



Florida International University College of Law  
eCollections

---

Faculty Publications

Faculty Scholarship

---


2013

## Legal Latin Americanism

Jorge L. Esquirol

Florida International University College of Law, [esquirol@fiu.edu](mailto:esquirol@fiu.edu)

Follow this and additional works at: [https://ecollections.law.fiu.edu/faculty\\_publications](https://ecollections.law.fiu.edu/faculty_publications)

 Part of the [Comparative and Foreign Law Commons](#)

---

### Recommended Citation

Jorge L. Esquirol, *Legal Latin Americanism*, 16 Yale Hum. Rts. & Dev. L.J. 145 (2013).

Available at: [https://ecollections.law.fiu.edu/faculty\\_publications/322](https://ecollections.law.fiu.edu/faculty_publications/322)

This Article is brought to you for free and open access by the Faculty Scholarship at eCollections. It has been accepted for inclusion in Faculty Publications by an authorized administrator of eCollections. For more information, please contact [lisdavis@fiu.edu](mailto:lisdavis@fiu.edu).

# HEINONLINE

Citation: 16 Yale Hum. Rts. & Dev. L.J. 145 2013

Provided by:

FIU College of Law



Content downloaded/printed from [HeinOnline](#)

Wed Jun 21 15:21:33 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

# Legal Latin Americanism

Jorge L. Esquirol

## I. INTRODUCTION

Legal scholars from Latin America are increasingly publishing, presenting at conferences and participating in legal debates in the U.S. as well as in Latin America. This relatively new development is effectively changing legal area studies focused on the region. It is enlarging the field with more participants and potentially alternative approaches. Whereas it may have been possible in the past for Latin Americanist legal scholars in North America to address themselves solely to a home audience, such is no longer plausibly the case. Legal area studies specialists are quickly confronted with the reactions and impact of their engagement in the places written about. In addition, with more translations of academic works and scholars working in multiple languages, venues, and publications, their professional production is quickly shared from one forum to another.

Yet, there are significant differences between legal Latin Americanism and legal discourse in Latin America. Legal Latin Americanism, in the sense used here, is the academic and professional practice of writing about law in Latin America from an external perspective. Its characteristic feature is not the physical location of the author, but rather a distinct epistemology. Most of this literature is produced in North America, in English, for audiences in the global North. By contrast, legal discourse in Latin America, again as used here, refers to the vast array of academic and societal debate about law in specific national legal communities in Latin America. Distinguished in this way, writing about Latin American law in English in North America and engaging in specific legal debates in a particular Latin American location can take very different forms. Additionally, the legal politics in one forum may be quite unlike the other. And, while Latin American legal studies is a field unto itself in the global North, the same cannot be said for legal discourse across Latin America as a whole. Specific locales or discursive communities may have their own conventions, authoritative references, short-hands, and interpretations of sources and events. Still, despite a broad range of local variation, a primary divide can be traced between legal discourse about Latin America principally generated in the U.S. and Europe, and legal discourse in specific Latin American countries.

Indeed, the modes of intervening in legal debates in the center may be quite different than legal discourse at the national level. This certainly includes differences over the relevance and emphasis of topics debated. But, more importantly, it concerns what is considered convincing argumentation, credible theoretical frameworks, and the disciplines or fields dominant within legal debates. Due to the differences in these distinct discursive economies, an intervention in the legal political arena at the national level may not easily translate into discussions at the center. Alternatively, Latin Americanist frameworks and debates may only obliquely engage with legal discourse at the national level. While the two fields of contestation may share a common *legal* thread, and presumably the same object of study, they are notably not the same. Due to the particularity of distinct interpretive communities, each exhibits its own epistemological commitments, analytical conventions, and political arena. Indeed, until recently, such differences have made transparent exchange between legal actors in Latin America and legal Latin Americanists quite limited.

Furthermore, these two distinct fields have quite different geopolitical impact. They clearly involve two different—although not mutually exclusive—audiences. Latin Americanists are principally involved in academic and political circles in the global North. Legal scholarship in Latin America is predominantly situated in legal communities within each country. While Latin Americanism may simply appear to be the reflective description and reproduction for foreign audiences of legal developments in Latin America, it actually responds to its own conventions and genealogy of knowledge production. Indeed, a casual observer from Latin America may be tempted to dismiss Latin Americanism as, at best, a second-hand account of legal events in the region. A more critical perspective may even highlight its erroneous, warped, or fantasized quality, in some cases. And, indeed, there may be a number of areas in which Latin Americanists have simply gotten it wrong, emphasized the wrong points, or even instrumentally mischaracterized the situation.

Regardless, writing in the center about “Latin American law” in English has, in many respects, a greater impact on local law and legal institutions in Latin America than does local legal scholarship. It is this transnational field that informs U.S. foreign policy on law in the region, including aid for legal and institutional reform. It is also the sort of background analysis that gets taken up by international organizations in the formation of their development programs, areas of assistance, and conditions on loans. Indeed, the design of internationally-sponsored reform programs and policy conditions are interconnected with these debates. Additionally, Latin America experts are frequently called to testify in U.S. courts on the state of legal systems in specific Latin American countries. These situations arise in *forum non conveniens* motions, political asylum cases, U.S. enforcement of Latin American court judgments, and other such situations. The bases for these views

are generated and supported by the literature on law in Latin America in the center, in the form of academic scholarship, expert opinions, commissioned reports, project evaluations, and the like.

The present essay begins to explore the distinction between the fields of legal Latin Americanism and national legal discourse in Latin American countries. Section II briefly outlines the specificity of legal discourse in Latin America at the national level. Part of this specificity derives, no doubt, from differences in the legal issues most prominent in each context. More importantly, though, is its distinctiveness resulting from epistemological differences, such as distinct histories of jurisprudence, particular modes of reading authoritative texts, and contextually persuasive types of argumentation. Section III highlights the overall characteristics and relevance of legal Latin Americanism, as produced mainly in the U.S. This field of knowledge disproportionately trains legal realist insights on law in Latin America, while mostly accepting liberal legal ideology in the global North at face value. This produces a persistent image of legal failure in the region, compared to an idealized vision of liberal law in the more developed countries. Finally, Section IV describes some of the recent developments in the field of legal Latin Americanism and examines the pros and cons of some of these approaches.

## II. LEGAL DISCOURSE IN LATIN AMERICA

The differences between legal Latin Americanism at the center and national legal discourse in Latin America are significant. Local legal writing is in the local language and more finely focused, in most cases, on national legal questions. This includes the gamut of discussions about law, legislative reform, judicially decided cases, administrative regulation and the like. It is produced both within and outside of formal institutions. In some cases, it revolves around the opinions of highly regarded jurists and the judiciary.<sup>1</sup> In other cases, it involves arguments and explanations in legal textbooks, expert commentary, and the press.<sup>2</sup> In brief, local legal discourse is a highly important and often under-valued dimension of the legal system. One can perceive it as an “informal” legal institution. It generates societal engagement and debate over national legal arrangements.

Of course, local legal discourse in Latin America is also wider than that. It can extend to philosophical debates, international law, and the like. Additionally, there is significant transnational exchange in most countries of the

---

1. See generally JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 57, 60 (2007).

2. See, e.g., Isabel C. Jaramillo, *The Social Approach to Family Law: Conclusions from the Canonical Family Law Treatises of Latin America*, 58 AM. J. COMP. L. 843 (2010).

region.<sup>3</sup> A main example is Latin America's historical relation to European legal sources, authorities and developments.<sup>4</sup> Additionally, specific subject areas or methodological and political affinity groups cross borders in significant ways. Dezelay and Garth have demonstrated that increased contact with U.S. law schools and legal scholars has been translated into clout and influence by Latin American legal actors in their home contexts.<sup>5</sup> This has also been a mode for increased "South-South" exchange, possibly triangulated with U.S. or foreign assistance.<sup>6</sup> Alas, this is not the place to explore in any great detail the particularities of local legal discourse in specific Latin American legal communities.

