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ENVIRONMENTALISM ISN'T NEW: LESSONS FROM INDIGENOUS LAW

Joseph Kowalski†

The much-overlooked laws and lifeways of Indigenous people show that concepts of environmental sustainability have long been a part of the human tradition. By studying the Indigenous jurisprudence of societies that maintained these traditions into the modern era, much can be learned. Rather than making laws in regards to the land, the land itself was the source of the law, for the environmental laws were built around a relationship with the land.

Through most of human history, the western world had a similar relationship. However, the Holy Roman Empire's interpretation of Biblical scripture, which at that time was law, forever changed that relationship. After the beginning of the Westphalian Nation State which is the global model for a nation based on the Treaty of Westphalia, and the spread of this model via colonization, every state has a mindset and legal system largely at odds with the natural world.

Through both allowing the remaining Indigenous societies to continue their traditions and incorporating some of their principles into the law of states such as New Zealand's granting of legal personhood to the Whanganui River, the effects of this history and the threat to the global environment can be overcome.

INTRODUCTION

In terms of the despiritualization of the universe, the mental process works so that it became virtuous to destroy the planet. Terms like progress and development are used as cover words here, the way victory and freedom are used to justify butchery in the dehumanization process. For example, a real-estate speculator may refer to “developing” a parcel of ground by opening a gravel quarry; development

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here means total, permanent destruction, with the earth itself removed. But European logic has gained a few tons of gravel with which more land can be “developed” through the construction of road beds. Ultimately, the whole universe is open—in the European view—to this sort of insanity.

Most important here, perhaps, is the fact that Europeans feel no sense of loss in this. After all, their philosophers have despiritualized reality, so there is no satisfaction (for them) to be gained in simply observing the wonder of a mountain or a lake or a people in being. No, satisfaction is measured in terms of gaining material. So the mountain becomes gravel, and the lake becomes coolant for a factory, and the people are rounded up for processing through the indoctrination mills Europeans like to call schools.¹

The above quote is from Lakota activist Russel Means’ famous *For America to Live Europe Must Die* speech.² This was meant as a metaphorical death. What he meant was that for the natural environment and the Indigenous cultures of what is now called “the Americas” to continue, the culture of dominance and control the colonizers brought with them must be put to rest. In the popular imagination, the environmental movement began in the United States in the 1970’s.³ As far as the geographic boundaries of the U.S. go, however, the environmental movement began the first time an Indian killed a white man on U.S. soil. That may sound like tongue-in-cheek hyperbole, but the fact is the roots of the first war between Anglo-colonists and their Indigenous neighbors in the early days of the colony were environmentally based.⁴ King Philip’s War,

¹ Russell Means, Lakota activist, *For America to Live Europe Must Die* (July 1980).

² *Id.*

³ See Peter Dykstra, *History of Environmental Movement Full of Twists, Turns*, CNN.COM, (December 15, 2008), www.cnn.com/2008/TECH/science/12/10/history.environmental.movement/index.html. (last visited July 19, 2018).

⁴ See Jason W. Warren, *King Phillip’s War*, *Encyclopædia Britannica, Inc.* (July 15, 2015), <https://www.britannica.com/event/King-Philips-War>.

fought between the Wampanoag and their allies against the colonists, largely began due to tensions rising from European despoliation of the tribe's environment.⁵ Of course, back in Europe prior to their own radical transformation from Christianity, many Europeans held similar practices to that of the Indigenous Peoples of the Americas. Perhaps the real first environmental movement began in the ancient world when agriculturalists first started going to war against more nomadic tribes.⁶

This paper seeks to explore this basic preposition: the idea that environmental protectionism is not the brand-new radical idea many make it out to be. This, of course, is not intended to overly romanticize. Indigenous societies no doubt have their flaws: warfare, slavery, and other ills.⁷ However, Nation states too have those same flaws and our society is seldom condemned outright for them. From Treblinka to Tuol Sleng, it appears States have perfected rather than eliminated humanities' darker tendencies. What is indisputable is that Indigenous societies had a much more sustainable relationship with the natural world. After all, the Natives of the present-day United States were able to live here for at least 15,000 years, and when colonizers came, the land was so pristine they thought they were in an untouched landscape.⁸

I will look to analyze the roots of many Western-based notions of property, the environment, and law, which form the basis of current environmental law. I will compare these concepts and rules to the laws of several Indigenous societies.

In order to understand how the Western notions of the environment became the backbone of both international law and the domestic law of almost every state on Earth, I will trace the history

⁵ *Id.*

⁶ JEFFREY SZUCHMAN, *NOMADS, TRIBES AND THE STATE IN THE ANCIENT NEAR EAST: CROSS-DISCIPLINARY PERSPECTIVES* (Oriental Institute of the University of Chicago, 2009).

⁷ CHRISTINA SNYDER, *SLAVERY IN INDIAN COUNTRY: THE CHANGING FACE OF CAPTIVITY IN EARLY AMERICA* (Harvard University Press, 2009).

⁸ See Chris Clarke, *The Idea of Wilderness Erases Native People. Here's How To Fix It.*, KCETLINK (Jan. 31, 2017), <https://www.kcet.org/shows/tending-the-wild/the-idea-of-wilderness-erases-native-people-heres-how-to-fix-it>.

of colonization and imperialism that laid the grounds for the current dominant system of laws and worldviews regarding the environment. The impacts of colonization and the separation from traditional Indigenous values have manifested itself twofold. First, they have negatively impacted those who remain “Indigenous.” I mean this in the cultural sense, as many nation-states are populated by the people that have always lived there. However, the government of every country is modeled on the Westphalian Nation-state, a European creation based on the Treaty of Westphalia at the end of the 100 Years War that forms the basis for how every Nation is organized, so in many countries whether the rulers are of the same genetic stock is irrelevant because their values and governmental system are often at odds with the norms and values of the people who remained true to pre-state traditions. For example, while the genetic difference between the average Peruvian citizen who has a large degree of Amerindian ancestry and an uncontacted Indian of the Amazon rainforest isn’t as readily apparent as the clear distinction between a European descendant and a Native in a settler colony such as the United States, there is a world of difference between the values, laws and norms of someone who identifies as a citizen of a modern nation state of Peru and someone who follows the traditional laws of the Achuar people. Because the Indigenous people forced to be in the confines of Westphalian Nation-states are often subject to the decisions of that state’s government, there is a very real and immediate impact on their rights and lives.⁹ I will explore the various international laws and rules governing the rights of Indigenous peoples. While not all are immediately environmentally based, Indigenous concepts of self are so tied to notions of land that the effect of protecting Indigenous rights and culture is most often hand-in-hand with protecting the environment.¹⁰ I will also observe how these laws can be

⁹ See United Nations, *Environment for Indigenous Peoples* UNITED NATIONS, www.un.org/development/desa/indigenouspeoples/mandated-areas1/environment.html.

¹⁰ See Janis Alcorn, “*Indigenous Peoples and Conservations*” MACARTHUR FOUNDATION CONSERVATION WHITE PAPER SERIES (2010),

strengthened or more adequately implemented.

Of course, everything is connected because the environment encompasses the entire planet and because borders only exist on paper. While the Indigenous people of today are the most immediately impacted by supplanting Indigenous values for colonial ones, all human beings were at one time “Indigenous.” In my humble opinion, forgetting the values of respecting nature has worsened all of our cultures. The western world has so largely forgotten what it means to be Indigenous that it has created some false dichotomy of “progress” versus “backwardness.” I will follow the history of this mindset and how it has led to much of the problems of today. I will then look at how these Indigenous principles are being applied today, such as in the granting of legal personhood to water in New Zealand through the efforts of the Maori, and the creation of the Law of the Rights of Mother Earth in Bolivia.

