North Dakota Law Review

Volume 69 | Number 2 Article 3

1993

Making All the Difference: Natice American Testimony and the Black Hills (A Review Essay)

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MAKING ALL THE DIFFERENCE: NATIVE AMERICAN TESTIMONY AND THE BLACK HILLS (A REVIEW ESSAY)

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Who will
discover the truth?
The wrong has been committed.
The important thing is who will redeem it.[1]
George Seferis

I. INTRODUCTION

If history, as suggested by the influential writer Simone Weil, is simply the propaganda of the victors,[2] then much of the (dominant) history concerning Native Americans becomes inherently suspect. This history is not necessarily false or erroneous, but rather, something worthy of close scrutiny, intense reflection, and energetic dialogue. The books[3] under review in this essay provide a rich opportunity for such scrutiny, and one of them even presents an analytical and theoretical framework with which to evaluate and to mediate particular claims and assertions.

History plays an absolutely central role in the enterprise of Indian law because much of the field rests on construing and interpreting the legacy of time.[4] Specifically, for example, there is the question about what is (or ought to be) the meaning of treaties and other federal statutes entered into or enacted in the early days of the national republic. In addition, what were our original understandings of these sovereign commitments on which we make con-

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1. JOHN MONTAGUE, THE ROUGH FIELD, frontispiece (1989) (quoting George Seferis).

2. *See, e.g.*, THE SIMONE WEIL READER 184-257 (George A. Panichas ed., 1977) (addressing the problems of "uprootedness and nationhood").

3. EDWARD LAZARUS, BLACK HILLS/WHITE JUSTICE (THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT) (1991); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); NATIVE AMERICAN TESTIMONY (A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT, 1492-1992) (Peter Nabokov ed., 1992).

Please note that the word "Lakota" is the traditional linguistic reference used by the Teton Sioux people to describe themselves in their own language. The word "Sioux" is a French corruption of a Chippewa word which means snake or adder and was used by the Chippewas in a derogatory fashion to describe their traditional enemy, the Lakota. For this reason, "Lakota" is the preferred term, although popular and legal usage has made the word "Sioux" a much more conventional and well-known term. The terms are used interchangeably throughout the text.

4. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 13-14 (1987).

temporary judgments? In the context of Indian law, history looms not just as a colorful backdrop, but rather as an inescapable shadow. The failure to adequately confront and comprehend this history inevitably threatens to blot out understanding and resolution of significant Indian law issues involving treaties, tribal sovereignty, and the commitment to a flourishing tribal life.

A group of significant themes pertinent to this quandary of time and understanding present themselves in these works and serve as the cornerstone for this review. They include: 1) the arrogance of many well-meaning people whose naive attempt to support Native American sovereignty only inhibits these endeavors (hereinafter referred to as Indian law liberalism); 2) the significance of Indian country context and situatedness in the field of Indian law; and 3) the dilemma of difference and justice in Indian affairs. Each of the books discussed in this essay touches on these themes with varying degrees of sophistication and intensity, but they place greater emphasis elsewhere, without providing sustained insight on these issues. The method employed to get at these themes in this review will be to discuss the book *Black Hills/White Justice* as the text upon which *Native American Testimony* and *Making All the Difference* provide valuable (indirect) commentary, that occasionally is not without shortfalls of its own. This critique, in combination with these three works, suggests some valuable protocols for thinking about Native Americans, history, and reconciliation.

II. THESES AND "REASONS"[5]

Black Hills/White Justice by Edward Lazarus, son of one of the prominent claims attorneys for the Sioux Nation, purports to describe the events and tell the story of the Sioux Nation versus the United States from 1775 to the present. The facts of this legal and moral saga are easily summarized. The Black Hills, which are located in the western part of present day South Dakota, were originally part of the Great Sioux Nation Reservation recognized in the Fort Laramie Treaty of 1868.[6] Article XII of the Fort Laramie Treaty provided that any future land cessions by the Great Sioux Nation to the federal government would have to be approved by three-fourths of the adult male population.[7]

5. NABOKOV, *supra* note 3, at XXI. "One tribesman explained, 'Yes, you are a people of reasons, you always have reasons for this, reasons for that.' "

6. Treaty with the Sioux Indians, 15 Stat. 635 (1868).

7. *Id.*

After a scientific expedition, led by General George Custer, discovered gold in this beautiful and sumptuous landscape, the federal government undertook negotiations with the Great Sioux Nation to secure cession of the Black Hills. These negotiations failed on several different occasions, and ultimately the United States unilaterally—and in violation of the Fort Laramie Treaty of 1868—confiscated 7.7 million acres of land pursuant to the Black Hills Act of 1877.[8]

At the time of this "taking," federal law prohibited any Indian tribe from suing the United States unless the federal government specifically waived its traditional immunity from suit.[9] When the Black Hills were taken, there was no jurisdictional statute that would permit suit by the Sioux Nation against the United States. In 1920, a special jurisdiction act was passed, permitting the Sioux Nation to sue the United States in this matter, and only then was the legal controversy finally joined. This lawsuit (judicially) culminated sixty years later when the United States Supreme Court ruled in favor of the Great Sioux Nation in 1980.[10] The Court held that the federal government had taken the Black Hills pursuant to its powers of eminent domain, but that it had failed to pay adequate compensation. The Court ordered the federal government to pay the Great Sioux Nation approximately 17.5 million dollars plus five percent interest figured from the time of the taking in 1877. This interest award made the total initial judgment more then one hundred million dollars. Yet, the constituent tribes[11] of the Great Sioux Nation refused (and still refuse) to accept any portion of the award until some or all of the land involved is returned to the Lakota people. It is on the issue of land return, and the various historical and cultural differences it illustrates, that the Lazarus book not only fails, but perpetuates certain negative myths and harmful stereotypes about Native Americans and their cultural aspirations.[12]

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8. *See* Black Hills Act, art. 1, 19 Stat. 254 (1877).

9. 12 Stat. 765, 767 (1863).

10. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).

11. The constituent tribes consist of the Rosebud Sioux Tribe, Oglala Sioux Tribe, Cheyenne River Sioux Tribe, Standing Rock Sioux Tribe, Crow Creek Sioux Tribe, Lower Brule Sioux Tribe, Santee Sioux Tribe of Nebraska, and the Fort Peck Sioux of Montana.

