

Squatters, Pirates, and Entrepreneurs: Is Informality the Solution to the Urban Housing Crisis?

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I. INTRODUCTION

Giving the poor legal title to the lands they occupy extra-legally (informally) has been widely promoted by the World Bank and by best-selling author Hernando de Soto as a means of addressing both poverty and the scarcity of affordable housing in the urban centers of the global South.¹ Using Bogota, Colombia, as a case study, this article interrogates deSoto's claims about the causes of informality and the benefits of formal title.

The article concludes that de Soto's analysis is problematic in three distinct respects. First, deSoto exaggerates the benefits of formal title and fails to consider its risks. Second, de Soto constructs informality as a uniquely Third World phenomenon, and neglects to address the growth of poverty, inequality, and informality in both the global North and the global South as a consequence of the neoliberal economic reforms that de Soto advocates. Third, de Soto's attribution of informality to the failure of law in the global South reinforces the narrative of Latin American inferiority, thereby justifying the imposition of disadvantageous market-oriented legal reforms on Latin American nations and discrediting Latin America legal innovations that might better alleviate poverty and address the shortage of affordable housing.

Contrary to de Soto's policy prescriptions, the benefits of formality and informality must be evaluated on a case by case basis. De Soto's ideas are dangerous to the extent that they persuade policy-makers that the "free market" will solve the problem of pov-

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1. See HERNANDO DE SoTo, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 5-7, 75 (2000); HERNANDO DESoTo, THE OTHER PATH: THE EcoNoMic ANsWER To TERRoRISM 55-57 (1989); WoRLD BANK, HOUSiNG: ENABLING MARKETS TO WoRK 117 (1993); Alan Gilbert, *On the Mystery of Capital and the Myths of Hernando de Soto*, 24 INT'L DEV. PLAN. REV. 1, 4 (2002).

erty and housing scarcity if the urban poor are simply given legal title to the lands they currently occupy informally.

II. POVERTY AND INFORMALITY IN A MODEL CITY

During the last fifteen years Bogota, Colombia, has been transformed from a city in crisis to a paradigm of good urban governance.² A series of highly competent mayors increased the city government's income; invested in parks, public transit and new libraries; improved access to electricity, water and sanitation; and restored a sense of civic pride.³ Like the Brazilian cities of Curitiba and Porto Alegre, Bogota is widely regarded as a model city whose practices are worthy of emulation.⁴

However, among the challenges that Bogota continues to face are high levels of poverty⁵ and an acute housing deficit.⁶ Of the city's more than seven million inhabitants, at least two-fifths live below the poverty line.⁷ Many of these residents occupy substandard housing in the inner city or in the urban periphery.⁸ Approximately one million *bogotanos* reside in Ciudad Bolivar, a sprawling slum at the southern end of Bogota consisting primarily of self-constructed dwellings.⁹

Ciudad Bolivar is an example of an informal settlement.¹⁰ For purposes of this article, an informal settlement is a settlement that operates outside the framework of government regulation. Informal settlements are common in every city in Asia, Africa, and Latin America¹¹ and are becoming increasingly visible in the

2. See Alan Gilbert, *Good Urban Governance: Evidence from a Model City?*, 25 BULL. OF LATIN AM. RES. 392, 393-94 (2006).

3. See *id.* at 394-98.

4. See *id.* at 394.

5. See *id.* at 410.

6. See UN HABITAT, GLOBAL REPORT ON HUMAN SETTLEMENTS 2003: THE CHALLENGE OF SLUMS 205 (2003), available at <http://www.unhabitat.org/pmss/getPage.asp?page=BookView&book=1156>; Alexander Nhio Ruiz, *Formal and Informal Housing Practices in Bogota, Colombia: The Experience of Metrovivienda and Juan XXIII*, 36 UNIVERSIDAD DE LOS ANDES, REVISTA DE DERECHO PRIVADO 177, 188 (2006).

7. Gilbert, *supra* note 2, at 393, 399.

8. See UN HABITAT, *supra* note 6, at 205.

9. RAUL ZIBECHI, CENTER FOR INTERNATIONAL POLICY, AMERICAS PROGRAM SPECIAL REPORT: WHERE THE ASPHALT ENDS: BOGOTA'S PERIPHERIES paras. 1, 3 (Mar. 11, 2008), available at <http://americas.irc-online.org/am/5057>.

10. Nicolas Rueda-Garcia, *The Case of Bogota D.C., Colombia*, in UNDERSTANDING SLUMS: CASE STUDIES FOR THE GLOBAL REPORT ON HUMAN SETTLEMENTS 8, available at http://www.ucl.ac.uk/dpu-projects/Global_Report/cities/bogota.htm.

11. See GEORGES VERNEZ, PIRATE SETTLEMENTS, HOUSING CONSTRUCTION BY INCREMENTAL DEVELOPMENT AND LOW INCOME HOUSING POLICIES IN BOGOTA, COLOMBIA 2 (1973).

United States.¹² Whereas the informal settlements in most Latin American cities result from the illegal invasion of public or private land ("squatting"), most of Bogota's informal settlements are so-called "pirate" settlements involving the purchase of land by settler families from a proprietor or developer.¹³ While the land purchase is usually legal, the subdivision typically fails to comply with applicable requirements regarding zoning, permits and licenses, and access to urban services (such as water, electricity, paved roads, drainage, and sewers).¹⁴ The land often consists of former agricultural lands far from the urban center or low-lying lands with flooding problems.¹⁵ The purchaser will usually occupy the land despite the absence of urban services in violation of the municipal housing code,¹⁶ and will gradually construct a dwelling and negotiate with the municipality for the provision of these services.¹⁷ The dwelling itself may also fail to comply with the local building codes.¹⁸

Informal housing is a product of poverty and rapid urbanization. The post-World War II flood of migrants from the rural areas to the urban centers of the global South has been described as one of the great migrations of human history.¹⁹ In Colombia, the industrialization of agriculture along with high levels of political violence produced a massive rural-to-urban shift during the span of a few decades.²⁰ In 1950, only 32.7% of Colombia's population was urban.²¹ By 1970 the urban population had climbed to

12. See Jane E. Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL'Y REV. 137, 141-42 (2002).

13. See VERNEZ, *supra* note 11.

14. See RAKESH MOHAN, UNDERSTANDING THE DEVELOPING METROPOLIS: LESSONS FROM THE CITY STUDY OF BOGOTA AND CALI, COLOMBIA 154-55 (1994).

