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## The Failed Law of Latin America

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JORGE L. ESQUIROL\*

## The Failed Law of Latin America

*I personally believe it is a good thing for a nation to have a firm conviction of its worth; but it should have the decency and the manners to keep that conviction to itself. We did not. We showed it constantly, and I am sorry to say at times we still do.*

Theodore Roosevelt, 1933

*Law's failure in Latin America is the standard background for projects of law reform over the past half century of international development assistance to the region. This "failed law" is quite peculiar though. Reformers often restate general limitations of law as particular deficiencies of Latin American legal systems. They measure shortcomings based on legal constructs often incommensurate with local arrangements. And, they generalize problems in one sector or country on Latin America as a whole. As a result, no amount of simple law reform can undo such a constant and irrepressible image of failure. Viewed this way, Latin America's failed law is principally a discourse facilitating legal change. It also denies much of any value to existing law anywhere in the region. The latter may consist of different legal policies, local interests expressed in law, accumulated investments in specific legal institutions, or other considerations of the sort. Consequently, this failed law formula for reform is a harmful device. It undermines state law and institutions while simultaneously purporting to support them. It keeps a range of questions off the table, depriving all of the Americas of any real engagement with the pre-reform options embodied in the law of Latin American states. And, it weakens the position of many Latin Americans within international legal politics.*

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## I. INTRODUCTION

Law in Latin America fails on many fronts. Numerous studies and scholarly accounts attest as much. State law in the region appears mostly ineffective and inappropriate; national judiciaries look inefficient and corrupt; and the rule of law and its enforcement seem practically non-existent. This is the standard background for projects of law reform over the past half century of international development assistance to the region. The period's literature amounts to, in effect, an indictment of "failed law" against Latin American states. The allusion to failure typically leads calls for change. It is quite an effective catalyst because, among other things, it mirrors perceptions of the many shortcomings of Latin American governments.

This meaning of failure, though, is quite distinct. It is different than, say, a list of operational breakdowns or a set of unachieved policy preferences. Not simple description or explicit politics, it signals the ineffectiveness of law across the region. Law and development literature upholds this view in some unexpected ways. For example, commentators restate general limitations of law as particular deficiencies of Latin American legal systems. They measure shortcomings based on legal constructs often incommensurate with local arrangements. And they generalize problems in one sector or country on Latin America as a whole. As a result, no amount of simple reform can be expected to change such a constant and irrepressible image of failure.

Understood in this way, Latin America's failed law is principally a discourse facilitating projects of reform. As such, it must be assessed largely in relation to the predominant objectives it assists. Notably, though, it can be turned to any number of ends. It can serve to condemn liberal legality all together or—quite differently—just to advocate for different norms. Progressive scholars in the past, for example, have relied on this concept to argue for legal pluralism and to criticize purely symbolic state laws. In the law and development context, the paradigm of failure has been predominantly employed to introduce new legal policies.

Over the past fifty years, mainstream development programs have changed and so has internationally supported law reform. The original 1960-70's objective was to increase regulatory authority and to validate legal pragmatism to support state-led growth. The 1980-90's objective, the focus of this article, was to adopt new institutions and judicial practices to promote open markets and private rights, to increase human rights and criminal prosecutions, and to reduce public corruption. Throughout, whole sectors have been targeted for reform, including the legal culture, court administration, criminal procedure, and the judiciary.

However, rather than addressing alternative policies, the likely impact of different rules, and the competing claims of political participants, the effort has been mostly directed at replacing them. Development reformers have urged different models and alternative institutions under the aegis of the rule of law, international best practices, and economic development. These reforms, though, do not stand much better chances of avoiding the same negative fate. This is so because the failure they purport to redress is actually a combination of features endogenous to all systems of law, problems projected on the region as a whole, and assessments contingent on political and organizational preferences. Moreover, the image of failure thus solidified undermines the very legal sphere necessary for effective reforms. And yet, while legal systems in the region certainly need improvement, they also represent a significant amount of legal capital. Termed "*acquis légaux*" here, this concept highlights values often hard to perceive due to the force of the image of failed law. The former include alternative legal policies, local interests expressed in law, acquired expertise in specific legal forms, and other developments within national legal systems. Reforms predicated on replacing a failed law, however, reject such *acquis légaux* without significantly addressing any of their relative merits.

As a result, the image of failed law is ultimately harmful, irrespective of the policies advanced. There are at least three significant reasons why. First, it undermines the legitimacy of state law and institutions. It effectively disinvests in the sector which law and development simultaneously purports to support. Rather than reinforce, democratize or develop the legal system, it tears at its very standing. Nonetheless, this practice of indicating law's failure in order to redirect its politics is routine. Second, it keeps a range of decisions off the table. It deprives all of the Americas of any real engagement with the pre-reform options embodied in the law of Latin American states, which in fact are worth considering. Finally, it undermines the positions of many Latin Americans in hemispheric legal relations. Any actual Latin American option is summarily excluded from consideration. Not that the options within Latin law are ideal or the only ones that should be considered, but their exclusion limits the range of choice and obscures the political decision this entails.

This article analyzes legal development writing on the region. It identifies an underlying narrative of failed law, and it considers this discourse within the framework of international legal politics. Along the way, the paper makes three salient points. First, it describes and critiques the "failed law" discourse. Second, it examines the impact of this discursive formula on Latin America's institutions and on the political choices available to Latin Americans. Finally, the Article raises some concerns about how discredited law and institutions in

the region may adversely affect Latin Americans and North Americans alike with regard to greater hemispheric collaboration.

## II. THE FICTION OF FAILED LAW

The diagnosis of failed law is a contemporary strategy of legal politics.<sup>1</sup> It is also a common perception about law in Latin America.<sup>2</sup> The following references offer a sampling of these views. The fuller concept, however, cannot be captured in any one quote. That part remains for the discussion further below.

Statistical and survey evidence about trends in justice in Latin America and the Caribbean indicates that the performance of the justice sector in much of Latin America and some of the Caribbean lags behind other regions of the world.<sup>3</sup>

[T]he most noted phenomenon in Latin American judiciaries has been the inability to achieve the delicate balance between judicial independence and judicial accountability.<sup>4</sup>

Latin America is marked by a general lack of internalisation of rights and obligations throughout society and high levels of mistrust and dissatisfaction with the judicial system.<sup>5</sup>

Pointedly, law and development operators in our era have supported, consolidated, and instrumentalized statements of this type to advocate for legal change.<sup>6</sup> Taken together, they constitute the failed law

1. I use the term "failed law" to evoke critiques of the "failed state" concept popularized by Gerald B. Helman and Steven R. Ratner's article, "Saving Failed States," 89 FOREIGN POL'Y 3 (1992). Ralph Wilde, *The Skewed Responsibility Narrative of the "Failed States" Concept*, 9 ILSA J. INT'L & COMP. L. 425, 428 (2002-03); but see Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, AM. SOC. INT'L L. PROC. 420 (1997).

2. I use the terms "the law in Latin America" and "Latin law," interchangeably, to mean the sum of law and institutions in the various Latin American states. By contrast, "Latin American law" is used to refer to its identity as legal failure. But see ANGEL R. OQUENDO, *LATIN AMERICAN LAW* vi-vii (2006); Rogelio Pérez Perdomo, *Notes of a Social History of Latin American Law: The Relationship between Legal Practices and Principles*, 52 REV. COLEGIO DE ABOGADOS P.R. 1, 1 n.1 (1991) ("Obviously, there is no comprehensive Latin American legal order.").

3. Christina Biebesheimer, *Justice Reform in Latin America and the Caribbean: the IDB perspective*, in *THE RULE OF LAW IN LATIN AMERICA* 99-100 (2001).

4. WILLIAM C. PRILLAMAN, *THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA—DECLINING CONFIDENCE IN THE RULE OF LAW* 19 (2000).

5. Pilar Domingo & Rachel Sieder, *Conclusions: Promoting the Rule of Law in Latin America*, in *THE RULE OF LAW IN LATIN AMERICA* 151 (2001).

6. See, e.g., EDUARDO BUSCAGLIA & WILLIAM RATLIFF, *LAW AND ECONOMICS IN DEVELOPING COUNTRIES* 97-99 (2000); LINN HAMMERGREN, *THE POLITICS OF JUSTICE AND JUDICIAL REFORM IN LATIN AMERICA* 6-8 (1998); PILAR DOMINGO & RACHEL SIEDER, *RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM* 1-3 (2001); HERNANDO DE SOTO, *THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD* 244-45 (1989); Felipe Saez Garcia, *The Nature of Judicial Reform in Latin America and Some Strategic Considerations*, 13 AM. U. INT'L L. REV.

paradigm described here. It is serially evoked in country reports, project evaluations, and legal scholarship.<sup>7</sup> It does not simply serve to identify areas of weak law enforcement, bad public policies, or impaired distribution of public resources needing change. Rather, as a whole, it impugns the legal systems' capacity to function as law.<sup>8</sup> The image of a failed law provides a convincing rationale for reconfiguring existing arrangements. Moreover, it makes it more difficult to defend any actual interest or value in existing law and institutions — the latter reduced to artifices of rent-seeking and inefficiency.<sup>9</sup> In this way, reformers locally and internationally have not always reinforced legal institutionalism; rather, some have sought to overturn it for tactical gain.<sup>10</sup> The rules of the game in Latin America have included putting the very game into question.<sup>11</sup>

This formula might seem innocuously instrumental or even incidental, since it promises big results. However, it is not an institutionally sustainable mode of strengthening law. Its particular use within development reform eclipses deliberation over competing interests, balancing relevant policies, or anything of the sort: it mostly offers dualistically substituting international or U.S.-supported alternatives for a failed law. This process undermines and disinvests in those same legal institutions. And, it makes them more vulnerable to neo-colonialism.<sup>12</sup> Discredited institutions are more liable to volatility and imposition. Acting in this way creates the banana-republic-like quality that reformers simply claim to describe and want to replace.<sup>13</sup>

This representation of Latin American law as failed is what I refer to as a fiction. It is not fiction in the sense that it is entirely untrue. It is more akin to the idea of a "legal fiction," a constructed

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1267, 1315-18 (1998); Jorge Santistevan de Noriega, *Reform of the Latin American Judiciary*, 16 FLA. J. INT'L L. 161, 164-65 (2004); Paulo Sérgio Pinheiro, *The Rule of Law and the Underprivileged in Latin America: Introduction*, in THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA 11-15 (Juan Mendez, Guillermo O'Donnell & Paulo Sergio Pinheiro eds., 1999) [hereinafter (UN)RULE OF LAW].

7. See various sources under specific sections below.

8. See Robert G. Vaughn, *Proposals for Judicial Reform in Chile*, 16 FORDHAM INT'L L.J. 577, 589 (1993).

9. See generally William Glade, *Privatization in Rent-Seeking Societies*, 17 WORLD DEV. 673 (1989).

10. 6 MOORE'S DIGEST OF INTERNATIONAL LAW 660 (1906); Luis M. Drago, *State Loans in Their Relation to International Policy*, 1 AM. J. INT'L L. 692, 694-96 (1907); see Liliana Obregón, *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, 170-72 (2005).

11. See, e.g., Lauren Castaldi, *Judicial Independence Threatened in Venezuela: The Removal of Venezuelan Judges and the Complications of Rule of Law Reform*, 37 GEO. J. INT'L L. 477, 479-80 (2006).

12. See Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEG. STUD. 383, 401-02 (2003).

13. See, e.g., Castaldi, *supra* note 11, at 506.

notion serving an instrumental purpose.<sup>14</sup> I have in separate articles developed the theme of fictions of Latin American law.<sup>15</sup> The pieces have examined commonly accepted views about the region's European imitativeness and its exceptionally wide gap between written and practiced law.<sup>16</sup> In each case, the concept helps to contrast value judgments and observed deficiencies with narratives supporting change.<sup>17</sup> Unlike an explanation based on cause and effect, these fictions offer a continual rationale and legitimacy for reform. By challenging them, I do not purport that law in Latin America is above reproach or that it should not be reformed. My analysis simply shows the limited effects and the usually unconsidered harm that can be expected from change pursued in this way.

### A. *Types of Failure*

For analytical purposes, two types of failure can be distinguished in the legal development scholarship on Latin America. The first type corresponds to operational problems. The second are failings in matters of governance, which I term "legal failure" here for brevity's sake. These first two types are especially identified with legal systems in Latin America and are linked to poor economic performance, insufficient democracy, income inequality, and a host of other ills affecting Latin states. The distinction here is useful because each contributes to the overall picture of failed law in separate ways. And, each is the product of several distinct analytical twists. Still a third type of failure concerns the merits of certain policies or policy combinations to achieve specific ends. These are rarely addressed in the development literature in a transparent way. Below is a fuller explanation of each type.

#### 1. Functional Failure

This characterization encompasses common descriptions of system breakdown, lack of enforcement, inefficiency of legal procedures and transactions, insufficient capacity and training of legal professionals, and other aspects of negative performance.<sup>18</sup> However, oper-

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14. DORIS SOMER, FOUNDATIONAL FICTIONS: THE NATIONAL ROMANCES OF LATIN AMERICA 5-7 (1991).

15. See generally Jorge L. Esquirol, *The Fictions of Latin American Law*, 1997 UTAH L. REV. 425 (1997) [hereinafter *Fictions*]; Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41 (2003) [hereinafter *Continuing Fictions*].

16. *Fictions*, supra note 15, at 432-33; *Continuing Fictions*, supra note 15, at 110-11.

17. See also Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 157 (1984).

18. See, e.g., Harry Blair, et al., *A Strategic Assessment of Legal Systems Development in Uruguay and Argentina*, USAID Working Paper No. 192, at 5-7 (Sept. 1994), available at [http://pdf.usaid.gov/pdf\\_docs/PNABT455.pdf](http://pdf.usaid.gov/pdf_docs/PNABT455.pdf); Harry Blair, et al., *A Strategic Assessment of Legal Systems Development in Colombia*, U.S. AID Final Draft, at



ating deficiencies vary from country to country. Each Latin state has its own history and configuration of interests, and these manifest themselves in various ways. More precise attention to individual places would certainly reveal substantial differences. Nonetheless, development reform is mostly regional in scope, and legal scholarship shares this perspective. Projects are staged in one state and then commonly transported to others with only minor adjustment. As a result, views about one place—even if only nominally so—are easily extended to Latin America as a whole.<sup>19</sup>

Additionally, functional shortcomings are—at least theoretically—distinguishable from opinions about underlying policies and expectations about the legal system's role in governance. However, the criteria used to assess performance are often inseparable from policy and institutional objectives. Examples are efficiency and due process; law enforcement and defendants' rights; titling squatters and state-owned property. All these areas entail legal line drawing. This exercise is not neutral or uniform. It is by no means clear that one particular demarcation is better for everyone. Rather, it involves selection and, ultimately, a preferred baseline. Moreover, from the perspective of both legal realism and economic theory, a wide range of activities can be aggregated and disaggregated in various ways.<sup>20</sup> For example, some financial exchanges can be considered either instances of corruption or part of the economic transaction, although the existence of clear distinctions is often assumed.<sup>21</sup> Additionally, some legal practices may be considered examples of inefficient legal formalism or, conversely, protected features of due process or vested rights. State regulation may be seen as sorely absent in informal markets or simply the rules' indirect demarcation of less or differently regulated activity. In short, judgments about legal functionality

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ii (Mar. 8, 1993) (describing justice reform as another approach “to further USG [U.S. Government] policy objectives.”), available at [http://pdf.usaid.gov/pdf\\_docs/PNACK421.pdf](http://pdf.usaid.gov/pdf_docs/PNACK421.pdf) (last visited May 18, 2007) [hereinafter *USAID*]; Benjamin L. Crosby & Ana Maria Linares, *Justice Sector Reform in the Dominican Republic: A Stakeholder Analysis*, USAID Project Report No. 517-0000-3-60021, at 11-15 (Oct. 1996), available at [http://pdf.usaid.gov/pdf\\_docs/PNACA062.pdf](http://pdf.usaid.gov/pdf_docs/PNACA062.pdf); Klaus Decker, Caroline Sage & Milena Stefanova, *Law or Justice: Building Equitable Legal Institutions*, at 4, n.9, World Bank, Working Paper (2005); World Bank, *Implementation Completion Report on a Loan in the Amount of US \$5 Million to the Republic of Argentina for a Model Court Development Project*, at 2-8, Report No. 35356 (Mar. 15, 2005); World Bank, *Implementation Completion Report on a Loan in the Amount of US \$30 Million to the Bolivarian Republic of Venezuela for a Judicial Infrastructure Development Project*, at 2-3, Report No. 26173 (June 28, 2003); World Bank, *Peru – Judicial Reform Project*, at 1-2 (1997); World Bank *Staff Appraisal Report: Ecuador Judicial Reform Project, passim*, Report No. 15385-EC (June 24, 1996).