12. See *infra* note 89 and accompanying text. It is necessary to note here that *Black Hills/White Justice* follows an unusual format. Despite the fact that this 400-plus page book deals with diverse historical and contemporary materials and quotes extensively from both, there are *no* footnotes. There is instead only a generalized "Notes on Sources." LAZARUS, *supra* note 3, at 459-70. This is unfortunate to say the least. I have never been a proponent of a heavy scholarly apparatus overkill, but its complete absence in such a "comprehensive" work is extremely disconcerting.

On balance, the straight legal narrative presented by Mr. Lazarus is informative and often even compelling. This story, unlike much of the law, does have intense drama. Part of the drama involves the role of the attorneys. Since the author is the son of one of the main claims attorneys, it is perhaps not surprising that they are given prominence in its telling. There is, for example, the initial decision of the tribes, after a certain amount of give and take, to hire Ralph Case, a local South Dakota attorney, to pursue the claim. Despite Mr. Case's enormous goodwill with the Great Sioux Nation, the claim was bungled until Arthur Lazarus and Marvin Sonosky[13] were brought in to replace him in 1957. The author succinctly describes Case's efforts as a "tragic combination of passionate commitment and unlawyerly argument."[14] He summarizes his efforts:

> In thirty-five years, two courts [Court of Claims and Indian Claims Commission] in three decisions had dismissed or rejected the Black Hills claim. On the merits, both the Commission and the Court of Claims had ruled not only that Case had proceeded on an untenable theory of valuation, but that the government's treatment of the Sioux had been reasonable under the circumstances, and even generous.
>
> Still lost in the wilderness, now despairing of the promised land, the Sioux did not need another Moses; they needed a conjurer to raise their claim from the dead.[15]

Eventually, the new legal team assembled a "winning" strategy, which included, among other things, a successful motion to set aside the 1956 Court of Claims decision based on Ralph Cases' incompetence,[16] and to persuade Congress to pass a statute in 1978 to avoid *res judicata* problems with the previous decision of the Court of Claims.[17] Additionally, the new legal team developed the ultimately successful "taking claim" theory, arguing that the United States "took" the Black Hills in an exercise of its eminent domain power, but that it denied the Great Sioux Nation due pro-

13. Mr. Lazarus and Mr. Sonosky represented the Oglala Sioux Tribe, Rosebud Sioux Tribe, Standing Rock Sioux Tribe, Crow Creek Sioux Tribe, Lower Brule Sioux Tribe, and the Santee Tribe of Nebraska. William Howard Payne represented the Cheyenne River Sioux Tribe and the Fort Peck Sioux of Montana. LAZARUS, *supra* note 3, at 231.

14. LAZARUS, *supra* note 3 at 201.

15. *Id.* at 216.

16. *Id.* at 228-34.

17. *Id.* at 347-65.

cess under the Fifth Amendment by not paying just compensation.[18] All of this is not an inconsiderable achievement, but Lazarus portrays the Great Sioux Nation as merely a spectator to this gripping drama. The people of the Great Sioux Nation are described as "untutored clients,"[19] who "were blind and mute, entirely dependent on the white experts with whom they had deposited their faith to guide them successfully through the labyrinth of law."[20]

The book, *Native American Testimony*, counters this disturbing silence that Mr. Lazarus posits with its wide-ranging chronicle of Indian voices in the history of Indian-White relations from "prophecy to the present." None of these voices specifically addresses the Black Hills issue, but many touch on the following core issues: (1) the significance of landscape in Native American thought and culture, and (2) Indian perception of the nature of non-Indian behavior and philosophy. Discussion of these core issues seems almost gratuitously omitted from the Lazarus book.

These voices are not simply a chorus of vilification, but are rather nuanced and varied in their braid of response. The Native American statements are grouped chronologically by editor Peter Nabokov in nineteen chapters (with brief introductions) ranging from "premonitions and prophecies" to "facing the future." They run the gamut from the metaphysical observation of Black Elk (Oglala) that "[s]ometimes dreams are wiser than waking,"[21] to the declaration of Big Bear (Otoe) that "we all work. But you cannot make white men of us. That is one thing you cannot do."[22] Such voices reveal a vital counterpoint to the mostly univocal narrative of Mr. Lazarus' work.[23]

Professor Martha Minow's book, *Making All the Difference*, describes a very helpful conceptual framework for thinking about the creation and persistence of difference in American law. In such a diverse society, which has been troubled about matters of race, class, and gender from its very beginning, the issue of "differ-

18. *Id.* at 383-402. This element was critical in the area of damages. Fifth Amendment takings require payment of five percent interest. Interest is not charged against the wrongdoer if the violation is brought under the Indian Claims Commission Act. In the context of the Black Hills claim, the difference between a claim brought under the Fifth Amendment and a claim brought under the Indian Claims Commission Act was $102 million versus $17.5 million (as of 1980). Since there has been no distribution of this money to date, interest is still accumulating.

19. LAZARUS, *supra* note 3, at 235.

20. *Id.* at 236.

21. NABOKOV, *supra* note 3, at 17.

22. *Id.* at 139.

23. See *infra* notes 30-33 and accompanying text.

ence" within the legal system has always been central. This work elucidates the recurrent themes of inclusion and exclusion within the dominant legal system with a particular focus on its paradoxes and troubling inconsistencies. Professor Minow, displaying keen insight, describes difference as being largely socially constructed around the often hidden norm of white, able-bodied, middle class males.[24] In addition, Professor Minow suggests that the mask of difference is often used to hide misallocations and distortions of power.[25]

Professor Minow also includes an illuminating discussion of what she calls the "dilemma of difference," which raises pertinent issues that arise when there is an attempt to ameliorate the harms caused by the invidious use of difference. There is, for example, the potential to exacerbate the difference which exists by pretending it does not exist or by calling undue attention to it in the first instance.[26] Surprisingly, and particularly unfortunate for the purposes of this review, *Making All the Difference* makes almost no reference to race, and only limited reference to Native Americans.[27] Nevertheless, Professor Minow provides a serviceable and helpful analytic rubric to apply to some of the most glaring declarations and omissions in the work of Mr. Lazarus.

III. ARROGANCE AND INDIAN LAW LIBERALISM

Indian law liberalism, despite its benevolent intention to "help" Indians, has often lapsed into a harmful and hurtful arrogance. The liberalism to which I refer is the kind of liberalism practiced by one who inherently "knows" what is best for others, particularly those who are situated outside mainstream, middle-class America. Mr. Lazarus' book is clearly cut from this cloth.

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24. MINOW, *supra* note 3, at 49-78.

25. *Id.* at 111-13.

