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A LATCRIT SENSIBILITY APPROACHES THE INTERNATIONAL: REFLECTIONS ON ENVIRONMENTAL RIGHTS AS THIRD GENERATION SOLIDARITY RIGHTS

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I approach the task of speaking of a LatCrit perspective on environmental rights as third generation rights (solidarity rights), with great trepidation. I am faced with a number of quandaries.

First and foremost, I face the problem of articulating what a LatCrit theoretical perspective might be. This requires me to first consider what it means to unite the two halves of the moniker "Lat" and "Crit." Alone, both Lat and Crit are familiar, if controversial, terms. The term "Lat," the abbreviated form of "Latino/a," is enmeshed in at least two significant "identity" debates. One is the controversy over whether Latino/a refers to race or ethnicity. The second is the importance of gender, or the issue of the intersectionality¹ of race, ethnicity, and gender, highlighted by the common practice of writing Latino/a.

The term "Crit," because it refers to a host of competing and supplementing critical legal theories, is controversial in a very different way. Paradoxically, critical legal theories are suspect for two discordant reasons: first, their progressive activist tendencies; and second, their association with what are believed to be the normatively empty "isms" of structuralism, postmodernism, and deconstructionism. The abbreviated form of the term Crit is already linked to a family of related legal theories including FemCrit, RaceCrit, and QueerCrit. I take it as a given that, in our struggle to give shape to a LatCrit theoretical perspective, we mean something more than a RaceCrit perspective from a

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1. See, e.g., Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

Latino/a point of view. The turn to the identifier "Lat," I am suggesting, should not be understood merely as a substitution for the identifier "Race" in the term RaceCrit. Otherwise, LatCrit would be no more than a simple, if necessary, reminder that Latinos/as and their interests are not sufficiently visible within the RaceCrit "mainstream." Rather, I believe, associated with the launching of this new term, is the sense that there is a special critical insight to be gained by the bringing together of Lat and Crit.

So, what happens when you link the complex set of identity positions associated with Latino/a to the various critical theories grouped under the moniker Crit? Do these two terms really fit together? How does each term modify the other? And how, in any case, do they relate to "rights"? Is the LatCrit position closer to a Crit's *critique of rights*, or closer to a RaceCrits' *critique of the critique of rights position*?

The second quandary I face in speaking on the subject of a LatCrit perspective on environmental rights is that although we may talk of "environmental rights," it would be hard to sustain a claim that such rights have a formal existence. Even the most determined rights advocates can do little more than point to strands of language in various national and international instruments that are suggestive of "environmental rights," or argue that the existence of such rights is "inherent in" or "derivative" of other more formal rights.² Thus, environmental rights, we are told, are inherent in the right to life, the right to health, and the right to security. Most commentators on so-called "emerging" environmental rights ultimately admit that there is, of course, no consensus as to the content, reach, or effect of such rights. Nevertheless, we are told such rights are essential and our inability to achieve them is evidence of a failure of environmental will.

The third quandary is, even assuming I assent to the existence of something to which we will apply the term "environmental rights," I must ask why it has seemed so natural to relegate such rights to the "third generation." That is, a generation

2. See, e.g., Patricia W. Birnie & Alan E. Boyle, *The Structure of International Environmental Law III: The Role of National Law and the Role to a Decent Environment*, in *INTERNATIONAL LAW AND THE ENVIRONMENT* 188 (1992); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to the Environment*, 28 *STAN. J. INT'L L.* 103 (1991).

of rights which, because its main exemplar is the right to development, is often treated by commentators in the first world as though it were a concern of developing countries alone. The ascription of the label "third generation" to environmental rights presents two further somewhat contradictory problems. First, because traditional human rights attach to, and may be asserted by, individuals whereas third generation rights are said to attach to groups and cannot be asserted through traditional human rights mechanisms, many human rights activists dismiss them as not "true" human rights. Further, third generation rights are said to deflect attention from true and important human rights or even to justify the postponement of the application of such core human rights. Thus, those who advocate third generation rights are considered to be either misguided or cynical manipulators of the human rights discourse. It is thus not surprising to find that human rights case books give no more than cursory treatment to third generation rights and generally present them as being in conflict with first generation rights. Second, to include environmental rights alongside the right to development raises the question of the relationship between environmental rights and developmental rights. Many advocates of the right to development are uncomfortable with any attempt to place explicit limits on that right. While recognizing that no right is absolute but must yield to some degree in the face of other competing rights, yet they seek to retain the expression of the right in its absolute form.³ The elaboration of a right to environment that occupies a space adjacent to that of the right to development, may be too close for comfort, and may be experienced as a deliberate affront by those who have been toiling for the recognition of a right to development.

