

WRITING THE LAW OF LATIN AMERICA

JORGE L. ESQUIROL*

I. INTRODUCTION

Latin America scholars have largely neglected the constructivist role of legal discourse as it relates to the region's national legal systems. This dimension of law includes the range of traditional legal scholarship in all its various stripes. It also extends to other forms of legal writing, including expert consultant reports, multi-disciplinary studies, and transnational work. An example of the latter is Lesley McAllister's *Making Law Matter: Environmental Protection and Legal Institutions in Brazil*, featured in this symposium edition.¹ The present Essay—while not a review of her book—explores the broader area in which she writes: namely, Latin American legal transnationalism. My general observations of the field, here, are not meant as specific comments on Professor McAllister's work. Rather, at certain points, I refer to sections of her book as examples of the ways in which transnational scholars grapple with some of the issues identified below.

My primary objective is to examine several characteristic limitations of contemporary transnational writing on law in Latin America. Indeed, this *George Washington International Law Review* symposium offers a welcome opportunity to reflect on legal transnationalism.² Certainly, writing about law in Latin America takes many different approaches, positions, and styles. Much of this is no doubt idiosyncratic to individual authors. At the same time, much of this literature fits quite a similar form. Disappointingly, the tendency is to replay a standard set of conventions, surface explanations, and general diagnoses of the problem of law in Latin

* Professor of Law and Director of International and Comparative Law Programs, Florida International University. S.J.D. 2001, J.D. 1989, Harvard Law School; B.S.B.A. 1986, Georgetown University. Many thanks to Colin Crawford, Aya Gruber, and Conrado Hübner Mendes for their helpful comments, to Marisol Floren for her expert research assistance, and to the Watson Institute for International Studies at Brown University for a fruitful research stay.

1. LESLEY McALLISTER, *MAKING LAW MATTER: ENVIRONMENTAL PROTECTION AND LEGAL INSTITUTIONS IN BRAZIL* (2008).

2. See Symposium, *Rainforests and Regulation: New Directions in Brazilian Environmental Law and Legal Institutions*, 40 *GEO. WASH. INT'L L. REV.* 611 (2009).

America. This rather reduced spectrum is surely due to the normal difficulties attendant to comparative work, such as language barriers, stylistic differences, institutional dissimilarities, and functional disanalogies. Transnational commentators are certainly faced with a difficult task.

Yet, beyond the basic constraints, certain epistemic disconnects also limit wider engagement. Simply put, certain *idées fixes* and automatic reflexes have the effect of truncating fuller debate over questions of law in Latin America. The former significantly displaces wider discussions over alternative policies, competing interests, and the distributional impact of rules and institutions. Transnationalism, advanced in this way, privileges a narrow set of diagnoses, positions, and prescriptions. Rather than breadth, transparency, and alternatives, the commonly accepted forms limit the very contribution of transnationalists. Some of these same disconnects may be perceived in comparative work generally or in relation to other places. Nonetheless, the combination of conventions described in more detail below is particularly salient with respect to Latin America.

Of course, contestable generalizations, distorting simplifications, and unconscious projections are inevitable features of any communicative form—especially across wide power differentials. Turned into convention, however, their repeated reassertion solidifies a skewed perception, in this case of law in Latin America.³ The overall impact, as it turns out, is fewer legal-institution-building benefits than could be expected from international expert attention and resources expended on the region. Certainly, a tandem practice of persistent critique may, in specific cases, provide a corrective of sorts. This Essay, itself, could be seen as such an example. My aim, though, is not simply a round of criticism and re-representation in the same mode. Rather, I propose to identify specific limitations of the prevailing transnationalism that have the effect of narrowing engagement and privileging the legal politics and policies within the dominant channels. A more engaged transnationalism could, potentially, better contribute to the collective construction, democratic reform, and ultimately acceptable performance of institutions in the area. Indeed, I argue here, transnational writing practices with respect to Latin America need not always be nega-

3. See generally JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006) (celebrating the multiplicity and incommensurability of theory).

tive, even though they may immediately suggest an *Orientalizing*, neocolonial, and hegemonic structure.⁴

Notably, this Essay does not advocate any single methodology or critique related to law. It also does not argue the relative practical or political relevance of any one type of legal debate. Rather, I take the perspective that writing about law and legal institutions is constitutive of our knowledge about them and is inseparable from their operation. Legal writing shapes both the views and options of operators within and outside those entities. It also contributes significantly to the social construction of “law-ness”—by which I mean the general perception of law in a given society. In these multiple ways, legal discourse plays a significant role.

II. BACKGROUND

By way of background, traditional legal scholarship assumes certain dominant modes in specific places. In broad strokes, in Latin America—as is typical of the civil law model—the work of legal scholars comprises a formal element of those systems.⁵ The writings of distinguished jurists in the form of textbooks, treatises, commentaries, and articles are a subsidiary source of law.⁶ The *doctrine*—as it is known—varies from more literal expositions of the positive law to ones that are less so.⁷ Such legal writing is ranked along an informal hierarchy. The most prominent works appear in legal textbooks and are studied in law schools.⁸ Such views greatly structure legal reasoning and shape the boundaries of legal institutions. The most common critiques of this civil-law scholarship—and civilian legal reasoning generally—stress its excessive reliance on logical rationalism and conceptual formalism and the relative absence of contextual considerations.⁹ This general mode is quite

4. See generally EDWARD SAID, *ORIENTALISM* 201-20 (1979), Lama Abu-Odeh, *The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia*, 52 AM. J. COMP. L. 789 (2004); Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179 (2002);

5. See JOHN DAWSON, *THE ORACLES OF THE LAW* 395 (1968); RENÉ DAVID & JOHN E.C. BRIERLY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 147 (1988); JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 57, 60 (2007); John Henry Merryman, *The Italian Style I: Doctrine*, 18 STAN. L. REV. 39, 42-43 (1965-66);

6. MERRYMAN & PÉREZ-PERDOMO, *supra* note 5, at 60.

7. See *id.* at 56-67; DAWSON, *supra* note 5, at 386-400.

8. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 5, at 60; ALAN WATSON, *THE MAKING OF THE CIVIL LAW* 168-74 (1981).

9. DAVID & BRIERLY, *supra* note 5, at 149; MERRYMAN & PÉREZ-PERDOMO, *supra* note 5, at 62-63; Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65, 76-77 (1996).

typically contrasted to legal analysis that is more transparent in addressing law's policies and purposes. Notably, though, the characteristics of specific places have much to do with the variety and shape of locally accepted modes of authoritative writing. European authors—as is well-known—are a significant source of law in Latin America, but they are by no means the only source.¹⁰ Reflecting much more particularity, legal debate is structured in quite distinct ways in national and other forums.¹¹

By comparison, in the United States, legal scholarship performs a somewhat different yet analogous function. It is not a source of law *per se*. Still, courts cite specific works to support a novel proposition or background theory.¹² Law school casebooks routinely include excerpts of legal articles.¹³ And advanced law courses and seminars are based on the most cutting-edge examples. Legal practitioners also make use of scholarly writing for general background, updates on new developments, and ideas for novel theories about a case.

Mainstream writing is often critiqued as either too superficial or, conversely, too theoretical.¹⁴ For some critics, legal writing fails to advance far enough into the stuff of analysis.¹⁵ In the United States, much legal writing is limited to “case crunching,” tinkering at the margins of policy and reform, and reinforcing liberal legalism.¹⁶ On the other end of the spectrum, for other critics, much contemporary legal writing tends to be largely irrelevant, difficult to understand, and overly theoretical.¹⁷ And, in fact, analyses and proposals straying more than a comfortable distance from mainstream positions are quite unlikely to be taken up by courts or practitioners.

Transnational legal writing, in turn, has some distinct features. In its simplest terms, it can consist of conventional works of com-

10. See generally ANGEL OQUENDO, *LATIN AMERICAN LAW* (2006).

11. See generally DIEGO LÓPEZ-MEDINA, *TEORÍA IMPURA DEL DERECHO: LA TRANSFORMACIÓN DE LA CULTURA JURÍDICA LATINOAMERICANA* (2004).

12. See E. ALLAN FARNSWORTH, *AN INTRODUCTION TO THE LEGAL SYSTEM OF THE UNITED STATES* 83-89 (1996).

13. See Bethany Rubin Henderson, *Asking the Lost Question: What is the Purpose of Law School?*, 53 J. LEGAL EDUC. 48, 66-67 (2003).

14. See generally ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996) [hereinafter UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?*]; Roberto Mangabeira Unger, *Legal Analysis as Institutional Imagination*, 59 MOD. L. REV. 1 (1996) [hereinafter Unger, *Institutional Imagination*]; Wendy Brown & Janet Halley, *Introduction in LEFT LEGALISM/LEFT CRITIQUE* 1, 25-33 (Wendy Brown & Janet Halley eds., 2002).

15. See generally UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?*, *supra* note 14.

16. See, e.g., Unger, *Institutional Imagination*, *supra* note 14, at 17.

17. See, e.g. Brown & Halley, *supra* note 14, at 25-33.

parative law, foreign law, or legal area studies. Transnational scholarship along these lines typically serves the purpose of informing a home audience about another legal system. It can also provide arguments for or against particular proposals of law reform or institutional redesign—at least in jurisdictions receptive to foreign experiences. Moreover, transnational commentary may supply legal practitioners with needed information about foreign rules and procedures applicable to a multiple jurisdiction case or transaction. It informs the substance of expert testimony on foreign law.¹⁸ In international development and aid contexts, it can significantly form the basis of country reports, project proposals, and performance assessments.¹⁹ By using the term “transnational,” I do not mean to invoke a methodological difference, such as distinctions among functionalism, thick description, or side-by-side textual comparison.²⁰ This is not an endorsement of a particular method.²¹ It is also not meant to describe a separate body of law, such as a realm of norms straddling national and international law.²² Rather, my intention is to draw the widest net possible on writing about law in Latin America from a transnational perspective.

III. LEGAL TRANSNATIONALISM

Legal transnationalism, in the sense meant here, refers to a discursive construct. It is sustained by transnational legal writing that simultaneously describes and creates a relationship between different legal systems. It also incorporates legal writing not primarily

18. See generally Carolyn B. Lamm & K. Elizabeth Tang, *Rule 44.1 and Proof of Foreign Law in Federal Court*, 30 LITIG. 31 (2003-04).

19. See generally MARIA DAKOLIAS, *THE JUDICIAL SECTOR IN LATIN AMERICA AND THE CARIBBEAN: ELEMENTS OF REFORM* xi (1996); LINN A. HAMMERGREN, *THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA: THE PERUVIAN CASE IN COMPARATIVE PERSPECTIVE* (1998); WILLIAM C. PRILLAMAN, *THE JUDICIARY AND DEMOCRATIC DECAY IN LATIN AMERICA: DECLINING CONFIDENCE IN THE RULE OF LAW* 3 (2000); *JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA* (Edmundo Jarquin & Fernando Carrillo eds., 1998); *LAS REFORMAS PROCESALES PENALES EN AMÉRICA LATINA* (2005); *THE RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM* 4-5 (Pilar Domingo & Rachel Sieder eds., 2001); *THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA* (Juan E. Méndez, Guillermo O'Donnell & Paulo Sérgio Pinheiro eds., 1999).

20. See generally Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 425-40 (1985).

21. Compare Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65, 75-78 (1996) (arguing for a law-and-society approach).

