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# ***¡Esa India!* LatCrit Theory and the Place of Indigenous Peoples Within Latina/o Communities**

SIEGFRIED WIESSNER\*

## **I. THE PROMISE OF A POLICY-ORIENTED PERSPECTIVE**

LatCrit, as I understand it, stands in a great tradition. With American Legal Realism, it shares the focus on the empirical rather than the normative. Transcending, however, the Realist emphasis on analysis, and harnessing the sensitivities of the outsider, the LatCrit movement has formed around a powerful policy objective: the goal of overcoming structures of oppression and patterns of injustice encountered by Latinas/os in the United States and beyond.

LatCrit theory is, as Frank Valdes has explained, “embryonic.”<sup>1</sup> It attempts to produce critical knowledge, create material social change, and build coalitions as well as scholarly community. Beyond those activities, LatCrit is “a project perpetually under construction, but one whose construction . . . seems consciously guided by a progressive, inclusive and self-critical theory about the purpose and experience of theory.”<sup>2</sup> As a postmodern theory, LatCrit focuses on education,<sup>3</sup> illuminating the limitations of an exclusively rights-based approach to resolving problems of group-wide oppression and discrimination.<sup>4</sup> As a

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1. See Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1092 (1997).

2. *Id.* at 1096.

3. Key elements of this strategy are the twin goals of empowering individual human beings via education and encouraging them to act as agents for social change. See PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (1970).

4. Critical Legal Studies (CLS) launched a more fundamental assault on “rights rhetoric.” It argues that rights perpetuate patterns of societal subordination by, *inter alia*, maintaining “collective passivity.” Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN L. REV. 1, 36 (1984). See also MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 63 (1987) (“Rules are the opiate of the masses”); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); and Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984). Another reason for the critique of “rights” is their perceived indeterminacy. Cf. Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 328 (1987) (“Rights are whatever people in power say they are.”) In addition, proponents of feminist jurisprudence have identified a focus on “rights,” even as a means to overcome social injustice, as overly aggressive, male, litigious. See, e.g., MARY ANN GLENDON, *RIGHTS TALK* (1991).

post-postmodern movement, it reveals inklings of cultural essentialism in its difficult quest for identity,<sup>5</sup> the fight for language rights,<sup>6</sup> and the affirmation of distinct expressions of culture.<sup>7</sup>

Appropriately, LatCrit joins critical race theories in their skepticism of a wholesale rejection of the rights discourse<sup>8</sup> and the power processes

5. The definition of Latina/o identity is complicated by the multiple affiliations and identifications of the individual person sought to be encompassed. See Leslie G. Espinoza, *Latina/o Identity and Multi-Identity*, in *THE LATINO/A CONDITION: A CRITICAL READER* 17-23 (Richard Delgado et al. eds., 1998). For local flavor, see Andra D.S. Burch & Lydia Martin, *Defining Who We Are In S. Florida Isn't Just a Black and White Issue*, *THE MIAMI HERALD*, Sept. 7, 1998, at 1A, 6A.

Frank Valdes uses the term "Latina/o" "generally to signify persons with nationalities or ancestries derived from countries with 'Hispanic' cultures; currently in the United States, these persons or groups are primarily (but not exclusively) Mexican Americans, Puerto Ricans, and Cubans or Cuban-Americans." Valdes, *supra* note 1, at 1090 n.6. This working definition still leaves us with the question of what, exactly, "Hispanic cultures" are. As Valdes points out, Latina/o communities are characterized by a "high degree of *mestizaje*, or racial intermixture." *Id.* at 1106. In celebrating this substantive, multicultural condition, Margaret Montoya calls for the "pursuit of *mestizaje*, with its emphasis on our histories, our ancestries, and our past experiences, . . . [because it] can give us renewed appreciation for who we are as well as a clearer sense of who we can become." Margaret E. Montoya, *Masks and Identity*, in *THE LATINO/A CONDITION: A CRITICAL READER* 37, 42 (Richard Delgado et al. eds., 1998).

6. See Christopher David Ruiz Cameron, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 CAL. L. REV. 1347, 1366 (1997), ("To suppress the speaking of Spanish is to suppress an essential, if not the essential, component of Latino identity"); see also Montoya, *supra* note 5, at 41 (Montoya's sensitive statement on the relevancy of language, syntax, and accent to identity: "Aquí estoy ocultada por mi máscara lingüística con sus aspectos subtextuales. Desde niña, he entendido el significado de acentos, vocabulario, pronunciación, sintaxis. En inglés estos elementos idiomáticos están relacionados con mi psique, con la persona quién soy. Por la primera vez entiendo que español tiene el mismo poder"); Juan F. Perea, *Death by English*, in *THE LATINO/A CONDITION: A CRITICAL READER*, 583 (Richard Delgado et al. eds., 1998); Margaret E. Montoya, *Law and Language(s)*, in *THE LATINO/A CONDITION: A CRITICAL READER*, 574 (Richard Delgado et al. eds., 1998).

7. See Angel R. Oquendo, *Re-imagining the Latino/a Race*, in *THE LATINO/A CONDITION: A CRITICAL READER*, 60, 70 (Richard Delgado et al. eds., 1998). See also ILAN STAVANS, *THE HISPANIC CONDITION: REFLECTIONS ON CULTURE AND IDENTITY IN AMERICA* (1995); RENATO ROSALDO, *CULTURE & TRUTH: THE REMAKING OF SOCIAL ANALYSIS* (1989); Felix M. Padilla, *On the Nature of Latino Ethnicity*, 65 SOC. SCI. Q. 651, 662 (1984). Also, the humanities discussion of the integrative function of music and dance in Latina/o communities might be apposite in this context.

8. For an insightful critique of pertinent CLS theories and theorists, see Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Need?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987).

According to classical "liberal" theory (another article needs to be written about the gusto with which both the left and the right attack their common foe, albeit differently defined, i.e. "liberalism"), the empowerment of individuals through the legal system has been effectuated, over time, through the accordance of certain legally protected claims called "rights." Recently, this focus has come under fire. See discussion *supra* note 4. However, shared concepts of legal "rights" and their enforcement in authoritative and controlling decision-making structures have been, and continue to be, critical to the protection of vulnerable groups. Thus, rights are necessary, albeit hardly sufficient. See Siegfried Wiessner, *Faces of Vulnerability: Protecting*

of the state as useful instruments to establish a public and private order that approximates the proper respect for equal status and dignity of all human beings. In that quest, LatCrit theory can only gain from considering the contributions of a theory about law that has been termed the "jurisprudence for a free society"<sup>9</sup> — a most helpful, interdisciplinary approach that analyzes and resolves societal problems and finds its guiding light in the overarching goal of a universal order of human dignity.

Lamentably, Professor Myres Smith McDougal, this theory's main protagonist, died yesterday morning.<sup>10</sup> In Eugene Rostow's words, "A mighty oak has fallen and the forest will never be the same."<sup>11</sup> His intellectual legacy, however, will go on. And what a tremendous legacy he has left us. Professor McDougal has revolutionized the way we view law. Law, for him, had a purpose: it was to maintain minimum order,<sup>12</sup> and on that basis, to construct an optimum public order of human dig-

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*Individuals in Organic and Non-Organic Groups*, in *THE LIVING LAW OF NATIONS* 217, 222 (Gudmundur Alfredsson & Peter MacAlister-Smith eds., 1996). They are, if not prerequisites, at least useful tools in the realization of other "ideas of the good" such as a global (minimum) ethic, cf. JA ZUM WELTETHOS, PERSPEKTIVEN FÜR DIE SUCHE NACH ORIENTIERUNG (Hans Küng ed., 1995), some basic mandates of religion or the concept of development, cf. L. HENKIN, *THE AGE OF RIGHTS* 186-87, 191-93 (1990) even Joseph Singer's social vision of "nihilism" in its quest for the prevention of cruelty, alleviation of misery, and democratization of illegitimate hierarchies, cf. Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984), the tenets of natural law, or the goals of a world public order of human dignity as suggested here. The indeterminacy critique does not relieve us from responsibility for our acts of interpretation, i.e., participation in the process of making and changing decisions. See Drucilla Cornell, *From the Lighthouse: The Promise of Redemption and the Possibility of Legal Interpretation*, 11 CARDOZO L. REV. 1687, 1714 (1990) ("Interpretation is transformation, and we are responsible as we interpret for the direction of that transformation. We cannot escape our responsibility implicit in every act of interpretation.").

