

Cluster I

\*41 CONTINUING FICTIONS OF LATIN AMERICAN LAW

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\*42 Law in Latin America is routinely the target of systemic criticism by U.S. commentators. Marked by underdevelopment and corruption in the region, national legal systems are considered part of the problem and not the solution. As a result, numerous reform proposals advocate the internationalization of traditionally national legal domains. International competence in the form of the Inter-American system, NAFTA, a free trade area of the Americas or World Bank intervention in national judiciaries will not, however, supplant most of the hemisphere's law. Whatever expectations the global arena may hold, local law will continue to play a substantial role. In addition, internationalizing reforms may actually undermine the general goal of expanding democratic participation. Distancing the operation of law from local reach is likely to reinforce the very anomalies already perceived in the region. In this light, we should re-examine our settled understandings of "Latin American law" and the latter's widely-noted limitations. This Essay advances the task of re-thinking some of the basic background beliefs.

The most substantial body of U.S.-based, legal writing on the region remains the development scholarship of the 1960s and 70s. At the time, many U.S. legal scholars turned their attention to promoting economic development through law reform. With respect to Latin America, their diagnosis was that excessive legal formalism constituted the main stumbling block to growth and the redistribution of wealth. State law, the sum

of official rules and regulations, was seen as operating quite separately from the needs and characteristics of Latin American societies. The image of a wide gap was used to characterize the distance separating the written law, sanctioned by the State, and the living law--the actual rules which people follow. Moreover, the perceived disconnection of Latin American peoples from their legal institutions was, in turn, taken as reflecting a host of societal and cultural particularities unmet in the law. These same critiques and images continue to be expressed today: "antiquated Latin American law is insufficient to meet the needs of developing societies and economies"; "legal techniques are unresponsive to the societal goals of development, efficiency and rationality"; and "judicial administration is arcane and ineffective." Moreover, these same core beliefs can be expected to influence the structure of hemispheric trade agreements and to inspire more program proposals by non-governmental organizations.

Development scholars sought to address these same dysfunctions several decades ago by proposing a range of remedies, especially in the area of access to the courts and legal education. The legal culture, it was argued, should better square with modernization and its priorities. New legislation was suggested in furtherance of economic activity; new methods were introduced to make the legal process more accessible; and, a different conception of the role of law in society was advanced as crucial. Latin American lawyers and legal operators were urged to exchange their <sup>\*43</sup> professional tools for more pragmatic implements. While never really attaining much impact in Latin America, the Cold War project of law-and-development quickly succumbed to its critics, not the least of whom were some of its very practitioners. For many, the end was the result of authoritarian Latin American governments and the manipulation of well-intentioned reforms. Development-style legal pragmatism, it seemed, simply lent credibility to the then reigning military rulers in the region, with its malleable conceptions of law and legitimacy. The traditional legal formalism of Latin America at least appeared to offer a way of holding an intractable law, with whatever protections and guarantees it offered, over authoritarian states and illegitimate regimes. For others, developmentalism failed because of the shortcomings of its proponents. Armed with an insufficient understanding of the workings of Latin American law, these early scholars are viewed in retrospect, by some, as not sufficiently attuned to local legal cultures. Notably, today's neo-developmentalists stress this latter explanation for earlier failings and are quick to note, as a course correction, their now extensive collaboration with Latin American legal scholars and institutions and their current advisory rather than directing roles.

In any case, while its immediate goals may have been foiled, the scholarship of developmentalism and the framework it erected for thinking about law in Latin America continue to have far-reaching effects. The images it created remain well-entrenched in the minds of U.S. academics and policy planners. First, while claiming to offer a realistic diagnosis of the failings of Latin American legal systems, developmentalists pressed a commonplace argumentative strategy. The gap between law and society, or the discrepancy between social and legal spheres, is a common trope throughout jurisprudence. Development experts pressed this image, though, as a way to usher in a series of broad-scale reforms. Purporting to align the legal system with social needs, they were able to launch changes in substantive law, legal education, and litigation, which would have in all likelihood been more difficult if introduced piecemeal and debated on their own merits through more open processes.

Second, developmentalism's deployment of social incongruity as the basis for its intervention has produced a sort of legal orientalism. That is, it has generated a depiction of law and society in Latin America which is quite indefensible as pure description: Law is presented as qualitatively distinct from social relations. In this same vein, Latin America is purported to be the site of more, and more divergent, legal pluralism than one would find elsewhere. This strategic portrayal of Latin America, more than just shoddy empiricism, has a perverse effect. It continually discredits Latin

American legal institutions by calling for a different legal model, projected and idealized as truer to economic and social realities. Repeated iterations of these notions as empirical description have lodged these images as a special peculiarity, or identity, of Latin American law. That is, the \*44 significant focus and writing on Latin America during the high period of developmentalism has had a profound influence on commonly-accepted notions about Latin American law and legal systems. More than at any other time, U.S. law reviews constructed the picture of a Latin American legality. Their central images, part of a rhetorical strategy, cemented the notions of an abnormal, Latin American gap between law and society and a culturally or socially distinct normativity peculiar to Latin American peoples.

In this background way, 1960s developmentalism and its aftermath have structured the politics of law in Latin America for subsequent generations. Highlighting the dissonance between state law and social practice, as developmentalists did, has over time entrenched a deep skepticism as to the relevance and desirability of the former. Specifically, and here one of the main points of this Essay, it has led to increased disengagement by progressives with official legal discourse, especially with respect to struggles over the meaning of legal norms. And, it has skewed debates over the appropriate mix of regulatory versus informal mechanisms of societal governance. Progressives are led to advocate automatically and reflexively for the informal end of the equation, putting all stock in social-based solutions, understood as reflecting a distinct, identity-based normative system. By contrast, state law is identified with illegitimate elites and portrayed as mere ideological cover for the ruling classes. It is argued that a more effective and appropriate law should take its place--characterized as a more autochthonous law or, alternatively, modern law, the U.S. legal model, or transnational law. As such, engagement with state law is projected as a sterile endeavor, relegated to the ministrations and concerns of Latin American elites. In its place, attention is drawn to autochthonous social spheres of normativity or, alternatively, a foreign model. As a result, questions over informality or non-state intervention in certain areas of the economy and society are displaced, never taken up as issues of political and economic interests directly, but rather as matters of essentialist legal identities outside state law.

The impact of developmentalism was also significant in other unexpected ways. Clearly, the call for a renegotiation of existing social and economic arrangements fell on deaf ears among Latin America's legal traditionalists. They dismissed any such social-based argument and rather, if anything, cast it as political maneuvering and not serious legal reform. Responding to this marginalizing move over time, subsequent generations of progressives have-- misdirectedly I argue below--pursued a strategy of separate but equal systems of legality, with social norms as the source of such separate systems and the banner for a populist legal politics. This approach, consisting of an acute emphasis on social practices, a qualitatively distinct Latin American conception of law, and the idea of legal particularity across identity groups in the region--taken together, \*45 what I call the hyper-social--can be understood as a product of 1960s developmentalism. Its persistence as a progressive legal strategy, as well as its intrinsic marginality, is especially connected to the way in which legal developmentalism was successfully rebuffed.

The notion of official law's social incongruity, beyond just a formula for promoting the law-and-development program in the 1960s, has retained a special appeal in Latin America. Indeed, its general acceptance as uncontroversial diagnosis, for both the right and the left in legal politics terms, is a central topic of this Essay. The notion's persistence might, at first blush, be seen as an open challenge to traditional Latin American jurists, a constant reminder of the fragility of national legal systems as against the overwhelming weight of divergent social forces. And indeed, neo-developmentalists continue to play on this image in just this way. Images produced by progressives in the 1960s serve just as well to push for a neoliberal renovation of Latin America's

discredited legal systems today; this time following the logic of the market rather than state-directed growth and redistribution.

For progressives still operating under this same "development" framework, the usefulness of this strategy has long come to an end. It has induced new generations to engage in a prolonged and unfruitful search for the actual substantive content of Latin American social normativity. Instead of challenging traditionalist interpretations of official law, and openly questioning which sectors benefit from informality, demands are premised on a separate social code, typically posited and sought outside the official legal realm. Countless efforts have been expended in confirming the existence and substance of these separate codes. At the same time, the degree to which the Latin American gap between law and society is greater than elsewhere is repeatedly accentuated, and the static character and social irrelevance of state law reinforced.

Official legal discourse, of course, remains central to the distribution and maintenance of economic, political and social power. It serves as a significant locus of societal struggle. State law's interpretation and potential re-conceptualization, even if performed in outwardly opaque fashion, is a chief mode of social governance. It remains the site for advancing governance alternatives and cementing existing configurations. It is constitutive of the economy and society, and most importantly of sectors remaining outside direct state involvement. Furthermore, its role in structuring access to the global arena, by local interests and popular forces, while by no means exclusive, will surely remain considerable. Thus, to the extent developmentalism has swayed progressives to abandon their engagement with official legality, the effect has been to concede significant power. Freed of such academics and activists, traditional jurists can more easily dominate legal interpretation. All the while, this dichomotization reinforces traditionalism's monopoly over official law and its claims to a \*46 non-politicized legality--and thus to law, tout court. In this connection, a legacy of 1960s developmentalism is a more undemocratic legal discourse in Latin America.

The effects mentioned above work a great disservice to the understanding of law in the region as well as to progressive intervention in this field. Abandoning official law to the most conservative actors within Latin America reinforces, if not produces, the very notion of its exclusivity to elite sectors. Furthermore, normalizing as fact a pathological disconnection between official law and local society undermines the legitimacy of law generally within popular consciousness, without any qualitatively better or less problematic substitute. Social normativity as an operational system, even if elevated to the rank of official law, cannot avoid on-going societal struggles over political conservatism, elite monopolies, and discursive hegemonies. None of these can be magically sidestepped. At most, social normativity offers a different terrain for these same battles. Moreover, the social field as deployed by progressives today does not serve them well. On the contrary, the discredit heaped on national legal systems has mostly worked to open the door to--or at least make it more difficult to resist--frequent proposals for transplants of foreign law or foreign models. While legal imports may not embody a determinate political valence (either multi-nationals or barrio dwellers might be benefitted in a particular instance), they typically do deprive local actors of transparent engagement with the political choices inherent in lawmaking. And, they fail to solve the proffered problem of legitimacy, said to consist of the current system of non-participative and mystified lawmaking, by replacing it with more of the same.

In this Essay, I focus on the ideas about law in Latin America embedded in law and development scholarship of the 1960s and 1970s. I criticize the particular way in which these ideas have subsequently been given content. Additionally, I highlight their impact on legal thinking in and about Latin America. Finally, I describe alternative ways to conceive of the relationship between society and law in the region. While a significant

body of neo-development scholarship has been produced in the last two decades, my aim is not to describe developmentalism over time, but rather to highlight the particular legacy of its earlier variety and the reactions it provoked in Latin America.

## I. THE 1960S-1970S LAW-AND-DEVELOPMENT PARADIGM

My focus in this Part is to highlight the key ideas of the 1960s and 1970s law-and-development movement. Numerous theories about law's relation to the economy and to society have been advanced throughout the past century, including various theories finding favor within Latin America. \*47 Some of these overlap with the notions identified here. [FN1] To the extent they coincide, this Essay then speaks to potentially multiple intellectual traditions. However, my line of analysis is U.S. law-and-development. Different attempts have already been made at articulating its central paradigm. [FN2] These have mostly focused on identifying the conceptual models and political forces that influenced developmentalists. [FN3]

My approach is quite different. It examines the rhetorical structures used by development scholars, the images drawn upon, and especially the framework they offer us for thinking about, and acting in relation to, Latin American law. [FN4] Rather than characterizing "legal development" as some sort of system or model (even a highly variegated or multiply-defined one) in which the central question is its acceptance or rejection (even if this is considered in light of deeply local variables), I examine legal developmentalism as a set of argumentative structures, deployed at a moment in time by a group of legal professionals, to achieve their specific aims. The latter, simply put, consisted of exporting a part of U.S. legal discourse under the assumption it would support both economic growth and social justice.

My objective in this Essay is to highlight the generic legal strategies that inform developmentalists' "diagnosis" of Latin American law, to note their \*48 deployment of these arguments as empirical description of law and society in the region, and to remark on the effect that the continued acceptance of these ideas, as part of the nature of Latin American law, have on legal politics within Latin America. As a result, my analysis is concerned more with development scholarship than with particular projects proposed or implemented in Latin America. Of course, these are inter-related, as much of this scholarship describes then current or past projects.

Another focus of my analysis is the reaction of traditional Latin American legal scholars to the project of developmentalism, as well as the lasting consequences of the development effort. Accordingly, I draw into consideration the reactions of Latin American jurists, as active interlocutors, and not simply as accepting or resisting of foreign aid. The demise of developmentalism in the 1970s cannot be explained solely in terms of cuts in assistance funding or political debates occurring in the United States--although these are important--but depends on the appeal and receptivity of the project in the legal political context of Latin America. This is quite different than saying that legal development or that a "U.S. model" was manipulated by Latin American dictators, thereby causing the project's failure, [FN5] or that Latin American legal culture is of a different quality--whether socially or culturally--rendering antiformalism or pragmatism impracticable. It highlights, instead, how Latin America's legal intelligentsia reacted to an attempt to change the rules of the game. Law and development is more important, in Latin America, because of its failure than because of any significant impact of its programs. And, the end of developmentalism is meaningful because of the role it played within Latin American legal politics and because of the impact of its scholarship on persisting rhetorical constructions.

Law-and-development was, for the most part, a politically progressive movement within the U.S. legal academy. Riding on the coattails of development economics, legal developmentalism went hand-in-hand with reformist approaches to social justice and the redistribution of wealth in Latin America. Political stability and economic growth were understood as inter-connected. Achieving both was U.S. policy in the 1960s, an attempt \*49 to counter more revolutionary appeals such as the Cuban Revolution of 1959. Of course, developmentalists can be found in varying stripes. [FN6] The movement became quite radicalized at both ends of the spectrum. On the right, economic progress turned into a justification for military governments and the systematic repression of social demands. Pinochet's Chile is a bold example. It is mostly this version of developmentalism which survived through the 1980s. Right-wingers ultimately turned to private markets, instead of the military, as the discipline to produce economic growth. On the left, the promise of economic development came to be seen as illusory, the relationship between developed and underdeveloped countries more static and symbiotic than collaborative and evolutionary. Dependency theory drove these points home. [FN7] Today, the progressives that are engaged in economic development debates work mostly from a defensive posture: arguing for some continuing role for the state over the market and highlighting the human toll of an unbridled economic logic.

My portrayal of law-and-development scholarship here draws mostly from the progressive middle, and from the first wave of developmentalism, which constitutes the bulk of writing about Latin America in U.S. law reviews and reflects the most enduring images. Notably in the 1960s and 1970s, several legal casebooks were published in the United States, specifically on Latin America. [FN8] They contain excerpts from various development scholars of the period in addition to their authors' own views. These materials, as well as additional works cited, provide the basis for my analysis here.

#### A. Social Theory of Law

In the law-and-development movement, like any area of scholarship, its participants espoused a range of approaches to scholarship and to legal \*50 theory. [FN9] In the main, however, the imprint of social-based approaches is unmistakable. [FN10] Many development scholars were contemporaneously engaged in law-and-society groups, particularly active during that time. [FN11] As such, a general description is possible. It is not an exhaustive description nor can it capture the complexity of any single scholar. Still, it conveys the most operational ideas of this moment in legal scholarship.

That being said, some brief comments about social theories of law, in general, are in order. Evidence of the richness of legal theory, sociolegal discourse in some form is a significant complement to most modern conceptions of law. [FN12] While no single generalization captures the variety of \*51 theories on the nexus of law and society, the familiar dualism offers a ready source of legal authority. It signifies a separate field of societal interaction whence organic norms can be unearthed. [FN13] It may also be used to draw into consideration, within the context of legal decisionmaking, the formal law's practical effects on society. [FN14] In both cases, the purported link to popular society provides an ostensibly democratic justification for its relevance. Expanding legal decisionmaking, in this way, to include social aspects enlarges the set of technologies available to legal operators beyond the traditional modes of conceptualism and deductivism or naturalism and positivism.

Also significant, social-based theories offer a way to challenge existing rules or interpretations of rules. An account of prevailing social realities may, for example, be introduced within legal analysis to argue the obsolete nature of current legal rules. It may be used in favor of a new policy direction, arguably more in keeping with societal needs, over others. Or, it may be used to marshal images of societal ill-adaptedness and

thus an explanation for the failure of conventional legal formulas. Of course, the method can also be deployed to uphold the underlying legitimacy of existing laws. Images of society can also be produced to justify the seamlessness and cultural coincidence of legal norms and societal practices. Social accounts of law are actually quite standard within most modern legal systems. As such, they often stand for nothing more than the dominant understanding. Thus, while social argument can often be an effective tool \*52 for reform, it is just as often part of the legitimating rhetoric of established positions.

Scholars of the 1960s and 1970s were clearly interested in the question of development. [FN15] While the term came to encompass a range of meanings, key to its understanding was more, and more equitable, economic growth. [FN16] Working from the discipline of law, legal developmentalists struggled with the relationship between economic and other sorts of development and the legal system. [FN17] Convinced that a link existed, they charged ahead with projects of legal reform with the objective of promoting economic as well as political development. [FN18] Their writing about Latin America, the focus of this Essay, built a consensus of sorts on the ills of then contemporary systems of Latin American law. [FN19] These ideas, sketched out below, inform most writing about Latin America, and they continue to do so today. They influence the type of legal reforms often insisted upon by international organizations and foreign governments for the region. They also condition \*53 the types of projects supported by non-governmental organizations in their efforts to promote change. Most importantly, they impact the legal strategies available for progressive positions.

## B. Gap Between Law and Society

Developmentalists were in accord that a wide rift existed in Latin America between state law as enacted and the way people behave. [FN20] The relationship between law and society, law-and-development's central premise even if not fully understood, thus consisted of a vast disconnection between the two in Latin America. This discrepancy is central to a range of scholarship on agrarian reform, [FN21] economic regulation, [FN22] urban squatter settlements, [FN23] legal aid services, [FN24] legal education, [FN25] and the legal culture. [FN26] \*54 Without attempting an exhaustive description of all these works, the key throughout is that official law is out of step with society. A formalistic and ritualistic legal tradition, based on foreign, European models, is determined to be a key obstacle to development, if not an outright bulwark of the status quo. Additionally, the actual social practices of Latin Americans are presented as reflecting a distinct realm, separate and distinguishable from state law.

The disconnectedness of law to society was highlighted, within developmentalist writings, to demonstrate the ineffectiveness of state legal systems. In their place, a modern law capable of promoting development was proposed. Developmentalist efforts spanned a broad range, including both formal and informal strategies. Legislation for agrarian reform programs and urban settlements was advanced. Antitrust and securities law regimes were devised. Legal education, especially, was targeted. Some scholars emphasized the mentality of development. Setting proper incentives and drawing from local codes of conduct--development from the bottom--were highlighted. The prominence of the informal sector was studied. Informality provided a gauge on the motivations and values of local actors. It was also typically characterized as the by-product or result of an ill-functioning formal legal sector. A more effective modern law, or \*55 the promise of it, was by contrast a way of legitimizing the political and economic proposals advanced by developmentalists. [FN27]

By contrast, references to social or informal legality encompassed a variety of different meanings across the range of development writing. When filling a relatively minor role in specific work, the notion of the social order generally refers to a source of additional

norms, derived from observable social interactions, social values, and attitudes [FN28]-- themselves derived from morality, [FN29] religion, community, and other systems of coercion. [FN30] Under this formulation, the claim is that the formal law does not satisfactorily describe, and could not describe, the entire legal system. [FN31] \*56 Simply enough, other criteria must be considered. These may, alternatively, supplement existing laws, provide for other better rules, or assist in understanding the causes for official law's breakdown.

In other works of development, the social law plays a larger role. In these cases, the social field signifies a thickly populated set of autonomous cultural norms. Qualitatively different from state law, this notion of social law designates an alternative system more organically connected to the societal group. [FN32] Under this formulation, the claim is that social groups hold such norms irrespective and possibly independent of state law. In its strongest terms, social law is presented as a potential substitute for the state.

The scale of legal diversity identified also varies within development scholarship. It may refer to particular norms of a group or community within a specific area. Some development and development-paradigm studies, in fact, focused on systems of normativity within smaller-scale communities: urban barrio dwellers, [FN33] rural localities, [FN34] indigenous settlements, and others. Alternatively, it may refer to the vastly different levels of state presence throughout one country or in Latin America as a whole. In the aggregate, nonetheless, these works offer the picture of a broadly plural social sphere.

Every Latin American country has a large body of formal national law on the books--and has had, at least from the mid-19th Century. Still, the vertical segmentation highlighted by Wiarda [i.e., "a number of corporate elites and intereses"] persists, stubbornly resisting the establishment of truly national legal universalism. The moral communities, in other words, are national communities only with respect to a relatively limited number of kinds of transactions and relationships.

A perspective that emphasizes participatory development, however, permits us at least to speculate that a "horizontally" oriented idea of community may grow at a grass-roots level, with legal institutions playing their \*57 expected role: defining communities, providing channels for group effort, providing training in cooperation and leadership. [FN35]

This diverse society is consistently presented as sharing one commonality, its radical distinctness from the official legal culture.