Still, local legal discourse in the aggregate may be seen as quite distinct from legal Latin Americanism. This difference does not mean that the two fields never connect. In fact, as noted already, the preponderant geopolitical power of legal Latin Americanism has very direct and substantial effects on law and legal institutions in Latin America. For the most part, though, it is articulated as a discourse of policy and social science, external to juristic legal debate.<sup>7</sup> Still, it has underwritten broad-scale development projects, the re-design of national institutions, and efforts to transform the local legal culture. It has not, however, significantly engaged with the substance of mainstream local legal debate in particular Latin American countries. However, as is the premise of this essay, with more Latin America-based legal scholars participating in Latin Americanist legal debate in the center, this is likely to change. It remains to be seen, however, in which ways different local legal debates may be transformed through such increasing interaction, especially as relates to dominant conceptual frameworks, the disciplines emphasized, and the actual substance of debates.

### III. LATIN AMERICAN LEGAL STUDIES

The field of Latin American legal studies proper is a relatively recent development.<sup>8</sup> Its origins are inseparable from the law-and-development

---

3. See generally Alejandro Garro, *Shaping the Content of a Basic Course on Latin American Legal Systems*, 19 U. MIAMI INTER-AM. L. REV. 595 (1988).

4. See RENÉ DAVID & J.E. BRIERLY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* (1985); PHANOR J. EDER, *A COMPARATIVE STUDY OF ANGLO-AMERICAN AND LATIN-AMERICAN LAW* 4 (1950); MERRYMAN & PÉREZ-PERDOMO, *supra* note 1; DIEGO LÓPEZ MEDINA, *LA TEORÍA IMPURA DEL DERECHO: LA TRANSFORMACIÓN DE LA CULTURA JURÍDICA LATINOAMERICANA* (2004); Jorge L. Esquirol, *The Fictions of Latin American Law (Part I)*, 1997 UTAH L. REV. 425 (1997).

5. YVES DEZELAY & BRYANT GARTH, *THE INTERNATIONALIZATION OF PALACE WARS* (2007).

6. See Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 54 AM. J. COMP. L. 617 (2007).

7. On different legal interpretive communities, see William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. R. 629 (2001).

8. For historical context on Latin American studies in general, see Richard M. Morse, *The Strange Career of "Latin American Studies"*, 356 ANNALS AM. ACAD. POL. & SOC. SCI. 106 (1964).

projects of the 1960's and 1970's.<sup>9</sup> As such, the main framework for this type of intellectual work has been the effort to promote economic development through law.<sup>10</sup> This model suffers from the many shortcomings that have been amply discussed in the law-and-development literature as well as the literature critiquing that field.<sup>11</sup> In essence, it has become evident that there is no clear blueprint for how law can be aligned to produce either development or democracy.

Scholars have noted three separate phases of the law-and-development movement: the initial social-democratic variety of the 1960s and 1970s, the neo-liberal version of the 1980s and 1990s, and the more recent chastened neo-liberalism *cum* social justice rhetoric of the early twenty-first century.<sup>12</sup> Though the policy prescriptions changed over time, the underlying paradigm for Latin American legal studies remained the same. It stood to reason that if development and democracy were lacking, and law was assumed to have something to do with it, then there must be something seriously wrong with Latin American law. Essentially, it aimed law-and-society type critiques on the region's national legal systems.<sup>13</sup> Moreover, this body of transnational writing, overall, repeatedly suggests the conclusion that Latin American law is a failed version of Western liberal law.<sup>14</sup>

By contrast, a very different paradigm for legal studies related to Latin America has been the "Europeanness" approach.<sup>15</sup> In terms of U.S. writing, this is a relatively marginal stream. It is filled by the ranks of classical comparativists who group Latin America together with Europe.<sup>16</sup> In terms of engagement with juristic discourse in specific Latin American locales, the Europeanness stream has *potentially* a much greater connection. Indeed, its main point on national law in Latin America is the close relation to its European sources. However, much of this comparative law writing typically

---

9. See generally Kenneth Karst, *Teaching Latin American Law*, 19 AM. J. COMP. L. 685 (1971); Jorge L. Esquirol, *Writing the Law of Latin America*, 40 GEO. WASH. INT'L L. REV. 693 (2009).

10. See generally Thomas M. Franck, *The New Development: Can American Law and legal Institutions Help Developing Countries?* 1972 WIS. L. REV. 767 (1972); Lawrence M. Friedman, *On Legal Development*, 24 RUTGERS L. REV. 11 (1969).

11. See JAMES GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980); David Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974); THOMAS CAROTHERS, *THE MANY AGENDAS OF THE RULE OF LAW REFORM IN LATIN AMERICA*, IN *RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM* (Pilar Domingo & Rachel Sieder eds., 2001); Brian Tamanaha, *The Primacy of Society and the Failure of Law and Development*, 44 CORNELL INT'L L.J. 209 (2011).

12. David Trubek & Alvaro Santos, *Introduction: The Third Movement in Law and Development Theory and the Emergence of a New Critical Practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 1, 5-9 (David Trubek & Alvaro Santos eds., 2006).

13. John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977).

14. Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75 (2008).

15. MERRYMAN & PÉREZ-PERDOMO, *supra* note 1, at 57, 60.

16. MERRYMAN & PÉREZ-PERDOMO, *supra* note 1; see also Esquirol, *supra* note 4.

only adds a few examples from Latin America to works principally about civil law systems in Europe. The view it perpetuates about law in the region is, in fact, that it is simply a second-rate copy of European models.<sup>17</sup> As such, this scholarship downplays the importance or interest of engaging the law in Latin America. It would be better and more enlightening, so this thinking goes, to study the original European sources.

Notably, the Europeanness approach to Latin America contributes to the construction and maintenance of a particular form of legal ideology. It further justifies Latin Americans in believing that their law and legal practices are part of a transnational, European practice.<sup>18</sup> In broad strokes, it assists in legitimating the legal system overall, even at the expense of Latin Americans being labeled unoriginal imitators. Additionally, law-and-development practitioners incorporated this "Europeanness" strain of comparative scholarship into their thinking. It figures as another one of the elements of the legal failure diagnosis.<sup>19</sup> Law's quality in Latin America as a copy, borrowed from other societies, and from models not generally considered ideal either adds to the law-and-development diagnosis of dysfunction which is believed to lead to bad economies and limited democracies.

Finally, the dominant forms of legal Latin Americanism have also significantly influenced the social sciences concerned with law. Thus, for example, the expansive legal pluralism literature also indirectly adopts the "gap" premise, i.e. the notion that there is an exceptional gap between law and society in Latin America.<sup>20</sup> This type of work is usually considered quite different from development scholarship.<sup>21</sup> However, it draws on the same background understanding of law in the region.<sup>22</sup> The effect, for most commentators, is to sideline state law altogether. Alternative "legal" orders closer to society become the central focus and, it commonly follows, lead to calls for their equal standing with, or outright replacement of, formal state law. Primary examples are indigenous peoples' law and the inter-American human rights regime.<sup>23</sup> A different but related example is the more recent "judicialization of politics" literature.<sup>24</sup> This latter scholarship is primarily

---

17. See Garro, *supra* note 3.

18. MEDINA, *supra* note 4.

19. Esquirol, *supra* note 15.

20. BOAVENTURA DE SOUZA SANTOS, ESTADO, DERECHO, Y LUCHAS SOCIALES (1991); RAQUEL YRIGOYEN FAJARDO, PAUTAS DE COORDINACIÓN ENTRE EL DERECHO INDÍGENA Y EL DERECHO ESTATAL (1999).

