

2011

The Turn to Legal Interpretation in Latin America

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THE TURN TO LEGAL INTERPRETATION IN LATIN AMERICA

JORGE L. ESQUIROL*

INTRODUCTION	1032
I. THE NEW INTERPRETATION	1034
A. FROM APPLICATION TO INTERPRETATION	1035
B. SUPPORTING NEO-CONSTITUTIONALISM	1038
C. THE UNDERLYING STRUCTURE	1041
II. THE FAILED LAW BACKGROUND	1042
A. HISTORICAL BACKGROUND	1043
B. THREE DIFFERENT PERIODS	1044
C. DEVELOPMENT TRANSNATIONALISM	1047
D. FAILED LAW	1048
E. ENDEMIC ELEMENTS OF FAILURE	1050
F. CRITIQUE OF FAILED LAW DIAGNOSIS	1056
III. CRITIQUES OF THE NEW INTERPRETATION	1058
A. OVERSIMPLIFYING LEGAL FORMALISM	1058
B. SIDE-STEPPING LEGAL REALISM	1061
C. IDEALIZING TRANSNATIONAL THEORIES	1063
D. LOSING LEGAL CAPITAL	1066
E. DEEPENING LEGAL FAILURE	1069
CONCLUSION	1071

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INTRODUCTION

Legal interpretation is an increasingly prominent feature of national governance in Latin America. This development is certainly evident with respect to high profile judicial decisions. It has also become a major topic of legal academic debate. There are a number of reasons this is so. Beginning in the mid-1980s, many countries adopted new constitutions or constitutional reforms with significantly expanded fundamental rights and basic guarantees. Some of these new or amended charters introduced separate constitutional tribunals, greater constitutional review in existing courts, and additional procedures for constitutional claims. Additionally, many countries established judicial councils to make the judiciary more independent and to sanction official misconduct. As a result, increased public discussion of judicial action is driven at least in part by these material changes.

During roughly the same time period, graduate legal studies in the United States have become increasingly popular, not only for Latin American business lawyers and political leaders, but also for scholars and academics. In the past, the latter usually headed to continental Europe for advanced degrees. Now increasing exposure to Anglo-American legal culture has resulted in a greater focus on adjudication and its related set of concerns, among which legal interpretation is central. Additionally, beginning in the late 1980's, the second wave of legal development assistance from the United States and international sources has significantly focused on modernizing the judiciary, transferring not only technical expertise, but also judicial ideology and culture.

Finally, some Latin American law schools have begun hiring larger numbers of full-time faculty members, a significant change from the previously near-exclusive reliance on practicing lawyers. Some schools are substantially investing in junior faculty by providing incentives for graduate studies and research stays abroad. Some of these schools have created masters and doctoral programs, a relatively new development, for locals not willing or able to leave home. Many of these institutions are looking to their faculty members returning from foreign studies or graduate programs to lead these new offerings.

This expanded pool of local scholars, graduate students abroad,

diasporic Latin American academics, and engaged Latin Americanists constitutes a significant and growing discursive community. Its members intervene not only in comparative law fields in the global North, but also in legal-political debates within individual Latin American countries. As a result, the surging interest in legal interpretation is not solely attributable to the wave of recent constitutional and legal reform, it is also the product of a growing critical mass of engaged participants, a newly shared stock of Anglo-American legal literature, and certainly the expectation that public debate and academic interventions can produce tangible effects.

Clearly, specific exchanges over questions of legal reasoning vary from country to country, especially given the diversity of actual issues at stake, the multitude of theories or approaches in play, and the sometimes unexpected political alignments of transnational sources and local politics. Common to much of the region, however, is the “turn to legal interpretation” and the field of discourse it designates, marking a shift away from traditional legal reasoning and its accepted methods. Whether debating *nuevo derecho* in Colombia, *principiologia* in Brazil,¹ the proportionality principle in Mexico,² or plurinational legal hermeneutics in Bolivia,³ the background framework for these discussions is much the same: new interpretive theories are marshaled against the conventional practices of national courts and traditional commentators, which are in turn dismissed as pure legal formalism.⁴

1. See Leonardo García Jaramillo, *El “Nuevo Derecho” En Colombia: ¿Entelequia Innecesaria O Novedad Pertinente? [The “New Law” in Colombia: Unnecessary Entelechy or Pertinent Novelty?]*, 29 BARRANQUILLA 289, 292 (2008) (Colom.) (noting that “*nuevo derecho*” refers to a series of theoretical and dogmatic transplants); Padua Fernandes, *A reflexão sobre os princípios no direito [Reflection on the Principles of Law]*, 6 PRISMA JURÍDICO 11, 11-14 (2007) (Braz.) (identifying the similar role that general, judicial, and moral principles share as sources of law).

2. Imer Flores, *Towards a Glocal Jurisprudence: Comparative – and Transnational – Constitutional Reformation and Interpretation in Mexico* (2010) (presented at the XVIIIth International Congress of the International Academy for Comparative Law, Washington, D.C., July 2010) (on file with American University International Law Review).

3. See generally BOAVENTURA DE SOUSA SANTOS, REFUNDACIÓN DEL ESTADO EN AMÉRICA LATINA: PERSPECTIVAS DESDE UNA EPISTEMOLOGÍA DEL SUR [REFOUNDATION OF THE STATE IN LATIN AMERICA: PERSPECTIVES FROM A SOUTHERN EPISTEMOLOGY] (2010).

4. See generally DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE

The present Essay begins to explore this background dichotomy of the current legal interpretation debates. At first glance, Latin American “interpretationists” seem merely to be echoing the legal realists in their opposition to formalist legal thought. Upon further inspection, however, it becomes clear that, by taking as their foil an aberrational Latin American legal formalism, interpretationists are simply reproducing the common diagnosis of pervasive legal failure within the region. This Essay argues that, in doing so, the new interpretation may yield some significantly self-defeating and unintended effects. Admittedly, the many examples and case studies the topic fully merits are not possible in this short piece. To begin this discussion, nonetheless, Part I briefly identifies the salient features of the new interpretation. Part II summarizes the sources of the failed law background against which it is conducted, drawing on some of my earlier work. Finally, Part III indicates various drawbacks of the new interpretation, highlighting its dependence on the failed law concept.

I. THE NEW INTERPRETATION

The “new interpretation,” as defined here, is not limited to any one mode whether historical, constructivist, sociological, or hermeneutic.⁵ It is also not confined to a single area, such as interpreting constitutions, codes, or other legal texts, although

SIÈCLE 105-07 (1997).

5. My intention is not in any way to emphasize so-called “interpretive” approaches at the expense of others in my discussion of interpretationism, since they are only some of the many new theories. On interpretivism, see Mark Tushnet, *The Possibilities of Interpretive Liberalism*, 29 ALTA. L. REV. 276, 276-77 (1991) (exploring political theory through the interpretation of political culture and noting that a new liberal political theory arose out of the lack of “legitimacy of the liberal state”); on hermeneutics, see NEIL MACCORMICK, H.L.A. HART 30 (2d ed. 2008) (explaining Hart’s hermeneutic way of analyzing legal jurisprudence through the lens of moral and political philosophy); on a sociological approach, see Mauricio García Villegas, *No Sólo De Mercado Vive La Democracia: El fenómeno del (in)cumplimiento del derecho y su relación con el desarrollo, la Justicia y la democracia [Democracy Does Not Survive Solely on the Market: The Phenomenon of (Non)Compliance with Rights and Its Relation to Development, Justice, and Democracy]*, 6 REVISTA DE ECONOMÍA INSTITUCIONAL 95, 95-134 (2004) (Colom.). See generally CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY 22-25 (1996) (discussing how interpretation is necessary to fill logical gaps in constitutional law, such as how the right to life in the Argentine Constitution is inferred from other clauses).

constitutional questions are clearly the most prominent.⁶ Overall, the new interpretation presents additional elements for legal reasoning, such as the application of neutral principles; the utilization of past facts of a legal, social, or historical nature; and the introduction of consequentialist thinking. Thus, the reference here to new interpretation or interpretationism does not denote any single perspective. Instead, it is meant to capture the wide array of discussions across the region about national governance through interpreting law and legal texts.⁷ It signals a newer, heightened consciousness about legal reasoning.

A. FROM APPLICATION TO INTERPRETATION

Historically, national legal communities in Latin American states have constructed their local legal discourse in deeply transnational ways.⁸ The common observation that Latin America is part of the civil law tradition, or a member of the Romano-Germanic or continental European legal family, is primarily an outward sign of the embeddedness of this transnationalism within the region's national legal systems.⁹ The paradigm of European transnationalism can be analyzed in its different historical moments and from its different theoretical underpinnings, such as natural law, positivism,

6. See generally Dante Figueroa, *Current Constitutional Developments in Latin America*, INT'L LEGAL RESEARCH INFORMER (ASIL) 8-18 (Summer 2011), available at http://www.asil.org/pdfs/IG/Informer_Summer_2011.pdf.

7. I use the terms "new interpretation" and "interpretationism" interchangeably to refer to this academic and expert discourse about legal reasoning in, or related to, Latin America.

8. See generally Alejandro M. Garro, *Shaping the Content of a Basic Course on Latin American Legal Systems*, 19 U. MIAMI INTER-AM. L. REV. 595, 599 (1988) (signaling the influence of French, Spanish, German, and Italian law in Latin America).

9. See generally PHANOR J. EDER, *A COMPARATIVE SURVEY OF ANGLO-AMERICAN AND LATIN-AMERICAN LAW* 4 (1950) (describing the history of civil law systems by illustrating how the Roman law influenced Latin American law by its reliance on statutes and the legislature); RENÉ DAVID & JOHN E. C. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 81-82 (2d ed. 1978) (explaining how the Romano-Germanic source of civil law expanded to the "western world"); JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 42 (3d ed. 2007) (examining how interpretation within the judicial system in civil law countries is criticized as an abuse of discretion by the courts).

and legal sociology.¹⁰ In sum, its effect is to generate legal analysis and legal scholarship which, in their most reputable forms, are commonly performed by citing and commenting upon prominent continental European authorities. Local legal-political positions are, as such, expressed in this particular language of foreign and comparative sources.

To date, a few jurisprudential studies have been produced about the workings of this traditional mode of legal reasoning and argument in Latin America.¹¹ Significantly, the most important results of this work show that it is not merely copying or unthinking and random uses of foreign texts. Still, the practice may indeed lead to some unintended consequences because of the quite indirect ways that local policy objectives are expressed.¹² At its most basic level, this European-inflected transnationalism offers a mode of taking positions on local questions of law without appearing to be engaged in mere politics. It provides arguments and models for legislative reform and institutional change, and it legitimizes action and discretion by local legal officials. Law, seen in this way, is thus not simply the winning side of local political struggle or conflicting beliefs. Rather, it can be portrayed as more broadly transnational, if not plausibly universal.

