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Heterodox Legal Informality

Some Examples from Latin America

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7.1 INTRODUCTION

Legal heterodoxy is hard to sustain, especially in developing countries. When transnational interests are at stake, the geopolitical pressures are great and opposite forces are usually prevalent. Legal harmonization predominates. The European Union may be the best example among developed countries. There, visions of a common market drive the reduction of national legal differences. In the developing world, promises of development and foreign investment propel hegemonic models. Institutions like the Organization for Economic Cooperation and Development, the United Nations Commission on International Trade Law, Unidroit, as well as the World Bank and the International Monetary Fund, each in their own way promotes the global standardization of national laws. International development assistance by powerful countries also works by conditioning aid on national legal reform, often in the style if not exact copy of donor laws and institutions. Foreign investors equally demand familiar laws and legal institutions providing for the maximum of profits and guarantees.

By contrast, critiques of "one-size-fits-all" solutions are routinely rebuffed by assertions of "best practices," proven solutions, investor rights, efficiency, and lower transaction costs. Alternatives more responsive and representative of local conditions, potentially more sustainable, are mostly undermined or ignored. This is not simply because they are not known. Powerful interests often stand against them. In this environment, the developing world is the least capable of resisting. Such countries often depend on international loans, trade treaties, bilateral assistance, and foreign investment tied to legal harmonization. If that were not enough, the main

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experts on law and development, and their sponsoring institutions, similarly applaud the benefits of one model over multiple alternatives.

Despite the adverse currents, Latin American countries enjoy a long history of legal innovation, whether the result of autonomous development, explicit adaptations of foreign models, or *de facto* variation on the ground of the law-in-the-books. For most international observers, many of these developments remain relatively obscure, unless they involve transnational interests or geopolitical attention. Indeed, most comparative law on Latin America stems from law-and-development work. It is these projects that have garnered the most attention. Local legal differences – when considered at all – mostly figure as diagnoses of legal underdevelopment. They generally become targets for reform, "modernization," and inevitably elimination.

Regardless, differences persist. And not all Global South differences can be simply dismissed as either dysfunctional or indefensible. However, the law-and-development literature has helped consolidate a hierarchical ordering between developed and developing. This makes it harder to take developing country law seriously and to examine its features at face value. It is not simply a question of making these legal systems, and their latest developments, better known to an international audience. Even when amply shown, skepticism quickly emerges over their lack of effectiveness, relative unacceptance by the broader population, origins in a foreign parent jurisdiction, and even their drafters' misunderstanding of their own laws. Pretending that this hierarchical structure does not exist will not make it go away. An array of geopolitical interests, and an extensive development assistance industry, depend on it existentially.

As such, in addition to making heterodox laws and legal institutions better known in the legal literature, the structural bias against their recognition must be frontally addressed. The elements that keep it in place must be critically assessed. To the extent these are not defensible distinctions, they must be challenged and rejected – repeatedly, until a new paradigm is in place. It may not be inalterably structural, but it is also not just ephemerally discursive. This chapter contributes to that work by challenging one of the main elements of this hierarchical arrangement: specifically, legal informality as a marker of underdevelopment.

Surely, recognizing different policy objectives and distributional effects within developing country law allows for more sober consideration of alternatives. This is not possible, however, if they are summarily dismissed. Certainly, not all differences will be useful or positive. Some examples of heterodoxy may turn out to be norms and institutions from a different era – uniformly regarded as unsuitable to address contemporary problems. Some may represent unjustifiable advantages for a single group or class in society, enacted through pork-barrel politics common throughout the world's legislatures. However, some legal heterodoxy may more valuably signal a defensible technique, policy preference, and distribution of resources than those offered by hegemonic prescriptions.

This chapter is divided into two sections and two examples. Section 7.2 examines the notion of legal heterodoxy itself and introduces the theory of *heterodox legal informality*. The latter, I argue, is Latin America's pre-eminent contribution to modern law. It represents alternative arrangements of legal formality and informality, combined. Section 7.3 examines two instances of heterodoxy in Latin America. The first is secured transactions laws. These are laws that enable transfers of property rights from debtors to creditors to guarantee debts. They have undergone a neoliberal revolution in the past decades. Almost all countries in the region have replaced, or are under pressure to replace, their chattel mortgage laws. Whatever laws were previously in place, the reforms enact the liberalizing approach to security rights modeled by the Uniform Commercial Code in the United States. The second example is specifically from Colombia. That country has adopted an innovative property law regime within the context of private law transitional justice. Its objective is to restore landed property to those physically displaced from their homes by that country's guerrilla war. It turns the traditional mix of formality and informality in property law on its head, by switching presumptions and shifting burdens of proof. Both of these are examples of heterodoxy: the first waging a rearguard action and mostly losing, the second recently extended by Colombia's legislature for a second ten-year period until 2031.

7.2 LATIN AMERICAN LEGAL HETERODOXY

Uncovering legal heterodoxy, from a constructive perspective, may yield some defensible alternatives to dominant global models. Of course, the first distinction to make concerns the meaning of the term "heterodoxy" itself. What is considered heterodox or divergent from the hegemonic changes over time, as dominant global positions themselves change. Features that may seem heterodox today may have been hegemonic in their day, when initially introduced. Heterodoxy also depends on the type of orthodoxy that it militates against – whether global, local, sectorial.

From today's perspective, legal heterodoxy was rife in Latin America in the early twentieth century. An example is the area of property rights. Panama developed a form of rural property not subject to foreclosure.[1] Colombia established the power to extinguish title *without compensation* on large, un-utilized tracts of agricultural land for redistribution to landless farmers.[2] Mexico, until a recent reform, constitutionally protected collective ownership of *campesino* farmlands.[3] Brazil recognized different

[1] Law No. 1 of March 20, 1941, on *Patrimonio Familiar* (Panamá); J. L. Esquirol, Titling and Untitled Housing in Panama City (2008) 4 *Tennessee Journal of Law and Policy* 243–302.

[2] Agrarian Reform Law No. 200 of 1936 (Colombia); J. L. Esquirol, Formalizing Property in Latin America, in M. Graziadei and L. Smith (eds.), *Comparative Property Law: Global Perspectives* (Northampton: Edward Elgar, 2017), pp. 333–54.

[3] K. Karst and N. Clement, Legal Institutions and Development: Lessons from the Mexican Ejido (1969) 16 *UCLA Law Review* 281–303.

property types, distinct from full title, for squatters on public land.[4] And, in many countries, indigenous territories have long constituted a different type of landholding.

Most of these laws when enacted were not counter-hegemonic *per se*. They benefitted from the globalization of "social law" in the early twentieth century, equally impacting Latin America.[5] The specific formulas adopted in the region were in some cases unique, but they were supported by a broader transnational *zeitgeist* generating models and authoritative ideas. These were generally directed at protecting the most vulnerable from the unequal harms produced by industrialization and capitalism. Some of the laws and models from that era remain on the books. And these are certainly heterodox today, from the perspective of a contemporary neoliberal order.

Faced with the increasing power of multinational agribusiness and foreign investors, however, even obscure agrarian laws on the books have come under fire. Promoted by the World Bank and the Inter-American Development Bank, titling programs for squatters and parcelization of collective farming have had this effect. They substitute full-title property for the social relations and legal forms previously in place – consolidating a singular form of property. Indeed, "orthodox" legal rules – to which powerful transnational actors are committed – are hard to deviate from. A significant amount of geopolitical pressure accompanies the push for uniform rules for foreign creditors and investors.

7.2.1 *Legal Informality*

Probably the most significant example of legal heterodoxy in Latin America however is the role played by informality in the legal system.[6] This is not generally perceived as a positive, though.[7] Rather the opposite is true. In fact, it figures as an element in

[4] Law No. 10.406 of 2002 (Brazil), Art. 1.225, inc. XI and XII (originally 1967) ("concessão de uso especial," "concessão de direito real de uso").

[5] Du. Kennedy, Three Globalizations of Law and Legal Thought, in D. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006), pp. 17–73; see also Du. Kennedy, *A Critique of Adjudication: Fin de Siècle* (Cambridge: Harvard University Press, 1997), pp. 92–95.

[6] The focus here is on legal informality and not the informal sector per se defined by social scientists. See generally, B. Guha-Khasnobis, R. Kanbur, and E. Ostrom, Beyond Formality and Informality, in Linking the Formal and Informal Economy, in B. Guha-Khasnobis, R. Kanbur, and E. Ostrom (eds.), *Linking the Formal and Informal Economy: Concepts and Policies* (Oxford: Oxford University Press, 2006), pp. 1–18, p. 3 ("formal and informal are better thought of as metaphors that conjure up a mental picture of whatever the user has in mind at that particular time"); R. La Porta and A. Shleifer, Informality and Development (2014) 28 *Journal of Economic Perspectives* 109–26 (reporting that the main obstacles of informal firms are underskilled entrepreneurs and access to finance).

[7] K. J. Fandl, The Role of Informal Legal Institutions in Economic Development (2008) 32 *Fordham International Law Journal* 1–31, 3 ("When we begin to examine how legal reform can

law-and-development's diagnosis of underdevelopment.[8] In development circles, legal informality goes hand in hand with legal formal*ism*, which has a different meaning than informality's opposite, "formalization."[9] Legal formalism refers to excessive rigidity in the drafting and application of legal rules and categories.[10] This is generally associated with raising form over substance. And the forms *prere-form* in Latin America are generally perceived as backward, connected to (old) European models, inherent to political economies less conducive to economic development, and generally unaligned with contemporary policy goals. The formal-istic training of lawyers is blamed for the reproduction of a legal consciousness steeped in doctrinal categories, traditions, and *idées fixes*. These get in the way of implementing policy and functionality.

Indeed, both excessive legal formalism and rampant informality are closely associated with law in the region. One is typically tied to the other: legal formalism breeds informality. However the two are interconnected, they mark the hard divide between developed and developing country law. Developed countries are not formalistic (or much less so), and they do not have significant informality, so this thinking goes. I have critiqued the diagnosis of excessive legal formalism in Latin America, elsewhere.[11] My focus here is on informality. In this context, the high incidence of legal informality is perceived as related to economic stagnation, political instability, lawlessness, and other evils.[12] It may be expressed as a gap between law and society, lack of penetration of the formal legal system, or some other way. The basic concept, however, is routinely misused. And informality has no singular meaning.[13] It has been stretched to include a broad array of phenomena – that is, as a euphemism for illegality; abuse of discretion in official decision-making;

be provided to all people in a developing country, we run up against a significant issue that is often sidestepped – informality").

[8] See generally, J. L. Esquirol, *Ruling the Law: Failure and Legitimacy in Latin American Legal Systems* (Cambridge: Cambridge University Press, 2019).

[9] See some of the classics on Latin America: K. Karst and K. Rosenn, *Law and Development in Latin America: A Casebook* (Berkeley: University of California Press, 1975); K. Karst, Rights in Land and Housing in an Informal Legal System: The Barrios of Caracas (1971) 19 *American Journal of Law* 550–74; K. Rosenn, The Jeito: Brazil Institutional Bypass of the Formal Legal System and Its Development Implications (1971) 19 *American Journal of Comparative Law* 514–49; all the way to contemporary repetition of these same ideas, H. De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000); M. G. Villegas, *La Eficacia Simbólica del Derecho: Examen de Situaciones Colombianas* (Bogotá: Uniandes, 1993).

[10] For a discussion of legal formalism, see Du. Kennedy, *A Critique of Adjudication: Fin de Siècle*; *contrast* L. Grossman, Langdell Upside Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anti-codification (2007) 19 *Yale Journal of Law and Humanities* 149–220.

[11] Esquirol, Ruling the Law.

[12] Ibid., see also Esquirol, Titling and Untitled Housing in Panama City.

[13] A. Sindzingre, The Relevance of the Concepts of Formality and Informality: A Theoretical Appraisal, in B. Guha-Khasnobis, R. Kanbur, and E. Ostrom (eds.), *Linking the Formal and Informal Economy: Concepts and Policies* (Oxford: Oxford University Press, 2006), pp. 58–74, p. 58.

social norms operating instead of legal norms; gaps, conflicts, and ambiguities in the positive law; impunity; the gap between law and enforcement; and other possibilities. In reality, these represent commonplace phenomena in all modern legal systems, although not normally labeled that way.[14] Nonetheless, the diagnosis of informality – in its various forms – drives much development reform.[15] It works by undermining the defensibility of existing arrangements – described as informal – and, in their place, advancing development reforms.

7.2.2 *The Stigma of Informality*

The preference for formalization is strong and long-standing. It hails back to at least Max Weber and his authoritative analysis of developed legal systems.[16] According to him, their hallmark was the superior level of formalization and bureaucratization attained. It was a legal system's dis-embeddedness from traditional and charismatic authorities that distinguished it. It was able to garner legitimacy through routinization and regularization. Legal norms and institutions stand apart because of their character as general rules applied uniformly. Weber may have fallen prey to an overly narrow reading of his texts, considering his more nuanced views.[17] It is not surprising, however, that Western legal professionals would have internalized this definition.

Law and development experts easily extended it to the developing world.[18] There, the prevalence of non-formalization or different formalization helps explain

[14] M. Granovetter, The Social Construction of Corruption, in V. Nee and R. Swedberg (eds.), *On Capitalism* (Redwood City: Stanford University Press, 2007), pp. 152–72 ("it is common in human history that groups with conflicting interests present different sets of standards for what behavior is appropriate, and label behavior that benefits competing groups as illegitimate or more specifically 'corrupt'").

[15] J. E. Larson, Informality, Illegality, and Inequality (2002) 20 *Yale Law & Policy Review* 137–82, 142–43 (noting the negative valence of informality: "... fundamental values of legal culture stand in the way of a productive engagement with informality in the United States. Informality contradicts legality, and especially equality, as we conceive these values. From within this tradition, informality is an abuse of law, as well as tolerance of exploitation and inequality. Accordingly, informality creates the best argument for stepped-up regulation").

[16] M. Weber, *From Max Weber: Essays in Sociology*, C. Wright Mills and H. H. Gerth (eds.) (London: Routledge, 2014), pp. 216–17 ("The 'rational' interpretation of law on the basis of strictly formal conceptions stands opposite the kind of adjudication that is primarily bound to sacred traditions"). But note Weber's recognition that "Even today in England ... a broad substratum of justice is actually Kadi-justice to an extent that is hardly conceivable on the continent"; M. Weber, *Economy and Society: An Outline of Interpretive Sociology*, G. Roth and C. Wittich (eds.) (New York: Bedminster Press, 1968).

