

# Governmental Coverage of Traditional Indigenous Medicine, An Ethical Justification

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*[W]e know of no principle of law that would relate the availability of  
... relief inversely to the gravity of the wrong sought to be addressed.<sup>3</sup>*

Does a government have the responsibility to provide traditional indigenous medicine (“Traditional Medicine”)<sup>4</sup> to indigenous people within its constituency? The answer to this question, of course, depends upon resolution of the larger issue regarding whether a government has a

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<sup>2</sup> This paper represents only the views of its author. Nothing in this paper constitutes legal advice, or necessarily expresses the views of the Nordhaus Law Firm.

<sup>3</sup> This statement was made by a federal court as it rejected the argument that Native land claims must be dismissed because of their potentially catastrophic ramifications for the current possessors of the land. Oneida Indian Nation of New York v. County of Oneida, 719 F.2d 525, 539 (2d Cir. 1983).

<sup>4</sup> There is no one adequate description of Traditional Medicine among indigenous people. Rather than attempting to craft one, this paper will refer to Traditional Medicine generally as those remedies and therapies that indigenous groups engage in to promote good health, and to cure illnesses. For many indigenous groups in the United States, this means that Traditional Medicine includes ceremonies, dances, prayers, herbs, and certain types of food.

responsibility to provide any type of health services to anyone. This paper will not address that larger issue. Rather, this paper will assume that governments do have some sort of obligation to provide health services. Accordingly, the discussion below addresses the limited question of whether such an obligation includes the responsibility to provide Traditional Medicine to indigenous people.<sup>5</sup> More specifically, the paper will examine whether the United States federal government has an obligation to pay for the delivery of Traditional Medicine to indigenous people within its population. As will be shown below, my approach to this topic necessarily involves a view of the larger obligations owed to Native people by the federal government.

Presumably, Traditional Medicine has not been included in most governmental health programs, at least in part, because of the belief among non-indigenous people that Traditional Medicine is not the type of health service that the government is obligated to provide. In other words, non-indigenous people often do not give Traditional Medicine respect as legitimate health services. It is likely that many people would feel much more comfortable if the federal government were to provide only those health services that the non-indigenous people believe to be valuable and effective.

The right to choose one's own conception of life, health and healing is at the center of any such debate. Adequate treatment of this topic may require an explanation and definition of "health services." One could then attempt to address the concept of "legitimate" health services, and

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<sup>5</sup> This paper will use the terms "indigenous people" and "Native people" interchangeably to describe the descendants of those people who occupied North America prior to Columbus' "discovery" of North America in 1492. Throughout the United States, the term "Indian" often used for the same purpose. Use of "Indian" will be avoided in this paper due to the confusion that term may cause in the international community. However, the term "Indian Tribe" will be used to refer to political subdivisions within the United States that are sanctioned by the federal government to govern groups of Native people.

determine whether Traditional Medicine should fall within that definition. However, this paper is not primarily concerned with that inquiry. Rather, it is enough for this paper to describe Traditional Medicine as that set of beliefs and practices regarding health and healing that is embraced by each indigenous community.

Important in this approach is the concept that Native people define their own Traditional Medicine. In other words, Traditional Medicine is defined by a Native community's own beliefs about life, health and healing. It is the self-determination of health services that is important to the political and ethical justification of federal funding for Traditional Medicine within the United States. As will be explained below, the principles of corrective justice establish a moral responsibility for the United States federal government to pay for costs associated with Traditional Medicine.

#### I. American Federalism

The American system of federal government includes three types of sovereign<sup>6</sup> entities - the federal government, state governments, and tribal governments. Under the United States Constitution, the federal government consists of three branches (legislative, judicial, and executive), and is a government of limited powers. This means that the federal government has only those powers that are specifically enumerated in the Constitution. Powers not enumerated in the

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<sup>6</sup> The term sovereign is not used here in the strongest sense. Rather, the term is meant to describe a governmental entity that possesses at least some ability to carry out governmental functions separately and independently from other governmental entities.

