

NATIVE AMERICANS IN THE CLUTCHES OF
CATHOLICISM: HOW CATHOLICISM AND NATIVE
RIGHTS CONNECT VIA NATURAL LAW IN A WORLD
THAT WANTS YOU TO BELIEVE OTHERWISE

Brett G. Roberts[†]

“Native American cultures and the good news are not two competing ideas. They can and do merge, as can be seen in how God’s grace fulfills the lives of so many Native Americans. With a deeper understanding of the Native American Catholic communities, we, as a Church, are better able to unify both the faith and the cultures that guide Catholic Native American ministry into a great gift to Christ and his Church.”

— United States Conference of Catholic Bishops¹

TABLE OF CONTENTS

Table of Contents	44
Introduction	45
I. Why Natural Law Truth Is Needed in the West	48
A. The Indian Boarding School Gravesites in Canada	48
B. The Indian Boarding School Gravesites in the United States of America	51
C. Providing Context to the Church’s Role in Gravesites at Residential Schools	53
II. Understanding the Natural Law	59
A. Foundations of Natural Law	60
B. Natural Law and International Human Rights for All	63

[†] Brett Gabriel Roberts is an LL.M. Candidate at the University of Arkansas School of Law. Brett is a graduate of Ave Maria School Law, Class of 2023. He would like to thank Prof. Ligia Castaldi for her guidance, his parents for their unapologetic faith, and God, for to Him be the glory. An abbreviated version of this Article appears in the *Catholic Social Science Review* Vol. 28 in September of 2023.

1. SUBCOMM. ON NATIVE AM. AFFAIRS, TWO RIVERS: A REPORT ON CATHOLIC NATIVE AMERICAN CULTURE AND MINISTRY 29 (2019) [hereinafter TWO RIVERS], <https://www.usccb.org/issues-and-action/cultural-diversity/upload/Two-Rivers-On-Catholic-Native-American-Culture-and-Diversity.pdf>.

III. Debunking the Doctrine of Discovery as Truly Rooted in Natural Law	68
A. The Church Did Not Sanction Slavery or Oppression in the New World	69
B. “Natural Law” Jurisprudence as Applied to Indian Law Cases in America	74
IV. Native and Catholic Theology Under the Natural Law	80
A. Perceptions of the Natural Law Ethos in Native Theology	81
B. Natural Law Ethics as Legal Theory for Indian Law Cases	86
Conclusion	90

INTRODUCTION

Truth is scorched in the fires of the West. On January 20, 2019, the *Washington Post* published an article—under the deceptive auspices of an opinion editorial—lambasting Catholic teens who “took place” in a “troubling scene” at the Indigenous Peoples March.² The incident? According to the *Washington Post*, Catholic teens in Washington, D.C., hurled insults at a Native American elder.³ The article’s author, William Cossen, references a “shameful history of Native American abuses” at the hands of the Catholic Church, and calls for Catholic dioceses and institutions—who evidently “rarely examine the [C]hurch’s record of actively participating in the federal government’s conquest and colonization of Native Americans”⁴—to investigate the partnership with Christian Protestants that resulted in Indigenous people’s assimilation.⁵ For Cossen and many others, the horrors of this colonial assimilation were family separations, boarding schools, and abuse.⁶ Citing historian Carol Berg, Cossen writes, “even when [Catholics] had ‘the best of intentions, most missionaries failed to respect Indian culture for its own worth.’”⁷ According to Cossen, racist portrayals and culture denigration by Catholics were used to first fuse Catholicism into the American ethos and then to spread the

2. William S. Cossen, *The Catholic Church’s Shameful History of Native American Abuses*, THE WASH. POST (Jan. 20, 2019, 11:09 AM) <https://www.washingtonpost.com/outlook/2019/01/20/catholic-churchs-shameful-history-native-american-abuses/>.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

American empire more broadly.⁸ Referencing one Benedictine priest in 1893, who referred to Natives as filthy, ignorant, spoiled children, Cossen conveys a notion that, even if some missionaries acted in good faith, colonialist motives were the hidden agenda of the missions.⁹ Quoting another commentator and priest of that time, Cossen suggests settlement, civilization, and rescue were also on the minds of all Catholics.¹⁰ To conclude his perspective, Cossen suggests a “violent relationship” between Catholics and Natives being uncovered abroad.¹¹ He writes, “[r]eckoning with this past is essential for coming to terms with the injustices faced by indigenous people [today].”¹² That final sentence is the most truthful of the entire piece.

If you have kept up with the news, you know that the Catholic teen that inspired Cossen’s article—the one that was pictured nearest the Native elder attending the “March for Life” (an annual Washington, D.C., march from the National Mall to the Supreme Court to pray for the lives of the unborn lost to abortion)—was awarded multimillion-dollar settlements from *CNN* and *The Washington Post* for defamation.¹³ A video from the scene showed no insults were hurled at the Native elder.¹⁴ On the date the *Post*’s article was uploaded, the Native elder was stopped by police at the National Shrine for attempting to disrupt the ongoing Holy Mass.¹⁵ As of July 2022, the *Washington Post*’s perspective article remains online.

So, what about the *Post*’s piece is true? What about the Catholic-Native history is true? And, what do we do about the reckoning with the past—so injustices Native Americans face today can be resolved? The horrors of the separations, the boarding schools, and the abuse have been examined closely in recent years by large institutions. In 2009, the United Nations (“UN”) Economic and Security Council published its findings in a report titled

8. *Id.* (“They denigrated indigenous cultures in attempts to fuse Catholicism and Americanism at a time when Catholics were frequently considered inherently un-American. They then used this colonizing experience to help spread the American empire beyond the country’s borders at the turn of the 20th century.”).

9. *Id.* (“Amazingly, [one Benedictine priest] used these descriptors in the context of defending Native Americans from abuses perpetrated against them by the federal government and white settlers.”).

10. *Id.*

11. *Id.*

12. *Id.*

13. WLWT Digital Staff, *Nick Sandmann Settles \$250M Lawsuit with the Washington Post*, WLWT5 (July 24, 2020, 11:26 AM), <https://www.wlwt.com/article/nick-sandmann-settles-250m-lawsuit-with-the-washington-post/33415531>.

14. *Id.*

15. Louis Casiano, *National Shrine Confirms Report That Native American Activist Allegedly Tried to Disrupt Mass*, FOX NEWS (Jan. 24, 2019, 12:09 AM), <https://www.foxnews.com/us/national-shrine-says-nathan-phillips-allegedly-tried-to-disrupt-mass>.

Indigenous Peoples and Boarding Schools: A Comparative Study, in which its preliminary analysis of boarding school policies globally resulted in the conclusion that “[b]oarding schools have had varying impacts for indigenous peoples.”¹⁶ The purpose of the boarding schools, at least to many Indigenous people, “was to assimilate indigenous peoples into the dominant society of which they lived.”¹⁷ Andrea Smith, author of the UN document, wrote, “for Native people to become fully ‘human,’ they would have to lose their Native cultures.”¹⁸ Others have stated the purpose of the schools was to bestow status onto the Indigenous people.¹⁹

Fr. Henry Sands, Executive Director of the Black and Indian Mission Office, suggests the path to quelling anger begins with forgiveness, and that path can be learned only through the Church.²⁰ Many Church officials, like Archbishop Emeritus Sylvain Lavoie, O.M.I.—who spent over thirty years ministering among the Indigenous people in Canada—have worked tirelessly on a reconciliation between Catholics and Indigenous people.²¹ No doubt, reconciliation has taken a hit with virulent news stories about unmarked graves.²² Through the intercession of the saints, like Kateri Tekakwitha, I offer this Article to restore faith and Truth in Native-Catholic relations.²³ In another publication, I proposed a legislative solution to Indian land disputes that would revive a much-needed connection with tribes.²⁴ Today, I now focus upon another, more foundational, method of philosophy and

16. Andrea Smith for the Secretariat of the U.N. Permanent Forum on Indigenous Issues, *Indigenous Peoples and Boarding Schools: A Comparative Study*, 2, U.N. Doc. E/C.19/2009/CRP.1 (Jan. 26, 2009) [hereinafter Andrea Smith], https://www.un.org/esa/socdev/unpfi/documents/E_C_19_2009_crp1.pdf.

17. *Id.*

18. *Id.*

19. *Id.* at 3.

20. See ENDURING FAITH: THE STORY OF NATIVE AMERICAN CATHOLICS (Knights of Columbus 2021).

21. See Sylvain Lavoie, *Walking a New Path: A Harvest of Reconciliation—Forging a Renewed Relationship between the Church and the Indigenous Peoples*, in THE CHURCH AND INDIGENOUS PEOPLES IN THE AMERICAS: IN BETWEEN RECONCILIATION AND DECOLONIZATION 78, 82 (Michel Andraos ed., 2019).

22. See generally The Canadian Press, *Timeline of Events Since Finding of Unmarked Graves in Kamloops*, CTV NEWS (May 18, 2022, 5:43 AM), <https://www.ctvnews.ca/canada/timeline-of-events-since-finding-of-unmarked-graves-in-kamloops-1.5908292>

23. Brian McDonough, *The Truth and Reconciliation Commission of Canada*, in THE CHURCH AND INDIGENOUS PEOPLES IN THE AMERICAS: IN BETWEEN RECONCILIATION AND DECOLONIZATION 56, 70 (Michel Andraos ed., 2019).

24. Brett Gabriel Roberts, *Note: Returning the Land: Native Americans and National Parks*, 21 AVE MARIA L. REV. 148 (2023) (explaining how, through decolonization and self-determination efforts, courts may understand tribes land connections more fundamentally).

jurisprudence in which tribes may find relief—the natural law.²⁵ The issue is to, broadly speaking, sift through the historical debates, recalling natural law-based justice in its truest sense, and outline natural law's relevance in ongoing Indian rights cases in American justice systems.²⁶

To begin, this Article's first part will provide context to tales of Native-Catholic animosities. The second part will recall the historical understanding of natural law and how the jurisprudence led to the birth of international human rights. Part III refutes the notion of the Church and North American Indigenous people as plain enemies. Then, Part IV will examine Native and Christian theology to show how there is a powerful connection between them that yearns for natural law jurisprudence. Finally, this Article will return to the problems of this Introduction and explain how true natural law thinking offers a myriad of solutions for Indian injustice. We will “move forward together” with “special care.”²⁷

PART I. WHY NATURAL LAW TRUTH IS NEEDED IN THE WEST

What natural law truth is not, is often easier to know than what natural law truth is. Institutions constantly feed us deceptive half-truths or blatant lies—to think Indian rights issues are exempt from the same treatment is to not think at all. As the Introduction just showed, media organizations' selective reporting can portray Catholic and Native interests as being at odds, and this irreparably harms chances at reconciliation.

A. *The Indian Boarding School Gravesites in Canada*

On July 24, 2022—during the production of this Article—the Holy Father, Pope Francis, visited Canada so he could apologize in person for clerical abuses by the Catholic Church to the indigenous First Nations in

25. See generally ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Pt. I-II, Q. 94 (Fathers of the Eng. Dominican Province, trans., Christian Classics 1981) [hereinafter *SUMMA THEOLOGICA*].

26. See David M. Lantigua, *Faith, Liberty, and the Defense of the Poor: Bishop Las Casas in the History of Human Rights*, in *CHRISTIANITY AND FREEDOM VOLUME 1: HISTORICAL PERSPECTIVES* 176, 177 (Timothy Samuel Shah and Allen D. Hertzke, eds., 2016).

27. See Lavoie, *supra* note 21 at 93 (“In general to ‘move forward together’ in ways that will bring about greater justice, healing, and reconciliation with the Indigenous peoples. There are many ways this can be and is being done. One is by implementing *Laudato Si'*. This encyclical by Pope Francis provides a blueprint for renewing our relationship with the Indigenous peoples. It speaks of showing special care for Indigenous communities, involving them as principal dialogue partners, and supporting their view of the land as a sacred space. We must allow this document to keep guiding our steps as we move forward together.”); see also Pope Francis, *Laudato Si'* [*Encyclical on Care for our Common Home*] ¶ 146 (2015).

boarding schools.²⁸ Pope Francis previously remarked on his feelings of “sorrow and shame” regarding the loss of Indigenous identities, culture, and spiritual values in missionary school abuses.²⁹ The July apology stemmed from accounts of “unmarked” mass graves at the sites of Christian-or-Catholic-operated Indigenous boarding schools.³⁰ Canadian bishops and Indigenous leaders welcomed the Pope’s “apostolic journey.”³¹ Canada’s Prime Minister called the visit a necessary step to “advance meaningful reconciliation.”³² There has also been speculation that Pope Francis will repatriate many cultural items that were formerly bestowed to the Vatican as gifts by Catholic missionaries from Indigenous groups.³³

When the UN prepared its “Comparative Study,” it found that Canada’s residential schools had poor sanitary conditions leading to disease outbreaks and deaths.³⁴ Many schools had reports of sexual abuse, physical beatings, and low educational achievements.³⁵ By 1992, denominational churches were issuing formal apologies.³⁶ In 2006, the Indian Residential Schools Settlement Agreement was reached between victims, government, and church entities.³⁷ In 2008, Canada’s government established a Truth and Reconciliation Commission—with expressed support from the Canadian Conference of Catholic Bishops—to understand how residential school abuses affected communities and society.³⁸ The Commission found, after seven thousand former students gave testimony, that Canada attempted cultural genocide by setting out to destroy the political and social institutions of Indigenous people, seizing land occupied by Indigenous people, banning the Indigenous language of these people, and breaking families to “prevent

28. Frances D’Emilio, *Pope to Visit Canada to Apologize for Indigenous Abuses*, AP NEWS (May 13, 2022, 11:56 AM), <https://apnews.com/article/pope-francis-canada-religion-edmonton-2bab0bc5f45ad652f8b842e53832e50a>.

29. *Id.*

30. See generally Ian Austen, ‘Horrible History’: Mass Grave of Indigenous Children Reported in Canada, THE N.Y. TIMES, <https://www.nytimes.com/2021/05/28/world/canada/kamloops-mass-grave-residential-schools.html> (Sept. 5, 2022).

31. D’Emilio, *supra* note 28.

32. *Id.*

33. Nicole Winfield, *Vatican Says They’re Gifts; Indigenous Groups Want Them Back*, AP NEWS (July 21, 2022, 3:06 AM), <https://apnews.com/article/pope-francis-entertainment-travel-canada-3e9ab6fad79ee444f20633fd8020ede>.

34. Andrea Smith, *supra* note 16, at 8.

35. *Id.* at 8-9.

36. *Id.* at 10.