21. See also MAURICIO GARCÍA VILLEGAS, LA EFICACIA SIMBÓLICA DEL DERECHO (1993)

22. MULTICULTURALISM IN LATIN AMERICA: INDIGENOUS RIGHTS, DIVERSITY AND DEMOCRACY (Rachel Sieder ed., 2002).

23. See, e.g., Lillian Aponte Miranda, *Uploading the Local: Assessing the Contemporary Relationship between Indigenous Peoples' Land Tenure Systems and International Human Rights Law Regarding the Allocation of Traditional Lands and Resources in Latin America*, 10 OREGON R. INT'L L. 419 (2008).

24. LINN A. HAMMERGREN, THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA: THE PERUVIAN CASE IN COMPARATIVE PERSPECTIVE (1998); WILLIAM C. PRILLAMAN, THE



produced by political scientists and legal scholars working with them. It capitalizes on the recent expansion of constitutional courts and constitutional jurisdiction in Latin America.<sup>25</sup> These works generally track how policy decisions and politics that were previously the domain of other branches of government are now being transacted in the courts. This literature predominantly views local legal discourse, if anything, as post-hoc rationalizations for prevailing political interests. The real meaning, following this line of thinking, is to be discovered in the background order that produces these decisions.

### A. The Dominant Forms

The main literature in the field of Latin American legal studies in English, and principally in the U.S., has thus taken one or both of these two dominant forms: (1) it devalues formal law as irrelevant in the face of different and more determinative social factors; and (2) official law is examined through an ideological lens searching for dysfunction, under the assumption that Latin American law has played a key role in producing economic underdevelopment and weak democracies.<sup>26</sup> Indeed, much of this work generally follows in the “law-and-society” or the “law-and-development” type perspectives.<sup>27</sup> While much of this scholarship is quite useful and sheds significant light on developments in Latin America, it also leaves out a significant part of the picture. Indeed, this omission often leads to a disappointingly predictable conception of legal failure *in Latin America*.

Common to both of these main approaches is that they ignore the constitutive politics of local legal debate. This is not to say that law in Latin America is insufficiently understood as political. In fact, official law is

---

JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA: DECLINING CONFIDENCE IN THE RULE OF LAW (2000); THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA (Rachel Sieder et al. eds., 2005); CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA (Javier Couso et al. eds., 2010); GRETCHEN HELMKE & JULIO RÍOS-FIGUEROA, COURTS IN LATIN AMERICA (2011).

25. See, e.g., THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA (Rachel Sieder et al. eds., 2005); GRETCHEN HELMKE & JULIO RÍOS-FIGUEROA, COURTS IN LATIN AMERICA (2011); CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA (Javier Couso et al. eds., 2010).

26. See, e.g., KENNETH KARST & KEITH ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA: A CASEBOOK (1975); Keith Rosenn, *The Jeito: Brazil's Institutional Bypass of the Formal Legal System and its Developmental Implications*, 19 AM. J. COMP. L. 514 (1971); Kenneth L. Karst, *Rights in Land and Housing in an Informal Legal System: The Barrios of Caracas*, 19 AM. J. COMP. L. 550 (1971); Joseph Thome, *El derecho como instrumento de cambio social: Comentarios sobre un modelo de derecho y desarrollo*, 12 BOLETÍN DEL INSTITUTO DE DOCENCIA E INVESTIGACIÓN JURÍDICA (Chile, May 1972).

27. See generally John Henry Merryman, *supra* note 13, at App. A; David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 1 (1991); Brian Tamanaha, *The Lessons of Law and Development Studies*, 89 AM. J. INT'L L. 470 (1995); Esquirol, *supra* note 9.

widely perceived as nothing but bad faith rationalizations of dominant political interests.<sup>28</sup> By contrast, the point here is that the way legal discourse is structured also matters. Views on the nature of law, standard argumentative conventions, the level of persuasive abstraction, common understandings of specific concepts and references, and the general consensus on commonsensical reasoning all shape the type and slant of legal politics.

There are a number of reasons why this latter line of inquiry tends to be quickly truncated when turning to Latin America. Analysis often ends at the observation that state law in the region penetrates imperfectly throughout all of society or that law is mainly a game for the rich and the elite.<sup>29</sup> In fact, all of legal liberalism's elusive objectives – such as decisional neutrality, legal objectivity, equal application of the laws, judicial independence, and the like – have been repeatedly found lacking in Latin America.<sup>30</sup> These conclusions essentially encapsulate the sum of the literature on the region. Indeed, the very term “Latin American Law” – as given content by comparative legal studies, the social sciences, and ultimately popular reference – reflects the skewed understandings produced by legal Latin Americanism. The same term could potentially be used, by contrast, to simply capture the sum of contemporaneous developments or similar features in more than one Latin American country.<sup>31</sup> In reality, though, it has acquired the more limited, dominant understanding described above. Its use chiefly denotes the ultimate meanings produced by legal Latin Americanism – law's irrelevance and dysfunction.<sup>32</sup>

However, critiques of irrelevance or dysfunction can be applied, in some degree, to any system of liberal law.<sup>33</sup> Moreover, they are not sufficient reasons to deny the importance of state law, local legal analysis, and national legal discourse. In fact, it is a serious omission in our understanding of the stakes in Latin American legal systems. It should be noted that this does not mean that information about other social systems, legal pluralism, and the political context of law are not important endeavors.<sup>34</sup> But in the case of Lat-

---

28. See e.g. STEPHEN HABER ET AL., *THE POLITICS OF PROPERTY RIGHTS: POLITICAL INSTABILITY, CREDIBLE COMMITMENTS, AND ECONOMIC GROWTH IN MEXICO, 1876-1929* (2003); see generally, *THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA* (Juan E. Mendez et al. eds., 1999).

29. See e.g. John Linarelli, *Anglo-American Jurisprudence and Latin America*, 20 *FORDHAM INT'L L.J.* 50 (1996).

30. See e.g. Keith Rosenn, *The Success of Constitutionalism in the U.S. and its Failure in Latin America: An Explanation*, 22 *U. MIAMI INTER-AM. L. REV.* 1 (1990); see generally Daniel Brinks, *Judicial Reform and Independence in Brazil and Argentina: The beginning of a New Millennium?* 40 *TEX. INT'L L.J.* 595 (2005).

31. ANGEL OQUENDO, *LATIN AMERICAN LAW* (2006).

32. See Jorge Esquirol, *¿Hacia dónde va Latino-América?* in, *DERECHO Y SOCIEDAD EN AMERICA LATINA: UN DEBATE SOBRE LOS ESTUDIOS JURÍDICOS CRÍTICOS* (M. García-Villegas & C. Rodríguez Garavito, eds. 2003).

33. See, e.g., BRIAN TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004).

34. See Tamanaha, *supra* note 11.

in American legal studies, these have been emphasized at the expense of much if any analytical work on the official law. Indeed, Latin American legal studies has been notably limited in its repertoire of intellectual tools. For the most part, its major insight as a field is that there is wide gap between “law in the books” and “law in action” in Latin America.<sup>35</sup> The failure to meet policy goals satisfactorily – as evidenced by this well-noted gap – has been the single-most important driver of legal commentary on the region.

### B. Rationale for Development Reform

Furthermore, much Latin Americanist legal scholarship directly supports law-and-development projects of reform. It paves the way for the rejection and replacement of entire areas of law in Latin America. In its place, alternative models are more easily introduced. These may, in some cases, be framed as more directly connected to society. A good example is Hernando de Soto’s efforts, widely supported by the World Bank and the Inter-American Bank for Development, to formalize various informal sectors of the economy, which simply amounts to, in essence, an argument in favor of de-regulation.<sup>36</sup> For him, the state should formalize and universalize the de-facto model of the informal economy, closer to the people or “informals” as he calls them. In his theoretical analysis, de Soto condemns the state’s formal law as impeding economic development. Instead, he lauds the informal sector as a font of entrepreneurship and locked-up wealth. However, these informal sectors are nothing other than lax regulatory environments produced by official tolerance of legal non-compliance, whether or not one agrees with the underlying situation of non-enforcement. Elevating the informal as somehow more authentic to local people, however, simply clothes the argument for de-regulation in the narrative of a cultural gap between law and society.