[17] D. Trubek, Max Weber's Tragic Modernism and the Study of Law and Society (1986) 20 *Law and Society Review* 573–604, 590 ("Weber can and has been read as asserting the superiority of a formal legal order").

[18] See e.g., L. M. Friedman, On Legal Development (1970) 24 *Rutgers Law Review* 11–64, 12 (arguing that legal developmentalists had no theory); J. H. Merryman, Comparative Law and Social Changes: On the Origins, Style, Decline & Revival of the Law and Development

underdevelopment.[19] It encapsulates the distinction between developed and underdeveloped law. Not limited to informality, the discursive divide is created by an array of familiar observations about underdevelopment: the arcaneness of laws on the books, backwardness of institutions, an extraordinary gap between the law-on-the-books and the law-in-action, law's lack of penetration in society, excessive legal formalism, *as well as extensive informality*. These generalized beliefs consolidate the view that legal development reform depends on formalization of the informal.

However, what may be appropriately considered informal is far from clear. There is a tendency to find a plethora of informality in developing countries and to characterize such phenomena as negative. The designation may effectively express, in any given instance, a preference for rules over standards on a certain question; judicial review instead of administrative discretion; state law instead of social (or extralegal) norms; and the repression – or conversely regularization – of illegal or quasi-illegal activities. Regardless, the finding of informality becomes an argument for reform. Whatever gets tagged as "informal" appears deficient and in need of modernizing and changing.

Quixotically, some of the same phenomena when noted in developed countries are rarely labeled "informal." Instead, they are validated and legitimated within the legal system as expressing some other value. Extralegal phenomena simply become private ordering, self-regulation, legislated deference to commercial practices, decision-making based on standards, official tolerance for residual non-enforcement, self-help remedies, and other concepts of this type. Some of the equivalent phenomena in the developing world are not so generously described. Regardless, law and sociology scholars have abundantly demonstrated the gap between the law in the books and the law in action *in developed countries*.[20] In a famous 1971 article by Stewart Macaulay, the informal practices of businesspeople, car dealers in Wisconsin, were examined.[21] Despite the mythology of commercial law as a regulator of business transactions, business actors actually transact in the shadow of the law. Moreover, their behavior varies significantly depending on whether they are dealing with repeat actors or one-time transactions. Repeat actors are better able to interact with the legal system to their benefit.

Movement (1977) 25 *American Journal of Comparative Law* 457–91, 466, and 481 ("The law and development movement, primarily a U.S. phenomenon, has incorporated a view of the role and consequences of lawyers that is unfamiliar to and inconsistent with the legal cultures of most developing societies . . . [it] was bound to fail and has failed").

[19] F. K. Upham, Speculations on Legal Informality: On Winn's Relational Practices and the Marginalization of Law (1994) 28 *Law & Society Review* 233–42, 235 ("It is natural, then, [for developmentalists] to conclude that there is a causal connection between the existence of some kind of formal legal system on the one hand and economic growth and social order on the other . . . this easy and intuitive conclusion is most likely fundamentally wrong").

[20] See, e.g. O. W. Holmes, The Path of the Law (1897) 10 *Harvard Law Review* 22–36; R. Pound, Law in Books and Law in Action (1910) 44 *American Law Review* 12–36, 24.

[21] S. Macaulay, Non-Contractual Relations in Business: A Preliminary Study (1963) 28 *American Sociology Review* 55–67.

The Macaulay piece is significant for many reasons. Primarily, however, it demonstrates the informality prevalent within developed legal systems. No need to go to the developing world or other locations to find it. It exists in plentiful form throughout developed country law. Authoritative descriptions, such as certain interpretations of Weber, obfuscate the real workings of these legal systems. They present a fictionalized narrative, in which evidence of informality is relegated to the exceptions or not even clearly seen for what they are. For example, trial court judges have significant latitude in a range of decisions. They may have the power to assess monetary responsibility for harms produced in society through their views on duties of care and proximate cause of events. In fact, numerous areas of the law require that government officials rely on standards and not black-letter law. Likewise, the Uniform Commercial Code frequently relies on industry standards and commercial practices as the source of law.[22]

What might be condemned as informality in one context can be seen quite differently in another. Indeed, it may approvingly reflect private parties independently pursuing their contractual remedies rather than submitting to judicial management. Or, the repossession and sale of collateral in a secured credit transaction may allow for efficient (if relatively unchecked) self-help remedies rather than mandated judicial intervention. Such powers nonetheless allow for significant amounts of informality on the part of creditors, pushing against if not overstepping the bounds of legality when repossessing collateral. Regardless, self-help is a lauded feature of US secured transactions law, the premier global model.

Additionally, there are differences in terms of doctrinal formality and informality. While formal categories like "contract" and "property" may have legal significance, the distinction may not matter at all or matter only for specific questions. The latter suggests a form of doctrinal informality. In an example, the difference between a "true sale" of an account receivable – and its transfer as collateral – does not matter for most purposes in the Uniform Commercial Code (UCC). But it critically matters *upon default* of the debtor.[23] If the transaction is deemed retrospectively a secured loan and not a sale *based on formal indicia*, the debtor may be able to get its surplus value back after the loan is paid off. As such, within the same law in the same code, formal legal categories are determinative for some purposes, but not so for others.[24] Another example is the effect of public registration for property transfers. This formal requirement may generate a favorable legal presumption for some

[22] L. Bernstein, Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms, 144 *University of Pennsylvania Law Review* 1765 (1996).

[23] See Article 9-601(g) and 9-607(c); *Major's Furniture Mart, Inc.* v. *Castle Credit Corp., Inc.*, 602 F 2d 538 (3rd Cir. 1979) (requiring the court to devise a definition of "property" ownership).

[24] See H. Hughes, Robots, Markets, and the Value of Deal Lawyers (2024) 49 *Journal of Corporation Law* 833–71. Compare UCC Article 9-109, which provides that Article 9 applies to "a transaction, regardless of its form that creates a security interest", and Ohio Revised Code Annotated §1109.75 (West 2016), which provides that in securitization transactions, assignments are true sales if they are labeled as such, regardless of actual function and intent of parties.

transactions or, quite differently, certain facts on the ground may be assigned (by courts or legislatures) the superior legal presumption. All of these scenarios involve alternative allocations of formality/informality within the legal system as discussed next.

7.2.3 *Locating Legal Informality*

Examples abound in Latin America, and elsewhere, that much legal informality is not outside the legal system but rather within it. It is ordered directly by legislation and enabled indirectly through the mix of background rules. This is what I am calling *legislated informality*. Moreover, legal systems may allocate – or allow for – informality at different points within legal relationships, substantive law requirements, the legal process, and official decision-making. As already noted, it is not as if any legal system in the world has eliminated all forms of informality altogether. That would not be possible or advisable. Developed country law relies on substantial standards-based official decisions, discretion of the parties, self-help remedies, legal ambiguity, function over form, and a host of similar phenomena.

Moreover, if one were to accept certain legal realist insights, the differences between inside and outside the legal system are not substantial.[25] Legislating informality (authorizing private practices, etc.) is not much different than allowing its reign without such explicit approval. Thus, de jure and de facto deference to private ordering – for example – is rather indistinguishable. Deregulating and legislative silence are functionally equivalent. There is nothing truly outside the law or essentially extralegal, the latter being one of the standard understandings of "informality." One could unilaterally insist on a narrow *formal* definition of informality to attempt to cabin its usage. However, that would not reflect functional reality nor how the term gets used expansively.

Indeed, the intention here is not to nail down a definitive meaning for the term "legal informality," once and for all. One could certainly insist on a narrow definition of "informality" in the hopes of policing its expansive and instrumental use. But that is not the project here. Nor is my objective to track down all the many meanings attached to the term "informality." That would certainly be useful but beyond my scope. Rather, this chapter examines a few ways in which the notion has been used. I am not espousing any particular definition myself. I am simply selecting some of its usages in Latin America in order to turn the gaze back on developed country law. How about if developed country law were viewed through the same wide lens of legal informality used to diagnose underdevelopment?

[25] R. L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State (1923) 38 *Political Science Quarterly* 470–94 (legislated coercion and background norms producing coercion are indistinguishable).

When viewed from this angle, informality – in its expanded use – is alive and present throughout the developed world. Most of it is just not typically characterized as *negative*. Instead, it is legitimated by alternative terms and concepts that normalize it. Moreover, the locus of informality – when comparing laws and legal systems – is different from legal community to legal community. And that is not always a sign of dysfunction (of either one or the other). Informality is simply a legal device employed with different policy and distributional consequences.

7.2.4 *Heterodox Legal Informality*

Latin America has historically produced different allocations of legal informality – different from hegemonic models. This is what I am calling *heterodox legal informality*. It has been the region's main contribution to modern law. To take it seriously, however, legal informality requires destigmatization and differentiation among its varieties. It is not just an epithet to be used against things we don't like. And, distinguishing among the different meanings is crucial to developing better policy. The specific type of informality foregrounded here is located within law itself, whether overtly legislated or produced indirectly through the intersection of background rules.

In a number of legal domains in Latin America, the locus of informality is – or has been – simply different than where global hegemonic models prescribe. For example, local criminal procedure may place investigative and charging authority in the hands of a "judge of instruction," rather than a public prosecutor. However, both involve significant quotients of discretion to the officials designated. And this kind of standards-based, relatively unaccountable decision-making is one of the possible definitions of "informality." But this kind of informality is obtained in either case. It is simply allocated differently, to different officials in different offices.

Indeed, over the past twenty years in Latin America, the United States Agency for International Development (USAID) and other foreign assistance have been heavily involved in promoting the transformation of criminal procedure codes in the region.[26] The change is characterized as moving from an inquisitorial to an adversarial system. One of the main indictments of the inquisitorial system is the wide discretion it vests in the "judge of instruction." In civil law systems, a judge is in charge of the investigation phase of a criminal proceeding. They should lead an effective investigation but also safeguard the rights of defendants. This type of "informality" lying within the entire discretion of the judge of instruction has been highlighted as exceptional and intolerable. It is damningly perceived as providing no accountability for decisions made, unchecked by defense counsel, a "secretive" process, and increasing the likelihood of outside influence and corruption.

[26] M. Langer, Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery (2007) 55 *American Journal of Comparative Law* 617–76.

However, the big change made in many Latin American countries was to move those decisions to a public prosecutor, along the lines of the model of the United States. The prosecutor has broad discretion in deciding whether or not to take on a criminal case, what charges to press, whether or not to enter into a plea deal, and a number of other questions throughout the life of a criminal case. All the same discretion remains, if not more. In fact, judges of instruction had in some cases less discretion. They had to process all cases brought to them and could not choose to drop a case. However, prosecutorial discretion – no less a form of informality – within the legal system appears more natural to USAID funders than the civil law analogue. Informality has not been eliminated. It has just been relocated.

Legal informality in developed and developing countries is, in fact, not so dissimilar. The difference, I am arguing, is its location. Some countries locate their informality under the auspices of different officials, allow certain social or economic groups to exercise their particular norms and practices, and sanction explicitly or not certain activities or individuals to undertake self-help remedies. Whether these allocations are justified or not, should be reformed or not, is certainly a topic of debate and contestation. They should not, however, be simply refuted or reformed on the basis of the practice being stigmatizingly labeled informal, or that the informality happens to be located differently than "developed country" models. Indeed, the strong belief in Weber's reputed characterization has obscured the fuller picture.[27] Developed legal systems are riddled with instances of informality, whether legislated directly or indirectly through background rules or meaningful omissions and lacunae.

When examining Latin American legal systems, however, these heterodox phenomena are often lumped together as harmful informality, especially when placed in the hands of unexpected actors and situations. Unexpected because the informality is assigned differently than where informality occurs in hegemonic models. By contrast, within hegemonic models, the given allocations of informality are normalized as acceptable – if not preferable – and may not even be fully understood as examples of informality. Indeed, as already noted, instances of informality are routinely described more positively as standards-based decision-making, deference to commercial practice, functionalism, self-help remedies, alternative interpretations, legal pragmatism, and other such legitimating characterizations. By contrast, the over-inclusive epithet of "informality" for these same and other phenomena is mostly reserved for developing countries.

Certainly, informality assigned *de jure* or *de facto* to unexpected parties and situations appears, from an external perspective, as extralegal. It looks like social norms prevailing over legal norms, pragmatic workarounds to ineffective legal systems and outright law breaking. Such informality seems to be taking place wholly

[27] See generally, E. Ehrlich, *Fundamental Principles of the Sociology of Law*, W. L. Moll (ed.) (Cambridge: Harvard University Press, 1936).

outside the legal system. From this angle, the greater the informality, the greater the gap appearing to exist between law and society. The greater the gap between law and society, the greater the perceived failure of law. The greater the perceived failure of local law, the more compelling the exhortations to adopt hegemonic models.

Ideological filters that normalize informality generally fall away when examining foreign legal systems. Unless the lines separating formality and informality are drawn exactly the same way, foreign informality assigned to different actors and situations appears strikingly prominent and out of place. In these foreign contexts, informality has not been normalized, especially from an outsider perspective. Rather, it stands out. It stands out from the baseline normal, or what is unreflexively considered normal from an external legal consciousness. The observed legal community may indeed have developed its own modes of legitimating specific allocations of informality and formality. However, as is often the case in developing countries, there is frequently much less self-legitimating discourse surrounding those systems. And foreign observers are indubitably less attuned to – or interested in – its affirmative construction.

Indeed, in any liberal-legalist system, reinforcing the rationality and justification of legal institutions and legal outcomes requires substantial resources – both discursive and economic. Legal scholars and legal commentators are on the front lines of this societal and institutional function. Overall, their job is to justify and legitimate the workings of liberal legal systems, often in the face of contradictory values and inevitable failures and shortcomings. The objectives of neutrality, objectivity, and universality that these systems aspire to, however, are tall bills to fill. The inevitable shortcomings are mitigated through explanations and post-hoc rationalizations by supportive – or relatively supportive – legal experts and commentators.

