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Living Outside the Law: How the Informal Economy Frustrates Enforcement of the Human Rights Regime for Billions of the World's Most Marginalized Citizens

Brett J. Miller*

¶1 How is it possible that in a world of six and a half billion people, roughly four billion of them are living outside of the law, beyond the reach of many basic human rights protections?¹ The answers are as complex and diverse as the vast number of people who make up the question, but the unifying connection lies in what has been called the “informal economy.”² This article is a modest attempt to extend the work of development economists and legal scholars who have studied the informal economy to the issue of the human rights corpus. The range of human rights implicated and the uniqueness found in each of the world's extralegal sectors make this undertaking too immense to fully develop here. Nevertheless, this article will proceed by broadly examining the informal phenomenon and its consequences, identifying the ways human rights are implicated, and finally offering proposals for moving forward. It is impossible to bring every person and transaction into the formal sector.³ Despite this challenge, the human rights community's goal remains providing everyone with the protections of the human rights regime.

¶2 This article will argue that for state actors to fulfill their responsibility to enforce human rights, they must build coherent legal regimes in functional market economies that bring the cost of formality below that of informality. Additionally, international instruments must adequately provide for these rights and include reporting and enforcement mechanisms as a means to apply international pressure upon state violators. Only when state and international actors fulfill their respective duties will the human rights regime overcome the pitfalls of informality and provide those who seek such protection a means to afford, and incentive to freely choose, existence within the law.

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¹ Institute for Liberty and Democracy, Home Page, at <http://www.ild.org.pe/home.htm> (last visited Apr. 6, 2006).

² Also referred to as the “extralegal,” “underground,” or “black-market” economy. These terms will be used interchangeably throughout this article.

³ It would be impossible and inefficient to regulate every transaction, activity, and behavior. A certain amount of illegality, moonlighting, corruption, and cash-based transactions is inevitable because the cost of preventing them is prohibitively expensive.

I. THE INFORMAL ECONOMY

¶3 “The informal economy is . . . characterized by one central feature: it is unregulated by the institutions of society, in a legal and social environment in which similar activities are regulated.”⁴

A. Activities

¶4 The informal economy is comprised of activities ranging from the illegal to the ordinary, such as narcotics trafficking or professionals who moonlight for cash. Much of the developing world’s informality surrounds activities and people within the labor, housing, and commercial sectors. These informal sectors are characterized by an absence of legal licenses, titles, and regulatory supervision. Residents in informal housing are essentially squatters, which makes eviction an ever-present threat. Informal businesses operate without licenses and do not pay taxes.⁵ The more illicit side of informality involves the sex trade, drugs, slavery, sweatshops, money laundering, smuggling, the arms trade, and other various black-markets. Additionally, worldwide there is a prevalence of work done outside of the formal legal regime, often by illegal immigrants, involving work in agriculture, domestic service, factories, restaurants and hotels.⁶ The tremendous breadth of informal activities helps explain the prominence of extralegal sectors.

B. Location and Size

¶5 The informal economy is present throughout the world. The most prevalent extralegal sectors are found in the Third World and post-Communist States transitioning to market economies.⁷ In such developing and transitioning nations, 80% of the population exists as “informals.”⁸ Yet, informal sectors also exist in countries representing every stage of the development spectrum. Thus, while the vast majority of informals are found in Latin America, Africa, Asia, and former Communist countries, the United States is also home to many who live or work outside of the formal sector.⁹

¶6 Extralegal sectors vary in size dramatically from country to country, but estimates and examples will help gauge the scope of informal sectors relative to the economies in which they operate. In Russia, the underground economy has been estimated to represent as much as 30-40% of all personal incomes¹⁰ and account for up to 50% of gross

⁴ Manuel Castells and Alejandro Portes, *World Underneath: The Origins, Dynamics, and Effects of the Informal Economy*, in *THE INFORMAL ECONOMY: STUDIES IN ADVANCED AND LESS DEVELOPED COUNTRIES* 12 (Alejandro Portes et al. eds., John Hopkins Univ. Press 1989).

⁵ See generally, HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* (I.B. Tauris & Co Ltd. 1989) [hereinafter DE SOTO, *THE OTHER PATH*].

⁶ Free the Slaves, Washington, D.C., & the Human Rights Center of the Univ. of Cal., Berkeley, *Hidden Slaves: Forced Labor in the United States*, 23 *BERKELEY J. INT’L L.* 47, 48 (2005).

⁷ HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE?* 15 (Basic Books, 2000) [hereinafter DE SOTO, *THE MYSTERY OF CAPITAL*].

⁸ *Id.*

⁹ *Id.*

¹⁰ Daniel McGrory, *Civilizing the Russian Underground Economy: Requirements and Prospects for Establishing a Civil Economy in Russia*, 5 *TRANSNAT’L L. & CONTEMP. PROBS.* 65, 71 (1995).

domestic product (GDP).¹¹ In other countries transitioning to market economies, the extralegal sector is also very large. The informal economy comprises 50% of GDP in Ukraine, 62% in Georgia,¹² and 80% of the total economy in Armenia.¹³ For non-European Union immigrants moving to Italy, 62% will find their first job in the underground economy and 30% will remain there.¹⁴ In Africa, Zambia has only 10% of its entire workforce employed in the formal sector.¹⁵ This pattern persists in the Western Hemisphere where the International Labor Organization has estimated that 85% of new jobs in Latin America and the Caribbean are being created in the informal sector.¹⁶ Taken altogether, the informal portion of the Latin American urban workforce grew from 25.6% in 1980 to 31.9% in the 1990's.¹⁷ By 1994, the informal sector had become the largest sector of urban employment in Latin America at 33.2%.¹⁸ The size of the informal economy in the United States is hard to determine because of its clandestine and persecuted nature.¹⁹ Yet, estimates from 1994 placed unreported income at \$492 billion, representing 9.6% of all personal income and 8.1% of GDP in the United States.²⁰

C. Causes

¶7 Extralegal sectors derive from a plethora of causes and unique local conditions. Nevertheless, some consistent circumstances are found around the world. People may be driven into underground economies through bare necessity. The legal regime of a country can be perfectly adequate, but immediate pressing need may lead an individual to engage in prostitution,²¹ child labor, or narcotics trafficking. While good governance is not immune to extralegality, the lack of such a system exacerbates the problem. Government corruption is present in all countries in varying degrees, but is especially prevalent in developing and transitioning economies, leading to thriving black-markets.²² If the system is administered in a corrupt, incoherent, exorbitantly expensive, discriminatory or elitist manner, then many are forced into informality as the law does not protect them.

¹¹ See DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 7, at 69.

¹² *Id.*

¹³ Jack McMahon, *A Year in Armenia*, 43-DEC ADVOC. 19 (Dec. 2000).

¹⁴ Kitty Calavita, *Law, Citizenship, and the Construction of (Some) Immigrant 'Others'*, 30 LAW & SOC. INQUIRY 401, 413 (2005).

¹⁵ DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 7, at 69.

¹⁶ *Id.*

¹⁷ Guillermo O'Donnell, *Poverty and Inequality in Latin America: Some Political Reflections*, in 49 POVERTY AND INEQUALITY IN LATIN AMERICA: ISSUES AND NEW CHALLENGES 50 (Victor E. Tokman & Guillermo O'Donnell eds., Univ. of Notre Dame Press 1998).

¹⁸ The other sectors analyzed were: small-enterprise at 22.5%, large and medium enterprise at 30.8% and public employment at 13.6%. Carlos H. Filgueira, *Welfare and Citizenship: Old and New Vulnerabilities*, in 119 POVERTY AND INEQUALITY IN LATIN AMERICA: ISSUES AND NEW CHALLENGES, 131-32 (Victor E. Tokman & Guillermo O'Donnell eds., Univ. of Notre Dame Press 1998).

¹⁹ Castells and Portes, *supra* note 4, at 20.

²⁰ Morton Paglin, *The Underground Economy: New Estimates from Household Income and Expenditure Surveys*, 103 YALE L.J. 2239, 2249 (1994).

²¹ Kelly Schwab, Comment, *The Sexual Exploitation of Children: Suppressing the Global Demand and Domestic Options for Regulating Prostitution*, 13 TUL. J. INT'L & COMP. L. 333, 352 (2005).

²² Helena Kolenda, *One Party, Two Systems: Corruption in the People's Republic of China and Attempts to Control It*, 4 J. CHINESE L. 187, 192-93, 201, 204-05 (1990).

