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Introduction

Latin America is plagued with the world's highest homicide rates and with failing judiciaries widely perceived to be nobody's friend. It is a region where the law is in crisis.[1] But it wasn't always like that. In colonial Latin America, the legal system imposed on the region by the Iberian colonizers had in fact gained a wide degree of popular acceptance. "They have more lawsuits than before [and] without method or basis, more tricks and lies, and more people inciting them towards those [lawsuits]", Cristóbal Ramírez de Cartagena, the most senior member of Lima's high court, wrote about indigenous Peruvians in 1592, at a time when the conquest of Peru was still a part of living memory.[2] Ramírez was expressing an idea that was rapidly gaining ground among Spanish settlers and officials: Native Americans were suing too much. The idea provoked bitterness and not a little concern. The natives themselves seemed to acknowledge its truth. "In the time of our gentility [i.e. before the Spanish conquest] we did not often have lawsuits", a group from Mexico wrote the Spanish king in the 1570s. "[N]ow that we are Christians we have many lawsuits, with other natives as well as with the Spanish people of your Majesty".[3]

Over the course of the colonial period, Latin America's fame as a land of excessive litigation only increased. Native Americans continued suing and imperial officials continued complaining. One Crown servant wrote in the 1790s that the inhabitants of a Mexican town should spend more time at home and less time pursuing lawsuits, "roaming around and leaving their fields untended."[4] And not only indigenous people were using the law. Plebeian Latin Americans from all races, classes, and

[1] For two overviews, see Angelica Rettberg, "Violencia en América Latina hoy: manifestaciones e impactos", *Revista de Estudios Sociales* 73 (2020), 2-17; and Thomas Carothers, "The Many Agendas of Rule-of-Law Reform in Latin America", in eds. Pilar Domingo and Rachel Sieder, *Rule of Law in Latin America: The International Promotion of Judicial Reform*, (Institute of Latin American Studies, 2001).
[2] Quoted in Renzo Honores, "Una sociedad legalista: Abogados, procuradores de causas y la creación de una cultura legal colonial en Lima y Potosí, 1540–1670," PhD dissertation (Florida International University, 2012), 132.
[3] Quoted in Brian Owensby, *Empire of Law and Indian Justice in Colonial Mexico*, (Stanford University Press, 2008), 3.
[4] Quoted in William Taylor, *Magistrates of the Sacred: Priests and Parishioners in Eighteenth-Century Mexico*, (Stanford University Press, 1996), 363.

genders were annoying their betters by going to court. Plebeian Latin Americans, furthermore, learned to sue not only as groups but as individuals. Wives sued their husbands, slaves sued their masters. Native peasants sued their neighbors, their landlords, and even their priests. Plebeian Latin Americans also initiated a wide range of criminal complaints against suspected thieves, brawlers, or rumor-mongers impugning their honor. Overworked court scribes in the empire's bustling cities moaned about cramped fingers and chronic fatigue. The volume of claims imperial subjects made on the law was not always seen as a virtue: colonial elites often spoke of it as a flaw and a nuisance. To Latin America's popular classes, however, the law had become an indispensable instrument for claiming rights, solving conflicts, and advancing interests.

It is hard to say when exactly the law in Latin America started its reputational decline. The inadequacy of the region's legal institutions began attracting widespread political and academic attention in the 1980s and 1990s, in the context of the region's post-Cold War democratic transitions. A lack of popular faith in the region's legal institutions, however, was by then a well-established fact in many countries. On the ground, the law was widely shunned by popular sectors, who saw it as an instrument of power, manipulated by the rich and influential.[5] "To our enemies, the law; to our friends, everything," went a Brazilian adage, describing an attitude that observers of other Latin American countries found it easy to echo.[6] Trust in the law was low and support for alternative forms of justice, high. Vigilante justice was not uncommon and the extra-judicial murder of criminal suspects by the police often enjoyed a high degree of popular backing.[7] Such backing is indicative not only of a good

[5] For rich, empirical proof that in Latin America "the poor often see the law as an instrument of oppression in the service of the wealthy and powerful", see especially the collection of studies in Juan Méndez, Guillermo O'Donnell, and Paulo Sérgio Pinheiro (eds.), *The (Un)Rule of Law and the Underprivileged in Latin America*, (University of Notre Dame Press, 1999). The quote is from Pinheiro's chapter "The Rule of Law and the Underprivileged in Latin America: Introduction", 11.

[6] Roberto DaMatta, *Carnivals, Rogues, and Heroes*, trans. John Drury, (University of Notre Dame Press, 1991), 168, and 137-197 for a larger discussion of the social dynamic expressed in the adage. Claudio Lomnitz discusses the adage's relevance for the Mexican culture of citizenship *in Deep Mexico, Silent Mexico: An Anthropology of Nationalism*, (University of Minnesota Press, 2001), 58-80. For a collection of other Latin American adages, expressing similar cynicism about the fairness of the law, see Mauricio García-Villegas, "Latin America's Culture of Noncompliance with Rules", in Rachel Sieder, Karina Ansolabehere, Tatiana Alfonso (eds.), *Routledge Handbook of Law and Society in Latin America*, (Routledge, 2019), 66.

[7] On lynchings, see Antonio Fuentes Díaz, *Linchamientos: Fragmentación y respuesta en el México neoliberal*, (Benemérita Universidad Autónoma de Puebla, 2006); Daniel Goldstein, "'In Our Own Hands': Lynching, Justice, and the Law in Bolivia," *American Ethnologist* 30/1 (2003), 22-43; Angelina Snodgrass Godoy, *Popular Injustice: Violence, Community, and Law in Latin America*, (Stanfrod University Press, 2006); and, for a historical take, Gema Kloppe-Santamaría, *In the Vortex of Violence: Lynching, Extralegal Justice, and the*

deal of frustration with the inefficiencies of the justice system, but also of expectations of a standard of protection from criminal acts (to be achieved through punitive measures) to which people still tried to hold their judicial and law-enforcement institutions. Thus, Gemma Kloppe-Santamaría writes about the historical practice of lynching in Mexico that it "was triggered by the presence of state authorities that were nonetheless perceived by communities as insufficient or incapable of providing the type of justice people deemed appropriate or necessary to punish transgressions."[8] Legal institutions continued to be central to popular expectations of justice. But they were no longer able to meet those expectations.

The enthusiasm for legal means of redress that popular actors demonstrated in the colonial period, and dissatisfaction with the operation of the law they have shown in recent decades, presents us with a notable reversal. That claim is not about the fairness of written law, for the law in colonial Spanish America had hardly been fair. It had privileged some groups over others, fixing imperial subjects in a repressive hierarchy of race, class, and gender. The claim is rather about Latin Americans' trust in and use of their judiciaries. The law went from king to beggar in the popular estimation. It went from being eagerly sought out to being often avoided. The transformation is all the more mysterious for happening during a period when state capacity grew markedly in other areas of public administration. Why did it happen?

In this article I seek to explain the loss of popular trust in the law in Latin America. By 'popular trust in the law' I mean particularly the trust that people in subordinate social positions (workers, peasants, women, slaves, indigenous people, etc.) placed in the law's ability to protect their personal rights and advance their interests as against the interests of their social superiors. I do not discuss other dimensions of the law's ability to regulate social and economic life – to order traffic, govern financial

State in Post-Revolutionary Mexico, (University of California Press, 2020). On popular support for extra-judicial police violence, see e.g. Teresa Caldeira and James Holston, "Democracy and Violence in Brazil", *Comparative Studies in Society and History* 41/4 (1999), 695-696; Luis Berneth Peña, "El que tiene un martillo, todo le parece un clavo. El sentido común securitarista y la paz en Colombia," in David Díaz Arias and Christine Hatzky (eds.), *¿Cuándo pasará el temblor? Crisis, violencia y paz en la América Latina contemporánea*, (Centro de Investigaciones Históricas de América Central, 2019), 73-78; and, for a historical take, Pablo Piccato, *A History of Infamy: Crime, Truth, and Justice in Mexico*, (University of California Press, 2017).