Regarding judicial decision-making, John Merryman and Rogelio Pérez-Perdomo have noted the great anxiety it produces:

This evolution [of courts' acceptance of the power of interpretation] has also been accompanied by an enormous amount of discussion and writing, some of it to justify interpretation of statutes by courts, some of it to

10. See Josef L. Kunz, *Introduction* to LUIS RECASÉNS SICHES ET AL., *LATIN-AMERICAN LEGAL PHILOSOPHY* xix (Gordon Ireland et al. trans., 1948) (placing jurisprudential theories in historical context, contending that natural law was predominant in eighteenth century France, positivism in nineteenth century continental Europe, and sociological jurisprudence in early twentieth century Latin America); see also Jorge L. Esquirol, *The Fictions of Latin American Law (Part I)*, 1997 UTAH L. REV. 425, 441 (1997).

11. See Garro, *supra* note 8, at 602 (explaining how few scholars, other than those in political science, economics, or sociology, are willing to research Latin American institutions because these institutions are seen as “underdeveloped and backward”).

12. See generally DIEGO EDUARDO LÓPEZ MEDINA, *TEORÍA IMPURA DEL DERECHO: LA TRANSFORMACIÓN DE LA CULTURA JURÍDICA LATINOAMERICANA [THE IMPURE THEORY OF LAW: THE TRANSFORMATION OF THE LATIN AMERICAN JURIDICAL CULTURE]* (2004).

define the limits of the interpretive power, and some of it to specify how that power should be exercised. The mass of scholarship on interpretation in civil law countries (which is roughly analogous to the mass of literature in the United States on judicial process) thus is in part an expression of uneasiness over the fact that courts are interpreting statutes, and in part an expression of anxiety that they will abuse their power of interpretation; only a small proportion of it focuses on the actual process of interpretation Only a few writers have tried to give the judge help in facing up to particular problems of interpretation.¹³

The new interpretation addresses this “actual process” directly. It takes the leap from discussions about *applying* the law—the traditional mantra in civil law systems—to debates about outright *interpreting* it. Accordingly, it brings legal reasoning practices into sharp relief.¹⁴ Methods and theories for correct and singular legal

13. MERRYMAN & PÉREZ-PERDOMO, *supra* note 9, at 42.

14. *See, e.g.*, Everaldo Lamprea M., *Derechos Fundamentales y Consecuencias Económicas [Fundamental Rights and Economic Consequences]*, 8 REVISTA DE ECONOMÍA INSTITUCIONAL 77, 84 (2006) (Colom.) (claiming that independent theories that conceive rights as procedural criteria or restrictions which are to be observed above all other considerations are incomplete); Valéria Ribas do Nascimento, *A Filosofia Hermenêutica Para Uma Jurisdição Constitucional Democrática: Fundamentação/Aplicação Da Norma Jurídica Na Contemporaneidade [The Hermeneutic Philosophy for a Democratic Constitutional Jurisdiction: Substantiation/Application of the Rule of Law in Modernity]*, 5 REVISTA DIREITO GV 147, 147-168 (2009) (Braz.) (recognizing the valorization of constitutional jurisdiction as a contributing source to the development of theories for judicial interpretation); *see also* Víctor Alberto Quinche Ramírez, *Los sistemas jurídicos y la teoría del razonamiento judicial: una lectura de H.L.A. Hart [Juridical Systems and the Theory of Judicial Reasoning: A Lecture of H.L.A. Hart]*, 5 REVISTA ESTUDIOS SOCIO-JURIDICOS [ESTUD. SOCIO-JURID.] 257, 257 (2003) (Colom.) (contrasting Hart’s concept of rights with Dworkin’s interpretation of norms); Sergio Estrada Vélez & Julián García Ramírez, *Algunas reflexiones en torno a la necesidad de una teoría del derecho y de los casos difíciles acorde al contexto del Estado constitucional colombiano [Some Reflections Surrounding the Necessity of a Theory of Rights and of Hard Cases According to the Context of the Constitutional State of Colombia]*, 8 OPINIÓN JURÍDICA 97, 98 (2009) (Colom.) (exploring the social and constitutional rule of law model and the obstacles it faced in the Colombian context); Pilar Zambrano, *El Derecho como práctica y como discurso: la perspectiva de la persona como garantía de objetividad y razonabilidad en la interpretación [Law as a Practice and Discourse: The Perspective of Personhood as a Guarantee of Objectivity and Reasonableness in Interpretation]*, 23 DÍKAION 109, 111 (2009) (Colom.) (arguing that although “the teleological projection of law” creates problems in legal interpretation “it also constitutes the limit or framework for the creative dimension of interpretation”).

outcomes are its central focus. In the new interpretation, prestigious, transnational theories, especially from the United States and the United Kingdom, are its primary sources.¹⁵

B. SUPPORTING NEO-CONSTITUTIONALISM

The impetus for legal interpretation is quite intelligible. It accompanies a recent trend in Latin America of progressive constitutional decisions and reformist legal constructions, part of the broader global trend of neo-constitutionalism.¹⁶ Of course, a turn to

15. See, e.g., Margarita Cepeda, *Dworkin: un mal lector [Dworkin: A Bad Reader]*, 6 REVISTA DE ESTUDIOS SOCIALES 123, 124 (2000) (Colom.); Daniela R. Ikawa, *Hart, Dworkin e Discricionariedad [Hart, Dworkin and Discretion]*, 6 LUA NOVA: REVISTA DE CULTURA E POLÍTICA 97, 97-113 (2006) (Braz.) (distinguishing between H. L. A. Hart's positivist theory and Ronald Dworkin's constructivist theory in their application to the question of judicial discretion in cases of legal lacunae); Luis Villavicencio Miranda, *Algunas Críticas a la Idea de Razón Pública Rawlsiana [Some Critiques of the Idea of Rawlsianan Public Reasoning]*, 23 REVISTA DE DERECHO 533, 533-57 (2009) (Chile); Victor Manuel Rojas Amandí, *El Concepto De Derecho De Ronald Dworkin [The Concept of Rights According to Ronald Dworkin]*, 246 REVISTA DE LA FACULTAD DE DERECHO, UNAM 355, 355-56 (2006) (noting that Dworkin's theory was developed through judicial analysis of the U.S. Supreme Court); Javier Saldaña, *¿Derechos Morales O Derechos Naturales? Un Análisis Conceptual desde la Teoría Jurídica de Ronald Dworkin [Moral Rights or Natural Rights? A Conceptual Analysis from the Juridical Theory of Ronald Dworkin]*, 90 BOLETÍN MEXICANO DE DERECHO COMPARADO 1207, 1209 (1997) (mentioning Hart and Dworkin, along with John Rawls and A. Macintyre, as the most influential authors in this area); José Alberto Tamayo Valenzuela, *La Teoría del Derecho de H.L.A. Hart [H.L.A. Hart's Theory of Rights]*, 237 REVISTA DE LA FACULTAD DE DERECHO, UNAM 219, 220 (2002) (Mex.). But see Guillermo Lariguet, *Conflictos Trágicos Genuinos y Respuesta Correcta en torno a algunas ideas de Ronald Dworkin [Genuine Tragic Conflicts and the Correct Response in Light of Some of Ronald Dworkin's Ideas]*, 246 REVISTA DE LA FACULTAD DE DERECHO, UNAM 205, 206 (2006) (Mex.) (placing more emphasis on Jon Elster's work related to solomonic justice).

16. My particular use of the term neo-constitutionalism is meant to refer to the actual decisions of courts in Latin America. See generally CARLOS NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* (1996); Mauricio Barberis, *Neoconstitucionalismo, Democracia, e Imperialismo de la Moral*, 31 JURÍDICA, ANUARIO DEL DEPARTAMENTO DE DERECHO DE LA UNIVERSIDAD IBEROAMERICANA 325 (2001) (Mex.); see also David Landau, *The Two Discourses in Colombian Constitutional Jurisprudence: A New Approach to Modeling Judicial Behavior in Latin America*, 37 GEO. WASH. INT'L L. REV. 687, 709-10, 733 (2005) (discussing different forms of reformist theories in Latin America, such as traditionalism-positivism and constitutionalism, and describing the situation in Colombian constitutional adjudication as one where "[a] summary of some

judicial lawmaking need not lead inexorably to progressive political results. It could promote any number of ends.¹⁷ Still, much recent constitutional change and judicial action has advanced social justice and progressive causes.¹⁸ Discussing this phenomenon, Jorge Correa Sutil reflects:

The judiciary, which in the Latin American tradition has not been an important forum for the underprivileged to voice their demands, may finally become, under the new conditions, an important place to advance social justice At the same time, using the judiciary to advance socioeconomic rights represents serious risks, especially in countries where judges are not accustomed to hearing arguments based on social science data or foreseeing the general effects that a particular decision produces on society.¹⁹

Notably, the sorts of reasoning that produce these social justice outcomes are not typically perceived as keeping within the normal bounds of conventional Latin American judicial practices.²⁰ New theories and methods thus offer the promise of consolidating greater fundamental rights and guarantees by legitimating different forms of

important cases since 1991 demonstrates the generally liberal bent of recent jurisprudence, as well as its connection to new constitutionalist interpretative methods”).

17. See, e.g., Landau, *supra* note 16, at 735 (exemplifying the use of judicial interpretations to criminalize abortion based on a judge’s interpretation of the right to life over the rights of a mother).

18. See Allen R. Brewer-Carías, Vice President, Int’l Acad. of Comparative Law, General Report on Constitutional Courts as Positive Legislators in Comparative Law 21 (July 27, 2010), *available at* <http://www.allanbrewer-carias.com> (search “Constitutional Courts as Positive Legislators,” follow first search return link) (summarizing country reports from a host of participating national reporters, such as constitutional courts creating human rights jurisprudence based on their constitutions).

19. Jorge Correa Sutil, *Judicial Reforms in Latin America: Good News for the Underprivileged?*, in *THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA* 255, 269-70 (Juan E. Méndez et al. eds., 1999).

20. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 9, at 39 (explaining how “[t]o the civil law fundamentalist, authoritative interpretation by the lawmaker was the only possible kind of interpretation”); see also Landau, *supra* note 16, at 709-10 (describing how “[t]raditional-positivism is still the dominant outlook within Latin American societies; carriers of the new constitutionalism perceive it as being something quite new and different within Latin America, part of a transnational network of high-level academic/judicial discourse moving towards expansive constitutionalism”).

legal reasoning in general.²¹

Thus, the allure of new interpretation lies in its perceived ability to defend results not otherwise easily accepted. Yet in any individual case, an interpretive theory could serve either to defend or to critique a specific legal position or judicial opinion. No single theory would likely legitimate all, or any, specific product of neo-constitutionalism. Still, this discursive field, generally, affirms that proper forms of interpretation exist, even if there is disagreement over methods and application. Further, it openly expands legitimate legal decision-making beyond logical deduction from law texts.

For example, Dworkinian interpretivism allows for variation in judicial decisions while still maintaining that a Herculean judge could find the predominantly correct answer from among the differing values contained in legal precedents.²² Likewise, Hartian hermeneutics recognizes the open texture of language, yet still limits results within a penumbra of social meaning.²³ As such, the field has the overall effect of defending alternative forms of legal reasoning as defensible law, even if some individual cases may end up not being interpreted correctly. In this way, the new interpretation supports neo-constitutionalism generally, whether or not particular decisions by the courts faithfully follow any single approach.²⁴

21. On the other hand, in Venezuela constitutional court supremacy has effectively eroded international human rights protections and freedom of expression.

22. See generally RONALD DWORKIN, *LAW'S EMPIRE* 225-74 (1986) (comparing legal interpretation in the common law tradition to writing a chain novel stating, "[the Herculean judge] knows that other judges have decided cases that, although not exactly like his case, deal with related problems; he must think of their decisions as part of a long story he must interpret and then continue, according to his own judgment of how to make the developing story as good as it can be.").

23. See MACCORMICK, *supra* note 5, at 29 (noting that Hart's attempt bridges linguistic philosophy and legal theory by "reconciling scientific and commonsense modes of thought").

24. See Conrado Hübner Mendes, *Judicial Review of Constitutional Amendments in the Brazilian Supreme Court*, 17 FLA. J. INT'L L. 449, 450 (2005) (contending that "[t]he constitutionalist has a crucial role within a constitutional democracy [and] [a]bove all, he is expected to offer sound arguments for the protection of fundamental rights, not in the courts alone, but also in the various institutional spaces which form the public sphere.").

C. THE UNDERLYING STRUCTURE

Much of the new interpretation shares an underlying structure. It rests on a defining distinction, pitting conventional legal practices in Latin America against alternative, transnational interpretive theories. Usually it is reasonable to distinguish between practice and theory, and, in fact, it is quite common. It is also not unreasonable to consider local practices in light of foreign experiences. More curiously, though, the new interpretation is structured around a somewhat different dichotomy: it typically juxtaposes an unrelentingly formalist Latin American practice against idealized, post-legal-realist reconstructive theories of liberal law in the global North. The poles are thus neither simply theory and practice, nor horizontal comparisons of Latin America and the global North.

Indeed, the common critiques of liberal legalism are stressed in Latin America, while transnational interpretive theories appear to offer effective practices. Within this dynamic, conventional local forms are thus automatically rejected or simply ignored in favor of aspirations to, e.g., Dworkinian interpretivism, Hartian hermeneutics, or Alexian principles.²⁵ This arrangement may serve as a useful catalyst for interpretation discourse but is quite counterproductive to reinforcing the standing of law in the region. I have described in earlier work how the rather permanent critique of legal failure in Latin America is partly the product of a projection of internal critiques of liberal law everywhere as an exceptional, external diagnosis of Latin American national legal systems in particular.²⁶ Considering the critiques simply reflect inherent limitations of liberalism, however, they are never fully remediable from a committedly legal realist perspective.²⁷ Such a *hyper*-realist characterization of failure is constantly available to argue for a change in laws and legal institutions. In the context of the new interpretation in Latin America, it appears that the image of legal failure is once again at work, providing the specific springboard for

25. ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans., 2002); DWORKIN, *supra* note 22; H.L.A. HART, THE CONCEPT OF LAW (2d. ed. 1994).

26. See generally Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75, 109-16 (2008) (analyzing the ways in which academic discourse has contributed to the portrayal of Latin American law as “failed law”).

27. ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS (1975) .

interpretationist discourse. The section below describes the sources of this failed law background in more detail.

II. THE FAILED LAW BACKGROUND

The turn to legal interpretation can be seen, ironically enough, as a response to the very pronouncements of Latin American legal failure advanced by “law and development” writings. The latter have significantly influenced comparative law scholarship and various other disciplines focused on the region.²⁸ Specifically related to the legal culture, the conventional development view portrays Latin American legal reasoning as an anachronistic and impoverished form of Western legal analysis. It also presumes that in the global North modern versions of legal analysis are effectively operational. As I have argued, this standard assessment can be understood as the aggregate of images and characterizations marshaled in favor of or against different projects of legal politics.²⁹ They stand as instrumental constructions that have been advanced and have taken hold to further historical and current attempts to change law and legal institutions. This instrumental image, while effective to advocate for law reform, has significant downsides.

“Interpretationists” appear to rely on and reinforce this same diagnosis of law’s failure in the region, while reproducing idealized versions of liberal law elsewhere as actually practicable and operational. While such idealized results are hardly attainable, at least within our current state of human limitations, their unsatisfactory effects are projected and amplified onto Latin America as an argument for reform. Projecting these constant limitations of the system onto Latin America has been a successful rhetoric for triggering law reform.³⁰ It comes at the high cost, however, of

28. See Esquirol, *supra* note 26, at 112-14 (arguing that scholars continuously paint a picture of “Latin American legal failure”).

29. I have written extensively about these topics before. My focus in the past has been to describe the central paradigms that serve principally for transnational legal politics in Latin America, specifically the Europeanness of Latin American law and alternatively the failure of liberal legalism in the region. Additionally, I have demonstrated how these paradigms are mirrored internally in Latin America and have concrete effects in terms of local legal politics. In this Essay, my focus is to demonstrate how this same framing is also part of the legal interpretation discourse in the region and portends some troubling results.

30. See *id.* at 76 (linking the images of Latin American law as “ineffective and

consolidating a constant image of the failure of liberal legal models *in Latin America*. Each new round of reform conducted in this way further entrenches the same negative perceptions. The subsections that follow lay out the sources of the legal failure diagnosis and summarize some of my earlier work.

A. HISTORICAL BACKGROUND

The past fifty years have seen a significant rise in exchange between the United States and Latin American states in the legal sphere. This exchange is chiefly due to funding of initiatives by the U.S. government, U.S.-based foundations, and U.S.-influenced international organizations. These efforts have generally been grouped together and described as the “law and development” movement.³¹ In the extensive literature on the topic, scholars have noted the movement’s different phases, changing political orientation, and general theoretical presuppositions.³² For the most part, however, the phenomenon has been addressed primarily from the supply side of the equation.³³ The focus has been on the types of projects funded, their political economy, and the objectives of funding organizations. Scholars have also expounded on the mostly

inappropriate” and Latin American judges as “inefficient and corrupt” with development agendas created to increase human rights protections and reform criminal procedure and the judiciary in the region).

31. See John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 457-67 (1977) (discussing how the “law and development movement” developed in the 1960s and involved law reform through societal changes, social engineering, and foreign assistance).

32. See, e.g., *id.* at 484-89 (providing a bibliography of 125 works written on Law & Development); THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 120 (David M. Trubek & Alvaro Santos eds., 2006) (explaining how the law and development movement in the U.S. “exported styles of legal pragmatism and antiformalism” to developing states); José E. Alvarez, *Promoting the “Rule of Law” in Latin America: Problems and Prospects*, 25 GEO. WASH. J. INT’L L. & ECON. 281, 281-82 (1991) (focusing on the Administration of Justice Program that the United States employed to promote the rule of law and development in Latin America during and after the Cold War). See generally JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980) (providing a detailed history of the U.S.-led, early law and development movement in Latin America).

33. See e.g., David Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 6-9 (1972) (arguing that “modern law” is a prerequisite for economic and political development).

tacit legal theories underlying these efforts, primarily an uncritical faith in the effectiveness of the U.S. legal system and its positive correlation with economic growth.³⁴ At the same time, others have noted the imperial nature of these assumptions and designs.³⁵ Additionally, attention has been directed to the actual beneficiaries of these projects, both governments in power and specific individuals who may benefit from the resources and clout they offer.³⁶

B. THREE DIFFERENT PERIODS

In terms of specific projects, three different periods are generally noted, including the original 1960-70's developmental state round, the 1990's neo-liberal round, and the more recent social justice moment.³⁷ In the 1960-70s, the funding organizations were either the U.S. government or U.S. based foundations, specifically the United States Agency for International Development ("USAID") and the Ford Foundation. The objective in this first round was state-led growth, planning and control by regulatory agencies, and government reallocation of resources.³⁸ It was supported by

34. See, e.g., Thomas M. Franck, *The New Development: Can American Law and Legal Institutions Help Developing Countries?*, 1972 WIS. L. REV. 767, 767 (1972) (discussing the appropriateness of U.S. legal structures in the assistance of developing social welfare in both the United States and abroad); Lawrence M. Friedman, *On Legal Development*, 24 RUTGERS L. REV. 11, 12 (1969) (declaring that American legal imperialism is never criticized with regards to "its sense, its propriety, its rationale" in promoting economic development).

35. See generally GARDNER, *supra* note 32; 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, 1063-64 (proposing that doubts regarding legal development projects' contributions have led to "self-estrangement" by failing to promote equality and freedom). In the latter article, note that Trubek problematizes many of his earlier ideas regarding the exportation of instrumental law to developing countries.

36. See YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* 48 (2002).

37. See generally David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 32, at 1-18 (describing each movement beginning with the 1960s and the role of the state including the 1980s and the neoliberal law reform, the 1990s and economic development, and today's social welfare movement).

38. See Franck, *supra* note 34, at 772 (informing that conventionally, to establish growth in industry, the state should promote "national unification [and]

Keynesian economics, placing the state as the principal agent of development. The objective in the legal sphere was a pragmatic state regulatory law, capable of effectively implementing government planning and transcending vested private rights with the potential to impede government action.³⁹ Outwardly, legal development assistance was introduced as part of state modernization.⁴⁰ Early projects emphasized improving legal education and consequently the legal culture.⁴¹ Developmentalists believed the right prescription was American-style legal realism and policy-oriented lawyering.⁴² In fact,

the creation of stable and viable communities and markets,” which lead to social welfare).

39. See David Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 32, at 95, 104 (suggesting that the more detailed disputes concerned with “legislative and administrative positivism” were less important than the general principle that the state should implement regulatory schemes). *But see* Diego López Medina, *El Sueño Weberiano: Claves para una Comprensión Constitucional de la Estructura Administrativa del Estado Colombiano [The Weberian Dream: Keys to Constitutional Comprehension of the Administrative Structure of the Colombian State]*, *REVISTA DE DERECHO PÚBLICO*, June 2006, at 3, 30-33 (discussing the Colombian constitutional reform of 1968 and decentralization).

