

**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***

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In her valuable new book, *Making Law Matter: Environmental Protection and Legal Institutions in Brazil*, Professor Lesley McAllister argues that in Brazil the “involvement of legal institutions is a route toward enhancing the effectiveness of environmental law.”<sup>1</sup> The picture Professor McAllister draws in *Making Law Matter*, based upon her doctoral thesis for the Energy and Resources Group at the University of California, Berkeley, is one that, she says, “tells an atypical story about environmental law in a developing country,” atypical in that it was prosecutors and the courts who “helped develop a robust, effective environmental regulatory system in Brazil.”<sup>2</sup> As such, Professor McAllister maintains, “Brazil stands as a model of how developing countries can empower their legal institutions to act in ways that make environmental law matter.”<sup>3</sup>

At the outset, it is essential to note what an important service *Making Law Matters* performs, not only for legal writing in English about Brazil, but more generally for legal writing in English about countries in development. Specifically, Professor McAllister’s focus is on the dynamics of legal institutions and the process that leads to their creation. This is terrifically important work for a country like Brazil, with a democracy that, in 2009, is just a quarter-century old. Despite the strength of its laws, enforcement remains a problem in Brazil (a point covered more extensively below). Thus, a focus on

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

2. *Id.* at 2.

3. *Id.*

institutional operation—the nitty-gritty, day-to-day work of legal actors and institutions—helps fill a huge void in our understanding about how law can come to serve an important role in new democracies and developing societies. Professor McAllister's choice to do this cannot be celebrated enough.

Before scrutinizing Professor McAllister's claims about her “atypical story,” it is necessary, first, to describe the institutional focus of Professor McAllister's attention, namely the *Ministério Público*. Although the *Ministério Público*, which literally translates as “Public Ministry,” is usually described to English speakers as the equivalent of the Office of the Attorney General, its powers and potential are in fact much greater than that of its nearest U.S. equivalent.<sup>4</sup> Based upon European models and in particular the French *Ministère Public*, the *Ministério Público* has its roots in the medieval French legal system.<sup>5</sup> The institution passed to Portugal and subsequently to its Brazilian colony in the fifteenth and seventeenth centuries, respectively.<sup>6</sup> Although historically responsible to exercise “the state's monopoly on accusing and prosecuting criminals,” such prosecutorial entities “have also historically held the power to intervene in and, in some cases, initiate civil litigation that involves the interests of the general public.”<sup>7</sup>

Professor McAllister describes how this expanded version of the *Ministério Público* took root in Brazil, emboldened in particular by the constitutional reforms of the mid-1980s, such that, today, the *Ministério Público* is commonly recognized to constitute a “fourth branch” of government.<sup>8</sup> Its lawyers are paid by the government and, formally, are members of the Justice Department (*Ministério da Justiça*), yet they make their living holding the very same government accountable—that is, they make a habit of suing the very branch of government that employs them to enforce the rule of

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4. Professor McAllister herself suggests that it would better be translated “public prosecution service” or “procuracy.” *Id.* at 26 (citing Stefan Voigt, *Power over Prosecutors Corrupts Politicians: Cross Country Evidence Using a New Indicator*, Law and Economics Workshop, University of California Berkeley, Paper 6, at 4 (Sept. 25, 2006), available at [http://repositories.cdlib.org/berkeley\\_law\\_econ/Fall2006/6/](http://repositories.cdlib.org/berkeley_law_econ/Fall2006/6/)). “Procuracy,” a rather odd English-language usage, is used by Professor McAllister to refer to prosecutors' offices generally.

5. See McALLISTER, *supra* note 1, at 59.

6. *Id.* A useful, if abbreviated, description of the role of the *Ministério Público* and how it differs from that of U.S. prosecutors and other litigants in class actions can be found in Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 366-70 (2003).

7. McALLISTER, *supra* note 1, at 59.

8. *Id.* at 65.

law. Try to imagine, by contrast, an arm of the U.S. Department of Justice suing the U.S. president and the administrator of the U.S. Environmental Protection Agency for failing to enforce the environmental laws, and one begins to appreciate the potential scope of the Ministério Público's authority. For most of us, the scenario is unimaginable in the United States, and it emphasizes the considerable power the Ministério Público can wield.

As Professor McAllister notes, the Ministério Público typically attracts Brazil's best and the brightest, top-ranking graduates of its best law faculties. These people are accomplished, bright, and ambitious, products of the brutally competitive Brazilian university entrance examination—the *vestibular*—and, later, the equally challenging public employment examination system.<sup>9</sup> As recent Brazilian news reports have emphasized, public employment evermore constitutes the most attractive employment option for young Brazilians because it is highly paid and, after an initial probationary period, exceptionally secure.<sup>10</sup> For this reason, Professor McAllister's assessment about the quality of the lawyers in the Ministério Público seems likely to continue to hold true for some time. Thus, Professor McAllister's focus on the role of the Ministério Público in Brazilian law and in environmental law enforcement is timely.

As Professor McAllister explains, with the end of dictatorial rule in many Latin American countries during the last two decades, “almost all Latin American procuracias have undergone reforms as their criminal justice systems have adopted features of the accusatory (or adversary) model.”<sup>11</sup> In addition to gaining power in criminal prosecutions, “[i]n Brazil, prosecutors also became extremely active in civil litigation involving public interests such as consumer defense, children's rights, disability rights, and worker health and safety as well as environmental protection.”<sup>12</sup> This development reflects, she asserts, the “judicialization of politics” in Latin

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9. See, e.g., Camila Antunes, *Do zero ao topo do ranking*, VEJA, July 11, 2007, available at [http://veja.abril.com.br/110707/p\\_106.shtml](http://veja.abril.com.br/110707/p_106.shtml) (describing successful struggles of five candidates for university entrance and their good fortune once achieved); cf. Abdias do Nascimento & Elisa Larkin Nascimento, *Dance of Deception: A Reading of Race Relations in Brazil*, in *BEYOND RACISM: RACE AND INEQUALITY IN BRAZIL, SOUTH AFRICA, AND THE UNITED STATES* 105, 115-17 (Charles V. Hamilton et al. eds., 2001) (discussing the inequalities of the Brazilian educational system).

10. See, e.g., Gabriela Carelli, *Cinco milhões querem o governo como patrão*, VEJA, June 20, 2007, available at [http://veja.abril.com.br/200607/p\\_088.shtml](http://veja.abril.com.br/200607/p_088.shtml) (reporting that “Five million [young people] want the government as [their] employer,” and discussing the competitiveness in seeking government positions).

11. McALLISTER, *supra* note 1, at 7.

12. *Id.*

America, meaning “the ‘increased presence of judicial processes and court rulings in political and social life, and the increasing resolution of political, social or state-society conflicts in the courts.’”<sup>13</sup> This arguably represents increased cultural approval for the rule of law.<sup>14</sup>

This is not, by any means, a predictable result following the end of military rule, the writing of a new constitution, and the ushering in of a democratic form of government. It is common knowledge that in Brazilian life the *jeito*—literally “the way”—and not law or regulation, is how to get things done. *Jeito* in this sense refers to a cultural tendency to rely upon personal connections and skill at manipulating social and economic circumstances to one’s advantage.<sup>15</sup> As Professor McAllister notes, following earlier judgments of the comparative law scholar Keith Rosenn, “the *jeito* . . . includes not only conventional corruption but also situations in which a public servant deviates from the law because it is unrealistic or unjust,” adding that this “has been the norm rather than the exception in many areas of law.”<sup>16</sup> Indeed, so deeply entrenched is the power of *jeito* that, as Professor McAllister observes, “[a] 1996 survey of law students in the Brazilian state of Rio de Janeiro revealed that only 6 percent believed that conflicts in Brazil were principally resolved through the law and legal institutions; 94 percent considered the *jeito* or the ‘law of the strongest’ to be predominant.”<sup>17</sup> Thus, it is no small achievement, in Professor McAllister’s conception, to “make *law* matter” (emphasis added) for environmental protection in Brazil. Brazil is a country where, despite an abun-

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13. *Id.* at 8 (quoting THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 3 (Rachel Sieder, Line Schjolden & Alan Angell eds., 2005)).

14. See generally McALLISTER, *supra* note 1, at 10-13. Professor McAllister is careful to note that the existence of the Ministério Público alone will not establish the rule of law in Brazil, although she maintains that “[t]he work of prosecutors stands as an important symbol conveying the idea that the ruled and the rulers obey the same rules.” *Id.* at 183.

15. *Id.* at 12 (stating that the *jeito* allows those with political and social connections ways to get around the law); see also JOSEPH A. PAGE, THE BRAZILLIANS 10 (1995) (“The *jeitinho* [literally, “little *jeito*”] personalizes a situation ostensibly governed by an impersonal norm.”).

16. McALLISTER, *supra* note 1, at 12 (citing Keith S. Rosenn, *The Jeito: Brazil’s Institutional Bypass of the Formal Legal System and its Developmental Implications*, 19 AM. J. COMP. L. 514, 515-16 (1971)).

