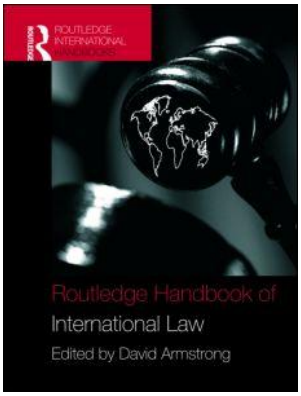

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David Armstrong, Jutta Brunée, Michael Byers, John H. Jackson, David Kennedy

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Liliana Obregón
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Latin American international law*

Liliana Obregón

This chapter points to the importance of sovereignty as a principle that helped to underwrite the international legal system that developed among the newly independent Latin American states in the nineteenth century. It shows how a distinctive Latin American International Law (LAIL) emerged that drew on the experience of the "creole" elites both during and after Spanish rule. The transnational legal consciousness that underpinned this continued to be influential with attempts to articulate a regional IL in the twentieth century: albeit one that still reflected the outlook of the (male) elites. LAIL can be understood as an expression of international legal "regionalism," which has been defined as a particular set of approaches and methods for examining the question of universality in international law, its historical development, and substantive issues or forms of legal method. After the 1960s Latin American regionalist perspectives in international law became scarce and thus gradually irrelevant and forgotten. However, the leading regional organization, the Organization of American States, and its Inter-American System of Human Rights, is often remembered as the institutional result of more than a century of Latin American regionalist thought in international law.

Latin American international law (LAIL) was a regionalist approach to international law that was most influential during the first half of the twentieth century. Inspired by several foundational ideas from the first post-independence internationalists of the nineteenth century, LAIL was the particular perspective of several Latin American internationalists that promoted it into full force.[1] LAIL can be understood as an expression of international legal "regionalism," which has been defined as a particular set of approaches and methods for examining the question of universality in international law, its historical development, substantive issues or forms of legal method. As international law became more specialized and responsive to functional differentiation with the emergence of special types of law that responded to specific concerns (such as "human rights law" or "environmental law") instead of geographical ones, the power of LAIL as a general approach gradually diminished and fell into oblivion. However, some analysts argue that for the second half of the twentieth century regionalism persisted through its institutional development with the Organization of American States (OAS) and its Inter-American System of Human Rights (IASHR) being the outcome of more than a century of regionalist practice and thinking about international law (Caicedo Castilla 1970; Puig 1984; Sepúlveda 1960). In

addition, LAIL has also been suggested to be a pre-TWAIL (Third World Approaches to International Law) as a form of resistance or questioning the universalism of international law (Wa Mutua 2000) from a state-centered perspective.[2]

Creole legal consciousness

In sum, though LAIL has often been presented through a history of sources (treaties and customary law, principles and doctrines) or institutions, its existence is constituted and advocated by the writings and practice of a century of Latin American internationalists. Therefore, this article is focused on an author-based interpretation of LAIL rather than on trying to define its legal content. One unifying way of reading LAIL authors is through what we have previously argued as their participation in a "creole legal consciousness."[3] By a creole legal consciousness, we mean a broad set of problems, strategies, uses and ideas about the law that are shared among a group of Latin American lawyers in the post-independence era.[4] We do not include specific legal rules or theories about the law as part of this consciousness but rather a wide acceptance of a regional identity of the law, both in its American particularism as in its European roots, an adjudication practice that allowed for the reception and appropriation of foreign ideas and theories about the law as part of a new application to local needs or interests, and a continuous "will to civilization."

Creole legal consciousness has its origins in the hierarchical social and legal structure of 300 years of Spanish rule in the Americas. Through its legislation, the colonial government categorized people into different groups which gradually developed their own sense of identity and recognition. Although these groups legally disappeared when the newly independent nations were founded in the nineteenth century, ostensibly many of the characteristic ways of their habitus,[5] especially of the *criollo* (or creole) elite, the most powerful of these groups, continued on to the post-independence period and early twentieth century.