15. Umberto Molina, *Bogota: Competition and Substitution Between Urban Land Markets*, in THE TRANSFORMATION OF LAND SUPPLY SYSTEMS IN THIRD WORLD CITIES 295, 298 (Paul Baross & Jan van der Linden eds., 1990).

16. See VERNEZ, *supra* note 11, at 3.

17. See Molina, *supra* note 15, at 299.

18. See VERNEZ, *supra* note 11, at 3.

19. William A. Doebele, *The Private Market & Low Income Urbanization: The "Pirate" Subdivisions of Bogota*, 25 AM. J. COMP. L. 531, 532 (1977).

20. See John Betancur, *Spontaneous Settlements in Colombia: From Opposition to Reluctant Acceptance to . . . Again Opposition*, in HOUSING THE URBAN POOR: POLICY & PRACTICE IN DEVELOPING COUNTRIES 224 (Brian C. Aldrich & Ranvinder S. Sandhu eds., 1995).

21. UNITED NATIONS, WORLD URBANIZATION PROSPECTS: THE 2007 REVISION 80 tbl.A.2 (2007), available at http://www.un.org/esa/population/publications/wup2007/2007WUP_Highlights_web.pdf.

54.8%.²² In 2007, the figure stood at 74.2%.²³ Because many migrants lacked meaningful job opportunities in the cities, they frequently resorted to self-help housing and self-employment to provide for basic needs.²⁴ In 1970, nearly half of the families in Bogota lived in pirate settlements.²⁵ As migration from the countryside continues, informal settlements in Bogota and other urban centers are anticipated to proliferate.²⁶

The initial response to informal housing in much of the global South was slum clearance—the mass eviction of poor households.²⁷ When this approach merely shifted the problem to the urban periphery, the dominant approach became upgrading and legalization.²⁸ In Bogota, the legalization process involved the provision of public services (such as roads, water, electricity, drainage and sewage) to pirate subdivisions based on contributions from the government, from the developers, and from the community itself.²⁹ Once the subdivision was legalized, individual lot owners could initiate proceedings to obtain legal title to the land they occupied.³⁰ In order to facilitate this process, the government waived a series of requirements, including deeds, income tax returns, proof of military service, payment of national taxes, and possession of construction or urbanization licenses.³¹

Designed to encourage private home ownership, Bogota's land titling program is consistent with the housing programs adopted in most of the global South³² and consistent with the evolving policy debates about poverty and informality.

III. FROM DEMOLITION TO LEGALIZATION: THE EVOLUTION OF HOUSING POLICY IN THE GLOBAL SOUTH

The issue of informal housing in the developing world became the subject of serious inquiry beginning in the 1960s.³³ At first, the policy debate was dominated by scholars such as anthropolo-

22. *Id.*

23. *Id.* at 72 tbl.A1.

24. See Betancur, *supra* note 20, at 224-26.

25. VERNEZ, *supra* note 11, at 6.

26. UN HABITAT, *supra* note 6, at 205.

27. *Id.* at 125, 127.

28. *Id.* at 127.

29. MoHAN, *supra* note 14, at 154.

30. *Id.* at 155.

31. See Law of Urban Reform (Law 9 of 1989), arts. 44-46, available at <http://planeacion.cali.gov.co/poUnormas/ley9.html>; Betancur, *supra* note 20, at 233.

32. See MoHAN, *supra* note 14, at 180.

33. See Charles L. Choguill, *The Future of Planned Urban Development in the*

gist Oscar Lewis, who attributed the plight of the urban underclass to the "culture of poverty" – pathological cultural traits such as dependence, fatalism, lack of ambition, criminality, and inability to adapt to modern urban norms.³⁴ Consistent with this thesis, the poor were blamed for their own failure to enter the formal housing and job markets, and governments were encouraged to allocate resources to industry and transportation rather than squander them on low-income housing.³⁵ Negative stereotypes about the urban poor were used to justify eviction and demolition as the initial policy response to informal settlements.³⁶

By the late 1960s, housing policy was in transition as a consequence of the work of scholars such as William Mangin and John Turner.³⁷ Mangin argued that informal housing, far from being evidence of social pathology, was a rational response to the complex problem of rapid urbanization, migration, and housing shortages.³⁸ Turner contended that giving the poor security of land tenure would result in the progressive upgrading of informal urban settlements through individual and community self-help.³⁹ Turner and Mangin's ideas were particularly appealing to policymakers in the global South because they offered resource-strapped governments inexpensive solutions to the crisis of urban housing.⁴⁰

Following decades of land tenure reform experiments throughout the developing world, the debate about formalization of property rights has been revived by the work of Hernando de

Third World: New Directions, in HOUSING THE URBAN POOR: POLICY & PRACTICE IN DEVELOPING COUNTRIES 404 (Brian C. Aldrich & Ranvinder S. Sandhu eds., 1995).

34. See *id.*; Asef Bayat, *Globalization and the Politics of Informals in the Global South, in URBAN INFORMALITY: TRANSNATIONAL PERSPECTIVES FROM THE MIDDLE EAST, LATIN AMERICA, AND SOUTH ASIA* 83 (Ananya Roy & Nezar Alsayyad, eds., 2004). See generally OSCAR LEWIS, *LA VIDA: A PUERTO RICAN FAMILY IN THE CULTURE OF POVERTY* (1966); OSCAR LEWIS, *CHILDREN OF SANCHEZ: AUTOBIOGRAPHY OF A MEXICAN FAMILY* (1961); OSCAR LEWIS, *FIVE FAMILIES: MEXICAN CASE STUDIES IN THE CULTURE OF POVERTY* (1959).

35. See Choguill, *supra* note 33.

36. See Janice E. Perlman, *Marginality: From Myth to Reality in the Favelas of Rio de Janeiro, 1969-2002, in URBAN INFORMALITY: TRANSNATIONAL PERSPECTIVES FROM THE MIDDLE EAST, LATIN AMERICA, AND SOUTH ASIA* 120 (Ananya Roy & Nezar Alsayyad, eds. 2004).

