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Old Law in the New World: Soloranzo and the Analogical Construction of Legal Identity

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OLD LAW IN THE NEW WORLD: SOLÓRZANO AND THE ANALOGICAL CONSTRUCTION OF LEGAL IDENTITY

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Over 500 years ago, a small band of Europeans sailed past the borders of the map, encountered a previously unknown land and peoples—and sought legal advice on how to proceed. The initial response, from royal financiers of the voyage and their ecclesiastical supporters, focused on gaining control of the new territory by claiming responsibility for its inhabitants. Despite the juridical consensus surrounding this approach, however, it required a century and a half of experimentation and debate before one jurist was able to classify the identity of these new "subjects" within the expansionist empire.

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I. TERRA INCOGNITA LEX[1]

Modern civic identity in the Western Hemisphere flows from the original fifteenth century collision between Native American[2] peoples of the Caribbean and European explorers sailing under the Spanish flag. Shortly after this unexpected event, European legal advisors turned to the familiar language of medieval jurisprudence to assert sovereign control over the previously unknown territory.[3] In order to apply these legal principles, the jurists first required a means of bridging the situational gap between the Old World and the New. Just as metaphor provided a vehicle for European explorers attempting to describe an unfamiliar continent, so legal analogy offered an apparent means to equate portions of the established legal order with the newly incorporated elements. Analogical reasoning, designed to expand Spanish influence, thus provided the basis for a new world order, aspects of which continue to inform the relationship between national governments and indigenous peoples.[4]

The initial sequence of European law's transplantation to the Americas is fairly straightforward. First contact between Indians and Europeans yielded a series of descriptions intended for the royal financiers of the voyage. The news of potentially valuable lands prompted Spain to stake a legal claim, preferably through arguments sufficient to exclude other European competitors. This claim, while aimed at the territory itself, necessarily included a characterization of Spain's relationship with the native inhabitants.

The *ius commune*, however, lacked a provision for newly "discovered" peoples. They were neither Christian allies, nor Spanish subjects, nor Muslim infidels. While they might be captured as slaves, such trade would not support Spain's exclusive claim to the new lands. Medieval experience did allow their designation as objects of missionary activity, with an eye to conquering them should such overtures be refused. Yet even apparently

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1. Unknown land, unknown law.

2. At the risk of anachronism, the terms "Native American," "Indian," and "native or indigenous peoples" appear interchangeably throughout this Essay to describe the pre-contact inhabitants of the Americas and their descendants. Similarly, as modern scholarship appears to lack a culturally neutral term for the territory explored and occupied by European powers from the late fifteenth century onward, the terms "Americas," "Western hemisphere," "New World," and "Indies" appear throughout the work.

3. *See generally* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: DISCOURSES OF CONQUEST (1990).

4. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). While Chief Justice John Marshall does not refer in his decision to European civil law or to the European jurists cited by the parties, his characterization of Native American tribes as "dependent" is strikingly similar to the conclusions of Spanish jurists. *Id.* at 596. For a useful collection of Latin American constitutional provisions and legislation regarding indigenous peoples, see DERECHOS DE LOS PUEBLOS INDIGENAS: LEGISLACIÓN EN AMERICA LATINA (Gisela González Guerra ed., 1999).

successful conversion seemed insufficient to prompt recognition of these "gentle, naked" people as full-fledged Spaniards.

Complicating these attempts at legal classification was European recognition of social classes, and in particular a ruling elite, among Native American groups. As a practical matter, many Spaniards viewed influence over and exploitation of Indian leaders as a strategy for controlling the native population as a whole. Treatment of native elites as equal partners, however, would undermine Spain's claim to the territory. The problem of Native American legal status under European law remained ambiguous for over a century, despite persistent discussion of colonial exploitation and the periodic appearance of ineffective royal laws prohibiting such behavior.