¶8 The written laws in countries with vast informal sectors are frequently not arcane, but the most modern and elegant legal systems in the world.²³ When small extralegal sectors exist, the problem is one of law enforcement. However, when forty to fifty percent of the population disobeys the law, as is the case in many developing and post-Communist countries, the social efficiency of the law is the problem.²⁴ Laws are socially efficient when accepted, observed, or used by a vast majority of the community to which they are directed;²⁵ essentially, the law must reflect the heterogeneous social realities of its people. The main difficulty in writing laws in the developing world is a lack of information. Lawmakers often cope by borrowing the most modern comparative foreign laws, which may not be suitable for local circumstances.²⁶ Therefore, whether a country has the best laws that money can buy or is adhering to laws illegitimately promulgated by de facto regimes, the result is a system of governance that drives people into informality based on its incoherence.²⁷

¶9 The history of development also offers consistent patterns leading to informality. Often, a largely agrarian society is quickly pushed into an industrial revolution, not altogether unlike the experience of the United States.²⁸ Massive migration to cities results, facilitated by the construction of modern highways, perceived high standards of urban life, and various agricultural crises.²⁹ Further rationales include migrants' hopes of higher wages, better education, improved health services, and lower infant mortality.³⁰ Urban areas are ill-equipped to support such swift growth and massive squatting ensues.³¹ The result of which is often the promulgation of vagrancy laws that further enhance the illegality of such squatter populations.³² To survive in rapidly developing countries, migrants are often forced into informality.³³

¶10 Immigration commonly leads to informality. Often, immigrants must survive on the margins, without legal protections, because they are either illegal or invisible to the law for long periods after arrival.³⁴ Immigrants that seek asylum regularly toil through a long examination process that only infrequently leads to legal recognition.³⁵ Thus, many immigrants remain undocumented, surviving in the informal economy and facing the constant threat of deportation.³⁶ The "in transit" period for asylum seekers is one of "vulnerability, insecurity and socio-economic marginalization," in which informals often

²³ John Linarelli, *Anglo-American Jurisprudence and Latin America*, 20 *FORDHAM INT'L L.J.* 50, 51 (1996).

²⁴ This has been identified as the largest challenge facing Latin American legal systems. Hon. Roberto G. MacLean, *The Social Efficiency of Laws as an Element of Political and Economic Development*, 4-*SPR NAFTA/BRA* 6, 7 (1998).

²⁵ *Id.* at 10.

²⁶ *Id.*

²⁷ *Id.*; Linarelli, *supra* note 23, at 52.

²⁸ DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 7, at 17-18, 149-50.

²⁹ DE SOTO, *THE OTHER PATH*, *supra* note 5, at 8-9.

³⁰ *Id.*

³¹ *Id.* at 10-11; DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 7, at 17-18.

³² Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913-1924*, 75 *U. COLO. L. REV.* 667, 674-77 (2004).

³³ DE SOTO, *THE OTHER PATH*, *supra* note 5, at 11.

³⁴ Aspasia Papadopoulou, *Smuggling Into Europe: Transit Migrants In Greece*, 17 *J. REFUGEE STUD.* 167, 171, 175 (2004).

³⁵ *Id.* at 171.

³⁶ *Id.*

seek accommodation in refugee camps.³⁷ Such restrictive immigration policies are not *per se* violations of human rights. However, it is worth noting that their effect of pushing people into extralegal sectors, where they are identified as illegal aliens that lack rights and face deportation, undoubtedly leads to violations.

¶11 Informal sectors will always be present to some degree, even in the most efficient economies. Income will never be fully reported and unlawful behavior will persist. It is preferable to have some extralegal norms and practices because, if nothing else, it avoids overly-invasive and inefficient regulatory schemes. The pervasiveness of extralegal sectors in developing and transitional countries leads to the conclusion that their primary cause is the inability to establish a coherent and workable market system, governed by predictable and regularly enforced laws. As will be shown in the following section, the result is that it simply costs less to exist outside of the law.

D. The Costs of Formality v. Informality: Hernando De Soto and the Case of Peru

¶12 Many noteworthy scholars have studied the informal economy, perhaps none more so than Peruvian economist Hernando De Soto and his think tank, the Institute for Liberty and Democracy (ILD).³⁸ De Soto's influential book, "The Other Path," takes an in-depth look at informality in Peru, focusing on the incoherence and costs of the legal system as the primary factors pushing people into extralegal existence. De Soto sees legal reform and specifically a formalized system of property rights as the answers to bringing people into the system. Such legal recognition of property ownership combats poverty by allowing the poor to use the assets they already possess as a means to create capital. The analysis of Peru in the late 1980's has continued relevance because of its tremendous depth in detailing the cost differential between legal inclusion and exclusion. Moreover, the problems chronicled are likely representative of those still existing in the developing world. De Soto and his research team discovered that 48% of the economically active population and 61.2% of work hours were devoted to informal activities, making up 38.9% of Peru's GDP.³⁹

¶13 The costs of formality in Peru were staggering. In an experiment to test the cost of access to industry, De Soto's team followed all of the legally required steps and procedures to open a legal sewing business.⁴⁰ This process took 289 days of bureaucratic procedures, eleven permits, and a total cost of \$1231, or thirty-two times the monthly minimum living wage.⁴¹ Despite a desire to abide by all the legal rules, the applicants were still forced to pay two bribes in order to allow their permit requests to proceed.⁴² Likewise, legally purchasing a piece of urban land for housing required an adjudication and numerous permits and certifications totaling a process of almost seven years, with almost five years of minimum wage being required for the adjudication alone.⁴³ The cost of access to trade was equally exorbitant. It took forty-three days and \$590.56 (fifteen times the monthly minimum wage) to open a formal store and fourteen and a half years of

³⁷ *Id.* at 175.

³⁸ MacLean, *supra* note 24, at 15.

³⁹ DE SOTO, THE OTHER PATH, *supra* note 5, at 12.

⁴⁰ *Id.* at 134.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 136, 139.

waiting time to open a formal public market.⁴⁴ Finally, the cost of access to public transit entailed a twenty-six month wait to obtain legal recognition for operating a minibus route.⁴⁵ Once legality is achieved, dramatic costs remain to sustain formal legality. De Soto's team discovered that firms' profits would be more than quadrupled without the substantial costs imposed by the administrative procedures to stay formal, which include endless streams of documents and an inflexible government staff.⁴⁶

¶14 The exorbitant costs of formality are in no way unique to Peru. It takes 168 bureaucratic steps and thirteen to twenty-five years to formalize informal urban property in the Philippines.⁴⁷ Gaining access to desert land and registering property rights for construction purposes takes between six and fourteen years in Egypt, which explains why 4.7 million Egyptians have chosen to build their dwellings illegally.⁴⁸ Finally, after leasing land for five years in Haiti, it requires 111 steps and 4112 days to complete a sales contract.⁴⁹ Hence, the steep costs of formality are a pervasive phenomenon.

¶15 Yet, there are also costs to informality. In order to avoid penalties and detection, informal businesses must disperse employees, use less-visible workplaces, refrain from advertising, avoid certain marketplaces, bribe authorities, and keep scale small.⁵⁰ Perhaps the largest cost is the inability to use one's assets as collateral for credit, which denies funding and prohibits growth.⁵¹ Further, informals incur inevitable net transfer costs. De Soto found that informals transferred approximately thirteen percent of GDP to the formalized citizenry through taxes levied on inputs purchased, inflation costs incurred by an inability to use banks, and the steep interest rates charged in the informal credit market.⁵² Finally, there are various costs associated with the inability to easily transfer property, defending possessions, constant threats of eviction, inability to use the contract system, inefficiencies of extra-contractual law, lack of insurance, and the absence of means to share risk or protect innovation.⁵³ Thus, while the cost of formality in Peru was prohibitively high for most of the population, the informal alternative was not without considerable expense.

¶16 De Soto and his ILD team actually had the opportunity to put many of their legal reforms into place in Peru and have been contracted by foreign governments to research and assist in similar government transformations.⁵⁴ In Peru, the ILD helped implement approximately 400 new laws and managed one of the largest titling, or property-creation, projects ever employed.⁵⁵ Although their projects were interrupted the results are significant. Recording of real estate ownership dropped from over twelve years down to

⁴⁴ *Id.* at 143-44.

⁴⁵ *Id.* at 146.

⁴⁶ *Id.* at 151.

⁴⁷ DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 7, at 22-23.

⁴⁸ *Id.* at 20, 24-25.

⁴⁹ *Id.* at 26-27.

⁵⁰ DE SOTO, *THE OTHER PATH*, *supra* note 5, at 153.

⁵¹ *Id.*

⁵² *Id.* at 155-56.

⁵³ *Id.* at 158-72; DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 7, at 83.

