On the Rightful Political Heritage of Native Nations

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"[O]n the soft fibers of the brain is founded the unshakable base of the soundest of Empires."

— Michel Foucault[1]

"One cannot rule by force alone. True, force is decisive, but it is equally important to have this psychological something which the animal trainer also needs to be master of his beast. They must be convinced that we are the victors."

— Adolf Hitler[2]

"Only one thing's sadder than remembering you once were free, and that's *forgetting* you once were free. That would be the saddest thing of all. That's one thing we Indians will never do."

— Mathew King (Oglala Lakota)[3]

I. INTRODUCTION

This article is intended as a critical assessment of federal Indian law from the perspective of an Indigenous person outside of the legal profession. Those who

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1. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 103 (Alan Sheridan trans., Vintage Books 2d ed., 1995) (1978) (citation omitted).

2. *Quoted in* James C. Scott, Domination and the Arts of Resistance: Hidden Transcripts 49 (1990) (citation omitted).

3. HARVEY ARDEN, NOBLE RED MAN: LAKOTA WISDOMKEEPER MATTHEW KING 82 (1994).

work in the area of federal Indian law find themselves in a bind much of the time, feeling tangled up in the complicated conceptual mess of this field of law. This is a problem for the simple reason that if there is one thing any attorney must do, it is to achieve and project a feeling of certitude that her side is going to win. This sense of confidence is extremely difficult to achieve when working in an area of law that is, by definition, confusing, contradictory, and at times almost incoherent, and in which, more often than not, the cards are stacked against you.[4]

This observation about the "binding" and confusing nature of federal Indian law is in keeping with our general sense that "law" has a "binding" force or effect.[5] If there is another adjective that seems to fit federal Indian law, it is "perplexing," a word which further suggests "bewildering" and "entangling."

Some years ago I pointed out in a law review article that United States federal Indian law is grounded in a distinction between "Christian people" and "natives, who were [considered] heathens . . . ."[6] I found, however, that few federal Indian law attorneys appreciate my perspective because most consider my critique "impractical." I have been told that my approach "won't win cases." This charge is highly ironic, however, given that the perplexing nature of federal Indian law is compounded yearly as the vast majority of cases involving Indians brought before the United States Supreme Court (some 80%) are *lost* rather than won, a trend that has been ongoing for generations.[7] It seems clear that the standard approach to

4. *See, e.g.*, DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE vii-xi, 1-3 (1997).

5. *See* BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 1876 (8th ed. 1914) ("'[O]n the whole the safest definition of law in the lawyer's sense seems to be a rule of conduct *binding* on members of a commonwealth as such.'" (quoting Sir F. Pollack)) (emphasis added); WEBSTER'S NEW INTERNATIONAL DICTIONARY 1401 (2d ed. 1959) (defining law as "[t]he *binding* custom of practice of a community; rules or mode of conduct made obligatory by some sanction which is imposed and enforced for their violation by a controlling authority . . . .") (emphasis added).

6. Steven T. Newcomb, *The Evidence of Christian Nationalism In Federal Indian Law: Johnson v. McIntosh, the Doctrine of Discovery, and Plenary Power*, 20 NYU REV. L. & SOC. CHANGE 303, 326 (1991) (quoting Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 576-77 (1823)).

7. Glenn T. Morris, *Vine Deloria, Jr., and the Development of a Decolonizing Critique of Indigenous Peoples and International Relations*, *in* NATIVE VOICES: AMERICAN INDIAN IDENTITY AND RESISTANCE 97, 143 n.86 (Richard A. Grounds, George E. Tinker & David E. Wilkins eds., 2003). Morris cites David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280-81 (2001), and says that

> Getches exposes the astounding statistic that, in the past ten terms of the Rehnquist Supreme Court, indigenous interests have lost 82 percent of their cases. Getches concludes that this record of defeat is the worst of any litigant group appearing before the Supreme Court, even worse than that of incarcerated criminals seeking reversal of their convictions.

Morris, *supra*, at 143 n.86.

federal Indian law "won't win cases" either, at least not more than roughly 20% of the time.