This Essay examines the efforts of seventeenth-century Spanish jurist Juan de Solórzano Pereira to clarify Native American legal identity within the Spanish social order through the use of legal analogy.[5] Part II describes Solórzano's legal education and the sources of law that he brought to bear on the problems of the Americas. In Part III, the Essay follows Solórzano to his Peruvian post and outlines changes in the colonial legal regime. Part IV returns to the discussion of indigenous legal status, outlining the early debates, and then focusing on Solórzano's use of analogy to identify Indians as "*miserabiles personae*," a category including widows, orphans, and other persons similarly in need of special protection under the law. Although this classification of Indians among the dependent members of European society endured through the end of Spanish colonial rule and was consistent with the royal claim to the territory of New Spain, the analogy ultimately proved insufficiently flexible to adapt to actual circumstances. Part V briefly reviews both the attacks of Critical Legal theorists on the validity of analogical reasoning and recent defenses of this venerable method of legal analysis, as well as cognitive bases of metaphor and analogy. Finally, Part VI offers preliminary conclusions about Solórzano's use of analogical reasoning to construct indigenous peoples' Western legal status and invites further discussion.

II. EUROPEAN SOURCES OF LAW

Juan de Solórzano Pereira was born in Madrid in 1575. His mother and father, both Old Spanish petty nobility, were from the university towns of Valladolid and Salamanca, respectively. At approximately age 12,

5. In terms of methodology, this Essay combines a legal history narrative with legal realism's insights regarding the importance of agency and forms of legal reasoning. Critical Legal Studies, and thus LatCrit, is one of several branches of modern jurisprudence that traces its intellectual lineage to the realists. *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 435-50 (1995); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 269-72 (1992).

Solórzano followed his father into the legal profession, enrolling at the University of Salamanca, the peninsula's most distinguished legal faculty. He graduated in 1599 and began teaching shortly thereafter, receiving the advanced degree of Doctor of Laws in 1608.[6] This traditional legal education formed the core of Solórzano's jurisprudence.

When Solórzano was a law student, the standard curriculum covered the *ius commune*, or law common to all of Europe, rather than local or national Spanish law.[7] Although medieval and early modern jurists treated the *ius commune* in many respects as one system,[8] it actually consisted of two distinct branches.[9] The first was Roman or civil law, based on the Emperor Justinian's sixth-century *Corpus iuris civilis*, a landmark compilation of laws and legal scholarship.[10] In the late eleventh century, the legal community rediscovered the Digest, the section of Justinian that excerpted and organized by subject matter the writings of great Roman jurists.[11] This rediscovery led to the establishment of law schools across Europe and the rapid diffusion of Roman law.[12] So highly regarded was the *Corpus iuris civilis*, that jurists assumed it to contain sufficient material to resolve any given legal question,[13] and centuries later still referred to it as "written reason"—although this reverence for the text did not deter multiple and competing schools of interpretation.[14] Indeed, the Spanish government's attempt, over a century after Solórzano's graduation, to force universities to replace the Roman law-based curriculum with national law was met with such resistance from professors that the order was ultimately repealed.[15]

The second branch of the *ius commune* was canon or ecclesiastical law, which included Biblical passages, statements of Church councils, writings of Church fathers, Papal decisions, and other materials among its

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6. For basic biographies of Solórzano, see JAVIER MALAGÓN & JOSÉ M. OTS CAPDEQUÍ, SOLÓRZANO Y LA POLITICA INDIANA 7-40 (1965); JOSÉ TORRE REVELLO, ENSAYO BIOGRÁFICO SOBRE JUAN DE SOLÓRZANO PEREIRA 15-25 (1929). Note that while modern orthography renders his patronymic as "Pereira," it often appears as "Pereyra" in historical documents.

7. *See* MANLIO BELLOMO, THE COMMON LEGAL PAST OF EUROPE 1000-1800, at 124-25 (Lydia G. Cochrane trans., Catholic Univ. of Am. Press 1995) (1988) (noting the limited legal curricula of late medieval and early modern universities); 1 ALFONSO GARCIA-GALLO, MANUAL DE HISTORIA DEL DERECHO ESPAÑOL §§ 599-603 (10th ed. 1984) (describing twelfth through seventeenth century universities, with emphasis on the legal curriculum in Spain).

8. PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 52 (1999).

9. *See id.* at 49-52.

10. *Id.* at 35.

11. *Id.* at 43.

12. *Id.* at 52-53.

13. *Id.* at 46.

14. *See* BELLOMO, *supra* note 7, at 224-25 (describing various approaches to the study of the *ius commune*).