In developing countries, this task of social construction is less well sustained, or less well prioritized, as an essential element of liberal-like legal systems. Latin American countries, in particular, have constructed national legality as relatively continuous with continental European and in some cases US law. Local legitimating discourse often piggybacks on foreign scholars from those same source countries. Such foreign sources and commentators, however, are principally focused on their own legal systems and their particular composition. Justifying the mix of formality and informality chosen, or – when seen as a whole – in place, in a given Latin American country, is not at the forefront of concerns for foreign legal scholars or international observers.

As such, there is no institutionalized rebuttal, defense, or justification generally available to defend Latin America's particular allocations of formality and informality. This is not to say that *all* informality – wherever and of whatever type – is justified and should be maintained. But, some of it might. They are not simply social norms interfering with otherwise formal legal systems, not simply a gap between the law on the books and law in action, not simply an unjustifiable transaction cost or inefficiency. Rather, they are an integral legal device. However,

it is not possible to perceive them as such – or credibly argue in defense of a particular configuration – if they are summarily denounced. If they are automatically diagnosed as the product of failed legal systems.[28]

In the examples in Section 7.3, one can better appreciate the various generations of law-and-development as a preference for one combination of formalization/informality over another. The mix of formality and informality is simply different: different from pre-reform law and different across the various generations of law and development itself. They are differences, however, that have major policy and distributional implications.

7.3 EXAMPLES FROM LATIN AMERICA

This section discusses two examples of legal heterodoxy from Latin America. The first concerns secured transactions law and the "heterodox" secured lending previously in place. It has been substituted almost in its entirety by reforms based on UCC Article 9. It is a story of the difficulties of sustaining and articulating a credible defense for heterodoxy in the Global South. The second example concerns the special private–law transitional justice scheme enacted in Colombia. It is an exceptional measure to address that country's long-standing guerrilla war and displacement of people. It transforms the traditional rules of property. Admittedly, it is an exceptional measure with a limited duration, twenty years. However, the model has the potential to be extended to other policy concerns and potentially made permanent or of long duration.

7.3.1 *Secured Transactions Laws*

Laws enabling personal property guarantees for debts are another example of the travails of legal heterodoxy. In an area of law highly relevant to transnational financial interests, secured credit in recent years has been a major topic. Indeed, secured lending has widely caught the attention of the US government, international financial institutions, development experts, and legal scholars. It is considered an essential aspect of economic development, presumably enabling additional resources in the form of debt to support business development. With liberalized security laws, the thinking goes, creditors would be encouraged to lend more freely on the strength of debtor's economic resources. And they would do so at lower rates of interest. Anything of value could potentially serve as collateral. And creditors could easily enforce property rights to obtain those resources upon the debtor's default.

[28] J. L. Esquirol, The Failed Law of Latin America (2008) 56 *American Journal of Comparative Law* 75–124.

The ostensible objective of reforms is thus to make credit more readily available to all debtors, from all creditors, and guaranteed by anything of value. The model overwhelmingly pursued is Article 9 of the Uniform Commercial Code, adopted in all fifty US states. It is the preeminent model for secured transactions worldwide. International financial institutions and proponents of harmonization widely promote it. It has at this point influenced numerous legal reforms around the world.[29] It is a model directly or indirectly, in its essential terms, pursued by international institutions, including in the Organization of American States's (OAS) Model Inter-American Law on Secured Transactions.[30] The UNCITRAL (United Nations Commission on International Trade Law) Model Secured Transactions Law,[31] and the recommendations of the International Finance Corporation, which is part of the World Bank Group, equally follow this same approach.

Many Latin American countries have followed suit. They have modified their laws to resemble Article 9. Some have adopted the OAS Model Law, in part or outright.[32] The latter is also patterned on Article 9.[33] Vestiges of differences and distinctions from earlier secured transactions models may remain in certain countries.[34] However, the reforms move in the direction of making anything of value the potential object of collateral, the creation of a single security device to do so, and a centralized registry to record these consensual liens.[35] Latin American countries have not been able to resist this type of uniformization.[36] After all, providing

[29] Article 9, internally, contains its own imperial ambitions. It limits recognition of debtor-located applicable law to jurisdictions with similar filing provisions. UCC 9-307(c), Comment 3. Absent that, the applicable law is Washington, DC.

[30] The Model Inter-American Law on Secured Transactions ("Model Law") was approved by the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI) on February 8, 2002.

[31] F. Fiorentini, Legal Transplants in the Law of Secured Transactions. Current Problems and Comparative Perspectives, in F. Fiorentini and M. Infantino (eds.), *Mentoring Comparative Lawyers: Methods, Times, and Places* (Cham: Springer, 2020), pp. 3–23, p. 3 and 13 (describing the heavy influence of US-based Commercial Financial Association in the drafting of the UNCITRAL model law, and corresponding Article 9 similarities).

[32] Guatemala (Decree No. 51 of 2007), Honduras (Legislative Decree No. 182 of 2009), Colombia (Law No. 1,676 of 2013), El Salvador (Decree No. 488 of 2013), Panama, some provisions (2013), Costa Rica (Law No. 9,246 of 2014), Peru (2018); Mexico (Reform to Ley General de Títulos y Operaciones de Crédito, May 23, 2000 and June 13, 2003); Dominican Republic (2020).

[33] A. M. Garro, Exportability of North American Chattel Security Regimes: The Inter-American Model Law on Secured Transactions (2006) 43 *Canadian Business Law Journal* 200–7.

[34] A. M. Garro, La Ley Modelo Interamericana sobre Garantías Mobiliarias: Primeros Desafíos en su Implementación, in *The Organization of American States – Inter-American Juridical Committee, Curso de Derecho Internacional XXXVII (2010)* (Rio de Janeiro: OAS, 2011), pp. 127–70 (discussing implementation in Peru, Guatemala, and Honduras).

[35] M. Dubovec, UCC Article 9 Registration System for Latin America (2011) 28 *Arizona Journal of International and Comparative Law* 117–42, 142 (arguing that Latin American states – other than Honduras – fail the test of international model instruments for secured transactions registration reform).

[36] At the Organization of American States Commission meeting adopting the OAS Model Secured Transactions law, which incorporated the US delegations essential 7 principles based

unconditional market access, without government limitations, is an essential part of the neoliberal recipe – at least when it comes to some markets and for some market actors.

The international campaign began in the 1970s with funding by the Rand Corporation and the United States Agency for International Development.[37] Recipient of this funding, Professor Boris Kozolchyk's National Law Center for Inter-American Free Trade at the University of Arizona has led the charge throughout Latin America. Many commentators note his oversized influence and direct involvement with reform proposals in Latin American legislatures.[38] His center produced the Arizona Project, modeled on Article 9, which served as the first draft, and substantially final, for the OAS Model Law.

Other legal scholars have also forcefully argued for Article 9 as the model for Latin America-wide harmonization.[39] Among them, Professor Alejando Garro at Columbia Law School has been instrumental with extensive publications and consulting, critiquing Latin America's selective model and praising Article 9.[40] Moreover, liberalized secured transactions laws are heavily endorsed by the United States government, international financial institutions, the European Union, and other promoters of Article 9. Legal heterodoxy in this realm has been explicitly targeted for elimination, which makes the defending and maintaining of alternative models quite improbable.

Such reforms and the discourses that propel it have been, nonetheless, critiqued from certain quarters. To some extent, Latin America's alternative political economy and modes of regulation have been championed. For example:

> [T]here are consistent assertions that Mexico's secured transactions and bankruptcy laws are not just deficient, but pre-modern, archaic, and backwards. These same voices contend that Mexico's economic development will remain retarded as long as the Mexican government fails to adopt protections of creditors modeled after the U.S. Uniform Commercial Code. These discourses are propagated by elite

on Article 9 of the UCC, only Guatemala declared the right to not approve the model law on the grounds that enforcement provisions were "exclusively thought for the benefit of creditors." D. Fernández Arroyo, La CIDIP VI ¿Cambio de Paradigma en la Codificación Interamericana de Derecho Internacional Privado, in *The Organization of American States – Inter-American Juridical Committee, Curso de Derecho Internacional XXIX (2002)* (Rio de Janeiro: OAS, 2002), pp. 465–600, p. 475.

[37] Garro, Exportability of North American Chattel Security Regimes.

[38] Crediting Kozolchyk as the intellectual author of the OAS Model Law, and indefatigable activist, Fernández Arroyo, La CIDIP VI, p. 8.

[39] A. M. Garro, The Reform and Harmonization of Personal Property Security Law in Latin America (1990) 59 *Revista Jurídica de la Universidad de Puerto Rico* 1–156.

[40] See e.g., A. M. Garro, Security Interests in Personal Property in Latin America: A Comparison with Article 9 and a Model for Reform (1987) 9 *Houston Journal of International Law* 157–242; A. M. Garro, The Difficulty of Obtaining Secured Lending in Latin America: Why Law Reform Really Matters (1996) 1 *Yearbook of International Financial and Economic Law* 97–116; Garro, Exportability of North American Chattel Security Regimes.

corporate groups within the U.S. that have vested interests in altering particular aspects of Mexico's legal system.[41]

Critiques of this type, however, remain vastly in the minority. Alternatives – heterodoxies – are hard to sustain.[42] The analysis that follows focuses on the interests disfavored by Article 9 reforms. It also examines the preconceptions and discredit associated with alternative legal devices. Part of the campaign in favor of reform rides on critiques of the particular mix of formalism and informality. It is especially this latter dimension that I consider here.

The following sections describe the heterodox model previously in place in Latin America. And, they examine the allocations of informality inherent in both this model and in Article 9. My argument is that the selective "Latin American" model simply assigns informality differently than Article 9 does. The latter could be equally faulted on grounds of "informality." Indeed, I provide three different examples of *legislated informality* within Article 9. However, these are not perceived as signs of its weakness but of its strength. This is evidence of the structural bias operating within developed and developing country discourse. It is not about whether or not there is informality. It is about where informality is preferably located and by whom it is exercised. And, ultimately, whose preferences prevail on these questions.

7.3.1.1 Selective Secured Transactions Laws

Latin American countries began from a different starting point. They generally pursued a model of *selective* secured lending. Historically, the civil codes in these countries limited personal property security to the traditional pledge. That legal device requires the transfer of physical possession of the collateral to the creditor. Only in this way are these asset guarantees (for other than publicly *registered* personal property) enforceable against all others. Certainly, this is an unworkable solution for debtors that must handle those assets on a regular basis. Only in some countries did commercial codes relax this requirement.[43] They enabled nonpossessory security interests for merchants. In the past, however, for most countries of the

[41] T. A. Canova, Banking and Financial Reform at the Crossroads of the Neoliberal Contagion (1999) 7 *United States – Mexico Law Journal* 85–120, 94–95 ("A very ethnocentric mind-set permeates these dominant discourses. They conveniently overlook the flaws in the US legal system and in US bankruptcy law. In addition, there seems to be no formal modeling or empirical support for the more dramatic assertions that Mexico's commercial code is the primary and direct cause of the country's economic plight. Finally, these dominant development discourses also overstate the deficiencies in Mexican law").

[42] C. R. P. Pouncy, Contemporary Financial Innovation: Orthodoxy and Alternatives (1998) 51 *SMU Law Review* 505–90, 510 and 575 ("heterodox (economic) concerns (lie) with greater risk taking, increased speculation and diminished monetary control").

[43] Garro identifies these countries as Colombia, Panama, Costa Rica, Mexico's capital district, and Paraguay. Garro, Security Interests in Personal Property in Latin America; See e.g. Colombia (Commercial Code, Decree No. 410 of 1971, Article 1200).

region nonpossessory security interests were only available through *special enabling legislation*.

7.3.1.1.1 SPECIAL LAWS In civil law countries generally, not just Latin America, special legislation has historically supported a selective approach to secured credit.[44] Specific industries and products have been singled out for the benefits of this private law instrument. Special laws were created over time for specific types of personal property. These include assets commonly serving as security, such as automobiles, vessels, and generally registered property. But, more creatively, special legislation can target specific assets, industries, and creditors.

Selective secured credit is not simply pre-modern, archaic, and backward – as development reformers insist. It does promote some defensible goals. Selectively enabling *non-possessory* security interests provides opportunities for enacting industrial policy. It allows governments to conduct differential credit policy through a private law mechanism. Moreover, it allows them to do so without state aid or subsidies, which could violate contemporary international trade treaties. These special laws are not government subsidies or exemptions from amounts owed to government. Rather, this scheme mobilizes the rules of private law, commercial law specifically. It does so in a way such as to create segmented credit markets. Some actors are capable of accessing – through the relevant legislation – secured credit markets. Others are not. Only certain industries or products are granted such exceptions, in this case "private law" benefits. Additionally, certain conditions may be imposed in order to qualify for the exception, whether certain products, production methods, environmental sustainability, or other.

Both France and Italy, for example, developed this sectorial approach over time.[45] Secured credit was not indiscriminately made available in the civil code. Rather, certain sectors of the economy were selected legislatively to benefit from this legal privilege. The laws in each of these countries developed over time, dependent on economic exigencies and the importance of certain industries or sectors of the economy. Probably the most recent example of this is Italy's enactment of special legislation for the wine and alcoholic beverage industry. As part of its COVID-19 emergency measures to support the economy, it extended these norms to these industries in its 2021 *Cura Italia* decree.[46] Previously, collateral enabling legislation had been directed to the prosciutto industry in 1985 and aged-cheese industry in

[44] Along with common law developments, such was the case in the United States as well, prior to UCC Article 9.

[45] J. L. Esquirol, Les Outils Juridiques en Matière de Politique Économique: L'Exemple de la Réforme du Droit des Sûretés en France (2022) 22 *Revue des Juristes de Sciences Po* 4–11; J. L. Esquirol, Credit Supports for Italian Specialty Products: The Case of Prosciutto and Long-Aged Cheese (2021) 14 *FIU Law Review* 589–614.

[46] Decree 23 of 2020 (Italy).

2001.[47] These laws allow producers to grant their stock of products, warehoused during the ageing process, as collateral without transfer of possession to the creditor. These provisions are limited to certified Italian origin denominated goods. And, they are conditioned on producers following the traditional production protocols required by their industry association. In short, selectively – rather than liberally – enacting secured lending laws functions as a sort of industrial policy. Whether thought out comprehensively over any one point in time, or the accretion of past decisions of industrial policy, the overall model in the history of civil law countries is one of selective enabling laws.