37. See Choguill, *supra* note 33.

38. See William Mangin, *Latin American Squatter Settlements: A Problem and a Solution*, 2 *LATIN AM. RES. REV.* 65, 85 (1967).

39. See, e.g., JOHN F.C. TURNER, *HOUSING BY PEOPLE: TOWARDS AUTONOMY IN BUILDING ENVIRONMENTS* (1976); JOHN F.C. TURNER, *Barriers and Channels for Housing Development in Modernizing Countries*, 33 *J. AM. INST. PLANNERS* 167 (1967).

40. See Choguill, *supra* note 33, at 405.

Soto. De Soto argues that the poor in Asia, Africa, and Latin America are actually the owners of vast assets, most notably self-constructed dwellings.⁴¹ According to deSoto, the poor have failed to benefit from capitalism because their assets are not recognized by the formal legal system; thus, these assets are not readily convertible into capital, cannot be traded beyond a narrow circle of trustworthy acquaintances, and cannot be used as collateral for business and home improvement loans.⁴²

Rather than blaming the poor for their misfortune, de Soto depicts the urban poor as hard-working, creative, and entrepreneurial,⁴³ attributing their disenfranchisement to the elite's manipulation of the legal system to create formidable administrative obstacles to the receipt of permits and licenses for the establishment of new businesses and for housing construction.⁴⁴ De Soto's prescription for reform consists of de-regulation, de-bureaucratization, and privatization so as to unleash the entrepreneurial energies of the poor.⁴⁵ What is required is not the abolition of informality but the integration of extralegal arrangements into the formal legal system.⁴⁶

In short, de Soto attributes the persistence of poverty in developing and former socialist countries to the failure of these nations' legal systems.⁴⁷ Using the United States as an example, de Soto contends that the economic prosperity of "advanced nations" is due to their successful formalization of extralegal assets into one unified property law system, and recommends that developing countries follow suit.⁴⁸

DeSoto's ideas have been warmly received across the ideological spectrum.⁴⁹ For the left, de Soto's pro-poor rhetoric is a welcome antidote to cultural explanations of poverty that depict the poor as shiftless and lazy.⁵⁰ For the right, the notion of poverty

41. See DE SoTo, *THE MYSTERY OF CAPITAL*, *supra* note 1, at 5, 32-35 (concluding that the value of the assets held by the poor in developing and former communist countries is at least \$9.3 trillion).

42. See *id.* at 6.

43. See *id.* at 28-30.

44. See DE SoTo, *THE OTHER PATH*, *supra* note 1, at 208-10.

45. See *id.* at 242-52.

46. See *id.* at 252.

47. See *id.* at 12, 134-42, 184-87, 233-34; DESOTO, *THE MYSTERY OF CAPITAL*, *supra* note 1, at 4-10, 46-62, 161-71.

48. See generally DE SoTo, *THE MYSTERY OF CAPITAL*, *supra* note 1, at 105-51.

49. See Celestine Nyamu Musembi, *DeSoto and Land Relations in Rural Africa: Breathing Life into Dead Theories about Property Rights*, 28 *THIRD WORLD Q.* 1457, 1458 (2007).

50. See, e.g., Gerald Torres, *The New Property*, 56 *STAN. L. REV.* 741, 745 (2003).

alleviation through self-help is consistent with the neoliberal notion of limiting the role of the state to the establishment of legal and institutional framework necessary to facilitate the operation of the market.⁵¹

IV. DEMYSTIFYING DE SOTO: THE ADVANTAGES AND DISADVANTAGES OF FORMAL TITLE

In *The Mystery of Capital* and *The Other Path*, de Soto makes three principal arguments regarding the benefits of formal title. Drawing upon studies of titling programs in Bogota and other Latin American cities, I will examine each of these arguments in turn and then will discuss some of the potential pitfalls of de Soto's recommended approach.

First, de Soto argues that lack of formal title and the ever-present threat of eviction cause informal settlers to under-invest in their dwellings, foregoing such items as piping, drainage, roofing, and sanitation.⁵² While this argument may be intuitively appealing, empirical studies indicate that tenure security rather than formal title is critical with respect to investment.⁵³ Most urban residents assess the security and legitimacy of their property rights based on indications of government tolerance, particularly the provision of infrastructure or the collection of property taxes, and based on community recognition of their property-owning status.⁵⁴ In the pirate settlements of Bogota, for example, settlers were willing to commence home construction despite the absence of formal title as soon as they obtained receipts for plots of land and especially once water and electricity became available.⁵⁵ Indeed, residents of Ciudad Bolivar's Jerusalem neighborhood developed their own informal legal norms to prove ownership and to prevent invasion of plots by outsiders, including the use of notarized promissory notes and the development of a register of plots.⁵⁶

Second, deSoto contends that informality impedes the poor's access to financing for home improvement or to start a new business because lenders will not accept informal property as collat-

51. See Musembi, *supra* note 49.

52. See DE SOTO, *THE OTHER PATH*, *supra* note 1, at 161.

53. See Gilbert, *supra* note 1, at 7-8.

54. Musembi, *supra* note 49, at 1461; Ann Varley, *Private or Public: Debating the Meaning of Land Tenure Legalization*, 26 INT'L J. URB. & REGIONAL RES. 449, 455 (2002).

55. See Doebele, *supra* note 19, at 537; Gilbert, *supra* note 1, at 8.

56. See Daniel Bonilla, *Legal Pluralism and Extra-Legal Property: Class, Culture and Law in Bogota* 29-31 (2008) (unpublished manuscript, on file with author).

eral for loans.⁵⁷ Evidence from Bogota and from studies conducted in countries as varied as Turkey, Mexico, Argentina, South Africa and de Soto's native Peru conclude that formal title makes little difference with respect to the acquisition of loans from private sector lenders.⁵⁸ Financial institutions are reluctant to lend to the poor because their incomes are low; because self-employment income (even if adequate) is difficult to verify; because lenders view low-income borrowers as unreliable; and because potential borrowers' homes are often constructed in hazard-prone areas (such as steep hillsides or floodplains).⁵⁹

Furthermore, many poor families hesitate to take out mortgage loans because they distrust formal financial institutions and are unwilling to risk losing their homes in the event of non-payment.⁶⁰ Many prefer the flexibility of unsecured credit based on informal arrangements with friends or relatives.⁶¹ The ongoing mortgage debacle in the United States certainly justifies a cautious approach and underscores the danger of formalizing property rights without implementing regulatory measures to protect the poor from predatory lending.⁶²

