Honoring Indian Law and Treaties, Part Two

"Indigenous Perspectives" - Monthly Broadcast on HealthyLife.Net

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http://www.ecologia.org/news/15.IndianLawPt2Jan2022.mp3 (57 minutes)

"The signing of the peace agreement with the Indians on April 22, 1642 in Jonas Bronch's house Emanus in New Amsterdam" by John Ward Dunsmore, American (1856-1945)[1]

Segment One

Randy Kritkausky: Greetings, or may I say Bozho in Potawatomi, to those joining us for today's Indigenous Perspectives show. I'm Randy Kritkausky, an enrolled Potawatomi tribal member, and the host of Indigenous Perspectives. Our program today is the second in a two part series: Honoring Indian Law and Treaties.

[1] https://americangallery.files.wordpress.com/2011/03/signing-the-treaty-with-the-indians.jpg

Indigenous Perspectives originates from Vermont in the United States. Vermont is located on lands that the Abenaki people call N'dakinna. It's the unceded traditional territory of the Abenaki people, who for thousands of years have been, and continue to be, stewards of the lands found here and across the border in Québec province in Canada.

Carolyn Schmidt: And I'm Carolyn Schmidt, our co-host. Today we welcome back our guests - Steve Schwartzberg is a former Director of Undergraduate Studies for International Studies at Yale University, now writing a book titled "Arguments over Genocide: The War of Words over Cherokee Removal in the Congress and the Supreme Court. "

Peter d'Errico is a member of the New Mexico Bar Association and a former staff attorney at Navajo Legal Services. During his career, Peter has litigated on behalf of Wampanoag on fishing issues, Western Shoshone on land issues, and a variety of tribal members on their freedom to practice indigenous spiritual traditions while in prison. Peter is Professor Emeritus of Legal Studies at the University of Massachusetts at Amherst. Welcome back, Steve and Peter, and we look forward to another lively discussion.

Peter d'Errico: It's good to be here.

Steve Schwartzberg: Good to be here.

Randy: During Part One of Honoring Indian Law and Treaties, we began to explore the complicated legal history of indigenous nations in North America, their struggles to assert national sovereignty and to resist being overwhelmed by an imported and often brutally imposed European-based legal system. We likened the process of trying to describe these events to trying to assemble a jigsaw puzzle, without having the picture on the puzzle box which indicates what the final image looks like. On today's show, we'll be adding some new pieces to the puzzle.

"Jumbled Puzzle Pieces" image in Public Domain, released under Creative Commons 0 license.
https://www.pxfuel.com/en/free-photo-jndef

By using the puzzle metaphor before, we referred to the difficulty of the process of assembling the pieces of a historical puzzle . But it's also time to focus on the emerging picture – to visualize what the actual assembled puzzle image might look like.

I'll start this off: A few weeks ago I ran across an historical account of Columbus's less well-known second voyage in 1493. It refutes the common accepted image of conquerors overwhelming and subduing both indigenous people and nature in this hemisphere. It provided me with hope that we can develop a more nuanced and realistic understanding of where we could be headed.

Here's the very brief story:

> During Columbus's second expedition his crew became entangled, literally, in what is now Cuba. When soldiers went ashore they struggled through dense undergrowth and then were attacked by indigenous inhabitants who forced them back to their vessel. In their retreat to safety they became stuck in the mud and quicksand. Their vessel became entangled in seaweed as they fled.
>
> End of story.

I have returned to this picture again and again in recent weeks, as I've found new information about Indian law and treaties, and as my focus shifted from early colonial history to contemporary events.

The emerging puzzle solution I now see offers us a multi-layered picture of Native American empowerment, a picture lying invisible, for too long, beneath the puzzling image of court cases we've been discussing. My emerging new image is one of indigenous people using traditional Indian law, tribal courts and treaty rights to lever and reassert their nations' sovereignty. And, as in the Columbus story, we see the descendants of colonial settlers entangled in a web that combines indigenous resistance and the power of nature, and has the potential to push back against encroachment.

Carolyn: With the entanglement image in mind, we'll look again at the US Supreme Court cases and "bad faith treaties" that we discussed last time. Steve, you have mentioned that many of the Supreme Court cases that damaged Indian rights were actually controversial – there were strong dissents, and organized public efforts in support of Indians like the Cherokee. Can you give us some examples?