Constitution are reserved for the States. However, the Constitution is clear that, within its enumerated powers, federal law has supremacy over State law.<sup>7</sup>

Among the enumerated powers granted to the federal government, are the legislature's exclusive authority to "regulate commerce ... with the Indian Tribes,"<sup>8</sup> and the President's power to make treaties.<sup>9</sup> From these powers, and in conjunction with the supremacy of federal law over State law, the federal government has the exclusive power to recognize political entities, known as Indian Tribes<sup>10</sup>, that govern the affairs of Native people.

The current policy of the federal government is to encourage the self-determination of Native people, and to recognize the sovereign status of Indian Tribes. This policy, while laudable, stands in sharp contrast to the historical treatment of Native people by the federal government.

## II. The Federal Government's Treatment of Indigenous People

When Columbus first made contact with the "new world" in 1492, it is estimated that there were roughly 125 million indigenous people within the Western Hemisphere.<sup>11</sup> In the four hundred

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<sup>7</sup> United States Constitution, Article VI.

<sup>8</sup> United States Constitution, Article I, Section 8.

<sup>9</sup> United States Constitution, Article II, Section 2. The President has the power to make treaties so long as two-thirds of the Senate concurs.

<sup>10</sup> Use of the term Indian Tribe can be confusing because, historically, Native people did not necessarily group together in "tribes." Rather, there was a wide diversity in types of Native communities and structures of Native governments. Additionally, contemporary Native communities describe themselves in many ways, including Nation, Indian Nation, Indian Tribe, Indian Community, Pueblo, and Rancheria. Under federal law, however, "Indian Tribe" is a term of art that is reserved for those groups of Native people that have received recognition as a tribal government from the federal government.

<sup>11</sup> See "Estimating Aboriginal American Population: An Appraisal of Techniques with a New Hemispheric Estimate," Current Anthropology, No. 7, 1966.

years between 1492 and 1892, it is estimated that ninety percent <sup>12</sup> of this indigenous population was wiped out due to colonial invasion and “settlement.” In the words of one author, these millions of indigenous people died by “being hacked apart with axes and swords, burned alive and trampled under horses, hunted as game and fed to dogs, shot, beaten, stabbed, scalped for bounty, hanged on meathooks and thrown over the sides of ships at sea, worked to death as slave laborers, intentionally starved and frozen to death during a multitude of forced marches and internments, and, in an unknown number of instances, deliberately infected with epidemic diseases.”<sup>13</sup>

In addition to the tragic loss of life that resulted from this genocide, the land used by indigenous people who were murdered, and their surviving relatives, was almost entirely depleted. Within the boundaries of what is now recognized as the United States, indigenous people were first forced to give up vast amounts of land in exchange for “Reservations” on which they had to live within boundaries set by the federal government. Often times these reservations were not within the traditional homelands of the indigenous people, and, therefore, did not include sacred sites that were of great religious significance. Additionally, after being displaced onto Reservations in foreign areas, Native people were often unable to continue the farming, hunting, or gathering practices that were central to the economies of particular groups of Native people in particular areas.

To make matters worse, beginning in the 1880’s, the federal government decreased the Native land base even more dramatically through the policy of “allotment.” The federal

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<sup>12</sup> Id.; and “Report on Indians Taxed and Indians Not Taxed in the United States (except Alaska) at the Eleventh U.S. Census: 1890” U.S. Bureau of the Census (Washington, D.C.; U.S. Government Printing Office, 1894).

<sup>13</sup> Ward Churchill, A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present (City Lights Books 1997) 1.

government hoped to change the communal nature of Reservation land by dividing it up into pieces and assigning each Native family its own particular piece of land, with a fixed amount of acreage, to own in fee. Whatever Reservation land that was not divided up and assigned to particular families was to be declared “surplus” and made available for non-Indian ownership and development. Although the policy of allotment was eventually abandoned, its legacy remains today on many Reservations that now include great amounts of land that has fallen out of Native ownership.