22. Compare Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT'L L. REV. 745, 745-47 (2005-06). “Transnational law represents a kind of hybrid between domestic and international law that can be downloaded, uploaded, or transplanted from one national system to another.” *Id.* at 753.

concerned with a foreign locale but that is, nonetheless, rendered relevant and even influential as a result of the connection. In this context, legal transnationalism in Latin America can be grouped, primarily, into separate U.S. and European axes. Some of the points made in this Essay are common to both. Yet, each has a somewhat different relationship to national legal systems in the region.

Succinctly, European transnationalism has been especially salient in jurisprudential and positive law projects over most of the twentieth century, premised on the historical and continuing connections of continental European and Latin American states.²³ Traditional comparativists sustain this paradigm by reaffirming Latin America's essentially Continental European law. Moreover, the shape of this form of transnationalism derives chiefly from the very hierarchy that gives it its impetus. Latin American legal systems figure as junior members within the civilian legal family and are thus understood as simple receivers or imitators of European legal production.²⁴ As such, European authorities not principally or even marginally concerned with Latin America furnish much of the terms of national legal discourse in the region.

At the same time, this mode of transnationalism offers certain advantages to legal operators in Latin America. It provides ostensibly nonpolitical and universal-like sources of law and legal reasoning.²⁵ It also introduces the legal production of continental Europe as prime material for national legal debate. A "European-style" intervention within legal discourse in Latin America routinely takes one of the following forms: an annotative approach listing all the countries where a certain European model has or has not been adopted;²⁶ a sociological turn tracking divergences from original models and describing the operation of informal or living law;²⁷ or a discursive tack combining select European authorities to support particular legal positions within national debates.²⁸

My focus in this Essay, though, is principally on U.S.–Latin American legal relations. The prominence of this U.S.-legal transnation-

23. See generally Jorge L. Esquirol, *Fictions of Latin American Law (Part I)*, 1997 UTAH L. REV. 425 (1997) [hereinafter Esquirol, *Fictions*].

24. See generally RENÉ DAVID, *L'ORIGINALITÉ DES DROITS DE L'AMÉRIQUE LATINE* (1956).

25. See Esquirol, *Fictions*, *supra* note 23.

26. See generally Alejandro Garro, *Shaping the Content of a Basic Course on Latin American Legal Systems*, 19 U. MIAMI INTER-AM. L. REV. 595 (1988).

27. See generally DERECHO Y SOCIEDAD EN AMÉRICA LATINA: UN DEBATE SOBRE LOS ESTUDIOS JURÍDICOS CRÍTICOS, (César Rodríguez y Mauricio García, eds., ILSA 2003).

28. See generally LÓPEZ-MEDINA, *supra* note 11.

alism is a relatively recent phenomenon. Of course, the regional influence of U.S. law, especially public law, dates back to well into the nineteenth century.²⁹ The current, more subsidized version originates in Cold War politics and the 1960s Alliance for Progress attempt to keep Latin America within the U.S. sphere of influence. Specifically, the period of “law and development” of the 1960s and 1970s was the high point of U.S. scholarly attention and commentary on law in the region. In fact, some of the enduring perspectives and parameters of the ensuing transnational relationship were forged in this era.³⁰ The neoliberal round of development of the 1980s and 1990s also trained significant attention on law in Latin America. This second time, it took less the form of scholarly works than expert-panel country reports, project proposals by consulting firms, and agency and foundation project evaluations.³¹ Many of these have included collaboration by experts and academics based in Latin America.³² Since the 1990s, international agencies, the U.S. government, and private foundations have continued to support legal reforms, with possibly less emphasis on neoliberal prescriptions and greater focus on social-justice concerns.³³

In brief, this sort of transnationalism appears oriented along three principal lines. National legal systems in Latin America are illiberal or failed versions of modern law.³⁴ Informal or social norms are more representative of people’s actual conduct than formal state law.³⁵ And legal reform with better liberal models is needed to generate development and democracy.³⁶ In sum, not so unlike European transnationalism in a certain way, this paradigm offers an ostensibly nonpolitical mode of pursuing legal change and a near-universal goal. Certain legal projects can, as such, lay

29. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 5; see also Jacob Dolinger, *The Influence of American Constitutional Law on the Brazilian Legal System*, 38 AM. J. COMP. L. 803 (1990).

30. See John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline, and Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 484-89 (1977) (Appendix A: Bibliography of Works on Law & Development).

31. See Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75, 94-95 (2008) [hereinafter Esquirol, *Failed Law*].

32. See Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 54 AM. J. COMP. L. 617, 651 (2007).

33. Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 203, 203-52 (D. Trubek & A. Santos eds., 2006).

34. See Esquirol, *Failed Law*, *supra* note 31.

35. See Jorge L. Esquirol, *Continuing Fictions of Latin American Law*, 55 FLA. L. REV. 41 (2003) [hereinafter Esquirol, *Continuing Fictions*].

36. See Esquirol, *Failed Law*, *supra* note 31; Esquirol, *Continuing Fictions*, *supra* note 35.

claim to rather unopposable—yet indeterminately vague—assertions of development and democracy. And elevated by transnational standing, these positions may more easily override alternative legal-political interests at the national level not backed in the same way.

This paradigm of legal transnationalism is also maintained—for the most part indirectly—by work on law and legal institutions in other academic disciplines.³⁷ Area studies and comparative politics at U.S. universities, in particular, have been a principal vehicle. Notably, an increasing number of Latin American-origin scholars and practitioners have come to fill these ranks, contributing to academic journals and conferences, as well as development project teams, country reports, and U.S.-government-sponsored missions. Graduate students from Latin America, some of them staying in academic or other positions in the United States, also contribute significantly.³⁸ Taken together, all of these generate a continuing stream of legal writing and a field of discourse that is the focus of this Essay.

Transnationalism, thus broadly understood, may serve a number of functions not usually considered. It adds more “participants” to the work of national legal institutions. It provides additional authorities for legal change. It may serve to reinforce a particular paradigm of legal reasoning. And it may reproduce a conceptual arrangement advancing certain interests and limiting others. Additionally, more critical transnationalists may also challenge the parameters of available options, frameworks, and limitations of law and legal institutions. In certain cases, the blind spots, structural biases, and unintended ill-effects of dominant legal prescriptions—and their proponents—may be more easily explored from a transnational vantage point. Furthermore, these perspectives and interlocutors may contribute to fuller consideration of resource allocation, priorities, incentives, and distributional consequences of specific rules and institutional designs. As such, the transnational field—more realistically perceived—is simply another arena in which political positions compete, albeit in differently styled and frequently obscure ways.

37. See, e.g., La Porta, Lopez de Silanes, Shleifer & Vishny, *Law and Finance*, 106 J. POL. ECON. 6 (1998); Guillermo O'Donnell, *Why the Rule of Law Matters*, 15 J. DEMOCRACY 32 (2004).

38. Marta Vides de González, Manuel Gómez, Luis Pérez-Hurtado, *The American Way: Los Abogados Latinoamericanos como Estudiantes de Maestría en Estados Unidos de América* (2004) (unpublished manuscript, on file with author) (confirming sense of increased numbers and stays in the United States).

A. *Limited Engagement*

The dominant U.S.–Latin America transnationalism, however, is quite limited by its own conventions. This is not an empirical claim. It is based on the particularities of the field described below. The effects are considerable though. It forces legal-political questions through the prism of accepted conventions and the current geopolitics of knowledge, suppressing certain interests and broader consideration.³⁹ Moreover, in light of vast economic and political differentials, writing from the center (literally or figuratively) intrinsically carries great weight and capacity to shape international action. Thus, its representations impact the attitudes and policies that powerful U.S. and international entities may adopt. This impact is not limited to transnational audiences. It has the capacity to impress certain beliefs inordinately on commented-upon societies about their own systems of law.

Concretely, U.S.–Latin American legal transnationalism is generally limited to a circumscribed set of modes.⁴⁰ Exchanges over law in Latin America typically consist of the following: comparing laws and legal institutions (explicitly or implicitly) to the *presumed* workings of law elsewhere, especially the United States;⁴¹ contrasting

39. See UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME?, *supra* note 14, at 131. Somewhat parallel, Unger identifies:

The preconceptions to be replaced negate the possibility or the significance of criticism [defined as comparing existing arrangements with the goals they both frustrate and make real.] Such preconceptions present the greater part of any extended and received body of law and legal understandings as an expression of a cohesive moral and political vision, or a set of practical necessities, or of a lawlike evolutionary sequence.

Id.

40. While my claims here extend to work on Latin America generally, the footnotes immediately below focus on a random sample of recent U.S. law review articles on Brazil specifically (the setting of Professor McAllister's book). Compare AHJAZ AHMAD, IN THEORY: CLASSES, NATIONS, LITERATURES 183 (1992) (critiquing Edward Said's *Orientalism* for reverse-Orientalizing the same discourse he critiques. Ahmad's objection—responding in my own defense in this Essay—can be understood as specific to Said's zeal in tracing Orientalism throughout all periods and all disciplinary canons of a common and uninterrupted European identity-as-difference from the "Orient," all the way back to Greek Antiquity. Additionally, describing a phenomenon—ineluctably through the use of concepts and generalizations as I do here—is different than replicating the hegemonically institutionalized set of generalizations, simplifications and projections described in the text.).

41. See Matthew S. Poulter, *My Client's Going to Brazil: A U.S. Practitioner's Guide to Brazilian Limitadas under the New Civil Code*, 11 SW. J. L. & TRADE AM. 133 (2005) (comparison of 2002 New Civil Code provisions of Brazilian "sociedades limitadas" to U.S. limited liability companies); John C. Tucker & Mark A. Brown, *Comparative Analysis of Pesticide Regulatory Programs in the United States and Brazil*, 18 LOY. L.A. INT'L & COMP. L. REV. 81 (1995) (arguing for greater U.S. regulation of pesticide exports, based on perceived higher incidence of human poisoning in Parana, Brazil than in Florida, U.S.A. despite similar procedural and substantive regulation. Poisoning data was based on 1982 to 1991 figures of pesticide

idealized legal models with actual material conditions on the ground;⁴² finding a lack of “penetration” of formal law in local societies and highlighting the prevalence, instead, of different informal and social norms;⁴³ and diagnosing systemic deficiencies based on the self-legitimizing *ideology* of legal liberalism.⁴⁴ Much of this

poisoning reporting program conducted by Public Prosecutor’s office of the State of Parana and, on the U.S. side, a phone interview with an official at the Florida Department of Agriculture and Consumer Services reporting 1994 figures.)

42. See Mariana Mota Prado, *The Challenges and Risks of Creating Independent Regulatory Agencies: A Cautionary Tale from Brazil*, VAND. J. TRANSNAT’L L. 435 (2008) (claiming the failure of internationally-prescribed and U.S.-modeled independent regulatory agencies because “they are not as insulated from electoral cycles and the political sphere as they are perceived or expected to be.”); Tanya Kateri Hernandez, *Relearning Brown: Applying the Lessons of Brown to the Challenges of the Twenty-First Century: To Be Brown in Brazil: Education and Segregation Latin American Style*, 29 N.Y.U. REV. L. & SOC. CHANGE 683 (2005) (advocating the value of an “anti-caste” interpretation of *Brown v. Board of Education* to Afro-Brazilian activists – despite noting significant differences of context such as widespread facial integration and likely rejection by Afro-Brazilian activists); Lesley K. McAllister, *Judging GMO’s: Judicial Application of the Precautionary Principle in Brazil*, 32 ECOLOGY L.Q. 149 (2005) (advocating the model of procedural “hard-look” doctrine of U.S. environmental law, in precautionary principle cases, in Brazilian courts); Alexandre Tadeu Seguin, *LLM Perspective: New Transfer Pricing Rules in Brazil*, 19 NW. J. INT’L L. & BUS. 394, 395-96 (1999) (arguing that Brazil’s 1996 transfer pricing law “exhibits a clear misreading of the concept” — such concept according to the author means essentially the view of the 1979 OECD Report on Transfer Pricing and Multinational Enterprises that “transfer pricing is a mechanism designed only to avoid taxes is misleading. Actually, to transfer price is a sound and positive way to increase value.”); Paulina L. Jerez, *Proposed Brazilian Money Laundering Legislation: Analysis and Recommendations*, 12 AM. U. J. INT’L & POL’Y 329, 352 (1997) (arguing for U.S.-backed money-laundering legislation in Brazil, despite acknowledging it may result in harm to Brazilian economy yet making no note of possible alternatives or internal debates in Brazil: “Nonetheless, the United States views these laws as a desirable and necessary step to combat money laundering.”).