Steve: I'd be glad to. Before I get into examples, though, I want to talk about this within the context of the metaphor Randy has set out, of entanglement. I think part of this entanglement is entanglement within the broader space of Turtle Island, of indigenous legal traditions and American legal traditions - American legal traditions being divided, as you suggest, between the dominant Supreme Court decisions and a measure of opposition to those decisions, especially in the 1820s and 1830s. But the legal lens of, say, the Aninishinaabe, for example - I'm drawing this from a book by John Borrows called *Law's Indigenous Ethics* - is focused on the Seven Grandmother/Grandfather teachings of love, truth, bravery, humility, wisdom, honesty, and respect. And those are very appealing as an alternative to what the Supreme Court has produced in its domination system, in its "bad faith" interpretive stance toward treaties.

So what I want to say is that that "bad faith" interpretive stance is rooted in the Doctrine of Christian Discovery. And to give people a taste of that, in this quote from Senator John Forsyth from 1830, he says, "All Christendom seems to have imagined that by offering that immortal life promised by the Prince of Peace to fallen man, to the Aborigines of this country, the right was fairly acquired disposing

of their persons and their property at pleasure." That is the ideology underlying the genocide of the 1830s.

The opposition to that genocide came from people like Rhode Island Senator Asher Robbins, who said in 1830, "The Indian is a man, and has all the rights of man. The same God who made us made him, and endowed him with the same rights; for 'of one blood hath he made all the men who dwell upon the earth.'" And it came from people like Jeremiah Everts, who's a Congregationalist leader in that period; he says "the people of the United States are bound to regard the Cherokees and other Indians as men, as human beings entitled to receive the same treatment as Englishmen, Frenchmen or ourselves would be entitled to receive in the same circumstances."

And that choice that was before the American people and the American government in the 1820s and 1830s remains the choice before us today. The arguments of the advocates of genocide won that debate *[in the 1820s and 1830s]* and their premises continue to shape American law, policy, and conduct to this day. But as the American people become more aware of that fact, they can be expected, one hopes, to choose the alternative, to choose opposition to genocide instead of the advocacy of genocide.

Carolyn: Thank you, Steve. And Peter, can you add to or qualify that perspective?

Peter: Well, I think Steve has done a great job picking out a couple of discrete quotations that show a diversity, within Christian thinking itself, I guess we could say, in that period that he's specifically focusing on, the so-called Removal period. And I think that it's really important to understand that when we talk about the Doctrine of Christian Discovery or the Christian Doctrine of Discovery, we're not talking theology here, we're not indicting a religion or a worldview at its spiritual foundations; we're talking about the political usage. And I think we could apply that to any religion that has been used politically.

And so we're - the focus is on the law here, the way in which legal actors, political actors, try to import religious concepts to use them one way or another. So I think what Steve has shown is that there's some very specific examples, such as Forsyth. And it - it continues today actually where *[some]* people regard Christianity as somehow privileged to dominate the world. And then there are the others, like Asher Robbins - and actually there are many more than that, that Steve has studied

- that have made the opposite claim and saying that there's no domination inherent in that. I just - I think we need to be clear about that.

Carolyn: Okay! Thanks. And now, Randy, can you give us an indigenous perspective on this time in history and how Indian law has fared?

Randy: Yes. I'm going to here put my historian hat back on for a moment, and give an overview of what things on the ground looked like. Not so much in the courts, but , you know, out in the territories on the contested lands. I think it's important for people to understand that in the beginning of the colonization process, particularly between 1600 and 1675, the colonies were at first a shared legal landscape - not necessarily totally equal, but a shared landscape. Both colonists and Indians used their own laws and procedures in their own territories, that were much like a patchwork quilt of areas of control. And, imitating the Europeans, Indians over time quickly learned to create their own courts with Indian magistrates. When I came across this recently, it was really quite a shock to me.

Unfortunately, you know, this sort of interesting development comes to somewhat of a halt in 1675 when the British subdued Indian tribes in much of what we now call New England. The power of Indian courts and laws to control the actions of colonists continually weakened for the next century. However, even with this weakening, as Indian courts themselves declined, Indians used colonial courts quite effectively. Colonists were taken to colonial courts *[by Indians] to* resolve territorial disputes, gain compensation for stolen property, address crimes committed against Indians. It's really quite a complex picture. So Indians continued to apply their own law and procedures within their own territory in matters involving their own people.

With American independence, there was yet another turning point. And even though the US Constitution specifically mentioned and recognized Indian lands as sovereign nations, land-hungry colonies extended control over more and more Indian territory. And as our two guests just reminded us, in the 19th century we see legal traditions that, you know, take another rather grim turn for Indians.