37. McDonough, *supra* note 23, at 61-62.

38. *Id.* at 57.

the transmission of cultural values and identity from one generation to the next.”³⁹ A report on unmarked graves, however, was not issued until 2015.⁴⁰

While the Canadian government has testified and apologized for its assimilationist colonization policies—policies it thought, for the record, were the only way to live *with* Indigenous peoples—scholars like Brian McDonough, lecturer of theological studies at Concordia University (Montreal), have opined on the Catholic Church’s responsibilities towards this historical injustice.⁴¹ McDonough, like so many readers, recognizes what appears to be “structural sin” in the Catholic Church.⁴² McDonough agreed with the Commission that Canadian and Church officials committed spiritual violence—that is, suppression of a preferred spiritual belief or forcibly requiring one to subscribe to the spiritual beliefs of another—but happily acknowledges this practice no longer continues.⁴³ The consequences were profound, however, and some survivors lost faith in the existence of a higher power.⁴⁴ Indeed, as one group wrestles with anger and sadness over the injustice of their ancestors, the settlers’ descendants wrestle with profound guilt.⁴⁵ For the last thirty years, the Catholic Church in Canada continued to issue apologies,⁴⁶ culminating now in Pope Francis’s arrival. But, considering recent “unmarked” grave reports,⁴⁷ will the papal visit be enough to begin reconciliation?

39. *Id.* at 59.

40. See 4 TRUTH AND RECONCILIATION COMM’N OF CAN., CANADA’S RESIDENTIAL SCHOOLS: MISSING CHILDREN AND UNMARKED BURIALS vi (2015) [hereinafter Commission Vol. 4].

41. McDonough, *supra* note 23, at 62, 67. (“Today, there are more Indigenous children in out-of-home care than there were at the height of the residential school system. Indigenous children make up nearly half of the children in foster care, while making up only seven percent of children in Canada. Why are so many Indigenous children in foster care? Among the contributing factors are dilapidated housing, extreme poverty, and drug abuse—the long-term consequences of the residential school system. With so many children in out-of-home care, are we collectively in the process of repeating the residential school tragedy?”).

42. *Id.* at 62 & n.14 (“Each generation has its blind spots. Each generation needs prophets and artists, not only to challenge their contemporaries’ moral conscience, but also to reveal their blindness.”); see also Pope John Paul II, *Sollicitudo Rei Socialis* [Encyclical on Social Concerns] ¶ 36 (1987).

43. McDonough, *supra* note 23, at 64-65.

44. *Id.* at 70.

45. *Id.* at 73.

46. *Id.* at 68-69.

47. See, e.g., The Canadian Press, *supra* note 22.

B. *The Indian Boarding School Gravesites in the United States of America*

Meanwhile, in the United States, in response to Canada's announcements, U.S. Interior Secretary Deb Haaland headed the U.S. federal government's own investigation of its past oversight of Native American boarding schools.⁴⁸ Her mission was to "work to 'uncover the truth about the loss of human life and the lasting consequences' of policies that . . . forced hundreds of thousands of children from their families and communities."⁴⁹ A purported goal, "no matter how hard it will be," is to locate and protect possible burial sites at the schools.⁵⁰ Leaders of the Navajo Nation and Cherokee Nation in Oklahoma both expressed their support of Sec. Haaland's research.⁵¹

Much like Canada's history, "[b]eginning in 1819 and continuing through 1969, the U.S. government provided the resources and logistical support for the schools, and religious groups, including the Catholic Church, were among the willing recipients."⁵² The UN, by the time of its 2009 report, had determined American Indian children were forcibly abducted as state policy.⁵³ Christian denominations took administration of Indian reservations in 1869-1870, and Congress provided the funding for boarding schools.⁵⁴ By 1909, twenty-five of the schools were located off-reservation, and attendance for all schools was mandatory.⁵⁵ The education the children received was catered to their "[assimilation] into the bottom of the socio-economic ladder."⁵⁶ According to the UN report, the "role of education for Native girls was to inculcate patriarchal norms[.]"⁵⁷ The underlying assertion the report's author makes is that the schools were not for education—they were for

48. The Associated Press, *Biden Administration to Review Native American Boarding Schools' Dark History*, NBC NEWS (June 23, 2021, 7:22 AM), <https://www.nbcnews.com/politics/politics-news/biden-administration-review-native-american-boarding-schools-dark-history-n1272082> [hereinafter *Dark History*].

49. *Id.*

50. *Id.*

51. *Id.*

52. The Editors, *The Catholic Church Must Come Clean—Completely—About What It Did to Native Americans*, AM.: THE JESUIT REV. (June 30, 2021), <https://www.americamagazine.org/politics-society/2021/06/30/native-american-boarding-schools-catholic-church-investigation-240950>.

53. Andrea Smith, *supra* note 16, at 3.

54. *Id.* at 3.

55. *Id.* at 4.

56. *Id.* at 5.

57. *Id.*

cultural genocide.⁵⁸ Yet, physical genocide was often ancillary, according to the report, as inadequate funding resulted in food rations, lackluster medical care, starvation, and disease.⁵⁹ The combination of these factors and sexual, physical, and emotional abuse resulted in untold deaths.⁶⁰

Sec. Haaland recently released Volume One of the Department of the Interior's "Federal Indian Boarding School Initiative Investigative Report."⁶¹ In a statement accompanying the report, the Department of the Interior ("DOI") stated the "horrific" and "forced assimilation" of Indian children by the United States through the boarding school system was both "traumatic and violent."⁶² Volume One highlights evidence that the United States targeted the Indigenous communities "in furtherance of territorial dispossession of Indigenous lands[.]"⁶³ The volume also shows fifty-three different schools contain "marked or unmarked graves" and approximately fifty percent of all federal Indian boarding schools received support, funding, or involvement from a religious institution.⁶⁴ The DOI also predicted the number of burial sites to increase as it increases its research efforts into Volume Two of its investigative series.⁶⁵

In 2009, President Obama issued an apology to Native Americans on behalf of *all* Americans "for the many instances of violence, maltreatment, and neglect inflicted on Native Peoples by citizens of the United States [and it] expresses its regret for the ramifications of former wrongs[.]"⁶⁶ Befuddlingly, President Obama's administration issued this apology only on page forty-four of a Department of Defense spending bill.⁶⁷ Now, does the Holy Father's arrival on North American soil, to make a public apology, suffice for all the reported wrongs? In the U.S., between 367 and 408 schools

58. *Id.*

59. *Id.*

60. *Id.* at 5-7.

61. BRYAN NEWLAND, U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT (2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf [<https://perma.cc/3J24-RS9G>].

62. *Volume 1 of the Department of the Interior's Federal Indian Boarding School Initiative Investigative Report and S. 2907: Hearing Before the S. Comm. on Indian Affairs*, 107th Cong. (2022) (statement of Deb Haaland, Secretary of the U.S. Department of the Interior), <https://www.doi.gov/ocl/boarding-school-initiative>.

63. *Id.*

64. *Id.*

65. *Id.*

66. Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, 123 Stat. 3409, § 8113(a)(4) (2009).

67. *Id.*; see also *Dark History*, *supra* note 48.

operated,⁶⁸ housing more than 60,000 children over those 150 years, and 84 of them were Catholic-operated.⁶⁹ These figures from *America Magazine*, a Jesuit-operated periodical since 1909,⁷⁰ equate to 22.8% of direct Catholic involvement in this scandal. For some, “identifying [tuberculosis] and other forms of ‘natural’ mortality among these schoolchildren will not tell the full story,” and it is clear why.⁷¹ The recent headlines of clerical sexual abuse in the United States only amplify pressure to resolve Indigenous injustices swiftly with the full truth.⁷² But do they also incentivize, both legally and financially, groups to uncover other, possibly scintillating, mistakes of Church history? Is the end-outcome justice?

Once again, the Church’s critics are correct in a sense: “Forgiveness and healing can begin only after . . . [we speak] the truth.”⁷³ The question now becomes, legally speaking, what do these gravesite reports mean for tribes? What does it mean for the Catholic Church? To explain these questions requires a proper understanding of what ground there is to stand on in the broader war for truth.

C. *Providing Context to the Church’s Role in Gravesites at Residential Schools*

To be clear, I believe that many injustices have occurred to Indigenous people since their first contacts with Western societies. I believe Canada and the United States are not exempt from part of the blame. I am also convinced of the Catholic Church’s continued commitment to helping Indigenous communities across the globe. I am well-aware of the Church’s continued persecution and the history of anti-Catholic hostility. Those key contextual prefaces must be discussed now in order to best approach legal remedy solutions for Christian/Catholic and Native relationships.

First, what exactly are “unmarked” graves? Are they graves formally known of and forgotten as time has passed? Are they graves unrecorded

68. While the Department of the Interior reports 408 schools, The National Native American Boarding School Healing Coalition reports 367 schools. *Compare American Indian Boarding Schools by State*, 1 HEALING VOICES (The Nat’l Native Am. Boarding Sch. Healing Coalition, Minneapolis, Minn.) June 2020, at 9 [hereinafter HEALING VOICES], <https://boardingschoolhealing.org/wp-content/uploads/2021/09/NABS-Newsletter-2020-7-1-spreads.pdf> (367), with NEWLAND, *supra* note 61, at 6 (408).

69. HEALING VOICES, *supra* note 68, at 6, 8, 9.

70. *About America Media*, AM.: THE JESUIT REV., <https://www.americamagazine.org/about-america-media> (last visited July 22, 2022).

71. The Editors, *supra* note 52.

72. *Id.*

73. *Id.*

officially? Are they gravesites whereupon identifiable markings—like crosses—have eroded with the seasons? These broad questions cannot be answered here. Until, however, they are answered definitively by governments, Indigenous entities, or Church institutions, these questions create uncertainty as to the full scope of the problem. The truth is most Catholic Churches, including missionary schools of the time, have an associated cemetery and school.⁷⁴ The tragedy is, in pursuit of colonial assimilation, governments like Canada and the U.S. mandated Indigenous children to move to rural residential schools.⁷⁵ We at least know the Church/school graveyards were used quite often because disease was rampant.⁷⁶ Does this prove genocide? Does this prove intent by the Catholic Church to commit genocide?

Since the 1970s, gravesites have been revealed around Canada's residential schools.⁷⁷ When one residential school closed in 1914, the principal notified government authorities about the gravesite, but no maintenance was ever kept on the grounds.⁷⁸ In the 1970s, university students conducting a study on the possibility of the school's grave, uncovered the unmarked grave and excavated it.⁷⁹ Another gravesite, at a long-shuttered residential school, was rediscovered in 2021 after routine maintenance, making headline news around the world.⁸⁰ A former chief of the local Indian band, however, knew the graves were there, stating "wooden crosses that originally marked the gravesites had been burned or deteriorated over the years."⁸¹ Wooden markers were common in Canada during the period.⁸² The gravesite itself also became a graveyard for the whole

74. TRUTH AND RECONCILIATION COMMISSION OF CANADA, HONOURING THE TRUTH, RECONCILING FOR THE FUTURE: SUMMARY OF THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA 99 (2015) ("Many of the early schools were part of larger church mission centres that might include a church, a dwelling for the missionaries, a farm, a sawmill, and a cemetery.").

75. 1 TRUTH AND RECONCILIATION COMMISSION OF CANADA, CANADA'S RESIDENTIAL SCHOOLS: THE HISTORY, PART 1, ORIGINS TO 1939: THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA 290 (2015) [hereinafter Commission Vol. 1].

76. Commission Vol. 4, *supra* note 40, at 22, 138.

77. *Burial Ground Re-Consecrated*, SASK. INDIAN (Sept. 30, 1975), <https://web.archive.org/web/20170408082324/http://www.sicc.sk.ca/archive/saskindian/a75sep3006.htm>.

78. Commission Vol. 4, *supra* note 40, at 3, 119.

79. *Burial Ground Re-Consecrated*, *supra* note 77.

80. Adam MacVicar, 'We Knew It Was There': Former B.C. Chief Says Unmarked Graves Near Cranbrook Need More Context, GLOB. NEWS, <https://globalnews.ca/news/7996606/cranbrook-residential-school-graves-chief/> (July 2, 2021, 6:11 PM).

81. *Id.*

82. *Id.*

community over time.⁸³ The Kamloops Indian Residential School, formerly run by the Catholic Church, was the topic of much stir and outrage in 2021 when a reported unmarked grave was uncovered by an anthropologist using ground-penetrating radar.⁸⁴ The radar showed “reflections,” and body counts were initially estimated at 215, but have since changed to “over 200.”⁸⁵ No excavation has been conducted on the site to determine the precise number of possible bodies.⁸⁶ From 2021 to 2022, over a dozen other residential schools have been analyzed with similar radar technologies to report suspected unmarked gravesites.⁸⁷

For the United States, the DOI’s recent investigation just compiled an official list of Federal Indian boarding schools for the first time.⁸⁸ The report explained that of 53 identified burial sites at residential schools, 33 were marked, 6 were unmarked, and 14 were both marked and unmarked at the same location.⁸⁹ Of course, one hidden unmarked grave of children is unacceptable, let alone a half dozen of them. Except, were the residential schools really an entire failure or a master plan by church leaders for genocide? What were the successes of Indian boarding schools, if any? Was it truly as if the schools simply had the nuns and priests abusing, then killing, kids and chucking the bodies into unmarked graves?

Not only did the missionaries have the perseverance to travel to territories and learn the languages of Indigenous groups⁹⁰—they began with the inherently good religious mentality that they were bringing souls to eternal salvation⁹¹—but they also tried to continue to the best of their abilities when government funds dried up.⁹² The good faith effort is reflected

83. *Id.*

84. Dana Kennedy, ‘Biggest Fake News Story in Canada’: Kamloops Mass Grave Debunked by Academics, N.Y. POST, <https://nypost.com/2022/05/27/kamloops-mass-grave-debunked-biggest-fake-news-in-canada> (May 29, 2022, 11:06 PM) (citing Barielle Fonrouge, *Mass Grave with 215 Indigenous Kids Found on Former School Grounds in Canada*, N.Y. POST (May 28, 2021, 4:51 PM), <https://nypost.com/2021/05/28/215-indigenous-kids-found-buried-on-former-school-grounds-in-canada/>).

85. Kennedy, *supra* note 84.

86. *Id.*

87. *Id.*

88. NEWLAND, *supra* note 61, at 5.

89. *Id.* at 8.

90. McDonough, *supra* note 23, at 62 (“It must be said from the outset that missionaries, both women and men, displayed immense courage and perseverance in learning the languages of the peoples who inhabited the territories to which they were sent and in trying to adapt as best they could to the very difficult living conditions in which they found themselves.”).

91. *Id.* at 63.