⁵⁴ Institute for Liberty and Democracy, *Origins of the ILD*, at <http://www.ild.org.pe/eng/history1.htm> (last visited Apr. 6, 2006); Institute for Liberty and Democracy, *ILD In a Nutshell*, at <http://www.ild.org.pe/eng/contenido.htm> (last visited Apr. 6, 2006).

⁵⁵ HERNANDO DE SOTO, *THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM*, at xxiii (Basic Books 2002) [hereinafter DE SOTO, *THE ECONOMIC ANSWER*].

one month at 1% of the previous cost.⁵⁶ By 2000, 1.9 million urban buildings representing 75% of the extralegal market were legalized.⁵⁷ Beginning a legal business went from around 300 days to one.⁵⁸ Finally, Peru's participation in the international cocaine market declined.⁵⁹ All of these reforms and administrative simplifications led to very high economic growth rates, including the worlds highest at 12% in 1994.⁶⁰

¶17 The Peruvian case study about the costs of formality and potential for reform is dramatic. However, this is not to say that the informal economy has a one-size fits all remedy. The work of De Soto, the ILD, and other scholars merely serves to illustrate the depth, costs, and challenges posed by extralegal sectors as we turn to the effects of informality on human rights.

II. HUMAN RIGHTS IMPLICATED

¶18 Studies of the informal economy have made a reasonably comprehensive examination of informality's effects upon property and development rights, which will be analyzed within. This section will also focus upon the informal economy as an impediment to fulfilling nearly every significant human right including, *inter alia*, rights regarding: political participation, judicial remedies, protection from arbitrary or unlawful inference and attack, equal protection, slavery, freedom of movement, access to services, adequate standards of living, women's and children's rights, social security, education, and marriage. Because research in many of these areas has yet to be taken up or is inadequate, this section will necessarily remain theoretical and broad. The goals here are to analyze what is known, ask the right questions, and draw reasonable inferences. As an initial matter, this analysis is not aimed at the extralegal activities of, for example, a mechanic who moonlights for cash, but rather the large portion of the informal sector made up of those that the law effectively forces into informality.

A. *Development and Property Rights*

1. Right to Development

¶19 The right to development is rooted in the United Nations Charter, the Universal Declaration of Human Rights and the two International Human Rights Conventions.⁶¹ According to the Declaration on the Right to Development:

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

⁵⁶ *Id.* at xxvi-xxviii.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at xxvi-xxviii.

⁶⁰ *Id.* at xxvii.

⁶¹ Office of the United Nations High Commissioner for Human Rights, Right to Development: Background, at <http://www.unhcr.ch/development/right-01.html> (last visited Mar. 10, 2006).

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.⁶²

Both individuals and peoples can invoke the right to development, which imposes duties of promoting fair development and effective international cooperation upon both individual states and the international community.⁶³

¶20 Does informality frustrate the right of individual development? The answer appears to be a resounding yes. Informality perpetuates poverty by removing the protections of the legal regime from the poor, denying them the ability to use their assets as capital, and ultimately foreclosing the opportunity to create wealth.⁶⁴ This undoubtedly violates their inalienable rights to contribute to economic development, self-determination, and to sovereignty over their natural wealth and resources, as called for in the Declaration. Further, because informals effectively have no interaction with the State unless they commit a serious crime,⁶⁵ they are not able to exercise their right to participate in and contribute to political development.

¶21 Informality also frustrates the right to development as a people. The global poor own an estimated \$9.3 trillion in dead capital.⁶⁶ These are assets that cannot be used to their fullest in creating wealth.⁶⁷ Dead capital includes untitled property, unregistered businesses, and dwellings that could be seized at any time.⁶⁸ Developing nations are made to depend upon foreign aid, which is wildly insufficient and unnecessary if only this dead capital could be utilized.⁶⁹ For example, the dead capital of the poor in Egypt is worth fifty-five times as much as the sum of all direct foreign investment ever recorded there, including construction of the Suez Canal and the Aswan Dam.⁷⁰ Haiti is the poorest nation in Latin America, yet the poor have assets worth more than 150 times greater than all foreign investment received since their independence in 1804.⁷¹ As the richest country on Earth, it would take the United States more than 150 years to transfer to the world's poor the resources they already possess if we were to increase foreign-aid to the United Nations' recommended level.⁷² Informality is denying entire peoples their

⁶² Declaration on the Right to Development art. 1, paras. 1, 2, G.A. Res. 41/128 (1986), available at <http://www.unhcr.ch/html/menu3/b/74.htm> (last visited Mar. 10, 2006).

⁶³ Office of the United Nations High Commissioner for Human Rights, Right to Development: The Content of the Right to Development, at <http://www.unhcr.ch/development/right-02.html> (last visited Mar. 10, 2006).

⁶⁴ Interview by Dario Fernandez-Morera with Hernando De Soto, REASON ONLINE MAGAZINE, available at <http://reason.com/DeSoto.shtml> (last visited Apr. 6, 2006).

⁶⁵ Claudia Fonseca, *Inequality Near and Far: Adoption As Seen From the Brazilian Favelas*, 36 LAW & SOC'Y REV. 397, 401 (2002).

⁶⁶ DE SOTO, THE MYSTERY OF CAPITAL, *supra* note 7, at 35.

⁶⁷ Hernando De Soto, *Citadels of Dead Capital: What the Third World must learn from U.S. history*, REASON ONLINE MAGAZINE, (May 2001), available at <http://www.reason.com/0105/fe.hs.citadels.shtml> (last visited Apr. 17, 2006).

⁶⁸ See generally, DE SOTO, THE MYSTERY OF CAPITAL, *supra* note 7.

⁶⁹ *Id.*

⁷⁰ *Id.* at 5.

⁷¹ *Id.*

⁷² *Id.*

right to development by keeping them from participating in economic development, infringing self-determination through unnecessary foreign involvement, and denying sovereignty over their resources.

2. Property Rights

¶22 Property rights and human rights share a tense yet inseparable history. Scholars have noted that formal property rights and libertarian autonomy conflict with human rights provisions relying upon government action.⁷³ Property rights are a “negative” right of non-interference that strongly emphasizes the protection of individual liberty.⁷⁴ The human rights regime incorporates property rights and the Universal Declaration of Human Rights states that: “[e]veryone has the right to own property alone as well as in association with others.”⁷⁵ And “[n]o one shall be arbitrarily deprived of his property.”⁷⁶

¶23 It is clear that informals who lack access to a formalized system of property ownership are denied their rights from the Declaration to legally own their property. Constant threats of arbitrary eviction further infringe these rights. The right to resell property in a formalized recording system protects and enhances property rights, allows assets to be fungible, and provides security to transactions.⁷⁷ These benefits of the formalized system are not available to informals, who are generally forced to transfer property by means of extralegal social contracts.⁷⁸ Sales are effectively restricted to acquaintances in the informal economy and occur at greatly market-reduced prices.⁷⁹

¶24 The informal economy’s denial of property rights is arguably its most significant deprivation of human rights because many of the other rights discussed, such as political rights, social services, and education, often depend upon property ownership. Further, the extralegal sectors denial of property rights is bad policy that perpetuates poverty through impeding the transformation of assets into capital. Moreover, there is no incentive to improve property when it can be taken at any time. The adverse ramifications of this problem are exemplified by narcotics producers who lack incentives to invest in legal crops that take longer to grow, but yield higher profits.⁸⁰

¶25 The informal economy is a large impediment to the attainment of development and property rights, but hope remains. De Soto points out that the current industrial revolution in the Third World and post-Communist countries is moving at a much faster pace and involving more people than its Western predecessor.⁸¹ The lesson he draws from the experience of the West, is that stopgap solutions were not enough.⁸² Instead,

⁷³ Robin Paul Malloy, *Equating Human Rights and Property Rights—The Need for Moral Judgment in an Economic Analysis of Law and Social Policy*, 47 OHIO ST. L.J. 163-65 (1986).

⁷⁴ HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS*, 363 (2d ed. Oxford Univ. Press 2000).

⁷⁵ Universal Declaration of Human Rights, art. 17, para. 1, *available at* <http://www.unhcr.ch/udhr/lang/eng.htm> (last visited Mar. 10, 2006) [hereinafter Universal Declaration].

⁷⁶ *Id.* art. 17, para. 2.

⁷⁷ DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 7, at 56-62.

⁷⁸ DE SOTO, *THE OTHER PATH*, *supra* note 5, at 163.

⁷⁹ *Id.* at 160, 166.

⁸⁰ Fernandez-Morera, *supra* note 62.

