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CONFERENCE TRANSCRIPT: HEEDING FRICKEY’S CALL: DOING JUSTICE IN INDIAN COUNTRY*

Table of Contents

HEEDING PHIL FRICKEY’S CALL: THE ISSUES IN INDIAN COUNTRY	348
Matthew L.M. Fletcher, Professor of Law and Director of the Indigenous Law & Policy Center, Michigan State University College of Law	348
Joseph Heath, Attorney at Law, Onondaga Nation General Counsel...	351
Pat Sekaquaptewa, Executive Director, Nakwatsviewat Institute.....	358
ENVIRONMENTAL JUSTICE IN INDIAN COUNTRY	365
Sarah Krakoff, Professor of Law, University of Colorado Law School.....	365
Hawk Rosales, Executive Director, InterTribal Sinkyone Wilderness Council	369
CRIMINAL JUSTICE IN INDIAN COUNTRY	374
Sarah Deer, Assistant Professor of Law, William Mitchell College of Law	374
M. Alexander Pearl, NALSA Alum; Assistant Professor, Florida International University College of Law	384
BERKELEY LAW’S RESPONSIBILITY FOR HEEDING FRICKEY’S CALL	390
Matthew Fletcher, Professor of Law and Director of the Indigenous Law & Policy Center, Michigan State University College of Law	390
Katherine Florey, Professor of Law, University of California at Davis.....	391
INTERNATIONAL HUMAN RIGHTS AND INDIAN COUNTRY	393
Joseph Bryan, Assistant Professor of Geography, University of Colorado at Boulder	393
Amy Bowers Cordalis, Staff Attorney, Native American Rights Fund.....	402
RACE, LAW, AND CULTURE.....	407
Matthew Fletcher, Professor of Law and Director of the Indigenous Law & Policy Center, Michigan State University College of Law	407

* These materials were presented at the University of California at Berkeley Law School on Sept. 27-28, 2012.

Bethany Berger, Professor of Law, University of Connecticut School of Law.....	410
B.J. Jones, Director, Tribal Judicial Institute, University of North Dakota School of Law	416

HEEDING PHIL FRICKEY'S CALL: THE ISSUES IN INDIAN COUNTRY

Matthew L.M. Fletcher, Professor of Law and Director of the Indigenous Law & Policy Center, Michigan State University College of Law

Miigwetch, Mary Louise for the kind introduction and kind words. I am going to spend a couple of minutes talking about why we are here and introducing this whole thing. We are going to talk about Phil Frickey's call, so I guess we have to thank him also for being here. This really started five or six years ago. Frickey spoke about something he called new realism back in 2006 at the Cohen Symposium.¹ Then, in 2007, he brought a bunch of us — including some that are here and others — to talk about what that might mean for legal scholars.² He spoke a little bit more about it in 2008 in his Kansas address right near the end of his life.³

I would say looking back at those materials and thinking about what I recalled about what was going on, I think there were four things that Phil was calling for. The first is more empirical research, social science research that has good methodology and actual analysis based on actual data from Indian Country. He was also saying, "Let's have more research that is grounded in tribal realities in Indian Country, more theoretical and practical research." He also added that Indian scholars need to have more scholarly objectivity. Finally, he said there should be fewer doctrinal papers. I think what Phil said was, "We do not need to write the twenty-seventh article about *Oliphant v. Suquamish Indian Tribe*⁴ all the time; it's already been

1. See Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649 (2006) [hereinafter Frickey, *Transcending*] (essay based on an address given at the symposium "Indian Law at a Crossroads," University of Connecticut School of Law, Oct. 28, 2005).

2. See *Conference Transcript: The New Realism: The Next Generation of Scholarship in Federal Indian Law*, 32 AM. INDIAN L. REV. 1 (2007-2008) [hereinafter *Conference Transcript*] (transcript of a meeting of the National Congress of American Indians, Berkeley, Cal., Nov. 17, 2006).

3. See Philip P. Frickey, *Address at University of Kansas Conference on Tribal Law and Institutions, February 2, 2008: Tribal Law, Tribal Context, and the Federal Courts*, 18 KAN. J.L. & PUB. POL'Y 24 (2008) [hereinafter Frickey, *Address*].

4. 435 U.S. 191 (1978).

done.” To be fair, what’s missing from Indian law is the Indians.⁵ Frank Pommersheim in his book *Braid of Feathers* from the mid-1990s said there is just not enough tribally centered scholarship out there.⁶ Of course, we all know Sam Deloria says this all the time.⁷ I bring Sam up because he, of everyone, is really interested in the scholarly activity of this new realism, this research, and he would say we need less cheerleading. This is our five-year retrospective.

I wanted to highlight something that I wrote about in a short paper — it is an honor to talk about it at this conference — on the citation patterns of federal, state, and tribal courts to Indian law scholarship going back to 1959.⁸ But I want to talk a little bit, before we move on to this panel, about my own experiences, about what brought us out here in 2007, and I took very seriously what he was saying. I can tell you realism is not easy. I have had so many starts and stops and foibles since then that it’s not funny. One of the things I remember John Dossett talking about specifically back in 2007 was, “When will we know what the rules are for fee to trust acquisitions? We do not know what kind of lands go into trust.”⁹ We don’t know case-by-case what’s going to happen, and a good study would be a survey of how that actually works. I take that prescription seriously.

I come from the Grand Traverse Band of Ottawa and Chippewa Indians in Michigan. We were federally recognized in 1980 with twelve acres, and we have been trying to get land back ever since.¹⁰ So the trust acquisition process is central to our core as a modern government, and I know about it myself, but I tell you, unless I had a couple million bucks to research this thing, it’s not going to happen. If you want information regarding so-and-so, the Department of the Interior (“Interior”) would be happy to give it to you eventually, but for a cost.

5. See Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203 (1989).

6. See FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* (1995).

7. E.g., Sam Deloria, *Commentary on Nation-Building: The Future of Indian Nations*, 34 ARIZ. ST. L.J. 55 (2002) (based on remarks during a panel discussion at the “Symposium on Cultural Sovereignty: Native Rights in the 21st Century,” March 7, 2001).

8. See Matthew L.M. Fletcher, *American Indian Legal Scholarship and the Courts: Heeding Frickey’s Call*, CALIF. L. REV. CIRCUIT (Mar. 21, 2013, 12:00 AM), <http://www.californialawreview.org/articles/american-indian-legal-scholarship-and-the-courts-heeding-frickey-s-call>.

9. See generally 25 U.S.C. § 465 (2006).

10. See MATTHEW L.M. FLETCHER, *THE EAGLE RETURNS: THE LEGAL HISTORY OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS* (2012).

For example, I had my law library request some documents from the Interior under the Freedom of Information Act (“FOIA”), only twenty-five cents a page, which is probably something we could have negotiated, but there were 12,000 pages. I just couldn’t do it; I had to get tenure first. There are other things too, in regards to getting research done. I remember Pat Sekaquaptewa saying this as well at the conference in 2007.¹¹ It’s not easy to go to Indian Country and say, “Hey, give us this information,” right? She was saying that it’s hard for tribal leaders, tribal attorneys, Indian people, or scholars to come on the reservation and demand all this information, no matter how nicely they do it. We still remember the anthropologist problem that Vine Deloria talked about in the 1960s.¹²

So there is also a demand on time. For example, another research project I started had to do with how many nonmembers in Indian Country have consented to tribal jurisdiction. I just wanted to do a sampling of a couple of different tribes just to get a sense. I know from some other tribes I worked for in the West that there were a lot of people who worked for the tribe, such as non-Indians who were employees for the tribe, had vendor contracts with the tribe, and who lived in tribal housing with tribal members who may have been their family members. It would have been nice to get a guestimate; but it’s almost impossible to get that information.

The Navajo Tribe is great — they will send you to every single agency that doesn’t have that information. There are a lot of those agencies. But I was able to write a few papers about that even before Phil passed away. I was able to get a copy of some of the materials Justice Blackmun had made available online¹³ (thanks to John Dossett and Ian Gershengorn who told me about this) from the mid-1980s to late 1990s about what the Supreme Court justices are thinking, and what they write (during the certiorari process).¹⁴ I started shortly after the conference; I wasn’t thinking about the conference anymore. It ends up being related in some way, the core of the research I did, ironically. So this conference is in honor of all that.

I am not going to introduce the panelists one by one. We don’t have a whole lot of time. They have ten to twelve minutes to talk. I’m here with a stick to make sure we don’t go over our time. Thank you.

