

# THE LATIN AMERICAN TRADITION OF LEGAL FAILURE

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## I. INTRODUCTION

The topic of this Colloquium in Perugia brings to mind the early twentieth-century debate over the existence of a Latin American international law. It recalls, in particular, the work of Alejandro Alvarez, the Chilean jurist and judge on the International Court of Justice. Throughout his life, Alvarez strove to demonstrate the existence of a regional, American international law. While it included the United States, its principal sources were Latin American treaties, conferences, diplomatic history, and the actual practices of states. Alvarez had many opponents quick to underscore the paradox of a purportedly particular, yet equally universal, international law. In the end, the notion of a separate American international law was not widely accepted as accurate description or worthy aspiration.

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Still, for our purposes here, examining Alvarez's work more closely reveals the purposefully constructed nature of his American law. The legal materials that he marshaled to compose this corpus were: the practices of Latin American states, the principles commonly defended against European interference, and a series of treaties and treaty attempts aiming to consolidate these various norms. For the most part, these consisted of nothing other than heightened versions of general principles of international law and customary practices not uncommon among lesser European powers, although not uniformly recognized as international law. The content of American international law was, in fact, not very exotic. It was just another variety of prescriptive understandings arranged in a particular way.

Instead of a claim of real uniqueness or originality in law, this tradition-building attempt is better understood in relation to its geo-politics. Alvarez's project was a product of its time. It was a moment in which Latin American states were relatively subordinate in the international arena, not consistently invited to international congresses, infrequent participants in the creation of international law, and subject to periods of European and U.S. intervention in the region. At the time that Alvarez launched his concept, the U.S. occupied Cuba and Puerto Rico, had engineered Panama's independence from Colombia, and controlled the Dominican Republic.

The argument for a regional international law interceded in this *realpolitik*. It advocated the notion of hemispheric relations ordered through law. It placed Latin American states as authors of these international norms, and it included the United States within its realm. Alvarez's jurisprudence can be seen as a strategic geopolitical move to improve the standing and stature of the Latin American states within the international community. The joint authorship of an American international law by both Latin American states and the United States was one dimension. Equally, his work targeted the United States and its hegemonic role within the hemisphere. Beyond simply listing a set of common norms, Alvarez urged pan-American collaboration in the enforcement of international law within the hemisphere, as opposed to lone U.S. unilateralism. It was a bid against gunboat diplomacy. Specifically, he advanced the participation of "better constituted" Latin American states in matters of enforcement. Chile, Argentina, and Brazil could all be reliable partners, in his view, in enforcing international law in the Americas, foreclosing European intervention.

Somewhat analogously, the topic of this colloquium invites us to reflect on the construction of legal traditions. The backdrop here is certainly the notion of a European legal tradition in the context of the European Union.

My remarks here are rather by way of comparison with a different context of legal tradition-building. My focus is on the contemporary formation of a “Latin American law.” Interestingly, it updates the story of Alvarez and his attempts to build and convince others of the specificity of an American and Latin American law. As my account of Alvarez already notes, his was a historical project of empowerment within the realm of international relations. It also was an attempt to temper raw U.S. power and unilateral intervention in the region.

The historiography of a Latin American legal tradition over the past fifty years, however, has taken a very different turn. Notably, the notions of “Latin America” and “Latin American Law” have once again been mobilized in the legal field. This time, it is not as a source of creativity, difference, and standing – as it was for Alvarez. Rather, it is the foil against which legal reforms and institutional replacements, are argued, should take place. Indeed, the Latin American tradition of law – under this newer construction -- is forcefully depicted as one of lawlessness, legal formalism, an unbridgeable gap between law and society, legal ineffectiveness, law’s inefficiency, and official corruption. The most damning evidence against it is economic underdevelopment and political instability. Thus, instead of a fertile source of experience and experimentation in social organization, the legal tradition described is one of failure. This pronouncement is underwritten in a variety of ways. Indeed, it turns out to be the operative conclusion of law-and-development writing and much inter-disciplinary literature on law in the region.

Accordingly, within the context of legal development assistance in the past half-century, a core understanding is that Latin America’s law, and by extension the legal tradition, is significantly responsible for the lack of progress. The stock of analyses, diagnoses, inter-disciplinary studies, comparative and historical work, commentaries and the like constitute the foundations of this “tradition” of law. The latter’s main characteristic – within this literature -- is its consistent failure to deliver prosperity and democracy.