26. *Id.* at 19-48. For example, legal and personal harm in the context of racial discrimination is accentuated by ignoring its existence, while it is also sometimes contended that affirmative action plans are flawed because they call attention to the invidious "differences" such plans are designed to combat.

27. *Id.* at 351-56 (reviewing the litigation involving the Mashpee Indians of Massachusetts in Mashpee Tribe v. Mashpee, 447 F. Supp. 940 (D. Mass. 1978), *aff'd.*, 592 F.2d 575 (1st Cir. 1979)). In *Mashpee Tribe*, the Mashpee Indians claimed that 16,000 acres of land on Cape Cod belonged to their tribe. Ultimately, the case turned on the predicate question of whether the plaintiff Indians were a "tribe" under the Non-Intercourse Act. Both courts ruled in the negative. Professor Minow's discussion focuses on the social construction of the term "tribe," "especially as a concept defined by whites to describe and regulate nonwhites." *Id.* at 355. In addition, there are the problems of contending narratives where the perspectives of the inquirer and the perspective of the evaluator become critical. *Id.* Professor Minow's observations are quite insightful in this regard. Unfortunately, Professor Minow does not provide any examples (like the Black Hills case) analyzing the issue of differences where tribes admittedly do exist.

One of the best historical examples of this arrogance in the area of Indian law can be found in the testimony articulated in support of the allotment process. This discussion, which took place in the latter part of the nineteenth century, focused on the question of whether it would be in the best interests of Indian people to divide the communal land on the reservation into individual Indian-held allotments. This issue was resolved in the affirmative and culminated in the passage of the Dawes Severalty Act in 1887.[28]

The results of this Act were truly devastating. The national Indian land estate diminished from 134 million acres to slightly more than 50 million acres in 1934, a staggering loss of nearly 90 million acres.[29] A leading chronicler of the Allotment Era observed "[t]hat the leading proponents of allotment were inspired by the highest motives seems conclusively true. A member of Congress, speaking on the Dawes bill in 1886 said, 'It has . . . the endorsement of the Indian rights associations throughout the country, and of the best sentiment of the land.' "[30] The notion was that allotment would bring material progress and deter non-Indian predation. It did neither. Yet, it had the unequivocal support of non-Indian Indian rights groups throughout the country. The well meaning allotment supporters did not find it necessary to confer with Indian people and tribes to solicit their views. They knew best.

Yet there were eloquent Indian voices set against allotment. For example, from the Rosebud Sioux Reservation, Chief Hollow Horn Bear said:

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28. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. 331-34, 339, 341-42, 348-49, 354, 381 (1983)).

29. WILKINSON, *supra* note 4, at 20. More than twenty-six million acres of allotted land was transferred from the tribe to individual Indian allottees and then passed to non-Indians through sale, fraud, mortgage foreclosures, and tax sales. *Id.*

Sixty million of the eighty-six million acres lost by Indians during the Allotment Era were lost because of the "surplus" land provisions of the Act. *Id.* According to historian Father Francis Prucha, thirty-eight million acres of unallotted tribal lands were declared "surplus" to Indian needs and were ceded to the federal government for sale to non-Indians. The federal government allowed another twenty-two million acres of "surplus" tribal land to be homesteaded. FRANCIS PAUL PRUCHA, THE GREAT FATHER 896 (1984). The ravages of the allotment policy were halted only by the Indian Reorganization of 1934, Act of June 18, 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. 461-78 (1983)), which permanently extended the trust status of all existing allotments and halted the issuance of any new allotments.

The allotment policy was vigorously endorsed within the Indian Service. 'The common field is the seat of barbarianism,' proclaimed an Indian agent; 'the separate farm [is] the door to civilization.' A commissioner of Indian Affairs explained in 1880, '[the Indian] must be imbued with the exalting egotism of American civilization so that he will say 'I' instead of 'We' and 'This is mine' instead of 'This is ours.' " NABOKOV, *supra* note 3, at 233.

30. D.S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS 8 (1973).

> "My friends, you have all heard what my father-in-law says, but I do not think he is right. He believes what the white people tell him; but this is only another trick of the whites to take our land away from us, and they have played these tricks before. We do not want to trust the white people. They come to us with sweet talk, but they do not mean it. We will not sign any more papers for these white men."
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> All the Indians grunted "Hau!" ("How!"), which meant that they agreed with what Hollow Horn Bear said. Then other chiefs arose and spoke. So many of them were against the allotment that it seemed we were not to get it, but these councils which the Indians held among themselves were not recorded, as there were no white persons present.[31]

And from a Hopi by the name of Albert Yava:

> I don't know where [Senator] Dawes got his knowledge of Indian ways, but he was dead set against a tribe or clan owning communal lands . . . . [T]he Government began to survey the Hopi lands to divide them up, and they did all this without any consultations with responsible Hopi leaders . . . . They only stirred up confusion and resentment by what they were doing.[32]

These voices (and others) might have made a difference if they were heard. Their insights might have shed the necessary light into the public and congressional debates. Yet, apparently, they were deemed to be of no consequence and were neither sought nor heard by their "friends."[33] And catastrophe ensued.

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31. NABOKOV, *supra* note 3, at 242.

32. *Id.* at 247.

33. Support for allotment came from an unusual coalition of those who favored opening Indian lands to non-Indian development and many Indian rights associations throughout the country. For example:

> Allotment was supported by those in Congress who favored opening Indian lands to non-Indian development. It was also supported by many Indian agents and Indian rights associations throughout the country. The support of the program by eastern Indian rights advocates was evident at the Lake Mohonk Conference in 1889. These Indian rights supporters sought to protect the Indian in his land holding. The feeling was that an Indian holding a patent from the federal government, restricted against alienation, enjoyed greater security for his land tenure than the protection afforded by tribal possession. Additionally, the program held forth the vision that the Indian would acquire the benefits of civilization through the pursuit of sedentary agricultural life and would, therefore, abandon his "uncivilized," nomadic, hunting tribal culture. Of course, these paradigm extremes rarely existed in practice. Despite the fact that agriculture already formed an important ingredient of many tribal cultures,

This instructive example seems to have eluded Mr. Lazarus. A similar kind of intellectual and political arrogance pervades his analysis. Despite his focus on a landscape of sacred and historical centrality to Lakota people, their voices and views are of little consequence in the book's narrative. Any corrective view would not mean, of course, that Lakota voices would carry the day, but only that these voices would be honestly heard and considered in the context of a meaningful dialogue, subject-to-subject, rather than treated with the affectless view of Native Americans inherent in Mr. Lazarus' subject-object construction.