11. See generally *Conference Transcript*, *supra* note 2, at 120-26.

12. See generally VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* 78-100 (Univ. of Okla. Press 1988) (1969).

13. *Digital Archive of the Papers of Harry A. Blackmun*, UNIV. OF S. CAL – LEE EPSTEIN, <http://epstein.usc.edu/blackmun.php> (last visited Sept. 26, 2013).

14. See Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933 (2009).

*Joseph Heath, Attorney at Law, Onondaga Nation General Counsel*¹⁵

Good afternoon everyone. I want to thank the law school for having this forum and all of you for coming.

My name is Joe Heath. I am fortunate enough to be General Counsel for the Onondaga Nation. Onondaga is the central fire of the Haudenosaunee Confederacy. They are often known as the Iroquois, which is a pejorative French colonial term. Their name for themselves is Haudenosaunee, which roughly translates as “People of the Longhouse.”

Onondaga is a traditional nation.¹⁶ They still govern themselves by the Great Law of Peace that was brought to them over a thousand years ago by the Peacemaker. They are governed by a Council of Chiefs, selected by Clan Mothers, who also have the removal authority.¹⁷ They have maintained their active clan system, and they still perform their ceremonies and speak their language.¹⁸ The Tadodaho was hopeful to be here today, but they are in the middle of a ceremonial period that runs for about five weeks, and he just could not get away from that.

The Onondaga Nation does not accept any federal funding.¹⁹ Most of the work my office does — there are only two lawyers and a community organizer — is diplomatic and environmental because the nation is trying to fulfill its obligation to be good stewards of the land and water that is left in central New York. I will get back to some of our environmental work in a minute.

15. General Counsel to the Onondaga Nation, the central fire keeper of the Haudenosaunee Confederacy. Adjunct Assistant Professor of Law, Syracuse University Law School, 1982; Adjunct Professor, SUNY Oswego, 1982-1983; A.B., Syracuse University, 1968; J.D., SUNY Buffalo, 1974; and admitted to the New York State Bar in 1975.

This Essay was originally presented as a speech on September 27, 2012 at the UC Berkeley Law School at the “Heeding Frickey’s Call: Doing Justice in Indian Country” Symposium. I take full responsibility for all unsupported assertions in this Essay, as they are based upon my personal observations during my three decades of working for the Onondaga Nation.

The author wishes to acknowledge and express appreciation for the research assistance provided for this Essay by Jenna Gansworth, J. D. Syracuse University Law School, 2012.

16. Joseph Heath, *Review of the History of the April 1997 Trade and Commerce Agreement Among the Traditional Haudenosaunee Councils of Chiefs and New York State and the Impact Thereof on Haudenosaunee Sovereignty*, 46 BUFF. L. REV. 1011, 1012 n.2 (1998).

17. *Id.*

18. *Id.*

19. *Id.* at 1022 n.33.

Of the issues that face the Onondaga right now, the worst one, the one that is weighing on them the heaviest, is the federal district court dismissal of their land rights action. This action was but the latest in a series of Supreme Court and Second Circuit decisions leading to the dismissal of the Six Nations' land claims. The Second Circuit dismissed the Cayuga Nation's land claim in June of 2005.²⁰ This was only three months after the *Sherrill* decision,²¹ in which the Supreme Court made up a new equitable defense, the "new laches." We have people around the country who are beginning to write about the laches defense and break it down.²² We searched for years to figure out what happened to equity here, what happened to fairness. Then the Second Circuit sort of educated us about that in the summer of 2010, when they dismissed the Oneida land claim that had been pending for over thirty years.²³

All of the rules of equity had been thrown out in these rulings, such as the balancing of equities; but they have created a new "equity defense" that only applies to Indian nations' land cases and ignores almost every historical rule of equity.²⁴ The fact that the State of New York knowingly acted illegally — in violation of treaties, the Trade and Intercourse Act, and the U.S. Constitution — should have resulted in court recognition that the State did not have "clean hands" and should therefore not have been entitled to invoke an equitable defense.²⁵ The Haudenosaunee land rights cases are based upon illegal takings of the land by New York in the 1790s and early 1800s, which the State has not denied, and in other cases, has been proven through long factual hearings.

New York needed the land after the Revolutionary War because it had no money and it needed to pay its soldiers. So New York carved up the region in maps for military tracts before ever stealing the land. These takings of

20. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005).

21. *City of Sherrill, N.Y. v. Oneida Indian Nation*, 544 U.S. 197 (2005).

22. See Kathryn Fort, *Disruption and Impossibility: The New Laches and the Unfortunate Resolution of the Modern Iroquois Land Claims*, 11 WYO. L. REV. 375 (2011) [hereinafter Fort, *Disruption*]; Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 GEO. MASON L. REV. 357 (2009); Sarah Krakoff, *City of Sherrill v. Oneida Indian Nations of New York: A Regretful Postscript to the Taxation Chapter in Cohen's Handbook of Federal Indian Law*, 41 TULSA L. REV. 5 (2005); Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21 (2005); Joseph William Singer, *Nine-tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605 (2006).

23. *Oneida Indian Nation v. Cnty. of Oneida*, 617 F.3d 114 (2d Cir. 2010).

24. Fort, *Disruption*, *supra* note 22, at 402.

25. *Id.*

Haudenosaunee lands by New York were such a problem for President George Washington and the new government that in 1790, Washington had Congress pass the Trade and Intercourse Act ("Act"), which is now 25 U.S.C. § 177. Essentially, this is a very simple law that says no party can take Indian land without federal involvement and federal ratification.²⁶ This Act applies to everybody, including the states, and if any party takes Indian land in violation of those two simple rules, then the transfers are void.

The Act was directly aimed at New York because New York was taking Haudenosaunee lands progressively.²⁷ Washington's army was losing the war in Ohio and he could not afford to have the Senecas and other Haudenosaunee warriors join that war. New York kept taking the land and these takings violated the Constitution, the Act, and the last treaty the Six Nations made with the United States — the 1794 Treaty of Canandaigua.²⁸

Five of the Six Nations filed land claims. The Onondagas filed what they called a land rights action because they did not claim possession of the land, they just asked for a declaratory judgment stating New York had violated the law and therefore the transactions were void.²⁹ In response, the Second Circuit has made up a new rule that says, "It is not fair for you to bring these issues forward now because this is too disruptive of the expectations of the landowners." So there only are two elements in this "new laches" defense: (1) A long passage of time, and (2) a judicially noticed disruption of the "reasonable expectations" of the non-natives that have taken over the land.

If you think about that, this framework is based upon removal, because one of the factors considered in this "new laches" defense is that all Indians have "moved away" and non-Indians, almost exclusively, now use the land. And disturbingly, these dismissals are being done under the guise of "equity." The final insult is that this "new laches" defense only applies to Indian land claims.³⁰ This is the background and framework that sets up the Onondaga's challenge of arguing the land claim action on Columbus Day in the Second Circuit — yes, the irony is profound.³¹

26. 25 U.S.C. § 177 (2006).

27. LAURENCE M. HAUPTMAN, CONSPIRACY OF INTERESTS: IROQUOIS DISPOSSESSION AND THE RISE OF NEW YORK STATE (2001).

28. *Id.*

29. Onondaga Nation v. New York, No. 5:05-cv-0314, 2010 WL 3806492, at *1 (N.D.N.Y. Sept. 22, 2010).

30. Fort, *Disruption*, *supra* note 22, at 402.

31. One week after the oral argument, the Circuit issued a summary denial of the appeal.

The Onondaga case was filed just weeks before the *City of Sherrill v. Oneida Indian Nation of New York* decision, and so we amended the complaint, which eventually was dismissed by the district court after the Oneida land claim³² was dismissed in the Second Circuit.

Of course, we all know that federal Indian law is founded on the problematic and racist doctrine of discovery.³³ The lands were taken illegally, and New York did not even deny any of these facts. They filed a Federal Rule of Civil Procedure 12(b)³⁴ (“Rule 12(b)”) motion, which essentially says it does not matter if any of the proposed facts are true. The State did not deny any of the facts by filing this motion. The State claims that it’s just not fair for the nations to bring these illegal land takings up anymore, because that is “inequitable” to the current non-Indian landowners.

We (the Onondaga) will see what the Second Circuit does with our case. The challenge on this appeal is particularly difficult because the three-judge panel cannot rule against their prior rulings and dismissals in *Cayuga*³⁵ and *Oneida*.³⁶ We are trying to convince the panel that our case is fundamentally different. We did not sue any individuals; we sued the state, the city, and the county because we needed lesser governments to remain as defendants when the state exercises its Eleventh Amendment immunity. We also sued five corporate defendants, and those corporate defendants are the major polluters in the area.