In turn, the development-related diagnosis of law’s failure is commonly followed by advocacy for simply a different liberal legal model. Thus, for example, the criminal law procedure throughout Latin America has been comprehensively transformed through the introduction of the adversarial system.<sup>37</sup> All prior criminal procedure systems, regardless of their variation across the region, were effectively characterized, in a blanket-like way, as “undemocratic,” “inefficient” and “inquisitorial” with all the connotations that these terms imply, and then convincingly rejected and replaced wholesale.<sup>38</sup> Whether the country in question faced such different problems

---

35. See MATTHEW MIROW, *LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA* (2004)

36. HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* (1968).

37. Langer, *supra* note 6.

38. See generally Michael R. Paul, *Wanted: Criminal Justice—Colombia’s Adoption of a Prosecutorial System of Criminal Procedure*, 16 *FORDHAM INT’L L.J.* 608 (1992-93); Carlos Rodrigo de la Barra

as either insufficient criminal enforcement or, on the other end of the spectrum, insufficient regard for defendants' rights, the solution was the same: the adoption of the adversarial model promoted by United States Agency for International Development.

It is useful to recall that legal Latin Americanism is not dependent on the nationality of the expositor or the physical location from where he or she writes. Indeed, in the two examples above, both can be claimed as projects championed by legal scholars from Latin America. Hernando de Soto works from Peru, closely tied to local issues, although his inspiration is self-professedly traced to legal developments in Europe. Additionally, the intellectual leaders of the switch to adversarial criminal procedure throughout Latin America have been convincingly shown by Máximo Langer to be Argentinians.<sup>39</sup> Thus, rather than any required authenticity or locational factors, legal Latin Americanism as described here is best understood as a combination of a conceptual framework based on Western liberal legal ideology, a set of analytical techniques, certain dominant ideas about law in the region, and its audience principally in the global North.

### C. Impact of Latin American Legal Studies in Latin America

As noted above, it may have been possible in the past for legal Latin Americanists, located in the global North, to think of their audiences as limited to their home contexts.<sup>40</sup> Because of language differences, separate academic circuits, and more limited communications, it could be that only this audience appeared to be relevant. An author had to appeal to and convince this reference group, and had to present the material in a way which would make sense to them, would fit within accepted intellectual paradigms, and express acceptable political interests (albeit in a veiled way). What was written about Latin America may have not been consciously considered in terms of how the text intersected with the region's own legal intellectual traditions and paradigms or how it impacted certain groups or individuals within that community.

Of course, even if our erstwhile Latin Americanists never contemplated their own contribution to national or international legal politics, their work can still be analyzed for its impact on those areas.<sup>41</sup> In some cases, its effects might even be quite substantial. In the center, it helps form the opinions we have about the studied group. It might even influence weighty decisions of foreign policy, international institutions, and the production of knowledge.

---

Cousiño, *Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile*, 5 SW. J. L. & TRADE AM. 323 (1998).

39. Langer, *supra* note 6.

40. See generally Robert Morse, *supra* note 8.

41. See generally DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004).

In addition, it may influence the self-perception of the studied group. Opinions from centers of power may induce a sort of self-fulfilling internalization.<sup>42</sup> The studied may come to see themselves through the eyes of their observers.

Additionally, the connection of Latin American legal studies to legal politics in specific Latin American states surely varies. Until recently, it has had little conscious impact on the class of jurists, at least as many have themselves reported.<sup>43</sup> Most legal scholars in Latin America have been insufficiently aware of its operational reach, specifically in the form of law-and-development projects as an organized effort. It is only now being assimilated as a significant paradigm with past and continuing concrete effects.<sup>44</sup> This is not to say that the legal reforms advanced by law-and-development had a negligible impact.<sup>45</sup> Many projects have been implemented through the force of such law-and-development writings and perspectives. They were, for the most part, however not significantly metabolized through mainstream local legal discourse. They predominantly operated at the political level and beyond the stuff of fine-grained legal debate. As a result, the impact of “legal development assistance” was mostly to bulldoze competing positions that in one way or another supported existing laws or changes within them. In the face of law’s radical failure, engaging in mainstream legal debate in Latin America no doubt appeared – from an external perspective on local legal discourse such as legal Latin Americanism and its law-and-development strain – like the proverbial rearranging of deckchairs on the Titanic.

As such, the fields of national legal politics in Latin America and legal geo-politics in the center have proceeded in somewhat different registers. Their differences, to be sure, are a moving target, limited only by the changing dynamics of discourse.<sup>46</sup> A challenge for progressives in these shifting discursive communities is indeed producing interventions that advance collective objectives across different epistemic locales. This presents some unique difficulties. Beyond specific intellectual commitments and demands for coherence and consistency, there is the additional factor of a significant power differential between the two fields. Intervening in debates in the global North in a way that does not simply reproduce this hierarchy may make it more difficult to be included and to be heard there. That is, attempting to write about Latin America in the global North in a way that

---

42. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* 52-100 (2006).

43. See *EL DERECHO EN AMÉRICA LATINA* (Cesar Rodriguez Garavito ed., 2012).

44. OSCAR VILHENA VIEIRA AND DIMITRI DIMOULIS, *O ESTADO DO DIREITO E O DESAFIO DO DESENVOLVIMENTO* (2011)

45. See generally *THE NEW LAW AND ECONOMIC DEVELOPMENT* (David Trubek & Alvaro Santos eds., 2006).

46. See William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 *Nw. U. L. R.* 629 (2001).

does not reinforce the global hegemony of the North is a difficult feat, because the field is structured that way. Conversely, intervening in actual juristic debates in Latin America in a way that does not simply transfer the hegemony of legal Latin Americanism wholesale is also quite difficult to resist.<sup>47</sup> The latter enjoys the intellectual validation of a transnational community and legal authorities in the global North.

#### D. The Geo-Politics of Legal Latin Americanism

Legal Latin Americanism has shown itself to be, on the whole, the academic counterpart to U.S. and mainstream international policy toward Latin America. This has translated for the most part into economic and political reformism to contain more radical and revolutionary change. Its mode of operation has been to diagnose Latin American legal systems and to introduce alternative models. Usually, however, the level of analysis is conducted at the system-wide level with external diagnoses and critiques.<sup>48</sup> As such, legal area studies of the region have a predominantly institutional focus, whether they relate to the 1960s developmental state or in the 1990s neo-liberal version. Thus, for example, a central question in the early period was getting the right type of administrative agencies and law schools. In the neo-liberal version, it was the right type of courts, criminal procedure, and property and contract rights.

At a basic level, legal area studies focus on law in Latin America. As such, they purport to be about the same subject matter as national legal discourse, if at a level removed. Yet, considering the close connection with law-and-development, Latin American legal area studies easily assumed the role of diagnostician of national legal systems. Thus, the field has been closely tied to the international political arena of competing legal models.<sup>49</sup> In this context, participants in the field compete on the basis of ever more convincing assertions of law's breakdown in the region, frequently followed by alternative, preferable models for law reform. In the aggregate, this type of writing has generated a number of baseline perceptions about law in the region. As already noted, the main picture produced is one of the recurrent failure of law and legal institutions in the region. This general diagnosis is not only the product of faulty analysis as discussed below; it is also quite useful to the objective of advocating legal reforms. Once existing legal arrangements are convincingly shown to have failed, introducing alternative legal institutions can be more easily achieved. The elements of this

---

47. See *EL DERECHO EN AMÉRICA LATINA*, *supra* note 44.

48. On the difference between external and internal critique, see William Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1 (1984).