The fourth quandary is that, regardless of the generations of rights and beyond the critique (or the critique of the critique) of rights, it is important to consider whether rights discourse is a useful framework within which to consider and address environmental problems. Even commentators who generally favor the future elaboration of environmental rights recognize two serious limitations of the traditional human rights prism when turned on the environment.

3. See Ileana M. Porras, *The Rio Declaration: A New Basis for International Cooperation*, 1 REV. EUR. COMM. & INT'L ENVTL L. 245 (1992), reprinted in GREENING INTERNATIONAL LAW 20 (Philippe Sands ed., 1993).

In the first place, environmental problems are considered to have a multigenerational dimension. The central concept of sustainable development, for instance, assumes a responsibility by the present generation towards future generations. A traditional human rights approach is not well-suited to address the needs of future generations. Indeed, the traditional human rights regime, concerned with the present needs of individuals, may well work against the equitable obligation of sacrificing in the present to preserve the future.

In the second place, and perhaps more controversial, many people, including myself, believe that an anthropocentric approach to the environment leaves a whole host of environmental values out of our calculations. Since human rights discourse is anthropocentric by its very nature, this means that only human-oriented environmental values will be emphasized.

Finally, if we consider the state of the environment today and attempt to list the most critical environmental problems, we will see how unsusceptible they are to correction through a rights solution.

My list of such environmental problems would include:

- The irretrievable loss of biodiversity on land and sea and the consequent destruction of well-functioning ecosystems;
- The strain on the environment of increasing human demand for fresh water, air, energy, and land, which has grown along with population growth, but also in response to more consuming lifestyles;
- The depletion of the ozone layer and the effects of climate change;
- The need to dispose of the hazardous by-products of our productive activities. (Most environmental harm results from otherwise beneficial activities.)
- The exportation of hazardous activities, products, and wastes to poorer states where transplant and disposal are deemed "cheaper."

Obviously, in the short time assigned for my presentation, I can only begin to touch on some of these issues. I will begin by taking on the challenge of articulating what a LatCrit theoretical perspective might be.

The first, and perhaps very obvious, point is that LatCrit must, by definition, recognize the constructed nature of all identity positions. That is, LatCrit theorists are aware at every moment that the identity position they identify with, let us call it the "Latino/a identity," is a construct whose contours, content, and meaning are perpetually shifting.

By "identity" here, I mean the recognition of a set of commonalities and affinities expressed through an associative desire and giving rise to a sense of special responsibility. This associative desire is driven in part by both the human urge for recognition and valuation and the search for a sense of belonging with its goal of protection and the possibility of political action. This unstable Latino/a identity intersects with and is modified by a multiplicity of other equally constructed and unstable identities organized around the concepts of gender, race, ethnicity, nationality, and sexual orientation.

One of the fascinating things about the Latino/a identity, as we have discovered over the past series of discussions (the first LatCrit Conference in La Jolla and earlier discussions at this Colloquium), is that the Latino/a identity cannot be reduced to any of the other identity categories. Persons who self-identify as Latino/a include individuals who also identify with either gender, every race, every ethnicity, every nationality, and every manner of sexual orientation. In this sense the Latino/a identity is truly *sui generis*. Unique, not in that all other identities are somehow simpler or in fact more homogeneous, but rather that the Latino/a identity contains already and visibly within itself an irreducible confusion which begs the question of "identity."