One of them is Honeywell, which is actually owned by Allied Chemical (“Allied”). The company kept the Honeywell name because it sounds “cleaner.” Over a century, Allied and Honeywell heavily polluted and ruined Onondaga Lake, the sacred lake where the confederacy was born.³⁷ The lake is the birthplace of western democracy.³⁸ The lake used to be so

See Onondaga Nation v. New York, 500 F. App’x 87 (2d Cir. 2012). The Nation filed a petition for a writ of certiorari in the Supreme Court, which the Court denied on October 15, 2013. *See Onondaga Nation v. New York*, No. 12-1279, 2013 WL 1774236 (U.S. Oct. 15, 2013).

32. *See Oneida Indian Nation v. Cnty. of Oneida*, 617 F.3d 114 (2d Cir. 2010).

33. *See generally* LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2005).

34. FED. R. CIV. P. 12(b).

35. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005).

36. *Oneida Indian Nation v. Cnty. of Oneida*, 617 F.3d 114 (2d Cir. 2010).

37. *See* LEWIS HENRY MORGAN, LEAGUE OF THE IROQUOIS 7 (1851).

38. H.R. CON. RES. 331, 100th Cong., 2nd Sess. (1988); *see* DONALD A. GRINDE, THE IROQUOIS AND THE FOUNDING OF THE AMERICAN NATION (1977).

abundant with fish that people wrote about it in the 1700s;³⁹ but these companies have turned it into the most polluted lake in the country. So those are the kinds of defendants we targeted. However, one of the major problems we face now is this “new laches” defense.

With the loss of its land, the Onondaga and its people have been deprived of their spiritual, cultural and historic relationship with the land, including the lake and other water bodies. They can no longer fish, or eat any fish they might catch, due to the heavy contamination of mercury and twenty-six other toxic chemicals in the lake sediment. Without legal recognition of property rights, the Onondaga have no authority to dictate how the land and waters are used. This means that it is much harder for the Onondaga to protect its environmental interests, to protect sacred sites, and to protect the unmarked graves of their ancestors.⁴⁰

New York is one of only four states in the nation that has no state law protecting unmarked graves.⁴¹ We also do a lot of repatriation work. We try to prevent groups from digging up un-marked graves, which happens often in upstate New York these days. Onondaga used to live on and use two and a half million acres running from the eastern end of Lake Ontario⁴² through the center of New York, down into Pennsylvania. But Onondaga is now confined to 7500 acres. They used to fish extensively throughout the aboriginal territory; one-third of their diet was fish.⁴³ They are now confined to a small territory where the only body of water is Onondaga Creek.

I keep using the name Onondaga because their presence and ties to this land are very well recognized and accepted by the local people.⁴⁴ We have a very positive relationship with the local governments. However, in the last fifty years, the creek has been turned from a clean trout stream into a muddy mess because of a solution salt mining industry upstream. This mined salt was then used in chemical processes that polluted the lake.

39. See JOHN BARTRAM, LEWIS EVANS & CONRAD WEISER, *A JOURNEY FROM PENNSYLVANIA TO ONONDAGA IN 1743* (1973).

40. See Christopher A. Amato, *Digging Sacred Ground: Burial Site Disturbances and the Loss of New York's Native American Heritage*, 27 COLUM. J. ENVTL. L. 1 (2002).

41. *Id.*

42. See BARTRAM, EVANS & WEISER, *supra* note 39.

43. *Id.* at 64-65.

44. See Editorial, *Sacred Land: Proposal to Return Parcel to Onondagas a Worthy Idea*, POST-STANDARD (Syracuse), May 2, 2011, http://blog.syracuse.com/opinion/2011/05/sacred_land_proposal_to_return.html.

We also have a phenomenon called “mudboils,” which are the result of solution salt mining.⁴⁵ It is a process by which companies have drilled hundreds of wells about 1300 feet in the ground and used the water from nearby kettle and glacier lakes to flush the salt out of the bottom of the valley, leaving this huge vacuum in those salt cavities.⁴⁶ This process has caused subsidence, sinkholes, and rock fissures, leaving gaps in the surface rock four feet across. This kind of damage has interfered with the aquifer to the extent that now thirty tons of silt come up spontaneously on a daily basis, in an almost geyser-like phenomenon. That silt ends up in the creek. We have elders who can remember fishing in the creek at night with a kerosene lantern and spearing trout — it was a pretty clean stream. You can’t even see three inches into this creek anymore.

A lot of our work these days in central New York is fighting hydrofracking.⁴⁷ Chesapeake, Exxon, Halliburton, and other oil and gas companies are poised to frack the Finger Lakes.⁴⁸ For those of you who don’t know about hydrofracking, the process uses about eight million gallons of water per frack. Companies drill down thousands of feet horizontally into the shale formation and break (or fracture) the shale formations using water that is polluted with chemicals. The water then comes back up partially radioactive, highly salty with hundreds of chemicals.⁴⁹

Fracking destroys millions of gallons of water per frack.⁵⁰ It takes the water out of the water cycle and puts it in the ground and buries it, thereby permanently removing billions of gallons of fresh water from the

45. See WILLIAM M. KAPPEL, DONALD A. SHERWOOD & WILLIAM H. JOHNSTON, U.S. GEOLOGICAL SURVEY, HYDROGEOLOGY OF THE TULLY VALLEY AND CHARACTERIZATION OF MUDBOIL ACTIVITY, ONONDAGA COUNTY, NEW YORK 2 (Water-Resources Investigations Report 96-4043, 1996), available at <http://ny.water.usgs.gov/pubs/wri/wri964043/WRIR96-4043.pdf>.

46. *Id.* at 5.

47. Charles Ellis, *Protesters in Syracuse Call for Statewide Ban on Hydrofracking*, POST-STANDARD (Syracuse), June 14, 2012, http://www.syracuse.com/news/index.ssf/2012/06/protesters_in_syracuse_call_fo.html.

48. See Andrew Zepp & W. Stuart Schweitzer, Letter to the Editor, *Hydrofracking Threatens Finger Lakes Region*, POST-STANDARD (Syracuse), Oct. 18, 2011, http://blog.syracuse.com/opinion/2011/10/hydrofracking_threatens_finger.html.

49. Chris Mooney, *The Truth About Fracking*, SCI. AM., Nov. 2011, at 81, available at <http://www.acfan.org/wp-content/uploads/2011/11/truth-casings.pdf>.

50. Marie Morelli, *Environmentalists Meet in Syracuse to Learn About ‘Hydrofracking’ and How They Can Try to Stop It*, POST-STANDARD (Syracuse), Oct. 29, 2009, http://www.syracuse.com/news/index.ssf/2009/10/environmentalists_meet_in_syra.html.

worldwide water cycle. We do a lot of work fighting that,⁵¹ and we work with our non-Native neighbors in accordance with the direction of the Council of Chiefs. This work inspires me to publicly speak three or four times a week. The Chiefs go to the state capitol building in Albany when there are rallies. We want to protect the natural world so it can heal, not only the natural world, but also repairing the strained relationships resulting from centuries of settler invasions.

Another problem that we are dealing with a little more is gaining acceptance of the Onondaga's traditional governmental structure. The Onondaga does not have Anglo-style courts. It does not have three branches of government. It does not have a written constitution. But it does have its own traditional customs and institutions.⁵²

It is incredibly hard for non-Native people to accept how the Chiefs and Clan Mothers make decisions.⁵³ We are often confronted with questions like, "What is it about these custody arrangements that make you want us to honor them?" So we are working with courts and outside agencies to gain acceptance and recognition of Onondaga birth certificates, marriages, and dead feasts.⁵⁴ Dead feasts are the Onondaga's way of resolving what happens to property and land after death. We have encountered some difficult issues with the lack of respect and recognition of dead feasts.

Finally, an issue you may have heard about is that the Onondaga have always rejected United States citizenship. The Onondaga rejected the 1924 Citizenship Act immediately with a letter to the President.⁵⁵ An Onondaga chief, Jessie Lyons, went to Washington D.C. carrying wampum belts as a way of saying, "We are Haudenosaunee citizens, not U.S. citizens."⁵⁶ Nation citizens travel using Onondaga passports and have done so for over thirty years. Now, the United States is refusing to recognize those passports

51. Sarah Moses, *Onondaga Nation to Host Anti-Hydrofracking Music Festival*, POST-STANDARD (Syracuse), Sept. 7, 2012, http://www.syracuse.com/news/index.ssf/2012/09/onondaga_nation_to_host_anti-h.html.

52. Heath, *supra* note 16.

53. See *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960).

54. *George v. Pierce*, 85 Misc. 105, 127-28 (N.Y. Sup. Ct. 1914).