### C. Arcane and Formalist State Law

In terms of existing law, developmentalism emphasized the ineffectiveness of Latin American legal systems, alien to the social particularities of Latin American peoples. [FN36] Rather than emphasize the multiple and competing governance projects at work in the arena of state law, drawing on both formalist and antiformalist methodological discourses, [FN37] developmentalists painted with a broader brush. They depicted official legality as simultaneously anachronous, malfunctioning, and marginal. They presented the picture of an unredeemably dysfunctional legal system, and they drew on a variety of images to do so.

The charge raised by developmentalists has the effect of drawing into question the conventional repertoire of Latin American legal technologies. It questions its capacity to represent, and perform, legal decisionmaking in transparent, rational, and accessible forms. Latin American legal discourse indeed reflects a relatively complex argumentative

style. [FN38] Drawing on European scholars and foreign models, legal operators frame their arguments in outwardly circuitous and arcane elocutions. In general, the dominant mode of legal reasoning advances specific legal positions on the basis of foreign authorities and legislative developments in Europe and North America, that is to say, on interpretations of foreign jurists and characterizations of international developments. This does not mean that legal argument is necessarily any less strategized nor reflective of particular local interests. Foreign authorities are sufficiently abundant, and their interpretations sufficiently pliable, to provide a basis for multiple positions.

**\*58** It does raise the question, however, which will be discussed further below, of the outward effects of this dominant mode of legal reasoning. Even if the array of local political choices may be fully represented, the need to marshal European precedents or transnational jurists in their defense may undermine, in the aggregate, a system of democratic law. Law is mystified by being presented as beyond local agency and individual objectives. The different outcomes in question are eclipsed by discussions of foreign jurists. Additionally, certain interests may more easily trump others absent a more transparent, democratic discourse. The quite indeterminate discourse of juristic authority, paradoxically, makes it easier to defend idiosyncratic results. Furthermore, allocating societal goods without reference to social consequences or local equities relieves the decision-maker of a level of democratic constraints, even if the constraint is only to craft the decision within the discourse of democratic constraint.

Not so attuned to the intricacies, however, developmentalists mostly depicted the official Latin American legal systems as a hold-over from formalism of an earlier era. The legal system was pictured as a relic, not unlike classical legal formalism at the turn of the twentieth century in the United States. Albeit, Latin American formalism was understood as reflecting civilian rather than common law forms. Typical common law prejudices about civilian legal systems were raised. For example, ideas about the rigidity of code law and the isolation of the deductive method from social reality were added to the causes of Latin America's anachronistic law. [FN39] Historical narratives were introduced to support claims of the region's tradition of ineffective legality. The mass of colonial laws and regulations, unassimilable and contradictory, were used to show the parallel with contemporary forms. [FN40] Sociological narratives, today quite suspect, were raised to argue the characteristics of societies impacted by Spanish and Portuguese mores, and thus to explain Latin Americans' predispositions to circumvent official law. [FN41]

Somewhat understandably, legal technique in Latin America reinforced this perception. Clearly, legal discourse consisting of citations to foreign **\*59** jurists and transnational legislative developments recalls an outdated theory on the nature of law. The notion of Latin American law's foreignness is also supported by the traditional comparative law scholarship on the region. [FN42] The legal systems of Latin American countries are generally described as faithful imitations of continental European models. Particularly in terms of private law, the resemblance between Latin American legal codes and legislation and their European counterparts is well noted. Continental legal sources and juristic authorities are understood as the bases of legal argument within Latin America. Additionally, the United States is generally recognized as the source of most of the region's constitutional law. These characterizations of imitativeness or transplantedness are not, however, intended as criticism. Many comparativists and Latin American jurists, on the contrary, laud the transnational commonality and, indeed, point to it to justify the legitimacy and objectivity of the region's laws.

In addition, much comparative scholarship about Latin America reinforces the idea of the region's official legality as merely a brand of legal formalism. The eminent, Austrian jurist Hans Kelsen is often presented as a sufficient and exhaustive description of Latin

America's legal consciousness. Mainstream analyses signal the larger-than-life impact of this European jurist. [FN43] For many commentators, after citing Kelsen no more need be said. For them, Kelsen is a shorthand for describing a system of positive law formalism, essentially a belief in the hierarchical sources of legal authority--from regulations to statutes to constitutions--and the law as a relatively autonomous system--the pure theory of law. Kelsen, coupled with a Spanish, scholastic past often constitutes the extent of explanation of Latin America's official legality. Its natural law and deductive logic tradition is simply understood to be updated by reference to Kelsen's theory of graduated legal sources and the autonomy of law from other spheres of social life.

Other analyses demonstrate a more varied picture. Despite Kelsen's great influence, other figures have been instrumental. [FN44] And, more importantly, Kelsen himself has been used to stand for many different propositions and many different interventions within legal argument and legal politics. [FN45] Attempting to understand Latin American law solely \*60 through one's view of Kelsen would be unsatisfactory and misleading. Kelsen does not describe the full workings of Latin American legal systems. Rather, much legal argument and legal projects citing Kelsen as authority for myriad propositions are but some of the elements of Latin American legal reasoning.

In any case, whether or not Latin American law can be unproblematically characterized as a transplant from other political societies or the spitting image of Kelsen is part of the same argumentative repertoire. The affirmative side of the debate, it is worth noting, generally upholds a view of law as a coherent whole, capable of being transported to different locations while working in much the same way. Even modified versions of this point, where foreign laws are said to be adapted to the Latin American context, reinforce the same notion that law is mostly autonomous of local actors. By contrast, Latin American law may be understood quite differently. Its foreign borrowings may respond to different political or strategic motivations. Use of those materials may be intimately tied to local interests and cultural politics. Outwardly foreign sources may be used quite differently and for different reasons in local settings. This debate, however, makes little sense in the abstract. Both sides are already sufficiently well-known terrains. Either vision can offer the background scenario for or against a particular political position within some specific debate. [FN46]

What is relevant to this discussion, however, is that 1960s/1970s developmentalists deployed the characterizations of foreignness and formalism. And, they pressed them as system-wide critiques. The formal legal system was presented in two ways. It was portrayed as ill-fitting and anachronous, adrift in stultified European (and old U.S.) models. [FN47] This imported law was contrasted to the very different lived realities of actual Latin American peoples. At the same time, official law was identified as reflective of the interests of a small elite within these countries. This latter point would seem to show the opposite, its local ties, notwithstanding the unsurprising fact that the legal system benefits some at the expense of others. The contradiction, however, is downplayed by the suggestion that Latin American elites (or those benefitted) are foreign just as well. [FN48]

\*61 In any case, developmentalists criticized the legal system's economic effects and attributed this to an operational incapacity to align judicial decisions with national, social, and economic policy. In an era of changing economic measures, policy enthusiasts were loathe to be frustrated by local judges. Absent legal decisions aligned with the development consensus, however, local judiciaries threatened the effective implementation of national economic objectives. In this regard, the dominant legal technologies, it was argued, were insufficiently calibrated to assure the survival of development policies. As such, the technologies were slated for reform.

Developmentalism embraced the prescription of updating Latin American legal theory. [FN49] Introducing pragmatism to law schools and the courts, as mentioned already, was the goal. It was assisted by claims of improving access to the social norms of Latin American peoples; better reflecting the social realities and cultural identity of the nation; and embodying the internal conceptions and choices of local society.

Developmentalists--most of them faithful believers in the sociological underpinnings of law--were quick to demonstrate the influence of society on law and vice versa. The whole of their project was based on the belief that development could be engineered through law. Yet, this truism turned out not to be a belief about all legal systems. Legal systems might be a product of their societies, and then again they might not. In Latin America, the sociological truth marshaled by developmentalists was that the legal system was not. [FN50] There, the mass of law was presented as unmoored from \*62 the mass of society. Depictions of urban barrios, peasant communities, and other "informal" sectors, by contrast, were used to demonstrate both the truth of this assertion and, for some scholars, the alternative resources within society (or informal law) available to development planners, including economic incentives and goal-setting values of social groups. Of course, the unproblematic way in which the law-and-society dichotomy was expressed, as both irreconcilable and necessarily symbiotic, signals the strategic use made of this formula.

#### D. Legal Informality as an Argument for Development Politics

The characterization of a gap between law and society is not peculiar to Latin America nor is this notion particular to law and development. On the contrary, it is a methodological convention which boasts a long history. The notion of a different lived experience of the law is highlighted and instrumentalized for purposes of legal reform. In the Anglo-American tradition, it is generally attributed to sociological jurisprudence, spearheaded by Roscoe Pound before World War I. [FN51] The most common association with the concept is embodied in the slogan: "law in the books and law in action." [FN52] According to Morton Horwitz, it was originally employed for the purpose of criticizing nineteenth and early twentieth century orthodox legal thought. [FN53] The underlying notion, that law can become disconnected from social reality, was also the springboard for American legal realism. [FN54] A more controversial version of progressivism than sociological jurisprudence, [FN55] realism had an indelible influence on U.S. legal thought. In fact, one is hard pressed to describe legal consciousness \*63 in this country without reference to its main tenets. For law-and-society scholars, as direct heirs to realism, "gap" studies were central to their work. Measuring the relative distance between formal law and societal behavior was instrumental in calibrating law as a tool of social engineering. It is thus not surprising that 1960s developmentalists, many of them North Americans, highlighted the relatively "unrealist" cast of Latin American legal culture and the wide gap between law and society:

In Latin America, however, governmental administration has, from the very beginning, been incorporated into the prevailing system of patronage. Nepotism, for example, which seems almost sinful in the Anglo-American world, is widely regarded in Latin America as a social duty. Monopoly privilege is at least as old as the Conquest; Queen Isabella sought from the outset to limit the exploitation of the New World to her own subjects--not even to Spaniards generally, but to subjects of Castile. In Latin America, it is sometimes said, mercantilism never died. Given this history, it has been argued that the very idea of "rights" in Latin America is meaningful largely in terms of group privileges, as distinguished from individual rights. Legal universalism is thus seen as a dream--and perhaps a North American dream at that--rather than even a potential reality in Latin America. [FN56]

It is also this "informal" feature which they invested with great significance. [FN57] The Director General of the International Labor Office, Wilfred Jenks, speaking in Costa Rica in 1972, was rather clear about it:

The most renowned legal thinkers in Latin America in recent times, men of the stature of Luis Recaséns Siches, Carlos Cossio y Eduardo García Maynez, have been essentially philosophers of the tradition of Kelsen rather than architects and engineers of social change through the legal process in the fashion of Roscoe Pound. There has not been a contemporary Andrés Bello, with the universal scholarship of a grand humanist conceiving of law as, essentially, a branch of the art of statesmanship. What is required are public figures of their stature in order to place law as an effective \*64 instrument of social change at the center of thought and practice in Latin America. [FN58]

This discussion, among other things, highlights the "methods reform" advanced by legal developmentalists. Methods reform is a shorthand way of describing a range of proposals advanced by various scholars of this period. In the aggregate, their proposals not surprisingly suggest emulating U.S.-like legal reasoning. [FN59] Latin American legal operators were urged to adopt the United States' particular form of legal discourse (or what developmentalists understood that to be). [FN60] Describing the characteristics of this latter notion would obviously be the subject for a body of scholarship in its own right. However, one element of this discourse, which can be safely asserted, is that there is no, or at least need not be, overarching theory encompassing all legal reasoning. On the contrary, legal \*65 reasoning is, above all else, grounded in local social realities and discrete policy objectives.

To this end, developmentalists were active in promoting a new curriculum for Latin American law schools. [FN61] Changing legal methods and reasoning habits required modifying them at their source. [FN62] Take for example, Edward Laing, speaking of Colombia:

\*66 The following are illustrations of these failings [of traditional legal education]: (i) Absence of courses on the social sciences (and the relation of law to society), on economic law and on forensic deontology or professional ethics. (ii) Failure to provide the student with practical exercises and the opportunity to see law in operation and some of the by-products of the legal process, such as prisons. (iii) The disregard of decided cases (jurisprudencia) in the teaching of law. [FN63]

Additionally, development-minded reformers supported the expansion of legal services to the poor and public interest litigation. [FN64] Beside the direct benefit in terms of assistance to low-income groups, these services offered a way to reallocate economic resources by means of the legal system.

## II. BRIDGING THE EVER-PRESENT GAP: THE DEVELOPMENT ATTEMPT

One of the paradoxes of Latin American legality is that "social" argument is not a routine part of mainstream legal discourse. That is, arguing on the basis of social particularities and perceived realities is not, in fact, unproblematically available as a legitimate mode of legal argumentation. Understandably then, attempts at its introduction underlie the strategy of presenting, emphasizing, and constructing a separate social or informal sphere of normativity. As it has been configured, however, the latter course has been and continues to be ineffective to produce change.

To explain, the mainstream conception of law in Latin America (with all the caveats that such a general reference to very diverse phenomena must entail) is that answers to

legal questions are singular; there is but one correct response for any legal question under the law. This conception is supported by a host of different legal theoretical positions and approaches. Naturalism, positivism, and sociology have all in one way or another been pressed into service in furtherance of this dominant idea. Moreover, arguments premised on other than accepted legal materials are deemed illegitimate and inapposite as legal reasoning. As such, it is understandable \*67 that different waves of social reformers have sought to position "social reality" as an alternative source of law and to insist on the formulation of rules that follow its recognition. Such an argumentative move re-conceptualizes legality as plural, that is, of permitting potentially multiple solutions under potentially multiple presentations of social reality.

This characterization is not intended to describe an essential quality of law in Latin America. Surely, law and legal discourse are the product of the motivations and idiosyncracies of its participants. Throughout Latin America, these are mostly organized at the national level. As such, this Essay admittedly presents broad ideas and hypotheses calling to be enriched by more detailed accounts of country-specific or even community-specific usages. Still, past political projects mobilizing the conception of a unified Latin American legal identity (either as explicitly Latin American or essentially European) have had an impact on legal discourse throughout the region. It is the collective impact of these projects which is described here as a common element and thus renders it sensical to discuss on a regional level of analysis. It depends on nothing other than the historical fact of "Latin American" (or European) identity-based projects pursued in law. Thus, this description of a Latin America-wide state of affairs is neither an attempt to reinforce some past identity project nor does it seek to mobilize a new identity characterization of its own. Rather, it describes the commonalities produced historically by the advancing by some, and resisting by others, of projects of transnationality. A by-product of those struggles, and achievement of those emerging victorious, happens to be the rejection of social-based legal argument. Mainstream Latin American jurisprudence, thus, has consistently drawn a sharp line between law and politics, and placed social argument firmly within the latter camp. In this discursive economy, social argument is the antithesis of law. It threatens the above-politics authority of legal rules. Curiously, a wide spectrum of legal politics has effectively acquiesced in this state of affairs. As such, consolidating the social realm as a source of law remains an activity relegated to the margins, if not completely outside, of national legal discourse. Characterized as political discourse, it is rejected by mainstream jurists. As such, the tried and true method of legal renewal through invoking social considerations is rendered ineffective.

In this light, the inordinate efforts of progressive scholars of the social, in particular, become more understandable. In the face of a legal culture apparently impervious to transformation on the basis of social needs, the strategy has been to redouble efforts. The exclusion heightens the motivation to defend and construct a separate social sphere, as a concrete sociological reality, to render it undeniable for arguing for legal reform. The gap between law and society is magnified and the coherence of a separate sphere of social normativity is re-emphasized. Thus, in order to make way for quite conventional social arguments, many progressives have dedicated \*68 themselves to the vast enterprise of defending social alterity. Identifying and making concrete the potential of a social source of norms offers the hope of strengthening their hand. Real transformation, however, seems always postponed until the social is sufficiently articulated, through empirical study, sociological research, or maybe only after a revolution.

This state of affairs within Latin American legal culture is indeed problematic. Instead of a routine use of social-based argument within national legal discourse, this technique has been rendered for the most part unavailable or illegitimate. Clearly, social argument is not new (it was not new in the 1960s) nor is it a deeply counter-institutional mode of

legal argument, often quite the contrary. Yet, its deployment in Latin America, as a reforming catalyst against traditionalism within the official legal system, has not worked. This apparent unavailability of the social, however, is no more an intrinsic particularity of Latin American legal systems than is the figure of a lawless gap between state normativity and social conduct.

Historical accounts demonstrate that Latin America is not immune to cross-national currents in legal theory. Latin American jurists provide testamentary proof of the pervasive influence in the region of social theories in scholarship as well as decision-making. Yet, there is admittedly a perceived absence of social argument within Latin American legal reasoning. It is deeply eclipsed, and when it is raised, it is quickly challenged as illegitimate. Additionally, this is not a result of a time lag in general jurisprudence--such as a movie that might not have yet reached our southern neighbors. Quite differently, the arrival of social argument in law is not late but, rather, has been repeatedly re-inscribed as an innocuous reaffirmation of the existing legal system or as a political question to be kept off the table. Thus, its reformist, transformative potential has been repeatedly blunted.

Nonetheless, this same strategy of calling on the social, employed by law-and-development scholars, continues to be relaunched and given new life by subsequent generations of progressive scholars. [FN65] As it has been <sup>69</sup> given shape, it consists of projecting and defending a qualitatively different and dense field of social particularity from which to argue for change, a field of social reality and difference that cannot be denied, which is what I call the hyper-social. Consequently, it entails arguing an ever bigger and deeper gap between law and society. Law-and-development's rejection by Latin American traditionalists, however, has already marked the marginality of this enterprise. Specifically, the defenses and arguments raised against methods reform in the 1970s, inscribed this antiformalist, progressive strategy as non-legal discourse. Indeed, the way this skirmish took place, discussed below, helps to explain the current state of play of Latin American legal politics.

In passing, I have referred to neo-developmentalism in Latin America. Direct heirs to the tradition of social-legal duality, these newer reformers employ essentially the same ideas and strategies to promote a market-oriented overhaul of the legal system. They respond to the objections, the same ones directed at 1960s developmentalism, by differentiating their approach. Objective economic incentives and market logic, it is argued, guide their efforts and thus, it is claimed, are not as easily manipulable as social engineering and political redistribution goals. Furthermore, neo-developmentalists defend their agenda as the product of collaboration with and consent by Latin Americans. With these explanations, the new wave of developmentalists are satisfied to pick up where past efforts left off--if not with the same content at least with the same overall analysis and framework.

My concern here, though, rather than tracing the impact of neo-developmentalism and discussing its parameters, is the impact on progressive legal politics remaining in the wake of earlier developmentalism. In this connection, the specific ways in which developmentalism was rebutted in Latin America are important.

### III. ROLLING UP THE BRIDGES (ACROSS THE GAP)

Aligning the law with economic development and social justice was not in the abstract very controversial. Latin American leaders were anxious to receive the new technologies associated with modernization. Especially in the areas of law and economics and business law, Latin American professionals were eager to tool up. Latin American jurists as well were enthusiastic about the renewed attention and resources targeted to legal

institutions. The year 1959 marked the first of five regional conferences of Latin American law schools to reconsider their curriculum. [FN66] While framed \*70 in broad and somewhat vague terms, the need to adjust law to its social setting was an articulated goal. [FN67] The value of these conferences, according to Edward Laing, lay in "the spiritual coming together and the widening of horizons [, and these] were worthwhile achievements notwithstanding the 'flagrant discordance' between the accords of the conferences and their application in each law school." [FN68] Yet, the division between reformers and traditionalists was quite plain. In a prepared presentation for a subsequent Latin American law school conference, scheduled in Argentina but not held, Héctor Fix-Zamudio traced the dividing lines:

Due to this traditional exaggeration of our exclusively theoretical juridical studies, a path is opening among Latin American treatise writers worried about the abuses of "dogmatism," [demonstrating] an inclination for the so-called "empirical" studies, following the example of a sector of Anglo-American treatise writers, especially those from the United States, who have signaled the need to reduce the predominance of those labeled pejoratively as "bookteachers." [FN69]

The 1960s and 1970s also saw much localized, national interest and debate on reforming legal education, such as in Argentina, Brazil, [FN70] Chile, \*71 Colombia, [FN71] Peru, and various Central American states. [FN72] In short, the political environment offered an opening for reform. Furthermore, developmentalism was supported by a worldwide focus on issues of economic progress and the backing of powerful international agencies and their resources. Not surprisingly, Latin American legal operators were receptive. Indeed, there was a ready segment of Latin American reformers, as evidenced by the regional and national conferences on Latin American legal education, whose agenda developmentalists directly reinforced. [FN73] \*72 While the formula-- essentially antiformalism--was not new to Latin America, developmentalists had their own way of articulating it. [FN74] An emphasis on policy, pragmatism, and realism was surely a new turn within Latin American legal discourse. Yet, it was no more than old wine in new bottles. It represented a challenge to dominant legal discourse in much the same way that other social-based efforts had attempted in the past. It did so, specifically, by drawing authority from social and economic imperatives and proposing different legal arrangements to attain them.