17. *Id.* at 12-13 (citing Eliane Botelho Junqueira, *Brazil: The Road of Conflict Bound for Total Justice*, in LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE 64, 93-95 (L. M. Friedman & R. Pérez-Perdomo eds., 2003)).

dance of thoughtful and well-constructed laws,<sup>18</sup> cultural norms and social practice often preclude observance of legal norms.

In Professor McAllister's understanding of recent Brazilian legal history, the Ministério Público has played a central—if not *the* central—role. Specifically, as she tells it, “Brazilian public prosecutors became significant actors in the enforcement of environmental laws and regulations in the 1980s.”<sup>19</sup> This was important, in Professor McAllister's telling, because of the comparative weakness of Brazilian environmental-enforcement agencies: “Environmental agencies tend to be weak both in terms of their resources and their power to coerce compliance.”<sup>20</sup> As in the United States, Brazil has federal and state environmental regulators. Thus, for example, during the 1980s and 1990s, the National Council on the Environment (CONAMA) was active in advancing an environmental agenda, with its resolutions gaining “increasing authority” and “attaining the force of law and substituting to some extent for legislative activity in the environmental area.”<sup>21</sup> By contrast, at the state level, again as in the United States, the resources for environmental enforcement at the agency level vary greatly.<sup>22</sup> By 1987, for example, fully 81 percent of all public expenditure on state environmental agencies in Brazil occurred in two southeastern states, namely Rio de Janeiro and São Paulo.<sup>23</sup>

During the 1990s, however, “the political winds shifted,” and amidst a larger national political and economic crisis, “[e]nvironmental agencies experienced significant resource shortages as the Brazilian government cut budgets and froze hiring in line with a series of fiscal reform measures.”<sup>24</sup> It should come as no surprise, therefore, that an audit of the federal environmental-enforcement agency (IBAMA) “in the late 1990s found significant

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18. This is a position with which Professor McAllister agrees, asserting that “Brazil's laws were [sic] among the most rigorous and complete in the world, but they lacked compliance.” *Id.* at 4 (citing Paulo C. Vaz Guimarães, Silvia F. MacDowell & Jacques Demajorovic, *Fiscalização em meio ambiente no estado de São Paulo*, in *Cadernos Fundap: Revista Da Fundação Do Desenvolvimento Administrativo* 20, 35-46 (1996)). *See also id.* at 20 (noting the abundance of detailed environmental protections enacted into Brazilian law).

19. *Id.* at 4.

20. *Id.* at 20.

21. *Id.* at 23 (citing Ivan Carlos Maglio, *A descentralização da gestão ambiental no Brasil: O papel dos órgãos estaduais e as relações com o poder local* (2000) (Master's thesis, Universidade de São Paulo)).

22. *See id.* at 25, 29-31.

23. *Id.* at 28 (reporting that of that 81 percent total figure, 75 percent was in the state of São Paulo alone).

24. *Id.* at 32.

weaknesses in the issuance and collection of administrative penalties,” with multiple errors in the issuance of those citations, not to mention numerous other substantive and procedural weaknesses in environmental administration.<sup>25</sup> At both the federal and the state levels, environmental agencies suffered not only funding but also significant staff cuts, and by the late 1990s, stories of widespread corruption in IBAMA were rife, a situation fostered by the “‘politics of state absence.’”<sup>26</sup>

Professor McAllister provides a great service by chronicling these developments in great detail,<sup>27</sup> drawing upon personal analysis of administrative-sanction data and secondary sources. All of these propel her to evaluate that

[a]s a general rule, Brazilian environmental agencies tend to be among the least powerful agencies in the government. They have difficulty defending policies and administrative actions that run contrary to the priorities of political leaders and other governmental agencies.<sup>28</sup>

Professor McAllister concludes, therefore, that “Brazilian environmental agencies, while varying widely in their capacities, have not lived up to the promise of Brazilian environmental law. . . . The result is a profound disconnect between environmental law ‘on the books’ and environmental law as it operates in practice.”<sup>29</sup>

Into this breach, in Professor McAllister’s telling of the story, stepped the white knight of the Ministério Público.

The rise of the Ministério Público in the 1980s must be understood, as Professor McAllister makes clear, in light of two phenomena. First, the Ministério Público gained justification and power in an exciting period of political and legal reform, the end of a 20-year period of military rule, and the drafting of a new and expansive “citizen’s” constitution in 1988.<sup>30</sup> Second, the budget and fis-

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25. *Id.* at 36.

26. *Id.* at 40 (quoting KATHRYN HOCHSTETLER & MARGARET E. KECK, GREENING BRAZIL: ENVIRONMENTAL ACTIVISM IN STATE AND SOCIETY 182 (2007)).

27. *See id.* at 39-56.

28. *Id.* at 41.

29. *Id.* at 55-56.

30. Although the formal name of the constitution is the “Constituição da República Federativa do Brasil de 1988,” it is commonly called the “Citizen’s Constitution” by constitutional law scholars. *See, e.g.*, LUÍS ROBERTO BARROSO, DOZE ANOS DA CONSTITUIÇÃO BRASILEIRA DE 1988 (UMA BREVE E ACIDENTADA HISTÓRIA DE SUCESSO) 15, available at [http://www.cepc.es/rap/Publicaciones/Revistas/8/AIB\\_004\\_011.pdf](http://www.cepc.es/rap/Publicaciones/Revistas/8/AIB_004_011.pdf) (last visited Jan. 23, 2009). The constitution and amendments appear in full, in Portuguese and English, in the Political Database of the Americas maintained by Georgetown University. *See* Brazil: Constitutions, <http://pdba.georgetown.edu/Constitutions/Brazil/brazil.html> (last visited July 31, 2009).

cal crises of the 1990s opened the way for a different institutional voice and role.

With meticulous care, Professor McAllister chronicles the role of smart, idealistic young lawyers in the redefinition of the Ministério Público. This is perhaps the most useful portion of the book because of its record of how legal institutions are made in a country without a strong tradition of democratic lawmaking. As she explains, with the input of young lawyers and law professors, the 1988 Constitution came to contain an article specifically devoted to environmental protection, including, for instance, the constitutional requirement for environmental-impact statements, commitments to biodiversity protection, and pollution controls.<sup>31</sup> In addition, restructuring and institution building of the Ministério Público in the 1980s set the stage for a newly empowered “procuracy,”<sup>32</sup> one that would go well beyond its traditional role of criminal prosecution, to “defending public interests through civil litigation” as an “equally important part of its work.”<sup>33</sup> Just as the class action represented a key development in U.S. law for the defense of group rights such as civil, consumer, and environmental rights,<sup>34</sup> so too in Brazil the increased potential for civil litigation initiated by the Ministério Público was made possible by the introduction and gradual acceptance of the notion of “diffuse and collective interests.”<sup>35</sup>

The term “diffuse and collective interests” is essential to understanding the expanded role in Brazil of the Ministério Público. Professor McAllister oddly relegates this important notion to a footnote, although she usefully explains there that the term “is preferred to [public interest],” as that term is used in the United States, because

[t]raditionally, “public interest” has been used in Brazil to refer to interests of the state or government. “Diffuse interests,” in contrast, are those of society as a whole, defined in Brazilian law as interests that are transindividual, indivisible by nature, and

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31. Constituição Federal [C.F.] [Constitution] art. 225 (Braz.). For a detailed description of the role of the young reformers, see McALLISTER, *supra* note 1, at 73-74.

32. See *supra* note 4 and accompanying text (discussing use of the term “procuracy”).

33. McALLISTER, *supra* note 1, at 57.

34. See Gidi, *supra* note 6, at 323-24 & n.21 (comparing and contrasting the class action device in the United States and in Brazil).

35. The phrase was added to the Public Civil Action Law—*Lei de Ação Civil Pública*—in 1985, following the appearance of variants of the phrase throughout the early 1980s. McALLISTER, *supra* note 1, at 61-62.

held by an indeterminate number of people linked by a factual situation.<sup>36</sup>

Thus, as she indicates, forest conservation is a “diffuse interest.” “[Collective interests] are transindividual, indivisible interests held by a determinable number of people of a particular group, class, or category who are united through a basic legal relationship. An example would be the protection of the lands of a certain indigenous group.”<sup>37</sup> That such interests could have a voice represented a remarkable legal innovation in Brazil, and in civil law systems generally, since doctrinally, “[t]o allow courts to protect group rights, civil law systems must abandon the orthodox and individualistic principles of civil procedure, which traditionally have demanded the existence of a personal and direct interest in the outcome of the litigation and thus have not allowed such absentee representation.”<sup>38</sup>

In Professor McAllister’s estimation, the 1981 National Environmental Policy Act—a procedural environmental-review statute in broad terms comparable to the U.S. statute of the same name<sup>39</sup>—was of central importance because it “was the first law to authorize the Ministério Público to act on behalf of a diffuse interest.”<sup>40</sup> Subsequently, this authority made its way into the 1988 Constitution, along with the power to protect consumer interests and cultural patrimony,<sup>41</sup> changes secured in considerable measure by the efforts of the young reformers Professor McAllister admires. As a result, she avers, “[i]n what has been referred to as the greatest institutional novelty of the 1988 Constitution, the Ministério Público was largely successful in getting the profile it sought,”<sup>42</sup> a profile that would allow it to “play a primary role in the defense of societal interests and . . . [maintain] a high level of independence at both the institutional and individual levels.”<sup>43</sup> What emerged from this period of redemocratization and Ministério Público institution building was, according to Professor McAllister, an institu-

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36. *Id.* at 210 n.1.