55. Laurence M. Hauptman, *Congress, Plenary Power, and the American Indian, 1870 to 1992*, in *EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS AND THE U.S. CONSTITUTION* 317 (Chief Oren Lyons & John Mohawk eds., 1992).

56. Howard McLellan, *Indian Magna Carta Writ in Wampum Belts: Six Nations Shows Treaty Granting Them Independent Sovereignty as Long as Sun Shines*, N.Y. TIMES, June 7, 1925, available at http://www.ratical.org/many_worlds/6Nations/WampumBelts.html.

and is preventing them from traveling internationally.⁵⁷ We do a lot of work in the United Nations. The Onondaga's lacrosse team competes on the international level with the United States, Canada, and other countries. The tribe just won a bronze medal in the world games this summer in Europe, but traveling with their own passports has become more and more of a challenge.

Those are the issues that we work with every day. There are many others, but I have a very limited amount of time.

Thank you for listening.

Pat Sekaquaptewa, Executive Director, Nakwatsvewat Institute

My name is Pat Sekaquaptewa. I am a member of the Hopi Tribe and the Village of Hotevilla, located in northeastern Arizona. I currently serve as the Executive Director of the Nakwatsvewat Institute, a non-profit committed to working with tribes to further their justice, governance, and educational institutions. I have also served for five years as the Executive Director of the UCLA School of Law's Native Nations Institute and its Tribal Legal Development Clinic. I have also served as an Appellate Justice for a number of tribal courts, including my own.

I was asked to speak today in response to Professor Frickey's observation that federal judges have no way to have a broader, balanced view of tribal institutions. Professor Frickey felt there is a failure of scholarship in federal Indian law in that the work does not grapple with the law on the ground in Indian Country. He also felt that the federal courts and Congress need strong contextual arguments to show how tribal institutions operate. As I was preparing my remarks, something really jumped out at me. As legal scholars we are stuck in the middle. Even Native legal scholars are stuck in the middle. We have powerful decision makers in Congress and the federal judiciary whose decision-making seems purely discretionary to us in Indian Country. What they seem to be looking for is a good story that will tug at the heart so they will be compelled to make or find some law in favor of the tribal communities.

This does not feel like a rule of law kind of thing or a justice kind of thing. So, as advocates and legal scholars, we tell a good story in order to win battles for our people; but we are stuck in the middle because in tribal communities, even our own leaders and community members are very suspicious of us (lawyers), for good reason. All you have to do is walk

57. Charles McChesney, *Iroquois Nation Passports Have Worked For Years*, *Attorney Says*, POST-STANDARD (Syracuse), July 13, 2010, http://www.syracuse.com/news/index.ssf/2010/07/iroquois_nation_passports_have.html.

back through the cases in federal Indian law to see it. Also, every tribal community has its own tragic history with non-Indians. So how are legal scholars supposed to develop scholarship for use by congressmen and federal judges? How are we supposed to tell an accurate story if we can't get access to the information from our own communities?

It is simultaneously true that in the U.S. legal system, the law is made and put in books. But in Indian Country, the law is in the people and in their relationships.⁵⁸ I do a lot of work with custom and tradition as law in Indian Country. Many tribal constitutions, codes, resolutions, and court rules recognize custom law as a valid source of law that is enforceable in tribal courts.⁵⁹

The U.S. federal system also recognizes tribal custom law to the extent that it recognizes the case law coming out of the tribal court systems — and in certain areas it is recognized and applied via federal statutes.⁶⁰ But where does custom law come from? It resides in the people. It resides in the practices and norms that come out of the community. Many of the elders know it. Many of the community members live it. The law is in the people and it is reinforced in their everyday lives. You can't look it up on your computer. You can't Google it easily — or maybe you Google it and

58. See generally Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319 (2007-2008).

59. See Hopi Tribal Resolution H-12-76, § 2(a) ("The Courts of the Hopi Tribe, in deciding matters of both substance and procedure, in cases otherwise properly before the Courts of the Hopi Tribe, shall look to and give weight as precedent to, the following: (1) the Hopi Constitution and Bylaws; (2) Ordinances of the Hopi Tribe Council; (3) Resolutions of the Hopi Tribe Council; (4) Customs, traditions and culture of the Hopi Tribe; (5) Laws, rules, and regulations of the Federal Government and the cases interpreting such . . . ; (6) The laws and rules, and cases interpreting such laws and rules, of the state of Arizona; [and] (7) The Common Law."). However, under section 2(b), the Courts of the Hopi Tribe shall not recognize nor apply any federal, state, or common law rule or procedure which is inconsistent with either the spirit or the letter of the Hopi Constitution, ordinances, resolutions, or the custom, traditions, or culture of the Hopi Tribe. *Id.* § 2(b). Under Hopi case law, federal and state laws are considered persuasive but not mandatory authority. Hopi Tribe v. Consolidated Cases of Mahkewa, 25 Indian L. Rep. 6144, 6145 (Hopi App. Ct. 1995). The Hopi Appellate Court has also held that relevant custom must be considered before the application of foreign law (federal and state laws) in the Hopi tribal courts. Hopi Indian Credit Ass'n v. Thomas, 27 Indian L. Rep. 6039, 6040 (Hopi App. Ct. 1996); see also Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57 (2007) (discussing comparative tribal provisions); Sekaquaptewa, *supra* note 58, at 380-81 (discussing comparative provisions establishing tribal custom).

60. See 25 U.S.C. § 1903(2) (2006) (defining extended family member "by law or custom of the Indian child's tribe" under The Indian Child Welfare Act of 1978).

you don't know when you are seeing it — but it is there. You can't look it up on Lexis or Westlaw unless one of us has written a law review article. I do want to acknowledge those lawyers and practitioners who are doing case studies with particular tribes and who are trying to share their observations because that is extremely valuable.⁶¹ How are we supposed to communicate the importance of tribal values, practices, and motivations if we can't gain access to the information from our own communities?

There are some basic facts of life given this dilemma. Legal scholars have to earn trust and access in tribal communities to get the information we would then put in law review articles. We also must provide a compelling context for our congressmen and federal judges and for lawmakers on other levels. And we must simultaneously educate people about tribal institutions and values. But often, the compelling context is more important strategically than the education because if federal judges are not swayed by a good story in the context of their value system, they may not care much about the information.

So that makes it very important for us to provide a compelling context to outside lawmakers and judges. Otherwise, we can't further our communities' interests. Even Native scholars must gain access to tribal communities to get information in order to build and describe these contexts to others. Successful legal scholars today earn trust and access to tribal communities by exchanging services and by helping tribes develop their infrastructure.⁶² We don't get to extract information from tribal communities because we went to school and are very smart and can publish articles. We have to trade for it. We have to earn trust and live up to the access that we will have in our tribal communities.

I made a list of strategies or recommendations for furthering this access. The first is that faculty in law schools should incentivize research and publication by their legal clinicians working with Indian Country. This assumes that law schools have legal clinics serving Indian Country. What is true for Native legal scholars is true for their academic institutions —

61. See, e.g., RENNARD STRICKLAND, *THE FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* (1975); Justin B. Richland, "What Are You Going to Do with the Village's Knowledge?" *Talking Tradition, Talking Law in Hopi Tribal Court*, 39 *LAW & SOC'Y REV.* 235 (2005); Robert Yazzie, "Watch Your Six": *An Indian Nation Judge's View of 25 Years of Indian Law, Where We Are and Where We Are Going*, 23 *AM. INDIAN L. REV.* 497 (1998-1999); Howard L. Brown, *The Navajo Nation's Peacemaker Division: An Integrated, Community-Based Dispute Resolution Forum*, 24 *AM. INDIAN L. REV.* 297 (2000).

62. See *Indian Law Clinics*, TRIBAL COURT CLEARINGHOUSE, <http://www.tribal-institute.org/lists/clinics.htm> (last visited Jan. 27, 2013).

access requires trust that must be earned with service. Legal scholars should also consider serving as tribal judges, and I know many do. If there is a problem with judging and writing outside Indian Country, a case could be made for why it is imperative to do it within and among tribal communities when it is done carefully.

The third recommendation is that legal scholars should participate in tribal law clinics and in tribal court clerkship programs as supervisors or advisors so they get some sense of how disputes arise and how case law is argued in tribal court. The fourth recommendation is that legal scholars, clinicians, and their students get off their computers and go to the tribal communities. I know that one of our U.S. Supreme Court Justices visited the Hopi. This was likely part of the Tribal Supreme Court Project, a joint project by the Native American Rights Fund ("NARF") and the National Congress of American Indians ("NCAI"), which tasked itself with educating the justices and other federal judges on key aspects of federal Indian law. In the summer of 2001, Justices O'Connor and Breyer took part in a historic visit to Indian Country to observe tribal justice systems.⁶³ Justice O'Connor actually showed up on the Hopi Reservation and met with a Hopi judge to learn how our tribal court system works first-hand. Even our U.S. Supreme Court Justices understood that this was an important thing to do.