49. See, e.g., James M. Cooper, *Competing Legal Cultures and Legal Reform: The Battle for Chile*, 29 *MICH. J. INT'L L.* 501 (2008).

failure diagnosis, however, are generally based – in whole or in part -- by highlighting the region's inadequacy in fulfilling liberal legalism's practically unattainable myths.

My critique of the discourse of Latin American legal failure has been presented in other work.<sup>50</sup> For purposes here, however, it is more important to note that these images of failure are not merely the serendipitous projection of legal academics. No doubt, this is indeed one dimension of it. The projection of the dark side of liberal legalism onto Latin America – contrasted to its successful operation in the West – is quite likely an unconscious projection of legal academics in the West.<sup>51</sup> This is a phenomenon described by Edward Said regarding how the “Orient” was constructed out of the suppressed images and fantasies of the West.<sup>52</sup> And, I have argued elsewhere, the common images of Latin American law mirror the general critiques of liberal legalism in the West over the course of the twentieth century. However, the “orientalization” of Latin American law is not merely a product of academic fancy. Nor can it simply be ascribed to an unconscious projection of our own suppressed knowledge about legal systems in the West. There is an active demand for these images and diagnoses. Indeed, the hierarchical ordering of different national legal systems has a long history. It is not a new phenomenon or a recent observation. It responds to a host of different objectives.

In Latin America, it can be traced back to the early formation of independent states.<sup>53</sup> The form of intervention then by powerful states on behalf of the interests of their nationals living or doing business in Latin America was based on the injustices -- or perceived injustices -- suffered in these regions.<sup>54</sup> Early in the nineteenth century, direct military or diplomatic intervention was unproblematically the norm for redress. Once Latin American leaders gained some traction with international law arguments against these incursions, intervention was only admitted – at least in theory – in cases where there had been a “denial of justice.”<sup>55</sup> Such an assertion could trigger direct interference in the sovereign affairs of Latin American states. Of course, it had to be supported in some way. Repeated accounts of the mal-

---

50. Esquirol, *supra* note 15.

51. See, e.g., Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 209 (2002); Lama Abu-Odeh, *The Politics of (Mis-)Recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789 (2004).

52. EDWARD SAID, *ORIENTALISM* (1979).

53. See Jorge L. Esquirol, *Latin America*, in *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 553 (Bardo Fassbender et al. eds., 2012).

54. *Id.*

55. See Liliana Obregon, *The Colluding Worlds of the Lawyer, the Scholar, and the Policymaker: A View of International Law from Latin America*, 23 WIS. INT'L L.J. 145 (2005); Arnulf Becker Lorca, *International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination*, 47 HARV. INT'L L.J. 283 (2006); Jorge L. Esquirol, *Alejandro Alvarez's Latin American Law: A Question of Identity*, 19 LEIDEN J. INT'L L. 931, 955 (2006).

functioning and corruption of all Latin American courts and governments made this justification for intervention more easily acceptable.

The active demand for negative accounts of law in Latin America has many contemporary sources as well. Some of them are even disciplines and approaches generally considered to promote social justice goals. The most emblematic no doubt is human rights discourse. Many of the remedies provided at an international level depend on quite negative renditions of entire segments of law and legal institutions in individual countries. For example, political asylum claims by individuals in first world countries often depend on country reports describing the gross violations of human rights and national legal systems incapable of addressing them.

There are many other interests that also call for this type of account. In any lawsuit connected to a Latin American jurisdiction brought in the United States, the plaintiff might have to defend against an attempt to transfer jurisdiction by presenting evidence that the legal system in the alternative Latin American forum lacks the capacity to handle the case. Claiming the impossibility of achieving justice in Latin America will guarantee the case remains in the United States. Likewise, in actions for the enforcement of judgments entered by national courts in Latin America, the judgment debtor may claim a lack of due process, corruption, incompetence of the deciding court. Several significant money judgments against U.S. corporations, for doing environmental and other harm in Latin America, have been evaded in just this way. All of these motions in U.S. courts are supported by expert witness testimony on the ineffectiveness of the legal systems in Latin American countries. These opinions are buttressed by scholarship and commentary on the law in the region that echoes these same views. Moreover, the lack of any significant contrary views about law in Latin America, in this literature, is also a source of support in convincing the U.S. judges of the truth of these claims.

As a result, these narratives with respect to law in Latin America are key pieces in the geo-politics of national legal systems. They are not only haphazard social constructions produced by the limitations of comparative study in the center. Nor are they necessarily just the sum of idiosyncratic perspectives of transnational commentators. Overall, they can be seen to respond to real interests and stakes. These significantly shape the international hierarchy of authoritative decision-making. In the cases highlighted above, they pertain especially to the jurisdiction and judgments of Latin American courts. However, this ordering also impacts the political priorities of different national communities. In any process of harmonization or globalization of laws, legal systems perceived to be inferior – and the political options enshrined within them – are much easier to disregard, if not outright reject. This exclusionary process can affect Latin American countries' ability to uphold certain national legal positions in the context of globalization and treaty negotiations, for example. Some of these positions



may include particularly notable legal developments in the region such as social rights, labor law, the social function of property, and others. Not all of the examples need be from the political left either. The whole jurisprudence on states of emergency, and extraordinary executive powers, are another example of a body of law common to many Latin American states that is not generally appreciated. In short, the point is that the geo-politics of law – justified by just the sort of area studies described here – influences the relative weight that different societies have in deciding their own fate.

#### IV. TOWARD A NEW SCHOLARSHIP ON “LAW IN LATIN AMERICA”

Recently, new scholarship has begun to address the geo-politics of Latin American law.<sup>56</sup> The underlying paradigms and images have been critically examined. The workings of these discursive economies have been identified and debated. Additionally, as already noted, new generations of scholars from the region and elsewhere have entered the fray.<sup>57</sup> These developments are surely transfiguring the field. However, this is not to say that the old paradigms are no longer entrenched or that scholars do not still easily default into reproducing them. Far from it, established patterns of writing and thinking are still quite compelling for many. For some, they are also still quite convincing.

Nevertheless, it is now more difficult to dismiss the multiple audiences and impact of transnational legal writing. As such, it would be intellectually irresponsible to ignore the effects of intervening in one arena on the other. A well-intentioned intervention in debates on comparative law at the center could – if directly transferred to debates in Latin America – have potentially quite negative effects on equally important concerns. Likewise, well-targeted critiques in, say, local debates in Mexico or Peru could prove terribly detrimental to the geo-politics of, for example, global labor law.<sup>58</sup> For scholars interested in a transnational academic practice, the question of intellectual perspective takes on added importance. This does not mean that different forums may not require different forms and styles of analysis and argument. It does however force these questions to the fore. At a minimum, decisions about critical tools can be pursued while recognizing their multiple and possibly conflicting impacts.

---

56. See RIVISTA CRITICA DEL DIRITTO PRIVATO, Anno XXIX (2011) (special edition on postcolonial law in Latin America); see also *Renewing Latin American Legal Studies*, HARVARD LAW SCHOOL (Nov. 13, 2010), <http://www.harvardiglp.org/uncategorized/november-13-renewing-latin-american-legal-studies/>

57. See generally, TEXAS LAW REVIEW, CONSTITUTIONALISM IN LATIN AMERICA (2011); FORDHAM LAW REVIEW, LAW IN LATIN AMERICA (2011).

58. See, e.g., Alvaro Santos, *Mexican Labor Law* (on file with author).

### A. Law-and-society

Many legal scholars in Latin American countries are drawn to law-and-society approaches.<sup>59</sup> This orientation has generally been associated with the progressive left. It appears to offer an alternative to the much maligned legal formalism understood to be dominant in Latin America. Additionally, it offers a way to speak about the actual reality of inequality, maldistribution of resources, racial and other forms of discrimination, lack of legal enforcement, and other ills prevailing in the country. For those focused on these issues, it is certainly a powerful tool. At the same time, the traditional field of legal Latin Americanism has primarily drawn on these same law-and-society insights: the gap between law on the books and law in action, the separate operation of social norms, the poor degree of legal penetration in society, the prevalence of only “paper” rules, the insufficient recognition of legal pluralism, etc.

