

2000

## Disabling Certitudes: An Introduction to the Role of Mythologies of Conquest in Law

Jo Carrillo

Follow this and additional works at: <https://scholarship.law.ufl.edu/jlpp>

---

### Recommended Citation

Carrillo, Jo (2000) "Disabling Certitudes: An Introduction to the Role of Mythologies of Conquest in Law," *University of Florida Journal of Law & Public Policy*: Vol. 12: Iss. 1, Article 2.  
Available at: <https://scholarship.law.ufl.edu/jlpp/vol12/iss1/2>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in University of Florida Journal of Law & Public Policy by an authorized editor of UF Law Scholarship Repository. For more information, please contact [kaleita@law.ufl.edu](mailto:kaleita@law.ufl.edu).

DISABLING CERTITUDES:  
AN INTRODUCTION TO THE ROLE OF MYTHOLOGIES OF  
CONQUEST IN LAW

*Jo Carrillo\**

Narrative and mythology are powerful forces in human history and life. They are also powerful in law, which is itself a narrative tradition. Narrative and mythology are meant to explain and illuminate the mystery we find ourselves in, but often they harden into intellectual dogmas whose purpose is to teach images and symbols in the service of ideology. For purposes of this paper, I label the intellectual dogmas that operate in legal narrative "disabling certitudes."<sup>1</sup> Just as dogma hitches symbol and image into the service of ideology, so too, in law, do disabling certitudes. I argue here that disabling certitudes are meant to teach symbolic lessons; that is, they turn on culturally accepted (and often culturally specific) symbols presented repetitively in such a way that the images eventually come to be unconsciously accepted as part of the fabric of law.

In the material I discuss here, disabling certitudes give rise to a particular image. This image is of the indian, which in the context of liberalism, is a foil for modernity. This indian is pre-modern, hopelessly backward, somewhere closer in evolutionary scales to animals than humans. This indian is a sign along the road of modernity; it points the way for readers, steeping them further in liberal ideology, teaching them critical lessons of liberalism such as the need for private property, the exaltation of the individual over the group, and the like. This indian also teaches the troubling lesson of white supremacy. For it is consistently this indian's *lack* that gets juxtaposed against the white amer-european's plenty to make the point that nature and history favor those who have and take over those who do not have, or for whatever reason cannot take.

The law and legal pedagogy I introduce here, especially given the way they misrepresent and distort indigenous issues, serve a similar function in the transmission of legal ideology. But they teach a lesson that has hardened into dogma, and therefore depends on symbol for its transmission. The lesson is so time-worn that it is transmitted and accepted unconsciously. Indeed, to question the dogma would weaken and possibly tear the fabric of symbolism by forcing questions, and thus opening up a discussion of the sort of topics that today do not fit into the law school curriculum. Questions, for instance, about the genocidal and racist

---

\* Professor of Law, University of California, Hastings College of the Law. B.A., 1981 Stanford University. J.D., 1986-University of New Mexico; JSD, 1996-Stanford University.

1. Anthony Lewis, *The Fault, Dear Brutus*, N.Y. TIMES op-ed, Dec. 31, 1999, at A23.

foundations of the U.S., or about the forced removal of indigenous communities, or about the theft of indigenous property by the United States and its settlers.

*A. The Relationship Between the Mythology of  
Conquest and Legal Narrative*

U.S. colonization by Europeans depended upon a mythology of conquest. Colonization was as much a matter of narrative as of might and commerce. It is well known and accepted that law was and still is a powerful tool of colonization. In 19th century legal opinions about indigenous issues judges drew consciously upon the current events of their time, but they also drew unconsciously upon a mythology of conquest. This mythology has far distant origins, but in its Americanized version, indigenous peoples had no role other than to fare poorly as compared to settlers. Indeed, in the mythology of conquest, indigenous peoples represent nature, chaos, primitivism, animalism, communal property, and the like — all forces characterized by liberal ideology as ones that inevitably evolve into order.

In fashioning the mythology, the judges worked separately, not necessarily collectively, or at least not knowingly so. I'm not arguing here that the judges conspired about what the official narrative would be, though an official narrative did indeed form, carrying with it ever increasing weight and influence through the years. Instead, my view is that while the judges worked separately, they shared an ideology, a social experience of themselves in relation to the indian whom they designated as the other.<sup>2</sup> One important lesson these judicial opinions offer their reader was (and still is) in part a social experience, specifically the social experience of casting judgment on the other. The rhetorical force of the opinions provided readers with a communal experience in which settlers were represented as the evolved, civilization-bearing victors and indians as the conquered, defeated, excluded outsiders. The audience was given the opportunity if not the obligation to judge the indian based on the misrepresentations articulated in judicial opinions. And the opinions were written in such a way that the audience could very easily conclude that they — as people sharing the social experience of casting judgment — were indeed superior to the simulated indian whom they collectively passed judgment on.

Opinions and texts in which the simulation of the indian is used as an example still put readers in the seat of judgment in relation to the indian.

---

2. See THOMAS KEENAN, FABLES OF RESPONSIBILITY: ABERRATIONS AND PREDICAMENTS IN ETHICS AND POLITICS 177-89 (1997) (discussing SLAVJO ZIZEK, THE SUBLIME OBJECT OF IDEOLOGY (1990)).

Studying legal narratives thus begins the process of outlining the mythology of conquest upon which the narratives are based. This piece is part of a larger work that maps the mythology of conquest (or multiple mythologies, as the case may be) so that the ideas and logic contained within it can be examined critically. I also want to understand how it is that law contributes to and relies upon simulations of the indian. So part of my larger project is to determine whether and how the mythology of conquest has made its way into law generally, and into the teaching of law more specifically. One early reviewer commented that this work might be mistaken as a teacher's guide. Although I examine legal teaching materials — specifically property casebooks — this work is not intended as a pragmatic guide to teaching property, or wills and trusts, or any other subject in the current law school curriculum. Rather I am writing theoretically for the purpose of examining the way in which law in its multiple expressions (opinions, pedagogical materials and the like) discredits indigenous interests primarily by relying on a simulated indian character that serves as a bar to the consideration of actual indigenous concerns.