9. The *summa* of the approach presented here is to be found in HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* (1992). It has been developed and applied in a wide variety of contexts. Key statements of the approach, interchangeably called the "New Haven School of Jurisprudence," "law, science and policy," or "policy-oriented jurisprudence," are to be found in the classic articles: Myres S. McDougal & Harold D. Lasswell, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943); Harold D. Lasswell & Myres S. McDougal, *Jurisprudence in Policy-Oriented Perspective*, 19 U. FLA. L. REV. 486 (1966-67); Myres S. McDougal & Harold D. Lasswell, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362 (1971); Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968). For the location of Myres McDougal's ideas in the universe of jurisprudence, see William L. Morrison, *Myres S. McDougal and Twentieth-Century Jurisprudence: A Comparative Essay*, in *TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDUGAL* 3 (W. Michael Reisman & Burns H. Weston eds., 1976).

10. The lecture was presented on May 8, 1998, the day after Professor McDougal passed away.

11. 45 YALE L. REP. NO. 2, at 16 (Summer 1998).

12. Myres S. McDougal & Siegfried Wiessner, *Law and Minimum World Public Order*, in MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR* XIX (1994).

nity.<sup>13</sup> Empirically speaking, he considered law the outcome of a process of making decisions, vested with both authority and the attendant threat of sanctions in case of non-compliance, which he called "control intent." Professor McDougal urged every participant in this process, from scholars, to legislators, to lawyers, to judges, and others, to clarify their "observational standpoint:" "Where do you locate yourself vis-à-vis the problem at hand?" Such standpoint varies, depending upon factors such as one's life experiences, education, family background, and whether one is a member of the dominant social group or an outsider on the margin. It may differ according to important aspects of our identity such as race, ethnicity, gender, age, sexual orientation, and so forth. This observational standpoint also may change over time.<sup>14</sup> We all have different experiences in life, even though we share some with other members of particular groups. What Professor McDougal has taught us is how to be both cautious and introspective; to find out where we are coming from, what makes us tick, what our background is; and to put our particular perception of a problem and its solution into the perspective of our own critically reviewed experience. Thus, the call of policy-oriented jurisprudence to "clarify our observational standpoint," issued many years ago,<sup>15</sup> is a proper approach for critical race theorists committed to the discipline of self-reflection and self-critique,<sup>16</sup> as well as to the insights of intersectionality, multiplicity, and multidimensionality.<sup>17</sup> It also evokes Pierre Schlag's problematization of the "subject"<sup>18</sup> and Robert Chang's call for elucidation of the "subject position,"<sup>19</sup> i.e.,

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13. W. Michael Reisman, *Myres Smith McDougal Remembered*, 45 YALE L. REP. No. 2, at 14, 15 (Summer 1998).

14. Individual and group identity influence and modify each other in social interaction. As an individual human being's identity develops in constant interplay between the individual and society's constituent groups, starting with the basic relationship between parents and children, not only is the individual self shaped and changed, but general patterns of group behavior are reconstructed and modified as well. See GEORGE HERBERT MEAD, *MIND, SELF AND SOCIETY: FROM THE STANDPOINT OF A SOCIAL BEHAVIORALIST* (C. Morris ed., 1934); Wiessner, *supra* note 8, at 218-19 (providing further references).

15. E.g., Lasswell & McDougal, *Jurisprudence in Policy-Oriented Perspective*, 19 U. FLA. L. REV. 486, at 501 (1966-67).

16. See Francisco Valdes, *supra* note 1, at 1140 (stressing the "need for continual self-reflection, self-examination, and self-critique").

17. Cf. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Berta Esperanza Hernandez-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994); Espinoza, *supra* note 5.

18. See Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991); see also J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105 (1993).

19. See Robert S. Chang, *The End of Innocence or Politics After the Fall of the Essential Subject*, 45 AM. U. L. REV. 687 (1996).

determination of the stance of the author vis-à-vis the topic addressed.

Professor McDougal also insisted that, in fashioning a solution to a particular social problem, we should not, *a priori*, limit the variables that constitute and impact the issue at hand to one text (of a law or judgment or other prior decision) or consider only a few cloistered societal factors.<sup>20</sup> Instead, he counseled that we should include all of the factors relevant to legal decisionmaking regarding the problem under consideration. Underlying this approach is a broader, empirical conception of law that views law not merely as a body of rules, but as a continuous process of decisions made by persons vested with authority and backed up by the threat of sanctions.<sup>21</sup> This co-presence of authority and control intent is essential, because naked power, absent authority, is not enough to vest a decision with the mantle of law. Also, morality, even at the vaunted level of "natural" law, is not self-enforcing. Thus, we need the power processes of established communities to help morality, or certain value or policy preferences, to become reality.

In order to arrive at a decision that promotes the public order of human dignity, Professor McDougal recommends the fulfillment of five intellectual tasks. The first such task is to identify the social problem in all its dimensions. In the context of the Latina/o condition, whether we refer to the general problem of conscious or unconscious oppression, its roots and manifestations, or to specific exclusionary or discriminatory practices against members of the Latina/o community, we must endeavor to gain as complete an understanding of the problem as possible and draw on all sources of knowledge available. These sources include narrative<sup>22</sup> as well as traditional, trans-subjective analysis. It is imperative that we use all the tools of empirical research at our disposal. The second phase of the inquiry highlights the conflicting claims, the claimants, their identifications, bases of power, and so forth. In a third step, the approach identifies the particular solutions in the processes of "making" and "applying" law that have been arrived at in the given community via legislation, court decisions, and so on. Beyond the text

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20. This is the way partial approaches, including ones relying solely on cost-benefit analysis and other economic criteria, would proceed.

21. See Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959); W. Michael Reisman, *A Theory About Law from the Policy Perspective*, in LAW AND POLICY 75, 88 *et seq.* (D. Weissstub ed., 1976); Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967).

22. See Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231 (1992); Mari J. Matsuda, *supra* note 4; see also Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993) (claiming the need for stories to be "typical").

of these decisions, it is critical to also analyze the conditioning factors of these authoritative and controlling decisions. Why did the law develop the way it did? Those conditioning factors include environmental factors, such as the mood of the times, and the predispositions of the decisionmakers, personal, political, social, and so on. Taking into account changes in these conditioning factors, we would proceed to predict future decisions regarding the social problem under investigation. The last phase, which often is neglected in critical legal studies, is to offer a recommendation to solve the problem at hand.

For this recommendation, we need a guiding light. Professor McDougal's genius called this guiding light, the overarching policy preference, a "public order of human dignity."<sup>23</sup> This structural concept of dignity has been defined as maximum access of *all* people to the processes of shaping and sharing of *all* the values humans desire. Professor McDougal's friend, Harold D. Lasswell, founder of policy sciences, delineated those values empirically, as human aspirations for power, wealth, well-being, affection, respect, rectitude, skills, and enlightenment.<sup>24</sup> In seeking access for *all*, not just Bentham's greatest number, this approach would not leave minorities out in the cold.<sup>25</sup> In its inclusive thrust, this conception of dignity aspires to reach a solution, as difficult as that may be, that takes into account and safeguards the interests of all of the members of the community.

Documenting the face of oppression of Latinas/os in the United States of America is beyond the scope of these few comments. A thorough analysis of the problem, its conflicting claims and past trends in decision, conditioning factors, and so forth, is nonetheless warranted. Legitimate and widespread grievances exist. From the Miami perspective, it may appear that an increasingly isolationist *Anglo*<sup>26</sup> elite considers Latinas/os as the present major threat to the melting pot, the constitutive myth of the United States. Famed historian Arthur Schlesinger, Jr. has expressed this anxiety by stating that the unity of this coun-

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23. See MYRES S. McDOUGAL et al., *HUMAN RIGHTS AND WORLD PUBLIC ORDER* (1980).

24. Harold D. Lasswell is to be credited with the categorization of these values that are of immense heuristic value. Cf. HAROLD D. LASSWELL & ABRAHAM S. KAPLAN, *POWER AND SOCIETY* (1950); Harold D. Lasswell & Allan D. Holmberg, *Toward a General Theory of Directed Value Accumulation and Institutional Development*, in *COMPARATIVE THEORIES OF SOCIAL CHANGE* 12 et seq. (1966).

