-Saharan Africa, and seriously ugly in Russia after 1989 (the 'shock therapy'). In the 1990s, the neo-liberals made an 'institutional turn', and quite suddenly, although consistently with the Hayekian background many of them shared, the Rule of Law became the development panacea.

The 'post-Washington Consensus' version of the rule of law bore some limited similarity to the pre-Washington Consensus version of Dave's youth in Brazil and then at Yale. In each case, there was a critique of the ineffectiveness (and corruption) of legal administration. But the neo-liberal emphasis was on private rather than public law, and therefore on courts rather than administrative law regimes. The neo-liberals were for repealing rather than enforcing the whole developmentalist regulatory apparatus, imagining that the economy would default to the 'free market', organised according to formalised property and contract law administered through adversarial processes. This (fantasy) was a return to the nineteenth-century colonial model, very different from the post-World War II vision of law as an instrument of transformative social and economic policies. When Dave got back into

the law and development game, his new critical project was ironically aimed at something a good deal more primitive than what he and Galanter had critiqued in 1974.¹⁴

Consultant to ARD/Checci-US AID Rule of Law Project in Russia 1993–94
 ‘Law and Development: Then and Now’ (1996);
 ‘The Rule of Law in Development Assistance: Past, Present and Future’ (2004);
 ‘The New Law and Economic Development: A Critical Appraisal’ (co-editor with Alvaro Santos) 2006.

Dave’s first re-engagement, ‘Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas’ (1994), co-authored with Yves Dezalay, Ruth Buchanan and John Davis,¹⁵ is my favourite of all Dave’s articles, a stunning opening shot in the left critical attempt to come to terms with the new global legal order. It describes the emergence of a new legal professional order that is the equivalent and mirror of the new world economic order, presenting it as a function of institutional change that is driven in one sense by the economy but with its own ‘relative autonomy’. In the new world order, multinational corporations spawn multinational law firms and overmatched NGOs spawn overmatched public interest law firms, as the organisation of the bar in different countries changes in response to international competitive pressure, but always in strict dependence on local history and local legal culture.

As in every earlier stage of his career, Dave has been producing subject-matter specific studies on the way globalisation, legal and economic, generates and perpetuates inequality, and calls out for institutional responses that reject the basic neo-liberal paradigm of strong property rights for strong parties with no regulatory protection for weak ones.¹⁶

‘Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks’ (1999);
 ‘The Transatlantic Labor Dialogue: Minimal Action in a Weak Structure’ (2001);
 ‘Trade Law, Labor and Global Inequality’ (2006).

And again, as in earlier stages of his career, Dave looked for, and found, this time in New Governance, an already existing set of practices (soft law) that had the potential to counter the dominance of the strong, in this case in the European context. He allied himself with the Celtic Fringe (including notably the editors of this volume) in defence of these innovations against conservative legalist critiques, and against left critiques that soft law was doomed to be ineffectual. New Governance in this version is left, at least as I interpret it, because it arises at the moment of disillusion with the European ‘hard law’ social democratic project, and not just general disillusion. ‘Negative harmonisation’ in the European Union meant the dismantling of some regulatory regimes of Member States, reconceptualised as being inconsistent with the common market. *Pace* Scharpf, there has

¹⁴ See, DM Trubek, ‘Law and Development: Then and Now’, Proceedings of the 90th Meeting of the American Society of International Law, (1996) 90 ASIL Proceedings; DM Trubek, ‘The “Rule of Law” in Development Assistance: Past, Present, and Future’ (2004); DM Trubek and A Santos, *The New Law and Economic Development: A Critical Appraisal* (Cambridge, Cambridge University Press, 2006). David Trubek acted as a Consultant to ARD/Checci-USAID Rule of Law Project in Russia in 1993–94.

¹⁵ DM Trubek, Y Dezalay, R Buchanan and J Davis, ‘Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas’ (1994) 44 *Case Western Reserve Law Review* 2.

¹⁶ On labour see, ‘Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks’ (1999); ‘The Transatlantic Labor Dialogue: Minimal Action in a Weak Structure’ (2001); ‘Trade Law, Labor and Global Inequality’ (2006).

been considerable re-regulation from the centre, but nothing like the rebirth of the social project. Soft law promotes the goals of the social project in a climate of democratic deficit and ideological stalemate.¹⁷

'Mind the Gap: Law and New Approaches to Governance in Europe' (2002);
 'Hard and Soft Law in the Construction of Social Europe' (2005);
 'New Governance and Legal Regulation: Complementarity, Rivalry and Transformation' (2007).

The New Governance approach in Europe, if its meaning for Dave was at all what I've just suggested, was not without relevance to the situation of weak parties everywhere in the age of neo-liberal deregulatory globalisation, permitting me to end this introduction to Dave's contributions with another version of the Eternal Return.

VII. Back to Brazil: The New Developmental State

Dave's book on Brazilian capital markets, which seemed to have dropped into the void at the time he wrote it, has been republished in Brazil and hailed as an important contribution to the recasting of the Brazilian economy after the return to civilian rule.¹⁸

'Direito, planejamento, e desenvolvimento do Mercado de capitais brasileiro 1965–1970' (2011).

It includes a new introduction by a former Minister of Finance who was also chair of Brazil's SEC, but is otherwise exactly the same as the original, as is proper for a book published in the series 'Classics of Brazilian Jurisprudence.'

Dave's re-engagement with Brazil draws together many strands of his career since his first sojourn there from 1964 to 1966. But what is most striking to me is the choice to launch a new project on the developmental state, basing it on the actual practices of the Brazilian government in its latest phase of rapid growth with innovative social transfer programmes that effectively reduce poverty. The developmental state is what the post-war policy-makers wanted, though they didn't want it to be *too* developmental, and it is what the Washington Consensus set out to eliminate, not just practically but theoretically, through neo-liberal critique of state failure and rent-seeking. It is based on developing many existing practices as well as on a commitment to creative new policies. It is rooted today in the notion of agency from the South, rather than the abandonment of policy autonomy to the international financial institutions, or for that matter to well-meaning Northern intellectuals.

I see no reason to think it will be his last project. Without trying for a grand conclusion, I just want to say that it has been one of the great pleasures and great rewards of my academic-political existence to have Dave as a friend and comrade.

¹⁷ On new governance see J Scott and DM Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8 *European Law Journal* 1; DM Trubek and LG Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination' (2005) 11 *European Law Journal* 343; DM Trubek and LG Trubek, 'New Governance and Legal Regulation: Complementarity, Rivalry and Transformation' (2007) 13 *Columbia Journal of European Law* 539.

¹⁸ D Trubek, JHG Vielra and PF de Sá, *Direito, Planejamento e Desenvolvimento do Mercado de Capitais Brasileiro 1965–1970* (São Paulo, Editora Saraiva, 2011).