43. See Erica Gorga, *Culture and Corporate Law Reform: A Case Study of Brazil*, 27 U. PA. J. INT’L ECON. L. 803, 812, 824 (2006) (arguing Brazil’s 2001 corporate law reform failed due to Brazilian cultural acquiescence to excessive controlling shareholder/executive personal use of corporate assets, as opposed to the *presumed* situation in the United States: “the ‘patrimonial’ and ‘personal’ culture, deep-seated in Brazil for centuries, is a crucial factor that restrains the development of the capital markets. . . . A distinguishing cultural feature of Brazilian entrepreneurs is that they tend to extract not only pecuniary benefits, but also, and above all, non-pecuniary benefits of their ownership.”); Gesner Oliveira and Thomas Fujiwara, *Competition Policy in Developing Economies: The Case of Brazil*, 26 NW. J. INT’L L. & BUS. 619, 640-41 (2006) (advocating the creation of “competition values and culture” in Brazil, in light of pending “reduction of bureaucracy” anti-trust legislation in the Brazilian Congress).

44. See Cristina Schwann Romano, *The 1996 Brazilian Commercial Arbitration Law*, 5 ANN. SURV. INT’L & COMP. L. 27, 44 (1999) (supporting 1996 Brazilian arbitration law and international commercial arbitration, based on “overcoming Brazil’s deficiency in relation to foreign law,” the well-known deficiencies of its judiciary, and the inadequacy of the Civil Codes and Code of Civil Procedure); Flavia Piovesan, *Integrating Gender Perspective into Brazilian Legal Doctrine and Education: Challenges and Possibilities*, 7 AM. U. J. GENDER SOC. POL’Y & L. 251 (1998-99) (mobilizing tropes of formalism, contradictions, and anachronism of the Brazilian legal culture to advocate greater attention to women’s issues).

work is certainly commendable and no doubt stems from earnest and laudable objectives. Indeed, any one of these modes is quite common to comparative law work, generally. Taken together and circumscribed to these forms, however, the repeated practice of these approaches consolidates a particular picture of law in Latin America. Indeed, most interventions in the field simply reproduce and reinforce this same basic paradigm.⁴⁵ Notably, they also reinforce standard ideological beliefs about the operation of modern liberal law in developed countries, and they serve to legitimate the current geopolitical hierarchy of different national legal systems.

B. *Mystifying and Exclusionary Politics*

This construct turns actual legal debate in Latin America into an obscure object of study rather than an arena of legal/political struggle to be directly engaged. Indeed, in the ways described below, U.S. transnationalism may actually foreclose more horizontal and transparent engagement with the legal actors and the variety of political positions potentially supported in different places.⁴⁶ As a mode of intervening in legal politics, nonetheless, it is quite effective. Indeed, its authority is based on the hierarchical political economy of U.S.–Latin American legal relations, rather than an open analysis of the range of interests concretely at stake in given Latin American polities. Thus, this transnational paradigm more characteristically preempts and displaces contending positions than it does address them.

45. *But see* Colin Crawford and Guilherme Pignataro, *The Insistent and (Unrelenting Challenges) of Protecting Biodiversity in Brazil: Finding “The Law that Sticks*, 39 U. Miami Inter-Am. L. Rev. 1 (2007) (analyzing the pros, cons, and enforcement challenges of Brazil’s “National System of Conservation Units” legislation in 2000); Patricia Maria Basseto Avalone, *The Award of Punitive and Emotional Distress Damages in Breach of Contract Cases: A Comparison of the American and Brazilian Legal Systems*, 8 NEW ENG. INT’L & COMP. L. ANN. 253, 270 (2002) (arguing against the formalistic distinction between tort and contract, common to both Brazilian and U.S. law, to advocate for more “moral damages” awards in contract cases: “This theme si (sic) emphasized both because of the importance of this remedy in providing a fair and just system of compensation to a creditor, and because every day breaches of contract constitute an offense to the moral patrimony of the persons, instead of a mere offense to their pecuniary interests.”); Stanley A. Gacek, *Revisiting the Corporatist and Contractualist Models of Labor Law Regimes: A Review of the Brazilian and American Systems*, 16 CARDOZO L. REV. 21 (1994) (comparing U.S. and Brazilian labor law and labor relations to contractualist and corporatist models, respectively, as to likely levels of labor militancy); Jacob Dolinger, *Brazilian Supreme Court Solutions for Conflicts Between Domestic and International Law: An Exercise in Eclecticism*, 22 CAP. U. L. REV. 1041 (1993) (engaging a range of positions on the question of direct applicability of international law within the Brazilian legal system).

46. *See* Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in COLONIAL DISCOURSE AND POST-COLONIAL THEORY: A READER 66, 90 (P. Williams & L. Chrisman eds., 1994).

As such, in the context of the prevailing U.S. transnationalism, the fuller range of legal/political positions remains relatively isolated, paradoxically, in contexts of increasing internationalization and transnational involvement. Indeed, powerful transnational intervention in one legal struggle or another may squelch the relative strength, or even possibility of significant expression, of the fuller range of interests affected. Engaging the wider gamut of legal politics in Latin America is not typical of transnational analyses. Nor is it on the agenda of formal hemispheric discussions on trade or crime control, to take a couple of examples.⁴⁷ This mode of transnationalism thus falls far short of responsive engagement with legal actors in Latin America and horizontal participation in the societal negotiations of national law and legal institutions.

C. *Diverted Resources*

This disjuncture of legal transnationalism is a missed opportunity to reinforce the construction and consolidation of national legal institutions through added global intellectual resources. The epistemic and strategic divides foster distancing and projection. Rather than broader and more extensive legal debate, edified instead is an instrumental conception available for interjecting legal change in the region, under the aegis of transnational knowledge production. This is especially the case in a hierarchical relationship, such as the weight of U.S. intellectual and financial resources trained on law and legal institutions in Latin America.⁴⁸ Thus, many of the benefits that sustained attention by a wider group of participants could otherwise provide are diverted, at least in terms of the wider goal of societal "law-ness" mentioned earlier above.

IV. DISCIPLINARY CONVENTIONS

The dominant form of U.S. transnationalism is limited by the default positions many comparativists and others repeatedly maintain about the region.⁴⁹ In the aggregate, this vision shapes devel-

47. See e.g. Jorge L. Esquirol, *Can International Law Help?: An Analysis of the Colombian Peace Process*, 16 CONN. J. INT'L L. 23, 82-91 (2000) (arguing the priority of U.S. interests in assistance to Colombia).

48. See generally JAMES GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980).

49. See Esquirol, *Failed Law*, *supra* note 31, at 76.

opment assistance efforts and internationally subsidized law reform.⁵⁰ Described below are some of its more salient features.

A. *Idées fixes*

The consolidation of certain *idées fixes* about the object of study is a significant stumbling block. Especially in a field covering twenty-some countries over the full range of legal issues and institutions, certain generalizations take precedence over more specific knowledge of contexts and situations.⁵¹ In part, overarching frameworks and generalities are the bread and butter of analytic work. At the same time, however, they produce certain distortions and stereotypes that are difficult to counteract and disentrench. The very definition of an *idée fixe* is that it persists despite evidence to the contrary.

1. Underdeveloped Law

The view of a backward or imitative law is one example of an *idée fixe*. Law in the region is seen as a less advanced version of European or U.S. law and methods. One scholar explains the following:

[S]o many of Latin America's institutions and so much of its legal doctrine are derived from foreign sources that it is arguable that there is little point in focusing on Latin America in a basic course in comparative law. The European countries have produced incomparably richer source materials, both primary and secondary.⁵²

Furthermore, law in Latin America is generally viewed as contributing to lesser development, if not viewed itself as underdeveloped.⁵³ One example of such characterization is as follows:

The dominant perception is that Latin American countries, generally classed as underdeveloped and backward, lack a pattern of social organization sufficiently cohesive to permit a minimum basis for comparison of the role of legal institutions as an integral part of a culture.⁵⁴

50. *Id.*

51. See generally Esquirol, *Fictions*, *supra* note 23; Esquirol, *Failed Law*, *supra* note 31, at 75; Esquirol, *Continuing Fictions*, *supra* note 35.

52. Kenneth L. Karst, *Teaching Latin American Law*, 19 AM. J. COMP. L. 685, 685 (1971).

53. Contrast KENNETH KARST & KEITH ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA* 6 (1975) (stating "the dizzying profusion of laws and lawyers suggests that a more appropriate word for law in Latin America might be 'overdeveloped.'").

54. Garro, *supra* note 26, at 602.

Weak economies and unstable democracies are linked to this insufficient law.⁵⁵ Formal legality is thus cast as part of the problem. If anything, such insufficient law—so this thinking goes—needs to be replaced with better legal methods and institutions. As a result, it would appear completely nonsensical to engage actual doctrinal texts, to master the genres of legal debate in Latin America, or to act in relation to existing laws and institutions. Instead, the focus has been to replace them with better methods and forms. As a result, there is no apparent need to engage such law's particularities in the many different national legal systems. Rather, if anything, the study of European law and its authors is deemed a sufficient complement to a common-law background for understanding law in the region. Still today, for example, there are few courses on law in Latin America taught in U.S. law schools.⁵⁶ And some comparativists have even suggested that studying French or German law is a more productive avenue for learning about law in the region.⁵⁷

Moreover, the legal similarities and differences across Latin American countries are often viewed as, more than anything else, reflecting different encroachments on a model "rule of law."⁵⁸ As such, they are described as illegitimate politics, alternative social norms in place of law, evidence of clientelism, the gap between law and society, happenstance historical features, or differences owing to the prominence of certain individuals or events in a particular country.⁵⁹ In this way, it becomes possible to speak of a general "Latin American law," although no such thing exists.⁶⁰ In the final analysis, the operative meaning of the latter merely consists of the region's shared shortcomings measured against projected ideal types. Additionally, within this transnational field, no significant intra-Latin American engagement exists, except for possibly the

55. See generally KARST & ROSENN, *supra* note 53; KENNETH KARST, *LATIN AMERICAN LEGAL INSTITUTIONS* (1966).

56. MARISOL FLOREN-ROMERO, *UNOFFICIAL SURVEY OF LATIN AMERICA-RELATED LAW COURSES AT ABA-ACCREDITED (INCLUDING PROVISIONALLY ACCREDITED) U.S. LAW SCHOOLS (EXCLUDING PUERTO RICO)* (Sept. 2008) (on file with author) (out of 196 schools, 32 listed at least one—very few listed more than one—course substantially on Latin America at their home campus. This number does not indicate how often they are actually offered.).