Given these factors, we need tools of analysis that will enable us to cut through the confusion of federal Indian law and reach an entirely new point of clarity as to what it is we are involved with when we refer to "federal Indian law." I believe that cognitive theory (theory of the mind) offers such an approach because it provides us with a way of becoming hyper-aware of the fact that "the law" is a product of human cognitive or mental operations. Law is a product of the mind.[8]

Another word used to convey the binding effect of "the law" is "constraint." In other words, the aggregate of ideas known as "federal Indian law" consists of a whole series of *constraints* that the United States government has succeeded in imposing on Native nations and peoples. The number one constraint is the assertion that the United States government has "plenary power" *over* Indians.[9]

The body of ideas referred to as federal Indian law was made to bind Indians under the political and legal authority of the American empire. Let us be clear, federal Indian law is an oppressive system. It did not come from Indians. Indian people did not make federal Indian law. It should not be referred to as "Indian law," because it consists of ideas that came out of the minds of non-Indians. Federal Indian law is non-Indian law.

Where is the constraint of law located? According to legal philosopher Steven Winter, law's constraint is located in the mind.[10] Physiologically speaking, law's constraint is located in the neural structure and make up of the brain and the body.[11] This suggests, therefore, that the constraint of federal Indian law is *internal*; it is located in the cognitive and neural workings of the brain. Put simply, the constraint of federal Indian law is a direct result of the way our minds, as Indigenous people, have been conditioned (colonized) by the dominant society. Recognizing this little understood truth opens up the possibility of a method for decolonizing our minds and our lives.

8. *See generally* STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND (2001).

9. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning . . . .").

10. *See* WINTER, *supra* note 8, at xiii-xiv.

11. *See id.* at 22-42.

II. THE SACRED BIRTHRIGHT OF INDIGENOUS NATIONS AND PEOPLES[12]

Distinct and diverse, Indigenous peoples are nations, born of the Earth (the Sacred Life Giver), placed by the Creator in sacred relationship with our respective homelands and territories throughout time. Our ancestors lived free and independent of Western colonialism and subjugation for an untold succession of ages, until the empires of Christendom invaded our region of Earth, which is commonly known in the foreigners tongue as the "Western Hemisphere."

Our ancestors bequeathed to us the gift of a sacred birthright, which is our very being as naturally existing nations of people. This sacred birthright is comprised of our languages, cultures, lands, deserts, mountains, forests, and our relatives, such as the buffalo, caribou, salmon, cedar, sage, sweet grass, and corn pollen, as well as our spiritual and ceremonial traditions, our songs and sacred ceremonial places, our oral histories, and the burial places of our ancestors. Our sacred birthright includes our minds, our philosophies and sciences, our economic systems, and agricultural practices. It includes our petroglyphs and artifacts. And our sacred birthright also includes the rivers, streams, natural springs, lakes, underground aquifers, seas, bays, inlets, oceans, and all bodies of water, the precious and sacred liquid that flows through the veins of Mother Earth and sustains all life and without which life cannot continue.

Our sacred birthright includes an inherent right to live in peace, free of domination, subjugation, colonization, hate and war. In short, it is our sacred birthright to live the spiritual way of life bequeathed to us by our ancestors. Yet, for more than five centuries in this hemisphere, dominating political systems from Western European Christendom have worked maliciously to destroy our sacred birthright while heedlessly disrupting the balance, harmony, and beauty of life in the process.

Our sacred birthright, which we shall never freely forfeit, includes the right to heal from the trauma of colonization, and to one day be free and independent of all forms and manner of colonial domination. We have a solemn responsibility to use every fiber and breath of our being to uphold and protect the sacred birthright of our own children and young people for the benefit of our future generations, and for the

12. The writings in this section are edited excerpts of two previously published opinion columns. *See* Steven T. Newcomb, *The Sacred Birthright of Indigenous Peoples*, INDIAN COUNTRY TODAY, Aug. 20, 2003, at A-5; Steven T. Newcomb, *In Honor of Tecumseh*, INDIAN COUNTRY TODAY, Oct. 22, 2003, at A-5. More of the author's columns can be found at http://www.indiancountry.com.

benefit of all life. Every spark that spirals into the air from a ceremonial fire represents the spiritual essence of the universe that burns in each and every one of us. We have the ability to combine together the fire of our respective spiritual essences as human beings, to become a tremendous force of healing, cultural resurgence, and revitalization.