Third, de Soto argues that informality impedes the development of robust property markets by imposing cumbersome approval procedures, often involving all of the neighbors in order to transfer property.⁶³ De Soto's claim is contradicted by the development of active markets for untitled land in Bogota and elsewhere in the developing world.⁶⁴ Furthermore, to the extent that the market at issue is for existing dwellings, studies of Bogota, Santiago de Chile, Caracas, and Mexico City suggest that formal title appears to make little difference because the market for dwellings in low-income neighborhoods tends to be sluggish on the demand side due to potential buyers' limited income and lim-

57. See DESOTO, *THE OTHER PATH*, *supra* note 1, at 162.

58. See Gilbert, *supra* note 1, at 11; *Development: Of Property and Poverty*, *Economist*, Aug. 26, 2006, at 50; Julio Calder6n Cockburn, *Property and Credit: Property Formalization in Peru* 19-20, 44 (Lincoln Institute of Land Policy, Working Paper, 2002).

59. See Gilbert, *supra* note 1, at 11-12.

60. See Cockburn, *supra* note 58, at 38-39; Gilbert, *supra* note 1, at 13.

61. See Varley, *supra* note 54, at 455.

62. See, e.g., Vikas Bajaj, *Housing Lenders Fear Bigger Wave of Loan Defaults*, *N.Y. TIMES*, Aug. 4, 2008, at A1, available at http://www.nytimes.com/2008/08/04/business/04lend.html?_r=2&oref=slogin&oref=slogin (describing the ongoing mortgage crisis in the United States).

63. See DESOTO, *THE MYSTERY OF CAPITAL*, *supra* note 1, at 47.

64. See Gilbert, *supra* note 1, at 9.

ited ability to obtain formal financing.⁶⁵ On the supply side, low-income home owners who have acquired legal title may be reluctant to sell their homes due to the many years of sweat equity invested in their dwellings, the value of the social networks they have established, and their inability to afford a better home in a more desirable location.⁶⁶ In addition, dwellings in low-income formalized settlements may not be suitable for commodification because these dwellings represent far more than shelter or economic assets; they are often central to the life stories of the urban poor and to the life stories of their families and their communities.⁶⁷

In short, contrary to de Soto's assertions, the mere provision of legal title is unlikely to improve investment in urban housing, create a vibrant market for low-income dwellings, or provide the urban poor with capital to finance entrepreneurial activities. In addition to overestimating the advantages of formal title, de Soto fails to address some of the disadvantages of regularization and titling programs.

First, regularization and titling programs may subject the urban poor to property taxes and utility bills that they can ill afford. In Bogota, social stratification is the tool used to assess property taxes and utility charges.⁶⁸ Neighborhoods are classified into six different strata according to social and economic characteristics.⁶⁹ Neighborhoods classified as strata one and two pay the lowest taxes and are entitled to greater social services.⁷⁰ If the formalization process results in an upgrade in the neighborhood's stratification, the community will be subjected to higher levels of taxation and fewer social services.⁷¹

Second, regularization and titling programs may increase the vulnerability of the urban poor to predatory lending if these programs facilitate the use of homes for personal and business loans. In the United States for example, predatory lenders encouraged

65. See *id.* at 10-11; Alan Gilbert, *Financing Self-Help Housing: Evidence from Bogota, Colombia*, 5 INT'L PLAN. STUN. 165, 178-79 (2000) (explaining why financial institutions are reluctant to finance the purchase of existing self-constructed housing with or without legal title).

66. See Cockburn, *supra* note 58, at 35; Varley, *supra* note 54, at 457.

67. See Varley, *supra* note 66.

68. See Rueda-Garcia, *supra* note 10, at 12.

69. See *id.*

70. See *id.*

71. See Bonilla, *supra* note 56, at 30-31 (quoting a Jerusalem community leader's acknowledgement that regularization and titling may result in upward reclassification of the community's stratification).

low-income home owners to take out loans on disadvantageous terms on the theory that they could later refinance based on appreciating housing prices; when the housing bubble burst, many borrowers defaulted on their loans and lost their homes, triggering a world-wide financial crisis.⁷² The recent U.S. experience highlights the risks of predatory lending and the importance of government oversight of lending practices to prevent abuse.

Third, formalization may impair the social capital of the urban poor by undermining the social solidarity and community organizing that enabled informal settlements to develop and thrive in the first place. For example, in the early 1980s, the 8,000 residents of the Jerusalem neighborhood of Ciudad Bolivar did not have electricity, water, drainage, sewers, telephones, public transit or schools.⁷³ Through collective efforts the residents developed day care and community education projects; constructed roads, parks, clinics and shops; and organized a neighborhood strike in order to pressure the municipal government to provide basic infrastructure and services.⁷⁴ As a consequence of over twenty years of community organizing, Jerusalem became one of the few informal settlements in Bogota to have a full panoply of urban services, including water, electricity, schools, public transit, and parks.⁷⁵ Regrettably, regularization and titling programs may undermine community solidarity by promoting individualistic solutions to economic and social problems. Indeed, based on their work on the impact of self-help housing in Mexico City, Alan Gilbert and Ann Varley conclude that home ownership discourages political protest and re-orientes the energy of the household to individual home improvement.⁷⁶

Fourth, the urban infrastructure and self-constructed dwellings in informal settlements may be substandard and unacceptable for human habitation.⁷⁷ Formalization may reinforce the inferior social status of the urban poor by giving legal imprimatur to double standards for health, safety and environmental qual-

72. See Joseph Stiglitz, *Houses of Cards*, GUARDIAN, Oct. 9, 2007, available at <http://www.guardian.co.uk/commentisfree/2007/Oct/09/housesofcards>.

73. ZIBECHI, *supra* note 9, at para. 7.

74. See *id.* at paras. 10-20; Bonilla, *supra* note 56, at 15-19.

75. ZIBECHI, *supra* note 9, at para. 5.

76. ALAN GILBERT & ANN VARLEY, LANDLORD AND TENANT: HOUSING THE POOR IN URBAN MEXICO 11 (1991).

77. Martin O. Smolka, *Informality, Urban Poverty and Land Market Prices*, 15 LANO LINES (2003), available at <http://www.lincolninst.edu/pubs/PubDetail.aspx?pubid=723>.