The term *criollo* (from the Latin *creare* – to create) was first used in the sixteenth century to designate black slaves born in the Americas (as opposed to *bozales* or African born slaves) (Lavalle 1993). By the seventeenth century it had become a pejorative term that was applied by the Spanish conquerors to a person born in America of European heritage but suspicious of being miscegenated with the Indian and/or black population. Nonetheless, creoles shared a hierarchical superiority and legal equality with the Spaniards as part of the "Republic of the Spanish," a jurisdiction which also included the *castas* (mixed peoples) and free blacks at a lower level.[6] These categories were constituted in legal terms through separate jurisdictions, privileges and restrictions.[7] Therefore, racial stratification was based more on social, political, and administrative categories than on strictly biological ones. Thus, despite their status as a local elite, continuous claims to whiteness, and legal superiority over the Indian, *castas*, free blacks, and slaves, creoles were perceived by the Spanish as impure Europeans (Mazzotti 2000) and were seldom allowed to hold the most important administrative posts[8] or have access to privileges reserved for the Spanish born.

This differentiation between the European-born Spaniards and Spanish Americans led the creole *letrados*[9] – a name given to lawyers but also to those who were well cultivated in the humanities – to gradually construct the idea of an American *patria* or homeland expressed not only in literature and the arts but also in social, political and legal manifestations. Indeed, during the first two centuries of the colonial era, when Spanish law (mainly the *Siete Partidas*, a thirteenth-century Castilian compilation based on Roman and canon law)[10] was not fully applicable to local situations, creoles developed a form of interpretation and adjudication which took local

laws (called *fueros* or municipal charters) into account in a process that became known as *derecho vulgar* (popular justice) (Cutter 1999). However, by the seventeenth century the increasingly complex mixture of peoples with their new social stratifications, distance from the metropolis, extensive territory, different forms of land management and economic exploitation posed many new legal issues that were not foreseeable by this method. Such particularisms soon became evident to the Crown and in 1614 New World distinctiveness was recognized officially through a royal order that ruled that only laws specifically issued for the Indies were applicable (Cutter 1999). The laws, together with the form of applied justice, became known as *derecho indiano* (law and justice of the Indies) where judicial decisions were based on the judge's ample discretion – known as *arbitrio judicial* (judicial will) – over the use of written law, *doctrina* (commentaries of Castilian or foreign jurists on Roman, canon and royal law), custom (as local usage and long-standing practice) and *equidad* (or fairness, as defined by the satisfaction of the aggrieved party together with the well-being and harmony of the community).[11] This case-by-case decision making, referred to as *casuismo* (casuistry), was the basis of an extremely flexible system of legal administration that was considered to be a distinctively American form of justice, and therefore called *derecho criollo* (creole law or justice).[12] Thus, the imperial structure (the universal) was challenged by the creole literati as they strategically adapted both the meaning and the use of the external law to local circumstances, giving it an identity of place, a sense of regional uniqueness while at the same time their flexibility was essential to maintaining the colonial enterprise and the centrality of a European legal heritage.[13]

After the independence of the Spanish American colonies, the former creole elite continued to identify themselves as superior to the rest of the national populations but still linked by a regional identity which in the 1850s was coined as *Latin* America despite the claims to nationalism and individual equality among the citizens of the new republics. Perhaps a well-known phrase from independence leader Simón Bolivar's 1815 "Jamaica Letter" best illustrates this double bind: "But we . . . who are not Indians nor Europeans, but a mixture of the legitimate owners of the country and the usurping Spaniards, . . . we, being Americans by birth and with rights equal to those of Europe, have to dispute these rights with the [natives] of this country, and [defend] ourselves against the . . . invaders. Thus, we find ourselves in the most extraordinary and complicated predicament."[14] Indeed, the newly independent creoles had an ambiguous position: on the one hand, the creoles' right to belong to the metropolitan center as descendants of Europeans, with, on the other hand, the need to be recognized as independent and distinct from Europe.

In addition, a new element came into play in post-independence creole consciousness: the "will to civilization"[15] or desire to be part of the community of civilized nations. "Civilization" was a word that came into use during the French Revolution as the idea of progress and the perfectibility of humanity.[16] In its plural form, it meant the existence of various social groups in development, whose unity and perfection were synthesized only in *European* civilization. Therefore, barbarism, its opposite, was outside of Europe (Elias 1994). The civilizing discourse was appropriated by the newly independent elites who appealed to their European heritage in order to avoid being excluded from the rights and entitlements assigned (by Europe) to other members of the so-called "community of civilized nations." But from their colonial tradition of autonomy and proud identity, independent creoles did not view themselves as outside of civilization, as barbarians, but rather as part of their national (and regional) mission to do everything necessary to *complete* the civilization that the Spanish colonizers had brought with them but left lacking. More than a consequence of colonization, the creoles' will to civilization was self-imposed, one of the factors

they knew to be essential to the recognition of their new nations as sovereign states.