Indigenous litigants have been seriously handicapped by U.S. law. Indeed, many of the most important cases have turned on disputes over the controlling mythology or narrative. Is land sacred? Can a mountain or a watershed be a numinous space, a place of community, history, meaning, story, worship, love, identity, future and the like? Or, is a mountain just a mountain whose value is judged by its harvestable timber?<sup>3</sup> When a mountain is just a mountain, then assertions about the mountain's religious significance sound romantic but impractical. But when a mountain is a numinous space, assertions about the mountain as just an economic resource sound like stupid human arrogance.

Unlike multiversal points occupying their centers simultaneously,<sup>4</sup> these settler and indigenous mythologies conflict in the sense that while it might be possible to manage a wilderness area as both numinous space and marketable resource, at some point there will be a clash in vision that reminds us of the tensions drawn out in the biblical tale in which Jesus enters a temple only to find it has become home to a thriving marketplace. Using Christian narratives, some friends of the court evoked the temple story in a recent case to point out that just as it was hard for Jesus to pray and meditate amidst the buzz of the market in the temple, so it is for practitioners of traditional indigenous spiritual practices to pray amidst the

---

3: See e.g., R. C. GORDON-McCUTCHAN, *THE TAOS INDIANS AND THE BATTLE FOR BLUE LAKE* 7 (1995).

4. This example is drawn from one offered by JACE WEAVER, *OTHER WORDS* (University of Oklahoma Press, forthcoming).

buzz of chain saws, logging trucks, front-end loaders, and the like.<sup>5</sup> In some cases, in other words, depending on the resource in question, the resolution *does* present an either-or choice. One either cuts down an ancient tree, or one does not. What is destroyed cannot be rebuilt, or regrown, or regained. There are legal disputes in which it is impossible to be of both worlds, so to speak. One world or vision *must* give way to the other. One world or vision *is* chosen over the other, especially if one of the alternatives materially and ecologically consumes the very space in question. Thus, legal proceedings are not only about doctrine, or who wins and loses; they are also, in a sense, about how narrative will set the course for the material future. The way in which legal narratives are produced and controlled, modified and questioned (if at all), will and do bring a future (and futures) into being.

The legal mythology of conquest, itself a narrative, has robbed indigenous communities of their right to control, or even to participate in the credited production of the U.S.' governing mythologies. Yet, whether they are credited or not, indigenous peoples have always insisted upon their right to survive as peoples, as well as upon their right to resist or to participate in the imagining of the nation that now surrounds them. Gerald Vizenor calls this imagining "*survivance*,"<sup>6</sup> which he defines as more than mere physical survival. Survivance is "an active sense of presence, the continuance of native stories, not a mere reaction, or a survivable name. Native survivance stories are the renunciation of dominance, tragedy, and victimry."<sup>7</sup> Survivance is carrying on, given the context, and yet staying vital to one's ideals, one's visions, one's ethics and responsibilities, one's mythologies; it is living by one's own images and symbols, and thereby establishing what Vizenor refers to as an imagic presence.<sup>8</sup> Whereas "native" stories are cues to modernity, signaling perhaps a return-to-the-past defense against modernity, the postindian is "the actual tease of human contingencies" in the here and now.<sup>9</sup> The postindian "absolves by irony the nominal simulations of the indian."<sup>10</sup> For Vizenor, the postindian is itself a form of survivance.

Legal narratives of conquest rely on symbols — or, what Vizenor calls immovable simulations — of the indian.<sup>11</sup> This symbol, especially in

---

5. See *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (deciding the question of whether and to what degree the U.S. Forest Service had to take indigenous religious interests into account when building a road through a sacred wilderness area).

6. GERALD VIZENOR, *MANIFEST MANNERS: NARRATIVES OF POSTINDIAN SURVIVANCE* (1994).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

relation to other powerful legal symbols, such as the symbol of the tragic commons,<sup>12</sup> is a powerful way of reducing options and possibilities related to the methods of understanding, perceiving, relating to “resources” and so forth. These symbols work to exclude an indigenous imagic presence. Legal narratives render indigenous assertions of myth and vision immediately suspect, especially as infused with economics as late 20th century legal narratives are. Over time, these legal narratives force the indigenous vision to comply with garish stereotype or else to risk being ignored or more astonishingly to risk being labeled “wrong” or “inauthentic” because they do not comport with the stereotyped notions of who indians are and ought to be. Vizenor calls this phenomenon *manifest manners*, which he defines as “the course of dominance, the racialist notions and misnomers sustained in archives and lexicons as ‘authentic’ representations of *indian* cultures.”<sup>13</sup> The net result is that the expression of the indigenous communities, individuals, and litigants — their imagic presence — is stifled, silenced, muffled, and replaced with the immovable simulation of the indian. These simulations are familiar: indians as great environmentalists,<sup>14</sup> indians as communal land holders (obviously a wrong approach to property holding given the tragedy of the commons),<sup>15</sup> indians as inefficient spiritualists,<sup>16</sup> indians as fierce warring communities,<sup>17</sup> and so forth. They depend on theories of authenticity (who is a *real* indian) and legal authentication (whom does *the law* recognize as a real indian) for their validity.<sup>18</sup> They allow the law — a discourse of dominance — to define who and what is indian as a matter of law, politics, and ideology.<sup>19</sup> In the language of the 19th century the suspicion and rejection of the indigenous imagic presence gets coded in the binary that opposes the “uncivilized” against the “civilized.” In the language of the 21st century

---

12. I contend that the commons is now a symbol because it is used as a disabling certitude dealing with the possible ways of owning property. The commons is now often presented as inevitably leading to depletion of the resource as set forth in Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968). For further discussion, with additional footnotes, of the concept of the debate over the existence of the public domain in the field of intellectual property, see Jo Carrillo, *Protecting a Piece of American Folklore: the Example of the Gusset*, 4 *J. INTELL. PROP. L.* 203 (1997).