⁸¹ *Id.*

⁸² *Id.*

legal reform and formal property systems were needed to raise the standard of living.⁸³ Thus, while the extralegal sector is a human rights concern, it can also be the answer to attaining development and empowerment through reform that brings dead capital assets within the legal system.⁸⁴

B. *Civil and Political Rights*

1. Political Participation

¶26 Political participation as a human right is found in both article 21 of the Universal Declaration,⁸⁵ and more significantly, article 25 of the International Covenant on Civil and Political Rights (ICCPR). The latter states:

Every citizen shall have the right and the opportunity, without . . . unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors⁸⁶

¶27 Political participation and the extralegal sectors of the developing and post-Communist world seem to be conceptually incompatible. The ICCPR promises “citizens” the right and the opportunity to participate, but how many informals are bestowed with the rights of full citizenship? Sometimes they are literally not citizens and other times they are practically not able to participate as citizens. The Covenant assures a freedom of participation without “unreasonable restrictions.” The wholesale exclusion of the informals from the formal legal regime must necessarily qualify as such an unreasonable restriction. Moreover, voting itself seems to be an unlikely occurrence. Those living in informal housing are usually squatting and may not have a recognized address or the proper documentation required for registered voting. One study found that in Brazilian “lawless zones” most workers had no Social Security numbers, no identity documents, and no voter registration cards.⁸⁷ For these reasons, many of those who exist within the extralegal economy are undoubtedly precluded from political participation.

¶28 Voting, even where it takes place, may be both a less responsible and effective form of political participation for informals. Most informals do not pay taxes because their jobs are not legally recognized, therefore if they are voting, they may be doing so irresponsibly because they will not have to pay for the decisions they make. Representation without taxation may be a way of leveling an unequal society, but perhaps not one that encourages fiscal responsibility. Further, while groups such as students,

⁸³ *Id.*

⁸⁴ DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 7, at 71-73.

⁸⁵ Stating: “(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” Universal Declaration, *supra* note 75, art. 21, para. 3.

⁸⁶ International Covenant on Civil and Political Rights, art. 25, subpara. a, b, *available at* <http://www.ohchr.org/english/law/ccpr.htm> (last visited Mar. 10, 2006) [hereinafter ICCPR].

⁸⁷ Fonseca, *supra* note 65, at 401.

retirees, and the disabled are generally allowed to participate despite their vastly reduced tax-burden, they are still treated as important segments of the electorate based upon their numbers, organization, and the expectation that they financially contribute at some point. This influence is a stark contrast from the informals who are outcast and ignored. Under these conditions, informality effectively denies the human right of political participation, regardless of whether or not voting occurs.

2. Effective Judicial Remedies

¶29 Problems of government inefficiencies, corruption, and irrational legal regimes are discussed throughout this article. While the political branches of many developing and transitioning nations have exacerbated the problem of informality, judicial branches have fared no better. The World Bank has recognized that “[u]nreliable judiciaries hinder development, discourage and distort trade, and foster corruption.”⁸⁸ An effective legal system and an independent, respected judiciary are necessary to assist in the transition to free markets.⁸⁹ Despite the obvious importance of universal judicial access, informals are the least likely to use the formal judicial system, but most in need of legal protection.⁹⁰

¶30 Article 2 of the ICCPR echoes and expands upon article 8 of the Universal Declaration by declaring that:

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.⁹¹

¶31 Yet, how can an “effective remedy” be guaranteed without access to the judiciary? Further, how can the guarantee of “enforcement” be carried out when the “competent authorities” are the same ones who exclude, discriminate against, and ignore the informals? The skepticism in these questions is supported by public perceptions in

⁸⁸ Robert M. Kossick, Jr. & Marcelo Bergman, *The Enforcement of Local Judgments in Mexico: An Analysis of the Quantitative & Qualitative Perceptions of the Judiciary & Legal Profession*, 34 U. MIAMI INTER-AM. L. REV. 435, 457 (2003).

⁸⁹ McGrory, *supra* note 10, at 96.

⁹⁰ The number of households using the formal judicial system is significantly higher in titled communities versus informal communities. Erica Field, *Property Rights, Community Public Goods, and Household Time Allocation in Urban Squatter Communities: Evidence From Peru*, 45 WM. & MARY L. REV. 837, 842 (2004).

⁹¹ ICCPR, *supra* note 86, art. 2, para. 3.

developing countries of an elitist, arbitrary judiciary⁹² that is corrupt and inefficient.⁹³ Further, there is a consensus that judgments do not reconcile the law with social realities⁹⁴ and that unjust application of law by courts has become only graver as the pressures that lead to informality continue.⁹⁵

¶32 The informal sector has responded by developing an informal jurisprudence out of the need for a dispute resolution mechanism. This has been called “dynamic” jurisprudence and it gives informals a set of non-static legal norms to apply.⁹⁶ For example, “invasion contracts” bind informals together when taking over land for settlement.⁹⁷ While these judicial mechanisms can be relatively effective for some matters, such as disputes between informals, they are not an effective means of ensuring that the state is living up to its human rights obligations. In such cases, a formalized judiciary is essential.

¶33 Many countries with large informal economies have very weak and ineffective judicial systems.⁹⁸ The informal economy is likely perpetuated because people neither trust the courts nor can afford to bring their suits. Further, it is probably often the case that informals cannot bring claims due to the illegality of their actions. For these reasons, informals are forced to deal with disputes themselves. Thus, broadly, one more important actor in the protection of human rights is not fulfilling its role, and more narrowly, the human right of access to effective judicial remedies is denied.

3. Protection from Arbitrary or Unlawful Interference and Attacks

¶34 Article 17 of the ICCPR provides that: “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.”⁹⁹

¶35 The informal sector is problematic for the enforcement of this human right for two significant reasons. First, those who live in informal housing may be subject to arbitrary interference with their homes at any time. Because informals are forced into squatting, they have no formal protection against invasions of their dwellings. Second, protection of the law is not provided for most informals. Often, the police either ignore or are afraid to enter extralegal zones.¹⁰⁰ Thus, law enforcement provides little or no protection. Assuming that the police do respond, they may only exacerbate the problem for informals. For example, the police in Thailand often simply return enslaved prostitutes who run away to their owners.¹⁰¹ Perhaps worse, corrupt police may prey further upon the victim. Under such circumstances it would not be surprising if such victims choose

⁹² Linarelli, *supra* note 23, at 69.

⁹³ Kossick & Bergman, *supra* note 88, at 457.

⁹⁴ Linarelli, *supra* note 23, at 61.

⁹⁵ *Id.* at 52.

⁹⁶ Arthur J. Jacobson, *The Informal Economy: The Other Path of Law*, 103 YALE L.J. 2213, 2214 (1994).

⁹⁷ *Id.* at 2228.

⁹⁸ Linarelli, *supra* note 23, at 61-71.

⁹⁹ ICCPR, *supra* note 86, at art. 17.

¹⁰⁰ Fonseca, *supra* note 65, at 401.

¹⁰¹ A. Yasmine Rassam, *International Law and Contemporary Forms of Slavery: An Economic and Social Rights-Based Approach*, 23 PENN ST. INT’L L. REV. 809, 820 (2005).

not to avail themselves of formal protection. Moreover, the legal protections of the judiciary are generally not available to informals. For all of these reasons, informality frustrates the realization of the human right of protection from arbitrary or unlawful interference and attacks.

4. Equal Protection

¶36 Article 26 of the ICCPR echoes and expands upon the article 7 of the Universal Declaration by stating:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁰²

¶37 The human right of equal protection of the law as effective protection against discrimination on the ground of “other status” is noteworthy. Informality is certainly a distinguishable social status that leads to substantial legal discrimination. This “other status” discrimination is evident from the aforementioned lack of police protection for informals, the way the law removes this entire class of people from the formal regime, and the unequal access to and treatment within the judicial system. In much of the world, the legal treatment of informals is to exclude and ignore them; this is a far cry from achieving the human right of equal protection before the law.

5. Slavery

¶38 The popular conception that slavery has ended, or been nearly eradicated, is a myth.¹⁰³ Slavery in its various forms, including chattel slavery, is still found in alarming numbers in countries representing all stages of development.¹⁰⁴ ICCPR article 8 provides that: “1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. 2. No one shall be held in servitude. 3. (a) No one shall be required to perform forced or compulsory labour”¹⁰⁵ Today, at least twenty-seven million people around the globe are performing forced labor, without pay, under the threat of violence.¹⁰⁶

¶39 Working conditions in formal sectors exist that represent something very close to de facto slavery, especially for women pushed into semi- and no-skill jobs, subject to inhumane conditions, low-wages, and physical and sexual abuse.¹⁰⁷ Not surprisingly, modern slavery is a problem whose prevalence is associated with the informaleconomy.