37. *Id.* at 58, 210 n.1.

38. Gidi, *supra* note 6, at 363.

39. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (2006).

40. McALLISTER, *supra* note 1, at 67.

41. *Id.* at 70-71.

42. *Id.* at 71 (citing Fábio Kerche, *O Ministério Público e a constituinte de 1987/88*, in *O SISTEMA DE JUSTIÇA 61* (M.T. Sadek ed., 1999)).

43. *Id.* at 74 (referencing HUGO NIGRO MAZZILLI, *O MINISTÉRIO PÚBLICO NA CONSTITUIÇÃO DE 1988* 20 (1989)).

tion that “aligned itself with societal interests and proclaimed itself a representative of environmental and other social interests.”<sup>44</sup>

From this point forward in her narrative, Professor McAllister frequently uses this “environmental and other” formulation, although she focuses, with rare exceptions, only on the environmental activities of the procuracy.<sup>45</sup> Furthermore, the quoted phrase reveals a weakness in Professor McAllister’s method that should concern any critical student of Brazil specifically and Latin America more generally. Specifically, she is prone to such sweeping assertions like the claim that the Ministério Público “aligned itself with societal interests.”<sup>46</sup> But one must ask, *what* societal interests specifically? Brazil, the country with both the largest contiguous physical territory and the second-largest population in the Americas is, like the United States, a country with notable racial and ethnic diversity and cultural heterogeneity.<sup>47</sup> Moreover, Brazil is one of the most economically unequal countries in the world; the richest 10 percent of its population hold nearly 50 percent of the wealth, for example, while the poorest 20 percent hold 2.5 percent.<sup>48</sup> In fact, by many estimates using the standard Gini-coefficient comparison to measure income distribution, Brazil is one of the most unequal countries in the world.<sup>49</sup> In short, Brazil can thus be characterized as a rich country governed by a wealthy, talented, and well-educated elite, with millions upon millions living in misery. Consequently, it is problematic to speak of “societal interests” as if they are monolithic. To be sure, today most people in any country would define themselves as “environmentalists” to the extent that everyone wants to drink clean water and breathe unpolluted air. But the suggestion that the Ministério Público thus stood to represent the “societal interests” of hundreds of millions of people in a country where those interests are inherently contradictory,

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44. *Id.* at 75.

45. *See, e.g., id.* at 83 (asserting that the Ministério Público “gained authority to legally defend the ‘diffuse and collective’ interests of society—environmental and other so-called public interests”).

46. *Id.* at 75.

47. *See generally* CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2008), <https://www.cia.gov/library/publications/the-world-factbook/geos/br.html> (providing various facts on Brazil). Estimates comparing the United States and Brazil, of course, include Alaska and Hawaii in their estimations of national territory.

48. U.K. DEP’T FOR INT’L DEV., THE DEVELOPMENT CHALLENGE FOR BRAZIL 1, *available at* <http://www.dfid.gov.uk/pubs/files/brazildevchallenge.pdf> (quoting these and related comparative statistics) (last visited Jan. 23, 2009).

49. *See, e.g., id.*

especially because of the country's appalling income divide, simply overreaches.

This criticism relates, furthermore, to a central feature of the volume's methodology. Specifically, Professor McAllister organizes her analysis—and designed her fieldwork—to examine the work of the Ministério Público in two very different states, namely São Paulo and Pará states. Professor McAllister's fieldwork focusing on these states involved a total of approximately eight months, during the period from October 2001 through mid-May 2002.<sup>50</sup> She spent the majority of this time in São Paulo, the country's wealthiest and largest city, and only two months in the poor, parched, much-less-developed northeastern state of Pará.<sup>51</sup> In other words, she designed her project to examine two extremes—from Brazil's most privileged, most prosperous urban center to one of its longest-suffering and poorest provinces. Conceptually, the contrast is provocative and potentially revealing, because the places are different in so many ways: demographics, geography, and degree of development, to cite just three.<sup>52</sup> As might be expected, Professor McAllister discovered wide differences in the enforcement capacity and zeal of prosecutors in the different places.<sup>53</sup> This is not a startling conclusion, but it is useful that Professor McAllister has documented it. These differences confirm, furthermore, the need to work on institution building in Brazil's poorer states, which are also often places plagued by centuries of patronage politics and hegemonic economic control by powerful but numerically small elites.<sup>54</sup>

At the same time, as useful and stark as this comparison is, it hardly merits sweeping generalizations about the Ministério Púb-

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50. McALLISTER, *supra* note 1, at xiii-xv (the field work with the Ministério Público offices did not take up the entire period, presumably because of the Christmas, New Year's, and Carnival holidays).

51. *Id.*

52. Some of the differences are detailed. *Id.* at 8-10. On the stark and persistent regional divides and inequalities that characterize Brazil, see generally, for example, Timothy J. Power & J. Timmons Roberts, *A New Brazil? The Changing Sociodemographic Context of Brazilian Democracy*, in *DEMOCRATIC BRAZIL: ACTORS, INSTITUTIONS, AND PROCESSES* 236 (Peter R. Kingstone & Timothy J. Power eds., 2000).

53. See McALLISTER, *supra* note 1, 20-56 (comparing records of agencies at federal and state levels, especially as between the states of São Paulo and Pará).

54. By "patronage politics" I refer to a political system in which rewards are distributed by powerful local political bosses. See, e.g., David Maybury-Lewis, *The Persistent Patronage System*, in *BRAZILIAN MOSAIC: PORTRAITS OF A DIVERSE PEOPLE AND CULTURE* 153, 154-55 (G. Harvey Summ ed., 1995).

lico across a vast and diverse nation.<sup>55</sup> Brazil is marked by huge income differentials, and they are nowhere more marked than between the elites of São Paulo and the poor of the northern and northeastern states like Pará. But there is also a huge middle. It would have been interesting, for example, to know whether the relatively more prosperous, economically homogeneous states in the south, like Paraná and Santa Catarina, fit into Professor McAllister's broad generalizations. Professor McAllister reports that indeed she canvassed several other states, including the southern states of Paraná and Rio Grande do Sul, in 1999 and 2000.<sup>56</sup> It is a pity that these excursions—and the reasons they were not chosen—did not ultimately form part of her story, as they would have only further deepened the intricate, layered story she tells. The idea, presumably, was that by looking at the extremes one would understand the range of experience. But the conditions of the middle cannot be inferred from the conditions of the extremes. The limited scope of Professor McAllister's field work might have simply dictated a more modest, more focused thesis. In addition, because Professor McAllister's field work was so heavily weighted in São Paulo (six months), it strains confidence to countenance without reservation the bold comparisons she makes. To be sure, the examples and the contrast between the states Professor McAllister studied provide useful information on which to base informed speculations. But to use these examples as typical of larger changes throughout a society as large, varied, and complicated as Brazil's, as when Professor McAllister concludes that the Ministério Público "became the environmental lawyer and negotiator of society,"<sup>57</sup> is surely to go too far. Perhaps, "the environmental lawyer of *some* interests in a large and complex society" would be accurate. As it happens, while preparing this review, a 30-year-old environmental nonprofit in the city of São Carlos, in São Paulo state, claimed "one more judicial victory in the environmental defense of the quality of life in the region."<sup>58</sup> The victory involved the success-

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55. She states, for example: "In sum, part of what makes the Ministério Público capable of being a strong actor in environmental protection is the institutional capacity of the environmental agencies in its jurisdiction." McALLISTER, *supra* note 1, at 87.

56. 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, 656 & n.35 (2008).