25. See Siegfried Wiessner, *International Law in the 21<sup>st</sup> Century: Decisionmaking in Institutionalized and Non-Institutionalized Settings*, in *INTERNATIONAL JUSTICE*, 26 *THESAURUS ACROASIMUM* 129, 145 (1997).

26. The word "Anglo" is used in Miami to denote all non-Hispanic Whites who have lost their traditional preeminence in local politics due to local demographics, i.e., a (mostly Cuban-American) Hispanic voting population of more than 50% of all voters in the City of Miami.

try is about to “break away at the fringes.”<sup>27</sup> In Miami and the Southwest, where immigrant communities from south of the border dare to refuse to speak English and establish their own social and economic infrastructure, immigrant communities have made the inherited majority begin to experience, ever so slightly, what it feels like to be different, on the outside - to be a minority. Faced with what they perceive as Latina/o insistence on non-assimilation, some Anglos, at times joined by African Americans, have reacted with somewhat hysterical measures such as English-only statutes and legislation that adversely affects the status of immigrants on both the state and federal levels. Measures promoting inclusion and diversity, such as affirmative action policies, have been halted by the courts, which, at times, utilize legal arguments, such as colorblindness, out of proper historical context. We should, nevertheless, avoid the temptation of throwing in the towel by abandoning the legal process altogether and eschewing the reliance on claims to judicially enforceable rights from the comfortable chairs of the academy. Power, at least in the short term, is necessary not only to sustain but also to overcome subordination.

## II. LATCRIT AND THE ESSENTIAL RELEVANCY OF INDIGENOUS PEOPLES

If equal treatment, both in fact and in law, is our goal, it must be universal and it must be reciprocal and mutually granted. We must continue to be mindful of discrimination within our midst. If we do not respect the legitimate claims of others, we forfeit our own.<sup>28</sup> It is fitting that in this quest for equal dignity, the plight of indigenous peoples within the Latina/o midst cannot be ignored. To their credit, major intellectual leaders of the LatCrit movement have not done so. They have formulated as international and border-crushing a theory as they come. Elizabeth Iglesias has stated the issue clearly:

Making the international challenge in our scholarship confronts us with the question whether our particular experiences of oppression will inspire us to imagine a broader more inclusive community, based on our common humanity and in solidarity with each other and the struggles and suffering of our Third World “others,” or whether these experiences of oppression will become the media through which we

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27. ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* (1993); *see also* THOMAS WEYR, *HISPANIC U.S.A.: BREAKING THE MELTING POT* (1988).

28. *See* The Hon. Harry Lee Anstead, *Legal Ethics and the Struggle of Native Americans*, 9 ST. THOMAS L. REV. 5, 13 (1996) (“When we ignore the struggle of others, we forfeit our own claims.”).



stake our claim in the privileges of our First World citizenship.<sup>29</sup>

One must wonder whether everyone heard this message. A recent "Annotated Bibliography of Latino and Latina Critical Theory" manages to painstakingly describe seventeen distinct "themes" of "critical Latino/a scholarship,"<sup>30</sup> including "intersectionality," "black/brown tensions," and "Latina/o essentialism," yet fails to mention the indigenous condition as any such "theme" nor does it include it in the discussion of any of these clusters of scholarship. The indigenous peoples of the Western hemisphere are, however, a key ingredient of Latina/o identity. As Margaret Montoya points out, "[A]s Latinas/os, we, like many colonized peoples around the globe, are the biological descendants of both indigenous and European ancestors, as well as the intellectual progeny of Western and indigenous thinkers and writers."<sup>31</sup>

The indigenous peoples of the Western hemisphere are of flesh and blood. They have survived and continue to face an onslaught of massive attacks directed at the core of their existence. Their plight is not merely historical. It is a day-to-day occurrence of which we often are not aware, or wrongfully believe it exists only in foreign countries.

Conscious, and even more often, unconscious racism may infect the ranks of victim groups as well. I would like to share with you a personal example that highlighted the problem for me. A friend was driving a car in Miami, when a woman cut her off. Angry as hell and without even taking a close look at the inconsiderate "stupid" female driver, my friend blurted out "*¡Esa India!*" Now, my friend is from Chile, a country where very few Indians remain. My friend had never even met an *indio*, or, for that matter, an *india* in her country. She also now regrets the incident and has kindly agreed to have me share it with you. What it reflects, however, is an attitude of unreflected, yet pervasive scorn of native inhabitants of the hemisphere, which places indigenous peoples at the bottom of the social ladder, and which appears widespread among *criollas/os* not only in the Southern Cone, but throughout Latin America. Similar attitudes, I am told, are to be found in Mexico, Venezuela, and other parts of the Western hemisphere. They are a legacy of history — a history of suffering, physical and cultural genocide, conquest, penetration, and marginalization that has been endured by indigenous people in this hemisphere and beyond.

Still, indigenous peoples have not been stamped out. A majority of

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29. Elizabeth Iglesias, *International Law, Human Rights, and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 177, 180 (1997).

30. Jean Stefancic, *Latino and Latina Critical Theory: An Annotated Bibliography*, 85 CAL. L. REV. 1509, 1511-14 (1997).

31. Margaret E. Montoya, *supra* note 5, at 40. LatCrit III has taken up the challenge and made indigenous peoples a theme of the official discourse.

the population of Bolivia and Guatemala are *indios*. The indigenous people of Peru and Ecuador constitute more than forty percent of the population. In twelve countries, including Belize, Honduras, Mexico, and Chile, between five percent and twenty percent of the population are considered indigenous.<sup>32</sup> Overall, approximately fifty million people maintain indigenous lifestyles. This population is growing in absolute and relative numbers,<sup>33</sup> despite continuing attempts at physical extermination, the mass killings that never stopped, the disappearances, and the tortures. In civil wars, indigenous communities are often caught between the government and its armed forces on the one hand, and private armies or gangs on the other. Ethnocide was often committed through the theft of indigenous land, policies of assimilation and termination, public and private discrimination, and other severe deprivations of many kinds.<sup>34</sup>

It bears repeating that the process of colonization has left indigenous peoples defeated and relegated to minor spaces and reservations, mere breadcrumbs of the land conceded by the dominant society. Indians were separated from the sacred land of their ancestors, with which they shared a deeply spiritual bond. Deprived of traditional environments, they were politically, economically, culturally, and religiously dispossessed. They became entrapped peoples, "nations within."<sup>35</sup> The indigenous peoples aspire to leave this confinement, to extricate themselves from the trap, and to live lives of self-defined dignity and happiness. Indigenous peoples all over the world claim the right to live freely on their ancestral lands, to celebrate their culture and deeply-felt spirituality, and to move from cultural autonomy to economic autonomy, and to political self-government. At times they may even call for the ultimate option of secession.

Despite the European powers' successes on the battlefield, the legal systems of the conquerors often had a hard time justifying the conquest in terms of the constitutive myths of the community. Catholic Spain had Francisco de Vitoria rationalize the duty of the Indians to welcome the Iberian "guests," *inter alia*, with the New Testament admonition to "love thy Neighbor" and to be hospitable to strangers.<sup>36</sup> His view of the

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32. See HÉCTOR DÍAZ POLANCO, *INDIGENOUS PEOPLES IN LATIN AMERICA: THE QUEST FOR SELF-DETERMINATION* x (1997).

33. See *id.*

34. See AMNESTY INTERNATIONAL, *HUMAN RIGHTS VIOLATIONS AGAINST INDIGENOUS PEOPLES* (1992). Current information can be found on the Internet, in particular at the home pages of Cultural Survival (<http://www.cs.org/main.html>) and the Center for World Indigenous Studies (<http://www.halcyon.com/FDWP/cwis.info.html>).

35. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* (1984).

36. FRANCISCO DE VITORIA, *DE INDIS ET DE IURE BELLI RELECTIONES*, 152-53 (Classics of

essential humanity of Indians and their natural rights, however, did not fit with the atrocities committed by these self-invited guests. Victoria's fellow Dominican, Bartolomé de las Casas, argued for better treatment of the beaten people.<sup>37</sup>

By contrast, the British colonization relied much less on brute force and the destruction of indigenous political structures and society. Its subjugation strategies largely included mechanisms of negotiation and persuasion.<sup>38</sup> Nevertheless, like the Spanish, the hands of the British government and those of its successor administrations have not been free from blood.