There was an increasing rejection of Indian treaties, and conjuring of legal doctrines allowing the US government and states to completely disregard treaty obligations. And as frontiers moved westward, Indian territory shrunk, and then

so did Indian legal institutions.

In the 21st century, a hybrid of traditional Indian law and colonial style courts still applies on Indian land and even beyond sovereign Indian territory on occasion. The authority of Indian courts to reach out is contested, which is the situation that we have today. And again, it's - it's a puzzling and murky history, by no means a history merely one of domination.

Carolyn: So, Peter and Steve, we're going to discuss the *McGirt* Supreme Court decision later, in Segment Three, so without getting into the specifics of that case, can you each give your thoughts on the point that local Indian-run courts, tribal courts, can show a window of opportunity for push-back against damaging state and federal laws?

Peter: Yes. Steve, you want to go first? I'm ready to jump in.

Steve: Sure. Again, let me back up a bit before we get into that, and talk about Indian law, that is to say indigenous law - not Federal Indian law - indigenous law as based in stories and based in guiding conduct through stories rather than through a coercive apparatus of laws. I think certainly with contact, you had the emergence of a system of courts in some of the native nations that was emulating the court systems of the European colonists.

But at a deeper level, indigenous law is law about such things as love, truth, bravery, humility, wisdom, honesty, and respect. And it's about the stories that convey how we should guide our conduct in terms of these values, in terms of these principles. So that ultimately what we're looking towards is a form of harmony with the world and within ourselves.

So with that as preface: the court issues that come up on the side of Federal Indian law are all premised on a secularization of the Doctrine of Discovery, which we call the "Trust Doctrine" in US law. And I want to emphasize that this is a matter of an assault on the lands and on the authority of native peoples conducted in the name of a good sounding word. So just as in the Doctrine of Christian Discovery, "Christianity" and "civilization" were presented as good things that were being offered by the American people, by the American government, so the "Trust Doctrine" is presented as a good thing. "Trust" - everybody likes the sound of trust - but as the Supreme Court uses these words – "trust," "Christianity," "civilization"

- it uses them on behalf of a system of domination. I think that's essential to realize.

It's not the only part of this equation. There is the pushback of the native peoples. There is the alternative legal traditions of the native peoples that also help to shape the relationship. But from the United States side, from the side of the United States government, what is operative are these keywords that are used to defend a system of assaulting Indian land and Indian authority on behalf of the colonist settler state.

Carolyn: Okay - and Peter?

Peter: Yes, I think the question you were asking opens up, actually, an opportunity to look across the continent at various nations, indigenous nations, that are taking more and more matters in their own hands. And it's particularly powerful and important around environmental issues, what we call environmental issues. And I say, what we call them is because even the word "environment" presumes that somehow people are separate from the thing that surrounds them, that's their environment. When in fact we're talking about life and all life forms. And I think that we see that happening where native peoples are insisting that they have jurisdiction over their waters, over the plant life, the animal life that they - that that is native laws, which need to govern the relationship between humans and the rest of life.

So that's happening around the country, as native nations assert jurisdiction. Now it's constantly combated by the forces that Steve just talked about. But I want to emphasize that this is one of those moments when there's a wider context. And I think the wider context is there are many non-native people - around the world, actually, not just on this continent - who understand that we have an ecological - we are in the midst of an ecological crisis. And this is an opportunity to look around and to see, well, the system of law that's based on domination, doesn't seem to be working well for life. And what other opportunities are there for thinking about that? And that's where indigenous people's laws come in - a new way of thinking. Or not new, it's certainly ancient, but a new way to many non-natives.

Carolyn: Okay, Peter! And you've put in - it's a great segue to our next segment. We've got our new section of the puzzle coming together with these new pieces, focusing on the contributions from Indian traditions and Indian law. We'll take a

quick break before our next segment about what is Indian law. Thank you, Steve and Peter.

Segment Two ***What Is Indian Law?***

Carolyn: Welcome back. In this segment, we're discussing what Indian law is and how it's different from formal written laws interpreted by courts. We know that one element is restorative justice. Peter, can you fill us in with your experiences with restorative justice, among other aspects of the law?