¹⁰² ICCPR, *supra* note 86, art. 26; Universal Declaration, *supra* note 73, art. 7.

¹⁰³ iAbolish: American Anti-Slavery Group, Modern Slavery 101, at http://www.iabolish.com/slavery_today/primer/index.html (last visited Mar. 11, 2006).

¹⁰⁴ *Id.*

¹⁰⁵ ICCPR, *supra* note 86, art. 8.

¹⁰⁶ *Id.*

¹⁰⁷ Rassam, *supra* note 101, at 826.

Examples include full chattel slavery, domestic housekeeping, sweatshop work, sex trafficking, debt bondage, restaurant/hotel work, and forced agricultural labor.¹⁰⁸ These indisputable violations of the human right to be free from slavery are clearly fueled by the existence of extralegal sectors. While the informal economy allows slavery to survive, the presence of over 10,000 forced laborers in the United States demonstrates that this is not merely a problem for the developing and transitioning worlds.¹⁰⁹ Thus, much like other illegal activities such as drugs, weapons, and prostitution, slavery is unlikely to be remedied by legal reform alone.

6. Freedom of Movement

¶40 The Universal Declaration guarantees that: “[e]veryone has the right to freedom of movement and residence within the borders of each State.”¹¹⁰ This freedom of movement can be directly denied to informals through vagrancy laws, migration-control systems such as the Chinese hukou system,¹¹¹ and other restrictions that limit ones ability to live in a city or region of their choice. Movement is also constrained indirectly by the denial of property rights, which often forces informals to remain on their property in order to guard it from invasion by the State or other informals.¹¹² Thus, the Universal Declaration is again effectively thwarted.

C. *Economic and Social Rights*

¶41 Article 25 of the Universal Declaration broadly sets out many of the human rights to which we now turn.

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance.¹¹³

1. Access to Services

¶42 The Universal Declaration’s article 21 states that: “[e]veryone has the right to equal access to public service in his country.”¹¹⁴ Even if the State was willing to provide services to informals, their inability to keep tabs on people existing outside of the legal regime effectively precludes them from doing so. The fact that urban informals have almost no contact with the State, unless they commit a serious crime, underscores their

¹⁰⁸ Free the Slaves, *supra* note 6, at 48; iAbolish, *supra* note 103.

¹⁰⁹ Free the Slaves, *supra* note 6, at 47.

¹¹⁰ Universal Declaration, *supra* note 75, art. 13, para. 1.

¹¹¹ Xin Frank He, Regulating Rural-Urban Migrants in Beijing: Institutional Conflict and Ineffective Campaigns, 39 STAN. J. INT’L L. 177-78 (2003).

¹¹² Field, *supra* note 90, at 838-39.

¹¹³ Universal Declaration, *supra* note 75, art. 25.

¹¹⁴ *Id.* art. 21, para. 2.

deprivation of services.¹¹⁵ If even the police avoid informal settlements, then it can come as no surprise that social services rarely visit such dwellings either.¹¹⁶

¶43 The International Covenant on Economic, Social, and Cultural Rights (ICESCR) article 12 recognizes the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹¹⁷ Yet, health care is another issue that is problematic with informality. Informal housing settlements often lack adequate infrastructure to provide proper sanitation, clean water, sewage treatment, etc.¹¹⁸ These inadequacies create a host of health problems that are aggravated by the lack of government-sponsored social services available. Yet, informality is not entirely a victim, as it also intensifies this problem. For example, assuming other political obstacles could be overcome, the attainment of universal health coverage remains frustrated by the tremendous tax evasions of the informal economy, which impedes the mobilization of resources necessary to finance such a system.¹¹⁹ Therefore, both the State’s treatment of informals and the consequences of informality itself, jointly deny the human right of equal access to public services.

2. Adequate Standard of Living

¶44 ICESCR article 11 sets out a series of recognized rights that make up the guarantee of an adequate standard of living.

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

¹¹⁵ Fonseca, *supra* note 65, at 401.

¹¹⁶ “[I]t was a rare day when the teachers or health officers entered anyone’s home.” *Id.*

¹¹⁷ International Covenant on Economic, Social, and Cultural Rights, art. 12, *available at* http://www.unhcr.ch/html/menu3/b/a_ceschr.htm (last visited Mar. 11, 2006) [hereinafter ICESCR].

¹¹⁸ Bernadette Atuahene, *Legal Title to Land as an Intervention Against Urban Poverty in Developing Nations*, 36 GEO. WASH. INT’L L. REV. 1109, 1123-24 (2004).

¹¹⁹ Konstantina Davaki & Elias Mossialos, *Plus CA Change: Health Sector Reforms in Greece*, 30 J. HEALTH POL. POL’Y & L. 143, 146 (2005).

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.¹²⁰

¶45 The attainment of the provisions for adequate food and clothing are difficult to measure. Yet, the fact that informal housing conditions are linked with a woefully inadequate supply of basic services, including clean drinking water,¹²¹ and are primary causes of many injuries, psychological stresses, and both communicable and chronic diseases,¹²² indicates that there is work to be done here.

¶46 At least one billion people lack appropriate housing and billions more live in informal settlements under various degrees of livability.¹²³ Conditions in Third World cities have conspired to force people into informal housing based upon the rapid rural-urban migration, overall population growth, lack of funds, and lack of reasonably priced housing.¹²⁴ In a study of informal housing in Egyptian cities, it was discovered that these conditions have led to fifty-four percent of all housing units being informal.¹²⁵ Greater Cairo alone had approximately sixty-eight informal settlements occupied by more than 11.39 million occupants.¹²⁶ The United Nations Center for Human Settlements (Habitat) has recognized that “neither squatter settlement upgrading, nor sites and services projects in their present form provide a long-term answer to the problems of accommodating the growing numbers of urban poor at decent standards. As conceived at present, they will not be able to guarantee that very large numbers of people will be able to satisfy their basic rights with respect to shelter.”¹²⁷

¶47 Because migrants and the poor are forced into informal housing settlements that lack the necessary infrastructure to guarantee safe, sanitary living conditions, the human right of attaining an adequate standard of living is not being realized by billions in the informal sector.

3. Women’s Rights

¶48 The human rights regime aims to ensure equal rights for women,¹²⁸ while also recognizing motherhood should be accorded special protections.¹²⁹ The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) is the only human rights treaty that affirms the reproductive rights of women.¹³⁰ ICESCR article 10

¹²⁰ ICESCR, *supra* note 117, art. 11.

¹²¹ Atuahene, *supra* note 118, at 1123.

¹²² AHMED M. SOLIMAN, A POSSIBLE WAY OUT: FORMALIZING HOUSING INFORMALITY IN EGYPTIAN CITIES, 15 (Univ. Press of America 2004).

¹²³ SOLIMAN, *supra* note 122, at xiii.

¹²⁴ *Id.* at 9.

¹²⁵ *Id.* at 31.

¹²⁶ *Id.* at 25.

¹²⁷ *Id.* at 19.

¹²⁸ ICESCR, *supra* note 117, art. 3.

¹²⁹ *Id.* art. 10, para. 2; Universal Declaration, *supra* note 75, art. 25, para. 2.

¹³⁰ Convention on the Elimination of all Forms of Discrimination Against Women, art. 11, para. F, available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (last visited Mar. 11, 2006) [hereinafter CEDAW].

goes on to accord pregnant mothers “paid leave or leave with adequate social security benefits.”¹³¹ Such rights are not found in the informal economy.

¶49 The various human rights instruments establish women’s rights to socioeconomic mobility and opportunity through education and employment.¹³² However, the informal economy is a barrier to the attainment of this opportunity and it particularly affects minority, immigrant, and indigenous women whose informal employment offers lower levels of labor protections than the mainstream economy.¹³³

¶50 CEDAW additionally ensures that: “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”¹³⁴ Yet, such activities are prevalent and the informal economy is where they exist.

¶51 While the great bulk of scholarship rests on the notion that informality is harmful to women¹³⁵, under some circumstances informality can be relatively advantageous. Hunter R. Clark has argued that the expansion of the informal economy throughout Africa has benefited women because it allows them to avoid discriminatory regulation affecting licenses, loans, and accounting that have been called a primary “mechanism of male control over women.”¹³⁶ This argument is not without merit, yet it is clear that by and large women are especially vulnerable to the informal economy’s consequences of malnutrition, hunger, poor health,¹³⁷ economic exploitation, and physical violence.¹³⁸ For these reasons, extralegality remains very problematic to achieving women rights.