Nineteenth-century foundational authors

In the memory of twentieth century LAIL advocates, the nineteenth century is historically important because it marks the end of more than 300 years of Spanish colonial rule and the beginnings of independence.[17] Nationally, it is the era of different models of statehood and state consolidation, civil wars, *uti possidetis iuris*, *caudillismo*, the struggle over local interpretations of liberalism, the appropriation of indigenous lands, and the abolition of slavery. Internationally, the nineteenth century marks the entrance of more than 20 new republics into a "community of civilized nations," until then only understood as reserved for European states. For LAIL, it is the century of the Monroe Doctrine, the American and Pan-American Congresses, U.S. imperialism, European interventions, and the transfer of the Anglo (England and the U.S.) civilizational model to the Latin (France) one, and therefore the shift of identities from "Americans" during the first half of the nineteenth century to "Latin Americans" in the second half. The nineteenth century for Latin American internationalists is a long and turbulent one, remembered for its stories both of foundational achievements and for the ones of oppression and resistance.

Nineteenth-century Latin American writers of international law thus part from a collective understanding of their particular moment of independence. Although Henry Wheaton (1845), the renowned U.S. international legal scholar of the nineteenth century wrote in 1845 that European international law was simply extended by the accession of the "new American nations that have sprung from the European stock," a close reading of the precursors of LAIL shows that they were not simply following or copying the international law that was produced in Europe or the United States, but rather were also participants and producers of a transnational legal consciousness that they re-created and transformed with their regional interests in mind and directed back as acceptable to the metropolitan center. In the nineteenth century, *criollo* lawyers and intellectuals received and articulated international law as part of their nation-building projects and their search for recognition and legitimate participation of the new states in the "community of civilized nations."

The most representative pre-LAIL authors are Andrés Bello (1781–1865) and Carlos Calvo (1822–1906). Bello participates in what has been called the "early professional" or pre-classical period of international law and Calvo is part of the professional or classical period.[18] Bello published the first international law textbook in the Americas in 1832, titled *Principios del Derecho de Gentes* where he acknowledged the most recognized European authors of his time as well as the U.S. jurisprudence on maritime law and prize courts of Justice Story and the writings on international law of Chancellor Kent, Joseph Chitty, and Henry Wheaton. In fact, his book anticipated Henry Wheaton's *Elements of International Law* by 4 years. Bello wrote his textbook as a treatise that condensed the most important works of the time: a codification of principles from which he anticipated legal outcomes could be deduced. Although Bello's sources were in several languages, he translated what was relevant into Spanish and edited them and rewrote what he considered appropriate to the purpose of teaching international law to the law students of the newly independent states. In his treatise, Bello purposely incorporated references to the new states as undeniable members of the community of civilized nations and participants in the making of international law. He went as far as to make commentaries in the footnotes that questioned principles upheld by the foreign sources he embraced in the mainstream of the text.[19] Bello justified this as the right that the peoples of the new states had to access to an

intellectual tradition of which they were naturally part of:

> Our Republic is certainly just been born to the political world; but it is also true that since the moment of her emancipation she can access all the . . . political and legislative wisdom that Europe and North America have added to this opulent {intellectual} heritage. All the peoples that have distinguished themselves on the world scene before us, have worked for us . . . The independence we acquired has put us in immediate contact with the more advanced and cultured nations; nations rich in knowledge, of which we can participate just by wanting to.[20]

Thus Bello saw himself as improving on the recognized writers of international law. He says he wrote the book to give "uniformity" of ideas and of language to the doctrines of recognized European and U.S. publicists that were "spread out and confusing." His own text is self-described as "comprehensive" and representative of "the current state of the science" claiming to have put into "one single body *all* of the elementary and indispensable notions" of international law by incorporating only what is "useful," "substantial," and "educational." Nonetheless, he also incorporated his own critique of the principle of sovereign inequality among nations as well as repositioned and placed forth principles or issues that he felt were important to the American nations such as the need to codify international law, the principle of non-intervention, the use of arbitration as a form of resolving conflicts among states, the status of combatants in civil wars, the rights of nationals and foreigners, and the most-favored nation status for trade among Spanish American nations, all of which were later held to be unique Latin American contributions to international law.