92. *Id.* (“It is also important to understand the religious mentality of the time. Catholic authorities, locked in fierce competition with Protestant groups, considered sound instruction in the church’s doctrines

in reports of students both from the United States and Canada who did not see their experiences at residential schools entirely negatively.⁹³ For some, the “boarding schools did give them access to a better education than they might otherwise not received.”⁹⁴ In other instances, missionaries actually preserved Indigenous languages and cultures against the will of the government.⁹⁵ These reports are rarely given their proper due.⁹⁶

This information is not presented to debunk these instances of Indigenous injustices, but to show a broader portrait of the battle facing modern Catholics and the responsibility of academics to write the Truth. It is presumable that much of the anti-Catholic spin to media reports is rooted in what is now a wave of timeless anger and outrage over colonization.⁹⁷ What precisely is the root connection the Catholic Church has in the global colonization scheme? Many scholars have written at length about this topic defining colonization as, “the policy or practice of acquiring full or partial political control over another country, occupying it with settlers, and exploiting it economically.”⁹⁸ Accordingly, scholars attribute the Doctrine of Discovery—typically understood as a Roman Catholic land-grabbing doctrine adopted by Western colonizers⁹⁹—as the root of Indigenous injustice.

and proper preparation for the sacraments to be essential for the eternal salvation of souls. The heads of the missionary orders reminded their benefactors what was at stake when they solicited them for financial assistance. But the donations received were insufficient to meet the need. The government’s offer became very difficult to resist, especially when certain Indigenous groups refused to meet the missionaries’ expectations and refused to adopt the customs of the ‘whites.’”)

93. See Andrea Smith, *supra* note 16, at 28; see McDonough, *supra* note 23, at 76-77 (“And yet, there is evidence from the Commission report itself that a significant number of religious men and women were held in high esteem by Indigenous students.”).

94. Andrea Smith, *supra* note 16, at 28.

95. McDonough, *supra* note 23, at 76-77.

96. *Id.* (“And yet, there is evidence from the Commission report itself that a significant number of religious men and women were held in high esteem by Indigenous students. The hearings did not offer an opportunity to learn about the occasions when the religious took up their Indigenous students’ cause by lodging protests with government officials regarding the poor quality of food and the inadequate level of health care. Nor did we often hear words of appreciation regarding the colossal task accomplished by missionaries in preserving Indigenous languages and cultures, in spite of opposition from government officials.”).

97. Lavoie, *supra* note 21, at 90 (“The residential school reality, which has been the focus of national attention since 1990, has overshadowed the more basic and pervasive destructive reality of colonization mentioned earlier, which spawned the schools. It is this reality that calls for much more attention.”).

98. *Id.* (explaining “[t]hat is truly what happened in Canada.”).

99. *Id.* at 90-91 (“One factor that enters into the picture is the reality of the Doctrine of Discovery and its adjunct, the notion of *terra nullius*. The Doctrine of Discovery is a complex legal tradition that arose in Western Europe during the medieval period, and in which the church played a central role. A

Yet, around the same time Sec. Haaland began her review of “dark history,” the Knights of Columbus released a documentary, *Enduring Faith: The Story of Native American Catholicism*, which told a different perspective on the Church’s influence in Natives’ lives.¹⁰⁰ Critics of the film, like Mary Annette Pember, caveat the film’s description of Native Catholics’ subjective relationship with their faith as potentially accurate, but she asserts the film’s “historical accuracy is flawed and filtered[.]”¹⁰¹ Calling the film a “whitewash [of] history,” Pember attacks the usual suspects: the Doctrine of Discovery and those fifteenth- and sixteenth-century papal bulls.¹⁰² She criticizes Fr. Sands for his assertion in *Enduring Faith* that the U.S. government—and not the Catholic Church, as Pember believes it—developed the Doctrine of Discovery.¹⁰³

What can be conceded to these types of critics is the “law” of forced Indian Residential Schools was foolish. Sharing the Word of God is a mission of every Catholic, but to do so by twisting another’s arm is to not live in friendship with one another. Native Americans should never have been required to attend boarding school, for the purposes of converting to Christianity, under penalty of law. The effects were far too negative by-and-large and completely against the state’s highest interest in providing health and protection to its citizens. Similarly, the Church’s main goal is to love all to bring all into eternal salvation.¹⁰⁴ Church complacency, though, at least in Indian residential school abuses, may be misunderstood—as Fr. Joseph Daoust referenced in the *Enduring Faith* film—because without some adherence to government policy, Catholic-operated missions would not have existed at all.¹⁰⁵ Yet we know, the cost of complacency in abuse was Indian

series of papal bulls—particularly, *Romanus Pontifex* and *Inter Caetera*—both reflected the thinking of dominant European powers and reinforced the trajectory of justifying conquest by Christian powers. This gave Christopher Columbus and other European explorers the mandate they needed to conquer and exploit the territory they ‘discovered.’ Even when they knew the land was occupied, the notion of *terra nullius* was applied under the pretext that the land was not being cultivated and utilized as it was in Europe.” (citation omitted).

100. ENDURING FAITH, *supra* note 20.

101. Mary Annette Pember, *Documentary About Indigenous Catholics Short on Accuracy, Long on Spin*, INDIAN COUNTRY TODAY (June 29, 2021), <https://indiancountrytoday.com/news/documentary-about-indigenous-catholics-short-on-accuracy-long-on-spin>.

102. *Id.*

103. *Id.*

104. *Cf.* Pope Benedict XVI, *Caritas In Veritate* [Encyclical Letter on Integral Human Development in Charity and Truth] ¶ 7 (2009) (noting the institutional path of charity is achieved by securing a “common good” through loving one another).

105. Pember, *supra* note 101.

family disintegration.¹⁰⁶ The cost was a loss of vibrant culture.¹⁰⁷ The cost was a cyclical, multigenerational abuse.¹⁰⁸ Pember's film review article also echoed Cossen's *Washington Post* piece when she suggested Catholics' work in the health care and social welfare of Indians at boarding schools resulted in a climb up the power-ladder of American government.¹⁰⁹ Though one must ask, what government system does not reward those who provide broad, institutional care of those sorts?

All this begs the question of: well, what has been done about the negative effects? Pember's article acknowledged that "Catholics had the greatest number of denominational missions."¹¹⁰ Therefore, Catholics should be doing something. Also, to be clear, just because these gravesites have not been dug up does not mean the claims are false, as

Tribal preferences for the possible disinterment or repatriation of remains of children discovered in marked or unmarked burial sites across the Federal Indian boarding school system vary widely. Depending on the religious and cultural practices . . . [preference may be] to leave the child's remains undisturbed in its current burial site.¹¹¹

As Catholics, we have to accept these wishes and not argue for excavations. Instead, we can do more. For the U.S., the UN found the Catholic Church to be the only institution providing some reconciliation.¹¹² The Church paid billions in Canada's 2008 Indian Residential School's

106. Andrea Smith, *supra* note 16, at 29 ("Many indigenous peoples also report that the highly regimented nature of boarding schools often instilled in them passivity rather than initiative, entrapping them into a life resulting in additional forms of institutionalization, such as prisons. They report that the generation that suffered the worse forms of abuse in schools are often the generation unsupportive of current cultural revitalization programs and are the least likely to feel themselves capable of making changes for themselves and their communities. Other consequences of boarding schools include increased violence, increased suicide rates, increased substance abuse, and increased family disintegration.").

107. *Id.* at 28 ("But even under the best of circumstances, boarding school policies have contributed to cultural alienation and loss of indigenous languages.").

108. *Id.* at 30 ("When multi-generations of indigenous peoples are impacted by the sexual, physical, and emotional abuse they suffered in schools, they are not in a position to build vibrant communities unless healing can take place.").

109. Pember, *supra* note 101. See Cossen, *supra* note 2.

110. Pember, *supra* note 101.

111. NEWLAND, *supra* note 61, at 92.

112. Andrea Smith, *supra* note 16, at 33-34 ("In 2007, the Jesuit Order of Roman Catholic priests stated it would pay approximately \$5 million to 16 people who stated they were sexually abused by clergy while attending a boarding school on the Colville Indian reservation. Those who claimed abuse attended the school in the late 1960s and early 1970s. Otherwise, there has been virtually no acknowledgment by the U.S.A Government of its complicity in boarding school abuses.") (citation omitted).

Settlement, too,¹¹³ so how is Pember's criticism, that the "Catholic Church continues to dodge culpability," fair at all?¹¹⁴ Furthermore, some Native communities have repurposed the residential schools as better education centers than public schools or collaborated with the Church on Indigenous-specific education,¹¹⁵ turning a wrong into a right. A "fair appraisal" of the religious orders that work with Indigenous communities across the globe is crucial.¹¹⁶

This emphasis on speaking the entire truth is necessary for reconciliation to begin. Felix Cohen, renowned Indian Law scholar, wrote, "[l]ike the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians . . . reflects the rise and fall in our democratic faith."¹¹⁷ Humbly, the democratic faith is not yet lost. Yes, there were abuses of Indigenous people at the hands of bad men who do not speak for or represent "the Church," regardless of their title. Now that contemporary issues have been discussed, we must learn natural law-based justice in its truest sense, so that we may understand how natural law's timeless truthfulness will assist lawyers in Indian rights cases.¹¹⁸

This discussion elucidates just the beginning of Native and Catholic reconciliation, a concept better understood once we know what the natural law truly is.

PART II. UNDERSTANDING THE NATURAL LAW

Justice, as a fundamental moral concept, involves consciousness, rationality, and a moral sense.¹¹⁹ For justice to be formalized, and thereby

113. See McDonough, *supra* note 23, at 62.

114. Pember, *supra* note 101.

115. Andrea Smith, *supra* note 16, at 47 ("4. In the U.S.A, some Native communities have taken over boarding schools and have adapted the curricula accordingly. 5. In the U.S.A, New Zealand and other places, indigenous communities are looking to boarding schools as potential place to teach indigenous languages particularly in areas where the language might be endangered. Indigenous-specific boarding or other schools might be more effective institutions to accomplish this goal than mixed public schools.").

116. McDonough, *supra* note 23, at 77 ("These actions reveal how some members of religious congregations actively struggled against cultural genocide, albeit while participating in a colonialist system which would lead, over time, to such a result. A fair appraisal of the legacy of religious men and women in their relations over several decades with Indigenous peoples in Canada has yet to be done—one that would bring out not only the negative aspects, but also the positive ones.").

117. NEWLAND, *supra* note 61, at 20 (alteration in original) (quoting Felix S. Cohen); see Felix S. Cohen, *The Erosion of Indian Rights*, 62 *YALE L.J.* 348, 390 (1953).

118. See Lantigua, *supra* note 26, at 177.

119. MARK TEBBIT, *PHILOSOPHY OF LAW: AN INTRODUCTION* 6 (3d ed. 2017) ("The concept of justice is not only the most prominent theoretical concept in the philosophy of law, equalled in importance

measured effectively, “[all kinds of human transactions] have to be governed by rules that are applied with as much consistency as it is possible to achieve.”¹²⁰ To do this, humans have to depersonalize, and “[m]oral principles and standards have to be formalised into unbending rules that then apply to the act, rather than the actor.”¹²¹ Author Mark Tebbit explained, “the belief that justice is integral to law has been the guiding light of natural law theory since its inception.”¹²²

A. *Foundations of Natural Law*

Natural law theory, however, predates the necessity for justice systems in societies and is founded in human nature.¹²³ It is beyond close associations with Catholic theology,¹²⁴ but “[it] is a necessary element of true Christian belief.”¹²⁵ This is not the place to fully detail other philosophical foundations for the natural law—like eternal law¹²⁶ or canon law—but, from the great Christian theologians to the Protestants, the Puritans, and the Anglicans, all have seen the merit in some form of natural law.¹²⁷

What natural law is—in the Catholic tradition—is an objective means by which the human mind formulates legal principles that can then be applied to govern a specific jurisdiction.¹²⁸ It surmises moral truths are fundamental and hold in any society.¹²⁹ Fr. Robert John Araujo wrote:

only by that of ‘law’ itself, it is also so regular a feature of common discourse about public life that virtually everybody has an immediate intuitive understanding of it. It is one of those concepts – like ‘being’ or ‘truth’ – that is so readily understood, especially in the context of its negation, ‘injustice’, that any questioning of its meaning tends initially to cause consternation.”).

120. *Id.* at 8.

121. *Id.*

122. *Id.* at 9.

123. See DAVID HAINES & ANDREW FULFORD, *NATURAL LAW: A BRIEF INTRODUCTION AND BIBLICAL DEFENSE* iv (2017).

124. Cf. Adam Crepelle, *Shooting Down Oliphant: Self-Defense As an Answer to Crime in Indian Country*, 22 LEWIS & CLARK L. REV. 1283, 1288 (2018); see also CATECHISM OF THE CATHOLIC CHURCH ¶ 1954 (2d ed. 1997) (“The natural law expresses the original moral sense which enables man to discern by reason the good and the evil, the truth and the lie[.]”).

125. HAINES & FULFORD, *supra* note 123, at viii.

126. *Id.* at 7 (“[E]ternal law is foundational for natural law, just as the mind of the inventor is foundational for the purpose and working of his invention.”).

127. *Id.* at vii.

128. Robert John Araujo, S.J., *The Catholic Neo-Scholastic Contribution to Human Rights: The Natural Law Foundation*, 1 AVE MARIA L. REV. 159, 160-61 (2003).

129. TEBBIT, *supra* note 119, at 11.

In essence, the natural law is planted within the objective reasoning process innate to the human person which enables and equips the person to develop a just positive—i.e., human—law. The positive/posited law will then be imbued with the essential substantive principles that are desirable for the just governing of society in which rights and responsibilities coexist side by side. This juxtaposition, in turn, enables people to flourish in ordered societies.¹³⁰

As understood by the Church, natural law is based on reason and revelation.¹³¹ According to it, human laws must give expression to the natural law, and those that do not are laws of tyranny.¹³² Fr. Araujo continued:

It is this ordering that is inclined to bring harmony to the specific society for which the positive law was made. Reliance on the natural law provides assistance to individuals and their civil society as they seek that which is publicly and privately good. In the end, the inevitable human law product of natural law reasoning should be a society in which individuals live together in peace and prosperity because this fundamental type of reasoning is inclined to seek virtue and to eschew vice.¹³³

Thus, clearly, natural law is foundational for human law, and “natural law is normative for all human beings.”¹³⁴ The Book of Genesis, in fact, begins with God recognizing that all things are innately *good*.¹³⁵ Therefore, “natural law is both biblical[ly] and philosophically coherent.”¹³⁶

Beyond its Christian roots, natural law developed globally, as “[t]he remote origins of natural law ethics lie in Greek and Roman philosophy and law,” too.¹³⁷ Prior to this awakening of natural law in recorded history, laws

130. Robert John Araujo, S.J., *Our Debt to De Vitoria: A Catholic Foundation of Human Rights*, 10 AVE MARIA L. REV. 313, 321–22 (2012).

131. D. BRIAN SCARNECCHIA, *BIOETHICS, LAW, AND HUMAN LIFE ISSUES: A CATHOLIC PERSPECTIVE ON MARRIAGE, FAMILY, CONTRACEPTION, ABORTION, REPRODUCTIVE TECHNOLOGY, AND DEATH AND DYING* 35 (2010).