As discussed above, emphasizing these images of law in the region can have some very practical effects. It has served as the oversized diagnosis of Latin American law and the characteristic mode of law-and-development discourse. Relatedly, it has been quite effective in ushering in new legal models, international best practices, and the like. In the end, Latin Americans and others find it quite easy to believe that that their legal systems don’t work and that developed societies’ legal systems do work. The particular elements typically shown to demonstrate failure, however, are rather disingenuous. As noted above, they are in many instances the endemic shortcomings of liberal legal systems, only amplified. This tool for reform comes at a high price, however. Its continual use – whether by legal Latin Americanists or legal scholars in Latin America – perpetuates the view of permanent failure.

Thus, to the extent that this methodology is indiscriminately trained on the legal system as a whole – rather than on specific issues – it replicates the same legal failure diagnosis. In their most systematic form, law-and-society critiques surely show that modern liberal law cannot satisfy its own pretensions. These critiques emphasize that law does not fully penetrate society, and that it cannot achieve pure legal objectivity and judicial independence, among other arguments. Still, by amplifying these insights of law-and-society primarily on Latin America in particular, these critiques continually undermine those national legal systems in the broader global economy of legal forms.

---

59. See, e.g., *DERECHO Y SOCIEDAD EN AMÉRICA LATINA: UN DEBATE SOBRE LOS ESTUDIOS JURÍDICOS CRÍTICOS* (Mauricio García-Villegas & Cesar Rodríguez Garavito eds., 2003).

And yet, a well-directed law-and-society critique may be quite powerful on an issue of local legal politics.<sup>60</sup> Thus, such an approach remains no doubt appealing to local legal political actors. Moreover, the dominant forms of legal reasoning in much of Latin America further provoke these broad-ranging critiques of law's overall disconnection to society. The dominant modes of legal reasoning – or legal dogmatics – appear quite insulated from more transparent weighing of competing local interests and consequential effects.<sup>61</sup> Thus, in the absence of a more routine representation of these elements within the standard forms of legal reasoning, the image of a system-wide gap critique remains very compelling. Its local deployment, however, would be better informed if conducted with an eye toward its impact in the realm of international legal politics. That is, its repeated use in the local domain – at least in its form as a system-wide critique – reinforces the legal Latin Americanist view of formal law's general irrelevance in Latin America, with all the attendant negative consequences already discussed.<sup>62</sup> In brief, as a common system-wide critique, it has the negative consequence of continually discrediting the whole of the legal system. In this way, it undermines the very societal confidence needed to implement the very reforms brought about in this way.

#### B. Distributional Analysis

Reducing all of law to distributional analysis is another direction for Latin Americanist legal scholarship. This is a popular form of critical analysis by legal progressives in the U.S.<sup>63</sup> It is inspired by American legal realism and looks to identify the real political and economic interests in any given legal position. This type of analysis goes directly to the point. Its attractiveness as a tool is understandable. Legal debate is often shrouded in terminological and conceptual obfuscation and confusion as to the real interests at play. As just one example, some seemingly egalitarian proposals championing abstract concepts of personal liberty can actually turn out, in reality, to benefit the rich disproportionately and to further disenfranchise those less capable of realizing its promises. As a result, in the often opaque world of legal discourse, pointing out the winners and losers is a powerful antidote. And, indeed, this path is well trodden and quite persuasive, especially in left-leaning circles. In essence, it treats law as simply another way

---

60. See, e.g., Mauricio García-Villegas, *No sólo de mercado vive la democracia: el fenómeno del (in)cumplimiento del derecho y su relación con el desarrollo, la justicia, y la democracia*, 6 REVISTA DE ECONOMÍA INSTITUCIONAL 95 (2004).

61. See Jorge L. Esquirol, *The Turn to Legal Interpretation in Latin America*, 26 AM. U. INT'L L.R. 1031 (2011).

62. Jorge L. Esquirol, *supra* note 15.

63. See generally LAW, STATE, AND DEVELOPMENT IN LAW IN LATIN AMERICA (David Trubek & Alvaro Santos eds., forthcoming) (on file with author).

of doing politics and cuts through metaphysical, culturalist, economicist, and other mystifications of the law and legal discourse. Clearly, it has much to commend it. It gets to the heart of what we are all interested in – who wins and who loses.

As it is commonly performed in legal analysis, distributional analysis is mostly based on a gut intuition, or an impressionistic sense of both the effects of legal rules and their ultimate consequences on different constituencies.<sup>64</sup> But both of these future forecasts about how the law will work itself out, and how its consequences will impact those affected, are highly tenuous. Projections about winners and losers are based on rough approximations, guesses, and intuition about rule implementation, in the short or long term. Moreover, these assertions about winners and losers in any given case can also be further questioned. The analyst can be shown to be misinformed, mistaken, or mis-apprised of the true interests of those affected or the likely consequences of a rule change (although there may certainly be some instances in which the relevant interests and how they cut may seem quite clear.) As such, distributional analysis of this type can be endlessly questioned by skeptics demanding ever more precise information. Granted, gut impressions are likely at the base of all legal-political interventions in any debate. One could not defend a thesis if it were not for a sense or preference for one thing over another, likely informed by rough estimates about their outcomes. But, by putting these guesses upfront as the reason for a decision, distributional analysis highlights this kind of querying as the basis of debate.

Thus, the distributional analysis discussed here consists of openly and explicitly articulating the likely distribution of power and resources resulting from a rule, with respect to different constituencies, for the purpose of evaluating its desirability. This discursive shift is clearly appealing in many instances, especially in cases where those who stand to lose would get to see their interests more clearly. However, when transposed to certain political contexts, this approach may potentially have some quite counterproductive effects. It may be that systematically making societal decisions based on a perception of winners and losers, decided by a majority vote for example, could have negative consequences for the very positions progressives favor. Indeed, this realist/critical move may undermine the very legal constructs that could most directly advance progressive interests (whatever those may be on a given point). This is the case because this analytic contributes to undermining the at-least marginal confidence that is needed for law to operate as a viable social system.

Nonetheless, from a purely distributional perspective, some or all of law may be seen as pernicious, as it locks in certain earlier choices under the

---

64. See Dan Danielsen, *Economic Approaches to Global Regulation: Expanding the International Law and Economics Paradigm*, 10 J. INT'L BUS. & L. 23 (2011).

guise of “legal rights.” In any particular party’s hand, legal rights can then serve as trump cards of sorts in contemporary legal political contests. But, for purposes of decision-making based on distributional analysis, everything should always be potentially up for grabs, with ultimate decisions presumably made based on political or economic preferences formed elsewhere, outside of law. And yet, all legal systems strive for the proper balance between the need for legal certainty and legal flexibility. While legal flexibility is undoubtedly needed, legal certainty is also important. And, some of that desired legal certainty is provided by holding certain interests constant, at least in some areas for some periods of time. These are generally maintained as human rights, constitutional guarantees, recognized forms of property, or other legal rights. (They may also be claimed on extra- or quasi-legal notions such as legitimate expectations or historical social gains, among other things.) Of course, these concepts are no less subject to critique and deconstruction. Their durability is based, no doubt, on impermanent discursive consensuses produced through the medium of legal and other societal debates.