Later in the same century, Carlos Calvo, who had studied international law through Bello's book, made an effort to acknowledge the field as *scientific* by writing manuals and dictionaries of international law, presented almost all international legal issues in a historicist narrative, and proposed a distinction between public and private international law. Although he also wrote in Spanish, Calvo published most of his work in French, the language of international diplomacy and culture at that time, so that he would reach a broader European audience. He compiled treatises and other documents dating back to the period of conquest to present positive sources of international law that originated in Spanish America as well as a manual and dictionary of international law which were later translated and used by French and U.S. authors. In a similar move to Bello's, Calvo inserted the names of several Latin American publicists and the history of the region and its role in international law into his widely read treatise and dictionary. In fact, Calvo is one of the first to adopt the term '*Latin* America' as a post-independence effort to defend the region's interest. Calvo (1862) was concerned that Latin American nations were not taken seriously as active participants of international law because of the "absolute ignorance in Europe of our state of civilization and progress."[21] Stressing that the negative judgments of Europeans were not based on facts, Calvo (1862) pointed to the obligation of "any American" to demonstrate the truth of the continents progress in a way "that will not leave any doubt in the spirit of the European reader."

Even Bello's seemingly systematic treatise of international law is full of references to the Latin American context of the time. Bello's particular role as the region's foremost nation builder does much to explain why he gave such attention to international law. In fact, many of his disputes with European legal scholars are based on an intense relation with events that happened in Latin America. The same is true of Calvo. Both intertwined regional events with those of Anglo and European international histories as a way to include their view of a corrective, more balanced account of the Latin American

nations' participation in the further development of international law, guided by a complex dialectical relationship between globality and locality, international prestigious authorities and local demands and contestations. Contrariwise, the texts' structure shows that these early Latin American scholars were very familiar with the contemporary canon of international law and participated in a common vocabulary shared by European and North American writers despite that they are not remembered as such or that the memory of their existence is limited to their particularity as Latin Americans.

Despite the fact that these pre-LAIL authors did not develop a rejectionist stance of international law their writings could also be read as presenting the perspective of former colonial subjects that questioned the balance of power in the world but at the same time had immense faith in their capacity to participate in the adaptation of international law to accept the needs of the newly independent states. This does not mean that Bello and Calvo, as other authors of their time, were aware of their own colonial attitudes towards the subaltern subjects of their new states or that they did not embrace the European move of restricting the right to sovereignty of those considered "uncivilized" during the colonial enterprise of the nineteenth century. Indeed, the development of a doctrine of state sovereignty was one of the principal concerns of nineteenth-century Latin American internationalists but in accordance with what benefitted their own particular situation in the world with respect to the issues of recognition, the principle of non-intervention, the notion of regional unity and the limitation of borders among neighboring countries.

Twentieth-century rise and fall of LAIL

Soon after the publication of Carlos Calvo's book *Le Droit International Théorique et Pratique* (*Theoretical and Practical International Law*) Amancio Alcorta, an Argentine internationalist, wrote an article complaining that Calvo's work did not mention the possibility of a LAIL (Alcorta 1883). Calvo responded that though he had a regional approach to his writings, LAIL as such did not exist because international law should be about general principles and not about particular problems and LAIL should not be understood as a branch of law because it only referred to a particular set of regional problems (Calvo 1883).

Two decades later, however, Alejandro Álvarez,[22] a young Chilean internationalist argued for a LAIL in a paper titled "Origen y desarrollo del derecho internacional americano" ("Origin and development of American international law") presented at the third Latin American Scientific Congress in Rio de Janeiro.[23] Álvarez (1910) began to claim for himself a foundational role as sole theorizer of LAIL:

> In spite of the obvious existence of this law . . . it has not been studied nor even clearly stated by the publicists either of Europe or of America . . . The only publicist who seems to have grasped the idea of the existence of the matters constitutive of [an American International Law] is Alcorta[24] but he never expressly affirmed its existence, nor indicated its foundations, nor the subjects that constitute it.[25]