I. IN THE BEGINNING: INDIGENOUS SOCIETIES PRIOR TO COLONIZATION

According to the United Nations, the term “indigenous refers to:

peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and

legal system.¹¹

In accordance with that definition, I will be primarily focused on living cultures of today that fall under this understanding of indigeneity. While every human being is obviously descended from Indigenous cultures, I want to rely mostly on information about currently existing societies. Through Christianization and the creation of nation-states, most of Europe veered off-course from their original cultures so much that little information or understanding of them remains. Therefore, I will look at cultures that still remember or practice their pre-State ways, rather than relying on New Age revivals of pagan Europe. While it can be argued some civilizations carried on Indigenous understandings of nature into their State, such as China's relationship with Taoism, I am focusing mainly on the Natives of the Americas, Australia, and New Zealand in this paper. All three of those regions have thousands of distinct cultures and I do not intend to make it seem as if they are interchangeable. However, they do carry similar understandings to their relationship to the natural world. After all, it is most likely that every human society once viewed nature in the same way, as archaeological evidence and what we have in the historical record about ancient cultures indicate a predilection for animism and other spiritual practices centered in nature.

I will begin with an analysis of several Indigenous societies prior to colonization. A great number of cultures have been destroyed over the past few hundred years of colonialism. Due to the majority of Indigenous cultures being oral rather than literate societies, much of what was written was written by colonizers. Therefore, a lot of it was at best inaccurate misunderstanding, and at worst deliberately inaccurate in order to depict them as backwards so as to justify colonization and the destruction of said cultures. Secondly, due to the risk of being openly engaged in Indigenous culture, it became common for Indigenous people to hide their beliefs and only practice

¹¹ U.N. Secretariat of the Permanent Forum on Indigenous Issues, *The Concept of Indigenous Peoples*, U.N. Doc. PFII/2004/WS.1/3 (Jan. 19-21, 2004).

them in secret. However, now that it is relatively less dangerous in settler-colonial societies such as the United States and Australia, Indigenous scholars are starting to write more about the concepts of Indigenous jurisprudence.

A. *Land is the Source of the Law*

As this caption and the title of one of the books I relied on indicates, the land is the source of the law in Indigenous jurisprudence. If it sounds simple that is because, on some level, it is. As Norwegian Black Metal singer Gaahl said, “as long as Nature is not allowed to rule by the laws of Nature, there will always be kings and there will always be slaves.”¹² In other words, it is our efforts to fight against nature, that which has created complexity, hierarchy, and environmental catastrophe. As Taoist philosophy would promote, going with the “way” of nature is one of the core principles of most Indigenous societies. Therefore, it is unique in every locale:

Indigenous Peoples have millennia-old Indigenous Knowledge Systems (IKS) that are tribally and geographically specific. Within these knowledge systems or teaching bundles of Indigenous Knowledge is Traditional Ecological Knowledge (TEK). This “TEK” or native science holds the memories, observations, stories, understandings, insights, and practices for how to follow the natural laws of a particular place. TEK is often encoded in the stories and songs of the oral tradition and within particular rituals and daily practices. The Coast Miwok of Marin and Sonoma Counties in northern California hold the traditional knowledge for how to live in dynamic equilibrium with the oak woodlands, redwood forests, grasslands, creeks, wetlands, and coastal prairies of their rich landscape. My Ojibwe

¹² VICE, *True Norwegian Black Metal*, YOUTUBE (Oct. 26, 2011), <https://www.youtube.com/watch?v=32iX51bVDto>.

nation holds the traditional knowledge for navigating the Great Lakes, rivers, and the maple and birch wood-lands of the Minnesota, Ontario, and Wisconsin area. Knowing, remembering, practicing, and implementing these place-based native sciences and laws comes with a great responsibility.”¹³

In the book *Land is the Source of Law* by Australian Indigenous legal scholar C.F. Black, the author described an Aboriginal society and how its jurisprudence is informed:

For the Ngarinyin, the world is received and transmitted through direct communication with nature, understood in ritual through performing and visual arts, and consolidated into law of being and doing through the medium of dream in readily accessible altered states of consciousness. In order to experience the world through this media you must suspend your more familiar intellectual thinking in favor of sensory receptivity, awareness, and responsiveness. Above all, you must observe nature mindfully, listen to the elements carefully and receive knowledge subjectively.¹⁴

In other words, they go out into natural areas, get a feeling for the natural environment of that ecosystem, and act accordingly. He went on to further explain:

it is the individual who must take responsibility for becoming the voice of authority to his own experience of the Law. So it is the individual who is constantly testing out his experiences through his

¹³ JOHN MOHAWK ET AL., ORIGINAL INSTRUCTIONS: INDIGENOUS TEACHINGS FOR A SUSTAINABLE FUTURE 42 (Melissa K. Nelson ed., Inner Traditions Bear & Company 2008).

¹⁴ C.F. BLACK, THE LAND IS THE SOURCE OF THE LAW: A DIALOGIC ENCOUNTER WITH INDIGENOUS JURISPRUDENCE 23 (Routledge, 2011).

surroundings—whether seen or unseen. To feel the law, which is posited in the land, requires a communication with the unseen. This feeling of the spirit world and the reliance on that feeling as the basis for knowledge keeps the individual mindful of his own actions and so leads him to internalize the law, rendering it intimate, in contrast to the Wests reliance on external prompts and norms.¹⁵

Rather than having rules dictated to them via statute or decree, they would individually experience nature to see how it operated. In reaching an understanding of how their ecosystem operated, they would then seek to live their lives in a manner that complimented it. That was not always the case, but societies' ideals are not always the same as societal reality. It is noble we criminalize murder, for example, though murders obviously still occur. Likewise, while not everyone may have followed their laws, the ideals of the culture were to live with nature in this way, and for the most part, it worked.

Indigenous peoples in Australia are one of the oldest living cultures in the world, and successfully inhabited that continent for at least 30,000 years with minimal negative impact on their environment.¹⁶ This is largely due to the fact that Indigenous cultures tend to not have a separation of humanity and the environment as is found in Western culture: “As the late Western Shoshone spiritual leader Corbin Harney used to say,

Native people are not separate from the environment. We *are* the environment!” With every bite of food we eat, every drop of water we drink, every breath of air we inhale, we are on the fluid edge of “inside” and “outside,” “me” and the “environment,” the person and the planet, and the individual and humanity.¹⁷

¹⁵ *Id.* at 25.

¹⁶ See Bill Gammage, *The Biggest Estate on Earth: How Aborigines Made Australia*, CONVERSATION (Dec. 7, 2011, 2:34 PM), <https://theconversation.com/the-biggest-estate-on-earth-how-aborigines-made-australia-3787>.

¹⁷ MOHAWK ET AL., *supra* note 13, at 40.

B. *Law of Relationship*

C.F. Black explains that the laws relate back to primordial energy, known in his culture as the “Djang:” “that force or energy comprises legality, rather than the governance of men;” “the world around humans moves from being a space subordinate to the human desires to one of a superior informant, of the humans need for survival.”¹⁸ An understanding of and relationship with this primordial energy guides behavior:

the balance of the Djang, therefore, is the basis of the Law of Relationship: the metaphysical and physical relationship between people and the cosmos. This relationship jurisprudence is not only metaphysical, but geographical- between the people and the land.¹⁹

The effect of viewing law as stemming from the land is best summarized in this way, by Chairman Galarrwuy Yunupingu of the Northern Land Council: “Land is very close to the Aboriginal heart and we can actually feel sorry for land, like you would feel sorry for someone who has been hurt. We give land ceremonial names as a sign of respect and that is very important, like respecting your elders.”²⁰ Land, in most Indigenous cultures, is not a dead thing but a living entity. The Inca civilization refer to the earth as “Pachamama,” which roughly translates to “Earth Mother.”²¹ While “Mother Earth” as a concept in the west was once meant literally, it has often taken on a symbolic meaning. In Indigenous societies, the meaning is not symbolic; rather, she is literally alive. Everything is alive. Pachamama is an Earth goddess but is traditionally worshipped in the landscape herself. The Lakota call her “Unci Maka,” “Grandmother

¹⁸ BLACK, *supra* note 14, at 32.