In any case, defenders of the traditional system did not wait long to react. [FN75] The potential of non-traditional argument as proposed by developmentalists was soon undone. [FN76] One mode of rejecting reform and supporting traditionalism was to emphasize the importance of Roman law to the Latin American legal curriculum. [FN77] Roman law is still a basic, \*73 required course within most Latin American law schools. The course is generally offered over a full year, and possibly more than any other discipline firmly propounds the membership of Latin American legal systems within the family of a European transnational law--the mainstay of legal legitimation in Latin America. [FN78] In 1967, the first Inter-American Congress on Roman Law was held in João Pessoa, Brazil [FN79]--in effect, the counter-conference to those mentioned above, targeting "pragmatic" curricular reform. A few years later in 1973, at another such event, César José Ramos Sojo of the Universidad Central de Venezuela captured the sentiment of these meetings:

It is also worthwhile to observe that the crisis in higher education is part of a more general crisis of culture. It is not so much a determinate discipline which is questioned, but rather the proper finality of studies imparted, the values that until now have been represented, the concrete ideal which is sought to be created.

In what concerns the studies of Law, we see widely disseminated the persuasion that the interest lies in forming, along the way more able manipulators of procedures and competent drafters of acts and legal documents. It is then, as a logical consequence, that Roman law and other disciplines are not appreciated within such conception of scholastic education.

\*74 From this cannot be excluded the utilitarianism of many who register at law schools. According to the pragmatism, by them maintained, only what can be translated into economic gain and purchasing power should be the object of study, fast and easy, within professional practice. For them, creative activity, the attainment of order and the intuition of the normative, [and] the social mission of the jurist of *condere et interpretare ius* do not matter. [FN80]

Also, for example, Nina Ponnsa de la Vega de Miguens from Argentina argues in the same symposium proceedings, published by the Universidad Autónoma de México Law Review:

Other specialties, like for example sociology and economics, approach their study with a prospective criterion and projections toward the future. The mental training of those that think in law is moved by the present and by an objective field which is at the same time axiomatic, with the concern to know and obtain juridical values whose nucleus is justice .... Roman jurisprudence has meant an always current truth, applied today in different fields of law .... It is evident that legal education has as its principal end to configure the mentality and way of thinking, in such a way that the student acquires a certain logico-juridical habit that is adapted to the normative system of his time .... It is desirable the fact that the study of Roman jurisprudence be every day more extensive and deep, despite that its learning require the study of rules and prescriptions that are frequently permitted and inapplicable in actuality. Its specific objective is the training of scientific jurisconsults armed with a special and necessary logic for the interpretation and application of laws, which is acquired fundamentally through the jurisprudence of the Romans. [FN81]

Other approaches and theoretical frameworks were also marshaled against substantial curricular reform--essentially arguing against changing the "European" identity of Latin American law. [FN82] The new methods, to the extent they were actually introduced, were quickly undermined. [FN83] Their lack \*75 of success has been attributed, by certain scholars, to insufficient resources and unsustained attention directed at curricular change; and lethargy and inertia, or both, on the part of Latin American legal professionals and law students. [FN84] Yet, considering that legal developmentalism's main product was conceptual (an idea about the nature of law and its application), its open resistance by Latin America's legal mainstream and the discursive forms this took, I maintain, is a significant part of the explanation.

Dominant Latin American jurists and defenders of the traditional order rejected the developmentalist opening and its democratizing potential. [FN85] Introducing new variables within legal reasoning would, at a minimum, require a different way of justifying settled divisions of power and distributions of resources within society. Developmentalist methods, moreover, might go further. They could disrupt the long-settled accommodations reached by the legal system. Accepting policies such as the then widely-touted goals of economic progress and social equity, as \*76 part of legal decisionmaking, could open to renegotiation the old bargains struck. The lurch to the left, represented by dependency theory's critiques of the development model, [FN86] further exacerbated the perceived dangers of a substantial renegotiation, under the mantle of a "periphery-centered" development.

In order to derail this possibility, traditional legal operators emphasized the dangers of instrumentalism. [FN87] Policy, rule-skepticism, and antiformalism were all tarred with the same defect: legitimating arbitrary laws. The focus on policy and social reality was associated with unlimited deference to the government in power. [FN88] To sharpen the point, following this thinking, in a left-wing government antiformalism means the end of private property and the rule of law; in a military dictatorship, it means repressive norms of social control and autocratically-derived public policies. [FN89] By interpreting development methods as leading to these results, traditional jurists called upon the fears of political extremism; the new methods could just as easily legitimate arbitrary state action by undemocratic governments.

Traditionalists sought refuge in their conventional role as defenders of the status quo, containing the unruly masses on the one hand and restraining autocratic leaders on the other. The balance was maintained, however, by defending against any deep transformation of the existing *\*77* order. Social-based legal argument presented such a potential disruption, upsetting the balance enshrined by conventional legal reasoning. Accordingly, traditional jurists helped rechannel, defeat, or otherwise disable the transformative potential of this legal technology. The specific outcome of a development-inspired attempt at transformation in the 1960s and 1970s is significantly illustrative of this occurrence.

Developmentalists, on their part, allowed themselves to be cowed. Faced with the very real abuses of political extremists at the time, it appeared Latin America was not ready for policy or pragmatic legal decisionmaking. [FN90] At least it was not so at the cost of reducing democracy or progressive aims. Take for example James Gardner's "terminal" review of the Brazilian legal education reform project presented to the Ford Foundation in 1973:

[T]he core of this conceptualization [producing more activist and socially aware lawyers and a more humanistic approach] may become very tenuous if law has, by the very essence of its being, an enduring affinity for the status quo, and if lawyers, by their class background, training, professional reinforcement, etc., are among the more persistent agents of the status quo .... Stated baldly: even to the extent that [the grant] did succeed, it may have simply trained up more effective agents of the status quo, and strengthened the institutions which train these agents. [FN91]

Even worse, faced with the possibility of supporting dictators or Marxist regimes, developmentalists pulled their own plug. [FN92] Even an insightful and critical scholar such as Gardner, cited above, fell into the belief that American legal assistance and repressive, state instrumentalism were indistinguishable:

*\*78* In summary, well before the arrival of American legal assistance and the establishment of CEPED [the institutional vehicle for legal education reform] in Brazil, that country's governing technocracy had accepted much of CEPED's basic perception of law: that formal, doctrinal law is antiquated and is an impediment to development, and that instrumental law is modern and is an important vehicle for social control and social engineering. The governing technocracy [an authoritarian military government] had started the public sector on a forced march to state instrumentalism .... And the Brazilian legal profession, as discussed above, was bypassed and generally confused by, and attempted to catch up with, this major jurisprudential change. American legal assistance was not the "cause" of this fundamental breach in Brazil's traditional legal culture, of course .... It was precisely this emerging public sector instrumentalism that

conditioned much of the receptiveness to CEPED's American jurisprudential models. [FN93]

Developmentalists especially came to see it this way, if they understood their own project as simply getting law out of the way of the developmentalist state. Up against an obstructionist Latin American legal class resisting developmental policy, their notions of pragmatism, antiformalism, and instrumentalism, which were intended to overcome the resistance, became conflated with simply legitimating state action. [FN94] Their objectives were limited to undoing the separate authority of the traditional legal profession to speak exclusively for the law, rather than providing an alternative legal discourse capable of differentiating between different types of state action. In the belief that the developmentalist state would do the right thing, advocating the legality of its actions was a logical way to align law with development. Once Latin American governments were perceived as not doing the right thing, however, the strategy of undoing the obstructionist power of the legal profession came to be seen as wrongheaded. The backpedaling that marked the end of developmentalism contributed especially to reinforcing--in legal discourse terms--the connection between the independent authority of the legal profession and \*79 traditionalist legal positions, the latter consisting of a narrow and undemocratic conceptualization of law as necessitarian and univocal.

In any case, the whole legal development project was thus drawn into question. In fact, public self-questioning and self-doubt ultimately prompted the main U.S. and international agencies to withdraw their support. Faced with the choice of either accepting the traditional political settlement under the existing legal system or potentially offering legitimacy to political extremes, they chose the former. This formulation of the options, however, presents a false dilemma. While pragmatism and policy can surely serve as handmaidens of authoritarianism, this discovery does not undermine its ability to articulate critiques or to stand as alternative law supported by the legal class, as a sustainable national legal discourse. Furthermore, in this same way, legal formalism can offer a basis for resisting state action, yet it can also be a singularly effective basis for justifying repression. In any case, developmentalists backed away. They were daunted by the traditionalist stranglehold on the conception of law and by their own dualistic depictions of Latin American legality.

As such, developmentalism was shown incapable of providing safeguards against political extremism, the same objection raised against state instrumentalism. Developmentalists seemed to agree that the new methods were in fact prone to legitimating arbitrary action, failing to differentiate among different projects in policy pragmatist terms. Notably, no effective opposition to state authoritarianism was conceived of, if the multiple character of law were to be acknowledged openly. [FN95] The only \*80 strategy apparently available against extremism was a return to univocal, legal dogmatism. Traditionalism often frustrated the implementation of developmental policies; on the other hand, it offered some traction and autonomy against repressive regimes. This turn, however, greatly limits and accepts the fear of political extremism as a valid limit on pluralist legal politics. Acquiescing in necessitarian, univocalism as the lesser of two evils reinforces non-dominant (be it framed as pragmatism, policy, or antiformalism) legal argument as political. Furthermore, it postpones a more democratic legal discourse for another day, for the sake of condemning--with the strongest force of a univocal and unquestionable law--an undemocratic government today.

Some recent commentators have criticized the 1970s withdrawal of developmentalists on different grounds. [FN96] They view the internal criticism and ultimate termination of development projects as constituting as much a U.S.-centered and imperialist imposition as the actual development projects to which internal critics were objecting. However,

reading either developmentalism or its demise as solely U.S. phenomena presents a picture of Latin American actors devoid of agency and fails as a fuller explanation. The key feature of legal developmentalism was an idea about legal reform through changing legal reasoning techniques. This idea was not new within Latin American legal circles by the time foreign developmentalists arrived, nor was the extensive resistance to it merely the by-product of anti-Vietnam War protesters or intellectual crises over modernization theory. It also reflected the interests of those standing to lose from the reforms, and the discursive struggle that marks its defeat.

In this regard, casting social-based argument--including its policy pragmatist version--as illegitimate legal reasoning and reemphasizing the univocality of law by traditionalists played a prominent role. It has also led to an equally forceful counter-strategy by progressives of arguing social particularity and its distinctness from state legal institutions. Here, it is important to differentiate between incorporating social considerations within legal reasoning and, alternatively, claiming a hypostatized field of social interaction deemed particular to Latin America. It is the latter course that many progressives writing about Latin America have followed. The motivations are multifold.

As deployed by 1960s and 1970s developmentalists, discussed above, it can be traced to attempts to sweep the decks clear, to make room for a whole new program and set of prescriptions for the legal system. The \*81 position is understandable: U.S. academics were not interested in engaging in political struggles through the then existing Latin American legal argumentative conventions nor did they want to be hamstrung by them. Rather, they proposed a whole new playing field and a whole new agenda, ones which they, of course, understood much better. Subsequent generations of progressives, as discussed in more detail below, have gravitated to this position as well. Attracted by the potential of introducing multiplicity or pluralism to legal reasoning, consistently foreclosed in the past, the strategy appears to be mere common sense. However, the resistance of Latin America's legal intelligentsia played an important role. After the victory over development, reforms premised on social reality, pragmatism, and policy are more clearly off the table, leading progressives to ever more accentuated claims of an excluded and alternative social law.

#### IV. CRITIQUES

##### A. Critique of Latin American Duality

##### B.

The predominant diagnosis advanced by developmentalists quite obviously suffered from an overly reified conception of both Latin American law and Latin American peoples. State law in Latin America is not simply an inert, foreign artifact, nor are Latin American people unique bearers of inimitable social particularity. [FN97] Developmentalists deployed these tropes, rather plainly, in furtherance of their overall project. The legal culture was to be transformed, ostensibly, to encourage the legal system to respond to social needs and policy objectives. [FN98] A new deal was required. \*82 To do this, traditional political and economic arrangements enacted through law, and their articulated justifications, had to be undone. The card played was none other than the disconnectedness of official law from social reality.

This claim, rather than a sociological or cultural discovery, was a challenge to the political compromises that had been hammered out through the legal system at the time. A systematic overhaul of those settlements could only be effected by re-opening the bases of legal decisionmaking. [FN99] Reforming legal methods and introducing "social law" arguments were crucial. They offered a way of renegotiating the established political and economic deals. Drawing on a social sphere of human interaction has been the tradition within legal theory in both the United States and Continental Europe, as

discussed above. It can be traced to calls for undoing the strict positivism of the 19th century. [FN100] It has fueled countless reform efforts against laws perceived as out-of-step with contemporary realities. [FN101] Conversely, it has also assisted in defending state law against delegitimizing critiques. Social theories of law are not new in Latin America either. [FN102] In different degrees, the legal culture has assimilated both challenges and affirmations stemming from notions of a separate social source. A comprehensive study of these would be valuable at this point, but is unfortunately beyond the scope of this work. Yet, the existing work of <sup>\*83</sup> Latin Americanists is sufficient to demonstrate prior uses of social theory as a mode of intervening in legal discourse. [FN103]

Social alterity, in its sense of otherness from the legal system, is thus not novel within Latin American legal discourse. Simply put, it was also the technique of choice for developmentalists. The introduction of this concept does not serve any new or better understanding of the workings of the legal system. Rather, it is an argumentative move within legal discourse. Highlighting the estrangement between legal and social spheres, simply as a logical matter, may argue in favor of transforming existing laws or possibly assimilating society to the law in place. Both the extensiveness of legal reform or, alternatively, the intensity of legal penetration efforts depend on the objectives of its proponent. In this way, it can be less a claim about a particular reality than an effort to transform that reality. Understood as such, developmentalists' emphasis on the dichotomy between law and the social order then should not be read as the key, idiosyncratic element or identity of Latin American legal systems. Instead, these writings may best be read as advancing particular political or programmatic objectives, swaddled in the argumentative device of social-legal duality.

Developmentalists' claims then can be viewed as less about the actual functioning of Latin America's legal systems than about the particular way or particular deals cut under those official systems. Indeed, considering the fact that many developmentalists had little prior familiarity with the region, its languages, and the peculiarities of its various legal systems, it stands to reason that their intervention, in the mode of description, was designed to clear the decks. Advancing the irrelevance of official law, as a matter of fact, gave them a free hand to drive through a broad agenda, unencumbered by the necessity to work from within the existing state of legal play. Their reform objectives, or renegotiation objectives, were assisted by calls reconnecting them with social reality and attuning the legal system to local culture. In fact, of course, Latin American legal systems were already responding to social reality and were inseparable from local culture. The social norms and policies in place, however, were simply different from those advanced by developmentalists.

## B. Critique of an Identity Approach to Latin American Law

The portrayal of informality, and the gap in developmentalist literature often projects this device as a peculiar or especially exaggerated aspect of the local legal culture, cast in terms of the sociological or cultural particularities of Latin Americans in relationship to law. It is this claim which is untenable as an empirical fact peculiar to the region. Such <sup>\*84</sup> phenomena as gaps and informality are common features of all legal systems. Nonetheless, in one of the better known developmentalist pieces, Keith Rosenn, despite acknowledging the occurrence of informality elsewhere, sustains its cultural dimension in Brazil:

Plainly Brazil is not unique in this respect; bending of legal norms to expediency occurs in all countries .... But what is striking about Brazil is that the practice of bending legal norms to expediency has been elevated into a highly prized paralegal institution called "jeito." The "jeito" is an integral part of Brazil's legal

culture, and in many areas of the law it is employed normally rather than exceptionally. [FN104]

It is this construction of "paralegal," sociological, or cultural identity, which the above citation is an example, that this Essay rejects. My claim is that giving a sociological cast to, circumventing administrative red tape through legal fictions, even if they are far-fetched fictions, advances the idea of a qualitatively distinct Latin American conception of law. And yet, legal fictions are a time-honored device of all formalized systems. Furthermore, making a judgment as to the degree of informality and then characterizing it as evidence of a cultural phenomenon leads to a misconception. It downplays the role of resources and political will in effective law enforcement, highlighting instead the social incongruity of the legal system. This mode of arguing for law reform has contributed to the belief--and to the rhetorical construction--of an identity of Latin American law that is essentially discordant with a separate cultural system in place.

This particular Latin American situation is typically contrasted to the way law operates elsewhere, especially in developed countries. Advancing cultural reasons for the refracted ways in which official law operates across society creates a picture of multiple and distinct systems of legality at work, each with its own relative degree of legitimacy. Classifying legal informality as cultural or social displaces on to Latin America a common, yet not readily admitted, feature of all modern state law. It preserves, by contrast, an idealization of developed legal systems as able to transfuse the entirety of human society and amply consensual throughout, evidenced by the projection of a uniform internalization. Such a fiction does not hold even among officials of the same state apparatus, much less across whole societies. In any case, its predominant effect is to undermine Latin American legal institutions by highlighting, as extraordinary and pathological, features which are quite common. In the long run, which is my point in this Essay, it has not served progressive causes well.

*\*85* This is not to say that experiences of legal pluralism are wholly invented nor that the term is completely inapposite as a characterization of certain phenomena. [FN105] In fact, legal pluralism is an appealing concept because it is so present everywhere. Even if one differentiates between types of legal pluralism, the notion is deployable in almost any context. [FN106] Furthermore, it has been quite effective both as a conceptual and a political tool for indigenous communities in Latin America. [FN107] Identifying indigenous norms and recognizing them at the level of state law or quasi-state law has been, according to its proponents, an effective strategy in recent decades. [FN108] To what extent the outcome has been, in the best of cases, anything other than an aggressive decentralization of dispute resolution functions can be debated infinitely. Regardless, many progressive scholars focusing on indigenous rights laud its potential. [FN109] My analysis and criticism, here, do not extend to these gains. In the context of indigenous groups, legal pluralism may indeed be a politically useful concept. However, in terms of a diagnosis or an intervention in national legal discourse, the notion--often advanced as a corollary of the gap between law and society--has come to be counterproductive to progressive aims, as is discussed below.

Furthermore, my argument does not deny that there are identifiable differences between law as enacted and popular sentiment or even local practices. Of course these exist. However, this does not mean that Latin American societies are evidence of this difference any more than anywhere else. Legal diversity, to some degree, is part and parcel of any application *\*86* of law. One need only look for it to find it. Specific communities often assimilate generalized rules in idiosyncratic fashion; undocumented immigrants live in a constant state of informality; political dissidents and marginalized groups abide by their particular loyalties; and the various institutions of civil society all produce their own codes of conduct, not all of these always in strict alignment with

written law. To the extent Latin America is perceived as any different, in these terms, it is more logically the result of scarce enforcement resources and lack of political will, at any one time, to increase repression. Raising the image of lawlessness or its positively-stated analog, an accentuated social-legal gap, to the level of a deep cultural and historical characteristic is all together a different matter. This is part of the legacy of law-and-development scholarship, as this passage on the gap or extra-legality of market transactions illustrates:

Ironically, corruption itself is often a response to conditions of insecurity. If strangers are suspect, then the world of market transactions is cold and forbidding. A bribe turns a transactional relationship into a "moral" relationship--although the word "moral" may be jarring in this context--by defining a new particularist moral community. Such a community is functionally analogous to the community created when one person becomes the godparent (padrino) of another's child, making the two "co-parents" (compadres), bound to each other in quasi-familial loyalties that imply, among other things, some forms of economic support. [FN110]

The preceding is an example of the curious characterizations sketched by developmentalists, many seemingly riding on an undercurrent of racial or cultural preconceptions.

### C. Critique of "Exoticized" Latin American Law

During the high period of developmentalism, there were of course already existing critiques within the bosom of law-and-society regarding simple distinctions between the legal sphere and the social sphere. Furthermore, there was a growing body of critical literature which took exception to the dichotomies presented by legal sociologists and questioned the motivations of this type of analysis. The apparatus employed by developmentalists in Latin America was already more richly explored within academic circles than the legacy of developmentalism would lead us to believe. The notions of a gap and of separate spheres were contested <sup>\*87</sup> propositions even as they were being deployed to describe reality in Latin America. Of course, concepts about the law's social effects and social engineering through law were still common. What is curious is that when depicting Latin America, it was possible to present the dichotomy in the starkest terms possible without raising much of an eyebrow.

This aspect of developmentalist writing deserves some attention. Scholarship about the U.S. legal system by U.S. legal scholars could not have drawn such a clean divide between society and law, nor could it have implanted the notion of a systemic gap between the two in such uncontestable ways (of course, the point for most centrist U.S. scholars writing about the United States at the time was precisely to avoid doing so). David Trubek and Marc Galanter approached the phenomenon from this perspective. [FN111]

[I]n view of many areas that diverge from the model [liberal legalism], there is little reason to assume that it represents the typical or normal case of legal regulation in this [U.S.] society. The gap between the law on the books and the law in action has been discovered innumerable times (in race relations, divorce, school prayers, and criminal justice, for example) but the implications of this discovery depend on one's picture of what is normal and typical in our legal system. Within the received paradigm, each instance of the gap tends to be dismissed as an exception--something atypical, peripheral, and transient. Awareness of such discrepancies does not induce professionals to relinquish their model of the legal system, for the persistence of the paradigm is

powerfully supported by the training and intellectual orientation of the profession. [FN112]

While this is undoubtedly so, in the contrasting case of Latin America, forceful pre-existing beliefs assisted. There, the gap was starkly presented as between the official law as a whole and a separate social sphere. The plausibility of this notion is no doubt reinforced by popular ideas about Latin American lawlessness. The easy acceptance of a systemic breach between law and societal behavior dovetails with widely popularized images of Latin Americans. The figure of the "bandido" or the outlaw possibly comes into play. The unreflective assumption of Latin Americans as law breakers makes the academic diagnosis of the same appear rather unproblematic. Exoticizing these societies, indeed characterizing them as somehow beholden to different conceptions of the meaning of law, plays a large role. In this milieu, individual scholars' observations, or even scientific \*88 studies if you will, about Latin Americans' lack of attention to traffic lights or strategic manipulation of bureaucratic obstacles come to constitute evidence of a different, qualitative idea about the nature of law.