Words attributed to the great Shawnee leader Tecumseh express a credo for our sacred birthright:

> Live your life that the fear of death may never enter your heart. Love your life, perfect your life, and beautify all things in your life. Seek to make your life long, and its purpose the service of your people. Prepare a noble death song, for the day when you go over the great divide. Show respect to all people, and grovel to none. When you arise in the morning give thanks for the food and the joy of living. If you see no reason for giving thanks, the fault lies only in yourself. Abuse no one and nothing, for abuse turns the wise ones into fools and robs the spirit of its vision.[13]

The powerful example of Tecumseh's life provides a lesson that says: "Never submit, never give in, never surrender your spirit to those who would capture it and hold you against your will under a system of domination."

III. Our Sacred Birthright and Our Political Power

By the phrase "rightful political heritage," I am referring to that which we as Indigenous peoples have inherited from our ancestors. It is for this reason that I refer to this heritage as a birthright. In dominant society law, heritage is also considered a form of property, specifically, "that which has been or may be inherited by legal descent or succession."[14]

One form of political power is the power that arises from, or grows from, property (that which we rightfully possess).[15] It is commonplace to consider any person or any people to have the right to control their own property. Thus, to say that our respective Native nations have a rightful political heritage is to recognize that we have a particular kind of political power that arises from our sacred

13. This quote was published on the back of a pamphlet distributed by the National Service Points of Life Foundation. *See* The Honor of Giving: National Grantmaking and Philanthropy in Indian Country, Wingspread, June 23-25, 2002 (on file with UCLA Indigenous Peoples' Journal of Law, Culture & Resistance).

14. Merriam-Webster's Collegiate Dictionary 543 (10th ed. 1998) (defining heritage as "something possessed as a result of one's natural situation or birth").

15. William Brandon, New Worlds for Old: Reports from the New World and Their Effect on the Development of Social Thought in Europe, 1500-1800, at 121 (1986).

birthright as Indigenous nations and peoples. It is to further recognize and contend that we have the inherent right to control every aspect and feature of the property of our sacred birthright, including our lives and our very existence. The origin, basis, and longevity of our political power arises from the fact that we as Indigenous peoples have existed here in this hemisphere for thousands and thousands of years, and from the fact that we continue to exist here, despite all efforts to destroy us. From our point of view, the Creator placed us in this land, and here we will stay.

However, we must also account for the fact that we do not exist in isolation. Another dominating society has come into our midst and into our respective sacred homelands and established its own social, economic, and political systems. The dominating society utterly denies, either unconsciously or intentionally (probably both), the very existence of our sacred birthright as Indigenous nations and peoples. This process of denial is as old as the first efforts of Christian Europeans to colonize and control this hemisphere.

IV. THE LIBERATING POTENTIAL OF COGNITIVE THEORY

Over the past thirty years, dramatic breakthroughs have been occurring in the areas of cognitive science (the study of the mind) and cognitive theory.[16] Recent discoveries based on empirical studies in linguistics, psychology, and anthropology reveal that mind is both embodied and imaginative.[17] The imaginative processes of the mind are, so to speak, rooted in the incredibly fertile "soil" of the brain's structure and neurology.[18]

Cognitive theory suggests that "the mind itself is an embodied process formed in interaction with the physical and social world."[19] The findings of cognitive science enable us to grasp the role that metaphor and other conceptual operations play in the construction of reality. Metaphor is not a mere ornament of language, though as a literary device it can be used as such. Rather, conceptual metaphor—thinking of one thing in terms of something else, or, more technically stated, thinking of one domain

16. *See generally* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980) [hereinafter LAKOFF & JOHNSON, METAPHORS]; GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT (1999) [hereinafter LAKOFF & JOHNSON, PHILOSOPHY].

17. *See* LAKOFF & JOHNSON, PHILOSOPHY, *supra* note 16, at 16-44.

18. *Id.*

19. WINTER, *supra* note 8, at xii.

in terms of another—is an essential part of the construction of social and political reality.[20]

Allow me to provide a rather mundane example of the way embodied imagination, and such conceptual operations as cognitive metaphor constitute, structure, and influence our experience of reality. Suppose a fog cloud has moved in from the ocean. I look out and see both the fog and a hill in the distance. I point toward the hill and ask, "Do you see that fog *in front* of the hill?" The question arises: do hills have fronts or backs independent of us imaginatively projecting such concepts onto hills?