¹⁹ *Id.*

²⁰ Yunupingu, G. (1997) ‘Concepts of land and spirituality’, in A. Pattel-Gray (ed.) *Aboriginal Spirituality, Past, Present, Future*, Melbourne: HarperCollins

²¹ See Emilie Blake, *Are Water Body Personhood Rights the Future of Water Management in the United States?*, 47 TEX. ENVTL. L.J. 197, 211 (2017).

Earth.” In my own ancestral language of Polish, she was “Matka Ziemia,” “moist mother earth.” Earth as a literal mother has been found in many cultures throughout the world. For many Indigenous societies, it is no metaphor. She is to be cared for. These concepts are so old that they are often embedded in the spirituality of these cultures and their beliefs as to their origins:

No matter where you go on the planet, Indigenous and traditional cultures regularly refer to the “Original Instructions” or “First Teachings” given to them by their Creator(s)/Earth-Maker/Life-Giver/Great Spirit/Great Mystery/Spirit Guides.

Original Instructions refer to the many diverse teachings, lessons, and ethics expressed in the origin stories and oral traditions of Indigenous Peoples. They are the literal and metaphorical instructions, passed on orally from generation to generation, for how to be a good human being living in reciprocal relation with all of our seen and unseen.²²

The law of relations not only guided how to interact with the earth, but with other creatures of the earth as well. Many Indigenous societies had totemic relationships, such as membership in a “Bear Clan” or other animal grouping, where a member of that society had a duty to look after the wellbeing of their totemic animal. The Lakota pray with the phrase “Mitakuye Oyasin” indicating a relationship with all that is, as it translates to “all my relations” but means every living thing.²³ The Yolngu of what is now called Australia, like many Indigenous cultures, have clan relationships with the animals that share their homelands:

The relationship between the crocodile and myself and all my clansmen is a very special relationship. I see a crocodile as an animal that is part of me and I belong to him, he belongs to me. It’s a commonness of land ownership. Everything that I have comes from the crocodile. Crocodile, he’s the creator and the

²² MOHAWK ET AL., *supra* note 13, at 2-3.

²³ JOSEPH M. MARSHALL III, *THE LAKOTA WAY: STORIES AND LESSONS FOR LIVING* 211 (2002).

landgiver to the Gumatj people. We have always treated crocodiles in a way that it is part of family.²⁴

The Lakota people observed nature for lessons on how to be:

We looked at the animals and saw what was right. We saw how the deer would trick the more powerful animals and how the bear would make her children strong by running them without mercy. “We saw how the buffalo would stand and watch until it understood. We saw how every animal had wisdom and we tried to learn that wisdom. We would look to them to see how they got along and how they raised their young. Then we would copy them. We did not look for what was wrong. Instead we always reached for what was right. “It was this search that kept us on a good path, not rules and fences. We wanted honor for ourselves and our families. We wanted others to say, ‘He is a good man. He is as brave as the bear’ or ‘as clean as the fox.’ We had freedom so we did not seek it. We sought honor, and honor was duty. The man who sought freedom was just running from duty, so he was weak. “The only time freedom is important is when others are trying to put you in chains. We had no chains so we needed no freedom.²⁵

Russel Means, Lakota, explained this concept of responsibilities being the source of freedom:

Freedom means you are free to be responsible. No one has any rules or regulations for you to follow because you are a responsible individual: responsible for your

²⁴ LAURELYN WHITT, SCIENCE, COLONIALISM, AND INDIGENOUS PEOPLES: THE CULTURAL POLITICS OF LAW AND KNOWLEDGE 43 (2009).

²⁵ KENT NERBURN, NEITHER WOLF NOR DOG: ON FORGOTTEN ROADS WITH AN INDIAN ELDER 157-58 (2d ed. 2002).

own behavior, responsible for your generations, responsible for your Mother the Earth, responsible for every living being, and responsible for the universe. That's what freedom means.²⁶

The Maori of New Zealand also view themselves as part of their environment:

Maori saw themselves as users of the land rather than its owners. While their use must equate with ownership for the purpose of English law, they saw themselves not as owning the land but as being owned by it. They were born out of it, for the land was Papatuanuku, the mother earth who conceived the ancestors of the Maori people. . . . That and descends from the ancestors is pivotal. . . . The communities right to land was by descent from the earth of that place.²⁷

For many Indigenous cultures, humanity is but one of many creatures, all of which are related. There is no reason to dominate nature, one can merely exist within in, depending on it for survival but also paying respect to it by maintaining wildlife and living sustainably. While this is a spiritual concept, it obviously also led to maintaining the ecosystem.

C. Seven Generations

Planning in Indigenous societies often involved looking very far into the future so as to consider the long-term implications of one's actions. The Great Law of Peace of the Haudenosaunee sheds light on what was expected of many Indigenous lawmen and decision makers.

²⁶ Russell Means, Free to be Responsible, Address at Navajo Community College (1995) (transcript available at <http://www.russellmeansfreedom.com/2009/free-to-be-responsible-a-russell-means-speech/>).

²⁷ Whitt, *supra* note 24, at 44.

Otherwise known as the Iroquois Confederacy, the Haudenosaunee are a confederacy of several Indigenous nations of the Northeastern Woodlands of North America. Their Constitution, which was later an influence on the US Constitution, was “written” in wampum belts, but was initially purely oral and showed a good example of what was required from their leadership:

We now do crown you with the sacred emblem of the deer's antlers, the emblem of your Lordship. You shall now become a mentor of the people of the Five Nations. The thickness of your skin shall be seven spans—which is to say that you shall be proof against anger, offensive actions and criticism. Your heart shall be filled with peace and good will and your mind filled with a yearning for the welfare of the people of the Confederacy. With endless patience you shall carry out your duty and your firmness shall be tempered with tenderness for your people. Neither anger nor fury shall find lodgement in your mind and all your words and actions shall be marked with calm deliberation. In all of your deliberations in the Confederate Council, in your efforts at law making, in all your official acts, self-interest shall be cast into oblivion. Cast not over your shoulder behind you the warnings of the nephews and nieces should they chide you for any error or wrong you may do, but return to the way of the Great Law which is just and right. Look and listen for the welfare of the whole people and have always in view not only the present but also the coming generations, even those whose faces are yet beneath the surface of the ground—the unborn of the future Nation.²⁸

This has been further interpreted by Haudenosaunee and other Indigenous societies with similar views as requiring considering at least seven generations ahead for one's actions. This would ensure against rash decision making, as any act by the society would require considering at least one hundred years in the future. Doing so ensured planning things out in a way that would leave the natural environment viable for future use.

²⁸ *Wampum #28*, KAYANEREHKOWA: THE GREAT LAW OF PEACE (last visited June 8, 2018), <http://www.ganienkeh.net/thelaw.html>.

D. Summary

In short, much of Indigenous jurisprudence was tied to ancient spiritual beliefs regarding the earth as a sacred, living being. Their land carried lessons for them on how to live, and a duty to care for the land. Their “laws” on how to be varied on the land but were tied to a reciprocal relationship to it. The land was the source of all life, and, therefore, the rules of how to live in that environment.

II. WHERE IT ALL WENT WRONG

A. Ancient Europe Had Similar Views

The West, at one point, had similar views. Nature worship, and a reverence for their own land-base was common throughout pagan Europe.²⁹ Unfortunately, the Christianization and Romanization of Europe so radically altered the heritage of the continent so only bits and pieces remain as folkloric elements and the full details of these cultures remain largely uncertain.³⁰ While some remain in Western Europe, such as the Saami peoples, and many remain in Russia, there is little evidence in English regarding their traditions, especially that described it in terms of their jurisprudence. Indigenous cultures were largely suppressed and destroyed during the Soviet Union era, though a resurgence is occurring. This section focuses on Western European history, as the history of colonialism has spread the Western model far wider than any methods of Eastern Europe.