[88] Kloppe-Santamaría, *In the Vortex of Violence*, 5.

markets, protect property, or facilitate credit relationships for example – which may well have seen efficiency gains over the period of study. My analysis is general (I shall make no effort to distinguish between Latin American countries) and preliminary, aiming to provoke debate and further research as much as to suggest some tentative answers. Because my premise – the social depth of the law in colonial and, I shall argue, early-republican Latin America – may be unfamiliar to readers, I begin with an extended review of the historiography. That review also allows me to attempt a more precise account of the relevant contrast between the popular legal cultures of colonial and late-twentieth century Latin America. I then lay out three propositions to begin the task of explaining that contrast.

Historiography

Why modern Latin American legal institutions were unable to maintain or build upon the levels of popular trust they had been enjoying by the end of the colonial period is not only a question about which we know little. It is a question that scholars have not, to my knowledge, yet thought to formulate, much less systematically examine. This is in part the result of the relatively recent discovery of the critical role that legal institutions played in legitimating Spanish and Portuguese rule in colonial Latin America. In the mid-twentieth century, when Latin American history first expanded into a significant field of academic study (in Europe and the United States as well as in Latin America itself), many observers took the lawless and authoritarian nature of most of the region's contemporary justice systems for granted. At the same time, however, scholars tended to also describe Latin America's colonial period as uniformly violent and repressive. Indeed, a history of conquest and colonial violence was often adduced to explain the continent's ongoing legal and democratic deficits.[9] More recently, cultural scholars have tended to depict colonial law in Latin America as the domain of a lettered elite who followed the men of the sword to the 'New World' and came to dominate the population by dint of their

[9] Examples are Caio Prado Júnior, *The Colonial Background of Modern Brazil*, trans. Suzette Macedo, (University of California Press, 1967 [1942]); Stanley and Barbara Stein, *The Colonial Heritage of Latin America: Essays on Economic Dependence in Perspective*, (Oxford University Press, 1970); and Howard Wiarda, *The Soul of Latin America: The Cultural and Political Tradition*, (Yale University Press, 2001). This view of the colonial origins of a Latin American legal deficit is still common in current scholarship on Latin American legal systems, see e.g. García-Villegas, "Latin America's Culture of Noncompliance with Rules".

mastery over the written word.[10] In the context of such widely-held assumptions, to ask about a "decline" in popular trust in the law simply didn't make sense.

Historians now agree that the idea of a uniformly repressive colonial period is severely misleading. An early pushback against the idea came from the intellectual historian Silvio Zavala, who showed how the Spanish Crown's jurisdictional claims in the Americas clashed with those of Spanish conquerors and settlers, leading the Crown to create limits on settler power and legal protections for its new Native American subject population. The mass plunder, violence, and indigenous enslavement of the era of conquest was eventually followed by a more consensual style of rule.[11] But while Zavala's ideas were widely debated, empirical research into indigenous usage of the colonial legal apparatus had to await the opening of new archives and new lines of investigation (especially in the field of social history) and didn't take off until the 1980s.[12] From such slow beginnings, it is only in the last two or three decades that a rich and mature scholarship on popular legal culture in colonial Latin America has developed.

Our growing knowledge on colonial Latin America has so far failed to prompt research into the modern decline of what Gabriela Ramos and Yanna Yannakakis call "the colonial legal system's capaciousness and social depth".[13] Historians of colonial Latin American law have mostly been occupied with period-specific concerns. A first generation of studies on the colonial period emphasized the corporate nature of subordinate populations' legal strategies.[14] They explored how the indigenous nobility used the justice system to make their status legible within a colonial context, and how indigenous town or village corporations used the justice system to defend or expand territorial rights

[10] See especially Ángel Rama's influential study *La ciudad letrada*, (Ediciones del Norte, 1984).
[11] Silvio Zavala, *Las instituciones jurídicas en la conquista de América*, (José Porrúa e Hijos, 1935) and *De encomiendas y propiedad territorial en algunas regiones de la América española* (José Porrúa e Hijos, 1940).
[12] Steve Stern, *Peru's Indian Peoples and the Challenge of Spanish Conquest: Huamanga to 1640*, (University of Wisconsin Press, 1982) Woodrow Borah, *Justice by Insurance: The General Indian Court of Colonial Mexico and the Legal Aides of the Half-Real*, (University of California Press, 1983).
[13] Gabriela Ramos and Yanna Yannakakis, "Introduction", in eds. Gabriela Ramos and Yanna Yannakakis, *Indigenous Intellectuals: Knowledge, Power, and Colonial Culture in Mexico and the Andes*, (Duke University Press, 2014), 7.
[14] On the legally plural nature of early-modern European empires, see especially Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900*, (Cambridge University Press, 2001), and Karen Graubart, *Republics of Difference: Religious and Racial Self-Governance in the Spanish Atlantic World*, (Oxford University Press, 2022).

against colonial landowners and neighboring towns and villages.[15] Scholars of post-colonial Latin America followed suit, examining indigenous peoples' efforts to protect corporate territorial rights and forms of governance within a new, republican political idiom.[16] For example, a petition by indigenous authorities in Peru's Andean Ancash region written more than sixty years after Peruvian independence explicitly demanded the enforcement of colonial-era laws that guaranteed free common access to woodlands and pastures even when those woodlands and pastures were located on privately-owned land.[17] The petitioners accepted the new legal system independence had brought, but only as long as it did not infringe on customary rights that had been enshrined in colonial legislation.

Inasmuch as the first generation of socio-legal historians of Latin America posited a corporate and custom-based colonial and post-colonial legal culture, they did not robustly challenge the idea that the malfunctions of Latin America's modern justice systems had colonial origins.[18] However, a second generation of studies has now demonstrated the emergence of a rights-based, individualistic legal culture among Latin America's popular classes first in the late-colonial and then in the early-republican period.[19] In the eighteenth-century, as 'enlightened' imperial reformers aspired to the suppression of

[15] On usage of the colonial justice system by indigenous nobles see e.g. Borah, *Justice by Insurance*; Stern, *Peru's Indian Peoples*, 158-183; and Kevin Terraciano, *The Mixtecs of Colonial Oaxaca: Ñudzahui History, Sixteenth through Eighteenth Centuries*, (Stanford University Press, 2001). On corporate groups using the law see e.g. Owensby, *Empire of Law*; and Stern, *Peru's Indian Peoples*, 114-137. For a discussion of the formal aspects of colonial Latin American legal culture, see Victor Tau Anzoateguí, *Casuismo y sistema: Indagación histórica sobre el espíritu del derecho indiano*, (Instituto de Investigaciones de Historia del Derecho, 1992).
[16] See e.g. Tristan Platt, *Estado boliviano y ayllu andino: Tierra y tributo en el norte de Potosí*, (Instituto de Estudios Peruanos, 1982); Mark Thurner, *From Two Republics to One Divided: Contradictions of Postcolonial Nationmaking in Andean Peru*, (Duke University Press, 1997); and Romana Falcón, *México descalzo: Estrategias de sobrevivencia frente a la modernidad liberal*, (Plaza Janés, 2002).
[17] Thurner, *From Two Republics to One Divided*, 112-114.
[18] The distance between the colonial and nineteenth-century states on the one hand and modern legal state on the other is particularly emphasised in François-Xavier Guerra, *México: del antiguo régimen a la Revolución*, trans. Sergio Fernández Bravo, (Fondo de Cultural Económica, 1988); Antonio Annino, "Imperio, Constitución y diversidad en la América hispana," *Ayer* 70/2 (2008), 23-56; and Tamar Herzog, *Upholding Justice: Society, State, and the Penal System in Quito (1650-1750)*, (Univesity of Michigan Press, 2004).
[19] In the colonial period, scholars have associated that more individualistic legal culture especially with slaves, African freepeople, indigenous people, and women. See e.g. Alejandro de la Fuente, "Slaves and the Creation of Legal Rights in Cuba: Coartación and Papel", *Hispanic American Historical Review* 87/4 (2007), 659-692; Michelle McKinley, *Fractional Freedoms: Slavery, Intimacy, and Legal Mobilization in Colonial Lima, 1600-1700*, (Cambridge University Press, 2016); Charles Walker, "Crime in the Time of the Great Fear: Indians and the State in the Peruvian Southern Andes, 1780-1820", in Carlos Aguirre, Gilbert Joseph, and Ricardo Salvatore (eds.), *Crime and Punishment in Latin America: Law and Society Since Late Colonial Times*, (Duke University Press, 2011), 35-55; and, especially, Bianca Premo, *The Enlightenment on Trial: Ordinary Litigants and Colonialism in the Spanish Empire*, (Oxford University Press, 2017). For the republican period, see e.g. Sarah Chambers, *From Subjects to Citizens: Honor, Gender, and Politics in Arequipa, Peru, 1780-1854*, (Pennsylvania State University Press, 1999); and Reuben Zahler, *Ambitious Rebels: Remaking Honor, Law, and Liberalism in Venezuela, 1780-1850*, (University of Arizona Press, 2012).