13. VIZENOR, *supra* note 6, at 1.

14. See e.g. Carol M. Rose, *Given-ness and Gift: Property and the Quest for Environmental Ethics*, 24 *ENVTL. L.* 1 (1994).

15. See e.g., DUKEMINIER & KRIER, *PROPERTY* 16-19 (4th ed. 1998).

16. See *Lyng*, 485 U.S. at 439.

17. See *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

18. See The Mashpee Indians' Story (explained further in Jack Campisi, *The Mashpee Indians: Tribe on Trial*, in *READINGS IN AMERICAN INDIAN LAW: RECALLING THE RHYTHM OF SURVIVAL* 32-42 (Jo Carrillo ed., (1998)).

19. See e.g., Laura Nader & Jay Ou, *Idealization and Power: Legality and Tradition in Native American Law*, 23 *OKLA. CITY U. L. R.* 13 (1998).

it gets coded in an economic binary that opposes the “inefficient” against the “efficient.”

But what exactly is this mythology of conquest as it exists in law as a literature (or discourse) of dominance? What are its parameters, its themes? Who are its characters? How do those characters come together, and what is the result? In other words, what is the story (the narrative or simulation) that judges, lawyers, law professors, and their students tell in law about the indigenous peoples who lived and still live within the boundaries of the U.S.? How closely do the simulations of law come to a contemporary indigenous imagic presence? Or more accurately, how badly do the simulations of the indian in law misrepresent and thus exclude an indigenous imagic presence? And how does the U.S. mythology of conquest compare to what we know about other countries’ mythologies, like Australia’s for example?<sup>20</sup>

Given the above framework, then, the theoretical basis for this paper is the idea that while law is a rational endeavor<sup>21</sup> there are nevertheless “glint[s] of symbolism and enchantment”<sup>22</sup> that exist within its parameters, meaning within legal narrative. These glints are important to analyze whether they are a large or small part of law, or whether they are even close to what constitutes the law as we purport to understand it. They show the “slow, delicate shift in the meanings of concepts,” and thus form “an essential part of social history.”<sup>23</sup>

Thus by identifying mythologies of conquest within the narrative of law, this work brings into focus a symbolic site — the indian — where the fabric of rationalism has not quite cohered; where unexamined ideas, certitudes, dogmas about and simulations of the indian disable the legal process and consciousness.<sup>24</sup> Obviously I am distinguishing rationality

---

20. The international dimensions of this discussion are outside the scope of this paper.

21. See generally MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY (Max Rheinstein, ed., 1954). The applicable theme of Max Weber’s work is the idea that there has been movement from traditional forms of authority toward rational-legal forms of authority. See *id.* For an explication of Weber, in the sense that his work is invoked here, see LAWRENCE M. FRIEDMAN, THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE 38-39, 211-12 (1990).

22. FRIEDMAN, *supra* note 21, at 39.

23. *Id.* at 26.

24. A symbol is defined here as the means by which archetypes, of which we typically remain unconscious, communicate to consciousness. In Jung’s framework, instincts, archetypes and symbols all stand in relation to each other. Instincts are physiological urges, and archetypes are the (typically unconscious) emotional and intellectual significance we give to instinctual urges. In Jung’s framework, archetypes are the inclination to form pictures so that the unconscious can communicate with consciousness, and symbols are the means by which archetypes get communicated to consciousness. Symbols are not passed on by heredity; they are passed on by acculturation. Thus in the terms of this framework, the law, as a distinct culture, could indeed have its own symbols for expressing information. Symbols impart information to the consciousness, but their strength is at least made clear (if not diminished) by bringing them to consciousness for

from symbolism, but not, I hope, in order to simplistically privilege one over the other. Instead, what I want to demonstrate is the interrelatedness between logic and illogic, at least when it comes to studying indians in law.<sup>25</sup> I contend that with respect to indigenous interests and issues, when indians are discussed in law, and particularly in the property curriculum, symbol gets presented as rational analysis, fiction gets passed off as historical fact, and the use of symbol and fiction go unchallenged in recitations of the legal narrative. In other words, the simulations of the indian *are* what the law relies on to exclude indigenous imagic presence, ultimately ensuring that symbol — what Vizenor enlivens by calling simulation<sup>26</sup> — and mythology express thought “more trenchantly and, in the end, far more clearly than the clearest concept,” since the symbol both conveys information to the mind, and “brings a re-experience of it” to the being.<sup>27</sup>

Identifying places in law where references to indigenous interests are more a dissemination of mythology than accurate information serves two clear purposes. The first is that it begins a more consciously reasoned analysis than we now have of how the symbol of the indian is a foil used to teach liberal ideologies behind Anglo-American property rights. The second purpose is that it points out a site in law that is consistent with a view of symbol as both a way in which to disseminate information and a way to re-experience or alternatively repress past collective trauma.<sup>28</sup> Indeed, I call the symbolic site I identify in this paper a “disabling certitude,”<sup>29</sup> by which I mean a place where systems of hierarchy, entitlement and positional privilege subordinate, through uncritical acceptance of symbol, the “ideological self-conception of a liberal legal order.”<sup>30</sup> It is a place where the law does not practice the liberal values it preaches.

---

examination. See ENCOUNTERING JUNG: JUNG ON MYTHOLOGY 39-40 (Robert A. Segal, ed., 1998) [hereinafter ENCOUNTERING JUNG]; see also MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 53-72 (1995), exploring the tension between “emotions” (which symbols invoke by communicating the power of the archetype which in turn explains the power of the instinctual) and “reason.”