Another example of this arrogant liberalism can be identified in the context of the attorney-client relationship. Mr. Lazarus never discusses the attorney-client relationship *per se*. He apparently does not think it is necessary or pertinent. The lawyers are ascendant, even supreme. Yet there are some elements of the "successful" legal strategy employed by Lazarus and Sonosky which their clients likely would not have approved. The attorneys for the Sioux Nation did not seriously press the treaty issue. For example, the lawyers did not really challenge the rationale of *Lone Wolf v. Hitchcock*,[34] which permitted the United States to unilaterally abrogate treaties with Indian tribes, even when those treaties explicitly required tribal approval of any future land sessions,[35] as in the crucial text of the Fort Laramie Treaty of 1868.[36] Lazarus and Sonosky might have used a viable legal strategy, but did they seek what their clients wanted, particularly in the context of significant historical and cultural differences?

Lone Wolf is cited extensively in *Black Hills/White Justice*, but never with a culturally or legally critical eye. Mr. Lazarus correctly notes:

> *Lonewolf* [sic] transmogrified the guardian-ward concept, originally conceived for the benefit of the tribes, into a Dickensian relationship granting the guardian extraordinary powers, absolving him of any wrongdoing, and leaving the ward essentially powerless. What John Marshall envisioned as a relationship binding the government to

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Congress approved the allotment program, over significant tribal opposition, based on these cultural stereotypes.

ROBERT N. CLINTON, NELL JESSUP NEWTON, MONROE PRICE, AMERICAN INDIAN LAW 149-50 (1991).

34. 187 U.S. 553 (1903).

35. Lone Wolf v. Hitchcock, 187 U.S. 553, 553-54 (1903).

36. *See supra* note 7 and accompanying text (Art. XII of the Fort Laramie Treaty of 1868).

> the Indians according to "moral obligations of the highest responsibility and trust," the *Lonewolf* [sic] suit refashioned to suit the convenience of a conquering people imposing its will.[37]

Yet, Mr. Lazarus makes no reference to the extensive scholarly criticism of this astounding doctrine.[38] More telling perhaps is his failure to consider the *cultural* implications of such a doctrine on a people who saw the treaty as more than mere political expedience, and who considered land as more than some compensable property interest.[39] The lawyer-client relationship described in

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37. LAZARUS, *supra* note 3, at 170. The "guardian-ward" relationship is adumbrated by Chief Justice Marshall in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). In *Cherokee Nation*, Chief Justice Marshall also characterized Indian tribes in the following classic (positive) statement: "They may, more correctly, perhaps be denominated domestic dependent nations." *Id.* at 17.

38. *See, e.g.*, Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 856 (1990). The following quotation is a small excerpt of the sweeping scholarly criticism of the plenary power doctrine collected by Professor Clinton.

> The illegitimacy of federal assertions of such sweeping unilateral authority frequently is proclaimed in Indian country. Indeed, scholars consistently have questioned the purported doctrine of plenary federal authority over Indians because of the lack of any textual roots for the doctrine in the Constitution, the breadth of its implications, and the lack of any tribal consent to such broad federal authority. Therefore, many commentators have sought out limits on that authority. *E.g.*, [Milner S.] Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J., 367-113 (suggesting lack of textual authority for plenary power . . .); [Robert] Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 996-1001 (1981) (suggesting inherent limits in the reach of the Indian commerce clause); [Richard B.] Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989) (arguing for Indian consent as a limitation on federal authority); [Robert T.] Coulter, *The Denial of Legal Remedies to Indian Nations Under U.S. Law*, in NATIONAL LAWYERS GUILD COMMITTEE ON NATIVE AMERICAN STRUGGLES, RETHINKING INDIAN LAW 103, 106 (1982) ("[T]here is not textual support in the Constitution for the proposition that Congress has plenary authority over Indian nations."); [Nell Jessup] Newton, *Federal Power over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195, 261-67 (1984) (suggesting due process and takings limitations).

Id.

39. As insightfully noted by Father Peter John Powell, the well-known historian and anthropologist,

> [W]hites rarely, if ever, have understood the sacredness of the context in which treaties were concluded by Lakota people . . . . "The pipe never fails," my people the Cheyennes, say. For the pipe is the great sacramental, the great sacred means that provides unity between the Creator and the people. Any treaty that was signed was a sacred agreement because it was sealed by the smoking of the pipe. It was not signed by the Chiefs and headmen before the pipe had been passed. Then the smoking of the pipe sealed the treaty, making the agreement holy and binding.
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> Thus, for the Lakotas, the obligations sealed with the smoking of the pipe were sacred obligations.

ROXANNE DUNBAR ORTIZ, THE GREAT SIOUX NATION 106 (1977) (quoting Peter John Powell, *The Sacred Treaty*).

For a discussion of the land as a "sacred text" within Lakota culture and tradition, see Frank Pommersheim, *The Reservation As Place: A South Dakota Essay*, 34 S.D. L. REV. 246 (1989).

Black Hills/White Justice is monocultural and one dimensional.[40] The lawyers are smart, they know how the system "works," and they devise the attendant strategies to "win." However, there is no awareness that a "victory" which results in financial compensation *only*, without land return and without full consideration of the ethical, moral, and cultural implications of the treaty issue, might not be completely satisfactory to the clients.[41]

The fact that the treaty claim is blithely dismissed by the Supreme Court in a footnote,[42] when coupled with the observation of Mr. Lazarus that his father seldom traveled to Sioux country,[43] and that "[h]e did his job at arm's length from his clients"[44] is therefore not surprising. One would not have to be in Sioux country very long to ascertain the centrality of the treaty issue to the Sioux Nation "client."[45] Maybe the treaty issue was not a "winner," but perhaps thoughtful lawyer-client dialogue might have developed it as *part* of a comprehensive legal strategy that could not only "win," but could demonstrate cultural fidelity and lawyer-

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40. *See, e.g.*, Gerald P. Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989) (suggesting the necessity of special law school training in order to make lawyers sensitive to differences among their clients). Lopez argues that

> [l]egal education conceives of and treats people, their traditions, their experiences, and their institutions as essentially fungible. It declares, at least tacitly, that who people are, how they live, how they struggle, how they suffer, how they interact with others, how others interact with them, and how they relate to conventional governmental and corporate power need not be taken into account in any sustained and serious way in training lawyers. Generic legal education teaches law students to approach practice as if all people and all social life were homogenous.

Id. at 307. This indifference in the legal academy "reflects in part a reluctance or refusal by many in the mainstream to acknowledge subordination as a pervasive phenomena." *Id.* at 306.