In addition to the genocide and massive divestment of Native homelands, during the fifty-year period between the 1870’s and the 1930’s, the federal government enforced policies intended to replace Native culture, religion, political structure and economy with that of the dominant American population. It is well accepted that these policies were “deigned to assimilate Indians forcibly and destroy their culture and tribal institutions.”<sup>14</sup> Among other things, the federal government criminalized and enforced prohibitions against many traditional Native practices, including religious ceremonies and dances.

The policy of assimilation was followed by a concerted effort on the part of the federal government to impose its own governmental structure on Indian Tribes through the Indian Reorganization Act of 1934. Thereafter, beginning roughly in the 1950’s, the federal government adopted policies intended to “terminate” the status of Indian Tribes as governmental entities. Eventually, around 1970, this policy of termination was abandoned in favor of its polar opposite: tribal sovereignty and self-determination.

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<sup>14</sup> R. Clinton, N. Jessup Newton, and M. Price, American Indian Law: Cases and Materials (3d Ed.) 151.

Detail regarding the shifting federal policy toward Indian Tribes is beyond the scope of this paper. However, it is important to understand that each set of federal policy initiatives was partially successful. As a direct result of federal policy, millions of people were killed, millions upon millions of acres of land was taken, traditional religious practices were outlawed and partially destroyed, and Native people were forced to abandon their traditional political, legal, and economic systems. Now, in the shadow of this destruction, the federal government has embraced a policy that aims to empower Native people to make decisions for themselves and recover from these tragedies. As explained below, this federal policy should include payment of costs associated with Traditional Medicine.

The federal government's power over Indian Tribes is generally understood to include an obligation that is known as the "federal trust responsibility." While there is much agreement about the existence of this responsibility, there is very little agreement about the particular requirements of the responsibility. At its most basic level, the trust responsibility requires the federal government to protect the interests of Indian Tribes, including tribal property and jurisdiction.<sup>15</sup>

The character of, and justification for, this obligation has changed over time. In its earliest days, the federal trust responsibility was part of a paternalistic understanding of the relationship between Indian Tribes and the federal government that required the federal government to protect Indian Tribes as a parent would protect a child.<sup>16</sup> Although protection of tribal resources is still

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<sup>15</sup> See e.g., Nance v. EPA, 645 F.2d 701, 713-15 (9th Cir. 1981)(affirming EPA recognition of tribal authority over air quality designations under the Clean Air Act).

<sup>16</sup> Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831)(characterizing the tribal-federal relationship as being like that of a "ward to its guardian").

required, the federal trust responsibility is now generally understood to involve a respect for, and the facilitation of, tribal sovereignty and self-determination.<sup>17</sup>

Clearly, there is a fundamental tension between the paternalistic protection of Indian Tribes, and the facilitation of Indian Tribes' sovereignty and self-determination. If reconciliation of these principles is possible, it certainly will not be accomplished in this paper. Rather, what follows is an description of the principles that should guide the federal government in its treatment of Indian Tribes. This set of principles, referred to as the Modified Trust Responsibility ("MTR"), embraces the goals of corrective justice, aspiring to address the tremendous harm and moral wrong that has been visited on Native People by the federal government.

### III. The Demands of Corrective Justice.

This paper will broadly, and roughly, define corrective justice as that set of theories demanding that both actual harm inflicted and moral wrongs committed be addressed in forming the proper response to unjust actions. In other words, corrective justice should be understood to require that the proper response to an unjust action, or set of actions, includes an accounting of how the response will both correct the harm that was inflicted and right the moral wrong involved with the unjust action.