Such a claim may at first seem both naive and dangerous. After all, it may be argued, while it is true that identity is constructed, the construction of a Latino/a identity is constrained because it emerges within a U.S. context entirely occupied by a black and white paradigm. Furthermore, the legal protections achieved in the United States will only protect Latinos/as, if to be identified as Latino/a is to make a claim to a race or an ethnicity. It would, therefore, be irresponsible to insist on a nonethnic, nonracial classification. How can Latinos/as hold to their sense of an identity which is always breaking down the classifications of race, ethnicity, gender, class, sexual orientation, etc., while pursuing particular political or social agendas which appear to require the reduction of our Latino/a identity to

either race or ethnicity?

This is where adopting a distinctive LatCrit theoretical perspective may help us out of the apparent impasse. A LatCrit perspective permits us to characterize Latino/a as a race or an ethnicity if it is strategically important to do so. It is, after all, that too. A LatCrit perspective is not dogmatic and is open to all possibilities.

But a LatCrit perspective also requires us to step back and remember that Latino/a is not only a race or an ethnicity. It allows us not to be overly attached to any of these identity classifications and reminds us that they are themselves fluid and constructed. Further, a LatCrit theoretical perspective should remind us that, while short term benefits may be occasionally derived from playing from within a system that relies on single characteristic identity classification, ultimately we may simply be reinforcing the very system that oppresses Latinos/as. To enter naively into the game of proper classification is to become entangled in a discourse of distinguishing, parsing, and discriminating to determine who is in and who is out.

What I am suggesting is that the LatCrit theoretical perspective should stand for a politics of inclusion. Our shared constructed Latino/a identity requires that we value our differences as well as our commonalities. A LatCrit perspective should recognize and celebrate the simultaneity of identities. We must therefore seek to be as unconstraining and nonexclusive as possible. Rather than expend our energies trying to delimit the contours of our Latino/a identity, we should leave the boundaries of that identity as vague as possible. At a time when identity politics seems to be inexorably leading us to narrower and narrower forms of distinctiveness through particularism, a LatCrit perspective reminds us of the impossibility of achieving perfectly bounded identities while offering us a vision of the multifaceted forms of connection and relatedness that is always available.

What does this have to do with the "international"?

Historically (and very much so today), one of the difficulties that Latinos/as have faced is the problem of their association with what I will call "the foreign." Regardless of the means whereby a Latino/a came to be part of the U.S. polity—whether by annexation, conquest, migration, immigration, or birth—we have been suspect as being "foreign" or of having a "foreign alle-

giance." Our reaction has been to deny our foreignness, to position ourselves as domestic by reassigning foreignness to others, especially those others, outside the borders, who are most like us.

At its worst, this has led Latinos/as to reject those outside the U.S. geopolitical boundaries and to deny the "natural" connection that others impute to us. For those of you who have seen John Sayles' movie *Lone Star*, it is Gloria, herself, a wetback from an earlier generation and now a well-to-do restaurant owner, who calls the Border Patrol to denounce "wetbacks" she discovers in her backyard. It is Gloria who imposes an English-only policy on her Spanish-speaking workers because "we are in America." It is our attempt to convey, in order to deflect suspicion, that we do know the difference between "us" and "them." It is a move that allows us to insist that while we may be Latinos/as, we are USLats within the border. Outside the United States' geopolitical boundaries, on the other hand, they are "foreigners." The problem is that this perspective and positioning forces us to split in two, to deny part of ourselves.

A LatCrit theoretical perspective allows us to avoid the crippling necessity of crafting a USLat identity by denying what, for the sake of symmetry, I will term the OtroLat.

A LatCrit theoretical perspective requires that we recall the contingency of all geopolitical boundaries, that is, the contingency and constructed nature of nation and national identity. As LatCrit theorists, we are free to recognize that often the only thing that distinguishes "us" from "them" is that we have the right set of papers and they do not.

This is not to say that a LatCrit perspective requires that we abandon or eliminate our borders or claim that borders are meaningless. On the contrary, many of us are very strongly attached to an identity position we refer to as "American" even while we may admit it is geographically constructed. There is nothing surprising about the claim that Latinos/as as a group are as patriotic and committed to something called the United States as any other group of Americans. But as LatCrits we should be comfortable in holding on simultaneously to our "U.S." identity and to our Lat identity, even if that Lat identity spills over the borders. There is no reason why an identity need be contained within a set of geopolitical boundaries and no reason

to assume we must choose one identity over the other.