57. McALLISTER, *supra* note 1, at 154.

58. For the full text of the press release, see Press Release, Associação para Proteção Ambiental de São Carlos (APASC), APASC consegue vitória judicial que anula acordo entre o Ministério Público e fazendeiros (Feb. 17, 2008), *available at* <http://www.noticentro.com.br/Noticias.asp?Acao=Ler&Id=9403&Categoria=4>.

ful challenge to the action of the Ministério Público in the state of São Paulo in an accord made between its representative and owners of rural property—ranchers—in the city of Riberão Preto.<sup>59</sup> “The annulled accord,” a press release stated, “would have permitted the cutting of trees and the suppression of native vegetation without [obtaining] the required and necessary license from an appropriate environmental regulator and registering [the area] as a legal conservation area.”<sup>60</sup> The press release went on to laud the Ministério Público, “without the least shadow of a doubt,” as “great and competent allies in the society in the protection of the essential public interest and the environment.”<sup>61</sup> At the same time, it faulted the Ministério Público for the practice of freely entering into agreements called Terms for the Adjustment of Conduct (*termos de ajustamento de condutas*), or “TACs.”<sup>62</sup> The TACs, according to the nonprofit, are a type of “friendly agreement for the environmental malefactor to adjust its action to the law; however, the Ministério Público cannot compromise the defense of a healthy environment, essential to the quality of life, consenting to situations or practices prejudicial to the primary public interest and/or the environment.”<sup>63</sup> The point here is not to bash the Ministério Público, which, as Professor McAllister and this nonprofit both acknowledge, has achieved important victories. The point, how-

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59. *Id.*

60. *Id.* The untranslated text of the press release, dated February 15, 2008, reads as follows:

APSAC CONSEGUE VITÓRIA JUDICIAL QUE ANULE ACORDO ENTRE O MINISTÉRIO PÚBLICO E FAZENDEIROS—A Associação para Proteção Ambiental de São Carlos (APSAC), organização não governamental que em 2007 completou 30 anos de existência, obteve mais uma vitória judicial na defesa ambiental e da qualidade de vida na região, ao questionar a atuação do Ministério Público do Estado de São Paulo num acordo feito entre o seu representante e os proprietários de um imóvel rural na cidade de Riberão Bonito. A acordo anulado permitia a corte de árvores e a supressão de vegetação nativa sem o obrigatoriedade e necessário licenciamento do órgão ambiental competente e postgerava a averbação da reserva legal.

*Id.*

61. *Id.*

62. *Id.*

63. *Id.*

The untranslated text reads in full as follows:

Acorre que, às vezes, na medida em que a instituição é representado por seres humanos, podem acontecer falhas, inclusive nos casos de acordos ou termos de ajustamento de condutas (TACs). Nesses acordos, há um tipo de composição amigável para que o infrator de legislação ambiental ajuste a sua conduta à lei, porém, não pode o Ministério Público transigir na defesa do ambiente sadio, essencial à qualidade da vida, consentindo com situações ou práticas prejudiciais ao interesse público indisponível e do meio ambiente . . . .

*Id.*

ever, is that this more complicated narrative of a Ministério Público that sometimes serves corporate and other private interests, and is often alienated from the civil society it nominally represents, is almost entirely absent from *Making Law Matter*.

In the experience of this reviewer, at least, the example is not an isolated one. In September 2007, a state prosecutor in Rio de Janeiro discussed with me a case the prosecutor's office was pursuing, challenging continued "invasions" of environmentally sensitive land by the poor.<sup>64</sup> The prosecutor suggested to me that, in fact, the environmental claims, which admittedly had a legal basis, may in fact have been means rather than ends to assert what might be characterized as class privilege.<sup>65</sup> That is, the Ministério Público was listening in the instance to residents of better-heeled areas using environmental laws to keep the poor away from them, rather than to those who, invoking other legal grounds, sought to protect social and economic interests as well.<sup>66</sup> Regrettably, this is not a story that tends to get written about, both because the Ministério Público does perform good pro-environmental work, but also because it is powerful, and people are reluctant to offend its members. Yet, again in the experience of this reviewer, this kind of tension runs deep in the work of the Ministério Público, and anyone working in the environmental area in Brazil hears frequent talk of it. Accordingly, one wishes that, in her interviews and other research, Professor McAllister had been more open to this more complex reality and less disposed to tell the story the Ministério Público tells about itself.

Professor McAllister continues to explain that, given its expanded powers and higher profile as a possible agent of social change and legal reform, the Ministério Público acquired a kind of glamour. In particular, in the country's largest and richest city São Paulo, "[e]ven as hiring and salaries tended to stagnate in the public sector in Brazil in the 1990s, the São Paulo Ministério Público was able to hire more prosecutors and offer very attractive sala-

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64. Interview with Humberto Dalla, Promotor de Justiça no Estado do Rio de Janeiro, in Atlanta, Ga. (Sept. 7, 2007).

65. *Id.*

66. *Id.* This, of course, is a famous characteristic of prominent U.S. environmental laws, which use substantive environmental statutory provisions to promote other, collateral objectives, such as land use and economic regulation. Perhaps the most famous case example is *TVA v. Hill*, 437 U.S. 153 (1978) (using the National Environmental Policy Act and the Endangered Species Act to stop construction of a \$100 million dam project). Professor McAllister critically discusses the notion of TACs. See McALLISTER *supra* note 1, at 190-91.

ries.”<sup>67</sup> Remarkably, “[b]etween 1985 and 2002, the number of state and federal prosecutors in Brazil almost doubled.”<sup>68</sup> Moreover, along with this growth developed a new *esprit de corps* among the prosecutors. Professor McAllister reports that the new “‘ideology of political voluntarism’”<sup>69</sup> among prosecutors was rooted in two “widely held” beliefs.<sup>70</sup> First, she says, prosecutors believe “that civil society is too weak and disorganized to defend its own interests; and second, that the government often violates or offends the public interest.”<sup>71</sup> The environment, moreover, at least in Professor McAllister’s account, was more attractive as an object of protection of “‘diffuse and collective rights’” given these beliefs, and came to supplant “‘traditional areas’” of the work of the Ministério Público like criminal prosecution.<sup>72</sup>

As intimated above, the history of the Ministério Público told by Professor McAllister thus presents the Ministério Público in the 1980s and 1990s as a sort of Brazilian-legal-institution white knight—brash, educated, talented, idealistic young lawyers bent on bringing out the best in their country, a sort of Brazilian equivalent of the Kennedy White House.<sup>73</sup> As she explains at the beginning of her book, it is

about Brazilian prosecutors who function much like public interest environmental lawyers in other countries. They sue polluters and the government to enforce environmental laws. They accuse environmental agencies of shirking their duties because of political pressure. They form alliances with local environmental groups and the media. . . .

. . . As individuals and as an institution, prosecutors receive substantial public attention and acclaim for their environmental work. Headline enforcement cases . . . reinforce the notion that

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67. *Id.* at 76.

68. *Id.*

69. *Id.* at 82 (quoting ROGÉRIO BASTOS ARANTES, *MINISTÉRIO PÚBLICO E POLÍTICA NO BRASIL* 119 (2002)).

70. *Id.*

71. *Id.*

72. *Id.* (quoting ROGÉRIO BASTOS ARANTES, *MINISTÉRIO PÚBLICO E POLÍTICA NO BRASIL* 118-19 (2002)).

73. Not unlike the Ministério Público in Brazil, John F. Kennedy’s administration attracted some of the brightest, best-educated talents of the day, as discussed in several books. *See, e.g.*, ARTHUR SCHLESINGER, JR., *A THOUSAND DAYS* 126-155 (1965) (profiling the Kennedy administration’s selection process for its appointees). But there have been darker, more nuanced accounts as well, examining how, perhaps also like Brazil’s Ministério Público, the Kennedy forces could pursue highly conservative as well as progressive ends. *See, e.g.*, SEYMOUR HERSH, *THE DARK SIDE OF CAMELOT* (1997).

prosecutors are politically independent from the government and that they play a vital role in representing public interests.<sup>74</sup>

Later, she maintains, the noble lads of the Ministério Público “had the salutary effect of changing the climate of impunity that had long prevailed in Brazilian environmental law.”<sup>75</sup> Professor McAllister thus reports, but also seems to endorse, the caricature of Brazilian prosecutors “as being young and idealistic.”<sup>76</sup> These are Good Guys (and they are mostly guys)—Eliot Ness for the Brazilian set.

In its details, admittedly, the story Professor McAllister tells is more nuanced. Not surprisingly given their vastly different levels of development, the results Professor McAllister gathered differed greatly between São Paulo and Pará. Thus, for instance, “[s]tate prosecutors are much more active in environmental enforcement in the state of São Paulo than in the state of Pará. In Pará, the environmental enforcement work of a handful of federal prosecutors [who are often transplants from the wealthy southeastern capital cities] is more expressive than that of a much larger group of state prosecutors.”<sup>77</sup> As Professor McAllister relates, this “difference in prosecutorial enforcement activity is partly explained by the extent to which prosecutorial institutions are able to tap resources from environmental agencies and other environmental institutions in their regions.”<sup>78</sup> Consequently,

part of what makes the Ministério Público capable of being a strong actor in environmental protection is the institutional capacity of the environmental agencies in its jurisdiction. Where the corresponding environmental agencies have the technical resources and political resolve to lend support, prosecutors are able to be more productive and successful in their enforcement work.<sup>79</sup>

The claim is unsurprising and virtually self-evident, a logical and predictable recipe for strong administrative and legal enforcement in any context.<sup>80</sup> Still, as with so many such observations in this book, Professor McAllister's service is to review and document these institutional dynamics. The assertion, however, also contra-

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74. McALLISTER, *supra* note 1, at xi.

75. *Id.* at 85.

76. *Id.* at 83.

77. *Id.* at 86.

78. *Id.*

79. *Id.* at 87.