The historical record shows the “pagan” cultures of Europe once had similar views on nature as many of today’s Indigenous people. It is said peoples of what we now consider the Baltic lands “as with trees and animals, Baltic Pagans revered the Earth, often kissing her on starting work or going to bed, It was considered sacrilegious to hit the Earth, spit on her or otherwise abuse her.”³¹

²⁹ PRUDENCE JONES & NIGEL PENNICK, A HISTORY OF PAGAN EUROPE 177 (1995).

³⁰ *Id.*

³¹ *Id.*

The ancient Greeks and other peoples of the Mediterranean engaged in nature worship:

There seems, then, to have been a basic and apparently ancient veneration of the Earth itself, which continued alongside the newer cults and which was differentiated into the cults of particular goddesses such as Demeter and Kore, Pandora and Aneisdora. The symbol of the Earth was the cleft, the underground chamber or megaron and the omphalos, all representations of the female anatomy.³²

Like many Indigenous cultures today, they considered the Earth a living entity, and a female one at that, as she is our mother. Renowned Greek philosophers known as “Stoics” also had an ethos similar to many Indigenous traditions:

In order to live in accord with nature, it is necessary to know what nature is; and to this end a threefold division of philosophy is made—into Physics, dealing with the universe and its laws, the problems of divine government and teleology; Logic, which trains the mind to discern true from false; and Ethics, which applies the knowledge thus gained and tested to practical life. The Stoic system of physics was materialism with an infusion of pantheism. In contradiction to Plato's view that the Ideas, or Prototypes, of phenomena alone really exist, the Stoics held that material objects alone existed; but immanent in the material universe was a spiritual force which acted through them, manifesting itself under many forms, as fire, aether, spirit, soul, reason, the ruling principle.³³

³² *Id.* at 18.

³³ MARCUS AURELIUS, *MEDITATIONS: BOOK NINE* (2015).

These are just several examples of regional variance in a common thread of respect for and even worship of the Earth. Neo-Druids have an affinity for nature, although traditional Druidry was annihilated and suppressed so long ago that it is impossible to know what the ancient Celtic mystics truly thought.³⁴ Their pantheon of goddesses and the fact Ireland is named after a goddess of land does seem to indicate they too held these types of animistic beliefs.³⁵ Occasionally some of the west's most brilliant thinkers such as Thoreau would get back in touch with this mindset of nature reverence, but unfortunately it has mostly existed in the West now through philosophy, romanticism and neo-pagan revival rather than concrete law. Even some of our strongest environmental protections seem to be more about preserving nature as something outside us rather than living with it.

B. New Religion, New Rules

While the Roman Empire initially was fairly tolerant of the many cultures and ethnic groups within its jurisdiction, the conversion to Christianity changed that. Roman Emperor Constantine was vilified by pagan elites for killing members of his family on his rise to power.³⁶ He also found it inconvenient that power was not centralized. Ostracized by his peers and desperate to centralize control, he turned to a fledgling cult in the middle eastern territories of the empire.³⁷ After Christianity was adopted as the official religion, it forever changed the west's relationship to nature. The Emperor was now seen as the embodiment of God's divine will on Earth. Therefore, all other religions, especially nature-based pagan religions, were seen as heathen and forbidden as they interfered with his centralization of power.³⁸ *A Concise History of the Law of Nations*

³⁴ JONES & PENNICK, *supra* note 29.

³⁵ See HEIDE GÖTTNER-ABENDROTH, *THE GODDESS AND HER HEROES* 103 (Anthony Pub. Co. 1995).

³⁶ See JONATHAN KIRSCH, *GOD AGAINST THE GODS: THE HIST. OF THE WAR BETWEEN MONOTHEISM AND POLYTHEISM* (Penguin Compass 2005).

³⁷ *See id.*

³⁸ *See id.*

describes how the Roman Empire would treat those it conquered, which set the tone for centuries to come on colonial relationships, which at the time was the core of international relations:

the representative of the Romans, in concise, traditional language, would put certain preliminary questions (on power of attorney and liberty of disposal) to the representatives of the vanquished nation, and, upon a satisfactory answer would ask them whether their nation was willing to surrender to the Romans their persons and property, sacred and profane, of their nationals.³⁹

In addition to severing people's relationships to their land by considering traditional religions as evil, the Biblical view of nature completely changed their concept of a relationship to the natural world:

Then God said, 'Let us make man in our image, after our likeness. And let them have dominion over the fish of the sea and over the birds of the heavens and over the livestock and over all the earth and over every creeping thing that creeps on the earth.'⁴⁰

Rather than the reciprocal relationship where humans were considered one of many important aspects of the environment common in Indigenous cultures, here "man" was made directly in God's image and given power and control over all of the Earth.

The church's attempts to sever the tribes of Europe from their connection to nature can be seen firsthand by an account written by a missionary to the Slavic tribes written in the year 1120. The chronicler, Helmod, explains that, after forced conversion, the "Slavs

³⁹ ARTHUR NUSSBAUM, A CONCISE HIST. OF THE L. OF NATIONS 17 (Macmillan Co. 1950).

⁴⁰ *Genesis* 1:26.

were forbidden to swear by springs, trees, and stones.”⁴¹ He later explains a priests’ destruction of sacred grove:

When we came to that wood and place of profanation, the bishop exhorted us to proceed energetically to the destruction of the grove . . . we heaped about all the hedges of the enclosure about those sacred trees and made a pyre of the heap of wood by setting fire to it.”⁴²

In the 15th century, when the Roman Catholic Church was the dominant religion in Europe and the separation of church and state did not exist, the Holy See was one of the major sources of law; “the popes relied in this respect on an alleged paramount sovereignty over the world- more specifically on their right and duty to spread the Gospel to all countries and overcome the resistance of the enemies of Christianity.”⁴³ The Pope granted the Kings of Europe authority to conquer new lands that were not Christian, in order to bring them under Christian rule.⁴⁴ The “doctrine of discovery” was a religious and legal instrument that gave full authority to colonize lands not currently in Christian hands.⁴⁵ This, more than anything else in history, has impacted both Indigenous people’s relationships to land as well as Western cultures’ views towards land. As the colonizing powers ventured out, they supplanted the Indigenous ways of life with a dominator system:

In the earliest understandings of the international law of nations, “discovery” carried with it rights against other European nations of exclusive trade, purchase of lands and the right of conquest. The motivation of European powers in securing trading partners and

⁴¹ HELMOLDUS PRESBYTER BOSOVIENSIS EPOQUE AND FRANCIS JOSEPH TSCHAN, THE CHRONICLE OF THE SLAVS 224 (Columbia University).

⁴² *Id.* at 219-220

⁴³ NUSSBAUM, *supra* note 39, at 25.

⁴⁴ STEVEN T. NEWCOMB, PAGANS IN THE PROMISED LAND: DECODING THE DOCTRINE OF CHRISTIAN DISCOVERY (Fulcrum Publishing 2008).

⁴⁵ *Id.*

allies was superseded by a new, more intrusive agenda. The primary focus of colonial expansion turned to the control of lands and resources. The “discovering” states laid claim to all the lands of the colonized territory as a sole sovereign. For some theorists, the absence of a political force in the community of nations meant that Indigenous lands with no colonial presence could be legally occupied as *terra nullius*, i.e., viewed as vacant land.⁴⁶

C. *Effects of Colonization*

In the United States, the Christian understanding of nature led to extremely negative impacts on the environment and people’s relationships to it. Nature was an evil unknown to the colonial powers; contemporary art even depicts women in the woods lining up to kiss the devil on the buttocks.⁴⁷

Colonizers brought all of their countries’ livestock with them, rendering the wildlife of the new colonies essentially useless.⁴⁸ Forests would be knocked down to make land to graze upon. The first war in the colonies, King Philip’s War, was largely due to cattle and other domesticated animals destroying the habitat the Wampanoag needed for their crops and streams they relied on for fishing.⁴⁹ The war worsened settler-Indigenous relations for the next several hundred years.⁵⁰ It planted the seeds of racial hatred that justified stealing the entire continent.⁵¹ Another common excuse was the idea that Natives were not properly using the land (this still plays out

⁴⁶ Lisa Strelein, *From Mabo to Yorta Yorta: Native Title Law in Australia*, 19 WASH. U. J.L. & POL’Y 225, 228 (2005).