### III. INDIGENOUS PEOPLES IN LATIN AMERICA

The legacy of conquest and the meanderings of the legal status of the subjugated, but resurgent, Indian nations are retraced in the following selective overviews of pertinent domestic legal systems throughout Latin America. *Brazil's* policies regarding indigenous peoples have set

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International Law Series, J. Bate trans. 1917); cf. ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 100-01 (1990).

37. BARTOLOMÉ DE LAS CASAS, *HISTORY OF THE INDIES: SELECTIONS* (Andree Collard ed. and trans., 1971); cf. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 10 (1996). The Dominicans Francisco de Vitoria (died 1546) and Bartolomé de las Casas (1474-1566) were united in their rejection of Juan Ginés de Sepúlveda's (1490-1573) justification of the Spanish conquest by a theory of "world domination by the Pope or the Emperor and the Aristotelian theory of natural inequality among individuals and peoples." Instead, based on natural law theories of St. Thomas Aquinas, they recognized the claims of indigenous communities to be regarded as subjects of the law of nations with inalienable rights often infringed upon by the colonists. See Antonio Truyol y Serra, *History of the Law of Nations: Regional Developments: Latin America*, in 7 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 231-32 (Rudolf Bernhardt ed., 1984); Glenn T. Morris, *In Support of the Right of Self-Determination for Indigenous Peoples under International Law*, 29 *GERMAN Y.B. INT'L L.* 277, 280-88 (1986); see also Greg C. Marks, *Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolomé de las Casas*, 13 *AUSTRALIAN YB. INT'L L.* 1 (1992).

The theory of Iberian conquest by papal grant goes back to the two bulls *Inter Caetera*, issued by Pope Alexander VI in May of 1493. These edicts were designed to resolve the dispute between Portugal and Castile over title to the territories in the New World. They not only allocated exclusive powers to pursue missionary activities to both states, but they also drew an imaginary north-south boundary line 100 leagues west of the Azores between their present and future possessions in the New World. This line was amended in the Spanish-Portuguese Treaty of Tordesillas on June 6, 1494 to a line 370 leagues west of the Cape Verde Islands. This secured Spain's title to most of the Americas and guaranteed Portuguese control of the easternmost part of South America, which is now Brazil. This agreement was extended to the Pacific Ocean in the Treaty of Zaragoza on April 22, 1529. *Id.*

38. See Steven P. McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 *N.Y.U. REV. L. & SOC. CHANGE* 217, 229-44 (1993). See also Steven Paul McSloy, "Because the Bible Tells Me So": *Manifest Destiny and American Indians*, 9 *ST. THOMAS L. REV.* 37, 38 (1996). ("How were American Indian lands taken? The answer is not, as it turns out, by military force. The wars, massacres, Geronimo and Sitting Bull - all that was really just cleanup. The real conquest was on paper, on maps and in laws. What those maps showed and those laws said was that Indians had been 'conquered' merely by being 'discovered'").

important trends throughout Central and South America. Brazilian Indians, most of them inhabitants of the tropical rainforest of the Amazon, numbered 1.1 million at the time of conquest. By 1970, their numbers had dropped to 120,000. Now, the total Brazilian Indian population is estimated at 250,000, divided into 200 tribes and speaking 170 languages.<sup>39</sup> The Brazilian Indians do not enjoy any "inherent right" of "self-government." They are considered to be "relatively incapacitated," legally minor under the guardianship of the Brazilian state and subject to a special regime of tutelage.<sup>40</sup>

The tutelage is exercised by FUNAI (National Indian Foundation), the "Brazilian Bureau of Indian Affairs." The role of FUNAI is, presumably, to protect Indians' interests, but this protection has been carried out in an exclusivist way under the guiding light of a national policy of assimilation.<sup>41</sup> Indians could not own land legally or initiate legal proceedings in their own right to defend their precarious rights of "possession" and "usufruct" of lands. The old Brazilian Constitution postulated: "The Union shall have the power to legislate upon . . . incorporation of forest-dwelling aborigines into the national community" with the goal of "integrating them, progressively and harmoniously, in the national communion." Like the model of Venezuela, this model of development has been considered to be paternalistic and ethnocentric.<sup>42</sup>

Partly in reliance on Vitoria's naturalist theory of international law,<sup>43</sup> Brazil recognized the right to primordial occupation of land. Many of its other statutes, however, help undercut this advantageous legal starting-point. The national government owns all minerals and hydropower resources found within the country. Brazil also claims for-

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39. See L. ROBERTO BARROSO, *The Saga of Indigenous Peoples in Brazil: Constitution, Law and Policies*, 7 ST. THOMAS L. REV. 645, 648 (1995) (referring to Darcy Ribeiro's estimate that there were roughly 1.1 million Indians at the time of Portuguese arrival in Brazil, and using demographics based on a 1993 estimate by the Centro Ecumenico de Documentação e Informação (CEDI) for the present population figure of 250,000). In reference to the estimate of 120,000 Indians in 1970, see Marc Pallemerts, *Development, Conservation, and Indigenous Rights in Brazil*, 8 HUMAN RTS. Q. 374 (1986).

40. Estatuto do Índio [Statute of the Indian], Law No. 6.001, Dec. 19, 1973, cited in Barroso, *supra* note 39, at 652. Interestingly, if an entire indigenous community has "demonstrated its integration into the national community," the President may, upon request of its members, declare its "emancipation." Individual Indians who fulfill the same criterion, may also request their emancipation before a court. See *id.* at 653.

41. See Pallemerts, *supra* note 39, at 655-56; Carneiro da Cunha, *Aboriginal Rights in Brazil*, 2 L. & ANTHROPOLOGY 55 (1987). Today, the Brazilian Constitution of 1988 confers upon the Public Ministry and its head, the Procurator-General, the function of defending the legal rights and interests of Indians in court. Constituição Federal art. 232. See also Barroso, *supra* note 39, at 655-56.

42. See Pallemerts, *supra* note 39, at 380.

43. See discussion *supra* notes 36-37.

est areas to be vacant land owned by the government. Thus, for forest-dwellers<sup>44</sup> to have their rights recognized, they must seek recognition of their title from a government agency that is also in charge of economic development. Additionally, land reform measures, such as land grants to individuals, threaten the lands indigenous people hold communally.

The new Brazilian Constitution of 1988, prompted, in relevant part, by a 1985 communication from the Inter-American Commission on Human Rights, reduces the role of FUNAI. Interventions on Indian land no longer can be authorized by the Executive Branch; they require approval by Congress. Also, the Indians' rights to their cultures and languages, as well as access to the judicial system and their original rights to land, finally have been recognized.<sup>45</sup> Art. 231 provides:

(1) Lands traditionally occupied by Indians are those inhabited by them permanently; those used for their productive activities; those indispensable for the preservation of the environmental resources necessary for their well-being; and those lands necessary for their physical and cultural reproduction, according to their uses, customs and traditions.

(2) Indians are entitled to the permanent ownership of the lands traditionally occupied by them including the exclusive fruition or enjoyment of existing soil resources, rivers and lakes.

The Yanomami are the largest indigenous nation in the Amazon.<sup>46</sup> Nine-thousand of them live in the Brazilian state of Roraima, while twelve-thousand live across the border in Venezuela. The Yanomami occupy a territory the size of Washington State, and lived undisturbed in relative isolation until the 1980s. As many indigenous peoples, they believe that the natural and spiritual world are a unified force.<sup>47</sup> Their peaceful life ended in the late 1980s when gold, diamonds, and tin were discovered in their territory. Between 40,000 and 80,000 miners poured in, killing, burning their homes and the forest, and bearing the "gifts" of

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44. "Forest-dweller" is a term used co-extensively with the word "Indian" in the Statute of the Indian, arts. 1, 3. See Barroso, *supra* note 39, at 654; see also Comment, *Land and the Forest-Dwelling South-American Indian: The Role of National Law*, 27 BUFF. L. REV. 759 (1978).

45. See *Indian Rights in the New Brazilian Constitution*, 13(1) CULTURAL SURVIVAL Q. 6 (1989); Márcio Santilli, *Notes on the Constitutional Rights of the Brazilian Indians*, 13(1) CULTURAL SURVIVAL Q. 13 (1989).