57. See GARRO, *supra* note 26, at 599-601.

58. See generally Guillermo O'Donnell, *Why the Rule of Law Matters*, 15 *J. DEMOCRACY* 32 (2004).

59. See, e.g., M.C. MIROW, *LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA* (2004).

60. Except as the sum of Latin American state law (and/or the inter-American human rights system and isolated harmonization attempts). See generally OQUENDO, *supra* note 10.

occasional regional commission to draft model laws and USAID assisted efforts.⁶¹ Notably, individual Latin Americans often generalize their own country's particularities on the region as a whole or adopt the general conventions of the prevailing legal transnationalism, as discussed here, as a mode of engaging in this "regional" discursive key.⁶²

2. Legal Formalism

The fixed belief that the legal culture of the whole region can be explained easily by the influence of one (or a couple of) prominent European jurists is another example of an *idée fixe*.⁶³ Probably the most salient example in modern times is the larger-than-life place accorded to Austrian legal scholar Hans Kelsen. "The greatest influence of Latin-American theory of law is presently being exercised by Hans Kelsen."⁶⁴ The influence of this archetypal figure, it has been argued, can account for the whole of legal consciousness in the region. "The importance of the influence of Kelsen is often strongly stated and the conviction voiced that Kelsen is *the* jurist of the contemporary epoch."⁶⁵ Specifically, Kelsen is credited with a very structured legal formalism, not unlike the historical nemesis of legal realism taught to U.S. law students.⁶⁶ He is associated with a strict formal and independent legal logic—as opposed to more flexible policy considerations—in which law and legal operators fit within a lock step hierarchy of written norms.⁶⁷

This belief in a simple epistemology or legal consciousness—said to characterize the region—undergirds much contemporary

61. See, e.g., Langer, *supra* note 32, at 625-26, 642-43 (in the case cited by Langer, the intervention from the periphery depended on USAID support).

62. See, e.g., *id.*; Liliana Obregón, *The Colluding Worlds of the Lawyer, the Scholar and the Policymaker: A View of International Law From Latin America*, 23 WIS. INT'L L.J. 145 (2005); Arnulf Becker Lorca, *International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination*, 47 HARV. INT'L L.J. 283 (2006); Jorge L. Esquirol, *Alejandro Alvarez's Latin American Law: A Question of Identity*, 19 LEIDEN J. INT'L L. 931 (2006).

63. Contrast Esquirol, *Fictions*, *supra* note 23 (examining other mid-century currents of legal thought).

64. Josef L. Kunz, *Latin-American Philosophy of Law in the Twentieth Century (Continued)*, 24 N.Y.U. L. REV. 473, 488 (1949) (emphasis in original).

65. *Id.*

66. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 9-31 (1992).

67. Compare Antonio Carlos Wolkmer, *INTRODUÇÃO AO PENSAMENTO JURÍDICO CRÍTICO: O PROBLEMA DA IDEOLOGIA NA TEORIA PURA DO DIREITO* 163-70 (2002); Luis Villar Borda, *KELSEN EN COLOMBIA* EDITORIAL TEMIS (1991) (describing Kelsen as rather a response to critiques of classical legal thought).

U.S.–Latin American transnationalism and produces an impoverished representation of the state of legal theory, diversity of approaches, and activity of jurists in the region.⁶⁸ The image is one of a legal culture stuck in an earlier era of knowledge and skill about the law. Indeed, it is quite unjustified to believe that the whole of the region's legal consciousness can be contained in the thought of a single theorist—no matter how postmodern one's approach.⁶⁹ Furthermore, as discussed in more detail below, even one individual can be interpreted and come to stand for quite different propositions. These may be marshaled with very different valences than normally associated in their home contexts.

3. Failed Law

In yet another example of an *idée fixe*, law in Latin America suffers from the permanent stigma of its practical ineffectiveness.⁷⁰ “It is practically a truism to point out that both the new constitutions and the new codes [in Latin America] were ill-suited to the countries which adapted them and that the ‘grafts,’ hence, failed to ‘take.’”⁷¹

In Professor McAllister's work on environmental law enforcement in Brazil, we similarly encounter this constant within the field.⁷² We also have the benefit of her particular treatment of these ideas. Professor McAllister's story, quite differently, is one of success—“Brazil stands out as a country where legal institutions have forged a path towards environmental rule of law”⁷³—and this is hard to reconcile with the established wisdom of the field. She notes as much, stating, “[t]his book tells an atypical story.”⁷⁴ Her book is an empirical analysis of environmental law enforcement efforts at both the state and federal levels in two Brazilian states, São Paulo and Pará. She generally lauds the broad enforcement powers granted to public prosecutors by the 1988 constitution, and she distinguishes among levels of success in different offices.

Professor McAllister's treatment presents one respectable approach to the disciplinary constraints noted here. She recog-

68. See generally LÓPEZ-MEDINA, *supra* note 11.

69. See DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT*, xv (2006) (distinguishing between an era's legal consciousness and legal theories falling in line).

70. See Esquirol, *Failed Law*, *supra* note 31, at 80.

71. Howard J. Wiarda, *Law and Political Development in Latin America: Toward a Framework for Analysis*, 19 AM. J. COMP. L. 434, 442 (1971).

72. McALLISTER, *supra* note 1, at 12.

73. *Id.* at xiii.

74. *Id.* at 2.

nizes the field's *idées fixes*, demonstrating her familiarity with the literature, restates them, and then works around them since they are not really supported by her own analysis. This is not to say the *idées fixes* are frontally refuted, although Professor McAllister comes close. "In Brazil," she states, "bringing environmental law into the ambit of procuracies and courts has strengthened its implementation because legal institutions have strong reputations for integrity, political independence, and public responsiveness and because they have specialized developed knowledge and case management tools that are conducive to resolving environmental problems."⁷⁵

However, in an effort to maintain disciplinary credibility, commentators are often compelled to accommodate what everyone already knows, or thinks they know, about the operation of law in Latin America. When these conflict with one's own work, however, then the question becomes what to do with these *idées fixes*. Notably, in Professor McAllister's work, the persistence of the *idée fixe* of failure resurfaces through the distinction she draws between legal actors and regulatory agencies in Brazil.⁷⁶ The trope is retained but redirected to the regulatory agencies. *Regulatory agencies* have failed at environmental protection. By contrast, the *legal* actors (Professor McAllister's usage)—public prosecutors—have mostly succeeded.⁷⁷ Of course, the underlying expectation is that regulatory agencies—and not the public ministry—should provide muscular environmental enforcement, although Professor McAllister recognizes environmental agencies are weak the world over.⁷⁸ Indeed, it is not particularly fitting to intone the narrative of failure here. Simply, this institutional configuration, according to Professor McAllister herself, happens to be better for (certain) environmental interests in Brazil, whereas regulatory agencies may be better somewhere else.⁷⁹ A nod to failure, though, makes the story conform to the *idées fixes* of the field. It makes it seem more famil-

75. *Id.* at 13.

76. *See id.* at 4.

77. *Id.* at xi.

78. *Id.* at 21. ("The weakness of environmental agencies is, of course, not unique to Brazil. . . . This chapter re-affirms the conventional wisdom that, despite the strength of Brazilian environmental laws, environmental agencies are constrained in their capacities to implement and enforce them.")

79. Compare Cristina Schwanssee Romano, *Land and Resource Management: Brazilian Government Policies Towards the Amazon Rain Forest: From a Developmental Ideology to an Environmental Consciousness?* 10 COLO. J. INT'L ENVTL. L. & POL'Y 65 (1999) (describing competing development interests balanced by environmental agency and ultimately their lack of enforcement resources).

iar, more consonant a story about Latin America and Brazil in particular.

Indeed, much scholarship on Latin America takes the form of simply repeating or retreading accepted *idées*. These *idées* may be garbed in different theoretical clothes. Contexts, problems, and situations may change, but the conceptual framework and ultimate conclusions often simply default back to the same. Professor McAllister's particular way around the field's accepted truths is a notable aspect of her book. This is not to say that the pall of accepted notions does not affect the overall analysis and impact of her work. It is indeed these background understandings that make one of her conclusions appear startling due to its simplicity. She explains, "[t]his book contends that the involvement of legal actors may provide an answer to the rule of law problem of environmental law in developing countries."⁸⁰ In fact, the point appears *too* simplistic if it were taken solely to mean that the problem of nonenforcement in Brazil is that legal actors are not involved (except for the successful case of public prosecutors in environmental enforcement). But absent the disciplinary baggage, this conclusion—that directing more state resources and power to prosecutors increases enforcement—undoubtedly just makes good sense.

4. Lack of Independence

Also common to the field is the explanatory power Professor McAllister assigns the concept of legal independence. Much transnational analysis identifies lack of independence as a failing constant of law in Latin America.⁸¹ One recent article notes the following:

Many well-known studies of judicial independence in Latin America make what might be called monolithic and millenarian arguments. Keith Rosenn, for example, argues that all of Latin America suffers from a fairly permanent lack of judicial independence

. . . .
 . . . Given the proliferation of definitions of independence used by the various scholars, if there is any surprise in the literature it is that everyone agrees that, whatever independence might be, Latin America does not have it.⁸²

80. McALLISTER, *supra* note 1, at 13 (citations omitted).

81. See Esquirol, *Failed Law*, *supra* note 31, at 78; see also Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1, 3-13, 32 (1987).

82. Daniel Brinks, *Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?*, 40 TEX. INT'L L.J. 595-96 (2005).

Of course, judges beholden to outside interests and forces would subvert the meaning of an “independent judiciary” in a liberal democracy. Independence, however, can have a host of different meanings.⁸³ It may mean, in any one case, independence from other branches of government, from partisan politics, from the interests of litigants, or from any outside influence other than the law.⁸⁴ In the Latin American context, in particular, one or more of these versions can always be picked as lacking.⁸⁵ In effect, the consensus, as the commentator above has noted, is its permanent failure.

In any case, independence appears to be relatively straightforward in only two senses. First, as simply formal independence, it can mean a completely autonomous organizational structure with lockstep benchmarks for tenure and promotion of its members. In this way, for example, judicial decisions will be—at least as a formal matter—free of illegitimate influence at the level of judicial appointments and promotion. Second, independence also appears relatively clear in extraordinary and unlikely cases of complete institutional freedom. Where an institution is not subject to any checks or controls, its independence is definitional even if other values may be compromised.

The difficult cases, however, are all those where institutional independence is held to the countervailing requirement of accountability. And yet, scholars presume to be able to recognize the right mix and easily quantify it. Indeed, a common measure cited as proof of judicial independence is the percentage of court cases decided against the state, where the latter is a party.⁸⁶ A high percentage is purported to show political autonomy. However, in actuality, it can just as well represent a high incidence of judicial excess.⁸⁷ Distinguishing between political autonomy and judicial

83. See Owen Fiss, *The Limits of Judicial Independence*, 25 U. MIAMI INTER-AM. L. REV. 57, 57-60 (1993-94).

84. See generally GERMÁN BURGOS SILVA, INDEPENDENCIA JUDICIAL EN AMÉRICA LATINA ¿DE QUIÉN? ¿PARA QUÉ? ¿CÓMO? 13-42 (2003).

