

Untangling Ourselves from the Doctrine of Discovery

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Preface

Scholarship and Indigenous activism focused on the Doctrines of Discovery (DoD)¹ have provided important insights into the role of legal and moral fictions that enabled European colonization, and shaped legal history of North America throughout the 19th century and into the 20th century. What was until recently an esoteric topic in North American colonial history, unknown even to many Indigenous Peoples, the DoD is now a featured aspect of an increasing number of mainstream articles. Historians and teachers include information on the DoD in an effort to provide balance in a colonial historical narrative that for too long reflected only the colonial settler perspective. Newspaper articles, television programs, and popular discourse on almost any topic related to Indigenous issues or colonial history now routinely mention the DoD. Scholarship on the DoD has been at the forefront of changing both public awareness and policy makers' understanding of colonial history and its continuing legacy. We should be grateful for these much needed corrections to a 500 year-old distorted historical narrative.

Overview

When the Vatican repudiated the Doctrine of Discovery on March 30, 2023, it presented those of us who are Indigenous with the possibility of beginning to disentangle ourselves from harmful historical narratives. We now have an opportunity to complete the task of demolishing and finally laying to rest the (im)moral foundations of a colonial mindset and a pseudo-legal legacy emanating from the US Supreme Court *Johnson v M'Intosh* decision. We also have an opportunity to unburden ourselves of a long and disempowering tradition of wedding our identity to a victimhood mindset that is entangled with the DoD. This second opportunity may prove to be as much of a challenge as was pressuring the Vatican to repudiate its doctrines.

Toward that end I offer an historiographical analysis informed by my own Indigenous perspective. It focuses on several misleading assumptions about the DoD which pervade the literature on decolonization. My primary concern is that by continually focusing on the Doctrines of Discovery, Indigenous advocates overstate the doctrines' historical influence, current impact, and persistence, thereby unwittingly enhancing their aura as all powerful. This

¹ I use "DoD" in the singular to refer to the sprawling constellation of multiple Medieval and Renaissance Papal pronouncements including *Inter caetera* (1493), various declarations of European monarchs and imperial powers on matters of "discovery" and occupancy, and more than a century of legislation and jurisprudence whereby Indigenous Peoples were dispossessed of their lands and sovereignty.

can result in discouraging Indigenous Peoples from affirming their sovereignty and treaty rights out of fear that they will ultimately and with certainty be defeated by a five hundred year old legal and moral fiction. Such an outcome is, paradoxically, the exact opposite of the aspirations of those engaged in highlighting these doctrines. Of further concern, this backward-looking perspective can distract both Indigenous communities and those in the mainstream from addressing the even more damaging daily reality of racism which gave birth to the DoD and which continues to underpin anti-Indian law today.

Re-examining Assumptions About Causation in DoD Scholarship

The DoD is commonly presented in scholarly and advocacy publications as something approximating a primary determinant or shaping force of the *entire* historical and continuing colonial experience for Indigenous Peoples. The DoD has been raised to the level of often being given as the sole cause of afflictions in Indigenous society including residential schools, drug and alcohol abuse, and domestic violence.

To restate this in social science language, if the DoD were a variable in an analysis of variance equation examining the sum total of negative impacts of colonial history, the DoD is being given the explanatory power of appearing to account for a vast majority of the variance in occurrence of afflictions challenging Indigenous society, as opposed to the occurrence of the same afflictions in the mainstream. In terms of the logic of causation, the DoD has been elevated from its status as a “necessary ingredient” for understanding colonialism to the point where it is not uncommonly now seen as virtually a “sufficient ingredient” by itself, for explaining an entire historical period. Such exaggerated claims are often made implicitly, as in article titles designed to attract search engines and gain journal editors’ sympathy and acceptance. But these claims also appear explicitly in official reports such as recommendations made by the Truth and Reconciliation Commission of Canada where Call to Action number 46 attributes the appearance of residential schools largely to the DoD.

Not only do such claims exceed reasonable standards of demonstrating causation, over-stating the role of the DoD in shaping every aspect of colonial history focuses responsibility on actions that occurred safely distant in time. Such explanations let politicians off the hook by allowing them to posture awareness and sympathy, while distracting attention from probing current realities.

Equally questionable is a critical underlying assumption of DoD literature: the notion that statutory law and federal court cases are a primary determinant of human behavior in society. Sociologists, anthropologists, and criminologists have long disputed such claims. Nevertheless, DoD scholarship implicitly, if not explicitly, attributes extraordinary power to law and civil authority exercised by colonial governments which were in the very early stages of formation, consolidation, and exercise of state and federal power in the 18th century and even throughout

the 19th century at the “frontier” in North America. As we are all aware in the 21st century, even with a historically high-water mark of state and federal powers, legal restraints on corporate behavior, drug use, and gun control fall far short of actually constraining behavior. Our current realities should inform our understanding of the vastly more limited reach of colonial laws and court rulings.