⁴⁷ JAMES R. LEWIS, *SATANISM TODAY: AN ENCYCLOPEDIA OF RELIGION, FOLKLORE, AND POPULAR CULTURE* (ABC-CLIO 2001).

⁴⁸ G.A. Bowling, *The Introduction of Cattle into Colonial North America*, 25 J. DAIRY SCI. 129, 129 (1942).

⁴⁹ See Warren, *supra* note 4.

⁵⁰ See Matthew J. McCormack, *The Name of War: King Philip's War and the Origins of American Identity*, 180 MIL. L. REV. 155, 156 (2004).

⁵¹ *Id.*

today) and so it was justified and Manifest Destiny to take it from them.⁵² Manifest destiny is the political/theological idea that it was the Manifest Destiny of the United States, and later other such settler-colonial states, to conquer the land of the Native people. In the case of the US, biblical comparisons to the Israelites seizing land from the pagan Canaanites was used to justify expelling Indigenous peoples.⁵³

John Locke's theories on property were another source of destruction for the rights of Indigenous peoples, particularly when he claimed:

Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joined to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state nature placed it, it hath by his *labour* something annexed to it, that excludes the common right of other Men. For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.⁵⁴

This theory of superiority was applied through the colonizing lens as a means to seize all lands from Indigenous people.⁵⁵ Hunting grounds, forests for foraging, and even gardens mistaken for "the wild" were seized under the theory that Indigenous people were not

⁵² Damon Linker, *Calvin And American Exceptionalism*, NEW REPUBLIC (July 9, 2009), newrepublic.com/article/50754/calvin-and-american-exceptionalism.

⁵³ NEWCOMB, *supra* note 44.

⁵⁴ JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 27 (1960).

⁵⁵ Note the religious and cultural assumption of the superiority of human beings stated as though it was fact in Locke's quotation

putting them to proper use, or worse, sometimes Indigenous peoples were considered to be the “inferior Creatures” common to all men.⁵⁶ This conflicted greatly with the Indigenous view towards the natural world. Wilderness is a cultural construction. The Natives of the Americas did not view their landscape the way colonizers did:

We did not think of the great open plains, the beautiful rolling hills, the winding streams with tangled growth, as 'wild'. Only to the white man was nature a 'wilderness' and only to him was it 'infested' with 'wild' animals and 'savage' people. To us it was tame. Earth was bountiful and we were surrounded with the blessings of the Great Mystery.”⁵⁷

Around the colonial era, Lockean concepts of property were formalizing; the concept we now consider the norm of a nation-state also was developing. After the Thirty Years' War between various interpretations of Christianity, the kingdoms of Europe came together to sign the “Peace of Westphalia,” named after the German city in which it was signed.⁵⁸ Though the treaties signed in the Peace did not directly create the concept of the nation state, they were later referred to in justifying nationalism and the sovereign rights of various European nations. However, not just any group of people was considered a state in the eyes of the Western powers: “international law was based on the cultural process of Europe, a process of ‘civilization’ in contrast to which the cultural process of other nations could be understood as half civilized or savage.”⁵⁹ The term “government” meant European style governments. This delegitimized the vast majority of societies globally, especially Indigenous ones, leading to both excuses for European powers to colonize further, and later, for settler colonies such as the US to

⁵⁶ Whitt, *supra* note 24, at 26–27.

⁵⁷ LUTHER STANDING BEAR, LAND OF THE SPOTTED EAGLE 38 (Univ. of Nebraska Press, 1978).

⁵⁸ MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 (Cambridge Univ. Press, 2010).

⁵⁹ *Id.* at 73.

conquer Indigenous lands.

Spain's conquest of what is now California sheds light on how Christian norms replaced Indigenous spirituality and supplanted the concept of land as a source of law:

In spite of their philosophically enlightened state in the mid-eighteenth century, it rarely occurred to Spaniards or other European colonial powers, especially those charged with converting or controlling Indians, that native peoples possessed their own legal or moral systems . . . the Spanish view in respect to the process of civilizing was not that they were replacing existing functional institutions and culture traits, but that they were giving the Indians things which the latter did not have.⁶⁰

In the Americas, settlers waged genocidal wars on Indigenous populations, often forcibly relocating them from their homelands.⁶¹ In the United States, the government would then have tribes sign treaties to politically legitimize such theft.⁶² The U.S. has since violated several hundreds of these treaties.⁶³ Once reservations were established, government policies such as sending missionaries to tribal land, and creating federally approved tribal governments modeled after European systems completely changed the systems of the many Indigenous nations of what is now the territory of the US.⁶⁴ To this day, there are feuds between traditionalists and westernized

⁶⁰ RICHARD L. CARRICO, *STRANGERS IN A STOLEN LAND: INDIANS OF SAN DIEGO COUNTY FROM PREHISTORY TO THE NEW DEAL* 23 (Sunbelt Publications 3d ed. 2008).

⁶¹ DAVID E. STANNARD, *AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD*, (Oxford Univ. Press) 2006.

⁶² Arthur Spirling, *U.S. Treaty Making with American Indians: Institutional Change and Relative Power, 1784-1911*, 56, *American Journal of Political Science*, 84-97 (2011).

⁶³ See RUSSELL MEANS & MARVIN J. WOLF, *WHERE WHITE MEN FEAR TO TREAD: THE AUTOBIOGRAPHY OF RUSSELL MEANS* 35 (St. Martin's Griffin 1995).

⁶⁴ *Id.*30-56

governments on many reservations.⁶⁵

Others such as Australia dispensed with the need for treaty-making altogether. Colonizers declared the entire continent *terra nullius*, which, under their law means un-inhabited land owned by no one, meaning, as far as the law, Aborigines did not even exist.⁶⁶ This did not make much sense under their own legal principles, as the Indigenous people of Australia did in fact have massive impacts on nature through controlled burns and other practices.⁶⁷ These practices which still allowed wildlife to flourish and was more of a custodial relationship than a dominator one, went unnoticed by a culture so used to western agriculture.⁶⁸ Like many parts of the world, the conflict between Indigenous methods of growing food and that of the colonizers' led to disaster. Because domesticated animals would pollute the Natives' food source, they would have to kill the farmed animals or starve. This led to violent reprisals by white farmers. An account by the son of a survivor of Australia's colonization shows the horrific violence all too often inflicted on Indigenous people by the supposedly "civilized":

They buried our babies with only their heads above the ground. All in a row they were. Then they had a test to see who could kick the babies heads off the furthest. One man clubbed a baby's head from horseback. They then spent the day raping the women. Most of them were tortured to death by sticking sharp things like spears in their vaginas until they died. They tied the men's hands behind their backs, then cut off the penis and testicles and watched them run around screaming until they died. I lived because I was young and pretty and one of the men kept me for himself, but I was always tied up until I escaped into

⁶⁵ *Id.* 483

⁶⁶ Stuart Banner, *Why Terra Nullius? Anthropology and Property Law in Early Australia*, 23 L. & HIST. REV. 95 (2005).

⁶⁷ Gammage, *supra* note 16.

⁶⁸ *Id.*

another land to the west.⁶⁹

This was, and is, horrifically common. The State of California, through federal funding, paid nearly one million dollars to militia fighters in the 1800s to exterminate Native villages.⁷⁰ In recent years, mercenaries in Brazil have slaughtered isolated tribal people on behalf of corporate interests.⁷¹ These are but a few instances of the devastation enacted on people wanting to stay true to their traditions.