41. *See, e.g.*, Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2302 (1989). Professor Ball observes:

> Their counsel, inexplicably, acceded to the proposition that the United States could legally abrogate the Fort Laramie Treaty and that the United States held title to Sioux and all Indian land . . . .
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> . . .
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> [T]he courts are not confined to money damages. They and the Congress could respond with flexibility. They could return the land, certainly at least those considerable portions of it that are public and are held by the federal government. Moreover the voice of the Sioux can certainly be better heard in the judicial process through a different quality of legal representation.

Id. (footnotes omitted).

42. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 411 n.27 (1980).

43. LAZARUS, *supra* note 3, at 312-13. He "submitted cordial but formal reports to the tribal council, recounting progress in the claims and frankly assessing their future prospects." *Id.*

44. *Id.* at 313.

45. For example, I witnessed a public meeting on the Rosebud Sioux Reservation in the mid-1970s in which Mr. Sonosky was loudly booed when he sought to minimize the significance of the treaty issue.

client integrity. Sadly, this potential solution completely eludes Mr. Lazarus because he does not see the lawyer-client relationship as a problem in the first instance.

A final, broader illustration of this pernicious liberalism involves an examination of the period following the 1980 Supreme Court decision[46] regarding the Black Hills. The Sioux Nation objective of seeking land restoration as part of the ultimate resolution to the Black Hills issue was simply not attainable within the framework of litigation against the federal government. Neither Congress nor the federal judiciary has ever authorized land restoration as a *judicial* remedy in the context of Indian land claims litigation. Land restoration may only be effectuated by specific congressional enactments.[47] Thus, the attention of the Sioux Nation eventually turned to Congress.

The first version of the Sioux Nation's effort to persuade Congress to restore its land was (and is) entitled the "Sioux Nation Black Hills Act."[48] It is popularly referred to as the "Bradley Bill" after its prime sponsor, Senator Bill Bradley of New Jersey. Senator Bradley, the former New York Knicks basketball player, became friends with a number of Lakota people as the result of basketball camps in which he participated on several reservations in South Dakota. He agreed to sponsor the bill in the absence of any sponsors from the South Dakota congressional delegation.

The proposed Sioux Nation Black Hills Act has three major components:

1) Restore the approximately 1.3 million acres in the Black Hills still held by the federal government to the Sioux Nation;[49]

2) Provide financial compensation along the lines decided by the United States Supreme Court in 1980;[50] and

3) Establish a Sioux Nation Council to govern the restored area.[51]

Mr. Lazarus' assessment of the potential of this effort is rather bleak and somewhat haughty:

[T]he notion of holding out for a better deal—a return of

46. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980).

47. *See, e.g.*, Alaska Native Land Claims Act, 43 U.S.C. §§ 1601-28 (1988); Maine Indian Land Claims Settlement Act, 25 U.S.C. §§ 1721-29 (1988).

48. S. 705, 100th Cong. 1st Sess. (1987). *See also* H.R. 5680, 101st Cong., 2nd Sess. (1990) (Sioux Nation Black Hills Restoration Act of 1990) ("The Phil Stevens/Grey Eagle Bill").

49. H.R. 5680 § 4.

50. *Id.* § 10.

51. *Id.* §§ 13-14.

> the Black Hills themselves and perhaps a lot more money in damages—was enormously attractive, especially to a people ignorant of Washington and unable to assess independently their chances for success.[52]

The bill, as well as its successors, essentially has gone nowhere. The uniform opposition of the three-person South Dakota congressional delegation has effectively stymied any movement in Congress. What is needed is not necessarily more adroitness in the halls of Congress courtesy of "liberal" insiders,[53] but the ability to mount a grass roots campaign in South Dakota (and elsewhere) to develop an Indian/non-Indian coalition in support of the Bradley Bill or other similar legislation. Such a coalition has yet to materialize. There is no doubt that the building of such a coalition would be a difficult task,[54] but it is the challenge of a commitment to justice and the democratic process. Curiously, this is not a strategy that has occurred to Mr. Lazarus. It is, I guess, just not a part of the mentality of Indian law liberalism. Everything begins and ends within the capital beltway and the expensive suites of its lawyers and lobbyists. It is this kind of thinking that inevitably preserves a "guardian/ward" mentality.

What Mr. Lazarus does discuss in the context of legislative redress is especially truncated. He fails, for example, to indicate that Congress has on a number of occasions passed legislation that provided for land restoration. Two notable instances include the Alaska Native Lands Claims Settlement Act[55] and the Maine Indian Land Claims Settlement Act,[56] both of which involved comparable issues of land, money, and jurisdiction. The Alaska Native settlement process involved over 500 million acres and one billion dollars, which arguably makes the Black Hills situation rather modest in comparison. The essential point of this illustration is that Congress has acted in this area, and some sense of this context in Mr. Lazarus' book would have rendered his assessment of the likelihood of congressional action more realistic.

More troubling, however, is Mr. Lazarus' failure to actually identify the specifics of South Dakota (official) opposition to legisla-

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52. LAZARUS, *supra* note 3, at 406.

53. There is no doubt of the value of liberal "insiders" to this movement, but they do not constitute the beginning and the end of such efforts.

54. *See, e.g.*, Frank Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 230 (1991). The racism and ignorance surrounding this issue in South Dakota is extensive. *Id.*

55. *Supra* note 47 and accompanying text.

56. *Id.*

tive redress in the Black Hills matter. He merely notes that "[these] non-Indian constituents, never friendly to the Indians beforehand, grew virtually apoplectic at the prospect of giving the Sioux substantive civil jurisdiction over Black Hills lands that produce 600 million in annual revenue from tourism, mining, and timber harvesting."[57] His statement is, of course, true, but woefully incomplete—the legacy and animus of race prejudice.

Not surprisingly, South Dakota public officials articulate their opposition differently. According to some public officials, the proposed legislation should be rejected because it offends the First Amendment, intrudes improperly into state sovereignty, creates needless "checkerboard" jurisdiction, and is not historically justified.[58] These claims are significant in that they establish the floor for much of the needed public debate and discussion in South Dakota and elsewhere. Obviously no progress is possible on the issue without understanding the terms of the debate. It is therefore all the more remarkable that Lazarus' "comprehensive" work does so little to inform readers about the current contours of the controversy and struggle.