Clearly, colonial era legal restraints on purchasing and occupying lands in “Indian Territory” had some measurable impact. The British Crown’s Proclamation of 1763, issued after the French and Indian War, imposed a prohibition against settler advances beyond the Appalachians. It did briefly have some effect. However, it was largely ignored. And in fact, it was one reason that settler-colonists argued for independence, to escape such British legal restrictions entirely. When George Washington and other founders argued for independence, it was in no small part due to the fact that they were speculating on lands in Indian Territory and wanted to end restrictions on acquiring Native American lands. When Chief Justice Marshall ruled on *Johnson v M’Intosh*, his own land speculation interests and those of his cronies came into play behind the scene.

It can be reasonably argued that decisions such as *Johnson v M’Intosh* enabled and facilitated westward advances by settlers and the federal or state governments into territory designated as treaty-protected for Native Americans. Undoubtedly this was the case to *some* degree. However, any notions that westward expansion and settler seizure of Indian lands piece by piece were driven in large part or entirely by decisions such as *Johnson v M’Intosh*, not to mention the DoD, must be viewed with extreme caution. The overriding reality is that the *de facto* occupation of Indian lands by settlers occurred a century or more before legal occupation by settlers was the norm. Supreme Court cases and statutory laws were more a confirmation of a *fait accompli* than they were a stimulus.

The sociological reality of colonial America has been somewhat distorted by implicit and explicit claims that the DoD broadly shaped colonists’ behavior. The highly profiled musings of Chief Justice Marshall on “discovery” in deciding *Johnson v M’Intosh* in 1823 should not be confused with a broad cultural embrace of *Inter caetera* or other papal decrees collectively referred to by historians as The Doctrine of Discovery. Indeed as Steven Schwartzberg’s book *Arguments over Genocide: The War of Words in the Congress and the Supreme Court over Cherokee Removal*, documents, colonists, newspapers and ranking political leaders questioned the legitimacy and justice of seizing Indian lands, and treaty violations in the early decades of the 19th century.

This raises the question of the colonists’ cultural landscape and how their values and interests were imposed on the physical landscape. Here we must note that land hungry speculators and settlers did not have copies of *Inter caetera* hanging on the walls of their log cabins. Various forms of the DoD were not printed and inserted into the front page of the family Bible as daily

inspiration. Such theological encouragement was not needed. The motivation to lay claim to Indian lands did not need a moral imperative akin to 19th newspaper editorials imploring settlers to “go west young man”. The DoD was not a significant part of public consciousness or the zeitgeist of colonial times. Land greed was the dominant value. Land greed was endemic and an epidemic that drove state and national governments to play catch up by providing *ex post facto* justifications for land and resource seizures. The pattern continues to this day.

Johnson v McIntosh, and before it papal bulls concerning occupation and ownership of Native lands, were a reflection of economic forces aligned with the military and police power of the state, whose function has long been to protect the property and resources that the affluent and powerful lay claim to. Sound jurisprudence and morality are, sadly and too often, afterthoughts, not primary drivers of human behavior in such situations.

My push back on the matter of causation concerning the influence of the DoD should not be interpreted as a wholesale rejection of the notion that the DoD played a harmful role in the realm of jurisprudence with regard to Indigenous Peoples. I am instead arguing that that the role of the DoD is significantly overstated, and that “quantifying” its precise import or weight in colonial history requires pressing the pause button and turning down the heat and outrage surrounding the DoD so that we can more rationally and objectively assess causation in both colonial history and the contemporary world. Only then can we begin to fully understand the complex dynamics of continuing Indigenous dispossession and exploitation.

The Myth of a Coherent Legal Doctrine

Among the most damaging and inaccurate assumptions about the “The Doctrine of Discovery” is the implication that it consists of a powerful coherent, single, and institutionalized legal doctrine that has coalesced and consistently grown in influence over time. In fact, there is no single coherent “Doctrine of Discovery”. Use of the singular term “doctrine” rather than the plural “doctrines” is largely an artifact of scholarly and advocacy narratives that seek to simplify an immensely complex chapter in colonial history. It is powerful rhetoric but not good history.

The keystone segment of “The Doctrine of Discovery”, the 1493 Papal Bull *Inter caetera*, began unravelling soon after it was issued, as discussed in the section which follows. Other related papal declarations made over more than half a millennium, multiple edicts issued by European monarchs, and decisions made by the highest courts of several nations, converged loosely and often inconsistently in an attempt to legitimize efforts to subjugate Indigenous inhabitants of the western hemisphere.² But they did not and do not collectively constitute a coherent overriding single “doctrine”. Describing them *as if* they exhibit coherence has given them legitimacy and has attributed authority which is undeserved, inaccurate, and disempowering.

² See Appendix A (forthcoming)

Consequently, several scholars have rightly pointed out that the mere specter of the DoD often stands in the way of Indigenous legal advocates who hesitate to confront and challenge it for fear that they will inevitably be defeated in their efforts to assert Indigenous sovereignty and treaty rights. How much of this intimidation is sound reasoning and how much is the result of DoD historiography is in need of revisiting. That is precisely the point of this paper.