With the above in mind, one could thus speak of the distributional analysis of *doing distributional analysis*. That is, doing distributional analysis of law in a particular legal political context may have negative effects on one’s ultimate goal, and thus even distributional analysis -- self-consciously pursued -- would direct against its own use. Moreover, an unrelenting distributional approach society-wide would reject otherwise desirable objectives arrived at through the logic of legal guarantees. This is not to say that distributional arguments cannot be a valuable intervention. However, for purposes of considering its international legal political dimension, as is my intent here, reducing legal analysis *in Latin America* down to only political and economic choices reinforces the view of legal failure in the region. Indeed, as mentioned above, a common perception is that decisional choices are not actually processed through analysis of legal materials and the intellectual work that legal reasoning implies. Rather, political and economic choices are made elsewhere – based on other decisional modes – and simply dressed up in the language of law. Thus, distributional analysis as the only legitimate analytical engagement for progressives – or at least the only one not subject to immediate cynical disbelief by critical colleagues – reinforces the view, and the practice, of marginalizing legal reasoning in Latin America.

### C. Essentialism

Another example relates to the international hierarchy of national legal systems. The predominant picture left by law-and-development is one of inferior, if not altogether marginal, national legal systems in Latin America.

This has a number of deleterious effects, already noted. Not least is the background it sets for reform proposals, international agency action, negotiations of trade treaties (especially when national law becomes relevant) and the like. If these characterizations of failure were to be rejected, a quite different intervention in legal geopolitics could take the form of countering such images by presenting and engaging a fuller range of particular Latin American legal communities.

Recently, a number of progressive scholars have begun to contribute in this very way. Some have shown the actual agency of Latin Americans in the process of international legal reform, such as adversarial criminal procedure, plea bargaining, or new legal forms such as collective constitutional actions.<sup>65</sup> Latin Americans are shown in the role of producing and implementing law. Alternatively, scholars have also described the creative process of legal theorizing in Latin America.<sup>66</sup> This combats the generalized perception – produced by the European strain of comparativism – that Latin American legal consciousness is merely mimetic of European legal thought. Additionally, my own work has critiqued the faulty diagnosis of legal failure undergirding legal development reform.<sup>67</sup> Specifically, that diagnosis chiefly reflects endemic shortcomings of modern liberal law, which are not particular to Latin America but which are amplified on to the region. Faced with the general perception of lawlessness in Latin America, I have also sought to highlight the existing legal capital (or *acquis légaux*). This latter term refers to the sum of societal investment, institutions, culture, and education in law in Latin America, which is significant.

In such debates, however, these interventions may produce different reactions across the distinct arenas of legal political discourse. From the perspective of a progressive scholar in the center, all of these proposals may seem to share the mistaken belief that there is something real about national identity. In other words, all of these interventions seeking to combat the dominant and harmful image of Latin American legal inferiority may appear to make the mistake of asserting there is such a thing as Latin American – or Colombian, Mexican, Argentinean – legality at all. Pointing to the agency, creativity, or accumulation of resources of legal actors in Latin America could be seen as making a nationalist argument highlighting the local identity of law. Certainly, anything of the sort sounds like another one of the unbelievable mystifications that critical legal scholars in the global North would quickly eschew.

---

65. Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004); Angel Oquendo, *Upping the Ante: Collective Litigation in Latin America*, 47 COLUM. J. TRANSNAT'L L. 248 (2009).

66. MEDINA, *supra* note 4.

67. Esquirol, *supra* note 15.

From the perspective of national legal debate, nationalist arguments for legal reform have, the world over, been a tried and true element in the repertory of legal political argument. While it may not have any determinate political valence, in any one locale it may be that the nationalist position at any one time, say for example the dominant Mexican labor law, may actually prove quite regressive. In turn, a progressive legal scholar may then no doubt want to advance the critique of identity construction against it. Moreover, such a legal scholar may want to show that sustaining this identification with the national essence may prove disadvantageous to many in the nation.

Taking these scenarios together, critiquing Mexican labor law and demonstrating Latin American legal capital, presumably present a methodological conundrum. The first rejects essentialist arguments in law. The second apparently requires them. Of course, the resolution of this quandary may simply be to point out that agency, creativity and resources in law in Latin America can be defended without making an essentialist claim. These features are not uniquely or especially Latin American, but they are present there as in many other places. Yet, the point still remains that the methodological tactics in one arena may play out very differently in another and may, on any one issue or set of issues, present scholars with a contradiction of approaches, if not politics. It is in these junctures, especially, that contemporary progressive scholars are developing the most interesting work.

#### D. Latin Americans as the new Latin Americanists

For progressives, legal Latin Americanism presents a real conundrum. There is foremost the issue of relative power dynamics that come into play between traditionally minded Latin Americanists and Latin America-based legal scholars.<sup>68</sup> Specifically, Latin American scholars writing about law in their home countries, in the center, are quickly drawn to the dominant existing frameworks for speaking about the topic. In this regard, the discussion and reflection has gotten to the point where Latin American-based scholars question the possibility of a more horizontal engagement, or even the expression on their own terms of legal realities in Latin America for audiences in the global North.<sup>69</sup> This apprehension is expressed in the worry that Latin Americans must become “Latin Americanists” in order to be heard in the North.<sup>70</sup> As noted above, this relates to the modes of discourse thought to be convincing and the types of concerns that are deemed relevant.

---

68. Daniel Bonilla, *Legal Clinics in the Global North and South: Between Equality and Subordination—An Essay*, 16 YALE HUM. RTS. & DEV. L.J. 176 (2013).

69. *Id.*

70. EL DERECHO EN AMÉRICA LATINA, *supra* note 44.

One approach to counter this hegemony of Latin Americanists over information about Latin America is to revindicate a local epistemology of Latin American concerns.<sup>71</sup> In this vein, the mere fact of Latin Americans speaking in the global North about issues in their particular locations would provide an antidote. Simply expressing and describing issues of law, in whatever vocabulary or theoretical mode is prevalent in specific local debates, would then be privileged over the competing accounts and worldviews of Latin Americanists. This move would simply attempt to flip the hegemonic relationship of Latin Americanist discourse and local discourse about law.

This “flip” has a number of immediate drawbacks, however. In terms of engaging Latin Americanist discourse, it merely attempts to substitute one for the other. And, this move is, in my view, already pre-figured and dismissed within legal discourse in the center. Merely displaying a sample of local legal discourse for transnational audiences is typically viewed as a sort of irrelevant exoticism. The issues and questions raised are likely not connected to ongoing debates in the center or to shared perspectives on foreign relations and international politics in the global North. Moreover, it may be difficult for actors in the center to decipher the way in which local debates are conducted, the particular analytics employed, and the interpretations given to sources and events. Local legal debates in Latin America may operate on a different plane of argumentation and evoke different modes of persuasion. Indeed, local discursive routines and techniques may be viewed from the outside with some skepticism, not equally convincing to transnational audiences of the truth or logic of their assertions. Rather, they may—and in fact, with respect to some Latin American styles of legal reasoning—are commonly viewed as part of a mistaken or anachronistic repertoire of argumentative techniques.

Thus resurfaces the complaint of Latin American scholars that to be heard in the global North they must become Latin Americanists. This in effect means that they must employ the range of argumentative conventions and adopt the like theoretical baggage of scholars in the global North. Only in this way can they be effectively heard there. This of course means viewing Latin America through the refracted prism that legal area studies scholars have constructed. To avoid this, insisting on a separate Latin American epistemology of law may, at first, seem like a logical objective. One could say that the Latin Americanists in the global North have simply gotten it wrong. Due to their insufficient understanding of the region, and the vastness of the inter-textuality of sources and conventions in local legal discourse, area studies scholars have not been sufficiently able to penetrate and understand the questions and modes of analysis addressed by Latin

---

71. BOAVENTURA DE SOUZA SANTOS, *REFUNDACIÓN DEL ESTADO EN AMÉRICA LATINA: PERSPECTIVAS DESDE UNA EPISTEMOLOGÍA DEL SUR* (2010).