As a problem of law, this characterization then paves the way for any number and type of development prescriptions. Whether overt or implicit, this underlying narrative in project proposals and country reports establishes the basis for law reform, institutional re-design, and legal policy change. The features highlighted as constant failings characteristic of law in Latin America are, however, predominantly intrinsic contradictions and limitations of all modern systems of liberal law. Development reforms, by contrast, are

championed as the rule of law, best practices, rules with better legal origins, and the like. Yet, they are simply different versions and combinations of modern legal forms advancing certain policies and priorities. As a result, many of the intractable legal failings diagnosed in Latin America and associated with pre-reform law can only but persist even after waves of development reform. The real change is in the different distributional consequences, legal policies, institutional priorities, assignments of official discretion, and the like introduced by the legal structures implemented as development reform.

This Essay describes, in very abridged terms, the instrumental construction of this particular tradition or identity of law in Latin America. As a back formation of law and development, it provides the permanent backdrop and rationale for legal change. Furthermore, this Essay sounds a cautionary note on the obfuscating role that identity constructions may produce in contexts of legal and policy reform.

## II. LEGAL TRANSNATIONALISM

The legal communities in Latin American states have, historically, constructed their national legal discourse in deeply transnational ways. Indeed, the common observation that Latin America is part of the civil law tradition, or a member of the Romano-Germanic legal family, is primarily an outward sign of the embeddedness of this transnationalism within the region's national legal systems. This paradigm of "European" transnationalism, specifically, can be analyzed in its different historical moments and from its different theoretical underpinnings (such as natural law, positivism and legal sociology). At its most basic, European transnationalism offers a basis for taking positions on questions of legal interpretation. It provides arguments and models for law reform and institutional change. And, it legitimates action and discretion by local legal officials. Law, viewed in this way, is not simply the winning side of local political struggle or conflicting beliefs. Rather, it can be portrayed as more broadly transnational – if not plausibly universal.

Additionally, this European transnationalism in Latin America has not meant the complete exclusion of transnational engagement with U.S. legal culture. In the area of constitutional law, to take an example, U.S. legal sources -- if often through the intermediation of European authors -- have been particularly salient. European legal transnationalism as practiced in Latin America, however, is not the object of my remarks here, except to note its salience in the region and its predominantly continental European connection. The focus here, instead, is on an analogous -- yet different -- transnational

paradigm more recently prominent within the region: law and development or, as I refer to it here, “development” transnationalism. This second paradigm, as well, can be analyzed as a distinct phenomenon with its own periods and theoretical bases.

### III. DEVELOPMENT TRANSNATIONALISM

The past fifty years have seen a significant rise in exchange between the United States and Latin American states in the legal sphere. Chiefly, this is due to the funding initiatives of the U.S. government, U.S.-based foundations and U.S.-influenced international organizations. These efforts have generally been grouped together and described as the law and development movement. The topic has been extensively written about. Commentators note its different phases, changing political orientation, and general theoretical presuppositions. For the most part, however, the phenomenon has been addressed primarily from the supply side of the equation. The focus has been on the types of projects funded, their political economy, and the objectives of funding organizations. Scholars have also expounded on the mostly tacit legal theories underlying these efforts: primarily an uncritical faith in the effectiveness of the U.S. legal system and its positive co-relation with economic growth. At the same time, others have noted the imperious and imperial nature of these assumptions and designs. Additionally, attention has been directed to the actual beneficiaries of these projects, both governments in power and specific individuals who may benefit from the resources and clout they offer.

In terms of funded projects, three different periods are generally noted: the original 1960-70’s developmental state round, the 1990’s neo-liberal round, and the more recent social justice moment. I briefly describe the main two periods here and leave for another time fuller discussion of the more contemporary third period. In the 1960-70’s, the funding organizations were either the U.S. government or U.S. based foundations, specifically the United States Agency for International Development (“USAID”) and the Ford Foundation. The objective in this first round was state-led growth, planning and control by regulatory agencies, government reallocation of resources, and the like. It was supported by Keynesian economics placing the state as the principal agent of development. The objective in the legal sphere was a pragmatic state regulatory law, capable of effectively implementing government planning and transcending vested private rights with the potential to impede government action. Outwardly, legal development assistance was introduced as part of state modernization. Early projects emphasized

improving legal education and consequently the legal culture. Developmentalists believed the right prescription was American-style legal realism and policy-oriented lawyering. In fact, in the first period, the main focus was to transform Latin American law schools along U.S. lines.