corporate differences and attempted to homogenize social conduct through a flurry of new regulations and policing measures, Iberian colonial subjects increasingly went to court to protect their personal rights against what they described as the arbitrary behavior of their social superiors.[20] Litigants inserted their own notions of fairness into the legal culture of their time by arguing them in court, and in that way contributed to the modernization of Latin American law. "By repeatedly hauling 'tyrannical' domestic and community authority figures before royal judges", writes Bianca Premo, "litigants made space for law as a system of rights and rules that transcended the hierarchical order of colonial society" – and, no less than imperial reformers, "produced the Enlightenment" in the process.[21]

Premo's *The Enlightenment on Trial: Ordinary Litigants and Colonialism in the Spanish Empire* is the most comprehensive and sophisticated study of popular legal culture in late-colonial Latin America, making it worthwhile to more closely review its findings. Premo highlights the importance of legal intermediaries (such as notaries, priests, public scribes, and assorted educated laymen who might be litigants' relatives, lovers, or even "drinking buddies") in opening the world of the law to the Spanish Empire's unlettered majorities.[22] Legal intermediaries allowed poor and middling Latin Americans to defend their interests in court. And over the course of especially the second half of the eighteenth century they facilitated an increase in Spanish American civil litigation that far exceeded the colonies' population growth and that was partly driven by the growing penchant of those near the bottom of the

[20] On new Bourbon regulations and policing efforts, see Juan Pedro Viqueira Albán, *Propriety and Permissiveness in Bourbon Mexico*, trans. Sonya Lipsett-Rivera and Sergio Rivera Ayala, (SR Books, 1999); Pamela Voekel, "Peeing on the Palace: Bodily Resistance to the Bourbon Reforms in Mexico City", *Journal of Historical Sociology* 5/2 (1992), 181-207; Gabriel Haslip-Viera, *Crime and Punishment in Late Colonial Mexico City, 1692-1810*, (University of New Mexico Press, 1999); Gabriel Ramón, "Urbe y orden: evidencias del reformismo borbónico en el tejido limeño", in Scarlett O'Phelan Godoy (ed.), *El Perú en el siglo XVIII: la era borbónica*, (Pacífica Universidad Católica del Perú, 1999), 295-324; Chad Thomas Black, *The Limits of Gender Domination: Women, the Law, and Political Crisis in Quito, 1765-1830*, (University of New Mexico Press, 2010), chapter 2; Jordana Dym, "El podern en la Nueva Guatemala: La disputa sobre los Alcaldes de barrio", *Cuadernos de Literatura* 14/28 (2013), 196-229; and Sylvia Sellers-García, *The Woman on the Windowsill: A Tale of Mystery in Several Parts*, (Yale University Press, 2020), 201-232.

[21] Premo, *Enlightenment on Trial*, 3.

[22] Premo here adds to a considerable body of scholarship on the role of intermediaries in articulating colonial Latin American society, see e.g. Kathryn Burns, "Notaries, Truth, and Consequences", *American Historical Review* 110/2 (2005), 350-379, and "Making Indigenous Archives: The Quilcaycamayoc of Colonial Cuzco", *Hispanic American Historical Review* 91/4 (2011), 665-685; Alcira Dueñas, *Indians and Mestizos in the 'Lettered City': Reshaping Justice, Social Hierarchy, and Political Culture in Colonial Peru*, (University Press of Colorado, 2010); Yanna Yannakakis, *The Art of Being In-Between: Native Intermediaries, Indian Identity, and Local Rule in Colonial Oaxaca*, (Duke University Press, 2008); and Gabriela Ramos and Yanna Yannakakis (eds.), *Indigenous Intellectuals: Knowledge, Power, and Colonial Culture in Mexico and the Andes*, (Duke University Press, 2014). For the Brazilian case, see John Marquez, "Afflicted Slaves, Faithful Vassals: Sevícias, Manumission, and Enslaved Petitioners in Eighteenth-Century Brazil", *Slavery and Abolition* 43/1 (2022), 95.

social hierarchy to sue their superiors. "In the colonies, women, native commoners, and slaves made use of the secular courts against authority figures with a statistically demonstrable enthusiasm."[23] Women, native commoners, and slaves, furthermore, not only sued their superiors in greater numbers, they increasingly framed their lawsuits in a natural-rights idiom that we associate with the Enlightenment. In this way Latin Americans, including those in various positions of social subordination, helped create a new sense of the law as an independent domain governed by rules that anyone could in principle master and activate, and of themselves as persons invested with legal rights that were independent of their place in the social hierarchy.

The popular legal culture explored by Premo and other historians of the late-colonial era – rights-based and individualistic – did not disappear with Latin American independence. The struggle for independence itself was understood by many Latin Americans through notions of justice they had acquired in the colonial legal system, and postcolonial lawmakers explicitly imagined the new nations they were building as communities of rights-bearing citizens.[24] Independence and the beginning of constitutional government can indeed be seen as a kind of institutional crystallization of the late-colonial trend towards an individualistic and rights-based legal culture described by Premo. However, it should also be noted that historians do not yet agree to what extent the new Latin American republics implemented the citizenship rights their constitution granted in practice. An influential strain of scholarship has long highlighted the disconnect between Latin America's constitutional ideals and the reputed perseverance of the traditional values and cultural patters of what remained a highly hierarchical society.[25] This argument remains persuasive in as far as it describes the culture associated with various institutionalized forms of inequality: most clearly and obviously the bondage of slavery (which

[23] Premo, *Enlightenment on Trial*, 15. The statistical evidence is presented on pp. 97-101, 113-115, and, most extensively, 241-250 (Appendix II).

[24] On the importance of the colonial justice system to how people understood independence, see Marcela Echeverri, *Indian and Slave Royalists in the Age of Revolutions: Reform, Revolution, and Royalism in the Northern Andes, 1780-1825*, (Cambridge University Press, 2016). Scholars of colonial Latin America have also stressed the relationship between people's legal imaginaries and their decision to engage in acts of rebellion, see e.g. Sergio Serulnikov*, Subverting Colonial Authority: Challenges to Spanish Rule in Eighteenth-Century Southern Andes*, (Duke University Press, 2003), and Dueñas, *Indians and Mestizos in the 'Lettered City'*, esp. chapter 3.