132. *Id.*

133. Araujo, *supra* note 130, at 322.

134. HAINES & FULFORD, *supra* note 123, at 8.

135. See *Genesis* 1:1-31; see also HAINES & FULFORD, *supra* note 123, at iv.

136. HAINES & FULFORD, *supra* note 123, at ii.

137. Stephen J. Pope, *Natural Law in Catholic Social Teachings*, in MODERN CATHOLIC SOCIAL TEACHING 41, (Kenneth R. Himes ed., 2005) (“Aristotle spoke of doing the right or just act.”); see also HAINES & FULFORD, *supra* note 123, at ii.

typically applied only to a sovereign's citizens.¹³⁸ But Plato and Aristotle were "concerned with goodness and with its realization in the state" by distinguishing "between what is naturally just and what is legally just."¹³⁹ Then, Romans began to make a critically important distinction between the civil law (*ius civile*) that pertained to citizens of Rome and the law common to all nations (*ius gentium*) used to govern the peoples of Italy and the Roman provinces.¹⁴⁰ Perhaps the distinction for the Romans came after the Apostle Paul's letters began to reach more eyes and ears.¹⁴¹ Afterwards, "[t]he influential legal theorist Ulpian (c. 170-228 A.D.) . . . defined natural law . . . as 'that which teaches all animals' (*id quod natura omnia animalia docet*)."¹⁴² While canon law developed separately over the proceeding one-thousand years:

The Church turned to natural law for two principal reasons. First, the central normative document of the faith, the sacred scripture, speaks in many different voices about moral and social issues . . . Second, Christians in the Roman Empire, not entirely unlike Christians today, faced the problem of communicating their convictions to citizens who did not necessarily share their religious convictions. Indeed, some were outwardly hostile toward them.¹⁴³

The great scholar Gratian, in *Decretum*, wrote that "[n]atural law is common to all nations because it exists everywhere through natural instinct, not because of any enactment."¹⁴⁴ Thus, "the natural quality of law means 'an instinct of nature proceeding from reason.'"¹⁴⁵ For example, Gratian taught that uniting in marriage and repelling violence were natural law, and that war is only lawful when necessary.¹⁴⁶ These principles were expounded upon by the "Universal Doctor" of the Catholic Church, St. Thomas

138. Pope, *supra* note 137 ("Up until [the early second century], the laws of the Roman state, like that of other ancient laws, applied only to its own citizens.").

139. HEINRICH ROMMEN, *THE NATURAL LAW* 12 (1998).

140. *Id.*

141. *Romans* 2:14-15 ("For when Gentiles, who do not have the law, by nature do what the law requires, they are a law to themselves, even though they do not have the law. They show that the work of the law is written on their hearts, while their conscience also bears witness, and their conflicting thoughts accuse or even excuse them.").

142. Pope, *supra* note 137, at 41.

143. *Id.* at 42.

144. David B. Kopel et al., *The Human Right of Self-Defense*, 22 *BYU J. PUB. L.* 43, 120-21 (2007).

145. Araujo, *supra* note 130, at 322.

146. Kopel et al., *supra* note 144, at 121.

Aquinas, in the thirteenth-century,¹⁴⁷ who taught that human reason was the way natural law became consciously accessible.¹⁴⁸ Aquinas equated precepts of reason, “do good, avoid evil,” to many broader issues.¹⁴⁹

Emphasizing the common good—“the good for each person must take stock of the good for the other person”¹⁵⁰—Aquinas would inadvertently face the issues that would come with the discovery of the New World and continue today.¹⁵¹ Tebbit explained, “[t]he whole point of natural law, then, is to counter these worst characteristics of humanity.”¹⁵² Natural law, therefore, acknowledges that humans will inevitably fail and commit evil.¹⁵³ Natural law’s antithesis, the philosophy of power, finds its roots in such individualistic and autonomous thought—either for the single or the collective—and leaves men with two choices, choose a Leviathan state to order us all or secure power in the survival-of-the-fittest game.¹⁵⁴ Legal positivism is the philosophy of power’s shape in contemporary legal theory and is still on the rise today.¹⁵⁵

B. *Natural Law and International Human Rights for All*

Historically, however, natural law was the bedrock for international protections of human rights.¹⁵⁶ When the New World was discovered, it “raised new great problems for the *ius gentium*.”¹⁵⁷ A school of thought emerged because Indians were not civilized in the Western sense; therefore, they must be “undeserving of the bountiful lands they occupied” and subject

147. *Id.* at 121-22.

148. TeBBIT, *supra* note 119, at 16.

149. See Kopel et al., *supra* note 144, at 122; see also Araujo, *supra* note 130, at 323.

150. Araujo, *supra* note 130, at 323.

151. James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT’L & COMP. L. REV. 55, 58-61 (1997).

152. TeBBIT, *supra* note 119, at 12.

153. *Id.* (“The purpose of human law is to instill in everyone the habit of following the natural law. So the first point to note is that nothing could be further from the truth than the popular caricature of natural law that sees it as naively believing in an ideal world in which everyone is naturally inclined only towards the good. Natural law philosophers do not believe this at all.”).

154. Joseph M. de Torre, *The Roots of International Law and the Teachings of Francisco De Vitoria As A Foundation for Transcendent Human Rights and Global Peace*, 2 AVE MARIA L. REV. 123, 138-48 (2004).

155. TeBBIT, *supra* note 119, at 9.

156. Araujo, *supra* note 130, at 324 (“[I]nternational law, which is the source of human rights law as we know it today, has a strong foundation in the natural law tradition.”).

157. ROMMEN, *supra* note 139, at 55.

to the conquering power.¹⁵⁸ Catholic and Spanish theologian Francisco (Francis) de Vitoria, the so-called “founder of international law,”¹⁵⁹ provided some answers. The natural law would provide clarity to missionaries and to the Spanish throne on what to do with the Indigenous people discovered in the New World. Using “the Bible allows cultural engagement, and more specifically of a kind that can admit goodness and value outside the visible church.”¹⁶⁰ Scholars like Fr. de Vitoria understood that for “Christians especially interested in being ‘missional,’ this cannot but be useful.”¹⁶¹ At first, the Pope “donated” the New World to Spain—due to pressures outside his control¹⁶²—but the Church’s magisterium was “more concerned with the good treatment of the native peoples of the newly-discovered lands, and bestowed a trust upon the Spanish monarchs to see to their well-being.”¹⁶³ “Justifications” for colonization were inferred from *Inter caetera*, a papal bull issued by Pope Alexander VI in May 1493,¹⁶⁴ but these inferences by scholars and historians do not offer a full picture of the truth and certainly deserve some context.

Fr. Vitoria, in the years soon after colonization began, provided his “unequivocal defense of the Indians against their conquerors.”¹⁶⁵ Not only was he a “writer of the first treatise on Indian rights in the Americas,”¹⁶⁶ but his authorship was “extremely important,”¹⁶⁷ as he “developed an account of universal human dignity in the course of mounting arguments to refute philosophical justifications offered for the European exploitation of the native peoples of the Americas.”¹⁶⁸ Fr. Vitoria maintained that the Indians did not need to know intimately God’s grace to be considered His children, too.¹⁶⁹ He added, “the doctrine that Indians are ‘human,’ and thus possess reason, and that they have their own law and government (and a right to

158. John P. Lowndes, *When History Outweighs Law: Extinguishment of Abenaki Aboriginal Title*, 42 BUFF. L. REV. 77, 81–82 (1994).

159. Zion & Yazzie, *supra* note 151, at 59.

160. HAINES & FULFORD, *supra* note 123, at 108.

161. *Id.*

162. See Part III, Subpart A *infra*.

163. Zion & Yazzie, *supra* note 151, at 60.

164. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 59 (1999).

165. Zion & Yazzie, *supra* note 151, at 59.

166. *Id.*

167. ROMMEN, *supra* note 139, at 55.

168. Pope, *supra* note 137, at 45.

169. Zion & Yazzie, *supra* note 151, at 59 (“He refuted the false notion (which was a heresy in Catholic theology) that without grace, Indians could have no polity.”).

them) which was to be respected by the Spanish Crown.”¹⁷⁰ Scholars have commented that, “[de Vitoria’s] view of the essential humanity of Indians and their natural rights, however, did not fit nicely with the atrocities committed by these self-invited guests,”¹⁷¹ but let those atrocities not be an indictment of the Church at large.

In the true Spirit of the Church, another Spanish Dominican of the time added to de Vitoria’s theological offerings, Bartolomé de las Casas, who “took Vitoria’s academic discourse into Spanish royal venues and used it on behalf of the Indians.”¹⁷² De las Casas espoused Indians had the natural rights “to political liberty and property,”¹⁷³ and offered these declarations to the papacy:¹⁷⁴

Las Casas took the political debate over the rights of Indians to Pope Paul III who issued the bull *Sublimis Deus* in 1537. The bull responded to contemporary debates in Spain. Were Indians “humans” or were they the subjects of “natural slavery,” as found in Aristotle’s works? Did Indians have rights to liberty or to property? The bull resoundingly reaffirmed the humanity and reason of Indians.¹⁷⁵

Together, Vitoria and Las Casas would transition “medieval doctrines of natural law to modern conceptions of natural rights[.]”¹⁷⁶ Indian Law scholar, Cohen, conceded the bull, *Sublimis Deus*, attempted to be upheld in good faith throughout the years, but the papal bull really was a fundamental principle of Western law.¹⁷⁷ It might not have always worked, but its principles are secured in our Constitution—making us the great Nation that we are, where intellectual freedom can abound. From the work of the Spanish Dominicans, the world was able to create the Universal Declaration of Human Rights.¹⁷⁸ From the natural law, the rights of the Indigenous are protected on the international stage. The philosopher Jacques Maritain wrote of the Declaration:

170. *Id.* at 60.

171. Wiessner, *supra* note 164, at 59.

172. Zion & Yazzie, *supra* note 151, at 60.

173. ROMMEN, *supra* note 139, at xxiii.

174. Zion & Yazzie, *supra* note 151, at 60.

175. *Id.*

176. ROMMEN, *supra* note 139, at xxiii.

177. Zion & Yazzie, *supra* note 151, at 61.

178. *See generally* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

The human person possesses rights because of the very fact that it is a person, a whole, master of itself and of its acts, and which consequently is not merely a means to an end, but an end, an end which must be treated as such. The dignity of the human person? The expression means nothing if it does not signify that by virtue of natural law, the human person has the right to be respected, is the subject of rights, possesses rights.¹⁷⁹

Throughout philosophic debate, rights often come into conflict with utility principles. In his book, *Philosophy of Law*, Mark Tebbit discussed many theories that would either support the innate rights of Indigenous peoples or reject them.¹⁸⁰ Regarding the natural law, he wrote, “[t]he concept of a right is intimately connected with the concept of justice. If the modern natural lawyers are right to regard justice as a necessary feature of the law, the consequence of this is that the concept of a moral right is equally indispensable.”¹⁸¹ For Tebbit, “[t]he point of identifying and defending any specific right is to raise an obstacle against arguments from utility, whether this means the general welfare or overall aggregate of benefit, or merely more effective government.”¹⁸² In this sense, the natural lawyer would recognize the importance of human rights of all peoples. Still, it is an utter failure of understanding when some think of Vitoria’s natural law contributions as offering a loophole to Spanish conquest.¹⁸³ Robert J. Miller viewed Vitoria’s acknowledgment of human rights of all—including the Spanish right to travel, free trade, and preach the Gospels—to be authorization for a “just war” against the Natives.¹⁸⁴ He wrote, “[N]atives were bound by the Eurocentrically defined natural law rights of the Spanish [which provided] an ample excuse to dominate, defraud, and then engage in a ‘just war’ against native nations that dared to stop the Spanish from doing whatever they wished.”¹⁸⁵ This is a straw man’s argument¹⁸⁶ whereby Miller fails to see the logical fallacy in creating a distortion of Vitoria’s theology and then attacking the extreme mutation. His “defined natural law rights of

179. Araujo, *supra* note 130, at 316.

180. See generally TEBBIT, *supra* note 119 (examining several approaches to natural rights and natural law).

181. *Id.* at 119.

182. *Id.*

183. See Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1 (2005).

184. *Id.* at 12.

185. *Id.*

186. MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/straw%20man> (last visited Mar. 20, 2024).

the Spanish” do not truly exist, of course, since natural law rights are universal for all. If Native interests were to impede such rights to travel, trade, or preach—by force of death—then they were in violation of the natural law, themselves.

Shortly after the time of the Spanish Dominicans, Grotius would add that natural law “[norms] bind morally even if, though impossible . . . there were no God.”¹⁸⁷ Removing God from the natural law, removed what undergirds the entire theory, as “[n]atural law theories evolved in directions Grotius never intended. They came to regard the human predicament as essentially conflicted, apolitical, and even antisocial.”¹⁸⁸ Scholars have noted:

Though Grotius was a sincere Christian with no desire to secularize natural law theory, he believed for the sake of agreement that it was necessary to abandon speculation on the highest good, the ideal regime, or anything more elevated than a minimal version of Christian belief. This period generated the first proposals to approach morality from a purely empirical perspective in order to establish a science of morals. From this point on, the major theoreticians of natural law were lawyers and philosophers rather than theologians.¹⁸⁹

By the nineteenth-century, natural law was completely superseded by utilitarianism and other forms of positivism—borne from such empiricism—which see morality as an attempt to codify conventional social norms,¹⁹⁰ ones that may or may not exist to these natural law critics. Well, what consequences stem from the divorce of morality and law?¹⁹¹ The consequences are that the state “no longer respects a sphere of personal moral responsibility” which transcends it.¹⁹² By tying the natural law to rationality, its theoreticians betrayed natural law’s essence, and positivism vanquished the natural law way of justice.¹⁹³ It can never vanquish the idea itself.¹⁹⁴

As other authors have noted, sometimes finding the merits in natural law can be difficult as it has undergone these many permutations,¹⁹⁵ yet its

187. Pope, *supra* note 137, at 46.

188. *Id.*

189. *Id.*

190. *Id.* at 48.

191. ROMMEN, *supra* note 139, at 95-96.

192. *Id.*

193. *Id.*

194. *Id.*

195. See generally Pope, *supra* note 137, at 45-48.

central concepts are still a permeating force binding “cultures in various societies which share little else in common with each other or the modern world we are familiar with.”¹⁹⁶ Yet, “[Secularization], as we shall see, does not spell the death of natural law philosophy, because its roots go deeper than a dependency on any set of religious beliefs.”¹⁹⁷ The natural law in its truest form, as it was in Maritain’s influence on the Universal Declaration of Human Rights, would return to legal systems and still engulfs the minds of thinkers today.¹⁹⁸ In his introduction to the great work of Heinrich Rommen on the natural law, Russell Hittinger wrote, “Every generation, it is said, finds a new reason for the study of natural law.”¹⁹⁹ Perhaps today is the day Indian Law scholars will consider its value.