15. STEIN, *supra* note 8, at 106.

authoritative texts.[16] In the early twelfth century, a scholar named Gratian attempted to organize this unwieldy mass of material in his *Concordia discordantium canonum*, or *Harmony of conflicting canons*, and began to use the volume as a textbook for law students.[17] Over the course of the twelfth and thirteenth centuries, scholars updated Gratian's work with additional compilations, and the resulting authoritative collection of ecclesiastical law became known as the *Corpus iuris canonici*.[18] Although many students, like Solórzano, were not members of the clergy, it nevertheless became common for their university degrees to reflect certification in both civil and canon law.[19]

While the universities of Solórzano's era taught the "learned law," Spanish lawyers conducted the quotidian legal business of the empire according to more localized rules. Collected royal legislation received greatest deference, supplemented by local municipal charters or custom as necessary.[20] Only when these sources failed to address a particular issue were lawyers and judges to apply Roman law, preferably by reference to the *Siete Partidas*, a thirteenth century vernacular text commissioned to introduce Roman and canon law principles into the peninsula.[21] The influence of the *ius commune* was not limited to the interstices of positive law, however, as educated jurists looked to broader currents of European jurisprudence in matters of procedure and interpretation.[22] Solórzano's legal education, while devoid of practical experience, thus prepared him to engage in critical analysis of legal issues according to the highest standards of the seventeenth century European legal community.

III. LAW IN THE INDIES

In 1609, one year after completing his doctoral degree, Solórzano received a judicial appointment as *oidor* of the Royal *Audiencia* of Lima, and the following year set sail for the Americas.[23] He remained in that post

16. *Id.* at 49. For an accessible English-language description of the historical development of canon law and its significance in Western jurisprudence, see JAMES A. BRUNDAGE, MEDIEVAL CANON LAW (1995).

17. STEIN, *supra* note 8, at 49; BRUNDAGE, *supra* note 16, at 47-49. Modern scholars express disagreement as to Gratian's identity, as well as the original date and content of what is often called simply Gratian's *Decretum*. *See also* ANDERS WINROTH, THE MAKING OF GRATIAN'S *DECRETUM* (2000).

18. STEIN, *supra* note 8, at 50-51.

19. *Id.* at 52.

20. CHARLES R. CUTTER, THE LEGAL CULTURE OF NORTHERN NEW SPAIN, 1700-1810, at 31-32 (1995).

21. *Id.* at 32.

22. *See* STEIN, *supra* note 8, at 66 (describing the gradual acceptance of the *Siete Partidas* among professionally trained judges).

23. MALAGÓN & CAPDEQUÍ, *supra* note 6, at 14-15. For a glossary of terms intended to make

for eighteen years, during which he married a *criolla* of a distinguished family and witnessed the birth of eight children.[24] This overseas assignment might have proven routine and unimportant; after all, over a century had passed since first contact between Native Americans and Europeans, and many of the major public debates had given way to established institutions. Instead, subsequent changes in the laws of the Indies allowed Solórzano's Peruvian experience to form the basis for a lasting contribution to Spanish colonial jurisprudence.

Upon Solórzano's arrival in Lima, the system of governance combined the laws of Castile, which exercised claim to the region, with both royal decrees regarding the Indies and local regulations created by European officials and settlers.[25] The Spanish legal system also recognized indigenous law and custom, so long as they conflicted with neither Christianity nor European law.[26] Solórzano's position as a judge required consideration of all of these sources of law, as well as facility in determining which to apply. In 1614, however, King Philip III replaced this extant patchwork of peninsular and colonial laws with a decree that only laws formulated specifically for the New World or adopted by the Council of the Indies would have force there.[27] The declaration placed Solórzano at the forefront of a major reorganization of Spanish colonial law.

Over the course of his career in the royal service, Solórzano became not only an authoritative commentator on the laws of the Indies under Spanish rule, but also a participant in the reorganization of those laws. His first major commentary and legal defense of imperialism, *De Indiarum Iure*, appeared in 1629, shortly after his return to Madrid; the second volume of this work followed ten years later.[28] In addition to this Latin text, Solórzano, in 1647, published *Política Indiana*, a modified version in Spanish intended for wider distribution.[29] Both the Latin and the

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the history of Latin American law accessible to English-speaking scholars, see M.C. Mirow, *Latin American Legal History: Some Essential Spanish Terms*, 12 LA RAZA L.J. 43 (2001).

