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## Anglo-American Jurisprudence and Latin America

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# Anglo-American Jurisprudence and Latin America

John Linarelli

## Abstract

This Article attempts to describe certain characteristics of Latin American legal culture that have jurisprudential implications and to inquire into certain themes of jurisprudence in the context of these cultural characteristics. A syncretic approach to jurisprudence may allow Latin American countries to formulate ideas about, and potential solutions to, widely recognized fundamental problems in their legal systems. Section I of this Article examines four conflicts between law and society in Latin America: 1) the conflict between the customary law of the informal sector and formal law, 2) the conflict between the bureaucratic ideal of the civil law judge and the heterogeneous, evolving social realities in Latin America, 3) the widespread evasion of formal law in Latin America, often to accomplish socially and economically desirable transactions, and 4) the de facto legitimacy of non-constitutional governments and the laws they enact as a longstanding tradition in Latin America. Section II of this Article uses these conflicts as a basis for making fundamental inquiries into the nature of law in Latin America. Section II also compares certain dominant themes in the jurisprudence of the United States with Latin American jurisprudence and identifies the fundamental distinction between the two legal cultures: the idealist, philosophical approach of Latin America as opposed to the pragmatic, anti-philosophical approach of the United States. Section II further posits that while Latin American thinkers may be uncomfortable with explicit recognition of North American realist thought and other North American schools of jurisprudence, certain parallels are apparent and borrowings may be productive. Section III provides concluding observations.

# ANGLO-AMERICAN JURISPRUDENCE AND LATIN AMERICA

*John Linarelli\**

There is a clear lack of perception, within the Judiciary or within society, that the administration of justice is a service *performed for* the citizenry, rather than something *done to* the citizenry.<sup>1</sup>

## INTRODUCTION

From the 1930s until very recently, Latin American countries adhered to statist policies designed to achieve development<sup>2</sup> through government intervention, protectionism, and regulation.<sup>3</sup> Starting with Chile in the 1970s, Latin American countries sought to reverse these policies in favor of market-oriented economics, free trade, competition, and deregulation.<sup>4</sup> They have adopted contemporary ideas on the economics of development.<sup>5</sup> Latin American countries embraced democracy

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1. International Bank for Reconstruction and Development ("World Bank") Project Implementation Document, Peru-Administration of Justice Project 1 (June 12, 1995).

2. The term "development" is elusive. In this paper, the term refers broadly to the economic, social, and political development of a country. In developing countries, the goal of development would plausibly be poverty alleviation. See generally WORLD BANK, POVERTY REDUCTION HANDBOOK 1 (1993). With such a goal, the primary emphasis would seem to be on economic development. Economic development, however, has social and political ramifications. See Paul H. Brietzke, *Insurgents in the "New" International Law*, 13 WIS. INT'L L.J. 1, 4 n.5 (1995) (attempting to define economic development). Moreover, development may be characterized in the human rights context as involving the promotion of economic and social rights, or as a soft "right to development". See Roland Rich, *The Right to Development as an Emerging Human Right*, 23 VA. J. INT'L L. 287 (1983) (analyzing various potential sources for human right to development); Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 CAL. W. INT'L L.J. 473 (1985) (discussing human right to development).

3. SEBASTIAN EDWARDS, *CRISIS AND REFORM IN LATIN AMERICA: FROM DESPAIR TO HOPE* vii (1995).

4. *Id.*

5. See generally James H. Weaver & Kevin M. O'Keefe, *Whither Development Economics?* 11 SAIS REV. 113 (1991) (discussing theories in development economics).

contemporaneously with these sweeping economic reforms.<sup>6</sup> All of the Latin American countries except Cuba have elected national governments.<sup>7</sup> As these changes have occurred, Latin American countries have had to rethink the role of the state.<sup>8</sup>

The governments of Latin American countries, for the most part, have been characterized by strong, intrusive executive branches.<sup>9</sup> Yet they have been weak in providing what the World Bank calls "good governance," particularly in the area of law.<sup>10</sup> They have suffered from extremely weak and sometimes nonexistent legislatures. From the very beginning of the law and development movement, Latin American judiciaries and legal systems generally have been the subjects of a great deal of scholarship as well as aid. The United States<sup>11</sup> has had a particularly strong interest in the region. Despite the widespread criticism of Latin American judiciaries, they have performed relatively well, even in the face of many disadvantages and sometimes in the face of physical danger.<sup>12</sup>

Latin American countries have no shortage of elegantly drafted codes, constitutions, and legislation. Indeed, some have said that the Civil Code of Chile, prepared by Andrés Bello, reads like literature.<sup>13</sup> The tradition of such laws is longstanding

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6. See Robert G. Vaughn, *Proposals for Judicial Reform In Chile*, 16 *FORDHAM INT'L L.J.* 577, 578 (1993) (stating that in Latin America, "[t]he fall of military governments as well as the rejection of planned economies has created a number of democratic, market-oriented economies . . .").

7. The transition to democracy, however, is "far from complete." Irwin P. Stotzky & Carlos S. Nino, *The Difficulties of the Transition Process*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* 3 (Irwin P. Stotzky, ed. 1993) [hereinafter *TRANSITION TO DEMOCRACY*].

8. Shahid Javed Burki, *Economic Development and Judicial Reform*, in *JUDICIAL REFORM IN LATIN AMERICA AND THE CARIBBEAN: PROCEEDINGS OF A WORLD BANK CONFERENCE* 11 (Malcolm Rowat et al. eds., 1995) [hereinafter *WORLD BANK PROCEEDINGS*].

9. See Carlos S. Nino, *The Debate Over Constitutional Reform in Latin America*, 16 *FORDHAM INT'L L.J.* 635, 641-43 (1993) (discussing "hyper-presidentialism" in Latin America).

10. Burki, *supra* note 8 at 11.

11. In this Article I have attempted to avoid using the term "American" or "America" to refer to "United States" because the first two words may be construed as referring to the entire Western Hemisphere. See PAUL B. STEPHAN III ET AL., *INTERNATIONAL BUSINESS AND ECONOMICS: LAW AND POLICY* vii (1993) (providing guidance on this approach).

12. Keith S. Rosenn, *Judicial Review in Latin America*, 35 *OHIO ST. L.J.* 785, 809-10 (1974) [hereinafter *Judicial Review in Latin America*].

13. Professor Roberto G. MacLean, Comparative Law Latin America course at Georgetown University Law Center, Fall 1994.

in Latin America. A dominant theme in the examination of Latin American legal systems has been that law in Latin America, in many respects, has failed to reflect the heterogeneous social realities of its people, is ignored or evaded by many segments of the population, and is unjust in its application by courts. This dysfunction between law and society has become even more grave as the citizens of Latin American countries feel the pressures of urban migration, population growth, and economic debilitation from the 1980's debt crisis. The lessons that can be derived from Latin America are evident. Particularly, countries in transition from socialism, in Central and Eastern Europe and elsewhere, should heed these lessons as they either build or re-constitute their legal systems to function in the context of globally integrated market-oriented economic systems.

This Article attempts to describe certain characteristics of Latin American legal culture that have jurisprudential implications<sup>14</sup> and to inquire into certain themes of jurisprudence in the context of these cultural characteristics. A syncretic approach to jurisprudence may allow Latin American countries to formulate ideas about, and potential solutions to, widely recognized fundamental problems in their legal systems.<sup>15</sup>

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14. One must be careful to avoid confusion between the English word "jurisprudence" and the Spanish word "jurisprudencia." The English word means the study of the philosophy of law. The Spanish word is frequently used as the Latin American equivalent of case law or precedent. Latin Americans typically refer to what Anglo-Americans call jurisprudence as simply philosophy of law. Even a well-known Spanish-English English-Spanish Dictionary confuses the terms by providing both meanings in the definition of each word. See WEST'S SPANISH-ENGLISH ENGLISH-SPANISH DICTIONARY 196, 565 (1992).

15. Before continuing, a few caveats. In this Article, I have strived to avoid an approach that would risk the label "legal imperialist." See Francis G. Snyder, *The Failure of "Law and Development,"* 1982 WIS. L. REV. 373, 373 (1982). Professor Snyder describes the law and development movement of the 1960's and 1970's as follows:

The movement embodied the ethnocentric, ahistorical assumption that the "modernization" of underdeveloped countries would approximate the pattern of American capitalist development, in which specific, usually idealized forms of law were tacitly presumed to be central. Consequently, it encouraged underdeveloped countries to adopt ideas about law and to establish legal institutions and systems of legal education similar to those in the United States.

*Id.*; see generally Richard Stith, *Can Practice Do Without Theory: Differing Answers in Western Legal Education,* 4 IND. INT'L & COMP. L. REV. 1, 1 (1993). I am a common law lawyer with the sense of my legal culture imbued in me by my life experiences in litigation and corporate transactions in the United States. No doubt those who disagree with me will label me an imperialist nonetheless. I have strived to make this Article descriptive and not prescriptive, although it is difficult to draw bright lines and an Article of this nature

Section I of this Article examines four conflicts between law and society in Latin America: 1) the conflict between the customary law of the informal sector and formal law, 2) the conflict between the bureaucratic ideal of the civil law judge and the heterogeneous, evolving social realities in Latin America, 3) the widespread evasion of formal law in Latin America, often to accomplish socially and economically desirable transactions, and 4) the *de facto* legitimacy of non-constitutional governments and the laws they enact as a longstanding tradition in Latin America. Section II of this Article uses these conflicts as a base to make

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cannot be purely descriptive. Professor John Henry Merryman, in his work on the decline of the law and development movement, suggested that the future of the movement might be in scholarship focused on inquiry and theory rather than action. John H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 481 (1977) [hereinafter *Comparative Law and Social Change*]. Although the law and development movement has been discredited in the academy, it is alive and well in practice. The United States Agency for International Development ("USAID") funds numerous "rule of law" projects, most notably in Central and Eastern Europe and in the former Soviet bloc countries. The World Bank, moreover, is significantly involved in judicial reform. Indeed, the second volume of essays by the General Counsel of the World Bank, Ibrahim Shihata, contains a section on judicial reform and the role of the World Bank. In this Article, I attempt to follow Merryman's suggestion by, *inter alia*, examining how Latin American legal systems actually function, and identifying why Latin American courts and law do not reflect social reality. See Howard J. Wiarda, *Law and Political Development in Latin America: Toward a Framework for Analysis*, 19 AM. J. COMP. L. 434, 461-62 (1971). Wiarda stated:

It would seem . . . that as scholars concerned with the process of Latin American development — including the place of law and legal institutions in that process — we should be concerned not so much with devising schemes to close . . . supposed 'gaps' [between the niceties of legal-constitutional structures and the harsh realities of political life] or with providing prescriptive remedies for the real or imagined 'ills' of the Latin American nations that are usually based on some Western European or Anglo-American conception of the way the development process *ought* to proceed. Instead, we must recognize and come to grips with the dilemmas of Latin American underdevelopment realistically, on its own terms and in its own context.