In sum, de Soto's claims about the benefits of formal property upgrading of dwellings and infrastructure in legalized settlements and to provide government credit, subsidies and technical assistance for this purpose. For example, the upgrading of low-income housing is one of the explicit objectives of Bogota's regularization and titling program.⁷⁹ Furthermore, it is important to recognize that formal settlements do not necessarily adhere *in practice* to higher health, safety and environmental standards than informal settlements. Paradoxically, the collective efforts of informal settlers have often produced superior urban planning in informal settlements than government or private development of comparable middle-class or low-income formal settlements.⁸⁰ Thus, the actual impact of formalization on health, safety and environmental quality will have to be assessed on a case by case basis.

Fifth, regularization and titling programs are problematic to the extent that they are not accompanied by other policies to increase the urban housing stock. While formalization (ideally) upgrades the quality of the existing housing stock, it does not generate new housing.⁸¹ In addition, the cost of providing water, sewers, and other municipal services to informal settlements is often higher than the cost of servicing new land and making it available for development.⁸² In Bogota for example, many informal settlements are located in areas that are difficult or costly to reach, or in areas vulnerable to natural disasters.⁸³ In order to increase the formal housing stock and to compete with pirate developers, Bogota's housing policy includes working with landowners and private developers to produce formal housing for low-income home-buyers.⁸⁴ However, this policy is unlikely to succeed unless low-cost loans or subsidies are made available to poor families.⁸⁵ Pirate developers offer low-income borrowers *de facto* credit in the form of installment sales for the purchase of land with no forms to

78. See Richard Delgado, *Rodrigo's Twelfth Chronicle: The Problem of the Shanty*, 85 GEO. L.J. 667, 675 (1997); Larson, *supra* note 12, at 160-64.

79. See Ruiz, *supra* note 6, at 192-93.

80. See Jorge L. Esquirol, *Titling and Untitled Housing in Panama City*, 4 TENN. J. LAW & POL'Y 243, 281-82 (forthcoming 2008) [hereinafter Esquirol, *Titling and Untitled Housing*]; Alvaro Uribe, *Ciudad y Sostenibilidad*, Remarks at Encuentro Interamericano de Desarrollo Sostenible, Fundación Conama (Nov. 19-21, 2007) (transcript available at <http://www.conama.org/eima/documentos/8.pdf>).

81. Ruiz, *supra* note 6, at 203.

82. See Smolka, *supra* note 77.

83. Ruiz, *supra* note 6, at 197.

84. See *id.* at 198.

85. See *id.* at 200.

fill out and no questions asked, and with the right of immediate occupancy once the down payment is made.⁸⁶ Furthermore, informality enables poor families to make incremental investments in servicing and construction over a span of several years using both sweat equity (family labor) and cash.⁸⁷ Contrary to the free market policy prescriptions of de Soto, state intervention is required in order to provide low-income urban dwellers with the necessary financial assistance to purchase land in the formal sector.

Sixth, formalization programs are problematic to the extent that they are not accompanied by efforts to increase the stock of affordable rental housing. Since the 1950s, governments in Latin America have promoted owner-occupied housing because it is perceived as a stabilizing force that gives poor urban dwellers a stake in the urban social order.⁸⁸ However, in the context of ever-increasing urban sprawl, rental housing offers the convenience of central location and greater mobility.⁸⁹ As Bogota's population continues to grow and as urban lands become scarcer and more distant from the city center, creating affordable rental housing needs to be an important element of Bogota's housing policy.⁹⁰

Finally, the advantages and disadvantages of formal versus informal housing will vary from location to location.⁹¹ In some cities in Latin America, titling programs have produced gentrification and housing instability as newly titled lands are sought by real estate speculators and developers in order to construct luxury housing.⁹² In Bogota, this phenomenon has not yet materialized.⁹³ While a full assessment of the costs and benefits of formality and informality is beyond the scope of this paper, it is important to acknowledge that such an assessment must be grounded in local knowledge and local conditions.

86. Doebele, *supra* note 19, at 549.

87. See Paul Baross, *Sequencing Land Development: The Price Implications of Legal and Illegal Settlement Growth*, in THE TRANSFORMATION OF LAND SUPPLY SYSTEMS IN THIRD WORLD CITIES 57, 64-65 (Paul Baross & Jan van der Linden eds., 1990).

88. ALAN GILBERT, IN SEARCH OF A HOME: RENTAL AND SHARED HOUSING IN LATIN AMERICA 1 (1993).

89. *Id.* at 156.

90. See Ruiz, *supra* note 6, at 204.

91. See generally Steven E. Hendrix, *Myths of Property Rights*, 12 ARIZ. J. INT'L & COMP. L. 183 (1995) (arguing that the impact of land titling varies depending on a multiplicity of local factors, including custom, geography, law, and history); Esquirol, *Titling and Untitled Housing*, *supra* note 80 (analyzing the advantages and disadvantages of formal and informal title in Panama City, Panama).

92. Esquirol, *Titling and Untitled Housing*, *supra* note 80, at 292.

93. See Gilbert, *supra* note 1, at 15.

In sum, de Soto's claims about the benefits of formal property are not supported by studies of land titling programs in Latin America and elsewhere in the developing world. Far from being a panacea, regularization and titling programs possess advantages and disadvantages which must be evaluated on a case by case basis. What matters in the end is making sure that the urban poor have adequate shelter, decent jobs, and access to health care and education. Whether the best solution is formality or informality will depend upon local circumstances.

V. DECONSTRUCTING THE "FAILED LAW" HYPOTHESIS

One of the central premises of deSoto's work is that the disenfranchisement of the urban poor is due to the failure of law in the global South,⁹⁴ and that the solution lies in the familiar one-size-fits-all prescriptions of neoliberalism: privatization, deregulation, and de-bureaucratization.⁹⁵ DeSoto's claims are problematic for the three distinct reasons discussed below.