D. The Mindset goes Global

As states developed at the expense of Indigenous populations and the environment, the dominance of Western laws and norms spread internationally. Western lawyers and politicians, much in the way Christianity was seen as a universal truth that needed to be imparted on everyone, saw law as a singular truth rather than something specific to one's place and culture:

but how to give expression to the undeniable and constant experience of cultural difference while preserving the idea of one single law? This was possible by adopting a theory of stages of civilization which in Fiore—as in most other international lawyers—was only implicit, playing upon the prejudices of the European bourgeoisie. Only fully civilized States could be members of the Magna Civitas, the juridical community. For “this community is already a product of civilization. To the extent that it expands to savage countries, it gives rise to needs

⁶⁹ STEPHEN SPENCER, RACE AND ETHNICITY: CULTURE, IDENTITY AND REPRESENTATION 67 (2d ed. 2014).

⁷⁰ BENJAMIN MADLEY, AN AMERICAN GENOCIDE: THE UNITED STATES AND THE CALIFORNIA INDIAN CATASTROPHE 1846-1873, 238-250 (Yale University Press, 2017).

⁷¹ See Gethin Chamberlain, “*They’re Killing Us’: World’s Most Endangered Tribe Cries for Help*” THE GUARDIAN (2012) www.theguardian.com/world/2012/apr/22/brazil-rainforest-awa-endangered-tribe. (last visited July 14, 2018).

and interests that unite the civilized nations with barbaric or other peoples' less advanced in the path of progress." . . . "This level was first attained in Europe but through commerce and other contacts it was slowly spreading."⁷²

The mindset was reached that Europe attained enlightenment above all others, and that this was the natural progress of humanity. All other cultures not in tune with Eurocentric norms needed to either change themselves so thoroughly as to be imitation Europeans or be swept aside. Legal theorists of the early 1900s made clear the initial aims of international law:

the Aryans were to educate other races in political theory and statehood so as to fulfill their great historical assignment: "to develop and complete the domination of the world which already lies in the hands of the Aryan peoples in a consciously humanistic and noble way as to teach civilization for the whole of mankind.

Whether the intention of Western domination still remains is irrelevant, as the outcome is the same: every state that is considered legitimate on the world stage through the United Nations is organized under the Westphalian sovereignty model.⁷³ Some states were former colonies, some were settler colonies, and some merely shifted their structure to be allowed to take part in the system.⁷⁴ Therefore, every state has a hierarchical structure based on an imposed government rather than Indigenous tradition, even if the leader is of Indigenous ancestry.

As a result, Indigenous peoples are suppressed in every country in which they exist. In some countries they are marginalized and victims of high murder rates by civilians and experience police

⁷² KOSKENNIEMI, *supra* note 58, at 55-56.

⁷³ *Id.*

⁷⁴ *Id.*

violence and poverty, such as in the United States.⁷⁵ In others, such as Brazil, they are still being forced off their lands and murdered by corporate interests which want their land for agricultural projects or mining for energy purposes.⁷⁶ People already forced into cities or reserves face discrimination, diseases, and poverty which causes lower life expectancy rates than the general population.⁷⁷ Those still attempting to live on their traditional lands often face genocidal settlers or military and police who arrest, torture, or kill them for protesting environmentally-destructive projects.⁷⁸

E. In Summary

The values, structure, and principles of International Law are all rooted in the history and norms of Western Europe. Tracing back shows they are structured in the current concept of a state which largely began with the Peace of Westphalia. As shown above, tracing the values themselves shows roots in Christianity, Lockean theory and the Roman Empire. The modern notion of a state is a European invention and states must follow Western thinking to be considered legitimate in the international legal community, which is still dominated by both Europeans or Europhiles. This has led to all States having a relationship of dominance towards the natural world and of state violence towards those still trying to live within the ancestral

⁷⁵ Stephanie Woodard, *Special Investigation: Native Americans Are Being Killed by Police at a Higher Rate Than Any Other Group*, IN THESE TIMES (Oct. 16, 2018), http://inthesetimes.com/features/native_american_police_killings_native_lives_matter.html. (last visited 7/19/2018)

⁷⁶ *Brazilian Indians*, SURVIVAL INT'L, <https://www.survivalinternational.org/tribes/brazilian>.

⁷⁷ UQ POCHE CENTER FOR INDIGENOUS HEALTH, URBAN INDIGENOUS HEALTH: OPPORTUNITIES AND CHALLENGES IN SOUTH EAST QUEENSLAND (2016), <https://pochc.centre.uq.edu.au/files/1007/Opportunities%20and%20challenges%20in%20SEQ.pdf>.

⁷⁸ Jonathan Watts & John Vidal, *Environmental defenders being killed in record numbers globally, new research reveals*, THE GUARDIAN (2017), <https://www.theguardian.com/environment/2017/jul/13/environmental-defenders-being-killed-in-record-numbers-globally-new-research-reveals>. (last visited July 16, 2018).

tradition of treating the land as the source of law.

III. PROPOSAL: WHERE DO WE GO FROM HERE?

These problems are so firmly rooted on a global level that there are many ways they may be addressed. There will be a need for a major shift in people's thinking, and perhaps even extralegal methods such as civil disobedience in some countries.

The solution is twofold: the protection of Indigenous lands and peoples as well as incorporating some of their principles into international law. These are two complementary solutions, not a "one or the other" situation. Incorporating the ideas of Indigenous cultures while not protecting the lands of Indigenous people would just be a furtherance of the exploitation and oppression that has been occurring for far too long.

A. *Indigenous Rights Are Key*

One of the ways Indigenous people and their allies have attempted to attain stronger protections is through general human rights instruments and other structures of the United Nations such as the Inter-American Court of Human Rights and other international organizations. A major victory for Indigenous people occurred in *Sawhoyamaxa Indigenous Community v. Paraguay*, where the Inter-American Court of Human Rights demanded Paraguay return land stolen from the Sawhoyamaxa community, as it cut off the Sawhoyamaxas' source of water.⁷⁹ One legal argument for Indigenous rights ties into the universal human right to water. Activists are now forming arguments and advocating to have the spiritual use of water to be considered part of the human right to water, as Indigenous people often have ceremonial ties to

⁷⁹ Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, 35 AM. INDIAN L. REV. 263, 356 (2011).

waterways.⁸⁰ The Wind River Reservation in the United States has incorporated spiritual use as a “beneficial use” under their Water Code.⁸¹

Others, such as law professor Lillian Aponte Miranda, have argued customary law can provide a basis for Indigenous rights. Indigenous communities have longstanding customs which, if acknowledged as customary law, might provide a basis for protecting their rights.⁸² However, “customary law” is really just a very broad and vague concept which means if enough States were doing something for a long, time it becomes a custom. This could likely backfire if it is argued the purpose of the custom was to subjugate Indigenous populations. As seen in the Supreme Court decision *Johnson v. McIntosh*, which is still the basis for Federal Indian Law, the idea that it was the custom and norms of Christian Europe to conquer non-Christian lands is the foundational principle of the United States.⁸³ “Evidence of a general practice accepted as law” is not particularly aspirational. Just because a majority of people are doing something does not necessarily make it just, wise, or beneficial.

Others have argued for the benefits of the “Alien Torts Claim Act.”⁸⁴ This is a U.S. act that allows for foreign violators of laws to be tried in U.S. courts, as well as allowing U.S. corporations that are complicit in corruption and other illegal practices in their foreign operations to be held accountable in the U.S. While beneficial, this is not a solution in and of itself. First, it would only be so useful if the laws themselves governed relationships with Indigenous people, and those laws are still lacking. Second, it is a reparative rather than preventative solution. A preventative solution blocks the harm from ever happening, whereas reparative tries to mend a problem after the

⁸⁰ Rhett B. Larson, *Holy Water and Human Rights: Indigenous Peoples' Religious-Rights Claims to Water Resources*, 2 ARIZ. J. ENVTL. L. & POL'Y 81, 83 (2011).

⁸¹ *Id.*

⁸² Lillian Aponte Miranda, *Indigenous Peoples as International Lawmakers*, 32 U. PA. J. INT'L L. 203, 236–37 (2010).

⁸³ *Johnson v. McIntosh*, 21 U.S. 543, 562 (1823).