24. MALAGÓN & CAPDEQUÍ, *supra* note 6, at 16.

25. CUTTER, *supra* note 20, at 32; GARCIA-GALLO, *supra* note 7, § 777.

26. CUTTER, *supra* note 20, at 32; GARCIA-GALLO, *supra* note 7, § 777.

27. CUTTER, *supra* note 20, at 32; GARCIA-GALLO, *supra* note 7, § 777.

28. *See* ANTHONY PAGDEN, LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C. 1500-C. 1800, at 98 (1995) (noting that Solórzano's work offers a defense of imperial ideology grounded in both scholasticism and Roman law).

29. JAMES MULDOON, THE AMERICAS IN THE SPANISH WORLD ORDER: THE JUSTIFICATION FOR CONQUEST IN THE SEVENTEENTH CENTURY 10 (1994). Muldoon notes that Solórzano was ordered to remove certain detailed royal orders against mistreatment of Indians from the manuscript of *Política Indiana* in order to prevent these official descriptions of mistreatment from drawing the attention of other European powers. *Id.* (quoting LEWIS HANKE, THE SPANISH STRUGGLE FOR JUSTICE IN THE CONQUEST OF AMERICA 90 (1949)).

Spanish versions of Solórzano's work circulated widely throughout the New World and were reprinted several times during the seventeenth and eighteenth centuries.[30]

While Solórzano also played a major role in collecting and rationalizing the laws of the Indies following the 1614 decree, that project did not proceed as expeditiously as the publication of his scholarly commentaries. The Council of the Indies, including Solórzano himself, approved an early version in 1636.[31] The official text of the *Recopilación de leyes de las Indias*, however, was not promulgated until 1680, some twenty-five years after Solórzano's death.[32] The fortuitous timing of Solórzano's judicial appointment, together with a traditional legal education that informed his analysis of colonial jurisprudence, nevertheless secured his position as an influential force in the history of Latin American law.

IV. LAW FOR THE INDIANS

As Solórzano worked to construct what became the definitive legal argument for Spanish activities in the New World, one of the major unresolved issues was the legal "status" of Native Americans within Spanish society. Despite a century of debate, including significant currents of thought that emerged from Solórzano's own alma mater, a mass of ad hoc legal enactments governed Indian-European interactions. Diversity among indigenous peoples and changing demographics further complicated the search for a unified legal structure. Lima, for example, was a city of 60,000 people, of whom 30,000 were slaves of African descent, 25,000 were considered Spanish, and a mere 5,000 were Indians.[33] While the daily life of an *indio* compelled to render service to the Spanish state may have been little different from that of an *esclavo*, Indians were nevertheless a separate group from slaves, who were treated as chattels, and were subject to different rules. Solórzano's attempts to articulate a precise classification of this distinct minority group within the formalist Spanish legal system formed an important part of his work, and one that may offer insight into the deepest roots of the modern legal identity of indigenous peoples in the Americas.

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30. MULDOON, *supra* note 29, at 10.

31. *See* GARCIA-GALLO, *supra* note 7, § 785 (describing the series of efforts that led to the promulgation of the *Recopilación*).

32. *Id.*

33. MALAGÓN & CAPDEQUÍ, *supra* note 6, at 18.

A. *Historical Debate: Indian Identity and Legal Status*

From Queen Isabella's frequently quoted reprimand of Columbus for attempting to initiate a slave trade in her Native American "vassals,"[34] to the famous debates between Bartolomé de Las Casas and Juan Ginés de Sepúlveda at Valladolid,[35] early European attempts to characterize the previously unknown American peoples polarized the empire. The first eyewitness report from the "Indies," the widely circulated letter attributed to Columbus, enthusiastically described many of the native peoples as gentle, unsophisticated, unclothed, and lacking in any "ill-will [or] treachery."[36] By contrast, the letter also warned against certain islands inhabited by armed cannibals.[37] Although simplistic and inaccurate, Columbus's words laid the foundations for two competing theories regarding the nature of the Indians: either they were "noble savages," endowed with a wide range of simple virtues, or they were mere "beasts," greedy, savage, and idolatrous.[38] More informed, moderate, and nuanced ethnographic information would gradually inform this national debate, in part through the testimony of indigenous peoples themselves, but the argument's general parameters influenced royal policy throughout the colonial period.