Concerning “Christian” Origins and Practices

It is now time to address what is undoubtedly the most contentious and zealously held misconception about the “Doctrine of Christian Discovery”. Because many of the earliest proclamations on the rights of European colonizers and explorers were issued by Catholic Popes, some historians, and a plurality if not a majority of Indigenous advocates, see the moral underpinnings of *Inter caetera* and derivative legal “doctrines” that unfolded over the following centuries as rooted entirely, and in a deterministic fashion, in mainstream Christian theology.

Almost any pronouncement from European leaders, including secular rulers, in the Medieval or Renaissance time frame exhibited significant strains of Judeo-Christian thought and was couched in lofty theological terms. The “divine right” to rule that monarchs claimed is an example. Viewing such statements as derived directly *from* religious thinking distracts us from exploring other social, economic and political dynamics behind rhetoric. A contemporary analogy would be taking at face value US presidential declarations that the nation’s foreign policy arises entirely from an unwavering commitment to protecting freedom and national sovereignty. Moral posturing frequently hides more profane influences. Scholars of the DoD have much to gain by looking at factors other than theology which underlie moralistic utterances.

The time will come when Indigenous advocates and critics of the DoD will be called upon to explain and defend claims that the unjust treatment and genocide evident during colonization is directly attributable to Christian influence. DoD scholars will be expected to meticulously document their narrative concerning the culpability of the DoD in actions that rise to the level of the criminal by 21st century standards. Currently Indigenous advocates and scholars of the DoD enjoy an atmosphere which has generally discouraged scrutiny of Indigenous historical counter-narratives. That may be ending. Evidence that such a shift toward skepticism is underway can be seen in the rapid rise of mainstream media coverage and “investigations” of purportedly false claims of Indigeneity, such as those leveled by the Canadian Broadcast Corporation against Buffy Sainte Marie. The whole “pretendian” controversy has arisen in Eastern Canada due to growing turmoil surrounding Métis fishing and hunting rights, and the perception that such rights deprive non-Indigenous people of access to hunting and fishing lands. The legitimacy and authenticity of Indigenous people in general is now being called into question. Such conflicts, arising from heightened Indigenous power and rights, and the

targeting of those who make exaggerated claims about personal or communal identity is a reminder that we must become wary of making such claims and presenting appealing narratives for which we have less than clear and incontrovertible evidence.

An example of our vulnerability and overdependence on less than rigorous analysis is the practice of juxtaposing declarations of the Medieval Catholic Church with reports of colonial behavior which occurred a century or more later. Causal connection is too often dealt with in a naïve manner by merely *suggesting* that there is a one-to-one correspondence. For example, it is all too common to see the most extreme statements from various doctrines of discovery lifted out of context and then paired with individual tales of conquerors' brutality, or worse, paired with graphic engravings of violence and genocide. This is a powerful rhetorical device and has been effective in gaining public sympathy. But it is not sound historical analysis, and will not withstand the test of time.

Perhaps even more revealing is the fact that few DoD scholars appear willing to examine historical evidence pointing to efforts by explorers and missionaries to adapt and moderate extreme religious directives to "conquer and convert". Few scholars have examined how Indigenous leaders used their initial power dominance and diplomacy to very deftly negotiate, for several centuries, power sharing arrangements that fall far short of collapse and hopeless acceptance of subjugation in the face of what is commonly portrayed as a genocidal onslaught attributable to the DoD.

The gap between extreme rhetoric and colonial practice returns us to the question of the degree to which historians' characterizations of the DoD as *essentially* Christian should be taken at face value in the first place. It is indeed shocking to read papal pronouncements on the rights, powers and obligations of European nations encountering non-Christians. But taken as a whole and not selectively quoted, papal bulls and their subsequent clarifications are not the egregious calls for genocide that is routinely alleged.

There are undeniably very significant strains of Eurocentric religious and cultural superiority in various doctrines proclaiming the rights and powers of explorers and colonizers over "heathen" Indigenous peoples during the late modern historical period of exploration and colonization. However, the DoD was not clearly, consistently or absolutely affirmed by Church officials in the late Middle Ages, Renaissance, or subsequent eras. This is illustrated by the fact that theologically based notions of Indigenous spiritual inferiority were challenged shortly after the issuance of *Inter caetera* in 1493.

Directives to subdue and Christianize "heathens" by force, and the implication that this was also a license to expropriate the wealth of the western hemisphere, were questioned almost immediately by none other than Queen Isabella of Spain, who was an intended beneficiary of

the 1493 Papal Bull *Inter caetera*. Notions of limitless power of European “discoverers” over Indigenous Peoples were also challenged almost immediately by important theologians. In 1539 Francisco de Vitoria wrote that the Spanish discovery of the Americas provides “no support for possession of these lands, any more than it would if they had discovered us.”

Secular leaders, including a Holy Roman Emperor, Charles V, questioned the Papal Bull. The French disputed territorial claims of Spain rooted in the DoD as they attempted to establish their own colonies in Canada. French opposition to territorial claims focused on discovery without possession. The French king stated that “Popes hold spiritual jurisdiction, and it does not lie with them to distribute land amongst kings” and further asserted that “passing by and discovering with the eye was not taking possession” and does not legally establish imperial claims. Papal secular authority was being widely and directly challenged.