4. Children’s Rights

¶52 The need for special protections for those under the age of 18 is recognized in the Convention on the Rights of the Child (CRC) and ICESCR. The human rights identified in the CRC as being possessed by all children include: “the right to survival; to develop to the fullest; to protection from harmful influences, abuse and exploitation; and to participate fully in family, cultural and social life.”¹³⁹ To these ends, the CRC goes on to include a host of rights that individual government signatories are responsible for promoting,¹⁴⁰ providing,¹⁴¹ respecting,¹⁴² and protecting.¹⁴³ It comes as no surprise that

¹³¹ ICESCR, *supra* note 117, art. 10, para 2.

¹³² Catherine Powell & Jennifer H. Lee, Comment, *Recognizing the Interdependence of Rights in the Antidiscrimination Context Through the World Conference Against Racism*, 34 COLUM. HUM. RTS. L. REV. 235, 251 (2002).

¹³³ *Id.* at 251-52.

¹³⁴ CEDAW, *supra* note 130, art. 6.

¹³⁵ See e.g., Nandini Gunewardena, *Reinscribing Subalternity: International Financial Institutions, Development, and Women’s Marginality*, 7 UCLA J. INT’L L. & FOREIGN AFF. 201 (2002-2003).

¹³⁶ Hunter R. Clark, *African “Renaissance” and U.S. Trade Policy*, 27 GA. J. INT’L & COMP. L. 265, 282 (1999).

¹³⁷ Gunewardena, *supra* note 135, at 221.

¹³⁸ Katrina R. Kelly, *Gendered Aspects of Migration: Law and the Female Migrant*, 22 HASTINGS INT’L & COMP. L. REV. 47, 109 (1998).

¹³⁹ The United Nations Children’s Fund, Convention on the Rights of the Child, *available at* <http://www.unicef.org/crc/> (last visited Apr. 6, 2006) [hereinafter CRC]; See also ICESCR, *supra* note 117, art. 10.

¹⁴⁰ The government is responsible for promoting: survival and development (art. 6); and the best interests of the child (art. 21). CRC, *supra* note 139.

¹⁴¹ The government is responsible for providing: protection and care (art. 3); access to information (art. 17); health care (art. 24); social security (art. 26); and an adequate standard of living (art. 27). *Id.*

these noble ambitions are not realized for the young informals whose existence often includes child labor, prostitution, slavery, trafficking, street living, begging, stealing, and a host of health problems.¹⁴⁴ Further, CRC article 16 protects children from arbitrary interferences with their home and guarantees the right to legal protection against such actions. Yet, for the vast number of people without formal property ownership, this right can be infringed at any moment.¹⁴⁵ The objectives of both the CRC and ICESCR to protect and assist children cannot be accomplished when children live in extralegality.

5. Education

¶53 The right to education is recognized in article 26 of the Universal Declaration, ICESCR article 13, and CRC articles 28 and 29. These instruments call for a broad right that includes: compulsory education (available free to all), availability of secondary education (including technical and vocational), equal access to higher education, progressive introduction of free education at the secondary and higher levels, development of the human personality and sense of dignity, development of school systems, strengthening respect for human rights and fundamental freedoms, furtherance and maintenance of peace, and promotion of understanding, tolerance and friendship among all peoples.¹⁴⁶

¶54 The informal economy presents abundant challenges to the provision of public education. Potential difficulties consist of: enrollment without a recognized home address, language barriers, exclusion of children not living in their state-mandated area,¹⁴⁷ and concern that enrollment will expose the family's illegal status. Another large obstacle to fully attaining this right is the prevalence of child labor in the developing world. Even if the child attends school in addition to working, evidence shows that the education suffers based on the child's fatigue and lack of time for schoolwork, recreation, and rest.¹⁴⁸ Compulsory education must also combat the skepticism of its worth in informal sectors where the curricula may be viewed as unpractical, the costs of uniforms and books as prohibitive, and the schedule as unaccommodating.¹⁴⁹ While informal sectors are not always utterly denied the recognized human right to education, as they may be with other human rights, it is apparent that informality presents numerous impediments to the full and consistent realization of this right.

¹⁴² The government will respect: freedom of expression (art. 13); freedom of thought, conscience and religion (art. 14); and freedom of association (art. 15). Convention on the Rights of the Child. *Id.*

¹⁴³ The government is responsible for protecting children from: discrimination (art. 2); loss of identity (art. 8); separation from parents (art. 9); abuse, neglect, and physical and mental violence (art. 19); economic exploitation (art. 32); drug use, production and trafficking (art. 33); sexual exploitation and abuse (art. 34); being trafficked (art. 35); cruel, inhuman, or degrading treatment/punishment and deprivations of liberty (art. 37); and armed conflict involvement (art. 38). *Id.*

¹⁴⁴ Jennifer Bol, *Using International Law to Fight Child Labor: A Case Study of Guatemala and the Inter-American System*, 13 AM. U. INT'L L. REV. 1135, 1142-48, 1169-70 (1998).

¹⁴⁵ CRC, *supra* note 139, art. 16.

¹⁴⁶ Universal Declaration, *supra* note 75, art. 26; ICESCR, *supra* note 117, art. 9; CRC, *supra* note 139, arts. 28, 29.

¹⁴⁷ Such as in China where the hukou system has been used to control migrant relocations. He, *supra* note 111, at 180-81.

¹⁴⁸ Bol, *supra* note 144, at 1146.

¹⁴⁹ *Id.* at 1145-46.

6. Labor Conditions

¶55 Article 7 of the ICESCR broadly sets forth the recognized rights regarding labor conditions.

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.¹⁵⁰

¶56 ICESCR article 8 goes further to guarantee the right to form and join trade unions.¹⁵¹ As with many of the previous human rights analyzed, the guarantees regarding safe working conditions, fair wages, equal opportunity, paid holidays, trade unions, etc., are generally not realities for workers in the informal economy. These guarantees are meaningless because of the types of jobs that exist within the informal economy, such as street vending, drug dealing, prostitution, and sweatshop labor. By delving deeper into some of these extralegal jobs and the labor conditions surrounding them, we can better examine the rights violations present.

¶57 Sweatshop labor continues to be a sad reality of modern production that disproportionately victimizes women, who are essentially hidden from the outside world, leading to little concern for their denials of basic human rights.¹⁵² The working conditions that define such labor are: remuneration below the minimum wage, extra-long work shifts without overtime pay, harassment/abuse by supervisors, demands for sexual favors, arbitrary punishments or firings, physical violence, restrictions upon restroom use,

¹⁵⁰ ICESCR, *supra* note 117, art. 7.

¹⁵¹ *Id.* art. 8.

¹⁵² Alison A. Gormley, Note, *The Underground Exposed: The United States Corporations' Use of Sweatshops Abroad, and the Abuse of Women*, 25 SUFFOLK TRANSNAT'L L. REV. 109, 111 (2001).

retaliation for complaints, hazardous conditions, overcrowding, and a lack of insurance, paid holidays, vacations, sick days, job security, maternity leave, and breaks.¹⁵³ That such conditions violate the human rights of labor standards requires no analysis and could often be accurately equated with slavery, examined *supra*.¹⁵⁴

¶58 Sweatshops are usually found in areas immersed in repression and fear;¹⁵⁵ hallmarks of incoherent legal regimes and their corresponding informal economies. The prevalence of sweatshop conditions is likely driven by both large corporations and the host countries in which they manufacture. Corporations seek to maximize profits through manufacturing in countries desperate for development. To avoid discouraging foreign investment, these countries neither enforce many regulations nor punish violators.¹⁵⁶ Both the U.N. and I.L.O. have attempted to address the human rights violations of sweatshops,¹⁵⁷ but their efforts are frustrated by the core question posed by this paper: how do we provide any type of human rights to those in the informal economy?

¶59 The sex trade generally exists within the informal economy. While men, women, and children all work in this sector, it is women who are most often forced into such work based upon desperation and lack of employment alternatives in the formal economy.¹⁵⁸ While sex trade employment against ones will or out of necessity is egregious in and of itself, it is the accompanying abuses that are particularly concerning from a human rights standpoint. Sex workers routinely face arrest, police violence, extortion, assault, rape, loss of child custody, robbery, humiliation, harassment, murder, and discrimination in housing, employment and law enforcement.¹⁵⁹ Moreover, these informals are often the victims of trafficking and forced prostitution.¹⁶⁰ Both the general illegality of such work and the frequent abuse of workers by the police or State, leads to fear amongst sex workers in reporting violations of their rights.¹⁶¹ Thus, the informal economy creates and perpetuates the human rights violations found in the sex trade.