25. See Pierre Legendre, *The Other Dimension of Law* (Yafit Hachamovitch trans.), in *LAW AND THE POSTMODERN MIND: ESSAYS ON PSYCHOANALYSIS AND JURISPRUDENCE* (Peter Goodrich & David Gray Carlson eds., 1998), where Legendre states that the medieval turn to law arose not out of a privileging adherence to rationality as a mode of analysis, but out of spirituality and mysticism. See also NUSSBAUM, *supra* note 24.

26. See VIZENOR, *supra* note 6.

27. ENCOUNTERING JUNG *supra* note 24, at 89-90.

28. See *id.*

29. Lewis, *supra* note 1.

30. NICOLA LACEY, UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY 188 (1998).

A disabling certitude is a site where the rational-legal system's fabric gives way to symbolism, magic, or enchantment. It is a place that "cannot be tackled with ordinary rational methods."<sup>31</sup> A place where "memory fades and mythological interpretations of the beginnings of human society take hold in the popular imagination."<sup>32</sup> It is a place of concentrated ideological importance and meaning, thus making it a site within which one is sure to find many allegedly universal truths, assertions, barriers, and binaries rotating around myths (in this case insinuated into the law) whose loss is stubbornly guarded against by those whom the myths most clearly mirror, which is to say, their intended audience.<sup>33</sup> A disabling certitude is a place where the alternatives we are accustomed to are diminished into a startling, obvious, and concentrated lack of alternative. Disabling certitudes create what Pierre Legendre, the French jurist and psychoanalyst,<sup>34</sup> calls "obstacles to the liberty of thought [*esprit*]."<sup>35</sup> A disabling certitude might also be a site of impasse — an aporia — where two alternatives emerge but then dead end.<sup>36</sup> The disabling certitudes found in mythologies of conquest could fairly be classified as intellectual dogmas: ideas that demand *non-analysis* out of ideological imperative,<sup>37</sup> habit,<sup>38</sup> politics,<sup>39</sup> or the need to administer to individual or collective trauma.<sup>40</sup> One could say that disabling certitudes are a psychologically protected state of studied ignorance. Instead of seeing no evil, we acknowledge no past. Like the Medieval *exemplum*, disabling certitudes further didacticism, not critical analysis. And they work by disseminating information almost irrespective of the disseminator's conscious intention. As such, they function most obviously as places in the legal consciousness that — in the prescient words of Chief Justice John Marshall — "cannot

---

31. ENCOUNTERING JUNG, *supra* note 24, at 92.

32. VINE DELORIA JR. & DAVID E. WILKINS, *TRIBE, TREATIES, AND CONSTITUTIONAL TRIBULATIONS* vii (1999).

33. See Segal, *supra* note 24, at 94, noting that myths have a vital meaning, as they are the psychic life of the group; thus the group insinuates the myths into other institutions in order to prevent the loss of its mythological heritage, as that loss "is always and everywhere, even among the civilized, a moral catastrophe." *Id.* at 94.

34. For an introduction to Legendre, see Peter Goodrich, *Translating Legendre, or the Poetical Sermon of a Contemporary Jurist*, in *LAW AND THE POSTMODERN MIND: ESSAYS ON PSYCHOANALYSIS AND JURISPRUDENCE* (Peter Goodrich & David Gray Carlson eds., 1998).

35. Legendre, *supra* note 25, at 175.

36. See Jo Carrillo, *The American Indian and the Problem of History* (C. Martin ed. 1987), 33 ARIZ. L. REV. 281 (1991).

37. See Robert A. Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

38. See Legendre, *supra* note 25.

39. See Deloria & Wilkins, *supra* note 32.

40. See Segal, *supra* note 24.

*be questioned.*"<sup>41</sup> Indeed they are the discursive places where the U.S.' mythological narrative and symbolic lexicon about its own origins are stubbornly protected by those whom the mythology benefits. This is the paradox of the U.S. mythology of conquest still actively disseminated in American legal pedagogy, scholarship, and court opinions.

### B. Examples

The following are examples that use the symbol of the indian to make their point. The first example I take up is Felix Cohen's American exceptionalist argument that the vast majority of land was purchased from indigenous communities, not stolen or otherwise taken as a result of conquest.<sup>42</sup> The second example is Chief Justice John Marshall's legal opinion in *Johnson v. McIntosh*,<sup>43</sup> a text that I argue is many things including a creation (originary) story and an admonition against questioning. The third example is taken from the 1997 edition of a widely used property law casebook.

#### 1. Cohen's American Exceptionalism

Felix S. Cohen invoked U.S. exceptionalism arguing in defense of legislation that would allow indigenous communities to sue the U.S. government for the uncompensated loss of aboriginal land.<sup>44</sup> According to Cohen, U.S. policy was based on purchase, unlike the policy of other European nations acting under the Doctrine of Discovery.<sup>45</sup> Cohen then linked policy with action when he posited that the U.S. *acted* honorably as demonstrated by its *policy* to purchase as opposed to simply steal or otherwise take indigenous land; and so, his argument went, the U.S. should continue to act honorably by passing a statute allowing indigenous groups to sue the U.S. for compensation of land lost by theft or unfair practices.<sup>46</sup> Cohen's argument, like Chief Justice John Marshall's before him, tapped into the mythology of conquest. In Cohen's version, as in Marshall's, the conqueror was equitable and just — two central liberal ideals. But whereas Marshall acknowledged the fact of conquest (theft), Cohen's 20th century version insisted for instrumental reasons, that the great bulk of land had been legitimately purchased, not simply taken.<sup>47</sup>

---

41. *Johnson v. McIntosh*, 21 U.S. (Wheat. 8) 543, 591 (1823).