In the late 1980's and 1990's neo-liberal round, more international organizations became involved, many of them following the lead of U.S. or U.S. controlled entities. Among them were Inter-American Development Bank, World Bank, along with early donors like Ford Foundation and USAID. Additionally, European Union and European national agencies have also more recently participated in projects of this type, less in Latin America than in Africa and the Maghreb. This second period was dominated by neo-classical economics with its focus on free markets, privatization and de-regulation. Accordingly, the principal objectives for law were the protection of private property, enforcement of contracts, regulation of securities markets, and enforcement of criminal law.

The first two periods of law and development funding had very different economic theories driving them. The third more contemporary moment, now described by scholars, arises from the backlash against orthodox neo-liberalism. The response on the part of donors has been to incorporate more social justice and minority rights concerns within their project funding priorities. Whether or not this change is significant or alters any of the main underlying propositions of neo-liberal developmentalism remains to be seen.

An alternative way of conceptualizing law and development, however, is as a separate paradigm of transnationalism. Structurally, the projects fit the logic of foreign assistance by developed to lesser developed countries: Donors sponsor legal change in countries lacking developed law. More broadly, though, law and development provides an alternative logic for reasoning about the law. It can be usefully compared to the European legal transnationalism, strongly rooted in Latin America. It can propel very differently oriented projects on its account. It can draw on various legal theories for justification. It no doubt redounds to the benefit of governments and individuals capable of mobilizing its resources. And, it appeals to the promise of prosperity and democracy – economic and political development - - through better versions of law or the “rule of law,” tout court. The many conflicting political aspirations of societal actors all appear equally attainable simply through the right mix of positive law, public institutions, and legal culture. In this way, development transnationalism offers a *legal* terrain in which to work out the problems of poor economies, human rights violations, deficient democracy, and the like.

Thus, as an epistemic construct, development transnationalism provides a rationale for a wide range of legal change at the level of positive law, legal institutions, legal culture, etc. It orients this activity under the rubric of promoting development, and it provides significant legitimacy by the weight of foreign and local experts, international organizations, and scholarly consensus. Additionally, in Latin America, transnationalism, as already noted, is an historically accepted and privileged driver of legal change. The deep-seatedness of European transnationalism as a mode of legal reasoning and legitimation paves the way for yet different modes of transnationalism.

#### IV. THE LATIN AMERICAN LEGAL TRADITION

Salient within the paradigm of development transnationalism – in all its phases -- is the counterpoint image of the poor quality of legal systems in Latin America. Notably, though, in many Latin American countries, law and legal institutions are well developed elements of national social systems. Observers have noted that Latin American states are not lacking in law, in fact there may be too much of it. There are abundant law schools and law graduates. Political leaders and government officials often have legal training. Moreover, law and legal discourse from Europe and the United States have been primary tools of governance, over these countries' nearly 200 years of independence.

As such, law and development's main tenet that law is central to prosperity and democracy would seem to call for a better explanation in Latin America. There the legal systems have ostensibly failed to deliver. Presumptively, a diagnosis pointing to the absence of Western conceptions of liberal law is not plausible. As noted above, Latin American societies are steeped in Western law, and legal institutions pervade much of society. Rather, the general diagnosis is directed at the kind of law and legal institutions in Latin America.

This explanation, however, is assembled in some very peculiar ways. The general description, and the constructed tradition of Latin American law it supports, suffers from at least three different types of flaws. First, particular problems or issues in one location are generalized and projected onto Latin America as a whole. Conclusions are based less on detailed empirical and contextual analyses than on overall assertions about commonalities. Thus, for example, insufficient protection of defendant rights within the criminal procedure of countries such as Chile or Argentina is conflated with lax law enforcement in Colombia. In both situations, the adversarial system and oral

hearings have been promulgated as the proper solution, propelled by the purported, all-around superiority of development-supported “adversarialness.”

Second, units of analysis stemming from particular political or cultural preferences in the U.S. or the North Atlantic are applied to the Latin American context indiscriminately. The inexistence of that same political or cultural combination in some place in Latin America is then used to show an institutional lack or failure. For example, constitutional change through judicial interpretation may be preferred to constitutional change through amendments or new constitutions. It is not clear though that one is necessarily preferable to the other. Indeed, diametrical judicial re-interpretations of constitutional law may shake public confidence in the rule of law, especially in populations not thoroughly imbued in liberal legal ideology. In Latin America, constitutional change through new texts has been characterized as evidence of constitutional failure. Another example, the lobbying of law-makers and regulators by regulated industries may be deemed perfectly legal in the U.S., but *ex parte* communications with judges may be seen as evidence of corruption. While in some cases the legality in the one and corruption in the other may be clear, the difference is not universally obvious. These are just a few very general and broad-stroke examples.