The fifth recommendation has to do with formal research. In researching tribal court cases, legal scholars need to be careful to look at the entire case file including the full recordings and transcripts at the trial level. There is so much filtering that goes on, particularly if we have non-Indian lawyers and judges working in tribal courts. Consequently they often inadvertently filter out (or never see) the issues central to the tribal parties and relevant custom law considerations. Further, when tribal judges (and I might argue any judges) write their final opinions and orders, you are getting a somewhat subjective view of the conflict given their gender and life experiences and even of the law, which very often excludes custom law issues raised by the parties.⁶⁴ Where non-Indian lawyers and judges work in tribal court, much gets "lost in translation," so it is very important to look

63. NATIVE AM. RIGHTS FUND, TRIBAL SUPREME COURT PROJECT: TEN YEAR REPORT 2 (Dec. 2011), *available at* <http://sct.narf.org/updatememos/tsct-10-year-report.pdf>.

64. *See, e.g.,* Smith v. James, 2 Am. Tribal Law 319 (Hopi Ct. App. 1999) Sekaquaptewa, *supra* note 58, at 335-65 (describing a trial judge framing a new customary rule for women's property rights but from a male perspective, and I would argue to leave open the possibility of recognizing potential male property right by use).

at the whole record if you are going to truly understand tribal conflicts and court cases.

Finally, we need to expand the nature of our research and work with researchers from other disciplines. There are other disciplines doing empirical research that is critical in Indian Country.⁶⁵ The more work I do as a mediator with my own tribe, the more I wish I had a Ph.D. in psychology. While there are no current reliable statistics, given both the nature of the disputes that we handled in mediations and the feedback from our community mediators, we believe that many, if not most of our people and our leaders, have experienced or are experiencing trauma in their lives including: 1) child abuse, 2) domestic violence, and 3) alcoholism. I also perceive, given my work with tribes nationally, that child sexual abuse is a very big problem in Indian Country. I am by no means the first to make note of this.⁶⁶ One expert describes the multiple risk factors that contribute to a greater incidence of child sexual abuse on Indian reservations. Those include poverty, unemployment, familial stresses, violence, geographic and social isolation of families, weakened family structure due to a history of federal policies such as mandatory placement of Indian children in boarding schools and the Indian Adoption Project.⁶⁷ These federal policies that weaken family structures contribute to the breakdown of extended families, the loss of traditional child-rearing practices, the absence of good parental modeling, and newly learned dysfunctional behaviors such as sexual abuse and physical punishment. Native American communities also have a higher percentage of children, with younger than average populations.⁶⁸ These layers of trauma related to child abuse, domestic violence, and alcoholism are affecting every aspect of our governance, our criminal justice systems, and of course our family and work life.

65. See, e.g., JUSTIN B. RICHLAND, *ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT* (2008).

66. See Larry EchoHawk, *Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 83, 91-95 (2001) (citing old and conflicting statistics on Indian child sexual abuse — for a period ending in 1998, the U.S. Bureau of Justice reported that Native American children experienced 19.8 cases of sexual abuse per 1000 children, second only to African Americans at 20.7 cases per 1000 children). EchoHawk shares the view that many professionals working with tribal communities know that existing data is “scant,” and that the existing data fails to accurately capture the depth of the problem. *Id.*

67. *Id.*

68. See KATHLEEN A. EARLE, CASEY FAMILY PROGRAMS & NAT'L INDIAN CHILD WELFARE ASS'N, *CHILD ABUSE AND NEGLECT: AN EXAMINATION OF AMERICAN INDIAN DATA* 11 (2000), available at http://www.nicwa.org/research/02.Child_Abuse.pdf.

Tribes need research in the following areas involving conflict: governance (tribal, sub-tribal, inter-tribal, and inter-governmental), property (both real and personal), family, youth, and criminal cases. I also make the following observations given my work with my own tribe and over a hundred others nationally.

First, as tribal people, we live in a society of kin, not a society of strangers. What often looks like an arms-length contract dispute is actually a family law case in some aspect. For example, because most Hopis view themselves as related by clan, and because the villages, as opposed to the Hopi tribal courts, have original jurisdiction over family disputes under Article III, Section 2 of the Hopi Constitution, it is common for an opposing party in tribal court litigation to claim the court lacks jurisdiction to hear a matter because the litigants in a contract dispute are related by clan.⁶⁹ It is also true that Hopi land disputes are invariably family disputes where the traditional Hopi land tenure system is arguably based on clan use rights.⁷⁰

Second, some tribes have hybrid constitutions and governmental institutions. The constitutions or other laws recognize governance powers in both traditional leaders and in elected leaders simultaneously. The Hopi Tribe, by way of example, has an Indian Reorganization Act ("IRA") Constitution,⁷¹ but it recognizes the authority of each village's traditional leader to certify representatives to the tribal council.⁷² If any of you have been watching the news on the Hopi within the last five or six years, you know that we had a complete meltdown, largely over this issue, and our government fell apart.⁷³ There are perpetual tensions, both with respect to values and with respect to what form governance structures should take in the present and future given these hybrids.

69. See *Coin v. Mowa*, 25 Indian. L. Rep. 6208, 6208-10 (Hopi Ct. App. 1997).

70. See, e.g., *Smith v. James*, 2 Am. Tribal Law 319 (Hopi Ct. App. 1999); see also *Sekaquaptewa*, *supra* note 58, at 332-46.

71. See CONSTITUTION & BY-LAWS OF THE HOPI TRIBE, available at <http://thorpe.ou.edu/IRA/hopicons.html>.

72. *Id.* art. IV, § 4.

73. See S.J. Wilson, *Hopi Tribal Council Suspends Chairman Nuvamsa — Nuvamsa Asks Federal Government for an Investigation*, NAVAJO-HOPI OBSERVER, Sept. 30, 2008, <http://www.navajohopiobserver.com/main.asp?Search=1&ArticleID=7231&SectionID=1&SubSectionID=1&S=1>; see also Ben Nuvamsa, *What I Wish I Knew Before I Took Office: Emerging Leaders Seminar*, Native Nations Institute for Leadership Management and Policy — University of Arizona (Mar. 24, 2010), available at <http://nnidatabase.org/db/video/ben-nuvamsa-what-i-wish-i-knew-i-took-office> (video presentation).

Third, the currency in tribal communities may include far more than money or property. With the Hopi for example, it is arguable that even today the central currency is ceremonial knowledge and participation. Much has been written on the Hopi villages' elaborate ceremonial cycles.⁷⁴ There is an intimate connection between authority, property use rights, and Hopi ceremonialism.⁷⁵ If one doesn't understand the connections between authority, kinship, ceremonialism, and economy in a particular tribe, many of the values and applications of both western and tribal law will not make sense.

Fourth, in most tribes there is a law of reciprocal obligations in operation — a sort of kin-based customary tort law that floats underneath the western-influenced tribal codes and court system. These obligations are delimited by the way one is related to another, and breaches inform who is right and who is wrong and how one should be punished or rewarded.

Fifth, there may be multiple traditional and secular entities legitimately vying for authority in the eyes of the tribal public. At Hopi, we find tribal, village, and clan entities sharing or vying for exclusive authority over use rights and property rights.⁷⁶ When you talk about property law in Indian Country, there are multiple authorities that may have a say about how property is used or transferred, even given a federal land trust system. In the eyes of the tribal public, there also may be another body of customary property law operating underneath.

Sixth, in many tribal communities, family equals clan/band/village, etc. and clan/band/village, etc. equals government. You cannot understand tribal government unless you understand local government (clan/band/village, etc.).

I have a big list of observations, but this gives you a sampling of what tribal legal scholars have to be aware of in accessing and reporting on tribal legal conflicts before they ever come into tribal court. Tribal conflicts are simply much more complex and nuanced than one might observe from looking at tribal court opinions and orders.

Finally, I would like to talk about the types of research and publications that I would like to see based on what we are seeing on the ground in Indian

74. See, e.g. MISCHA TITIEV, OLD ORAIBI 103-78 (1972) (discussing basic patterns, underlying concepts of Hopi ceremonies, and what he calls "the Kachina cult").

