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Peter d'Errico, FOREWORD
to
Steven T. Newcomb, *Pagans in the Promised Land: Decoding the Doctrine of Discovery*
[Fulcrum Publishing, 2008]

The formative influence of Christian doctrines on U.S. law was once clear and unambiguous. Religious dogmas of fifteenth-century Vatican papal bulls were deployed as the foundation of property law, nationhood, and federal Indian law in the early nineteenth century. Court decisions bound U.S. law to the world of Christendom and Christian imperialism. This process was not hidden or mysterious, nor was it a conspiracy among judges and priests. It was long-range planning for the takeover of a continent and a hemisphere. It was the theory that guided colonial practices. It is the story of *Pagans in the Promised Land*.

Before we go further, let us distinguish some core terminology. There is a difference between Christ and Christianity: the former is a title given to Jesus of Nazareth by those who believe him to be the Messiah of the family of Abraham; the latter is the teachings these believers produced over many years in the institutional development of their church. Christianity, the belief system of the church, is different from Christendom, which is an amalgamation of churches and states. Christendom consists of alliances among secular princes and priestly authorities; it culminates in the doctrine of divine right of kings and popes.

When we make these important distinctions, we can begin to understand the possibility of differences between the teachings of Jesus and the political and legal doctrines of a church-state complex operating in his name. Jesus is not reported as having ever uttered any words about American Indians, but the official organizations of Christendom most certainly did utter words and enact laws and policies affecting Indians, from the time of first contact to the present. As

Newcomb demonstrates, the doctrines of Christendom informed the thinking of jurists and other lawgivers who created property and federal Indian law.

To put it in a nutshell, *Pagans in the Promised Land* is not an attack on Jesus or Christianity. It is a careful and impassioned exploration of the ways that federal law relating to property, nationhood, and American Indians grew from Christendom. The basic story holds true if we reverse Newcomb's formulation, that Christendom is an aspect of federal Indian law, and say that federal Indian law is an aspect of Christendom. To be specific, property and federal Indian law—the body of rules created by the U.S. government to define the indigenous peoples of this continent, their land rights, and the land rights of the colonizers—is a continental manifestation of the world-historical mission of Christendom: to bring all Creation into its domain.

I emphasize these distinctions to help readers who are unfamiliar with the history of church and state to get past resistance to the charge that Christendom is linked to colonialism and oppression. Readers familiar with Vine Deloria, Jr., and *God Is Red* will have an easier time with this material because they will already distinguish between religion and spirituality. The point here is for the reader who is sensitive to Christian teachings about Jesus to be open to learning about the problematic history of Christendom in relation to U.S. law.

One more distinction is necessary, to help us understand what Newcomb means when he writes that federal Indian law is the result of the "white man's imagination." This is not a statement about skin color. It is a statement about demographics and the historical development of a conceptual framework. Indeed, the white man's imagination has spread to the minds of many who are not white. The target of Newcomb's critique is a metaphorical, rather than a literal, whiteness. It's about a way of thinking, not about the color of the people who think that way.

We may ask about the apparent acquiescence of so many indigenous peoples to the "white man's imagination": Did not Indians sometimes willingly accept the rules of their "discoverers"? Is this evidence that there was no oppression? The best response is to look at the demographics of discovery. As Charles C. Mann documents in *1491: New Revelations of the Americas before Columbus*, the colonial projects of "discovery" were not possible until indigenous peoples had been decimated by strange diseases, their social relations disrupted and destroyed by widespread death.

From the viewpoint of cognitive theory, which Newcomb utilizes throughout his analysis, we may use Steven L. Winter's terminology to say that the "sedimented tacit knowledge" and "cognitive structures of social meaning" of these peoples were nearly rendered obsolete by the devastation. The invaders' worldview filled the deep gaps that had opened in their cultures.

Newcomb's use of cognitive theory stirs up the deepest parts of today's conventional thinking about law, the sedimented tacit knowledge and cognitive structures of social meaning of twenty-first-century American life. These are the deep layers of consciousness that support our everyday understanding and involvement with legal institutions.

Cognitive theory also suggests that people resist challenges to their worldview unless or until it is obviously not functional. The question is whether and to what extent federal Indian law is no longer functional. The fact that federal Indian law is widely, almost universally, acknowledged to be riddled with contradictions does not mean it is perceived as not functional. Many areas of law carry built-in contradictions, but these areas are accepted and maintained because they solve discrete disputes, even if they cannot be satisfactorily explained in theory.

Dysfunction in federal Indian law is evident from several perspectives. Indigenous peoples throughout the Americas are asserting self-government, directly challenging claims of state sovereignty. State and non-state entities are responding, sometimes violently, with efforts to assimilate indigenous peoples into standard state structures. International organizations, notably the United Nations Permanent Forum on Indigenous Issues, are taking up these matters of self-government and forced assimilation, questioning existing doctrines and practices. Indigenous peoples' issues are a major part of the global movement toward expanding human rights that is challenging conventional understandings of government.

Newcomb challenges us to accept the effort of rethinking federal Indian law, land rights, and Indian nationhood. If we are surprised or angered by what his research has found, we must work through these reactions to study the documents he presents. This is a book to study, not simply to read. It cracks the code that explains the seminal U.S. Supreme Court case *Johnson v. M'Intosh*, in which "Indian occupancy" and "discoverer's title" intersected. Newcomb's analysis of this cornerstone of U.S. law raises the stakes of legal analysis far beyond antiquarian concern for old cases. His work of decoding is akin to Michel Foucault's "archaeology" of knowledge: It is not the history of the past but the history of the present telling us where we are in the law of property and nationhood and how we got here.