The two types of flaws, described above, can be considered problems of insufficient context and narrow functionalism. There is another type of flaw that is more difficult to correct. Internal critiques of liberal law, traceable to the legal history of the West, are passed off as deficiencies specific to Latin America. To offer just a couple of examples here, they consist of some of the following.

First is law’s backwardness. This notion is expressed in different ways. It is often depicted as a legal culture stuck in an earlier time, reminiscent of the past in the West. The region’s law is seen as dominated by conceptual formalism. The image is not unlike classical legal thought or Lochnerism in the U.S. Additionally, the theories of a handful of European jurists are believed to represent the whole of legal consciousness in the region. Notably, ideas commensurate to legal realism and pragmatic legal reasoning are believed to have not yet arrived.

Second is the gap between law and society. The gap refers to the distance between the law practiced by ordinary people and the law on the books. This disjuncture is deemed inordinately, and measurably, wider in Latin America than elsewhere. It is one of the most salient images about law in the region. It is pervasive in development writing. And, it is supported by various, presentist works of legal history and social science. Notably, this notion is deployed by

many different camps. For example, it is celebrated by advocates of legal pluralism, possibly influenced by their interest in elevating the stature of particular group law relative to the law of the state. More traditional scholarship makes reference to this same idea in terms of the law's lack of penetration in society. Some progressive scholars have described it in terms of the symbolic versus operative value of law: whereby socially responsive legislation and constitutions are denounced as only symbolic, and not actually effective.

Third is a culturally inappropriate European law. This element of the diagnosis is not unrelated to the measure of the gap between law and society. It figures as one of the explanations for the distance between the two. Essentially, though, it is the flip side of Latin America's historical European legal transnationalism. The latter serves a number of functions, as noted above, and can be seen as simply a different sort of transnational paradigm. Within the alternate development paradigm, it becomes one of the elements of the diagnosis of malfunction. Indeed, from this perspective, the deep engagement in European transnationalism is one of the sources of legal failure in the region.

Fourth is elite control of the law. This observation may express a more radical point about liberal law in capitalist societies. It can mean that the rule of law simply masks the true sources of power in society. In its development version, it conjures the particular salience of a Latin American oligarchy in control of the state. It also functions as an indictment of the sector of society resistant, for one reason or another, to proposed legal changes. It is often denoted as lack of "political will" by the powers-that-be. This position conceives development reform as technical improvement, impeded by illegitimate self-interest, lethargy or ignorance. It ignores the political and distributional stakes inherent in existing law and in reforms. It groups together those that may be politically or economically opposed with those simply standing to lose ill-gotten rents. However, not in all cases is resistance to a particular legal change exclusive to the elites, just like not all law reform benefits the poor.

There are other elements of the development diagnosis, but these examples suffice for my purposes here. In short, statements of the above type are well-known critiques found in the history of jurisprudence in the United States and in Europe. In fact, each of these has counterparts in both traditions. In the development context, they are more often expressed in the U.S. vernacular. For example, the backwardness of law can be traced to Oliver Wendell Holmes's observations about law in the U.S. in his article, *The Path of*

*the Law*. In it, Holmes expressed the need of every generation to update its law in its own language and in terms of its own uses. Scholars note Holmes' role as a precursor to legal realism and a critic of formalism. Critiques of conceptual formalism in the U.S. were a mainstay of legal realists in the 1920's-30's in the United States. Realism sparked a loss of faith in logical abstraction at the level performed by the then reigning classical legal thought. Abstract principles were as a result no longer generally believed capable of rendering concrete particular results in specific cases. As another example, the gap between the law on the books and law in action is commonly attributed to Roscoe Pound and his sociological jurisprudence. Here was yet another attempt to unseat the mechanical or formalist jurisprudence. Gap studies also became popular in the 1960's by scholars of law and society. They were a welcome accompaniment to the bold constitutional changes of the Warren court. And so on with other elements of the diagnosis.