75. *Id.* at 181-200; see also PETER M. WHITELEY, THE ORAYVI SPLIT: A HOPI TRANSFORMATION: PART I: STRUCTURE AND HISTORY 21-31 (2008).

76. Sekaquaptewa, *supra* note 58, at 319, 346-51 (discussing legal levels and multiple legal systems); see also PETER M. WHITELEY, RETHINKING HOPI ETHNOGRAPHY 80-104 (1998).

Country. I think there needs to be more thinking on the structure and process of therapeutic dockets in tribal trial courts, like drug and mental health courts. There needs to be more on conflict theory and transformative mediation methods in working with disputes that involve ongoing relationships in tribal community. Custom law is more alive in mediation than it is in tribal adjudication.

We also need to have more case studies focusing on living custom law coming from specific tribes and specific conflict issues, and we need some decoding for outside judges and lawmakers. I suspect that we will see one track of law review articles for the community and its needs, and a second track of law review articles that decodes the research for the non-Indian public and federal decision makers. We must also write about what tribal community members perceive to be needed in Indian Country versus what the outside lawmakers and judges say. We badly need an internal forum to dialogue about internal value and policy conflicts (for example, to game or not to game).

Thank you for providing me with the opportunity to share my experiences and my views in response to Professor Frickey's valuable observation that we desperately need to communicate the tribal realities to those who have so much control over tribal lives and resources.

ENVIRONMENTAL JUSTICE IN INDIAN COUNTRY

Sarah Krakoff, Professor of Law, University of Colorado Law School

Thanks again to Berkeley, Mary Louise, and everyone who helped to organize this conference. I also want to thank my co-organizers who aren't up here on the panel. One of them is Scott Williams, and the other is Bob Anderson. Professor Anderson is visiting at Harvard this fall and couldn't make the cross-country trip. It was the three of us, talking with Mary Louise, who conceptualized and organized the panel and invited our wonderful guests.

Our idea for this part of the conference was to hear from tribal people — both elected officials and community leaders — about the challenges of doing environmental work in Indian Country. If there will ever be environmental justice in Indian Country, it will be because of them. Without their voices and activism, the default practices of using tribal lands and resources for the needs of development, mostly by non-Indians, will continue unchallenged. There are lines of continuity between the content of this panel and Judge Fletcher's talk yesterday about sacred sites. Those include the relentless pursuit of natural resource development, the

accompanying problem of agency capture when that development is on public lands, and the translation problems tribes face when challenging development in judicial forums, which all pose significant challenges. To add to the complexity, the translation problem is multi-layered, as you will hear from the amazing speakers today. For some tribal members, getting through to their own tribal governments can pose threshold challenges. If that difficulty can be overcome, translating to outsiders — whether courts, legislators or agencies — is the next daunting step in the process. At that stage, lawyers and academics might be brought in to assist, but our work is only as good as the work of the tribal and community leaders with whom we are engaged in these efforts.

That is why we structured the panel the way that we did. So before turning the rest of this time over to our speakers, I thought I would just add a few more thoughts about the larger framing of this conference and how we might think about what it means to heed Phil Frickey's call.

I think there are several ways to make our scholarly work relevant, and they take very different forms. First, there is the work academics do that targets an academic audience, and there are reasons for that. Some of the reasons are fairly instrumental. We have to get tenure and, like it or not, we are mindful of *U.S. News* rankings and that kind of thing. But there are other more important reasons having to do with the nature of scholarship itself. We are writing — and should be doing so — for the long term. Sometimes our work takes many years (and pages) to work through complicated and subtle concepts. A great deal of the scholarly work undertaken by American Indian law professors is very engaged work, even if it is of a more remote and sequestered nature. A scholarly project often begins with a puzzle relevant to contemporary American Indian law; but piecing the puzzle together may take years of painstaking historical research, mountains of data, pages of dense theoretical analysis, or all of the above. So, while almost all American Indian law scholars are motivated by the larger question of doing justice in Indian Country, that does not mean our work can or will instantly achieve such an outcome.

It was refreshing to hear Judge Fletcher talk about the very limited extent to which judges actually read law review articles, and who can blame them? They are very long with a lot of footnotes. They are not often directly or instrumentally helpful, and they are not supposed to be. But in the long run, if done well and in the right spirit, they provide deep context for practical and instrumental problem solving, and they do so in a way no other resources can.

The second way scholars can engage with legal issues is through a category of scholarship I think of as “service scholarship,” which includes treatises as well as shorter, more practical pieces that can be used by legislators, policy makers, and judges. To do this work well, one needs a deeper intellectual grounding in the field, which can only be achieved by spending a lot of time doing the first kind of scholarship. A great treatise, in my opinion, can only be written after being steeped in a field’s complexities. Similarly, someone who knows the long, impractical context of a subject can best write a short, practical guide. It is my rough sense that American Indian law professors do as much or more service scholarship as any other sub-category of legal academics. As a group, we tend to be very engaged with the communities in which our work has the biggest impact, and therefore take the service obligations to heart, including how we spend our time writing.

Third, teaching is a way to engage immediate problems and issues in the field, and includes recruiting students to write shorter papers that provide direct assistance to tribes and tribal communities. To provide just one example, I took my seminar class on a field trip to the Navajo Nation, where we met and stayed with two of our panelists here today. They were gracious enough to host us on their lands in the Hard Rock Chapter. Several of my students dramatically changed their paper topics after hearing about the legal challenges confronting the people of Black Mesa. They wanted their papers to matter, and I have little doubt that in the end they did.

Finally, many American Indian law professors engage in *pro bono* work, often in ways that connect with our scholarship. So another way to make the first category — the longer articles and books that take years to write — relevant is to do *pro bono* work that draws on that knowledge. Whenever my colleagues and I assist practicing lawyers in this way, we are struck by the help we can provide to the pressing issues that practitioners and their clients face every day.

In all these ways, academics can contribute to the goal of achieving justice in Indian Country. With so many options, there are no excuses for not bending at least some of our work toward that end. As we hear our panelists talk about these hard and complex issues they have been working on in their communities, we can think about how we can engage our own communities in one or more of these ways. Maybe we won’t have to wait for them to tell us how we can make our work relevant. Just listen closely and then go do it!

Thank you to all of our panelists. I just have a few observations about the themes I have heard throughout all the presentations. One is how clear it is that contemporary American Indian law is, if seen in its best light, an attempt at reconciliation. Indian law today has to reconcile the laws and policies of the past, which were largely rationalizations for the non-Indian settlement of the continent, with contemporary values and goals of tribal survivalism and self-determination. Reckoning with Indian law's darker origins is not merely a paper exercise; it entails confronting the violence and pain inflicted on tribal people. We heard quite explicitly about Indian law's violent past from all of the speakers in different ways. Hawk Rosales's story stands out in particular as a personal one and, yet, not a singular one.

In almost every Native family, there are similar stories written on the backs of grandmothers, grandfathers, aunts, and uncles. This is a difficult and complicated backdrop against which to work out pressing contemporary problems of environmental justice. Most of us cannot do the work that was just described by the members of the panel. Most of us are not equipped to do that work because we are not from tribal communities. But we can provide the translation, the technical assistance, and often the explanation of how and why these conflicts have arisen in the form they have today.

Think about Madelyn's story, too. If you know the legal doctrine of Indian water rights, you might be very puzzled as to why her tribe cannot immediately fend off the Southern Nevada Water Authority. After all, the *Winters* doctrine says tribes have a priority right to water to fulfill the purpose of their reservation lands, and that right predates all other western water rights.⁷⁷ So what is the problem? Why can the tribe not assert its legal right and block the actions that would syphon its water to Las Vegas?

The problem is that *Winters* rights clash with our western water law doctrine of prior appropriation, which gives priority to water users who divert and use the water first. More importantly, the prior appropriation doctrine is not just the law, it is the practice on the ground. As the cliché goes, water flows uphill toward money. The first (and most powerful) entity to divert water often wins, regardless of how strong a tribe's paper rights might be.

This is evident in Nicole and Marshall's story, too. The Navajo Nation, notwithstanding an 1868 treaty that guarantees higher priority water rights

77. See *Winters v. United States*, 207 U.S. 564 (1908) (finding that tribes have reserved rights to water that date to the time their reservations were established).

than any other entity in the four corners region, is last in line to obtain rights to surface water and even harder pressed to protect its sacred groundwater. The natural resources of the Colorado Plateau, and Black Mesa in particular, have been exported to support development outside of Indian Country, leaving the Navajo and Hopi communities to struggle for water and energy to meet their basic needs. Phoenix, Los Angeles, and Las Vegas have turned repeatedly to the coal-rich high desert plateau without heed of the effects on communities that call the area home.