85. See Esquirol, *Failed Law*, *supra* note 31, at 78.

86. See, e.g., Joel G. Verner, *The Independence of Supreme Courts in Latin America: A Review of the Literature*, 16 J. LATIN AM. STUD. 463 (1984); David Clark, *Judicial Protection of the Constitution in Latin America*, 2 HASTINGS CONST. L.Q. 405, 433, 435, 438 (1975) (finding in favor of relatively effective judicial review correlated to economic development).

87. See UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME?, *supra* note 14, at 74-78; see, e.g., PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK 139 (1990) (“determining the Court’s direction involves more than a count of the decisions. By emphasizing results over reasoning, these studies [showing more statutes were upheld than over-ruled by the U.S. Supreme Court] tend to have misinterpreted it.”).

activism is more complicated to ascertain and difficult to discern than simply counting cases decided against the state.⁸⁸ Additionally, judicial intervention in the area of public law tells us little about levels of neutrality and objectivity in private law matters.⁸⁹ A more nuanced, qualitative analysis depends on the meaning of independence espoused. If the meaning is freedom from all outside influences, then certainly clear evidence of independence is rather unlikely as its assertion rests on a highly controversial theory about law's singular autonomy from politics and society. It can certainly be argued, at least with respect to such idealized version of law, that legal independence is simply not attainable operationally.⁹⁰ Thus, the question of legal independence is more problematic than merely recognizing that it comes in degrees, as Professor McAllister states.

Independence, as an aspirational ideal, projects the achievement of faithfulness—not to ideology, politics, or oneself, but to strict enactment of “the rule of law.” In other words, decisions and actions, so this theory goes, should strive to conform solely to the law. Here, too, there is a potential multiplicity of outcomes—all in good faith. These outcomes derive from alternate interpretations of the law, conflicting jurisdictions and norms, and the relative unachievability of neutral and objective decision making. Singularity of outcomes—under this meaning of independence—is primarily a produced effect and not any one practice. Certainly, the imagined possibility and repeated assertions of “independence,” in specific contexts, reinforce a sense of law-ness: i.e., as the opposite of ideological, political, or personally idiosyncratic law. As such, exercising discretion in legal matters in such a way as to generate general acceptance as objective and independent is, under our current state of legal technology, rather more a complex performance than a particular practice. Regardless, in a wide array of situations, legal officials must inevitably act within zones of more or less discretion and decide among multiple and conflicting positions. Yet despite this well-known understanding of legal independence as

88. Brinks, *supra* note 82, at 606 (attempting to strike the right mix: “In summary, then, a strong independent and diverse oversight body will ensure that decisions are made according to accepted standards for judicial decision making.” This, however, merely displaces the problem of independence on to the oversight body, which must itself be independent, and it assumes there are clear “accepted standards for judicial decision making.”).

89. KENNEDY, *supra* note 69, at 4.

90. See Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 10, 29 (1984).

relational and practically unattainable in any sure way, its functional unachievement in Latin America is a standard diagnosis of the specific failings of law in the region.⁹¹ A lack of independence is thus always relatively easy to claim. It would not be difficult, for those so disposed, to consider any particular legal action as tainted by considerations or influences outside a narrow definition of law.

Professor McAllister's analysis is likewise drawn to the question of independence, not of the judiciary but of prosecutors.⁹² The evidence she marshals in this regard—not unlike past studies of Latin American judiciaries—is the number of cases investigated, filed, or settled.⁹³ For Professor McAllister, high numbers signal energetic enforcement, and, conversely, low numbers signal outside constraint.⁹⁴ Under this test, the São Paulo state and federal prosecutors and Pará federal prosecutors are independent, but the Pará state prosecutors are not.⁹⁵ Of course, these numbers can have alternative explanations and lead to different conclusions: for example, high numbers could signal high activity lacking in priorities, coordination, or accountability. Professor McAllister herself considers this possibility about the São Paulo state prosecutors, who reported high numbers.⁹⁶ Nevertheless, she concludes instead that the lower reported activity of Pará state prosecutors indicates their lack of independence. It may very well be that, at the end of the day, the Pará state prosecutors should have more discretion from a certain perspective, and the São Paulo ones should retain the same (or less) from some other or the same perspective. Yet the concept of independence or lack thereof, though a long-standing *idée fixe* about law in Latin America, is not sufficiently helpful as an analytical category here. In fact, it is actually somewhat deceptive.

The multiple meanings of this concept, moreover, are evident in its variety of uses within Professor McAllister's own conclusions. Some examples are as follows. “While not directly stated and discussed by Valente or other early commentators, the most fundamental factor constraining the state Ministério Público of Pará is its

91. See generally Esquirol, *Failed Law*, *supra* note 31.

92. See McALLISTER, *supra* note 1, at 108-20.

93. *Id.* at 96-108.

94. *Id.* at 86-87.

95. *Id.* at 87.

96. See, e.g., *id.* at 115 (too much autonomy of the São Paulo prosecutor leads to too much control or accountability [information requests] of the São Paulo environmental agency limiting its effectiveness and *ad hoc* re-arranging its priorities).

lack of independence from the executive branch.”⁹⁷ Professor McAllister criticizes, in effect, the 1988 Brazilian Constitution for not going far enough in granting the Ministério Público greater autonomy. Proposals in favor of internal appointments of attorneys general and complete control over their own budgets were advanced by an organization of Brazilian prosecutors at the time.⁹⁸ They were rejected, however, by the constitutional assembly, providing instead that state governors appoint attorneys general from a three-person slate provided by the respective public ministries and that the executive exercise budgetary controls.⁹⁹ Notably though, “comparing the Brazilian Ministério Público with the Ministério Público in nine other countries, Kerche finds that on the spectrum of independence from political control, the Ministério Público is the extreme case of independence.”¹⁰⁰

In a different sense of the meaning of independence, Professor McAllister maintains that “[d]espite the constitutional provisions that favor the political independence of the Ministério Público, Pará governors managed to retain influence over the work of the state prosecutors through their control of the state budget process and their power to appoint the attorney general.”¹⁰¹ Professor McAllister’s position is based on interviews of Brazilian prosecutors for this study, without much critical distance on the situations giving rise to such beliefs. However, as already noted, these conditions are not unique to the state of Pará. The same structural and functional features apply to state prosecutors in all Brazilian states.¹⁰² Therefore, at a minimum, the question of discretion must be understood in relation to particular cases of undue influence or in some other more disaggregated way.

In yet a different usage, Professor McAllister finds that “Pará’s state prosecutors may also lack independence from city government officials in the localities where they work.”¹⁰³ In this case, the term “lack of independence” has a different sense. It refers to the fact that, due to insufficient resources, Pará state prosecutors *de facto* rely on municipal resources, in indirect ways, in order to carry out their work. The implication is that, as a result, prosecutors are likely to be swayed by these accidental local patrons.

97. *Id.* at 110.

98. *Id.*

99. *Id.*

100. *Id.* at 65.

101. *Id.* at 110.

102. *Id.* at 108-09.

103. *Id.* at 111.

These various statements reflect the multiple tasks performed by the concept of independence. Certainly, at its most basic level, independence can be either positive or negative in a particular situation. Indeed, it may introduce welcome freedom from unwanted political interference, or it may usher in unbridled arbitrariness, political bias, or personal idiosyncrasy.¹⁰⁴ Thus, independence is not an absolute good. It is constantly in relation to other considerations. Moreover, *dependence* may be a positive value when used to mean accountability. It may also be positive when referring to external influences infusing the law with corresponding societal priorities, synchronized governmental policy, or simply good management. Professor McAllister appears to sense as much—“it [independence] is a matter of degree”—although she does not disentangle the various meanings and possibly conflicting objectives signified by this concept.¹⁰⁵

Indeed, by resting her conclusion on “lack of independence,” Professor McAllister forecloses a number of other promising lines of inquiry. Her conclusion preempts a number of other questions alluded to but not explored in the text.¹⁰⁶ For example, how can the individual autonomy of prosecutors be reconciled with countervailing concerns such as individual civil liberties; prosecutorial accountability; office and individual case coordination; desirable levels of discretion in specialized agencies; proper priorities of regulatory agencies faced with legal sanctions for noncompliance with prosecutorial demands; and the balance of prosecutorial time spent on environmental versus other matters of social and collective concern?¹⁰⁷ Additionally, the goal of more independence may have different meanings for the prosecutors interviewed, potentially manifesting their frustration—possibly tactically—against incomplete autonomy, insufficient resources, individual reactions to particular cases, an antagonistic superior, and the like. Relatedly, how does “lack of independence” clarify the differences

104. See generally Brinks, *supra* note 82.

105. See McAllister, *supra* note 1, at 115.

106. As an example, she herself notes that a principal difference between Pará state prosecutors and the others examined is the relative lack of support received from the state environmental agency. *Id.* at 105 and 30, 37.

107. See generally Rosângela Batista Calvancanti, *The Effectiveness of Law*, in ENFORCING THE RULE OF LAW: SOCIAL ACCOUNTABILITY IN THE NEW LATIN AMERICAN DEMOCRACIES 34 (E. Peruzzotti & C. Smulovitz eds., 2006) (noting competing claims upon Ministério Público resources from different societal interests, the general limitation of administrative discretion in favor of Ministério Público “strict legal enforcement” actions, and potential overreliance on Ministério Público by civil society groups possibly leading to their demobilization).

between São Paulo state and Pará state where both offices operate under the same structural framework? If the difference is a matter of perception, as suggested in the text, then what contributes to that perception and how does this book—arguing actual lack of independence—contribute to that construction?

In sum, *idées fixes* are often interjected as default diagnoses or generic conclusions when the actual complexities are hard to resolve, or when political conflicts are not easily reconcilable. It is a common place to end. Some form of external dependence—cast negatively—is highlighted in order to confirm the general theme. While the charge of undue influence may be justified in particular cases, if the level of independence imagined is law's complete autonomy or some composite mix of different meanings of independence, then Latin America's legal institutions must assuredly always fail the test. In any case, the congealment of certain *idées fixes*—such as this one—limits broader analysis and options for reform.

B. *Anthropologizing the Law*

The unrelenting background notion that Latin American laws and legal structures present only part—and a small part at that—of the picture of legality in these countries is also difficult to demystify. There is a well-developed literature on the region that social norms—variously characterized as informal law, law in action, society, and legal pluralism—are as important as, if not more important than, state law.¹⁰⁸ Professor McAllister summarizes the conventional wisdom in the following way:

Studies of Brazilian legal culture reveal the extent to which the cultural dimension of the rule of law has been lacking. Brazilians often quip that some law simply “stay on paper” (“*ficar no papel*”) and “that are laws that catch on, and other that don't” (“*há lei que pega, e lei que não pega*”). Moreover, Brazil is the land of the “*jeito*,” by which those political and social connections have ways to get around or “bend the law.” The *jeito*, which includes not only conventional corruption but also situations where a public servant deviates from the law because it is unrealistic or unjust, has been the norm rather than the exception in many areas of law. A 1996 survey of law students in the Brazilian state of Rio de Janeiro revealed that only 6% believed that conflicts in Brazil were principally resolved through the law and legal institutions; 94% considered the *jeito* or the “law of the strongest” to be predominant. In a Brazilian public opinion sur-

108. See, e.g., Professor McAllister's citations to this body of literature. McALLISTER, *supra* note 1, at 10-13.

vey, 82% agreed that Brazilians disobey most laws and 80% agreed that only the poor have to obey the law. The application of law in Brazil is perceived as highly socially contingent.¹⁰⁹

While some version of this account is applicable everywhere, in Latin America it has been endowed with a particular salience.¹¹⁰ Its effect, ultimately, is that mainstream national legal discourse—from a transnational perspective—is significantly downgraded. Such discursive practices are presumed limited to a small sector of society—the Europeanized elite.¹¹¹ And even within the Europeanized elite, they are often seen as mostly symbolic.