As already noted, these critiques or positions within jurisprudence have their analogues in the civilian tradition. Indeed, it is an interesting question of intellectual history to note their often contemporaneous popularity on both sides of the Atlantic. Critics of formalism such as Rudolf von Jhering and François Gény, to cite a couple, can be seen to express similar ideas to legal realists and sociological jurists in the U.S. Other parallels include the French *juristes inquiets* critics of legal exegesis, the German Free Law movement, sociological functionalism, and critical social theory. Some of these jurisprudential commonalities have already been well described by comparative scholars; others remain to be more fully explored.

Whether in U.S. legal jurisprudential terms or civilian ones, these positions are predominantly internal arguments within modern systems of law. Historically, they can be traced to particular political contexts with real stakes. Over time, they can also be seen to support particular positions in contests over legal interpretation and institutional design. In this way, they are part of the repertoire of legal political argument, often deployed in favor of one or another position on legal policy, positive law, legal institutions, constitutional interpretation, and change of this sort.

Each of these may have been at one time potentially devastating attacks on the legitimacy of the existing legal system, but for the most part they are currently normalized features of liberal legal discourse. For example, the common observation of elite control of law parallels a Marxist-type analysis of the real power in society and law's merely masking role. However, in the development diagnosis they serve merely as arguments for much tamer policy change and distributional reallocation. They usher in reforms consisting of

other versions of liberal law with different positive rules, institutional design, and historic or cultural origins. As such, the observed existence of the above-described negative phenomena within the law is never fully rectified or eliminated.

Indeed, aspects of law will always be liable to charges of needed updating – depending on what one wants to change. Conceptual formalism is an inherent dimension of logical reasoning: Its total elimination is impossible. What we find logically convincing may only be phenomenologically produced. In other words, there is no clear dividing line between formal and anti-formal, it may be a product of shared experience varying from reference group to reference group. The gap between law and action is axiomatically ever present. While surely there may be some rules more closely followed than others, a full society-wide measure is quite impossible. Resources for law enforcement surely play a predominant role. Plus, the reasons for rule non-compliance may be so broad ranging that even such a measure, were it possible, would be practically meaningless.

In any case, these internal critiques comprise the diagnosis of law in Latin America. This repertoire of legal arguments is projected as the external description of Latin American legal systems as a whole. As such, the charge of formalism is not simply directed at a line of conservative constitutional opinions but rather it becomes a problem of the whole legal culture. The law in action is not simply a way of privatizing areas of commercial law but rather marks the irrelevance of the whole of state law. European transnationalism is not simply a mode of legal reasoning but a mark of cultural inappositeness of the social system that is law and its exclusivity to a racial and cultural minority in the region. In short, the architects of development transnationalism have projected these moves as the diagnosis. This rendering promotes law reform and institutional re-design. Projects are, in this way, more easily sold. Absent a functioning law, replacement or substitution appears not only desirable but necessary.

Over time, these particular explanations and diagnoses buttressing particular projects of law reform or funding assistance have consolidated a standing narrative about law in Latin America. The amalgamation of these mutually-reinforcing descriptions has the effect of casting law in the region as effectively incapable of performing the functions expected of law. These enduring views have ripened into an identity or, in effect, a tradition of law. This instrumentalized image has solidified into the common understanding of the workings of law in the region. However, the shortcomings identified and the failings decried paint a permanent picture of failure. As noted above, the

elements of this diagnosis cannot be reversed through simple law reform. They are constantly observable features of liberal legal systems. Moreover, these internal critiques passing as diagnosis – while no doubt insights of jurisprudence on the workings and assumptions of liberal legalism – are routine tactical moves within legal politics. They are available to advance endless proposals. Thus, as failings of the legal system to be rectified and fixed, success is never achievable. Their endogeneity to liberal law is what makes them continually available as justifications for new reforms.

Troublingly, as a significant dynamic for law reform in Latin America, it seriously debilitates and undermines law, generally, as a social system. Pursuing reform in this way is counter-productive. First, it undermines the legal system purportedly “assisted” by continually denigrating it for the purpose of ushering in reforms. The reforms are equally liberal legal forms subject to the same failings previously diagnosed. Second, it occludes potential alternatives and values in pre-reform law not openly evaluated. An example is the mix of defendants’ rights and state enforcement powers in the areas of criminal procedure. The detailed question of specific rights at different stages of the proceedings and the appropriate mix in particular countries take a back seat to the juggernaut of transforming procedure from the traditional inquisitorial to the development adversarial. This example particularly shows the impact of the widely reviled “inquisitorial” model linked to Latin America, branded the cause of evils ranging from human rights abuses to non-enforcement, impunity, secrecy, corruption, undemocratic-ness and the like. However, the mere substitution of inquisitorial to adversarial obscures the many detailed policy questions that re-calibrating criminal procedure entails. More “orality” and shifting discretion from the judge of instruction to the public prosecutor will not solve the intrinsic tensions between political independence and official accountability, defendant rights versus state enforcement powers, positive law and social behavior.