So these are just a few among many themes that the speakers have presented to us. They give us some ideas about how we can help at the margins to solve some of these puzzles and engage in acts of translation for legislators and judges.

Hawk Rosales, Executive Director, InterTribal Sinkyone Wilderness Council

Good morning. My name is Hawk Rosales. I am the Executive Director of the InterTribal Sinkyone Wilderness Council. We are based in Mendocino County and we are a nonprofit consortium of ten federally recognized tribes,⁷⁸ founded in 1986 for the purpose of cultural conservation of ancestral tribal lands in southern Humboldt County and Mendocino County. Today I am going to talk about how we have been working with legal scholars and using appropriate legal tools to secure recognition, for the first time in the State of California, for the aboriginal rights of the tribes affected by the Marine Life Protection Act ("MLPA") process in the marine areas of Northern California.

I am going to give some background about how our organization was formed and the type of work we do. The Sinkyone tribal ancestral territory is a fairly large area of land. The upper part of this territory is located in Humboldt County and the lower part is located in Mendocino County. This is a very remote and beautiful coastal area within the redwood rainforest ecosystem. It cannot be compared to any other place in the world. This is the area in which we work.

78. The ten member tribes of the InterTribal Sinkyone Wilderness Council are: Cahto Tribe; Coyote Valley Reservation; Hopland Band of Pomo Indians; Pinoleville Pomo Nation; Potter Valley Tribe; Redwood Valley Rancheria of Pomo Indians; Robinson Rancheria Band of Pomo Indians; Round Valley Indian Tribes; Scotts Valley Band of Pomo Indians; and Sherwood Valley Rancheria of Pomo Indians. Each of these tribes is a sovereign nation that retains ancient ancestral and cultural ties to the aboriginal Sinkyone tribal territory.

A number of Sinkyone stream valleys flow down into the ocean. The sea cliffs here are about 2000 feet in elevation; but these coastal streams go back into the mountains for many miles, and contain a huge variety of wildlife and cultural resources that the tribes still depend on for subsistence. Bear Harbor is located toward the northern end of the Sinkyone territory. The Roosevelt elk are an important part of the redwood and marine ecosystem. Every year, these elk go swimming about a mile out into the ocean. We don't know how many of them make it back. We haven't counted, but apparently most of them do. This practice may be part of their instinct because they are related to the caribou, which also travel between islands farther north.

The redwood tree is a very sacred part of the tribal culture in this region. Some of these redwoods are 5000 years old, and every aspect of the tribal culture is dependent upon this tree. In the 1960s, most of the old growth along the Sinkyone coastline was still intact. Looking at a photo taken fifteen years later, massive clear cutting is evident throughout all of these watersheds. The result has been severe degradation of the entire ecosystem. To this day, we are still dealing with the cumulative effects.

In 1983, a lawsuit was brought by the Environmental Information Protection Center and the International Indian Treaty Council against the Georgia-Pacific Corporation ("Georgia-Pacific"), the California Board of Forestry, and the California Department of Forestry to force compliance with existing state standards for protection of natural and cultural resources.⁷⁹ Also known as the "Sally Bell Case," the lawsuit charged the landowner and responsible state agencies with violations of the California Environmental Quality Act ("CEQA").⁸⁰

Georgia-Pacific, which owned the property, was found responsible for knowingly destroying Native American cultural resources. In 1985, the California appellate court ruled in favor of the plaintiffs.⁸¹ Eventually, the case resulted in a revision of the timber harvest rules for California. The Sally Bell Grove was saved as a result of that lawsuit. The entire grove contains about ninety acres of old growth. Only 2% of the old growth redwoods remain in this area. The Sinkyone Council was formed one year after the Sally Bell Case to address permanent protection and restoration of Sinkyone lands, including those affected by the lawsuit.

79. *Envtl. Prot. Info. Ctr., Inc. v. Johnson*, 216 Cal. Rptr. 502 (Cal. Ct. App. 1st 1985).

80. *See Epic v. Johnson I*, ENVTL. PROTECTION INFO. CENTER, <http://www.wildcalifornia.org/case-history/case-documentation/1980s/epic-v-johnson-i/> (last visited Mar. 27, 2013).

81. *Envtl. Prot. Info. Ctr.*, 216 Cal. Rptr. at 519-20.

The Sinkyone Council has been working all of these years to move toward environmental and social justice for tribal peoples who were removed from this land. Following the initial genocide of the Sinkyone and nearby tribes, the relative that is so sacred to the Indian people — the redwood tree — was cut down without restraint. Sally Bell was a survivor of one of the many massacres that occurred in this area during the mid-1800s, and the woman in whose honor the lawsuit was named. In the late 1920s, Sally Bell recounted the massacre:

My grandfather and all of my family — my mother, my father, and we — were around the house and not hurting anyone. Soon, about ten o'clock in the morning, some white men came. They killed my grandfather and my mother and my father. I saw them do it. I was a big girl at the time. Then they killed my baby sister and cut her heart out and threw it in the brush where I ran and hid. My little sister was a baby, just crawling around. I didn't know what to do. I was so scared that I guess I just hid there a long time with my little sister's heart in my hands. I felt so bad and I was so scared that I just couldn't do anything else. Then I ran into the woods and hid there for a long time. I lived there a long time with a few other people who had got away. We lived on berries and roots and we didn't dare build a fire because the white men might come back after us. So we ate anything that we could get . . .⁸²

Unfortunately, this was not an unusual story for California Indian people during that time. Many tribes were completely annihilated. But there were survivors, and those survivors are the forebears of Indian families who became members of the ten tribes that comprise the Sinkyone Council tribal consortium. Since our inception, our effort has been to reclaim traditional tribal stewardship for Sinkyone lands by the original descendants through restoring the tribal presence and the natural ecosystem. In 1997 we purchased 3845 acres of ancestral Sinkyone land from The Trust for Public Land, and thereby established the first ever inter-tribal Indian wilderness area on the Sinkyone coastal lands that were sold by Georgia-Pacific following the Sally Bell Case decision.

It is important to understand that Congress refused to ratify all eighteen of the treaties agreed to and signed in good faith between California Indian

82. GLADYS A. NOMLAND, SINKYONE NOTES 166-67 (1935).

tribes and the federal government.⁸³ As a result, aboriginal rights of California tribes are not recognized outside of reservation boundaries. It has been a tremendous challenge to get these rights recognized by the State of California. This has been the focus of much of our effort over the past few years: returning tribal presence to these lands in order to bring back the spirituality and the cultural practices has been the main focus of our work during the last twenty years. We have conducted a lot of salmon restoration work, and we focus on several areas of traditional cultural uses on this land.⁸⁴

We work with many partners, and all of this work that we have been doing has led to our engagement in the MLPA process. We have many restoration projects in the Sinkyone coastal watersheds. We have partnered with California State Parks in removing old logging roads to address mass erosion problems. All of these projects are directly related to protecting and improving the health of the ocean. In our work to honor and protect the cultural ecology of this coastal area, we began engaging in 2009 with the MLPA Initiative.

The MLPA is a California statute passed by the state legislature in 1999 and is designed to protect the ocean ecosystem. It did not include any consideration for the tribes and their traditional uses of the marine protected areas ("MPAs") that the State of California intended to establish up and down the coastline. When this process reached the north coast, the tribes began organizing, meeting, and attending every single one of the blue ribbon task force, regional stakeholder group, and other MLPA Initiative meetings. Twenty-six federally recognized tribes in the north coast were affected.⁸⁵ In the regions to the south, there was a much more limited

83. *Who We Are*, BUREAU OF INDIAN AFF., U.S. DEP'T OF THE INTERIOR, <http://www.bia.gov/WhoWeAre/RegionalOffices/Pacific/WeAre/index.htm> (last visited Mar. 27, 2013).

84. Hawk Rosales, Executive Director, InterTribal Sinkyone Wilderness Council, Address at the University of California Berkeley Law Symposium: Doing Justice in Indian Country (Sept. 27-28, 2012) (on file with author). These areas include, as listed in the September 28, 2012 Sinkyone Council PowerPoint Presentation: traditional harvest of culturally important plants and animals; ceremony; protection and stewardship of sacred and other cultural sites; restoration of the land's cultural/ecological values (water quality, fish habitat, basketmaking plant stands, endangered species' habitat, etc.); reintroduction of traditional fire management regime; reduction of fuel-load hazardous areas; cultural-recreational activities; cultural-educational programs; youth and elders gatherings; and backcountry recreation, including hiking trails network.