Latin America followed this selective approach.[48] Most countries in the region, starting in the late nineteenth and early twentieth century, opted for the French model of *warrants* and *gages sans dépossession*.[49] The *warrants* were new legal instruments that combined a negotiable instrument and chattel mortgage over specifically defined assets. The *gages sans dépossession* constituted a nonpossessory pledge with registration. There is considerable similarity among the region's twenty plus countries.[50] A discernible pattern of economic policy emerges at historical inflection points.[51] Like in France, the earliest laws were in the agricultural sector.

[47] Law No. 401 of 1985 (Italy), Law No. 122 of 2001 (Italy).

[48] A useful summary is provided by Garro, Security Interests in Personal Property in Latin America, 162 and 175–99.

[49] A *warrant* consisting of a warehouse receipt, see Esquirol, Les Outils Juridiques en Matière de Politique Économique.

[50] Notably, Mexico did not follow this course. They have a *guaranty trust* that preceded the 2001/2003 reforms, remains unrevoked by reforms, and by all accounts functions well as a guarantee device. Debtors transfer title on collateral to a guarantee trust for the benefit of one or multiple creditors. No official or judicial intervention is required for foreclosure. Additionally, the general warehouse receipt long exists as a form of real right guarantee. General Law on Negotiable Instruments and Credit Transactions of 1932 (Mexico), Article 229; See also, A. Lopez-Velarde and J. M. Wilson, A Practical Point-by-Point Comparison of Secured Transactions Law in the United States and Mexico (2004) 36 *Uniform Commercial Code Journal* 3–65, 14–15.

[51] Argentina: Law No. 928 of 1878 (initially for any goods deposited in customs houses); Law No. 9,643 of 1914 (available for national agricultural, ranching, forestry, mining, and manufacturing products warehoused in third part depositories with the exception of wine); Bolivia: Civil Code, amended by Decree Law No. 12,760 of 1975 (providing for nonpossessory agricultural, hotelier, and industrial pledges); Brazil: Decree No. 3,272 of 1885 (nonpossessory agricultural pledge with registration on crops, machinery and others with prior consent of real property mortgage holder); Law No. 492 of 1937 (rural pledges over agricultural products and animals without transfer of possession and with registration in real estate registries); Decree Law No. 1,271 of 1939 (extending nonpossessory pledge with registration to industrial machines and apparatuses), replaced by Decree Law No. 413 of 1969 (creating *cédula de crédito industrial*, a promissory note with security interest including guarantees of industrial personality without dispossession and with registration); Chile: Law No. 497 of 1926 (agrarian nonpossessory pledge), Law No. 4,702 of 1929 (nonpossessory purchase money security interest with registration over specific items of personalty); Law No. 5,687 of 1935 (nonpossessory industrial pledge); Colombia: Law No. 24 of 1921 (nonpossessory agrarian pledge including working machinery, animals and products of national mining and industry); Decree No. 553 of 1932 (nonpossessory industrial pledge extending to industrial machinery, tools, raw materials,

Such laws enabled pledges without transfer of possession, so-called agrarian pledges. They defined the permissible scope of assets, debtors, and creditors. These later led to industrial pledges: extending the same legal device to industrial debtors and their particular assets. The conditions and terms of legislation certainly vary across countries. The terminology may also be slightly different. Overall, though, the differences between this selective model and Article 9 are highlighted next.

7.3.1.1.2 HETERODOX INFORMALITY The reform campaign for secured transactions in Latin America has relied mostly on critiques of *legal formalism*, not informality per se. The variety of laws pertaining to different industries, different debtors, and different registries are condemned as part of Latin America's typical, excessive formalism. Yet, as this same thinking goes, that leads to a sort of informality for those not benefiting from the legislation. They must resort to a combination of contractual means, legal subterfuges, and official complicity to simulate their desired legal outcomes. Excessive formalism and informality here work together discursively. Debtors excluded from selective enabling laws must recur to other devices to achieve comparable yet less favorable results.

Certainly, private parties can transact into nonpossessory secured transactions. They can operate under the general rules of contract law – in relation to either official or ad hoc creditors. However, these are not recognized as property rights enforceable against third parties and the bankruptcy trustee. Historically in the civil law, there has been a limitation on contractual arrangements for asset guarantees, and the parties need careful drafting to avoid such pitfalls.[52] However, the difference between formal and *informal* is precisely the point. It is the relative advantage made available to the law's intended beneficiaries. Only the former may assuredly engage in secured credit transactions, backed by assets employed in the operation of business, enforceable by creditors, *against all others*.

Certainly, credit market segmentation is quite controversial from a neo-liberal economics perspective. Differentiation is precisely what hegemonic secured transactions reform is intended to eliminate. The latter is championed as opening up

products); Peru: Law No. 2,402 of 1916 (nonpossessory agricultural pledge available only to farmers and ranchers); Law No. 23,407 of 1982 (nonpossessory industrial pledge over machinery, tools, raw materials, and products).

[52] The doctrine of *pacto comisorio* is a civil code prohibition that limits the ability of parties to contingently transfer property rights upon default by simple contract. It effectively works to bar self-help strict foreclosure (permitted by UCC Article 9-620 in which the secured party transfers ownership to itself upon debtor's default without returning any surplus value of collateral to debtor, over amount owed, but disallowing deficiency claims against the debtor in case of insufficient value to cover the debt). The doctrine is meant, among other possibilities, to protect the debtor from rapacious creditors or the debtor itself. It creates a pitfall for the unwary contract drafter but does not prevent contractual arrangements altogether. That discussion, however, is beyond the scope here. See Fiorentini, Legal Transplants in the Law of Secured Transactions; M. Bussani, *Il Problema del Patto Commissorio: Studio di Diritto Comparato* (Torino: Giappichelli, 2000), pp. 10–94.

credit to all on equal terms and on anything considered by the parties to be of value. Article 9 does indeed provide a singular security device for all industries in the real economy. However, this does not mean that it does not differentiate among markets. It focuses on financial assets – with different rules depending on financial type and deviations from standard priority rules. It is economic policy tailored to the financial industry. Wall Street not Main Street.

Still, defenders of the state's need to undertake industrial policy remain steadfast. This is especially so in developing countries where "Main Street" is the principal, or only, economy. Beliefs about the ability of completely undirected markets to create development, sustainable and equitable, are very much disputed. Sectorial differentiation – rather than financial asset differentiation – may be even more important there. In light of that economic debate, *selective* secured credit is not necessarily anachronistic but rather an alternative legal device that enables a different economic policy prescription.

The disagreements over economics may be debated on their own merits. The economic reasoning may certainly be challenged from a neo-liberal perspective. Nonetheless, selective enabling is an approach with a long pedigree in Western countries and an articulable rationale in its favor. Credit markets are segmented.[53] And the private law rules enable this differentiation. However, the arguments are obscured by erroneously characterizing it as arcane legal tradition, cumbersome technique, or even legal informality. Disagreements over these policy differences cannot genuinely be resolved by simple appeals to formalizing the informal, or conversely reducing formalism. That shortcut would circumvent the economic and distributional decisions being made. It is tantamount to deregulation and liberalization without transparent discussion.

7.3.1.2 "Liberalized" Secured Transactions

The transformation to "liberalized" secured transactions upends the selective model. At its utmost, liberalization means enabling anything of value, from any debtor, to be conveyed to any creditor, preferentially against all others, with minimal recording requirements, enforceable privately without recourse to the courts. The reforms are promoted as pro-development, pro-modernization, good for small- and medium-sized businesses, and a win–win. It portends to place all potential debtors on equal footing. In effect, it restructures how the state implements credit policy. Government is deprived of the use of multiple legal devices, tailored to specific industries, to devise and implement industrial policy through private law. Regardless

[53] The dual economy hypothesis in developing countries has been reaffirmed by authoritative studies such as La Porta and Shleifer, Informality and Development. They see duality as between formal and informal. But, even within what is considered formal, rejecting segmentation is neither realistic nor conducive to good policy necessarily.

of one's economic theory or political preferences, the change is not merely one of modernization over tradition, development over stagnation. Rather, it reflects divergent opinions with respect to industrial policy, and it generates different distributional outcomes.[54]

Latin America is not the only region to feel the pressure to "liberalize," nor is it just developing countries. Italy passed liberalizing reform in 2016, coming into effect just this past 2022.[55] France has gone through two stages of liberalization in 2006 and 2021, while still retaining some nominal distinctions.[56] Regardless, the Article 9 model contains its own mix of formality and informality.[57] This is not the place for a detailed description of the workings of the UCC. Suffice it to say that Article 9's provisions create a singular legal device for all non-realty consensual guarantees.[58] The result serves as an example of the political and economic indeterminacy of critiques of formalism. In this case, formalism's opposite – functionalism – is placed at the service of the financial industry.[59] Anything of value can be *preferentially* conveyed to creditors as collateral.[60] As to its particular types of "informality," I point out three dimensions: private action (self-help) based on social norms; informal types of property; and related transactions outside the law's scope.

[54] Article 9 does not eliminate the state's ability to conduct industrial credit policy through private (commercial) law. It merely replaces the technique of doing so through multiple security devices. It favors a singular device (the security interest), while allowing for differential rules related to different asset types and effects of perfection in its many specialized provisions.

[55] Decree Law No. 59 of 2016 (Italy), *Disposizioni urgenti in materia di procedure esecutive e concorsuali, nonché a favore degli investitori in banche in liquidazione*, converted into Law No. 119 of 2016 (Italy).

[56] Ordinance No. 2006-346 of 2006 (France) relating to sureties; Ordinance No. 2021-1192 of 2021 (France) reforming the law of sureties. See J. F. Riffard, The Reform of the French Law on Security Interests (Droit des sûretés): A Second and Final Season? (2022) *Zeitschrift for Europäisches Privatrecht* 565–84 (explaining that the French Reforms which commenced in 2006 and retaken in 2021, were instigated by pressure from the World Bank's Doing Business Reports, ranking France low).

[57] Consider G. Gilmore, *Security Interests in Personal Property*, vol. I (Boston: Little, Brown & Company, 1965), pp. 24–25 (describing the relaxation of the transfer-of-possession to creditor requirement in the Anglo–American tradition, as passing from a conclusive presumption of retention of possession by seller/creditor to one of a rebuttable presumption, and then a variety of independent security devices).

[58] K. Llewellyn, Problems of Codifying Security Law (1947) 13 *Law and Contemporary Problems* 687–702, 694 ("Codifiers in the field of secured commercial transactions are not planners of an economy, they are but shapers of legal tools to be used at will").

[59] A. R. Kamp, Downtown Code: A History of the Uniform Commercial Code 1949–1954 (2001) 49 *Buffalo Law Review* 359–476, 361 ("In the words of Soia Mentschikoff, 'special interests' won over the drafters' desire to protect small merchants and consumers . . . They (business representatives on drafting committee) wanted, for example, the unified article 9 security interests that allows a financier to have priority on almost all the debtor's assets but did not want any provisions for consumer disclosures or limitations of obtaining or realizing on a security interest").

[60] Llewellyn, Problems of Codifying Security Law, 694 ("I as a person feel that the tendency of full legal availability of the assets of an enterprise to serve as security will *expand* net credit materially less than it will *secure* that credit" (original emphasis)).

7.3.1.2.1 SELF-HELP REMEDIES Article 9 deploys informality in several ways. Most prominently, it authorizes self-help remedies for repossession of collateral and foreclosure of a debtor's property rights. Creditors can seize debtors' property without any prior judicial notice or supervision. Private parties may seize the collateral and dispose of the property to satisfy the underlying debt. The only limitation is that creditors not "breach the peace" as part of the physical act of seizing the property. And the only remedies for debtors are post hoc. They may be able to sue for wrongful repossession, if they can prove damages. And, they may defend against a deficiency judgment – that is, a judgment for the remaining amount of the debt beyond the proceeds of the foreclosure sale – if the repossession and foreclosure are not conducted by the creditor in a commercially reasonable manner.

There can be no greater example of legal informality than this.[61] The legal process is seconded to private actors.[62] Creditors and their agents may carry out the entire procedure of seizing assets and terminating debtor's rights. All of this under the most general and cursory admonition to creditors to not "breach the peace" and to proceed under "commercially reasonable" standards. These post hoc restraints have proven very malleable and are interpreted in wildly different ways. It leads to conflicting and even absurd results. In some cases, simply saying no to a repossessor entails a breach of peace if the latter proceeds anyway.[63] In another reported case, two male repossessors could legitimately proceed in the middle of the night against a single mother with two small children, living in a trailer park, contrary to her physical overtures to enter her car and the disturbance caused to neighbors.[64] And, most perplexingly, a repossession carried out with the accompaniment of paid law enforcement *does* constitute a breach of the peace even where there was no disruption or violence, because the debtor was inhibited from becoming violent – ironically.[65] Moreover, the post hoc check of commercial reasonableness only works to eliminate deficiency judgments against debtors. As such, the actions of creditors and their agents are constrained, if anything, by *social norms and personal limits*. The line of illegality is frequently grazed if not outright breached with impunity. Notably, this is an area in which social norms reign in the place of law. It is legislated informality.

[61] See Rosenn, The Jeito (providing a typology of good and bad legal informality in Latin America. Self-help remedies would certainly fall under more than one of these categories).

[62] Courts have found no due process for debtors because no state action is involved. See W. M. Burke and D. J. Reber, State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment (1973) 47 *Southern California Law Review* 1–57.

[63] *Hollibush* v. *Ford Motor Credit Co.*, 508 N.W.2d 449 (Ct. App. 1993); *Dixon* v. *Ford Motor Credit Co.*, 391 N.E.2d 493, 497 (Ill. App. Ct. 1979).

[64] *Williams* v. *Ford Motor Credit Co.*, 674 F 2d 717 (8th Cir.1982); see also *Chrysler Credit Corp.* v. *Koontz*, 661 N.E. 2d 1171 (Iil. App. Ct. 1996).

[65] *Stone Machinery Co.* v. *Kessler*, 463 P.2d 651 (Wash. Ct. App. 1970); see also Comment 3 to UCC §9-609.