A. *Informality in the Global North*

De Soto's "failure of law" hypothesis neglects to account for informality in the global North, and thereby perpetuates the myth of informality as a phenomenon of legal and economic "underdevelopment." In the state of Texas for example, over 400,000 people reside in informal settlements known as *colonias*.⁹⁶ The *colonias* are widely distributed throughout the state (rather than confined to the border) and are populated by whites and African-Americans as well as Mexican-Americans.⁹⁷ The residents of the *colonias* are typically the working poor who purchase unserviced land on an installment basis and then construct their own dwellings or purchase trailer-type dwellings or portable homes.⁹⁸ The *colonias* are appearing on the periphery of the urban landscape because they offer affordable housing to low-income households in cities with relatively high housing costs.⁹⁹ Peter Ward

94. See DESoto, THE MYSTERY OF CAPITAL, *supra* note 1, at 5-10, 46-62, 161-71; DE SoTo, THE OTHER PATH, *supra* note 1, at 12, 134-42, 184-87, 233-34.

95. See DESoto, THE OTHER PATH, *supra* note 1, at 242-52.

96. Larson, *supra* note 12, at 141-42.

97. Peter Ward, *Informality of Housing Production at the Urban-Rural Interface: The "Not So Strange Case" of the Texas Colonias*, in URBAN INFORMALITY: TRANSNATIONAL PERSPECTIVES FROM THE MIDDLE EAST, LATIN AMERICA, AND SoUTH AsiA 243, 265 (Ananya Roy & Nezar Alsayyad, eds., 2004).

98. *Id.* at 247-49, 252-54.

99. *Id.* at 250-51.

describes the *colonias* as a rational response by the working poor to a statewide shortage of affordable housing in a regional economy characterized by vast inequality between high-income professional and industrial workers and low-paid service sector employees.¹⁰⁰ *Colonias* can also be found in Arizona, New Mexico, and California.¹⁰¹

Moreover, informality in the global North is not limited to the housing sector. In the United States, a wide variety of economic actors operate outside of or in violation of government regulations, including unlicensed street vendors,¹⁰² gypsy cabs,¹⁰³ garment industry sweatshops,¹⁰⁴ and house- and office-cleaning services.¹⁰⁵ Saskia Sassen argues that informality in the global North is a function of economic polarization reflected in "the decline of the middle class, the growth of a high-income professional class, and the expansion of the low-income population."¹⁰⁶ Jane Larson predicts that low-income households in the United States will increasingly resort to informal economic activity, including informal housing and working "under the table," to the extent that economic globalization continue to depress wages and to discourage government investment in affordable housing and in social welfare programs.¹⁰⁷

In other words, informality is not an exotic transplant from Latin America or a manifestation of legal "underdevelopment." Rather, informality is a rational response to poverty and inequality, and will likely flourish in both the North and the South as long as the underlying economic causes persist.

B. *The Neoliberal Prescription: Exacerbating Inequality and Informality*

De Soto's proposed reforms exacerbate the housing crisis by

100. *Id.* at 247-50.

101. Texas Secretary of State, Colonias FAQ's, <http://www.sos.state.tx.us/lborder/colonias/faqs.shtml> (last visited Oct. 22, 2008).

102. Regina Austin, "An Honest Living:" *Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119, 2120 (1994).

103. Saskia Sassen, *The Informal Economy*, in *DUAL CITY: RESTRUCTURING NEW YORK* 79, 101 n.52 (John Hull Mollenkopf & Manuel Castells eds., 1991).

104. See Alex Stepick, *Miami's Two Informal Sectors*, in *THE INFORMAL ECONOMY: STUDIES IN ADVANCED AND LESS DEVELOPED COUNTRIES* 111, 116 (Alejandro Portes et al. eds., 1989).

105. Larson, *supra* note 12, at 152-53.

106. Saskia Sassen, *The Informal Economy: Between New Developments and Old Regulations*, 103 YALE L.J. 2289, 2303 (1994).

107. Larson, *supra* note 12, at 142, 153-54.

increasing poverty and inequality in Latin America and throughout the global South. Latin America is no stranger to economic inequality. As the World Bank acknowledges, the "empirical literature unambiguously suggests that Latin America is the region with the highest levels of inequality in the world, and that this has been true for as long as the statistics have been kept."¹⁰⁸ For example, according to the United Nations Development Program, 64% of Colombia's population lives below the poverty line.¹⁰⁹ The informal sector accounts for 58% of the country's non-agricultural employment.¹¹⁰ The country's Gini index, which measures inequality (with 0 representing absolute equality and 100 representing absolute inequality) is 58.6, giving Colombia the dubious distinction of surpassing Brazil's notoriously high levels of inequality.¹¹¹

While inequality has a long history in Latin America, the United Nations Settlements Program concluded in a major report on the world's slums that the single greatest cause of increasing poverty and inequality in the last two decades was the retreat of the state from the economy under the auspices of neoliberal economic reforms, including reduced social welfare spending, privatization of state enterprises, reduced regulation of labor markets, and curtailment of the state's role in the provision of public housing.¹¹² In most Latin American countries, these reforms were undertaken pursuant to structural adjustment programs mandated by the International Monetary Fund (IMF), the World Bank and the Inter-American Development Bank in response to the region's debt crisis.¹¹³ The neoliberal economic reforms exacerbated inequality, increased unemployment, and swelled the ranks of the informal sector.¹¹⁴ As a consequence of these reforms, there

108. WORLD BANK, *INEQUALITY IN LATIN AMERICA & THE CARIBBEAN: BREAKING WITH HISTORY?* 2-27 (2003), available at <http://wbln0018.worldbank.org/LAC/LAC.nsf/ECADocByUnid/4112F1114F594B4B85256DB3005DB262?0pendocument>.

109. See UNITED NATIONS DEVELOPMENT PROGRAMME, *HUMAN RIGHTS DEVELOPMENT REPORT 2007/2008* 238 tbl.3 (2007), available at <http://hdr.undp.org/en/reports/globalhdr2007-2008>.

110. See *id.* at 299 tbl.21.

111. See *id.* at 282 tbl.15. By way of comparison, the Gini index of Brazil is 57.0 and that of Argentina is 51.3. *Id.* at 281-82 tbl.15.

112. See UN HABITAT, *supra* note 6, at 43-45.

113. See DUNCAN GREEN, *SILENT REVOLUTION: THE RISE AND CRISIS OF MARKET ECONOMICS IN LATIN AMERICA* 39, 47-49 tbl.2.1 (2d ed. 2003).