Mr. Lazarus does a better job of chronicling the fragile unity of support for the Bradley Bill achieved by individual Indians and the tribes that make up the Sioux Nation, before this unity dissolved with the appearance of Phil Stevens[59] and his divisive tactics and strategy. Ultimately, Mr. Lazarus ends the book amidst despair about the "false hopes" on both sides of the Black Hills issue: "There has been no cleansing of guilt on the one side, neither adjustment nor deliverance on the other."[60] Yet, he ignores the fact that the promise remains that some kind of legislative redress could achieve a measure of justice and fulfillment on both sides.

The theme of justice, despite its presence in the book's title, is not really addressed in *Black Hills/White Justice*. Mr. Lazarus' view seems to be that the "United States held itself to a higher

57. LAZARUS, *supra* note 3, at 419.

58. George S. Mickelson, *Governor's Letter*, WICAZO SA REVIEW, Spring 1988, at 26-28; John P. Guhin, *The Black Hills Bill: Expressions of Doubt as to Its Justification and Constitutionality*, WICAZO SA REVIEW, Spring 1988, at 51-55; Frank Pommersheim, *The Black Hills Case: On the Cusp of History*, WICAZO SA REVIEW, Spring 1988, at 18-24 (discussing land restoration in the Black Hills controversy).

59. LAZARUS, *supra* note 3, at 423-26. Mr. Stevens claimed that the Sioux Nation was actually entitled to $3.1 billion in compensation (in addition to land restoration) and that he could convince Congress to pass such legislation. *Id.* at 423. He also claimed to be a descendant of an Oglala chief by the name of Standing Bear. *Id.* These brazen assertions undermined a good deal of tribal unity on the Bradley Bill. *Id.* at 424.

60. *Id.* at 427.

level of accountability"[61] than the Sioux did in building their "plains empire." Therefore, the Sioux Nation should be grateful and exit stage left. Despite these undocumented, provocative, and cranky assertions, justice remains as elusive as ever. Justice cannot easily be reduced to identifying a specific result in advance, but rather emerges from an ongoing dialogue which culminates in a sense "that one party's story is more morally compelling than the other's story."[62] This dialogue is all the more important in the context of matters involving race, culture, and history of which the Black Hills issue is almost paradigmatic. Justice emanates from conversation[63] rather than declaration. Mr. Lazarus' book offers little in this vein beyond culture-bound frustration with what appears to him to be Sioux Nation intransigence and unwillingness to yield its status as a victim.[64]

Part of dialogue requires listening. Yet the dialogue within the Sioux Nation itself seems to have eluded Mr. Lazarus. For example, both the *Lakota Times*[65] and the Cheyenne River Sioux Tribe[66] surveyed tribal members about the Black Hills issue and asked about money-only or money-and-land remedial solutions. Both of these surveys indicated strong majority (but not unanimous) support for money-plus-land settlement. In addition, in a recent newspaper column by Alex Lunderman, Chairman of the Rosebud Sioux Tribe, Lunderman notes the lack of agreement among Lakota tribes about the best way to settle the Black Hills issue, and also makes the frank admission that "[s]uch doubt should not make any of us feel good about ourselves."[67] The promise of such introspection and the resurgence of honest and respectful

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61. *Id.* at 413. Mr. Lazarus contends that since the Sioux Nation displaced other tribes on the plains, they have no cause to complain about the quality of justice rendered by the United States courts in the matter of the Black Hills.

62. Anthony D'Amato, *Rethinking Legal Education*, 74 MARQ. L. REV. 1, 52 (1990).

63. *Id.* at 52 n.117.

64. LAZARUS, *supra* note 3, at 428. Specifically, for example, Mr. Lazarus states:

> As for the Sioux, the claims process has encouraged them to evade any real responsibility for repairing the tragic condition of their lives. They have come to believe that their status as victims, their sense of grievance, is their greatest source of strength and only hope for unity. And in this belief the Sioux have abandoned any meaningful attempt to control their own destiny in favor of rhetorical claims to sovereignty and independence.

Id.

65. Alex Lunderman, *We Must Prove Worthy of Responsibility*, LAKOTA TIMES, April 22, 1992, at B2. (discussing the survey conducted in 1991.)

66. Conversation with Cheyenne River Sioux Attorney General's office (March 1993) (discussing the survey conducted in 1988).

67. Lunderman, *supra* note 65, at B2. This article appeared in the LAKOTA TIMES after the publication of *Black Hills/White Justice*, but it is illustrative of the genuine sentiment that Mr. Lazarus seems incapable of finding or identifying.

debate unfortunately remains outside the confines of the Lazarus text.

IV. CONTEXT AND SITUATEDNESS

Such a wide-ranging legal and historical controversy as the Black Hills issue inevitably requires that analytic attention be paid to context and situatedness. For the Sioux Nation, land restoration is a cornerstone cultural commitment. Economic considerations are important, but not as central. The Black Hills land is of primary importance because of its sacredness, its nexus to the cultural well being of Lakota people, and its role as a mediator in their relationship with all other living things. As noted by Gerald Clifford, Chairman of the Black Hills Steering Committee, "[u]ntil we get back on track in our relationship to the earth, we cannot straighten out any of our relationships to ourselves, to other people."[68]

Land is inherent to Lakota people. It is their cultural centerpiece—the fulcrum of material and spiritual well being. Without it, there is neither balance nor center. The Black Hills are a central part of this "sacred text" and constitute its prophetic core:

> As part of the "sacred text," the land—like sacred texts in other traditions—is *not* primarily a book of answers, "but rather a principal symbol of, perhaps *the* principal symbol of, and thus a central occasion of recalling and heeding, the fundamental aspirations of the tradition." It summons the heart and the spirit to difficult labor. In this sense, the "sacred text" constantly *disturbs*—it serves a prophetic function in the life of the community. The land, therefore, constantly evokes the fundamental Lakota aspirations to live in harmony with Mother Earth and to embody the traditional virtues of wisdom, courage, generosity, and fortitude. The "sacred text" itself guarantees nothing, but it does hold the necessary potential to successfully mediate the past of the tradition with its present predicament.[69]

In addition, there is the assertion in certain Lakota creation myths that the Black Hills are not only holy, but they are the literal place of the origins of Lakota people thousands of years ago.

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68. William Grieder, *The Heart of Everything That Is*, ROLLING STONE, May 7, 1987, at 62.