42. See Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28 (1947).

43. 21 U.S. (Wheat. 8) 543 (1823).

44. See Cohen, *supra* note 42, at 56-58.

45. See *id.* at 35.

46. See *id.* at 56-57.

47. See *id.* at 35.

Cohen started out by suggesting that while school children might believe the land was stolen, in actuality fair trades had been made, though they might not appear to be fair in hindsight.<sup>48</sup> As support for his argument, Cohen used appellate court cases, not historical or sociological evidence.<sup>49</sup> The fair trades were not *economically* fair, to be sure, a point Cohen acknowledged. But in the end, Cohen implied, land was exchanged for either monetary benefits or for intangibles such as education, exposure to Christianity, and “civilization.” According to Cohen, the amer-europeans drove hard Yankee bargains, a Lochnerian notion that Cohen himself introduced into the mythology of conquest.<sup>50</sup> Thus, Cohen’s view introduced a theme of American exceptionalism into the mythology of conquest, and the disabling certitudes upon which it is based. Cohen’s view offers an introductory vignette to demonstrate my broader argument, which is that the law, as it is presented especially in casebooks, but also in legal opinions and in legal scholarship, is offered pedagogically to educate students about liberal ideals and narratives, not to encourage them to critically assess or otherwise question those narratives.

## 2. John Marshall’s *Johnson* Narrative

*Johnson v. McIntosh* is part legal text, part historical narrative, part creation story, and part symbolic text with a political function. It does indeed have a strange, strangely logical, puzzling sentiment wafting through it, beginning with its explicit admonition against questioning. As Justice Marshall puts it, “the right of society to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question.”<sup>51</sup>

The basic themes of Marshall’s narrative are these: the story starts with European action, specifically the European action of crossing the ocean

---

48. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415-17 (1980) (calling into question Cohen’s view that the adequacy of past consideration cannot be revisited) “[A]n essential element of the inquiry . . . is determining the adequacy of the consideration the government gave for the Indian lands it acquired. That inquiry cannot be avoided by the government’s simple assertion that it acted in good faith in its dealings with the Indians.” *Id.* at 416-17.

49. All evidence can be ideologically collected and shaped, but the point is that Cohen asserted his historical correction based on appellate court cases, which represent views of the elite from the top, not on broader historical or sociological pools of evidence. See Cohen, *supra* note 42, at 38-43. Moreover, Cohen acknowledged the indigenous point of view, but characterized it as one lacking in sense. See *id.* He argued that if Indians thought bad deals were good, that was essentially their downfall in the face of what Cohen characterized as “hard Yankee bargains.” *Id.* at 42.

50. *Id.* at 42; see also *Lochner v. New York*, 198 U.S. 45 (1905) (holding that a state statute prohibiting the employment of bakery employees for more than 10 hours a day or 60 hours a week interfered with the right of contract between the employer and the employees).

51. 21 U.S. (8 Wheat) 543, 572 (1823).

and arriving on the continent of America.<sup>52</sup> But as there were indigenous groups in European settlement areas, something had to be done. Marshall goes through the colonial history to conclude that indigenous groups had the right to occupancy as against settlers.<sup>53</sup> There were no land speculators in Justice Marshall's story, nor are the settlers invading, no matter how unfounded their claims about their control of the continent. Rather they are cast as ambitious, innocent, at worst pretentious nations that "on the discovery of this immense continent" were "eager to appropriate to themselves so much of it as they could respectively acquire."<sup>54</sup> By the time of Cohen's 1947 Minnesota article, this tendency toward pretension was transformed into a national American quality: the ability to drive hard Yankee bargains.<sup>55</sup>

Under the Doctrine of Discovery, the European nations had the right of acquisition to lands that they were the first to claim, and their respective settlers took this to heart. Ironically, this European first-in-time principle justified the late coming European's claims even as against the first in time indigenous peoples, in Marshall's narrative, because "the character and religion of [the indigenous] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy."<sup>56</sup> Acquisition in Cohen's 20th century post-World War II view, took place primarily by purchase,<sup>57</sup> but Marshall's 19th century colonialist view acknowledges that it also took place "by the sword" and as such was a "title by conquest," legitimately acquired and maintained by a force justified by the "character and religion" which

52. *See id.*

53. *See id.* at 574.

54. *Id.* at 572.

55. *See* Cohen, *supra* note 42, at 42.

56. Johnson, 21 U.S. at 573. Marshall uses the "character and religion" and the "character and habits" of the people at least twice. *See id.* at 573, 588, 589; *see also* M.F. LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW: BEING A TREATISE ON THE LAW AND PRACTICE RELATING TO COLONIAL EXPANSION* 11-17, 25-31 (1926) (putting Marshall's language in the context of legal arguments that were contemporaneous with Johnson).

57. *See* Cohen, *supra* note 42, at 35, *reiterated in* Howard R. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 *BUFF. L. REV.* 637 (1978) (elevating Cohen's thesis to historical fact), *and in* John Leshy, *Indigenous Peoples, Land Claims and Control of Mineral Development: U.S. and Australian Legal Systems Compared*, 8 *U. NEW SOUTH WALES L. J.* 271, 275-77, 299-301 (1985) (applying Cohen's assertion that the vast majority of indigenous land was purchased to show that indigenous property interests in terms of mineral rights have been recognized, not disregarded, by the U.S.; Leshy then advocates that Australia adopt the U.S. model of recognition and compensation over its own historic model of non-recognition and non-compensation). Of course, these arguments had earlier antecedents in legal arguments of Marshall's time. *See e.g.* CRIBBET, et al., *PROPERTY* 37, 83 (7th ed. 1996); *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 457-65 (William W. Story ed., 1972).

devolves later in Marshall's opinion to the "character and habits" of the indigenous peoples.<sup>58</sup> Thus for Marshall, amer-european greed gets converted into pretentious eagerness, which sometimes led to fair land transactions, but more often led to the violent dispossession of indigenous communities. In Marshall's time, land theft gets packaged into a "title by conquest;"<sup>59</sup> however, by Cohen's time, it gets repackaged into the view that amer-europeans almost always paid for the land they took from indigenous communities.