[25] See e.g. John Lynch, *The Spanish American Revolutions 1808-1826*, (Weidenfeld and Nicolson, 1973), and Antonio Annino and François-Xavier Guerra (eds.), *Inventando la nación: Iberoamérica.Siglo XIX*, (Fondo de Cultura Económica, 2003).

remained legal until the mid-nineteenth century in Colombia, Venezuela, Argentina, and Peru, and famously until 1888 in Brazil, by far the biggest slave state in the Americas) and more subtly various forms of institutional discrimination against indigenous and free-black citizens, for example the imposition of outside authorities on indigenous towns or restrictions on the freedom of movement of free Afro-Brazilians.[26] But historians have also started to show that the workings of legal institutions really did change after Latin American independence. New courts were installed in small towns with no prior judicial presence, which under new constitutional dispensations were entitled to a town government with its attendant court of law.[27] Judges, constrained by new procedural guarantees, focused less on the social status of plaintiffs or defendants and more on empirical evidence.[28] Plebeian litigants and defendants soon became proficient in the new language of rights enshrined in the region's first constitutions, fitting that language to local realities and, through constant use, making it ordinary.[29]

The body of scholarship I have reviewed rules out the traditional answer to the question of why Latin America's legal systems in the late-twentieth century were so notoriously mistrusted: that the region was victim of a dark colonial legacy, that in Latin America a modern culture of law never arrived. What stands out is in fact the contrast between the picture of a highly involved and capacious late-colonial legal culture painted by that scholarship, and the picture of a dysfunctional legal culture painted by scholars of Latin America in the post-Cold War era. For after the Cold War, as Matthew Mirow has noted in his overview of Latin American legal history, the rule of law was so weak in many Latin American countries that the question of whether it existed at all turned into a subject of scholarly

[26] See e.g. Sidney Chalhoub, "The Precariousness of Freedom in a Slave Society (Brazil in the Nineteenth Century)," *International Review of Social History* 56 (2011), 405–39; Daniela Marino, *Huixquilucan: Ley y justicia en la modernización del espacio rural mexiquense, 1856-1910*, (Consejo Superior de Investigaciones Científicas, 2016). Julie Gibbings, *Our Time is Now Race and Modernity in Postcolonial Guatemala*, (Cambridge University Press, 2020), 80-81.
[27] Antonio Annino, "Imperio, Constitución y diversidad en la América hispana," *Ayer* 70/2 (2008), 23-56. Timo Schaefer, *Liberalism as Utopia: The Rise and Fall of Legal Rule in Post-Colonial Mexico, 1820-1900*, (Cambridge University Press, 2017), chapter 1.
[28] Reuben Zahler, *Ambitious Rebels: Remaking Honor, Law, and Liberalism in Venezuela, 1780-1850*, (University of Arizona Press, 2013), 107-119.
[29] Sarah Chambers, *From Subjects to Citizens: Honor, Gender, and Politics in Arequipa, Peru 1780-1854*, (University Park: Pennsylvania State University Press, 1999), and "Citizens before the Law: The Role of Courts in Post-Independence State Building in Spanish America", in Miguel A. Centeno and Agustin E. Ferraro (eds.), *State and Nation Making in Latin America and Spain: Republics of the Possible*, (Cambridge University Press, 2013); Zahler, *Ambitious Rebels*; Schaefer, *Liberalism as Utopia*, chapter 4; Black, *Limits of Gender Domination*, 232-237.

debate.[30] In his Introduction to an influential volume, Paulo Sérgio Pinheiro provides a long list of problems with Latin American post-Cold War judiciaries and law-enforcement institutions: summary police violence, the widespread use of torture to extract confessions from criminal suspects, the law's unequal treatment of the rich and the poor, impunity for legal (and human-rights) violations carried out by agents of the state or powerful private actors (e.g. owners of latifundias), discrimination by race and gender, and, in general, a "glaring gap between what the law says and the way the institutions charged with protecting and implementing the law… function in practice."[31] That 'glaring gap' between law and reality must bear a great part of the responsibility for the lack of public confidence Latin American judiciaries enjoyed after the Cold War. Thus, in 1995, the first year Latinobarómetro conducted its annual survey, 62.5 percent of respondents across 8 Latin American countries reported having little or no trust in their judicial institutions, and only in Uruguay did that number dip below 50 percent.[32] In a 1994 global ranking of judicial efficiency, carried out by the World Economic Forum and based on national opinion surveys, all of the ranked Latin American countries save Chile placed in the bottom 20 percent.[33]

While the inefficiency of Latin American legal systems after the Cold War was a concern for people from all social groups, it placed special burdens on poor and marginalized groups. It is in this area – the protection of subordinate populations from the abuses of state agents or of their social superiors – that the gap between the legal cultures of the late-colonial and the post-Cold War periods seems especially strong, reflecting a failure of Latin American legal culture not just to keep up with a rise in legal standards and expectations (judicial procedures that were acceptable in the eighteenth century may, after all, seem deficient in the twentieth) but rather a real decline in the law's ability to protect disadvantaged sectors of the population. By the late-twentieth century, Latin American elites no longer showed much alarm about lower-class actors' use of the legal system, as they had routinely done

[30] M.C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America*, (University of Texas Press, 2004), 238.
[31] Pinheiro, "The Rule of Law and the Underprivileged in Latin America: Introduction," quote on p. 11.
[32] The countries surveyed were Argentina, Brazil, Chile, Mexico, Paraguay, Peru, Uruguay, and Venezuela. The data is available at https://www.latinobarometro.org/latOnline.jsp, accessed 26 February 2023.
[33] William Ratliff and Edgardo Buscaglia, "Judicial Reform: The Neglected Priority in Latin America," *The Annals of the American Academy of Political and Social Science* 550 (March 1997), 61.

in the colonial period (they were far more alarmed by instances of popular political mobilization). This suggests that the law had ceased to be an effective instrument that popular actors were able to use to make claims against elite interests. In the meantime, the violation of defendants' due-process rights had in many Latin American countries become a scandal. Hundreds of thousands of criminal suspects languished in overcrowded prisons while waiting for their sentence – "often far longer than the maximum sentence had they been found guilty" – and torture was commonly used to extract confessions.[34] "Most of these detainees," writes Linn Hammergren, "are poor, have never seen a lawyer, and are probably the victims of police who were just looking for someone to take the blame."[35] In late-colonial and early-republican Latin America, on the other hand, measures to speed up criminal trials had often been effective, and neither overcrowded prisons nor judicial torture had been common.

A parsing of the current scholarship therefore suggests that the legal culture in late-colonial and early republican Latin America contrasts with that in late-twentieth century Latin America not only in terms of its relationship to changing Western legal standards but also in terms of its actual treatment of disadvantaged Latin Americans. Subordinate social sectors by the late-twentieth century appeared less inclined to use legal means to protect their rights against, and to challenge the interests of, their superiors. And criminal suspects, especially if they hailed from the lower classes, became far more likely to suffer often harrowing abuse in prison and to be convicted on the basis of fabricated evidence including confessions extracted through torture. That is the historical trend which in the rest of this article I seek to explain.

Three Propositions

So why did Latin American legal systems lose the ability to deliver justice and hold the trust of the public between the early-nineteenth and the late-twentieth century? The current state of knowledge does not allow for a fully-fleshed narrative of the evolution of Latin American legal cultures that would link

[34] Linn Hammergren, *Envisioning Reform: Conceptual and Practical Obstacles to Improving Judicial Performance in Latin America*, (Penn State University Press, 2007), 31. For studies of the extensive use of torture in two recent high-profile criminal investigations in Mexico, see Anabel Hernández, *La verdadera noche de Iguala: La historia que el gobierno trató de ocultar*, (Grijalbo, 2016); and Jorge Volpi, *Una novela criminal*, (Alfaguara, 2018).
[35] Hammergren, *Envisioning Reform*, 31.

those two periods. Any attempt at an explanation will therefore have to be impressionistic, tentative, and preliminary. Here I want to offer such an attempt at an explanation in the form of three propositions. They are as follows: (P1) *Popular trust in the law declined because of the law's increasing formalism*, observable first in the streamlining of legal proceedings and jurisdictions in the late-colonial period and then in the codification of civil and criminal law over the course of the nineteenth century. This formalism made the law more "modern" and predictable but also alienated it from the social context and moral imaginaries of popular sectors. (P2) *Popular trust in the law declined because of the rise of patrimonial capitalism* over the period of study, that rise leading to the creation of large social spaces, such as plantations, factories, and company towns, in which the use of state-sanctioned force was effectively privatized and removed from any sort of public oversight. And (P3) *Popular trust in the law declined because a new generation of social rights became politicized*, first under populist, corporatist regimes that arose in the region in the early and mid-twentieth century, and then under the military dictatorships that ruled in countries like Brazil and Argentina between the 1960s and 1980s.