Although Álvarez was later followed by several other internationalists, the debate on the existence or not of a LAIL continued well into the twentieth century. Indeed, a Brazilian diplomat and professor of international law, Manoel Álvaro de Souza Sá Vianna (1860–1924) published a book titled *De la non Existence d'un Droit International Americain*,[26] which was presented at the Fifth Latin American Scientific Congress of 1912 in an effort to challenge Álvarez's (1905, 1907b, 1909a, 1910) earlier proposals for a general recognition of the existence of a LAIL.[27] Sá Vianna's intention was to put an end to the

notion of a regional international law, arguing that problems common to the countries of Latin America or to the American continent did not and could not constitute a basis for an autonomous or separate sphere of international law. For Sá Vianna international law was based on principles, laws, and rules observed by the international society and not on common historical experiences among a group of countries, as Álvarez had argued.

Nonetheless, Álvarez continued to publicly defend in his writings and oral presentations the need to recognize a regional version of international law.[28] In addition, several other Latin American internationalists followed Álvarez and published books and articles on the characteristics, history, proposals and future of LAIL during the first half of the twentieth century.[29] The proposal of a LAIL, as well as the debates about its existence, bring forth the underlying story of a regional sensibility and it troubles the common assumption that the discourse of international law went unchallenged when received and appropriated by Latin American nations peripheral to European and U.S. economic and political dominance.[30]

Although Álvarez broke away from the classical period and became modern by embracing and promoting social legal thought in international law, he still inhabited a creole legal consciousness reflected in three areas in which Álvarez worked: in his own reading of local events and texts, in the production of a theory of LAIL and in the project of institutionalization of a regional law. First, from 1905 to 1910 Álvarez wrote extensively for the recognition of a LAIL. His historical exposition referred to the regional treaties and conventions, the Latin American and Pan American conferences, and Scientific Congresses that occurred throughout the nineteenth century. He claimed that all these events revealed the particular character of problems *sui generi's*, which were the basis of a LAIL that European publicists did not account for.

Second, Álvarez claimed to be the first to theorize LAIL in an effort not to follow European writers. Álvarez critiqued European internationalists for not taking into account the social, economic and technological transformations of the nineteenth century. He also criticized them for continuing with the same conception of the nature and extension of the rules of international law and for giving excessive credence to sovereignty and to the universality of all principles. Thus Álvarez proposed that by studying the states of the Americas in their particular situations and history of institutions, it would be possible to proclaim that there were different or contrary principles from those of the European states, and that they would reveal a different character of the rules of international law.

Third, Álvarez was able to access and master the centers of academic and institutional production of international law in order to promote his work in French and English, languages that were more broadly read. When the U.S. began to promote the Pan-American Congresses he changed his first text titled "Latin America and international law" to "American international law" and figured the U.S. as an important hegemon in the region, despite the charges of U.S. imperialism by several of his colleagues. From 1916 to 1918 he spoke at nearly 30 U.S. universities in order to promote the unification of what he called the Anglo-American and Latin American schools of international law into a single Pan-American School. In Latin America he promoted his theory in the Scientific Congresses and when he was challenged by Sá Vianna and others he adapted by changing his titles to "American problems in international law" or "International law . . . from the point of view of the American continent." He also managed to promote a motion in the First Panamerican Scientific Congress in which all the discussions of the sciences (including political science and legal science) would be done from "an American point of view." Álvarez was also concerned about institution building. He co-founded the American Institute of International Law in

1912 and its French counterpart in 1919. On one side of the ocean, he promoted the consolidation of an American juridical conscience, on the other, he promoted an international juridical conscience. Álvarez preached his project of codification both at the American and international levels, managing to get conferences and discussions started at each.

In sum, it would not be difficult to prove that Álvarez was making generalizations that only apply to his specific experience as member of a particular male, educated, "white" elite group that during the colonial era was denominated as *criollo*. It is obvious that Álvarez essentialized characteristics from nations that have different ethnical and historical compositions inside of their national boundaries. He so adamantly believed in these claims that he had presented them (and more) in previous texts and would continue to do so for the next 50 years (Álvarez 1905, 1907a, 1907b, 1909a, 1909b, 1910, 1911a, 1911b, 1917). Álvarez argued such a position unabashedly and with utmost convincement because he was thinking, writing and speaking from his particular creole habitus and arguing the need for a regional perspective on international law from a creole legal consciousness.