The intensity of the debate might have waned in the decades following first contact between Native Americans and Europeans were it not for the political and theological ramifications of the issue. Spain had predicated its original claim to territory in the New World on a missionary "duty" to subject the Indians to Christian rule and thus convert them. In the 1493 bull *Inter caetera*, the Pope recognized this claim and assigned a large portion of the region and its inhabitants to Castile. This constructed understanding of the Spanish presence in the Americas led directly to the *encomienda* system, which entrusted groups of Indians to individual Spaniards who were responsible for their religious and cultural training and protection.[39] In practice, the system allowed an *encomendero* to exact heavy tributes from "his" (or occasionally her) Indians, and fostered many of the abuses of chattel slavery, including removal from home villages and

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34. HANKE, *supra* note 29, at 20.

35. *Id.* at 11. For the arguments of Las Casas, see BARTOLOMÉ DE LAS CASAS, IN DEFENSE OF THE INDIANS (1992).

36. Margarita Zamora, *Christopher Columbus's "Letter to the Sovereigns": Announcing the Discovery*, *in* NEW WORLD ENCOUNTERS 1, 4 (Stephen Greenblatt ed., 1993).

37. *Id.* at 8.

38. *See* HANKE, *supra* note 29, at 11-12 (describing the sixteenth century conflict regarding the nature of the Indians).

39. *See generally* LESLEY BYRD SIMPSON, THE ENCOMIENDA IN NEW SPAIN: THE BEGINNING OF SPANISH MEXICO (1966).

forced labor. Although the crown issued a steady stream of decrees designed to curb the atrocities of the colonists,[40] many believed that the Indians' "brutish" or "barbaric" nature required subjugation through harsh controls.[41] Those on the other side of the debate, including the Dominican and former *encomendero* Bartolomé de Las Casas, supported a policy of converting the "docile and clever" native peoples to Christianity through teaching and persuasion.[42] Beliefs regarding the nature and character of Native Americans were thus central to Spain's Catholic religious identity and exercise of imperial power.

In the realm of academia, the sixteenth century debate over the "nature" of the Indians led to a new union of jurisprudence and theology centered at the University of Salamanca. Its leading proponent was the Dominican theologian Francisco de Vitoria, who believed that law should interpret and reflect the divine will apparent in nature, including the unequal status of persons.[43] This theory supported both the need for governmental structures and the exercise of power over individuals, such as the *encomienda* system. Vitoria also argued, however, that the Church did not exercise universal temporal authority over nonbelievers, and that Spain required grounds other than the 1493 papal donation for its claims in the New World—a point of view shared by competing European powers.[44] Lawful control over non-Christian lands might instead, in Vitoria's view, arise from the need to exercise moderate force in order to preach the gospel.[45] Since this argument focused on nonbelievers' receptivity to Christianity, and on the potential use of just war in the service of missionary activity, it once again drew attention to the essential question of the Indians' character and normative legal status.

B. *Solórzano's Synthesis: Miserabiles Personae*

The value of Solórzano's treatment of the issue of Native American legal status, and of colonial jurisprudence more generally, lay not in original argument or polemical description but in an orderly approach to harmonizing a century of debate and ad hoc decrees with pre-existing legal structures. His *Política Indiana* consists of six books, the first of which addresses the threshold question of Spanish title to the Indies, while the second turns to the question of indigenous status. After discussing specific forms of labor and desired conditions, Solórzano concluded "[t]hat the Indians are and should be counted among those persons whom the law

40. *See generally* RECOPILACIÓN DE LEYES DE LOS REYNOS DE LAS INDIAS 1681 (1987).
41. LAS CASAS, *supra* note 35, at 11-16.
42. *Id.* at 362.
43. BELLOMO, *supra* note 7, at 226-28.
44. HANKE, *supra* note 29, at 150-52.
45. *Id.* at 151.

calls *miserables* . . . ."[46] In this context, the term is categorical rather than merely descriptive. While Solórzano did consider many Indians to be among the "poor and wretched" of the earth, comparing them to Job and other suffering Biblical figures,[47] his primary intent as a jurist was to establish for them a definitive legal status, in this case the canonical category known in Latin as *miserabiles personae*.