*Id.* Professor Wiarda, however, bases these conclusions on the premise that Latin American legal systems are capable of promoting development through "ingenious patchwork solutions" and that "a little 'grease' here or a little cement there" may be sufficient. *Id.* at 462. This Article, in contrast, identifies some basic ideas in jurisprudence, the foundation for a legal system, that may be of guidance to Latin American lawyers and legal scholars. I do not believe that "telling it like it is" is legal imperialism, even though it does reflect a core idea in Anglo-American realist, and possibly pragmatist, jurisprudence. It would seem obvious that law reform efforts, as well as law and development scholarship, should focus on "what the *community* is already doing." See Jack A. Hiller, *Lawyers, Alternative Lawyers, and Alternatives to Lawyers: Of Thomas Hobbes and Rumpelstiltskin*, 1985 THIRD WORLD LEGAL STUD. 1, 15 (1985) (making analogy to public health policy).

fundamental inquiries into the nature of law in Latin America. Section II also compares certain dominant themes in the jurisprudence of the United States with Latin American jurisprudence and identifies the fundamental distinction between the two legal cultures; the idealist, philosophical approach of Latin America as opposed to the pragmatic, anti-philosophical approach of the United States. Section II further posits that while Latin American thinkers may be uncomfortable with explicit recognition of North American realist thought and other North American schools of jurisprudence, certain parallels are apparent and borrowings may be productive. Section III provides concluding observations.<sup>16</sup>

### I. *THE CONFLICT BETWEEN LAW AND SOCIETY IN LATIN AMERICA*

Professor John Henry Merryman, in his basic work on the civil law tradition, explains that civil law scholars agree:

[T]hat the purity of legal science — its rejection of everything considered nonlegal — has had the effect of separating law from the life of society whose problems should be its basic concern. This social, economic, and political antagonism has cut the law off from the rest of the culture, and has made lawyers less and less relevant to social needs.<sup>17</sup>

Merryman explains that this and other criticisms “have special force and relevance in developing nations within the civil law world, particularly in Latin America.”<sup>18</sup> Merryman continues:

There [Latin America] the argument can be most persuasively made that the legal process is lagging behind the rest of the culture, sometimes inadequate as a vehicle for economic and social change that should be put into legal form, sometimes inherently opposed to such change, and with increasing

16. This Article has some obvious inherent limitations. The study of Latin American law requires significant long-term experience in Latin America. See H.H.A. Cooper & Dale B. Furnish, *Latin America: A Challenge to the Common Lawyer*, 21 J. LEGAL ED. 435, 437 (1969) (stating, “[n]o one, even someone enjoying perfect fluency in Spanish and no problems in locating the sources of the law, could come down for four to six months and produce a sound study of any topic in Peruvian law.”).

17. JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 147-48 (1985) [hereinafter *CIVIL LAW TRADITION*].

18. *Id.* at 148.

frequency irrelevant to it.<sup>19</sup>

Latin American and North American lawyers, scholars, and public policy figures have often advanced these propositions about Latin American legal systems. The momentum for fundamental change, however, has been insufficient, particularly when the major funding organizations, such as the World Bank and the United States Agency for International Development ("USAID"), do not focus financing on issues of such basic significance. This section analyzes four areas in which there has been a recognition of the conflict between law and social reality in Latin America and their adverse effects on development.

It is difficult to generalize about law in the many countries that comprise Latin America. There are common features, however, that manifest themselves in many Latin American countries. These features are systemic in nature and do not concern the intricacies of rule comparisons. Moreover, the similar characteristics do not concern issues of administration of justice, such as the problems of judicial delay, court inefficiency, and lack of infrastructure endemic in many of the judicial systems of the Latin American countries. Rather, the characteristics analyzed below focus on the legal culture of Latin America generally.

#### A. *The Informal Sector and Its Description: Formal Versus Informal Law*

There has been a great deal of study of the informal sector<sup>20</sup> in Latin American countries. A significant amount of the research focuses on the economic aspects of the informal sector. The research also raises the fundamental questions of what constitutes "law" and whether the formally sanctioned law of a coun-

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19. *Id.*

20. Professor Jane Kaufman Winn has collected various definitions of the "informal economy" and stated:

The informal economy is also known as "black, cash, clandestine, irregular, parallel, subterranean, secret, shadow, submerged . . . . The informal economy is also described as "underground" or "secondary" in social science literature . . . . [Two social scientists] define the informal economy by one central feature: "It is unregulated by the institutions of society, in a legal and social environment in which similar activities are regulated."

Jane Kaufman Winn, *How to Make Poor Countries Rich and How to Enrich Our Poor*, 77 IOWA L. REV. 899, 900 n. 5 (1992) (citations omitted) [hereinafter *Poor Countries Rich*].



try is a positive force for development.<sup>21</sup>

In an early study of the barrios<sup>22</sup> in Caracas, Venezuela, one Venezuelan lawyer described the barrios as a "jungle."<sup>23</sup> Examinations of what really happens in the informal communities in Latin America have revealed that this is clearly an inaccurate description.

Hernando de Soto, a Peruvian economist performed a prominent and controversial examination of the informal sector. In his book *The Other Path*,<sup>24</sup> de Soto detailed the social realities of the informals in Lima, Peru. De Soto discovered norms as they actually applied in society. De Soto found an extensive "system of extralegal norms" governing property acquisition, trade, transportation systems, dispute resolution, and community governance.<sup>25</sup> He explained these extralegal norms as follows:

Consisting essentially of informal customary law and of rules borrowed from the official legal system when they are of use to informals, the system of extralegal norms is called on to govern life in the informal settlements when the law is absent or deficient. It is the "law" that has been created by informals to regulate and order their lives and transactions and, as such, is socially relevant.<sup>26</sup>

As the above quotation explains, the informal law that de Soto describes can in some cases borrow features from the formal legal system in Peru. For example, the formal legal system may promulgate a statute or decree that provides a measure of formal legal recognition of informal trading in the form of excise taxes. Payment of these excise taxes allows street vendors to trade on streets and sidewalks, but does not convey any property

21. See Elliot M. Burg, *Law and Development: A Review of the Literature & a Critique of "Scholars in Self Estrangement,"* 25 AM. J. COMP. L. 492, 500-01 (1977) (providing various definitions of "law").

22. Barrios is defined as the "poor quarter" or "slums". POCKET SPANISH DICTIONARY 54 (Langenscheidt Editorial Staff ed., 1985).

23. KENNETH L. KARST & KEITH S. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA 586 (1975); KENNETH L. KARST ET AL., THE EVOLUTION OF LAW IN THE BARRIOS OF CARACAS 3 (1973) [hereinafter EVOLUTION OF LAW]; Kenneth L. Karst, *Rights in Land and Housing in an Informal Legal System: The Barrios of Caracas*, 19 AM. J. COMP. L. 550, 558 (1971) [hereinafter *Rights in Land and Housing*].

24. HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD xix (1989). The Instituto de Libertad y Democracia (ILD), located in Lima, Peru, conducted the research for the book. De Soto was the director of the ILD.

25. *Id.* at 13-14, 19.

26. *Id.* at 19.

rights in the areas occupied. Levying these taxes provides additional security to certain "special rights of ownership" that are recognized in the informal legal system as being held by a vendor occupying a certain location.<sup>27</sup>

For the informals in de Soto's study, the formal legal system is oppressive and serves only elite interests. As Mario Vargas Llosa stated, "[w]hen legality is a privilege available only to those with political and economic power, those excluded — the poor — have no alternative but illegality."<sup>28</sup> One notable exercise undertaken by de Soto was the establishment of a fictitious company in Peru, which took 289 days, required the payment of two bribes (although ten were solicited), and cost US\$1231 in expenses and lost wages to incorporate.<sup>29</sup> In such a situation, a person of limited means in a developing country such as Peru would have no choice but to conduct business outside of the formal legal sector, as a matter of survival.

In Latin America, there traditionally has been a strict aversion to custom in the formal legal system. One of the most important principles in the drafting of the Chilean Civil Code, for example, was the "omnipotence of the law."<sup>30</sup> Because of this omnipotence, "custom is not law, save in exceptional cases when the law expressly provides that custom has the force of law."<sup>31</sup> This attitude is pervasive even in contemporary revisions of Latin American civil codes. Article 1 of the Peruvian Civil Code, for example, revised and in force since November 1984, prohibits the application of custom that derogates from the formal law.<sup>32</sup> This has substantial ramifications for both traditional custom manifested in the substantial indigenous populations of Peru,<sup>33</sup> and for the modern custom of the informals. Native societies have centuries old normative institutions that formal legal sys-

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27. *Id.* at 66-68.

28. *Id.* at xiv.

29. *Id.* at xii, 133-34.

30. Juan G. Matus Valencia, Comment, *The Centenary of the Chilean Civil Code*, 7 AM. J. COMP. L. 71, 75 (1957).

31. *Id.*

32. Código Civil, art. 1 (Peru) ("La ley se deroga sólo por otra ley." [A law is only repealed by another law]); Dante Cracogna, *La costumbre como fuente del derecho en el nuevo Código Civil peruano*, in EL CÓDIGO CIVIL PERUANO Y EL SISTEMA JURÍDICO LATINOAMERICANO 80 (1986) (code supersedes conflicting custom).

33. See Javier Aroca Medina, *Pueblos indígenas y familia en el derecho peruano. Una aproximación a esta problemática*, 7 LAW & ANTHROPOLOGY 131, 131 (1994).

tems in Latin America have, at best, reluctantly and sporadically recognized.<sup>34</sup> Moreover, there has been a great proliferation of uncodified and unwritten principles in the twentieth century with the rise of the informals in Latin America. In a sense, there has been a rise of common law in Latin America.<sup>35</sup> The alternative systems of governance and their norms of social and economic behavior constitute "legal systems" and "law." This "law" is not recognized as such in the formal legal system, although there have been some attempts at a modicum of recognition.

De Soto was, for a time, a close advisor to President Alberto Fujimori of Peru, but left the Fujimori Government in 1991. Soon thereafter, de Soto became an outspoken critic of Fujimori's April 1992 coup and dissolution of the Peruvian Congress.<sup>36</sup> De Soto, however, did begin a number of law reform projects in Peru.<sup>37</sup> The Peruvian Government, through a reform program initiated in 1990, at least partly under the influence of de Soto, began to limit the role of the state in the economic sphere. Notably, he worked with the Peruvian legislature in preparing legislation which grants formal legal title to informal land holders in Lima.<sup>38</sup>

Informal sectors are not unique to Peru. They exist in many Latin American countries, as well as in many countries outside of Latin America, including the United States.<sup>39</sup> The World Bank

34. Professor Roberto G. MacLean, Comparative Law: Latin America course, Georgetown University Law Center, Fall 1994.

35. *Id.*

36. *Poor Countries Rich*, *supra* note 20, at 937-39; see Marie Arana-Ward, *Peru's Shaky Miracle: Fujimori's Success Pleases the People, but not the Elite*, WASH. POST, Mar. 19, 1995, at C03; Don Podesta, *S. America's Trickle-Down Democracy: Elected Rulers Find Ways to Impose Programs Over Faction-Ridden Legislatures*, WASH. POST, Aug. 9, 1992, at A28; see Nathaniel C. Nash, *In Peru, a 'Second Coup' Reveals the Upper Hand*, N.Y. TIMES, May 2, 1993, at 6 (discussing Fujimori's coup and dissolution of Congress).

37. Joel Millman, *The Next Path: Peruvian Economist Hernando de Soto's Land Reform Plan*, FORBES, May 23, 1994, at 106; Arana-Ward, *supra* note 36, at C03; see U.S. Dep't of Commerce, *Market Research Report, Peru, Investment Climate Statement*, Oct. 28, 1994 (discussing reform program begun in 1990) (on file with author).