Globalization of Article 9 on this very point has met with significant resistance. Even countries that have in principle adopted "self-help" remedies have built in protections.[66] Secured creditors must repossess under the supervision of a notary public or public official. Moreover, the debtor may stop creditor's self-help remedies if there is disagreement on the default, amount of debt, or right to repossess. These safeguards for debtors have provoked a hail of criticism from Article 9 harmonizers. Only the most extensive informal version is considered economic and efficient. Indeed, in the case of Mexico, for example, it has led to the complaint:

> The Mexican legislator seems to harbor a fundamental distrust of the marketplace, wary of the secured creditor's capacity to restrain himself from abuses against his debtor if foreclosure is made too easy and of the debtor's capacity to assert himself when he has a valid defense or cooperate in an expeditious foreclosure when appropriate.[67]

Formalization here is rather a global inclination, if not the hegemonic one.

7.3.1.2.2 INFORMAL PROPERTY Another example of informality relates to the scope of Article 9. The latter is primarily a property statute governing chattel mortgages. But it also includes contractual payment rights and treats them increasingly like property. It accomplishes the latter by muddying the differences between contract and property.[68] This is especially poignant in the case of accounts receivable.[69] The elision has become so normalized in US legal culture that it is hard to see. It is a two-step operation. First, payment rights are deemed to be "property." What that means is not a given, however. Second, the full range of property features are presumed.

Article 9 principally advances the second step. It extends the *power* to convey "preferential rights against all others" to contract right-holders.[70] A contract right-

[66] D. B. Furnish, Mexico's Emergent New Law of Secured Transactions: Recent Developments 2000–2010 (2011) 28 *Arizona Journal of International and Comparative Law* 143–82, 169 ("the Mexican foreclosure procedure … established excessive safeguards for the debtor, creating a high-cost, time-consuming process that favored the debtor at the expense of the creditor, thus raising the cost of credit by increasing the risks associated with default").

[67] Ibid., 171.

[68] Article 9-109(a) ("creates a security interest in personal property" and "sale of accounts, chattel paper, payment intangibles or promissory notes." The original Article 9 included the term "contract rights" specifically as objects of collateral). Secured Transactions: Sales of Accounts, Contract Rights and Chattel Paper, UCC 229 (1951). Currently, those not covered by the definition of accounts are included as payment intangibles; see G. Gilmore, Security Law, Formalism, and Article 9 (1968) 47 *Nebraska Law Review* 659–77, 671 ("Almost nothing new was added"); see G. Gilmore, The Assignee of Contract Rights and His Precarious Security (1964) 74 *Yale Law Journal* 217–61, 218 ("Security assignments of executory contract rights have been widely used only in recent years").

[69] An account receivable is simply money owed to a party, whether under a contract or simple sales transaction. Article 9 differentiates among the types of rights to payment, but that is not necessary for the discussion here.

[70] See W. N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (New Haven: Yale University Press, 1919), pp. 35–42. Distinctive features of

holder does not have a "preferential right against all others" with respect to its debtor. But it can nonetheless convey one to its own creditor.[71] Admittedly, the contract right and the derivative preferential right are enforceable by different parties. Still, the logic runs counter to the fundamental property principle that one cannot convey more than one has.[72] Much less the contract rule that assignees stand in the shoes of their assignors.

In the world of Article 9, however, this all makes perfect sense. The objects of security interests need not consist of full title. *Any right* held by a debtor will suffice.[73] Conveyed to a creditor, it becomes a full preferential right. In this way, Article 9 sanctions a sort of *informal* property creation;[74] that is, contract rights with property characteristics. Notably, Article 9 does not codify a new property type. Nor does it change the definition of "personal property." Nor does it explicitly announce a *power* to convey greater rights.[75] Rather, it simply operates *as if* it already existed. It is not that the distinction between contract and property does not matter in the common law[76]: it does, throughout the legal system, including other sections of Article 9.[77] On this particular point, however, doctrinal "informality" flourishes.

property are priority against all others and the right to pursue in the hands of others. Security interests under Article 9 share these two characteristics, see § 9-117/§ 9-322 and § 9-315.

[71] Including contractual rights in Article 9 enables additional preferential rights for secured creditors. Specifically, expected income flows from contract payments need not be sold outright but rather granted as collateral. The latter produces a legally valid conveyance at the time concluded and perfected. Such act marks the priority ranking of preference of creditors. And, it grants creditors immunity from later fraudulent conveyance challenges, when the actual transfer to creditor really takes place upon default (likely near the bankruptcy date). This "perfected" transfer also ensures that the conveyance is enforceable against all others, including the bankruptcy trustee. Extending this property rule to contracts potentially excludes yet another source of repayment by the debtor away from the unsecured voluntary and the involuntary creditors.

[72] Compare UCC 2-403 that expressly grants greater rights to the transferee from the transferor with voidable title; Hughes, Robots, Markets, and the Value of Deal Lawyers.

[73] Art. 9-203(b)(2) and Comment 6.

[74] See generally Y. Emerich, La Nature Juridique des Sûretés Réelles en Droit Civil et en Common Law: Une Question de Tradition Juridique? (2010) 44 *Revue Juridique Themis* 95–142, 103–13, 125–28 (describing the predominantly essentialist perspective of civil law secured transactions law: "[It] creates a situation relatively heretical for the civilian in that a concept is preserved whilst associating it with the legal regime of a different concept").

[75] Article 9 does recognize such powers may derive from other law, such as UCC Article 2-403 (explicitly granting better title to transferee over transferor's voidable title); and Article 3-305(b) (holder in due course of negotiable instrument has greater rights than transferor subject to claims and defenses); UCC Article 9-617 expressly authorizes the transfer of greater rights to the transferee in a foreclosure sale, since the Secured Party is not an "owner" and the Debtor is not voluntarily transferring. See W. D. Warren and S. D. Walt, *Secured Transactions in Personal Property*, 10th ed. (New York: Foundation Press, 2019), p. 319 ("Although the selling secured party does not 'own' the collateral after repossession, 9-617(a) (1) empowers it to make a transfer of all of the debtor's rights to the transferee").

[76] Ibid, pp. 130–31.

[77] See Emerich, La Nature Juridique des Sûretés Réelles en Droit Civil et en Common Law, 125–28; see also, UCC Article 9-607 distinguishes between a true sale and a security assignment for transfers of accounts receivable in the application of the commercially reasonable standard

Admittedly, accounts receivable have long been considered "property" in the United States.[78] They have been extensively assigned and used as collateral since the 1920s and expanding after WWII.[79] Assignments of such accounts were first popularized in the textile industry. In turn, assignments of long-term contract rights became popular during World War II, to finance inputs for US government procurement contracts. Such transactions assumed a property-like nature, at least with respect to assignor–assignee conveyances and debtor–creditor collateral.[80] Doctrinalists in the United States have gone as far as claiming that contract rights are property, *tout court*.[81]

Regardless, the fact that contract rights have some property features does not mean that they have to have them all. Contract rights serving as property-guarantees *enforceable against all others*, especially against the bankruptcy trustee and all involuntary creditors, is an additional step. Yet, it passes relatively unremarked.[82] In this way, Article 9 effectively adds more property features to contract

for disposition. On the one hand, Article 9's inclusion within its scope of the sale of financial assets – such as accounts, instruments, chattel paper, and payment intangibles – blurs the distinction of ownership and other rights. On the other, the formal distinction re-emerges as legally meaningful, in which commercial lawyers and courts must grapple with the meaning of "ownership." Comment 4, UCC Article 9-109 ("That issue is left to the courts"); Here is an example of the significance elsewhere based on the "nature" of the transaction: "The question for the court then is whether the *nature* of the recourse, and the true nature of the transaction, are such that the legal rights and economic consequences of the agreement bear a greater similarity to a financing transaction or a sale." *Major's Furniture Mart, Inc.* v. *Castle Credit Corp., Inc.*, 602 F 2d 538 (3rd Cir. 1979); see also, J. Moringiello, False Categories in Commercial Law: The (Ir)Relevance of (In)Tangibility (2007) 35 *Florida State University Law Review* 119–66, 120 (arguing that tangibility and traditional conceptions of property re-enter Article 9 enforcement attempts and argue for collapsing the tangible/intangible distinction in Article 9 in favor of the "legal qualities of those assets").

[78] A. L. Corbin, Assignment of Contract Rights (1926) 74 *University of Pennsylvania Law Review and American Law Register* 207–34; Gilmore, The Assignee of Contract Rights and His Precarious Security, 221 and 259 ("It is assumed, and there is no modern authority to the contrary, that such rights can be effectively assigned . . . We have been discussing the assignee's righemerts on the assumption that only the original parties to the financing transaction are involved. Against third parties such rights might be of doubtful worth").

[79] M. S. Boas, Legal and Economic Aspects of Accounts Receivable Financing and Factoring (1954) 59 *Commercial Law Journal* 65–67.

[80] Commentators continue to support this formula, without explicit distributive analyses. See Moringiello, False Categories in Commercial Law, 132–33, "For the purpose of creditors' rights laws, this inquiry remains current; if a right can be transferred for value (or in exchange for a 'fund'), then it should be capable of serving as collateral . . . It remains necessary to give those rights a property label because Article 9 defines collateral in property terms." In the 1940s, many US states regulated the assignment of receivables confirming the same stature. 'Comment', (1958) 67 *Yale Law Journal* 402, 410–1 (twenty-three states requiring recordation).

[81] A. Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Working Rules of Contract Law* (Saint Paul: West Publishing Company, 1951), vol. IV, p. 418 (§ 860 Is a Contract Right "Property"?).

[82] Article 9-318 rejects prior US Supreme Court invalidation (based on fraudulent conveyances New York law) of enforceability against bankruptcy trustee of accounts receivable assignment because of non-notification to account debtors (retention of dominium by debtor), *Benedict*

rights.[83] It extends the power to grant enforceability against all others.[84] And, it does so informally by fudging the distinction between assignment of contract and mortgage of property. It subsumes both types of transactions indistinctly within its scope.[85] The differences between contract and property are thus blurred.[86]

It is not incidental that Article 9 avoids all mention of property rights, opting instead for the term security "interest." The UCC drafters admit, in an obscure comment on licenses:

> Neither this section nor any other provision of this Article determines whether a debtor has a property interest … the debtor's *property interest* may be confined solely to its interest in the promises made by the licensor in the license agreement (e.g. a promise not to sue the debtor for its use of the software) (italics mine).[87]

This insouciance about formal categories is no doubt a testament to the UCC's legal realist pedigree.[88] Surely, there are strong arguments for function over form. A debtor's contractual rights to payment from a third party is a definable value over which a creditor *could* be assigned priority.[89] Nothing materially impedes it. Not wholly dissimilar situations in Latin America have been labelled "informal"

v. *Ratner* 268 U.S. 353 (1925). Article 9 comments state that it "makes explicit what was implicit, but perfectly obvious."

[83] As an additional example, Article 9 extends additional property-like protections to accounts receivable by rendering ineffective any contractual restriction on the alienation of accounts receivable, as impermissible restraints on alienation. Article 9-406(d), Comment 5 ("the policies … under this section build on common law developments").

[84] S. Posel, Factoring Accounts Receivable in France: Some Legal Aspects and American Comparisons (1982–1983) 57 *Tulane Law Review* 292–327, 293. ("Free from the restrictions and doubts which once surrounded its legal status, such a loan *(secured by accounts receivable)* is no longer the expensive practice it was during and between the World Wars. Governed by article 9 (secured transactions), which specifically includes accounts as available collateral security"); see also G. Gilmore, Article 9: What It Does for the Past (1966) 26 *Louisiana Law Review* 285–99, 295 ("a sixth part [of Article 9], on long-term contract rights financing as distinguished from short-term accounts receivable financing, was projected but never reached draft stage"). Subsequent reforms have extended the definition of accounts and payment intangibles to the point long-term payment rights are also included.

[85] UCC 9-109(a); 9-309(2) (retaining the ambiguous "assignments" language for accounts and payment intangibles).

[86] Gilmore, *Security Interests in Personal Property*, pp. vii–ix (extending the "property rule," Gilmore transforms the question into: "what types of claims or choses in action …, can be presently transferred … with the result that today's assignee will have priority?"); but see Corbin, Assignment of Contract Rights, 229 ("the right of the assignee is the same right as that previously held by the assignor").

[87] Article 9-408, Comment 3.

[88] Llewellyn, Problems of Codifying Security Law, 694; Gilmore, Security Law, Formalism, and Article 9; P. Winship, An Historical Overview of Article 9, in L. Gullifer and O. Ackseli (eds.), *Secured Transactions Law Reform: Principles, Policies and Practice* (Oxford: Hart Publishing Ltd, 2016), pp. 21–48.

[89] Comment, Contract Rights as Commercial Security: Present and Future Intangibles (1958) 67 *Yale Law Journal* 847–92, 861 ("A criterion of identifiability would accordingly appear a more realistic standard").

property, that is, private contractual arrangements that are treated like property.[90] At the same time, enabling the proliferation of informal property priorities through private ordering contradicts the contemporary development mantra on the need for "clear property rights."[91] Functionality and informality may be different sides of the same coin.[92]

In any case, "functionalist" deconstruction of the property–contract distinction does not address its distributive effects. The fact that contractual and other rights can be treated as property *functionally/informally* does not mean that they should be. Function here is not neutral.[93] The doctrinal distinction has major policy implications. How much of debtor's economic value can be prioritized for some obligations and not others? Privileged are consensual creditors – without limits on the economic value available for their prioritized claims.[94] In the process, contractually produced judgment-proof debtors may leave non-self-adjusting involuntary creditors without any recourse whatsoever.[95] Think workers, pensioners, tort judgment creditors, tradespeople, and the like. They may be left with no assets to satisfy their claims. These considerations may be particularly relevant to developing countries where Article 9 is exported, which may not have social safety nets like workers compensation or pension guaranty trusts.

[90] Karst, Rights in Land and Housing in an Informal Legal System (contractual arrangements coupled with de facto acquiescence by the state labeled informal property). Notably, Karst ascribes a positive development value to informality of this type. Subsequent law and development reverses that: targeting it for formalization; B. Kozolchyk and C. Castaneda, Invigorating Micro and Small Businesses through Secured Commercial Credit in Latin America: The Need for Legal and Institutional Reform (2011) 28 *Arizona Journal of International and Comparative Law* 43–116, 89 (contractual arrangements simulating a registered business association).

[91] Esquirol, Titling and Untitled Housing in Panama City; Da. Kennedy, Some Caution about Property Rights as a Recipe for Economic Development (2011) 1 *Accounting, Economics & Law* 1–62.