19. Cf. *Continuing Fictions*, *supra* note 15.

20. See generally William Joseph Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975 (1982).

21. See David Kennedy, *The International Anti-Corruption Campaign*, 14 CONN. J. INT'L L. 455, 463-64 (1999).

depend on how the categories are constructed and where the lines are drawn. Fairly typical accounts of operational failure in Latin America—e.g., delays, impunity, bias, and others—are premised on such underlying categorizations, themselves the product of specific choices.

## 2. Legal Failure

Another common set of images about Latin American law parallels various standard critiques of general legal theory. These include charges of antiquated law; legal formalism; law disconnected from society; the gap between law on the books and law in action; ill-fitting legal transplants; elite control of law; inefficient laws and institutions; subjectivity in the law; and rent-seeking.<sup>22</sup> While the list may be drawn up somewhat differently, it reflects characteristic weaknesses of liberal law.<sup>23</sup> In the development literature, these items purport to mark especially salient Latin American flaws and to describe deficiencies of those legal systems as a whole. While none of these critiques alone leads to a conclusion of general failure, in the aggregate their effect does: so much so that neo-development's general prescription for its correction is the rule of law itself. In this way, the image of legal failure amplifies and projects the very limitations of liberal legalism onto Latin America. It does so in two important ways.

First, these critiques are generally well-known features of modern law: outdated legal doctrines as theorized by Holmes;<sup>24</sup> socially disconnected law addressed by historicist and sociological approaches;<sup>25</sup> formalism criticized by legal realists;<sup>26</sup> judicial overreaching from a legal process perspective;<sup>27</sup> the gap between law in books and law in action highlighted by law and society theorists;<sup>28</sup>

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22. See Vaughn, *supra* note 8, at 600, 605; Obregón, *supra* note 10; see also Jorge L. Esquirol, *Can International Law Help? An Analysis of the Colombian Peace Process*, 16 CONN. J. INT'L L. 23, 25-26 (2000); Carlos Manuel Loperena Ruiz, *Civil Justice Reforms in the Americas: Lessons from Mexico*, 16 FLA. J. INT'L L. 29, 33 (2004); see also *supra* note 18.

23. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 32-46 (2004).

24. See OLIVER W. HOLMES, THE PATH OF THE LAW 22-36 (1907).

25. See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 24 (1910).

26. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 846-47 (1935).

27. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (10th ed. 1958); see also William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2031-32, 2043-45 (1994) ("The Legal Process and its philosophy made a come back in the 1980's").

28. David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 1, 24-29 (1991); see also Pound, *supra* note 25.

and rent-seeking behavior described by law and economics scholars.<sup>29</sup> They are undeniable aspects of much law anywhere. Indeed, these very critiques were articulated primarily in relation to legal systems in the United States and Europe.<sup>30</sup> And, however erstwhile unsettling, they are not much of a threat to contemporary law in those places.

Second, these critiques are more typically aimed at judicial decisions, legislation, or institutional practices.<sup>31</sup> Most of them are "critique[s] from within, a critique that uses the premises of traditional legal theory against itself."<sup>32</sup> Thus, in the context of U.S. legal history, for example, the critique of formalism was directed against courts hostile to social legislation on the grounds of vested rights; the critique of law disconnected from society was marshaled against segregationist laws in favor of a living constitution; critiques of judicial activism have and continue to strike at federalism on behalf of states rights.<sup>33</sup> These types of arguments are also commonly employed for other objectives in other contexts. The examples above are just particularly well-known. And, while not identically articulated in civilian jurisdictions, they are widely analogous to discursive counterparts in that tradition as well.<sup>34</sup>

However, in the context of development reform, these arguments have become general descriptions of Latin American legal systems as a whole. The transposition of internal critique to external diagnosis takes some of the following forms: excessive conceptual formalism is unmoored from questions of judicial interpretation to refer to the operative limitations of legal reasoning in Latin American legal culture. The discordance between law and society is not just an argument for validating established social norms. Instead, it condemns law as a whole, as a European artifact inapposite to local populations. Excessive discretion is not simply an argument to limit judicial interven-

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29. See Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 10, 29 (1984).

30. See DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 73-79 (1997).

31. See Singer, *supra* note 29, at 10, 26. See Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 583-92 (1982); Henry Rottschaefer, *Legal Theory and the Practice of Law*, 10 MINN. L. REV. 382, 400, 403 (1926); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 800 (1983). See also Robert Paul Wolff, *Robert Nozick's Derivation of the Minimal State*, 19 ARIZ. L. REV. 7, 20 (1977).

32. See Singer, *supra* note 29, at 10.

33. MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* 60-61, 258-64 (1992).

34. See, e.g., KENNEDY, *supra* note 30, at 3-5 (1997); Marie-Claire Belleau, *The "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth Century France*, 1997 UTAH L. REV. 379, 390-98 (1997); Mitchel de S.-O.-l'É. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1343-402 (1995); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 28-34 (1991).

tion in a certain area. Rather, it shows Latin American legal systems' incompatibility with the rule of law. In this way, these arguments provide further support for claims of the *functional* failure of Latin legal systems as a whole.

Granted, some of the critiques in this section can also be external claims, independent of the transpositions noted here. An example is the critique of law as an instrument of the ruling elites. This view parallels Marxist perspectives on law as mere ideology, masking the true structure of power. Another example is the critique of law as inappropriately European. Certainly, a colonizing law forced on conquered peoples violates recognized rights to self-determination. Yet, these more radical objections to law in Latin America are not typically part of the failed law repertoire of law and development. Rather, development diagnoses combine ideas about functional and legal failure in quite idiosyncratic ways, providing a constant and permanent rationale for reform.

### 3. Policy Failure

By contrast, an often more relevant question involves the merits of policies promoted by the specific rules and legal institutions in place. For instance, an enacted norm may impose more or less environmental costs on economic activity; may privilege prosecutions or defendants' rights; may promote more or less private autonomy with respect to property. While a certain policy mix can surely fail a specific objective, there is no single clear legal and institutional prescription for any particular goal. Indeed, different legal communities may combine priorities and organizational forms in different ways. Much of development reform, in effect, aims at policy change in fact, without assessing if an existing policy combination is convincingly failing a specific objective or is simply opposed by those seeking reform. Law and development reforms in Latin America, indeed, rarely address policy questions in a transparent way.<sup>35</sup> Rather, Latin American *law* is impugned, when *policy change* is actually at stake.

#### B. *Latin American Law*

Of course, there is no such thing as "Latin American law" in general.<sup>36</sup> It is a conceptual category grouping the laws of the different states. Notably, there are a few regional organizations producing international law, principally the inter-American human rights system. In addition, Mercosur, the Andean Community, and a few others are examples of regional trade associations that promulgate a variety of

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35. See generally Susan Kaufman Purcell & John F.H. Purcell, *State and Society in Mexico: Must a Stable Polity Be Institutionalized?*, 32 *WORLD POL.* 2, 194-220 (1980).

36. Perdomo, *supra* note 2, at 1.

common legal rules. There have also been attempts to make the case for a regional public international law based on common treaties and customary norms.<sup>37</sup> But what scholars envisage when speaking of Latin American law are the commonalities across state law in the region. These are presented mostly as the product of a shared history<sup>38</sup> and common differences compared to the United States<sup>39</sup> Moreover, the meaning of Latin American law is principally constructed by products of legal scholarship and regional projects, especially those linked to Europe and the United States. This meaning widely depends on broad comparative assertions, and its significance chiefly mirrors the purposes of its proponents.

In this same way, the failed law image is projected and amplified on Latin America as a whole. Its meaning is more than just a list of arguments for change. It is a resilient identity forged by a generation or so of the critiques described here. Indeed, it is the accumulation of these assertions repeated over time that generates its common acceptance.<sup>40</sup> Compared to elsewhere, so the assumption goes, the gap between book law and action law is wider; the legal culture and local culture is more distant; the official actors are more corrupt; the rules are more inefficient; conceptual formalism is more intractable. It is not that these critiques have no bite. To the contrary, any one of them may be appropriate in relation to a particular situation. However, their composite offers a constant repository of dysfunction. Their cumulative and repeated use has crystallized into a fixed idea about the nature of Latin American law. Thus, rather than address political resistance and resource reprioritization directly, the failed law image provides a movable marker available for triggering wide-scale reform. Law's failure, indeed, has come to represent the standard diagnosis. A talisman of legal politics—instead of part of an alternating exchange of critique and response—it garners consensus about law in the region.

Moreover, the past fifty years of U.S.-supported law reform have exacerbated this discredit by reinforcing the image of Latin legal failure. Surely, international assistance is a welcome resource, and sweeping reform is not itself negative. Law and development's failed law, however, misleads about its object of reform. It rejects Latin American law with the aim of introducing different, yet equally lib-

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37. See 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, 304 (2006); Obregón, *supra* note 10.

38. See, e.g., MATHEW C. MIROW, *LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA* 6-7 (2004).

39. See OQUENDO, *supra* note 2, at vi.

40. See BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 219-21 (2006).

eral law-based regimes.<sup>41</sup> This view combines deep skepticism about Latin legal institutions with law-centered faith in U.S.-supported substitutes.<sup>42</sup> These substitutes stand no better chance of success, though, because they are no less amenable to “failed law” critiques.<sup>43</sup> Additionally, the normalization of the failure narrative—sticking to Latin American law—leaves little room for “success” or for different criteria by which to assess legal institutions. While the failed law trope<sup>44</sup> examined here is not exclusive to law and development or relations with the United States, other examples from different times and by different actors must remain topics for another day.

Additionally, my contention about the instrumental use of failed law discourse does not ascribe particular motives to reformers. Some may certainly be self-aware of their own strategic aims. But, the distinction between strategy and description may not seem evident, at first. The strategy’s force is precisely due to its normalization as plain description. It simply appears to be true. Additionally, to the extent their instrumentalism is conscious, reformers may still be unaware of its consequences. They may be unattuned to their own role—by advancing assumptions and uncritical observations—in the construction of a Latin legal identity of failure. Repeatedly playing this strategy, however, produces an enduring image that frustrates their own stated goals.

### 1. The Un-rule of Law

Another way of understanding the fiction of failed law is by its presumptive opposite, the rule of law. The latter implies a satisfactory resolution of the tension between objectivity and subjectivity in matters of legal decision-making.<sup>45</sup> Locating law beyond subjective discretion is a central preoccupation of liberal theorists.<sup>46</sup> Isolating a failed dysfunctional variant of the rule of law, instead of its intrinsic condition, makes it appear that neutral and objective legal governance is achievable.<sup>47</sup> More powerfully, it reinforces the rule of liberal law’s success in developed states while ignoring its problem that no adequate operational theory exists.<sup>48</sup> Yet, development reforms—

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41. My use of the term “neoliberal law” is somewhat idiosyncratic and is simply meant as a shorthand way to describe the sum total of programmatic objectives pursued by the neo-developmentalists described in this section.

42. See TAMANAHA, *supra* note 23, at 32 (“the rule of law today is thoroughly understood in terms of liberalism.”).

43. See Singer, *supra* note 29, 61.

44. My use of the term “trope” tracks Heller’s *Structuralism and Critique*. Heller, *supra* note 17, at 161, n.62 (1984).

45. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“a government of laws, and not of men.”).

46. See, e.g., TAMANAHA, *supra* note 23, at 66-67; Singer, *supra* note 29, at 61.

47. TAMANAHA, *supra* note 23, at 89-90.

48. See Heller, *supra* note 17, at 197; see also TAMANAHA, *supra* note 23, at 82, 90.

often modeled on the United States or Europe—are just different versions of liberal law, packing the very same tension and similarly “failing” features. Projecting one side of the equation onto Latin American law, and the other onto new reforms, misconceives the semiotic operation at work.<sup>49</sup> As a result, the difference between the rule of law and failed law—different sides of the same coin—depends upon differences of perception, especially perceptions of predictability prevailing over those of arbitrariness. The image of rule of law can be seen as the product of a combination of factors, *inter alia*: significant political consensus, strenuous law enforcement, ample informational resources, parallel social norms, and a dedicated class of legal scholars claiming that it is so.<sup>50</sup> Conversely, projections of failed law are no doubt heightened by significant political resistance to existing laws, insufficient law enforcement, a lack of resources, and the image’s continuous deployment as a strategy for reform.

The impact of a charge of failed law, however, is not a radical critique—even though it suggests law’s practical demise.<sup>51</sup> Developmentalists, notwithstanding the force of their arguments, do not reject liberal systems for the region or the possibilities for reform. Their approach is quite different from, for example, a critical-legal-studies trashing of liberal law based on the indeterminacy of doctrine.<sup>52</sup> Take for instance Roberto Unger’s views:

[W]hy should the reform (suggested by the typical U.S. law review article) stop short at one point rather than another? Why should it not advance more deeply into the stuff of social arrangements, reconstructing them for the sake of the ideal conceptions, and then, later on, redefining the ideal conceptions in the light of the actual or imagined re-arrangements? An implicit judgment of practical political feasibility controls the answer to this question. Given that most of the institutional background must, as a practical matter, be held constant at any given time, proposals for institutional tinkering should remain modest and marginal.<sup>53</sup>

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49. See Duncan Kennedy, *A Semiotics of Critique*, 22 *CARDOZO L. REV.* 1147, 1176-83 (2001).

50. See, e.g., ALBERT VENN DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 202-05 (Liberty Fund 1982) (1908); RONALD DWORKIN, *LAW’S EMPIRE* 93 (Harvard Univ. Press 1986); H.L.A. HART, *THE CONCEPT OF LAW* 2 (Oxford 1961); FREDERICK A. HAYEK, *THE ROAD TO SERFDOM* 72 – 87 (Univ. of Chicago Press 1994) (1944).

51. See Singer, *supra* note 29, at 5-6. See, e.g., ROBERTO MANGABEIRA UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* 3 (1998).

52. See Duncan Kennedy, *Legal Formality*, 2 *J. LEG. STUD.* 351, 361 (1973).

53. Roberto Mangabeira Unger, *Legal Analysis as Institutional Imagination*, 59 *MOD. L. REV.* 1, 17 (1996).

To ensure change, Unger advocates the normalization of a legal culture of continual, institutional transformation and experimentalism.<sup>54</sup> Enabling change, however, is quite different from the phenomenon of failed law. Rather than building capacity, the latter stifles the range of alternatives in law and institutions. Reform of this type is not premised on either experimentalism or ideals of emancipation—whether in the form of legal practices providing for continuous change or of a legitimating discourse to accommodate repeated episodes of socio-economic transformation. Reform is based on the failure of law, and the remedy offered is other liberal models. This does not challenge liberal legalism per se: it just permanently rejects the Latin American version of it.