¶60 In addition, the prevalence and conditions of child labor are human rights violations found in the informal economy, as previously discussed generally and specifically as affecting education.¹⁶²

¶61 Despite the existence of horrific extralegal working conditions, it is the manner by which people enter such employment that is often most disturbing. According to the U.S. State Department's 2004 Trafficking in Persons Report, there are between 14,500 and 17,500 people trafficked into the United States annually, largely as an extreme abuse of foreign migrant labor.¹⁶³ Globally, an estimated two to four million people are trafficked

¹⁵³ Leslie D. Alexander, Note: *Fashioning a New Approach: The Role of International Human Rights Law in Enforcing Rights of Women Garment Workers in Los Angeles*, 10 GEO. J. POVERTY LAW & POL'Y 81, 85-86 (2003).

¹⁵⁴ Gormley, *supra* note 152, at 113-14.

¹⁵⁵ *Id.* at 114.

¹⁵⁶ *Id.* at 116-17, 125.

¹⁵⁷ *Id.* at 120-23.

¹⁵⁸ Madelyn Calabrese, *Kofi Annan's Vision for Promoting Human Rights in the 55th Session*, 17 N.Y.L. SCH. J. HUM. RTS. 897, 898 (2001).

¹⁵⁹ Amalia Lucia Cabezas, *Re-Orienting Law and Sexuality: Legal Challenges To and By Sex Workers/Prostitutes*, 48 CLEV. ST. L. REV. 79, 88 (2000).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See Bol, *supra* note 144.

¹⁶³ United States Department of State, Trafficking in Persons Report, 24 (June 2004), *available at*

annually.¹⁶⁴ The informal economy is where these forms of modern slavery, sweatshops, and child labor are found.

¶62 The United States presents an interesting case in extralegality because it is a country that has an arguably good record in providing human rights and coherent legal regulation to its citizens. However, with so many people being trafficked into the United States every year, it may surprise many that the United States, despite its rule of law heritage, also has a significant informal economy. The United States has its own problem with sweatshops and labor conditions, as found Los Angeles's garment industry.¹⁶⁵ Also, prostitution, drug dealing, and forced domestic or manufacturing labor all add to the unseemly side of the U.S. extralegal sector. Yet, perhaps some amount of informality is desirable, given the existence of imperfect legislation and unfortunate social realities. Moonlighting, street vending, and undocumented construction or agricultural labor may be arguably beneficial in providing desired services, sometimes in jobs Americans are unwilling to take, at prices that benefit consumers. Also, the informal economy is perhaps the most important element of the economy on Native American Reservations.¹⁶⁶ It has even been argued that U.S. drug dealers have been able to find more respect, better wages, and better labor conditions by leaving the formal economy where they were exploited by abusive and often racist employers.¹⁶⁷ The sad reality of this claim is likely true, yet such drug dealing perpetuates as many, if not more, destructive social realities as it alleviates. Thus, while a small amount of certain informal activities do not necessarily present obvious human rights concerns and in fact may alleviate some immediate social inequities, it remains in the long-term best interests of everyone to attain legal inclusion and the corresponding protection of their rights.

¶63 As with other rights discussed, the informal economy is not just the location of labor rights abuses, but also an enabler of the problem. Because anyone can seize informally possessed property, informals are often unable to leave their property to seek out adequate formal sector employment. In countries where property rights have been solidified and the economy has been formalized, there have been large increases in people seeking jobs outside of the home.¹⁶⁸ Freedom from guarding ones property has positive effects including increased wages and productivity, and reductions in child labor and illegal drug manufacturing.¹⁶⁹ Thus, extralegality itself frustrates the enforcement of human rights.

¶64 The problem of enforcing human rights regarding labor conditions in the informal economy is difficult, if not impossible, as these workers lack the formal working status necessary to claim their rights under national legislation.¹⁷⁰

<http://www.state.gov/documents/organization/34158.pdf> (last visited March 31, 2006).

¹⁶⁴ *Id.*

¹⁶⁵ See Alexander, *supra* note 153.

¹⁶⁶ Ezra Rosser, *This Land Is My Land, This Land Is Your Land: Markets and Institutions for Economic Development on Native American Land*, 47 ARIZ. L. REV. 245, 255 (2005).

¹⁶⁷ Reginald Leamon Robinson, *The Sacred Way of Tibetan CRT Kung Fu: Can Race Critics Teach the Shadow's Mystical Insight and Help Law Students "Know" White Structural Oppression in the Heart of the First-Year Curriculum? A Critical Rejoinder to Dorothy A. Brown*, 10 MICH. J. RACE & L. 355, 406 (2005).

¹⁶⁸ Field, *supra* note 90, at 858-59.

¹⁶⁹ *Id.* at 861.

¹⁷⁰ Francis Maupain, *Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protections of Workers' Rights*, 16 EUR. J. INT'L L. 439, 442 (2005).

7. Social Security

¶65 ICESCR article 9 provides that: “[t]he States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.”¹⁷¹ For the majority of informals, the attainment of this human right is impossible. Informals do not pay taxes and often receive very little, if any, government services. Third World governments rarely provide adequate levels of infrastructure to informal settlements to guard against immediate health problems, much less providing funds for long-term social insurance.¹⁷² The concept of a human right to social security must seem absurd to the many informals who live without sewage treatment, clean water, and other vital government services.

8. Marriage and the Maintenance of the Family

¶66 There is a recognized human right to willfully enter into a legal marriage. Article 16 of the Universal Declaration states that: “[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”¹⁷³ ICCPR article 23 goes on to guarantee: “1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.”¹⁷⁴

¶67 In informal sectors, people are often removed from any contact with the State. It has been reported that in a Brazilian “lawless zone” at least seventy-five percent of adult couples with children were not legally married.¹⁷⁵ It is reasonable that people who spend much time and energy eluding detection by the State would similarly see it as necessary to avoid registering and legalizing their marital unions. Also, just as the bureaucratic red tape required to secure titles and licenses can be prohibitive to an existence within the law, the administrative procedures to procure a marriage license can be prohibitive to seeking one out.¹⁷⁶

¶68 The destructive effects of informality are likely felt within formal marriages as well because families may be broken up as spouses travel from rural areas to urban centers for work. In sum, the delays, fears, disincentives, and familial strains caused by informality create a significant impediment to exercising the human rights of legal marriage and the maintenance of a family.

D. *Note on Terrorism*

¶69 Not all human rights issues involving extralegality fit neatly into the aforementioned categories of rights. Terrorism presents just such a case.

¹⁷¹ ICESCR, *supra* note 117, art. 9; *see also* Universal Declaration, *supra* note 75, art. 22.

¹⁷² Atuahene, *supra* note 118, at 1123-24.

¹⁷³ Universal Declaration, *supra* note 75, art. 16, para. 1.

¹⁷⁴ ICCPR, *supra* note 86, art. 23, paras. 1, 2.

¹⁷⁵ Fonseca, *supra* note 65, at 401.

¹⁷⁶ After putting the ILD’s administrative simplification proposals into effect, Peru saw a seventy-five percent reduction in time needed to get a marriage license. DE SOTO, *THE ECONOMIC ANSWER*, *supra* note 55, at xxviii.

1. Right to Security

¶70 Article 3 of the Universal Declaration proclaims “the right to life, liberty and security of person;” a right essential to the enjoyment of all other rights.¹⁷⁷ Terrorism is a threat to security and as such the United Nations has adopted a host of treaties aimed at combating and eradicating international terrorism.¹⁷⁸

¶71 Hernando De Soto’s seminal book, “The Other Path,” was written to show an alternative to the teachings of a Maoist terror organization in Peru called “The Shining Path.”¹⁷⁹ This group paralyzed the judicial system, threatened judges, freed prisoners, displaced over two million Peruvians from their homes, sent another one million into voluntary exile, executed, tortured, scalped, and took control of much of Peru’s coca-growing.¹⁸⁰ When the Shining Path were eventually defeated, some of the credit went to the influence of “The Other Path.”¹⁸¹ Regardless of who or what deserves credit, De Soto has some compelling thoughts on the linkage between informality and terror. “[T]errorists . . . will always be around to champion the cause of the excluded.”¹⁸² “People don’t rebel because they are poor but because they are excluded from the system. To give people a stake in the economy, to prove to them that government is in the business of including them in formal society, is to put the terrorists out of business.”¹⁸³

¶72 Today, terrorism is an ever-present threat and many protective measures have been employed that conflict with human rights and liberties.¹⁸⁴ However, as “The Other Path” demonstrates, both security and human rights enforcement can simultaneously be obtained by promoting universal inclusion within the legal regime. This method of guarding against terror, while increasing human rights protections, is particularly attractive when alternatives include violence and greater infringements upon rights.