Conclusion

A regional consciousness of international law is evident in the representative works of Andrés Bello, Carlos Calvo and other Latin Americans during the nineteenth century, but it wasn't until the beginning of the twentieth century that a "Latin American international law" (LAIL) was theorized and promoted by its main proponent Alejandro Álvarez. Many other internationalists followed Álvarez in defining and promoting a LAIL, but after the 1960s Latin American regionalist perspectives in international law became scarce and thus gradually irrelevant and forgotten. However, the strength of these regionalist perspectives (as well as the fissures in their homogeneity) every now and then resuscitate in the political discourse of Latin American leaders, from grassroots advocates to presidents. In addition, the leading regional organization, the Organization of American States, and its Inter-American System of Human Rights, is often remembered as the institutional result of more than a century of Latin American regionalist thought in international law.

Notes

* This chapter is drawn in part from the following: "Noted for Dissent: the International Life of Alejandro Alvarez", Special edition of the *Leiden Journal of International Law*, Vol. 19, No. 4, Cambridge University Press 2006. "Between Civilization and Barbarism: Creole Interventions in International Law", special issue, *International Law and the Third World*. Guest editors Richard Falk, Balakrishnan Rajagopal and Jaqueline Stevens in *Third World Quarterly*, Vol. 27, No. 4, Taylor & Francis 2006. "Creole Consciousness and International Law in Nineteenth Century Latin America" in *International Law and its Others*, edited by Anne Orford, Cambridge University Press 2006.

1 For other recent readings on LAIL see Becker Lorca 2006; Gros Espiell 2001.

2 LAIL scholarship like TWAIL I scholarship (or the first wave of TWAIL scholars of the 1960s and 1970s) was state centered and believed in the future of the United Nations as the institutional embodiment of the development of international law.

3 I have developed the idea of a creole legal consciousness previously in Obregón 2002: 200, 2006.

4 Although there have been myriad legal consciousness studies since the 1980s my definition is based on Duncan Kennedy's as a "particular form of consciousness that characterizes the legal profession as a social group, at a particular moment. The main peculiarity of this consciousness is that it contains a vast number of legal rules, arguments, and theories, a great deal of information about the institutional workings of the legal process and the constellation of ideals and goals current in the profession at a given moment." This definition is part of Kennedy's manuscript of 1975 reformatted

in 1998 (Kennedy (1998 [1975], first chapter published as Kennedy 1980)). In a more recent article, Kennedy clarifies his borrowing from the linguist Ferdinand de Saussure by explaining that a legal consciousness is "understood as a vocabulary of concepts and typical arguments, as a langue, or language," which contain an infinity of laws or "phrases" that can be formulated in the conceptual vocabulary of that consciousness as "*parole*," or speech. Therefore to identify one writer as participating of a consciousness (i.e. creole) does not mean that others of the same consciousness (*langue*) will utter identical forms of speech (*parole*) nonetheless, they participate by combining and recombining the general policy "argument or sound bites" of that language. Kennedy has recently revived the concept of legal consciousness in a global dimension in Kennedy (2003) and as noted in the "legal history" section of his new web page http://www.duncankennedy.net. The idea of argument bites is more extensively explained in Kennedy (1994b). For an analysis of the legal consciousness literature in the law and society scholarship see the articles by García-Villegas (2003) and Silbey (2005).

5 I am referring to Pierre Bourdieu's notion of habitus, as an "habitual, patterned ways of understanding, judging, and acting which arise from our particular position as members of one or several social 'fields,' and from our particular trajectory in the social structure (e.g. whether our group is emerging or declining; whether our own position within it is becoming stronger or weaker). The notion asserts that different conditions of existence – different educational backgrounds, social statuses, professions, and regions – all give rise to forms of habitus characterized by internal resemblance within the group (indeed, they are important factors which help it to know itself as a group), and simultaneously by perceptible distinction from the habitus of differing groups. Beyond all the undoubted variations in the behaviours of individuals, habitus is what gives the groups they compose consistency. It is what tends to cause the group's practices and its sense of identity to remain stable over time. It is a strong agent of the group's own self-recognition and self-reproduction" [translator's note in Bourdieu (1987)].