## 2. Law-lessness

The general understanding of “Latin American law” as failed also limits the role that certain interests, represented in law in specific Latin American states, can be expected to play in international legal relations.<sup>55</sup> Those laws and institutions and the political values they embody are easily dismissed. This disrepute goes well beyond understanding law as an instrument of policy implementation—considered quite flawed—or understanding law as subject to politics—understood as controlled by the elites. The notion of failure looms larger. Latin law and legal institutions are not credible alternatives in the economy of legal forms. They, and the interests they represent, are not recognized as having any independent value.

Conversely, the particular interests of developmentalists and trade negotiators alike, are assisted by the image of failure rather uniformly held. Steve Zamora reports an example from the NAFTA negotiations:

Several Mexican negotiators have confided to me that during the NAFTA negotiations some of their North American counterparts depreciated Mexican attitudes toward issues under negotiation, as proceeding from an inferior legal system (a legal system with which most U.S. negotiators were unfamiliar).<sup>56</sup>

The reflexive assumption of United States or European legal superiority works to negate the different set of prescriptions within Latin

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54. *See id.*; *see also* Tamara Lothian, *The Democratized Market Economy in Latin America (and Elsewhere): An Exercise in Institutional Thinking Within Law and Political Economy*, 28 CORNELL INT'L L.J. 169, 194-96 (1995).

55. *See* Stephen Zamora, *The Americanization of Mexican Law: Non-Trade Issues in the North American Free Trade Agreement*, 24 LAW & POL'Y INT'L BUS. 391, 391-92, 395-96 (1992).

56. *See, e.g., id.* at 444-45.



law.<sup>57</sup> Indeed, if judged solely by the criteria typically used to mark Latin American failure, no doubt Latin alternatives will come up short.<sup>58</sup> Yet, if legal institutions are recognized for the different political options they may represent, they cannot be scrapped without debate. As collective projects of organization, legal institutions work much the same way as culture or shared history. They embody and represent a broad dimension of a society's collective life. They change over time and are shaped by competing political and societal objectives.

An institutionally discredited Latin America undermines the legitimacy of a number of political and other values embodied in the region's legislation and legal structures. It inscribes an indelible stain on Latin legality, in an undifferentiated fashion. It is not a question of Latin American interests losing and United States or global interests winning. It impacts the politics of the entire hemisphere. To the extent certain individuals profit from reforms produced in this way, they are no doubt financially bettered. However, other policies and principles which could potentially benefit a majority of people in the Americas stand to lose, and they lose without so much as being considered. A reified Latin American law, marked in the way described here, is thus a red herring. Focusing on the region's "failed law" rather than on the specific reforms' distributional effects obscures the winners and losers of proposed legal changes. It makes it that much harder to challenge, at the same time, the introduction of a particular model of international legal economy.

### III. THE PARADIGM OF LAW AND DEVELOPMENT

Most contemporary scholarship on law and development focuses on questions different from the ones addressed here. Predominantly, scholars consider the emergence and decline of the movement and its different phases, descriptions of the actual projects, the economic and legal ideas supporting them, the role of international institutions and social networks, and the political and legal changes produced thereby. Critical scholars, in turn, have focused on the resilient appeal of law and development despite its admittedly limited results on its own terms. For example, scholars describe the "bait-and-switch" quality of shifting meanings of the rule-of-law promoted by reformers

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57. Edgardo Buscaglia, *Obstacles to Judicial Reform in Latin America*, in JUSTICE DELAYED 25 (1998).

58. See Keith Rosenn, *The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM. L. REV. 1, 12, 24 (1990); but see José Ma. Serna de la Garza, *Constitutional Federalism in Latin America*, 30 CAL. W. INT'L L.J. 277, 278 (1999-2000).

and the mostly symbolic and strategic nature of incorporating social concerns in the reform agenda.<sup>59</sup>

Along these same lines, this Article examines the appeal of reform not by reference to its promised and often shifting benefits or by its politics which purport to be all-embracing, but rather by the image of its opposite: a failed Latin American law. Clearly, development reform is much broader than just an intervention in Latin America: it extends throughout the developing world. The extent to which the failed law formula is characteristic of international legal relations elsewhere, or to development projects for other regions, remains for further study. It stands to reason, however, that the introduction of development reform in Latin America would proceed differently than in an Eastern Europe transitioning from command economies or in an Africa still consolidating relatively new independent states.

Specifically, United States and Latin American legal relations after WWII can be described as a specific paradigm of transnationality. In a nutshell, the history is one of U.S. efforts at promoting policy change in Latin America through law reform. Three periods stand out: original law and development in the 1960's and 1970's, the new law and development from the late 1980's to late-1990's,<sup>60</sup> and the period since then. In original law and development, the objective was changing the legal culture and modes of legal reasoning to support state intervention in the economy and some redistribution of wealth. The objectives then were Cold War calculations of expanding state economies and reducing poverty thereby reducing the appeal of communist revolutions. In the second phase, the focus was on the judiciary, procedure, and regulatory law. The objectives consisted of shielding foreign investment from the state, prosecuting human rights abusers, fighting the war on drugs, and other policies favored by the United States in the region. A more contemporary third moment describes projects responsive to reactions and critiques of neoliberalism.<sup>61</sup> It expands the development agenda to include social justice and minority concerns.

Of course, generalizations about different phases and projects cannot describe the full range of legal relations between actors in Latin America and the United States. Divergent policies and theo-

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59. See 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* 7-8 (David Trubek & Alvaro Santos eds., 2006).

60. "New law and development" and "neo-development" are used here interchangeably to refer to law and development's second moment.

61. David M. Trubek, *The "Rule of Law" in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 15 (David M. Trubek & Alvaro Santos eds., 2006) (note that even some of those who consider law and development is in its third moment "question whether the changes that we have observed reflect deep changes in policy and practice, or whether they really are little more than a smokescreen to deflect critics.").

ries obtain within and outside of them. Additionally, the combination of prescribed reforms and local conditions is often unpredictable. Legal transplants, for example, often operate differently in new environments.<sup>62</sup> Nonetheless, the major objectives of law and development constitute U.S. policy toward the region, promoted by international organizations within the U.S.-sphere of influence and backed by significant support from a number of Latin Americans: the “U.S.-sphere” more succinctly.<sup>63</sup> As such, law and development in the region consists of a range of projects propelled by identifiable though not uniform interests. The descriptive arguments supporting them, taken together, provide a justification for such reforms. The aggregate enterprise has generated a number of ideas and images. These are comparative critiques and diagnoses of law in Latin America. Their representations are important aspects of the relationship itself. Whether the image is one of individual states working toward an ideal universal law, a set of nation-states comprising one legal family sharing law appropriate to their kindred societies, or—as in the case of development reform—advanced nations providing assistance to others suffering from failed law, these guiding characterizations impact the type of borrowings, sources, and political ideals made available.<sup>64</sup>

The account below is not meant as an overall assessment of the substance of reforms. It is also not intended as a comprehensive description of their myriad projects. Assessing the relative degree of demand in Latin America for these projects is also less germane for my purposes.<sup>65</sup> While clearly appealing to many local actors and Latin governments at different times, specific project origins and constituencies are less relevant here. Rather, my focus is on the common discursive mode enabling their implementation: it is this commonality linking the first and second periods that is the object of this piece. Substantially more attention is paid to the second moment of law and development since my analysis of original law and development is al-

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62. See, e.g., 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, 6 (2004); Michael L. Owen, *Reforms of the Law of Secured Transactions in Mexico and the United States*, 10 U.S.-MEX. L.J. 99, 100, 104 (2002).

63. Scott Newton, *The Dialectics of Law and Development in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 174-76 (David M. Trubek & Alvaro Santos eds., 2006); see also USAID, *supra* note 6, at 1-2.

64. See Esquirol, *supra* note 22.

65. YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* 33-58 (2002); see also Máximo Langer, *Why do Codes Travel? Three Theses on Diffusion and the Wave of Criminal Procedure Reforms in Latin America*, 55 AM. J. COMP. L. (2007) (arguing that widespread criminal procedure reform can best be explained as a Latin American-initiated phenomenon).

ready separately published.<sup>66</sup> Finally, a closer examination of the latest, third moment remains for future work.

### A. *Original Law and Development*

The first major U.S.-led intervention in Latin law was the law and development movement of the 1960's and 1970's. More has been said and written about this movement than was actually ever executed on the ground. Briefly put, it was a diffuse project to effectuate change regarding Latin American legislation, legal education and access to justice.<sup>67</sup> Effectively, it consisted of efforts mostly in Chile, Brazil, and Colombia to modify the curriculum in law schools. The idea was that in some way, which was not well understood or theorized, law had a relationship to economic development.<sup>68</sup>

Legal developmentalists sought to align the law with economic development. Their only roadmap, however, was the U.S. legal system and its apparent co-relation with U.S. economic progress. Chiefly, pragmatic legal reasoning skills were thought key. Such tools would justify development-oriented public law against the challenges of a formalist legal system. As such, early developmentalists sought to transplant the legal realist and legal process combination of critique and reconstruction. In its barest expression, realism was to unlock the conceptual formalism upholding vested rights, potentially obstructive of economic planning and regulation. At the same time, legal process ideas would bolster regulatory agencies mandating different economic policies. Introducing a more pragmatic conception of law at the law school level—in this form of realist critique and reconstruction—was considered vital in aligning law with development.<sup>69</sup>

While it had little practical impact, the scholarship of law and development cemented some central images about Latin legality. It was the most important and sustained attention ever paid to law in Latin America within the U.S. legal academy. Equally important, it offered Latin Americans themselves a diagnosis and a framework for thinking about their own legal institutions that persists through today. It emphasized the region's antiquated law, legal formalism, and gap between law on the books and law in action—a subset of the legal critiques noted above. Reformers cast Latin American legality as both historically obsolete and culturally inapposite to Latin American societies. As historical oddities, Latin legal methods were presented as

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66. See generally *Continuing Fictions*, *supra* note 15 for a more detailed analysis of this movement.

67. See generally JAMES GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980); see José E. Alvarez, *Promoting the "Rule of Law" in Latin America: Problems and Prospects*, 25 *GEO. WASH. J. INT'L L. & ECON.* 281, 286 (1991-92).

68. Trubek, *supra* note 61.

69. *Id.*

ineffective—in need of updating to more modern methods and more accurate understandings of the workings of law. As culturally inapposite, these methods were cast as culturally-specific, and the culture they represented was not local society but rather a Europeanized elite. Local society, by not being represented within the legal system—either politically or culturally—was required to resort to paralegal institutions and informal law. In either case, the conceptual slate needed to be wiped clean. The institutional understandings warranted demolition and then alternative reconstruction. Building from the ground up, legal reasoning techniques and thus law schools were central.

Yet, there is no reason the same political and legal results could not have been sought in a different discursive key. David Kennedy has argued that the export of legal realism was, in fact, unnecessary. As a result of French sociological conceptions of law already present and the lack of significant judicial review: “[t]he judicial assertion of rights against postwar development policies was by and large a non-problem.”<sup>70</sup> sociological approaches within the civilian tradition could combat Lochnerism just as well if need be. In addition, the prevailing legal formalism itself might be employed to achieve some of the very same goals. Enacting legislation with constitutional stature or possibly a different formalist interpretation of rights may have been ways of raising state economic regulation over vested legal rights.

However, it may be that different interpretive canons were indeed required to dislodge overwhelmingly entrenched positions. Especially in the realm of legal interpretation, some dominant readings may have been normalized through formalist means to such an extent that alternative formalist analysis or French sociological methods could not have conceivably altered them.<sup>71</sup> Pragmatic analysis could possibly have made a difference and may have been made more acceptable in certain areas of law, for example, executive regulations or economic law. My point, though, is that—despite the possible benefits of exporting U.S.-style legal realism—the discredit heaped on Latin legality is a separate matter.<sup>72</sup> It is not necessary, and in fact counter-productive,<sup>73</sup> to raze Latin American law with indictments of

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70. David Kennedy, *Political Choices and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 104 (David M. Trubek & Alvaro Santos eds., 2006).

71. *Continuing Fictions*, *supra* note 15, at 66-69.

72. See generally Adam Liptak, *A Bit of Thin Skin Peeks Out of the Robes*, *NEW YORK TIMES*, May 7, 2007 (U.S. courts sanction litigants for showing disrespect of their decisions on grounds of judicial independence).

73. See GARDNER, *supra* note 67 (arguing that the push to legal pragmatism, and condemnation of legal formalism, was fueled by American developmentalist's lack of understanding of the necessary formalist dimension of all legal reasoning. By artificially attempting to eliminate formalism, it would leave formal and necessary interpretations of human rights protections at the whim of authoritarian governments).

obsolescence and impropriety in order to effectuate this particular agenda. Even if the implicit calculation was that it was necessary, over time critique has turned into identity.

In the original law and development period, in particular, while the reforms did not “take,” the analysis of Latin dysfunctionality did. The images that have endured are the ill-functioning of Latin legality and its illegitimacy vis-à-vis Latin American peoples. These critiques, though, are predominantly discursive strategies of rejection and denunciation to pave the way for implementing reforms. As such, they were used to clear the decks—to convince Latin American legal operators of the need to transform law school teaching and courses, to justify government bureaucrats in flexible and pragmatic interpretations of legal regulation in furtherance of economic development, and to transform lawyers into policy thinkers and social engineers. This project did not succeed for the many reasons that have been written about elsewhere.<sup>74</sup> More important, however, are the collective diagnoses of original law and development scholars. They are a first example of the discourse discussed in this Article. This whole generation of engagement with Latin America was quite effective in advancing and contributing to the symbol of failure. Presented as development assistance over and above on-going legal political struggles within Latin America, these particular images of law’s irrelevance and institutional inappropriateness have been especially resilient.

### B. *New Law and Development*

By the mid to late 1980s, Latin America’s legal systems were once again on the international development agenda.<sup>75</sup> Transitions to democracy, past human rights abuses, and flagging economies stirred attention.<sup>76</sup> Early U.S.-sponsored programs sought to redress the human rights situation in Central America and the national courts’ many limitations.<sup>77</sup> On the economic front, law and development efforts had never fully disappeared. Actors in various settings continued to assert law’s connection to economic growth and sought to

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74. See, e.g., *id.*; 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, 1101-02 (1974); cf. Brian Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT’L L. 470, 473-76 (1995).