This is not to say that proponents of gap analysis in Latin America harbored racist designs. That would obviously be an exaggeration. Some rather unfavorable images, however, part of the collective background, do support the relative plausibility of developmentalists' assertions. Conservatives may have found it only natural that Latin America was fraught with lawlessness. Progressives, among them many developmentalists, relativized the differences as cultural. The move of aligning moral authority with societal behavior--rather than with official legality--was then but a short step. That is, the norms to be valued and upheld were to be found within society and not within the state, at least some of them. In any case, this framework reinforces the belief that the actual norms accepted and internalized by the people of Latin America are quite different, sociologically, from European or Western counterparts. State law by contrast stands either as an objectionable imposition of power or, in the best case, a quixotic concoction of Latin American elites.

Ironically, law-and-development's diagnosis, by pressing this image of social alterity, entrenches the notion as a dominant understanding of Latin American law as well as an increasingly accepted self-understanding by Latin Americans. The repeated representations of systemic lawlessness, or "gap," between law and society, a debatable proposition at best about underlying reality, has a more insidious effect. It contributes to the actual internalization of this notion as part of Latin American legal identity. Clearly, my use of cultural ideas in this context does not adhere to a view of culture as an independent variable. Rather, it views culture as the aggregate of a dynamic panoply of images and devices, deployed in furtherance of myriad political projects in competition within society. As such, culture is created and given content by influential intellectual work, such as law and development scholarship, at times by claiming merely to represent an already existing reality. My point is that the claim to reality, here, is strategic--consciously or not. It is not a serious empirical claim. It is rather an argumentative commonplace, routinely deployed within modern legal discourse to challenge or support a particular position.

In any event, law and development scholarship marshaled the proposition that Latin America experiences a larger degree of discrepancy between law and society, even if other legal systems may also experience divergences. [FN113] Cataloguing these divergences has, in fact, occupied a great many Latin Americans who have taken the point seriously. This type of \*89 academic work continues to attract even progressive scholars. The framework etched by developmentalists thus continues to dominate Latin American law scholarship today.

#### D. Critique of the Hyper-Social

The motivation of developmentalists and others following in their tracks, manifestly, is often (although not only) to stake an alternative, authoritative position from which to challenge dominant legal positions, clearly a valid aim. Take for example, the proposal of Jorge Witker, law professor at the Universidad Autónoma de México, who in 1974 spliced together the law-and-development framework, depicted here, and "French sociological jurisprudence" to argue in favor of bridging the gap between positive law and the law in action. [FN114] Specifically, he suggested how such a move could be operationalized in Latin America:

For example, the majority of our [Latin American] legal orders possess open institutions such as the concept of good customs, the concept of the moral, that admits for connotations that are not necessarily individualist, and the public order [which is] of a vast generality in which the social or collective interest may prevail over an absolute liberal will. Lastly, the "so-called legal lacunae" that permit, fundamentally, the judge to operate with flexibility and breadth even within legal dogmatism. In synthesis, even positivist state norms whose range of observance is limited in our societies and whose conceptual structure is essentially static, permits, overcoming the until now prevailing criteria, to search for the necessary harmony between effectiveness and validity of the norm and its efficaciousness or concrete normativity. [FN115]

In the specific context of 1960s and 1970s law and development, the alliance between international advisors and legal reformers in Latin America may have consisted of nothing more than an interest in better articulated legal decisions, requiring different considerations to be incorporated as part of accepted legal reasoning. [FN116]

\*90 The legacy of law and development, however, is of a different order. It set the framework for subsequent reform efforts. It also catapulted forward claims about a distinct and isolated social order. In its wake, numerous attempts have sought to prove the substantiality of a dense, alternative legality existent in Latin America. As the argument goes, the formal legal system is not only politically insensitive to social interests but, moreover, is unreflective of genuine local normativity. It is this approach, deployed by developmentalists and legal sociologists alike, which continues to frame separate social and legal spheres in Latin America.

However, in the wake of traditionalist critiques of social methods and arguments as non-law or as social science, to offer some traction the social field required reconstructing, not as a normal and routine source of legal renovation, but as a substantial, different, and irrepressible contrast to the accepted conception of the formal legal sphere. As such, development scholars and, more so, others following in their footsteps propose that social realities--whether characterized as modern law or a societally-derived code--must be introduced within Latin American legal systems. For many Latin American progressives, loyal to the concept of socially-connected law, this approach then entails the articulation of a separate and available social normativity. And, as mentioned already, considerable resources have been expended on identifying--effectively attempting to create--such a justifiable, norm-producing social content.

My criticism here of this hyper-social field, in addition to rejecting the particular existence of social-legal disconnection or its purportedly extraordinary degree in Latin America, is to take objection with its extensive effects. The paradigm entrenched by development scholars treats behavioral divergences from the official legal system as evidence of a separate sphere of society. The official legal system is then presented as malfunctioning because it does not sufficiently mirror the social side. Demonstrating the

content of different social behavior is taken as proof of this malfunctioning. It presents the justification for changing the formal legal system. It also suggests that "social legality," "modern law," or some such other better suited system take its place. These efforts by legal scholars were, and continue to be, misplaced if not outright \*91 counterproductive. They reify the notion that a separately defensible social arena, more legitimate than the legal order, exists. In this way, it may be believed, social specificity can be more easily invoked for particular reform efforts. However, this tactic of appealing to the hyper-social, as I explain, should not be necessary. The social sphere is already part of the conventional repertoire of legal technique, even within the sources of legal authority cited by traditionalists themselves. Moreover, the vast efforts at inscribing social-based reform with authentic or organic value is counterproductive, considering the widespread skepticism with which these notions are held. Statements about social norms of this type may, in the end, be actually more easily dismissed as incapable of fulfilling their own claims.

In any case, the quintessential legal reform strategy of the last century--law's disconnectedness to society and reality--is repeatedly replayed within the Latin American context, without much effect. Continuous frustration with these failed efforts leads to larger and larger claims about an excluded social content. Additionally, a separate social normativity is presented as an option to state law. New legal techniques--often empirical ones--are said to hold the promise of introducing external society within formal legal discourse or of replacing it all together. The impetus for reform hinges on accentuating the discrepancy between state law and the social sphere. The greater the gap the more untenable the traditional system and the greater the urgency for reform. Yet, success has been misunderstood as requiring the articulation and defense of a distinct social sphere in fact.

In short, developmentalists and their progeny have assisted in transforming the argumentative device of "invoking the social" as an identity-based progressive political project in opposition to the identity of the official state system. The acquiescence in this move by many progressives has resulted in substantial work directed at the project of identifying and defending such a social normativity--all with the underlying purpose ultimately of standing side-by-side or even replacing the official legal orthodoxy. Such efforts are unnecessary--as well as misguided--since interventions in official legality based on social reality can be accommodated, and exist as a routine device within modern legal systems. Ironically, it is the very work-product of legal sociologists today that continues to reinforce the notion of separateness between law and society and attempts to construct a never-sufficiently-well-articulated social alternative, situated outside legal institutions.

It is this latter course which, rather than offering a promising alternative to Latin American traditionalists, falls into their hands. In effect, with the aim of forcing the consideration of social conditions within legal discourse by arguing their irrepressibility and undeniability, progressives accept the thick demarcation between legal and social realms. And, they pre-construct \*92 the social field--deep and dense--as different from law. Moreover, these characterizations are often given the form of sociological or cultural traits. The emphasis on a marked social identity typically coincides with the vesting of Latin American informality, legal pluralism, and social practices with a scientific, sociological flavor. Yet, this quadrant or strategy of political legal struggle is already effectively preordained as non-law by traditionalists, responding to the first wave of developmentalist reform efforts. [FN117]

The implications of my claim here extend to examples and periods beyond the scope of this Essay. [FN118] However, my hypothesis points to repeated instances in which the critical edge of social argument in Latin American legal discourse has been blunted; its

traction undone by defenders of the existing legal bargains. While this Essay obviously can only begin to examine this phenomenon, the circumstances surrounding the law-and-development movement are an apt example. This is not to say that the category of social argument was rendered problematic solely because of developmentalism. This would be an overstatement. Nonetheless, the use of social argument has been rendered more problematic at various historical junctures where proponents attempted to make significant use of the device. Tracing the circumstances surrounding these other moments is a topic for additional work. The study of developmentalism here presents some significant, preliminary insights.

## V. TRADITIONAL LEGAL DISCOURSE REINFORCED

Conventional jurists, plainly enough, maintain the political status quo by cloaking it with the authority of law. This authority is upheld through the primacy of dominant legal discourse and the discipline of accepted modes of legal reasoning. Admitting a different or more expansive, yet similarly authoritative, mode of legal reasoning would require new justifications or rationalizations for the existing political bargains. This opening could, in effect, result in the striking of different social and political arrangements. It <sup>\*93</sup> is precisely this new deal that was, in reality, the original goal of developmentalism. Progress would be achieved through incremental changes within the political economy, driven in part by the legal system, which would enlarge the class of enfranchised citizenry. This was the goal of 1960s Latin American reformism, as opposed to a more radical, revolutionary break. In effect, the notion of alternative legal techniques has the very purpose of re-dealing the cards.

However, it is also this renegotiation which traditional jurists highlighted as a way to intimidate progressive reformers. The fear invoked was a disruption of the delicate political balance established through law. Absent traditional legal limits, a free-for-all could ensue. Specifically, extremist political tendencies in Latin America might not be kept in check. The political aim of developmentalists' interventions, in this case, would be completely reversed. Rather than offer room within the legal system to pursue progressive aims, developmentalist methods could be just as easily, if not more easily, used to justify repressive regimes. Particularly, if the developmentalists in question believed in the vast malleability of law, this danger loomed large and real. Furthermore, even if a new political bargain could be struck, it would not henceforth have recourse to the unquestionable authority of law to preserve it. The legal sphere would be indelibly compromised, undermining its ability to justify a new political bargain, while also admitting its past role in legitimating the old order.

The end of developmentalism offers some clues to understanding the failure of other historical attempts at introducing social reality, pragmatism, policy, or generally antiformalism within Latin American legal discourse. [FN119] Considering the political leanings of most development lawyers, the risks presented were obviously too great. However, the choices presented were, I argue, unjustifiably limited. Reformism was too quickly defeated by the fears of its own proponents. Chiefly, that fear was made all too real as a result of underlying perceptions of Latin American political culture. The reality of autocratic, military governments and right-wing coups reinforced the plausibility of a potentially more reactionary political deal as a result of <sup>\*94</sup> a shift in the legal status quo. In addition, at least for developmentalists, social norms were not in reality a democratic check on state law. Traditionalists, and chastened developmentalists, understood Latin American societies as lacking these constraints. [FN120] The perception of such lawlessness is, in fact, what makes the ultimatum so compelling. Legal traditionalists, at least, offered the possibility of keeping right-wing rulers to some account. If belief in the unquestionability of law was somehow shaken, then the legal

establishment would be at a loss to reestablish authority. Undemocratic autocrats would be able to wield their power freely. [FN121]

This conundrum has played a repeated role in dismantling reformist legal projects in Latin America. The choice facing reformers is, on the one hand, to uphold the sanctity of law with its existing trade-offs, or, on the other, to do without the legal system as a tool of social governance. They must either withdraw from reform efforts or risk losing the support, and cover, of traditionalist forces. By their rejection of social-based legal discourse, traditionalists in effect refuse to agree to law's standing as unquestionable authority if it means legitimating a new political deal ushered in by social reformism. [FN122] This places reformers in the position of potentially winning the battle, but at the price of losing the war. Any gains achieved would stand precarious as a result of the compromised nature of legal authority, \*95 sabotaged by traditionalists threatening that any social reformist success would be the product of a politicization of law.

Reformism foreclosed, the option left would involve a system-wide, revolutionary rejection of official law. This was exactly the turning point for developmentalism. With few options for progressive reform that would preserve legal authority, proponents would have to reject the entire system, in terms of its foreignness or social disconnectedness, and then follow through with the conclusions. The choice, under this state of affairs, soon becomes radicalized: reject official law and draw on other social constraints as a system of governance or desist from social reform through the legal system.

My argument is not in favor of either of these options. It is rather to argue against the necessary nature of this limited choice. In its place, I am advancing social-based argument within national legal discourse through to its ultimate conclusions, notwithstanding the threats of traditionalists. [FN123] Furthermore, my analysis urges progressive reformers to re-take their engagement with official law, broadening the field of political struggle and debate over the meanings of texts and policy. My approach proposes a more democratic legal discourse, expanding both the terms and transparency of legal debate, rejecting necessitarian univocalism without foreclosing the above-political authority of law. It is not a very revolutionary or paradigm-shifting proposal, but in the Latin American context it challenges a true bottleneck choking political reform. Failing to address it only leaves a much more extreme choice, in which the only alternative is advocating the overthrow of Latin American states' legality with little hope of achieving any better social arrangements.

To clarify, my claim is not that social-based argument is a panacea for progressive reform. Like any legal technology, it has its limits and its reversals. Still, as part of the conventional repertoire of democratic legal systems, it opens a channel for alternative interpretations and positions available under state law. As such, it is a significant part of a democratic, \*96 or democratically-oriented, system of law. It is quite telling that traditional Latin American jurists have, in numerous instances, rejected and marginalized socially-based techniques. Possibly fearing class revolt, or substantial renegotiation, their objective has been to narrow the discipline of legal methods. Eliminating one of the sources of the regeneration of legal systems and their ability to respond to popular forces is, in the end, grave. The more limited the possibilities for addressing popular and democratic demands, the more vulnerable and precarious are state legality and the underlying political deal it preserves.

At a minimum, even if we understand socially-based legal decision-making to mean merely the discourse of democratic participation and accountability, resisting it aggressively will surely backfire. Traditionalists may believe that they have much to lose by allowing for social decision-making, and on a personal level this may very well be.

The class of jurists now exercising near exclusive ability to speak for the law would be unable to retain their monopoly. Legal discourse, at a minimum, would be democratized. Yet, from a conservative political perspective, social-based reasoning may in the long run actually be more effective. It could reinforce the authority of the legal class and foster more support for the political bargains which may be reached. Of course, those political bargains would have to be, at least discursively, struck differently. This may lead to some tangible sought-after renegotiations in certain circumstances. And, at a minimum, it would extend democratic considerations--to the extent this expanded legal discourse can provide them--throughout more of the institutions of the state.

By contrast, the shibboleth of law versus society, reinforced by developmentalism and its demise, has erected a zero-sum game for thinking about Latin American law. Its legacy makes available two potential political stances, roughly speaking. Either one joins the project of making the state more like the people, or one joins the project of making the people more like the existing state. Regardless, the task remains under the discipline of this framework to champion one identity over the other. Conservative approaches to this problem describe the issue as one of the penetration of state law into popular sectors. That is, the perceived gap between law and society is to be addressed by redoubling efforts at social transformation through the legal system. [FN124] In the main, this is the underlying blueprint for legal traditionalists in Latin America. The call for legal penetration \*97 reinforces the project of strengthening the official legal system and remaking society in its image. From a progressive perspective, this project is merely the perpetuation of control by legal elites and enforcement of the traditional political deal. Legal penetration, in this view, would not be neutral. It would not merely promote the harmonization of a common national culture of legal coercion. Instead, the inherent hierarchical tilt within state law would be more effectively imposed across national society.

For more progressive commentators, highlighting the discrepancy between law and society offers an indictment of the class-control and cultural insularity of state law in Latin America. [FN125] Interventions are thus directed at offering substitutes. Progressive efforts highlight alternatives to state legality, arguing they are better attuned to local, social activity. The discrepancy between law and the social order is presented as a diagnosis of the Latin American situation. The social order is offered as an alternative to the formal legal system--although, as discussed in the case of developmentalism, without much chance of success.

By accepting this duality, progressives are brought to heel. They eschew direct engagement with state law because they reject its central project of imposing the traditional political deal on society. They embrace social law as pertaining to a sphere outside the formal legal system. Yet, the latter can never be attained, or fully implemented, because it would come only at the price of renouncing the special status of law. Traditionalists can sustain this threat as long as progressives do not revisit the underlying duality premise. By shunning "formal" yet social-based argument and interpretation within national legal discourse, and not rebutting threats about law's politicization, progressives leave open the field of state law to traditionalists. As such, they can only argue for reform from the sidelines.

Progressives have in this way miscalculated the potential for intervention. By insisting on challenges from the sidelines, they have implicitly accepted the ultimatum put to them. Accepting the premise of social-legal dualism and its substantive difference reinforces the traditionalist monopoly of national legal discourse. The latter remains as the sole way of defending legal authority autonomous of the state. Like everyone else, progressives fear undermining law as a separate source of power. However, the room for progressive positions is self-selectedly peripheral if traditionalists alone are left to

speak for the (national) law -- no matter how much discredit is heaped from the margins in terms of class \*98 bias, social disconnectedness, and the multiplicity of other normative systems.

Furthermore, progressives have not appreciated the full workings of legal discourse. Maintaining a monopoly over legal power requires continuous reinforcement of dominant rhetorical constructions. Organized interests within society--much as any good lawyer--deploy the full range of legal argument, encompassing formalism, antiformalism, pragmatism, necessitarianism, and almost any other legal technology. However, accepting the identity of official Latin American law as distinct from social life works in effect to stabilize, as long as such identity holds, the monopoly of currently dominant interests. Vesting the legal system with essentialist characteristics, accepted across the spectrum of legal politics, leads to the perceived impermeability, and thus consequently-produced impermeability, of traditionalist interpretations of law. In that order, oppositional projects in legal politics come to be conceivable, exclusively in contrasting identity terms.

## VI. FROM THE SIDELINES

This Part focuses principally on the route taken by scholars of social law within Latin America. As noted above, development scholarship attributed the disconnection to a state law apparatus far removed from the lives of local inhabitants. To the extent state law is brought into focus, it is depicted as legal formalism, cut from a civilian mold, operated by legal elites. In addition to the differences of class it designates, the existence of a popular social law highlights the cultural, even racial, identification of Latin America's state law. Specifically, state law stands for Latin American assimilation to the broader culture of the foreign law it emulates. In consequence, it privileges European cultural forms over local practices. In these terms, the agenda for political progressives appears to follow, as a matter of course, to recuperate the cultural and social particularity of governance norms among Latin American peoples. Ultimately, these would then take the place of an exclusionary, entrenched legal culture reproduced by and for elites.

My argument is that the reaction to law and development, and the latter's defeat, lead to, once again, a missed opportunity for reform. Rather than introduce a more democratic and pluralist legal discourse, it merely reinforced the power of traditionalist positions as the sole embodiment of law and independent check on state action. The effort's demise, actively sought by Latin America's legal intelligentsia, perversely provided another occasion to link social-based legal argument with political maneuvering. At the same time, it further cemented the framework of divergent social and official normativities as the central paradigm. In this way, the demise of law and development, along with other attempts to introduce reformist \*99 techniques within Latin American legal thinking, has contributed to the current state of play and the range of positions and strategies deployed by progressives within Latin America.

### A. The Politics of Autochthonous Social Law

Local community norms may be no more progressive than state law. Indeed, localized legality may harbor some quite troubling convictions regarding minorities, punishment, and the vulnerable. While their study may indeed offer a clearer picture of actual community sentiment, it is not necessarily a treasure trove of progressive politics. Moreover, once enshrined as organic law, local norms are less amenable to dynamic reform. Indeed, attempts to champion the rights of women or minorities are resisted by reference to long-standing community standards. And, in fact, if community legality is precisely the source of law advanced by social scholars, then it is its very particularity

and deep-rooted nature that must be respected. Intervention from the outside or even by reformist elements of the local community would suffer a formidable presumption favoring tradition--however it becomes defined.

The term legal pluralism, in the sense of different systems of legality, is often used to describe this project. [FN126] It invokes alternative normative orders existing throughout society. Through this medium, community and group norms may not only enjoy comparable standing to state law, they may also offer a better description of internalized coercion within the locality. This first presupposition of scholars of the social law is based on the notion of an alternative legal code. It is a key notion as it informs the diagnosis of a misalignment of law and society in Latin America. It offers a non-racist yet often racialized explanation of the relative "irrelevance" of official law perceived in Latin America. It is not that there is a social or cultural deficiency in terms of abiding by legal obligations. Instead, the \*100 point is that Latin Americans, or at least some of them, march to the beat of a different drummer. If only we could find the tune being played, the legal system could be realigned with society's previously formed legal commitments.