(P1) *Popular trust in the law declined because of the increasing formalism of Latin American legal cultures,* which made the law more "modern" and predictable but also alienated it from the social contexts and moral imaginaries of popular actors. This proposition begins with the observation that colonial Latin American judiciaries derived much of their social capaciousness from the flexibility of legal rules. Colonial Latin America was legally plural: different laws applied to different social groups, and local custom was recognized as a source of normativity with considerable legal force. Apart from custom, written law, and the jurisprudence to be found in legal scholarship, furthermore, the principle of *equidad*, described by Charles Cutter as "a communally-defined sense of fairness", also informed judicial decision-making.[36] While this principle stipulated that people be treated according to their social rank, it also protected the moral fabric of society, as it demanded a search "for compromise and

[36] Charles Cutter, "The Legal Culture of Spanish America on the Eve of Independence", in Eduardo Zimmermann (ed.), *Judicial Institutions in Nineteenth-Century Latin America*, (Institute of Latin American Studies, 1999), 12. See also Victor Tau Anzoátegui, *Casuismo y sistema: indagación sobre el espíritu del derecho indiano*, (Instituto de Investigaciones de Historia del Derecho, 1992).

harmony between contending parties".[37] Altogether, colonial law in Latin America was flexible in a way that put the law in direct touch with popular traditions and ethical ideas.

In the late-colonial period, this situation began changing, as imperial reformers attempted to streamline the law and diminish the role of custom in legal proceedings.[38] In Spanish America, the so-called Bourbon Reforms represented "an effort to impose a set of norms upon a society that, during the late Hapsburg era, had been increasingly subjected to a set of local customary practices and compromises formed beyond colonial law and the crown' s control."[39] In colonial Brazil the Pombaline Reforms served a similar purpose, though here the Marquis de Pombal's efforts to create greater legal uniformity was partially reversed after his fall from power in 1777.[40] The Crown thus asserted its control over spaces and practices governed by corporate bodies (such as guilds, religious orders, and indigenous communities), greatly expanding the reach of a unitary royal jurisdiction over alternative norms and forms of authority.[41] Efforts to create legal uniformity continued over the course of the nineteenth century, as Latin America's newly-independent countries created first national constitutions that were premised on the equality of citizens, and then, more gradually, civil, criminal, and procedural law codes designed to make the application of the law entirely uniform and predictable. The desire for legal uniformity at this point coincided with anxiety over the prevalence of what the president of the Institute of Brazilian Lawyers called the "social anachronism" of having colonial-era laws govern the lives of the citizens of independent republics or, in the case of Brazil, of an independent constitutional monarchy.[42] The introduction of new legal codes was thus meant to create a rational, internally unified

[37] Cutter, "Legal Culture of Spanish America", 20.
[38] For an illuminating biographical study of a contemporary critic of that process, see Christopher Albi, *Gamboa's World: Justice, Silver Mining, and Imperial Reform in New Spain*, (University of New Mexico Press, 2021).
[39] Sergio Serulnikov, "Customs and Rules: Bourbon Rationalizing Projects and Social Conflicts in Northern Potosí during the 1770s," *Colonial Latin American Review* 8/2 (1999), 248. See also Gabriel Paquette, *Enlightenmen, Governance, and Reform in Spain and its Empire*, (Palgrave Macmillan, 2008), chapter 2.
[40] Gabriel Paquette, *Imperial Portugal in the Age of Atlantic Revolutions: The Luso-Brazilian World, c. 1770-1850*, (Cambridge University Press, 2013), 25-26, 35-36.
[41] Lyle McAlister, *The 'Fuero Militar' in New Spain 1764-1800*, (University of Florida Press, 1957), 5-12.
[42] Cited in Keila Grinberg, *A Black Jurist in a Slave Society: Antonio Pereira Rebouças and the Trials of Brazilian Citizenship*, trans. Kristin McGuire, (University of North Carolina Press, 2019), 129. See also Alejandro Guzmán Brito, "La influencia del código civil francés en las codificaciones americanas," *Cuadernos de Extensión Jurícica (Universidad de los Andes)* 9 (2004), 21, and Victor Tau Anzoátegui, *La codificación en la Argentina, 1810– 1870: Mentalidad social e ideas jurídicas*, (Buenos Aires: Imprenta de la Universidad, 1977), 119-123.

system of law while also doing away with the long-lingering influence of outdated colonial rules on contemporary legal practice.

Recent scholarship has shown that Latin America's new constitutions revolutionized the political culture of popular actors, who were often eager to appropriate the constitutional ideas of equality and citizen rights.[43] By contrast, the effect of legal codification on popular legal culture in Latin America still lacks a solid body of scholarship, let alone anything approaching a scholarly consensus. Certainly that effect was far from straightforward. Part of the purpose of codification was to make the law more impartial – to disembed it from any potentially distorting social hierarchies – and therefore to strengthen the protection the law offered to disadvantaged social sectors against the illegal depredations of their superiors. Perhaps the strongest evidence that codification could benefit non-elite actors comes from Casey Lurtz's study of legal and economic culture in the Southern-Mexican coffee region of Soconusco, where smalltime farmers, traders, and moneylenders in the late-nineteenth century increasingly came before the judge of Tapachula – the major town in the region – to register and formalize their credit relationships in the municipal registries known as *libros de conocimiento*.[44] "The libros de conocimiento," writes Lurtz, "did not create new kinds of economic activity, but rather gave people a means to better regulate, ensure, and signal the weight of their transactions and contracts."[45] They allowed small farmers and petty entrepreneurs to use a legal language and employ legal tools (such as the use of guarantors or of collateral in lending agreements) that were drawn from Mexico's new civil-law codes. Importantly, they did this even though the values at stake in most of the transactions were too small to be formally covered by the laws. The adoption of new legal instruments for purposes they had not been designed for suggests that there was a real popular need for the contractual precision encouraged by Mexico's codified legislation and for the legal security that

[43] For a synthesis, see Hilda Sabato, *Republics of the New World: The Revolutionary Political Experiment in Nineteenth-Century Latin America*, (Princeton University Press, 2018).
[44] Casey Lurtz, "Codifying Credit: Everyday Contracting and the Spread of the Civil Code in Nineteenth-Century Mexico," *Law and History Review* 39/1 (2021), 97-133. Other aspects of the legal culture of the late-nineteenth century Soconusco are discussed in Casey Lurtz, *From the Grounds Up: Building an Export Economy in Southern Mexico*, (Stanford University Press, 2019).
[45] Lurtz, "Codifying Credit," 123.

precision made possible. It suggests, too, that codification was most effective when it entered popular legal culture organically, to meet perceived needs, rather than being imposed from above.