In short, legal and institutional reform under the umbrella of development transnationalism undermines a significant amount of potential legal capital, or *acquis légaux*. Many legal policies and institutional forms may be easily if not automatically rejected through this formula. In this short Essay, it is not possible to discuss the array of legal capital existing within legal systems in Latin America. Briefly, though, they consist in part of the accumulated social investment in law and legal institutions over time, such as training the legal profession in certain modes of procedure and discourses of argumentation. A switch to different processes with different discursive landmarks and constraints adds significant costs. However, without a clear

definition of the policy changes and distributional consequences sought, a different legal institutional model may not fare any better. Indeed, as a result of the limitations of liberal law noted above, the same failure will likely re-appear.

Additionally, the *acquis légaux* also include particular political positions or policy combinations enshrined in law that, as a result of the development formula for reform, are never openly considered as real alternatives. It may be that a current policy mix can be convincingly shown to be counter-productive to economic development, but then again the reform may simply be more beneficial to those effectively mobilizing a “development” argument. For example, the position to reduce pro-labor legislation in Latin American countries draws strongly on the characterization of general legal failure. Specifically cited are the lack of enforcement, limited coverage, and cooptation of unions by government in some cases. In other words, the diagnosis is the same: lawlessness, the gap between law on the books and law in action, and official corruption. Discrediting national law assists in making the case for reforms. More concretely, however, real questions of policy over job security, workers’ rights, medical benefits, and the like are at play. Moreover, such reforms begin to shape the national political economy. Much of this discussion and debate, however, is waged only indirectly. It is obscured by the logic of development transnationalism. Rather than confront the stakes more directly, attention is directed to rectify purportedly broken legal systems, when at issue are policy changes and distributional re-allocations.

## V. INTER-DISCIPLINARY SUPPORT FOR THE TRADITION

The development diagnosis is also supported by inter-disciplinary work. The main examples come from legal history, comparative politics, and legal sociology. In this section, though, I will draw from an example from finance studies. Briefly, the “legal origins” literature recently developed in the area of law and finance is another example of failed law discourse. The source is a series of empirical works by Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny. The authors claim a significant correlation in levels of national economic development, measured by breadth of share ownership and depth of capital markets, to the legal origins of key corporate law rules. To do this, they divide countries into categories based on the origin of four primary legal systems: English, French, German and Scandinavian. They show through statistical regression that countries whose relevant business law originates in France fare far worse than any other group

of countries. The common law countries perform the best. The authors admit that France and Belgium, notwithstanding, are developed countries. (You can't argue with success.) Other than a few other also developed European countries -- like the Netherlands, Italy, Greece, Portugal, and Spain --- most other French-origin countries are in fact Latin American states.

I highlight this school of scholarship, and work of this type, to note the overall impact of studies like this. This type of literature contributes to the overall diagnosis of a failed law in Latin America. It is not dependent on development expert reports for its conclusions. Rather, the common sense understanding of experts, law firms, government agencies, and professors of law are formed and buttressed by social science and other academic work of this nature. This type of study, however, is highly questionable. Numerous critiques of the "legal origins" theses are already published. To note a few, Detlev Vagts notes that legal comparativists have long shown these groupings of legal families do not withstand scrutiny. Mathias Siems argues that "legal families" culled from generic comparative law texts is too imprecise a variable for econometric measures. Moreover, Siems notes: "the fact that in most law and finance studies the French legal family performs worst is mainly a statement about Latin America." Mark Roe shows that differences of political economy, including devastation by war and government policy, are better explanations of differential economic performance. Mark West notes the possibility of statistically significant regressions of legal origins with something as outlandish as world cup victories – in which case French legal origin is fantastic. West provocatively makes the point that a-contextual regression analyses can lead to quite non-sensical results. Daniel Berkowitz, Katherina Pistor and Jean-Francois Richard, in a rather more internal critique, note the significant difference in home-grown origins versus transplanted-law origins.