Additionally, legal pluralism of this type has had a popular political effect. It signifies respect for historically marginalized groups. Research agendas on particular groups' internal orderings offers the potential of political empowerment. Armed with their own law, proponents may then expect economic and other resources to follow close at hand. Promoting norms coming from within the particular group offers a better chance for legal compliance and more respect for enforcement efforts. Thus, not only would a people's law suggest more effective law enforcement, it would be more democratic. Again, this broad category of thinking about law is premised on the existence in Latin America of an alternative conception of law. Thus, the task at hand appears as one of uncovering the content of such alternative conception.

In terms of the actual content of any such social law, the scholarship is varied. [FN127] Of course, no coherent ready-made alternative to state law has been revealed. It should be clear that most proponents of legal pluralism and social law do not claim, which would be a large claim, an alternative legal order of the same stature waiting in the wings to be uncovered and implemented. Rather, in its most typical meaning, the notion of social law boils down to two beliefs: (1) particular legal rules exist which are more authentic (to particular groups) than state law, and (2) instances of dispute resolution are available which are more attuned to the local culture than the state. However, much of Latin American sociological jurisprudence is bogged down in endless theorizing over the type of relationship existing between law and society. [FN128] Rummaging through a multiplicity of theories and theorists occupies scholars rather removed, striving more for a convincing blueprint of legal and social interconnectedness than those attempting to operationalize an alternative justice.

In any case, there are, by way of support, sufficient development-era studies confirming the informality with which ordinary people conduct their "legal" affairs. Informality, social norms, and the gap between law and society all dovetail in reinforcing the same duality claim. Yet, we would expect nothing different from ordinary citizens in any society. We would not expect that they conduct their interpersonal interactions as magistrates or advocates before a court of law. Nor would legal concepts or legal categories be assimilated strictly or even understood as jurists would understand them. The prevalence of an informal sector or an informal \*101 version of state law is thus far from evidence of the separate identity of social law. On the contrary, it is evidence of the commonality of legal practices. Informal or disparate application is part and parcel of any system of law and of any system of coercion, as discussed above.

Additionally, arguing for a particular option on the basis of its immanence in society is not uncommon within any system of law, for several centuries now. It is not, it should be noted, a legal device leading to one type of interpretation. Differing views of a socially-based rule may be advanced; in such case, the same technology can advance different outcomes. Moreover, legal reasoning of this type also advances conservative positions, positions which can reinforce the status quo on social and political issues. This is not to say that norms or notions drawn from particular social groups may not be a valuable intervention. On the contrary, a main point of this Essay is to argue for the permeability and openness of state law to these sources of law. For the sake of clarity, however, advancing alternative, socially-inflected norms distinct from traditional interpretations is quite different than claiming autochthonous sites of norm generation which necessarily trump other positions. The latter is nothing other than a decentralizing political project, riding on a preference for more "local tradition-based" decisionmaking and the reinforcement of group identities. More than pointing out the downsides to this latter approach, my focus here is its impact on traditionalist dominance of legal discourse.

## B. Abandonment of Progressive, Counter-Dominant Law

The appeal of "informal law" is another of the legacies of the law-and-development movement for progressive scholars. Rather than devote energies to challenging traditionalist legal positions, numerous scholars have focused instead on studying the particularities of social groups within Latin American politics. [FN129] Indeed, a significant portion of law and development scholarship and its aftermath, focuses on the law of the barrio, the law of the urban slum, the law of the armed forces, the law of the guerrillas, the law of particular indigenous groups, and the law of any plausibly identifiable social grouping. [FN130]

*\*102* By siphoning off progressives, the emphasis on social law has thinned the ranks of counter-dominant legal discourse. While this claim is impossible to quantify, it is clear that many progressive Latin American legal thinkers adhere to sociological frameworks and empirical research agendas. By contrast, many fields of official law are thoroughly dominated by traditional, conservative scholars. Indeed, it is often difficult to find the full range of legal and political positions, afforded by the ordinarily available, multiple interpretations of legal materials. Often, a juristic orthodoxy is capable of capturing and univocally interpreting entire fields of law. [FN131] Of course, in some cases this is assisted by the hierarchical arrangement--also part of the legal profession--which prizes some traditional academic voices over others. But, beyond this admittedly uneven playing field, many times progressives have simply not articulated the quite plausible, formal counter-arguments. [FN132] They may disdain engaging the official materials believing they lack legitimacy. As such, the calculation is *\*103* to invoke instead "extra-legal" arguments based directly on political or social expediency.

The predominant effect has been the abandonment of state law by many progressive scholars. Rather than direct their political intervention--whether it be in terms of wealth redistribution or enfranchising marginalized groups-- faith has been placed in endorsing alternative, sometimes highly local, notions of legality. [FN133] Yet, in terms of results, it has been noted already that no unproblematic or coherent alternative emerges. Instead, the social field simply presents the project of reconstructing a different legality, and the opening of a different playing field not necessarily more progressive or just. By shifting energies to constructing an ideally imagined social field, however, scholars have left most other legal battles open to more conservative colleagues. [FN134]

Whatever one's position is as to state law or law generally, the fact remains that official legality is central to democratic governance. [FN135] No doubt, perceptions of law's

ineffectiveness and low levels of enforcement undermine the appeal of engaging dominant legal discourse. Yet, to the extent that these make engagement seem inconsequential or irrelevant, they \*104 are deceptive. For in fact, legal argument is a significant medium of political organization, with undeniable effects throughout the polity. Thus, the question cannot be reduced to whether or not Latin Americans are respectful of traffic rules or whether or not land registries are effective in enforcing property rights. As in any legal system, there are discrepancies between the letter of the law and how it is carried out. Possibly, even, in countries with fewer resources those discrepancies are more evident. However, in terms of allocations of political and economic power, state law is a significant player even if its role at a particular point in time is to divest itself of such authority. Clearly, this is not to say that its power is equitably exercised or democratically executed. Quite the contrary, Latin American legal authority over a number of areas has been captured by a small number of personalities, typically quite circumspect about redistributing power. Such figures are conservatives by definition, they oppose undermining their own source of authority. Law thus continues to be defended as univocal and impervious to alternative interpretation. In this way, the societies' respected legal experts are often in the position to speak for the law, effectively unopposed. This aspect of the Latin American legal profession, while not in any structural way preempting progressive reform, does in fact make it more difficult.

My hypothesis, in this connection, is that the situation would be different if Latin America's scholars of the social turned more of their attention to contestatory legal debate, especially at the national level. Offering alternatives to official positions, captured by conservative colleagues, would provide the opening of the legal system which is much desired not on the basis of an alternative conception of a coherent legality, much less in terms of a different cultural quality of law that must be recuperated or integrated. Instead, an amplified legality--more democratic and responsive to Latin America's diverse populations--lies in challenging orthodox views of Latin America's jurists as to what the law requires.

### C. Foreclosing the Potential for a More Pragmatic Legal Discourse

A separate by-product of social scholars' forays into law in Latin America is also negative. It bears repeating that this is not a comment as to any necessary implication of a social approach. It does, however, describe the way in which a social approach, in the aggregate, has operated in Latin America and what remains as its lingering effects. To the point, the hyper-social ideas reinforced by developmentalism have effectively foreclosed the exercise of a progressively-inflected pragmatism within the region. The particular history of law-and-development offers some insight on this particular point.

A mainstay of this particular social approach to legal legitimacy involved de-linking state law from purely formal concepts. In other words, to make \*105 room for alternative legality within the state, law-and-development scholars found themselves in opposition to the traditional operators of Latin American legal systems. In part descriptive, in part evaluative, the operators of the traditional system were characterized as formalists. While this latter concept has many meanings, the most significant one for development scholars, however, was the rigidity of legal interpretation. In an environment where one group or class controls, the legal system is impervious to democratically responsive modes of interpretation. In other words, the legal elite is thoroughly in control and in the singular position to speak for the law.

Key to changing this state of affairs was the introduction of an alternative mode of legal decision-making. The first target was the univocality of legal interpretation. The push for reform in legal education and broader access to courts, characteristic of law-and-development, was tailored to meet this objective. However, as was alluded to earlier,

the political climate of the time made an apparently more fluid conception of law a dangerous instrument. In the hands of reactionary politicians, legal plasticity could just as easily sanction repressive measures as the more humanist goals sought by developmentalism.

Once law and development scholars came around to see it this way, many withdrew their efforts. The upshot was that alternative legality, pluralism, and pragmatism became more firmly associated with particular politics, either of the far right or the far left. Consequently, it came to be seen that only in a progressive political environment could social or pragmatic notions of law thrive. In a reactionary environment, legal formalism--universal and univocal-- was a better ally against arbitrary action. While no doubt this was a plausible reading of the situation at the time, it reaffirms the perception that alternative legal discourse is political while traditionalism is not.

The fear of legitimating dictators surely cannot be discounted. Pushing for a transition in legal discourse which has this effect is certainly not appealing. However, desisting and furthermore characterizing the project of legal pragmatism, within the context of law and development, as an openly political calculation has left broader effects. It has reinforced the connection between the pragmatic (or social) and the non-legal, either in the form of state instrumentalism or, alternatively, cultural particularity. [FN136] \*106 The line between law and politics is further embedded, with the law on the side of only traditionalist interpretation.

This configuration describes the twin fears reinforcing objections to a more open legal discourse in Latin America. Latin American jurists have traditionally been preoccupied with defending state institutions from the onslaught of unruly Latin American societies. Indeed, even socially-committed scholars have questioned the feasibility of liberal democratic states in Latin America. Faced with illiberal societies, the worry thus arises that states may fall prey to openly undemocratic forces. The rule of law has thus been identified with a very particular mode of legal discourse. This is not to say that the range of potential legal outcomes available under more pragmatic approaches would be excluded under Latin America's brand of legal debate. As a discursive practice, it is not outcome-determinative per se. However, this mode of discourse does distance legal authority from the reach of local society and, clearly, legal progressives. In this way the potential range of political volatility is to be narrowed. The objective of Latin America's legal elites is an above-politics/above-social source of authority. Their mode of doing so is a well-patrolled discourse of singular legal options.

In any case, some challenges have been waged against this straightjacketing of Latin American legal reasoning. A case in point is the law-and-development attempt outlined in this Essay. To repeat, its chief means was to highlight the incongruity between social and legal orders. Progressive heirs of this strategy have further attempted to erect a social order that could rival traditional law. By reinforcing the conception of a deep social sphere, however, social pluralists' efforts have not gotten very far. It has caused the further abandonment of progressive engagement with the official legal system, leaving orthodox jurists freer reign. Moreover, its promised rewards are always delayed until after the reconstruction of an alternative social sphere. Rather minimal, its more immediate gains have consisted of establishing exceptions to state law. As such, it has only further undermined the routine and ordinary argumentative use of "social" interpretation and argument throughout national legal discourse.

## VII. SOME WAYS OUT OF THE DEVELOPMENTALIST BIND

This Part traces, in cursory fashion, part of the legacy of failed developmentalism in the 1960s and 1970s. It catalogues the main strategies and frameworks deployed by Latin

American legal progressives today. This is but a brief sampling of the very rich legal debate currently taking place in many Latin American countries. Several of my examples draw from \*107 Colombian legal scholarship, which has especially experienced a boom in recent years.

These works demonstrate a variety of reactions to the limitations of the law and development paradigm. Faced with the dichotomy expressed by developmentalism, these examples reveal attempts struggling with the resultingly reinforced, dominant framework. They also offer some options for reformism and progressive intervention within Latin American legal discourse.

#### A. Unapologetic Formalists

Some progressive scholars have reclaimed the tradition of formalist legal interpretation as their own. That is, championing a sort of legal nationalism, formalism is conceived as the autochthonous mode of legal interpretation in the region. [FN137] This is a curious turn of the meanings earlier ascribed to formalism and authenticity. Whereas formalism was perceived as the concoction of elites, informality signified the genuine law of the people. More recent defenses of formalism attempt to turn this critique on its head. Scholars of course are careful not to justify their defense of formalism purely in terms of the authentic. Notions of authenticity have been widely debunked already. Therefore, the claim is based in terms of tradition or some such other. Formalism by extension is a significant part of Latin American legal tradition. It need not be ejected, the argument goes, in favor of some foreign vogue for pragmatist antiformalism.

This is a compelling argument. It rejects the false dualism of social law and state law. It also adopts a sophisticated interpretation of authenticity. Furthermore, it acknowledges the indeterminate nature of formalism. In other words, progressive objectives need not require pragmatic legal methods. Formal interpretation, while generally associated with conservative legal decisionmaking, can serve quite well. Conversely, pragmatism or realism is no more a guarantor of an enlightened social order. This latter insight comprehends the fear experienced by development scholars. As mentioned above, development scholars placed much stock in pragmatism and the social as a way of democratizing Latin American legal systems and promoting progressive political objectives. They desisted when their methods proved equally amenable to promoting conservative goals and further entrenching military dictators.

Defenders of formalism attempt to advance beyond the limitations of developmentalists. They do so by claiming formalism as their own. Additionally, this position also attempts to capitalize on the perceived strengths of formalism. That is, it is more clearly defensible as a source of \*108 authority beyond the reach of sheer political power. Making law unreachable from the play of society and politics enhances its perception of objectivity and neutrality. Jurists are thus in a stronger position to interject the law as a limit on governmental power.

Some of the weaknesses with this approach have to do with the relatively nontransparent and undemocratic way in which this technology works. Discussion of this point is contained above in reference to traditional modes of Latin American legal discourse. An additional weakness is that it underestimates the effect of normalization of traditional positions deploying the same type of technologies. Thus, while legal devices may be instrumentalized for a variety of positions, certain positions can become dominant through their continual repetition by the dominant legal community. In other words, in any particular legal debate, formalist arguments may be less convincing in the hands of progressives when a "formalist" interpretation has already been authoritatively advanced by traditionalists and accepted across the legal profession. As such, it may be

hard to beat them at their own game. In any case, the articulation of alternatives using these same technologies is a valuable exercise, even if such positions are not immediately likely to prevail. It challenges the assumptions of necessitarianism and univocality associated with Latin American law.

## B. Sophisticated Dichotomists

Some scholars have continued in the tradition of critiquing the discrepancy between formal state law and the workings of society. These critiques are not merely a rehashing of the distinction articulated since at least the times of Roscoe Pound. Such scholars attempt to bring new insight to the dichotomy. [FN138] New linguistic and cultural studies theories are brought to bear on the subject.

For example, some scholarship taking the existence of the duality as established analyze the reasons for its persistence. One very well-developed treatment of the topic pursued the symbolic power of law in Latin America. Mauricio García Villegas' *La eficacia simbólica del derecho* draws on much contemporary deconstructivist theory to analyze the role of law in Colombia. [FN139] Analogizing much of law to the preamble of many modern constitutions, the symbolic work performed is highlighted. In a certain respect, scholarship of this nature clearly provides a deeper analytic approach and genuinely wrestles with the question of ineffective law enforcement. Assuming the diagnosis is correctly identified, then, this work \*109 attempts to understand the appeal of the existing situation; that is, the preference for symbolic as opposed to effective enforcement.

Furthermore, this type of scholarship recognizes that the formal legal system has a function. It may not be the function desired. Nonetheless, it identifies the relevance or connection between state law and society at large. In its most extreme rendition, the gap between law and society is described in terms of an inorganic state law--quite unconnected to the local citizenry. Symbolic power, for example, signals the ordering potential of state law, even if such ordering depends on cognitive dissonance as its basis.

Another excellent example, in line with neoliberal neo-developmentalism, however, is the work of Hernando de Soto in Peru. [FN140] In his much acclaimed, *The Other Path*, de Soto draws on the descriptive dualism of formal and informal sectors in Peru. [FN141] The formal sector, in his view, consists of the legal system, official institutions, and traditional social groups such as industry associations, labor unions, and pressure groups. [FN142] The informal sector consists of mostly peasant migrants to urban areas operating in the shadow economy. [FN143] For de Soto, it is not a sociological or cultural difference which gives rise to the difference; rather, it is the economic inefficiency of formal legal rules. [FN144] In his words:

Let us take the invasion of state waste land as an example. What explanation can we find for this phenomenon, if we view it from a cultural or social standpoint? Is it an age-old practice which reflects Peruvians' partiality for getting together and invading other people's property? Of course not .... From a legal standpoint, on the other hand, the explanation is perfectly clear .... If the red tape were reduced, there might still be people who would prefer to invade land and risk all the adverse consequences, but they would be a minority .... Although no one denies the relative importance of social, cultural, or ethnic factors, we simply have not found any evidence to bear out the theory that they explain why a large sector of the population operates outside the law. [FN145]

**\*110** De Soto's thesis is that the legal system discriminates against "informals"--as such they have no choice but to bypass official law. [FN146] The consequences of his view are that the formal legal system has lost social relevance. Alternatively, formalizing the mix of motivation and incentives, observable in the informal sector, would align the legal system with economic growth. [FN147] De Soto's analysis retains the dichotomy between law and society. He portrays it, however, as the product of economic inefficiency rather than a different Latin American conception of the nature of law. [FN148] He bases his claims on empirical research of Peru's extensive bureaucratic costs related to industry, housing, and transport. [FN149]

It is hard to read de Soto's work without drawing a parallel to illegal aliens in the United States. These informals also constitute a substantial population excluded from the official legal system, systematically repressed and denied constitutional rights. Moreover, a case can be made that all groups or individuals--and their identifying activities--may claim the quality of "informals" when disfavored by official law. Adopting economic efficiency analysis may improve their lot, then again it might not. What de Soto proposes is, in effect, to renegotiate societal conflicts by the lights of economic efficiency. [FN150] If his proposal were adopted, and the criterion of efficiency were paramount within legal decision-making, then the winners and losers would indeed look different. In this way, his proposal is much like the developmentalist one of a shift in legal methods as a mode of triggering broad-scale reform. Unlike earlier developmentalists, however, de Soto limits his method to the logic of economic gain while developmentalists placed social justice and redistribution of wealth at the top of their list.

This is not to say that this argument is a dead letter. Quite the contrary, the argument that the duality, produced by the formal legal system, is economically inefficient has had a receptive audience. Neoliberals have **\*111** embraced the point as a reason for stronger property and contract rights, in the place of current law, situated beyond the reach of shifting political deals. [FN151] They claim that legal rules premised on the logic of efficiency are better suited to promote development than the current, formal system riddled with bureaucratic costs. Whether or not this new attempt at overhauling the traditional legal deal is actually successful remains to be seen. Neoliberalism in any case has some very diverse supporters.

From a more progressive perspective, deeper analyses of the gap between law and society run parallel to developmentalism and neo-developmentalism. They offer once and again the argument for system-wide reform, but in the name of social justice rather than economic efficiency. Surely, the distance between law on the books and law in action is a plausible object of study. However, raising this question as the essential problem with Latin American law, or as the best strategy for progressive reform, is misguided.

The error stems from insisting on an already defeated 1960s strategy. The notion is that effective social reform can be achieved through informal law-led projects of social, economic, and political transformation. That is, that elite power in Latin America, exercised through official law, can be upset by a competing popular or social law. To the extent that reform-minded progressive scholars continue in this belief, and thus continue to call for informal law, they forego the potential for any actual effective reform of the overall state. They in fact continue to reinforce the identity of the gap and continue to cast their lot in the losing role.

### C. Foreign-Modeled Realists

A new outcropping of legal scholarship has attempted to champion legal pragmatism. Its basis of authority is a tried and true technique within Latin American legal discourse. Foreign authorities are marshaled in support of particular positions. [FN152] In this version, various Latin American scholars have \*112 been particularly attracted to U.S. academics, but also to some Europeans, writing in the field of constitutional law, especially. [FN153] I will focus my discussion on the general profile of this vein of scholarship.

Curiously, even relatively conservative sources are marshaled as authority for progressive positions in Latin America. Defenders of the legitimacy and objectivity of the existing U.S. and common law systems are often called upon to fulfill quite a radical role. Figures such as Ronald Dworkin and John Rawls are cited to support notions such as the multiplicity of textual interpretations and the legitimacy of social considerations. In their home terrain, these scholars are understood as defenders of the system's built-in constraints on decisionmaking. Indeed, they reinforce the legitimacy of legal decisionmaking, by reason of its qualitative difference from political or other social influences.

The tactic becomes more understandable, however, in light of the suppression of social argument within dominant Latin American legal discourse, as discussed above. Instead of crafting an empirically-demonstrable social sphere, foreign-modeled realists rely on traditional jurists from other locales. In this way for example, a U.S. jurisprudence of constraint in decision-making, which nevertheless recognizes the pliability of interpretation and the primacy of policies and principles as tie-breakers, offers Latin American progressives the room they need. Moreover, this authority is claimed as deriving from within the legal system itself, that is, as legal and not political. As such, legal operators pursuing this approach are driven to engage the formal legal materials directly.

Some of the drawbacks of this strategy are parallel to its strengths. Calling upon foreign authority is a well-known mode of legal argument within Latin America. Therefore, proclaiming the genius and relevance of particular foreign scholars is likely to be effective. Judging by recent citations within constitutional decisions in some Latin American countries, this strategy is already somewhat effective. However, it harbors the dangers of ossifying a certain notion of the social, not as the dynamic interplay of local societal interests and values, but rather, as some foreign-based determination which may only be accessed by reference to foreign legal materials or foreign scholars. In other words, the effectiveness of social argument may be limited by reading it as narrowly inherent in foreign sources, and possibly as transnational law. In this way, social decisionmaking can be undermined and rendered unresponsive to local conditions, instead of merely allowing for arguments based on "social" developments in countries with similar constitutions or other legal materials. Of course, this is only conjecture. Then again, it is based on the \*113 uses made in the past of foreign authority within Latin American legal discourse. Whether foreign-modeled realism may "bridge the gap between law and society" remains to be seen.