69. Pommersheim, *supra* note 39, at 269 (footnotes omitted).

Such claims, as noted in *Black Hills/White Justice*, are sharply contested based on (non-Indian) readings of the historical and archeological record.[70]

All of this is potential for a primal clash—a clash that seems irreconcilable because the "truth" assertions of each side appear grounded in the opposing and largely incompatible realms of science and myth. Such a clash is not, however, unique to this Indian/non-Indian dispute, but also exists within the dominant culture itself. Mr. Lazarus seems to notice this in passing, but smoothes it out and draws the wrong conclusion. He analogizes the Lakota myth to a " 'creationist' interpreting Genesis as the literal story of man's beginnings,"[71] intimating, of course, that the "creationist" is wrong. Yet, in fact, the teachings of most of the Jewish and Christian faiths instruct that Genesis is literally true, though many (western) Christians and Jews, while not denying these teachings, also seem equally at home with the scientific doctrine of evolution.[72]

This apparent paradox is illuminated by the insightful commentary of Marilynne Robinson:

> I consider myths to be complex narratives in which human cultures stabilize and encode their deepest ambivalences. They give a form to contradiction which has the appearance of resolution . . . .
>
> Myth is never plausible narrative. It asks for another kind of assent. To anyone for whom it does not strike an important equipoise, it seems absurd.[73]

It is possible that discussion of the Black Hills issue will proceed, at least in part, in this difficult realm, and therefore some caution ought to be observed. The conventional discourse of law, history, and even politics is not well suited for the mythological sphere, but special sensitivity to context and culture will surely help understanding.

Vine Deloria, Jr., a leading Sioux scholar and intellectual,

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70. LAZARUS, *supra* note 3, at 417. "The most careful archaeological and archival studies of scholars indicate that the Lakota had their origins, like all of the Sioux family, over East in what is now Minnesota." DONALD WORSTER, UNDER WESTERN SKIES (NATURE AND HISTORY IN THE AMERICAN WEST) 121 (1992).

71. *Id.*

72. *But see* Edwards v. Aguillard, 482 U.S. 578, 587 (1987) (noting that the doctrine of creationism is *not* science; the doctrine of evolution is a science). *See also* RONALD GOODMAN, LAKOTA STAR KNOWLEDGE (1991) (providing a Lakota perspective on astronomy that supports claims of centuries old presence of the Sioux in the Black Hills).

73. Marilynne Robinson, *Hearing Silence: Western Myth Reconsidered*, NORTHERN LIGHTS, Vol. VIII, No. 2, 1992, at 12.

points to the Black Hills issue as pivotal in providing the opportunity to begin the process of establishing greater economic and political independence for Lakota tribes from the strictures of federal hegemony and control.[74] Some kind of land restoration should play a vital role in this process.[75] All of this, as wisely suggested by Professor Deloria in his introduction to *Native American Testimony*, is not to excoriate the "white man" to once again to come to his senses, but rather to indicate that

> the lesson which seems so hard to learn is that of dignity and respect. Some of the voices contained herein may appear to be complaining about the loss of land, the loss of a way of life, or the continuing propensity of the white man to change the terms of the debate to favor himself. But deep down these are cries about dignity, complaints about the lack of respect.[76]

Any of these contexts, voices, and points of view are subject to contrary evidence and opposing contentions. Yet, without acknowledging or considering them, you only have proof of Vine Deloria, Jr.'s trenchant observation: "What is missing in federal Indian law is the Indians."[77]

Two observations about situatedness are in order. I have written about the Black Hills case elsewhere and support some kind of land restoration and legislative redress.[78] I did so because I believe that is how justice may be achieved, and because of the unique opportunity it provides to right an historical wrong—an opportunity that history seldom provides. This explains, in part, my strong disagreement with much of the Lazarus book and my impetus to write about it.

Nevertheless, one never knows what other readers bring to their interaction with the text. For example, the Dean of the University of South Dakota law school is a member of a small reading group made up of friends, including some of the leading educators and politicians in the eastern part of South Dakota. He chose *Black Hills/White Justice* for the group. The Dean invited me to their discussion of the book. They, including the Dean, uniformly gave the book high praise for "telling it like it is" with such com-

74. Vine Deloria, Jr., *Reflections of the Black Hills Claim*, WICAZO SA REVIEW, Spring 1988, at 33, 38.
75. *Id.*
76. Vine Deloria, Jr., *Forward* to NABOKOV, *supra* note 3, at XVIII.
77. Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 205 (1989).
78. Pommersheim, *supra* note 58.

ments as "we really did steal the Black Hills!" I was a little nonplussed. I explained some of my problems with the text as I've suggested here. Well, yes, they could see that, but their enthusiasm for the book remained undampened. The significant point in all of this is to note that readers often do bring different backgrounds and expectations to their interaction with the text, which may, in turn, greatly affect their interpretation. Given the experience just described, I believe it is necessary to acknowledge the potential range of readers' legitimate responses.

V. DIFFERENCES

"It is not necessary that eagles should be crows."[79]

Inevitably, much of the Black Hills controversy centers on "differences" between the dominant non-Indian society and the Sioux Nation. These differences have existed from the very first "contact" between Europeans and the indigenous people of this continent. What has emerged in this political and legal discourse is the perception of the Native American as the "other." Most often this "other" is characterized negatively as "savage" and "uncivilized," or sometimes positively as "natural" or in harmony with nature. In Indian law, this characterization is typified by Chief Justice Marshall's prototypical analogy which likened the relationship of the federal government to the Indian tribes as "that of a ward to [a] guardian."[80]

This bleak assessment finds its contemporary analog in declarations about tribal sovereignty as being of a unique and limited kind, subject to complete defeasance by Congress.[81] As Professor Minow notes in her insightful analysis, such statements do not describe "inherent" differences, but rather, these statements reflect the social construction of difference that is largely the function of the misallocation of power which allows such "differences" to be enforced as normative.[82] Such differences appear and develop sociological "reality" through the process of comparison. In the context of Native American culture, the ascendancy of the white middle-class standards of "progress" and material well being are assumed and seldom discussed.

This is most certainly true of Mr. Lazarus' analysis. Although his analysis is comprehensive in some respects, he does not explore

79. NABOKOV, *supra* note 3 at XVIII (quoting Sitting Bull) (emphasis added).
80. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1931).
81. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 323 (1978).
82. *See* MINOW, *supra* note 3, at 49-78.

this issue in much detail. It is, perhaps, more accurate to say that Mr. Lazarus looks at half of the difference equation as if it were the whole and (erroneously) pronounces the difficult equation solved. Although he does not employ any of the conceptual rubric set out in the Professor Minow's book, his own analysis tracks a portion of it. There is no doubt that the United States government acted improperly in "taking" the Black Hills. Nevertheless, the rationale of the federal government was the necessity and inevitability of its act, the march of progress and manifest destiny. As Justice Rehnquist stated: "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."[83] Mr. Lazarus' book amply documents this use of difference as negative and discriminatory in the Black Hills controversy. This "stigma" of difference has nothing to commend it and its use needs to be resisted and eradicated. Indeed, this is one way of reading *Black Hills/White Justice*, as the story of a successful attempt to overcome the invidious stigma of difference.