⁸⁴ Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 Suffolk Transnat'l L. Rev. 335, 342–45 (1997).

harm has already occurred. Indigenous peoples have been able to sue oil companies and other violators after the harms were already committed, but States shouldn't have been in a position to impose the project on them in the first place. Merely having a penalty fee rather than a preventative measure leads companies to calculate whether paying for the damages will still be worth all the profit of performing the harmful action.

Some activists have pointed to instruments such as the International Covenant on Civil and Political Rights.⁸⁵ Article 27 of the International Covenant protects Indigenous cultures as it grants minority cultures the rights to practice their traditions.⁸⁶ The problem with this is that it frames Indigenous people as a minority and relegates them to a civil right. I find almost all the instruments I have referred to as lacking for that reason. The International Convention on the Elimination of All Forms of Racial Discrimination is also lacking for this reason, though it has had some minor victories for the Indigenous.⁸⁷ Discrimination against Indigenous people isn't always racial, it is more often cultural. Any solution within a civil rights framework keeps the dominator-subject relationship, where they are begging for rights vis a vis their colonizers within the colony. As Santee Dakota activist John Trudell has said, "[w]e must go beyond the ignorance of civil rights. We must step into the reality of *natural* rights because *all* the natural world has a right to existence. We are only a small part of it."⁸⁸

Indigenous people must retain the right to be a separate society. The majority of approaches and rules involve them still being within a colony and having to seek civil rights within it or take part in environmental consultation begging their colonizers to not let oil drilling and other development in. The United States does not have to regularly go to court with Mexico to prevent them from drilling in the

⁸⁵ Miranda, *supra* note 82.

⁸⁶ *Id.*

⁸⁷ The International Convention on the Elimination of All Forms of Racial Discrimination, UN Doc A/6014, 660 UNTS 195 (1965).

⁸⁸ Joy Harjo: Tribute to John Trudell, INDIAN COUNTRY MEDIA NETWORK (2015), <https://indiancountrymedianetwork.com/news/native-news/joy-harjo-tribute-to-john-trudell/> (last visited July 19, 2018)

U.S.; why should an Indigenous population have to constantly beg in the colonizer courts to keep invaders out of their territories? States can still maintain their obligation to not violate racial discrimination laws and at the same time allow Indigenous people rights to their culture while streamlining them into the colonial regime. Treaties recognizing territory must be upheld, and clear delineations of Indigenous land must be respected. The closest instrument to this has been the United Nations Declaration on the Rights of Indigenous Peoples.⁸⁹ UNDRIP outlines the collective rights of Indigenous Peoples. These rights include the right to practice their religion, live on and maintain their homelands, their language, and other collective human rights rather than individual rights. While I think it has the strongest language to date of any International law-based document on Indigenous people, it is non-binding. Even with the non-binding status, major settler colonies such as the United States, Canada, New Zealand, and Australia initially opposed it, though they finally ratified it several years later.⁹⁰ More efforts must be made to implement UNDRIP. If states are convinced of its value and vote its principles into effect, it can become the laws of many states. This would take a great deal of public pressure. If enough states turn it into customary law, it might be granted a stronger status. If enough States support UNDRIP, it may even become a binding convention rather than a non-binding declaration. This would either have to be from countries with large Indigenous populations, or countries in Europe without Indigenous populations but who have the power and compassion to push for change on the behalf of Indigenous people.

No one knows how to manage their own lands more than Indigenous societies do.⁹¹ They have lived in their environment for

⁸⁹ G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous People (Sept. 13, 2007).

⁹⁰ *United Nations Declaration on the Rights of Indigenous Peoples For Indigenous Peoples.* UNITED NATIONS, available at www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html,

⁹¹ Cory Rogers, *Investing in Indigenous Communities is Most Efficient Way to Protect Forests, Report Finds*, Intercontinental Cry, IC (July. 4, 2018) <https://intercontinentalcry.org/investing-in-indigenous-communities-is-most-efficient-way-to-protect-forests-report-finds/>.

thousands of years in a sustainable manner. Racial paternalism which lead states to think they know better than the Indigenous has caused many to forcibly remove Indigenous people from their ancestral lands. Even the beloved Yosemite National Park forced out Natives as recently as the 1960s.⁹² States have abused calls for nature preservation, using preservation as an excuse to forcibly remove tribal populations so they can open up lands to tourism.⁹³ The Indigenous people need to be left alone on their lands to maintain their relationship and duties to it. In some heavily-assimilated areas the very traditional relationship no longer remains, but I think even assimilated tribes have better principles and plans regarding nature than the average State. They should be given the room to maintain those relationships while still being held to international principles to ensure they don't encroach on their neighbors. While states can and should be a part of this process, reviving and continuing Indigenous relationship to the land will also require lots of grassroots efforts. The Owe Aku International project, a Lakota group seeking to bring back traditional Lakota culture and protect their homelands, is one such grassroots organization to support in these efforts.⁹⁴ The Zapatista of Mexico have shown organizing beyond the State is possible.⁹⁵ They are an organization of primarily Mayan peasants in the jungles of Chiapas Mexico who have rebelled against the oppressive and environmentally destructive practices of the Mexican government by reviving and creating their own local Indigenous governance.⁹⁶ Anyone sincerely interested in creating a better future for Indigenous peoples should look into locally-based Indigenous groups such as these, as they are organized by and for the community for the interest

⁹² Carmen George, *American Indians Share Their Yosemite Story*, THE FRESNO BEE, June 27, 2014, <http://www.fresnobee.com/news/special-reports/yosemite-at-150/article19521750.html>.

⁹³ *Survival International accuses WWF of involvement in violence and abuse*, SURVIVAL INT'L, (Feb. 10, 2016), <https://www.survivalinternational.org/news/11107>.

⁹⁴ OWE AKU BRING BACK THE WAY & INT'L JUST. PROJECT, <http://oweakuinternational.org>.

⁹⁵ ALEX KHASNABISH, *ZAPATISTAS: REBELLION FROM THE GRASSROOTS TO THE GLOBAL* (Zed Books, 2013).

⁹⁶ *Id.*

of the community, as opposed to outside groups which usually have another agenda. It is not likely any state will just voluntarily concede power, given both the present and historical relationships they have with Indigenous people.

B. Letting Indigenous Principles, and Peoples Lead

Not only should the International world grant more protections for Indigenous peoples' rights to their lands and cultures, but States should incorporate more of the principles of Indigenous cultures into international law. If it is only Indigenous societies upholding true environmentalist values, their territories will be little specks of life on a dying planet. Every state must get on board with environmental preservation.

Christopher Stone, one of the first people to advocate for nature having rights in a Western legal framework famously asked "should trees have standing?"⁹⁷ It appears the Indigenous world has answered with a resounding "yes," and have been persuading some states to incorporate Indigenous concepts towards nature into law. Ecuador has officially granted nature rights in chapter seven its updated 2008 Constitution:

Article 71. Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.⁹⁸

All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.

The State shall give incentives to natural persons

⁹⁷ CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING? LAW, MORALITY, AND THE ENVIRONMENT*. (Oxford University Press 2010).

⁹⁸ Pacha Mama is the ancient Andean Earth goddess.

and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.

Article 72. Nature has the right to be restored. This restoration shall be apart from the obligation of the State and natural persons or legal entities to compensate individuals and communities that depend on affected natural systems.

In those cases of severe or permanent environmental impact, including those caused by the exploitation of nonrenewable natural resources, the State shall establish the most effective mechanisms to achieve the restoration and shall adopt adequate measures to eliminate or mitigate harmful environmental consequences.

Article 73. The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles. The introduction of organisms and organic and inorganic material that might definitively alter the nation's genetic assets is forbidden.

Article 74. Persons, communities, peoples, and nations shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living.