75. See Michael Dodson, *Assessing Judicial Reform in Latin America*, 37 LATIN AM. RES. REV. 2, 202-03 (2002).

76. See 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 5-6 (P. Domingo & R. Sieder eds., 2001).

77. See THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 33-37 (1999); MARGARET POPKIN, *PEACE WITHOUT JUSTICE: OBSTACLES TO BUILDING THE RULE OF LAW IN EL SALVADOR* (2000); Maria Dakolias, *Strategy for Judicial Reform: The Experience of Latin America*, 36 VA. J. INT’L L. 167 (1995); PRILLAMAN, *supra* note 4, at 39.

rework earlier discredited formulas.<sup>78</sup> Neoliberal economics offered a new approach and a different role for law.<sup>79</sup> The World Bank explains that whereas the old movement focused on the state to initiate and promote the process of economic development: “by contrast, today the Bank today sees law as facilitating market transactions by defining property rights, guaranteeing the enforcement of contracts, and maintaining law and order.”<sup>80</sup>

Neo-developmentalists claim to have learned the lessons of their predecessors.<sup>81</sup> With respect to actual projects, one commentator has noted that:

To the extent that components of bilateral projects in different countries are similar, this is the product of the “pragmatic problem solving” approach which underlies AID’s new strategy rather than any grand intellectual design. Further the AOJ (Administration of Justice) project no longer appears to harbor illusions about the superiority of U.S. lawyers or U.S. law.<sup>82</sup>

At their best, neo-developmentalists did not just simplistically endorse importing more developed country law.<sup>83</sup> This is a lesson learned from original law and development and from ample critiques of legal transplantation.<sup>84</sup> Instead, projects have been more concerned with institutional process and procedure,<sup>85</sup> described here as “institutional substitutions.” In this iteration, then, the focus has been less on laws or legal reasoning and more on institutional models.<sup>86</sup> These do not hinge on questions of sweeping versus incremental change or simultaneous versus staggered approaches.<sup>87</sup> Tinkering at the margins has been shown doomed to failure, but then again

78. See Tamanaha, *supra* note 74; Dakolias, *supra* note 77; accord Trubek, *supra* note 61, at 84.

79. THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 1-18 (David M. Trubek & Alvaro Santos eds., 2006).

80. The World Bank Website, Law and Development Movement, <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/LawandDevelopmentMovement.pdf> (last visited May 17, 2007).

81. Dakolias, *supra* note 77; cf. Trubek, *supra* note 61.

82. Alvarez, *supra* note 67, at 30.

83. See HAMMERGREN, *supra* note 6, at 17; PRILLAMAN, *supra* note 4, at 112; Carothers, *supra* note 76, at 5-6.

84. Dakolias, *supra* note 77.

85. Carothers, *supra* note 76, at 7; see also Appendix 5.1, *Inter-American Development Bank: Approved Projects in the Areas of Justice Reform and Citizen Safety*, in RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM 114-141 (Pilar Domingo & Rachel Sieder eds., 2001); Luis Salas, *From Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America*, in RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM 17-46 (Pilar Domingo & Rachel Sieder eds., 2001); Dakolias, *supra* note 77.

86. Stephen Zamora, *Introduction: Judicial Review in Latin America*, 7 SW. J. L. & TRADE AM. 227, 229 (2000).

87. See PRILLAMAN, *supra* note 4, at 112; Dodson, *supra* note 75, at 213-15.

wholesale reform is reportedly not successful either.<sup>88</sup> More generally, projects offer alternate legal designs, often similar to the United States or Europe, but in any case supported by development agencies, i.e., a kind of "U.S.-sphere models."

Significantly, legal transplants are not new in Latin America. They are understood as part of the historical connection between Latin America and Europe, and nowadays the United States, and reflect the purported quality and prestige of these donor systems.<sup>89</sup> It is thus well-accepted that the region's positive law draws from various Western European and North American sources.<sup>90</sup> Some legal scholars describe it as a patchwork of French civil code, U.S. and Spanish constitutional texts, Italian criminal law, German administrative law, and the like. As such, there is a strong tradition of justifying legal change by reference to the law of "source" countries. More precisely, though, legal borrowings are the result of political calculation by those gaining access to state law.<sup>91</sup> Specific transplants can always be connected to particular interests.

In the neo-development round, the transplants offered have been packaged as a set of practices characterized as central to the functioning of the legal system.<sup>92</sup> This development formula and pressure from international trade organizations have come neatly together.<sup>93</sup> The contemporary trade paradigm reinforces the conditions for irresistible convergence on certain models. Indeed, economists and legal policy experts have attempted in recent years to systematize the universal determinants of effective legal institutions.<sup>94</sup> Some openly argue that common law institutions are better at fostering economic development.<sup>95</sup> Others weigh the institutional transplants' adaptability to local conditions more heavily.<sup>96</sup>

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88. Chile's "sweeping reform" success in the 1990's cannot discount the very fortuitous circumstance of seven out of seventeen justices on the Pinochet-dominated High Court passed away or retired. PRILLAMAN, *supra* note 4, at 146.

89. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 21 (2d ed. 1993) (1974).

90. Alejandro Garro, *Shaping the Content of a Basic Course on Latin American Legal Systems*, 19 U. MIAMI INTER-AM. L. REV. 595, 599 (1988).

91. See Jonathon Miller, *A Typology of Legal Transplants: Using Sociology, Legal History, and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 880-81 (2003).

92. Carothers, *supra* note 76, at 15.

93. See Timothy Canova, *Banking and Financial Reforms at the Crossroads of the Neoliberal Contagion*, 14 AM. U. INT'L L. REV. 1571, 1590-91 (1999).

94. See, e.g., EDUARDO BUSCAGLIA & WILLIAM RATLIFF, *LAW AND ECONOMICS IN DEVELOPING COUNTRIES* 44-45 (2000); see UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* 97-99 (1997).

95. La Porta, Lopez de Silanes, Shleifer & Vishny, *Law and Finance*, 106 J. POL. ECON. 6 (1998) (Working Paper No. W5661, July 1996).

96. Daniel Berkowitz, Katherina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*. 1 CID at Harvard University, Working Paper No. 039: Law and Development No. 1 (Mar. 2000).



In the Latin American context, notwithstanding the hiring of local project consultants and assertions of the model's adaptation to local conditions, projects do not address the validity of competing interests.<sup>97</sup> There is little attention to how the mix of policy prescriptions, embedded in a new model, may empower or disempower various local groups and interests. Reform via institutional substitutes has the effect of overshadowing a fuller consideration of the issues involved. In its stead, it provides the formula for rules and conceptions to be inserted in place. Yet, individual projects advance some interests over others, frame problems in one of potentially multiple ways, and ultimately require a real choice in selecting a specific course. Neo-development accounts occlude the existence of alternatives at each level; and in effect, limit the choice to one of legal development over failed law.

As was the case with the original law and development, commentators have already come to question the neo-development program. Even at the World Bank, it is noted that:

Reforms can be either irrelevant or counterproductive. While the current reform packages probably should not be characterized in either fashion, there are reasons for concern. Their authors and supporters, and thus their objectives, are not exactly representative of the respective national populations. The problems they identify are real, but one may ask whether their resolution will make much difference to the bulk of the citizenry.<sup>98</sup>

Skepticism is fueled as reform projects have become a lucrative business for international consultants and Latin American governments alike.<sup>99</sup> Noting the marketing aspects of the "rule of law" campaign at the World Bank, Alvaro Santos argues that "[w]hereas projects of legal and judicial reform have remained more or less stable the rhetoric has shifted often making the same projects look better by the mere shift in language."<sup>100</sup> A number of dissenting opinions are already known.<sup>101</sup> Dezelay and Garth, for example, argue that free market

97. See Langer, *supra* note 62.

98. HAMMERGREN, *supra* note 6, at 26; see also DAVID F. VARELA, GOVERNANCE, LEGAL, AND JUDICIAL REFORM IN THREE ANDEAN COUNTRIES 7, available at <http://info.worldbank.org/etools/docs/library/18492/peru%5F3countries.pdf>.

99. E.g., Luz Estella Nagle, *The Cinderella of Government: Judicial Reform in Latin America*, 30 CAL. W. INT'L L.J. 345, 358 (1999-2000).

100. See THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 266 (David M. Trubek & Alvaro Santos eds., 2006).

101. See, e.g., Jeremy Adelman & Miguel Angel Centeno, *Between Liberalism and Neo-Liberalism: Law's Dilemma in Latin America*, in GLOBAL PRESCRIPTIONS 157 (Yves Dezelay & Bryant G. Garth eds., 2002); Linn Hammergren, *Book Review: Helmke, Gretchen. Courts under Constraints: Judges, Generals and Presidents in Argentina*. Cambridge University Press, 48 LATIN AM. POL. & SOC'Y 2, 194 (2005); Barbosa Moreira, *O futuro da justiça: alguns mitos*, 352 REV. FORENSE: MENSÁRIO NA-

strategies have found sturdier institutional homes than the human rights strategies.<sup>102</sup>

Furthermore, many of Latin America's reformers are on record that not much can realistically be expected to change.<sup>103</sup> Indeed, as envisioned, success is never achievable.<sup>104</sup> Commenting on expectations, Correa Sutil, while generally supportive of current reforms, cautions against excessive optimism.<sup>105</sup> Luis Salas recognizes that questions of "efficiency" and "accessibility" miss the point and blames the interests of the elite for frustrating reforms. More than simply a cynical perspective, however, his acknowledgment sheds light on the instrumental nature of the standard diagnoses.<sup>106</sup> Reform confronts competing interests and conflicting agendas.<sup>107</sup> Thus, the list of functional benefits is not likely to materialize, since they are proxies for a desired political change. Commenting on the neo-development agenda, Prillaman sums up the 1990's:

Where, then, are we left after more than a decade of judicial reforms? . . . The case studies examined here generally suggest that Latin American judiciaries have not come especially far or fared especially well since the end of the military rule; a variety of public opinion data confirms that the public in three of the four case studies is more cynical and more distrustful of the courts than before the reform process began.<sup>108</sup>

Three main areas of neo-development are examined below: judicial reform, property law, and criminal procedure.

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CIONAL DE DOCTRINA, JURISPRUDÊNCIA E LEGISLAÇÃO, 96, 115-22 (2000); Manuel A. Gomez, *When in Rome do as the Romans do: Commercial Disputants in Venezuela and their choices regarding Conflict Resolution Mechanisms and Fora* (on file with author) (presented at Law and Society Association Meeting, May 28, 2004, arguing the ineffectiveness of projects of arbitration centers as part of judicial reform).

102. DEZELAY & GARTH, *supra* note 65, at 57-58.

103. See, e.g., Linn Hammergren, *Fifteen Years of Judicial Reform in Latin America: Where We Are and Why We Haven't Made More Progress*, available at <http://www.pogar.org/publications/judiciary/linn2/latin.pdf>, at 2.

104. See, e.g., William Candelaria, *Democracia contra Liberalismo: Recent Judicial Reform in Mexico*, 108 HARV. L. REV. 1919, 1931 (1995).

105. See Jorge Correa Sutil, *Judicial Reforms in Latin America: Good News for the Underprivileged?*, in (UN)RULE OF LAW, *supra* note 6, at 261.

106. Salas, *supra* note 85, at 30.

107. See ANDRÉ-JEAN ARNAUD, *ENTRE MODERNITÉ ET MONDIALISATION: LEÇONS D'HISTOIRE DE LA PHILOSOPHIE DU DROIT ET DE L'ÉTAT* 102-03 (2e édition Librairie Générale de Droit et de Jurisprudence 2004); Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 286 ("From this perspective [by sectors of the World Bank], when judicial reforms are taking place, the poor are being empowered.").

108. PRILLAMAN, *supra* note 4, at 8.

## 1. Critique of the Judiciary and Reform

Neo-developmentalists first trained their sights on the judiciary. This special focus was the result of various factors.<sup>109</sup> Transitions to democracy in the 1980's opened the door to human rights prosecutions. The international investment community began to press for more legal certainty, reduced transaction costs, and guarantees against legislative and regulatory encroachments.<sup>110</sup> A number of significant local interests also aligned.<sup>111</sup> By the end of the 1990's, judicial reform was well underway in most Latin American countries.<sup>112</sup> The World Bank and IMF, in particular, embraced such reforms:

For several decades the governments of Latin American countries have been committed to "reform," a term which has been used primarily to describe development efforts focused on the macroeconomic agenda. It is becoming increasingly clear, however, that a second generation of reforms is long overdue with particular need for attention to the judicial sector.<sup>113</sup>

The main arguments for judicial reform are functional critiques such as faulty administration of justice, overburdened courts, poor case management, outdated technology, inefficient procedures, and corrupt judiciaries.<sup>114</sup> Additionally, judicial reform is premised on critiques of the legal failure type, as described above.<sup>115</sup> Depictions of Latin America's "un-rule of law" make for a compelling case:<sup>116</sup> the authors of *The Un-rule of Law and the Underprivileged in Latin America*<sup>117</sup> question whether Latin legal systems can fulfill their most basic functions: "No single country can boast a judiciary that is

109. See Joseph R. Thome, *Heading South but Looking North: Globalization and Law Reform in Latin America*, 2000 WIS. L. REV. 691, 702-05 (2000); see also HAMMERGREN, *supra* note 6, at 17.

110. BUSCAGLIA & RATLIFF, *supra* note 6; David Kennedy, *supra* note 70, at 138; but see Rodrigo de la Barra Cousiño, *Legal Reform in Latin America: Legal and Market Relations in Context*, 93 AM. SOC'Y INT'L L. PROC. 233, 233-34 (1999).

111. See Felipe Saez Garcia, *The Nature of Judicial Reform in Latin America and Some Strategic Considerations*, 13 AM. U. INT'L L. REV. 1267, 1267-71 (1998) (identifying other sources of support).

112. Nagle, *supra* note 99, at 346-47.

113. Dakolias, *supra* note 77.

114. HAMMERGREN, *supra* note 6, at 158; PRILLAMAN, *supra* note 4, at 28; Ricardo Haussman, *Lessons from the Political Economy of Other Reforms*, in JUSTICE DELAYED 40-41 (1998).

115. See, e.g., Fernando Carrillo Flórez, *Los retos de la reforma de la justicia en América Latina*, in REFORMAS A LA JUSTICIA PENAL EN LAS AMÉRICAS 5-8 (1999).

116. See generally (UN)RULE OF LAW, *supra* note 6; see also Edgardo Buscaglia, *Obstacles to Judicial Reform in Latin America*, in JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA 18-21 (Edmundo Jarquin & Fernando Carrillo eds., 1998).

117. Despite the book's subtitle, "[a] preliminary and not very optimistic conclusion would be that judicial reforms in Latin America are definitively linked more with the opening of markets than with any other factor." Sutil, *supra* note 105, at 268.

up to the daunting task of 'giving to each his and her own' in the current complicated circumstances of our societies."<sup>118</sup>

Reformers emphasize class and racial bias, i.e., the rich enjoy impunity while the poor cannot get in the courthouse door.<sup>119</sup> This situation, it is asserted, prejudices investors and propertied classes as much as underprivileged citizens.<sup>120</sup> The claim is based on the lack of an essential aspect of a democratic legal system, namely the equal protection of the laws. In their worst light, Latin American judiciaries appear to be the opposite of law.

Examined more closely, certainly, the effort to remedy case backlogs and antiquated technology is to be welcomed. A number of one-time efficiency gains can no doubt be obtained, given adequate attention and resources. Yet, beyond technical improvements, reform is unavoidably a matter of balancing questions of efficiency and rights of due process: not all efficiencies enhance party rights<sup>121</sup> and not all inefficiencies should be eliminated.<sup>122</sup> Some delays must perforce occur.<sup>123</sup> Indeed, they are part of all legal systems.<sup>124</sup> They sometimes serve to encourage consensual settlements by parties to a civil lawsuit, avoiding time-consuming trials and expenditure of resources. Sometimes civil suits may take a backseat to more pressing judicial business, like criminal cases. It is a common situation in courthouses around the world.<sup>125</sup> Furthermore, oral hearings and the adversarial process—discussed below—may not be the best solutions either. Yet, even assuming they provide some improvement, how much change is needed to count as a success is unclear.<sup>126</sup> Dissatis-

118. Juan E. Méndez, *Institutional Reform, Including Access to Justice: Introduction*, in (UN)RULE OF LAW 221-22 (1999).

119. See DE SOTO, *supra* note 6, at 232; Guillermo O'Donnell, *Polyarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion*, in (UN)RULE OF LAW 313 (1999).

120. See DE SOTO, *supra* note 6, at 231-33; HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE*, 160 (Black Swan 2001) (2000).