Today, *Johnson* is interpreted in law as troubling, yet necessary for U.S. nation building. It is also regarded as doctrinally protective of tribal (collective) property interests, in the sense that but for *Johnson*, indigenous land would have been available for direct sale from indigenous owners to settlers, and thus diminished. By placing the source of land title with the U.S., the argument goes, indigenous actors were eventually left with "something," since after *Johnson* the U.S. could legally protect even that land to which indigenous peoples had aboriginal title.<sup>60</sup> The typical tack property casebook editors use to deal with John Marshall's opinion is to reconstruct John Marshall as a heroic federalist valiantly opposed to the Jacksonian Democrats.<sup>61</sup> In this opposition, John Marshall becomes a cultural hero, fighting on behalf of the unrepresented indigenes. This canonical view of Marshall ironically takes him out of an amer-european vs. indigenous context and puts him instead into a narrower amer-eurocentric political context. In this way, Marshall is applauded for his decision despite the unfairness of his representations of indian character<sup>62</sup>

---

58. *Johnson*, 21 U.S. at 573, 588, 589.

59. *Id.* at 589.

60. See e.g. GORDON HYLTON, et al. *Property Law and the Public Interest: Cases and Materials* 28 (1998) (citing *Johnson* in the context of the Indian Non-Intercourse Act of 1790, Act of July 22, 1790, Ch. 33, 1 Stat. 137, 138).

61. See e.g. JOHN P. DWYER & PETER S. MENELL, *PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE* (1998), which nevertheless notes:

The decision is a minor aftershock in a far more momentous collision between Indian and European cultures between the fifteenth and nineteenth centuries. Nevertheless it raises (even if it does not satisfactorily answer) some important questions about the cultural contingency of every conception of property and about the origin and justification of property rights.

*Id.* at 69; see also CURTIS J. BERGER & JOAN C. WILLIAMS, *PROPERTY: LAND OWNERSHIP AND USE* 20 (1997) (characterizing the conflict that resulted from European acquisitiveness as a "clash between Native American property systems and the intuitive image of absolute ownership").

62. See SCOTT MICHAELSEN, *THE LIMITS OF MULTICULTURALISM: INTERROGATING THE ORIGINS OF AMERICAN ANTHROPOLOGY* 159 (1999) (distinguishing between shades of meaning communicated by the words "character," "culture," and "history;" arguing that the use of the word

on the ground that he was a man of his time, living in a period when violence against indigenous peoples was viewed as the normal state of things, racist characterizations (hierarchically understood cultural contingencies) were the order of the day, and what really mattered was Marshall's federalist heroism in the face of the Jacksonian Democrats. The moralistic push of the argument excusing Justice Marshall for not entering into controversies that he ultimately and actually enters into with noticeable vigor — such as “whether agriculturists, merchants and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits”<sup>63</sup> — is that we moderns ought not criticize the past with our presentist values.<sup>64</sup> Of course this refusal to analyze, in itself, is an admonition not to question.

If Marshall's simulated indian is indeed presented without critique as “primitive,”<sup>65</sup> or “uncivilized,” a student segueing in a course casebook from *Johnson* into economic arguments about productivity<sup>66</sup> is primed for what is often (predictably) the next lesson in the property casebook: learning that indigenous rights are mere occupancy rights, and accepting that any and all of the violence that flowed from such a dispossession was a (necessary) cost of nation building in an evolutionary world, meaning a worldview that says humans are structured along a hierarchized racial scale governed by evolution.

This particular evolutionary anthropological lesson is a longstanding one in the annals of U.S. legal history,<sup>67</sup> though its terms are today obscured by the late 20th century economic language of costs and benefits.<sup>68</sup> But in the unselfconscious 19th century language of manifest destiny, the framework of an evolutionary anthropology comes through loud and clear, even as late as 1930, as an article in the elite Yale Law Journal demonstrates:

---

character individualizes the subject, whereas the use of the words culture or history erase the subject's individuality by aggregating the individual with the group).

63. *Johnson*, 21 U.S. at 588; see also CRIBBET, *supra* note 57.

64. Justice Rehnquist makes this argument in his dissent in *U.S. v. Sioux Nation*, 448 U.S. at 435, when he says: “It seems to me quite unfair to judge by the light of ‘revisionist’ historians or the mores of another era actions that were taken under pressure of time more than a century ago.”

65. See e.g. CRIBBET, *supra* note 57, at 37, 83.

66. See e.g. DUKEMINIER & KRIER, *supra* note 15, at 11-19, (following *Johnson* with economic articles and notes about private property, exclusivity, and the tragedy of the commons).

67. See e.g. Robert E. Bieder, *A Brief Historical Survey of the Expropriation of American Indian Remains* (a paper presented to Congress), in READINGS IN AMERICAN INDIAN LAW 164-71 (1990); Jo Carrillo, *The Repatriation of Cultural Property*, in READINGS IN AMERICAN INDIAN LAW 153-63 (1990).

68. See Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347-57 (Pap. & Poc. 1967), cited in DUKEMINIER & KRIER, *supra* note 15, at 40.