Peter : Sure. Yes, there was - the restorative justice movement is an example of what I was saying a moment ago where non-native people began to try to understand how law could accomplish certain goals that it did not seem to be accomplishing when it was run as a state top-down system. And so they began to look at - particularly at this juncture, they looked at Navajo laws, Navajo ways of resolving disputes, I guess we could call it. Because the understanding was that the community got involved when there was a problem; it wasn't just a bunch of officials that got involved. And in fact, this is why we can see that historically the colonists didn't think that native peoples had law, because they didn't have something that looked like British courts. They didn't have police, they didn't have jails. So how did they resolve problems? But of course they *[British colonists]* didn't stop and ask that question.

It was only much later that there was any attempt to ask that question. In fact, there was a - one of the most interesting ones came in 1941, you can see how much later it is than the actual colonial invasion - that they – Karl Llewellyn and Adamson Hoebel - looked at what their book called The Cheyenne Way, because they, through deep interviews with elderly Cheyenne people, began to be able to demonstrate that in fact, there were conflict resolution mechanisms. But that they were quite different from state mechanisms. And as other writers have come forward, one of them, Leonard Jimson, was a - he wrote a book that became very important in what eventually became the Indian Child Welfare Act.

He was involved in a case out in the Navajo world where the Arizona state Department of Welfare was trying to terminate the parental rights of a Navajo man, because they said he wasn't taking care of his children. And so what Jimson pointed out in his testimony as an expert in the trial, which resulted in the man keeping the children, is that the great difference between the Navajo family structure and

ordinary middle class family life is the relationship of the child to a number of caring people. In other words, a whole community. And that when there were problems with the child, the whole community was involved. So that the fact the father, as the patriarch in the American view, didn't come in and discipline the child was not to say that the community wasn't taking care of the child.

Another writer, Wilfred Pelletier, was writing about the Odawa village that he grew up in, on Manitoulin Island. And he talked about – he used the phrase "community consciousness," and he says, the Department of Indian Affairs comes in and says, we don't have any organization. Even though we look around us and we're very highly organized in our own way, just like a school of fish or a flock of geese, the examples that he used.

So I think that as we look at that, we can see that restorative justice arises within a community context. And in the Anglo world, as Vine Deloria said, that most of the areas we call neighborhoods and communities are just places where people who work for the same employer live, they don't actually know each other. They don't relate to each other in this deep way that Navajo and other native peoples relate to each other.

And so the restorative justice movement has run into that problem, that within Anglo communities, within non-native communities, the difficulty is often that there's no preexisting deep community. So there's a learning process going on here that in order to have restorative justice to follow an indigenous model, which is rooted in ancient community ways, there needs to be attention to what makes a community. How do people take care of each other? Not just when there's a problem of a conflict, problem of somebody who did something disobedient, but every day, in all ways. That's the lesson that we're learning, it seems to me - and that's us - and that indigenous peoples are able, to teach is the nature of community.

Carolyn: So, Randy, how do members of an indigenous community know what traditional law is? How do they find out what the rules are?

Randy: Well, as, as Steven said, and again, we have to repeat this constantly because it is so contrary to our experience of, have you read the law, you know, section 77.4.3. It's inherent in - in stories that are told constantly. You know, here in the Northeast it's wintertime, and people would sit inside around a fire and tell

the same stories, the very same stories over and over again. and these were parables. They were amusing, sometimes fanciful, sometimes outrageously humorous, but they constantly pointed toward rules of behavior and the implications of breaking those rules of behavior.

And as Peter has said, and I think, you know, Steven can jump in here, what makes this work is the fact that the whole community is united behind quote/unquote "enforcing the rules." And that it is done in a softer way. And Peter, maybe your experience will help here. We have this notion of justice as being a deterrent for future misbehavior. And what we do is we end up punishing the criminal, spending a huge fortune putting the criminal in jail, but not compensating the victim. That's totally antithetical to what happened in indigenous communities, where there was an effort to compensate the victims, the victim being the whole community, not the individual, so that everyone goes away from the deliberation on quote "misbehavior" feeling that justice and harmony have been restored. Steven, I think you need to jump in here.

Steve: Okay. Let me jump in with a broadening, if I may, to all our relations. One of the things that I found most difficult to wrap my mind around when it came to the question of indigenous law was who the community is that we're talking about, because we're not merely talking about a human community. We're talking literally about all our relations, all living beings. I have a friend who said, when asked, who he was, I'm a part of creation. And that vision of our identity, that we are bound up in a community that includes all living beings, took me a while to wrap my mind around.