That the growing formalization of Latin American law would place a wedge between popular actors and a legal world of increasingly inflexible rules was not, then, inevitable or automatic. Rather, it appears to have happened when codification either abolished customary rights or removed customary ways of claiming and exercising legal rights. Both of those dynamics were present in the codification of property law, which took place in a context of economic expansion and political conservatism during the second half of the ninteenth century. In this period, as Latin American land markets were heated up by a rapidly-growing global demand for primary commodities, legislators attempted to replace the vague, dubious, and often competing ownership claims that were jamming up those markets with clear and exclusive property rights favorable to investors and fixed once and for all in national registries. Agustín Parise describes this development as a judicial shift from an "allocation" to a "liberal" paradigm of ownership, the first characterized by partial and often overlapping ownership rights, "subject to termination [by the Crown] if the requirements made at the time of granting the right were not satisfied," and the second stipulating "an absolute, unique, and perpetual real right of ownership."[46]

The shift towards codified, liberal property rights disadvantaged popular sectors in their disputes with social superiors in two ways. First, the new property laws deprived popular actors of access to public lands or to natural resources, such as wood, water, and pasture, that had previously been sanctioned by custom. In that regard, the property law of the new legal codes had a strong confiscatory dimension. It terminated the partial ownership rights to natural resources that popular actors had previously held. In the Buenos Aires countryside, for example, the Rural Code of 1865 established land owners' complete ownership over all "spontaneous products of the soil," thus crowning long-standing efforts to deprive locals of their customary rights to those products.[47] In Peru, landowners in the second half of the nineteenth century enclosed high-alpine pastures not so much because they

[46] Agustín Parise, *Ownership Paradigms in American Civil Law Jurisdictions: Manifestations of the Shifts in the Legislation of Louisiana, Chile, and Argentina (16th-20th Centuries)*, (Brill Nijhoff, 2017), 85, 129.
[47] Raúl Fradkin, "Ley, costumbre y relaciones sociales en la campaña de Buenos Aires (siglos XVIII y XIX)," in Fradkin (ed.), *La ley es tela de araña: Ley, justicia y sociedad rural en Buenos Aires, 1780-1830*, (Buenos Aires: Prometeo Libros, 2009), 135.

wanted them for their own use "but rather because they could thereby capture indentured Indian labor, which allowed the undercapitalized haciendas to survive under conditions of economic stagnation."[48] Thurner cites from an 1887 petition that the authorities of an indigenous peasant town, deprived of access to natural resources town inhabitants had long relied on, sent to the Peruvian president. After independence, wrote the petitioners,

> We… were gradually losing the exercise of the aforementioned rights [to use of alpine pastures, woodlands, and waters]; noting, in addition, that as we were losing them, the titular exclusive landowners of the ravines and pastures raised their access fees to the point that today they charge us one silver real for the extraction of one load of firewood; an arbitrary fee for each post that we extract for our workshops; seventeen silver reales for the pasture consumed each year for each cow; and five select lambs each year for the pasture by every hundred sheep etc..[49]

What drove these peasant leaders was not a principled rejection of a liberal ownership paradigm but rather the concrete hurt of a loss of rights (which for poor peasants translated too easily into a loss of livelihoods) that followed from the abolition of custom as a valid source of ownership claims.

The second way in which codification disadvantaged popular sectors in their property disputes with social superiores was that it complicated the legal procedures necessary for asserting and exercising ownership or usufruct rights over agricultural land. This was a common feature of the liberal disentailment of indigenous land, which removed the recognition and adjudication of individual ownership claims from local and indigenous to regional and non-indigenous authorities. It was a feature, too, of laws designed to regulate the claiming of public lands in frontier areas, and to formalize the ownership of land that had been previously claimed through the simple expedient of squatting. Formalizing property rights required investment in survey and registration practices that some people

[48] Thurner, *From Two Republics to One Divided*, 46.
[49] Quoted in Thurner, *From Two Republics to One Divided*, 113.

mastered faster than others and that, at any rate, not all could afford. In the process of formalizing land rights, those without resources therefore often lost out to capitalists and entrepreneurs with deep pockets and a greater familiarity with the new rules that were being put into place.[50] Indigenous peasants lost access to land they may have worked for generations. Frontier families lost their right to plots they had recently made productive by the sweat of their brows as "well-to-do land entrepreneurs appeared on the scene, intending to form large estates and convert the earlier settlers into tenant farmers by asserting property ownership over the land," according to Catherine LeGrand's study of that process in late-nineteenth century Colombia.[51]

The expropriation of smallholders was a trend, not a rule: the process for registering land was easier in some places than in others, and many smallholders were able to defend their rights in court or even to register their land without opposition. Especially in regions less affected by growing market pressure, furthermore, informal and customary practices remained a robust part of local legal cultures, as people adopted the provisions of the new legal codes only to the extent that it suited their interests. In many parts of the region, however, legal formalization put pressure on smallholders' customary ways of defending their ownership rights against their social superiors, thus sapping popular faith in the law as an effective remedy for the challenges they were facing.

(P2) *Popular trust in the law declined because of the rise of patrimonial capitalism*, that rise being especially marked during the export boom of the late nineteenth century. By "patrimonial capitalism" I mean a form of capitalism in which the ownership of capitalist assets such as factories or agricultural lands bestows on the capitalist forms of control over the lives of workers or dependents that in modern states are usually associated with the role of the judiciary. In Spanish America this form of capitalism had precedents in the plantation and estate (*hacienda*) economy of the colonial era, especially after the

[50] See for example Stanley Stein, *Vassouras: A Brazilian Coffee County, 1850-1900*, (Harvard University Press, 1957), 13-16, and James Holston, *Insurgent Citizenship: Disjunctions of Democracy and Modernity in Brazil*, (Princeton: Princeton University Press, 2008), 131-139, on Brazil; Catherine LeGrand, *Frontier Expansion and Peasant Protest in Colombia, 1850-1936*, (Albuquerque: University of New Mexico Press, 1986), and Hermes Tovar Pinzón, *Que nos tengan en cuenta: colonos, empresarios y aldeas: Colombia 1800– 1900*, (Bogota: Tercer Mundo, 1995), on Colombia; and Emilio Kourí, *A Pueblo Divided: Business, Property, and Community in Papantla, Mexico*, (Stanford University Press, 2004), on Mexico.
[51] LeGrand, *Frontier Expansion and Peasant Protest*, xvi.

transition from the state-administered *repartimiento* labor system to the use of either African-slave or wage labor that in the colonial heartland predominated (with significant exceptions) from the seventeenth century onwards. The transition to wage and slave labor tended to remove the estates from the purview of colonial officials, so that estate owners, in the words of François Chevalier, "would tend to withdraw, with their slaves, servants, and retainers, behind their own boundaries, where the sole authority was that exercised by the owner, the chaplain, and the handful of Spaniards and mestizos who controlled operation."[52]

Plantations and agricultural estates removed significant groups of people from the reach of colonial institutions, and in that way paved the way for the patrimonial capitalism of the late-nineteenth century export era. Leaving aside the special case of slave labor – which by the end of the nineteenth century was everywhere abolished and, at least in juridical terms, did not become a model – there was nevertheless still a significant difference between the authority of the late-nineteenth century plantation or hacienda owner and that of his colonial counterpart. Landowner-authority in the colonial period had been an extra-judicial social fact that was not by and large recognized by colonial institutions, depending instead on the distance of many estate settlements from the seats of Crown-sanctioned judicial officers. It was rooted not in state power but rather in an economic relation. As such it became stronger in contexts of labor abundance but diminished in contexts of labor scarcity, when landlords found it harder to find tenants or laborers than tenants or laborers to find landlords. There is also evidence that, unless questions of land use or labor management were at stake, *hacienda* owners in colonial and early-republican Latin America were reluctant to interfere in the affairs of the people settled on their properties. *Haciendas* therefore came to be known as spaces of relative social freedom, attractive to people who, by temperament or because of past legal troubles, preferred to lead their lives away from the potential interference of meddlesome community authorities or state officials.[53]

In the late-nineteenth century, however, many governments formalized landowner authority over the tenants and workers laboring on estates and even over the unemployed poor ("vagrants") living

[52] François Chevalier, *Land and Society in Colonial Mexico: The Great Hacienda*, trans. Alvin Eustis, (University of California Press, 1963), 81.
[53] Felipe Castro Gutiérrez, *Nueva ley y nuevo rey: Reformas borbónicas y rebelión popular en Nueva España*, (Zamora: El Colegio de Michoacán, 1996), 52-53; Schaefer, *Liberalism as Utopia*, 122-128.