In order to rationalize the existing body of Indian law according to the principles of the *ius commune*, Solórzano's preliminary task was to assign a group identity.[48] Rather than rely directly on his own impressions from nearly two decades in the *Audiencia* of Lima, he cited other authors to describe both the Native Americans' "humble, servile, and submissive condition"[49] and, even when their suffering did not reach Biblical proportions, their position as recent converts was noted for "ignorance, lack of sophistication, poverty, and faintheartedness."[50] Solórzano went on to discuss the Indians' need for protection against mistreatment, not only for their own benefit but also because they are the "feet" of the republic without which it cannot stand.[51] Largely absent from this account is consideration of hispanicized *indios ladinos*, including those who were able to win small but significant victories within the Spanish system of justice[52] or compose a book-length work intended to inform the crown of colonial abuses.[53] Instead, Solórzano relied on his elite, educated perspective to gather documentary evidence characterizing Native Americans as a relatively homogenous group in need of Spanish protection.

Once Solórzano had established a working description of Indian identity, he was able to assign the group to an existing category of European law. According to the canonists, the Church had a special duty to protect *miserabiles personae*, a term used to describe widows and

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46. JUAN SOLÓRZANO PEREYRA, POLÍTICA INDIANA 2.28 (Francisco Tomás Valiente & Ana María Barrero eds., Biblioteca Castro 1996) (1647) (author's translation) [hereinafter POLÍTICA INDIANA].

47. *Id.* at 2.28.2.

48. *See* Laurent Mayali, *Le droit des autres dan la France médiévale: Système de différenciation et mode d'harmonisation, in* IDENTITÉ ET DROIT DE L'AUTRE 183, 183 (Laurent Mayali ed., 1994) (noting that while approaches to the issue differ across legal systems, the initial problem is defined in terms of identity).

49. POLÍTICA INDIANA, *supra* note 46, at 2.28.1.

50. POLÍTICA INDIANA, *supra* note 46, at 2.28.3.

51. POLÍTICA INDIANA, *supra* note 46, at 2.28.20.

52. *See, e.g.*, STEVE J. STERN, PERU'S INDIAN PEOPLES AND THE CHALLENGE OF SPANISH CONQUEST: HUAMANGA TO 1640, at 114-37 (2d ed. 1993) (describing Indians' successful use of the court system to, *inter alia*, reduce payment of tributes and pursue land claims).

53. *See generally* ROLENA ADORNO, GUAMAN POMA: WRITING AND RESISTANCE IN COLONIAL PERU (2d ed. 2000) (analyzing the work of sixteenth and seventeenth century Native American author Felipe Guaman Poma de Ayala).

orphans in particular, as well as those who were old, blind, mutilated, worn-down by long sickness, or poor and oppressed in general.[54] The breadth of this category, which Solórzano defined simply as "all those whom we naturally pity because of their status, capacity, and labors,"[55] could easily accommodate an additional group characterized by their alleged need for protection. By analogy, then, the indigenous peoples of the Americas became *miserabiles personae*, and the Spanish government acted as their guardians on behalf of the Catholic Church.

Although the purported benefits of this dependent status under canon law were limited, Solórzano compiled a wider range of legal "protections" on the basis of existing colonial laws. Traditionally, *miserabiles personae* enjoyed only the option of bringing their cases directly before an ecclesiastical court rather than seeking justice in the secular realm.[56] Influential commentary on the law, however, suggested that this special original jurisdiction would apply only if the litigant were actually poor and powerless; wealthy widows and others who were technically *miserabiles* but not in actual need of protection could appeal to the Church only after failing in the first instance to obtain justice from a secular court.[57] Ordinary litigants, by contrast, could appeal to ecclesiastical courts only as a last resort after exhausting all avenues of secular justice.[58] In his expansion and adaptation of the concept of *miserabiles personae*, the former *oidor* did not limit himself to shifting jurisdiction away from the royal courts, in which he had once served, to potentially more sympathetic ecclesiastical courts. Instead, he focused on guidelines for judicial treatment of Native Americans and specific provisions drawn from both Roman and canon law. Among these were the admonition "that trials and court cases involving Indians, especially poor ones, be concluded quickly and with paternal love,"[59] limitations on contractual capacity intended to protect against alienation of goods,[60] and the presence of "protectors" to provide legal assistance.[61] Later, in the third book of *Política Indiana*, Solórzano employed a similar method to support the continuance of the *encomienda* system while reasserting the importance of safeguards against abuse. This reinterpretation of the duty owed to *miserabiles personae* allowed Solórzano to collect many of the ad hoc royal protections and