I, when I was growing up, would capture butterflies. I hunted them over the course of the summer, collected them in a scientific exhibit. And only relatively recently found a butterfly landing on me and giving me an opportunity to apologize, to reconnect in a different way with - with living beings, not as a predator, not as a scientist, or would-be scientist, but as somebody who - who shares this planet with all other living beings.

And I think that is part of the foundation of indigenous law, that we are concerned with everything. And with everybody. In the American context, you know, the great, vision of the Declaration of Independence is all men are created equal. I think in the indigenous world, all living beings are created equal.

Randy: Beautifully said.

Peter:Do we have a - do we have a moment that I can read a quick little quote here?

Carolyn: Go for it!

Peter: Okay. It's a question; this was back in 1990, a couple of authors, Walker and Mendlovitz, were talking about - they were criticizing or exploring the notion of state sovereignty, this whole top-down notion. And they say that the problem is that we haven't actually reflected on what are the questions that state sovereignty is supposedly the answer to. And the questions, they said, are: Who are we? What is our community? What is the relationship between our community and other communities? What is the relationship between our communities and the rest of life?

So it seems to me, that's a really interesting way of saying why is state sovereignty presumed to be the answer to so many questions? When we haven't even really tried to figure out why is - what are the questions that it's supposedly answering?

Carolyn: Okay. So the question before the four of us now becomes: whose law and whose courts have the power to shape the daily lives of indigenous people today? That is our third segment theme; be back in a minute.

Segment Three ***Whose Law, Whose Courts?***

Carolyn: Welcome back to Honoring Indian Laws and Treaties. We're now discussing the shifting balance of power between Indian tribal courts and traditional tribal law, US state courts, and US federal courts, including the Supreme Court. So, the *McGirt versus Oklahoma* Supreme Court case two years ago has gotten a lot of attention as it seemed to favor the Creek Indian tribal court's rights over the state of Oklahoma. So Peter, can you start off by briefly explaining the *McGirt* case and its decision?

Peter: Yes. Actually that is a great introduction because it allows me to clarify: what you describe as the way in which the case has been welcomed as favoring Creek jurisdiction is actually wrong. The case said that the Creek Nation[2] still existed, that the treaty that acknowledged their existence was still in effect. But it's

[2] In May 2021, the Creek Nation officially changed its name to the Muscogee Nation, the word for their people in their own language. Present-day references will either say Muscogee Nation, or Muscogee (Creek) Nation.

the result of - the actual detail of the case was resting on the federal jurisdiction over criminal acts occurring in Creek territory between a native and a native. And that it's - it's - I don't want to try to gloss over it, but the crucial question was whether the Federal Major Crimes Act was the proper jurisdiction for the man named McGirt to try his case rather than the state of Oklahoma. So it's very ironic that the *McGirt* case was really a question about federal power asserted in Indian Country, as it's called, versus state power.

Nevertheless, the fact that the court was willing to say that the Creek Nation existed was also a real strong pushback against those who say that Congress in its plenary power - which we've talked about before, its domination role - that Congress can exterminate the Creek Nation. *[Later clarification from Peter: The point I wanted to make was that the decision brought into focus the presumption that Congress has this power.]*

And the other side, Oklahoma and the dissent in *McGirt*, said, oh, yes, Congress has exercised this power. The Creek Nation no longer exists.

So the important part to celebrate about *McGirt* is that it said, yes, the Creek Nation still exists. Although it allowed - it said Congress can terminate it if it wants, which is a very clear demonstration of a domination assertion. But it said it hasn't done it yet.

So if we wanted to expand into the question of native jurisdiction itself, we would look at other cases, the *Oliphant* case, for example, which is still considered valid law. The Supreme Court said that a native nation cannot have jurisdiction over a non-native when they commit a crime. And just recently the court said that they did recognize that the native police could arrest the non-native and hold that person if they suspect them of a crime, but they can't actually prosecute them. So they can hold that person and wait for the outside jurisdiction to come in. There's a fair amount of struggle going around, around that issue.

There's also the question of tort law. What happens in the case of a civil wrong? In this case, it was a sexual assault by a non-native against a native person and the court - the name of the case is *Dollar General* - the Supreme Court actually couldn't decide; it was a tie. And so the circuit court decision has been basically the law in that area, which said that yes, the native nation can have jurisdiction over a non-native in a tort case.

So we have in fits and starts, and I think you used the patchwork - or Steve did, someone, maybe it was Randy - we have a patchwork emerging here in which, in certain fields, tort law, there's been an expansion of jurisdiction. Criminal law, there's been a restriction of jurisdiction. And then there are various other areas. For example, does the native nation have direct control over gaming, for example, economic areas? And what we see then in this patchwork is that it's a live struggle going on now. And that, increasingly, native nations are asserting a jurisdiction and resisting the domination of the United States and the states.