40. See generally Marc Galanter, *The Modernization of Law*, in *MODERNIZATION: THE DYNAMICS OF GROWTH* 153, 154-56 (Myron Weiner ed., 1966) (offering eleven features of modern law—uniform, transactional, universalistic, hierarchical, bureaucratic, rational, professional, technical, amendable, political, and separate from the legislature and executive—which must be developed and sustained as a part of modernization).

41. See, e.g., Edward A. Laing, *Revolution in Latin American Legal Education: The Colombian Experience*, 6 *LAW. AM.* 370, 371 (1974) (explicating that the Colombian liberal-professionalism period promoted legal education, medicine, and engineering); John Henry Merryman, *Law and Development Memoirs I: The Chile Law Program*, 48 *AM. J. COMP. L.* 481, 481-85 (2000) (indicating that the purpose of the legal education program in Chile was to create a foundation of legal professionals who would in turn help the legal infrastructure); Henry J. Steiner, *Legal Education and Socio-Economic Change: Brazilian Perspectives*, 19 *AM. J. COMP. L.* 39, 39 (1971) (stating that the “purposes, content and methods” of legal education are affected by society’s perceptions of the law); see also Claudio Souto, *Sociology of Law: A New Perspective in Brazilian Legal Education*, 58 *ARCHIV FÜR RECHTS UND SOZIALPHILOSOPHIE* 237, 243 (1972) (stressing the importance of socio-juridical theory and research classes that were offered in Brazil to promulgate legal education).

42. See generally Carl A. Auerbach, *Legal Development in Developing Countries: The American Experience*, 63 *AM. SOC’Y INT’L L. PROC.* 81, 81-90 (1969) (describing the development of the U.S. legal system in areas such as antitrust, consumer rights, and workers’ rights).

in the first period, the main focus was to transform Latin American law schools along U.S. lines.

In the late 1980s and 1990s neo-liberal round, more international organizations became involved, many of them following the lead of the United States or U.S.-controlled entities.⁴³ These organizations included the Inter-American Development Bank, the World Bank, and early donors like the Ford Foundation and USAID. Additionally, European Union and European national agencies have more recently participated in projects of this type, albeit less in Latin America than in Africa and the Maghreb.⁴⁴ This second period was dominated by

43. See, e.g., Maria Dakolias, *The Judicial Sector in Latin America and the Caribbean: Elements of Reform* 3-6, 64-71 (World Bank, Technical Paper No. 319, 1996) (discussing the relationship between economic development and judicial reform in Latin America, and recommending that the World Bank and other development institutions support the efforts of local governments and NGOs to promote procedural and structural reforms in the judiciary); LINN A. HAMMERGREN, *THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA: THE PERUVIAN CASE IN COMPARATIVE PERSPECTIVE* 21-25 (1998) (explaining that the United States and other funders were attracted by the “progressive, humanistic reform” taking place in Latin American countries in the mid-1990s); Fernando Carrillo, *The Inter-American Development Bank, in JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA* 149-154 (Edmundo Jarquín & Fernando Carrillo eds., 1998) (presenting the Inter-American Development Bank’s activities in the region, including a program in Colombia to increase the capacity of the Office of the Public Prosecutor); WILLIAM C. PRILLAMAN, *THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA: DECLINING CONFIDENCE IN THE RULE OF LAW* 163-175 (2000) (critiquing the incrementalist approach to legal reform advocated by international development agencies, and highlighting failures of this strategy in El Salvador, Brazil, and Argentina); Thomas Carothers, *The Many Agendas of Rule of Law Reform in Latin America, in THE RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM* 4-16 (Pilar Domingo & Rachel Sieder eds., 2001) (identifying four main types of “rule of law aid” in Latin America including democracy-building, economic development, human rights, and transnational crime prevention, and arguing that the expansion of assistance programs in recent decades has led to competing agendas).

44. For discussion of German investment in Chile, see James M. Cooper, *Competing Legal Cultures and Legal Reform: The Battle of Chile*, 29 MICH. J. INT’L L. 501, 527-36 (2008) (describing Germany’s financial and technical assistance in reforming the Chilean Criminal Procedure Code as one example of Germany’s strong influence over Chile’s legal culture). See also Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617, 663-64 (2007) (detailing investments by Germany and Spain to expand economic development in Latin American countries, such as Bolivia, Ecuador, and Nicaragua).

neo-classical economics with its focus on free markets, privatization, and de-regulation. Accordingly, the principal objectives for law were the protection of private property, enforcement of contracts, regulation of securities markets, and enforcement of criminal law. At the same time, human rights concerns and access to justice for the poor also figured into the agenda of second wave developmentalism, especially during its early years.⁴⁵

The first two periods of law and development funding had very different economic theories driving them. The third more contemporary moment arises from the backlash against orthodox neo-liberalism.⁴⁶ The response on the part of donors has been to incorporate more social justice and minority rights concerns within their project funding priorities.⁴⁷ Whether this change is significant or alters any of the main underlying propositions of neo-liberal developmentalism remains to be seen.

C. DEVELOPMENT TRANSNATIONALISM

An alternative way of conceptualizing law and development, other than as a succession of projects and periods, is as a separate paradigm of transnationalism. It can be usefully compared to the more traditional European legal transnationalism described above.⁴⁸ Structurally, the projects fit a somewhat different pattern. Rather than a common legal family as in European transnationalism, the

45. See Carothers, *supra* note 43, at 10-11 (observing that international donors have begun directing assistance at grassroots human rights groups as a way to address inequality in Latin America); Sutil, *supra* note 19, at 269-70 (noting that, historically, poor or marginalized groups have not viewed the judiciary as a legitimate forum for their issues, but acknowledging that such groups have recently capitalized on judicial reform in several Latin American countries to bring public interest claims).

46. See Trubek & Santos, *supra* note 37, at 10 (illustrating that law and development and neoliberalism were efforts to promote “free market ideas of classical legal thought”).

47. See generally Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 32, at 203, 203-09 (highlighting the recent shift in development policy towards incorporating social objectives such as health and education as an economic growth strategy, and analyzing how this new agenda both shapes, and is shaped by, social and human rights issues).

48. See *supra* Part I(A).

guiding image is foreign assistance by developed to lesser-developed countries, whereby donors sponsor legal change in countries lacking developed law.

In this way, law and development provides an alternative logic for reasoning about the law. It can propel very differently-oriented projects on its account.⁴⁹ It also can draw on various legal theories for justification and redounds to the benefit of governments and individuals capable of mobilizing its resources. Law and development promotes prosperity and democracy, namely economic and political development, through better versions of law or the rule of law, *tout court*. The many conflicting political aspirations of societal actors all appear equally attainable simply through the right mix of positive law, public institutions, and legal culture. Development transnationalism offers a legal terrain in which to work out the problems of poor economies, human rights violations, and deficient democracy.

Thus, as an epistemic construct, development transnationalism provides a rationale for a wide range of legal change at the level of positive law, legal institutions, and legal reasoning. It orients this activity under the rubric of promoting development, and it provides significant legitimacy by the weight of foreign and local experts, international organizations, and scholarly consensus. Additionally, in Latin America, transnationalism is a historically accepted and privileged driver of legal change. Indeed, the historical deep-seated roots of European transnationalism as a mode of legal reasoning and legitimization pave the way for different modes of transnationalism, such as this form of development transnationalism.

D. FAILED LAW

Notably salient within the paradigm of development transnationalism is the counterpoint image of the poor quality of legal systems in Latin America. And yet, in many Latin American countries, law and legal institutions are well-developed elements of national social systems. Latin American states are not lacking in law, in fact some say there may be too much of it. There are abundant law schools and law graduates. Political leaders and government officials

49. See, e.g., Carothers, *supra* 43, fig. 1.1 (illustrating the wide array of actors, agendas, and institutions involved in law and development projects).

often have legal training. Moreover, law and legal discourse from Europe and the United States have been primary tools of governance over these countries' nearly two-hundred years of independence.

As such, law and development's main tenet that the existence of law is central to prosperity and democracy would seem to call for a better explanation in Latin America. There, the legal systems, while extensive, have ostensibly failed to deliver. As a first hypothesis, a diagnosis pointing to the absence of Western conceptions of liberal law is not really plausible. As noted above, Latin American societies are steeped in Western law, and legal institutions pervade much of society.⁵⁰ Instead, the common diagnosis of legal failure more typically points to the type of Western or liberal law and legal institutions in Latin America.⁵¹

This explanation, however, is assembled in some very peculiar ways. The general diagnosis suffers from at least three different types of flaws. First, particular problems or issues in one location are generalized and projected onto Latin America as a whole. Conclusions are based less on detailed empirical and contextual analyses than on overall assertions about commonalities. Thus, for example, the adversarial system and oral hearings have been promulgated as the proper solution for both weak law enforcement in Colombia and insufficient protection of defendants' rights in Chile, implicitly conflating the issues into one generic critique of Latin American criminal procedure.⁵² In both cases, the solution is propelled by the purported, all-around superiority of the development-supported adversarial system.⁵³

50. See *supra* Part I(A).

51. See, e.g., Esquirol, *supra* note 26, at 106-07 (noting the common neo-development critique that Latin American criminal procedure is too "inquisitorial" and therefore less democratic than the U.S. model).

52. See generally Michael R. Paul, *Wanted: Criminal Justice – Colombia's Adoption of a Prosecutorial System of Criminal Procedure*, 16 *FORDHAM INT'L L. J.* 608, 610 (1992/1993) (blaming impunity in Colombia on the country's "antiquated justice system," the inquisitorial model); Carlos Rodrigo de la Barra Cousino, *Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile*, 5 *SW. J. L. & TRADE AM.* 323, 325-26 (1998) (listing lack of an independent judiciary, delay, and lack of judicial power over the police as additional problems arising out of the inquisitorial system in Chile).

53. *But see* Langer, *supra* note 44, at 667-69 (arguing that Latin American activists thought critically about the reforms, looking to a plethora of European codes in the drafting process and choosing to incorporate only those ideas that best

Second, units of analysis stemming from particular political or cultural preferences in the United States or the North Atlantic are applied to the Latin American context indiscriminately.⁵⁴ The nonexistence of that same political or cultural combination in some places in Latin America is then used to show an institutional failure. For example, proponents of a law and development perspective may prefer constitutional change through judicial interpretation rather than through amendments or new constitutions, even though it is not necessarily clear that one is preferable to the other. Indeed, diametrical judicial re-interpretations of constitutional law may shake public confidence in the rule of law, especially in populations not thoroughly imbued in liberal legal ideology. Yet in Latin America, constitutional change through new texts is often characterized as evidence of constitutional failure.⁵⁵ To give another example, the lobbying of lawmakers and regulators by regulated industries is deemed perfectly legal in the United States, but the practice of *ex parte* communications with judges in many Latin American legal systems is often seen as evidence of corruption.⁵⁶ While in some cases the legality in the one and corruption in the other may be clear, the difference is not universally obvious. These are just some of many other possible examples.