In short, despite its serious flaws, scholarship of this type contributes to the construction of Latin America's tradition of law. This scholarship can be particularly easily instrumentalized in the service of development transnationalism. It supports the general diagnosis of law in the region. In this way, it can bolster country reports and project proposals in individual areas. It is not that I am claiming a conspiracy of the social sciences in reaching conclusions concordant with the overall paradigm of international relations in the legal sphere. However, scholars may be drawn to these research designs and feel comfortable with their overall conclusions because they appear to be common sense. Clearly, there have been greater levels of economic development in the United States than in Latin America. Statistically correlating legal system origins to that fact, however, tells us nothing about the

political and social context. It does, however, solidify an image of law and legal families as a set of competing models. Within that competition, the Latin American version is again presented as failed.

## VI. CONCLUSION

The paradigm of development transnationalism in Latin America promotes the construction of a tradition of Latin American law. Rather than a positive source, this tradition is the characterization of pre-reform law against which development reforms are to be undertaken. Such tradition is produced by analyses and diagnoses of law's failure to deliver development and democracy to the region. It is bolstered by works of legal history, comparative politics, and legal sociology drawn to this same problematic. Often reading the same diagnosis back into the history of Latin American states, or finding the same failings in every social sector of national societies, inter-disciplinary scholars frequently reinforce the same conclusions. Specifically, law in Latin America is faulted for the intrinsic limitations of liberal law as a system of social governance. In this way, the failure described is permanent. It is inherent in all modern legal systems to some degree.

Viewed, then, as an instrumental characterization, the Latin American legal tradition of legal failure serves to promote projects of legal change and reform. While the projects advanced may have different political valences – including some with which we might agree – my argument here is that reform pursued in this way is counterproductive and undermines the standing of law in the region. Furthermore, it obfuscates the real questions underlying legal reform and the actual impact that these changes bring. Under cover of a substitution to a more developed law, the rule of law, best practices, or what have you, a different set of policies and institutional arrangements are put in place. While this has the effect of changing course, it is less clear that the policies previously in place have been convincingly shown wrong or lack majority support. Moreover, some political positions worth defending may be more easily swept away through the fiction of pursuing policy and distributional change as simply a matter of correcting for a failed law.

## REFERENCES

Arnulf Becker Lorca, *International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination*, 47 HARV. INT'L L.J. 283 (2006)

Marie-Claire Belleau, *The "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth Century France*, 1997 UTAH L. REV. 379 (1997)

Daniel Berkowitz, Katherina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 1 CID Working Papers on Law and Development (2000)

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

P. DeShazo and J.E. Vargas, eds., *Judicial Reform in Latin America: An Assessment* (2006)

Yves Dezelay and Bryant G. Garth, eds., *The Internationalization of Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States* (2002)

Pilar Domingo & Rachel Sieder, eds., *The Rule of Law in Latin America* 151 (Institute of Latin American Studies, University of London 2001)

Jorge L. Esquirol, *The Failed Law of Latin America*, 56 Am.J.Comp.L. 75 (2008)

Jorge L. Esquirol, Alejandro Álvarez: *A Question of Identity*, 19 Leiden J.Int'l L. (2006)

Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 Fla.L.Rev. 41 (2003)

Jorge L. Esquirol, *Fictions of Latin American Law* (Part I), 1997 Utah L.Rev. 425 (1997)

Mauricio García-Villegas, *La eficacia simbólica del derecho: Examen de situaciones colombianas*. (1993)

James Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (1980)

Oliver W. Holmes, *The Path of the Law* (1907)

Morton Horwitz, *The Transformation of American Law 1870-1960* (1992).

Edmundo Jarquín & Fernando Carrillo, eds., *Justice Delayed: Judicial Reform in Latin America*, IDB (1998)

Kenneth L. Karst & Keith Rosenn, *Law and Development in Latin America* (1975)