Americans. As such, Latin American legal scholars could simply turn their backs on legal Latin Americanism all together and participate in an alternative network and field of their own creation. This approach would certainly add to Latin American legal area studies by privileging the epistemological frames of legal discourse in Latin America. Latin Americanists, in turn, would then have to master this discourse to remain relevant. This shift may introduce more of the actual concerns of people living in Latin America, or internationalize local debates in particular Latin American countries. These would reproduce for foreign audiences, and demand that the latter accept, local legal discourse as an authoritative expression and presentation of local legal knowledge.

However, simply reproducing local Latin American legal discourse for transnational audiences fails to engage the existing commitments of the intellectual community in the center. Legal Latin Americanism exists because there is an actual demand for information and analysis of the legal systems in the region from the perspective and capacity to comprehend of transnational audiences. Indeed, possibly more prominently in the legal field than in other disciplines, the different discursive communities have different conventions, theoretical guideposts, and repertoires of argumentation. Thus not all local legal discourse is transparently transferable to debates in the center in a way that would make sense. In fact, due to the emphasis of legal realism within legal Latin Americanism many lines of local argumentation may seem excessively formalistic or non-convincing. Additionally, many references to European or doctrinal authorities could seem quite esoteric. These may no doubt be incredibly sophisticated, and may demonstrate significant theoretical insights, but may not be easily recognizable in mainstream debates in the center. And still, knowledge about law in Latin America in the center is crucially important. It is equally important that this information be presented and debated in ways that are actually persuasive and authoritative. Thus, legal Latin Americanism cannot be simply replaced by ignoring its particular jurisprudential history, conventions, and deep seated beliefs, while attempting to create a rival transnational South-South legal Latin Americanism. Rather, the field must be confronted with different methodological and conceptual tools. It is this promise that the expanded ranks of legal scholars from Latin America might help fulfill.

#### E. Critical in the Center

More relevant than the difference between Latin Americans and Latin Americanists is, in fact, the methodological approaches a given scholar employs. Latin Americans more newly participating in debates in the center may quite unexceptionally adopt the same analytical frameworks as their Latin Americanist counterparts. Indeed, this is commonly the case. In an

effort to continue the conversation and to engage international audiences, scholars from the region may automatically adopt and refract their observations through the existing conventions. As such, adding Latin American-based scholars to the ranks of Latin Americanists may do little to change the central paradigms. The former may indeed more firmly entrench the existing frameworks, with the added authority of these scholars' local connections and authenticity.

Thus, in order to evaluate the different contributions that Latin America-based scholars may make to legal area studies, it is necessary to consider the varying intellectual approaches they may bring. Indeed, it is not that in the past Latin Americanists and Latin Americans have operated in completely different worlds. There are many points of connection. In fact, this essay has sought to highlight them. Thus, the idea here is not one of disconnection. Rather, it is that there are substantial differences between legal Latin Americanism and national legal discourse in Latin America. These include the emphases of these fields whether legal, political, or social science; and the different methods and conventions of engagement within particular fields.

Certainly, some analytical approaches are shared rather seamlessly, as the discussion above of law-and-society above demonstrates. This particular method is a very common approach. Yet, it functions somewhat differently than law-and-society arguments in the U.S. In the latter, these arguments are frequently used to update existing laws in response to actual conditions, or to consider the consequences of legal alternatives in operation. They may provide the arguments for legal reform, a change in a line of judicial decisions, and the like. In Latin America, though, this mode of argument has become mostly an indictment of the entire legal system for its inconsistency with the local culture. Another example is the economic analyses of law.<sup>72</sup> Deferring to economics, in this regard, offers a common bridge of communication. Again, this methodology is often deployed to make wholesale changes in legal institutions and to supplant local law with international best practices and foreign models.

By way of another example, critical legal analysis in the U.S. is a very effective tool for showing the incoherence in a line of cases or doctrinal area of the law.<sup>73</sup> The contradictions of reasoning are then commonly shown as supporting a politically regressive outcome. It is quite effective in showing that such an outcome is not a necessary outgrowth of mere legal reasoning. In fact, quite the contrary, it is not determinatively supported by it. The same may be said about arguments based on cultural norms or national identity. The objective is much the same, showing the incoherence of the

---

72. See Edgardo Buscaglia & Thomas S. Ulen, *A Quantitative Assessment of the Judicial Sector in Latin America*, 17 INT'L REV. L. & ECON. 1275 (1997).

73. See, e.g., DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* (1998).

constructed entity to make way for a re-thinking or re-arrangement of legal norms. In Latin America, by contrast, a dominance of critical analysis of this type may simply add to the already existing picture of the pretextual nature of law, understood as covering over elite interests and arbitrariness. Transposed unthinkingly—and in this single form—to legal Latin Americanism, it may have some rather unintended effects. Applied system-wide, it could simply reinforce the existing diagnosis that law and legal discourse are irrelevant in Latin America.

This is not to say these analytical tools are inherently suspect for progressives working on Latin America. It merely shows how both the target of critique and the surrounding general ideology about law significantly influence the meaning and impact of specific interventions. The same critical techniques may have quite different effects when directed at law in the global North. No doubt, these differences are due to contextual or intertextual factors such as the relative strength of the ideology supporting the legal system in place, in different locations. Additionally, they tend to differ as to the level at which these critiques are directed. Whereas critical attacks in the global North often focus on particular laws or institutions, the claims of Latin Americanists often extend to the legal system as whole and not to individual legislation or lines of judicial precedent.

## V. CONCLUSION

It is important to recall that legal Latin Americanism cannot be simply dismissed as just irrelevant or completely missing the mark. Quite the contrary: its most common positions are often backed and adopted by international agencies and the U.S. government. As a result, internationally supported legal reform is often produced and justified entirely within these circuits. And, these have a direct effect in Latin America. They may be introduced predominantly in political ways, with the support of government officials and the main actors in important legal institutions rather than through broad juristic debate, but still they have the power to change broad sectors of national legal institutionality. Until recently, jurists in the region were mostly unattuned to this body of scholarship, despite their extensive awareness of European and U.S. legal scholarship. Nonetheless, despite their relative disengagement with these law-and-development debates and the projects they directly or indirectly support, all those living in the region have experienced the changes these internationally funded reforms have wrought.

As such, the discourse of Latin Americanists has had a very tangible impact on Latin America. As noted this discourse has been mainly at the policy and political level. These debates were not significantly taken up by the local legal discourse nor widely assimilated by local jurists. Now, however, with increasing participation of Latin Americans and, in turn, increas-

ing penetration of Latin Americanist discourse in Latin America, these frameworks are more directly becoming a part of local legal debate. Again, this has led some local scholars to consider the need to become Latin Americanists themselves in order to effectively participate in this changing discursive environment. The dividing line, however, is not so much between Latin Americans and Latin Americanists as it is between the methods these adopt and where those methods are focused. Some methodological approaches are already widely shared. Law-and-economics and law-and-society are two main examples. The objectives to which each are put in the global North and in Latin America can be quite different, however, as noted above. The same is true for more progressive scholarship. These face particular challenges in straddling the Latin America and Latin Americanist divide. A certain form of systematic radical critique has already been the hallmark of legal Latin Americanism and its overly dismissive view of law in the region.

My objective here, in the end, is not to promote any particular uniformity in discursive fields or to argue for a particular notion of orthodoxy or coherence in anyone's scholarly practices. Rather, a mark of contemporary progressive thought is a recognition of the changing nature of methodological approaches and commitments in light of contextual circumstances. As a result, it would come as no surprise to anyone that today's critique of a dominant social construction, say rights talk, can become tomorrow's *taking a break* from critiques of rights talk. Furthermore, this essay is not an exhortation to a life-long or multiple issue commitment to any sort of methodological checklist. However, it is intended as a call to cognizance of the effects that thinking in solely one legal-political frame may produce in another. An important starting point, I would suggest, is injecting legal Latin Americanism with the specific critical insights that local legal debates in Latin America may provide.