121. Moreira, *supra* note 101; Carlos Manuel Loperena Ruiz, *Civil Justice Reforms in the Americas: Lessons from Mexico*, 16 FLA. J. INT'L L. 29, 33 (2004).

122. Daniela Vargas, *Civil Justice Reforms in the Americas: Lessons from Brazil*, 16 FLA. J. INT'L L. 19, 25 (2003) ("many think we should pursue fast judgments: 'the faster the better.'" However, this may jeopardize due process of law. Some proceedings do take time. Thus, we should pursue better judgments, not just faster judgments.").

123. Buscaglia, *supra* note 57, at 22-23.

124. Moreira, *supra* note 101. See, e.g., William Glaberson, *How a Reviled Court System Has Outlasted Many Critics*, N.Y. TIMES, Sept. 27, 2006, at A1 (chronicling New York State's lamentable justice courts).

125. See, e.g., CHARLES ALAN WRIGHT, ET AL., 3B FEDERAL PRACTICE & PROCEDURE: CRIMINAL § 831 (3d ed. 2006); John H. Langbein *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 866 n.25 (1985). Indeed, it has been noted that delays can be thought of as a mode of rationing the limited resources of the state. See Daniel D. Ntanda Nsereko, *Prosecutorial Discretion Before National Courts and International Tribunals*, 3 J. INT'L CRIM. JUST. 124, 130-31 (2005).

126. See Santos, *supra* note 107; Linn Hammergren, *Uses of Empirical Research in Refocusing Judicial Reforms: Lessons from Five Countries*, PREM, and the World

faction and any number of delays can no doubt fuel continual calls to reform.

Another argument for judicial reform, the existence of widespread impunity, must also be examined more closely. Specifically, impunity refers to the high rates of criminality perceived by Latin Americans themselves.<sup>127</sup> Without question, lack of significant law enforcement and convictions undermine the coercive effect of law. If citizens expect no real likelihood of punishment for illegal behavior, one of the tools of law enforcement is seriously impaired. Yet, the heavy charge seems rather disproportionate if its only purpose were to computerize court records and reduce backlogs. Its purpose is clearly a change in criminal law and criminal enforcement policies.

Notably, though, the region's history shows that many Latin American governments are not incapable of exercising social control. Periods of authoritarianism demonstrate that repression is not a functional impossibility. Balancing social control and civil liberties is, however, a more delicate mix. As a result, it is clear that no democratic legal system can be expected to attain full enforcement of the laws. Achieving large numbers of prosecutions in conformity with international human rights protections also requires substantial resources. Furthermore, effective levels of punishment and impunity are relative terms. Short of a target, Latin America's criticized low enforcement shapes public dissatisfaction at the same time it supports calls for judicial reform. Absent realistic expectations, however, the impunity rate—whatever it is—will always be a basis for new reforms.<sup>128</sup> This is not to defend impunity or backlogs. It does however point out that both are inherent parts of all legal systems and that they serve some indirect purposes. Additionally, there are other factors affecting crime control such as internalized morality, individuals' degree of risk aversion, social stability, among others. Even in terms of pure law enforcement, the threat of arrest and conviction is always a question of probabilities.

Finally, social justice is another important stated goal. Yet, judicial reform advances a specific jurisprudential logic only indirectly, if at all. And if that logic is merely the more formal and equal application of rules, this may or may not advance the cause.<sup>129</sup> Indeed, substantive equality is a troublesome question for any polity, and

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*Bank 2003*, available at <http://www1.worldbank.org/prem/PREMNotes/premnote65.pdf> (a study of Mexico City's mercantile courts show much lower incidence of delay than imagined); *USAID*, *supra* note 6, at 14-15.

127. See, e.g., Michael R. Pahl, *Wanted: Criminal Justice - Colombia's Adoption of A Prosecutorial System of Criminal Procedure*. 16 *FORDHAM INT'L L.J.* 608, 610 (1993) (arguing the failure of the inquisitorial system in Colombia).

128. See Ricardo Haussman, *Lessons from the Political Economy of Other Reforms*, in *JUSTICE DELAYED* 42, 44 (1998).

129. William Candelaria, *Democracia contra Liberalismo: Recent Judicial Reform in Mexico*, 108 *HARV. L. REV.* 1919, 1934-35 (1995).

attempts at its construction vary from country to country. Making law more democratic is broader than just making adjudication either more formalistic or less so. It raises wide-ranging concerns about rule making, rule application, enforcement, and the financial resources to accomplish them. Moreover, it involves other branches of government as well: executive power, representative law-making, and the regulation of markets no less. It is a running challenge for liberal law in all self-described democratic states.<sup>130</sup> Moreover, critiques of social injustice can just as equally apply to the changes introduced by neo-development reform.

In any case, the express objectives of better judiciaries in furtherance of economic efficiency, increased prosecutions, and social justice all involve policy change.<sup>131</sup> Development reformers for the most part, though, have not presented it in these terms. Rather, their projects suggest a particular alchemy of judicial practice not unlike that in the United States. In this mold, a successful judiciary means in some cases upholding certain policies while in others making policy change.<sup>132</sup> Legal discourse must offer sufficient flexibility to respond to popular agitation, to show some judicial independence, and to change policy directions: at the same time it must uphold certain precepts as strict matters of law or constitutionality. This is actually quite a distinctive balancing act. Its particular mix in the United States corresponds to specific historical experiences, background theories, and cultural practices. Transported abroad, some argue, it will reinforce the role of judges as referees of process mechanically applying the law.<sup>133</sup> Duncan Kennedy, by contrast, notes that the mix of human rights and free market objectives would require that judges be capable of private law policy analysis and public law legal formalism—a practice not unlike that in the global North.<sup>134</sup> In any case, the idea of transplanting this particular “judicial institution” to Latin America underlies much judicial reform.<sup>135</sup> Notably, such policy or political change is not formally part of the mandate of international funding institutions, a fact which may explain why change is pursued in this more indirect way.<sup>136</sup>

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130. *But see Furman v. Georgia*, 408 U.S. 238 (1972) (upholding system of death penalty despite statistical proof of its racially discriminatory application).

131. *See* PRILLAMAN, *supra* note 4, at 26; *see also* Cousiño, *supra* note 110; *see also* Santos, *supra* note 107, at 272 (arguing how World Bank President Ibrahim Shihata’s vision of legal reform melded an institutional vision of an appropriate legal framework with a substantive one requiring certain laws favorable to business).

132. *See* Unger, *supra* note 53.

133. *See, e.g.*, ARNAUD, *supra* note 107, at 81.

134. Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (2006).

135. *Id.*

136. *See, e.g.*, Jonathan L. Hafetz, *Pretrial Detention, Human Rights, and Judicial Reform in Latin America*, 26 *FORDHAM INT’L L.J.* 1754, 1766 (2003).

## 2. Property Rights Critique and Reform

Another important area of neo-development reform is reinforcing property rights.<sup>137</sup> Along with other forms of de-regulation, freedom of contract and protection of private property are staples of the neo-liberal recipe. The specific example considered here is the titling of squatted land and the upgrading of property registries. The foremost authority on the subject is Hernando de Soto. De Soto argues that the poorest in the region are not really poor: it is simply that their assets are not recognized by the formal legal system and are thus not financially productive.<sup>138</sup> His work is a prime example of critiques of legal failure described above. He places the blame for underdevelopment squarely on the law in Latin America. According to him, it fails because of excessive formalism. He echoes original law and development's emphasis on European imitativeness and legal formalism.<sup>139</sup> In that case, formalism was the reason to reform the legal culture, paving the way for more pragmatic legal reasoning against claims of vested rights. Within neo-development, the same critique is used to give greater rights to squatters (mostly on state-owned land), to streamline property registries, and to remove limitations on property rights.

De Soto, in several examples, traces the wrenchingly onerous procedures in Peru for incorporating a business, transferring property, and other transactions.<sup>140</sup> He argues that excessive legal costs and delays produce the informal economy. This informal sector is kept from the more productive economy because of overly formal law. Formal state law in his account is replete with arbitrary discretion, onerous regulatory processes, opportunities for monopolies, and other obstacles.<sup>141</sup> Thus, de Soto urges that the freer rules outside formal law should be brought within the state. He aligns his preferred policies with the people's informality and the existing policies with the elites' formal law:

The migrants (from rural areas to Latin American cities) want to engage in the same activities as formals but, since

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137. Inter-American Development Bank, Dominican Republic Project No. DR 118. Program to Modernize the Real Property Adjudication and Registration System. Loan Proposal (DR-0118). Nov. 27, 1997, p. 12; Inter-American Development Bank Peru Project No. PE 37. Land Titling and Registration Project (PE- 0037). Loan Proposal. May 18, 1998, p. 10; International Bank for Reconstruction and Development, Project No. P039086. Peru – Urban Property Rights Project. Report No. PID6523. May 22, 1998, p. 4; Inter-American Development Bank, Ecuador Project No. EC 191, Rural Land Regularization and Administration Program. Loan Proposal (EC-0191). Dec. 1, 2001, pp. 17-20.

138. DE SOTO, *supra* note 6, at 176.

139. Santos, *supra* note 107, at 294.

140. DE SOTO, *supra* note 6, at 133-51.

141. Cf. BERNARDINO BRAVO LIRA, FUENTES IDEOLÓGICAS Y NORMATIVAS DE LA CODIFICACIÓN LATINO-AMERICANA (1992).

the legal system prevents them from doing so, they have had to invent ways of surviving outside the law. As their numbers and the obstacles they face increase, their institutions and extralegal norms proliferate, creating a massive breach through which an increasingly large proportion of even the traditionally formal population has been escaping from the oppressive world of legality.<sup>142</sup>

Other economic analyses of law adopt this same line, arguing for “bottom-up” rules derived from observed society as the most efficient, demonstrated by the fact that local populations already follow them.<sup>143</sup> This idea of informal norms quickly gives way, however, to support for international best practices—presumably the norms of communities conceptualized as markets. Unlike the 1960-70s’ version of informal law, there are no different local, organic norms of property tenure attemptedly unearthed (not that any could be satisfactorily defended).<sup>144</sup>

In any case, red-tape should surely be eliminated as much as possible, costs reduced, and government made more effective. By casting these negative features as inseparable from government or the public sector, however, de Soto undermines government’s role in overseeing and patrolling private markets, and he foregoes a range of economic policy tools. Certainly, in a particular case, privatization is an option, and in a particular case there may be solid arguments for re-arranging the winners and losers in the economy. However, dismissing the public levers of governance as inalterably unworkable on the basis of, admittedly, ineffective management and labyrinthine procedures simply serves the cause of de-institutionalizing the Latin American public sphere. It paves the way for replacing it with the neo-liberal market.

This more limited range—both in terms of its institutional apparatus and its politics—is favored by de Soto and reformers following him. The political choices that may be expressed through the public realm are substituted by whatever interests may impose themselves in terms of market power, through de-regulation and privatization. De Soto’s formula is no less subject to domination by his country’s elite. Thus, his argument for switching from elite-captured formal law to informal norms is unlikely to have the intended effect of greater substantive equality. The economically powerful—by definition—control the bulk of productive assets as much as, if not more than, they control government posts. In a shift of power from government to markets, the concentration of real wealth and political power

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142. DE SOTO, *supra* note 6, at 232.

143. BUSCAGLIA & RATLIFF, *supra* note 6, at 9-14.

144. See *Continuing Fictions*, *supra* note 15, at 89-92.



is sure to be even more restricted.<sup>145</sup> In fact, by undermining the power of government administration, popular classes may lose a formidable tool for redistributing wealth. One may get a business registered quicker in a privatized registry or a transportation van licensed in half the time; however, once the forces of unbridled competition are unleashed, the business might not be worth registering and the vans might just as quickly be put out of business. Easier entry into productive markets implies fewer health, safety and other government controls. These controls, clearly, amount to increased costs. Once removed, the only limitation on new entrants may be their ability to undercut competitors by demanding less and less government regulation, to the point that any viable enterprise will depend on externalizing to society all but the most unavoidable costs. In the context of open markets, it also favors foreign interests, potentially some of the biggest participants.

This vision projects the informal sector, and its institutionalization by way of legal rules, as a form of utopian escape from the suffocating power of the elite and their formal obstacles to growth and participation in the country's wealth. It is odd to believe, however, that the elites will concentrate less wealth with more freely transferable property and reinforced private rights. Furthermore, it is not necessarily the case that the only way to eliminate red-tape is through wide-scale privatization. Yet, that is the effective thrust of much of this type of failed law discourse. Moreover, legal formalism—the basis of much of the critique—is a necessary feature of all legal systems. In fact, it is a key element for protecting property rights. De Soto himself recognizes as much: “At the moment when the poor become accountable under formal law they will be able to afford low-cost housing and thus escape from the topsy-turvy world of the extra-legal sector.”<sup>146</sup> The question, then, is not the degree of aggregate formalism in the state or the region but rather which formal law is to be recognized. In any case, the critique of legal failure, specifically formalism, simply provides an argument for reform. It facilitates the introduction of a different set of policies on property and state regulation. The neo-development prescription, in broad strokes, reinforces private rights—especially foreign investor rights—over government regulation.<sup>147</sup> This particular mix is the institution of property law supposed to replace the region's *failed* law.

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145. See Sutil, *supra* note 105, at 269.

146. DE SOTO, *supra* note 6, at 206.

147. Jacob S. Lee, *No “Double-Dipping” Allowed: An Analysis of Waste Management, Inc. v. United Mexican States and The Article 1121 Waiver Requirement for Arbitration under Chapter 11 of NAFTA*, 69 *FORDHAM L. REV.* 2655, 2664 (2003) (Chapter 11 provides remedies against the state for foreign investors aggrieved by regulatory takings and replaces the Calvo Doctrine in many Latin American countries against diplomatic intervention for property claims.).

### 3. Criminal Procedure Critique and Reform

Criminal procedure is another neo-development concern.<sup>148</sup> In an era of de-regulation and privatization, law enforcement is one of few remaining areas of acceptable government intervention.<sup>149</sup> Latin America is strongly faulted for leaving too much discretion with the judge and too restricted access to the public.<sup>150</sup> Reforms have mostly taken the form of new prosecutor's offices, oral hearings, and a non-investigative role for judges. This is the model urged on the region.<sup>151</sup> While changes of this type have been implemented in other civil law jurisdictions,<sup>152</sup> they have been extensively programmed in Latin America. Numerous countries have replaced or are now in the process of replacing their codes of criminal procedure.<sup>153</sup> Moreover, procedural reform is supported by a large sector of Latin America's legal community. Indeed, the genesis of these "accusatorial" reforms—funded first by USAID in Guatemala and then across Latin America—has been attributed to Argentine legal scholars critical of "inquisitorialness" and only coincidentally resonant with the U.S. model.<sup>154</sup> Yet, regardless of the nationality of reformers or the network of supporters in Latin America, the basic thought remains the same.

The arguments for reform are premised on a mix of legal and functional critiques. Significantly, pre-reform criminal procedure is associated with authoritarianism and human rights abuses as well as with impunity, lack of enforcement and inefficiency.<sup>155</sup> The various objectives sought are noteworthy, ranging from Chile's priority on civil rights to Colombia's urgency in reducing crime.<sup>156</sup> Regardless,

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148. Carothers, *supra* note 76, at 6.

149. See BUSCAGLIA & RATLIFF, *supra* note 6.

150. Hugo Rojas Blanco, *Reform to the Criminal Justice System in Chile: Evaluation and Challenges*, 2 LOY. INT'L L. REV. 253, 255 (2005); USAID, Colombia Administration of Justice Program (2001-2006) (USAID Contract No. 514-C-00-01-0013-00) Final Report Submitted by Checchi and Company Consulting, Inc. pp. 10-11 (Sept. 15, 2006).