38. Millman, *supra* note 37, at 106.

39. THE UNDERGROUND ECONOMY IN THE UNITED STATES AND ABROAD 1 (Vito Tanzi ed., 1982) [hereinafter UNDERGROUND ECONOMY] (discussing informal economies in United States, United Kingdom, Italy, Norway, Sweden, former U.S.S.R., Canada, Colombia, Australia, and Israel); see BEYOND REGULATION: THE INFORMAL ECONOMY IN LATIN AMERICA 5 (Victor E. Tokman ed., 1992) [hereinafter BEYOND REGULATION] (discussing methodology used in studies of informals in many Latin American countries); Jane Kaufman Winn, *Relational Practices and the Marginalization of Law: Informal Financial Practices of Small Businesses in Taiwan*, 28 LAW & SOC'Y REV. 193, 194 (1994) [hereinafter

has financed projects for certain Latin American countries to assist in the formalization of informal activities. Many U.S. legal scholars have taken a realist approach at documenting the law of the informal sector in Latin America.<sup>40</sup>

In Latin American countries' efforts to grapple with informality, governments have promulgated legislation outside of the codes, in a tacit recognition that the codes fail to reflect social reality.<sup>41</sup> This is viewed, in one sense, as an obvious fact of life in contemporary civil law jurisdictions. Merryman calls this legislation "special legislation" or "microsystems of law."<sup>42</sup> Such legislation is not the product of professors preparing codes in a social vacuum, on the basis of legal science, but is the result of compromise in an effort to deal with heterogeneous forces in a society of great potential power and danger to the *status quo*. De Soto recognized this compromise in his examination of Peru's initial resistance and eventual accommodation of the informals.<sup>43</sup>

It is doubtful whether Latin American countries will be able to fundamentally change and fully accommodate the informals. Latin Americans have an ambivalent relationship with law. In one respect, they ignore it. On the other hand, they possess a basic faith, an idealistic belief in the legislative paradigm, that legislation can solve all problems.<sup>44</sup> For example, Professor Keith Rosenn recounts a satire of lawmaking in Brazil, told by

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*Relational Practices*]; see generally Symposium: *The Informal Economy*, 103 YALE L. J. 2119, 2119-2335 (1994) (focusing on informals in United States but also addressing de Soto and informals in other countries).

40. For notable works by law and development scholars of the 1960's and 1970's see e.g., Burg, *supra* note 21, at 492; Kenneth L. Karst, *Latin-American Land Reform: The Uses of Confiscation*, 63 MICH. L. REV. 327 (1964) [hereinafter *Latin-American Land Reform*]; KARST & ROSENN, *supra* note 23, at 3; Kenneth A. Manaster, *The Problem of Urban Squatters in Developing Countries: Peru*, 1968 WIS. L. REV. 23 (1968); William A. Doebele, *The Private Market and Low Income Urbanization: The "Pirate" Subdivisions of Bogota*, 25 AM. J. COMP. L. 531 (1977); Joseph R. Thome, *The Process of Land Reform in Latin America*, 1968 WIS. L. REV. 9 (1968).

41. Brazil, for example, has promulgated a "Microenterprise Statute" to register informal businesses so as to bring them into the formal sector. Johanna W. Looye, *Real Versus Ideal and the Brazilian Jeitinho: A Study of Microenterprise Registry Under the New Microenterprise Statute*, in BEYOND REGULATION, *supra* note 39, at 109.

42. CIVIL LAW TRADITION, *supra* note 17, at 151-52; see Luis Quiñe Arista, *Doctrina: Una opinión sobre la reforma judicial*, 34 REVISTA DE JURISPRUDENCIA PERUANA 1033, 1040 (1975).

43. DE SOTO, *supra* note 24, at 33, 75, 105.

44. See *Relational Practices*, *supra* note 39, at 202 (noting similar ambivalence in Taiwan).

the former Planning Minister of the country, Roberto de Oliveira Campos. De Oliveira Campos suggested a Decree Law No. 001, which “[r]egulates the [l]aw of [s]upply and [d]emand and [p]rohibits the [s]carcity of [m]oney or [m]erchandise.”<sup>45</sup> The decree repeals inflation and the shortage of credit.<sup>46</sup> Passage of such idealistic legislation continues today. In Peru, for example, after de Soto’s departure, Fujimori enacted, in accordance with a sweeping delegation of legislative authority to him, a Framework Law for Private Investment Growth.<sup>47</sup> This Law provides, among other things, that “the state guarantees free private initiative,”<sup>48</sup> that “free competition means that prices in the economy are the result of supply and demand,”<sup>49</sup> and that “the State guarantees economic plurality.”<sup>50</sup>

Unlike studies done by others, de Soto takes a controversial, classical economic approach to making policy recommendations based on free markets and individualism.<sup>51</sup> He has struck a discordant note with some scholars. Professor Jane Kaufman Winn has criticized de Soto for failing to consider the noneconomic implications of informality.<sup>52</sup> Winn contends that de Soto’s documentation of the informals fails to consider race, class, and gender.<sup>53</sup> Ricardo Lagos, an economist, has criticized de Soto’s work as unscientific and based on inadequate sampling.<sup>54</sup>

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45. Keith S. Rosenn, *The Jeito, Brazil’s Institutional Bypass of the Formal Legal System and its Development Implications*, 19 AM. J. COMP. L. 514, 529 n.43 (1971) [hereinafter *The Jeito*].

46. *Id.*

47. Decreto Legislativo No. 757, Ley Marco para el Crecimiento de la Inversión Privada, Nov. 6, 1992, reprinted in *La Nueva Legislación Comercial Peruana* (June 1993).

48. *Id.* art. 2.

49. *Id.* art. 3.

50. *Id.* art. 5.

51. Scholars attribute Friedrich A. Hayek as the basis for de Soto’s approach. *Poor Countries Rich*, *supra* note 20, at 914.

52. *Id.*

53. *Id.*

54. Ricardo A. Lagos, *Barriers to Legality and Their Costs for the Informal Sector*, in *BEYOND REGULATION*, *supra* note 39, at 87, 104-05. This Article does not address the normative implications of de Soto’s work. Rather, it focuses on de Soto’s descriptions of informal law and not on whether informal law produces social justice or is fair. I am examining de Soto’s research, and the research of others, from the standpoint of whether it sets forth a description of norms that are in the nature of law, and the implications resulting from these norms, from the perspective of jurisprudence or philosophy of law. Issues such as how or whether governments should seek to change these norms, or how or whether the norms result in an appropriate income distribution, serve appropriate ends of social policy, or achieve social justice are for other Articles,

## B. Judging

Scholarly literature reflects a broad consensus that Latin American judiciaries fail to properly reconcile law with social realities. Presented here are two aspects of this phenomenon. The first aspect pertains to judicial discretion, while the second is related to the issue of judicial review.

### 1. Judicial Discretion

With the exception of certain Caribbean countries, the legal systems of Latin American countries are based on the civil law tradition.<sup>55</sup> Latin American countries inherited their formal legal systems from their continental European colonizers. The Latin American codes, thus, originate in Roman Law and European codes.<sup>56</sup> The civil law axiom of social order is that of reason. Civil law, although emanating from Roman Law and the *jus civile* of Justinian, had its ascendancy in European thought in the eighteenth and nineteenth centuries, during the Enlightenment and the Age of Reason.<sup>57</sup> Philosophers, such as Immanuel Kant, who contended that all problems associated with human activity could be resolved through reason influenced the great civil codes of that time.<sup>58</sup> In the civil law system, law is considered a science.

The legislature has the foremost role in achieving rationality in human civility. The resulting codes, codification, and legislation serve as the bases for civil law. In a pure civil law jurisdiction, there is no case law or *stare decisis*.<sup>59</sup> The codes, particularly the civil code, are supposed to resolve all societal conflicts in advance.<sup>60</sup>

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preferably based on rigorous social science methodologies. As explained above, in this Article I attempt to avoid action-oriented analysis. The norms of the informal sector are pertinent to this Article to the extent that they reflect the social realities of Latin America in a manner different than formal law.

55. Professor Roberto G. MacLean, Comparative Law: Latin America course, Georgetown University Law Center, Fall 1994.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* *Stare decisis* is the principle where courts follow earlier decisions on principles of law, even though later parties before the court were not parties to the earlier case. STEPHEN C. YEAZELL, CIVIL PROCEDURE 60 (1996).

60. The Napoleonic Code, promulgated in 1804, sets forth the ideals of the civil law as:

It is widely believed that codification in Latin America, and formal law generally in Latin America, have largely failed to serve societal needs.<sup>61</sup> The emphasis in the Latin American legal community has been on the systematic development of codes in the abstract, based on juristic writings and doctrine, with inadequate attention paid to social realities in a country.<sup>62</sup> Legal scholars in this archetypal civil law model "will criticize legislation, but not on the basis of its probable social or economic effects. They will discuss its consistency with the tenets of legal science, the quality of its draftsmanship, and its compatibility with the established conceptual system."<sup>63</sup> Civil law lawyers who critically examine their own legal systems have widely criticized this legal science model.<sup>64</sup>

The ideal of the civil law is based on legislative supremacy. Montesquieu has said that judges are the "mouths that pronounce the words of the law."<sup>65</sup> Andrés Bello has said that judges "are slaves of the law."<sup>66</sup> One Latin American judge has said, "[i]n Latin America the legislature is considered like a god and the judge is considered not even a man."<sup>67</sup> The ideal of legislative supremacy stands in remarkable contrast to the reali-

Good civil laws are the best thing people can give and receive; they are at the origin of good morals, the palladium of property and the guarantee of public and private peace. . . . They reach every individual, they affect the main events in his life, they follow him everywhere; . . . they are a consolation for each sacrifice the law requires of its citizens for the sake of society, by protecting them, their person and their property.

Discours préliminaire, an. IX, reprinted in Yvon Mercier, *Reform of the Civil Code, the Legal Aid System, and Technology in the Administration of Justice in Québec*, in *WORLD BANK PROCEEDINGS*, *supra* note 8, at 134.

61. See KARST & ROSENN, *supra* note 23, at 47; Jorge Witker, *Derecho, desarrollo y formación jurídica*, 65 *REVISTA DEL FORO* 35, 38 (1978); Boris Kozolchyk, *Commercial Law Recodification and Economic Development in Latin America*, 4 *LAWYER AMERICAS* 189, 195 (1973) [hereinafter *Commercial Law*]; STEVEN LOWENSTEIN, *LAWYERS, LEGAL EDUCATION, AND DEVELOPMENT: AN EXAMINATION OF THE PROCESS OF REFORM IN CHILE* 55 (1970).

62. Roberto G. MacLean, *Judicial Discretion in the Civil Law*, 43 *LA. L. REV.* 45, 48 (1982) [hereinafter *Judicial Discretion*]; see Roberto G. MacLean, *Judicial Reasoning and Social Reality in Peru*, 28 *AM. J. COMP. L.* 489, 490 (1980) [hereinafter *Judicial Reasoning*].

63. *CIVIL LAW TRADITION*, *supra* note 17, at 81.

64. *Id.* at 145.

65. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 156 (Thomas Nugent trans., 1949) quoted in Jorge Correa Sutil, *The Judiciary and the Political System in Chile: The Dilemmas of Judicial Independence During the Transition to Democracy*, in *TRANSITION TO DEMOCRACY*, *supra* note 7, at 93.

66. ANDRÉS BELLO, *ESCRITOS JURÍDICOS, POLÍTICOS Y UNIVERSITARIOS* 75 (1979) quoted in Correa Sutil, *supra* note 65, at 93.

67. Roberto MacLean Ugarteche, *Introducción al estudio comparado de los sistemas*

ties of the low prestige, precarious nature, and, sometimes, even nonexistence of legislatures in Latin America.<sup>68</sup> The states of Latin America have only recently begun to embrace democracy.<sup>69</sup> At present, the focus is on elections. Elections alone, however, do not produce democracy. The countries of Latin America currently have the beginnings of democracy, albeit "thin" or "superficial" democracy. One component of a viable democracy is a functioning legislature, a feature historically absent in Latin American governments.<sup>70</sup> The executive frequently has taken over the functions of the legislature in Latin America and laws often have been promulgated by executive decree. Often the executive has been a military regime, promulgating laws in a nontransparent manner, with little or no accountability.