This schematization of legal systems in the region has the effect of anthropologizing the field of law. Anthropologizing law, as used here, is different than simply contextualizing the law or linking law to society and social interests.¹¹² Rather, it advances the idea that state law is practically irrelevant and that normative choices are made primarily by the people through other, informal, and social means. This overall direction suggests that sociological or anthropological methods are better suited than legal analysis.¹¹³ The stress on informal law or divergent social practices calls for analysis not unlike that applied to primitive cultures or native populations studied for their particular cosmologies.¹¹⁴ In a similar way, Latin America's state law appears not amenable to the same type of legal reasoning and legal-political debates as in the United States or Europe. It is perceived as predominantly a mix of exclusive elite politics and passive symbolic representations.¹¹⁵ Thus, law is seen as more the province of the social sciences than legal debate. One commentator has described it as follows:

109. *Id.* at 12 (citations omitted).

110. See Professor McAllister's own observation that "Canadian regulators lowered their expectations and bent the rules when confronted with noncompliant pulp mills. Similarly, Gunningham (1987) found that the lack of prosecution in the regulation of Australian asbestos mines led to "negotiated non-compliance" with ultimately fatal results." *Id.* at 15.

111. See generally Esquirol, *Fictions*, *supra* note 23.

112. See Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1022 (1981) (on the difference between contextualizing and anthropologizing).

113. No reference to any particular anthropological methodology is intended. Still the distinction between anthropology and sociology drawn by Claude-Lévi Strauss serves sufficiently well. CLAUDE LÉVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* 2-3 (1963).

114. See generally Walter Mignolo, *Human Understanding and (Latin) American Interests: The Politics and Sensibilities of Geohistorical Locations*, in *A COMPANION TO POSTCOLONIAL STUDIES* 180 (H. Schwarz & S. Ray eds., 2004).

115. See, e.g., YVES DEZELAY & BRYANT GARTH, *THE INTERNATIONALIZATION OF PALACE WARS* 33 (2007); MAURICIO GARCÍA VILLEGAS, *LA EFICACIA SIMBÓLICA DEL DERECHO: EXAMEN DE SITUACIONES COLOMBIANAS* (1994).

[T]he best available American legal scholarship on Latin American legal institutions has been weighted toward what a Latin American lawyer would label as empirical studies rather than a straight juridical (i.e., technical and conceptual) analysis of legal norms. The viewpoint of Anglo-American legal scholars on Latin American legal problems generally does not make much sense to the typical Latin American jurist.¹¹⁶

This anthropologizing tendency presents a certain picture of law and legal institutions as a record of political decisions made elsewhere and, alternately, a catalogue of political demands that remain unmet.¹¹⁷ In either case, each picture merely records—in an unmediated way—the individual and societal bargains struck separately in the body politic. As such, they register the resulting arrangements, but are not believed as significantly acting upon or determining outcomes in concrete struggles—except possibly in some inappropriate way. This persistent perception significantly discredits participation in local legal modes of engagement.

The “law on the books” and, consequently, debates about such law seem like a shallow or ritualistic exercise, indeed. The interplay of legal arguments and positions taken by legal actors, in the wake of this critique, appear all largely disingenuous.¹¹⁸ As such, transnational analysis quickly jumps to party politics, clientelistic networks, and personal influence and corruption as explanations for legal decision making.¹¹⁹ Without such standard references and hedges included, representations of law for transnational audiences appear woefully incomplete, seemingly unaccompanied by an account of the *real* “law in action.” Indeed, this perspective adopts a deeply critical view of law as just pure politics or corruption, *in Latin America*. These accounts have the effect of suggesting that formal law is thus largely irrelevant—or pretextual—in the face of predominantly extralegal practices.

The relationship between law and social practices—and their purportedly exceptional divide in Latin America—is not really my focus here.¹²⁰ More pertinent for my purposes are the particularities of the transnational legal field within legal discourse in the region. As a significant source of knowledge production, the former widely shapes the attitudes and perspectives of jurists, law stu-

116. GARRO, *supra* note 26, at 601.

117. *See generally* VILLEGAS, *supra* note 115.

118. *See, e.g., id.*

119. *See generally* JUSTICE DELAYED: JUDICIAL REFORM IN LATIN AMERICA, *supra* note 19; THE (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA, *supra* note 19.

120. *See generally* Esquirol, *Continuing Fictions*, *supra* note 35.

dents, and public opinion.¹²¹ Moreover, due to its global politics, transnational legal analysis forms the basis for internationally supported law reform. Considered this way, this field can—on a spectrum—either more horizontally engage a range of local actors and their projects or more limitedly engage only other similarly inflected transnational interventions. Certainly, as noted above, all forms of legal writing—from the more traditional *doctrine* to transnational legal discourse, project evaluations, and empirical work, such as Professor McAllister’s book—contribute to the operation of legal institutions. The current limitations of the transnational genre, however, narrow the field of debate and privilege positions fitting conventional forms.

C. *False Cognates*

For the transnational observer-participant, engaging other legal systems is subject to a number of pitfalls. There are those pitfalls specific to Latin America listed above. But there are others common to all comparative work. For example, Merryman has noted that “[m]uch of the Italian doctrine may seem strange and unreal to the American observer . . . it is easy, too easy, to criticize Italian legal thought. By emphasizing its extremes and ignoring its context one can make it appear ridiculous.”¹²² Some examples are contained in the following sections.

The notion of “false cognates,” for instance, describes the surface similarity of certain common terms and references that may actually signify something different. As used here, it refers to the specificity of legal discourse in any one place. References consist of authorities, sources, and positions marshaled in quite contextual ways. From an outside perspective, such legal arguments may seem anachronistically formalist, oddly imitative of European jurists, stylistically obfuscating, theoretically unsophisticated, or simply unrecognizable in a myriad of ways. Thus, it would be quite difficult to engage in such legal politics in any earnest, participatory manner. The transnational participant-observer, therefore, would likely not take positions in the same stylistic and conventional manner as jurists operating in that genre.

False cognates, in the way described here, highlight the varying meanings of legal theories or legal authorities in particular con-

121. See generally Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19 (David M. Trubek & Alvaro Santos eds., 2006).

122. Merryman, *supra* note 5, at 63.

texts. Specific ideas and individual scholars may come to stand for different propositions and political valences in different places. In this way, for example, Ronald Dworkin or Hans Kelsen—mentioned earlier—could play quite different roles and represent quite different political constituencies across a variety of arenas.¹²³ The quite accepted view of Kelsen, in Latin America, as the chief—if not lone—architect of the region's modern positivism has already been noted. This view may be contrasted with a view of Kelsen as the inspiration for post-WWII constitutional courts in Europe and advocate of constitutional review powers by a high court.¹²⁴ It is also different from Kelsen as a pragmatist in the international law context, explicitly skeptical of outward forms and empty philosophizing.¹²⁵ Alternately, Kelsen can be viewed as a defender of the objectivity and neutrality of liberal legality in the wake of more radical critiques of the law's interpretative indeterminacy, while still accepting some of the insights of those critiques.¹²⁶

In a different example, Dworkin is typically understood in the United States as a rather mainstream supporter of generic liberal legalism.¹²⁷ While he acknowledges the multiplicity of legal materials suggesting their apparent plasticity, he also provides a comforting response against more radical critics.¹²⁸ Indeed, Dworkin provides a way of reconciling the competing tensions, objectives, and policies underlying the common law and legal interpretation more generally. Under a broader structural umbrella, he provides an amount of certainty and nonpoliticalness, ultimately, to the system of law.¹²⁹ In this way, Dworkin is understood as a response to legal realism and even to critical legal studies on the indeterminacy of law and its camouflaged politics.

By contrast, in the past decade, Dworkin has been embraced as a more radical champion in certain Latin American countries. In Colombia, for example, defenders of the expansive jurisprudence

123. Compare BORDA, *supra* note 67; David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7 (1994) (painting different portraits of Kelsen).

124. Bojan Bugarcic, *Courts as Policy-Makers: Lessons from Transition*, 42 HARV. INT'L L.J. 247, 256-57 (2001).

125. Kennedy, *supra* note 123, at 22 ("It turns out that Kelsen is adept at many of the criticisms to which we have learned to think him easily subject.").

126. See BORDA, *supra* note 67, at 43 (noting that Kelsen's theory recognizes judicial law-making, in this way rejecting legal exegesis).

127. See *Ronald Dworkin*, in THE CANON OF AMERICAN LEGAL THOUGHT 551, 554 (David Kennedy & William W. Fisher III eds., 2006).

128. See generally RONALD DWORKIN, LAW'S EMPIRE (1986); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

129. See generally *Ronald Dworkin*, *supra* note 127, at 551-57.

of the Colombian Constitutional Court have embraced his theories as a justification for the court's opinions.¹³⁰ Indeed, Dworkin provides the bases for a widely contextual and responsive judicial decision making. This, no doubt, goes beyond his self-stated reassurances of judicial constraint as a function of legal precedents and principles associated with the common law. Dworkin's emphasis on judicial practice and the Herculean task of judges in reconciling often-competing legal authorities from his perspective within the common-law tradition, however, make him particularly appealing to actors interested in defending the more daring and controversial decisions of Colombia's high court.¹³¹ Moreover, in Brazil, for example, Dworkin is seen by some as too radical.¹³² One commentator rejects Dworkin, associating him with the Brazilian Supreme Court's excessive discretion.¹³³ The Brazilian Supreme Court, in a *Marbury*-like fashion, has assumed the power of constitutional review over amendments to the constitution, thus making itself the final word on any political change short of revolution.¹³⁴

These more recent judicial practices in Latin America are controversial in their own particular ways. Commonly, civilian judges are projected as mere "mouthpieces of the law."¹³⁵ Certainly, in the constitutional realm, these constraints are somewhat loosened. The danger, however, is that these constitutional opinions may be deemed thoroughly political and thus not law at all. Additionally, many of these decisions, in the Colombian context, for example, were handed down in the context of *tutela* proceedings. *Tutela* proceedings are individual rights of action claiming a constitutional

130. DIEGO LÓPEZ-MEDINA, EL DERECHO DE LOS JUECES: OBLIGATORIEDAD DEL PRECEDENTE CONSTITUCIONAL, ANÁLISIS DE SENTENCIAS Y LÍNEAS JURISPRUDENCIALES Y TEORÍA DEL DERECHO JUDICIAL 194 (2000).

131. *Id.*

132. See Conrado Hübner Mendes, *Constitutions and Institutions: Justice, Identity and Reform: Judicial Review of Constitutional Amendments in the Brazilian Supreme Court*, 17 FLA. J. INT'L L. 449 (2005).

133. See *id.* at 457-60 (preferring Jeremy Waldron over Ronald Dworkin in arguing against the Brazilian Supreme Court's power of constitutional review over constitutional amendments).

134. Supremo Tribunal Federal, Ação Direta de Inconstitucionalidade, S.T.F., ADI No. 926-3/1993 (Brazil), Relator: Ministro Sydney Sanches, <http://www.stf.gov.br/portal/peticaoInicial/pesquisarPeticaoInicial.asp>; Supremo Tribunal Federal, Ação Direta de Inconstitucionalidade, S.T.F., ADI No. 466-2/1991 (Brazil), Relator: Ministro Celso de Mello, <http://www.stf.gov.br/portal/peticaoInicial/pesquisarPeticaoInicial> (holding that constitutional amendments "that are not original juridical norms – are not excluded, for that very reason, from the ambit of successive and repressive constitutional control."); see also Miyuki Sato, *Judicial Review in Brazil. Nominal and Real*, 3 GLOBAL JURIST ADVANCES art. 4, 1 (2003).