Sixteenth century monarchs knew all too well that the Papacy was morally compromised and over-reaching with its secular power grabs. It is therefore not surprising that they would challenge papal authority. They understood *Inter caetera* for what it was, a legal fiction issued as a *quid pro quo* by a notoriously corrupt Borgia family pope, Alexander VI, in appreciation for the support that Spain’s Catholic monarchs gave to him in his pursuit of raw secular power, and secondarily as payback for their huge expenditures removing an Islamic presence from Spain. Contemporaries of Pope Alexander did not see *Inter caetera* as a sincere or credible effort to ground international law in theology. That connection has been made primarily by DoD scholars centuries later. However, in so doing they display a lack of awareness of political and economic undercurrents omni-present in Medieval Vatican politics.

Put simply, the Doctrine of Discovery was issued as a secular political calculation and was widely understood at the time to be a display of secular power or over-reach by the Vatican. It has been misunderstood in the 20th and 21st centuries as a theologically rooted proclamation. As a result modern historians of colonization have been distracted from looking at the real historical roots of the dispossession of Indigenous Peoples of their lands and sovereignty.

Recognizing such gaps in understanding the historical origins of the DoD, we need to shift our focus from the realms of theology and intellectual history and begin to examine how edicts issued by the Vatican and secular rulers were *actually* implemented in the early decades of colonization.

If we make this shift in focus we will be struck by the fact that the first centuries of conquest and colonization were often characterized by Europeans struggling to first establish and then to maintain a foothold in distant worlds where Indigenous Peoples held considerable power and were able to mount effective resistance. This is very rarely discussed in DoD literature. Instead

we are routinely presented with the juxtaposition of an etching of some conquistador planting a cross on the shoreline while hapless “Indians” kneel and look on.

The diplomatic and legal traditions that European explorers employed in their initial relations with Indigenous Peoples deserve more attention than they have received in DoD narratives to date. Fortunately, this less well-known aspect of colonial history has been documented. The scholarly work of Damian Costello, a theologian, is an example of revisiting colonial history and assumptions from European cultural and religious points of view. In his research on the Spanish practice of *Requerimiento*,³ Costello shows how first contact Spanish explorers actually engaged Indigenous Peoples and often attempted to subdue them but not erase them with genocidal intentions. Costello points out that declaring the *Requerimiento* upon setting foot in foreign lands and attempting to establish legitimate domination required, by Spanish law, announcing exactly what the conditions of subjugation were to be. A *Requerimiento* routinely involved payments of tribute, but also allowed for a degree of political and cultural autonomy. In direct contradiction to the nearly unchallenged assertion that Spanish conquistadors were fanatically committed to forced religious conversion. Costello notes:

“While many modern commentators interpret the Requirement as if it declares “convert or die,” it actually had nothing directly to do with conversion. The only time the document refers to conversion is to reassure the hearer that conversion, unlike the demand for fealty, will be optional.”

Sixteenth century conquerors who are typically portrayed as something akin to leading a D-Day style invasion clutching the DoD in one hand and a cutlass in the other were notably constrained by legal and moral practices brought from Europe.

If anything, some of the conquistadors were hapless. Bartolomé de las Casas, an eye-witness chronicler of the earliest contact between Europeans and Indigenous Peoples, describes explorers reading the *Requerimiento* to natives who sometimes understood it but often had no translators. He also documents first contact Europeans reading the *Requerimiento* to empty sand beaches or to trees. He noted that the tragi-comic aspect of these bungled attempts at perfunctory notification and efforts to subdue Indigenous Peoples “legally” left him not knowing whether to laugh or cry.

Bartolomé de las Casas’ accounts should be a humbling reminder about being tempted to exaggerate claims that the DoD, by itself, and unmediated by other legal or moral constraints

³ Damian Costello, “Revisiting the *Requerimiento*: Fealty, Unsacred Monarchy, and Political Legitimacy” pp 185-201 in *Weaving the American Catholic Tapestry*, edited by Derek Hatch and Timoty Gabrielli, Pickwick Publications 2017.

shaped the early colonial experience. It is time to back up and qualify claims that the mere existence of the DoD, which apparently was never announced to Indigenous Peoples, is less directly involved in the actions of the conquistadors than has been claimed. Including such information will provide a more nuanced and accurate historical narrative of early colonial history.

The correction should not confuse those searching for a deeper understanding on the period. It will not distract mainstream audiences from the fact that the DoD did give rise, throughout the 19th century, to coercive practices of cultural assimilation and final removals of our peoples from a tenuous grip on many remaining fragments of traditional territories.

There was indeed a most startling 19th century shift of strategy on colonial acquisition of Native American lands and denial of treaty rights. *Johnson v M'Intosh* is both a cause and a manifestation of a maturing centralized post-independence society and government flexing its muscles, displaying its bravado, and employing bare knuckle tactics papered over with a pretense of legality. After all, the 19th century is the era of the Indian Removal Act of 1830, the Cherokee Trail of Tears, the Potawatomi Trail of Death, and countless 19th century massacres of Native Americans; Sand Creek and Wounded Knee are but few of such horrific events whose listing could fill an entire page.