Randy: Steve, can you jump in?

Steve – Yes, let me jump in here again, and try and broaden this out to the question of independent jurisdiction and independent authority, because that is what the native nations are entitled to under constitutional law properly construed. And in order to get to the point where constitutional law is properly construed, I think the elite in the country, particularly those who sit on the Supreme Court, have to lose their self confidence in their dogmas. And have to be called on the lies that this whole system is built upon.

And the lies that this system is built upon - I mean, take *McGirt* again, you know, you get this comment from Justice Gorsuch that lots of people have praised, about "at the other side, at the other end of the Trail of Tears, there was a promise." Well, that promise existed before the Trail of Tears! That promise existed in a treaty with the Creek Nation of 1790, that guaranteed to them their lands, that guaranteed their treaty, guaranteed dominion over their lands. And that treaty was broken in the Trail of Tears. The Trail of Tears couldn't have come about if that treaty had not been broken. And had we had the success of the dissent in *Cherokee Nation v Georgia* being accepted as it should have been as the law of the land, the Trail of Tears would never have taken place, at least not taken place the way that it did.

And so we have to go back and see what - what the nature of this "bad faith" interpretive stance is towards treaty obligations, that the Supreme Court has adopted. This bad faith whereby there is allegedly a "trust relationship." Well, let, let's look at that. Let's unpack that a little bit. The trust in any treaty relationship is the trust that the treaty will be adhered to on both sides. And that is exactly what a "trust relationship" as the Supreme Court defines it, does ***not*** mean. What the

Supreme Court means by that is that anytime the sovereign says the sovereign is not bound by a treaty, it's not bound by a treaty. And that's absurd. That is not trust; that is the exact opposite of trust. And people have to understand that when the Supreme Court uses the words – "trust," "Christianity," "civilization" - it means the exact opposite of what those words mean to most people. And when it becomes clear that that's the case, then I think the Supreme Court can be expected to lose confidence in its own dogmas. And then we can really expect to see a change in the law.

Carolyn: So to switch it a little bit in the minute we have left here, the US Supreme Court does have a history of reversing itself. Even Marshall reversed himself, in 1832 - too late to save the Cherokee - but to a certain extent, this reversal kind of thing happened in 1954 with the *Brown versus Board of Education* decision. So can any one of you envision the Supreme Court making the same kind of breakthrough for indigenous rights? What would it take?

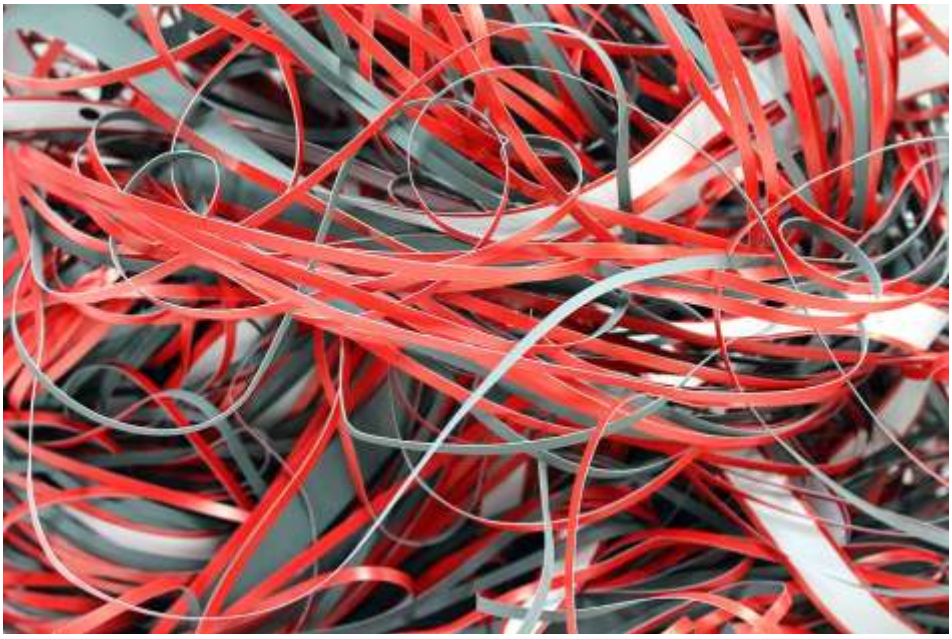
Peter: I think two things. One is the internal activity, I guess, "internal" meaning what do indigenous litigators do? Do they challenge? Very often, in fact most of the time, what I see when I read briefs, is that the native lawyers, whether they're themselves native or not, arguing for a native client start off by saying, "Oh, we already recognize the US has this dominant role called plenary power." They don't challenge it. They accept it. That's a mistake. That has to be challenged.