135. See MERRYMAN & PÉREZ-PERDOMO, *supra* note 5, at 56.

wrong.¹³⁶ The Court's decisions have no *erga omnes* effects and are not binding precedent.¹³⁷ Dworkin, more precisely, provides a way of reconciling the potential multiplicity of judicial outcomes while at the same time ensuring the legal nature of the final decision.¹³⁸ Thus, he and his work have been mobilized by legal actors in Colombia to serve as patron authority for the institutionality and legality of the court. This often extends to defending the most controversial and political-seeming decisions. From a conservative perspective within these legal battles, both Dworkin in Colombia and Dworkin in Brazil thus seem pretty radical.

The fact that ideas and their proponents may be marshaled quite differently in other discursive fields is not very surprising. National law is typically structured in rather particular ways. Like anywhere else, it is shaped by the projects and politics and the critiques and alternative projects championed within the field over time. This is equally the case in the context of Latin America. As such, legal discourse in Latin American countries has its own specificities. A useful comparison is the way in which legal transplants are commonly described to take different forms in their new environments. Similarly, legal ideas and their authors may take different forms and political valences in local legal debates.¹³⁹

In the United States, for example, the U.S. tradition is believed to be quite distinctive as a result of legal realist critiques and countervailing responses and defenses by supporters of liberal legalism.¹⁴⁰ The civilian tradition, by contrast, is widely understood as anchored in the school of exegesis, with its particularly narrow style of judicial opinion and the always defensive posture of promoters of more outwardly contextual and policy-oriented judicial decision making.¹⁴¹ As a result of these and other landmark influences, certain legal positions and authorities can be read quite differently across fields. Thus, in the Dworkin example, he passes from defender of legal liberalism in the United States—against the assault of legal realism and critical legal studies—to the challenger

136. See generally Eduardo Cifuentes Muñoz, *La Acción de Tutela en Colombia*, 3 IUS ET PRAXIS 165 (1997); NÉSTOR IVÁN OSUNA PATIÑO, *TUTELA Y AMPARO: DERECHOS PROTEGIDOS* (1998).

137. See generally Muñoz, *supra* note 136.

138. See Ronald Dworkin, *supra* note 127, at 554, 556.

139. See generally Esquirol, *Continuing Fictions*, *supra* note 35.

140. See generally DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997).

141. See Mitchell Lasser, "Lit. Theory" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse, 111 HARV. L. REV. 690, 697 (1998).

of legal exegesis and champion of legal realism in Colombia and Brazil.

Although quite explainable, these differences can be misleading. Particularly in the context of transnational scholarship, not understanding these shifts reduces the possibility of horizontal engagement with participants in local discursive fields. First, many local interlocutors may be seen simply to have misunderstood the transnational authorities or positions they are marshaling.¹⁴² This apparent misunderstanding produces a distancing effect. A transnational commentator may feel compelled either to correct the misunderstanding or to describe the debate in sociological terms. In the former case, intervention may take the form of explaining the real Dworkin, Kelsen, or some other authority. Shorn of the local context, this type of transnational intervention, however, may have little impact. Also, it could lead to the opposite of intended effects. The latter situation is exemplified by the results, surprising Law and Development scholars in the 1970s, in which defending legal realism merely strengthened the legal instrumentalism of authoritarian governments.¹⁴³ Understandably, the most committed progressives in the movement pulled away from these efforts.¹⁴⁴

Alternatively, if not correcting the misunderstanding, a transnational commentator may be prone to note the curious use of the authorities and attempt only to describe the ways in which they are used—i.e., to map them. Indeed, scholars associated with both the New Approaches to International Law and the Latcrit South-North project—on different but parallel tracks—have been actively engaged in such projects.¹⁴⁵ Participants have sought to connect with critical streams of scholarship in the global South. As a first step, they have sought to map the lines of legal-political debate in the region. While this exercise surely provides a better understanding of the legal actors and their intellectual tools, it still does not bridge the gap of dialogic engagement and horizontal participa-

142. See generally LÓPEZ-MEDINA, *supra* note 11 (explaining his theory of misreadings in contexts of reception).

143. See generally GARDNER, *supra* note 48. A clear example of this is the 1960's-70's generation of Law and Development in which legal realism, pragmatism, and social engineering were promoted by legal assistance programs which were read as no more than instrumentalism and ad hockery, the persistent foes of liberal legalism within the civilian tradition.

144. David Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1063-64 (1974).

145. See David Kennedy & Chris Tennant, *New Approaches to International Law: A Bibliography*, 35 HARV. INT'L L.J. 417, 417-18 (1994).

tion. In fact, this route parallels some of the sections described earlier above. A positive next step would entail a common ground of engagement in which transnational commentators can participate more widely in legal institutions across the region.

D. *Different Dialects*

Another impediment to transnational engagement is that similar legal concepts and critiques may be expressed in different ways across legal traditions and national legal histories. This impediment is analogous to the notion of false cognates, expressed above, but it refers instead to similar concepts garbed in different outward forms. Thus, a casual transnational focus may not easily reveal similar notions that inform legal practices across localities. This is the case since effectively equivalent notions may be quite differently expressed. Thus, the same idea in a different jurisprudential context can be missed if it strays too far from the familiar. Alternatively, different ideas having the same functional effect can easily be overlooked.

In this line, some simple examples may be drawn from theories about law's nature and legal interpretation. These topics have been the frequent subjects of much comparative law scholarship. Because comparisons of common law and civilian systems are the most abundant, a number of functional jurisprudential equivalents across these two traditions are well known. These are not, however, the only parallels. A more detailed list could be produced by comparing particular national legal histories and jurisprudence. Indeed, the "mapping" of alternative jurisprudential currents in other jurisdictions, as noted above, is an important first step. Some critical transnationalists have begun to document a wealth of lesser known and often subordinate ideas and positions advanced by local legal actors.¹⁴⁶

More specifically, the examples that follow further explain the point. Conceptual formalism in the form of Langdellian classical legal thought, for instance, has some striking parallels to the continental school of exegesis, the German Pandectist school, and Austinian analytical jurisprudence.¹⁴⁷ Legal realism has some distinct analogues in the work of Rudolf von Jhering in Germany and the *Juristes Inquiets* in France described by Marie-Claire Belleau.¹⁴⁸ Ros-

146. See, e.g., Obregón, *supra* note 62; Lorca, *supra* note 62.

147. See generally KENNEDY, *supra* note 140.

148. Marie-Claire Belleau, *The "Juristes Inquiets": Legal Classicism and Criticism in Early Twentieth Century France*, 1997 UTAH L. REV. 379, 390-98 (1997).

coe Pound's sociological jurisprudence, 1960s law and society, and law-in-context ideas, in similar fashion, greatly resemble the interpretive methods of François Gény and the sociological comparativism of René David in France, and, more contemporarily, the legal formants of Rodolfo Sacco in Italy.¹⁴⁹ Granted, this is a fast and dirty list. It leaves out much nuance and complexity in these cursory references to broad jurisprudential theories and movements. For my purposes, it is sufficient to suggest that quite similar legal ideas appear in different jurisprudential contexts under varying forms and monikers.

One would misperceive U.S. jurisprudence for example if, under the impression that the common law is case-based, problem solving, and relatively uncodified, legal formalism was believed limited to a superseded past. Alternatively, one would misunderstand much civilian jurisprudence if, under the belief that the civil law is code-based and exegetical, contextual and policy-oriented legal interpretation was thought non-existent.¹⁵⁰ These instances of misrecognition lead to significant misunderstandings. They may occur for different reasons. As noted above, the concepts may be articulated differently as a result of the local epistemic context, its particular trajectory, and the specific idiosyncrasies of their proponents.

Additionally, certain notions may appear at different historical periods and thus may seem quite unrelated. In some cases, some notions may have gained more prominence in one jurisprudential locale than another. For example, legal realism is widely recognized as constitutive of mainstream legal consciousness in the United States today. Yet, an analogous set of ideas articulated by French legal scholars at the turn of the twentieth century is not recognized as equally influential in contemporary France.¹⁵¹ The underlying ideas of French legal realists do—to some degree—inform contemporary French and civilian legal practices, in effect.¹⁵² The distinction, therefore, between concepts that actually inform legal practices and those that are, in addition, overtly recognized as informing such legal practice is potentially another reason for the differences. In any case, the fuller jurisprudential spectrum of a particular locale may not be immediately apparent. As such, one or only a few aspects—no doubt the most salient-

149. See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 28-34 (1991).

150. See Mitchell Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1343-1042 (1995).

151. See Belleau, *supra* note 148, at 379.

152. See Lasser, *supra* note 141, at 694-702.

seeming—could be mistakenly taken as a full explanation of a particular legal system as a whole. In this way, the casual transnational legal scholar may produce a quite wooden or, stated differently, one-dimensional representation. If this image then forms the basis for a diagnosis of law's shortcomings, then the remedy suggested—if one were to be proposed—would quite likely run awry.

In the Latin American context, 1960s law and development, again, provides an example, in the form of its diagnoses of excessive formalism and lack of legal realism. These explanations of the problem with local legal systems were associated with economic underdevelopment.¹⁵³ The importation of U.S.-style legal realism, chiefly by way of the pragmatic, case-method, policy-oriented legal education, was the remedy proposed.¹⁵⁴ This outlook, however, ignored the already present notions of legal realism within the traditions and national jurisprudence of many Latin American countries—whether through the major civilian transnational sources or more local jurisprudential production.¹⁵⁵ Specifically, German historicism and French sociological jurisprudence, as has been noted already by some commentators, provided a more familiar source for the same objectives sought by developmentalists—and probably better domesticated than the purely instrumental-seeming legal realism.¹⁵⁶ Alternatively, additional sources within the particular national histories and local jurisprudential debates would have been available as well. Indeed, at the time of early law-and-development effort, a number of regional initiatives were underway seeking to transform legal education and interpretative methods.¹⁵⁷ Transnational legal actors missed an opportunity to engage more significantly in debates of reform of legal education and alternative legal interpretation methods by failing to learn the local legal dialects.

Rather, developmentalists mistook the legal landscape in Latin America as an imagined earlier version of U.S. legal culture.¹⁵⁸ The image was of late nineteenth and early twentieth century class-

153. See Esquirol, *Continuing Fictions*, *supra* note 35, at 42-43.

154. *Id.* at 72.

155. See generally H.B. JACOBINI, A STUDY OF THE PHILOSOPHY OF INTERNATIONAL LAW AS SEEN IN WORKS OF LATIN AMERICAN WRITERS (1954).

156. See David Kennedy, *Political Choices and Development Common Sense*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 104 (David M. Trubek & Alvaro Santos eds., 2006).