The 19th century and the first half of the 20th century are characterized by what Peter d'Errico describes as "Anti-Indian Law"⁴. This era displays the kind of crushing realpolitik use of a vast array of coercive measures and brutal force that DoD scholars have generalized to the entire 500 year colonial era. This was a time when Indigenous Peoples found it no longer possible to seek justice or affirmation of their sovereignty or treaty rights through courts of law, which had been the case in the 18th century. That new reality of disempowerment obtained well into the mid 20th century and the 1955 *Tee-Hit-Ton Indians v. United States* Supreme Court decision where the heavy hand of legal precedence and *Johnson v M'Intosh* was still evident.

But, are these 19th and early 20th century historical horror stories of brutality and legal disempowerment directly connected to the purported *Christian* origins of the DoD? If so the century should also have exhibited the final dying gasp of our Native American culture and spirituality as it was steamrolled by Christian zealots and the crushing weight of residential schools. Instead, what we see is the emergence of a blended Indigenous spirituality that utilized many of the teachings of Christianity to incorporate and transform Christian teachings. This is an inversion of the widely accepted assimilation narrative.

In order to document this too often ignored chapter in Indigenous history I point to another research contribution of Damain Costello: his book *Black Elk: Colonialism and Lakota*

⁴ Peter D'Errico: *Federal Anti-Indian Law: The Legal Entrapment of Indigenous Peoples*. Praeger, 2022.

Catholicism. This respectful analysis of the life and teachings of the great medicine man Black Elk makes it clear that a Native American member of a tribe who directly experienced the crushing horrors of the Wounded Knee Massacre of 1890 was able to hold onto his traditional spiritual beliefs *while* embracing and then transforming Christianity into a hybrid spirituality. Costello makes the case that Black Elk not only combined two distinct spiritual traditions, but that he used Christian concepts to deftly push back against settler colonial claims.

Other rarely told tales of Indigenous resistance *employing* Christian doctrine make it clear that Black Elk was not unique. William Apess, a Pequot Methodist minister involved with the Mashpee in eastern Massachusetts, used Biblical language to implore settlers and their descendants to cease using alcohol and trade items to seduce Indigenous Peoples. Reflecting on colonists' behavior he wrote:

“How they could go to work to enslave a free people and call it religion is beyond the power of imagination and outstrips the revelation of God’s word. O thou pretended hypocritical Christian, whoever thou art, to say it was the design of God that we should murder and slay one another because we have the power.”

Apess eventually led an armed insurrection, the Mashpee Revolt of 1834, which resulted in the Mashpee gaining limited self-governance.

Such examples belie the notion that the DoD dominated and stymied Native American attempts to assert themselves and that it turbo-charged Anti-Indian law to such a degree that Indigenous peoples finally succumbed *entirely* to acts of physical or cultural genocide over the course of the 19th century which bears the strong imprint of *Johnson v M’Intosh*.

Finally, referring to our contemporary muddle of legal precedents on Indigenous sovereignty and treaty obligations as an extension of “The Doctrine of Christian Discovery,” whereby Christian is a derogatory adjective, is an affront to the millions of Indigenous Peoples who have adopted Christianity as an element of their spiritual beliefs or as their primary religious affiliation. Secular and largely non-Indigenous scholars need to be wary of taking on the role of once again imposing outside religious perspectives or evaluations on the enormously varying and complex spiritual lives of the world’s Indigenous populations.

Roots of Imperial Ambition

Violent genocidal practices associated with “The Doctrine of Discovery” and “Doctrine of Christian Discovery” are rooted deeply in the racist mindsets of pre-modern Europe. Rather than being the primary cause of this racism, Medieval and Renaissance Christianity and the proclamations that religious and secular leaders employed as moral justifications for colonization *reflected* secular social beliefs.

In fact, if we take a broader view of history, we see that the brutality of the first explorers and conquistadors who arrived in “the new world”, and colonists who followed in their wake, exhibit an all too familiar inhumane barbarism practiced by virtually all pre-modern empire builders as evidenced in Greek, Roman, and Mongolian empire building. The pattern continues in modern times with the efforts to build, extend or alter the boundaries of the nation-state as with the Chinese in Xinjiang, and the Russian invasion of Ukraine. Acts of the brutal domination of foreign people have occurred frequently in history without European Christian influence.

Such a broad historical pattern does not diminish the injustice of imperial practices inflicted on Indigenous Peoples in the Western Hemisphere. It should however give pause to those who claim that what happened in the Western Hemisphere is a unique manifestation of Christian theology or Catholic pronouncements. Why then is it that scholars and Indigenous advocates assert that the tragic history of colonization and genocide associated with the last 500 years of colonial history in the Western Hemisphere would not have happened had it not been for “The Doctrine of Christian Discovery”?