In other words, are "fronts" and "backs" inherent and objectively real features of hills, which are independent of the way our embodied mind imaginatively interacts with the social and physical world? Or do we think of hills *in terms of* certain physical features of our own bodies, in this case, "fronts" and "backs?" The answer is that there are no "fronts" and "backs" inherent in the geological features of the earth we refer to as hills. These are concepts that we imaginatively project onto hills.[21]

What does this example provided by cognitive theory have to do with our sacred birthright as Indigenous peoples and with our rightful political heritage? Plenty. For countless ages our ancestors were free to think of and conceptualize their existence and deal with their lives in terms of their own categories, concepts, metaphors, and other conceptual operations. Over time, with succeeding waves of Christian European colonization, the assumption has become well established that we, as Indigenous nations and peoples, are subject to the cognitive mechanisms and conceptual operations of Christian Europeans. This is the very premise of federal Indian law.

Christian Europeans arrived to this hemisphere already possessed of the assumption that we as Indigenous peoples, whom they considered either subhuman or barely human, are rightfully subject to categories, concepts, values, and judgments descended from Western Europe.[22] Some of the most powerful weapons that Christian Europeans have used against our nations and peoples are conceptual

20. *Id.* at 1-21.

21. Lakoff and Johnson provide this example of "the fog in front of the mountain" in LAKOFF AND JOHNSON, METAPHORS, *supra* note 16, at 162.

22. *See generally* ANTHONY PAGDEN, THE FALL OF NATURAL MAN: THE AMERICAN INDIAN AND THE ORIGINS OF COMPARATIVE ETHNOLOGY (2d ed. 1986). According to Pagden, "By the terms of the[ ] bulls [issued by Pope Alexander VI in 1493 to King Ferdinand and Queen Isabel of Spain] the Catholic Monarchs had been granted sovereignty over all the new found lands in the Atlantic which had not already been occupied by some other

metaphor and other conceptual operations. They used their embodied imagination to project certain categories and concepts onto us that are neither objectively real nor inherent features of our existence. Indeed, the embodied and imaginative thought processes of the dominant society are the very basis of the aggregate of ideas referred to as federal Indian law and policy.

When we as Indigenous nations and peoples allow Supreme Court justices and other representatives of non-Indian society to decide what categories, metaphors, and concepts shall be attributed to us and define our existence as Native peoples, we temporarily relinquish, to a significant degree, our rightful political heritage and our cognitive power of self-determination. Indeed, it bears repeating that federal Indian law is predicated on the dominating society of the United States using its embodied imagination to decide what ideas and concepts shall define our existence and to construct our reality. Just think of the metaphorical phrase "domestic dependent nation," a phrase coined by Chief Justice John Marshall in *Cherokee Nation v. Georgia* that is so commonly ascribed to Native nations and peoples.[23]

Christian prince." *Id.* at 29. Pagden then says that the "declared aim of the pope's concession, however, had not been to increase the might and wealth of Castile . . . ." *Id.* Instead, it had been

> to enable Ferdinand and Isabel to 'proceed with and complete that enterprise on which you have already embarked [namely] under the guidance of the orthodox faith to induce the peoples who live in such islands and lands [as you have discovered or are about to discover] to receive the Catholic religion, save that you never inflict upon them hardship or dangers'.

Id. (citing Manuel Giménez Fernández, *Las Bulas Alejandras de 1493 Referentes a Las Indias*, 1 AUNARIO DE ESTUDIOS AMERICANOS 171, 351 (1944) (translating text of *Inter cetera* bull of May 3, 1493)).

Based on the phrase "never inflict upon them hardship or dangers," Pagden draws the following inference: "The final phrase of this injunction would seem to preclude war being made upon the Indian for whatever purpose . . . ." *Id.* However, Pagden's assertion that this phrase precluded "war being made upon the Indians" appears to be based on a mistranslation.

Pagden notes that "[t]he best printed versions [of the bulls] are provided by Gimenez Fernandez . . . ." in Giménez Fernández, *supra*. Pagden, *supra* at 29 n.8. An examination of Giménez Fernández's work reveals that he translated the bulls from Latin into Spanish, and that Pagden evidently translated Giménez Fernández's Spanish into English. Giménez Fernández's Spanish translation of the above phrase is "*sin que nunca os intimiden peligros ni trabajos . . . .*" *Id.* at 351. This phrase translates into English as "without never you be intimidated by dangers or works." Translated directly from Latin into English, the phrase reads "nor at any time let dangers or hardships deter you therefrom . . . ." *See* 1 EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES 77 (Frances G. Davenport ed., 1967 ed.).

