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A RESPONSE TO PROFESSOR MCALLISTER'S REPLY TO MY REVIEW OF *MAKING LAW MATTER*

COLIN CRAWFORD

As Professor Lesley McAllister notes, her book makes an important contribution to our knowledge about environmental enforcement, namely its central finding “that prosecutorial enforcement is in many ways a success story—it has enhanced the effectiveness of environmental law in Brazil, and a similar approach may be useful in other national jurisdictions.”¹ This is a point for which I celebrated her monograph in my review that appears in this volume. Indeed, my review took pains to relate this central point at the outset.²

Thus, it is strange to be characterized by Professor McAllister as not agreeing with her highly positive impression of Brazil’s *Ministério Público*. She implies that my review falls into a category of scholarly writing about the “failed law” of Latin America, a phrase coined by my sometime collaborator and friend Professor Jorge Esquirol.³ This implication could not be further from the truth. The *Ministério Público*, as she explains, is filled with some of the best, brightest, and most idealistic legal reformers in Brazil today. They are engaged in important, admirable work, especially in the environmental area. In July 2008, I lectured to the federal *Ministério Público* for Rio de Janeiro⁴ and once again came away awestruck by the energy and sophistication of its lawyers. The best classes for any professor are those from which he or she walks away having learned as much as he or she took to the class. That is what

1. Lesley K. McAllister, *On Environmental Enforcement and Compliance: A Reply to Professor Crawford's Review of Making Law Matter: Environmental Protection and Legal Institutions in Brazil*, 40 GEO. WASH. INT'L L. REV. 649, 649 & n.6 (2009).

2. Colin Crawford, *Defending Public Prosecutors and Defining Brazil's (Environmental) "Public Interest": A Review of Lesley McAllister's Making Law Matter: Environmental Protection and Legal Institutions in Brazil*, 40 GEO. WASH. INT'L L. REV. 619, 619 (2009).

3. McAllister, *supra* note 1, at 667.

4. Colin Crawford, *Visão Comparativa da Tutela Ambiental e Extra-Judicial do Meio Ambiente nos EUA e no Brasil* [Comparative View of Judicial and Extra-Judicial Environmental Protection in the USA and Brazil], Address before Ministério Público Federal, Procuradoria da República no Estado do Rio de Janeiro [Federal Public Prosecution Service, Office of the Attorney General of the Republic in the State of Rio de Janeiro] (June 23, 2008).

lecturing to the *Ministério Público* is like. In my view, therefore, as based on both personal and professional experience, Professor McAllister is absolutely correct when she argues that the institution represents an important stage in the maturation of Brazilian environmental-enforcement institutions. As I noted in my review, in fact, the greatest contribution Professor McAllister makes to scholarship about Brazilian environmental law and for environmental enforcement in “developing” countries generally is her focus on institutions rather than on laws.⁵

In her pique at my criticisms, however, Professor McAllister has failed to grasp the real nature of my central and profound disagreement with her. That is, I greatly admire much of the work of the *Ministério Público* and entirely agree that its model of prosecutorial enforcement represents a positive advance for Brazil and other, similarly situated countries in terms of the development of environmental enforcement institutions. However, I do not endorse what I viewed as her ultimately uncritical characterization of the institution, a characterization that fails—as, to my mind, the very best social-science writing does—to locate that institution within Brazil’s larger social and historical context. I should stress here that Professor McAllister does a superb job of locating the *Ministério Público* within the Brazilian *legal* context. What her book lacks, in my reading of the text, however, is how that legal context exists in and derives from larger social and historical realities. Professor McAllister replies that “[r]egrettably, Professor Crawford ignores or minimizes the central empirical and theoretical claims of the book, perhaps wishing my research had focused on environmental justice or social movements in Brazil rather than environmental enforcement and compliance.”⁶ Law and the institutions that enforce it do not exist in a vacuum, and Professor McAllister’s reaction underscores the very core of our disagreement. As I suggested in my review, enforcement and compliance cannot deeply be understood without examining social and historical context such as environmental justice or other social movements. In my view, a piece of social-science scholarship like *Making Law Matter* should not examine one without also considering the other.

As Professor McAllister explains at the outset, *Making Law Matter* is “about Brazilian prosecutors who act a lot like public interest

5. See McAllister, *supra* note 1, at 650, 674-76.

6. McAllister, *supra* note 1, at 654.

environmental lawyers in other countries”⁷—a central part of her thesis that I quote in my review.⁸ Despite the high personal esteem that I have for the work of the *Ministério Público*, it is this claim—fundamental to the argument developed in *Making Law Matter*—with which I disagree, precisely because it largely ignores the Brazilian context. In the process of clarifying the nature of this disagreement, this brief response will also address three particular and, in my view, erroneous characterizations made by Professor McAllister of the positions I take in my review of *Making Law Matter*.

First, Professor McAllister asserts that I err when I comment on her “assertion that prosecutorial collaboration with agency enforcement officials strengthens environmental enforcement in Brazil.”⁹ I wrote that “[t]he claim is unsurprising and virtually self-evident, a logical and predictable recipe for strong administrative and legal enforcement in any context.”¹⁰ “In this statement,” concludes Professor McAllister, I reveal “a lack of attention to the most well-developed social science literature concerning environmental regulation, the literature on legalism. While it may seem self-evident to Professor Crawford that the involvement of a strong legal actor improves environmental enforcement, much of the literature in this area cuts in the other direction and espouses the view that legal institutions are often problematic actors in environmental implementation and enforcement.”¹¹ Simply put, Professor McAllister misreads me. Of course legal institutions can impede rather than foster effective implementation and enforcement. Yet as her quoted language reveals, I referred to her own discussion of the advantages of institutional *collaboration*. Thus, her suggestion that I ignore the critical scholarship of, for example, the pervasive and not always effective “adverse legalism” in the United States is wide of the mark. I was talking about apples and she replied with commentary about oranges. Professor McAllister goes on to explain that “[i]n Brazil, regulatory agencies have not embraced a legalistic approach, but the involvement of prosecutorial institutions in environmental enforcement contributes a degree of legalism—defined as control by formal legal rules and procedures—to the enforcement process.”¹² This is an interesting and valuable observation.