Environmental services shall not be subject to appropriation; their production, delivery, use and development shall be regulated by the State.⁹⁹

Another prime example is Bolivia, which implemented the Laws

⁹⁹ CONSTITUCION DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION] 2008, (Ecuador). <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

of the Rights of Mother Earth in 2010.¹⁰⁰ It was signed under President Evo Morales, the first Indigenous President in a country that has one of Latin America's largest per-capita Indigenous populations. In-line with Indigenous thinking, the laws acknowledge Mother Earth not as an abstract concept but as a living entity. It is a comprehensive list of rights which ensure protection of nature for nature's sake, granting Mother Earth the right to life, to a diversity of life (meaning allowing natural processes to continue instead of endlessly altering nature), to water cycles and other natural functions.¹⁰¹ It also establishes duties of the State and people to her, which is very similar to the Indigenous concepts of a responsibility towards Mother Earth.¹⁰² This law would be a great basis for creating such a legal instrument at the United Nations or for encouraging other states to adopt similar laws. Another landmark decision that demonstrates how Indigenous principles can be incorporated into a state's law is the study of the Whanganui River in New Zealand.¹⁰³ The river is sacred to the Whanganui Iwi people, who consider it to be a living entity.¹⁰⁴ Now, the official laws of New Zealand share the same view, granting the river legal status in the same way corporations and other non-human entities have been.¹⁰⁵ Parliament passed the "Te Awa Tupua Whanganui River Claims Settlement Bill" in 2016. It states, in part:

The Crown acknowledges through this settlement that
Te Awa Tupua is an indivisible and living whole,
comprising the Whanganui River from the mountains

¹⁰⁰ John Vidal, *Bolivia Enshrines Natural World's Rights with Equal Status for Mother Earth*, THE GUARDIAN, Apr. 10, 2011, <https://www.theguardian.com/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights>.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Christopher Rodgers, *A new approach to protecting ecosystems: the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*, 19 ENV'T L. REV. 266–279 (2017).

¹⁰⁴ *New Zealand Just Gave Human Rights to a River*, ABC NEWS, Australian Broadcasting Company (March 15, 2017) www.abc.net.au/news/2017-03-16/nz-whanganui-river-gets-legal-status-as-person-after-170-years/8358434. (last visited July 16, 2018).

¹⁰⁵ *Id.*

to the sea, incorporating its tributaries and all its physical and metaphysical elements—“E rere kau mai te Awa nui, mai i te Kāhui Maunga ki Tangaroa. “The Crown acknowledges that to Whanganui Iwi the enduring concept of Te Awa Tupua—the inseparability of the people and the River—underpins the responsibilities of the iwi and hapū of Whanganui in relation to the care, protection, management, and use of the Whanganui River in accordance with the kawa and tikanga maintained by the descendants of Ruatipua, Paerangi, and Haunui-a-Paparangi.¹⁰⁶

The river now has joint representation, one person being appointed by the local Maori and one being appointed by the New Zealand government.¹⁰⁷ This is a revolutionary acknowledgment of the Maori view on nature and a rare granting of an Indigenous method of maintaining the Earth. More states need to follow suit and acknowledge Indigenous relationships are vital to maintaining nature. Courts in India have done so, citing the Whanganui Claims Settlement Bill as an example when granting the same kind of legal personhood to the Ganges and Yamuna, so harming those rivers will be the legal equivalent of harming a human.¹⁰⁸ There was also a lawsuit in Colorado attempting to have the same rights established there for the Colorado River, which unfortunately was dismissed.¹⁰⁹ Whether through lawsuits, pressure for more states, or even a United Nations declaration, this is a great way to protect the environment and reestablish traditional Indigenous views on nature.

The recent United Nations Climate Change Conference in

¹⁰⁶ Te Awa Tupua (Whanganui River Claims Settlement) Bill 2016 (N.Z.).

¹⁰⁷ *Id.*

¹⁰⁸ Michael Safi, *Ganges and Yamuna Rivers Granted Same Legal Rights as Human Beings*, THE GUARDIAN (Mar. 21, 2017), www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings.

¹⁰⁹ Lindsay Fendt, *Colorado River Personhood Case Pulled by Proponents*, Aspen Journalism, THE GUARDIAN (Dec. 15, 2017) <https://www.theguardian.com/environment/2017/nov/15/indigenous-groups-win-greater-climate-recognition-at-bonn-summit>.

Bonn, Germany November 2017 proved to be a victory for Indigenous Peoples worldwide.¹¹⁰ Noting that the Paris accords acknowledge Indigenous people's roles in combatting climate change, it has been reported that the governments in attendance acknowledged that Indigenous people can play a leading role in addressing climate change.¹¹¹ Even China, who often denied it had "Indigenous people" out of fears of ethnic separatism, was said to have taken a softer stance.¹¹² The momentum of this support should be seized. Proposing more Indigenous lead solutions will test if states really mean what they say or are just virtue-signaling for political points. One of the initiatives mentioned at the conference which needs to be supported is a report by Movement Rights, the Indigenous Environmental Network and Women's Earth and Climate Action Network, titled "Rights of Nature and Mother Earth: Rights Based Law for Systemic Change."¹¹³ A summary of the document explains:

We are pointing to the need for a wholly different framework that recognizes that Earth's living systems are not the enslaved property of humans. Just as it is wrong for men to consider women property or one race to consider another race as property, it is wrong for humans to see nature as property over which we have dominion. All rights, including humans', depend on the health and vitality of Earth's living systems. All other rights are derivative of these rights. This requires an essential paradigm shift from a jurisprudence and legal system designed to secure and consolidate the power of a ruling oligarchy and a ruling species, and to substitute a jurisprudence and

¹¹⁰ Jonathan Watts, *Indigenous Groups Win Greater Climate Recognition at Bonn Summit*, THE GUARDIAN (Nov. 15, 2017) <https://www.theguardian.com/environment/2017/nov/15/indigenous-groups-win-greater-climate-recognition-at-bonn-summit>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ RIGHTS OF MOTHER EARTH: RIGHTS-BASED LAW FOR SYSTEMIC CHANGE 7 (Shannon Biggs et al. 2017).

legal system designed to serve all of the living Earth community¹¹⁴

A collection of grassroots organizers, civil society groups and Indigenous activists have written a proposed Universal Declaration on the Rights of Mother Earth, which is similar to the one in Bolivia but even more expansive.¹¹⁵ In short, they are looking to bring the entire world back to where we all used to be; that is, in a system which recognizes we are a part of nature and must live symbiotically with it. The world has seen enough Western theories and attempts at saving the environment and look where it has gotten us. Instead, I ask for a look into proposals Indigenous people have already mapped out, as it is time to listen to them.

IV. CONCLUSION

The dogmatic hierarchy model has been the norm for so long in the western world that many people don't even seem to question it. Our current state of affairs is considered the natural progress of history, and our right to dominate the Earth as common sense. However, with the growth of the environmental movement it does seem more people in mainstream society are remembering the once commonly held value towards nature. Even the Pope has come around to the idea.¹¹⁶ Contemporary Indigenous societies remember the ancient virtue of a reciprocal relationship with what is definitely our "mother" for the very fact that she/it created and sustains us. It is high time to end the paternalistic racism that dismisses traditional Indigenous knowledge and values as primitive savagery. Indigenous societies must be given full control of their lands for their sake as well as ours, because they steward the environment in a way we seem

¹¹⁴ *Id.*

¹¹⁵ WORLD PEOPLE'S CONFERENCE ON CLIMATE CHANGE AND THE RIGHTS OF MOTHER EARTH, PROPOSAL UNIVERSAL DECLARATION OF THE RIGHTS OF MOTHER EARTH (2017).

¹¹⁶ See Reuters, *Pope: Exploitation of Nature is Sin of Our Time*, THE HUFFINGTON POST (Sept. 4, 2014), www.huffingtonpost.com/2014/07/05/pope-francis-nature-environment-sin-_n_5559631.html.

unable or unwilling to. We must also incorporate the traditional notions of a relationship with nature and personhood for natural phenomena into the law of states and into international law. Anything short of this is merely allowing greed and power to be a hindrance to ensuring the survival of future generations. There is no time for half-steps.