Yet, the fact that this is only *half* of the dilemma of difference is apparently what so exasperates Mr. Lazarus. There is not only the stigma of difference but a (paradoxical) correlative of a "pride" of difference. Many people or groups who do not want to be discriminated against, nevertheless, take pride in their cultural differences and want these differences to be recognized and respected. In his book, *Black Hills/White Justice*, Lazarus neither sees nor understands the significance of this strand of difference. Therefore, the book lacks the empathy (which does not always mean agreement) necessary to make the contending views equally human and vital in the pressing historical drama of the Black Hills.

An interesting contrast to Mr. Lazarus' book is found in the approach of the environmental historian Donald Worster.[84] He accomplishes much simply by identifying the right questions, which are so often missed, and in turn, precluding any reasonable expectation of obtaining the right answers. Professor Worster observes that:

> we can do something about what has happened over the last century or so in the American West and what is still happening there today. We can ask, and because we profess to live by principle, not by mere expediency, we *must*

83. United States v. Sioux Nation of Indians, 448 U.S. 371, 435 (1980) (Rehnquist, J., dissenting).

84. *See supra* note 70, at 106-53.

> ask: what does the past reveal about the land and its rightful ownership? Are the Lakota really the legitimate owners of the Black Hills? . . . Did the white man's courts grant them a fair hearing and a just compensation, or were there critical aspects the courts ignored? Does the religious significance of the Hills give them a claim? Have the Hills in fact been traditionally held sacred in Lakota eyes, and if so, for how long? . . . Answers, however, will not be simple or obvious or easy; otherwise, the questions would have been addressed instead of being swept aside.[85]

Professor Worster's answers to these questions do not always "favor" the Lakota, but they are nuanced and culturally sensitive particularly in the context of the "sacredness" of the Hills.[86] His discussion about the sacred and the profane, the role of time and change in this area, and the varying impact of the sacred on different individuals is particularly illuminating. For example, he rests much of his opinion on the elucidation of the insights of the seminal scholar of religious studies, Mircea Eliade.[87] Thus, his discussion focuses on how perception of what is sacred evolves and changes over time, and how a sense of the sacred is necessary for full identity and renewal. Professor Worster is thinking and listening and has an enviable concern for healing and "mutual respect,"[88] premised on the need for enduring and honest dialogue.

Lastly, and most unfortunately, Mr. Lazarus' observations (particularly in the last chapter of *Black Hills/White Justice*) serve only to deepen the grooves of negative stereotypes about Indian people and the reservation. For example, he states:

> For many Sioux, the dominant pull of reservation life was irresistible. Along the gullied dirt roads of rural Sioux villages, drunks wandered like aimless phantoms. Many had taken to drinking the household cleanser Lysol, which

85. *Id.* at 117.

86. *See id.* at 121-42. "The most careful archaeological and archival studies of scholars indicate that the Lakota had their origins, like all of the Sioux family, over East in what is now Minnesota." *Id.* at 121. "Their loss in 1877 did just that [profaned them] and thus interfered with the Lakota's religious freedom of expression in the most vital way. Lakota religion came under a threat of extinction, and today it cannot survive unless the Hills are returned." *Id.* at 136.

87. *See id.* at 138-142 (discussing Professor Eliade's seminal book THE SACRED AND THE PROFANE and its application to the Black Hills).

88. *Id.* at 153.

was cheap, densely alcoholic, and "a real quick high."[89]

Of course, alcoholism is a significant problem on many Sioux reservations. Yet, to present this observation without the sense of the remarkable change in recent years in attitudes and efforts of Lakota people to combat these ravages seems remarkably ignorant of context and devoid of understanding. For example, Lakota people sponsored sobriety walks, alcohol-free events, alcohol abuse and drug education courses in the Indian-controlled community colleges, and "red road" to recovery treatment programs on the reservation. Certainly, the sense of tribal struggle against this terrible affliction is more real than ever before, but these actions do not fit Mr. Lazarus' central motif of dependence and passivity.

Differences persist and often appear likely to prevent any breakthrough in truly understanding and resolving the Black Hills issue in a mutually acceptable way. Perhaps this is so, but liberation is also within our reach. The dominant non-Indian community needs to listen and heed this observation:

> My grandmother told me that the white man never listens to anyone, but he expects everyone to listen to him . . . . The wind isn't a good listener! The wind wants to speak, and we know how to listen. My father always told me that an Eskimo is a listener. We have survived here because we know how to listen. The white people in the lower forty-eight talk. They are like the wind; they sweep over everything.[90]

If we listen to each other, we will not necessarily erase difference, but perhaps use it to our mutual advantage. In fact, Professor Minow suggests that this realization is pivotal to understanding the difference dilemma:

> The point is not to find the new, true perspective; the point is to strive for impartiality by admitting our partiality. The perspective of those who are labeled "different" may offer an important challenge to those who impose the label, but it is a corrective lens, another partial view, not the absolute truth. It is the complexity of our reciprocal realities and the conflict between the realities that constitute us which we need to understand.[91]

89. LAZARUS, *supra* note 3, at 420.
90. NABOKOV, *supra* note 3, at 431.
91. MINOW, *supra* note 3, at 376 (footnotes omitted).

The ultimate goal is therefore not to undo difference, but rather to create solidarity; a quality the chief source of which is the imagination with its ability "to see strange people as fellow sufferers.[92] Such efforts flow not from mere academic inquiry, but from work of the heart and mind:

> Solidarity is not discovered by reflection but created. It is created by increasing our sensitivity to the particular details of the pain and humiliation of others, unfamiliar sorts of people. Such increased sensitivity makes it more difficult to marginalize people different from ourselves by thinking, "They do not feel as *we* would."[93]

VI. CONCLUSION

The unresolved Black Hills issues serve as a constant reminder about the challenges of history, national diversity, and the ideal of justice. History is never really "past"; diversity seldom recedes into assimilation; and justice cannot often be obtained by money alone. There is, perhaps, no easy way to achieve resolution of the many questions posed by the Black Hills controversy, but there are better, though more arduous ways. They are the ways that lead to commitment, respect, imagination, and engagement.

92. RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY XVI (1984).
93. *Id.*