Legislatures in Latin America have not been in a position to promulgate laws that respond to societal needs and contexts. To date, these legislatures remain ill equipped. They are overly reliant on the executive branch for information,<sup>71</sup> remain closed to interest group views, and are unable to receive and reconcile important voices in society.<sup>72</sup> They have a history, moreover, as being fora for ineffective rhetoric and no real legislative debate.<sup>73</sup> In some cases, they are nontransparent and unaccountable. As Roberto MacLean explained in the context of Peru:

[L]egislation often is drafted without the necessary studies and information. The national reality has just begun to be explored and, faced with a lack of facts and figures and ignorant of precise situations to be regulated in many cases, legislation is done "by ear," frequently working from the legislative models available from other countries. Recourse to comparative law as an aid to the legislator, if made injudiciously, carries with it the danger of causing a serious distortion of the juridical function. Laws are a reflection of the conflicting interests existing in a society and its duty is to neutralize them and put them in equilibrium. For this reason, when a law is

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*jurídicos de las Americas* in LIBRO HOMENAJE ULISES MONTROYA MANFREDI 457, 461 (Roberto MacLean Ugarteche ed., 1989).

68. See DAVID CLOSE, LEGISLATURES AND THE NEW DEMOCRACIES IN LATIN AMERICA 6-8 (1995).

69. Stotzky & Nino, *supra* note 7, at 3-8.

70. See Nino, *supra* note 9, at 641-43.

71. CLOSE, *supra* note 68, at 2-3.

72. *Id.* at 24-26, 79.

73. *Id.* at 78.



transplanted from one country to another, it may be then in the new country the law does not satisfactorily resolve the conflicts between interests, simply because the conflicts are distinct. In such cases, they remain at least partially up in the air and without resolution.<sup>74</sup>

The result of weak or nonexistent legislatures is law that fails to mesh with society. The Latin American countries may not be in a position to adhere to the ideals of the civil law. Indeed, it may be that given the explosive pace at which Latin American societies are evolving, combined with the heterogeneity of the population in many Latin American countries,<sup>75</sup> the goals of the civil law system in its purest and most rigorous sense may be unachievable.

Despite the myth of legislative supremacy, Latin American judges adhere to the paradigmatic model of the civilian judge. As explained by Merryman, the civil law judge is "a kind of expert clerk."<sup>76</sup> Judges function as "strict and loyal law enforcers."<sup>77</sup> Their role is to "merely to find the right legislative provision, couple it with the fact situation, and bless the solution that is more or less automatically produced from the union."<sup>78</sup> The decision, rendered by the court and not by any particular judge, fits within the syllogism of Aristotelian logic; "[t]he major premise is in the statute, the facts of the case furnish the minor premise, and the conclusion inevitably follows."<sup>79</sup> The process is highly formal. Adherence to the model is further heightened by the existence of the crime of *prevaricato*, which provides for criminal punishment of a judge who fails to apply the law.<sup>80</sup> This crime is given added prominence in Latin America because of the history of strong executives in Latin American countries.

Latin American lawyers have advocated a shift away from formalism in proposals reminiscent of Roscoe Pound's criticism

74. *Judicial Reasoning*, *supra* note 62, at 490.

75. *Id.* at 489-90.

76. CIVIL LAW TRADITION, *supra* note 17, at 37.

77. DIARIO EL MERCURIO (Chile Newspaper), July 8, 1987, at A1, A10 *quoted in* Correa Sutil, *supra* note 65, at 93 (stating Chilean Supreme Court's response to criticism which indicated Court's belief that judges "must be strict applicers of the law.").

78. CIVIL LAW TRADITION, *supra* note 17, at 37.

79. *Id.* at 37-38.

80. *Judicial Reasoning*, *supra* note 62, at 493.

of mechanical jurisprudence.<sup>81</sup> Hernando París Rodríguez, of the Costa Rican Supreme Court, recently stated:

[A] judge is not an automator that is merely called upon to turn rules and facts into verdicts. Rather, he is a human being fulfilling a social role, called upon to make decisions in accordance with the legal and cultural traditions and values of the society in which he lives.<sup>82</sup>

París Rodríguez based his commentary on a speech given by Judge Cervantes Villalta of the Costa Rican Supreme Court. Judge Villalta condemned the lack of training of judges and lawyers in Latin America in the human aspect of the profession, and stated, "[i]t is not enough to apply norms mechanically. A judge has to weigh the social circumstances they are supposed to address."<sup>83</sup>

In several influential works, Roberto MacLean, a former Judge of the Supreme Court of Peru and now counsel at the World Bank, has advocated judicial discretion and judging to reflect social circumstances.<sup>84</sup> According to MacLean, "[n]o legal system can survive in any society without an acceptable degree of judicial discretion."<sup>85</sup> Of course, the Latin American judge has at his disposal a number of devices to decide difficult cases, including the theory of abuse of right,<sup>86</sup> general principles of law,<sup>87</sup> characterization or interpretation of facts, interpretation

81. See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) (criticizing view of judge's role as formalistic applier of legal principles).

82. Hernando París Rodríguez, *Improving the Administration of Justice in Costa Rica*, in WORLD BANK PROCEEDINGS, *supra* note 8, at 201.

83. *Id.* at 200-01.

84. Roberto G. MacLean, *El poder discrecional del juez*, 71 REVISTA DEL FORO 9, 9 (1984) [hereinafter *El poder discrecional*]. At the time that the 1979 Peruvian Constitution was being prepared, MacLean proposed that the Constitution should give judges the power to "distinguish" a case from the situation covered by an applicable code provision, in order to enforce the spirit if not the letter of the code provision. His proposal was rejected.

85. *Judicial Discretion*, *supra* note 62, at 49; *El poder discrecional*, *supra* note 84, at 13.

86. Article II of the Civil Code of Peru provides, "[l]a ley no ampara el ejercicio ni la omisión abusivos de un derecho. Al demandar indemnización u otra pretensión, el interesado puede solicitar las medidas cautelares apropiados para evitar o suprimir provisionalmente el abuso." [[t]he law does not extend to the abusive exercise or omission of a right. To demand indemnification or other provisions, the party may request appropriate cautious measures to provisionally avoid or suppress the abuse.] Código civil, art. 2 (Peru).

87. Article VIII of the Civil Code of Peru provides, "[l]os jueces no pueden dejar de administrar justicia por defecto o deficiencia de la ley. En tales casos, deben aplicar

of the law, discretion within the rules themselves, and other "safeguard provisions."<sup>88</sup> But there are perplexing cases in which these devices are insufficient, where the gaps between law and reality are too great for these devices to bridge, and where there are clear deficiencies in the written law.<sup>89</sup>

In response to cynics who assert that the above critique may be an attempt by Latin American lawyers to mimic North American legal realists in order to justify aid for legal reform, the late Santiago Dantas, a leading Brazilian jurist, in a speech he made in 1955 on reform of Latin American legal education, said as follows:

In the study of abstract legal rules presented as a system one

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los principios generales del derecho y, preferentemente, los que inspiran el derecho peruano." [[t]he judges may not stop administering justice because of a defect or a deficiency in the law. In such cases, they must apply the general principles of the law and preferably, those which are based in Peruvian Law.] Código civil, art. 8 (Peru).

88. *Judicial Reasoning*, *supra* note 62, at 492; see Jorge H. Bustamante Alsina, *Función de la equidad en la realización de la justicia*, [1990-E] L.L. 628, 631 (1990) (Arg.).

89. MacLean cites the following example:

One case, heard also by the First Chamber of the Supreme Court in 1976, illustrates this. It was a case of a woman from Cajamarca who at the age of fifteen was seduced by the son of a family friend. To avoid sending the boy to jail, they were made to marry, without ever living subsequently as husband and wife. In fact they went their separate ways, the woman coming to live in Lima. Through ignorance or poverty, she never worried about getting a divorce and normalizing her situation. Several years later, she fell in love and began living with a man from Lima, with whom she had three children. Her lover voluntarily recognized the first two as his children, but with the third, the woman had to file a paternity suit. The evidence of paternity by the *limeño* [man from Lima] was clear. Rarely is such convincing proof seen and the woman had well-founded reasons to expect a favorable judgment. Nevertheless, the *limeño* discovered or remembered that the woman had married in Cajamarca and produced at trial the marriage record. Lamentably for the woman, art. 299 of the Civil Code says, "The child born during a marriage or within three hundred days following its dissolution has as its father the husband." Furthermore, art. 300 maintains that, "The child is presumed legitimate, even though the mother declares against his legitimacy or is condemned as an adulteress." Art. 372 of the Civil Code establishes that only the husband may contradict such paternity.

In these circumstances, there could be no question of deficiency in the written law because the provision was too explicit. Nor could the doctrine of abuse of right be applied because, after all, he who was entitled to the only right which might have been exerted against the *limeño's* defense, the husband, was not a party to the action. Therefore, by presumption of the law and against the inner-most convictions of the judges, judgment had to be given against the woman.

*Judicial Reasoning*, *supra* note 62, at 492-93.

can easily lose the sense of the social, economic, or political relationship the law is intended to control. The legal system has a logical and rational value, autonomous, so to speak. The study we make of this system, with strictly deductive and *a priori* methods, leads to a condition of self-sufficiency which enables a jurist to turn his back on the society and lose interest in the matter regulated as well as in the practical significance of the legal solution.<sup>90</sup>

In European civil law jurisdictions, the judicial syllogism has been limited in significant respects. In Germany, it is plainly understood that codified law may be incomplete and ambiguous and that courts may, in certain situations, deviate from legislated rules.<sup>91</sup> A German judge may give weight to practical considerations and may interpret the text of a code as if he or she were legislating "at the present time with knowledge of contemporary conditions."<sup>92</sup> The Germans have adopted these accommodative approaches despite the backlash against legal realism in post-War Germany.<sup>93</sup> German court decisions are relatively nontransparent, however, because judges render them in the forms of deductive logic and syllogism.<sup>94</sup>

The Swiss Civil Code goes farther than the typical Latin American code in that it allows the judge to act in accordance with principles that he would have enacted were he a legislator.<sup>95</sup> Ibrahim Shihata, the General Counsel of the World Bank, advo-

90. *A educação jurídica e a crise brasileira*, 13-14 REV. JURÍDICA 7, 18 (1955) quoted in Keith S. Rosenn, *Brazil's Legal Culture: The Jeito Revisited*, 1 FLA. J. INT'L L. 1, 24 (1984).

91. Arthur T. Von Mehren, *The Civil Law System*, in LATIN AMERICAN LAW, BUSINESS AND DEVELOPMENT 154-55 (Frank M. Lacey ed., 1975) [hereinafter LATIN AMERICAN LAW, BUSINESS].

92. *Id.* at 155.

93. See Alexander Somek, *From Kennedy to Balkin: Introducing Critical Legal Studies from a Continental Perspective*, 42 KAN. L. REV. 759, 762-63 (1994).

94. Von Mehren, *supra* note 91, at 154-55.

95. Swiss Civil Code, art. 1. The Swiss Civil Code states:

The Law must be applied in all cases which come within the letter or the spirit of any of its provisions.

Where no provision is applicable, the judge shall decide according to the existing Customary Law and, in default thereof, according to the rules which he would law down if he had himself to act as legislator. Herein he must be guided by approved legal doctrine and case law.

Swiss Civil Code, art. 1 in THE SWISS CIVIL CODE: ENGLISH VERSION 1 (Ivy Williams et al. trans., 1987).

cates this approach.<sup>96</sup> Shihata suggests that such an approach may result in what François Geny calls "free scientific research."<sup>97</sup> Shihata also draws a parallel to Justice Benjamin Cardozo's contention that the judge would not "innovate at pleasure" but could "draw his inspiration from consecrated principles . . . exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity of order in the social life."<sup>98</sup> Shihata concludes:

Such a disciplined innovation may indeed be inevitable in the modern world where sophisticated commercial practices reach from the developed to the developing countries through international business and finance, a process which often includes adapting and adopting international codes and statements of practice where no rules exist, for example, in areas such as bills of exchange or letters of credit.<sup>99</sup>

In France, orthodox theories retain more prevalence.<sup>100</sup> Legal academics in France, however, propound a doctrine that explains French law in a manner accommodative of social realities, quite apart from the "official portrait" of the judge as a strict applier of law.<sup>101</sup> This doctrine accompanies judicial decisions in their published form and does, indeed, deal with the social and policy ramifications of the law.<sup>102</sup> French *magistrats*, moreover, provide discursive arguments to accompany judicial decisions.<sup>103</sup> The *magistrats* often base their arguments on policy and not strictly on the wording of the codes.<sup>104</sup>

There is movement in Latin America and elsewhere in the civil law world away from purist approaches to civil law. Modification of the traditional role of the civilian judge is necessary in

96. Ibrahim F.I. Shihata, *Judicial Reform in Developing Countries and the Role of the World Bank*, in *WORLD BANK PROCEEDINGS*, *supra* note 8, at 221.