46. AMAZONAS. MODERNIDAD EN TRADICIÓN (Antonio Carrillo and Miguel A. Perera eds., 1995) provides a good overview of indigenous issues in the Amazon within the policy context of sustainable development. As to the demographics and institutions of the Yanomami, see Marcus Colchester, *Sustentabilidad y Toma de Decisiones en el Amazonas Venezolano: Los Yanomamis en la Reserva de la Biosfera del Alto-Orinoco-Casiquiare*, in AMAZONAS, at 141, 149-60; see also N. CHAGNON, *YANOMAMO, THE FIERCE PEOPLE* (4th ed. 1994).

47. Cf. K.I. Taylor, *Body and Spirit Among the Sanumá (Yanomama) of North Brazil*, in SPIRITS, SHAMANS AND STARS: PERSPECTIVES FROM SOUTH AMERICA (David L. Browman & Ronald A. Schwarz eds., 1979).

epidemic diseases and environmental and moral destruction.<sup>48</sup>

The new federal policy heralded by the 1988 Constitution was supposed to stem this tide. According to this policy, ten percent of Brazil's territory was slated for demarcation as Indian land. An October 1993 deadline for demarcating these Indian lands has come and gone. FUNAI President, Sydney Possuelo, began a serious effort to protect these indigenous peoples from economic interests encroaching on their habitat, in particular, gold-mining interests.<sup>49</sup> He was dismissed in May 1993.

Brazil's turbulent internal politics did not help the plight of the Yanomami. In May of 1992, President Collor de Mello signed a decree ordering the demarcation of 9.66 million hectares of Yanomami territory.<sup>50</sup> FUNAI and the Federal Police began to expel the invading miners, reducing their number to approximately 300 in July 1992. In December of 1992, President Collor was impeached, and government vigilance ended. In the spring of 1993, the miners returned, numbering approximately 11,000. After being driven out of their life-sustaining environment, some desperate Yanomami are committing the first known suicides in Yanomami history.<sup>51</sup>

The government of Fernando Henrique Cardoso has, lamentably, given into some of the pressures of powerful groups opposed to the new federal policy on Indian lands. Its Decree No. 1775 of January 8, 1996, was liable to stop, if not roll back, demarcation of Indian land. It afforded private interests the right to formally contest the boundaries of Indian lands not yet demarcated. Decree No. 22 of 1991 had ensured the primacy of indigenous rights to ancestral lands based on aboriginal habitation alone. Under the decree, parties with "secondary" title would be compensated for their losses. Decree No. 1775 is a response to a

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48. See Catherine Alès, *Tierras Sagradas, Territorios Amenazados: Los Yanomamis Más Allá de su Doble*, in *AMAZONAS*, *supra* note 46, at 205, 207.

49. According to Professor Barroso, Sidney Possuelo "played a decisive role in the demarcation of the Yanomami reserve." The then FUNAI President defined his position once as follows: "[W]e caused so much confusion to the Indians that have been contacted and every time we approach isolated Indians we bring so much trouble and so many changes to their style of life, by creating needs, introducing diseases, that they only lose with such contacts. We should keep away from them for as long as possible," Barroso, *supra* note 39, at 663-64 (interview with Sidney Possuelo).

50. Barroso, *supra* note 39, at 662 n.62 (citing Decree No. 25, May 25, 1992).

51. Interview with Professor Gail Goodwin-Gomez, visitor to the Amazon Indians for the last twenty years (Jan. 10, 1996). Professor Goodwin-Gomez stated that the health situation of the Yanomami has never been worse. The Indians decry the "devastating effects of continued invasion by gold miners who pollute the rivers and forests, and introduce disease. Since 1987, nearly twenty-five percent of the Yanomami population has been wiped out by contagions carried by the unwanted colonists." See Rainforest Action Network, dated Jan. 25, 1996, <[http://www.igc.apc.org/ran/info\\_ce...press\\_release/brazil\\_reverses.html](http://www.igc.apc.org/ran/info_ce...press_release/brazil_reverses.html)>; see also *Yanomami in Peril*, Interview with Davi Kopenawa Yanomami, 13(9) MULTINATIONAL MONITOR (Sept. 1992) reprinted at <<http://www.halcyon.com/pub/FWDP/Americas/yanomami.txt>>.

Brazilian Supreme Court case brought by an agribusiness firm that occupies the land of the Guarani Indians. This firm has argued that the demarcation and registration of Indian land is unconstitutional because it does not provide for adversarial process.<sup>52</sup>

At the time Decree No. 1775 was passed, only 210 of the 554 indigenous areas slated to be demarcated, registered, and guaranteed by October 5, 1993, were fully registered. The new decree was argued to cast a legal cloud over the remaining 344 territories, even exposing presidentially-approved and demarcated areas to legal challenge,<sup>53</sup> including the gold-rich lands of the Yanomami.

Injunctions to reverse indigenous land titles already have been filed by powerful commercial interests. In addition, the effects of Decree No. 1775 extend far beyond the courtroom. In the first few weeks after Decree No. 1775 became law, eight Indian territories were reported to have been invaded, primarily by pirate mahogany loggers and gold miners.<sup>54</sup> The decree has been called a "recipe for tragedy" because it has served only to encourage illegal invasions, massacres, selective killings, abductions, and other serious assaults on the original inhabitants and guardians of the Amazon.<sup>55</sup> Still, by February, 1999, 315 indigenous areas have now been demarcated and registered. These areas cover 738,344 square kilometers, i.e. 79.4% of all Indian lands. The Brazilian government claims that Decree No. 1775 has given these Indian titles heightened legal protection and has made the process more

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52. *Genocide Decree Attacks Indian Rights*, Rainforest Action Network, Action Alert 118 (March 1996) <[http://www.igc.apc.org/ran/info\\_center/aa/aa118.html](http://www.igc.apc.org/ran/info_center/aa/aa118.html)>.

53. *Brazil: Amnesty International Fears for Indigenous Communities' Safety After Brazilian Decree on Indigenous Lands* (Jan. 24, 1996) <<http://www.amnesty.it/ailib/aipub/1996/AMR/21900396.html>> [hereinafter BRAZIL: AMNESTY INTERNATIONAL].

54. *Genocide Decree*, *supra* note 52.

55. Amnesty International summarizes:

Since the decree was passed, on 8 January 1996, several new invasions of indigenous lands have been reported. In the past, unscrupulous local politicians and economic interests in many states, often backed by state authorities, have stimulated the invasion of indigenous lands by settlers, miners and loggers, playing on uncertainty about the demarcation process. This has resulted in violent clashes and killings. The authorities at all levels have consistently failed to protect the fundamental human rights of members of indigenous groups or bring those responsible for such attacks to justice. Partial figures indicate that, during the last five years, at least 123 members of indigenous groups have been murdered by members of the non-indigenous population in land disputes. With few exceptions, no-one [sic] has been brought to justice for such killings. For example, to date no-one [sic] has been brought to trial for the massacre of 14 members of the Ticuna tribe in Amazonas in 1988, and for the massacre of 14 members of the Yanomami village of Haximu on the Brazil/Venezuelan border in 1993.

*Brazil: Amnesty International*, *supra* note 53.

transparent.<sup>56</sup>

Unlike 150 years ago in the United States, the possible replay of "Manifest Destiny" in Brazil does not go unnoticed and unaddressed by the world community.<sup>57</sup> Indigenous peoples have found significant and growing support worldwide — in the heartland and the capitals of the once-conquering nations.

One comparatively bright spot is *Colombia's* current governmental policy favoring Indian political and economic autonomy. The indigenous factor in this country is significant, encompassing approximately 800,000 persons, divided into eighty-one different communities and scattered throughout twenty-seven of the thirty-two political subdivisions of the state. The 1991 Constitution was drafted with significant indigenous input and provided for a major political breakthrough. Article 7 of the 1991 constitution recognizes and protects the ethnic and cultural diversity of the Colombian nation. This is a marked departure from integrationist or assimilationist schemes. It affords indigenous communities a high degree of political and administrative autonomy (arts. 246, 286, 321, 329). Respect for their institutions of self-government is guaranteed through provisions such as those that recognize indigenous courts and their application of traditional customary standards (arts. 246, 330). Indigenous collective property rights are recognized, in particular collectively owned and inalienable *resguardos* (art. 329). Native languages and dialects are made official languages in indigenous territories (art. 10). Education in these territories is to be bilingual and must be directed to preserve and develop indigenous cultural identity (art. 10, 68).