80. See generally RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 1-36 (3d ed. 1999) (discussing theories of legitimation for administrative action).

dicts her earlier claims that the Ministério Público stepped into the breach of weak agency enforcement.<sup>81</sup> She seems to conclude that, in fact, the Ministério Público succeeded most where it worked hand-in-glove with agencies; yet one of Professor McAllister's central laments is that prosecutorial and regulatory antagonism interferes with effective environmental enforcement.<sup>82</sup> In addition, she explains, "the most critical factor explaining the differences among the activity levels of different prosecutorial institutions in Brazil is the extent of their [executive branch interference]," and also pressure from "powerful economic actors."<sup>83</sup> As Professor McAllister reiterates throughout this book, the Ministério Público's "political independence" from the executive branch constitutes one of the most important values that permitted the institution to achieve successes in environmental prosecution.<sup>84</sup>

Not only is this conclusion central to Professor McAllister's analysis, it is an important affirmation of the need for an institution like the Ministério Público in order to achieve some social changes that might otherwise receive negative official support or even be undercut by political actors.<sup>85</sup> She demonstrates, for example, how prosecutors have often become irritants to regulators, who view them as pushy and intrusive.<sup>86</sup> In this way, Professor McAllister's book helpfully educates English-language students of Brazilian law, and civil law legal institutions more generally, about the possibilities for robust prosecutorial legal enforcement in an economically and industrially less-developed country than the United States.<sup>87</sup> Indeed, Professor McAllister believes that the model of the Brazilian Ministério Público is replicable.<sup>88</sup>

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81. See *supra* notes 19-20 and accompanying text.

82. See McALLISTER, *supra* note 1, at 185-86 (providing one example of such interference).

83. *Id.* at 87.

84. *Id.* at 108-09.

85. The importance of enforcement independence in environmental law has been reinforced by the negative and highly politicized enforcement of the George W. Bush administration's U.S. Environmental Protection Agency. See, e.g., Randall S. Abate, *Automobile Emissions and Climate Change Impacts: Employing Public Nuisance Doctrine as Part of a "Global Warming Solution" in California*, 40 CONN. L. REV. 591, 609-11 (2008) (mentioning executive efforts to circumvent judicial interference in policy); Andrew D. Finkelman, Note, *The Post-Ratification Consensus Agreements of the Parties to the Montreal Protocol: Law or Politics? An Analysis of Natural Resources Defense Council v. EPA*, 93 IOWA L. REV. 667, 706-07 (2008) (describing the use of critical-use exemptions to seek political ends).

86. See McALLISTER, *supra* note 1, at 19, 91, 105, 128 fig.5.1.

87. See *id.* at 193-95.

88. See *id.*

At the same time, the reader cannot help but wish that, in the end, Professor McAllister had herself been more independent from her subjects. A central worry of administrative law is the principle of capture. Capture describes the situation in which the regulated and the regulator become overly friendly or familiar, such that the regulator is “captured” by the views of the regulated.<sup>89</sup> Although administrative law struggles to avoid the possibility of capture by advocating the construction of various firewalls and other barriers that insulate regulator from the regulated,<sup>90</sup> capture does not necessarily imply fraud or corruption, but, at a minimum, it does imply over familiarity that leads to partiality. Reading Professor McAllister’s book brought to mind the legal literature on capture because, similarly, she accepts with little criticism the Ministério Público self-characterization of the institution as an aggressive defender of social interests. As argued above, of course, the victories of the Ministério Público in improving environmental quality, as for example in reducing the notorious industrial pollution in a city like Cubatão, in São Paulo state, deserve to be celebrated.<sup>91</sup> Equally unquestionable is the importance in a relatively new democracy of a legal institution that can hold governmental officials and politicians to account for their misdeeds or omissions.<sup>92</sup>

Yet ultimately this feels like a rather two-dimensional account; Professor McAllister’s book tells the story of the Ministério Público that the Ministério Público tells of itself to the legal visitor to Brazil—this reviewer included. One yearns for Professor McAllister to have engaged more critically with her subjects. For instance, she reports criticism of the governor of the state of Pará, in particular noting his implication “that federal prosecutors had political motives in opposing the state’s development of canals, dams, and highways.”<sup>93</sup> Professor McAllister could have moved beyond simply relaying the governor’s concern and sympathetically (to the prosecutors) concluding that the prosecutors in Pará faced “political

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89. See, e.g., Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 459-65 (1999) (discussing the risk of agency capture by the regulated community).

90. See, e.g., PIERCE, JR., SHAPIRO & VERKUIL, *supra* note 80, at 454-99 (surveying devices for ensuring regulatory impartiality in the U.S. context).

91. See McALLISTER, *supra* note 1, at 114 (discussing the Cubatão incident).

92. This is a point emphasized by McAllister. See, e.g., *id.* at 148 (“The horizontal accountability provided by the Ministério Público makes the environmental agency better able to assert its jurisdiction over the environmental aspects of the project.”).

93. *Id.* at 110.

barriers.”<sup>94</sup> She could have instead inquired into the truth of the governor’s claim. Were the prosecutors in fact motivated politically? If so, what exactly were their political motivations? Similarly, when reporting on the frustration of regulators who complain that they spend a fifth or more of their time simply responding to Ministério Público information requests,<sup>95</sup> Professor McAllister might have pressed further to consider whether in fact the Ministério Público is but another impediment to effective and efficient government in the massive and often maddening Brazilian bureaucracy. The same is true of the startling statistic that “[o]nly 37.2 percent of judges give a positive rating to the ‘expansion of the powers of the Ministério Público’ in the 1988 Constitution.”<sup>96</sup> Now, this may be because the much-criticized Brazilian judiciary, perceived as overly independent<sup>97</sup> and/or corrupt,<sup>98</sup> dislikes the Ministério Público because it knows that the prosecutors may hold them accountable. But this statistic could also reveal a perception, and perhaps a reality, that the Ministério Público interferes with the smooth functioning of the Brazilian legal system. It would have been nice to have such possibilities explored. Such assertions demand to be scrutinized and unpacked.

This larger failure to question the motives and motivations of the Ministério Público may be identified throughout the book. On the one hand, Professor McAllister’s book performs an essential and important task, describing the work of the Ministério Público as an environmental-enforcement institution in the crucial generation after the last dictatorship. On the other hand, the book fails to address two central questions prompted by this activity, namely, why environmental enforcement? and why by well-paid government lawyers? That is, Professor McAllister asserts that prosecutors in the Ministério Público “function much like public interest environmental lawyers in other countries.”<sup>99</sup> In the rare instances when Professor McAllister provides examples of this claim, they

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94. *Id.*

95. *Id.* at 128.

96. *Id.* at 170.

97. *Id.* at 169 (“While the question in most Latin American countries is whether the judiciary is sufficiently independent, the debate in Brazil has focused on whether the judiciary has become overly independent.” (citing Carlos Santiso, *Economic Reform and Judicial Governance in Brazil: Balancing Independence with Accountability*, 10 *DEMOCRATIZATION* 161, 163 (2003))).

98. TRANSPARENCY INT’L, *GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS* 142-43 (2007) (discussing some trends, positive and negative, in the functioning of the Brazilian judiciary and its relation to the Ministério Público).

99. McALLISTER, *supra* note 1, at xi.

support it. For instance, at one point she demonstrates how São Paulo state prosecutors took on state environmental authorities for their failure to observe environmental-assessment laws in their zeal to help push through a Volkswagen automobile plant, a state and city development priority.<sup>100</sup> However, there are few such detailed examples; more often than not, we must simply take the author's word for it. Moreover, if indeed Brazilian prosecutors are so much like Western public-interest environmental lawyers, it would have been helpful to ask why these nonprofit-like lawyers took the form of working for the government and not for the nonprofit sector. This is not a trivial point: a major feature of post-dictatorship Brazilian political discourse is the debate about how best to build civil-society institutions.<sup>101</sup> Moreover, even the Brazilian popular press—not known for its social progressivism—has spotlighted the socially transformative role of the nonprofit sector, especially as it relates to environmental protection.<sup>102</sup>

It therefore merits asking why the prosecutors Professor McAllister celebrates, those who shaped the Ministério Público's environmental role, pushed for laws that strengthened the prosecutorial role, rather than providing mechanisms that might have encouraged the development of more robust civil-society institutions. One can imagine, for example, a law creating a citizen-suit provision that would have encouraged civil-society organizations to undertake citizen-based enforcement of environmental law, as has happened in the United States.<sup>103</sup> Such a law might have included a provision that would have helped fund qualified nonprofits with judgments for successful prosecutions for environmental violations to help address the chronically underresourced nonprofit sector. Instead, the often effective but also deeply pater-

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100. *Id.* at 130-32; *see also id.* at 132-33 (describing the Xuxa Water Park case, another example of action against environmental agencies and their officials); *id.* at 114 (reporting environmental improvements in notoriously polluted Cubatão district in São Paulo State).