97. II FRANÇOIS GENY, *METHODE D'INTERPRÉTATION ET SOURCE EN DROIT PRIVÉ POSITIF: ESSAI CRITIQUE* 77 (1919), *quoted in* Shihata, *supra* note 96, at 231.

98. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1949); Shihata, *supra* note 96, at 231.

99. Shihata, *supra* note 96, at 231.

100. Von Mehren, *supra* note 91, at 155

101. Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 *YALE L. J.* 1325, 1344 (1995).

102. *Id.* at 1344-45.

103. *Id.* at 1328, 1355; In France, a *magistrat* is a body of judges and advocates general that provide *amicus curiae* arguments to the courts. *Id.* at 1328, n.6.

104. *Id.* at 1328, 1355.

Latin America to remediate serious disfunctions in the Latin American legal systems which combine to cause serious injustice. Deficient legislating, combined with explosive social change in a heterogeneous society and with a lack of institutional capability of judges to adapt to society, have resulted in a perception of the judiciary in Latin America as elitist and arbitrary.<sup>105</sup>

## 2. Judicial Review

Latin American constitutions contain a variety of mechanisms for judicial review of the constitutionality of laws. The systems of judicial review in Latin America are based on either the diffuse, decentralized U.S. model, the concentrated, centralized Austrian model, or on a mixture of these two "pure" models.<sup>106</sup>

Latin American countries have available, to varying degrees, actions by which individuals, who are deprived of constitutional rights, may seek redress from the judiciary. The better known procedural devices are the Mexican *amparo*, the Argentine *amparo*, the Brazilian habeas corpus, and the popular action in Colombia.<sup>107</sup> Because of widespread problems with enforcement of constitutional provisions in Peru, the Peruvian Constitution of 1993 contains a new action to compel Government officials to comply with the Constitution and other laws. These expanded procedural mechanisms are designed to provide courts with the ability to review acts on constitutional grounds. They are methods for reconciling social and legal-institutional interests. Such a reconciliation has great potential in Latin America because Latin American constitutions tend to be twentieth century "social" constitutions that set forth significant economic and social rights.

It is widely acknowledged, however, that these mechanisms remain far from dynamic protectors of rights or progenitors of social change. Latin American judiciaries have been criticized

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105. See *Judicial Reasoning*, *supra* note 62, at 490-92.

106. See, e.g., Jorge Carpizo & Héctor Fix-Zamudio, *La necesidad y la legitimidad de la revisión judicial en América Latina: Desarrollo reciente*, 18 BOLETÍN MEXICANO DE DERECHO COMPARADO 31, 33-40 (1985); Alejandro M. Garro, *Eficacia y autoridad del precedente en América Latina: Las lecciones del derecho comparado*, 20 INTER-AM. L. REV. 473, 474 (1989); *Judicial Review in Latin America*, *supra* note 12, at 785; Phanor J. Eder, *Judicial Review in Latin America*, 21 OHIO ST. L.J. 570, 575-610 (1960).

107. Carpizo & Fix-Zamudio, *supra* note 106, at 34-40; Karst & Rosenn, *supra* note 23, at 210-40; *Judicial Review in Latin America*, *supra* note 12, at 791-806.

for failing to redress human rights abuses.<sup>108</sup> A Latin American court, in many cases, will only prefer a constitution over a conflicting law, leaving an unconstitutional law on the books for later application by the executive, producing the need for further litigation by citizens that were not parties to the prior litigation.<sup>109</sup>

As with any aspect of the legal systems of Latin America, judicial review must be evaluated in context.<sup>110</sup> Scholars have asserted that the institutional characteristics of Latin American judiciaries create incompatibilities with the concept of judicial review.<sup>111</sup> Professor Jorge Correa Sutil, a Chilean legal scholar, has posited that the Chilean Supreme Court's ineffectiveness in redressing serious human rights abuses of the former Pinochet regime is rooted in Latin American notions of judicial independence based on the traditional role of the judge as Merryman's "expert clerk."<sup>112</sup> Correa Sutil relied on statements by Chilean judges to support his thesis. In 1987 in a rare response to criticism for failing to redress human rights violations, the Chilean Supreme Court said:

It has been said that the judiciary is weak, and that such weakness manifests itself in the incapacity to search for the ethical ideals of the law and the Chilean society . . . . Courts are strict and loyal law enforcers, law that continues to be for them the written reason. According to such law, the judges ought to decide the cases . . . and they are not authorized to disdain and deviate from this rule and look for general principles of morality or law which could produce their decisions . . . . The

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108. Correa Sutil, *supra* note 65, at 89; Vaughn, *supra* note 6, at 583-88.

109. Dale B. Furnish, *The Hierarchy of Peruvian Laws: Context for Law and Development*, 19 AM. J. COMP. L. 91, 101-02 (1971).

110. Correa Sutil, *supra* note 65, at 101; *cf.* Martha Minow & Elizabeth V. Spelman, *In Context*, 63 SO. CAL. L. REV. 1597, 1600 (1990) (stating "[w]e mean to signal with 'context' a readiness, indeed an eagerness, to recognize patterns of differences that have been used historically to distinguish among people, among places, and among problems."); Ruth A. Putnam, *Justice in Context*, 63 SO. CAL. L. REV. 1797, 1797 (1990); Catharine Wells, *Situated Decisionmaking*, 63 SO. CAL. L. REV. 1727, 1727 (1990).

111. This Article deals with certain structural aspects of Latin American judiciaries. Many other pressing problems exist for Latin American judiciaries, such as the physical insecurity of judges and their families from drug cartel violence and terrorism, the lack of modern computer equipment and facilities, and antiquated court administration. These factors, which are external to the nature of Latin American legal systems, also hinder judicial review.

112. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 14 (1993) *quoted in* Correa Sutil, *supra* note 65, at 93.

judges are aware that they must be strict appliers of the law.<sup>113</sup>

Correa Sutil contends that judges have been isolated from the social realities in Chile. He does concede that based on a review of Chilean court decisions, however, one could argue that the courts have issued decisions which are contrary to law yet reflective of social values.<sup>114</sup> His main criticism is that, in a system in which legal formalism is the dominant theory, it is very easy for the judiciary to be socially isolated.<sup>115</sup>

Correa Sutil concludes that the Chilean experience may show that in order for a judiciary to be accountable, judges may have to be "active political figures."<sup>116</sup> His view is that some form of ideological representation is necessary for the judiciary.<sup>117</sup> Correa Sutil's position is remarkably similar to Alexis de Tocqueville's description of the role of federal judges in the United States in his famous work, *Democracy in America*:

Not only must the Federal judges be good citizens, and men of that information and integrity which are indispensable to all magistrates, but they must be statesmen, wise to discern the signs of the times, not afraid to brave the obstacles that can be subdued, nor slow to turn away from the current when it threatens to sweep them off, and the supremacy of the Union and the obedience due to the laws along with them.<sup>118</sup>

De Tocqueville was speaking in the context of evaluating judges as political figures because of every U.S. judge's power of judicial review. De Tocqueville has been an influential authority in Latin America on constitutions and judicial review.<sup>119</sup>

### C. *Evasion of Formal Law*

Latin American lawyers and government officials have long been familiar with techniques for accomplishing their tasks de-

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113. Correa Sutil, *supra* note 65, at 93 (providing English translation of Chilean Supreme Court statement in newspaper article).

114. *See id.* at 99.

115. *Id.* at 99-102.

116. *Id.* at 101.

117. *Id.* at 102.

118. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 151-52 (Vintage Books ed., 1990).

119. *See* Carpizo & Fix-Zamudio, *supra* note 106, at 33; Professor Roberto G. MacLean, Comparative Law: Latin America course, Georgetown University Law Center, Fall 1994.



spite inadequate or ineffective laws. In Latin America, it is routinely necessary to avoid the strict letter of the law, often in order to accomplish seemingly legitimate transactions. Lawyers and government officials thus face a dilemma similar to the dilemma faced by judges.<sup>120</sup>

One of the most notable examples of such techniques in Latin America is the *jeito* in Brazil.<sup>121</sup> *Jeito* translates "roughly to a knack, twist, way, or fix" intended to bend or evade legal rules.<sup>122</sup> It has a variety of forms, some of which are undesirable, such as the paying of a bribe to a government official, and others which appear desirable from a social point of view, such as the evasion of an unjust, economically inefficient, or anachronistic law.<sup>123</sup> In Brazil, the *jeito* has even been applied in conjunction with Brazil's attempts to formalize the informals under its Microenterprise Statute.<sup>124</sup> In Argentina, Chile, and Mexico, parties to commercial transactions often resort to "simulations" to accomplish their transactions.<sup>125</sup> In Bolivia, the law precludes banks from providing secured loans with real estate as collateral.<sup>126</sup> To provide credit secured on the basis of personal assets,

120. See Edgardo Buscaglia, Jr., et al., *Judicial Reform in Latin America: A Framework for National Development*, *ESSAYS IN PUBLIC POLICY* 1, 3 (1995).

Indeed, the legal system in Latin America has become the butt of many jokes, such as the sayings *la movida para mis amigos, y la ley para mis enemigos* (deals for my friends, the law for my enemies) and *hecha la ley, hecha la trampa* (make the law and then find a way around it).

*Id.*

121. *The Jeito*, *supra* note 45, at 514; Rosenn, *supra* note 90, at 1.

122. *The Jeito*, *supra* note 45, at 514.

123. Rosenn describes at least five different types of behavior:

(1) A government official fails to perform a legal duty because of private pecuniary or status gains . . . . (2) A private citizen employs a subterfuge to circumvent a legal obligation that is sensible and just (in an objective sense) . . . . (3) A public servant performs his legal duty speedily only in exchange for private pecuniary or status gains . . . . (4) A private citizen circumvents a legal obligation that is unrealistic, unjust, or economically inefficient . . . . (5) A public servant deviates from his legal duty because of his conviction that the law is unrealistic, unjust, or economically inefficient . . . .

Rosenn, *supra* note 90, at 3. These categories are not mutually exclusive. *Id.*; *The Jeito*, *supra* note 45, at 515-16.

124. Looye, *supra* note 41, at 132-36. See *supra* note 41 and accompanying text (discussing Brazil's Microenterprise Statute and informals).

125. Boris Kozolchyk, *Simulation and the Law Elsewhere in Latin America* [hereinafter *Simulation and the Law*], in *LATIN AMERICAN LAW, BUSINESS, supra* note 91, at 47.

126. WORLD BANK, OFFICE OF THE CHIEF ECONOMIST, *LATIN AMERICAN AND CARIBBEAN REGION, HOW LEGAL RESTRICTIONS ON COLLATERAL LIMIT ACCESS TO CREDIT IN BOLIVIA* ii, 10 (1994).

lenders and borrowers have resorted to a number of maneuvers. In Bolivia, a bank may require a postdated check from a borrower to guarantee payment, even though the borrower does not have sufficient funds in his or her bank account to pay the check. In the event that the borrower defaults on the loan, the bank will cash the check, the check will bounce, and the bank will initiate criminal prosecution and seek a jail sentence for the borrower. Furthermore, in Bolivia, a bank may also require a bailee agreement that subjects the bailee, typically a close family member of the borrower, to a jail sentence if the collateral is not delivered.<sup>127</sup>

In many Latin American countries, there has been a disregard for rules governing civil procedure, particularly where those rules impose time constraints. Litigation in Latin America progresses at an extremely slow pace. Case backlogs and delays are endemic. Judges and lawyers often ignore time limitations set forth even in "reformed" civil procedure codes.<sup>128</sup> The failure to follow rules of civil procedure is an astounding revelation to a lawyer accustomed to litigation in the United States where procedural rules tend to be strictly enforced. It is in procedure where a great deal of certainty in the law may be established, particularly with respect to deadlines.