PART III. DEBUNKING THE DOCTRINE OF DISCOVERY AS TRULY ROOTED IN NATURAL LAW

Before applying the natural law-based justice, just restated, to ongoing Indian rights cases, an argument will undoubtedly obtrude that a nonstarter for cooperation with natural law exists because of one final historical misconception: the Doctrine of Discovery. By venturing to help Native Americans at all, Vitoria and Las Casas opened themselves up to centuries of criticism. Just in the last century, Felix Cohen would depict Vitoria as another Catholic promoter of the jurisprudential right, or doctrine, of discovery.²⁰⁰ Thankfully, some scholars have begun to set the record straight in legal scholarship. As Douglas Lind noted, a single doctrine of discovery thesis—that all European adventurers thought any lands they found to be God-given to them—originated with Felix Cohen and is plainly wrong.²⁰¹

It is nothing new for the Catholic Church and its theologians to face this criticism; there used to be an old lie told in schools that the Catholic Church opposed Christopher Columbus, a Catholic, from sailing the high seas because the Church believed the Earth was flat.²⁰² The reality is the Church opposed Columbus’s journey because they felt his crew would die at sea, and every educated European knew the Earth was round by the fifteenth-

196. TEBBIT, *supra* note 119, at 11.

197. *Id.* at 19.

198. *See generally* ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM (2022).

199. ROMMEN, *supra* note 139, at xiii.

200. Douglas Lind, *Doctrines of Discovery*, 13 WASH. U. JURIS. REV. 1, 5 (2020).

201. *Id.* at 6-7.

202. RODNEY STARK, BEARING FALSE WITNESS: DEBUNKING CENTURIES OF ANTI-CATHOLIC HISTORY 1 (2016).

century.²⁰³ By the nineteenth-century, “many vicious distortions and lies had entered the historical canon with the seal of distinguished scholarly approval, so long as they reflected badly on the Catholic Church.”²⁰⁴ The rhetoric stemmed from wars between the Protestants and Catholics after the Reformation, whereby Spain became a European power and its monarchs held the Catholic faith.²⁰⁵ Propagandists of Britain and other countries cast the Spanish as evil.²⁰⁶ Then, the Enlightenment came,²⁰⁷ and anti-religion thinkers, even to this day, distorted perceptions of history,²⁰⁸ such as “[b]eing entirely comfortable with slavery, the Catholic Church did nothing to oppose its introduction in the New World nor to make it more humane.”²⁰⁹ The effect of lying is severe, as one author noted, “[u]nfortunately, unlike the Columbus story, many of these equally spurious anti-Catholic accusations remain an accepted part of the Western historical heritage.”²¹⁰

A. *The Church Did Not Sanction Slavery or Oppression in the New World*

One accusation that permeates our culture, as evidenced by the outrage towards the Church with regards to colonialism, is that of the Doctrine of Discovery. It goes something like this:

Concealed behind the benevolent facade of the American *mission civilisatrice* is the brutal reality of invasion, slavery, forced relocation, genocide, land theft, ethnocide, and forcible denial of the right to self-determination wholly incompatible with contemporary understandings of U.S.-Indian history and with the notions of justice informing the human rights regime. It is perhaps impossible to overstate the magnitude of the human injustice perpetrated against Indian people in denial of their right to exist, on their aboriginal landbase, as self-determining peoples: indeed, the severity and duration of the harms endured by the original inhabitants of the

203. *Id.*

204. *Id.* at 2.

205. *Id.* at 2-3.

206. *Id.* at 3.

207. *Id.* at 4.

208. *Id.*

209. *Id.* at 5.

210. *Id.* at 2.

United States may well exceed those suffered by all other groups domestic and international.²¹¹

But from where did this perpetration of human injustice arise? Well, according to discredited law professor William Bradford,²¹² the “Metaphysics of Indian Hating” stemmed from a papal decree.²¹³ Embarrassing for academic legal scholarship, Bradford’s paper still circulates after nearly twenty years, and begins with a plainly false statement: “On May 3, 1493, Pope Clement called upon Spanish conquistadores to discover and conquer new lands in the Americas in order to draw ‘barbarous nations’ to the Christian faith.”²¹⁴ Pope Clement VII was not elected pope until the year 1523.²¹⁵ On May 3rd, 1493, Clement VII was fourteen years old.²¹⁶

The idea that the Church or the papacy promoted the Doctrine of Discovery needs a lot of proper context in legal scholarship. The Church, to its credit and to this day, distinguishes between the holiness of the institution and the corruptibility of men, including its own servants.²¹⁷ Indeed, the Church distinguishes the statements of its own Holy See, the Pope, as

ex cathedra is the theological term for a teaching that has been declared infallibly by the Roman Pontiff. In short, *ex cathedra* means that the pope can explicate an article of divine revelation under the guidance of the Holy Spirit and in full possession of his role as Peter’s successor. When he does so he is protected from error.²¹⁸

Our discussion has, so far, recapped what Vitoria and the best of the Catholic theologians thought at the time, that “[f]rom [natural law] principles adopted from Saint Thomas, Vitoria argued . . . the right to appropriate the things of

211. William Bradford, “*With a Very Great Blame on Our Hearts*”: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 19 (2003).

212. Andrew Kaczynski, *Trump Energy Official Who Said Controversial Comments Were Result of Hacking Resigns*, CNN (Sept. 1, 2017), <https://www.cnn.com/2017/08/31/politics/kfile-bradford-resigns/index.html>.

213. Bradford, *supra* note 211.

214. *Id.*; *cf. id.* at 175 (“The author takes full responsibility for all opinions and errors expressed herein.”).

215. *About Pope Clement VII*, BRITANNICA (Nov. 3, 2023), <https://www.britannica.com/biography/Clement-VII-pope>.

216. *Id.*

217. THOMAS E. WOODS, JR., *HOW THE CATHOLIC CHURCH BUILT WESTERN CIVILIZATION 2* (2005).

218. Kevin P. Considine, *Is There a List of Infallible Teachings?*, U.S. CATHOLIC (May 18, 2011), <https://uscatholic.org/articles/201105/is-there-a-list-of-infallible-teachings/>.

nature for one's own use belonged to all men regardless of their paganism or whatever barbarian vices they might possess."²¹⁹ Admittedly, "[i]t is true that several popes who served soon after Aquinas's day did not observe the moral obligation to oppose slavery."²²⁰ The two can be distinguished; both can be factually true, but only one is true by the natural law.

The argument by critics—that papal authority over non-believers on the basis of Christian natural law applied to aboriginal peoples in newly discovered territories²²¹—is not centered in fact. If the Church or Christendom wanted to “dominate the world,”²²² as some academics have suggested, why would popes condemn slavery? By the 1430s, when Spain was enslaving natives in the Canary Islands, Pope Eugene IV demanded an end to slavery under threat of excommunication.²²³ Rodney Stark explained, “Pope Pius II . . . and Pope Sixtus IV . . . followed with additional bulls condemning enslavement of Canary Islanders, which, obviously, had continued. What this episode displays is the weakness of papal authority at this time, not the indifference of the Church to the sin of slavery.”²²⁴

After the discovery of the New World, Pope Alexander VI issued the bull, *Inter caetera*, dividing the New World between Spain and Portugal, two massive sea-faring armies who sought the Pope's decree to bequeath these new lands, or open conflict would have ensued between them.²²⁵ Alexander VI, politically compromised in the interests of his own nepotism, still conditioned the assignment of these new lands between Spain and Portugal on the introduction of the name of Jesus Christ by righteous men.²²⁶ Naturally, the long journey across the sea to the New World did not attract many honest men, and, shortly after Spain sent its first missionaries to evangelize Natives, “the conquistadores intended to become independent of

219. WOODS, *supra* note 217, at 139.

220. STARK, *supra* note 202, at 170.

221. Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 719 (2004).

222. Joseph J. Heath, Esq., *The Doctrine of Christian Discovery: Its Fundamental Importance in United States Indian Law and the Need for Its Repudiation and Removal*, 10 ALB. GOV'T L. REV. 112, 121 (2017).

223. STARK, *supra* note 202, at 170-71.

224. *Id.* at 171.

225. GAZEGORZ GÓRANY & JANUSZ ROSIKOŃ, VATICAN SECRET ARCHIVES: UNKNOWN PAGES OF CHURCH HISTORY 184-85 (2020).

226. See Pope Alexander VI, *Inter Caetera* [Papal Bull on the Division of the Undiscovered World Between Spain and Portugal] (1493).

Spain . . . their administration was marked by crime and injustice.”²²⁷ The conquistadores were beyond the control of Spain—most traveled by private, not state-funded, expedition—and the missionaries then made quick enemies of the “lords” of the New World.²²⁸ It is sadly true that these conquistadores established colonial law, citing to their wicked reading of *Inter caetera*: “that if [Indians] did not submit to the power of the Catholic Church and its pope, Spanish conquistadors would wage war against them.”²²⁹ Yet, *Inter caetera* was spoken with the fallibility of man.²³⁰

The stage for conflict between conquistadores and missionaries was set, and Fr. Vitoria “responded that [Pope Alexander VI] had no temporal power over the Indians” to “give[] Indian lands to the Kings of Spain and Portugal.”²³¹ As discussed, these theologians of the New World took their observations of Indigenous natural rights—and those rights’ violations—to Pope Paul III who, in 1537,

issued a magnificent bull against New World slavery. But, it was somehow “lost” from the historical record until very recently, as were similar bulls by other popes. In the case of Pope Paul’s bull, its loss may well not have been due only to the Protestant bias of historians but also to scornful reactions to the fact that the pope attributed slavery to Satan.²³²

When Spanish leaders failed to respond, Pope Paul III issued another bull, again reemphasizing excommunication for those who practiced slavery in the New World, “[b]ut nothing happened. Soon, in addition to the brutal exploitation of the Indians, Spanish and Portuguese slave ships began to sail between Africa and the New World.”²³³ Stark wrote, “[t]he problem wasn’t that the Church failed to condemn slavery; it was that few heard it and most did not listen.”²³⁴ While “sometimes in the midst of slave societies, [some Christian] clergy themselves kept slaves,”²³⁵ that story of bad men is not reflective of the Truth, or the Church—it is not the natural law. Slavery was the oldest institution in human history—sanctioned by Aristotle—and not

227. GÓRANY & ROSIKOŃ, *supra* note 225, at 189.

228. *Id.*

229. Blumm, *supra* note 221, at 719.

230. Considine, *supra* note 218.

231. See Gary D. Meyers, *Different Sides of the Same Coin: A Comparative View of Indian Hunting and Fishing Rights in the United States and Canada*, 10 UCLA J. ENV’T. L. & POL’Y 67, 74 (1991).

232. STARK, *supra* note 202, at 171.

233. *Id.* at 172.

234. *Id.* at 173.

235. *Id.* at 184.

going to be stopped because of Pope Paul III or the Spanish crown.²³⁶ With the primary concern of saving souls, the missionaries did what they could in the times, as “the first hospital for Indians was established, and by 1534 there were schools for Indian girls. In 1539 the first printing press in the New World was set up, printing translations of all sorts of writings for the Indians. Orphanages, trade schools, and colleges followed, and even a university.”²³⁷ Fr. Mitch Pacwa provided a measured review of the age:

Generally, the missionaries were seen simply as extensions of the colonial powers who wanted to conquer, enslave, or exterminate the native peoples of the Americas. In reality, the history of the missionaries is quite mixed. Shamefully, some did serve to expand the colonial powers. Others stood up against colonists and defended the Native Americans from enslavement, degradation, and extermination. Some also gave their lives in order to spread faith in Jesus Christ, either at the hands of the Native Americans or at the hands of fellow European colonists. Most of them loved the Native Americans to whom they went with the Gospel of Christ.²³⁸

While the conquistadores became a great obstacle to the missionaries,²³⁹ researchers have continuously written on the papal commitment to helping those natives in need at the time:

By 1539 the Pope had excommunicated anyone guilty of enslaving or robbing the Indians. We might pause here to consider whether any previous conquest in history has ever proceeded thus, or whether the later English and Americans behaved similarly in their conquests of the North American Indians. (To raise the question is to answer it.)²⁴⁰

Faced with a seemingly insurmountable problem in the politics of the New World, the true Catholics of the day not only observed natural law, but, through it, birthed international law and rights²⁴¹ and, astoundingly, bestowed a faith so strong to native converts that “not even further crimes committed by the conquistadores were able to shake it.”²⁴²

236. GÓRANY & ROSIKOŃ, *supra* note 225, at 180.

237. DIANE MOCZAR, SEVEN LIES ABOUT CATHOLIC HISTORY: INFAMOUS MYTHS ABOUT THE CHURCH'S PAST AND HOW TO ANSWER THEM 157 (2010).

238. EMILY CAVINS, LILY OF THE MOHAWKS xii (2013).

239. GÓRANY & ROSIKOŃ, *supra* note 225, at 189.

240. MOCZAR, *supra* note 237, at 157.

241. WOODS, *supra* note 217, at 137.

242. GÓRANY & ROSIKOŃ, *supra* note 225, at 200.

B. “Natural Law” Jurisprudence as Applied to Indian Law Cases in America

Still, the permutations of “natural law” stretched from *Inter caetera* are found in early Indian Law cases. Some even call it the “doctrine of Christian discovery[.]”²⁴³ Whatever “masquerade” of the truth was used in the Indian Law cases, Vine Deloria Jr. was correct to write it was a “slight-of-hand.”²⁴⁴ The trick just was not based on natural law, Catholic social teaching, or true Christian understanding of the law.

First, the natural law provided for the doctrine of aboriginal title, as Fr. Vitoria proved when he “responded to those who advocated dispossessing Indians of their land, [saying] that heretics and sinners were also entitled to own property and could not be punished for their sins without trial.”²⁴⁵ Fr. Vitoria added, “there was *no legitimate title* to Indian lands *by right of discovery*, only by [just war] or voluntary consent.”²⁴⁶ John Lowndes wrote, “Vitoria rejected chauvinistic European title claims which were based on divine right or superior civilization.”²⁴⁷ Prof. Vera Cruz once noted, Indigenous peoples had been “‘true lords of their lands’ from time immemorial . . . the Spanish Crown had no right under natural law to grant their lands to anyone without their express consent.”²⁴⁸ When academics write that “[Europeans] never disagreed . . . that native people lost significant property and governmental rights immediately upon their first ‘discovery’ by a European country[.]”²⁴⁹ the scholarship loses its credibility.

Yes, many colonists believed this lie—that through *Inter caetera* through the natural law, they were entitled to lands of the New World. At the time of the first Indian Law cases, the U.S. had ambitions of expansion and revenue-raising²⁵⁰ as it acquired real estate at staggering rates.²⁵¹ To solve this problem, the Supreme Court, under Chief Justice John Marshall, was tasked with creating “a method of determining the scope of Indian property rights

243. Heath, *supra* note 222, at 112.

244. *Id.*

245. See Meyers, *supra* note 231.

246. Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897, 948 n.199 (2010).

247. Lowndes, *supra* note 158, at 82.

248. Raymond Cross, *Sovereign Bargains, Indian Takings and the Preservation of Indian Country in the 21st Century*, 38 PUB. LAND & RES. L. REV. 15, 52 n.177 (2018).