III. PROPOSED SOLUTIONS

¶73 Each informal sector possesses idiosyncrasies, based upon local circumstances and traditions, which make a one-size-fits-all solution inappropriate. However, there are some recognized approaches to battling extralegality that have either experienced success or are theoretically promising. These approaches range from broad conceptual methods that keep awareness of the consequences of informality in mind when affording rights protections, to a variety of specific, targeted responses.

¹⁷⁷ Universal Declaration, *supra* note 75, art. 3.

¹⁷⁸ These include the Declaration on Measures to Eliminate International Terrorism, the International Convention for the Suppression of Terrorist Bombings, the International Convention for the Suppression of Financing of Terrorism, and the International Convention for the Suppression of Acts of Nuclear Terrorism. Ad Hoc Committee established by G.A. Res. 51/210 of 17 December 1996, *Measures to Eliminate International Terrorism*, available at <http://www.un.org/law/terrorism/index.html> (last visited Apr. 10, 2006).

¹⁷⁹ DE SOTO, THE ECONOMIC ANSWER, *supra* note 55, at xv.

¹⁸⁰ *Id.* at xiv.

¹⁸¹ *Id.* at xv.

¹⁸² *Id.* at xxxiv - xxxv.

¹⁸³ *Id.* at xxxv.

¹⁸⁴ See generally, Raj Kumar, *Global Responses to Terrorism and National Insecurity: Ensuring Security, Development and Human Rights*, 12 ILSA J. Int'l & Comp. L. 99 (2005).

¶74 Nobel Prize winner Amartya Sen takes a less mechanical view of development in arguing that freedom itself is not only the end goal of development, but also the means.¹⁸⁵ Because human freedom is the overarching objective, it, rather than some chosen list of instruments or cunning development programs, should be the central focus of development.¹⁸⁶ Sen recognizes that explicit and implicit bondages in the labor market deny access to the free market.¹⁸⁷ This freedom-oriented view carries traction for the informal economy where an inability to leave one's property to secure a formal job is just such an implicit bondage.

¶75 The following are specific legal reforms that could help ensure the realization of human rights by keeping people within the law: an adequate minimum wage, special access to government programs for the traditionally discriminated against, improved compulsory education, literacy programs, increased access to credit for the poor, land reforms, and monitoring programs in economic sectors with traditionally informal employees, such as agriculture, and domestic work.¹⁸⁸ Yet, for any legal reform, integrity is vital. Reforms must emphasize the quality and credibility of State institutions,¹⁸⁹ which will be enhanced by increasing regulatory transparency and opportunities for public input in the legislative and regulatory process.

¶76 Titling programs, as previously discussed, are efforts to give the poor legal ownership over what they already possess. This draws informals into the legal regime, provides security for assets, protects and encourages investments, ensures the ability to transact, grants access to formal credit, and serves as a means to increase tax revenues to finance infrastructure improvements.¹⁹⁰ However, such programs also have substantial costs associated with potential violence, preexisting ownership, corruption, and price regressions.¹⁹¹ Yet, overall these programs have experienced some notable successes and offer perhaps the best chance for long-term poverty reduction and development.¹⁹² When titling programs are utilized, they should be implemented in ways that avoid reinforcing certain structural barriers, such as the marginalization of women and the poor location of titled lands for the poor, which impair social mobility and wealth accumulation.¹⁹³ These measures will help ensure that informals brought into the legal regime are able to avoid the exposure to disease, infrastructure failures, crime rates, etc., that they faced as informals.

¶77 Microcredit programs are used to reduce poverty amongst the "poorest of the poor" by increasing their income and productivity through access to credit.¹⁹⁴ The United Nations has noted that such programs are especially beneficial to women's empowerment.¹⁹⁵ Typical activities pursued with microcredits include small-scale

¹⁸⁵ AMARTYA SEN, *DEVELOPMENT AS FREEDOM*, 3 (Borzoi Books 1999).

¹⁸⁶ *Id.* at 3, 11.

¹⁸⁷ *Id.* at 7.

¹⁸⁸ Rassam, *supra* note 101, at 826-27.

¹⁸⁹ Steven E. Hendrix, *Myths of Property Rights*, 12 ARIZ. J. INT'L & COMP. LAW 183, 223 (1995).

¹⁹⁰ Jean O. Lanjouw, *A Difficult Question in Deed: A Cost-Benefit Framework for Titling Programs*, 45 WM. & MARY L. REV. 889, 949 (2004).

¹⁹¹ *Id.* at 936-50.

¹⁹² See generally, DE SOTO, *THE MYSTERY OF CAPITAL*, *supra* note 7.

¹⁹³ Atuahene, *supra* note 118, at 1177.

¹⁹⁴ Celia R. Taylor, *Microcredit as Model: A Critique of State/NGO Relations*, 29 SYRACUSE J. INT'L L. & COM. 303, 317 (2002).

¹⁹⁵ *Id.*

agriculture, manufacturing, and trade.¹⁹⁶ For human rights purposes, microcredit programs can be a tool for moving extralegal activities into the formal economy.¹⁹⁷

¶78 The transition to market economies in post-Communist countries presents a special economic case. While these countries also need to establish sound public institutions, rule-of-law, and individual rights, they differ from the Third World in one important economic aspect, the existence of a merchant middle class.¹⁹⁸ While this merchant middle class exists largely underground, it has been argued that it could be drawn into formality by legalizing their property rights and allowing expansion in the scope of their activities.¹⁹⁹ Because transitioning economies face some different obstacles than the Third World, remedies should be tailored accordingly.

¶79 A complimentary solution is offered through the human rights regime. By ratifying human rights instruments, potentially powerful mechanisms are put in place for enforcing rights. Countries are bound to abide by domestic law and obligations from international treaties. When these obligations stem from ratified human rights treaties, systematic failures to comply violates the rule of law, human rights, and potentially democratic rights as well. Essentially, these violations reflect a right to live under a political system that meets its self-imposed obligations. Utilization of the reporting and complaint functions contained in many human rights instruments could help focus increased public attention, both national and international, on the failure of the State to live up to its human rights obligations. This would create pressure on the government to enforce their own laws more effectively. Further, reporting gives a voice to people who have been treated as invisible and the voicing of one's oppression can be the path to liberation.²⁰⁰ This solution is also attractive to help end the perception in much of the developing world that human rights instruments are "just politics."²⁰¹

IV. CONCLUSION

¶80 This article has analyzed a vast array of human rights, and while not exhaustive, it has demonstrated that the informal economy is extremely problematic to enforcement of the human rights regime. The danger posed by such immense extralegality is that international human rights instruments may be merely pie in the sky to the billions of people who make up the informal economy. Even when such instruments are ratified by States, this provides little comfort to the intended beneficiaries existing outside of the legal regimes charged with implementing these rights. To make the human rights regime a reality for those who need it most, they must be allowed into the formal system. The question is how.

¶81 Programs providing increased wages, government assistance, education, land reform, labor monitoring, and access to credit are good starts in helping the poor create wealth. However, institutional reform is needed to eradicate poverty, attain development, and successfully transition to free market economies. Reforms that reduce bureaucratic

¹⁹⁶ *Id.* at 319.

¹⁹⁷ *Id.*

¹⁹⁸ McGrory, *supra* note 10, at 95.

¹⁹⁹ *Id.* at 95-96.

²⁰⁰ Elvia R. Arriola, *Comparative and Co-Constituent Construction of Identities*, 55 FLA. L. REV. 413, 423 (2003).

²⁰¹ McMahon, *supra* note 13, at 21.

red tape and bring the cost of legal compliance under that of extralegality are necessary to formalize the previously excluded. Such reforms should also create greater regulatory transparency, allow for citizen input, and aim at fighting corruption and inefficiency. When tailored to local circumstances, titling programs that turn dead assets of the poor into useable capital are great tools for poverty reduction, development, and attaining legal inclusion for informals.

¶82 The human rights corpus itself should be emphasized as a major part of the solution. The reporting functions contained within many of the human rights instruments can be used to generate international pressure on governments to enforce their human rights obligations. Moreover, global and regional human rights courts and commissions are increasingly effective bodies for ensuring human rights enforcement. Because the informal economy effectively interferes with the attainment of almost every significant human right, these bodies should assume a leading role in fighting extralegality. The human rights regime does not need to be merely a victim of informality, but can also be a significant part of a solution that brings people within the law, alleviates poverty, and creates coherent legal systems.