Evasive behavior exists to some extent in all countries. One has only to think back to the 1980's, when real estate tax shelters were routinely used in the United States as effective tax avoidance schemes for persons in upper income brackets. The difference in Latin America, however, is the great frequency and regularity of these maneuvers, and their widespread acceptance by Latin American lawyers, businessmen, and the populace generally.<sup>129</sup> Such devices obscure the law and its application and result in an undesirable lack of transparency in a legal system.

The numerous instances of evasion of law is yet another manifestation in Latin American countries of an ambivalence towards law. In the context of creating devices to evade law, law is "in the way" of perceived efficient and desirable transactions and relationships. The idealistic belief in legislative supremacy has

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127. *Id.*

128. Buscaglia, Jr., et al., *supra* note 120, at 10, 14.

129. *The Jeito*, *supra* note 45, at 515; Rosenn, *supra* note 90, at 2-3; *Simulation and the Law*, *supra* note 125, at 48-49.

resulted in a superabundance of confusing and inconsistent legislation which Latin Americans spend a great deal of time and resources circumventing in their daily lives. Latin Americans thus exhibit both a basic faith in the "ideal of law"<sup>130</sup> and a "rule-oblivious mentality."<sup>131</sup>

#### D. *De Facto Regimes*

Latin American governments have been characterized by swings between civilian and military rule and between democratic and nondemocratic regimes. In many discordant political situations, Latin American legislatures have been dissolved, and executives have passed laws in the form of decree laws. The existence of democracy in virtually all of the countries in Latin America is a recent phenomenon. Whether democracy will consolidate in Latin America remains an open question.

The typical Latin American constitution provides for representative government as the only legitimate public order, with power based on popular sovereignty and the consent of the governed. A recent example is Peru's 1993 Constitution. The Peruvian Constitution provides that "[n]o person, organization, Armed Force, National Police, or sector of the community may arrogate upon itself the exercise of such power. To do so would constitute rebellion or sedition."<sup>132</sup> The Peruvian Constitution further provides that "[n]o one owes obedience to a usurping government or to those assuming public functions in violation of the Constitution and of the laws. The civilian population has the right of insurgency in defense of the constitutional order. The acts of those who usurp public functions are null and void."<sup>133</sup> Because no coup in Peru has occurred since the promulgation of this new Constitution, these provisions have yet to be tested. The reality is that the *de facto* government<sup>134</sup> doctrine is long-

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130. Cf. John Linarelli, *An Examination of the Proposed Crime of Intervention in the Draft Code of Crimes Against the Peace and Security of Mankind*, 18 SUFFOLK TRANSNAT'L L.J. 1, 44 (1995) (discussing similar approach of Latin American and other delegates to U.N. International Law Commission).

131. Stotzky & Nino, *supra* note 7, at 9.

132. POLITICAL CONSTITUTION OF PERU, art. 45, *reprinted in* GIBBERT H. FLANZ ED., CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 28 (1995).

133. *Id.* art. 46.

134. See J. Irizarry y Puente, *The Nature and Powers of a "De Facto" Government in Latin America*, 30 Tul. L. Rev. 15, 25 (1955) (defining *de facto* government as government that

standing in Peru, as it is in other Latin American countries.<sup>135</sup>

The *de facto* government doctrine provides that laws promulgated by unconstitutional rulers are treated as legitimate by the judiciary both during the existence of the unconstitutional regime and after its demise, even when a constitutional order follows the unconstitutional order.<sup>136</sup> As Dale Furnish explained in the context of Peru:

Peru's turbulent political history has given rise to many existing "laws" which were promulgated unilaterally by military or other extra-constitutional governing bodies. These norms are designated *Decreto-Leyes* (decree-laws). Peruvian and other Latin American practice has made a pragmatic adjustment to the recurring interruptions of the constitutional system, by simply recognizing the inevitability of such events and incorporating them into the Rule of Law. According to the weight of Latin American authority, general decree-laws should not be permanently effective without Congressional consent upon resumption of constitutional government, which sooner or later follows dictatorship almost as surely as dictatorship follows constitutional government. However, tacit consent by the reinstated Congress seems sufficient. "The Peruvian Supreme Court has held that all *Decreto-Leyes* not expressly derogated or modified by a succeeding Congress are impliedly approved."<sup>137</sup>

The doctrine is so entrenched in Latin America that the numbering scheme for laws is continued in the successive nondemocratic and democratic orders.<sup>138</sup>

The Supreme Court of Argentina set forth the modern origins of the doctrine in a 1930 accord.<sup>139</sup> In 1983, the Supreme

"usurps power by force in violation of established constitutional and legal forms of succession . . .").

135. See Furnish, *supra* note 109, at 95, 109.

136. *Id.*; see *Ziella v. Smiriglio Hnos.*, 209 Fallos 25, 27 (1947) (recognizing that *de facto* government has equal plenary powers of constitutional government).

137. Furnish, *supra* note 109, at 94-95 (footnotes omitted).

138. Roberto G. MacLean, *Comparative Law: Latin America course*, Georgetown University Law Center, Fall 1994.

139. *Acordada*, Supreme Court of Justice of Argentina, 158 Fallos 290 (1930), reprinted in KARST & ROSENN, *supra* note 23, at 194-95. The Supreme Court of Argentina first recognized a *de facto* law as valid in 1865. *Martinez y Otero*, 2 Fallos 127, 142-43 (1865); see Carlos S. Nino, *On the Exercise of Judicial Review in South America* [hereinafter *Exercise of Judicial Review*], in *TRANSITION TO DEMOCRACY*, *supra* note 7, at 317-19 (summarizing *de facto* doctrine in Argentina). The *de facto* doctrine lay dormant from 1865

Court of Argentina found a *de facto* law that the former military regime enacted to be null and void on the basis that the successor democratic government must ratify *de facto* laws.<sup>140</sup> The Court thus abandoned the *de facto* government doctrine in 1983.<sup>141</sup> In 1990, however, a Supreme Court packed by President Carlos Menem<sup>142</sup> revitalized the doctrine.<sup>143</sup>

## II. IMPLICATIONS FOR A COMPARATIVE JURISPRUDENCE: PHILOSOPHERS AND ANTI-PHILOSOPHERS

Jurisprudence<sup>144</sup> has an uncertain relationship to the comparative study of legal systems. Jurisprudential thought seems to have some capability to move across national borders. One only

until the 1930 accord. *Id.*; see HORACIO VERBITSKY, *HACER LA CORTE* 154-58 (1993) (summarizing modern treatment of the *de facto* doctrine).

140. Aramayo, 306 Fallos 72, 73-74 (1984); see Soria contra Dir. Nac. de Vialidad, 307 Fallos 338, 343 (1985) (stating that ratification may be either express or implicit); Raúl R. Alfonsín, *The Function of Judicial Power During the Transition, in TRANSITION TO DEMOCRACY*, *supra* note 7, at 50-52 (outlining *de facto* doctrine in Argentina since restoration of democracy in the 1980's); Stotzky & Nino, *supra* note 7, at 13.

141. Alfonsín, *supra* note 140, at 50-52; Stotzky & Nino, *supra* note 7, at 13.

142. Stotzky & Nino, *supra* note 7, at 8; see generally VERBITSKY, *supra* note 139, at 47-52 (detailing President Menem's expansion of Supreme Court from five to nine Justices and political alliances between President Menem and new Justices).

143. Godoy v. Universidad Nacional de la Plata, [1991-II] J.A. 455, 459 (1990); Gaggiamo Provincia de Santa Fe, [1992-D] L.L. 481, 488; Pignatoro, [1992-D] L.L. 82, 88 (1991); Alfonsín, *supra* note 140, at 50-52; Stotzky & Nino, *supra* note 7, at 13.

144. Judge Richard Posner's definition of "jurisprudence," which is instructive for purposes of this paper, is as follows:

By "jurisprudence" I mean the most fundamental, general, and theoretical plane of analysis of the social phenomenon called law. For the most part it deals with problems, and uses perspectives, remote from the daily concerns of legal practitioners: problems that cannot be solved by reference to or by reasoning from conventional legal materials; perspectives that cannot be reduced to legal doctrines or to legal reasoning. Many of the problems of jurisprudence cross doctrinal, temporal, and national boundaries.

"Philosophy" is the name we give to the analysis of fundamental questions; thus the traditional definition of jurisprudence as the philosophy of law, or as the application of philosophy to law, is *prima facie* appropriate. Problems of jurisprudence include whether and in what sense law is objective (determinate, impersonal) and autonomous rather than political or personal; the meaning of legal justice; the appropriate and the actual role of the judge; the role of discretion in judging; the origins of law; the place of social science and moral philosophy in law; the role of tradition in law; the possibility of making law a science; whether law progresses; and the problematics of interpreting legal texts.

RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* xi (1990) [hereinafter *PROBLEMS OF JURISPRUDENCE*].

has to take a cursory look at the European literature using the "law in the books - law in action" distinction of Roscoe Pound and other legal realists, and the emergence of law and economics in Europe, to appreciate this phenomenon.<sup>145</sup> On the other hand, jurisprudence is informed most dramatically by the legal culture, intellectual style, and national identity of a given society. One only has to read the numerous articles and books devoted to jurisprudence in the United States to appreciate the grounded nature of jurisprudence in a national sense of law.

In Latin America, U.S. law is a significant influence, due in no small part to the fact that many Latin American lawyers study law in the United States.<sup>146</sup> Based on the structural or cultural characteristics of Latin American legal systems described in the preceding section, Latin American judges, legislators, and practicing lawyers may be in a good position to appreciate and embrace certain North American schools of jurisprudence. Legal realism, particularly the teachings of Karl Llewellyn, with his idea of legislating to conform to social realities, seems to have at least implicitly penetrated the consciousness of many individuals in Latin American legal communities. Yet the overt acceptance of realist jurisprudence by Latin American scholars has been limited. Although some are open to realist jurisprudence, they treat it as a foreign object.<sup>147</sup> In the United States, the realist school has evolved (or devolved, depending on one's perspective) into pragmatism and critical legal studies. Some suggest that even law and economics is an outgrowth of realism,<sup>148</sup> which is open to debate, given the strong positivist nature of the law and economics movement and its basis in only one social science. Set

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145. Ugo Mattei, Comment, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195, 206 (1994).

146. *Id.* at 207.

147. See Gregorio Robles, *La decisión en el derecho y la tónica jurídica*, 18 BOLETÍN MEXICANO DE DERECHO COMPARADO 951, 965 (1985) (relying mainly on European sources); Witker, *supra* note 61, at 38; Eder, *supra* note 106, at 613 (discussing Argentinean scholar Charles Cossio's advocating more creative role for judiciary); *El poder discrecional*, *supra* note 84, at 12; Josef L. Kunz, *An Introduction to Latin-American Philosophy of Law*, 15 UNIV. TORONTO L. J. 259, 259-61 (1964) [hereinafter *Latin-American Philosophy*]; Josef L. Kunz, *Contemporary Latin-American Philosophy of Law*, 3 AM. J. COMP. L. 212, 212 (1954) [hereinafter *Contemporary Latin-American Philosophy*]; Josef L. Kunz, *Latin-American Philosophy of Law in the Twentieth Century*, 24 N.Y.U. L. Q. REV. 283, 473, 801 (1949) [hereinafter *Law in the Twentieth Century*].