A certain liberality of spirit resents any 'Americanization' of the Indian, preferring that he be preserved in his ancient life, culture, government, morals, and religion. There is indeed much worth preserving, but it must be recognized that an inexorable destiny dooms the ancient primitive life of the Indian before the advance of our modern civilization.<sup>69</sup>

This language gets modified by the end of the century, and more optimistic about how much better indigenous peoples have it in the U.S. today than they did in the 19th century, as demonstrated by this 1997 law review article published in the equally prestigious Stanford Law Review:

The First Amendment refers to the free exercise of religion, as if religion were wholly separable from other aspects of individuals' lives. Although this isolation of religion from other aspects of life may accurately reflect the Anglo-American perspective of the First Amendment's drafters, it is foreign to the Native American world view.<sup>70</sup>

To be sure, indigenous peoples are still other in the 1997 account, despite its useful collection of cases. Indigenous peoples are lumped together *en masse* and implied to possess a stubbornly unchangeable and unchanged, identifiable, single "Native American world view;"<sup>71</sup> indeed, *the* Native American world view. The article later optimistically (and wrongly) concludes, in a section titled (ironically) "The More Things Change, the More They Remain the Same," that "Native Americans are no longer subjected to overt government efforts to suppress their traditional beliefs and practices."<sup>72</sup> Indian problem virtually solved; but the indian problem rages on. In this tale, the indian gets to keep that old time religion, that ancient way of life, culture and government, morals and religion — in a phrase: "the Native American world view"<sup>73</sup> — thanks to a certain liberality of spirit that offers to analyze the problem in light of the First Amendment. Indeed, in this view, any remaining aspects of the 19th century Indian problem are tamable because they are mere problems of translation.<sup>74</sup> Instead of an inexorable destiny dooming "the ancient

---

69. Ray A. Brown, *The Indian Problem and The Law*, 39 YALE L.J. 307, 319 (1930). This theme appears at least as early as the writings of Joseph Story, see STORY, *supra* note 57, at 462-64.

70. Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 806 (1997).

71. *Id.*

72. *Id.* at 851.

73. *Id.* at 806.

74. See *id.* at 851-2.

primitive life of the Indian before the advance of our modern civilization,"<sup>75</sup> the modern civilization has punched out a space where "*the* Native American world view" can exist.<sup>76</sup> *Exist*; not thrive or influence or direct or challenge—just exist.

### 3. A Casebook Example, circa 1997

In my opinion, no property casebook published today calls Chief Justice Marshall's fabulously fictional narrative into question. Ironically, however, whether the casebook editor sympathizes (actually they all implicitly sympathize) with indigenous peoples or not, the effect is the same. The Cribbet, Johnson, Findley, and Smith casebook stands alone in explicitly adopting an evolutionist lens for analyzing the relationship between the indigenous and the non-indigenous. In discussing attributes of property, the Cribbet casebook asks: "Would it be fair to say that property, in a legal sense, has any meaning for species other than mankind? Why or why not?"<sup>77</sup> This query replicates the positioning of the Indian other near the animal other, a troubling but recurring motif seen in countless texts, including *Johnson*, and the work of Lewis H. Morgan,<sup>78</sup> a 19th century anthropologist whom the Cribbet casebook cites as an authority on the subject.<sup>79</sup> But, rather than stop there, the editorial voice continues: "Note, however, that even the most primitive human societies have some concept of property."<sup>80</sup>

This remark is followed by a 1928 commentary that itself remarks on Morgan's 1877 work detailing what Morgan thought were the major periods of civilization: savagery, barbarism, and civilization.<sup>81</sup> A comment, within a comment, within a comment pulling students from the cusp of the 21st century squarely back into the 19th, thus distancing the casebook from multiculturalism so as to align it with "anthropology," meaning an evolutionary anthropology that designates whites superior, and indigenous peoples inferior. Morgan, the Cribbet casebook informs students, places the emergence of the property institution in "the Middle Status of *Barbarism* — exemplified by the village life of *our* Southwestern Indians, of the aboriginal Mexicans, and the Peruvians." [Emphasis added.]<sup>82</sup> The excerpt goes on to state that Morgan thought that "among 'savages' . . .

---

75. Brown, *supra* note 69, at 319.

76. Dussias, *supra* note 70, at 806 (emphasis added).

77. CRIBBET, *supra* note 57, at 35.

78. See LEWIS HENRY MORGAN, ANCIENT SOCIETY (1877).

79. See CRIBBET, *supra* note 57, at 36 (citing Michaelson).

80. *Id.* at 36.

81. See *id.* (citing Lowie, *Incorporeal Property in Primitive Society*, 37 YALE L. J. 551-54, 561 (1928)).

82. *Id.*

property was inconsiderable.”<sup>83</sup> As the Morgan excerpt is intended by casebook editors to raise the issue of “incorporeal property in primitive society,”<sup>84</sup> it is followed by this (20th century) editorial note:

The rudimentary concepts of a primitive people are greatly expanded by modern civilizations whose articulate philosophers and molders of public thought must seek rationalizations for their views of so vital a social institution [as property].<sup>85</sup>

Here once again the belief is disseminated that indigenous property systems are monolithic and simple in comparison to the vast, nuanced, rational U.S. common law based system.

The entire discussion of the “primitive” ends several pages later by coupling the evolutionist framework laid out above with the nation-building excuse so often extended to *Johnson*. Indeed the editorial voice introduces *Johnson* by asking a question not unlike the question a progressive casebook poses about the balance of justice and power. The Cribbet casebook asks:

Is there any doubt about the role which property (in this case land) played in the development of the United States into a world power? Could the adjustment of the Indians’ claim of ownership have been handled in a different way? What would have been the consequences of the various solutions you may have in mind?<sup>86</sup>

Solutions? To what? From whose point of view? Who is speaking here and to whom? Is there a difference in effect, notwithstanding the radical difference in intention between the more progressive casebooks and this treatment of indigenous interests, other than that Cribbet seems to invoke a word — “solution” — which in the context of the 21st century, makes a chilling allusion to 20th century justifications for genocide? How do intentionally progressive anti-racist analyses and an intentionally “scientific” evolutionary analysis that purports to be neutral on the issue of race end up in the same place, asking the same questions, teaching the same binaries? What force is at work here?

---

83. *Id.*

84. *Id.* at 37-38.