249. Miller, *supra* note 183, at 6.

250. Cross, *supra* note 248, at 47.

251. Lowndes, *supra* note 158, at 84.

and sovereignty,” of course without any guidance on such matters from the Constitution.²⁵²

Fr. Vitoria’s doctrine of aboriginal title and *Sublimis Deus* “led to . . . acceptance of the doctrine of aboriginal title, referred to by Chief Justice Marshall in *Johnson v. M’Intosh*. ”²⁵³ There, Marshall wrote the Doctrine of Discovery was “pompous,”²⁵⁴ and he “observ[ed] that restrictions on Indian sovereignty over their own lands ‘may be opposed to natural right, and to the usages of civilized nations.’”²⁵⁵ Yet, in *Johnson*, “Marshall could not confirm the Indian peoples’ inherent authority to alienate their lands to whomever they wished.”²⁵⁶

So, Marshall bifurcated the Indian peoples’ land titles into (1) the right to exclusive use and occupancy, or “fee,” and (2) paramount fee simple, in the hands of the U.S.²⁵⁷ Indians knew they lost their inherent right to sell their land to anyone, and settlers lost their so-called “God-given” natural liberty to acquire land from Indians.²⁵⁸ Marshall reduced natural law to a mere advisory capacity, subordinated now to positive law.²⁵⁹ Except many critics actually view this as an adoption carte blanche of the Doctrine of Discovery, that ““the ancient doctrine of Christian discovery and its subjugation of “heathen” Indians [was] extended by the federal government into a mythical doctrine that the U.S. Constitution allows for governmental authority over Indian nations and their lands.””²⁶⁰ But other scholars disagree. As Gary Meyers opined, “Given their acceptance of [aboriginal title], how did the European nations justify the assertion of complete dominion over Indian lands? The answer can be stated in two words: power and misunderstanding.”²⁶¹ Disease and war decreased native voices in representation, and colonists were simply not educated about property rights.²⁶² Perhaps Marshall yielded to a practical reality, a reality of force,²⁶³

252. *Id.* at 83.

253. See Meyers, *supra* note 231, at 75; *Johnson v. M’Intosh*, 21 U.S. 543, 590 (1823).

254. *Johnson*, 21 U.S. at 590.

255. RODNEY A. SMOLLA, 1 FEDERAL CIVIL RIGHTS ACTS § 6:2 (3d ed. 2023).

256. Cross, *supra* note 248, at 47.

257. *Id.*

258. *Id.* at 48.

259. Pomp, *supra* note 246 (“[N]atural rights of human beings to dispose of property that they held by virtue of possession did not apply to Indians in America.”).

260. Lavoie, *supra* note 21, at 91 (quoting Newcomb, Steve, *Five Hundred Years of Injustice, SHAMAN’S DRUM*, Fall 1992, paras. 8, 13).

261. Meyers, *supra* note 231, at 75.

262. *Id.*

263. SMOLLA, *supra*, note 255.

as he held “Conquest gives a title which the courts of the conqueror cannot deny.”²⁶⁴ *Johnson*’s more anti-religion critics have said Marshall might not have ruled on the philosophical natural law, but a “Christian” theological natural law—one in which civilization, of the Christianization type, *is* a law.²⁶⁵ The truth is, what Marshall did might have looked like natural law, it might have cited natural law, but *it was not* natural law, as Raymond Cross explains:

But Marshall’s theory of federal ownership of Indian lands would have left many sixteenth-century jurists and theologians dumbfounded. They would have flatly rejected his hypothesized charter of discovery as wrongfully dispossessing the Indians of their lands. The “Indios of New Spain” were considered by most reputable European theologians and jurists to be entitled to the possession and ownership of their aboriginal lands. But the key distinction between the *Johnson* decision and the ruling sixteenth-century opinion regarding the Indians’ land rights in the New World is this: the Spanish Crown of the sixteenth century sought to incorporate the Indian peoples into the larger political and social order, whereas the federal government of the United States sought only to incorporate the Indian lands into its domestic legal order.²⁶⁶

In fact, “whatever frailty the ‘discovery doctrine’ suffered as a matter of natural law, however, Marshall found its ultimate justification in positive law.”²⁶⁷ Marshall even seemed tormented by the decision as “[he] exhibited a self-conscious concern with the moral justification for a theory that allowed Europeans to extinguish Indian land title and to curb, by their very presence, pre-existing powers of tribal self-government.”²⁶⁸

The dangerousness of Marshall’s positive-law ruling, based in the utilitarian philosophy, would “return to haunt him in 1831.”²⁶⁹ Apparently emboldened under the illegitimate and warped understanding of the Doctrine of Discovery from *Johnson*, “Georgia attempted to forcibly remove the Cherokee Nation from the external boundaries of the state.”²⁷⁰ Cherokee in

264. *Johnson v. M’Intosh*, 21 U.S. 543, 589 (1823).

265. Kathleen Sands, *Territory, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases*, 36 AM. INDIAN L. REV. 253, 270 (2012).

266. Cross, *supra* note 248, at 52.

267. David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1579–80 (1996).

268. *Id.* at 1579.

269. Sands, *supra* note 265, at 270-71.

270. *Id.*

Georgia, at the time, were working towards domestic agriculture and Americanization,²⁷¹ when gold was discovered on Indian land.²⁷² The state of Georgia became greedy for the land, and Georgia expropriated the land to its counties.²⁷³ The Cherokee sued, and the case made it to the Supreme Court in *Cherokee Nation v. Georgia*.²⁷⁴

Many may be surprised to know that the Cherokee Nation brought the action under natural law, as “the Cherokees argued that they had lived in the land from time immemorial, ‘deriving their title from the Great Spirit, who is the common father of the human family, and to whom the whole earth belongs.’”²⁷⁵ Whether this is the first use of natural law by a non-Westerner in a recorded tribunal is for further scholars to discover. The Cherokee “reinterpreted the Discovery Doctrine as a lawful agreement among the European nations, rather than as a justification of force. Understood as a matter of positive law, the Discovery Doctrine could not be binding upon the Indian nations who had never accepted it.”²⁷⁶ Kathleen Sands wrote, “[b]y natural law as well as the law of nations, plaintiffs argued, the Cherokee Nation truly owned its lands.”²⁷⁷

Chief Justice Marshall never doubted “[t]he Cherokees’ legal right to their lands,”²⁷⁸ but he “would refuse to rule on this case.”²⁷⁹ Marshall would cite Article III of the Constitution,²⁸⁰ conclude that the Cherokee were not a foreign nation,²⁸¹ and hold that the Court therefore lacked jurisdiction.²⁸² Though Marshall thought Georgia’s removal “policy inhumane and abhorred (in particular) Georgia’s imperious cruelty to the Cherokees[,]” there was no

271. *Id.* at 276 (“And in fact many of the Cherokees had become ‘civilized Christians’ and had turned from hunting to agriculture. In addition, the Cherokee Nation had created for itself a constitution modeled on that of the United States. On the Euro-American side, however, racial prejudice could discount these adaptations. “Civilization” in any case was a double bind, because to succeed at it was to largely destroy the traditional life-ways of the Cherokees, as a tribal community belonging to a particular geographical place.”).

272. Pomp, *supra* note 246, at 946-47, 950.

273. *Id.*

274. Sands, *supra* note 265, at 272.

275. *Id.*

276. *Id.*

277. *Id.* at 273.

278. Pomp, *supra* note 246, at 949 n.199.

279. Sands, *supra* note 265, at 272.

280. *See* U.S. CONST. art. III, § 2. (Article III permits the Court jurisdiction between states and foreign nations).

281. *Cherokee Nation v. Georgia*, 30 U.S. 1, 14 (1831).

282. *Id.* at 20.

remedy to be found in Court.²⁸³ Marshall wrote, “A people once numerous, powerful, and truly independent . . . gradually sinking beneath our superior policy . . . until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence.”²⁸⁴ Nary a hint of natural law principles can be found in these words, but “no more than necessary” is certainly utilitarian.

Marshall’s most infamous language follows:

They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.²⁸⁵

However, in the final case of the Marshall Trilogy, *Worcester v. Georgia*,²⁸⁶ “Chief Justice Marshall would embrace this more lawful, rational version of the Discovery Doctrine laid out by the Cherokees [in *Cherokee Nation*], reversing what he had asserted in *Johnson v. M’Intosh*.”²⁸⁷ His apparent rationalization was that then, with conquest of the land nearing completion, Worcester’s missionary work must be done by “good example.”²⁸⁸ As others have noted, the Trilogy seems self-consciously concerned with finding justifications for European land seizing.²⁸⁹ Was Marshall truly concerned with the Doctrine of Discovery’s contradictions with natural law?²⁹⁰ Was he just subscribing to what he thought were its theological justifications?²⁹¹ Considering all the context of the time, I agree with other scholarship that considers “the Marshall trilogy as remarkable for

283. Sands, *supra* note 265, at 272.

284. *Cherokee Nation*, 30 U.S. at 15.

285. *Id.* at 17.

286. *See generally* *Worcester v. Georgia*, 31 U.S. 515, 521 (1832).

287. Sands, *supra* note 265, at 273.

288. *Id.* at 316.

289. Pomp, *supra* note 246, at 949 n.199 (“Dean Getches describes the Marshall trilogy as exhibiting ‘a self-conscious concern with the moral justification for a theory that allowed Europeans to extinguish Indian land title and to curb, by their very presence, pre-existing powers of tribal self-government.’”).

290. *Id.* (“Some ‘scholars question the authenticity of Marshall’s professed agony over the morality of the doctrine and its contradictions with natural law.’”).

291. Sands, *supra* note 265, at 269.

their limitations on state power and recognition of tribal autonomy. It is difficult to imagine the young nation's Court being less restrictive of Indian rights in such hotly charged cases."²⁹²

Critics write the Doctrine of Discovery is still living on in Indian Law cases today: "no doubt that the doctrine of Christian discovery is still very much alive in the federal courts, and it is being used . . . in detrimental rulings, against Indian peoples."²⁹³ From the anti-Christian perspective, "the federal courts have consistently held all title, except the Indian right of occupancy, transferred to the Christian discoverer nation. This right of occupancy can be terminated at will by the dominant government; and that Native sovereignty was significantly limited upon discovery."²⁹⁴ Now, those criticisms may be true in the strictest sense, but those unfortunate rulings are not implicitly Christian. Critics continue that because of religious biases, the Indian natural rights of self-determination and more were lost.²⁹⁵ They claim "repudiation [of the Doctrine of Discovery] will not be possible until we admit the complexity of the problem and the series of racist rulings[.]"²⁹⁶ Prior to July of 2022 and Pope Francis's trip to Canada, questions arose as to what more public repudiation could occur, since *Sublimis Deus* in 1537 already did repudiate the Doctrine of Discovery—in some real sense—making the situation "rather confusing" and blurring "what can be done."²⁹⁷ Nevertheless, in March of 2023, the Vatican issued a formal statement "repudiat[ing] those concepts that fail to recognize the inherent human rights of Indigenous peoples, including what has become known as the legal and political 'doctrine of discovery.'"²⁹⁸ The Vatican appropriately noted, "the content of several papal bulls 'w[as] manipulated for political purposes by competing colonial powers in order to justify immoral[ity].'"²⁹⁹ Colonial expansion that ignored human rights did not accord with proclaimed principles of natural law,³⁰⁰ so the clamoring for exposure, renouncement,

292. Getches, *supra* note 267, at 1581.

293. Heath, *supra* note 222, at 136; *see also* Miller, *supra* note 183 at 2.

294. Heath, *supra* note 222, at 152.

295. Miller, *supra* note 183, at 3.

296. Heath, *supra* note 222, at 151.

297. Lavoie, *supra* note 21, at 91.

298. *Joint Statement of the Dicastries for Culture and Education and for Promoting Integral Human Development on the "Doctrine of Discovery"*, THE HOLY SEE, (Mar. 3, 2023), <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2023/03/30/230330b.html>.

299. Cindy Wooden, *Responding to Indigenous, Vatican disavows 'doctrine of discovery'*, USCCB (Mar. 30, 2023), <https://www.usccb.org/news/2023/responding-indigenous-vatican-disavows-doctrine-discovery>.

300. Heath, *supra* note 222, at 115.

and annulment of the doctrine germinated.³⁰¹ Now that the formality has occurred, and considering the papal visit to Canada and the numerous apologies referenced in the Introduction of this Article, another point needs mentioning. These same critics want to work in religious and academic communities, too, to pressure the Vatican to remove its “moral” cover.³⁰² All this does is try to destroy the church as an institution. Nothing good comes from this, and yet these critics want the Church and the government to “assist Indian nations in their efforts to preserve sovereignty and treaty rights[.]”³⁰³ Is that the true end of the means used? Is justice in the court of public opinion worth not having the Christian Churches at all?

Legal scholarship should be intellectually honest and distinguish the Church from actors operating under a guise. It should put forth an end to the deception and obfuscation and promote a proper understanding of the natural law. The Church, as an institution and an ethos, has maintained its mission toward Indigenous peoples across the globe. Where men failed throughout history is an opportunity for men today. Some call for justice in a court of public opinion, and others call for Congressional action—via the same positive law that deprived Native Americans of too much in the Marshall Trilogy.³⁰⁴ It is baffling why more positive law solutions would be called for to remedy a bastardization of the natural law. The natural law *is* the solution to Indian Law problems, so, perhaps, through a realization of how Christian and Native theologies are similar, tribal courts and federal judges can begin to consider how natural law would apply.

PART IV. NATIVE AND CATHOLIC THEOLOGY UNDER THE NATURAL LAW

It is an appropriate perception that no two native theologies are entirely alike.³⁰⁵ Much more, it is understood that comparing native theology to true

301. *Id.* at 155.

302. *Id.* at 156.

303. *Id.*

304. Miller, *supra* note 183, at 94 (“My suggestion relies on Congress and the idea that positive law . . . My suggestion is not really radical nor that dangerous.”).

305. Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387, 403 (2012) (“American Indian religious experiences are quite diverse and they are evolving.”); *see also* John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13, 17 (1991).

Catholic theology may be an oversimplification, at the very least.³⁰⁶ It is not this Article's goal to rehash differences in these religions, or try to fully combine native and Christian theologies,³⁰⁷ or to try to reconcile them for personal fulfillment.³⁰⁸ Though, I reject *ad hominem* arguments that it is colonial or "whitewashing" to point out certain bedrock similarities. However, Christianity—which "institutes natural laws which then govern the operation of physical nature"—and tribal religions are not necessarily diametrically opposed.³⁰⁹ If Native cultures combine story, place, an ethic, a creation story, sacred sites, and prayer,³¹⁰ then these tribal religions are quite like Christian theology, centered in the natural law. Remember the Cherokee's brief in *Cherokee Nation*—they argued they had a right to the land from "the Great Spirit, who is the common father of the human family, and to whom the whole earth belongs."³¹¹ The similarities to Christian theology are plentiful, including God's bestowing of the earth to man,³¹² implicating the natural right to one's lands.³¹³ Native and Christian creation stories explain the principles for people to thrive on Earth, the covenants to live in harmony.³¹⁴ Both espouse roots of natural law, in its truest form.