Instead of continuing to proclaim a totally historically unique form of victimhood, could we instead begin asking ourselves what complex set of values actually contributed to the multiple tragedies that characterize colonization of the Western Hemisphere? And could we ask what residue of those values persists in creating institutions that keep Indigenous Peoples subjugated today? Laying blame at the feet of dead theologians and jurists who fabricated legal principles underpinning practices of land seizures and the wholesale violation of treaties distracts us from focusing on contemporary policy makers and jurists who continue to invent entirely new “doctrines” as discussed below.

The Waning Power of Legal Fictions

The dramatic rise of Indigenous Power movements in the final third of the 20th century has signaled a tectonic shift in what is politically acceptable in terms of Indigenous dispossession and treaty violations. Twenty-first century interest in Indigenous cultural offerings borders on a Renaissance in mainstream thinking. Scientific interest in topics such as Traditional Ecological Knowledge signals a rising tide of respect and intrigue with cultures that mainstream society was attempting to erase only a generation or two in the past. International agreements such as the UN Declaration on the Rights of Indigenous Peoples have put Indigenous rights in the limelight. And last, but certainly not least, the Vatican’s repudiation of the Doctrine of Discovery has accomplished a milestone objective that until recently seemed a near impossibility.

If the glass of Indigenous power and respect was virtually empty in the 19th century, it must be seen as measurably rising in the late 20th century. And one could argue that it is at least half full in the 21st century, and is being filled slowly but steadily on an almost daily basis.

It is therefore troubling, and for this author, truly traumatic, to receive multiple daily emails asserting that *nothing* has *really* changed and there is really no good news to be had concerning Indigenous rights and sovereignty. As an Indigenous person I am continually told that the DoD and *Johnson v M'Intosh* are alive and well, and as influential as ever. The evidence? Most common is the claim that Ruth Bader Ginsberg cited the Doctrine of Discovery in her opinion denying the Oneida Indian Nation's effort to gain tax exempt status for former treaty lands they had reacquired. Her mention of the DoD was in a footnote, not a central pillar of her reasoning.

Similarly, when much of the Native American community was celebrating the 2020 *McGirt v Oklahoma* US Supreme Court decision on Indigenous authority to prosecute criminal activity on the reservation, almost immediately some DoD scholars attempted to impose a message of defeat. Their argument? In writing the opinion, Gorsuch invoked the authority of the US Congress to unilaterally dis-establish treaty rights granted to Native Americans by employing its plenary power. Gorsuch did mention the DoD in his opinion. But it was not cited as an opinion shaping precedent. The DoD reference was to a law journal article. In other words, the DoD did not really guide or compel Gorsuch's decision. The DoD says nothing about plenary power and vice versa. I would argue that Gorsuch's opinion marks a shift *away* from the DoD.

Interestingly, little was written about immediate efforts by Oklahoma's governor and its Senate delegation to pressure the Supreme Court to revisit its decision or to have Congress act on Gorsuch's implication that it could use its plenary power to negate the treaty recognized status of the Oklahoma tribe involved. Such action would render the *McGirt* decision moot, as the Muscogee Nation would no longer have federal recognition.

Even less discussed was the very active role that Oklahoma's powerful fossil fuel industry and lobby played in driving attempts to overturn *McGirt*. They feared that the newly affirmed authority of the Muscogee Nation might allow them to prosecute criminal activity more broadly, and might be extended to oil and gas industry pollution violations. That very contemporary cluster of economic, energy and environmental issues, and not remote echoes of the DoD, should have attracted the attention of Indigenous advocates.

Old Whiskey in New Bottles

While Indigenous advocates have their attention focused on the DoD and *Johnson v M'Intosh*, new and insidious political and legal strategies are being developed to dispossess us of our lands, our sovereignty, our culture and our role as effective stewards of Mother Earth.

As was the case with colonial fur traders and merchants who used alcohol to cheat Indians, we are once again being intoxicated in order to loosen our grip on reason and our most cherished values. The intoxicant being employed is no longer whiskey. It is money. Energy companies, presenting themselves as partners in a transition to more sustainable living, are offering large

sums of money in exchange for Indigenous communities dropping resistance to polluting hydroelectric dams and oil pipelines on and across their lands or treaty protected hunting, gathering and fishing grounds.

Other resource extraction companies are promising lucrative royalties in exchange for unfulfilled promises to “sustainably harvest” timber on lands recently rematriated to Indigenous Peoples and for the right to claim Indigenous participation in “co-management” plans for cutting trees. Claims of Indigenous co-management entangled with newly emerging grants of Indigenous authority over rematriated lands will allow timber companies to escape government requirements for truly sustainable forest management. This is a form of Red-Washing whereby the appearance of Indigenous involvement often acts as a shield from monitoring and regulation by mainstream society.

And in an all too familiar historical pattern, courts and jurists are once again inventing new legal doctrines in an attempt to justify seizures of Indigenous lands after the fact. As with the “Age of Exploration”, jurists and courts are not the engine powering and driving the train bringing disruption to Indigenous lands. They are the caboose following in the path of those who already did the dirty work of forceful displacement. This pattern is shockingly documented in *The Terms of our Surrender: Colonialism, Dispossession and the Resistance of the Innu* by Elizabeth Cassell.⁵ This meticulous analysis shows how the promoters of giant hydroelectric projects in Canada’s eastern provinces collaborated to flood traditional hunting and fishing grounds quickly so that Indigenous Peoples would not have adequate time to mount effective court challenges and stop the treaty violations involved.