114. See *id.* at 153-59. The impact of neoliberal economic reforms on informal housing (as opposed to informality generally) is more difficult to assess because these reforms have been accompanied by regularization and titling programs designed to formalize the informal sector. See, e.g., Alan Gilbert, *Laue in the Time of Enhanced*

was a significant increase in inequality within countries, between countries, and in the world as a whole between 1973 and 1993.¹¹⁵

De Soto's work re-packages and re-popularizes discredited neoliberal economic policies in pseudo-populist garb. Far from being a cure to the economic ills of the global South, de Soto's "free market" prescriptions threaten to aggravate the disease.

C. *Reinforcing the Stereotype of Latin American Inferiority*

De Soto's "failed law" hypothesis threatens to reinforce stereotypes of Latin American "inferiority" and legal "underdevelopment." Just as the "culture of poverty" discourse pathologized the urban poor and justified the demolition of informal settlements, the "failure of law" has been used as a discursive device for the past half century to justify a wide variety of legal reform projects in Latin America.¹¹⁶ Even though the objectives of the reform projects changed over time, the image of Latin American dysfunctionality endured.¹¹⁷ Latin American legal institutions were constructed as inflexible, inefficient, obsolete and corrupt.¹¹⁸

The "failed law" discourse renders Latin American legal systems vulnerable to legal reform projects that may ultimately disserve the interests of Latin American nations. In the 1980s and 1990s for example, the objective of these projects was to facilitate neoliberal economic reforms by strengthening the role of the market.¹¹⁹ Echoing de Soto, law and economics proponents identified excessive regulation as the obstacle to economic development, and advocated laissez-faire, market-enhancing alternatives.¹²⁰

Perhaps the most insidious effect of the "failure of law" discourse is that it discredits Latin American legal innovations as inherently "inferior," and therefore not worthy of serious study by scholars or policy-makers in the global North.¹²¹ For example, Texas law-makers initially regarded the *colonias* as a phenome-

Capital Flows: Reflections on the Links Between Liberalization and Informality, in URBAN INFORMALITY: TRANSNATIONAL PERSPECTIVES FROM THE MIDDLE EAST, LATIN AMERICA, AND SOUTH ASIA 57 (Ananya Roy & Nezar Alsayyad, eds., 2004).

115. See UN HABITAT, *supra* note 6, at 36, 38 box3.1.

116. See Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. CAMP. L. 75, 76, 92-94 (2008) [hereinafter Esquirol, *Failed Law of Latin America*].

117. See *id.* at 94.

118. See *id.* at 124.

119. See *id.* at 94-95.

120. See *id.* at 103-05, 110-11.

121. See *id.* at 113-14, 116.

non of Mexican origin and as a haven for criminals and illegal immigrants.¹²² Accordingly, they attempted to outlaw and criminalize such developments instead of recognizing the positive role that the *colonias* might play as part of a broader strategy to address serious economic and social inequality.¹²³ Efforts to persuade Texas officials that they might learn from Mexico's twenty-year history of dealing with informal housing fell on deaf ears.¹²⁴ As Jane Larson points out, few legal scholars in the United States study informality.¹²⁵ Informality is regarded as a Third World phenomenon of interest to only law and development scholars.¹²⁶ However, law and development scholars tend to focus on transferring U.S. law to developing countries rather than learning from legal experiments in the global South.¹²⁷ Sadly, de Soto's construction of informality as a failure of Latin America law only reinforces these misperceptions and deprives U.S. scholars and policymakers of valuable insights.

Two Latin American innovations hold particular promise in terms of advancing the rights of economically marginalized communities and promoting the right to housing. The first is the inclusion of social and economic rights in modern Latin American constitutions. The second is the social function doctrine. Regrettably, these innovations are not widely studied by legal scholars in the United States.

Unlike the United States, which recognizes in its Bill of Rights only "negative rights" to be free from government interference, most Latin American nations also recognize economic, social and cultural rights imposing affirmative duties on government.¹²⁸ For example, the 1991 Colombian Constitution recognizes the right to dignified housing and imposes affirmative obligations on the Colombian state to give effect to this right.¹²⁹ The 1991 Colombian Constitution also recognizes the right to education,¹³⁰ the right to health care,¹³¹ the right to a healthy environment,¹³² and a

122. See Ward, *supra* note 97, at 247.

123. See *id.*

124. See *id.*

125. See Larson, *supra* note 12, at 158.

126. See *id.*

127. See *id.*

128. See ANGEL R. OQUENDO, LATIN AMERICAN LAW 324 (2006).

129. See CONSTITUCI6N POLITICA DE COLOMBIA art. 51, available at <http://web.presidencia.gov.co/constitucion/index.swf>.

130. See *id.* at art. 66.

131. See *id.* at art. 49.

132. See *id.* at art. 79.

variety of labor rights (including the right to strike and the right to bargain collectively).¹³³ Far from being "dysfunctional" or "inferior," the Colombian Constitutional Court has demonstrated the justiciability of economic and social rights by vigorously protecting these rights in the face of the Colombian government's neoliberal economic onslaught.¹³⁴

In contrast to the neoliberal vision of absolute property rights, most Latin American constitutions impose an affirmative duty on landowners to use their property in ways that serve a social function.¹³⁵ For example, the 1991 Colombian Constitution recognizes that "property is a social function that implies obligations."¹³⁶ The Colombian Constitutional Court has held that the social function doctrine obligates landowners to use land in ways that are affirmatively beneficial to the community or run the risk of expropriation.¹³⁷ The social function doctrine can be used to justify the expropriation of both rural and urban land for the benefit of landless or homeless populations.¹³⁸ Indeed, the Colombian Supreme Court invoked both the right to housing and the social function doctrine in a case upholding the constitutionality of the Colombian government's grant of public lands to informal settlers pursuant to the government's regularization and titling program.¹³⁹ Sadly, the English-language literature on the social function doctrine is quite sparse notwithstanding the significant interest in this doctrine in Europe and Latin America.¹⁴⁰

VI. THE WAY FORWARD: LESSONS FROM BOGOTÁ

Regularization and titling programs are extremely popular with Latin American governments because they offer a cheap solution to the daunting problem of urban housing, especially

133. See *id.* at arts. 53-56.

134. See Maria Paula Saffon, *Can Constitutional Courts be Counterhegemonic Powers Vis-A-Vis Neoliberalism? The Case of the Colombian Constitutional Court*, 5 SEATTLE J. Soc. JusT. 533, 554-57 (2007).