A. *Perceptions of the Natural Law Ethos in Native Theology*

Indian justice systems have equally observed natural law for millennia, as "Indian civilization in North America included participatory democracy rich in its respect for individual human dignity, yet steeped in values of

306. Rhodes, *supra* note 305, at 17 ("Reliance on Western conventions, such as the English language and the Judeo-Christian conception of religion, to explain the spirituality of American Indians is inherently problematic.").

307. STEVEN CHARLESTON, *THE FOUR VISION QUESTS OF JESUS 3* (2015) (explaining his goal was to "to make a contribution toward the continuing development of a Native American Christian theology based on the Native Covenant[.]").

308. *Id.* at 151 ("Is . . . injustice aided and perpetuated by Christianity? Is the Christian faith part of the problem or part of the solution? . . . [I]s the acceptance of Christianity by Native Americans only window dressing for white racism, or is it a fulfillment of our own ancient covenant with God?").

309. *Cf.* Sands, *supra* note 265, at 293.

310. Carpenter, *supra* note 305, at 402.

311. Sands, *supra* note 265 at 272.

312. *See Psalms* 115:16 (Douay-Rheims) ("The heaven of heaven is the Lord's: but the earth he has given to the children of men.").

313. *See SUMMA THEOLOGICA*, *supra* note 25, Q. 66, art. 2.

314. Carpenter, *supra* note 305, at 404-05.

community.”³¹⁵ As philosopher J. Budziszewski explained, this knowledge is absolutely crucial for further pursuits of justice:

[N]atural law is especially pertinent to politics just because it is written on the heart, for that makes it a standard for believers and unbelievers alike; not only is it right for all, but at some level it is known to all. Even the pagans knew it. They caught hints of it in the plays of Euripides, they heard its name in the treatises of the Stoics, they saw it reflected in the commentaries of the Roman lawyers, and all these things made sense to them because, like us, they felt it pressing upon their inwards: prior to art, prior to philosophy, prior to statecraft.³¹⁶

Native American theology,³¹⁷ broadly speaking, has a natural moral law foundation no different than that of true Catholic teaching, despite best arguments otherwise. Consider the Ancestral Puebloans, whose perceptions informed their “fundamental prescriptions for . . . law and behavior. [They bore a sacred responsibility] to maintain the balance and the rhythm of the whole—for the sake of all the people, spirits and lives in the world.”³¹⁸ Native theologies state precepts of natural law, like the “*sa’ah naaghai bik’eh hozho*, which states that ‘the conditions for health and well-being are harmony within and connection to the physical/spiritual world.’”³¹⁹ The natural law also orientates us to the natural inclinations of goodness in accordance with the nature we have in common with the world.³²⁰

When Native Americans, generally, see their essence—what is central to their survival—as land, culture and community,³²¹ then an argument that tribes are only spatially-orientated fails.³²² Nor is natural-law-rooted Catholic

315. SMOLLA, *supra*, note 255; *see also* Zion & Yazzie, *supra* note 151, at 70 (“The many observations of Indian society sent back to Europe clearly showed that there was such a thing as Indian law and government.”).

316. J. BUDZISZEWSKI, *WRITTEN ON THE HEART: THE CASE FOR NATURAL LAW* 11 (1997).

317. Carpenter, *supra* note 305, at 403 (“Yet, the oft-repeated mantra that Indians ‘have no word for religion’ is surely an over-generalization.”); *cf.* Rhodes, *supra* note 305, at 18.

318. *See* John W. Ragsdale, Jr., *Anasazi Jurisprudence*, 22 AM. INDIAN L. REV. 393, 402 (1998).

319. Carpenter, *supra* note 305, at 402-03.

320. *See* SUMMA THEOLOGICA, *supra* note 25, art. 2.

321. Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 197 (2001).

322. *Cf.* Amber L. McDonald, *Secularizing the Sacrosanct: Defining “Sacred” for Native American Sacred Sites Protection Legislation*, 33 HOFSTRA L. REV. 751, 756-757 (2004) (“Unlike Catholicism, in which the faith’s practitioners may worship at any Catholic church, in traditional tribal religion the particular location in which a ceremony is performed is crucial to that ceremony’s success. ‘To substitute an alternate area in place of a sacred site would even be viewed as sacrilegious.’ Finally, sacred sites

theology merely temporally-based. Man's understanding of eternity is universal, existing in us everywhere all at once.³²³ This same essence is what Native theologians have related to.³²⁴ There are even claims "that in designing the Constitution, the framers were influenced by the experiences, political organization, and theories of the Six Nation Iroquois Confederacy (or Haudenosaunee)."³²⁵ Precisely, some have dispensed with the myth that tribes had no law, stating, "European philosophers such as Locke and Rousseau drew on the example of the Indians in developing theories of natural law, and several influential participants in the Philadelphia Convention, most notably Benjamin Franklin, were students of the Iroquois Confederacy."³²⁶

However, long after St. Thomas Aquinas, there are still difficulties in knowing true natural law which make its applications in legal systems difficult.³²⁷ Some authors take "a mediating position whereby natural law is partially known intuitively, and partially known *via* discursive reasoning."³²⁸ Regardless, natural law has to be relevant in Indian Law cases:

[T]he perennial appeal of natural law lies in the idea that the law is there to be found and as such can be seen as a rock upon which we can depend, as a reliable arbiter or point of reference in disputes and conflicts. It also implies that there are natural limitations on what can be enacted or enforced as positive law, and still properly be regarded as law.³²⁹

Historical land and colonization battles, like those in the Marshall Trilogy, caused tension and diverged understanding of natural law roots

cannot be moved or changed as manmade structures can. Altering the physical structure of a sacred place is believed to weaken that site's spiritual power, making rituals and prayers ineffective, and may even destroy an entire 'site-specific religion.' Indeed, many Christians would maintain that to tie their god to a specific location or an individual sacred site would 'reduc[e] Him to a façade of power and intelligence.' Rather, for Christians, 'the places at which religious experiences take place are of no consequence . . . God is everywhere at all times, and to define divinity according to sacred or holy places is to limit His powers beyond reason.' These Christian beliefs exemplify the fundamental difference between traditional Native American religious practices and those of other religions, as well as the source of much misunderstanding: Christianity, like most world religions, resides in 'the temporal dimension,' while tribal religions are 'basically spatially located.'")

323. See SUMMA THEOLOGICA, *supra* note 25, art. 2.

324. See generally VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS 101-24 (Univ. of Okla. Press ed. 1988) (1969).

325. SMOLLA, *supra* note 255, § 6:1 at n.3.

326. *Id.*; Zion & Yazzie, *supra* note 151, at 70.

327. See HAINES & FULFORD, *supra* note 123, at 47.

328. *Id.*

329. TEBBIT, *supra* note 119, at 12-13.

amongst these two theologies.³³⁰ As Kathleen Sands noted, “[g]iven that the tribal relationship to land lies at the heart of Native spirituality, [Christian] commodification of land also decimated tribal religion. Politically, the ending of tribal land ownership entailed the disappearance of Indian nations as such. All of this was intended by both the government and the missionaries.”³³¹ Today, misunderstandings continue over exactly how tribes were divested of their lands—again, not through natural law or proper Christian theology—and now “Indigenous peoples are often placed in the difficult position of being beholden to the government to continue to engage in centuries-old practices and ceremonies.”³³² Legally, tribes struggle to protect their religions in a system not looking at what comports with precepts of the natural law, but a government that observes religion through a narrow lens—some say it is a double standard in Supreme Court jurisprudence.³³³ It puts Native Americans in a terribly disadvantaged position, as sacred sites are destroyed³³⁴ because they do not comport with religion so defined.³³⁵ Practically, just consider the Navajo who worshipped at a site for generations before the creation of the Glen Canyon Dam drowned their gods.³³⁶ What would be the reaction of Catholics if the Garden of Gethsemane³³⁷ were drowned?

Readers undoubtedly wonder whether this natural law proposal is advocating for Indians to find sacred site protections³³⁸ under religious

330. Meyers, *supra* note 231, at 75-76 (“The view that the Indian peoples belonged to the Earth because it supported their needs, that they were part of the land rather than separate from it, and thus could ‘own’ no portion of it, was both foreign to and misunderstood by European cultures. [B]ecause the white men would not understand this, . . . the Indian nations had to define [in European legal terms] in formal treaties what was essentially a country of the mind.”).

331. Sands, *supra* note 265, at 313.

332. Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1297 (2021).

333. *See id.*

334. McDonald, *supra* note 322, at 783 (“Moreover, with the destruction of each sacred site, we risk the loss of entire religions, something that deprives us all.”).

335. Sands, *supra* note 265, at 320. (“‘Religion,’ and the constitutional questions it raises, pulls us back to our political origins, to seek that which lies before and beyond law. Returning to this origin as a place to dig for the questions, rather than a place to bury them, perhaps the ground will speak to us again.”).

336. McDonald, *supra* note 322, at 751-52.

337. Where Jesus underwent his anguish and was arrested after being betrayed by Judas Iscariot. *See Matthew* 26:36-56.

338. Rhodes, *supra* note 305, at 22 (“Sacred site claims arise when the spiritual and interdependent relationship of Native Americans with all living things, including land, is threatened by development. This relationship is at the core of Indian religions; it defines the identities of Native Americans. Sacred site litigation aims to preserve and protect such religious passions.”).

freedom principles of our Constitution, but as other scholars noted, “religion must be defined with respect to other constitutional principles, rather than with respect to a list of religions or definitions of religion extrinsic to the Constitution.”³³⁹ The boarding school fiasco, shamefully another suppression of Indigenous religion by a policy of forced assimilation through religious reeducation, has come to pass. Will obstacles to sacred site protection remain?³⁴⁰

There are arguments that natural law ethics theory in Indian Law cases could not work at all, as David Getches put it, “I am not convinced that asking courts to apply notions of justice or equity in individual cases will provide sufficient or consistent support for tribal government.”³⁴¹ In considering Western rights from the “social-compact” theory, Indian Law scholar Rebecca Tsosie wrote how a common or universal understanding of rights is assimilationist or essentialist and contrary to not only Indian sovereignty but Indian self-determination, too.³⁴² Scholars in this camp want the “ideal world” where “there would be no role for [government] in American Indian religion,”³⁴³ whereby tribes are truly free to live a “different and beautiful way of life.”³⁴⁴ To some, conceptions of rights derived from natural law are absolutist, and “[t]he Western liberal view of individual rights directly conflicts with the tribal view of social connection and collective rights, and promotes an intolerance for different policies.”³⁴⁵

Again, positive law enactments are still preferred in Indian Law, as Kristen Carpenter wrote, “I am persuaded, however, that Congress and the Executive Branch, when motivated to address Indian issues, are better situated than the courts to negotiate with tribal governments over the contours of religious accommodation.”³⁴⁶ The late Justice Scalia once offered a perspective that the political process is the best course for redress for Indian tribes.³⁴⁷ No matter what, according to Indian Law advocates, these arguments must recognize Indian duality in their sovereignty to continue

339. Sands, *supra* note 265, at 320.

340. Barclay & Steele, *supra* note 332, at 1308-09.

341. Getches, *supra* note 267, at 1581-82.

342. Rebecca Tsosie, *Separate Sovereigns, Civil Rights, and the Sacred Text: The Legacy of Justice Thurgood Marshall's Indian Law Jurisprudence*, 26 ARIZ. ST. L.J. 495, 531-33 (1994).

343. Carpenter, *supra* note 305, at 477.

344. *Id.*

345. Tsosie, *supra* note 342, at 531.

346. Carpenter, *supra* note 305, at 478.

347. Rhodes, *supra* note 305, at 69.

pluralism and multiculturalism,³⁴⁸ amidst fears the “Court forsakes foundation principles and expands the ambit of control over Indian tribes to include not just congressional but also judicial power to redefine and restrict tribal sovereignty.”³⁴⁹ I hesitate to fully embrace the positivist approach—especially considering all the anti-Christian and anti-Catholic rhetoric in this field—because it begs another question: what exact type of justice is being proposed? Is this a precisely defined, respectful of faith and cultures, and rationally understood prospective justice for future cases? Or are we merely discussing reparations for the victims of sins of long deceased generations?

B. *Natural Law Ethics as Legal Theory for Indian Law Cases*

Interpreting reality solely based on perception is treacherous when, as rational beings, the opportunity exists to contrast perceptions of objective truth. Case in point—there is an awful lot of rejection for natural principles and their applications in the Highest Court, yet, where is the proof that the natural law theory does not work? Space is wide open for application of natural law in Indian rights cases before legal positivism takes a firmer grasp. This is an echo of the call to make justice what it is and not what Congress says it is.³⁵⁰

Saint Pope John Paul II affirmed “natural law is inscribed in the heart of every person, is grounded in the human good, and gives clear directives regarding right and wrong acts that can never be legitimately violated.”³⁵¹ Remember the Spanish theologians of the sixteenth-century who taught that “[t]he lands of Native Americans could not be taken without their *consent* except in the case of just war.”³⁵² Using their teachings, using *Sublimis Deus*,³⁵³ post-colonial federal Indian policy—treaty making—fully embraced a model of *consent*.³⁵⁴ Scott Taylor wrote, “[The] historical picture of federal relations with Native American governments shows that the consent doctrine was embodied in the Constitution, treaty making, and federal legislation.”³⁵⁵

348. Tsosie, *supra* note 342, at 532-33.

349. Getches, *supra* note 267, at 1581-82.

350. Scott A. Taylor, *The Native American Law Opinions of Judge Noonan: Do We Hear the Faint Voice of Bartólome De Las Casas?*, 1 U. ST. THOMAS L.J. 148, 167 (2003).

351. Pope, *supra* note 137, at 58.

352. Taylor, *supra* note 350, at 148.

353. See generally Pope Paul III, *Sublimis Deus* [Papal Bull on The Sublime God] (1537).

354. Taylor, *supra* note 350, at 148 (“The federal consent model was the cornerstone of federal policy dealing with Native Americans from the inception of the United States until the termination of treaty making in 1871.”).

355. *Id.* at 162.