E. ENDEMIC ELEMENTS OF FAILURE

The two types of flaws, described above, can be considered problems of insufficient context and narrow functionalism. There is another type of flaw, however, that is more difficult to correct: internal critiques of classical legal theory in the West are used to reveal the “deficiencies” in Latin American law in a manner that

fit “the needs of Latin America’s social and political reality”).

54. See GARDNER, *supra* note 32, at 4 (critiquing American legal assistance to Latin America as “a rather awkward mix of goodwill, optimism, self-interest, arrogance, ethnocentricity, and simple lack of understanding”).

55. See, e.g., Keith S. Rosenn, *The Success of Constitutionalism in the United States and its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM. L. REV. 1, 7, 20-30, Appendix A (1990) (citing the fact that Latin American republics have promulgated an average of 12.65 constitutions per country as evidence of the failure of constitutionalism in Latin America, and identifying reasons for this failure, *inter alia*, the failure of economic integration, a lack of “real revolutionary change,” and the “imported flavor” of the constitutions themselves).

56. Dakolias, *supra* note 43, at 35-36.

portrays these perceived deficiencies as specific or intrinsic to Latin America.⁵⁷

First, Latin American law is often portrayed as “backward,” in the sense that its legal culture is perceived as being dominated by positivism and conceptual formalism in a manner that is reminiscent of the past in the West.⁵⁸ Additionally, the theories of a handful of European jurists are believed to represent “the whole of legal consciousness in the region.”⁵⁹ Notably, ideas commensurate to legal realism and pragmatic legal reasoning are believed to have not yet arrived.⁶⁰

The second major critique is the gap between law and society in Latin America. The gap refers to the distance between the law

57. On internal critique, see generally Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 10-14 (1984) (explaining that internal critique is a mode of challenging the internal logic of traditional legal theory, and giving the following example of an internal critique of determinacy: if traditional legal theorists and judges are correct that legal doctrine is outcome determinate, then by their own standards, the rule of law does not exist in systems that allow for judicial discretion). To understand traditional critiques of Latin American law, it is useful to review the classical critiques of liberal legal theory. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 3-7 (1992) (noting the Progressive attack on the “orthodoxy of the old order,” namely Classical Legal Thought, and explaining that the Progressive critique sought to both undermine the notion that law is neutral and make law more relevant to modern society); DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* 261 (1975) (noting that legal realism’s central project was to highlight the inconsistency between judicial activism under the due process clause and the corresponding claim by judges that applying law is a neutral and apolitical process).

58. For an overview of such critiques, see Jorge L. Esquirol, *Writing the Law of Latin America*, 40 GEO. WASH. INT’L L. REV. 693, 705-07 (noting that the focus of these critiques is always on replacing “outdated” or overly formalistic Latin American laws and institutions, rather than on engaging with those that are currently in place). The image of Latin America as “formalist” is not unlike classical legal thought or Lochnerism in the United States. *Lochner v. New York*, 198 U.S. 45, 64 (1905). See generally PAUL KENS, *JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK* 1-5 (1990) (introducing the *Lochner* decision and explaining the U.S. Supreme Court’s turn to “economic policymaking”).

59. See Esquirol, *supra* note 58, at 707 (2009) (providing the example of Austrian legal scholar Hans Kelsen).

60. See, e.g., John Linarelli, *Anglo-American Jurisprudence and Latin America*, 20 FORDHAM INT’L L. J. 50, 77 (1996) (noting the hesitance of Latin American scholars to embrace legal realism despite the influence of U.S. law in the region).

practiced by ordinary people and the law on the books,⁶¹ a disjuncture which is deemed inordinately wider in Latin America than elsewhere.⁶² One of the most salient images about law in the region is that it is both pervasive in development writing⁶³ and supported by various works of legal history and social science.⁶⁴ Notably, this notion is deployed by many different camps, both more traditional scholars and legal pluralists alike, the latter possibly influenced by their interest in elevating the stature of particular group law relative to the law of the state. Moreover, some progressive scholars have described the gap in terms of the symbolic versus

61. *See id.* at 54-60 (describing the conflict between the rules that govern the informal sector and the official legal system in Latin America, namely that the formal system serves elite interests leading most Latin Americans to ignore it); *see also* KENNETH L. KARST & KEITH S. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK* 58 (1975) (asserting that various “historical and cultural factors” are to blame for this disparity, including “idealism, paternalism, legalism, formalism, and lack of penetration”).

62. *See* KARST & ROSENN, *supra* note 61, at 58 (calling the gap “notoriously large”).

63. *See, e.g.*, Mariana Hernández Crespo, *A Systemic Perspective of ADR in Latin America: Enhancing the Shadow of the Law Through Citizen Participation*, 10 *CARDOZO J. CONFLICT RESOL.* 91, 92-97 (2008) (arguing that, although Latin American law purports to protect citizens, neither courts nor alternative dispute resolution enforce these laws effectively, and concluding that participatory lawmaking is essential to strengthening dispute resolution systems in Latin America); Keith S. Rosenn, *Brazil's Legal Culture: The Jeito Revisited*, 1 *FLA. INT'L L.J.* 1, 2-5 (1984) (describing, as evidence of the gap between law and society, the *jeito*, a Brazilian way of “coping with the formal legal system” by bending or bypassing law in established and culturally acceptable ways to achieve a just result). *See generally* Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 *FLA. L. REV.* 41, 53-57 (2003) (highlighting the emergence of development strategies in the 1960s and 1970s to address the “wide rift” between state law and social practice in Latin America, including legal reform, legal education, and the increased examination of values and actors within the informal sector).

64. *See, e.g.*, M.C. MIROW, *LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA* 235-38 (2004) (describing the gap between law and practice as “a perplexing problem for historians of Latin American law and . . . a frustrating reality for citizens” and surveying a variety of views about this gap); Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 *TEX. INT'L L.J.* 1, 5-6, 14-24 (2006) (linking the gap between law and practice in Latin America to the history of law's subordination to political and economic power in the region). *But see* Esquirol, *supra* note 26, at 79-80 (arguing that the common view that a gap exists between written and practiced law in Latin America constitutes an instrumental argument providing fuel for development reform proposals).

operative value of law, a perspective which critiques socially responsive legislation on the basis of its frustrating inefficacy.⁶⁵

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

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

In short, statements of the above-type are well-known critiques found in the history of jurisprudence in the United States and in Europe.⁶⁶ In the development context, they are more often expressed

65. See, e.g., Claudia Fonseca, *Inequality Near and Far: Adoption as Seen From the Brazilian Favelas*, 36 LAW & SOC'Y REV. 397, 397-404 (2002) (evaluating the potential of the newly enacted Children's Code to regulate clandestine adoption in Brazil, in light of Brazil's history of passing legislation that, while touted by the international community as highly progressive, in reality has little impact on the lives of ordinary Brazilians).

66. See generally HORWITZ, *supra* note 57, at 9-10 (discussing broadly the

in the U.S. vernacular. For example, the backwardness of law can be traced to Oliver Wendell Holmes's observations about law in the United States in his article, *The Path of the Law*.⁶⁷ Holmes expressed the need of every generation to update its law in its own language and in terms of its own uses.⁶⁸ Scholars note Holmes's role as a precursor to legal realism and a critic of formalism.⁶⁹ Critiques of conceptual formalism in the United States were a mainstay of legal realists in the 1920s and 1930s in the United States.⁷⁰ Realism sparked a loss of faith in logical abstraction at the level performed by the then-reigning classical legal thought.⁷¹ Abstract principles were as a result no longer generally believed capable of rendering concrete results in specific cases.⁷² Further, the gap between the law on the books and law in action commonly is attributed to Roscoe Pound and his sociological jurisprudence.⁷³ Here was yet another attempt to

history of American legal thought and highlighting the struggle against the "autonomy of law," which had lost touch with society); KENNEDY, *supra* note 4, at 78-79 (comparing the development of American and European jurisprudence).

67. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

68. *See id.* at 468-69 ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").

69. *See* William Fisher, *Oliver Wendell Holmes*, in THE CANON OF AMERICAN LEGAL THOUGHT 23 (David Kennedy & William W. Fisher III eds., 2006) (discussing the advances Holmes made in the discourse and debate about legal theory, such as by advocating that judges analyze the law through the perspective of social welfare as opposed to "fairness").

70. *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 824, 842-43 (1935) (criticizing questions posed by functionalists as meaningless and proffering realistic jurisprudence as a much more useful method of examining legal theory).

71. *See* KENNEDY, *supra* note 57, at 261 (discussing how the criticism of private law concepts as "illusory" or inoperative became an attack on the logic of the entire legal system).

72. *See* John Dewey, *Logical Method and Law*, 10 CORNELL L. Q. 17, 25 (1924) ("A large part of what has been asserted concerning the necessity of absolutely uniform and immutable antecedent rules of law is in effect an attempt to evade the really important issue of finding and employing rules of law, substantive and procedural, which will actually secure to the members of the community a reasonable measure of practical certainty of expectation in framing their courses of conduct.").

73. *See* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15-18 (1910) (illustrating "the distinction between legal theory and judicial administration" with reference to the *Lochner* case, employer liability, and the

unseat the mechanical or formalist jurisprudence. Gap studies also became popular in the 1960s by scholars of law and society.⁷⁴ They were a welcome accompaniment to the bold constitutional changes of the Warren court.⁷⁵

These critiques or positions within jurisprudence have their analogues in the civilian tradition. Indeed, it is an interesting question of intellectual history to note their often contemporaneous popularity on both sides of the Atlantic. Critics of formalism such as Rudolf von Jhering and François GénY can be seen to express similar ideas to legal realists and sociological jurists in the United States.⁷⁶ Other parallels include the French *juristes inquiets* critics of legal exegesis, of which GénY was one, the German Free Law movement, sociological functionalism, and critical social theory.⁷⁷

police practice of interrogating criminal suspects).

74. See generally David Kennedy, *Stewart Macaulay*, in THE CANON OF AMERICAN LEGAL THOUGHT, *supra* note 69, at 447, 454-456 (explaining the growth of the Law and Society movement and mentioning the emphasis on examining the gap between law and society, such as between contract law and actual commercial practice).