Having freed ourselves from the fear of the taint of foreignness at home without relinquishing our Lat identity, when we allow our associative effectiveness and sense of responsibility to spill over across our U.S. borders, we must yet face a greater international challenge. We must face the fact that in the eyes of the OtroLat, we will likely not be recognized as USLats, but just as U.S., which should bring us up short in our venture into the international.

When acting on the international plane, the identity that will be ascribed to us by others and, if we are honest, the identity we should ascribe to ourselves in the first place, is that of a U.S. national. After all, we cannot escape the fact that once we move to the international, we are acting in a sphere organized around the concept of a community of nation-states. When faced by others whose identities and interests are expressed as "national," we will bring our own national identity to the fore. Regardless of our sense of a shared history of oppression, discrimination, or disadvantage, we will be heard, by OtroLats, as speaking from a privileged position, representing a rich and powerful nation with an imperial expansionist past and a domineering present.

A LatCrit theoretical perspective, rather than rejecting this characterization as wrong or unfair, will acknowledge the fact that it does hold a kernel of truth. I cannot speak as a Latina without at the same time speaking as a *Norte Americana*. I am a *Norte Americana* and when I speak, even when I speak as a Latina, I speak from a privileged perspective vis-a-vis other peoples. A LatCrit perspective teaches me that in treading into the international, I cannot simply leave my U.S. identity behind, even if I wanted to, because it goes with me. I should not ask others to respond to me as though my nationality was not a constitutive part of my identity and my perspective. Even when I am being critical of the United States, I am critical as an insider. My critique is necessarily one shaped by that condition of being an American, even if a USLat. Thus, a LatCrit perspective teaches me to proceed with caution into the international.

So, where does this leave us? Have we come any closer to addressing the question of what a LatCrit perspective on environmental rights, as third generation solidarity rights, might be?

Here are some thoughts:

LatCrit theorists must seek to forge an identity that embraces differences and change in order to confront a world that is involved in an attempt to eliminate difference. What this means, *inter alia*, is that a LatCrit perspective must be sensitive to the dangers of all universalizing rhetoric. Attempts at setting international standards, for instance, must be viewed with a degree of skepticism. Whose values should such standards reflect? Who is to benefit from the harmonization of legal regimes? Should we really be engaged in the popular project of exporting our environmental standards, rules, regulations, and institutions, for wholesale adoption, to other states?

A LatCrit perspective sensitive to difference must recognize that environmental standards will reflect different values and different contexts. The same standard may not be appropriate everywhere. Different standards should not simply be tolerated or treated as deviations from our appropriate norms, they should instead be approached with respect. Approaching the choice of a standard with respect does not require simple acquiescence nor does it imply that we should forego inquiry into the nature of such a standard, rather it means that we should drop our arrogant certainty in the universal rightness of our own standard or choice and abandon the presumption that all departures from what we think is right are motivated by illegitimate interests. While a change in attitude may seem a modest proposal, if the history of international relations is a guide, it will be a difficult achievement.

The turn to human rights discourse as a means to address environmental degradation can be understood as part of the greater project of global harmonization. Human rights by their very nature are considered to be universal. The content of a right to the environment must, in order to be within the spirit of human rights discourse, be identical for all. Human rights rhetoric does not allow some people to be less protected than others. The result must be that the substantive content of a right to environment must be unacceptably low from the perspective of those who are promoting the adoption of such a right or it must be unachievably high from the perspective of those who labor under conditions of limited capacity, capabilities and competition.

A LatCrit perspective should not treat development needs and arguments as somehow illegitimate. Rather, it should seek

to understand the potent arguments for the recognition of a right to development and not respond to the assertion of development needs as always necessarily a desire to ignore all environmental consequences.

Human rights discourse has been criticized by many in the Third World as a particularly nefarious instance of Western imperialism, a mechanism that justifies interference with the internal affairs of less powerful states. A LatCrit perspective, while recognizing the origin and respecting the seriousness of this charge, need not simply assent to the critique.