101. *See, e.g.,* Kathryn Hochstetler, *Democratizing Pressures from Below? Social Movements in the New Brazilian Democracy*, in *DEMOCRATIC BRAZIL*, *supra* note 52, at 162, 163-65. In the environmental context, *see, for example,* KATHRYN HOCHSTETLER & MARGARET E. KECK, *GREENING BRAZIL: ENVIRONMENTAL ACTIVISM IN STATE AND SOCIETY* 11-13 (2007).

102. Felipe Seibel & Tatiana Gianni, *ONGs: Os Novos Inimigos do Capitalismo*, *EXAME*, Oct. 25, 2006, at 22, 24 (headline special report on how environmental non-profits have undertaken radical positions to defend the environment in Brazil and have so become "the new enemies of capitalism").

103. I refer to the "citizen suit" provisions that are a standard feature of many of the major U.S. environmental laws enacted in the 1970s and 1980s. *See, e.g.,* PHILIP WEINBERG & KEVIN A. REILLY, *UNDERSTANDING ENVIRONMENTAL LAW* §1.03 (1998). In Brazil, the *ação civil pública* (public civil action) can serve this role to some extent. *See* McALLISTER, *supra* note 1, at 62-63.

nalistic Ministério Público model was chosen.<sup>104</sup> *Making Law Matter* never invites the reader to ask why.

Curiously, too, when Professor McAllister says that prosecutors of the Ministério Público are a lot like nonprofit public-interest attorneys in other countries, she does not say what kind of nonprofit attorney. That is, few nonprofit attorneys in the United States, for example, start at salaries of about \$10,000 per month, which is how much the highly competitive Ministério Público positions pay young lawyers in some parts of the Brazilian Federative Republic. This is spectacularly good money for a young lawyer in the United States; it is a princely sum in Brazil. In my admittedly noncomprehensive (but, I suspect, reliable) experience, most nonprofit attorneys in the United States struggle for years before they make six figures. Nonetheless, idealistic young attorneys fight to secure highly competitive jobs in the comparatively limited nonprofit environmental-advocacy sector. This matters because a person who earns a third of what she could earn but who has made a commitment to work in the substantive area—whether it be environmental law or some other area in the public-interest area—is, in any country, going to be a somewhat different person from the one who opts for a career in one of the best-remunerated professional tracks in his or her country, with the added bonus that he or she can work in an area seen to be in the public good.<sup>105</sup> One can only

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104. On the deeply entrenched nature of paternalism and elite control in Brazilian culture, history, and society, see, for example, Riordan Roett, *The Patrimonial State, in BRAZILIAN MOSAIC*, *supra* note 54, at 181, 181-84 (observing, *inter alia*, that “[o]ne of the leading attributes of the Brazilian political system is its elitist nature. Regardless of the time period, politics in Brazil have been dominated by a relatively small group of individuals who have been able to manipulate the mass of the population and define the goals of the state in their own terms.”).

105. By contrast to the prosecutors of the Ministério Público, a young environmental lawyer at one of the most prominent environmental groups in a city like Atlanta earns about \$40,000-\$60,000, E-mail from Justine Thompson, Esq., Executive Director, Greenlaw (Apr. 14, 2009, 10:17 EST) (on file with author), while a starting associate at a big private firm will earn in the range of \$125,000-\$150,000. See, e.g., Nationwide Pay Raise Watch: King & Spaulding, [http://abovethelaw.com/2007/10/nationwide\\_pay\\_raise\\_watch\\_kin\\_1.php](http://abovethelaw.com/2007/10/nationwide_pay_raise_watch_kin_1.php) (reprinting a memorandum from the Atlanta firm of King & Spaulding confirming a rise in first-year compensation to \$152,000); see also Findlaw, Firm Salaries & Other Statistics Charts, Atlanta, <http://www.infirmation.com/shared/insider/payscale.tcl?state=GA> (last visited May 2, 2009). This is approximately what a young member of the Brazilian procuracy earns. The salary of the lawyers who work for the Ministério Público is provided for in Brazilian law. See Lei No. 7.725, de 31 de janeiro de 1989, D.O.U. de 02.09.1981 (Braz.), available at [http://www.planalto.gov.br/ccivil/leis/1989\\_1994/L7725.htm](http://www.planalto.gov.br/ccivil/leis/1989_1994/L7725.htm). As of early 2009, the gross annual salary of a young lawyer was R\$273,000. At the exchange rate of R\$2.1 to the U.S. dollar on April 17, 2009, that converts to \$130,000, a sum that excludes other perks such as travel and meal bonuses. E-mail from Dr. Antonio do Passo Cabral, Rio de Janeiro *Ministério Público* (Apr. 15, 2009, 13:08 EST) (on file with author) (confirm-

assume, therefore, that when Professor McAllister speaks of non-profit public-interest attorneys, she is speaking of the nearest U.S. equivalent, namely the handful of lawyers working for a small number of better-financed, more-mainstream environmental groups, like the Sierra Club and the Natural Resources Defense Council. In short, more definitional clarity would have helped the reader better understand her theoretical-analytical framework and assumptions.

Professor McAllister notes that environmental nonprofits tend to be weak and underfunded in Brazil, lacking the resources to file environmental litigation themselves.<sup>106</sup> But for the most part, *Making Law Matter* does not ask why this is so. The point of this critique is, once again, not unimportant. A central claim of Professor McAllister's is that the Ministério Público has come to be a central means "to solving a historical problem of the Brazilian legal system—the problem of 'access to justice.'"<sup>107</sup> What is left unanswered by this praise for the Ministério Público, however, are the questions of what kind of justice is thus made available, and for whom. Yet Professor McAllister does not seem to have spent much time in her eight months of field work in the two states that principally concern her speaking with members of civil-society environmental groups, although she clearly spoke a good deal with prosecutors of the Ministério Público and imbibed their professional identity. One possibly rich avenue for investigation would have been an analysis that was more rooted in Brazil's history and social map. Specifically, Brazil was for centuries dominated by an economic oligarchy—even when nominally a monarchy. Brazilians to this day speak of the "colonels" (*coroneis*), a term rich with a mixture of fear and contempt to describe a selfish and corrupt ruling elite, the history of which does much to explain Brazil's current income divide.<sup>108</sup> At the same time, the sociological and political-

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ing these figures). It is small wonder, then, that this and other high-paying government jobs are the most sought after by Brazil's best and brightest. See Carelli, *supra* note 10 (describing the number of people competing for well-paid government posts).

106. McALLISTER, *supra* note 1, at 153. As she notes, most environmental nonprofits in Brazil tend to be small in size and depend inordinately on the cooperation of the Ministério Público. *Id.* at 157-58.

107. *Id.* at 152.

108. As Boris Fausto, perhaps the country's leading historian, has written, "[t]he Brazilian government has been misused by a clever elite" and that "[f]or certain, market forces (oligopolistic forces?) will not make investments according to social priorities, nor will they attend to the basic needs of Brazil's people." BORIS FAUSTO, A CONCISE HISTORY OF BRAZIL 335 (Arthur Brakel trans., 1999); see also THOMAS E. SKIDMORE, BRAZIL: FIVE CENTURIES OF CHANGE 237 (1999) ("Could Brazil expect to become a modern nation with its small

science literature on Brazilian society uniformly notes that one consequence of oligarchic rule, whether in the coffee *fazendas* (large farms) of Rio de Janeiro and São Paulo states or in the mines of Minas Gerais or in the sugar fields of Bahia, is a patron-worker relationship that still structures much of social relations and, especially, the expectations of lower-income people that they will be taken care of by a patron.<sup>109</sup> Looked at in this context, the Ministério Público might be seen as yet another manifestation of that relationship: the rich and more privileged members of Brazilian society deciding what is best for the uneducated multitudes.<sup>110</sup> Indeed, I once heard a state prosecutor, who like the men described in Professor McAllister's book began his career as a criminal prosecutor but moved increasingly to environmental matters, lecture a class of U.S. students I was teaching in Brazil that they must "never visit a *favela*," meaning the often drug-controlled shantytowns that are a sad part of the landscape of most Brazilian cities. Of course, one anecdote about one talk from a single prosecutor does not prove a point about class bias, but it does hint at such one. To be specific, it suggests a fear of the well-to-do to mix with the poor. Professor McAllister never appears to have explored such biases with her subjects. Although she does report that "[s]tudies have shown that prosecutorial careers have become increasingly open to candidates that do not have familial connections and to candidates from lower socioeconomic backgrounds,"<sup>111</sup> she simply does not ask the more fundamental question, which is, again, why environmental law and not some other area with "diffuse and collective" effects? She also does not ask the prosecutors, for example, how they understand the nature

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minority of rich and super-rich inside their barricaded apartment blocks, while most Brazilians could barely enter the national market?").

109. See generally Roett, *supra* note 104 (examining how political elites manipulate power to maintain dominance in the patrimonial state of Brazil); see also Kurt Weyland, *The Brazilian State in the New Democracy*, in DEMOCRATIC BRAZIL, *supra* note 52, at 37 (noting the persistence of clientelism in Brazil, despite the arrival of democratic rule).