6 As African slavery was introduced into the Spanish colonies, distinctions grew in importance in multiple and ever increasingly complex ways. The colonial system of *castas* (castes) ranked individuals hierarchically according to the amount of visible (skin color), perceived (education, language, religion, culture) and acquired (through political or economic influence) European "blood." Edicts and other colonial legislation determined the limits of the *castas* in accessing certain jobs, holding public office or receiving public education. A mixed person could ascend beyond his skin color by adopting as many European traits as possible (see Jackson 1999; Seed 1982).

7 Precisely because of the creoles' characteristic ambiguity some scholars have suggested the term "agency" rather than "subject" as a marker of their political will within the public sphere. See José Antonio Mazzotti's (2000) collection on different studies of creole agency and ways in which the category of the *criollo* was constituted during colonial times. Although creoles in Spanish America were often portrayed as "white," it is constraining and misleading to describe the creole as a monolithic subject based only on a racial or social category. Other elements such as honor, purity of blood, legitimacy of birth, social status, economic and political power were more significant when defining differences that were legally, institutionally, and socially enforced. It is more appropriate to say that he (the creole is undoubtedly a male subject) represented certain positions taken in the public sphere. In this sense, it is easier to understand why "honor" rather than "race" would be important to a person positioning himself or being positioned as creole (see for example, Uribe Urán 2000).

8 Such as those of viceroys, bishops or *oidores*. *Oidores* were judges who were part of one of the *audiencias*: "a governmental body with administrative and judicial functions, usually the highest level appellate body located in a geographic area governed by a viceroy or other royal official magistrates" (Mirow 2001).

9 *Letrados* has been translated as "lettered men" or literati (Rojas 2001). Ángel Rama in *The Lettered City* describes the literati as "the restricted group of intellectual workers who learned the mechanisms and vicissitudes of institutionalized power and learned, too, how to make irreplaceable institutions of themselves . . . their services in the manipulation of symbolic languages were indispensable . . . servants of power, in one sense, the *letrados* became masters of power, in another" (Rama 1996).

10 These codes or compilations are the Ordenamiento de Alcalá (1348) restated in the Leyes de Toro (1505), Nueva Recopilación

de Castilla (1567) and the Novísima Recopilación de Castilla (1805).

11 I have taken these categories as conveniently simplified by Cutter (1999).

12 Even today, when contemporary legal issues are discussed based on local circumstances the charge is of *casuism* or of giving a creole interpretation to the law. Diego López Medina (2004) has done much to give new value to these Latin American transformations or transmutations of what he calls a "transnational legal theory" coming from "prestigious sites of production" by showing them as creative and often brilliant local appropriations. I would add that these transformations could be read as part of a modern creole legal consciousness. In fact, López's book may be read in the same tradition: López is appropriating (and criticizing) European- and Unitedstatesean-produced theory to propose a novel reading inscribed in the region, which would not have been possible from a monologist view from the center.

13 Joseph Lund (2001: 54–90) describes this as typical of Latin American exceptionalist discourse: that it proclaims its difference and distance but at the same time it only is able to legitimize itself through a Eurocentric point of departure.

14 As translated in Álvarez 1924.

15 I have borrowed the concept of the "will to civilization" as described by Cristina Rojas as "a place of [violent] encounter between the colonial past and the imagined future, as a passage between barbarism and civilization" (Rojas 2001). I also had in mind Walter Benjamin's statement: "There is no document of civilization which is not at the same time a document of barbarism" (Benjamin 1973: 256).

16 Civilization was understood as a "universal fact," and, with it, the trust that law and institutions would be able to mold the human character. The word "civilization" originated in the use of the French words *civilité* (civility) and *poli* (polished, refined, courteous, to emit prudent laws). For more about the etymology of the word see Goberna Falque (1999), Starobinski (1993), Lochore (1935), Febvre et al. (1930).

17 Depending on what countries are included in the imagery of "Latin America," independence dates can range from as early as 1791 for Haiti or as late as 1898 for Cuba. If only the continental former Spanish colonies are included in the regional reference these dates range roughly from 1810 to 1825.