nearby. In Mexican states like Guanajuato and San Luis Potosí, for example, state governments asked *hacendados* to form and command rural constabularies.[54] In Nicaragua, the 1862 *Ley de Agricultura* created the office of *juez de agricultura*, elected by landowners and tasked with coercing the idle into agricultural work. "The magistrate," stated the law,

> will patrol [the municipality], in particular on mornings following festivals and at all other times as he deems appropriate. He will arrest all drunken *operarios* [contract laborers], and when they have recovered he will force them to fulfill their contracts. If they have no contract, he will put them to work.[55]

The same law forbade agricultural laborers from leaving their places of work before the end of their contracts and charged their employers with punishing recalcitrant workers.[56] The privatization of judicial authority was also evident in company towns such as El Teniente in the Chilean Andes, autocratically ruled by a company police force, or Cananea in Northern Mexico, under the thumb of a municipal government almost wholly controlled by the Cananea Consolidated Copper Company.[57] The surge in capitalist-led economic growth in late-nineteenth century Latin America, in other words, was accompanied by the creation of social spaces where private power was invested with formal legal authority.

Beyond the proliferation of privately-ruled towns and settlements, the late-nineteenth century in Latin America saw a more general erosion of the rule of law as a public good. The region's republican polities in this period became increasingly anti-democratic, oligarchical, or even dictatorial, as the franchise was rolled back, police forces purged of their popular elements, and local governments either

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[54] Schaefer, *Liberalism as Utopia*, 194-195.
[55] Quoted in Elizabeth Dore, *Myths of Modernity: Peonage and Patriarchy in Nicaragua*, (Durham: Duke University Press, 2006), 114.
[56] Dore, *Myths of Modernity*, 116. For an expecially detailed discussion of the quasi-judicial violence employed by planation owners see also Gibbings, *Our Time is Now*, 169-179.
[57] Thomas Miller Klubock, *Contested Communities: Class, Gender, and Politics in Chile's El Teniente Copper Mine, 1904-1951*, (Duke University Press, 1998), 49-55; Christine Mathias, "At the Edge of Empire: Race and Revolution in the Mexican Border Town of Cananea, 1899-1917," B.A. thesis, Yale University, 2007, 16-18, 23-27. For further examples of the mingling of public and private power in mining camps and company towns in Chile and Mexico see e.g. Gabriel Salazar, *Labradores, peones y proletarios: Formación y crisis de la sociedad popular chilena del siglo XIX*, (Santiago: Ediciones Sur, 1985), and Rodney Anderson, *Outcasts in Their Own Land: Mexican Industrial Workers, 1906-1911*, (Northern Illinois University Press, 1976).

sidelined or controlled by higher government instances.[58] Judiciaries were affected by this transformation because they were usually staffed by political appointment. Governments run by oligarchs were now filling judgeships with friends and family (or at least with people sharing their ideological convictions), allowing elites to acquire influence over judicial and law-enforcement matters even when those matters were handled by institutions that remained formally in the public domain. In towns neighboring Mexican wheat and cattle estates, Guatemalan coffee plantations, or Brazilian post-abolition coffee and sugarcane farms, planters could usually rely on courts to solve labor disputes in their favor. And they could call on state police, militias, and gendarmeries to help them discipline workers whenever their private guards weren't up for the job.[59] In Chile's El Teniente mining camp the company not only depended on periodic public assistance to deal with labor unrest but, writes Thomas Klubock, following a 1911 miners' strike, managed to get a contingent of troops permanently stationed in the camp "until production came to a halt in the winter and the company could dismiss its entire workforce until the following spring."[60]

In the late-nineteenth and early-twentieth centuries, an economically and politically ebullient entrepreneurial class in many Latin American regions was able to effectively colonize the administration of justice with their private interests. The idea of an independent, socially-neutral justice sector – capable of delivering favorable verdicts to subordinate groups suing their superiors, as it had done with increasing frequency in the late-colonial and early-republican periods – broke down. We should perhaps not exaggerate the pervasiveness of that break-down: modern judiciaries are institutionally complex and internally diverse, and the values of public-spiritedness and impartiality no doubt held fast in many offices, courtrooms, and legal situations.[61] The idea broke down, however, in just those areas of social life most touched by the period's characteristic economic dynamism, leading to an immense and consequential disenchantment with the idea of the law as a suitable instrument for

[58] Sabato, *Republics of the New World*.
[59] Paul Vanderwood, *Disorder and Progress: Bandits, Police, and Mexican Development*, (University of Nebraska Press, 1981); David McCreery, *Rural Guatemala 1760-1940*, (Stanford University Press, 1994), 179-181; Walter Fraga, *Crossroads of Freedom: Slaves and Freed People in Bahia, Brazil, 1870-1910*, trans. Mary Ann Mahony, (Duke University Press, 2016), 212-213.
[60] Klubock, *Contested Communities*, 51.
[61] For examples see Lurtz, "Codifying Credit"; Palacio, *La paz del trigo*.

protecting popular actors against the abuses and dislocations attendant upon sudden and rapid capitalist development.

(P3) *Popular trust in the law declined because a new generation of social rights became politicized*, first under populist, corporatist regimes that arose in the region between the early and mid-twentieth century, and then under the military dictatorships that ruled in countries like Brazil and Argentina between the 1960s and 1980s. Those rights were politicized in the sense that they were adjudicated by tribunals that were at least partly controlled by the executive power. Politicized tribunals award positive decisions to favored groups in exchange for political loyalty. In twentieth-century Latin America, the creation of minimum-wage laws, worker protections against unfair dismissal, and land-reform laws, among others, facilitated the politicization of law. In the hands of populist governments (such as the governments of Getulio Vargas in Brazil, Juán Domingo Perón in Argentina, and various post-revolutionary presidents in Mexico), such laws were used to rewarded the loyalty of privileged sectors of the urban and rural working classes, tied to the regime in power through coopted unions and mass movements. The new social rights were scaled back but not abandoned by military or (in Mexico) more conservative governments in the second half of the twentieth century. For example, Edward Brudney has shown that even in an Argentina run by the exceptionally brutal military junta of the *Proceso de Reorganización Nacional* (1976-1983), auto-workers maintaining friendly ties to the junta and willing to couch their demands in a regime-friendly language were able to successfully fight against their dismissal by engaging in militant (though carefully calibrated) labor action of doubtful legality.[62]

Populist governments creating new social rights typically chose to distribute those rights not through traditional courts but rather through administrative channels that mimicked aspects of judicial decision-making but ultimately belonged in the sphere of executive action. To enforce their progressive labor legislation, for example, postrevolutionary Mexico, Vargas-era Brazil, and Peronist Argentina created special tribunals under the control of the

[62] Edward Brudney, "'In Defense of Our Livelihoods': Rethinking Authoritarian Legality and Worker Resistance during Argentina's Proceso de Reorganización Nacional," *Labor: Studies in Working-Class History* 16/4 (2019), 67-88.