Additionally, foreign-based realism harbors an additional pitfall. It presents the dilemma of marshaling foreign traditionalists for the purpose of local, reformist objectives. To the extent that foreign traditionalists subscribe to sociolegal discourse, however, this is not really an issue. It may pose particular questions for comparativists immersed in the legal discourse of both the United States (or Europe) and Latin America. However, the conservative pedigree of the foreign model can only stand to reinforce the Latin American reformer's position. The difficulty is that these same authorities do not offer much beyond rhetorical uses of sociolegal discourse. At some point, some of the very same critiques levied against U.S. traditionalists, for example, would become relevant.

In other words, supporting foreign model realism may merely foist the limitations of U.S. legal liberalism on Latin America. These limitations, as amply demonstrated by critical scholars, are a serious concern.

However, the authority of the U.S. mainstream within contemporary Latin American legal discourse, as discussed above, serves a very different purpose. It provides expression for recurrently-repressed social-based discourse within the formal legal system. Possibly at some point such social-based discourse will be normalized in such a way that it may need to be challenged. At this point in time, however, this reformist "liberal" intervention can be quite a progressive move in certain fields.

## VIII. CONCLUDING THOUGHTS

Developmentalist writing on Latin America has drawn some of the enduring images that we continue to hold about law in the region. This body of scholarship emphasized the looming disconnection between law and the social particularities of Latin American peoples. Another legacy of developmentalism is that its end in the mid-1970s is linked to the propensity of social-based methods to politicize law. More than just any set of images, this construction has had far-reaching effects. Specifically, it has reinforced the opposition against social transformation through the legal systems of Latin America.

By accepting the ultimatum posed by traditionalists in Latin America, development scholars accepted their inability to challenge the existing political deal. Cowed by fears of lawless societies out of control, absent a well-maintained formal discourse of law's above-politics authority, developmentalists desisted. They accepted the traditional deal cut by Latin American jurists over the potential loss of the authority of law. Additionally, they inspired a generation of Latin Americans and Latin Americanists to pursue marginally-situated projects of reform. Accepting <sup>\*114</sup> the framework of a more legitimate social normativity, heirs to this tradition remain busily crafting the bases for a substitute to state law. This, however, will likely not come. By definition, it is relegated to the dimension of society and minority politics--no matter how many empirical studies and research projects are conducted.

By contrast, traditional jurists preserve official legal discourse against projects that threaten reform or militate in favor of a reevaluation of the traditional political deal. In part defending the political status quo, in part defending their own quite singular authority to speak for the law, traditional Latin American jurists have prevented the legal system from responding to widespread social demands. As such, rather than defuse political grievances, they aggravate them. The state as a whole becomes open to challenge and the legal system subject to charges of irrelevance.

Perceived gaps between legal and social spheres and the relative unavailability of reformist social-legal discourse within Latin America are not, however, particularly useful descriptions of intrinsic features of the system. Rather, they are observations about the political projects and actors who have dominated legal discourse in the region. Making the mistake of accepting these as truths about Latin American law undermines the chances for reform and the strategies available to achieve it.

### Footnotes:

FN1. Professor of Law, Florida International University College of Law. My deep gratitude to Charles Donahue, David Kennedy, Máximo Langer, Liliana Obregón, Clara

Sandoval, and the May 9, 2001 participants of the Harvard Law School S.J.D. Colloquium for their wonderful comments and suggestions.

FN1. For example, the "alternative uses of law" movement within the Italian judiciary or the "Critique du droit" scholars in France, both important in the 1970s, present a number of complementary ideas about law. The specific contours of these and the uses made of them in Latin America are, however, subjects for other work.

FN2. See JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980); Richard Bilder & Brian Z. Tamanaha, [Book Review and Note Review Article, 89 AM J. INT'L L. 470 \(1995\)](#) (reviewing 2 *LAW AND DEVELOPMENT: LEGAL CULTURES* (Anthony Carty ed., 1992) and *LAW AND CRISIS IN THE THIRD WORLD* (Sammy Adelman & Abdul Paliwala eds., 1993)).

FN3. See generally GARDNER, *supra* note 2 (presenting legal development as a system or model--a U.S. one--which was sought to be transferred to Latin America). Gardner's account describes the failure of this project on the basis of the inherent vulnerabilities of the U.S. model and its manipulation "in tropic, authoritarian climates." *Id.* at 11. Concededly, his account contains a nuanced description of the "model" and an contextualized account of the local, political, and legal culture. The approach here, however, offers an alternative way of understanding developmentalism and its failures. It resists characterizations of the development project as the U.S. legal model, as well as, it resists characterizing its non-favorable reception in Latin America as the result of Latin American legal or political culture. Instead, I present an account of the actors within legal and political circles who deploy cultural and legal arguments for and against different projects.

FN4. An immediate objection, and a routine one, to the notion "Latin American" or more specifically "Latin American law" is its imprecision. Indeed, the existence of any such thing is highly debated. Still, the concept has been used historically, as either referring to the identity of law in the region or to a particular political project (of course, these two are not by any means mutually exclusive). The analysis here is intended precisely to dismantle the specific meaning of "Latin American law" resulting from development scholarship.

FN5. See GARDNER, *supra* note 2, at 5. The author blames the failings of developmentalism on the shortcomings of the U.S. legal model, but especially on the manipulability of U.S. style antiformalism in the Latin American context. See *id.*

The analysis in both parts of the volume suggests that the American legal models carried abroad had built-in flaws and vulnerabilities, and that these surfaced and were clearly illuminated in the harsh exposure of the Third World. As shown in the case studies, the American legal models demonstrated a vulnerability to authoritarian ordering and abuse.

*Id.*

FN6. See *id.* at 8. Gardner estimates that U.S. \$5 million went to Latin American legal development from a variety of public and private sources, and that approximately fifty American legal professionals worked in Latin America. *Id.*

FN7. See, e.g., *ESSAYS IN HONOR OF ANDRE GUNDER FRANK: THE DEVELOPMENT OF UNDERDEVELOPMENT* (Sing C. Chew & Robert A. Denmark eds., 1996).

FN8. See HENRY P. DE VRIES & JOSE RODRIGUEZ-NOVAS, *THE LAW OF THE AMERICAS* (1965) (containing information mostly on the subject of the Inter-American legal system, but dedicating a third to descriptions of law in Latin America); KENNETH L. KARST, *LATIN AMERICAN LEGAL INSTITUTIONS: PROBLEMS FOR COMPARATIVE STUDY* (1966); KENNETH L. KARST & KEITH S. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK* (1975); JOHN H. MERRYMAN, *THE LAWS OF WESTERN EUROPE AND LATIN AMERICA* (1976) (including some development writing, however, responding to a very different tradition of scholarship about Latin America and fitting more traditionally within the project of depicting Latin American law as an extension of European law, which I have written about elsewhere.). See generally Jorge L. Esquirol, [The Fictions of Latin American Law \(Part I\)](#), 1997 *UTAH L. REV.* 425 (analyzing the role of "Europeanness" within Latin American law).

FN9. See Lawrence M. Friedman, *On Legal Development*, 24 *RUTGERS L. REV.* 11, 12 (1970) (arguing that, for the most part, developmentalists had no theory; "when the lawyer goes abroad, he sails into a vacuum. He takes with him nothing that can reasonably be called a careful, thought out, explicit theory of law and society or of law and development--nor does he find one at his destination.").

FN10. See, e.g., Thomas M. Franck, *The New Development: Can American Law and Legal Institutions Help Developing Countries?*, 1972 *WIS. L. REV.* 767, 790. The precise role of lawyers in a given country emerges from the interaction of a variety of forces affecting that country, and, therefore, the kinds of roles lawyers play in national development ought to be viewed as a sociopolitical choice which each nation must make for itself .... [T]he means towards those ends employed by lawyers, laws, and legal institutions must be constantly updated to accord with the specific society, in all its multivarious complexity, and with each intricate, delicately balanced system of national goals and values.

*Id.*; see also Dennis O. Lynch, *Review Essay: Hundred Months of Solitude: Myth or Reality in Law and Development?*, 1983 *AM. B. FOUND. RES. J.* 223, 226 (finding developmentalists' inspiration in Karl Llewelyn's lawyer as a social engineer: "He [Llewelyn] had an anthropological view of law, which argued that lawyers and judges should examine how behavior in actual social circumstances reflected societal values that should be incorporated into the legal order as working legal rules to guide future behavior.").

FN11. See, e.g., Friedman, *supra* note 9, at 53 (stating "[t]he theory of law and development is only a special case, or corollary, of the theory of law and society."); Lawrence M. Friedman, *Legal Culture and Social Development*, 4 *LAW & SOC'Y REV.* 29, 34, 43 (1969) (defining the "legal system" to mean the living law, "under the influence of external or situational factors, pressing in from the larger society") [hereinafter *Legal Culture*]. Friedman considers the effectiveness of such a system as its ability to process demands for change while maintaining stability. See *id.* In this connection, he calls for more empirical study of the legal culture as the main factor determining effectiveness: "What is the living law of the

provinces, or the streets, or the corporation, in comparison to the law on the books?" *Id.* at 43; see also Kenneth L. Karst, *Law in Developing Countries*, 60 *LAW LIBR. J.* 13, 16 (1967) (highlighting the unevenness of law's application in developing countries (based on class membership) as contrary to a "development-conducive state of mind."). Karst sees law's role in development as principally one of "legitimizing change" needed to effect the social transformations required to apply law equally to all. See *id.* at 16.

FN12. Clearly, sociolegal discourse is also often directed at debates within sociology, generally speaking. This Essay is limited to considering sociolegal debate within the traditional field of law and not as a basis for intervention in the social sciences.

FN13. See, e.g., EUGEN EHRlich, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 119-20 (Walter L. Moll trans., 1936) (defending a theory of social and economic associations as the basis for legal as well as extra-legal norms). Ehrlich demonstrates how it would be quite impossible to understand legal rules without reference to this underlying realm of "facts of the law." *Id.*

And every new development which arises for new purposes, and which stands the test of time, is added to the treasure of social norms, and serves to guide later associations. There is an endless and uninterrupted process of adaptation to new needs and situations, in which is embodied, at the same time, the development of the human race and of its norms. It may suffice to instance the great number of new norms, not only of law, but also of morals, ethical custom, honor, good manners, tact, and perhaps, at least in a certain sense, etiquette and fashion ....

*Id.*

FN14. While both formulations taken together may seem contradictory, in terms of law as either a dependent or independent variable, Lawrence Friedman describes that even scholars considering law a secondary aspect of society, such as Marxists, believe that once law acquires an independent existence, it may exert reflex influence upon the foundation. See Friedman, *supra* note 9, at 54.

FN15. See Carl A. Auerbach, *Legal Development in Developing Countries: The American Experience*, 63 *PROC. AM. SOC'Y OF INT'L L.* 81 (1969).

FN16. See Franck, *supra* note 10, at 772-73 (describing "new" development (the 1960s and 1970s kind) as interested in social welfare and popular participation; "popular participation makes for better development than does elitist autocracy--better qualitatively and, ultimately, better quantitatively."); see also Friedman, *supra* note 9, at 13-14 (stating, "'[D]evelopment' ... refers to any process of growth or change; and at the same time it means a special kind of favorable growth, on the model of the so called developed countries.").

FN17. See Auerbach, *supra* note 15, at 82 (stating "legal scholarship in our country has contributed little upon which to build a theory of 'legal development' or to offer advice as to how legal institutions may be used to foster the modernization process ... legal scholars are beginning to pay attention to the problem of legal development; those who have worked in developing nations are reflecting upon their experiences and writing

about them"); see also L. Michael Hager, *The Role of Lawyers in Developing Countries*, 58 *A.B.A.J.* 33, 33 (1972) (stating "the neglect of law in development studies reflects uncertainty as to its ultimate contribution. The question for some observers is not simply a matter of degree but whether the law is an ally of development or an enemy.").

FN18. See Franck, *supra* note 10, at 788.

Of course, we have recognized the role played by law and lawyers in facilitating development in the United States. We would also accept the assertion that law is everywhere an essential instrument of government. But good law aids development; archaic law hinders it. Good lawyers help, bad lawyers do not.

*Id.*

FN19. My use of the term "Latin American law" is subject to much debate. It suggests a common system of law throughout Latin America or, at a minimum, a view of law's key characteristics as consisting of transnational similarities. Indeed, facile use of this phrase may signal complicity in the strategic use of the idea of transnational law, which I attribute to the dominant Latin American legal discourse (principally by reference to a transnational European law) and which I have criticized elsewhere. However, my use of the term here simply reflects the historical fact of the category and attempts to explore the strategic uses to which it has been put.

FN20. See Marc Galanter, *The Modernization of Law*, in *MODERNIZATION: THE DYNAMICS OF GROWTH* 153 (Myron Weiner ed., 1966). Galanter--not focusing on Latin America in particular in this piece--describes the law-and-society shibboleth of a "dualistic legal situation." See *id.* The innovation is not the discovery of a gap between lawyers' law and popular law (or law in books and law in action); gaps exist in most systems of law. See *id.* at 157-58. The interesting point, according to Galanter, is the particular way which "modern law" attempts to deal with this gap and the underlying local, legal tradition it evidences. See *id.* at 158-65. In his estimation, it is to suppress and replace it: "[o]ur model pictures a machinery for the relentless imposition of prevailing central rules and procedures over all that is local and parochial and deviant." *Id.* at 157. "The law on the books does not represent the attitudes and concerns of the local people .... The law in operation is always a compromise between lawyers' law and parochial notions of legality." *Id.* at 162.

[L]aws were frequently imported from foreign legal systems without consideration of their appropriateness to Brazilian society, and in a good many areas, laws are so out of touch with social reality that the society is able to function at all only by ignoring the law or on the basis of the *jeito*, a highly prized national institution for bypassing the formal legal structure.

Keith S. Rosenn, *The Reform of Legal Education in Brazil*, 21 *J. LEGAL EDUC.* 251, 254 (1969).

FN21. See Joseph R. Thome, *The Process of Land Reform in Latin America*, 1968 *WIS. L. REV.* 9, 22.

But if the legal system and its institutions are to play an effective role in the process of reform, then the lawyers who shape its form and substance must become painfully

aware of the actual social and economic conditions they would change. Only then will they realize that traditional legal methods may actually frustrate the process of reform, and that the legal process, at least in this area, may have to take strange and unfamiliar but yet effective and equitable forms.

Id.

FN22. See Dale B. Furnish, *The Hierarchy of Peruvian Laws: Context for Law and Development*, 19 AM. J. COMP. L. 91 (1971).

FN23. See generally Kenneth A. Manaster, *The Problem of Urban Squatters in Developing Countries: Peru, 1968* WIS. L. REV. 23, 61 (praising the 1961 Peruvian Barriadas Law: "The kind of pragmatic, imaginative adaptation of old legal concepts to new problems which we see in this law is the kind of first step which Peru and many other countries must take if they wish to begin to confront the squatter crises effectively, peacefully, and fairly within the framework of legal systems which are both progressive and just.").

FN24. See Barry Metzger, *Legal Services to the Poor and National Development Objectives*, in COMMITTEE ON LEGAL SERVICES TO THE POOR IN THE DEVELOPING COUNTRIES, *LEGAL AID AND WORLD POVERTY: A SURVEY OF ASIA, AFRICA, AND LATIN AMERICA* 10 (1974) (stating "the formal legal systems of most developing nations are derived from Western models imperfectly adapted to distinctive local conditions. Not surprisingly, this has resulted in the failure of certain laws to function as intended and in large gaps between popularly accepted behavior and legal norms.").

FN25. See, e.g., Jorge Witker, *Derecho, desarrollo y formación jurídica*, 24 REVISTA DE LA FACULTAD DE DERECHO DE MEXICO 659, 670 (1974) (giving, as an example of the gap between law and society, the supposition in the law which is "not empirically proven, that the family in Latin America is structured in general by way of the marriage tie. Sporadic studies of legal sociology in small communities have detected the existence of a multitude of extra-legal unions, which lack any legal provision regulating them."). Statements such as these can be made of any place at any time. The "gap" here is merely an argumentative device, which can in this same fashion be deployed in most any setting. Here, it is used to argue for a change in legal education and more social and economic policy-oriented judicial decisionmaking.

FN26. See Frank Griffith Dawson, *Labor Legislation and Social Integration in Guatemala: 1871-1944*, 14 AM. J. COMP. L. 124 (1965). Dawson describes how Guatemalan labor legislation is starkly at odds with Indian goals, values, and traditional hierarchy. See *id.* Dawson seems to argue against this destruction of "pluralism" by the state. See *id.* Indeed, his characterization of a cruel and oppressive official system makes this point. See *id.* Yet, in a footnote he states "[d]espite [its] perils, however, the demise of pluralism is to be welcomed." *Id.* at 142 n.86. For him, it is in this way that Latin American states will become national societies. See *id.*

FN27. See, e.g., *Legal Culture*, *supra* note 11, at 43-44 (stating "[n]o community or group is truly lawless. But if law is defined as the formal law of the capital or the rulers, then in every country there are lawless groups and territories .... Pluralism ... is not

merely a structural matter. It rests on cultural differences."); see also generally Hager, *supra* note 17.

FN28. See, e.g., Kenneth L. Karst & Norris C. Clement, *Legal Institutions and Development: Lessons from the Mexican Ejido*, 16 *UCLA L. REV.* 281 (1968) (focusing on the specific economic decisions confronting ejido (community-held land, which is parceled out to individual farmers to work) members in Mexico and arguing for legal reform, to better secure land tenure, based on the "small-scale" perspective of the ejido farmer's social and economic constraints). While the authors recognize the political interests aligned against reform and the legal arguments they invoke, they do not address them directly or suggest direct engagement to counteract them. See generally *id.* Instead, they advance their argument by urging the "small-scale" perspective as better suited to development. See *id.* at 302-03.

FN29. See, e.g., Norman S. Poser, *Securities Regulation in Developing Countries: The Brazilian Experience*, 52 *VA. L. REV.* 1283, 1294 (1966) (stating "[t]he developmental purpose of the program and the gap between business morality and the standards that are necessary for the existence of mature capital markets create special difficulties in formulating and enforcing these standards").

FN30. See, e.g., Kenneth L. Karst, *Rights in Land and Housing in an Informal Legal System: The Barrios of Caracas*, 19 *AM. J. COMP. L.* 550, 569 (1971) (describing the customary or informal law of the urban barrio in Caracas). Karst's analysis is an example of the use of a separate social sphere as a source of alternative legal norms. See generally *id.* He argues that "barrio law" should be considered as official law. See *id.* at 569-70. His argument is explicitly directed at those, within Venezuela or outside, who believe that barrios are simply an example of a legal void, where official law has yet to penetrate. See generally *id.* His rationale is that this informal, barrio law provides for land tenure stability for urban squatters, which has the effect of promoting investment in their dwellings and thus promotes development. See *id.* at 569. Of course, the official property regime also has the same objective of providing for stability. Solely on the principle of stability required for development, arguments can be made either for or against barrio law. In fact, barrio law's purported guarantee of stability is predicated on the government's decision not to enforce official laws because of political reasons, thereby keeping barrio law and urban squatters in a precarious position even if they feel secure as a matter of their "state of mind." According to Karst, however, "the security that is relevant to development is the state of mind of the developmental decision-maker." *Id.*

FN31. See, e.g., Friedman, *supra* note 9, at 29.

[Legal culture] includes all the relevant social values and attitudes that influence law but cannot be deduced from its structure and substance. These include respect for law or the lack of it, whether people readily use their courts, their officials, or prefer informal ways of solving problems, and attitudes and demands upon law posed by different ethnic groups, races, religions, occupations and social classes.

*Id.*

FN32. See, e.g., Keith S. Rosenn, *The Jeito: Brazil's Institutional Bypass of the Formal Legal System and its Developmental Implications*, 19 AM. J. COMP. L. 514, 515 (1971).

FN33. See Karst, *supra* note 30, at 569-70; see generally also Manaster, *supra* note 23, at 61.

FN34. Karst & Clement, *supra* note 28, at 282-302.

FN35. KARST & ROSENN, *supra* note 8, at 675 (footnote omitted).

FN36. See *id.*

FN37. See, e.g., Rosenn, *supra* note 32, at 533-34. Rosenn readily accepts that formalism, as a legal methodology, may be marshaled to frustrate social change; however, he does not recognize that it can also be the basis for projects of nation-building and even economic development. See *id.*

FN38. See Diego E. López Medina, *Comparative Jurisprudence: Reception and Misreading Transnational Legal Theory in Latin America* (2002) (unpublished S.J.D. Dissertation, Harvard University) (on file with the author) (Demonstrating this complexity, foreign legal authorities must be marshaled and aligned with an advocate's position. Sources concerned with vastly different issues and particularities in their own countries must be refitted to provide the rule for the case at hand. Additionally, the typical legal argument contains a hodge-podge of cites, seeking to win the battle of foreign authorities.).

FN39. See KARST & ROSENN, *supra* note 8, at 45-47, 61-62.