135. See Thomas T. Ankersen & Thomas Ruppert, *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19 TuL. ENVTL. L.J. 69, 99 (2006).

136. See *id.* (citing CoNSTITUCI6N PoLftICA DE CoLOMBIA art. 58).

137. See Corte Constitucional de Colombia [Supreme Constitutional Court of Colombia] Sentencia C-389/94 VII.2, VII.3, available at http://www.secretariassenado.gov.co/leyes/SC389_94.HTM.

138. See Esquirol, *Failed Law of Latin America*, *supra* note 116, at 121.

139. See Corte Constitucional de Colombia [Supreme Constitutional Court of Colombia] Sentencia C-251196, available at <http://www.dadep.gov.co/archivos/documentos/juridica/jurisprudencia/CorteConstitucionalVC%20-%20251-1996.doc>.

140. See Ankersen & Ruppert, *supra* note 135, at 119-20.

when poor households contribute to the cost of providing or upgrading municipal services. They are also extremely popular with low income families as the culmination of decades of collective struggle for a place to call home.

However, regularization and titling program are dangerous to the extent that they lull law-makers into believing that the "free market" will resolve the problem of poverty and housing scarcity if the poor are simply given legal title to the lands they occupy. Housing policy is only one part of a broader development strategy designed to combat poverty and inequality. In order to be effective, regularization and titling programs must be incorporated into a multi-pronged poverty eradication strategy that addresses employment, transportation, health, education, food security, and access to urban infrastructure and services, and that seeks to increase the stock of both owner-occupied and rental housing. It is also important to incorporate rural development into such a strategy since urban migrants are former rural dwellers. Colombia in particular, has one of the most unequal distributions of rural lands in all of Latin America.¹⁴¹ In addition to facing opposition from powerful landholders, land reform efforts in Colombia have undoubtedly been stymied by the ongoing civil war.¹⁴² Because urban migrants in Colombia are typically escaping both war and rural poverty, economic development and poverty eradication strategies must include land reform, rural development, and efforts to end the ongoing civil war.

Contrary to de Soto's policy prescriptions, the solution to poverty and to the housing problem lies not in further deregulation and privatization, but in a renewed emphasis on the state's affirmative obligation to promote economic development and to guarantee fundamental social and economic rights, including employment, education, housing and health care. A growing body of scholarship by economists Ha-Joon Chang, Alice Amsden, and others concludes that active state intervention in the economy was critical to the achievement of prosperity in the global North and in certain countries in the global South.¹⁴³ However, the policy flexi-

141. *See id.* at 103.

142. *See id.*

143. *See generally* ALICE H. AMSDEN, *THE RISE OF "THE REST": CHALLENGES TO THE WEST FROM LATE-INDUSTRIALIZING ECONOMIES* (2001); PAUL BAIROCH, *ECONOMICS AND WORLD HISTORY: MYTHS AND PARADOXES* 44-55 (1993); HA-JOON CHANG, *BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM* (2008); HA-JOON CHANG & ILENE GRABEL, *RECLAIMING DEVELOPMENT: AN ALTERNATIVE ECONOMIC POLICY MANUAL* (2004); HA-JOON CHANG, *KICKING AWAY THE*

bility of developing countries has been eroded by the neoliberal economic reforms required by multilateral trade agreements or imposed as conditions to IMF and World Bank loans. At the international level, re-inserting the state into the process of economic development requires that developing countries work collaboratively to reclaim from international trade and financial institutions the "policy space" to promote just and equitable economic development strategies.¹⁴⁴

The debate over formality versus informality is in many ways a red herring. Far from representing a failure of formal law, informality constitutes a parallel and intersecting system of law developed by the urban poor in the face of daunting economic hardship. Formal and informal property systems coexist and influence one another. The promissory notes and property registry system developed by the residents of Jerusalem mirrored those of the formal legal order. The formal legal order adapted its requirements to the needs of the poor by providing urban services to Jerusalem in response to the community's mobilization and by waiving onerous regulations that would have required residents to produce tax returns, construction licenses, and other documents in order to obtain formal title to the land they occupied. The legal system's tolerance of informality is itself a form of regulation akin to enforcement discretion.¹⁴⁵ Indeed, consistent with the recommendations of Mangin and Turner, the formal legal system in Colombia relied for decades on informality as an inexpensive solution to the housing crisis, and later shifted to a strategy of formalization through regularization and titling programs.

The advantages and disadvantages of formal and informal title must be evaluated on a case by case basis. What matters in the end is guaranteeing that every member of society has ade-

LANDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE (2002); ERIK S. REINERT, *How Rich Countries Got Rich . . . AND WHY Poor Countries Stay Poor* (2007).

144. See generally PUTTING DEVELOPMENT FIRST: THE IMPORTANCE OF POLICY SPACE IN THE WTO AND INTERNATIONAL FINANCIAL INSTITUTIONS (Kevin P. Gallagher, ed., 2005) (discussing global economic forces shrinking the 'policy space' that developing countries can draw from in order to construct policies to raise the standards of living of their people); Carmen G. Gonzalez, *Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology*, 19 *Geo. INT'L ENVTL. L. REV.* 583, 633-39 (2007) (discussing the ways in which the principle of special and differential treatment might be utilized in the WTO to give developing countries the necessary policy space to promote economic development).

145. See Esquirol, *Titled and Untitled Housing*, *supra* note 80, at 271-72.

quate shelter, decent jobs, a good education, and access to health care.

Finally, one of the most powerful lessons from Ciudad Bolívar's Jerusalen neighborhood is the creativity of the urban poor in devising solutions to seemingly intractable social problems. Rather than condemning the informal regulatory systems of the poor as tantamount to anarchy or criminality, policy-makers should build upon the survival strategies of the poor and should maximize the participation of low-income communities in the design and implementation of economic development and poverty eradication programs.

As informal housing settlements become increasingly visible in the global North, scholars and law-makers have much to learn from Latin America's decades of experiments with formal and informal title and from Latin America's innovative efforts to promote the fundamental human right to housing.