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54. BRIAN TIERNEY, MEDIEVAL POOR LAW: A SKETCH OF CANONICAL THEORY AND ITS APPLICATION IN ENGLAND 15-19 (1959) (citing *Decretum Gratian, Dist.* 84 *ante c.* 1; Innocent IV, *Commentaria ad* X 1.29.38).

55. POLÍTICA INDIANA, *supra* note 46, at 2.28.1 (author's translation).

56. TIERNEY, *supra* note 54.

57. *Id.* at 18-19 (citing Innocent IV, *Commentaria ad* X 1.29.3).

58. *Id.*

59. POLÍTICA INDIANA, *supra* note 46, at 2.28.27 (author's translation).

60. POLÍTICA INDIANA, *supra* note 46, at 2.28.42-45.

61. POLÍTICA INDIANA, *supra* note 46, at 2.28.46-52.

reforms of the first century and a half of Spanish colonial law under the umbrella of the *ius commune*.

Using legal analogy and the analytical techniques of the learned law, Solórzano incorporated the original inhabitants of the New World into the jurisprudence of the old, establishing an Indian identity and formal legal status that would endure for another 150 years.

V. ON ANALOGICAL REASONING

Although analogy is a venerable method of legal reasoning, its validity has been challenged in recent years. Roberto Unger and other Critical Legal theorists have argued that analogical reasoning is incoherent outside its own cultural context, and thus incapable of yielding just results in a heterogeneous society.[62] Quite so, since epithets such as "childlike" or "savage" are likely to mean very different things in different cultures, and near-nudity on Caribbean beaches today is unlikely to justify foreign conquest. By this account, Solórzano's use of analogy to categorize peoples and govern lands largely foreign to him is extremely suspect.

As one modern judge has pointed out, however, the use of legal analogy remains in good repute among members of the bar, and thus in little danger of disappearance.[63] Cognitive science, moreover, demonstrates that human beings have an innate tendency to analogize and to create categories; in other words, analogical reasoning is part of human hardwiring.[64] In light of these twin pillars of tradition and nature supporting the continued use of legal analogy, the contemporary legal community may enjoy more success if it attempts to re-examine this

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62. *See, e.g.*, Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 570 (1983).

63. Robert E. Keeton, *Statutory Analogy, Purpose, and Policy in Legal Reasoning: Live Lobsters and a Tiger Cub in the Park*, 52 MD. L. REV. 1192, 1213 (1993).

64. Keith J. Holyoak et al., *Introduction: The Place of Analogy in Cognition, in* THE ANALOGICAL MIND: PERSPECTIVES FROM COGNITIVE SCIENCE 1, 2 (Dedre Gentner et al. eds., 2001). An approachable introduction to the realm of metaphor and cognitive thought is GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980). Other recent works exploring analogical reasoning from a variety of perspectives include METAPHOR AND THOUGHT (Andrew Ortony ed., 1993) (indicating a cross-disciplinary collection of essays); KEITH J. HOLYOAK & PAUL THAGARD, MENTAL LEAPS: ANALOGY IN CREATIVE THOUGHT (1995) (noting an extended account of the mechanism and applications of analogy); GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT (1999) (wide-ranging exploration of the relationship between the embodied mind and philosophical inquiry); and BARBARA MARIA STAFFORD, VISUAL ANALOGY: CONSCIOUSNESS AS THE ART OF CONNECTING (1999) (noting an account of analogy from the perspective of an art historian).