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

8. Crawford, *supra* note 2, at 629.

9. McAllister, *supra* note 1, at 654.

10. Crawford, *supra* note 2, at 629.

11. McAllister, *supra* note 1, at 654.

12. *Id.* at 655.

Once again, however, rather than merely describing this relationship, as she does in *Making Law Matter*, what in my view would have made her text even richer would have been a critical assessment of why exactly this model, one that is neither highly adverse nor excessively legalistic, was adopted in Brazil.

Second, as I indicated at the outset of this reply, I agree that Professor McAllister's admiration for the *Ministério Público* and its new role in Brazilian law and society is well founded. Yet I was critical of what I viewed as her lack of critical distance from her subjects. In reply, she notes that she looked at both successful and less successful prosecutors.¹³ This is absolutely true, but again fails to confront my central challenge to her, which was to ask not whether the institution itself performed successfully overall, on its own terms, but why it performs in exactly the way it did and does within Brazil's rich and complicated social, economic, and political history.

Third, Professor McAllister characterizes my review as revealing "an acute interest in the social and economic background of prosecutors."¹⁴ She correctly perceives that, like the legal realists before me and many critical legal scholars since, I view such information as essential—particularly in a piece of social-science research about law and legal institutions like *Making Law Matter*. She further asserts that I imply that she "should have explored the class and gender biases of prosecutors."¹⁵ Although this is a rather reductive characterization of my criticism of her methodology,¹⁶ it is a fair characterization of my basic position. And, once more, it points to our central disagreement. In my view, one cannot write an entirely effective social-science analysis on a new and potentially powerful legal institution without considering the influence of personal background, experience, and resulting bias. This is especially true in a country with a long and divisive history of social and economic inequality as profound as Brazil's.

In *Making Law Matter*, Professor McAllister virtually ignored the fact of inequality in Brazilian life. While I believe, based on my own observations and discussions with members of the procuracy, that she is probably correct about the striking growth in gender balance (these positions, are obtained, after all, through initially

13. *Id.* at 667.

14. *Id.* at 676.

15. *Id.*

16. The language at issue appears in Crawford, *supra* note 2, at 635 nn.88-90 and accompanying text.

identity-blind public examinations), I am suspicious of her (much weaker) speculative claims about increased class and racial balance. The fact that she ignored these imbalances in her book, moreover, points to a serious flaw in both methodology and analysis. For example, in my daily reading of Brazilian newspapers and periodicals, and in discussions with community activists in slums and other poor areas, a criticism I hear more and more is a suspicion of the use of environmental enforcement actions by the *Ministério Público* and other legal enforcement institutions to advance the interests of the nation's moneyed elite. This is a serious (and common) claim.¹⁷ Yet perceptions like this one go unremarked in *Making Law Matter*. Professor McAllister virtually ignored the central observation of so much social-science writing about Brazil concerning the nation's egregious social and economic inequality, and, as a result, her book is neither as nuanced nor as powerful a contribution as, in my view, it might otherwise have been. My criticisms, therefore, were meant to note my astonishment that one could write about Brazil and ignore such central facts of Brazilian life, which, in the context of a book about environmental enforcement, does indeed invoke concerns of environmental justice that, again, should not so easily be deracinated from the institutional analysis Professor McAllister undertook.¹⁸

In sum, although there is much to admire in *Making Law Matter*, it sadly falls short of what it might have been, namely a text that not only describes the trajectory and innovation of Brazil's *Ministério Público* (this the text does) while also critically asking why the institution took and is taking the particular shape that it does (which the text does not). Professor McAllister seems to think that I failed to appreciate the questions she undertook to answer. On the contrary, as this response suggests, I would offer that I understood

17. See, e.g., Rodrigo de Almeida, *Dois tempos e uma estigmatização*, JORNAL DO BRASIL, May 18, 2008, at A2 (“[O governador Sergio Cabral] [s]ubstituiu-se o argumento da segurança pública (dos bacanas da Zona Sul) pela justificativa ambiental. Antes se propunha o muro como proteção contra bandidos; agora contra o crescimento das favelas e o desmatamento. Demofobia, não. Preservação ambiental, sim.”). The author writes, ironically and critically, of the efforts of Rio de Janeiro state governor Sergio Cabral to construct “eco-walls” around some of the city's most crime-ridden *favelas*, suggesting that the justifications have changed to suit the ruling classes. Thus, in the quoted language he says that “[Governor Cabral] substituted the public security argument (of the splendid elite of the South Zone [the region of Rio where most of the well-to-do live]) with environmental protection. Before the wall was proposed as protection against thieves; now against the growth of *favelas* and deforestation. Fear of the people, now. Environmental protection, yes.”

18. For the full text of Professor McAllister's opinion, see McAllister, *supra* note 1, at 675-76 nn.115-16 and accompanying text.

them all too well and found her analysis of them lacking, a point I endeavored to demonstrate in my review. However much one can admire the work of an institution like the *Ministério Público*, a social-science analysis of its work and institutional relations simply falls short without appreciating the larger social reality and historical context in which that institution exists.