Taylor is one of the few to ever consider the voice of the Spanish theologians—the natural law—in American Indian Law cases today, and he showed that not only was the consent model just, but that corrupted men also just cheated in their use of the natural law.³⁵⁶ He wrote, “[i]n the case of Spain, the preconditions for just war were presumed and the enforcement of the legal standard became ritualistic and meaningless. For the British (and later the Americans), the consent model was undermined and became factually unjust in application through sharp practices and white encroachment.”³⁵⁷

Therefore, natural rights lawyers must quickly recognize the principles at risk in Indian Law cases. First, with respect to consent, tribal sovereignty is consistently threatened. Tribal sovereignty entails “the right of federally recognized tribes to govern themselves, their lands, and their people. It also includes the existence of a government-to-government relationship with the United States.”³⁵⁸ This native right—the right to tribal sovereignty—comes from the treaties consented to by both parties.³⁵⁹ As native rights advocates write, “For a healthy government-to-government relationship to exist the US government needs to respect the binding agreements spelled out in their own treaties.”³⁶⁰ John Echohawk, Executive Director of the Native American Rights Fund (NARF) wrote, “Unauthorized and unconsented intrusions on tribal sovereignty are antithetical to tribal sovereignty and tribal treaty rights.”³⁶¹

Does today’s most infamous Indian Law case, *Oklahoma v. Castro-Huerta*,³⁶² with its intrusion on tribal sovereignty, give any hope for natural law justice? In *Castro-Huerta*, the Court’s majority ruled state interests can outweigh tribal interests in areas typically reserved to tribal sovereignty, like criminal jurisdiction.³⁶³ As Justice Gorsuch’s dissent explains, the Court recognized tribal sovereignty can require exclusion of state authority, but the Court erroneously applied a balancing test which outweighs tribal

356. *Id.* at 163.

357. *Id.*

358. *FAQ*, NATIVE AM. RTS. FUND, <https://www.narf.org/frequently-asked-questions/> (last visited Sep. 1, 2022).

359. *Id.*

360. *Id.*

361. *NARF/NCAI Joint Statement on SCOTUS Ruling on Castro-Huerta v. Oklahoma*, NATIVE AM. RTS. FUND (July 7, 2022), <https://www.narf.org/castro-huerta-v-oklahoma-scotus-ruling/>.

362. *See generally* *Oklahoma v. Castro-Huerta*, 597 U.S. 629 (2022).

363. *Id.* at 684 (Gorsuch, J., dissenting).

interests.³⁶⁴ Since *Worcester*, and Marshall's reversal of limiting tribal interests, "Native American Tribes retain their sovereignty unless and until Congress ordains otherwise. *Worcester* proved that, even in the '[c]ourts of the conqueror,' *the rule of law meant something.*"³⁶⁵ Perhaps, the justice that Justice Gorsuch seeks is synonymous with the distant and unchanging natural law. Justice Gorsuch's dissent explains, as it criticizes the ever-changing law and jurisprudence of the Court:

The Court today may ignore a clear jurisdictional rule prescribed by statute and choose to apply its own balancing test instead. The Court may misapply that balancing test in an effort to address one State's professed "law and order" concerns. In the process, the Court may even risk unsettling longstanding and clear jurisdictional rules nationwide.

...

. . . Today, the tables turn. Oklahoma's courts exercised the fortitude to stand athwart their own State's lawless disregard of the Cherokee's sovereignty. Now, at the bidding of Oklahoma's executive branch, this Court unravels those lower-court decisions, defies Congress's statutes requiring tribal *consent*, *offers its own consent* in place of the Tribe's, and allows Oklahoma to intrude on a feature of tribal sovereignty recognized since the founding. One can only hope the political branches and future courts will do their duty to honor this Nation's promises even as we have failed today to do our own.³⁶⁶

In an ever-secular society, how would one argue this is again Christianity or the Doctrine of Discovery at work? Present by omission, the natural law and its precepts undergird Justice Gorsuch's jurisprudence. Taylor asked, "Does natural law have any enduring validity in the area of federal Indian law?"³⁶⁷ I ask it again, realizing the reality may be quite difficult to achieve.³⁶⁸ Protecting Indian rights in federal government can also only work to a certain degree, and tribal communities must also incorporate the natural

364. *Id.*

365. *Id.* at 657 (Gorsuch, J., dissenting) (emphasis added).

366. *Id.* at 694-96 (Gorsuch, J., dissenting) (emphasis added).

367. Taylor, *supra* note 350, at 163.

368. *Id.* at 180-81.

law because “only Native people can decide what the ultimate contours of Native sovereignty will be.”³⁶⁹

In conjunction with the Catholic Church, Catholic theology, and Catholic Social Teaching, many tribal communities already have begun this process. In the 2019 report by the United States Conference of Catholic Bishops, the Church noted a “vibrancy and sacredness constituting Catholic faith and Native American cultures.”³⁷⁰ They are “two currents, and how they merge into a single source of spirituality and evangelization” was one of the report’s goals.³⁷¹ For the Church, “[t]he task of [missionaries] is to immerse themselves in the culture of the people, and to borrow and incorporate the elements of the Native American narrative that are in tune with the Gospel—such elements as the Native American sense of restorative justice,³⁷² family-centered spirituality, and a historical environmental reverence.”³⁷³

Perhaps the most unbelievable truth to those who spread anti-Catholic rhetoric is that “[t]hrough the work of parishes, missions, and Catholic schools[,] Native American cultures are enhanced, strengthened, and revitalized.”³⁷⁴ The report states, “Catholic schools continue to be places where high academic achievement, Native American cultural, linguistic fluency, and Catholic faith are attained and strengthened. Often, Catholic schools are the only alternative to the deplorable state of many Tribal Schools and the only way many Native American communities can escape endemic poverty.”³⁷⁵ Together with tribes, the USCCB calls for “pressure on Congress to change the laws governing reservations” and to “[w]ork within tribal government structure for foundational transformation that deals with the root causes of poverty.”³⁷⁶ Together, Christians and Native Americans can set the record straight and get to the truth. Together, Christians and Native Americans can reaffirm the objective truth. Natural law is the way.

369. Coffey & Tsosie, *supra* note 321, at 209-10.

370. TWO RIVERS, *supra* note 1 at 1.

371. *Id.*

372. *Id.* at 25 (“Native cultures also provide principles that enrich the rest of American culture. One of these is the principle of restorative justice. Restorative justice has developed from the Native American cultures to challenge how the criminal justice system functions . . .”).

373. *Id.* at 2.

374. *Id.* at 25.

375. *Id.* at 27.

376. *Id.*

CONCLUSION

In sum, historical debates have been addressed, just as natural law-based justice has been restated, and natural law's application to Indian rights cases has been made clear, to restore faith in Catholic-Native relations.³⁷⁷ As lawyers of natural law or Native rights go forward, they must use the natural law and written (human) law in accordance with each other. In his reply to Objection One of Article 5 of Question 94, St. Thomas Aquinas wrote, "The written law is . . . given for the correction of the natural law, either because it supplies what was wanting to the natural law; or because the natural law was perverted in the hearts of some men[.]"³⁷⁸ This is the often pointed-to weakness of the natural law, as Professor D. Brian Scarnecchia summarized succinctly, "because of original sin reasonable minds differ as to [natural law's] precepts . . . it is nearly impossible to refer to a higher law in the process of adjudication."³⁷⁹ Mark Tebbit, as well, warns us of natural law pursuits:

The injunction is always to try to adhere to and promote the good, while accepting that there are sometimes unavoidable negative or evil side-effects - hence 'double effect' - of actions that have to be taken for the common good. . . . The central constraint is that these side-effects can never be directly intended, or chosen as a means to a greater end.³⁸⁰

Yet, I propose we still must try. In the spirits of Christians and Native Americans, the "most troubling conflicts are . . . between good and good."³⁸¹ This writing presents these options, these mindsets, to showcase the things recently or long-since repudiated, in the hope researchers can stick to the facts and recall what is written on their hearts. In doing this, Native rights lawyers can look at the injustices still occurring in Native communities and try a natural law approach. Guilting each other is not going to lead us anywhere. In these times, new American and Canadian governments are in place that bear little resemblance to the burgeoning and disjointed ones of the past. There are better men and women, ethically trained, to handle serious issues. This is not the same papacy of the pre-Columbus age. Equally, that is

377. See Lantigua, *supra* note 26, at 177.

378. See SUMMA THEOLOGICA, *supra* note 25, art. 5.

379. SCARNECCHIA, *supra* note 131, at 35.

380. TEBBIT, *supra* note 119, at 12-13.

381. RESIDENT PEOPLES AND NATIONAL PARKS: SOCIAL DILEMMAS AND STRATEGIES IN INTERNATIONAL CONSERVATION, at xix (Patrick C. West & Steven R. Brechin eds., 1991).

why apologies, as expected, are not good enough to quell misplaced and misinformed anger.³⁸² Fr. Vitoria noted that, while divine law is the only source of Church power, “error and even grave sin could be present in non-dogmatic papal decisions.”³⁸³ Diane Moczar adds, “[i]n all human affairs, no matter how good the cause, the fallible human beings involved are capable of both sin and error.”³⁸⁴

It is time to acknowledge the fact that we are all sinners and forgive each other. If we reconcile in this way, we can protect native rights, like tribal sovereignty or religious freedom, and we can heal from the damage of the residential schools. Graves, bodies or no bodies,³⁸⁵ the real Church is working tirelessly to correct injustices in accordance with natural law. To prove the changing of the winds, “in October 2012, St. Kateri Tekakwitha, was canonized as the first Native American saint, and the causes for canonization of the La Florida Martyrs and Nicholas Black Elk have begun.”³⁸⁶ Offered by one devotee of St. Kateri:

[H]er purity shines like a beacon into the dark recesses of our doubts and fears. I hope you who read this work come to know Kateri by seeing how she met the challenges and hardships of her time with love and virtue. I hope you will admire her, as I do, for questioning authority, following her heart, and living as she needed to live. And above all, I hope you learn to love her, as I do, for her unflinching goodness and faith, a timeless example for us all to follow.³⁸⁷

As one Roman Catholic wrote in a report, “[t]he Catholic Church has a great potential with the many people that compose it, the capillarity of its institutions and structures on the ground and the great wealth it has at its disposal.”³⁸⁸ Seemingly, that is exactly what Pope Francis promotes

382. Nicole Winfield & Rob Gillies, *Canada says pope’s apology to Indigenous not enough*, AP NEWS (July 28, 2022) <https://apnews.com/article/pope-francis-world-news-religion-sexual-abuse-by-clergy-b50b62fd83c3e414b346c20b0008552e?>.

383. See 2 Robert L. Fastiggi, *Francisco de Vitoria (c. 1483-1546)*, in *ENCYCLOPEDIA OF CATHOLIC SOCIAL THOUGHT, SCIENCE AND SOCIAL POLICY*, at 1126 (ML. Coulter et al. eds., 2007).

384. MOCZAR *supra* note 237, at 171.

385. John Daniel Davidson, *Not One Corpse Has Been Found In The ‘Mass Grave’ Of Indigenous Children in Canada*, THE FEDERALIST (Jan. 19, 2022), <https://thefederalist.com/2022/01/19/not-one-corpse-has-been-found-in-the-mass-grave-of-indigenous-children-in-canada/>.

386. TWO RIVERS, *supra* note 1, at 1.

387. JACK CASEY, *KATERI: BEACON IN THE WILDERNESS* ix (2021).

388. ALEXANDER WIDMER, EUROPEAN INSTITUTE OF INTERNATIONAL STUDIES, *THE CATHOLIC CHURCH AND ITS CONTRIBUTION TO THE SDGs: AN UNSEIZED POTENTIAL?* 12 (Jan. 11, 2021), <https://www.ieeiweb.eu/wp-content/uploads/2021/01/Report-Catholic-Church.pdf>.

throughout *Laudato Si'*.³⁸⁹ He notes in Section III, “The work of the Church seeks not only to remind everyone of the duty to care for nature, but at the same time ‘she must above all protect mankind from self-destruction.’”³⁹⁰ The difficulty is in how to do this, literally the greatest problem to solve—and it is extremely painful to solve difficult problems. More people should agree with the logical presumptions, that what the Pope does suggest can show us the way: Scripture, the role of the individual, and Pope John Paul II’s emphasis on feeding the poor.³⁹¹ These are the natural law at work. If people take Pope Francis’s calls to develop an integral eco-theology at face value, then it is not hard to characterize infringements on Indigenous rights as “threats against the earth,” which “take a holistic approach that has much to learn from Indigenous peoples.”³⁹² Beyond the papacy, Native-Catholic connections, intimated at throughout these pages, are being drawn all over scholarly literature, as Robert J. Schreiter wrote, “[St. Francis of Assisi’s] capacity to communicate with animals (as in the stories of his encounters with Brother Wolf and with the birds) shows that he understood a central aspect of Indigenous spirituality[.]”³⁹³

Attacks will still come from all corners because a secular society rejects God’s will. They will “try by all possible means to discredit the institution that claims to speak for the source.”³⁹⁴ Even though these people reject the premise of God, they also fail to see how the natural law lives within them and is discernable. This Article is written for Truth for all. It has defined terms. It has provided historical context for the issue under discussion. Its author has learned. Now, it is time to remember the natural law for Indigenous rights worldwide:

Building on the ethics of Aquinas, Vitoria focused his attention on the common good as it applied to all the world’s peoples. According to the natural law, *a certain kinship exists among all human beings* insofar as all share a common nature and a common end. As a result of this kinship, there

389. See Pope Francis, *supra* note 27.

390. *Id.* ¶ 79.

391. See generally *id.*

392. Robert J. Schreiter, *Horizons of Memory and Hope: Some Concluding Reflections*, in *THE CHURCH AND INDIGENOUS PEOPLES IN THE AMERICAS: IN BETWEEN RECONCILIATION AND DECOLONIZATION*, *supra* note 21, at 210.

393. *Id.*

394. MOCZAR *supra* note 237, at 167.

is a law of nations, or *ius gentium*, that governs the rights and obligations of all the peoples of the earth.³⁹⁵

Jack Casey, another St. Kateri devotee wrote, “If the benefit of maturity is wisdom, then I believe it all comes down to faith. We are given these lives, this flesh and blood, these minds and hearts and souls along with free will to use or misuse them.”³⁹⁶ This is the best time for Indigenous rights in all recorded history. As a civilized nation, let us not resort to identity politics; let us not kowtow to sycophants who seek to divide us. What do we have to lose? Chief Justice Marshall may not have been entirely versed on the natural law in his time, but, with today’s technological mediums, infinite knowledge is at our fingertips to use wisely. We know that the natural law, at its most basic precepts, directs man to perfection in Christ, as man must “do good and avoid evil, be concerned for the transmission of life, refine and develop the riches of the material world, cultivate social life, practice good (know truth and live accordingly), and contemplate beauty.”³⁹⁷

Thus, Indian and/or Tribal Law practitioners should consult with Native Nations. They should apply true natural law ethics, like consent, to Indian rights cases, whether at the federal level or tribal level. They should use the principles of natural law that exist on the hearts of us all in everyday life. Perhaps, they will hear how Christ has called us all to live. Then, we just might replenish the Truth.

395. Fastiggi, *supra* note 383 (emphasis added).

396. CASEY, *supra* note 387, at viii.

397. SCARNECCHIA, *supra* note 131, at 39 (citing Pope John Paul II, *Veritatis Splendor* [Encyclical Letter Regarding Certain Fundamental Questions of the Church’s Moral Teaching] ¶ 51 (1993)).