151. For a thorough discussion of the theoretical categories of "adversarial" and "inquisitorial," see Langer, *supra* note 62.

152. See, e.g., William T. Pizzi & Mariangela Montagna, *The Battle To Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT'L L. 429, 430 (2004); see also Mirjan Damaska, *Aspectos globales de la reforma del proceso penal*, in REFORMAS A LA JUSTICIA PENAL EN LAS AMÉRICAS 3-5 (1999).

153. See Pilar Domingo & Rachel Sieder, *Conclusions: Promoting the Rule of Law in Latin America in Rule of Law*, in LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM 145-46 (2001).

154. See Langer, *supra* note 65; but see USAID, *supra* note 18, at 8-9.

155. José Cañerata I. Nores, *La reforma procesal en América Latina*, in REFORMAS A LA JUSTICIA PENAL EN LAS AMÉRICAS 2-3 (1999).

156. Mauricio Duce, *La reforma procesal penal en Chile ¿Buenas noticias para los derechos del imputado?*, in REFORMAS A LA JUSTICIA PENAL EN LAS AMÉRICAS 1-2 (1999); Jaime Giraldo-Angel, *La fiscalía, la defensoría, y la judicatura desde la óptica del derecho penal garantista*, in REFORMAS A LA JUSTICIA PENAL EN LAS AMÉRICAS 1-2 (1999).

reformers find that Latin America's criminal law does not meet necessary requirements of the rule of law.<sup>157</sup> To cite an example:

In our systems routine has replaced consideration of the concrete case and formalism [has replaced] the truth. Each time is more apparent the great abyss that exists between the principles consecrated in the Constitution, in the content of the law, and in the practice of administration of justice. Many criminal reforms have failed or are in the process of succumbing precisely because daily practice has overtaken the text of the law and the principles that inspire it.<sup>158</sup>

Some also stress the criminal system's disproportionate impact on the poor.<sup>159</sup> As a general matter, though, supporters contrast failed "inquisitorialness"—used to describe Latin America's criminal law—with the common law's "accusatorial" enforcement of laws and transparent "orality" of proceedings.<sup>160</sup> The adversarial system is also linked to greater democracy.

This comparative dichotomy is so widely accepted that it is quite uncritically reproduced in legal writing.<sup>161</sup> The epithet "inquisitorial" serves to argue against standing institutions. Indeed, inquisitorialness is particularly associated with Latin America, although it is by no means limited to the region. Its varying features are not unlike procedures elsewhere, especially within the civilian tradition. Law schools are geared to teach students this process. Generations of lawyers have practiced and are well versed in this mode of litigation. Judges have been trying cases in this way their entire professional lives. In addition, it is hard to say in how many ways adjective law inter-relates with substantive law. An across-the-board change of one is sure to have a number of unexpected and unforeseen effects on the other.

The implicit claim is that reforms will correct for legal and functional failures. Yet, the proposed substitute, the adversarial system,

157. See also Pahl, *supra* note 127; see also, Luz Estella Nagle, *Colombia's Faceless Justice: A Necessary Evil, Blind Imposition, or Modern Inquisition?*, 61 U. PITTS. L. REV. 881, 893 (2000).

158. Alvaro Fernandino, *El juez, el fiscal, y el abogado defensor: ¿Funciones nuevas y viejas costumbres?* in REFORMAS A LA JUSTICIA PENAL EN LAS AMÉRICAS 2 (1999), available at [http://www.dplf.org/CJR/span/us\\_cjr98/us\\_cjr98\\_ferrandino.pdf](http://www.dplf.org/CJR/span/us_cjr98/us_cjr98_ferrandino.pdf) (arguing the inferiority of the inquisitorial system's court appointed lawyers compared to the adversarial's public defenders).

159. Langer, *supra* note 65 (comparing USAID and Department of Justice objectives).

160. See, e.g., *Justice for All*, FLA. INT'L UNIV. MAG., Winter 2007, at 10-11 (discussing an example of this discourse's migration to popular accounts).

161. James L. Bischoff, *Reforming the Criminal Procedure System in Latin America*, 9 TEX. HISP. J. INT'L L. & POL'Y 29, 29 (2003); but see Linn Hammergren, *Some Thoughts on the Future Challenge of Justice and Legal Reform in Latin America*, (July 1995), available at [http://pdf.usaid.gov/pdf\\_docs/PNABX343.pdf](http://pdf.usaid.gov/pdf_docs/PNABX343.pdf).

may fare no better. Some of the same problems perceived in the United States may in fact exacerbate issues in Latin America. Its critiques, however, remain mostly unstated. Indeed one would expect that the problems noted by U.S. scholars in the criminal law field would be carefully considered before enacting a similar system abroad. For example, the accusatorial model assumes that the sides be evenly matched. The change thus requires creating or strengthening public defenders, not only prosecutors. Support for the former has been limited—despite the human rights rationale for reforms. Also essential is shifting discretion from the investigating judge to the prosecutor but prosecutorial discretion is an area of considerable concern.<sup>162</sup> Both charging decisions and sentencing recommendations have been the subject of racial bias complaints in some districts in the United States.<sup>163</sup> Prosecutorial misconduct is especially problematic because it is difficult to redress. It is not clear why the same difficulty would not be encountered in Latin America and why this is not obvious to reformers.<sup>164</sup> It is also not clear why prosecutors would do a better job than investigating judges or why they would be subject to fewer corrupting forces. An infelicitous combination of repressive legislature and overzealous prosecutor could facilitate abusive practices, such as multiple charging, coerced pleas, and jail time to avoid compounded indictments.<sup>165</sup> Additionally, conceptualizing the victim as a party to the proceedings may also unduly influence the prosecution.<sup>166</sup> Furthermore, the adversarial system may prompt judges to take less responsibility for defendant rights and civil liberties, leaving that up to defense counsel.<sup>167</sup> Finally, switching from written to predominantly oral procedures will require more time and resources.<sup>168</sup> The result may be less accountability rather than more.

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162. See, e.g., Micah S. Myers, *Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Obligations*, 25 MICH. J. INT'L L. 211, 229 (2003).

163. Deborah Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1211 n.50 (2003).

164. See, e.g., Rogelio Pérez Perdomo, *Una evaluación de la reforma judicial en Venezuela*, in JUDICIAL REFORM IN LATIN AMERICA: AN ASSESSMENT (Peter DeShazo & Juan Enrique Vargas, eds., 2006).

165. See generally, Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims' Rights*, 76 TEMPLE L. REV. 645 (2003) (noting the undue influence of victims' rights concerns on prosecutors).

166. Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741 (2007).

167. See Pahl, *supra* note 127, at 616-17; William T. Pizzi & Mariangela Montagna, *The Battle to Establish an Adversarial Trial System in Italy*, 25 MICH. J. INT'L L. 429, 449 (2004).

168. In Argentina, orality increased delays by a factor of eight and courts accumulated a backlog seven times greater than those using written procedures. PRILLAMAN, *supra* note 4, at 122. *Contra* Rafael Blanco, Richard Hutt & Hugo Rojas, *Reform to the Criminal Justice System in Chile*, 2 LOY. INT'L L. REV. 253 (2005) ("But the commitment to a system of oral argument is essential for the success of judicial reform and especially the reformation of criminal justice.").

Notably, commentators are already critiquing the new accusatorial procedures, enacted in Colombia in 1991, in exactly the same failed terms as before.<sup>169</sup>

As to their effects, reforms advance a specific legal and institutional reconfiguration of criminal law and its enforcement. Yet, other than making broad statements about democracy and human rights, reformers mostly do not consider the multiple policy implications that these shifts entail. More prosecutions and speedier trials mean a different balance between civil liberties and powers of enforcement. Switching control of the criminal investigation from judges of instruction to prosecutors means a re-assignment of resources having a range of possible effects. It may insulate the trial phase from the criminal investigation, but it may not eliminate any of the problems involving discretion, simply shifting it to a different office or to officials with different titles. It may also negatively affect defendants' rights in the investigation phase, previously under the direction of an active judge. In short, pursuing criminal procedure reform as if merely replacing the inquisition with democracy, or some other such generalization, obscures the alternate policies sought to be put in place.

### C. *Academic Technologies Supporting Failed Law*

The reality of Latin America's crippled legal systems is often depicted by emphasizing Latin Americans' opinion of their own law.<sup>170</sup> Surveys show the dismal regard in which citizens hold their national judiciaries.<sup>171</sup> Waves of reform have not changed these opinions at all. Indeed, even after a major structural change to the Supreme Court of El Salvador in the 1990's—in which even leading observers recognized improvements—more Salvadoreans had little or no confidence in the High Court than before.<sup>172</sup> What remained constant, significantly, is the image of failed law and its repeated availability for successive projects.<sup>173</sup> It is not surprising, then, that Salvadoreans express the same reaction no matter what the reforms.

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169. Giraldo-Angel, *supra* note 156, at 1-2; Nagle, *supra* note 157, at 923; see also Miguel Alberto Trejo Escobar, *Los derechos del reo: ¿Una mejor protección?*, in *REFORMAS A LA JUSTICIA PENAL EN LAS AMÉRICAS* (1999) (acknowledging critiques of accusatorial reforms' ability to combat crime).

170. See, e.g., HAMMERGREN, *supra* note 6, at 19; see also ELIANE JUNQUEIRA, *ATRAVÉS DO ESPELHO: ENSAIOS DE SOCIOLOGIA JURÍDICA* (Editora Letra Capital 2001); Jorge Santistevan de Noriega, *Reform of the Latin American Judiciary*, 16 *FLA. J. INT'L L.* 161, 164-65 (2004).

171. See William Ratliff & Edgardo Buscaglia, *NAFTA Revisited: Expectations and Realities: Judicial Reform: The Neglected Priority in Latin America*, 550 *ANNALS* 59, 61 (1997).

172. See PRILLAMAN, *supra* note 4, at 59.

173. See Trubek, *supra* note 68, at 78-79 (Trubek's description of post-reform is practically identical to pre-reform diagnoses).

At times, it may very well seem that law in Latin America represents nothing worth preserving. To be clear, I am in no way suggesting that the “failed law discourse” is part of some international conspiracy to undermine the relative political power of Latin Americans on a geo-political scale. Rather, this failure discourse is so potent because it is widely echoed. Whether understood as bluntly descriptive of an undeniable reality or—more self-reflectively—as an available and effective argumentative tool, the point is that failed law is firmly established as a feature of Latin America’s legal discourse. As such, it is a trope frequently employed in the service of myriad political projects. In this section, several streams of scholarship are discussed which buttress and support this instrumental indictment of Latin American law.

### 1. Law and Economics

Law and economics, as a methodology, has achieved phenomenal success within neo-development.<sup>174</sup> Whether in projects of judicial or legal reform, economic analysis is salient. Its main premise is a diagnosis of governmental failure—more specifically, of public institutions that interfere with market activity. Neo-liberal economics has meant not only a change in policy prescriptions from macro-economic intervention to micro-economic efficiency. It has also cemented a critique of public institutions. Much law-and-economics starts with the presumption that rent-seeking and bureaucratic jockeying are intrinsic to government. Edgardo Buscaglia and William Ratliff note the benefits of their field:

Law and economics have much to contribute to the analysis of how institutions fight these problems and promote economic development. Their comparative advantage over other disciplines is in two areas: (1) they can pinpoint those legal institutions that are imposing high transaction costs on business transactions and (2) they provide ways to empirically identify what types of laws and procedures best promote or impede a competitive economic environment.<sup>175</sup>

The authors contend that this process takes place in the context of mutually-desired legal integration, propelled by economic and political similarities between different countries trading in the same sector.<sup>176</sup> Nonetheless, transplants usually proceed from the more developed to the less developed countries.<sup>177</sup> Law-and-economics pro-

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174. See Buscaglia, *supra* note 57; Dakolias, *supra* note 77.

175. BUSCAGLIA & RATLIFF, *supra* note 6, at 6-7.

176. *Id.* at 41-54.

177. *Id.*; see also MATTEI, *supra* note 94, at 141.

ponents offer a theory for legal transplants: i.e., the comparatively more efficient legal option.<sup>178</sup>

In Latin America, the legal system itself is seen as the greatest obstacle to market growth: excessive regulation and unnecessary formalism are said to deter even the most dogged entrepreneur. High activity in the informal economy is claimed as proof of deregulated markets as the untapped engines for growth. Empirical methods and personal experience help demonstrate the unacceptable delays and red-tape hindering productive commercial activity. Law and economics scholars have been adept at identifying these resistances to reform, described as losses to current operators of the system versus the gains of reform to society at large.<sup>179</sup> The gains are recognized as consisting of mostly long-term benefits to the economy, which are diffuse and do not materialize until a decade or two later. The losses are immediate and fall on the operators of the legal system, characterized as forcing them to forego bribes and other power achieved through ill-functioning and non-transparent apparatuses.<sup>180</sup> Even the long-standing issue of land re-distribution in Latin America has been recast as a matter of legal-bureaucratic inefficiency, i.e., the state's failure to attend to land titling,<sup>181</sup> as if the political questions surrounding it were not main sources of delay. In this way, though, support for judicial reform is presented as democratic, and questions about judicial reform are framed as simply supporting corruption and bad management.

The contribution of law and economics to the rhetoric of failed law—both in terms of public institutions and legal rules—obscures other alternatives to this agenda. The region's detractors base their case on claims to reality or, more scholarly, empirical observation. They argue the very real shortcomings of these systems, their lack of effective enforcement, their susceptibility to corruption, their misalignment with societal characteristics, and their inability to promote economic development. Accepting these arguments as determinative instrumentalizes long-standing concerns of Latin American—if not all legal systems—and advances a program of international institutional substitution that limits the range of political options. Under the optic of law and economics, government institutions are replaced by market-enhancing criteria—laissez-faire by default and U.S.-sphere institutions by proxy—but have little to do with the choices that would be supported by many national societies. If anything, these institutions are reformed consistent with preponderant trans-

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178. MATTEI, *supra* note 94, at 141, 144-45.

179. See, e.g., Barbara Geddes, *A Game Theoretic Model of Reform in Latin American Democracies*, 85 AM. POL. SCI. REV. 371 (1991).

180. See William Ratliff & Edgardo Buscaglia, *Judicial Reform: The Neglected Priority in Latin America*, 550 ANNALS AAPSS 59, 65 (1997).

181. See DE SOTO, *supra* note 6, at 28-29.

national interests. Changes do not address institutional deficiencies from the perspective of democracy or societal participation. Some would argue that they are not even well-calibrated market-supporting responses. To be sure, law and economics is a useful and informative analytical tool. Its effect, however, has been to advance the replacement of Latin America's legal institutions with models favoring free trade and foreign investment in place of all else.

## 2. Comparative Law

Comparativists have also contributed to the narrative of Latin American legal failure. Historical accounts, sociological studies, comparative politics and the like provide the backdrop.<sup>182</sup> These pieces of scholarship approach the subject from different disciplinary perspectives. Yet, they mostly serve to re-affirm the standard law-and-development understanding of law in Latin America. Much comparativism reproduces as objective description the historical tropes deployed in furtherance of or in opposition to particular goals of legal politics in the past.<sup>183</sup> But to judge by such criteria is wrong and misleading and ultimately only a thinly-veiled political exercise. It becomes particularly troubling when the context is proposing reform and best models. If the criteria used are rhetorical devices historically employed to undo established institutions, then surely existing Latin legality will prove grossly deficient. Furthermore, if the hegemonic countries are not critically probed themselves, then the institutions in these countries will certainly appear superior.