Rather, our USLat experience allows us to question the assertion that any government represents or speaks for all people equally. A LatCrit perspective thus requires us to inquire about the distribution of costs and benefits of any given environmental regime. In particular, it makes us realize the importance of information, participation in decisionmaking, and the relevance of making the government and private sectors accountable.

On the other hand, we must reflect seriously on the way in which placing an issue into the human rights framework does in fact accent the problem in a very particular way. While human rights are universally applicable, our tendency in the North is to think that all human rights violations are taking place in the South. Despite recent attempts to highlight the reality of a South within the North, or to point out human rights failures in our own systems, we are likely to consider ourselves the good guys once we enter the game of comparative international achievements. We may not be perfect, we will admit, but we are pretty good compared to those other guys.

During the United Nations Conference on Environment and Development (UNCED)⁴ negotiations in Rio, I found myself in an odd position. I am an environmentalist. Yet, as a Costa Rican representative working with the G-77 group of developing countries, I fought the adoption of "environmental" language in various principles. Why? Because within the international context, it became clear to me that the need to address the human threat to the environment could and was being used by some in the North, sometimes unwittingly, as a means to continue the

4. United Nations Conference on Environment and Development, U.N. Doc. A/Conf. 151/5 (June 13, 1992).

North's economic domination. Northern countries were unwilling to undertake significant reform of their practices of environmental exploitation because the pain of the change to their economies and to the lifestyles of their citizens was deemed unacceptable. Nonetheless, they were quite willing to advocate equally painful measures to the governments of Southern states. The North was not ready to accept their fair share of the pain of environmental reform. Furthermore, it was unwilling to admit to the responsibility that flows from its historic and continuing role in the disproportionate exploitation of the world's natural and environmental resources and its concomitant disproportionate contribution to global environmental harms. Instead, the North's focus was on the predicted increased amount of environmental harm that would flow from the South, as populations expanded and environmental exploitation went unchecked.

While the Rio negotiations resulted in an apparently symmetrical acceptance of mutual responsibility through, for instance, the call to reduce population growth tied to a call to reform consumption patterns, that symmetry is nothing but a mirage. In the existing international context, developing countries have no tools available to them to force the North to reduce consumption, whereas the North, with its hands on the purse-strings, has many ways to impose conditions on developing countries.

Back to my fundamental question. Can a traditional human rights approach lead to a greater degree of environmental protection? If not, should we abandon the enterprise?

As Raúl Sánchez has just argued, a human rights approach may be helpful in redressing individual wrongs at the national level. It is only likely to be helpful, however, if a national right to a healthy environment is backed by specific tort and nuisance legislation providing easy access to administrative and judicial forums, broad standing, and meaningful remedies. Such a system will help provide remedies for and perhaps even prevent specific abuses. A right to a healthy environment may in this way prove extremely valuable. But the central dilemma remains, how can even an enhanced human rights framework help us prevent more diffuse environmental problems? How can it provide redress for environmental harms where no individual or group is particularly harmed, yet all of us now, future generations, and the environment itself are harmed?

The danger is that if we get too caught up in crafting new present-looking human rights and remedies for individuals and groups, we may mask the fact that we are all more generally responsible for environmental harm. We may ignore the obvious circumstance that it is our collective and cumulative actions, our "normal" practices of escalating production, consumption, and waste in the pursuit of economic well-being and daily comfort, that are to blame for the sad state of the environment, and not, as some would have it, the "abnormal" actions of a few, identifiable, bad agents.

So then, what can a LatCrit perspective bring to all this? Well, right now it is too early to say. The one thing we can hope is that a LatCrit sensibility will not abandon the sophisticated understanding of context and the contingency of identity and law when turning to the international.

A LatCrit perspective must help us to rethink the meaning of universalism in the international. We must strive to articulate a claim about universalism that leads us neither to the disabling arguments of moral relativism, nor towards the difference eliminating doctrine of harmonization. As LatCrits we need not accept claims about sovereignty as a barrier to assessing or opining about what is going on environmentally within any given geopolitical borders. We can and should have a principled position concerning human dignity and the natural ecosystem and seek to promote those views. But we must resist the simple attempt at imposing our own standards on others and resist the trend towards homogenization of human diversity, which seems to follow so naturally from the moment of globalization in which we are told we exist.