157. See Esquirol, *Continuing Fictions*, *supra* note 35, at 69-81.

158. See generally *id.*; Esquirol, *Failed Law*, *supra* note 31, at 92; GARDNER, *supra* note 48; Merryman, *supra* note 30, at 480-81; Trubek & Galanter, *supra* note 144, at 1079.

ical formalism, the principal image of that period's legal consciousness. And the 1960s reading of turn-of-the-century formalism—relevant to the first generation of law and development practitioners—found that this mode of legal reasoning was wrong politically and wrong as a matter of theory.¹⁵⁹ Of course, the charge of formalism is not a rejection of logical reasoning or conceptual categories all together but is rather an expression of deep skepticism about certain types of legal reasoning. Specifically, it rejects the possibility of deriving clear answers past a certain level of abstraction in nonconflicting and noncontradictory ways. The cut-off for suitable legal reasoning is, however, completely socially contingent. And the post-classical-legal-thought U.S. preference is simply a function of the subsequent socially constructed consensus on the basis of contemporary determinants of convincing legal analysis. This convincing or acceptable form of legal analysis can be viewed as a performative act to which mainstream legal operators would generally accede. It can also be viewed phenomenologically as intellectual work within a particular paradigm of knowledge or consciousness.¹⁶⁰ In any case, regardless of one's background theory about the sources of "thinking like a lawyer," its particularity and contingency cannot be denied.

The more Manichean perception of formalism versus pragmatism projected onto Latin America at the time, however, had the effect of advocating against the locally constructed consensus on what constitutes convincing legal reasoning. As such, much of the richness of Latin American legal production was missed. Indeed, the quite impressive jurisprudential pedigree of European and civilian legal traditions was, for all effective purposes, ignored. Rather, development scholars viewed such references as signs of mere juristic elitism and transplanted cultural non sequiturs. The jurisprudential activity of local actors was also significantly ignored, relegated to a mind-numbing legal formalism that appeared to explain the whole of the legal culture, and provided, presumably, its sufficient explanation. Thus, operating on the basis of this perceived one-dimensionality of an unmitigated legal formalism, the natural remedy appeared to be U.S.-style legal realism, the historically hailed antidote to the wrong reasoning and bad results of an anachronistic classical formalism.

159. See KENNEDY, *supra* note 69, at xxxv.

160. See generally Duncan Kennedy, *A Left Phenomenological Critique of the Hart/Kelsen Theory of Legal Interpretation*, in *PROBLEMAS CONTEMPORÁNEOS DE LA FILOSOFÍA DEL DERECHO* 371 (Caceres, Flores, Saldana & Villanueva eds., 2005).

E. *Hegemonic Legality*

By the term hegemonic legality, I refer to two different phenomena. The first refers to the hegemony of developed country law and jurisprudence within the prevailing paradigm of transnationalism. This does not mean that U.S. and other international scholars are inappropriately or uninformedly forcing their beliefs on Latin Americans. This discursive construct rather is shared by some scholars located in both the United States and Latin America. And the particular notions or limitations described here are equally common.

Not all interests affected by legal struggle in Latin America, however, have equal access to transnational platforms.¹⁶¹ As a result, transnational legal operators may sustain a somewhat insular dialogue.¹⁶² Highlighting the agency and contribution of specific Latin Americans within these circuits may be a positive step; it does not address, however, the representational and political imbalances reinforced by the same transnationalism. In fact, some have suggested that the benefits of transnationalism are limited to Latin Americans who have studied in the United States or who share other connections with U.S. experts.¹⁶³ Moreover, access to transnational circuits may be circumscribed by the interests and concerns of the participants with the greater resources. The point could be made that transnationalism, rather than introducing more resource-rich actors into legal arenas in other locales, instead draws adherents from the periphery into the political and intellectual questions of interest at the center. In any case, Dezelay and Garth have already chronicled how Latin American legal scholars are often able to parlay their connections at the center into powerful interventions in their home legal-political arenas.¹⁶⁴ They, for example, might harness the clout of relationships at Wisconsin or capitalize on the stature of studies at Harvard. Whether or not

161. See DEZELAY & GARTH, *supra* note 115, at 32-58.

162. See Robert M. Levine, *Pesquisas: Fontes e Materiais de Arquivos, Instituições Relevantes, Abordagens*, in *O BRASIL DOS BRASILIANISTAS, UM GUIA DOS ESTUDOS SOBRE O BRASIL NOS ESTADOS UNIDOS 1945-2000*, at 57, 62 (R. Barbosa, M. Eakin & P. de Almeida eds., 2002) (claiming that "Brazilianists" in the humanities and social sciences only began to collaborate with Brazilian counterparts in the late 1970's: "Antes dos anos 60, era raro que intelectuais americanos se envolvessem em debates sérios com seus colegas brasileiros." At the same time, Levine notes—in response to criticisms of Brazilianists as U.S. agents or having a Brazil-specific agenda—"O novo 'brasilianista,' por mais brilhante e bom-sucedido que seja, comporta-se como qualquer professor assistente do sistema universitário norte-americano, isto é, desenvolve uma sintonia com as orientações e enfoques de sua disciplina.").

163. See DEZELAY & GARTH, *supra* note 115, at 42-47.

164. *Id.* at 34.

first-world sponsors actually turn their attention to engage the local specificity of legal controversies in the periphery, their imprimatur strengthens the hand of the cosmopolitan Latin American legal actor in “palace wars” waged at home.¹⁶⁵

The addition of more and more varied transnationalists to the field may lessen some of these effects. Numbers are still quite small. Then again, as already noted, additional adepts from Latin America are no automatic antidote to the epistemic disconnects identified here. Many of the conventional modes are commonly shared by U.S. and Latin American proponents alike. Moreover, at U.S. institutions, individuals from abroad are faced with all the same limitations. They must still appeal to the established leaders in their areas, student editors at law journals, accepted parameters of review for promotion and tenure, and all the same entrenched difficulties identified throughout this Essay. In these ways, the hegemony of developed country and particularly U.S.-supported legal forms frame the range of communication and dominant concepts advanced.

A second meaning intended by the hegemonic legality reference is an attitude not often openly expressed but still close to the surface. It is the expectation that Latin American states are geopolitically subordinate to U.S. power. This idea may be viewed as a hyperrealist position or simply cold cynicism. Such a perspective, however, maintains that regardless of the various positions that may be supported in the periphery, U.S. policies and U.S.-backed interests will prevail over other contenders. Thus, on any substantial matter, contrary positions or alternatives advanced by Latin Americans—expressed in the form of legal rules, policies, or institutions—but not backed by significant U.S. support are ultimately irrelevant. If the stakes are high enough, contrary positions either will be defeated or, if enacted, will be *de jure* or *de facto* displaced.

Under this assumption, the broader local vernacular is thus simply not worth engaging. In fact, it provides an automatic answer to provocative questions such as, “Why do we need to know what Latin Americans *think* about law, anyway?” This query might sound like a caricature invented here for purposes of dramatic effect. But it is in fact a question I have heard in this same form and in other indirect ways. The following passage is an extreme example:

What concerns me is the fact that for many of our Latin-Americanists the intensive study of their subject merely kindles their subconscious hostility to it For us [North Americans] the

165. See *id.* at 44-47.

Latin-American is the peon or *pistolero*, and not—as he might be for occasional Frenchmen—the poet or jurist.¹⁶⁶

In any case, for the variety of reasons explained here and surely others I have missed, the discursive dimension of law in Latin America is underappreciated. It is afflicted by a “loss of faith,” as that concept has been elaborated by Duncan Kennedy in relation to rights talk and legal reasoning in the United States.¹⁶⁷ Kennedy, speaking in the context of the United States, identifies specific experiences provoking faithlessness in the rational coherence of rights, leading him to assert that “[i]f you have lost your faith in the mediating power of legal rights discourse, having come to experience it as no more than a form of ideologically permeable policy talk, then you are not likely to see . . . forms of lay [rights and legal] discourse as any different.”¹⁶⁸ In a different yet parallel fashion, one of the “limitations” of legal transnationalism identified in this Essay can also be described as a sort of faithlessness in “law talk” internal to Latin America. Significantly for Kennedy, faithlessness in law’s legitimation, however, is different than faithlessness in legal authority: “[faithlessness in rights or legal reasoning] might mean loss of faith in *law*, or in legal authority, as well. But . . . the critique and loss of faith in legal rights reasoning does not necessarily imply a loss of faith in *normativity* in general.”¹⁶⁹

Shedding a different light on the question, Doris Sommer has explained and endorsed the benefits of sustaining a “double-consciousness.”¹⁷⁰ Double-consciousness is meant to describe the ability to participate in at least two different cultural paradigms at the same time.¹⁷¹ The concept can also be applied to the different discursive contexts straddled by transnational legal work. Sommer believes that “[d]ouble consciousness may be our best cultural safeguard for democratic practice, because doubleness won’t allow the meanness of one thought, one striving, one measure of value.”¹⁷² This may be something to keep in mind.

166. Richard M. Morse, *The Strange Career of “Latin-American Studies,”* 356 ANNALS AM. ACAD. POL. & SOC. SCI. 106, 107, 110 (1964).

167. Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 194, 178 (Brown & Halley eds., 2002).

168. *Id.* at 211.

169. *Id.* at 197 (emphasis in original).

170. See generally Doris Sommer, *A Vindication of Double Consciousness*, in A COMPANION TO POSTCOLONIAL STUDIES 165 (H.Schwarz & S. Ray eds., 2000).

171. See *id.* at 165.

172. *Id.*

V. CONCLUSION

The current practices of much U.S.–Latin American legal transnationalism are inflected in particular ways. These are certainly afflicted by all the normal obstacles attendant to comparative work. But beyond such constraints, certain epistemic disjunctures also impact the field. Outwardly, these differences appear in a number of ways. For example, law in Latin America is anthropologized. The prevalence of extralegal practices in the region is taken as evidence of a different cultural conception of law, rather than simply part of the modernist system of law in place. Certain beliefs and inherent contradictions of law have become permanent diagnoses and inescapable conclusions. As such, “Kelsen,” “the un-rule of law,” and “lack of independence,” along with some others, are often accepted as the definitive word. Legal debate within the region appears to present an impenetrable house of mirrors. Concepts of legal theory—common in the United States—are found missing in the region. Law always appears to be behind, possibly because of these concepts’ refraction through civilian legal terminology or their particular configuration in local contexts. Additionally, a self-reinforcing practice of limited engagement and an unstated belief in the dominance of the global center all contribute to the current version of legal transnationalism.

The argument here is not that transnationalism should embody a single, correct form or set of practices. Nor is the point that transnationalists must engage national or doctrinal legal debates in the same terms. Certainly, the latter represent only some of the many different approaches to questions of legal governance. By way of example, advocates of legal pluralism usually sidestep detailed analysis of state law in favor of defending separate jurisdictions and autochthonous community norms. Critical legal scholars reject liberal legal reform and instead challenge the internal consistency and systemic effects of modern legal systems. Identity critics, in turn, advance liberal gains on their own terms and, simultaneously, denounce the racial subordination produced by current laws and institutions. These various approaches are not involved in one sole debate and do not necessarily address a single or unitary audience. It should be noted, though, that these different approaches may also fall liable to some of the same criticisms described in this Essay.

In any case, the currently dominant mode of U.S.–Latin American legal transnationalism is both privileged and played on the stage of reforming state law and legal institutions. As such, it can-

not be easily dismissed. Troublingly, its practice forcefully skews national legal-political debate in the region and instrumentally narrows the imaginable array of local policy options. Moreover, its conventions contribute to the frustration felt with legal institutions in the region. Such limitations, however, are not *necessary* consequences of transnational engagement. Identifying the fault lines—as this Essay has proposed to do—may begin to transcend some of the more counterproductive features. Possibly, once pretences and fantasies about the law are eased away, we can begin to advance projects and beliefs transnationally in ways that can reinforce lawness throughout the region.