In a different context, Lama Abu-Odeh has written about the orientalization of the law of Islamic countries within U.S. legal education and scholarship.<sup>184</sup> There is a notable similarity here. She describes a "fantasy effect" created by the almost exclusive attention on "Islamic law" to the detriment of the actual law of Islamic states. The latter more richly consists of Western transplants, influences, and new thinking. However, U.S. scholars hardly focus on these, drawn instead to overestimate the reach of religious Shari'a law. In somewhat parallel fashion, "Latin American law" is orientalized by its equation with legal failure. Many of the yardsticks selected by comparativists are tantamount to such an orientalization. From pointing to an inordinate number of constitutions to emphasizing the plurality

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182. KENNETH L. KARST, ET AL., *THE EVOLUTION OF THE LAW IN THE BARRIOS OF CARACAS* (1973); Joel G. Verner, *The Independence of Supreme Courts in Latin America: A Review of the Literature*, 16 J. LATIN AM. STUDIES 2, 463-506 (1984); see generally MIROW, *supra* note 38; Purcell & Purcell, *supra* note 35, at 220; see also Karen L. Remmer, *New Wine or Old Bottlenecks? The Study of Latin American Democracy*, 23 COMP. POL. 479, 479 (1991); Keith S. Rosenz, *Brazil's Legal Culture: The Jeito Re-Visited*, 1 FLA. INT'L L.J. 1, 5-16 (1984).

183. See Heller, *supra* note 17, at 142, 155-56.

184. Lama Abu-Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789, 806-08 (2004).



of informal norms, a number of legal scholars highlight criteria purporting to show the failings of law. Typically, contingent legal constructs are employed in order to judge. Moreover, no overall assignment of success or failure fits the complex social system that is law in Latin America. Nonetheless, the set of criteria and critiques cast Latin American legal systems as overall inferior. Refusing to acquire greater self-consciousness about these criteria has the effect of further discrediting the Latin American legal sphere.

Rejecting common comparative practices, Diego Lopez-Medina reframes Latin America's position with respect to the international jurisprudential economy.<sup>185</sup> Typically, the Latin end is conceptualized as consisting of merely copying originals produced in the West (or North) adjusted for differences of local material conditions. Whether hailing from Europe or the United States, the concept of legal transplant itself evokes this limited agency. It extends to the choice of donor countries, the particular sources selected, the faithfulness of the copy, its adaptability to local conditions, and not much else. Lopez-Medina explains, instead, contexts of production and contexts of reception. Significantly, he demonstrates how contexts of reception are forums for production as well, based not only on material but also on epistemic differences. As such, unfaithful copies, misinterpretations and misreadings of sources are not instances of failure but in many ways purposive and deliberate acts of legal politics and of the production of meaning.

Ugo Mattei also reminds us of the hierarchical context in which these relationships of reception and production occur.<sup>186</sup> Specifically, he describes U.S. transnational legal relations as a vehicle for imperialism. As such, the hegemony of U.S. interests cannot be exorcised from local contexts. Indeed, Mattei's contribution reveals the multiple forms which legal imperialism can take. While unfaithful copies, misinterpretations, misreadings, and native consultants may appear to demonstrate local agency, they can actually serve any number of interests. Thus, neo-liberalism can be advanced by a misreading or local variation of law just as much as by a faithful copy of U.S. law, and because of the hegemony of U.S. interests such neo-liberal or other favored policies are likely the result in contexts of internationally-backed reform.

Continuing this same line of analysis here, development legal change does not escape this hierarchical transnationality. Quite to the contrary, the failed law image cast on the Latin American sphere permanently disfavors locally enacted legal options—whatever their form or societal politics at any one time. In this way, Latin America's

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185. Diego E. López-Medina, S.J.D. Dissertation Harvard Law School, 2001 (on file with author).

186. Mattei, *supra* note 12.

failed law is the discursive manifestation of hegemony, not represented as the superior power, politics, or functioning of law in the United States or Europe, but as the inferiority of anything else.

### 3. Anti-Corruption Specialists

Neo-developmentalists significantly point to widespread corruption, rent-seeking and lack of transparency as reasons for reform.<sup>187</sup> From privatizing state industries to adopting oral judicial procedures, reforms are premised—at least partially—on anti-corruption grounds. Eliminating corruption and making government more transparent are thus additional reasons for replacing Latin America's faulty institutions. In a way, the relationship between neo-development and anti-corruption is axiomatic: smaller government, less regulation and fewer state industries means fewer opportunities for public sector corruption. Additionally, the meaning of corruption has been extended to include a range of opaque local practices that potentially disadvantage foreign investors.<sup>188</sup> Statistical correlation of general levels of corruption to inadequate development and limited democracy further reinforces the equation.<sup>189</sup> Indeed, some economists maintain that national wealth is directly affected by corruption with a proportional reduction in foreign investment.<sup>190</sup> With this, the anti-corruption concern has firmly entered the mainstream of trade and assistance-driven law reform.

Surely, theft and conversion are reprehensible. If nothing else, stealing by officials undermines the legitimacy of institutions and the credibility of government action. My comments here are not meant to downplay this fact nor its existence within Latin America's legal institutions.<sup>191</sup> Thus, all tools available should be employed to improve our systems of governance.<sup>192</sup> It would not be surprising, either, that more effort and more resources may be needed in Latin America to reach acceptable levels of law enforcement. Yet, the definition of corruption has historically been the subject of debate and cultural difference. It can vary depending on choices of classification. And, it can potentially stretch to a wide range of discretionary authority. Practices perceived as unethical or illegal in one society (or opposed by certain economic interests) may be acceptable to others.

Even if a universal definition were possible, corruption's relationship to development is also disputed. In the 1960's when the topic

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187. Alberto Ades & Rafael di Tella, *The New Economics of Corruption: A Survey and Some New Results*, in *COMBATING CORRUPTION IN LATIN AMERICA* 20 (2000).

188. Kennedy, *supra* note 21, at 460-62.

189. See *COMBATING CORRUPTION IN LATIN AMERICA* 2 (2000).

190. Ades & di Tella, *supra* note 186, at 20.

191. See, e.g., Juan Forero, *Latin America Graft and Poverty Trying Patience with Democracy*, *N.Y. TIMES*, June 24, 2004, at A1.

192. Ades & di Tella, *supra* note 186, at 35-37.

began to be studied, not all forms of corruption were perceived as negative. Some scholars believed certain questionable practices acted as the oil making bureaucratic government agencies more flexible.<sup>193</sup> Still, in recent years its detrimental effects have been more heavily emphasized. Significantly in the United States, Watergate heightened awareness and led ultimately to the passage of the 1977 Foreign Corrupt Practices Act, reaching U.S. corporate dealings with foreign officials. The focus on public corruption greatly intensified with neo-development. In the 1990's, specialized NGO's formed to address this problem.<sup>194</sup> The Organization of American States sprung into action with an Inter-American Convention Against Corruption in 1996. Multi-lateral financial institutions incorporated fighting corruption as a central focus of their development-related activity.<sup>195</sup>

Still, some observers maintain that corruption may or may not have much impact on economic growth.<sup>196</sup> In this latter case, the anti-corruption campaign, as an economic matter, may simply serve to oppose certain economic policies and discretionary practices. The alternatives may not be any more development-producing than current practices. The process, though, significantly stigmatizes Latin American legal institutions.

Additionally, condemning specific instances of corruption is different from discursively using the idea of corruption as a basis for the neo-development program. To conclude from broad assertions about high levels of corruption that existing Latin American practices should not be considered, that wholesale substitutes can be easily and automatically made effective, and that this is a relatively neutral exercise in political terms, fails to appreciate the ideological use of this rhetoric. Neo-development itself can be linked to new forms of corruption.<sup>197</sup> Charges against prominent neo-liberals, such as Carlos Salinas de Gortari in Mexico, Fernando Collor de Mello in Brazil and Carlos Menem in Argentina, are only some of the more famous cases. The sharp shift from state-ownership to private property has revealed vast opportunities for politicians disposed to wrong-doing.

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193. Nathaniel Leff, *Economic Development through Bureaucratic Corruption*, AM. BEHAV. SCI., 1964, at 8-14.

194. Nancy Zucker Boswell, *Combating Corruption: Focus on Latin America*, 3 SW. J.L. & TRADE AM. 179, 187-88 (1996).

195. Ibrahim F.I. Shihata, *The Role of the World Bank in Combating Corruption*, in COMBATING CORRUPTION IN LATIN AMERICA 205-09 (2000); Stephen Quick, *Inter-American Development Bank Initiatives against Corruption*, in COMBATING CORRUPTION IN LATIN AMERICA 214-18 (2000).

196. See, e.g., John K.M. Ohnesorge, *Ratcheting up the Anti-Corruption Drive: Could a Look at Recent History Cure a Case of Theory-Determinism?* 14 CONN. J. INT'L L. 467, 471 (1999); see also Paul B. Stephan, *Rationality and Corruption in the Post-Socialist World*, 14 CONN. J. INT'L L. 533 (1999).

197. See Susan Rose-Ackerman, *Is Leaner Government Necessarily Cleaner Government?* in COMBATING CORRUPTION IN LATIN AMERICA 87-104 (2000).

As such, neo-development reform—while assisted rhetorically by its anti-corruption punch—is subject to this same extended critique.

#### IV. ALTERNATIVES OF LAW IN LATIN AMERICA

By equating the criteria of failure with Latin American legal institutions, the latter are deeply discredited.<sup>198</sup> The interests they may express and the political forces they may represent thus have little standing. They may find some expression through another route, as outright political positions for example. However, positions expressed as law or legal institutions carry a different weight. Within crucial debates over the rules of the game, they may be more easily accepted as part of the configuration of common institutions. The discursive practice of denouncing Latin American legal institutionalism and the continuing perception of its intrinsic inferiority, however, severely limit the influence of Latin America's law.

My argument here is that the options embodied in pre-neoliberal law are worth considering. They include the particular combinations of interests and policies represented by law. They can be seen as an existing stock of "*acquis légaux*" whose selective and partial preservation may offer benefits.<sup>199</sup> This is not to over-emphasize the concept of historically-acquired political or institutional gains: these cannot be guaranteed over time in any definitive way.<sup>200</sup> By invoking the pre-reform options in the context of development reform, however, attention is drawn to the political choices that are being made. It points out that alternatives may be available and that one is selected over another.

The *acquis légaux* concept identifies state law as simply another source of politico-legal options for policy analysis and rule-making.<sup>201</sup> To the extent law continues to be differentiated from politics, it thus provides an alternative range and quality of options.<sup>202</sup> It may signify majoritarian interests enshrined in legislation, deeper commitments compared to simply political positions, or they may be happenstance prior transplants or the products of pork barrel politics. It matters

198. See ARNAUD, *supra* note 107, at 293.

199. Derivative of the terms "*acquis sociaux*," and also "*acquis communautaire*" which can be translated as "social gains" and "community gains," the latter in the context of the European Union. See Antje Wiener, *The Embedded Acquis Communautaire: Transmission Belt and Prism of New Governance*, 4 EUR. L.J. 3, 299-303 (1998).

200. See generally M. Noblecourt, *Acquis Sociaux: toujours moins!*, Le Monde Affaires, Supplément au No. 13066 (Jan. 31, 1987) (Fr.).

201. See, e.g., Kimberle Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1382, 1385 (1988) (critical race scholarship on the benefits of liberal legal rights.).

202. See generally Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988) (defending an internally-constructed legal formalism).

little for our purposes here. They are all part of the corpus of national law and legal institutions. Additionally, the question of legal capital must be approached situationally—case by case for specific reforms. In a certain case, it may include accrued knowledge and expertise in certain institutional forms or, in a different case, the benefits of judges of instruction in protecting the civil liberties of the accused.

This is not a blind defense of existing doctrines across the board or a conservative point about preserving institutions for their own sake. Also, this argument is not rooted in some romantic or nationalist ideal of tradition. I do not propose that national law of Latin American states should be preserved on some strictly cultural grounds, such as their “Mexicanness” or other national character, as has been argued by some.<sup>203</sup> Moreover, this is not an identity-based project to rehabilitate the notion of a regional Latin American Law or national law in Latin America.<sup>204</sup> And, needless to say, it is not meant to champion the European character of Latin American law.<sup>205</sup> Europeanness in Latin America—as I have argued elsewhere—goes well beyond formal similarities, cultural ties, or levels of penetration of foreign law; it is primarily a discourse of legitimation.<sup>206</sup> In any case, none of these can provide the theoretical basis for the *acquis légaux*. Rather, as long as law and politics are perceived qualitatively distinct, then it is appropriate to consider each in turn, not as unrelated but as operating simultaneously in different fields.

Critics may still question the value of any pre-reform law from a political perspective. Latin American legal entities suffer from the same political and social history of Latin American nations. They have experienced periods of autocratic and dictatorial rule. Constitutional process has not been respected at times in effectuating transitions of power. Corruption is a long-standing concern, as noted above.<sup>207</sup> Governments have often times not respected the human rights of their citizens.<sup>208</sup> Extreme instances such as torture and disappearances have marred the national histories of some countries.<sup>209</sup> Additionally, many states still suffer from the relative disenfranchisement of a significant portion of their populations due to socio-economic, racial or other disparities. In sum, the legal system

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203. Zamora, *supra* note 55.

204. See Jorge L. Esquirol, *Alejandro Álvarez's Latin American Law: A Question of Identity*, 19 LEIDEN J. INT'L L. 4, 931 (2006).

205. See E.S. Zeballos, *The Evolution of Law in Latin America*, 9 A.B.A. J. 633, 635 (1923).

206. Esquirol, *supra* note 15.

207. Angel R. Oquendo, *Corruption and Legitimation Crises in Latin America*, 14 CONN. J. INT'L L. 475, 493 (1999).

208. Thomas C. Wright, *Human Rights in Latin America: History and Projections for the Twenty-first Century*, 30 CAL. W. INT'L L.J. 303, 317-20 (2000).

209. *Id.*

can certainly be criticized, and enforcement of the laws may well be deemed insufficient.

Then again, in the 1930s to 1960s, Latin America witnessed a significant expression of social rights, re-distributional policies, and public welfare-directed regulation.<sup>210</sup> While the same cannot be said for authoritarian periods, even these less noble times did generate some defensible public policies. Transitions to democracy and the 1990's brought new developments in alternative law and critical approaches by judges and scholars.<sup>211</sup> More recently, rising social demands have challenged the orthodox neo-development formulas. Taken together, these are legal developments which offer a different set of options and elements for reform.<sup>212</sup> In short, law in Latin America cannot be simplistically dismissed as embodying a single ideology or class bias. In fact, quite the opposite is true.

In the paragraphs below, I focus on a very broad and incomplete sketch of some examples of *acquis légaux*. The analysis is not meant to suggest a stock of positive features that can be weighed against a charge of failed law—as if on some imagined scale. Rather, it highlights some of the legal capital, or *acquis légaux*, in Latin America, which should not be so easily dismissed. The examples below are very piecemeal: labor rights, the social function doctrine and constitutional rights. My hope, though, is that this provocation helps to open the field to a more transparent and democratic comparative discussion.

### A. Labor Law

Labor law enjoys a quite distinguished pedigree in Latin America.<sup>213</sup> The labor movements in countries such as Mexico and Argentina have a distinctive place in the histories of those nations.<sup>214</sup> The Mexican revolution of 1910, for example, heralded a victory for urban labor and agricultural workers, enshrined in the Mexican Con-

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210. Adelman & Centeno, *supra* note 101, at 148-52; see generally THE CAMBRIDGE HISTORY OF LATIN AMERICA: VOLUME 8, LATIN AMERICA SINCE 1930: SPANISH SOUTH AMERICA (1991).