75. See David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 1, 8, 27-28 (1990) (introducing the law and society movement and the movement's link to politics and expansion of rights).

76. FRANÇOIS GÉNY, *METHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF: ESSAI CRITIQUE [METHODS OF INTERPRETATION AND SOURCES IN POSITIVE PRIVATE LAW: CRITICAL ESSAY]* (2d. ed. 1954); see also Duncan Kennedy & Marie-Claire Belleau, *François GénY aux Etats Unis [François GénY in the United States]*, in FRANÇOIS GÉNY, *MYTHES ET RÉALITÉS [MYTHS AND REALITIES]* 304-08 (Yvon Blais ed., 2000) (discussing GénY's influence on U.S. thinkers such as Holmes, Pound, Cardozo, and other critics of "Classical Legal Thought").

77. See Marie-Claire Belleau, *The "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth-Century France*, 1997 UTAH L. REV. 379, 386-24 (outlining the internal and external critiques of the *juristes inquiets* and their vision that law continually evolve to meet social needs); Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 128-131 (1984) (explaining critical social theory as a form of structuralism, which provides concrete theories on "cultural institutions"); James E. Herget & Stephen Wallace, *The German Free Law Movement as the Source of American Legal Realism*, 73 VA. L. REV. 399, 416-17 (1987) (summarizing the main tenets of the German Free Law movement as skepticism towards traditional methods of legal interpretation, a belief in the indeterminacy of law, acknowledgement of the "creative function" of the judge in rendering just decisions, and a belief that judges should consider non-legal sources and "the social consciousness of the community"); KENNEDY, *supra* note 4, at 66 (distinguishing sociological functionalism from the distributive approach in that

Some of these jurisprudential commonalities have already been well-described by comparative scholars, while others remain to be more fully explored.

Whether in Anglo-American legal jurisprudential terms or civilian ones, these positions are predominantly internal arguments within modern systems of law.⁷⁸ Historically, they can be traced to particular political contexts with real stakes.⁷⁹ Over time, they can also be seen to support particular positions in contests over legal decisions and institutional design. In this way, they are part of the repertoire of legal political argument, often deployed in favor or against particular positions on legal policy, positive law, legal institutions, and constitutional adjudication.

Each of these critiques may have been, at one time, potentially devastating attacks on the legitimacy of the existing legal system, but for the most part they are currently normalized features of liberal legal discourse. Moreover, in the development context, these critiques serve not for revolution but for much tamer policy change and distributional reallocation within the limits of liberal law. Internal critiques of liberalism, turned into diagnosis and reformist rhetoric, usher in reforms consisting of other versions of liberal law with different positive law rules, institutional design, and historic or cultural origins. As such, the source of these critiques can never be fully rectified or eliminated through the types of reforms proposed. They nonetheless constitute the basis for the general diagnosis of legal failure, which provides the rationale for policy change.

F. CRITIQUE OF FAILED LAW DIAGNOSIS

This general diagnosis of Latin American law thus consists of a series of proto-typical arguments of legal politics. For example, law is always susceptible to charges of needed updating. Conceptual

the former analyzes the function of legal institutions in resolving disputes, while the latter examines how legal institutions impact disputes). *See generally* Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 3 (1991).

78. *See supra* notes 57-77 and accompanying text.

79. *See generally* HORWITZ, *supra* note 57, at 3-7 (connecting various constitutional revolutions and shifts to political crises, such as the World War I move away from progressivism to realism, and the World War II trend towards conservatism among realists).

formalism is an inherent dimension of logical reasoning and its total elimination is impossible. What we find to be logically convincing may only be phenomenologically produced. In other words, there is no clear dividing line between determinacy and indeterminacy. Rather, convincing arguments are more clearly a product of shared experience varying from reference group to reference group. Additionally, the gap between law and action is axiomatically ever present. While there may be some rules more closely followed than others, a full society-wide measure is quite impossible, and fair comparisons are elusive. Both resources for law enforcement and the internalization of certain norms play a central role. Furthermore, the reasons for rule non-compliance may be so broad-ranging that such a measure, even were it possible, would be practically meaningless.

These internal critiques underlie the central diagnosis of law's ineffectiveness in Latin America. This repertoire of legal arguments, in effect, is projected as the external description of Latin American legal systems as a whole. As such, the charge of formalism is not simply directed at a line of conservative constitutional opinions, but rather it becomes a problem of the whole legal culture. The law in action is not simply a way of privatizing areas of commercial law, but rather it marks the irrelevance of the whole of state law. European transnationalism is not simply a mode of legal reasoning, but a mark of cultural inappropriateness of the social system that is law and its exclusivity to a racial and cultural minority in the region. In short, the architects of development transnationalism have projected these ordinarily legal-political moves as an operational diagnosis. This rendering supports proposals for law reform and institutional redesign. Projects are more easily advanced. Absent a functioning law, replacement or substitution appears not only desirable but also necessary.

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

already, the elements of this diagnosis cannot be reversed through simple law reform. They are constantly observable features of liberal legal systems. Moreover, these internal critiques passing as diagnosis, while insights of jurisprudence on the workings and assumptions of liberal legalism, are routine tactical moves within legal politics. They are available to advance endless proposals. Thus, as failings of the legal system to be rectified and fixed, success is never achievable. Their endogeneity to liberal law is what makes them continually available as justifications for new reforms.

III. CRITIQUES OF THE NEW INTERPRETATION

Many positive things may be said for interpretationism, as it supports a progressive political direction advanced by constitutional adjudication. It has enlisted a broad array of talented scholars participating in debates over law and legal theory. It has deepened the ranks of academic legal communities in many countries in Latin America. It may be contributing, at least partially, to the perceived need, on the part of law school administrators and political leaders, to expand Latin America's legal intelligentsia. The broader intellectual community to which interpretationists contribute fills an important function in the legitimation of law at a national level.

At the same time, the particular structure and conceptions mobilized by interpretationism may produce some negative and unintended effects. The discussion below considers some of these points. I should note that these critiques are not direct comments on any one individual's work. Instead, they describe aggregate features of interpretationist discourse and their potential effects.

A. OVERSIMPLIFYING LEGAL FORMALISM

The new interpretation typically pushes off against a charge of legal formalism. It is a principal rationale for considering and advocating alternative legal reasoning practices. This claim without more, at minimum, echoes the widespread diagnosis of Latin American legal failure. It depicts local legal operators as stuck in an earlier era of legal consciousness and thus, incapable of performing the functions expected of contemporary legal systems, such as

policy/principles balancing and contextual analysis.⁸⁰ This generic condemnation goes well beyond a legal realist critique of specific judicial decisions.⁸¹

It is useful to recall Duncan Kennedy's discussion in the U.S. context of the two different meanings generally ascribed to legal formalism:

In one usage, formalism is a "theory of law," though one invented by its adversaries rather than by any known [U.S.] proponents. Formalism in this sense is the theory that all questions of law can be resolved by deduction, that is, without resort to policy, except for questions arising under rules that explicitly require policy argument. . . . [Thus] [i]n [the] second sense, it charges an adversary either with making the mistake of thinking that a particular abstract legal norm can generate a particular subrule, or with a general tendency to overestimate the capacity of norms in general to generate subrules by deduction.⁸²

While the bulk of interpretationism does not consider conventional local practices directly, both senses appear to be generically invoked. Legal dogmatics—as the conventional formalism is commonly known—is automatically regarded as both wrong and unconvincing.⁸³ In this regard, there is significant agreement across the various national discussions about the nature of conventional legal thought in the region. It appears as an anachronistic sort of classical legal thought.⁸⁴ Critically missing are operative elements of contextual analysis, or anti-formalism, capable of making the law

80. See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 32, at 22-23. (The *langue/parole* distinction is very useful here. The claim of this essay is that the new interpretation is likely a *parole/parole* shift rather than a change of *langues*.)

81. See HORWITZ, *supra* note 57, at 193 (noting that realism was the outgrowth of attacks on classical legal thought and that realism had a long-lasting impact on legal thought).

82. KENNEDY, *supra* note 4, at 105-06.

83. See NINO, *supra* note 5, at 22 (dismissing legal dogmatics as ineffective at assessing legal materials or overcoming "indeterminacies").

84. See HORWITZ, *supra* note 57, at 4-5 (attacking classical legal thought as inadequate to address the inconsistencies between the common law and the "individualistic premises of a self-executing market economy" which had become part of the American social construct); KARST & ROSENN, *supra* note 61, at 58 (re-emphasizing that the gap between the written law and practiced law was partly due to factors such as idealism and formalism).

more responsive to local conditions and national policy goals.⁸⁵

Certainly, the outward aesthetics of conventional legal reasoning in Latin America can appear overly abstract, positivist, or theoretical.⁸⁶ Moreover, it is widely described as outwardly opaque and lacking in local context.⁸⁷ Its elements often consist of continental European citations, conceptualist hierarchies, and deductivist logic.⁸⁸ Still, as noted above, this mode serves as the mode of legal reasoning and meaning-making in legal communities across the region. Moreover, European-inflected legal dogmatics has not completely eluded transnational engagement with U.S. legal culture.⁸⁹ In the area of constitutional law, for example, U.S. legal sources, if often through the intermediation of European authors, have been particularly salient.⁹⁰ Admittedly, Anglo-American authorities have not historically constituted the primary language of legal reasoning or the main referents of legal discourse. Nonetheless, a defining element of law in Latin America is its permeability to European and U.S. sources.⁹¹

85. See Esquirol, *supra* note 63, at 104, 112-13.

86. On the aesthetics of law, see generally Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1050-51 (2002) (introducing “the forms, images, tropes, perceptions, and sensibilities” that shape the creation of American law, including grid, energy, perspectivist, and dissociative aesthetics).

87. 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, 529-31 (1971) (noting that jurists and scholars rarely debate the “economic, social, political, or administrative” aspects of legislation; rather, debates focus on which universal principles the law ought to incorporate).

88. Esquirol, *supra* note 63, at 59.

89. This engagement, however, may be rather one-sided. See, e.g., Garro, *supra* note 8, at 598 (lamenting Latin American law's exclusion from U.S. comparative law courses).

90. See Jacob Dolinger, *The Influence of American Constitutional Law on the Brazilian Legal System*, 38 AM. J. COMP. L. 803, 805 (1990) (giving several examples of U.S. influence on Brazilian public law, including one case in which a Brazilian Supreme Court Justice cited *Marbury v. Madison*); Jonathan Miller, *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and its Collapse in Argentina*, 21 HASTINGS INT'L & COMP. L. REV. 77, 99-100 (1997) (noting the strong influence of the U.S. Constitution on original Argentine constitutionalism, especially judicial review).

91. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 9, at 5 (pointing out, for example, that both the U.S. and Latin American legal traditions have their origin in European law). Indeed this view is pervasive throughout comparative scholarship. *But see generally* Esquirol, *supra* note 10, at 427 (critiquing comparativist, René David's, reading of Latin American law as European).

The new interpretation thus paints a very incomplete picture, if much of any picture at all, of dominant legal practices in Latin American countries. It under-theorizes the actual practices of national courts and their commentators. In their place, it substitutes a generic image of legal formalism, piggy-backing on the development diagnosis. However, this characterization understates the ways in which existing practices further specific interests over others and serve to distribute resources.⁹² It also discounts a present political and social context that impacts legal reasoning, thereby contributing to its construction.⁹³ Additionally, it underestimates the practical responsiveness of local legal reasoning to foreign legal developments and trends in light of its receptiveness to comparative law and foreign sources.

This argument is not a defense of any particular line of legal reasoning labeled formalist in any particular case in any particular legal community in Latin America. Rather, it suggests that the new interpretation's depiction of "formalism" is rather incomplete. Further, the quest for a countervailing anti-formalist decision-making, to the extent it signifies contextually aware and purposive action, may be somewhat misdirected.⁹⁴ It may undermine its very ability to stand for law.

B. SIDE-STEPPING LEGAL REALISM

In their opposition to formalism, interpretationists appear to make a legal realist critique. However, their interventions consist of both more and less than legal realism.⁹⁵ It is more in that interpretationists draw on the ambient image of Latin American legal failure. This reference extends beyond a critique of unconvincing legal analysis in a particular case, line of cases, or legal area. It is also more than the

92. See Esquirol, *supra* note 58, at 731-32 (concluding that the "U.S.-Latin American legal transnationalism is . . . privileged" and does not fully take into account all locally available legal and political options, frustrating local legal institutions).

93. See Esquirol, *supra* note 10, at 463-64 (noting that much comparative scholarship on Latin America has suppressed "societal particularity" and focused instead on the "European character" of the region's law).

94. Cf. Esquirol, *supra* note 63, at 107-08 (noting the reclamation of formalism as "authentic" by some progressive Latin American legal scholars in reaction to "the legacy of failed developmentalism" of earlier decades).

95. See generally KENNEDY, *supra* note 4.

sum of observations that law in any one area is out of step with social norms. Rather, it casts the whole of national legal culture, including legal reasoning, cases, and norms, as unconvincing to and disconnected from the societies that have generated them. This pervasive diagnosis of law in the region rests on a variety of internal critiques of liberal legalism turned into external evaluations of law in Latin America as a whole, as has been described already. This generalized view has not only been a principal catalyst for internationally assisted law reform, but it is also a common feature within national legal politics. In this context, the new interpretation is driven by this hyper-realist generalization of liberal legalism's failure in Latin America.

Thus, rather than developing a sustained legal realist analysis of specific cases or doctrinal arguments—whether of the positions of traditionalists or neo-constitutionalism—interpretationists appear more drawn to the well-accepted diagnosis of Latin American legal failure for their impetus, with formalism as one of its standard characteristics. Discussing the reception of interpretationism in Latin America, Diego Lopez Medina notes:

[O]ne could also realize that the jurisprudential discourse in Latin America tends on occasion to separate more clearly between jurists and non-jurists than what it separates between formalists and non-formalists. We will discover, then, a continuous effort on the part of sophisticated lawyers-jurists to undo the much more traditionalist positions of the professional lawyer, little concerned with the theoretical foundations of the law. When that happens, all sorts of jurisprudential positions (either formalist or anti-formalist) are situated to the left (to the critical side) of the standard legal theory.⁹⁶

Indeed, legal realism of this heightened, unrelenting kind is already well-entrenched within the perception of Latin Americans and in the eyes of transnational observers, especially on the shortcomings of liberal law. Its prominence can be seen as underwriting a large part of the generalized image of law's failure in the region. It simply restates and confirms these common views.

At the same time, however, the new interpretation is also less than legal realist critique. It puts a great amount of faith in transnational

96. MEDINA, *supra* note 12, at 83-84.

reconstructive proposals for liberal law. It ignores the equally formalist character of these new interpretive theories, at least in the eyes of their critics.⁹⁷ As such, the new interpretation is not a realist intervention. It is propelled by both a hyper-realist view of Latin American legal practices and a faith in liberal law elsewhere. In this arena of legal politics, the reference to formalism for interpretationists appears synonymous with conventional Latin American legal reasoning practices. It substitutes for specific critiques of legal reasoning in particular cases or areas. It also sidesteps the work of showing the unconvincingness of particular legal practices. Rather, it rests on the generalized negative perception of law in Latin America as the justification for new methods. Anti-formalism signifies alternative, presumably operationally effective forms of transnationally recognized methods of legal interpretation.

C. IDEALIZING TRANSNATIONAL THEORIES

At the other end of the equation, new interpretationists propose a range of transnational methods and theories, presumably more responsive to local realities, while still resistant to judicial manipulation. The alternative theories called upon typically focus on common law judges, fundamental rights, constitutional decisions, and reasoned judicial opinions.⁹⁸ Anglo-American sources and others influenced by legal realism are attractive to Latin American “interpretationists.” While the former are generally reconstructivist proposals in their home contexts, they nonetheless generally incorporate and attempt to respond to a critique of classical legal formalism. They eschew simple deduction, while at the same time rebutting legal realism. Moreover, they generally are committed to professing liberal legalism’s success, while ignoring or defending

97. See KENNEDY, *supra* note 4, at 294 (arguing that “the apologetic motive or intent has inflected Liberal representations of legal institutions and regimes, falsifying or distorting the analyses” through their “denial of the ideological in adjudication and of the contradictory nature of the legal regimes produced by judicial law making” and suggesting that “the best we can or should hope for is [a] chastened theory”).

98. Compare DWORKIN, *supra* note 22, at 1-6 (stressing the importance of looking at common law judges and their decisions as mechanisms for “social revolution”), with ALEXY, *supra* note 25, at 6-7 (downplaying individual judge’s decisions and emphasizing that a series of “value-judgments” is necessary to establish normative policy).

against significant variation from the ideal. The bulk of new interpretation thus draws on reconstructive proposals for liberal law. More virulent critiques of these same reconstructive proposals are generally eclipsed, perhaps as too destructive of the possibilities for interpretive discourse, whose legitimization of actual legal and judicial practices is the main objective.

Thus, beyond rejecting legal formalism, interpretationists propose alternatives. They tend to over-idealize possible solutions to the inherent contradictions of liberal law, such as subjectivity and objectivity, politics and neutrality, indeterminacy and necessity.⁹⁹ The new interpretation draws heavily on authors from the global North claiming to have surmounted these difficulties. Yet the structural aspiration within liberal law to objectivity, neutrality, and apolitical-ness are both endemic and insoluble. In practice, they are alleviated only through a combination of tentative proposals, wishful thinking, political legitimation, and ideological belief sustained by specific legal communities to varying degrees.

This quick snapshot does not require, nor would it be possible, to prove in detail that any transnational interpretation theory fails to satisfy its own claims. There are those who would argue that, indeed, interpretation discourse only produces levels of convincingness for some people at some times.¹⁰⁰ Nor is it necessary here to determine whether any transnational interpretative theory is faithfully applied in the global North. For my purposes, it suffices to note that while no individual theory of interpretation is universally convincing, this field of discourse generally sustains the notion that legal interpretation is in fact an achievable enterprise in keeping with the claims of liberal law. In this regard, it may be said that theorizing about legal interpretation serves an important function in modern systems of law: it can be used to present local legal reasoning practices as a distinct, apolitical, objective, and neutral mode of decision-making. A fuller discussion of the function of legal interpretation discourse within the political economy of modern legal systems is beyond the scope of this Essay. My purpose here is

99. See UNGER, *supra* note 27, at 203-205, 230 (suggesting that these contradictions and oppositions are “fundamental qualities of the self,” and “indeterminacy, consciousness, practicality, and objectivity” are intertwined).

100. See generally KENNEDY, *supra* note 4, at 264-96 (tracing various interpretations of the role of adjudication in applying social theory).

accomplished, though, by simply noting the legitimating role this dimension of law can usefully play.

As such, interpretationist discourse, to the extent it principally draws on these texts, heavily relies on the legal ideology of the communities where they are produced.¹⁰¹ Absent a similar context of legitimation, local implementation of such theories does not guarantee any significant discursive or operational effect. Quite likely, the new interpretation will run the same negative fate as perceived of law generally in the region. It will look equally deficient in application under the withering gaze habitually cast on law in Latin America.

Indeed, critiques of legal formalism could surface against the new interpretation. The development objection to conventional Latin American practice condemns the prominence of foreign legal sources and the resulting gap vis-à-vis local societies. Their outward foreignness buttresses the critique of a legal formalism disconnected from social reality. This perceived problem might be no more remedied through the “new interpretation.” To maintain the appearance of legitimacy and law-like nature, it is not unlikely that interpretationists may turn to ever more disconnected presentations of transnational theory and methods. Similar to the role played by European legal sources, the purpose would be to present legal authority separate and distinct from local politics. This mode of legitimizing new practices would invite other rounds of critique, asserting the new interpretation’s own legal formalism and inappropriately transplanted nature.

The new interpretation already shares many of the same characteristics of traditional legal doctrine in the region, albeit with

101. See STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 1 (1980); BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 86-87 (2004) (determining that rule of law “does not produce a single right answer,” and this indeterminacy theory allows judges to make decisions based on information other than legal principles); William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 632-33 (2001) (debating how legislation can be interpreted both narrowly and broadly, and legal theory requires interpretation from these types of “extrinsic sources”); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 518 (1986) (assessing conflicts of law and the proper outcomes in cases as the types of questions legal reasoning must answer).

different sources. Whereas continental European authorities were the primary materials before now, it is rather more adjudication-focused Anglo-American jurists that are prominent. Not unlike European transnationalism, though, it is not uncommon for a Latin American scholar to become identified with a particularly well-known theorist and become his/her local champion within local debates. There is room for any number of misreadings and localized renditions of the foreign scholar.¹⁰² Local exponents of foreign authors may indeed advance, reject, or re-combine different legal and theoretical proposals. In this way, the new interpretation fits within the mold of European transnationalism, although with more Anglo-American sources.