On a national level, the indigenous peoples are represented by at least two senators in a special national district and by a number of repre-

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56. See A Ação do Governo Federal, FUNAI — Fundação Nacional do índio na Internet [FUNAI's official website] <<http://www.funai.gov.br>> (visited March, 7, 1999).

57. The world is on notice. See Action for Citizenship Committee, *Roraima, Brazil: A Death Warning*, 13(4) CULTURAL SURVIVAL Q. 59 (1989). Earlier warnings have gone unheeded. In 1980, for example, the Fourth Russell Tribunal on the Rights of Indians in the Americas concluded that the Yanomamis "face a high probability of genocide unless immediate protective action is taken." See Shelly Kellman, *The Yanomamis: Their Battle for Survival*, 36 J. INT'L AFF. 15, 36 (1982)(quoting Anthropological Resource Center, *The Yanomami Indian Park: A Call for Action* (Boston, Mass. 1981) at vi). Beyond Cultural Survival, a good number of international and domestic organizations are monitoring the situation in Brazil. Actions range from letter-writing campaigns coordinated via the Internet, to the National Forum for the Defense of Indigenous Rights' petitioning the Attorney General's office to challenge the constitutionality of Decree No. 775 in light of Article 231. See *Brazil: Amnesty International*, *supra* note 53. Additionally, Members of the United States Congress wrote to the World Bank urging it to "insist that the Brazilian Government comply with the original loan agreements and honor the demarcation of indigenous lands." *Congressional letter to World Bank re indigenous rights in Brazil* (Apr. 15, 1996) <<http://nativenet.uthscsa.edu/archive/nl/9604/0109.html>>.



sentatives fixed by law. They participate in key decisions concerning the exploitation of natural resources within their territories (art. 330) and the drafting of the national plan (arts. 340, 341). Indigenous peoples also receive transfers from the national budget and from the oil and mineral resources exploitation royalties (art. 357). The judicial system, in particular, the newly-created Constitutional Court, using the innovative writ of protection for human rights (*acción de tutela*), was instrumental in making this prescriptive scheme a reality.<sup>58</sup> Still, there are counterforces, including the "fog of war" with narcoterrorism, and ONIC (Organización Nacional Indígena de Colombia), founded in 1982 as the leading force of indigenous empowerment, has to continue its strenuous efforts to protect the rights and interests of the first peoples of Colombia.

Another place of cautious hope is *Venezuela*, at least at the federal level of government. Article 77 of its Constitution of 1961 establishes the principle of special protection for the indigenous peoples in order to facilitate their inclusion in the life of the nation.<sup>59</sup> Making use of this rather oblique provision, the Venezuelan Supreme Court recently invalidated as unconstitutional the political structuring of the federal state of Amazonas and ordered a reorganization that will take into account the

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58. In the case of the Paso Ancho community, for example, the Constitutional Court has ruled that there is a right to the creation of indigenous territories called *resguardos*, which are constitutionally protected through the principle of ethnic and cultural diversity. T-118, May 12, 1993, Judgment by Eduardo Cifuentes Muñoz (mimeo), at 10, a holding reaffirmed in T-257/93, Judgment by Alejandro Martínez. The Court, upon *acción de tutela* by the indigenous community of Cristianía and to the surprise of a somewhat fatalistic nation, recognized a right to communal integrity and stopped a highway construction project through indigenous land. T-428, June 24, 1992, Judgment by Ciro Angarita Barón, GACETA JUDICIAL, No., p. 479. Coal mining in the border area to Venezuela, adversely affecting the Wayúu community, was ordered to be undertaken in a way so as to protect the indigenous peoples' right to life, physical integrity, and a healthy environment. T-528, September 18, 1992, Judgment by Fabio Marón Díaz, GACETA JUDICIAL, No., p. 363. In a case in which the entire tropical forest ecosystem was put at risk by the activities of a wood production company, the Court upheld a lower court order for both the wood company and the overseeing agency to pay the costs of an environmental impact study, as well as reforestation and repairs. T-380, September 13, 1993, Judgment by Eduardo Cifuentes Muñoz (mimeo). It stated expressly that the right to cultural integrity did not belong to the members of the community but to the community as a whole. Other communities would not benefit from this extension since their frame of mind was individualistic. See *id.* at 14-15. For indigenous people, the Court said, the right to life includes a right to collective subsistence, and the protection against individual forced disappearance includes a right to protection against ethnocide. See *id.* at 23. On the other hand, individual *indios* did receive due process protection against expulsion decisions by their community. T-254, May 30, 1994, Judgment by Eduardo Cifuentes Muñoz (mimeo). For further insights, see FUERO INDÍGENA COLOMBIANO (Roque Roldan Ortega, et al. eds., 3rd. ed. 1994).

59. "La ley establecerá el régimen de excepción que requiera la protección de las comunidades de indígenas y su incorporación progresiva a la vida de la nación." René Kuppe, *The Indigenous Peoples of Venezuela and the National Law*, 2 L. & ANTHROPOLOGY 113 (1987).

legitimate interests of the indigenous communities in that state.<sup>60</sup> On December 10, 1997, the Supreme Court issued an order of execution on that judgment. The Court ordered the Legislative Assembly of the State of Amazonas to abstain from any action to give legal effect to its draft law on the political-territorial restructuring of the State which was written without the indigenous communities participating. Unfortunately, the State Legislature, on December 17, 1997, decided to go ahead and to publish the law despite the court's ruling. This action of defiance of the Supreme Court order is now under attack in the very same court.<sup>61</sup>

Thirty-five to forty percent of the population of *Ecuador* is estimated to be indigenous. The country's unity, forced by the ruling *criollo* elite, was based on *mestizaje*, common religion, and language.<sup>62</sup> Assimilationist and paternalistic policies characterized the policies of the government. This resulted in efforts to "launder" the indigenous people by underreporting their population,<sup>63</sup> or by calling them "minorities."<sup>64</sup> For the ten indigenous nationalities this exclusion is the reality, as recognized by the Inter-American Commission for Human Rights in its April 24, 1997, report on the human rights situation in Ecuador.<sup>65</sup> The

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60. The decision announced by the Supreme Court in Case No. 748 on December 5, 1996, declares unconstitutional, as violative of Article 77 of the Venezuelan Constitution, the Law Regarding the Political-Territorial Division of the State of Amazonas. LA GACETA OFICIAL DEL ESTADO AMAZONAS, número 3, Extraordinaria del 24 de septiembre de 1994. Article 77, in the interpretation given by the Court,

consagra un deber constitucional de protección a la especificidad indígena a las variables históricas ambientales, de ordenamiento territorial, de seguridad y defensa y de la integración del espacio amazónico, al derecho político y representativo de los pueblos y comunidades indígenas.

Case No. 748 (1996). For an analysis of the critical parameters for such indigenous self-determination, see Miguel Plonczak, *El potencial de la autogestión para el desarrollo de las comunidades indígenas organizadas en el Edo. Amazonas, Venezuela*, in AMAZONAS, *supra* note 46, at 127.

As to the general situation of indigenous peoples in Venezuela, which faces many challenges, see PROGRAMA VENEZOLANO DE EDUCACIÓN ACCIÓN EN DERECHOS HUMANOS (PROVEA), SITUACIÓN DE LOS PUEBLOS INDÍOS DE VENEZUELA CON RESPETO A LA CONVENCIÓN INTERNACIONAL SOBRE LA ELIMINACIÓN DE TODAS LAS FORMAS DE DISCRIMINACIÓN RACIAL (1996); NEMESIO MONTIEL FERNANDEZ, MOVIMIENTO INDÍGENA DE VENEZUELA (1992).

61. See Oficina de Derechos Humanos Vicariato de Puerto Ayacucho & ORPIA, Acción Urgente, Desacato de la Asamblea Legislativa del Estado Amazonas (Venezuela) a la decisión de la Corte Suprema de Justicia sobre la División Político Territorial, Junio de 1988 (on file with the author).

62. See Francisco Lopez Bermudez, *Indigenous Peoples and International Law: The Case of Ecuador*, 10 ST. THOMAS L. REV. 175, 186-87 (1997).

63. See *id.* at 187. The author refers to the country's official statistics on indigenous people, as reported to the United Nations agencies. These statistics fluctuated widely, from 50% in 1976 to 18.5% in 1985. See *id.* at 187-88. The 35-40% estimate is from the Inter-American Commission on Human Rights. *Ibid.*

64. See Jennifer E. Brady, *The Huaorani Tribe of Ecuador: A Study in Self-Determination for Indigenous Peoples*, 10 HARV. HUM. RTS. J. 291 (1994).