FN40. See, e.g., DE VRIES & RODRIGUEZ-NOVAS, *supra* note 8, at 161-73.

The colonial heritage of Hispanic America with its special techniques of adjustment to harsh measures persists in the present-day civic irresponsibility, if not outright evasion of obligations to the community .... The Hispanic American legal tradition is a blend of formal adherence to representative democracy and respect for written law isolated from social factors ....

*Id.* at 168. "[T]hough the forms of constitutional government have long been present, the sociological basis for effective implementation of written words is often lacking." *Id.* at 172.

FN41. See *id.* at 161-71.

FN42. See generally MERRYMAN, *supra* note 8.

FN43. See, e.g., Furnish, *supra* note 22, at 92. Furnish gives pride of place to Hans Kelsen. *Id.* He in fact wholly adopts this framework to describe the workings of Peru's administrative law structure: "The lawyer interested in law and development should follow that trail to see laws in action, for in Peru and other developing nations the most important source of developmental policy is the Executive." *Id.* at 111. Furnish adopts both the "gap" metaphor and the notion of official law's Kelsenianism at face value. See generally *id.*

FN44. See, e.g., CARLOS S. NINO, *INTRODUCCION AL ANALISIS DEL DERECHO* (1983).

FN45. See BORDA KELSEN, *EN COLOMBIA* (1991).

FN46. At the risk of getting ahead of myself, I simply make a cursory note here: One of the points of this Essay is that the particular form of traditional legal discourse in Latin America rejects part of this argumentative repertoire. It reinforces necessitarian univocalism by disqualifying arguments that openly acknowledge the multiple positions and interpretations available from traditional legal materials, that is, from citations to foreign jurists and foreign sources.

FN47. See, e.g., Dale B. Furnish, *Chilean Antitrust Law*, 19 *AM. J. COMP. L.* 464 (1971) (decrying the irrelevance of anti-trust laws as a result of Chile's social and economic realities).

FN48. This point is reinforced by the role ascribed within dependency theory to Latin America's comprador class, essentially local elites identified with the economically powerful in the developed world, or unscrupulous intermediaries in the incessant siphoning of wealth from the undeveloped to the developed world. See DAVID LEHMANN, *DEMOCRACY AND DEVELOPMENT IN LATIN AMERICA: ECONOMICS, POLITICS AND RELIGION IN THE POST-WAR PERIOD* 20-26 (1990). In a footnote, Lehman explains "the term seems to have originated in South-East Asia where it refers to non-indigenous merchant groups with a distinctive ethnic (Chinese, Indian, European) identity." *Id.* at 26 n.21.

FN49. This prescription is not limited to 1960s law and development. Recent writings by the head of the World Bank's legal division, Ibrahim Shihata, prescribes the same remedy not only for Latin America but around the world. See, e.g., Ibrahim F.I. Shihata, [The Role of Law in Business Development](#), 20 *FORDHAM INT'L L.J.* 1577, 1577-78 (1997). Shihata advocates a turn to legal realism by local judiciaries. See [id. at 1581-83](#). The rationale clearly stated is that realist judges will be better able to implement national economic goals at the micro level. See [id. at 1582-83](#).

FN50. See, e.g., GARDNER, *supra* note 2, at 267.

Although there is oversimplification in this analysis of a single and impedimental role of the exported formal legal system, it illuminates a particular "law-against-law" conflict, in this case between the formal legal system on the one hand and the informal law of the society or the instrumental laws of emerging states on the other. In these conflicts the law and development movement did not find the formal legal system uniformly on the

side of developmental change; on the contrary, legal formalism again demonstrated a considerable capacity to complicate social relationships and to delay and inhibit broader social change.

Id.

FN51. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 169-71 (1992). Horwitz downplays the controversy typically cited between sociological jurisprudence and legal realism; on the contrary, he suggests "both intellectual movements should be understood as sub-categories of pre- and post-World War I Progressive legal thought, and Legal Realism needs to be seen primarily as a continuation of the reformist attack on orthodox legal thought." Id. at 171.

FN52. See Roscoe Pound, *Law in Books and Law in Action*, 44 *AM. L. REV.* 12 (1910).

FN53. See HORWITZ, *supra* note 51, at 188.

FN54. See id. at 187-88.

FN55. See id. Indeed, it was the very slogan, "law in books and law in action," which became the target for legal realists in the 1930s. One of the principal figures of American legal realism, Karl Llewelyn, rose to prominence by critiquing the unfulfilled potential of sociological jurisprudence to reform the "law in books." See id. at 170-82. Pound's handiwork for all its reformist pedigree and potential had by the 1930s "a tendency toward idealization of some portion of the status quo at any given time." Id. at 174. Realism, according to Horwitz, presented a real threat to the then legal system's self-sustaining tropes of principled deduction and legal objectivity. See id. at 187-92. Sociological jurisprudence ultimately became a way to defend the even-handedness of legal rules by pointing to their source as observable human interaction as opposed to questionable human logic or doubtful neutrality.

FN56. See, e.g., KARST & ROSENN, *supra* note 8, at 639 (footnotes omitted).

FN57. See, e.g., DE VRIES & RODRIGUEZ-NOVAS, *supra* note 8, at 193. "Particularly in codes containing a high proportion of terse, abstract statements of principles rather than detailed rules, the power to interpret becomes, in practice, the power to create 'law in action.'" Id.

FN58. Wilfred Jenks, *El derecho y el cambio social en el pensamiento y la práctica de América Latina*, in *REVISTA DE CIENCIAS JURIDICAS* 307, 310 (1972) (author's translation). Jenks also relates that:

In this respect [i.e. providing for change within law as a response to social conflict], a large measure of change has been produced in the content and primordial tendencies of

Latin American law during the preceding generation. "Social law" has become a part of unceasingly growing importance in law as a whole .... So transformed to its social function, [law] enjoys a positive potential for social change of vast reach, which earlier generations would have doubted with profound skepticism.

Id. at 313 (author's translation).

FN59. See GARDNER, *supra* note 2, at 34.

The end result was a law and development movement that lacked many of the preconditions for direct legal transfer and turned instead to the task--the difficult task--of indirectly transferring abstract American legal models and concepts that were neither invited nor imposed, but rather infused, through American legal assistance.

Id.

FN60. See, e.g., KARST & ROSENN, *supra* note 8, at 646.

But in our zeal to be realistic, we should not overlook the obvious and central fact that an enormous portion of every legal system in the "developed" world is exceedingly coherent and knowable. (Our own legal education, which still centers on developing analytical skills, is misleading in this respect, for it consistently focuses on problem situations, while most transactions and relationships are "easy cases.") Consider, in contrast, ... Brazil.

Id.

FN61. See Rosenn, *supra* note 20, at 255 n.9 (reflecting on the obstacles to law school reform, "[i]t may be that something akin to American legal realism cannot thrive in a society where so many disputes are resolved by extra-legal measures, or where those charged with enforcing the law are accustomed to reinterpret it without particular regard to statutory language."). Rosenn construes American legal realism too narrowly. It is precisely these same phenomena that many legal realists reveal in the U.S. context. Elsewhere, Rosenn notes that "this prevailing attitude towards law and law study--that it comes hermetically packed like tennis balls and that deductive analysis is the key to open the can--is at least partly responsible for the great disparity between law and practice in Brazil." Id. at 272. See Henry J. Steiner, *Legal Education and Socio-Economic Change: Brazilian Perspectives*, 18 AM. J. COMP. L. 39 (1971); see also Edward A. Laing, *Revolution in Latin American Legal Education: The Colombian Experience*, 6 LAWYER AM. 370, 372-73 (1974).

Whether they were the cause or the effect of the tendencies to be presently described is a matter of speculation. But the Colombian (and the Latin-American) law school and university helped to produce and perpetuate the class distinctions and social cleavages which were earlier mentioned .... Traditionally, therefore, conservatism has been a feature of the law and society. In law and legal education the tendency has been to stress historicism and positivism as cardinal features of law, the teaching of which was designed to produce "jurists" cast in the traditionally exegetical mold by a system which eschewed intellectualism (unless traditionally endowed) and creativity, and which extolled professionalism .... The system we have described contributed to professional attitudes resistant to change, the retention of outworn techniques and to an inward-looking and

resilient law school organization and internal structure, with outmoded curricula and methodologies.

Id. (footnotes omitted).

FN62. See, e.g., Karst, *supra* note 11, at 19 (stating "[l]awyers in the older of the developing countries ... e.g., in Latin America ... have not been trained in a policy-oriented legal science .... A radical re-ordering of legal education seems essential to change these patterns of thought"). See also Thome, *supra* note 21, at 22.

[If] the legal system and its institutions are to play an effective role in the process of reform, then the lawyers who shape its form and substance must become painfully aware of the actual social and economic conditions they would change. Only then will they realize that traditional legal methods may actually frustrate the process of reform

....

Id.

FN63. Laing, *supra* note 61, at 374 (footnotes omitted).

FN64. See Metzger, *supra* note 24, at 7.

Except under the most exceptional circumstances, an effective legal services program can contribute only marginally to eliminating the economic poverty of lower-income groups. Its contribution is more toward distributive justice--toward the nondiscriminatory operation of institutions with which citizens deal--which is increasingly being recognized as a development goal complementary to but independent of economic development.

Id.

FN65. As noted earlier, taking up other historical examples of this phenomenon is beyond the scope of this Essay. However, by way of brief reference, Wanda Capeller tells the story of French "Critique du Droit" influence in the late 1970s in Latin America, in the way suggested by the analysis here. See generally Wanda de Lemos Capeller, *Entre o ceticismo e a utopia: A sociologia jurídica latino-americana frente ao debate europeu*, in *SOCIOLOGIA JURIDICA EN AMERICA LATINA* (1991). Capeller identifies military dictatorships in the 1970s with legal formalism (just as developmentalists did with then existing legal

regimes), subsequently challenged by critics, deploying "Critique du Droit," who saw the French ideas as an "'ideological option' in opposition to North American theoretical models." (Rather than legal realism, they wandered toward materialism.) See *id.* Still, its proponents failed, according to Capeller, because of insufficient connection with social research and social reality, making it impossible to effectuate any real transformation (reinforcing the subsequent move by progressives toward the hyper-social, discussed below in text). *Id.* at 94-95.

FN66. See GARDNER, *supra* note 2, at 56 (confirming that the first conference in Mexico City consisted of more than two hundred and fifty Latin American delegates from forty law schools in eighteen countries, with no North Americans in attendance).

FN67. See Laing, *supra* note 61, at 379. Laing highlights the following points:

[E]merging from the first conference was the recommendation, made in connection with curricula suggestions, that legal education should be adjusted to the social needs of the community and be related to its needs and those of the rest of Latin America. This was repeated at the third conference, while the fourth conference suggested some specific programs for law schools to follow in fostering the social and economic welfare of the community and its members [for example, free legal assistance and centers for legal information].

*Id.*; see also Héctor Fix-Zamudio, *Docencia en las facultades de derecho*, 3 BOLETIN DEL COLEGIO DE ABOGADOS DE MEXICO 2 (1973).

FN68. See Laing, *supra* note 61, at 382.

For its basic activities ARED [national Colombian association for legal education reform] has received some financial assistance from the Ford Foundation .... Despite the fact that these, and other activities could only have been beneficial, there has been some reluctance of other law schools to join ARED, and teachers using the modern methodologies have experienced considerable student resistance and been accused of brainwashing and conducting unwholesome Yankee practices.

*Id.* at 387-88.

FN69. Fix-Zamudio, *supra* note 67, at 15 (author's translation).

FN70. See, e.g., Cláudio Souto, *Sociology of Law: A New Perspective in Brazilian Legal Education*, 1972 ARCHIV FEUR RECTHS UND SOZIALPHILOSOPHIE 237 (1972). Souto describes the introduction of sociology of law courses and an institute at the University of Recife law school. See generally *id.* He credits William D. Macdonald of the University of Florida College of Law with the following. *Id.* at 243.

The more general and important of these applied studies [within the institute] was research initiated ... under a topic suggested by William D. Macdonald ... [which] attempts mainly to survey opportunities for socio-juridical research in connection with the reform of Brazilian legislation-- opportunities for research that could or should be carried out whether before or after the new codes are put into effect.

*Id.* at 243. Souto was interested in framing a qualitative definition of the "living law" (beyond the quantitative "high-frequency behavior") which could form the basis for

the expansion of societies and of their problems of sociability, the increase of internal and external communication, the needs of international life. All this seems to demand a type of social control capable of adaptation to our modern society: a social control less formal and less dogmatic and more flexible, more dynamic, corresponding to the rapid change of the particular societies and the nature of the international society, which remains, to a great extent, an informal one.

*Id.* at 245.

FN71. See Laing, *supra* note 61, at 383.

FN72. *Id.*; see, e.g., Mario Quiñónez Amézquita, El estudio del derecho y sus metodos de enseñanza, 1 BOLETIN DEL COLEGIO DE ABOGADOS DE GUATEMALA 2, at 4, 16 (1974) ("[P]odemos afirmar que son las Facultades de derecho las más conservadoras y reacias a la implementación de reformas .... Nosotros hemos considerado que Guatemala necesita un abogado con miras al desarrollo, que conozca el Derecho de su país, la realidad del mismo."); Antonio Vivanco, Enseñanza e Investigación en el Derecho Agrario, 1 REVISTA JURIDICA DEL PERU 151 (1974).

FN73. Of course, it is not clear how far Latin American-based reformers were willing to go. The words of a leading figure in legal education in Colombia, Dr. Fernando Hinestrosa of the Externado de Colombia, leaves room for doubt, stating that law is

not simply a science or a mere technique, nor speculative knowledge, nor a vulgar method of doing things. But, as in its classical Roman ancestry, Law continued to be an art and, require[d] a solid theoretical conception, a simple and direct method of reasoning and decision and an universal criterion, with a clear humanist flavor ....

Laing, *supra* note 61, at 386. Then again, legal mystification is not necessarily a proxy for lack of reformist intent.

FN74. GARDNER, *supra* note 2, at 57-58.

The American legal assistance programs which later emerged had little apparent memory or knowledge of the Latin American reform endeavor--a striking omission in the American law and development literature on Latin America in the early and middle 1960s, and an instructive comment on the American origins of the reforms subsequently launched.

*Id.*

FN75. See, e.g., *id.* at 62-63 (describing the resistance in Brazil to legal education reform, where an independent center in 1965 was created "largely because the Brazilian law schools were, in fact, unreceptive to American notions of reform ....").

FN76. A quite theoretical treatment of the tensions presented is the work of Eduardo García Máynez of Mexico. Eduardo García Máynez, El derecho en el orden del ser y como sector del orden social, 19 REVISTA DE LA FACULTAD DE DERECHO DE MEXICO 525 (1969). García Máynez reinforces the traditional conception of law, and argues against "psychological" or "legal consciousness" ideas about legality, in the following way. See generally *id.*

In other words, the execution of acts of consciousness in an individual or a plurality of subjects does not constitute, rather it confirms or recognizes legal objects. There is no doubt that the existence of these is found in the psychological ambit, in conscience and individual feeling, but it does not depend on such connection, nor is it limited by it.

Id. at 528 (author's translation). García Máynez grounds law in the social order, but for him the social order fixes the minimum requirements for co-existence. It is inter-subjective, rather than collective, yet rises above individual will. When participating in society, individuals submit their individuality to its pre-existing dictates. As such, in his work, the social order is not a source for substantial change, rather it is already present and the source of existing legal rules.

FN77. See, e.g., Maria do Socorro Bezerra da Costa et al., *Atualização do ensino do direito romano*, 23 *REVISTA DE LA FACULTAD DE DERECHO DE MEXICO* 53 (1973).

In no instance should the importance and utility of the study of Roman law be placed in doubt, as it has come to conform a true legal consciousness through above all legislation and case law. It is valid to consider it not a dead law that should be forgotten. It is a living law, acting, and impregnating o amago as the essence of other Laws.

Id. See also César José Ramos Sojo, *Necesidad de una actualización de la enseñanza del derecho romano*, 23 *REVISTA DE LA FACULTAD DE DERECHO DE MEXICO* 67 (1973). The author argues that

[t]he frequency with which we find the questioning of the modern study and teaching of Roman law, inside and out of law schools, could have us believe that it is a phenomenon exclusively of our times. As well it has been observed about France, this attitude is more than 200 years old .... Notwithstanding this observation by Accarias ("Roman law courses ... are in actuality rejected by students and attacked by reason of an undue suspicion by part of the peoples of the world.") the study and teaching of Roman law was conserved in the curriculum of studies of Roman law in France, without transcendental reform. And what is valid for France, can be said as well for our countries.

Id. at 67-68 (author's translation).

FN78. See Esquirol, *supra* note 8, at 427 n.2, 431-32 n.14.

FN79. See Bezerra de Costa et al., *supra* note 77.

FN80. Sojo, *supra* note 77, at 70.

FN81. Nina Ponnsa de la Vega de Miguens, *Necesidad de una actualización en la enseñanza del derecho romano*, 23 *REVISTA DE LA FACULTAD DE DERECHO DE MEXICO* 21, 22-23, 25 (1973) (author's translation).

FN82. Cf. Victor Tau Anzoátegui, *Importancia y estado actual de la enseñanza de la Historia del Derecho*, 130 *REVISTA JURIDICA ARGENTINA "LA LEY"* 976 (1968).

FN83. See, e.g., GARDNER, *supra* note 2, at 83.

Opposition surfaced [at PUC in Rio de Janeiro, Brazil], for example, in the form of persistent faculty criticism that the new reform program--especially the Development

Law branch--was not law but social science. Eventually, after intense intrafaculty struggles, the CEPED group and the dean were replaced by a dean in the more traditional and conservative mold.

Id.

FN84. See, e.g., id. at 231-35.

FN85. See, e.g., Francisco Serrano Migallón, *El derecho y la ley*, 5 *EL FORO* 53 (1969) (arguing that order is not a social norm, rather order is the goal of state law, as opposed to ideal justice or the common, social good). In his view, state law can only achieve some rough measure of the ideal of justice while providing peace for society to pursue its common good. Absent law, "una sociedad sin orden sería un mundo donde reinase como única Ley el bajo instinto del egoísmo y las insanas pasiones humanas." Id. at 54. But cf., Ambrosio Romero Carranza, *A los cincuenta años de la creación de una cátedra de derecho*, 1973 *JURISPRUDENCIA ARGENTINA: DOCTRINA* 287, 287 (arguing against the tendency in Argentine law schools to marginalize the study of political law; "[e]n la actualidad el conocimiento del derecho político se ha impuesto como una necesidad urgente e indispensable para el progreso de la vida social"); see also Sojo, *supra* note 77, at 77-78.

It is necessary to safeguard against the iconoclastic current of breaking all links with the legal tradition in which we are inserted and which signals our common destiny, Kischaker highlighted the contribution of Roman law in Europe, its active participation as a constructive, harmonious and pacific element, of the sole city, beyond national differences. Codifications of the French, Italian, and German type, as works of Romanists, reveal the phenomenon of a common descent and a common place of understanding. The codifications derived from the same cannot be subtracted from the influence of Roman law which remains the fundamental juridical datum, at the base of our social organization, a factor of unity.

Id.

FN86. See ANDRE GUNDER FRANK, *LATIN AMERICA: UNDERDEVELOPMENT OR REVOLUTION* (1969).

FN87. See GARDNER, *supra* note 2, at 117.

When, therefore, the OAB [Brazilian Bar Association] president, Faoro, discussed "formalism" and "instrumentalism," he in effect turned the legal models of American legal assistance inside out. Rather than criticize legal formalism as antiquated, for example, the movement perceived in legal formalism the "dorsal fin" of liberal constitutionalism. Rather than encourage rule skepticism and state instrumental law, the movement advocated formal rules and the rule of law.

Id. (footnote omitted).

FN88. An interesting example is the reaction of the Chilean Supreme Court to the legal interpretations espoused by the Allende administration in the early 1970s. A significant amount has already been written about the Chilean Court's exceptionally activist stance and consequent de-legitimation of legally valid, yet non-traditionally interpreted and applied, governmental programs and enforcement actions. But see Velasco, *The Allende Regime in Chile: An Historical Analysis* 9 LOY. L.A. L. REV. 480 (1975-76) (sustaining that Allende's actions were illegal, if not in the letter, in the spirit of the law, thereby precipitating the Court's justifiable stance); Neal Panish, *Chile Under Allende and the Decline of the Judiciary*, 9 LOY. L.A. INT'L & COMP. L.J. 693 (1987) (also attributing the Court's actions to Allende's violation of the separation of powers doctrine).

FN89. See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1070-84.

FN90. See generally PANISH, *supra* note 88. Panish retreats into "separation of powers" formalism when confronted with a politically-controversial, and for some, unbridled Chilean pragmatism. See *id.*

FN91. See GARDNER, *supra* note 2, at 80-81 (quoting his own report) (second alteration in original).