85. CRIBBET *supra* note 57, at 37-38.

86. CRIBBET *supra* note 57, at 77.

### C. *Thy Symbolic Indian and the Exclusion of the Indigenous Imagic Presence*

These examples, abbreviated as they are, introduce the analysis of how legal narrative is premised on disabling certitudes (symbols, or the more enlivened idea of simulations) that function to disseminate symbolic, mythological information about what one casebook labels “the case of whiteness” in relation to indigenous peoples.<sup>87</sup> My hope here is to point out that the relationship between disabling certitudes and the dissemination of symbol is clear enough to show that disabling certitudes are observably dogmatic, meaning biased, and yet continuously disseminated as universal truths, meaning general assertions that operate across the human spectrum. These symbols are promoted as independent of cultural bias, but they are observably culture specific as well as ideologically determined.

Indeed, the fact that indigenous rights and interests are discussed in the first year curriculum *only* in the first year property course functionally transforms the indian into a signifier whose political function throughout the rest of law school is essentially to make student-initiates of the legal profession skeptical about indigenous property interests on both a broad, ideological level as well as on an unconscious, symbolic level. By signifier I mean that indians in the legal discussions analyzed here “‘stand in for’ the unrepresentable,”<sup>88</sup> thus allowing the non-indigenous settler subject to interpret him or herself and the world known as America as the indian’s opposite: representable, coherent, ordered, civilized, efficient, manageable and so forth.

Signifiers in my definition also serve a political function; they hold strength “precisely in their ‘contentlessness.’”<sup>89</sup> Ideas like ‘democracy,’ ‘human rights’ or ‘community,’ for instance, are signifiers that “remain to be filled out by the fantasies of the subjects to whom they are addressed: the signifiers construct rather than describe the entities to which they refer.”<sup>90</sup> Precisely because they are contentless, discourses riddled with signifiers are unstable. While they seem to address, maybe even assuage, the anxiety or hopelessness that underlie the trauma they stand in for, ultimately they fail in this task. This is because the traumas for which they stand — in this case the genocidal foundations of the U.S. — conflict irreconcilably with the liberalistic notion of individual equality that stems from the protection of property rights. Sadly these conflicts remain

87. JUAN F. PEREA, et al., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 429 (2000).

88. LACEY, *supra* note 30, at 132 (1998); see also ANNABEL PATTERSON, FABLES OF POWER: AESOPIAN WRITING AND POLITICAL HISTORY (1991).

89. LACEY, *supra* note 30, at 133-34 (citing RENATA SALECL, THE SPOILS OF FREEDOM: PSYCHOANALYSIS AND FEMINISM AFTER THE FALL OF SOCIALISM 131 (1994)).

90. *Id.* at 133.

unrepresented, undiscussed and undiscussable, hidden away in legal discourse today.

America in most histories of significance is then, as some scholars argue, presented as an ethnically cleansed geography, a place whose beginning was with Europeans and no other groups.<sup>91</sup> If indigenous communities are mentioned at all it is often in the form of the indian signifier, which I argue, is a point meant to elucidate something about the allegedly superior non-indigenous path on the continent, not the indigenous path or alternatively the ways in which the paths came together. In this scheme, no reference to or elaboration of the indigenous imagic presence can occur.

Thus political signifiers can never, by definition, deliver what they promise, they can never assuage the guilt or trauma of genocide, because they have no content. Indeed, in the case of indigenous communities, the function of the indian signifier is to *avoid* or *suppress* any discussion of genocide, or even of violence and thus to encourage the view of America as a sparsely settled continent prior to European arrival. In developing his ideas about survivance, Gerald Vizenor specifically points out that the simulated indian is a signifier that predictably points to the *absence* of the indigenous, and as such it becomes a way to ethnically cleanse the idea if not the geography of America, of indigenous peoples, histories, and narratives.<sup>92</sup>

In law the currently accepted symbol of the indian — the simulated indian — also signals the absence of the indigenous imagic presence. But the indian as a signifier is not fixed in terms of its “democratic or anti-democratic tendencies . . . : [a signifier] can express different fantasy structures, different economies of desire, for different subjects at different times.”<sup>93</sup> This is why in the 19th century the symbol of the indian can have one meaning or a set of meanings, and an entirely different but still functionally similar set of meanings in the 20th century.

As with its content, the symbol can have different meanings depending upon its context, so that its meaning in the U.S., for example, can coincide or not with its meaning in Australia or New Zealand or Peru or Brazil or Canada at any given time. In other words, the simulated indian used today is a shell concept, a shell image, a simulation, a projection. It functions somewhat like the joker in a deck of cards to mark a space in the discourse, but that space is at one and the same time potentially haunted by all those other indigenous persons and peoples, who have been excluded from this country’s legal protections by physical force, genocide, fraud, ideological force, economic disadvantage, and the like.

---

91. See WEAVER, *supra* note 4.

92. See VIZENOR, *supra* note 6.

93. *Id.*

It is my observation that students enter law school utterly ignorant about the indigenous past, but very willing to learn. But they learn what we teach them. If we continue to teach the genocidal simulations of the indian, we will continue to deprive them of an indigenous imagic presence. We will continue teaching the idea of the ethnically cleansed America. We will also essentially force — through the precedential value of legal opinion and scholarship, itself a form of social control — indigenous litigants to adopt the role of the native caught in the past, and thus to place themselves in relation and reaction to modernity. We will continue seeing and encouraging if not requiring representations of the indigenous that refer to golden pasts, or that are otherwise reactionary returns to the past. Our continued existence on the planet is, for the first time in history, called into question. The answers may or may not be in the past; likely they are not. But we need the courage to understand ourselves, to imagine a rich, multiversal future, to question the very images and symbols that we make our laws by, and to ask whether (or not) and how (or not) they continue to serve us.