18 Although these classifications are rough sketches of a time period they help to describe different moments of legal consciousness. Martti Koskenniemi uses the term "early professional," or "early classical" to describe international law publicists for the first half of the nineteenth century, roughly for the same period that Duncan Kennedy uses the term preclassical to describe legal consciousness in the United States. The classical or professional period for both authors refers to the late nineteenth century, and the modern moment refers to the twentieth century (see Kennedy 1998 [1975]; Koskenniemi 1989). However, I, like Koskenniemi or Kennedy, do not use these terms to present a progress narrative of legal consciousness.

19 Bello's work is better explained in the chapter "Andrés Bello's principles of international law" in Obregón (2002) or in Obregón (2006).

20 The original quote in Spanish is taken from Hanisch Espíndola (1983).

21 Calvo's work is better analyzed in the chapter "Carlos Calvo's theoretical and practical international law" in Obregón (2002).

22 For a recent and extensive analysis of Alvarez's oeuvre, see Several 2006.

23 The paper was later modified and published as an article in Álvarez 1907b. In the revised edition, he enlarged the geographic domain to include the United States, therefore changing the name from "Latin American" to "American" (as in the continent).

24 Amancio Alcorta (1883) complained that Carlos Calvo's work on international law did not mention the possibility of an American international law (*derecho internacional americano*). Calvo (1883: 629–31) responded by saying that there was no American international law because international law treats principles and not problems. This debate initiated a series of discussions on the existence or not of an American international law. Among others who cite this debate, see Yepes 1938 and Jacobini 1954. For a contemporary analysis of these debates, see Becker Lorca 2006.

25 Bello and Calvo also felt that they were being original from an American point of view though they did not promote the idea of a regional version of international law. Nonetheless, they, like Alvarez, used rhetorical strategies to place their work at the center of production of international law. Doris Sommer (1999) has masterfully shown how minority writers often use "rhetorics of particularism" in order to engage admiration while at the same time resist control.

26 "[N]'existe pas, et ne peut exister un Droit International Latino-Américain . . . ni un

Droit International Américain" (Sá Vianna 1912). All translations are mine unless otherwise stated.

27 The usage of the term "Latin America" only began in the mid-nineteenth century but became more commonly used in the twentieth. Most writers refer to American as pertaining to the former Spanish colonies or to the entire continent but not solely to the United States. Sá Vianna makes the distinction of Latin American or American to clarify that he is referring to an international law pertaining to the former Spanish colonies and to a continental international law. Throughout this work, I will comply with a similar usage and make the distinction of Anglo American or U.S. when I refer to someone or something pertaining to the United States.

28 In 1909 Álvarez published two texts in English: "American problems in international law" and "Latin America and international law" in the *American Journal of International Law*. In 1910 he published a book titled *Le Droit International Américain: Son Fondement, sa Nature: d'apres l'Histoire Diplomatique des États du nouveau Monde et leur Vie Politique et Économique*, which he presented at the Fourth Panamerican Conference held in Buenos Aires, Argentina. A year later, still before the First World War, Álvarez released a book on the Monroe Doctrine and its impact on the American nations. After the First World War, he published *Le Droit International de L'Avenir* (*International Law of the Future*) a book which proposed to renovate a failed international law backed by the moral strength of a Latin American perspective. During the interwar period, Álvarez also published several papers and articles on an American need to codify international law. After the Second World War, Álvarez continued his belief that it was necessary to place the American continent's role at the forefront of the drastically changed international environment and expressed these views in several of his dissenting opinions as a judge on the International Court of Justice.

29 Álvarez 1923; American Institute of International Law, Pan American Union and Scott 1925; Arroyo Rivera 1952; Baez 1936; Castro Ramirez 1915; Checa Drouet 1936; Cock Arango 1948; Henriquez 1948; Henriquez Vergez 1966; Labra 1912; Mackenzie 1955; Nielsen Reyes 1934; Oro Maini 1951; Orrico Esteves 1956; Paredes 1924; Planas Suarez 1924; Puig 1952; Quesada 1916; Restelli 1912; Rueda Villareal 1948; Sanchez I Sanchez 1941; Sanchez I Sanchez 1958; Scott 1930; Uriarte 1915; Yepes 1930; Yepes 1952; Zárate 1957.

30 Latin America has been traditionally identified by comparative legal scholars as a place where legal imports are borrowed and well received. See Esquirol and López Medina's S.J.D. dissertations (Esquirol 2001; López Medina 2001, 2004).