Ministry of Industry, Commerce and Labor, the Ministry of Labor, and the Ministry of Labor and Social Welfare, respectively.[63] The placement of those tribunals under executive purview was deliberate, since "the procedures of ordinary justice," according to the preamble of the 1944 Peronist law that established the tribunals in Argentina (decree no. 32.347), "when applied to labor conflicts, prove to be formalistic, onerous, and lacking in the speed that the objects of the relevant legislation demands."[64] According to this perspective, "ordinary" justice was part of the problem, not the solution, at least when it came to the adjudication of newly-legislated workers' rights.[65]

It is still difficult to evaluate the efficacy or fairness of Mexico, Brazil, and Argentina's 'populist' labor tribunals. The dependence of those tribunals on the executive branch used to be cited as an aspect of the illiberalism of the regimes under which they were instituted: the post-revolutionary one-party state in Mexico, Peronist government in Argentina, and Vargas government in Brazil. But historians have also stressed the eagerness with which those countries' working classes made use of the new legal instruments at their disposal, and the importance of the tribunals in making new social rights accessible and concrete. Juan Manuel Palacio has noted that the new labor legislation, together with the

[63] For an overview and preliminary comparison of the Mexican, Argentine, and Brazilian cases, see Juan Manuel Palacio, "Legislación y justicia laboral en el 'populismo 'clásico' latinoamericano: Elementos para la construcción de una agenda de investigación comparada", *Revista Mundos do Trabalho* 3/5 (2011), 245-266. On the workings of the Mexican labor tribunals, see also Kevin Middlebrook, *The Paradox of Revolution: Labor, the State, and Authoritarianism in Mexico*, (John Hopkins University Press, 1995), 56-62, 185-205, and Timothy James, *Mexico's Supreme Court: Between Liberal Individual and Revolutionary Social Rights, 1867-1934*, (University of New Mexico Press, 2013), chapter 3. On the Argentine tribunals see Juan Manuel Palacio, *La justicia peronista: La construcción de un nuevo orden legal en la Argentina*, (Siglo XXI editores, 2018), and "The 'Estatuto del Peón': A Revolution for the Rights of Rural Workers in Argentina?," *Journal of Latin American Studies*, 51/2 (2019), 333-356. On the Brazilian labor tribunals, see also José Marcelo Marques Ferreira Filho, "Entre 'direitos' e 'justiça'. Os trabalhadores do açúcar frente à Junta de Conciliação e Julgamento de Escada/ PE (1963–1969)", *Cadernos de História*, 6/6 (2009), 211–247; Christine Rufino Dabat and Thomas Rogers, "Sugarcane Workers in Search of Justice: Rural Labour through the Lens of the State," *International Review of Social History* 62 (2017): 217-243; Joel Wolfe, *Working Women, Working Men:Sao Paulo & the Rise of Brazil's Industrial Working Class, 1900–1955*, (Duke University Press, 1993), 52-56, 75; and John French, *Drowning in Laws: Labor Law and Brazilian Political Culture*, (University of North Carolina Press, 2004), 46-52. Note that in Brazil, the labor courts moved from the executive to the judicial branch in 1946, after the ouster of Vargas.

[64] Cited in Juan Manuel Palacio, "El peronismo y la invención de la justicia del trabajo en la Argentina," *Nuevo Mundo Mundos Nuevos*, (online journal, published on 25 September 2013), consulted on 31 August 2022, 11.

[65] Palacio, "El peronismo y la invención," 12-13.

institutional mechanisms created for its enforcement, created the possibility of state oversight and legal protection in an area of social life that previously been shielded from an effective application of the rule of law.[66] The enforcement of workers' rights was particularly significant in the countryside: landlord-dominated, desperately poor, and long neglected by social reformers. In rural Argentina, writes Palacio, where travelers in the early-twentieth century had described miserable salaries and deplorable labor conditions, the passage (and subsequent nation-wide enforcement) of the 1944 *Estatuto del Peón* (rural labor code) in effect "signified the definitive juridical integration of the rural peons of the country, granting them all of the benefits of existing labor law."[67] Perón's anti-judicial animus, then, was not merely frivolous or self-serving but rather reflected the discredit into which the Argentine judiciary had fallen, especially in the countryside.

If the decision to place the adjudication of labor law under executive control may have brought the possibility of redress to previously neglected social sectors, there are nevertheless reasons to believe that in other ways it brought further damage to the reputation of the justice system. Giving the executive responsibility for adjudicating social rights was in part a way to rob labor unions of their independence, making their efficacy depend on their relationship to presidential power.[68] In 1930s Brazil, for example, only state-approved unions could bring collective worker demands before labor boards. Other unions were unable to take advantage of the new labor bureaucracy and, when they engaged in unauthorized strikes, faced government hostility and repression.[69] The administration of social justice thus devolved into an instrument of state control over workers – a way of keeping radical unionists in check and promoting the development of a compliant working class. This was a system that impugned the fairness, not of the labor tribunals as such but of their conditions of

[66] Palacio, "Legislación y justicia laboral."
[67] Palacio, "The Estatuto del Peón," 353.
[68] Palacio, "Legislación y justicia laboral," 266.
[69] Wolfe, *Working Women, Working Men*, 55-56.

access, as it excluded from its protection any workers whose industry was not represented by a government-friendly union.

It is plausible to interpret the politicization of social rights as at least in part a reaction to the trends I described in the previous two propositions. By the time populists like Vargas, Perón, and Cárdenas came to power in Latin America, the rise of legal formalism and spread of patrimonial capitalism had alienated the law from the ethical imaginaries and concrete life strategies of popular sectors, perhaps to the point that to many the law seemed but an expression of the power of a narrow entrepreneurial oligarchy. The creation of a new labor bureaucracy under executive control was in part a way of dealing with that reality but, in as far as it tethered the adjudication of social rights to a partisan conception of politics, ended up further eroding public trust in the law.

Conclusion

To answer the question why popular trust in the law in Latin America declined after the late-colonial period, I have put forward three propositions: (P1) *Popular trust in the law declined because of the law's increasing formalism*, observable first in the streamlining of legal proceedings and jurisdictions in the late-colonial period and then in the codification of law over the course of the nineteenth century; (P2) *Popular trust in the law declined because of the rise of patrimonial capitalism*, both in and beyond the late-nineteenth century; and (P3) *Popular trust in the law declined because a new generation of social rights became politicized* in the early and mid-twentieth century. Taken together, those propositions suggest a distinct relationship between the deterioration of the rule of law and the particular form in which capitalism developed in Latin America – a relationship most directly evident in the encroachment of private interests on public legal functions, and more obliquely discernible in

a legal-codification process that tended to rob popular sectors of customary rights and in a politicization of social rights that responded to those encroachments and dispossessions.

Far from portraying Latin America as a permanent legal jungle, the propositions I have offered in this article all recognize the law's deep social roots and embeddedness in the Latin American civic tradition. The formalism that drove legal codification in nineteenth-century Latin America is not only evidence of a deep appreciation for the law as an instrument of rule, it was also rejected by popular sectors only in as far as it was carried out in a way that damaged, or else complicated the process of claiming, established customary rights. The colonization of legal spaces by a patrimonial form of capitalism was felt as an encroachment precisely because of the historic strength and legitimacy of Latin American judiciaries. That colonization, furthermore, always remained partial, creating a patchwork of legal spaces and judicial cultures that provoked a probing cynicism more than a wholesale rejection. The politicization of a new generation of social rights further deepened that cynicism, even as it also pulled neglected areas of social life and previously marginalized (especially rural) populations into the sphere of rights-claiming and judicial contention. The lack of faith in the law that characterized Latin America so strongly at the end of the Cold War, and that today remains an important aspect of the public mood of most countries in the region, should thus be understood not as hostility to the law as such but, to the contrary, as a form of disillusionment caused by the institutional violation of legal norms and expectations too rooted, robust, and ubiquitous to ever be entirely eradicated.

I have here attempted to explain the decline in public trust in the law in Latin America in the form of propositions that will of course need revision, qualification, elaboration, and refinement. Each proposition no doubt works better for some countries, some regions, some social groups, and some areas of law than for others. None can illuminate all legal contexts and situations, and to specify under which conditions each proposition holds and under which

conditions it doesn't must for now remain a question for further research. Apart from provisional and exploratory, furthermore, my propositions make no claim to completeness. For example, I have said nothing about the role judicial corruption may have played in sapping Latin Americans' trust in the law, nor about the particular damage done by Cold-War dictatorships to already ailing judiciaries. What I have attempted to do is to formulate a neglected question for historical research, to propose the beginning of an answer, and, not least, to provoke debate and conversation.

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