Reading this account of dispossession, or surrender, as the author correctly describes the invasion of developers and construction/destruction teams that entered the territory of the Innu, one almost loses hope that Canadian courts could have theoretically provided relief. Cassel points out that a new doctrine justifying Indigenous land dispossession has taken root. It is a new fiction, “public benefit”, which is vaguely similar to the notion of eminent domain in the United States. Eminent domain is a legal concept that allows the government to take private property for critical public use such as building a highway, hospital, school or airport.

The Canadian re-invention of the concept argues that an urgent need to develop “green energy”, which Canada’s hydroelectric power is alleged to be, over-rides Indigenous treaty rights, and apparently even time to allow for due process. The urgency of the climate crisis is invoked to fast-track mega projects. Indigenous Peoples can go to court for compensation, but they have no choice other than to accept the cash compensation. Indigenous leaders can emerge from such humiliation looking like heroes, as they can claim that millions of dollars will fill community coffers. How the funds will compensate for mercury poisoning and a complete

⁵ University of London Press, 2021

loss of habitat needed to support a traditional lifestyle is a painful question that lies buried beneath piles of newly acquired electronics, motor bikes, and other consumer goods. Agonizing questions and second thoughts about the wisdom of surrendering, forever, a traditional lifestyle will emerge when the hangover caused by the cash infusion wears off.

Similar tales of fast tracked land dispossession are appearing across the planet as resource extraction companies seek rare earths needed for the “green energy transition” or fossil fuels to keep older technology viable while the dream of a transition to clean energy is pursued.

Signs of Hope

There are notable developments in the realm of Indian Law globally. Vast tracts of Indian lands and coastal waters are being rematriated and put under the protection of Indigenous land stewards. Many of these land restorations are avoiding the Red-Washing schemes noted above. I am capturing reports of these actions which appear almost daily in the media, Indigenous news services and scientific journals. My report on rematriation is forthcoming.

One of the most remarkable developments affirming Indigenous control over traditional lands is associated with the Rights of Nature movement globally. On its surface the movement appears to be an effort to embed legal protections for rivers, lakes, forests, and habitats. This is being done by giving our other-than-human kin legal status as persons and thereby empowering human guardians to intervene on their behalf much as court-appointed guardians are empowered to represent the interests of humans who for one reason or another are not able to be present and speak for themselves in court. In Ecuador the rights of nature have been recognized in the national constitution. In the United States this new development in law is happening in a more piece-meal bottom-up manner at the municipal level and in tribal courts. An example of the latter is an ongoing effort to establish legal personhood for wild rice in Minnesota.

In December 2018, the White Earth Band of Ojibwe adopted a “Rights of Manoomin” tribal law, which recognizes wild rice (Manoomin in the Ojibwe language) , their traditional food which also has ceremonial and religious functions, as having “the rights to exist, flourish, regenerate, and evolve, as well as inherent rights to restoration, recovery, and preservation.”

In August 2021, the White Earth Band filed a case, *Manoomin et.al. v. Minnesota DNR* , in White Earth Tribal Court. It opposed the state of Minnesota granting permits to Enbridge Corporation, that allowed Enbridge to take millions of gallons of water from wild-rice-growing areas, as part of the construction of its Line 3 tar sands oil pipeline. Manoomin, the wild rice itself as a living being, was the lead plaintiff. The case attracted nation-wide attention as it involved not only the emerging Rights of Nature, but also questions of who enforces treaty rights, and the extent to which a tribal court can pursue cases where the damaging actions do

not take place on tribal lands. White Earth's case has not achieved its ultimate objective of holding Enbridge liable in tribal court because it was over-ruled by higher Ojibwe courts.⁶ However, the case has succeeded in making Rights of Nature a concept which is no longer outside of the acceptable range of jurisprudence and actions taken by Indigenous People.

An outright legal victory involving the Rights of Salmon, brought in the tribal court of the Sauk-Suiattle in Washington State, succeeded in 2023 in getting the city of Seattle to provide passageways for the salmon to navigate around hydroelectric dams on their Skagit River.⁷ Legal victories involving municipal ordinances affirming the Rights of Nature across the United States suggest that this concept rooted in Indigenous culture has a bright future.

What is most remarkable about the Rights of Nature movement is that it is far more than a legal development. It represents a potentially game changing shift in defining human relationships with nature. Giving our other than human kin and the landscape personhood status introduces an element of core Indigenous thought into the legal system. If we circle back to the original Doctrines of Discovery we see that Indigenous Peoples were dehumanized and othered. Less frequently discussed is the explicit othering and objectifying of nature. It was viewed merely as a God-given resource to be utilized by humans who could claim it by virtue of their "discovery". The rights of nature movement shows signs of Indigenous culture upending and potentially transforming *both* environmental and Indigenous law. With new found reasons and the courage to look at legal systems as our potential path to progress and not as dead ends hopelessly mired in an ethic of "Anti-Indian Law" smothered in a stifling Christianity, we may yet form new alliances to begin healing ourselves and the planet.