110. In fact, Professor McAllister's text provides an example that proves the point. As she notes, Antônio Herman Benjamin, now a judge of the nation's second-highest court, the Superior Tribunal de Justiça, suggested to the Justice Minister the creation of a commission of specialists to draft an environmental crimes law. He was subsequently appointed the general secretary of the new commission, which ended up shaping the very same law. The story reveals the exceptional degree to which personal relations, particularly among the elite, control Brazilian political and civic life. See McALLISTER, *supra* note 1, at 126.

111. *Id.* at 188 (citing Maria Tereza Sadek & Rosangela Batista Cavalcanti, *The New Brazilian Public Prosecution: An Agent of Accountability*, in DEMOCRATIC ACCOUNTABILITY IN LATIN AMERICA 218 (S. Mainwaring & C. Welna eds., 2003)).

of their responsibility to the public. In fact, *Making Law Matter* makes clear that the Ministério Público's members have been zealous guardians of their role, rarely permitting others to infringe on their territory.<sup>112</sup> One begins to suspect that the Ministério Público insists upon democratic values and transparency for others, but not for itself.

In short, the text of *Making Law Matter* makes clear that Professor McAllister unabashedly and enthusiastically holds the Ministério Público's prosecutors in the highest esteem.<sup>113</sup> Perhaps this is merited, but one would like to have seen greater critical distance; *Making Law Matter* never demonstrates the phenomenon associated with an observation of Joan Didion's about the writer's moment of "betrayal" of his or her subject, when confidences and new friendships are put aside in favor of critical assessment.<sup>114</sup> In part, this is because there is so little historical and social context in *Making Law Matter* outside the somewhat rarefied and insulated world of the Ministério Público. Since the end of the dictatorship in 1984, Brazil has spawned numerous noteworthy social movements, many of which include demands related to increased environmental protection, particularly those movements—to date largely unsuccessful—demanding land reform. The best-known of these is the rural *Movimento Sem Terra* (Landless Workers' Movement), in addition to its lesser-known urban counterpart, the *Movimento Sem Tetos* (Homeless Workers' Movement), whose members take up residence in abandoned state-owned buildings in major urban centers and demand government assistance in the form of jobs, health care, child care, and housing programs. I know from working with the latter of these groups that they have sought the aid of the Ministério Público, sometimes with environmentally focused complaints, such as demands for improved sanitation or a more secure water supply. They have almost always done so without success.<sup>115</sup> As Professor McAllister notes, "[a]ccording to the

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112. See *id.* at 185, 191-92 (in the latter pages noting that, in part, this characteristic has institutional and structural origins).

113. See, e.g., *id.* at 69-76 (describing the Ministério Público's rise to power and attendant successes); *id.* at 157-61 (repeating the Ministério Público's vision of itself as the "lawyer of society").

114. On this topic generally, see HENRY F. WOLCOTT, *THE ART OF FIELD WORK* 139-44 (2d ed. 2005). Didion is actually supposed to have said that "I am so small, so neurotic, and so inoffensive that people invariably forget an important point: the writer will do you in." *Id.* at 140.

115. Interview with Directorate, Rio de Janeiro City branch, *Movimento pela Moradia*, in Rio de Janeiro, Braz. (June 13, 2007). This group, whose name literally means "Movement for Shelter," is involved in the occupation of a state hospital in Rio's Cajá *favela*. *Id.* Mem-

principle of obligation, prosecutors must respond to all environmental problems that they become aware of.”<sup>116</sup> But this does not mean all are treated equally: “The citizens or groups that complain most get the prosecutors’ attention, while other more significant environmental problems are ignored.”<sup>117</sup> Studies subsequent to Professor McAllister’s book would, one hopes, try to sort out not just the number of cases prosecuted, as she does, but ask why the Ministério Público chose to prosecute those cases it did, and why they listened to those voices they did, since, as Professor McAllister goes on to show, there is some room for maneuvering inside the “principle of obligation.”<sup>118</sup> The problem is this: prosecutors mostly come from privileged classes, and even when moved by what Professor McAllister agrees is “political voluntarism” or when desirous to create a more politically accountable social order, they may tend to limit their activism to serve the interests of their class.<sup>119</sup> I asked that same prosecutor who told my students never to visit a *favela* how we knew that the cases he picked would be the ones Brazilians most wanted to see pursued, and he said, “you just have to trust my judgment.” The point here is that this perspective is likely typical of the prosecutorial (or any) class,<sup>120</sup> and it goes uninvestigated by Professor McAllister in her eagerness to celebrate their (admittedly, often important) environmental work. This is especially regrettable inasmuch as a major weakness of the Ministério Público (noted by Professor McAllister) is that its ranks

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bers of the same group occupy an abandoned state administrative building next to Rio’s state assembly in the downtown Cinelândia neighborhood. Interview with Directorate, Rio de Janeiro City branch, *Movimento pela Moradia*, in Rio de Janeiro, Braz. (June 11, 2008). Both of these are locations of field visits by the Human Rights Law Seminar offered as part of the Summer Legal & Policy Study in Rio de Janeiro, for which the author of this Review serves as Program Director.

116. McALLISTER, *supra* note 1, at 162.

117. *Id.*

118. *Id.* at 163-64. Professor McAllister usefully reports percentages of cases and where they originated, for example, *id.* at 155-56. But she seldom takes apart the statistics, which, as suggested above, may mask a more complicated reality of personal choice and social bias.

119. Of course, this phenomenon is hardly limited to Brazil. Criticisms of this phenomenon are common, as, for instance, in the U.S. Critical Legal Studies Movement of the 1980s and 1990s. See, e.g., Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 40 (David Kairys ed., 1982) (arguing that law school provides ideological training for service in the hierarchies of what the author calls the corporate welfare state).

120. See, e.g., ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 164-67 (1975). Compare in the Brazilian context, Maybury-Lewis, *supra* note 54 (evaluating the historical and continued dominance of social hierarchies in Brazilian life).

are largely unaccountable.<sup>121</sup> This fact alone, given that prosecutors played such a key role in strengthening the Ministério Público's institutional power, may support the hunch that prosecutors in the Ministério Público largely serve their own socioeconomic interests rather than those of the entire society.

To be sure, environmental problems touch us all. However, as the environmental justice movement has so powerfully demonstrated in recent years, they do not affect all of us equally.<sup>122</sup> To this end, Professor McAllister's book reveals little about these sorts of cases; hers is a story of objective successes based on numbers, with little textured description of the kinds of battles prosecutors fight and, again, which ones they choose not to fight. In part, this is because Professor McAllister has opted for a descriptive method, common in the social sciences, that makes reference to personal interviews but virtually never gives the identity of the source.<sup>123</sup> Sometimes, this is understandable, as where she quotes a prosecutor critical of a state judge—the interlocutor merits anonymity where identification might compromise his or her career.<sup>124</sup> The method, however, keeps the author in total control of the information and does not allow the reader to make judgments about the sources. All sources are not created equal, and it would help the reader to get some sense of who these sources are, and of the strengths and biases of Professor McAllister's unnamed sources.

Structurally, too, the study might have been trimmed of some of its many repetitions in Chapters 5–7 (Chapter 7 is especially duplicative in much of its content). This would have allowed room for a more critical examination of the people in, and choices made by, the Ministério Público.

A great strength of Professor McAllister's book is the fact that it does what so little comparative legal analysis of Latin America does, namely examines institutional success and functioning, as opposed

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121. See McALLISTER, *supra* note 1, at 187-92. Professor McAllister criticizes the Ministério Público's lack of accountability and endorses the views of other scholars that the institution needs to increase its accountability. *Id.* at 192.

122. See generally THE LAW OF ENVIRONMENTAL JUSTICE (Michael B. Gerrard & Sheila Foster eds., 2d ed. 2008) (exploring the inequalities in environmental decisions, especially with respect to undesirable facilities and activities as they affect U.S. communities of color). Environmental justice is a newer concept in Brazil but nonetheless has gained traction there. See HOCHSTETLER & KECK, *supra* note 101, at 216-22; HENRI ACSELRAD, SELENE HERCULANO & JOSÉ AUGUSTO PÁDUA, JUSTIÇA AMBIENTAL E CIDADANIA 24 (2d ed. 2004).

123. As, for example in this typical instance, where a source is described as a "scholar and former São Paulo environmental agency official." McAllister, *supra* note 1, at 85.

124. See *id.* at 170.

to merely describing and analyzing laws on the books.<sup>125</sup> Given the strategic success of the proponents of the Ministério Público in the late 1980s, for example, it is fascinating to learn that despite its institutional profile, the Ministério Público has done a poor job at ensuring consistency in enforcement, given “the strong emphasis on the functional independence of each prosecutor.”<sup>126</sup> This has resulted in a lack of institution-wide planning that, Professor McAllister implies, ultimately may impede the highest possible functioning of the Ministério Público.<sup>127</sup> Likewise, Professor McAllister’s analysis of differences in prosecutorial styles and the consequences of such differences for successful enforcement will be useful to all students of institutional legal behavior, and not just comparative legal scholars of Latin America specifically and the developing world more generally. Her conclusion that a legal institution like the Ministério Público performs an essential role in assuring “horizontal accountability” (meaning holding branches of government accountable to one another)<sup>128</sup> is a provocative assertion and merits being tested and evaluated in future studies. The same is true of the claim that the model of “Brazilian prosecutorial enforcement stands as an example of ‘state-society synergy,’”<sup>129</sup> which “involve[es] a reciprocal relationship between civic engagement and effective state institutions, in which each strengthens the other.”<sup>130</sup> However, given the lack of social context and information about what cases the Ministério Público chooses, which ones it rejects, and why, such assertions invite further analysis. It will be left to future scholars to examine such conclusions with even more detailed empirical work and to create in the process, one hopes, even stronger legal institutions.