The other piece is the external world. I referred to ecology before. *Brown versus Board of Education* was decided in the Cold War when the US was in competition with the Soviet Union and it had to deal with legalized racism. I think that what the outside context is for the indigenous peoples is going to be people's awareness that there's an ecological crisis here.

Randy: I think that's going to be the theme we're going to carry over until the final section here. And I'll open that up after a break. Thank you.

Segment Four ***From Entanglement to Restoration***

Carolyn: Welcome back to the conclusion of our two programs on Honoring Indian Law and Treaties with guests Steve Schwartzberg and Peter d'Errico. The theme of the concluding segment is "from entanglement to restoration."



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Randy: So we've been examining how indigenous and colonial nations became entangled in a web of competing legal systems and concepts. Now, I'm going to look at examples of how such entanglement provides a roadmap for solving not only centuries -old conflicts over treaty rights and native sovereignty, but also very practical on-the-ground daily conflicts between indigenous communities and the broader society. In the bargain, we're going to discover that such a pathway also leads to environmental solutions the planet needs.

The first example of fruitful entanglement takes us back to the same reality that Columbus encountered on his second voyage: seaweed. I'm going to shift our focus back to the coastline of the Pacific Northwest, where Canadian First Nations people have become entangled with the Canadian Fisheries and Oceans Administration. Indigenous inhabitants of that region, such as the Heiltsuk and the Wuikinuxv *[pronounced "Oweekeno"]* have depended on fishing and hunting for thousands of years, and done so in a matter that allows fish stocks and wildlife to thrive. However, intensive modern commercial fishing has pushed the coastal ecosystem over the edge, and stocks have declined or even vanished, threatening a critical food source, as well as cultural practices.

Jordan Wilson from the Heiltsuk First Nation harvests herring roe on hemlock branches. [3]
Photo Credit: Ian McAllister/Pacific Wild; photo used by permission of Ian McAllister.

The Heiltsuk and the Wuikinuxv are working to bring back endangered species by providing them with human- built spawning habitats, such as clam gardens, spawning grounds for herring using kelp and evergreen bough entanglements, that are anchored offshore at critical times. This is action indicated by traditional law and rules of reciprocity that we've been referring to.

These tribes have also asserted their traditional legal concepts of limited harvesting, using their own on-the-ground observations to set rational limits on fish and crab catches by their own people. And - and here's the catch - with signed protocols involving commercial fishers.

Applying and enforcing fishing limits within the indigenous community relies on the kinds of customary mechanisms we've been talking about. Enforcement, if it needs to happen, involves peer pressure and counseling of elders to younger members of the community, as we've been talking about. However, the Canadian Fisheries and Oceans Administration has often ignored requests by the tribes to

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[3] This photo illustrates the article, "Of Roe, Rights, and Reconciliation: On the British Columbia coast, the Heiltsuk First Nation asserts its rights to manage its resources, and who has access to them, through the seasonal herring harvest." Hakai Magazine, August 28, 2018 https://hakaimagazine.com/features/of-roe-rights-and-reconciliation/

enforce restrictions on commercial fisheries. So the tribes created their own legal enforcement mechanism, the Guardian Watchmen. It's an inter-tribal group. The Watchmen sometimes travel on commercial fishing boats to monitor their catches. They don't have the quote "legal authority" from the Canadian government to do so. This has been worked out within the community of people who fish together.

When commercial crab fishermen entered waters of - that they had determined were endangered and required time to recover - the Watchman removed crab traps and put them on shore after informing the crabbers and the Royal Canadian Mounted Police of their intentions. Seeking to avoid a confrontation and public controversy over disrespecting indigenous people, the Canadian Fisheries and Oceans Administration began to cooperate with indigenous people: signing memorandums of understanding to establish limits and prohibiting fishing in areas by mutual consent.