211. See LEDIO ROSA DE ANDRADE, INTRODUCAO AO DIREITO ALTERNATIVO BRASILEIRO 112 (Livriario do Advogado Porto Alegre 1996) (citing the leaders of the Brazilian alternative law movement).

212. For those concerned with theories of legitimation, the question of legitimacy is equally relevant with respect to reforms. See TAMANAHA, *supra* note 23, at 38; see also, Heller, *supra* note 17, at 181, n.94 ("In poststructuralist understanding . . . it is not yet evident what such an apt form of delegitimation would accomplish." If anything, he continues "[d]elegitimation . . . would represent an assault on the self-characterization of members of a theory elite that could create internal confusion and yield some measure of satisfaction to their irreverent colleagues.").

213. See, e.g., Arturo S. Bronstein, *Labour Law Reform in Latin America: Between State Protection and Flexibility*, 136 INT'L LAB. REV. 1, 6-7 n.3 (1997).

214. *Id.* at 7.

stitution of 1917.<sup>215</sup> Mexican federal labor laws enacted in 1931 are the repository of those political struggles: "On paper, Mexican labor law is even more protective of workers' rights than U.S. labor laws."<sup>216</sup>

At the same time, the Mexican labor regime has notable and specific deficiencies. The labor movement was co-opted by the ruling party, the Partido Revolucionario Institucional.<sup>217</sup> It is limited to certain sectors of the economy. And it benefits mostly labor unions connected to the government. In short, it is subject to critique from both the left and the right. At the same time, it offers an alternative arrangement of labor regulation, leading Zamora to the view that "[t]he PRI [Partido Revolucionario Institucional] has been successful in providing sufficient benefits to enough workers—benefits such as public health services, public housing programs and wage increases to prevent widespread disturbances."<sup>218</sup> In any case, the Mexican laws are an important model throughout Latin America.<sup>219</sup> In Argentina, for example, the labor movement accompanied a period of substantial industrialization and had the power to seat presidents. Some of its considerable gains, even to this day, are still incorporated as part of the country's legal legacy. Many Latin countries created special labor codes and labor courts to uphold workers rights.<sup>220</sup> Venezuela instituted profit sharing in its labor legislation of 1947 for workers in any business or enterprise, amounting to at least ten percent of corporate profits.<sup>221</sup>

New law and development, inter alia, has begun to erase these legal structures.<sup>222</sup> Very directly, labor legislation is attacked as re-

215. *But see* Milo A. Borges, *Labor Relations in Latin America*, 17 OHIO ST. L.J. 290, 290 (1956).

216. Zamora, *supra* note 55, at 430-33.

217. The Partido Revolucionario Institucional [PRI] dominated the one-party political system of Mexico since the revolution of 1910 and, with the advent of free elections, continued to win until losing the presidency in 2000. Ranko Shiraki Oliver, *In the Twelve Years of NAFTA, the Treaty Gave to Me . . . What Exactly? An Assessment of Economic, Social and Political Developments in Mexico Since 1994 and Their Impact on Mexican Immigration into the United States*, 10 HARV. LATINO L. REV. 53, 115 (2007).

218. Zamora, *supra* note 55, at 432.

219. Rafael Albuquerque, *Minimum Wage Administration in Latin America*, 6 COMP. LAB. L. 57, 59 (1984).

220. *Id.*; W. Gary Vause & Dulcina de Holanda Palhano, *Labor Law in Brazil and the United States - Statism and Classical Liberalism Compared*, 33 COLUM. J. TRANS-NAT'L L. 583, 597-98 (1995).

221. Borges, *supra* note 215, at 292.

222. JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 4-8 (2002); *see also* Wright, *supra* note 208, at 320 ("The results of these economic problems and neoliberal policies have been a dramatic erosion of the economic and social conquests that the Latin American middle and working class, and secondarily the rural poor, had achieved throughout much of the twentieth century."); *see also* Alejandra Cox Edwards, *Labor Market Reforms and the Modernization of Labor Relations in Chile*, 6 SW. J. L. & TRADE AM. 285, 285-86 (1999).

sponsible for "rigidities" in the labor market that are said to impede development.<sup>223</sup> These rigidities are nothing other than legally-acquired labor rights. They are opposed, plainly enough, because they increase costs. Across Latin America labor rights advocates are on the defensive with reformers demanding more marketplace flexibility. Flexibility in this context means circumventing established rights by legalizing special employment relationships, offering fewer benefits, and less worker protection.

Less directly, but no less effectively, the job of dismantling labor rights is also assisted by the widely-entertained deficiencies associated with Latin American law. Indeed, it is almost impossible to cite the values enshrined in the labor legislation of Latin American states, without hearing, before finishing one's sentence: ". . . but it's not enforced."<sup>224</sup> One of the main objectives of this article is to hold that irresistible critique at bay. The point of this article is not to rehash these undeniable reservations. It is to emphasize the very existence of legal-political values within national legislation in Latin America. A different form of development could lead instead to their more widespread effectiveness and enforcement.

### B. *Social Function Doctrine*

Agrarian reform, as generally described, has been a centerpiece of state policy in various Latin American states throughout the past century. Its objective is to redistribute large and unproductive land holdings to landless farmers. Agrarian reform is a reaction to the large concentrations of land traditionally held by a minority of individuals in Latin America. It responds to both social justice issues as well as to land productivity concerns. It was given a much needed boost by U.S. sponsorship of the Alliance for Progress in the 1960's.<sup>225</sup> Foreign involvement in this area at the time is an example of a progressive goal assisted through internationalism.

The most notable agrarian reform programs in Latin America occurred in Mexico and Bolivia, after respective revolutions in 1910 and 1952. Cuba stands out as an extreme example of radical land redistribution as a result of the 1959 revolution. Its violence inspired a new wave of more moderate agrarian reform initiatives (as opposed to revolution) in Latin America, notably in Brazil, Chile, and Vene-

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223. See Bronstein, *supra* note 213, at 26 ("The evidence seems to suggest that the justification for introducing flexibility to Latin American labour markets was based on preconceived ideas than on an empirically proven case, and perhaps its main motive was the need, following on from adjustments in the economy, to effect a shift in the prevailing ideological climate.")

224. Adriana Marshall, *Economic Consequences of Labour Protection Regimes in Latin America*, 133 INT'L LAB. REV. 55, 67 (1994).

225. Frances M. Foland, *Agrarian Reform in Latin America*, 48 FOREIGN AFF. 97, 97 (1970).



zuela.<sup>226</sup> These initiatives were supported by the United States at the time, as another bulwark against communism in the Americas.<sup>227</sup>

The ambitious project of agrarian reform in all countries undertaking it has been subject to significant setbacks and delays. Numerous hurdles have prevented the actual implementation of much redistribution. For example, delays are attendant upon disagreements over the appropriate size of tracts subject to expropriation as well as to the appropriate size of awards of land to be redistributed. Questions revolving around just compensation, state funding, and the speed and effectiveness of such programs have abounded. The relevance of agrarian reform initiatives is not limited to twentieth century politics. Currently, a number of Latin American countries have well-organized and often militant landless and homeless groups, demanding the swift implementation of agrarian and urban land redistribution. The most visible example is the "Sem Terra" (landless) movement in Brazil, but it is by no means the only such effort. Such movements are making use of the social function doctrine in the courts to defend their organized invasions of unproductive land.<sup>228</sup>

Indeed, the central tension is the opposition between private property rights and the social function of property. The former preserves the sanctity of private property and would cripple agrarian reform if land-owners were unwilling to sell their lands. The latter limits the inviolability of private property under certain conditions subject to due process. Forced sales or outright expropriation would be permissible for public purposes, including the redistribution of wealth and the productive utilization of land. A recent law review article delineates the relevance of "social function" doctrines permeating property law in Latin America as opposed to the more absolute rights notion characteristic of U.S. law.<sup>229</sup> The authors note that: "The doctrine would appear to have weathered a trend toward neo-liberal governance in Latin America, and found new life in recently elected populist governments in Brazil, Bolivia, and Venezuela."<sup>230</sup> They also note, however, the practical elimination in Peru and partial erosion in Mexico of social function doctrines as a result of neo-liberal reforms.<sup>231</sup>

Yet, the inclusion in national laws of agrarian reform as state policy is significant. While nowhere near complete or broadly effec-

226. See, e.g., Roy L. Prosterman, *Land Reform in Latin America: How to Have a Revolution without a Revolution*, 42 WASH. L. REV. 189, 194-95 (1967).

227. Foland, *supra* note 225.

228. See Thomas T. Ankersen & Thomas Ruppert, *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19 TUL. ENVTL. L.J. 69, 102-03 (2006).

229. *Id.*, at 99-100, 102.

230. See *id.* at 106.

231. *Id.* at 117-118.

tive, it is a clear expression of a legal value.<sup>232</sup> It is also a concept around which people in Latin America continue to mobilize. Its place within legislation and jurisprudence affirms a certain conception of the nature of private property. Specifically, it endorses a balancing approach to property rights. While private property is not stripped of its status as a protected right, it is considered in light of its social function and may be subject to redistribution, providing for appropriate guarantees of compensation and process. This conception of property is different from the neo-liberal version of property rights. It is also quite different from the level of immunity for private property included under U.S. trade agreements with Latin American states.

### C. *Constitutional Rights*

Economic and social rights are part of the law in many Latin states.<sup>233</sup> This presents a stark contrast to their position in the United States, where only civil and political rights are effectively recognized.<sup>234</sup> Indeed, so-called second generation human rights have consistently played a role within the legal consciousness of Latin Americans and, despite Cold War politics, were never fully disconnected from civil and political rights. The Inter-American human rights system is a case in point.<sup>235</sup> The American Declaration of Rights and Duties of 1948 is a forerunner in the field, slightly predating the UN's Universal Declaration of Human Rights that same year.<sup>236</sup> A regional human rights organization, with its Commission in Washington, D.C. and Court in San Jose, Costa Rica, takes up individual complaints based on violations of inter-American human rights instruments. Unlike the United States, most Latin American states have ratified the International Covenant on Economic, Social and Cultural Rights, and signed or ratified the San Salvador Protocol to the American Convention on Human Rights. The Inter-American Court is widely regarded as a leader in human rights jurisprudence. Notably, the United States has not ratified the American Convention or submitted to the Inter-American Court.

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232. VÍCTOR BRETÓN SOLO DE ZALDÍVAR, *¿LA TIERRA PARA QUIEN LA TRABAJA? REFORMA AGRARIA, DESARROLLO RURAL Y CRISIS DEL CAMPESINADO EN AMÉRICA LATINA (1950-1990)* (Edicions de la Universitat de Lleida Espai/Temps 1994).

233. See OQUENDO, *supra* note 2, at 324 (Oquendo's book contains other examples. Hopefully more such research will begin to inform the agenda of Latin Americanists.).

234. Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT'L L. REV. 35, 46 (2006) ("Today the United States refuses to acknowledge socio-economic rights, not only as being legally enforceable, but as constituting human rights at all.").

235. See Lila García, *Reconstruyendo el Núcleo de Derechos de la Persona Humana: Aportes para la Justiciabilidad de, También, los Derechos Económicos, Sociales, y Culturales*, 22 AM. U. INT'L L. REV. 65, 73-78 (2006).

236. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 140-41 (2001).

A concrete example is the right to health.<sup>237</sup> Angel Oquendo reports that all Latin American constitutions include such a right and explains how plaintiffs have used it successfully to sue a number of Latin governments to provide HIV/AIDS treatment.<sup>238</sup> In Brazil, as a result of such lawsuits, state authorities responded with a comprehensive national health program to distribute HIV/AIDS treatment across the country. Indeed, in terms of constitutional remedies, Latin American states have been at the forefront of extending individual standing for actions to enforce fundamental rights and liberties. Mexico is a particular case in point. Its “*amparo*” jurisdiction developed in the mid-nineteenth century and took its modern form after the Mexican revolution of 1910. It has been adopted throughout the region with calls for a uniform Latin American law of “*amparo*”<sup>239</sup> The *amparo*, also called “*tutela*” in some countries and “*mandado de segurança*” in Brazil, is an available cause of action by affected parties against state actors for violations of constitutional rights. In some countries, *amparo* is used as an indirect form of constitutional review. It extends well beyond habeas corpus in its range of protected rights although the respective decisions mostly have no *erga omnes* effect. In any case, it has been noted that “[t]he introduction of ‘guarantees’ to protect fundamental rights and liberties has been a gradual victory of Constitutional Law in Latin America . . . [t]he *amparo* is Mexico’s contribution to the dissemination of civil liberties.”<sup>240</sup> It has played an important role in developing constitutional rights.

The impact of neo-development in this area is uncertain. While some reforms fund the judiciary, at the same time acceptable judicial practice may, in fact, limit the judiciary. For example, how the line is drawn between judicial activism and judicial propriety may restrict the reach of social and economic rights cases. Relatedly, the neo-development conception of minimal government may limit the administrative and institutionalized responses available to generalize the benefits of any such advances. In Brazil, for example, the government program for HIV/AIDS treatment, implemented as a consequence of leading judicial action, has been subjected to just such intense pressures. Thus, reforms may work simply to reinforce private property and first generation rights. A course in which the fuller range of guarantees develops in tandem with general constitutional

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237. See also Alcedo Fuentes & Ivan Carlos, *Protegiendo el Derecho a la Salud en el Sistema Interamericano de Derechos Humanos: Estudio Comparativo sobre su justiciabilidad desde un punto de vista sustantivo y procesal*, 22 AM. U. INT’L L. REV. 7, 12-15 (2006).

238. OQUENDO, *supra* note 2, at 355.

239. Pedro Pablo Camargo, *The Claim of “Amparo” in Mexico: Constitutional Protection of Human Rights*, 6 CAL. W. L. REV. 201, 212-14 (1969-70) (literally translates as “shelter”).

240. *Id.* at 202, 217.

remedies is quite uncertain and potentially liable to be rejected as another example of Latin America's failed law.

## V. CONCLUSION

The reform of law and legal institutions in Latin America under the United States sphere of influence has been advanced in a rather peculiar way. In arguing for new and different policy or political directions, existing practices and entities are rather routinely disparaged. They are cast as unworkable and effectively branded as failed. A number of discursive images are typically used, e.g., obsolescence, inflexibility, cultural inappropriateness, economic inefficiency, and corruption. Surely all legal systems within the region reveal the partial truth of these assertions, some more than others. More significantly, these characteristics are also common to all of the world's legal systems to some degree.

However, reformers in or concerned with Latin America have chosen to condemn entire segments or the legal system as a whole in order to effectuate change. That is, characterizations of failure are used to replace entire areas of Latin American institutionalities with different models, systems, and traditions. Rather than recognize specific policies or politics that are advanced by existing legality or by their opposition to them, reformers have chosen to frame their projects in terms of the broad deficiencies of the system as a whole.

In so doing, the image of failed law is the fiction upon which post-war U.S.-Latin American legal relations are conducted. Rather than identifying the different interests at stake, the charge of failure is pervasive. The preference is understandable. If those standing to lose were to recognize their interests in existing arrangements more clearly, they would possibly be more entrenched in their positions. This more opaque technique, however, disproportionately disempowers those disfavored by development policies. The *acquis légaux* of existing laws and institutions is easily cleared away—with not so much as an airing. By contrast, the purported failed law repeatedly remains, reflecting the same negative features previously diagnosed.

The failed law fiction as the facilitating discourse of law reform in Latin America is counter-productive. It undermines more than it advances the progress of law in Latin America. Change continually rides on the endemic pathology of Latin American institutions. Good results, however, ultimately depend on those continuously-discredited entities. It is like repeatedly attempting to build a new house while striking repeated blows at its foundations.