The fact that U.S. law is a precedent-based system means that legal history is always a history of the present. Each contemporary case rests on interpretation of previous cases. Therefore, a problem identified in a precedent case sends shock waves through subsequent cases. Sometimes a precedent must be overturned to make way for deep change in law, as when the doctrine of "separate but equal" was overturned to make way for civil rights equality.

The religious doctrine in *Johnson v. M'Intosh* is at the core of federal Indian law and of all property title derived from colonization and "discovery," as the Supreme Court stated when it rendered the decision, saying that "the property of the great mass of the community originates in it." Federal Indian law is the lynchpin of property law in the United States. In light of this precedent that has never been overturned, we can see that the United States is not yet in a postcolonial era. *Pagans in the Promised Land* shows us the conceptual threshold over which the law must step if we are to enter that era.

This is not the first book to criticize the concept of discovery, but it is notable for not whitewashing our language to make it politically correct. In the latter years of the twentieth century, efforts were made, particularly in educational curricula, to avoid the term discovery and replace it with contact or encounter. Especially around Columbus Day, it became popular to speak about the "encounter" of the "old" and "new" worlds as a way of trying to forget exactly how bloody this event was. But, as Michael Shapiro wrote, "Societies that have thought of themselves as a fulfillment of a historical destiny could not be open to encounters."

The cognitive underpinnings of discovery and attendant laws cannot be eradicated simply by changing the words we use. As John Trudell said in response to the terminological shift from American Indian to Native American, "They changed the name and treat us the same." Newcomb's decoding of the doctrine of discovery is an unpacking, not a relabeling. To decode is to make explicit what was hidden. Decoding implies a new understanding, not just a new way of stating an old understanding.

When Newcomb exhumes the cognitive models implicated in the doctrine of Christian discovery, he brings to light theological and political ideas that have been buried in legal discourse and exposes them to contemporary understandings of law

and human rights that do not allow for religious discrimination. A similar process happened when the U.S. constitutional formula that a black person is three-fifths of a citizen was exposed to twentieth-century ideas of human freedom and equality.

Scholars will someday exhume the doctrines of religious discrimination that inflame our early twenty-first-century world, in which competing theologies of domination over homelands and new lands fuel wars of conquest and attrition. The Judeo-Christian-Islamic family of Abraham, from which Christendom grew, carries forward internal feuds stretching across thousands of years.

Newcomb's analysis of the chosen-people doctrine at the core of federal Indian law and property law adds a significant piece to the puzzle of why the Abraham family feud persists: it is because theology is inscribed in the cognitive structures of warring humans, informing their daily lives with visions of eternal truths. Because these structures are the hidden foundation of ordinary thinking, they are resistant to ordinary questions. When they are made visible by cognitive analysis, they can be questioned.

One might speculate that the rise of cognitive theory itself is a response to an increasingly desperate human need for reconsideration of accepted truths in light of our actual experiences of life. As the twenty-first century opens, we find ourselves embroiled in competing claims of unitary truth. Our tendency to continue to assert our own unitary truth collides with our experience of multiple realities. Cognitive theory helps us explore and understand the situation. If we are fortunate, the result will be a heightened awareness of the fact that beneath our separate and competing truths is the common humanity we all share.

Pagans in the Promised Land will especially appeal to readers who see legal cases as stories. This is a narrative approach to law that has gained adherents in and out of the academic world. Newcomb's presentation informs us about the master

narratives of federal Indian law. He analyzes these narratives from an indigenous perspective and, in the process, sheds light on the ordinary workings of all law: how legal concepts are generated from argument, persuasion, and experience, and how these concepts become socially "real" in our lives.

Newcomb teaches us that the foundation of property law and federal Indian law is not the Constitution, but the idealized cognitive model of the conqueror seizing a promised land for a chosen people. This cognitive model involves not simply a historical right of conquest in the past, but an ongoing, contemporary right to conquer in the present. Newcomb's conclusion suggests that the U.S. government applies this same model not only to American Indian nations but also to nations around the world as it tries to assert global hegemony. All the more reason to untangle and decode this model.

Newcomb's unveiling of the Conqueror and Chosen People-Promised Land models reveals the nakedness of the American empire at its inception and shows that the Bible story of the family of Abraham is, in its own terms, a colonizing adventure. This decoding of the "doctrine of discovery" may be taken as incendiary in the context of the rise of the Christian right in U.S. politics, but it is supported by extensive scholarship and documentation.

The cognitive theory that decodes the founding doctrine of nationhood, property law, and federal Indian law also explains how that foundation is generally invisible today. Relying on standard legal concepts of precedent (*stare decisis* and *res judicata*), legal officials don't have to think about the conceptual basis for and conundrums of the foundation. They simply deploy the precedents. This is ordinary legal practice, which, as Karl N. Liewellyn wrote in *The Bramble Bush*, allows judges to apply a rule "without reexamination of what earlier went into" it.

Where a given rule is benign, we applaud the ordinary practice for its consistency and efficiency; but where the rule is problematic, ordinary practice is an obstacle to understanding and change. Cognitive theory shows us that a premise for rethinking any area of law is cognitive awareness: we must understand what it is that needs to be rethought. This requires a break with ordinary practice and an exercise of our human capacity for self-awareness and reflection. *Pagans in the Promised Land* provides us with this break, and encourages us to think anew about foundational legal issues.