This is not growing out of a treaty. This is a bottom-up initiative. This nonviolent path to recognition of Indian law and traditional ecological knowledge restores indigenous cultural practices, acknowledges indigenous sovereignty, and begins to restore damaged ecosystems. It's a triple win for restorative justice as we've been describing it, including the community of our other-than-human kin. I could tell you about, but time does not allow, similar initiatives that are going on in the upper Midwest here.

Let me - let me jump to the main point that I really want to make. Reversing centuries- old narratives isn't going to be accomplished overnight. Indigenous people have not been without allies in our struggle to push back on these insidious Supreme Court decisions that we keep referring to. We have relied on moral support and moral allies, such as the two people you've met on this show, Peter and Steven, and we are grateful. Migwéch. Thank you.

And now, as both of you have suggested, we benefit from working with Mother Earth, our most powerful ally in this struggle. She is our representative, our advocate before the courts of law and public opinion. She's providing irrefutable evidence, accumulating daily, that actions and policies subverting indigenous sovereignty, and preventing Indians from implementing Indian law concerning reciprocity with the natural world - that these actions are harmful not only to other-than-human kin, but to us.

To conclude, the Earth's message to the courts created by colonists is clear: rather than confining the realm of traditional Indian law to the small and limited areas within Indian reservations, we should continue expanding its application elsewhere, as I just gave an example. This is a matter of justice and survival, both of which have now become beautifully entangled.

Carolyn: Okay, Steven or Peter, yes, jump in.

Steve: Yes, I want to pick up on Randy's wonderful image of the earth itself helping us to change our narratives. Because, to come back to indigenous law as a matter of stories, it's not just indigenous law that's a matter of stories. American law - non-indigenous law - is also a matter of stories. And the stories that we tell ourselves - particularly about science and technology saving us - and this is fundamentally mistaken. The indigenous stories that focus on - on love, on honesty, on respect, these are the real foundations of what is going to save us if we are to be saved.

And so I want to stress again, the dishonesty of the narrative that we're working within when we're working with Federal Indian Law. I mean, Carolyn, you mentioned at one point that Marshall had overturned his earlier decisions in *Worcester* as against *Cherokee Nation* and *Johnson versus M'Intosh*. I want to stress that there's a lot more continuity there than people realize, and that Marshall did not really overturn it. He reaffirmed the Doctrine of Christian Discovery as a foundation for saying that the rights of the native nations, or the rights of the Cherokee Nation in this case, were traditional and natural and not really legal. And it is that narrative that we have to overturn *[by affirming that]* the legal rights of the native nations are actually superior in American constitutional law to the dishonesties that the Supreme Court has been working with.

Carolyn: Wow, that's a super strong point. And we'll shift to Peter for your comments.

Peter: Yes - just a quick thought - that we're thinking - people are wondering, they think they understand there's a crisis, but their thought is limited because they take actually a sense that there's no - there's no way out, that the society has simply come to the point where there's almost no return. It's a very negative view. I think it's very dangerous to get caught into that.

It's very important to be able to see through that, to be able to tolerate a sense of frustration, of fear, of ambiguity, and to keep moving forward. If - if you have just some grain of connection to the world, the wider world, the universe, looking out at night to the sky, thinking of ancestors, all of that, whatever it is that gives you a sense that you're rooted in something besides the current political structure will be very healthy for you, I think as an individual.

Because to realize this at a theoretical level is to realize that something that's called the state or law is not actually an immutable fact; it's a set of political choices that are made under historical circumstances. And we are in historical circumstances that are requiring us to broaden our thinking. That's basically what I think the message is, that's coming to us. And it just so happens that indigenous peoples around the world have not lost that broader sense; even though they've been under assault for centuries, they have not completely been obliterated. And the most important kernels of understanding - indigenous understanding - are now being revived and are available beyond indigenous communities.

Carolyn: An incredibly empowering way to close out this program. Thank you very much, Peter d'Ericco. Thank you, Steven Schwartzberg. And migwéch - thank you - to the listeners who have all joined us for these two programs on Honoring Indian Law and Treaties.

Randy: I hope this broadcast has given you time and space to reconnect with your roots in Mother Earth and with your ancestral roots as well. Before your busy day distracts you from this moment, I encourage you to take a few minutes to reach out and feel the presence of living flora and fauna, and perhaps even that of your ancestors. Allow yourself to touch their presence, capture that moment and hold onto it. And also if you will, write to me and let me know about your experience, I can be contacted through my website, at randykritkausky.com, where you can also find transcripts and supplemental materials for all Indigenous Perspectives shows. Stephen again, Peter, again, a deep heartfelt migwéch.

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