D. LOSING LEGAL CAPITAL

Generally, legal and institutional reform under the umbrella of development transnationalism undermines a significant amount of existing legal capital, or *acquis légaux*.¹⁰³ Worthwhile legal policies and institutional forms may be easily, if not automatically, rejected through this formula. A wholesale switch to different processes with different discursive landmarks and constraints adds significant costs. However, without a clear definition of the policy changes and distributional consequences sought, a different legal institutional model may not fare any better. Indeed, as a result of the limitations of liberal law, the same failures will likely re-appear. It is not possible here to discuss the array of legal capital existing within legal systems in Latin America. Briefly, though, they consist in part of the accumulated social investment in law and legal institutions over time, such as training the legal profession in certain modes of procedure and discourses of argumentation. Additionally, they also can include particular political positions or policy combinations enshrined in law that, as a result of the development formula for reform, are never openly considered as real alternatives.

102. See Duncan Kennedy, *Prólogo [Preface]* to MEDINA, *supra* note 12, at xi, xiii (discussing the author's novel explanation of the canons of legal reasoning theory in its multiple interpretations within the local context of readers that choose to read and interpret the texts with their own "creative" needs in mind).

103. See Esquirol, *supra* note 26, at 77 (explaining that the failure of legal reform occurs because these reforms "purport to redress . . . a combination of features endogenous to all systems of law, problems projected on the region as a whole, and assessments contingent on political and organizational preferences").

It may be that an existing policy mix, set in law in any one case, can be counter-productive to economic development, but then again its development-oriented reform may simply be more beneficial to those effectively mobilizing a “development” argument. For example, the position to reduce pro-labor legislation in Latin American countries draws heavily on the characterization of general legal failure in the labor regime. Specifically cited are the lack of enforcement, limited coverage, and cooptation of unions by government, or in other words, lawlessness, the gap between law on the books and law in action, and official corruption. Discrediting national law assists in making the case for reforms. More concretely, however, real questions of policy are in play over job security, workers’ rights, medical benefits, and the like. The sum of such reforms will shape the national political economy. Much of this discussion and debate, however, is waged only indirectly. It is obscured by the logic of development. Rather than confront the stakes more directly, attention is directed to rectify purportedly broken legal systems when policy changes and distributional re-allocations are the real issues at stake.

Another example is the mix of defendants’ rights and state enforcement powers in the areas of criminal procedure. The detailed question of specific rights at different stages of the proceedings and the appropriate mix in particular countries take a back seat to the juggernaut of transforming procedure from the traditional inquisitorial to the development adversarial. This example particularly highlights the impact of the widely reviled “inquisitorial” model linked to Latin America, branded the cause of evils ranging from human rights abuses to non-enforcement, impunity, secrecy, corruption, and undemocratic behavior. However, the mere substitution of adversarial for inquisitorial obscures the policy questions that re-calibrating criminal procedure entails. More orality of instruction and shifting discretion from the judge to the public prosecutor will not eliminate the intrinsic tensions between political independence and official accountability, defendant rights versus state enforcement powers, and positive law and social behavior.

In the context of interpretationism, the legal capital at risk is the status of law and legal reasoning. Despite the accumulated charges of failure and formalism, the legal dogmatics of the region retains its law-like quality, at least as compared to proposals framed as anti-

formalism commonly championed by interpretationists. Indeed, the danger of anti-formalism is that it could cease to be recognized as law.¹⁰⁴ Approached as merely a technical enterprise, the new interpretation would solely introduce new variables or techniques. However, with no clear set of constraints on such new variables, its skeptics assert that legal reasoning could simply become pure discretion.¹⁰⁵ Dressed up as principles or policies, for example, legal decision-makers could make the law say whatever they decided. The trick is to invest the principles or policies with enough meaning, or limitation of meaning, to provide some constraint against just any outcome. It is not clear that the adoption of any one proposal for greater pragmatism or context could withstand charges of instrumentalism. No single anti-formal device can defend against such critiques unless it stands side-by-side with a normalizing discourse, produced by a critical mass of faithful supporters insisting on its legitimacy and practicability.

As a result, the all-purpose diagnosis of Latin American failure can be turned against new constitutional and other legal constructions by opponents claiming these too are instances of a failed law, if not for their excessive formalism then for their unconstrained arbitrariness. The stage is set for subsequent rounds of challenges and critiques in this same way, available to political antagonists who can automatically and without much specificity claim the misapplication and manipulation of these new methods. Any such deformation is especially easy to link to their Latin American application, intoning the well-consolidated diagnosis of law's failure in these countries. At the same time, this picture downplays the general shortcomings of interpretation everywhere and the accompanying body of ideological legitimation that

104. The first phase of law and development has been generally described as shipwrecking on this very point. See James Gardiner, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1981); see also Miller, *supra* note 90, at 94-95, 155 (describing the de-legitimizing impact on the Argentine Supreme Court of interpretive methods based on mere "charismatic" assertions).

105. See Ronaldo Porto Macedo, Jr., *Interpretation of Good Faith in Brazilian Contracts: The Legal Principles in a Relational Approach* (2010) (presented at the XVIIIth International Congress of the International Academy for Comparative Law, Washington, D.C., July 2010) (on file with American University International Law Review).

successful practices require. Indeed, supporting the current wave of neo-constitutionalism has meant suppressing the knowledge that the right methods, to the extent that the instrumental belief guides participants in legal interpretation debates, are not a technical but a political question. Moreover, it has meant adopting the framework of Latin American legal failure as a convenient springboard for supporting substantive legal changes.

E. DEEPENING LEGAL FAILURE

The new interpretation may simply reinforce the background paradigm of failure and undermine the normalization of legal governance that most of its exponents desire. The field outwardly rests on the assumption that the right mix of interpretive methods can exist, and it is projected as operating effectively in the global North. However, this framing misperceives an important facet of interpretation discourse, either unconsciously or instrumentally. This dimension of law is not simply about achieving any particular interpretive technique. Rather it is a broad commitment to the deployment of interpretive discourse to legitimate judicial lawmaking and legal reasoning. It operates through the instrumental fiction of correct methods of interpretation and correct applications of method, consisting in debate, ultimate adoption, and subsequent revision of the correct meaning. However, retaining the optic of hyper-realist critique trained onto Latin America, a feature of the legal failure diagnosis, any interpretation locally is subject not only to critiques of incorrectness in method and application but also to constant charges of deformation and manipulation. It turns out to be a quite precarious mode of defending outcomes based on legal reasoning, *assuming that is one's purpose of course*.

In this light, the new interpretation can be seen as premised on a skewed representation of conventional Latin American practice, as well as transnational theories of interpretation. The transnational theories enjoy a wide degree of legitimacy from their home ideological contexts and as prestigious transnational theory.¹⁰⁶ The Latin American practice is continually discredited as a legal failure. As such, this framework sustains an image of a successful reconstructive practice of liberal law in the global North contrasted

106. Flores, *supra* note 2.

against its continually failed version in Latin America. It draws from and simultaneously reinforces the paradigm of the West's success and Latin America's failure.

The continual re-instantiation and normalization of this image undermines the credibility of national systems in Latin America. Additionally, the non-recognition of the various ways in which existing modes of legal reasoning already incorporate some of the elements purportedly found missing relegates Latin American interpretive practices to perpetual discredit. It also appears to disassociate public and academic discourse from the function of legitimation of much actual legal practice in Latin America.¹⁰⁷ Transnational alternatives become overly idealized as actually capable of producing uncontroversial operational results. Thus, while theories of legal interpretation are defended as appropriate decision-making, the practice of legal interpretation in Latin America may be serially de-legitimized.

Troublingly, as a significant dynamic for legal change, the failure trope seriously debilitates and undermines law as a social system. Pursuing reform in this way is counter-productive. First, it undermines the legal system unduly by continually denigrating it systematically for the mere purpose of ushering in legal reform. These reforms are equally liberal legal forms subject to the same failings previously diagnosed. Second, it occludes potential alternatives and values in pre-reform law not openly evaluated, as well as other options different than interpretationist discourse practiced in the current way. In short, reconstructive interventions in liberal law, as practiced in the global North, cannot redress the shortcomings of law perceived in Latin America. Rather than merely rebutting legal realism, interpretationists must re-construct against a crushing background of systemic legal failure. This idea goes well beyond proposals for more neutral principles analysis, policy balancing, or legal process. Instead, it requires confronting the

107. For scholarship drawing attention to actual local practices of interpretation, see generally Jorge González Jácome, *El Problema de las Fuentes del Derecho: Una Perspectiva desde la Argumentación Jurídica* [The Problem of the Sources of Law: A Legal Reasoning Perspective], 112 VNIVERSITAS 265 (2006) (Colom.) (discussing how Colombian judges choose legal modes to legitimate their rulings based on the legal environment, rather than basing their decisions on one doctrine or source of law).

diagnosis of failure, making fair comparisons, and having realistic expectations of liberal law and legal systems.

CONCLUSION

The limitations of legal interpretation are too difficult to deny in Latin America. Some may see this as proof of the reality of liberal law's failure in the region. Yet, perhaps it is also due to the lack of a sufficiently vast and disciplining liberal legal ideology exerting dominance. The new interpretation appears as a positive development. It has invigorated the scholarly community and the public to engage questions of legal governance. It incorporates new sources within the traditional scheme of continental European authorities. It also focuses on new questions, principally operational methods and approaches.

However, the new interpretation may also be unwittingly reproducing a narrative of perpetual Latin American legal failure. It is premised on the common diagnosis of failed Latin American legal practices and, by contrast, successful first world transplants and best practices as models for reform. This construct significantly misrepresents actual practice both in Latin America and elsewhere. As a result, all models can fail in the region. Indeed, the new interpretation sustains a hyper-realist critique of Latin American legal practices, further undermining legality at home while only reinforcing its reconstructive possibilities elsewhere.

One could imaginably evaluate the pros and cons of this new discursive framework as currently practiced. One could weigh, for example, the benefits it offers progressive constitutionalism versus its general erosion of Latin American legality. Of course, this measurement is not really possible. Outcomes are too hard to predict, we would likely get it wrong, and other problems of the sort. However, considering this is not the only possible framework for debating reform in Latin America, the particular down sides noted here may not be a necessary part of the mix.

It may be possible to dislodge legal interpretation discourse from its framing within the narrative of Latin American legal failure. For example, infusing discussions with more transparently critical versions of legal theory could serve to de-mystify the operation of interpretive debates in the global North. This would possibly

transform the current paradigm in Latin America, which could potentially take very different tracks. Faith in liberal legalism everywhere could wane, and participants in legal interpretation debates in Latin America could lose interest in these topics. Or, possibly, the relative faithlessness everywhere would generate a more horizontal perspective of different national versions of legal liberalism and maintain the utility of the discourse itself, emphasizing the nuances of local practices. On all of these fronts, however, much further work remains.