65. See Bermudez, *supra* note 62, at 195.

indigenous nationalities are shockingly poor, but they no longer are forgotten. They have managed to maintain their identity. Organized on a national level in the Confederation of Indian Nationalities of Ecuador (CONAIE), established in 1986, the indigenous peoples are pressing the interrelated demands of pluri-nationality, territoriality, and self-determination.<sup>66</sup>

Most of Peru's indigenous people reside in its Highland Andean regions. They speak predominantly Quechua or Aymara and number approximately nine million, which equals thirty-eight percent of the country's population.<sup>67</sup> They are the poorest, least educated, and least influential groups in Peru.<sup>68</sup> Historically, the Spanish, in the 1600s, recognized the pre-colonial social units of the Indians of the Andes called *ayllus*.<sup>69</sup> The Peruvian government, in 1854, renounced this scheme and sold many indigenous lands. The Peruvian constitutions of 1920, 1933, and 1980 again protected communal lands. In 1925, fifty-nine indigenous communities were recognized. This number has increased, and these communities have been granted a large measure of internal autonomy.<sup>70</sup>

Bolivia, judging by percentages of population, is the most indigenous of all the countries in Latin America. 4.440 million indigenous people, most of them speaking Quechua and Aymara, live in the *altiplano*, or Andean region of the country. They constitute fifty-five percent of all Bolivians.<sup>71</sup> The *indios* are highly discriminated against. Via a 19th-century decree, they were forced to sell their traditional communal lands.<sup>72</sup> In the 1960s, an indigenous movement started, taking its name and inspiration from the legendary Indian leader Tupac Katari who had led the 1781 uprising against the Spanish colonizers. The Kataristas were quite successful politically in the 1970s, and one of their leaders, Carlos Palenque, an Aymara Indian, was elected Mayor of La Paz in 1989. In 1991, a national law was passed protecting the rights of indigenous peoples. On May 13, 1992, President Paz Zamora granted the

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66. See *id.* at 190-93.

67. Pamela Burke, *Highland Indigenous People of Peru*, dated August 14, 1995, at <<http://www.bsos.umd.edu/cidcm/mar/hindpreu.htm>>.

68. Donna Macisaac, *Peru*, in *INDIGENOUS PEOPLE AND POVERTY IN LATIN AMERICA. AN EMPIRICAL ANALYSIS* 165, 169 (George Psacharopoulos & Harry Anthony Patrinos eds., 1994).

69. Cf. Charles Lacombe, *To Heal Society, Follow the Path of the Enlightened Inca*, *MIAMI HERALD*, March 14, 1992, at 21A.

70. Burke, *supra* note 67.

71. Pamela Burke, *Highland Indigenous People of Bolivia*, dated August 14, 1995, at <<http://www.bsos.umd.edu/cidcm/mar/hindbol.htm>>.

72. Consejo Indio de Sud America, Intervención sobre el Punto 4: Declaraciones Generales, por: Raimunde Mamani Baltazar, Palacio de Las Naciones, el 31 de julio de 1998, available at <[http://www.puebloindio.org/ONU\\_info/GTPI98\\_mamani.htm](http://www.puebloindio.org/ONU_info/GTPI98_mamani.htm)>.

indigenous people in the Andean region one million hectares of land.<sup>73</sup> A constitutional reform in 1994 designated Bolivia a “multiethnic, pluricultural society” and allowed indigenous people to assume the ownership of their traditional lands.<sup>74</sup> Despite this progress on the political front, social discrimination and economic distress are likely to persist, since Bolivia is the Western Hemisphere’s poorest country - second only to Haiti.<sup>75</sup> In contrast, Bolivia’s neighbor to the South, *Chile*, reports, as of 1995, only 598,000 indigenous people, making up four point two percent of the population.<sup>76</sup> The largest group of them, comprising over 570,000 persons, is the Mapuche.<sup>77</sup> They constitute the poorest sector of Chilean society, living now primarily on reservations south of Santiago. On the basis of two thousand meetings with indigenous communities and the work of a Special Commission of Indigenous Peoples (CEPI), Chile has passed new legislation in October of 1993 that legally recognizes indigenous peoples and their rights to self-identification, to their culture, and to the lands they historically occupied and possessed.<sup>78</sup> This *Ley Indígena* also affords protection for sacred sites and establishes a special fund (*Fondo de Tierras y Aguas*) for the financing of mechanisms to resolve disputes over land and water. Additional funding exists for indigenous development (*Fondo de Desarrollo Indígena*).<sup>79</sup>

Nicaragua’s Political Constitution, adopted by the Sandinista government<sup>80</sup> in the mid-1980s, recognized the communal property and cultural rights of the indigenous peoples of the Atlantic Coast.<sup>81</sup> Legislation in 1987 also created autonomous political regions for the indigenous communities of the Atlantic Coast.<sup>82</sup> Still, problems persist.

73. Burke, *supra* note 71.

74. *Id.*

75. *Id.*

76. *Latin America and the Caribbean*, available at <<http://www.bsos.umd.edu/cidcm/mar/tablela.htm>> (visited Nov. 25, 1998).

77. On the history of the Mapuche who had successfully fought off attempts by the Incas and the Spanish to conquer them, see JOSÉ BENGUA, *HISTORIA DEL PUEBLO MAPUCHE* (1985).

78. See *Ley Indígena*. Establece normas sobre protección, fomento y desarrollo de los indígenas y crea La Corporación Nacional de Desarrollo Indígena. Ley No. 19.253 (5 de octubre 1993).

79. See *id.* at arts. 21 and 13.

80. See generally John N. Burnstein, *Ethnic Minorities and the Sandinist Government*, 39 J. INT’L AFF. 155 (1982).

81. See Pol. Const. of Nicaragua arts. 89, 180 (amended 1995).

82. Statute of Autonomy for the Atlantic Coast Regions of Nicaragua, Law No. 28, Sept. 7, 1987, 238 LA GACETA 2833 (1987), reprinted in DOCUMENTS ON AUTONOMY AND MINORITY RIGHTS 386 (Hurst Hannum ed., 1993). It should be noted that until the 1950s, the “de facto autonomy of the Atlantic Coast,” a former British protectorate and kingdom of the Misquitá, was “never explicitly challenged by the Nicaraguan State.” STUDY ON TREATIES, AGREEMENTS AND OTHER CONSTRUCTIVE ARRANGEMENTS BETWEEN STATES AND INDIGENOUS POPULATIONS: THIRD PROGRESS REPORT, Miguel Alfonso Martínez, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1996/

The Nicaraguan government's thirty-year concession to a Korean-owned company to log a large area of tropical rain forest in the Atlantic Coast region inhabited by indigenous communities is presently under attack before the Inter-American Court on Human Rights.<sup>83</sup>

Violence, unfortunately, begets violence when the two worlds collide and little effort is undertaken to accommodate the vital interests of the indigenous peoples. This violence has been the reality in, among other places, the decades-long war in Guatemala, and the revolt in Chiapas, Mexico.

In *Guatemala*, on December 29, 1996, "the guns may have finally fallen silent." The peace accord signed on that day between the government and the guerrilleros, many of them Maya Indians, proclaimed to put an end to this country's long, bloody, and "forgotten" civil war, which left at least 100,000 persons dead, 40,000 missing, 250,000 children orphaned, and more than one million people driven from their homes.<sup>84</sup> The final accords guarantee, inter alia, Indian rights and land reform.<sup>85</sup> The jury is still out on the ultimate success of this experiment in national reconciliation.

*Mexico* is the battleground where it appears that indigenous peoples recently have taken up arms against the ruling elites. 85 percent of the Mexican population is *mestizo*, while ten million Mexicans are considered *indios*, primarily because of their language.<sup>86</sup> These indigenous

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23 (1996), para. 124. For details on Nicaragua's autonomous regions, see HÉCTOR DÍAZ POLANCO, *supra* note 32, at 119-25.