In addition, a related legal study on employment discrimination offers an in-depth exploration of the relationship between cognitive processes of categorization and formation of potentially harmful stereotypes. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

method of reasoning rather than simply overturning it. Essential to this enterprise are two questions: Are there benefits to analogical reasoning, particularly in the construction of socio-legal identity? And, is it possible to circumvent its parochial tendencies?

Cass Sunstein has provided a moderate defense of analogical reasoning, albeit while claiming a preference for Rawlsian "reflective equilibrium,"[65] and Solórzano's seventeenth-century attempt to rationalize Native American legal status according to the norms of his era offers a hypothetical object for this new perspective. Sunstein identifies several benefits to the use of legal analogy, all stemming from the "incomplete theorization" of analogical reasoning. Two of these potential benefits are particularly applicable to the issue of indigenous legal status under Spanish colonial rule. The first significant advantage is that those who cannot reach agreement on general principles may be able to agree on the outcome of a particular case through legal analogy.[66] This formulation suggests that in the Americas, decades of debate over the essential identity of the Indians might have been circumvented by an earlier appeal to legal analogy. It is plausible to imagine that Dominican friars like Las Casas seeking fair treatment for Native Americans under the law and royal governors seeking to police the abuses of the *encomienda* system in order to avoid international disapprobation might agree that Indians seeking access to justice would need special protection, not unlike the existing categories of *miserabiles personae*, even if they could not reach immediate agreement as to the Indians' nature and character.

The second significant advantage is that analogical reasoning allows moral evaluation over time because it is open to new facts and perspectives,[67] at least when unencumbered by the fixed categories of a formalist legal system. In Spanish colonial terms, it is possible that the steadily increasing ability of many disempowered groups of people, including Indians, to exercise influence and to assert their limited rights within the legal system might have prompted a revision of Solórzano's analogy. To speculate further, it is possible that such a revised analogy might have led to a more inclusive formulation of Spanish citizenship, or even the possibility of multiple group affiliations, rather than a series of revolutions against an oppressive colonial power.

Legal analogy is a basic tool from the lawyer's workbench, and one that we need to examine further, rather than unsuccessfully attempt to

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65. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 751 (1993). For another analysis and reconsideration of legal analogy, see Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 925 (1996).

66. Sunstein, *supra* note 65, at 782.

67. *Id.*

discard, in order to avoid cultural incomprehensibility or oppression. In the context of socio-legal identity, an important threshold issue is whether and how a legal system focused on individual rights can also be capable of protecting group identity. If legal analogy appears to be an avenue for such protection, jurists must attempt to ensure that the modern realist legal system is flexible enough to protect groups of people without reifying them. Perhaps most importantly, if legal analogy is used to define socio-legal categories, the law must provide for group boundaries to remain permeable and group identity to retain the opportunity to evolve.

VI. CHECKING THE REARVIEW MIRROR

In the mid-seventeenth century, an ordinary Spanish civil service lawyer undertook to situate the indigenous peoples of the Americas within the established categories of the formalist European legal system, an organizational task that had thus far eluded a society preoccupied by the complexities and opportunities of a newly "discovered" world. Reasoning from time-honored principles of medieval law, he discovered that legal analogy would allow him to identify Native Americans with the poor, wretched members of European society. Analogy ossified into a set of rules and expectations, and Indians—elite and otherwise—became wards to be educated and protected by guardians under the special protection of the Spanish legal system. This compact legal theorem, though inconsistently applied at the local level, gave the crown claim to the "Indies" and reclassified the native population as eligible for membership in a dependent class of Spanish subjects. As one might predict of the construction of a subordinate group within a formalist legal system, however, one inconsistency still remained: the apparent lack of a mechanism to ensure full participation in society when the characteristics used to justify dependency had dissipated. Eventually, this legal rigidity contributed to the crumbling of the entire colonial system.

By attempting to apply the rule of law to a rapidly growing and changing sphere of influence through the use of analogical reasoning, Spain accepted a challenge familiar to both ancient and modern legal systems. Its resulting legal process displayed many evident flaws, in particular the near-complete absence of indigenous participation. The historical evolution of this jurisprudence, alongside an early national debate surrounding the construction of an empire incorporating multiple populations, is nevertheless a significant and overlooked chapter in the evolution of Western law.