148. J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 436-37 (1992).

forth below is an exploration of dominant ideas in U.S. jurisprudence and their relationship to Latin American law.

A. *Philosophy and Anti-Philosophy: Law and Anti-Law*

The legal cultures of Latin America and the United States diverge on fundamental tenets. Legal culture in Latin America is heavily influenced by nineteenth century rationalism and the proposition that law can be reduced to science. Hans Kelsen and his seminal theory, the Pure Theory of Law, are of profound significance in Latin America. Legal culture in the United States, in contrast, has undergone an anti-formalist revolution characterized by skepticism towards abstract theories that rely only on legal principles, on a view of law as social policy rather than as science, and on a questioning of the value and comprehension of law itself as an independent area of social inquiry.

To understand the differences between Latin American and North American philosophies of law, one must understand the dialectic between philosophy and anti-philosophy.<sup>149</sup> The concept of dialectic is used because philosophy and anti-philosophy both are part of philosophy, yet they are in tension with each other. A significant way of thinking about law in the United States is on the basis of pragmatism. By now we are all familiar with Holmes' anti-formalist slogan that the life of the law is not logic but experience.<sup>150</sup> Pragmatism and its parent of sorts, realism, have been ascendant ideas in U.S. philosophy and jurisprudence during the middle and latter parts of the twentieth century. The influential philosophical thinking of continental Europe, however, has been existentialism and phenomenology.<sup>151</sup> These differing schools of philosophy deal with the same thing, the realities of the twentieth century. It is just that they deal with these realities in different ways.

The legal pragmatist school in the United States is contro-

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149. See THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS AND OTHER WRITING OF OLIVER WENDELL HOLMES, JR. xviii (Richard A. Posner ed., 1992) (discussing Posner's views on philosophy and anti-philosophy); Brietzke, *supra* note 2, at 52-55 (discussing use of dialectical method).

150. See Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 793 (1989).

151. See *supra* note 147 (discussing articles by Kunz). General philosophical ideas are borrowed here because jurisprudence often grows from or is influenced by philosophy.

versial. The school has its basis in the writings of two philosophers, the founder of the pragmatist school, John Dewey, and the contemporary proponent of the school, Richard Rorty. One of the fundamental tenets of the school is nonfoundationalism, which is "[t]he notion that there exists no absolute truth, no privileged text, no God's-eye point of view . . . ." <sup>152</sup>

The anti-philosophical thinking that is pertinent to this discussion is the "old" pragmatism of judges like Holmes and Cardozo. These figures are distinct from the "new" pragmatists, in that, among other things, they believed that certain truths existed, possibly not in religion or philosophy, but at least in history and culture. <sup>153</sup> The distinction is between an attitude of pragmatism, as opposed to a philosophy of pragmatism, although there is no doubt the two ways of thinking are significantly related. <sup>154</sup>

This attitude of pragmatism, as found in the United States, is identified in stark fashion by de Tocqueville, who said:

I think that in no country in the civilized world is less attention paid to philosophy than in the United States. The Americans have no philosophical school of their own, and they care but little for all the schools into which Europe is divided, the very names of which are scarcely known to them. <sup>155</sup>

De Tocqueville found the people of the United States to be people of action, whose "social condition deters them from speculative studies." <sup>156</sup>

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152. Joan C. Williams, *Rorty, Radicalism, Romanticism: The Politics of the Gaze*, in *PRAGMATISM IN LAW AND SOCIETY* 155, 155 (Michael Brint & William Weaver eds., 1991). Legal pragmatism is inherently contradictory, as it is expressed in its contemporary form by legal scholars in the United States. It attempts to cut through formalism and metaphysical constructs with its own form of abstraction and terminology. It is a layering of ideas that fails to promote a better understanding of how law works in society and that fails to result in coherent theories concerning law. It is "anti-law" in approach in that it requires lawyers to look at everything "in context," when lawyers, by their nature and training, are poor social scientists and unable to discern context in a rigorous way, separated from their own subjective predilections and biases.

153. See *PROBLEMS IN JURISPRUDENCE*, *supra* note 144, at 26-29.

154. One Irish scholar describes Roscoe Pound's use of the phrase "social engineering" as "a characteristic American piece of imagery, its deliberately unpretentious evocation of blue overalls and functional workshop contrasting with the elaborate abstractions of European jurists . . . ." KELLY, *supra* note 148, at 363.

155. DE TOCQUEVILLE, Vol. II, *supra* note 118, at 3.

156. *Id.* at 4.



De Tocqueville set forth the "principal characteristics" of the "philosophical methods of the Americans" as:

To evade the bondage of system and habit, of family maxims, class opinions, and in some degree, of national prejudices; to accept tradition only as a means of information, and existing facts only as a lesson to be used in doing otherwise and doing better; to seek the reasons of things for oneself, and in oneself alone; to tend to results without being bound to means, and to strike through the form to the substance . . . .<sup>157</sup>

De Tocqueville was a continental European observing society in the United States. He is quite influential in Latin America and, thus, may be perceived by Latin Americans as having an outsider's or "looking glass" view of society in the United States. This anti-philosophical attitude in the United States has influenced the major U.S. schools of jurisprudence.

The ideological and conceptual bases for thinking about law in Latin America are found in continental Europe, notably in Austria. In order to understand law in Latin America, one must understand the writings of Hans Kelsen, the leading figure in Latin American jurisprudence.<sup>158</sup> Scholar Roberto MacLean has remarked that lawyers in Latin America do not know the names of Supreme Court justices, but they are all familiar with Kelsen and his Pure Theory of Law and have read at least one of his seminal works, *The General Theory of Law and State*.<sup>159</sup> Professor Josef Kunz has said, "[t]he Latins think that the Pure Theory of Law is a product of intrinsic greatness which will remain incorporated in the thinking of jurists; that, to quote one phrase,

157. *Id.* at 3.

158. See *Latin-American Philosophy*, *supra* note 147, at 267-68 (stating, "[b]ut the greatest, and overwhelming, influence exercised in Spanish-American contemporary philosophy of law is that of Hans Kelsen, the founder of the 'Vienna School,' the creator of the 'Pure Theory of Law.'). Kelsen's influence in Latin America is obvious when one reviews Latin American legal literature. Many Latin American works cite to or discuss Kelsen. See e.g., Óscar Correas, *La sociología del derecho como condición de la jurisprudencia en Kelsen*, 22 *BOLETÍN MEXICANO DE DERECHO COMPARADO* 403 (1989); Carpizo & Fix-Zamudio, *supra* note 106, at 31; Ulises Schmill Ordóñez, *El concepto del derecho en las teorías de Weber y de Kelsen*, 18 *BOLETÍN MEXICANO DE DERECHO COMPARADO* 113 (1985); HECTOR GERARDO ZERTUCHE GARCÍA, *LA JURISPRUDENCIA EN EL SISTEMA JURÍDICO MEXICANO* 3 (1992); see generally Miguel Villoro Toranzo, *INTRODUCCIÓN AL ESTUDIO DEL DERECHO* 1 (1987).

159. Professor Roberto G. MacLean, Comparative Law: Latin America course, Georgetown University Law Center, Fall 1994; see generally HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 1 (1945) (presenting Kelsen's Pure Theory of Law).

all philosophy of law in the future will have to be a dialogue with Kelsen."<sup>160</sup>

Kelsen was an analytical positivist.<sup>161</sup> He eschewed sociological and realist jurisprudence.<sup>162</sup> His hierarchy of norms, as set forth in his Pure Theory of Law, serves as the theoretical framework for the legal systems of Latin America. All norms in a legal order are postulated on the basis of a basic legal norm. "The basic norm of a positive legal order is nothing but the fundamental rule according to which the various norms of the order are to be created."<sup>163</sup> To Kelsen, law is science, the product of reason, free from any moral or political judgments, and separate from the concept of justice. Justice and law are "confused" as the same in "non-scientific political thought."<sup>164</sup> In Kelsen's Pure Theory of Law, law is apolitical, certain, logical, and rational. Some Latin American legal scholars have attempted to extend or combine Kelsen's theory with phenomenological or existential philosophies.<sup>165</sup>

Kelsen's theory and law as science have a strong appeal in the context of a diverse society. Professors W. Michael Reisman and Aaron M. Schreiber explain, "Kelsen's work was rooted in the Austro-Hungarian empire, a complex of many different and discrete ethnic and language groups, each with its own authority dynamic and its own exclusive moral code."<sup>166</sup> According to Reisman and Schreiber, Kelsen's Pure Theory of Law "opens the way for compromise" among diverse groups who feel protected from the "potentially tyrannical views of the majority."<sup>167</sup> The difficulty with Kelsen's theory for Latin America, however, is that it requires a strong legislatively-based political order that can promulgate adequate laws to work the compromise. Latin America, however, has been plagued by extremely weak or non-existent legislatures, and excessive and deficient executive branch lawmaking.

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160. *Latin-American Philosophy*, *supra* note 147, at 272.

161. KELLY, *supra* note 148, at 384.

162. KELSEN, *supra* note 159, at 162-71, 175.

163. *Id.* at 114.

164. *Id.* at 5.

165. *Latin-American Philosophy*, *supra* note 147, at 276-78.

166. W. MICHAEL REISMAN & AARON M. SCHREIBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW 402 n.2 (1987).

167. *Id.*

*B. Constructive Borrowings: Potential or Actual?*

The descriptions and critiques of attributes of Latin American legal systems, as set forth in the preceding section, and the divergences between law and society recognized by lawyers in Latin America, indicate that a philosophy of law, reminiscent of the legal realist movement that dominated legal thought in the United States in decades past, may be developing in Latin America. Ronald Dworkin's principles for deciding "hard cases" and the law and economics movement offer means of additional inquiry into Latin American jurisprudence.

## 1. Realism

Jerome Frank, a leading figure in the legal realist movement in the United States, wrote in one of his famous works:

Even in a relatively static society, men have never been able to construct a comprehensive, eternized set of rules anticipating all possible legal disputes and settling them in advance. Even in such a social order no one can foresee all the future permutations and combinations of events; situations are bound to occur which were never contemplated when the original rules were made. How much less is such a frozen legal system in modern times. New instruments of production, new modes of travel and of dwelling, new credit and ownership devices, new concentrations of capital, new social customs, habits, aims and ideals — all these factors of innovation make vain the hope that definitive legal rules can be drafted that will forever after solve all legal problems. When human relationships are transforming daily, legal relationships cannot be expressed in enduring form. The constant development of unprecedented problems requires a legal system capable of fluidity and pliancy. Our society would be strait-jacketed were not the courts, with the able assistance of lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions; although changes cannot be made lightly, yet law must be more or less impermanent, experimental and therefore not nicely calculable. Much of the uncertainty of law is not an unfortunate accident; it is of immense social value.<sup>168</sup>

De Soto, Correa Sutil, MacLean, París Rodríguez, and others have expressed strikingly similar ideas about how law should

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168. JEROME FRANK, *LAW AND THE MODERN MIND* 6 (1930).

function in Latin American societies. The legal realists, however, differ in fundamental ways from Kelsen and the Vienna school.