- David Kennedy, *The International Anti-Corruption Campaign*, 14 Conn. J. Int'l L. 455 (1999)
- Duncan Kennedy, *The Rise & Fall of Classical Legal Thought*, Beard Books (2006).
- Duncan Kennedy, *A Left Phenomenological Critique of the Hart/Kelsen Theory of Legal Interpretation*, in Cáceres et al., eds. *Problemas contemporáneos de la filosofía del derecho*, UNAM (2005)
- Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in *Left Legalism/Left Critique*, Brown and Halley, eds. (2002)
- Duncan Kennedy, *A Semiotics of Critique*, 22 Cardozo L. Rev. 1147 (2001)
- Duncan Kennedy, *A Critique of Adjudication* (1997)
- Josef L. Kunz, *Introduction to Latin-American Philosophy of Law in the Twentieth Century (Continued)*, 24 N.Y.U.L.Q.Rev. 473 (1949)
- Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J.Fin. 474 (1999)
- Rafael La Porta et al, *Law and Finance*, 106 J.Pol.Econ. 1113 (1998)
- Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. Fin. 1131 (1997)
- Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 54 Am.J.Comp.L. 1617 (2007)
- Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 Harv. Int'l L.J. 1 (2004)
- Mitchel Lasser, "Lit. Theory" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse, 111 Harv.L.Rev. 690 (1998)
- Mitchel Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 Yale L.J. 1325 (1995)
- Assaf Likhovski, *Czernowity, Lincoln, Jerusalem and the Comparative History of American Jurisprudence, Theoretical Inquiries in Law* (2003).
- Diego López-Medina, *Teoría impura del derecho: La transformación de la cultura jurídica latinoamericana* (2004)
- Diego López-Medina, *El derecho de los jueces. Obligatoriedad del precedente constitucional. análisis de sentencias y líneas jurisprudenciales. teoría del derecho judicial* (2000)

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 (1995)

Roberto Mangabeira Unger, *Legal Analysis as Institutional Imagination*, 59 Mod. L. Rev. 1 (1996)

Roberto Mangabeira Unger, *What should Legal Analysis Become?* (1996)

Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 Ind. J. Global Leg. Stud. 383 (2003)

Ugo Mattei, *Comparative Law and Economics* (1997)

Juan E. Mendez, Guillermo O'Donnell, and Paulo Sergio Pinheiro, eds., *The (Un)Rule of Law & the Underprivileged in Latin America* (1999)

John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3rd Ed. (2006)

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

Liliana Obregón, *The Colluding Worlds of the Lawyer, the Scholar and the Policymaker: A View of International Law from Latin America*, 23 Wis. J. Int'l L.J. 145 (2005)

Guillermo O'Donnell, *Why the Rule of Law Matters*, 15 Journal of Democracy 32 (2004)

Angel Oquendo, *Latin American Law* (2006)

Rogelio Pérez-Perdomo, *Notes of a Social History of Latin American Law: The Relationship between Legal Practices and Principles*, 53 Rev. Colegio de Abogados P.R. 1 (1991)

Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12 (1910)

William C. Prillaman, *The Judiciary and Democratic Decay in Latin America – Declining Confidence in the Rule of Law* 19 (2000)

William Ratliff & Edgardo Buscaglia, *Judicial Reform: The Neglected Priority in Latin America*, 550 Annals AAPSS 59 (1997)

*Reformas a la Justicia Penal en las Américas*, Fundación para el Debido Proceso Legal (1999)

Mark Roe, *Legal Origins, Politics, and Modern Stock Markets*, 120 Harv.L.Rev. 460 (2006)

Keith S. 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 (1990)

- Teemu Ruskola, *Legal Orientalism*, 101 Mich.L.Rev. 179 (2002-2003)
- Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 Am. J.Comp. L. 1 (1991)
- Edward Said, *Orientalism*. Vintage Books Edition (1979)
- Mathias Siems, *Legal Origins: Reconciling Law and Finance and Comparative Law*, Centre for Business Research, University of Cambridge, Working Paper No. 321 (March 2006)
- Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L.J. 1 (1984)
- Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 Wis. L. Rev. 975 (1982)
- Doris Sommer, *A Vindication of Double Consciousness*, in *A Companion to Postcolonial Studies*, H.Schwarz and S. Ray, eds. (2000)
- Doris Sommer, *Foundational Fictions: The National Romances of Latin America* (1991)
- Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (2006)
- Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004)
- David Trubek & Álvaro Santos, eds., *The New Law and Economic Development* (2006)
- David M Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 Fla.St.U.L.Rev. 1 (1990-91).
- David Trubek and Marc Galanter , *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 Wis.L.Rev. 1062 (1974)
- Detlev Vagts, *Comparative Company Law: The New Wave*, in *Festschrift für Jean Nicolas Druey zum 65.Geburtstag* 595 (Rainer J. Schweizer et al. eds. 2002)
- Mark West, *Legal Determinants of World Cup Success*, Olin Center for Law & Economics, University of Michigan, Paper No. 02-009 (2002)