Pope Francis' 2015 encyclical *Laudato si'*, and his 2023 apostolic exhortation *Laudate Deum*, are bold articulations of a transformative global agenda on climate change. They beckon us to form alliances where, until very recently, we encountered adversarial relations.

Healing Ourselves and the Planet

I come to this conference as a Native American tribal member bearing a message of healing offered in the spirit of one of our culture's greatest moral pillars: restorative justice. Our societies were organized on principles of maintaining harmony amongst ourselves and with

⁶ "Rights of Manoomin". Center for Democratic and Environmental Rights (CDER), <https://www.centerforenvironmentalrights.org/rights-of-manoomin>; downloaded 3 Dec 2023

⁷ "Lawsuit Asserting the Rights of Salmon Ends in a Settlement that Benefits the Fish". Inside Climate News, <https://insideclimatenews.org/news/06052023/lawsuit-asserting-the-rights-of-salmon-ends-in-a-settlement-that-benefits-the-fish/> downloaded 3 Dec 2023

Mother Earth. When crimes were committed we did not seek justice in mere punishment of perpetrators. We sought to guide and *reintegrate them* back into our communities.

The time has come to view the Doctrine of Discovery in this light. We have an abundance of outrage directed at the long dead perpetrators of colonial injustice. Our anger and resentment cannot touch those who inflicted harm on us in the past. It destroys us. As Nelson Mandela, who knew a great deal about colonial injustice, noted “Resentment is *like drinking poison* and then *hoping* it will kill your enemies.”

I bear an invitation, a profoundly personal one, to join me in moving on. In recent years I have found myself assaulted by daily news stories about the injustices of our colonial past. These accounts often headline connections between the DoD and obstacles in our paths or they attribute dysfunctional aspects of Native American life to the DoD. New revelations about residential schools capture headlines. For Thanksgiving 2022 a major newspaper in my home state of Vermont “celebrated” the day and its Indigenous connections with a banner headline and feature story titled “Erasing Native America: A Tragic Tale”.⁸ The story involved two young Potawatomi sent to a Vermont college in 1837. They were to be educated in white ways and become doctors. Both died of neglect and tuberculosis. I read the tale in shock as I too am Potawatomi. The college involved is a short drive from my house. Distant history struck home.

Such continual recitations, typically told in almost prurient detail, trigger intergenerational trauma despite my growing up in white mainstream society and being insulated from the poverty and challenges often found in reservation life.

In part this is due to the fact that my grandfather attended three residential schools, including Carlisle. He was never able to discuss this experience with his children or grandchildren. I suspected what he had encountered but only experienced it when I attended a Canadian play, *Children of God*, which presented residential school life on a stage a few feet in front of me. I found the encounter unbearable until I felt the presence of my grandfather’s spirit and heard his voice whisper “this is the story I could never share.” Then I felt relief because I understood this to be a long-delayed moment of moving on and healing for my grandfather.

Looking back at the play *Children of God* and its impact on me, I have come to understand that it was also a moment of discovery for me, discovery of the power of forgiveness. In recent years I have learned a great deal about the importance of forgiveness. My friends and colleagues at the Bruderhof Christian intentional communities have helped me to understand this concept that does not come easily to Indigenous Peoples. Stories and publications such as *Why Forgive*⁹ and

⁸ Burlington Free Press, Nov 27 2022.

⁹ *Why Forgive?* by Johann Christoph Arnold, Plough Publishing House, Walden NY 2010,

Edith Eger's *The Choice*¹⁰ have convinced me of the gifts of forgiveness, including making an important life choice for those who have suffered trauma. As Dr. Eger notes, "I don't have time to hate, because if I would hate, I would still be a hostage or a prisoner of the past." These are not the pious "turn the other cheek" utterances of someone unfamiliar with genocide. Dr. Eger is Jewish and lived the horror of being someone experimented on by the infamous Dr. Mengele at the Nazis' Auschwitz concentration camp. It took her decades of work as a practicing therapist treating trauma victims, to come to terms with her own trauma and to grasp the meaning of letting go of corrosive bitterness.

These stories have taught me that forgiveness is *not* to be confused with forgetfulness; we must hold onto and remember how we got here. Forgiveness must be coupled with justice. Perpetrators of injustice and criminal acts must be held accountable. But this can be accomplished without punishing ourselves and our descendants with bitter memories and requirements to seek revenge.

Knowing the power of such healing moments, I am attending this conference inviting attendees to engage in a similar process of working through the grief *and beginning the process of moving on*. We live in a time when Indigenous teachings and wisdom are increasingly showcased and embraced. We need to focus more on our accomplishments and celebrate them. The time has come to disentangle ourselves from the tentacles of a distant past. We need to build bridges with the descendants of colonists, make peace with those who are recent adversaries, and heal together. Or, to put this in terms uniquely appropriate to our setting, we need to bury the hatchet. A wounded Mother Earth is beckoning us all to work together in the great healing.

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¹⁰ *The Choice*, by Edith Eger, Scribner, 2017.