83. See S. James Anaya, *The Awas Tingni Petition to the Inter-American Commission on Human Rights: Indigenous Lands, Loggers, and Government Neglect in Nicaragua*, 9 ST. THOMAS L. REV. 157 (1996); see also Julia Preston, *It's Indians vs. Loggers in Nicaragua*, N.Y. TIMES, June 25, 1996, at A8 ("The underlying issue is the future of woodlands throughout Central America, which are being razed at a rate of 1160 square miles each year.") In June of 1998, the Inter-American Commission of Human Rights decided to file a complaint with the Inter-American Court of Human Rights against the government of Nicaragua, charging it with a violation of Awas Tingni's traditional rights to their land. *Indian Rights Human Rights*. THE INDIAN LAW RESOURCE CENTER NEWSLETTER, Winter News 1999, vol. 6, No.1, at 1.

84. See Larry Rohter, "Hard Part" Ahead After Guatemala's 36-Year War, INT'L HERALD TRIB., Dec. 30, 1996.

85. The text of the Agreement on Identity and Rights of Indigenous Peoples between the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca (URNG), signed at Mexico City on March 31, 1995, can be found at <<http://www.un.org/Depts/minugua/paz7.html>>. It obligates the Government, inter alia, to "give special protection to cooperative, communal or collectively held lands," and "recognizes the right of indigenous and other communities to maintain the system of administration of lands which they hold and which historically belong to them." Part IV.F.3 of the Agreement. Moreover, "[r]ecognizing the particularly vulnerable situation of the indigenous communities, which have historically been the victims of land plundering, the Government undertakes to institute proceedings to settle the claims to communal land formulated by the communities and to restore or pay compensation for those lands." part IV. F.7 of the Agreement.

86. Cf. Margarita Gonzalez de Pazos, *The Chiapas Uprising and the Negotiating Process*, 7

peoples, divided into fifty-three different *etnias*, have suffered degradation and severe deprivation of values. The Indian past is "in many ways glorified," but an enormous gap exists between the Mexican myth and its "operational code."<sup>87</sup> The movement embodied by the *Ejército Zapatista de Liberación Nacional (EZLN)*, in the Mexican State of Chiapas, unites men and women from the Tojolobal, Tzeltal, Tzotzil, and Chol communities, all with Mayan roots, in the desire to confront the situation head-on. Since its inception, on January 1, 1994, the uprising has had military, political, and spiritual dimensions, and it has garnered considerable support, both inside and outside of Mexico.<sup>88</sup> One year earlier thousands of *indios* had died needlessly in that very state, they had experienced "physical and spiritual hunger, lack of medical services, and a century and a half of discrimination."<sup>89</sup> Their reasons for revolt and their demands were outlined in a document called the *Declaración de la Selva Lacandona*. The *indios* asked for autonomy, the democratization of the country's political life, the rule of law, and certain aspects of social justice.<sup>90</sup> Negotiations, which began with much hope, have stalled, and the reaction to the uprising has become more violent. The "first post-modern revolution"<sup>91</sup> faces a difficult road ahead.

Despite local variations, we may note some convergent, if not common trends in the domestic legal treatment of indigenous peoples throughout Latin America:

Indian nations still occupy the bottom rung of the ladder of economic and social status in the countries in which they reside. Their physical and spiritual survival is threatened by outside encroachment — private and, sometimes, public action.

A trend toward legal recognition of the special spiritual bond between indigenous peoples and their land is, however, clearly discernible. This movement includes the demarcation and legal guarantee, if not return, of lands of traditional indigenous use, and a recognition of Native title to use the resources of nature in the traditional, communal ways

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ST. THOMAS L. REV. 685 (1995), as updated in *Mexico Since the Mayan Uprising: Government and Zapatista Strategies*, 10 ST. THOMAS L. REV. 159 (1997).

87. *Id.* at 685 referring to JOSÉ EMILIO ORDÍNEZ CIFUENTES ET AL., *DERECHOS INDÍGENAS EN LA ACTUALIDAD* (UNAM ed., 1994) and CARMELO VINAS MEY, *EL RÉGIMEN JURÍDICO Y DE RESPONSABILIDAD EN LA AMÉRICA INDIANA* (1993). For the difference between "myth" and "operational code," see W. MICHAEL REISMAN, *FOLDED LIES* (1979).

88. See HÉCTOR DÍAZ POLANCO, *supra* note 32, at 148-49.

89. See Margarita Gonzalez de Pazos, *supra* note 86, at 692.

90. See *id.* at 692-93. The social justice demands pertained primarily to demands for land, housing, health care, labor and education. *Id.* Gonzalez de Pazos, *supra* note 86, at 159.

91. See Ana Carrigan, *Chiapas: The First Post-Modern Revolution*, 19 FLETCHER F. WORLD AFF. 71 (1995) (referring to the movement's professed aspiration not to take power for itself, but to create a "democratic space" where differences between competing political visions can be resolved).

(hunting, fishing, etc.). Counterforces, though, have been mobilized, and they have achieved some measure of success.

Nation-states rule out the option of political independence or a right to secession to indigenous peoples in their territory. However, in some countries, indigenous peoples are afforded an increasing range of autonomy. This recognition of self-rule, albeit limited, covers issues of membership, structures and processes of authority and control, as well as manifestations of culture and spirituality.

The gains made by indigenous communities are probably too far advanced and entrenched for the clock to be turned back to the policies of assimilation and termination.

To cement these gains domestically, the development of international prescriptions would help substantially. These prescriptions might not only seal progress discernible in the common law countries of North America and Oceania, but they also could provide the necessary sword to fight for a proper regime of protection and empowerment of indigenous populations in Central and South America, as well as in the remaining parts of the planet.

Both on the regional and universal level, declarations on the rights and status of indigenous peoples are in the formative stage.<sup>92</sup> Taken together with widespread state practice, pertinent customary law has emerged.<sup>93</sup> Any international prescriptions regarding indigenous peoples should be structured in such a way as to maximize for the intended beneficiaries the access of shaping and sharing of all the values humans desire.

## V. CONCLUSION

LatCrit, in its quest for authenticity, equal dignity, and removal of all vestiges of colonialism and oppression, is a most valuable ally in the struggle of indigenous peoples. Indigenous persons encounter, some of

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92. Cf. United Nations Draft Declaration on the Rights of Indigenous Peoples, *reprinted in* 9 ST. THOMAS L. REV. 212 (1996); Proposed American Declaration on the Rights of Indigenous Peoples, *reprinted in* 6 INT'L J. CULT. PROP. 364 (1997). For comment, *see, e.g.*, Julian Burger, *The United Nations Draft Declaration on the Rights of Indigenous Peoples*, 9 ST. THOMAS L. REV. 209 (1996); and Siegfried Wiessner, *The Proposed American Declaration on the Rights of Indigenous Peoples*, 6 INT'L J. CULT. PROP. 356 (1997). In the limited field of international labor law, an important treaty has been adopted: ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries of June 27, 1989, *reprinted in* 28 I.L.M. 1382 (1989). Its ratification by Latin American countries, including Mexico and Bolivia, brings nearly forty percent of all Indians of the Americas under the protective shield of the Convention. *See* Russel L. Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33, 45 n.51 (1994).

93. For details, *see* Siegfried Wiessner, *Rights and Status of Indigenous Peoples. A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS.J. 57 (1999).

the very same experiences Latinas/os face day in and day out in this country: exclusion, invisibilization, discrimination, the perception and reality of oppression. LatCrit has not shied away from addressing difficult issues. The movement continues to unfold and bring to light, the variegated, often hidden and many times unconscious manifestations of discrimination, racism, and social/economic subordination. The phenomena of oppression and discrimination, however, transcend the borders of this country. Latina/o identity, in particular, is essentially and radically, i.e., from its roots up, international. To be true to its guiding lights, the movement cannot afford to ignore the complexities of the inner structure of the Latina/o community/ies. It cannot forswear the analysis of the sometimes vast differentials of power, wealth, well-being, and other values within its midst as well as the resulting patterns of oppression and injustice — whether they manifest themselves in this country, “homebred” or imported, or at the places of the Latina/o family outside the United States, in the other countries of this hemisphere traumatized by the experience of colonial conquest. The plight of indigenous people is very much a part of the Latina/o condition.

Myres Smith McDougal has left us with a powerful set of tools to advance the critical study of the human condition and its attendant conflicts and to develop solutions in the global common interest. Would that we make use of his treasure trove of instruments, his inclusive, configurative jurisprudence to join together in the quest for a world order that responds to all of our aspirations and that celebrates difference as fervently as it affirms the universal goal of respect for equal dignity and justice for all.