Although a sufficient explanation of corrective justice is well beyond the scope of this paper, it is important to understand the basic difference between a "harm" and a "wrong." A harm has been described as "a disruption of or interference in a person's well-being, including damage to that

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<sup>17</sup> See e.g., Presidential Memorandum on Government-To-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22, 951 (1994)(requiring that "[a]s executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty").

person's body, psychological state, capacities to function, life plans, or resources over which we take this person to have an entitlement."<sup>18</sup> By contrast, a wrong, while more difficult to define, is related to the culpable action of the agent committing an unjust, or unethical action.<sup>19</sup> Therefore, corrective justice requires that we look back at the harm and figure out how best to compensate for it, while also thinking about the proper moral response to the agent that committed the unjust or unethical action.

As indicated above, both the harms inflicted on Native people and the wrongs committed by the federal government are massive. The MTR described below provides a set of principles that may begin to address these concerns through corrective justice.

#### IV. Modified Trust Responsibility

What follows is a description of the MTR, and a brief sketch of the reasons for adopting the MTR. Clearly, this approach raises many concerns that cannot be adequately addressed in this paper.<sup>20</sup> The purpose of this paper, of course, is to present the MTR, and explain how it provides an ethical justification for governmental coverage of Traditional Medicine.

The following three principles are the foundation of the MTR.

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<sup>18</sup> Jean Hampton, "Correcting Harms Versus Righting Wrongs: The Goal of Retribution," UCLA Law Review, 39 UCLA L.Rev. 1659, 1662 (August 1992).

<sup>19</sup> Id.

<sup>20</sup> For example, problems related to government (as opposed to individual) accountability for moral actions must be addressed. Additionally, there must be an explanation of why and how we should hold current generations of Americans financially responsible for historic harm inflicted by the federal government. Issues related to future generations of Native people also must be addressed. While viable responses to these concerns exist, both the concerns and the responses are beyond the scope of this limited paper.

1. The federal government should make payments to indigenous people that are related to the harm it has inflicted on indigenous people.
2. The federal government should construct a system of laws that attempts to restore the liberty and autonomy of Native political entities, and that allows Indian Tribes to exercise regulatory and adjudicative jurisdiction over their lands.
3. The federal government should help Indian Tribes solve problems created by the legacy of genocide, mass land depletion, and assimilation.

Principle one is an attempt to begin correcting economic harms inflicted by the federal government. Principles two and three aim to both correct the harms inflicted and right the wrongs committed. Unfortunately, a greater explanation of these reasons must be saved for a later date.

As will be explained below, principle three provides the most direct justification for governmental coverage of Traditional Medicine. Principle two provides a constraint on that assistance, requiring the federal government to pay for the services, but not dictate how they are to be delivered. Although the first principle is not the focus of this paper, it is presented here to put the other principles in context, and emphasize that the money spent to implement principle three is only part (and perhaps a very small part) of the remedy that must be constructed to address the challenge of corrective justice.

### III. Does the MTR Require the Federal Government to Pay For Traditional Medicine?

Yes. Principle three of the MTR requires the federal government to facilitate the health and welfare of Native people in accordance with the conceptions of life, health and healing that Native people define for themselves. The justification for this lies in the necessity for a proper remedy to

address the history of genocide, massive land depletion, and cultural assimilation carried out by the federal government.

Because there is not a clean slate in the history of federal-tribal relations, tribes face tremendous political, economic and health obstacles resulting from federal action. Because the slate is not clean, the federal government should not simply walk away and tell Indian Tribes that they will now be left alone to pursue their sovereignty and self-determination without the funds that are necessary to do so. Rather, the federal government has an obligation to pay the costs of such programs, while being careful not to impose non-Native conceptions of how this money should be spent.

For this reason, the costs for delivery of Traditional Medicine should be born, at least in part, by the federal government, but each Indian Tribe should make its own decisions regarding the best use of that money. Clearly, there will be those who want to question decisions made by Indian Tribes, and those who want to cast doubt on the efficacy of Traditional Medicine. However, it is not for them to decide. Rather, corrective justice requires the federal government to pay costs associated with Traditional Medicine, without questioning Indian Tribes' beliefs regarding life, health and healing.

This may be, of course, a hard pill to swallow.