Thus, one can correctly draw a conclusion opposite of that put forth by Pagden. The phrase in question does *not* "preclude war being made upon the Indian for whatever purpose." PAGDEN, *supra*, at 29. Absent any other language in the papal bulls precluding war against the Indians, and given that the bulls call for "barbarous nations" to be "subjugated" for "the propagation of the Christian empire," it seems clear that the bulls can be correctly construed to authorize war as one means of subjugating the Indians.

23. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

Referring to the Indians generally, Marshall wrote that "[t]hey may more correctly, perhaps, be denominated domestic dependent nations."[24] Many scholars misconstrue this to be a *statement of fact* on Marshall's part, thereby creating the erroneous impression that the Indians are *in fact* "domestic dependent nations." This simply ignores Marshall's hedging with the words "may" and "perhaps," and perpetuates the ontological fallacy that Indian nations automatically "become" whatever the U.S. Supreme Court says they are through the Court's imaginative and metaphorical projections.

V. Moving Toward a Solution

The solution to the problem outlined here is, at a minimum, two-fold. First, we as Indigenous peoples must be extremely cautious and discriminating when it comes to conceptualizing ourselves in terms of the non-Indian society's dominating categories, concepts, metaphors, and other cognitive operations. These conceptual terms and concepts include the construct of "domestic dependent nations" (the idea that Native nations are subject to the ultimate authority of the United States because they are "domestic" to the United States) and "the right of discovery" (the idea that originally free and independent Native nations are subject to the authority of the United States because "Christian people" supposedly "discovered" lands inhabited by "natives" who were conceptualized as "heathens"[25]).

Chief Justice Marshall himself was conscious of metaphor when he wrote phrases such as "may, more correctly, perhaps, be denominated domestic dependent nation,"[26] or when he used the so-called Right of Discovery to say in *Johnson* v. *M'Intosh* that the Court would *pretend to convert* "the discovery of an inhabited country into conquest."[27] Thus, "discovery" becomes a metaphor for "conquest." Federal Indian law scholars have tended not to delve into the metaphorical nature of such phrases and the fact that they are products or results of the embodied imagination of non-Indian jurists.

Second, we as Indigenous peoples must conceptualize our existence in terms of our own Indigenous concepts, metaphors, and cognitive operations, starting with an acknowledgment of our sacred birthright as nations of this hemisphere, originally free and independent from all forms and manner of Christian European domination,

24. *Id.*
25. *See infra* note 6 and accompanying text.
26. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.
27. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 591 (1823).

including cognitive domination. The previously mentioned process of metaphorical projection that assigns "fronts" and "backs" to hills[28] is the same process of metaphorical projection that refers to the U.S. government as having plenary power "over" Indian nations.[29] We commit a grave error of reification when we behave toward the metaphorical statement "the United States has plenary power *over* Indian nations" as if this is a statement of objective fact, or when we assume that Indian nations *really are* "domestic dependent nations" subject to the overriding authority of the United States, rather than merely metaphorically characterized as such by colonial jurisprudence.

Chief Justice Marshall was obviously referring to metaphor when he wrote in *Cherokee Nation v. Georgia* that the Indians "are in a state of pupilage[,]"[30] or that their "relation to the United States *resembles* that of a ward to his guardian."[31] Saying that one thing "resembles" another obviously involves making a comparison between those two things. This comparison in turn involves a process of thinking of one thing *in terms of* something else, which is the essence of conceptual metaphor.

Cognitive theory teaches us that colonization and dominant society "law" are internal (embodied imagination), despite tangible evidence of the coercive power of the dominating society and "the State," which are also social constructions. Internal or cognitive domination results in a very real and traumatizing experienced reality of domination. Liberation from that condition or state of domination must therefore begin in the mental or cognitive realm on the basis of our own Indigenous conceptions of reality.

The process of decolonization is a process of liberating our minds and our lives by revitalizing, to the greatest extent possible, our languages, cultures, and spiritual traditions, in keeping with our inherent political heritage as Native nations and peoples. At the same time we must use our cognitive political heritage and embodied sacred birthright to challenge the dominating society: "In comparison to the length of time we've been here, you are latecomers and quite recent arrivals to this hemisphere. We reject your use of embodied imagination to conceptualize our existence without our consent and call it 'the Law.'"

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28. *See infra* note 21 and accompanying text.

29. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning . . . .").

30. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

31. *Id.* (emphasis added).