Latin American legal systems appear to be frozen in a formalist model that compares closely to the "classical era of formalism" in the United States during the nineteenth century and prior to the New Deal.<sup>169</sup> This model is based on a philosophy of law in which private law is dominant, and complements the notion that private parties self-regulate in a free market system. One author describes the pre-New Deal period in the United States as:

[T]he classical era started with the notion of a self-regulating market system, a private sphere insulated from government interference, influence and control. It then added the belief in a formalistic method of legal reasoning. Roscoe Pound called formalism "mechanical jurisprudence" because classical lawyers had a tendency to apply their general principles relentlessly — regardless of the underlying policies or consequences of these policies in specific cases. Judicial method was seen as scientific, apolitical, principled, objective, logical, and rational. Legal argument was pervaded with a sense of certainty.<sup>170</sup>

When comparing this state of affairs in the United States to Latin America, the Latin American legal systems appear to be fixed on a myth of a classical market economy system that does not really exist in fact.<sup>171</sup> The above critiques of Latin American law indicate that formalist approaches to law have permitted elites and corporatist groupings, grounded firmly in the formal sector, to remain dominant.<sup>172</sup> The myth remains intact as judges trained in the classical style of law, ignorant of commercial and social realities and of public law approaches at regulation, dominate the judiciaries in Latin America.<sup>173</sup> The myth continues, moreover, despite the regulation by Latin American

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169. See Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 496 (1988).

170. *Id.*

171. DE SOTO, *supra* note 24, at 201.

172. Cf. Wiarda, *supra* note 15, at 448 (stating, "[t]he role of law in this [the Latin American corporatist] system is exceedingly important, for it is legal recognition that gives legitimacy to a group and makes its existence formally recognized. Legal recognition by the government is the *sine qua non* for the activities of any organized interest . . .").

173. See CIVIL LAW TRADITION, *supra* note 17, at 147-48; see also *supra* notes 55-105

governments, until recently, of virtually all spheres of economic activity and their purported promotion of development through extensive government intervention in the economy.

Realism in the United States was, in substantial part, a reaction to the formalism in the legal system that prevented the implementation of New Deal policies.<sup>174</sup> It was at once responsive to social forces and market realities. It has been hailed as the first break of the United States from European schools of jurisprudence, and the first school of U.S. jurisprudence.<sup>175</sup> Realism, however, shares some similarities to the teachings of certain late nineteenth century and early twentieth century European jurists, notably Rudolph Von Jhering and François Geny.<sup>176</sup> Some Latin American jurists, such as Eduardo García Máynez and Luis Recaséns Siches, have been influenced by realism, but are still grounded firmly in Kelsen's Pure Theory of Law.<sup>177</sup>

Perhaps we are seeing a convergence of philosophies based on a need for, in the words of Recaséns Siches, a "non-academic" philosophy of law<sup>178</sup> or, in the words of Charles Mwalimu, a "functionalist" jurisprudence.<sup>179</sup> Such a jurisprudence could be

and accompanying text (discussing Latin American judiciaries' failure to reconcile law with social realities).

174. Singer, *supra* note 169, at 477-99; Note, 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 HARV. L. REV. 1669, 1674-75 (1982). A contrary position is that realism lost vitality with the New Deal, when statutory and administrative law gained prominence. "Realist jurisprudence was not a jurisprudence of the modern regulatory state." Neil Duxbury, *The Reinvention of American Legal Realism*, 12 LEGAL STUD., 137, 140 (1992).

175. N.E.H. Hull, *Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange Over Legal Realism*, 1989 DUKE L.J. 1302, 1303 (1989).

176. KELLY, *supra* note 148, at 332-33, 362; REISMAN & SCHREIBER, *supra* note 166, at 434. There was a significant German "free law movement" in the first third of the twentieth century. The scholars of this movement posited that no code could possibly deal with all cases, and that the classical model of the civil law and the civilian judge would cause absurd results. The major figures in this movement were Eugen Ehrlich and Ernst Fuchs. Unfortunately, the Nazi regime in Germany perverted the teachings of the movement to sinister ends and even relied on the movement to enact vague criminal code provisions that plainly violated the axiom *nullum crimen sine lege*. KELLY, *supra* note 148, at 359-61. There was also a Scandinavian legal realism movement, which is quite different from the U.S. movement. The Scandinavians sought to explain what the law "really" is by using psychological concepts, mainly by examining mental responses to words commonly used in a legal system. *Id.* at 369.

177. *Latin-American Philosophy*, *supra* note 147, at 279-81.

178. *Id.* at 281.

179. M. Mwalimu, *The Need for a Functionalist Jurisprudence for Developing Countries in Africa*, 1986 THIRD WORLD LEGAL STUD. 39 (1986).

based on a moderate vision of Karl Llewellyn's realism.

For purposes of analyzing Latin American law, two points stand out with respect to Llewellyn's view of law: 1) his approach to drafting legislation, and 2) his vision of "grand style" judging.<sup>180</sup> Llewellyn probably is the most compelling of the realist thinkers in the context of Latin America because of his emphasis on codification. He is also a moderate realist with a more temperate approach than Jerome Frank or Thurman Arnold. It is noteworthy that Llewellyn spent time in Germany and authored works in German on the common law.<sup>181</sup>

Llewellyn was of the view that law, in particular codes, should fit the society it is intended to serve. His vision for the Uniform Commercial Code was that it reflect the better practices of merchants, while making unlawful certain "sharp" merchant practices that could be viewed as against public policy.<sup>182</sup> He attempted to make the Uniform Commercial Code different in approach to what he viewed as needless abstractions in Williston's Uniform Sales Act, the predecessor law to the Uniform Commercial Code.<sup>183</sup>

Llewellyn proposed a grand style of judging, in which judges interpreted legislation in accordance with its purpose and reason.<sup>184</sup> This type of judging took account of the law in a social context. Judges, moreover, could balance interests of parties, and engage in a more discursive informal logic in rendering decisions. Llewellyn's view was that such a judging style would render the decisions of judges more transparent. The parties to the case, as well as the public, would be told the true reasons for the judge's decision.<sup>185</sup>

Although Llewellyn-like approaches have been recommended for Latin America, realism is not a panacea for Latin America. Realism would seem to require a consolidation of democracy with a strong emphasis on human rights.<sup>186</sup> In Nazi

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180. See Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987).

181. Michael Ansaldi, *The German Llewellyn*, 58 BROOK. L. REV. 705, 706 (1992).

182. Wiseman, *supra* note 180, at 471-72, 493-97.

183. *Id.* at 473-77.

184. *Id.* at 496-99.

185. *Id.*

186. See Duxbury, *supra* note 174, at 144 (discussing criticism of realism as anti-democratic).

Germany, for example, judges disregarded rules in order to effectuate pernicious social goals.<sup>187</sup> There are strong arguments for a natural law theory as the basis for human rights and democracy.<sup>188</sup> There would seem to be some requirement for basic norms or morals to identify bad practices in society that are against public policy. For example, a significant problem in Latin America has been the acceptance of military and civilian nondemocratic regimes as *de facto* governments, and acceptance of laws promulgated by such unconstitutional regimes as valid.<sup>189</sup> Should such practices really be accepted as part of the social reality in Latin America?

## 2. Additional Basis for Inquiry

There are two other styles or schools of jurisprudence that may provide some fruitful points of inquiry for Latin America. The first is Professor Ronald Dworkin's principles for deciding "hard cases." The second point of inquiry is the law and economics movement in the United States.

### a. Dworkin's Principles

In his criticism of the positivism of constitutional scholar H.L.A. Hart, Dworkin sets forth some constructive views that may be interpreted as bridging the gap between the ideal of the common law judge and the ideal of the civil law judge. Dworkin is of the view that answers exist to hard cases and that lawyers:

[M]ake use of standards that do not function as rules, but operate differently as principles, policies, and other sorts of standards. Positivism . . . is a model of and for a system of rules, and its central notion of a single fundamental test for law forces us to miss the important roles of these standards that are not rules. . . . I call "policy" that kind of standard that sets out a goal to be reached, generally an improvement in

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187. See *supra* note 176 and accompanying text (discussing similarities between realism and teachings of late nineteenth and early twentieth century European jurists Von Jhering and Geny); Somek, *supra* note 93, at 762-63 (noting accommodative approaches of German judges in handling cases which are not addressed directly by German Civil Code).

188. See Duxbury, *supra* note 174, at 166 (discussing natural law and Thomist Catholic legal scholars who reacted against realism).

189. See *Exercise of Judicial Review*, *supra* note 139, at 317 (describing Argentine Supreme Court's recognition of *de facto* laws as, "the most obvious contribution to the impairment of the democratic process on the part of the Supreme Court.").

some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change). I call a "principle" a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.<sup>190</sup>

Although Dworkin is not a realist, his jurisprudence may provide a theoretical framework for advancing the idea of judicial discretion in Latin America. One criticism of this approach is that Dworkin seems to be describing a state of affairs that already exists, at least in theory, in Latin America. Codes in the civil law tradition are drafted in deliberately broad language in order to cover a plethora of situations. Code interpretations in a civil law court are liberal in scope in order to effectuate the intent of the legislature. Thus, the paradigmatic civilian judge may in effect be required to operate, at least to some extent, in accordance with Dworkin's theories.

#### b. Law and Economics

The law and economics movement is not significant in Latin America.<sup>191</sup> Law and economics may provide Latin America with some fresh ideas on how to make a positivist approach to law socially relevant.<sup>192</sup> Law and economics jurisprudence possesses some formal characteristics. Economics is formulated almost exclusively in mathematics.<sup>193</sup> Economics is also dominated by positivist thought. Economists make rigid distinctions between fact and value and seek to establish a value-neutral setting for economic theory.<sup>194</sup>

Economic analysis of law may have positivist and formal fea-

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190. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22 (1978).

191. R. Cooter & J. Gordley, *Economic Analysis in Civil Law Countries: Past, Present, Future*, 11 INT'L REV. L. & ECON. 261, 261 (1991). See <<http://www.findlaw.com/lalea>> (discussing Latin American Law and Economics Association).

192. See Avery Katz, *Positivism and the Separation of Law and Economics* (Mar. 15, 1995) <<http://WWW.11.georgetown.edu/1c/>>. "[F]oremost among the cultural differences between law and economics is [the] economist's commitment to positivism." *Id.* Positivism is "under substantial attack" in philosophy and in most other social sciences.

193. PROBLEMS OF JURISPRUDENCE, *supra* note 144, at 361.

194. Katz, *supra* note 192, at 1.



tures,<sup>195</sup> yet it involves the use of nonlegal facts and methods. As a method of inquiry, it is susceptible to systematic exposition in its search for core legal principles, but without a self-contained reliance on only legal rules and hierarchies.<sup>196</sup> Like Kelsen, law and economics scholars search for the essential norms governing society. Like the legal realists, they seek the real reasons for legal rules.<sup>197</sup>

Of course, significant limitations may exist in the application of law and economics in Latin America. The law and economics movement has been widely criticized for, among other things, failing to address the distribution of wealth and rights and failing to deal with social goals other than economic efficiency and wealth maximization. These and other criticisms, no doubt, would be of significance in the application of law and economics to societies characterized by wide disparities in income distribution, such as in many Latin American countries. These and other points would have to be flushed out by scholars who, hopefully, will make further inquiries to succeed the inquiries of this Article.

#### *CONCLUSION*

As Latin American countries continue to consolidate democratic rule, a fundamental reordering and strengthening of state functions will inevitably have to occur. A great challenge to courts, legislatures, and executive branches in Latin America will be whether they will promote or hinder development. All of these institutions — the entire apparatus of government — are involved in the law.

Given the complex and interwoven aspects of any society, the effect of law on development is virtually impossible to isolate, except in limited circumstances. In this Article, I have attempted to make some inquiries into the fundamental features of Latin American legal culture, and into certain themes in jurisprudence that have the potential for cross-border applications. Comparative inquiry that focuses on the structural rather than the technical and on the foundations rather than on the trimmings are beneficial for both the studying and the studied legal

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195. *Id.*

196. *See* PROBLEMS OF JURISPRUDENCE, *supra* note 144, at 442.

197. *See id.* (comparing law and economics to legal philosophy of Holmes).

culture. It is my hope that my analysis will be of some use to Latin Americans involved in law-related functions. I believe, however, that it is by now indisputable that there are no blueprints or quick fixes for legal reform; there is no *jeito* that will reconcile law and social reality.