FN92. See Bilder & Tamanaha, *supra* note 2, at 474. The authors discuss the practical end of law and development funding and scholarship after deep doubts were expressed within the U.S. legal academy about exporting instrumental approaches towards law to authoritarian Latin American governments. *Id.* "Trubek and Galanter did not, however, offer any suggestions about what should replace the Western model." *Id.* I agree with the authors' views on the error of imploding law and development but for very different reasons. The authors argue that its demise was a result of purely "homegrown" U.S. political reasons--the Vietnam War, distrust in government, and the rise of the critical legal studies movement. See *id.* at 474-76. They, however, underestimate the impact and resistance of powerful sectors of Latin American societies and legal intelligentsia to development-based reforms and to the politics of its proponents. See *id.*

FN93. See GARDNER, *supra* note 2, at 98-99.

FN94. See Dennis O. Lynch, *supra* note 10. In Lynch's review of Gardner's book, one criticism stand out: Gardner's failure to distinguish between positivism and naturalism within Latin American legal formalism, and his failure to differentiate between instrumentalism and pragmatism within North American realism. As a result of this confusion, formalism as natural law thinking appears to offer a basis for resisting authoritarian government decrees: developmentalism as merely instrumentalism appears to offer no brakes.

FN95. See *id.* at 118.

[T]he legal engineer and legal instrumental models were in fact engaged as the agents and the instruments of the state, and the models provided no coherent basis for criticism of, or resistance to, an authoritarian state. For this resistance the lawyers--Brazilian and American--turned to the formal legal tradition and the rule of law.

Id. About Chile, Gardner asserts

[t]he low point [of the legal instrumentalism model as supported by U.S. legal assistance] involved extralegal social action, encouraged by the state, as part of a larger pattern of coercive engineering, beyond the reach of legislative authorization, to force owners to transfer farms or businesses to the state sector. In that situation the already blurred line between "law" and "policy" faded to extinction, purposeful instrumentalism readily became state engineering beyond the reach of legal instruments and judicial review, and the process, if unchecked by legal or political institutions, became little distinguishable from raw state power. In Chile, then, underlying instrumental models again demonstrated a persistent affinity for policy and power--and a vulnerability to executive and state ordering.

Id. at 184.

FN96. See, e.g., César Rodríguez, *Globalización, Reforma Judicial y Estado de Derecho en América Latina: El Regreso de Los Programas de Derecho y Desarrollo*, EL OTRO DERECHO 25 (2001); see also Tamanaha, *supra* note 2.

FN97. See Esquirol, *supra* note 8, at 461-64.

FN98. See, e.g., Roger W. Findley, *Ten Years of Land Reform in Colombia*, 1972 WIS. L. REV. 880, 910-11. Findley attributes, in part, the slow progress of Colombia's 1961 land redistribution program, enacted out of fear generated by the Cuban Revolution, to resistance by the courts.

INCORA [the administrative agency charged with executing land reform] has been particularly hampered ... by reversals in the Administrative Disputes Courts, some of which appear to be considerably more sympathetic to the interests of large landowners than to the goals of the land reform program. Acquisitions have been invalidated for minute deviations from prescribed procedures .... Because of the vagueness of the statute and the latitude which it gives an unsympathetic court seeking a way to upset a finding of inadequate use [the legal standard required], INCORA personnel in expropriation proceedings have been greatly concerned over the possibility of lengthy appeals and, ultimately, reversals.

Id. In discussing pending legislation in 1972 to improve the system, he notes that

[t]he bill would establish an entirely new system of specialized land courts. These courts would have exclusive jurisdiction to hear many of the trials and appeals in expropriation and extinction cases now handled by the administrative and civil courts and would be directed to apply a social philosophy sympathetic to the land reform program.

Id. at 921.

FN99. See, e.g., Wolfgang G. Friedmann, *The Role of Law and the Function of the Lawyer in the Developing Countries*, 17 VAND. L. REV. 181, 186 (1963).

If the lawyer continues to be identified, as he predominantly is at the present time, with the defense of the existing order and of vested interests, against the urgent needs and interests of societies that must lift themselves from poverty and stagnation to a radically higher level of economic and social development, often within a desperately short time, the lawyer will eventually be reduced to an inferior and despised status in the developing nations.

Id.

FN100. See Marie-Claire Belleau, *Les Juristes Inquiets* (1996) (unpublished S.J.D. dissertation) (on file with the Harvard Law Library); see also FRANCOIS GENY, *METHODE D'INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF: ESSAI CRITIQUE* (1899).

FN101. See EHRlich, *supra* note 13, at 391-411; see also Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (Installment II of II), 39 AM. J. COMP. L. 343 (1991).

FN102. See generally Medina, *supra* note 38; see also Liliana Obregón, *Nineteenth Century Latin American Internationalism* (unpublished S.J.D. dissertation in progress) (draft on file with author).

FN103. See generally Medina, *supra* note 38.

FN104. See Rosenn, *supra* note 20, at 254.

FN105. Sally Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869 (1988).

FN106. See, e.g., BOAVENTURA DE SOUSA SANTOS, *ESTADO, DERECHO Y LUCHAS SOCIALES* (1991) (sustaining that legal pluralism extends to collectives based on cultural, guild, racial, religious, territorial, and other criteria, which have created their own normativity that regulate various spheres of social life and permit them to resolve their conflicts).

FN107. See, e.g., RAQUEL YRIGOEYEN FAJARDO, *PAUTAS DE COORDINACION ENTE EL DERECHO INDIGENA Y EL DERECHO ESTATAL* (1999).

FN108. Id. Note however that the advances in recognizing legal pluralism in Guatemala, as obtained in the peace accords in the mid-1990s, were ultimately defeated by a popular vote in May 1999 against the relevant modifications to the national constitution.

FN109. The way that separate indigenous law is being conceived by its defenders is, nonetheless, cause for concern and subject to the same critiques levied here against dominant legal traditionalism in Latin America. Defenders of this separate system argue for its stature on a par with state law. Additionally, many argue the incommensurability of its cosmivision and identity with Western law, thus arguing the inability of judging it by human rights principles (or any outside-derived criteria). These advocates, however, run into the error of presenting indigenous law as an arena which can only be understood and observed by outsiders but not in which they can participate. Dangerously, under this framework, outsiders can become anyone in disagreeing with or challenging the hegemonic interpretation of such indigenous normativity. Contra Esther Sanchez Botero, *Aproximación desde la antropología jurídica a la justicia de los pueblos indígenas*, in *EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA* (2001); see generally Beatriz Eugenia Sanchez, *El reto del multiculturalismo jurídico; La justicia de la sociedad mayor y la justicia indígena*, in *EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA* (2001).

FN110. See, e.g., KARST & ROSENN, *supra* note 8, at 638 (emphasis added and footnotes omitted).

FN111. See generally Trubek & Galanter, *supra* note 89.

FN112. *Id.* at 1082 (footnote omitted).

FN113. See, e.g., Rosenn, *supra* note 20, at 267 (stating "[i]n Brazil, to a greater degree than in many countries, much of the 'living law' bears little resemblance to the law on the books").

FN114. See Jorge Witker, V., *Derecho, desarrollo y formación jurídica*, 24 *REVISTA DE LA FACULTAD DE DERECHO DE MEXICO* 659 (1974).

FN115. See, e.g., *id.* at 663.

FN116. See, e.g., Carlos Gaviria Díaz, *La enseñanza del derecho en nuestro medio*, 27 *ESTUDIOS DE DERECHO: ORGANO DE LA FACULTAD DE DERECHO Y CIENCIAS POLITICAS DE LA UNIVERSIDAD DE ANTIOQUIA* 5 (1968). Gaviria rails against the hodge-podge, "historical" reasoning methods of mainstream Colombian jurists, which he maintains lead to legal dogmatism:

The fear that legal formalism is instilled in many does not come from its taking part in favor or against the existing status, rather from its remaining neutral and not committing to the preservation of a cracked system nor to the struggle to replace it by one judged better. In place of a theory of that type, [they] prefer to conserve devalued doctrines or even better [doctrines] withdrawn from circulation in the scientific world, which fulfills nonetheless the ideological function assigned by the moment.

*Id.* at 8. In its place, he argues for scientific criteria which can be demonstrated objectively as suitable to a given situation. See generally *id.*

FN117. See, e.g., *SOCIOLOGIA JURIDICA EN AMERICA LATINA* (Oscar Correas ed., 1991). Writing the foreword on a collection of articles on legal sociology in Latin America, Correas notes the wide divergences of these academic practices across the countries of Latin America. He notes, however, their one common feature is their politicization. He comments on the "First World perception," in his view, that this is an inferior practice as compared to the First World's "scientific" legal sociology. He notes the difficulty of Latin American legal sociology to get beyond politics, and he also champions the case that this political position is due to the injustices that continue to afflict Latin

America (as opposed to the White world). Under my framework, Correas' observations more than anything else reflect his condition, the marginalization (and self-marginalization) of legal sociology as political, not because of some knowledge deficiency on their part, but as is explained in the text of this Essay.

FN118. See generally Esquirol, *supra* note 8 (discussing another example in which the critical edge available through French socio-historicism was also blunted).

FN119. See, e.g., Bilder & Tamanaha, *supra* note 2, at 475-76.

I would suggest that, in a remarkable contradiction, the implication of Trubek/Galanter's objection to instrumental attitudes toward law is in direct conflict with the thrust of their argument and with their legacy to the field: what is needed in a developing country--to protect against the dangers of a purely instrumental view of law--is an established and functioning, formalistic-oriented rule-of-law system!

*Id.* Bilder and Tamanaha fall into this false dilemma as well. They address the alternative pole, legal formalism. This is precisely the argument made by Latin American traditionalists. Formalism represented the discursive practice under the latter's control.

FN120. Bilder and Tamanaha argue that a debilitating critique, stopping "1970s developmentalism" in its tracks, was the charge of ethnocentrism associated with liberal legalism. *Id.* at 481-83. My argument is that this is a rather secondary point if not an all together irrelevant concern--a red herring for both those making the claim and those rebutting it--at least in the Latin American context. Traditionalist Latin American legal discourse emphasizes its membership within the Western family of law. Thus, transplanting further aspects of Western liberal legalism is not much of an objection at all. Additionally, the entire critique of ethnocentrism is built on the dualism of law and society. Specifically, the sociological claim of a separate and autochthonous law is upheld by contrasting it with an essential and contrasting development identity. This Essay offers a different framework from which to conceptualize this dualism, and the claims and critiques that spring from it.

FN121. Indeed, for Gardner, for example, the Allende project of "revolution through law" consisting essentially of dusting off old laws and finding loopholes in existing laws to push through radical reforms (not in fact contemplated by the formal legal materials) demonstrates how legal instrumentalism is most effective the more authoritarian or non-democratic a government is. See GARDNER, *supra* note 2, at 179. Gardner's argument basically

boils down to the point that Allende's brand of legal instrumentalism did not work in the end because he retained (did not close down) democratic legal institutions (unlike in Brazil) and arrogated legislative power to himself. See *id.* Under this framework, the

more authoritarian the better legal instrumentalism, and thus U.S. legal models will work to legitimate whatever is said to be law. See id.

FN122. See, for example, Jorge Witker's description of the conservative Chilean Supreme Court's systematic undermining of President Salvador Allende's social program, leading to his de-legitimation and the ultimate overthrow of democratic government. Witker, *supra* note 115, at 667-69.

FN123. Various commentators, as well as several references in this Essay, note the specific Chilean experience from 1970 to 1973, under the socialist Salvador Allende government. It is commonly accepted that Allende's reform strategy of "revolution through law" consisted of legal instrumentalism in relation to already existing laws. The maneuver was the design of a small circle, not enjoying the support of most of the legal profession. To the extent that combining pragmatism and state law is understood as exemplified (and exhausted) by the Allende experiment, it should be noted that the actual form that it took in Chile is quite different from my own proposal here. Allende's legal

loopholes strategy was generally perceived as an intentional misreading, or exaggeration, of often outdated legal sources by a few close collaborators. My proposal here refers to the inherent multiplicity comfortably available through legal interpretation and legal decisionmaking, which includes reliance on social argument. It does not seek to defend a system whereby ostensibly contrived meanings to laws-on-the-books are pushed through to justify state action.

FN124. See, e.g., Rosenn, *supra* note 32, at 543-49. Rosenn uses the notion of the Brazilian *jeito* to capture, in his view, an extra-legal social device to circumvent an obsolete legal system. See *id.* Yet, he does not argue in favor of rebuilding the legal system on the basis of the *jeito*. See *id.* Instead, he advocates for legal penetration by the formal legal system "reasonably attuned to the times and culture, a high degree of obedience to the rule of law, and impersonal, efficient administration of the laws" which would make resort to the *jeito* unnecessary. *Id.* at 548-49.

FN125. See, e.g., Leopoldo Munera Ruiz, *La justicia es p'a los de ruana*, in *SOCIOLOGIA JURIDICA EN AMERICA LATINA* 45 (1991) (discussing how the alternative uses of law strategy in Colombia is based--in part as the result of a nine year reading group of social law scholars in Bogota--on an essentially materialist view of the primacy of social relations in the determination of law).

FN126. See, e.g., Boaventura de Sousa Santos, *Los paisajes de la justicia en las sociedades contemporáneas*, in *EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA* 85-150 (Boaventura de Sousa Santos & Mauricio García-Villegas eds., 2001) (noting "until recently the subject of legal pluralism was centered on the identification of local legal orders, infra-state, that coexisted in different ways with national official law"). Santos proposes a more complex notion of legal pluralism that would encompass the hybridity and inter-legality of local and national as well as global legal orders, "each one of these has its own normativity and legal rationality as a result of which relations among them are many times tense and conflictive." *Id.* While Santos proposes a porous and hybrid conception, the central image is of multiple identities colliding or coming together. See generally *id.* My analysis suggests that this approach repeats the pitfalls and deadends of identity-based analysis, although it does address simplistic Manichean

dualism. See also Capeller, *supra* note 65, at 100 (stating "[i]n this way, legal research at a local level demonstrates that pluralism and interlegality are key concepts for a post-modern conception of law"); see generally Gabriel Ignacio Gómez, *Justicia comunitaria en zonas urbanas*, in *EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA* (1991).

FN127. See generally *EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA* (Boaventura de Sousa Santos & Mauricio García-Villegas eds., 2001).

FN128. See generally *SOCIOLOGIA JURIDICA EN AMERICA LATINA* (1991).

FN129. See DE SOUSA SANTOS, *supra* note 106; *EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA* (Boaventura de Sousa Santos & Mauricio García-Villegas eds., 2001); RAQUEL YRIGOYEN FAJARDO, *PAUTAS DE COORDINACION ENTRE EL DERECHO INDIGENA Y EL DERECHO ESTATAL* (1999).

FN130. See Gómez, *supra* note 126. Gómez's work, for example, is an update on development-era studies of urban barrios. See generally *id.* In it, he describes how recent attempts by the Ministry of Justice to "informalize" (used to mean "decentralize") local dispute resolution by regulating "conciliation in equity" (community justice) programs have mostly failed. See generally *id.* He describes the failure as one of trivializing the social. See *id.* at 269.

According to this perspective, the new state proposals of community justice are limited to creating uniform models of regulation and control of "small" conflicts according to which the reality of the social micro-stages and daily relations must adapt, even at the expense of the group identity in which they emerge.

*Id.* Thus, even when the state takes an informal social approach, its performance is evaluated in the context of a "more real" social identity conflicting with an intrinsically formal legal system unwilling to share power with informal systems. See *id.*; see also Consuelo Acevedo et al., *Justicia comunitaria en zonas campesinas: Los casos de los municipios de Caparrapi y Arcaya en Cundinamarca*, in *EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA* (Boaventura de Sousa Santos & Mauricio García-Villegas eds., 2001).

FN131. See, e.g., Jorge L. Esquirol, [Can International Law Help? An Analysis of the Colombian Peace Process](#), 16 *CONN. J. INT'L L.* 23 (2000).

FN132. For example, Rodrigo Uprimny manifestly struggles to defend (in keeping with his professed conviction in favor of legal pluralism) the recent Colombian legislation newly instituting "justices of the peace" to administer community justice at the local level. Uprimny finds comfort in the fact that justices of the peace may be able to function as the "hinge" between state law and community norms, integrating the two. He leaves the job of constructing an "integrated" legal discourse to the newest, most vulnerable, and least resourced legal professions--these newly-formed, mostly rurally-located legal officials. No doubt opening more judicial offices, decentralizing, and making dispute-resolution available are rather positive developments. However, most studies of these state-sponsored community justice efforts (even in the same volume in which

Uprimny is published) note that they are grossly hamstrung by the formal logic of state law and are much less effective (influential) than home-grown dispute-resolution structures. In short, the democratic opening that justices of the peace (as well as other judges) may make use of cannot be utopically projected as the result of decentralization or procedural legal pluralism (and the physical contact of judges with the social), rather it is a process of construction of a national legal discourse in which progressives must take an active and engaged part. Contra Rodrigo Uprimny, *Yepes ¿ Justicia comunitaria en contextos violentos y antidemocráticos?*, in *EL CALEIDOSCOPIO DE LAS JUSTICIAS EN COLOMBIA* 309 (Boaventura de Sousa Santos & Mauricio García-Villegas eds., 2001).

FN133. Interestingly, in response to the rhetorical question that Boaventura de Sousa Santos asks himself as to why social practices should be thought of as separate systems of normativity, he answers, "[p]ut in these terms, this question can only be answered by another question: Why not? Why should the case of law be any different than religion, art or medicine?" See *DE SOUSA SANTOS*, supra note 106, at 138. My analysis here ventures a response.

FN134. See generally Carlos María Cárcova, *Teorías Jurídicas Alternativas*, in *SOCIOLOGIA JURIDICA EN AMERICA LATINA*, 25 (1991). In accord with the central proposition here, Cárcova puts it this way:

The field of legal theory is abandoned: "Given that the traditional models do not work to account for the relation law/society, (we should) migrate toward the more productive terrains of sociology and (we should) do legal sociology." With that, the theoretical categories organized by the traditional thinking of jurists is maintained undisturbed and the legal sociologists worry neither essentialists nor positivists.

*Id.* at 30.

FN135. See Wanda de Lemos Capeller, *Entre o ceticismo e a utopia: A sociologia jurídica Latino-americana frente ao debate europeu*, in *SOCIOLOGIA JURIDICA EN AMERICA LATINA* 75 (1991). Capeller recognizes the centrality of state law, and cites Boaventura de Sousa Santos for the same proposition. However, she attempts to explain the marginality of sociological jurisprudence in Brazil as a structural phenomenon, using the center/periphery metaphor; as a peripheral state, Brazil's sociological jurisprudence is therefore "peripheral." I think she takes the metaphor too far. My own focus is much less to attempt a comparative description of the place and role of sociological jurisprudence in Latin America versus Europe in broad structural terms. Rather, my analysis here

describes an historical attempt to use this technology as part of a specific political project by a certain group of individuals. Only as a consequence, and by hypothesizing about other such possible projects, a picture of the marginalization of sociological methods can be outlined.

FN136. See, e.g., Acevedo et al., supra note 130. Presenting the still-current dualism, the authors contrast state legal organs in rural communities with the more personal interactions of campesinos with respect to conflict resolution (specifically, based on their perception of official justice as a last resort and their idiosyncratic application of official norms). The latter is conceptualized as a separate system, "la justicia de acá" in which "[i]t is the pragmatism of campesino rationality which makes possible the incorporation

within their culture of this know-how (i.e. more localized justice), with concrete solutions deriving from knowledge of its causes and experience, applied by one of their own." *Id.* at 284.

FN137. See, e.g., Medina, *supra* note 38; see also IMER FLORES, INTEGRATED JURISPRUDENCE (2001) (pre-publication text on file with author).

FN138. See, e.g., HERNANDO DE SOTO, THE OTHER PATH (June Abbott trans., 1989).

FN139. See, e.g., MAURICIO GARCIA-VILLEGAS, LA EFICACIA SIMBOLICA DEL DERECHO (1993).

FN140. See, e.g., DE SOTO, *supra* note 138.

FN141. See *id.* at 80.

FN142. See generally *id.*

FN143. See generally *id.*

FN144. See *id.* at 185.

FN145. *Id.* at 185.

FN146. See generally *id.*

FN147. *Id.* at 187.

It is simpler and cheaper to bring the formals and informals together by changing the law than by trying to change the characteristics of the people. To show the informals how the existing laws operate, or to try to convince them that they will increase their social standing by accepting the mercantilist system inherited from Spain, would be to alter their culture drastically. It makes more sense to adapt the law to reality than to try to change everyone's attitudes, for the law is the most useful and deliberate instrument of change available to people.

*Id.*

FN148. See generally *id.*

FN149. See generally *id.*

FN150. See generally *id.*

FN151. *Id.* at 180. One passage is particularly illuminating:

It should be pointed out that the costs of informality also affect formals and particularly increase the uncertainty of the costs of remaining formal, for there is no property right, contract, or extracontractual liability which can be regarded as constant when the state can use the legal system arbitrarily.

*Id.* While de Soto deploys the intellectual framework of developmentalism, i.e., social/legal duality, his argument is not dependent on the differences between the formal and informal sectors (essentially they are both inefficient save the informal sector is more inefficient) and is chiefly a plea in favor of raising economic efficiency, in his reading co-terminous with strong property and contract rights, as the guiding principle of legal reform over and above local political debate.

FN152. See Oscar Mejía, Cesar Rodríguez, and Isabel Cristina Jaramillo (articles on file with author).

FN153. See, e.g., Sandra Morelli, Universidad Externado de Colombia (article on file with author).