[92] See Hughes, Robots, Markets, and the Value of Deal Lawyers (Article 9 endorses unclear conveyances, contradictorily styled both sales and security interests in the securitization context. Article 9 legislates this informality by conflating (1) sales of payment rights and (2) transfers of security interests in payment rights. Investment bankers are allowed to exploit the ambiguity – or informality – of blurred legal categories: pretending they are sales to induce maximum investor assurances while knowing the seller/debtor will claim they are security interests upon a default).

[93] Kamp, Downtown Code, 362 ("The reality is that the Code is a political document – the product of political realities of the early 1950s on the state level").

[94] Ibid., 374 ("They (business representatives on drafting committee) wanted, for example, the unified article 9 security interests that allows a financier to have priority on almost all the debtor's assets but did not want any provisions for consumer disclosures or limitations of obtaining or realizing on a security interest").

[95] Involuntary creditors are creditors that do not choose to be creditors. They are simply owed money from a past debt, court judgment, or outstanding legal claim. They are nonadjusting because it is not in their power to negotiate for better terms, raise the interest rate, etc., since this is not a voluntary anticipated relationship. The list in the next sentences provides some examples.

In the civil law tradition including Latin America, this operation is much more debated.[96] Civilians are more punctilious and insistent about "formalities." The *conceptual* question has bedeviled commentators and courts.[97] Can "obligations" be property? Property rights over contractual obligations have been controversial, if not an outright anomaly. They are like apples and oranges.[98] Likely, it is because the civil law world is more categorical about legal distinctions.[99] It defies the quintessential logic of contract and property, personal and real rights. In Latin America, security interests over floating stocks, proceeds, and uncertificated accounts receivable, for example, have been a particularly thorny issue.[100] A property right over a contractual right appears quite anomalous, and a contractual right such as an account receivable is not property. It is only in the latter half of the twentieth century that certain property rights over contract rights became admitted.[101] But, even so, it remained mostly a minority position in doctrinal circles.[102] It has been

[96] Some civilian jurisdictions abide by the doctrine of *numerus clausus* that limits "real" rights. Property rights are limited to those enumerated in the civil code or, alternatively, legislation. The topic is beyond the scope here, but see generally B. Akkermans, The Numerus Clausus of Property Rights, in M. Graziadei and L. Smith (eds.), *Comparative Property Law: Global Perspectives* (Northampton: Edward Elgar, 2017). Article 9 provides that legislative authority – although as I am arguing here *informally*.

[97] See S. Praduroux, Objects of Property Rights: Old and New, in M. Graziadei and L. Smith (eds.), *Comparative Property Law: Global Perspectives* (Northampton: Edward Elgar, 2017), pp. 51–70 ("It is widely debated whether claims – especially monetary claims for a fixed sum of money – can be classified as things that can be the object of property rights. This issue is controversial especially in legal systems which restrict property law to corporeal things; but even under legal systems that recognize property rights over intangible things, there is no consensus among legal scholars as to whether claims can be the objects of ownership or other rights of property"). It is beyond the scope here to discuss the differences *across* civil law systems.

[98] The differences between property and contract may be approached in – at least – three different ways: either nominally, functionally, or distributionally. Nominally, historical characterizations of legal relationships and their traditional objects are paramount. Functionality looks past nominal differences to the role the device serves, or can serve, in real transactions. Distributionally, who wins and who loses takes precedence in the analysis. Both nominal and functional arguments sidestep the real stakes.

[99] Some of the main proponents of the indistinguishability of credits (i.e., personal obligations) and real rights were the French legal realists described by M. C. Belleau, The Juristes Inquiets: Legal Classicism and Criticism in Early Twentieth Century France (1997) 1997 *Utah Law Review* 379–424; Y. Emerich, *La Propriété des Créances: Approche Comparative* (Paris: Librairie Générale de Droit et de Jurisprudence, 2007) (citing Josserand, Saleilles, Bonnecase); see specifically, J. Bonnecase, La Condition du Créancier Chirographaire: Sa Qualité D'ayant-Cause à Titre Particulier (1920) 19 *Revue Trimestrielle de Droit Civil* 103–50; R. Saleilles, *Etude sur la Théorie Générale de l'Obligation d'Après le Premier Projet de Code Civil pour l'Empire Allemand*, 3rd ed. (Paris: Librairie Générale de Droit et de Jurisprudence, 1925).

[100] See Garro, Security Interests in Personal Property in Latin America, 197–98; Furnish, Mexico's Emergent New Law of Secured Transactions, 153–54.

[101] S. Ginossar, *Droit Réel, Propriété et Créance: Elaboration d'un Système Rationnel des Droits Patrimoniaux* (Paris: Librarie de Droit et de Jurisprudence, 1960).

[102] The solutions arrived at in civil law jurisdictions are, nonetheless, not diametrically opposed to the UCC – even before the influence of Article 9 worldwide. Some jurisdictions had settled on

asserted that certain contractual obligations have a dual nature.[103] Defenders of "credits" or contractual rights, as property, have also upheld this classification on functional grounds.[104] Rights to payment, the argument goes, can be appropriated and conveyed just like property.[105]

Not surprisingly, the question of "property" was one of the stumbling blocks over the Article 9-inspired Arizona Project first presented as the OAS model law by the United States. Early on, Mexican commentators noted the Anglo-American particularity of the text that did not fit with Latin American legal codifications precisely for this reason:

> Typical *personal rights* will now be the axis upon which previously real rights transited. Or said in different words, assets today have a different value than assets conceived under the structure of real rights.[106]

These objections led, in response, to Mexico's co-presidency (along with the United States) of the OAS Commission that approved that institution's model law. It ultimately produced the same informalization of property evident in Article 9, possibly with a "Latin American" twist. Specifically, the discussion of "real" rights – the civilian term for property rights – was simply set aside, given the insistence by reformers for property-like priority over personal rights and credits.[107] The doctrinal conundrum between real and personal rights could not be formally resolved, so it was informally settled by not calling them property rights.

7.3.1.2.3 INFORMAL OTHERS Finally we come to closely-related parties and transactions that Article 9 leaves out. These other legal relations operate in a realm of relative informality. In this regard, I channel the work of Peruvian economist Hernando de Soto specifically. He draws a hard line between formals and informals. Formals are those that operate within the formal legal structure. Informals are all those that operate outside, for whatever reason. The costs of formal transactions may be too high. They may not be convenient for them. There may be too many

a comparable formula. *Certain* contractual rights to payment may be the object of a property right as a guarantee. In France, for example, the 1980 Loi Dailly initiated this path, taken further by the 2021 reforms to the Civil Code. Law No. 81-1 of 1981 (France), amended January 24, 1984. Monetary and Financial Code (France), Articles L. 313-23.

[103] Emerich, *La Propriété des Créances*.

[104] Ibid.; J. Flour, J. L. Aubert, and E. Savaux, *Les Obligations: L'Acte Juridique*, t. 1, 10th ed. (Paris: Dalloz, 2002); Ginossar, *Droit Réel, Propriété et Créance*.

[105] Riffard, The Reform of the French Law on Security Interests, with respect to accounts, "the ordinance [of 2021] aligns the rules of effectiveness against third parties of pledge and assignment." Essentially extending that rule to collateral transactions – like Article 9 does.

[106] L. Pereznieto Castro, Comentarios al 'Proyecto México -Estadounidense para una Ley Modelo en Materia de Garantías Mobiliarias (2001) 10 *Revista Mexicana de Derecho Internacional Privado* 59–66 (translation mine).

[107] Compare the Chilean Law, however, which specifically accepts the "real right" of guarantee over future goods and rights. Article 9, Law No. 20,190 of 2007 (Chile).

bureaucratic steps to fulfill. They may be subject to an alternative set of rules, functionally similar but distinct. Regardless, de Soto's prescription for development is to turn informals into formals. This means, in effect, lowering or eliminating legislative and regulatory conditions that treat them differently, whether that requires unconditionally titling squatters, automatically licensing street vendors, or condition-free regularizing of workers. No differentiations – or only minimal ones.

This conceptualization merely serves, however, to redraw the regulatory lines. Anything outside the existing lines can be labeled "informal." The conditions for it, and the reasons those operating outside may want to remain so, as well as policy reasons for having more than one line, are dismissed or simply ignored. Informality, once identified, must be formalized – according to this prescription. In the case of de Soto, the new lines proposed happen to coincide with neo-liberal preferences.

Yet, Article 9 could be described in similar ways. It draws its own regulatory lines, not always in functional ways.[108] Agricultural liens are included, but not other nonconsensual liens.[109] Consumer deposit accounts cannot serve as original collateral, but they can when they are the proceeds of a different type of collateral.[110] The centralized registration system excludes nonconsensual liens (with the exception of agricultural liens).[111] All of these are subject to complicated rules beyond the scope here, but the point is that Article 9 makes significant policy distinctions.

Additionally, security agreements need not be recorded or even written. Loan amounts are not public information, nor is meaningful documentation of collateral provided, especially in the case of accounts and contract rights.[112] The latter must be forensically reconstructed when bankruptcy or other issues arise, requiring proof

[108] See H. Hughes, Aesthetics of Commercial Law – Domestic and International Implications (2007) 67 *Louisiana Law Review* 689–750; see also, Kamp, Downtown Code, 435–48 (reporting politics of secured transactions provisions).

[109] S. C. Turner et al., Agricultural Liens and the UCC: A Report on Present Status and Proposals for Change (1991) 44 *Oklahoma Law Review* 9–70.

[110] Up until 2001, deposit accounts were excluded altogether. UCC Article 9-109; W. E. Gibson, Banks Reign Supreme under Revised Article 9 Deposit Account Rules (2005) 30 *Delaware Journal of Corporate Law* 819–62; G. T. McLaughlin, Security Interests in Deposit Accounts: Unresolved Problems and Unanswered Questions under Existing Law (1988) 54 *Brooklyn Law Review* 45–94; see also W. F. Kroener III and S. L. Sepinuck, Report of the Subcommittee on the Use of Deposit Accounts as Original Collateral, Working Document No. M6–44, in Permanent Editorial Board for the Uniform Commercial Code, *PEB Study Group Uniform Commercial Code Article 9 Report* (Philadelphia: PEB for UCC, 1992).

[111] Agricultural liens – created independently by state law – are incorporated within the registration and priority system of Article 9. All other statutory liens as well as judgment liens are not included. These others have their own separate state-prescribed procedures. And they are addressed by Article 9 only within general provisions on the relative priority of other "lienholders," defined as statutory and judgment liens.

[112] G. A. Moglia Claps and J. B. McDonnell, Secured Credit and Insolvency Law in Argentina and the U.S.: Gaining Insight from a Comparative Perspective (2002) 30 *Georgia Journal of International and Comparative Law* 393–442, 416 ("describing the Argentine system as more formal than the U.S. system does not in any way establish that the Argentine system is bad and the U.S. good. Formality is a normal feature of the legal order as indeed the Argentine hipoteca

such as invoices, bank statements, ledgers, and oral testimony. All of these features may be characterized as *informality* of various types.[113]

Indeed, distributing the remaining assets of an insolvent debtor may be seen as requiring a wholistic formal legal regime. Latin American systems have been faulted precisely for failing at that.[114] But, the scope of wholistic reform under the model of Article 9 extends only so far. For example, the silence on involuntary creditors effectively downgrades their remedies, if not eliminates them altogether. Their rights and powers are dependent on sources outside of Article 9 – for their different creation, priority, and enforcement. This is not unlike Hernando de Soto's "informals." Indeed. their relative order of preference is not pegged to a pre-emptive "perfection" or *notice* filing date, but in the best of cases after the legal process runs its course and a valid judgment is rendered.[115]

Surely, another way to perceive this is not as a gap or informality but as deliberate and justifiable, a conscious political or policy decision. Employees, pensioners, and other involuntary creditors – no matter how meritorious – have little or no priority and may only collect after everyone else. The priority date for these creditors is when a judgment is obtained. Surely, that is the case in the United States. Still, a relative informality – or an alternative formality if you will – is the way of achieving this result. These are matters of deliberate choice. As is evident, the mantra of comprehensive formalization alone cannot neutrally decide the question.

7.3.1.3 Section Summary

The transformation from selective to liberalized secured transactions law rearranges the elements of formality and informality. In the process, it distributes resources differently. The two models both allow for informality but at different stages and assign it to different actors. It would be hard to choose one model over the other based merely on *preferring formalization*. Both have elements of formality and informality. And arguments based merely on the equating "formalization" – or the model effectively labeled as representing formalization – with development are misleading. Indeed, the choice cannot be made as a technical legal matter. Rather, it requires understanding the relative benefits assigned to different parties under different regulatory regimes.

The informality of Article 9 may be no greater than that denounced in developing countries, although of a different type. The difference is that Article 9's text remains

and U.S. mortgage reflect. The critical issue in each case is whether the appropriate formalities are in place. That issue involves the weighing of competing values").

[113] Ibid.

[114] Furnish, Mexico's Emergent New Law of Secured Transactions, 156–59.

[115] Contrast to the singular exception provided by Art. 9-333, addressing and giving priority to statutory *possessory* liens – where the goods subject to lien are in the possession of the involuntary creditor.

relatively unchallenged, indeed hegemonic.[116] As such, it can effectively elide the question of superior rights granted to priority secured creditors over all economic value of the firm. It blurs the distinction between property and contract and effectively makes these rights property. The latter squarely involve economic and social policy questions. These should be debated specifically, not as either "transcendental" legal categories, disembodied functional equivalents, or informal property rights.

7.3.2 *Real Property Laws*

In a quite different example of legal heterodoxy, a 2011 Colombian law introduced a transitory property regime.[117] It was intended to right the wrongs of property despoilment generated by that country's civil conflict. Even though the conflict was not yet over, nor is it still completely now, the state acted to restore property to those displaced by the war, at least in areas where it was secure to do so.[118] The new law was meant to operate for 10 years, which was later extended another ten years, now in effect until 2031.[119] It sets up a separate state bureaucracy to deal with restitution cases. It has achieved some notable success. It is an elaborate scheme of new actors and new government offices.

For our immediate purposes, the more interesting points are the heterodoxy it introduced into property law. In the context of transitional justice, it modified the basic rules of ownership. Rather than employ command and control public legislation, it amended the rules of private law for cases of involuntary displacement. Restitution claims are judged based on alternative criteria, modified presumptions, and shifted burdens of proof. Indeed, this property restitution scheme offers another example of re-arranging formal and informal elements in the legal system. It is an instance of heterodox informality.