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125. The legal antecedents that helped influence this methodological choice to focus on groups and not merely describe laws is one she explores briefly elsewhere, with attention to the Brazilian case. See Lesley K. McAllister, *Revisiting a “Promising Institution”: Public Law Litigation in the Civil Law World*, 24 GA. ST. U. L. REV. 693, 696-704 (2008) (describing the development of comparative law scholarly focus on public law litigation).

126. McALLISTER, *supra* note 1, at 116.

127. *Id.* at 118 (“[T]he development and implementation of institutional plans did not become important aspects of the Ministério Público’s work. While they have been prepared each year since 1993, they are criticized for being too general and lacking usefulness, and they are not considered an important reference point for environmental prosecutors.”) (footnote and citation omitted).

128. *Id.* at 148.

129. *Id.* at 158 (quoting PETER B. EVANS, *STATE-SOCIETY SYNERGY: GOVERNMENT AND SOCIAL CAPITAL IN DEVELOPMENT* (1997); PETER B. EVANS, *LIVABLE CITIES? URBAN STRUGGLES FOR LIVELIHOOD AND SUSTAINABILITY* (2002)).

130. *Id.*

At the same time, this near-exclusive focus on institutional functioning results in an account that loses sight of the substantive gains and objectives of the prosecutors she studied.<sup>131</sup> On occasion, when Professor McAllister does examine the actual substance of the Ministério Público's efforts, she appears to be trying to force her thesis that Ministério Público prosecutors are essentially like public-interest lawyers in the United States. Thus, for instance, she explains that a "significant percentage of the Ministério Público's environmental lawsuits are against the Brazilian government, whether municipal, state, or federal."<sup>132</sup> In her telling, "significant" varies from 12 percent of public civil actions filed to half of the lawsuits filed by a particular office in a given state.<sup>133</sup> Yet simply reciting percentages of cases investigated and filed is rather like describing the size of the tip of an iceberg; it only hints at the complexity of the larger narrative, especially when the range of "significance" is so considerable. One hopes that future studies will delve more deeply into the substantive side of the work of the Ministério Público, although such studies will require more sustained engagement than the eight months of field study undertaken by Professor McAllister for this book.

A similar criticism can be leveled at her painstaking and detailed description of the role played by many of the idealistic Young Turks described in the book. The group that ultimately produced some of the country's most celebrated environmental lawyers and scholars, many of whom have risen to places of prominence in the bar and bench, were key players who pushed for the redefined and expanded powers of the Ministério Público.<sup>134</sup> Once again, on the one hand, Professor McAllister's account is a tremendous resource

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131. Speaking of the kinds of cases being examined by prosecutors in São Paulo state, Professor McAllister tantalizingly explains that "[s]ubjects of investigation[—that is, a wide-ranging look at particular problems in a large area—]included air pollution, noise pollution, leaking underground storage tanks at gas stations, and illegal squatting in the watershed of the city reservoir." *Id.* at 119. This leaves the reader hungry to know more of these cases.

132. *Id.* at 113.

133. *Id.* at 114.

134. I refer, for example, to three of the principal protagonists of her book, Édis Milaré, Paulo Affonso Leme Machado, and Antônio Herman Benjamín. The first two are among Brazil's most respected environmental-law commentators. As examples of their work, see, respectively, ÉDIS MILARÉ, *DIREITO DO AMBIENTE: A GESTÃO AMBIENTAL EM FOCO* (5th ed. 2007); PAULO AFFONSO LEME MACHADO, *DIREITO AMBIENTAL BRASILEIRO* (17th ed. 2009). The third, now a senior federal judge, is also perhaps the best known Brazilian analyst of Brazilian law who writes in English. For an example of his work, see Antônio Herman Benjamim, Cláudia Lima Marquês & Catherine Tinker, *The Water Giant Awakes: An Overview of Water Law in Brazil*, 83 *TEX. L. REV.* 2185 (2005).

for those wishing to understand the institution building that constitutes part of the process of creating a democratic and accountable legal and governmental structure. On the other hand, it again would have been useful to get a more textured sense of their motives, to understand why for these middle- and upper-middle class young men the environment was an important cause when there are other causes—tax equality, health care, child care, worker's rights, housing, and land reform—demanding equal (if not more) desperate attention and touching “diffuse and collective interests.” For instance, Professor McAllister describes the history and compromises that led to the bill creating the Ministério Público, and the fact that the bill favored by the Ministério Público included the phrase “any other diffuse interest;” this version, however, was vetoed by President Sarney to allow merely three classes of interest—“the environment, consumers, and cultural patrimony.”<sup>135</sup> Yet she does not question the motives of those prosecutors who themselves limited the interests they and their professional heirs could prosecute. Surely it merits asking why these children of privilege, even if idealistic and possessed of zeal to work in the public good, had the limited conception that they did. Yet Professor McAllister never asks such questions.

Similarly, it would have been helpful to get a fuller sense of the prosecutorial docket to be able better to judge whether, in fact, the Ministério Público is as successful as it—and as Professor McAllister, its newest U.S. spokesperson—claims it to be. In 2007 and 2008, and not for the first time in recent history, deforestation in the Amazon again reached alarmingly high levels.<sup>136</sup> It therefore merits asking, where was the Ministério Público? *Making Law Matter* makes scattered references to Ministério Público cases but provides little sense of the sorts of issues that compel prosecutorial attention and why.

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135. McALLISTER, *supra* note 1, at 70. José Sarney, president of the Republic from 1985–1989, is best known as a member of the political and social elite from one of the poorest northern states, Maranhão, and as one who used his skills manipulating the patronage system to ascend to what in the end amounted to a failed term as president. See, e.g., SKIDMORE, *supra* note 108, at 190-93. Skidmore records, for example, that “[a] poll in mid-January 1989 in greater Rio and São Paulo registered a 70 percent ‘no confidence’ rating for [President Sarney].” *Id.* at 193.

136. Professor McAllister's data on deforestation only goes through 1997. McALLISTER, *supra* note 1, at 100. The Brazilian popular press, however, continues to raise alarm over the rate of deforestation. See, e.g., Leonardo Coutinho & José Edward, *Amazônia: A Verdade Sobre a Saúde da Floresta*, VEJA, Mar. 26, 2008, at 95, 101 (reporting an increase in deforestation of 30 percent “in recent months”).

Professor McAllister is to be celebrated for turning our attention to Brazil, South America's largest economy and its most populous and geographically most-diverse country. Despite its size, oddly, Brazil remains somewhat outside our sights, perceived, if at all, as a huge tropical forest and a few famous beaches with scantily clad women. While the Western media obsesses about our relations with China and India, Brazil tends to get overlooked, even though, with Russia, India, and China, it comprises one of the so-called BRIC nations and will likely play an important role in world trade and geo-politics in this century.<sup>137</sup> Yet Brazil is not front and center stage for most U.S. readers, its lawyers and legal scholars included. This is reflected, in fact, in Professor McAllister's English-language legal sources, the most important of which date back to a 1988 Roger Findley article and to seminal but now dated articles by Keith Rosenn through 2000 only.<sup>138</sup> Since then, the quantity and quality of legal writing about Brazil in U.S. journals has been surprisingly limited, if increasing and improving, respectively.<sup>139</sup> *Making Law Matter* is thus important precisely because it draws our attention to the need for more solid legal writing—like Professor McAllister's book—on Brazil. Because of the importance of protecting Brazil's environment, not only for its public, but also for the planet and for a secure future of sustainable global trade, one can only hope that this is changing. Without question, Professor McAllister's book is an important contribution to a renewed interest in Brazilian legal studies in the United States.

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137. See, e.g., Roberta Paduan, *O Avanço dos Emergentes*, EXAME, Oct. 25, 2006, at 36-38 (on the "advance of the emergent" BRIC countries).

138. Roger W. Findley, *Pollution Control in Brazil*, 15 ECOLOGY L.Q. 1 (1988); see also McALLISTER, *supra* note 1, at 251 (citing several works by Keith S. Rosenn).

139. Good examples of some newer legal writing in English about Brazil include Benjamim et al., *supra* note 134; Rômulo Silveira da Rocha Sampaio, *Seeing the Forest for the Treaties: The Evolving Debates on Forest and Forestry Activities Under the Clean Development Mechanism Ten Years After the Kyoto Protocol*, 31 FORDHAM INT'L L.J. 634 (2008).