7.3.2.1 Traditional Property Law

Normally, property law in Colombia – like in most modern legal systems – grants superior rights to registered property owners.[120] Real property formalization in the

[116] See Hughes, Aesthetics of Commercial Law.

[117] Law No. 1,448 of 2011 (Colombia), Art. 74; For a general description of the law, see N. Summers, Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict? (2012) 25 *Harvard Human Rights Journal* 219–35.

[118] For a detailed history of reparation efforts to displaced persons, see A. J. Bautista Revelo, *La Restitución de Tierras en Colombia: ¿Realidad o Ficción?* (Quito: Universidad Andina Simón Bolívar / Corporación Editora Nacional, 2015); D. L. Attanasio and N. C. Sánchez, Return within the Bounds of the Pinheiro Principles: The Colombian Land Restitution Experience (2012) 11 *Washington University Global Studies Law Review* 1–54; R. Uprimny-Yepes and N. C. Sánchez, Los Dilemas de la Restitución de Tierras en Colombia (2010) 12 *Revista Estudios Socio-Jurídicos* 305–42.

[119] Law No. 2,078 of 2021 (Colombia) (extending Law 1,448's effectiveness from 2021 to 2031).

[120] M. R. Gardeázabal, *Teoría General de la Propiedad* (Bogotá: Themis, 2011).

civil law tradition typically takes one of two forms. Either it conditions property rights on public registration or it conditions enforceability of property rights against all others on the act of registration. Colombia recognizes ownership without registration but makes it subject to superior rights of registered owners. This step, registration, is considered the epitome of formalization. Registered right-holders receive all the legal procedural advantages.[121] They enjoy a presumption in their favor. Opponents, mounting a challenge, must rebut the presumption and carry the burden of proof demonstrating better rights.

In recent years, a wave of development projects has swept the developing world which purports to extend this type of formalization to all land holdings. Indeed, international financial institutions have embraced the formula of titling all forms of landholding. Squatters, irregular tenants, and others have been made eligible to receive full title ownership. Along with that presumably come the benefits of legal presumptions in their favor and shifted burdens of proof.[122] The formula has been advanced as a social justice measure for the landless and a development project for the economy. The locked-up capital of irregular holdings may become more freely alienable and available for mortgage loans. In both cases, markets are expected to expand.

Formal property in this mold, in the full-title civil code form, is not bereft of informality however.[123] Legal systems throughout the world recognize a quintessentially *informal* method of land transfer. Adverse possession is an integral part of property law in both common law and civil law countries. Open and notorious irregular possession of another's land (but not state land) over an extended period of time vests superior rights in the informal holder. Two types of adverse possession are recognized: adverse possessors in good faith who presumably had good title but there is a defect, and adverse possessors lacking good faith. Both of these periods have been repeatedly shortened over the past century: They currently stand at five and ten years, respectively.[124]

Adverse possession is not the only type of legislated informality.[125] Irregular possessors of state land may also be eligible for ownership rights. Under agrarian reform laws, the state may assign certain lands to landless farmers meeting eligibility guidelines. One of the requirements, under one of the procedures, is occupation of those lands for a period of time. Once again, informality is legislated and sanctioned. Meeting the formal requirements for both adverse possession and allocation of state

[121] Hale, Coercion and Distribution in a Supposedly Non-Coercive State.

[122] P. S. Pinheiro (Special Rapporteur on Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons), *Principles on Housing and Property Restitution for Refugees and Displaced Persons* (New York: United Nations Economic and Social Council, 2005), princ. 15.7.

[123] Esquirol, Titling and Untitled Housing in Panama City.

[124] Law No. 791 of 2002 (Colombia).

[125] Esquirol, Formalizing Property in Latin America, 333 (discussing presumption shifting in the Colombian 1936 Agrarian Reform Law).

lands requires informality. It requires the irregular occupation of land. Indeed, the initial Colombia agrarian reform law of 1936, Law 200, provided for superior rights to occupants of state land working the soil for a period of two years.[126] No registration was required or expected. Indeed, this legislated informality worked as the pre-eminent legal fact. It carried primary legal significance. Possibly in an era, and at a time, where extensive cartography and registration were not feasible, raising alternative acts to the level of legal significance made perfect sense. Regardless of the differences in time and resources, however, these quick examples demonstrate the deliberate uses of informality within the law.

Moreover, property theorists have demonstrated the equally property-like nature of competing claims to formal ownership.[127] Disputes over the use of land, for example, may thus be best understood as consisting of property claims on both sides. Squatters may have colorable property claims based on adverse possession or agrarian reform laws. Neighbors may have a legal privilege to challenge nuisances on adjoining property based on city ordinances. Long-time licensees of land may have accrued property interests in the development decisions of formal owners. The task for adjudicators is not identifying an owner based on strictly formal indicia and then excluding all others. Rather, the issue when more realistically approached requires resolving competing property claims (including both formal and informal elements) to determine who is in fact the "owner" of the specific *entitlement* in question.

Furthermore, formal property rights in both civil and common law systems are subject to a number of well-known limitations and restrictions.[128] They are certainly not absolute and are subject to the discretional state power of eminent domain; dependent on zoning laws in the area and their potential modification; and restricted by nuisance doctrines and other local rules and regulations. Many of these are subject to formal processes themselves (e.g. amending zoning laws and declaring eminent domain). They are subject to wide swaths of official discretion and unanticipated variability as evident for example in the determination of what qualifies as a nuisance or differences about takings for a public purpose.

Finally, full title is not the only type of formal property in modern legal systems. Both civil law codes and common law estates demonstrate multiple property forms: Fee simple, mere possession, life estates, fee tails, emphyteusis, servitudes, etc. These are made formally available within the positive law. And not all of them rely on public registration. As such, for example, possessors are recognized as having a property status. They have rights, just different or less than full owners. They may seek judicial assistance against intruders in Colombia for a one-year period.

[126] Ibid.

[127] J. W. Singer, *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2000), pp. 91–94 (distinguishing between the bundle-of-rights approach and entitlements approach to property).

[128] Hohfeld, *Fundamental Legal Conceptions*, pp. 35–42.

However, as initially noted, registered owners have paramount rights. They enjoy all legal presumptions in their favor and the burden is on opponents to dispute their rights. This is what the Colombian transitional justice regime changes.

7.3.2.2 Private Law Transitional Justice

The *traditional* property scheme is vastly unsatisfactory for remedying the particular situation of forcible displacement in Colombia's countryside. There, residents lost their homes and farms due to: Fighting nearby requiring them to abandon their holdings; coercive and below-market purchases by unscrupulous individuals, guerrilla fighters, and organized crime figures taking advantage of the situation; and fraudulent sales at gunpoint or other forms of intimidation. Moreover, some of the displaced had registered title to their lands. Others were mere possessors or occupants of private or state lands. While some cases resulted from harried abandonment and flight, other transfers were formally registered conveyances. These various fact patterns, equally considered as forcible displacement by the law, could not be easily addressed by formal property law. Unless traditional duress can be proven, the sale would not be overturned. Moreover, if adverse possession periods had run against displaced persons, even prior registered owners would lose their rights. Furthermore, possessors and occupants are quickly impeded, by the short statute of limitations, from a return of possession. In all cases, claimants would have to carry the burden of proof in individual cases. All in all, standard property law could not satisfactorily address the multitude of cases. Nor could it effectively restore lands to those unjustly displaced.

More specifically, traditional property raises the formal element of registration as the *sine qua non*. All legal presumptions and preponderance of proof tilt in the favor of registered owners. Other property rights are at best informal. For example, the adverse possessor is informal in that they have no adjudicated rights. At best they have an executory claim to seek adjudication of the land in their favor. By comparison, occupants on state land may not adversely possess under private law rules. Instead, they may seek an adjudication of the land under administrative law, agrarian reform proceedings. However, they are not entitled to such land until the procedure is concluded and rights are granted. Thus, any property claimant seeking to disrupt that status quo has presumptions stacked against them and must carry the burden of proving better rights against the registered owner, satisfaction of adverse possession requirements, or compliance with state land distribution conditions.

As such, everyone other than the registered owner starts from a position of informality. Squatters are normally considered "informal," but so are mere possessors and occupants (even those waiting out adverse possession periods and occupant residency requirements). Past registered owners barred by adverse possession running against them – or those having sold at unfair prices or under coercion not easily proved – may all be seen as holders of informal claims. Faced with a new registered

owner, or adverse possessor running the required period, restitution claimants are all *informals* – or informal petitioners. Their particular combination of formal and informal indicia of property rights are insufficient to award restitution – to prevail over new property holders.

Law 1448 changes that. It works by re-arranging the formal and informal elements of property law. Preeminence is assigned to informal indicia of superior property rights. The law itself sets out four fact patterns that are elevated and prioritized: displacement arising from generalized violence, forced collective displacement or serious human rights violations in the area; property concentration of land abutting armed conflict; property transfers to narco-traffickers; and excessively below-market sales (below 50 percent). The law provides a bit more detail and the special land courts, set up by the law, have further refined its application. In any case, demonstrating these facts – with the assistance of the special bureau established to assist claimants – is of preeminent legal significance. It is not property registration that primes all else. It is a particular arrangement of facts on the ground that is awarded superior rights. Registration is only another element of the complicated picture. Still, subsequent purchasers may demonstrate utmost good faith in the transfer and may, as a result, be eligible for state compensation. However, it is not determinative of whether or not they will be able to keep the property.

7.3.2.3 Heterodox Informality in Transitional Property Law

In this manner, facts on the ground – a form of legislated informality – have primary legal significance. The particular circumstances surrounding the transfer, the abandonment, or displacement are what give rise to the superior position of claimants. They are then vested with a legal presumption in their favor. They have a presumptive right to restitution. Subsequent occupants must carry the burden of proof of their own "good faith without fault." If proven, these secondary occupants (as described in the law) may receive compensation, or in some cases alternate property.

This particular arrangement is surely not without faults. It does attempt, however, to get at the problem of manipulation of registration systems to effectuate fraud. And, it has the capacity of setting up a dual or multiple property market. Indeed, its mechanisms could be extended to other domains. In this case, it is the public policy determination to restore land to displaced persons. The subjects of fact patterns identified in the law are assigned a priority. The informal, multiple and fact-driven situations enjoy presumptions and shifted burdens of proof which prevail over formal registration. But displacement is not the only public policy issue which could potentially be addressed this way.

Low-income housing and small-scale farming may also be considered. The scarcity and unaffordability of these proprieties arise from market competition. Merely one single market for urban housing or agricultural land places great pressure on lower income residents and small farmers. It also tends to displace

them. As such, a re-allocation of formality and informality – not unlike that in Law 1448 – could be extended to these sectors. Even duly registered transfers of housing and land could be subject to informal requirements. Transferees would need to meet such need or use requirements. Otherwise, transferees – even those duly registered – would be confronted with a reversed legal presumption and shifted burdens of proof. This would act to keep a pool of designated properties within their segment of differentiated markets. The penalty for transfers out would be a private law remedy – a cloud on title and possible reversal of the transaction.

In any case, consideration of other applications must remain for another day. For now, land restitution has been proceeding at a steady pace in Colombia. Even large corporations have been subject to the land courts' orders of restitution.[129] As noted, the program was extended for a second ten-year period. The ultimate merits may surely be better assessed then. However, reconcentration of land is a continuing issue in Colombia. It may be the primary issue in fact. Land restitution only indirectly gets at that. Some restitution claimants are small landholders, but some of them are not. Restitution to the latter only exacerbates the problem of land concentration. As such, other mechanisms of maintaining sectors of low income housing and small scale farming will be needed. Whether the mechanisms contained in Law 1448, or other modes of legal heterodoxy, will crucially need to be devised and implemented.

7.4 CONCLUSION

Legal heterodoxy presents in a variety of ways. Alternative laws, different institutional arrangements, and special procedures may all be discovered in different places. For developing countries, these are not always easy to maintain, even if patently suitable to their particular concerns and constraints. Geopolitical pressures have a large role to play. International institutions, powerful states, and foreign investors forcefully advance their own interests and preferred models. In a hegemonic arrangement, these interests primarily coalesce around a limited set of orthodox types. Thus, heterodoxy that stands out is often condemned, as underdeveloped or dysfunctional.

This is even more the case with informality, or alternative assignments of informality within the legal system. Informality appears like a marquis sign of underdevelopment. Regardless of the fact that all legal systems make use of substantial levels of informality, in the development community it is evidence of dysfunction and a rallying cry for formalization. Of course, informality within the legal system – in the sense of discretion lying with certain public officials, self-help remedies,

[129] H. S. Villota, En 9 Años de Restitución de Tierras se han Condenado 66 Empresas del País, *Caracol Radio*, March 6, 2020; see also Pares, Magistrados Condenan a Reconocidas Empresas a Devolver Tierras, *Pares*, November 6, 2016; Colprensa, Estas Son las Empresas que han Sido Condenadas a Restituir Tierras, *El Universal*, November 2, 2016 (indicating that these nineteen cases add up to approximately 53,821 hectares of land returned).

private dispute resolution, tolerated areas of nonenforcement of law, and other forms – is an intrinsic aspect of liberal legal systems. When those instances of informality arise in unexpected places – especially from the perspective of external observers – they stand out, seem excessive or outright unlawful. Surely, outside observers have internalized the particular mix of formality and informality in their home legal systems. It is those arrangements that seem natural and right. Developed country legal systems dedicate significant resources to normalizing the inherent anomalies of their own versions of liberal legality.

Regardless, probably the most significant type of legal heterodoxy that Latin America produces is its particular arrangements of legal informality. This is not a defense of all of its uses – wherever they may appear. To recall how I began, the term informality is overused. Sometimes it is just a euphemism for illegality. However, in many cases, the mobilization of discretion, private action, self-help remedies, and the like are just differently arranged. As such, a project for continuing work is analyzing the heterodox informality that proliferates in Latin America, and the developing world generally – without negative preconceptions.

BIBLIOGRAPHY

Akkermans, B., The Numerus Clausus of Property Rights, in M. Graziadei and L. Smith (eds.), *Comparative Property Law: Global Perspectives* (Northampton: Edward Elgar, 2017), pp. 100–20.

Attanasio, D. L. and Sánchez, N. C., Return within the Bounds of the Pinheiro Principles: The Colombian Land Restitution Experience (2012) 11 *Washington University Global Studies Law Review* 1–54.

Bautista Revelo, A. J., *La Restitución de Tierras en Colombia: ¿Realidad o Ficción?* (Quito: Universidad Andina Simón Bolívar / Corporación Editora Nacional, 2015).

Belleau, M. C., The Juristes Inquiets: Legal Classicism and Criticism in Early Twentieth Century France (1997) 1997 *Utah Law Review* 379–424.

Boas, M. S., Legal and Economic Aspects of Accounts Receivable Financing and Factoring (1954) 59 *Commercial Law Journal* 65–67.

Bonnecase, J., La Condition du Créancier Chirographaire: Sa Qualité D'ayant-Cause à Titre Particulier (1920) 19 *Revue Trimestrielle de Droit Civil* 103–50.

Burke, W. M. and Reber, D. J., State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment (1973) 47 *Southern California Law Review* 1–57.

Bussani, M., *Il Problema del Patto Commissorio: Studio di Diritto Comparato* (Torino: Giappichelli, 2000).

Canova, T. A., Banking and Financial Reform at the Crossroads of the Neoliberal Contagion (1999) 7 *United States – Mexico Law Journal* 85–120.

Corbin, A., *Corbin on Contracts: A Comprehensive Treatise on the Working Rules of Contract Law*, vol. IV (Saint Paul: West Publishing Company, 1951).

Comment, (1958) 67 *Yale Law Journal* 402.

Comment, Contract Rights as Commercial Security: Present and Future Intangibles (1958) 67 *Yale Law Journal* 847–92.

Corbin, A. L., Assignment of Contract Rights (1926) 74 *University of Pennsylvania Law Review and American Law Register* 207–34.
De Soto, H., *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).
Dubovec, M., UCC Article 9 Registration System for Latin America (2011) 28 *Arizona Journal of International and Comparative Law* 117–42.
Ehrlich, E., *Fundamental Principles of the Sociology of Law*, W. L. Moll (ed.) (Cambridge: Harvard University Press, 1936).
Emerich, Y., La Nature Juridique des Sûretés Réelles en Droit Civil et en Common Law: Une Question de Tradition Juridique? (2010) 44 *Revue Juridique Themis* 95–142.
La Propriété des Créances: Approche Comparative (Paris: Librairie Générale de Droit et de Jurisprudence, 2007).
Esquirol, J. L., Credit Supports for Italian Specialty Products: The Case of Prosciutto and Long-Aged Cheese (2021) *14 FIU Law Review* 589–614.
The Failed Law of Latin America (2008) 56 *American Journal of Comparative Law* 75–124.
Formalizing Property in Latin America, in M. Graziadei and L. Smith (eds.), *Comparative Property Law: Global Perspectives* (Northampton: Edward Elgar, 2017), pp. 333–54.
Les Outils Juridiques en Matière de Politique Économique: L'Exemple de la Réforme du Droit des Sûretés en France (2022) 22 *Revue des Juristes de Sciences Po* 4–11.
Ruling the Law: Failure and Legitimacy in Latin American Legal Systems (Cambridge: Cambridge University Press, 2019).
Titling and Untitled Housing in Panama City (2008) 4 *Tennessee Journal of Law and Policy* 243–302.
Fandl, K. J., The Role of Informal Legal Institutions in Economic Development (2008) 32 *Fordham International Law Journal* 1–31.
Fernández Arroyo, D., La CIDIP VI ¿Cambio de Paradigma en la Codificación Interamericana de Derecho Internacional Privado, in *The Organization of American States – Inter-American Juridical Committee, Curso de Derecho Internacional XXIX (2002)* (Rio de Janeiro: OAS, 2002), pp. 465–600.
Fiorentini, F., Legal Transplants in the Law of Secured Transactions. Current Problems and Comparative Perspectives, in F. Fiorentini and M. Infantino (eds.), *Mentoring Comparative Lawyers: Methods, Times, and Places* (Cham: Springer, 2020), pp. 3–23.
Flour, J., Aubert, J. L., and Savaux, E., *Les Obligations: L'Acte Juridique*, 10th ed. (Paris: Dalloz, 2002)
Friedman, L. M., On Legal Development (1970) 24 *Rutgers Law Review* 11–64.
Furnish, D. B., Mexico's Emergent New Law of Secured Transactions: Recent Developments 2000–2010 (2011) 28 *Arizona Journal of International and Comparative Law* 143–82.
Gardeázabal, M. R., *Teoría General de la Propiedad* (Bogotá: Themis, 2011).
Garro, A. M., The Difficulty of Obtaining Secured Lending in Latin America: Why Law Reform Really Matters (1996) 1 *Yearbook of International Financial and Economic Law* 97–116.
Exportability of North American Chattel Security Regimes: The Inter-American Model Law on Secured Transactions (2006) 43 *Canadian Business Law Journal* 200–7.
La Ley Modelo Interamericana sobre Garantías Mobiliarias: Primeros Desafíos en su Implementación, in *The Organization of American States – Inter-American Juridical Committee, Curso de Derecho Internacional XXXVII (2010)* (Rio de Janeiro: OAS, 2011), pp. 127–70.

The Reform and Harmonization of Personal Property Security Law in Latin America (1990) 59 *Revista Jurídica de la Universidad de Puerto Rico* 1–156.
Security Interests in Personal Property in Latin America: A Comparison with Article 9 and a Model for Reform (1987) 9 *Houston Journal of International Law* 157–242.
Gibson, W. E., Banks Reign Supreme under Revised Article 9 Deposit Account Rules (2005) 30 *Delaware Journal of Corporate Law* 819–62.
Gilmore, G., Article 9: What It Does for the Past (1966) 26 *Louisiana Law Review* 285–99.
The Assignee of Contract Rights and His Precarious Security (1964) 74 *Yale Law Journal* 217–61.
Security Interests in Personal Property, vol. I (Boston: Little, Brown & Company, 1965).
Security Law, Formalism, and Article 9 (1968) 47 *Nebraska Law Review* 659–77.
Droit Réel, Propriété et Créance: Elaboration d'un Système Rationnel des Droits Patrimoniaux (Paris: Librarie de Droit et de Jurisprudence, 1960).
Granovetter, M., The Social Construction of Corruption, in V. Nee and R. Swedberg (eds.), *On Capitalism* (Redwood City: Stanford University Press, 2007), pp. 152–72.
Grossman, L., Langdell Upside Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anti-codification (2007) 19 *Yale Journal of Law and Humanities* 149–220.
Guha-Khasnobis, B., Kanbur, R., and Ostrom, E., Beyond Formality and Informality, in Linking the Formal and Informal Economy, in B. Guha-Khasnobis, R. Kanbur, and E. Ostrom (eds.), *Linking the Formal and Informal Economy: Concepts and Policies* (Oxford: Oxford University Press, 2006), pp. 1–18.
Hale, R. L., Coercion and Distribution in a Supposedly Non-Coercive State (1923) 38 *Political Science Quarterly* 470–94.
Hohfeld, W. N., *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (New Haven: Yale University Press, 1919).
Holmes, O. W., The Path of the Law (1897) 10 *Harvard Law Review* 22–36.
Hughes, H., Aesthetics of Commercial Law – Domestic and International Implications (2007) 67 *Louisiana Law Review* 689–750.
Robots, Markets, and the Value of Deal Lawyers (2024) 49 *Journal of Corporation Law* 833–71.
Kamp, A. R., Downtown Code: A History of the Uniform Commercial Code 1949–1954 (2001) 49 *Buffalo Law Review* 359–476.
Karst, K., Rights in Land and Housing in an Informal Legal System: The Barrios of Caracas (1971) 19 *American Journal of Law* 550–74.
Karst, K. and Clement, N., Legal Institutions and Development: Lessons from the Mexican Ejido (1969) 16 *UCLA Law Review* 281–303.
Karst, K. and Rosenn, K., *Law and Development in Latin America: A Casebook* (Berkeley: University of California Press, 1975).
Kennedy, Da., Some Caution about Property Rights as a Recipe for Economic Development (2011) 1 *Accounting, Economics & Law* 1–62.
Kennedy, Du., *A Critique of Adjudication: Fin de Siècle* (Cambridge: Harvard University Press, 1997).
Three Globalizations of Law and Legal Thought, in D. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006), pp. 17–73.
Kozolchyk, B. and Castaneda, C., Invigorating Micro and Small Businesses through Secured Commercial Credit in Latin America: The Need for Legal and Institutional Reform (2011) 28 *Arizona Journal of International and Comparative Law* 43–116.

Kroener III, W. F. and Sepinuck, S. L., Report of the Subcommittee on the Use of Deposit Accounts as Original Collateral, Working Document No. M6–44, in Permanent Editorial Board for the Uniform Commercial Code, *PEB Study Group Uniform Commercial Code Article 9 Report* (Philadelphia: PEB for UCC, 1992), pp. 1–49.

La Porta, R. and Shleifer, A., Informality and Development (2014) 28 *Journal of Economic Perspectives* 109–26.

Langer, M., Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery (2007) 55 *American Journal of Comparative Law* 617–76.

Larson, J. E., Informality, Illegality, and Inequality (2002) 20 *Yale Law & Policy Review* 137–82.

Llewellyn, K., Problems of Codifying Security Law (1947) 13 *Law and Contemporary Problems* 687–702.

Lopez-Velarde, A. and Wilson, J. M., A Practical Point-by-Point Comparison of Secured Transactions Law in the United States and Mexico (2004) 36 *Uniform Commercial Code Journal* 3–65.

Macaulay, S., Non-Contractual Relations in Business: A Preliminary Study (1963) 28 *American Sociology Review* 55–67.

McLaughlin, G. T., Security Interests in Deposit Accounts: Unresolved Problems and Unanswered Questions under Existing Law (1988) 54 *Brooklyn Law Review* 45–94.

Merryman, J. H., Comparative Law and Social Changes: On the Origins, Style, Decline & Revival of the Law and Development Movement (1977) 25 *American Journal of Comparative Law* 457–91.

Moglia Claps, G. A. and McDonnell, J. B., Secured Credit and Insolvency Law in Argentina and the US: Gaining Insight from a Comparative Perspective (2002) 30 *Georgia Journal of International and Comparative Law* 393–442.

Moringiello, J., False Categories in Commercial Law: The (Ir)Relevance of (In)Tangibility (2007) 35 *Florida State University Law Review* 119–66.

Pares, Magistrados Condenan a Reconocidas Empresas a Devolver Tierras, *Pares*, November 6, 2016.

Pereznieto Castro, L., Comentarios al 'Proyecto México–Estadounidense para una Ley Modelo en Materia de Garantías Mobiliarias (2001) 10 *Revista Mexicana de Derecho Internacional Privado* 59–66.

Pinheiro, P. S., *(Special Rapporteur on Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons), Principles on Housing and Property Restitution for Refugees and Displaced Persons* (New York: United Nations Economic and Social Council, 2005).

Posel, S., Factoring Accounts Receivable in France: Some Legal Aspects and American Comparisons (1982–1983) 57 *Tulane Law Review* 292–327.

Pouncy, C. R. P., Contemporary Financial Innovation: Orthodoxy and Alternatives (1998) 51 *SMU Law Review* 505–90.

Pound, R., Law in Books and Law in Action (1910) 44 *American Law Review* 12–36.

Praduroux, S., Objects of Property Rights: Old and New, in M. Graziadei and L. Smith (eds.), *Comparative Property Law: Global Perspectives* (Northampton: Edward Elgar, 2017), pp. 51–70.

Riffard, J. F., The Reform of the French Law on Security Interests (Droit des sûretés): A Second and Final Season? (2022) *Zeitschrift for Europäisches Privatrecht* 565–84.

Rosenn, K., The Jeito: Brazil Institutional Bypass of the Formal Legal System and Its Development Implications (1971) 19 *American Journal of Comparative Law* 514–49.

Saleilles, R., *Etude sur la Théorie Générale de l'Obligation d'Après le Premier Projet de Code Civil pour l'Empire Allemand*, 3rd ed. (Paris: Librairie Générale de Droit et de Jurisprudence, 1925).
Sindzingre, A., The Relevance of the Concepts of Formality and Informality: A Theoretical Appraisal, in B. Guha-Khasnobis, R. Kanbur, and E. Ostrom (eds.), *Linking the Formal and Informal Economy: Concepts and Policies* (Oxford: Oxford University Press, 2006), pp. 58–74.
Singer, J. W., *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2000).
Summers, N., Colombia's Victims' Law: Transitional Justice in a Time of Violent Conflict? (2012) 25 *Harvard Human Rights Journal* 219–35.
Trubek, D., Max Weber's Tragic Modernism and the Study of Law and Society (1986) 20 *Law and Society Review* 573–604.
Turner, S. C. et al., Agricultural Liens and the UCC: A Report on Present Status and Proposals for Change (1991) 44 *Oklahoma Law Review* 9–70.
Upham, F. K., Speculations on Legal Informality: On Winn's Relational Practices and the Marginalization of Law (1994) 28 *Law & Society Review* 233–42.
Uprimny-Yepes, R. and Sánchez, N. C., Los Dilemas de la Restitución de Tierras en Colombia (2010) 12 *Revista Estudios Socio-Jurídicos* 305–42.
Villegas, M. G., *La Eficacia Simbólica del Derecho: Examen de Situaciones Colombianas* (Bogotá: Uniandes, 1993).
Villota, H. S., En 9 Años de Restitución de Tierras se han Condenado 66 Empresas del País, *Caracol Radio*, March 6, 2020.
Warren, W. D. and Walt, S. D., *Secured Transactions in Personal Property*, 10th ed. (New York: Foundation Press, 2019).
Weber, M., *Economy and Society: An Outline of Interpretive Sociology*, G. Roth and C. Wittich (eds.) (New York: Bedminster Press, 1968).
Weber, M., *From Max Weber: Essays in Sociology*, C. Wright Mills and H. H. Gerth (eds.) (London: Routledge, 2014).
Winship, P., An Historical Overview of Article 9, in L. Gullifer and O. Ackseli (eds.), *Secured Transactions Law Reform: Principles, Policies and Practice* (Oxford: Hart Publishing Ltd, 2016), pp. 21–48.