85. *See* Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs, 77 Fed. Reg. 47868 (Aug. 10, 2012), *available at* <http://www.loc.gov/catdir/cpsd/biaind.pdf>. The counties affected and names of the tribes are:

presence of tribes in the coastal areas. The game completely changed when California introduced the MLPA Initiative to the north coast.

Since the beginning of time, the tribes have been the careful stewards of their coastal lands and waters. Their stewardship has enabled diversity and abundance of a multitude of marine species and habitats. The wellbeing of plant and animal communities has been made possible for generations through the tribes' implementation of traditional ecological knowledge. The State's agencies and resource managers are only now beginning to understand this complex and vital dynamic.

During this process, we worked with many allies to convince California to change the marine-take regulations so that there would be a formal recognition of tribal use rights with respect to traditional and noncommercial fishing and the gathering and harvesting of shellfish, finfish, and marine plants. We have been able to change the regulations, through a very long process and with a lot of help from people like Sarah Krakoff, Curtis Berkey, Scott Williams, and many others, who graciously provided legal opinions on how California could structure a tribal marine-use regulation. It has been a time-consuming process, but on June 6 of this year [2012], the California Fish and Game Commission finally approved a regulation that formally recognizes and protects tribal traditional uses in each one of the State Marine Conservation Areas ("SMCAs") that were established in the north coast.

In our research to achieve this success, we found many old tribal photographs that showed families living on the coast — right at the proposed MPAs — in a traditional manner up until the 1920s and 1930s. These are the families that today are represented through the Sinkyone Council. They continue to use these areas as their ancestors did, and they always will do so.

Mendocino County (ten tribes): Cahto Tribe; Coyote Valley Reservation; Guidiville Rancheria; Hopland Band of Pomo Indians; Manchester Band of Pomo Indians; Pinoleville Pomo Nation; Potter Valley Tribe; Redwood Valley Rancheria of Pomo Indians; Round Valley Indian Tribes; Sherwood Valley Rancheria of Pomo Indians.

Lake County (seven tribes): Big Valley Band of Pomo Indians; Elem Indian Colony of Pomo Indians; Habematolel Pomo of Upper Lake; Lower Lake Rancheria; Middletown Rancheria of Pomo Indians; Robinson Rancheria Band of Pomo Indians; Scotts Valley Band of Pomo Indians.

Humboldt County (five tribes): Bear River Band of Rohnerville Rancheria; Big Lagoon Rancheria; Blue Lake Rancheria; Cher-Ae Heights Indian Community of Trinidad Rancheria; Wiyot Tribe.

Del Norte County (four tribes): Elk Valley Rancheria; Resighini Rancheria; Smith River Rancheria; Yurok Tribe.

This victory is an example of a successful collaborative approach that required carefully negotiating with California through administrative channels, instead of through litigation or legislation. It was all about building a solution whereby we could achieve dual protections for the environment and the tribes' traditional subsistence uses. All of the uses allowed by California before these new regulations go into effect will remain in place for the tribes that are listed for these MPAs. But the public will not be allowed the same extractive uses in those MPAs.

For the first time, north coast tribes have received formal recognition by California of their marine use rights through a new and distinct category of use that stands separate from the recreational and commercial categories. We view this as a huge victory for California tribes. The MLPA process has been far from perfect, and not everyone was happy with the outcome; but in the southern bio-region of the north coast (from the mouth of the Mattole River to Point Arena) seventeen federally recognized tribes in Mendocino and Lake Counties were included in this area's six new SMCAs, and one federally recognized tribe in Humboldt County was included in one of those SMCAs. Four federally recognized tribes in Humboldt and Del Norte Counties were included in four new SMCAs and one new state marine recreational management area in the north coast's northern bio-region (from the Oregon border to the mouth of the Mattole River).⁸⁶

Tribal engagement in the MLPA process demonstrates that when people pull together and work towards something good, both environmental protection and social justice can be achieved. And, we can change the way the government views tribal sovereignty and aboriginal rights.

CRIMINAL JUSTICE IN INDIAN COUNTRY

*Sarah Deer, Assistant Professor of Law, William Mitchell College of Law*⁸⁷

Author's preface: *These remarks were originally delivered in September of 2012. On March 7, 2013, President Obama signed the 2013 Violence Against Women Act Reauthorization ("VAWA 2013"). Contained within that legislation is a partial reauthorization of tribal criminal jurisdiction*

86. *Northern California Marine Protected Areas*, CAL. DEP'T OF FISH & WILDLIFE, http://www.dfg.ca.gov/mlpa/ncmpas_list.asp (last visited Mar. 27, 2013) (final approved regulation, including maps and details regarding tribal take).

87. Citizen of the Muscogee (Creek) Nation of Oklahoma. *Mvto* (thank you) to the many Native women survivors and advocates who have informed my work on this issue. I am grateful to Anna R. Light, who provided invaluable research assistance in finalizing these remarks for publication.

over non-Indians, which is a topic covered in this short essay. VAWA 2013 recognizes that the inherent right of tribal nations includes criminal jurisdiction over non-Indian defendants accused of domestic violence. The topics discussed in this essay — statistical evidence, interdiction of violence, and protecting Native women — will likely become even more important as tribal leaders and jurists consider the future of tribal self-determination and seek to realize the full potential of the changes created by VAWA 2013.

Thank you very much for this opportunity. This is my first visit to Berkeley and I am grateful that I have been invited to share some information about my work.

At the outset, I would like to lay some foundation for my perspective on Indian law. My introduction to law was based on my experience in victim advocacy. Prior to going to law school (and during law school), I worked at a rape crisis center in Lawrence, Kansas as an advocate for six years. Many of the women I worked with were Native students at Haskell Indian Nations University in Lawrence who had either been assaulted prior to coming to Haskell or had been assaulted on campus. Through that work I began to see a possible path of working in the legal system to help those women. My plan was originally to work as a sex crimes prosecutor.

I ended up straying from that particular career path, but most of my work continues to be informed by the experience of working directly with victims of violent crime. Since law school, I have spoken to literally hundreds of native women who have survived sexual assault or domestic violence (often both) throughout Indian Country and in urban areas. Most of my scholarship has focused on the needs and rights of those survivors.⁸⁸

The statistics regarding violence against Native women are almost a mantra now for many of us who work in this area. One in three Native women will be sexually assaulted in her lifetime, and three out of five will be victims of domestic violence.⁸⁹ Major news media outlets have called the problem "an epidemic."⁹⁰

88. See, e.g., Sarah Deer, *Toward an Indigenous Jurisprudence of Rape*, 14 KAN. J.L. & PUB. POL'Y 121 (2004); Sarah Deer, *Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law*, 38 SUFFOLK U. L. REV. 455 (2005); Sarah Deer, *Decolonizing Rape Law: A Native Feminist Synthesis of Safety and Sovereignty*, 24 WICAZO SA REV. 149 (2009); Sarah Deer, *Relocation Revisited: Sex Trafficking of Native Women in the United States*, 36 WM. MITCHELL L. REV. 621 (2010).

89. See Hilary N. Weaver, *The Colonial Context of Violence: Reflections on Violence in the Lives of Native American Women*, 24 J. INTERPERSONAL VIOLENCE 1552, 1557 (2009); Stephanie Wahab & Lenora Olson, *Intimate Partner Violence and Sexual Assault in Native American Communities*, 5 TRAUMA, VIOLENCE & ABUSE 353 (2004); *Policy Insights Brief:*

It is important to understand the origin of those statistics in order to learn from this data, as opposed to it being a phrase we simply repeat. Many advocates in tribal communities have told me that those statistics don't reflect the reality they encounter. When I talk to advocates on the reservations and in Alaska Native villages about the "one in three" Native women, they have expressed skepticism. The skepticism is based on experience, that the problem is much more significant because the existing data grossly understates the problem. Charon Asetoyer and other women from reservations have explained the severity of domestic violence this way: Native women "talk to their daughters about what to do when they are sexually assaulted, not *if* they are sexually assaulted, but *when*."⁹¹ In 2011, Juana Majel Dixon, First Vice President of the National Congress of American Indians and member of the Pauma-Yuima Band of Luiseno Indians explained, "Young women on the reservation live their lives in anticipation of being raped. They talk about 'how I will survive my rape' as opposed to not even thinking about it. We shouldn't have to live our lives that way."⁹² Sexual assault has been normalized in many of our communities.

In 1999, the Bureau of Justice Statistics issued a report called "American Indians and Crime," which was really the first national exposure of Native victimization in the United States.⁹³ It showed a highly disproportionate

Statistics on Violence Against Native Women, NCAI POL'Y RES. CTR. (Feb. 2013), http://files.ncai.org/broadcasts/2013/February/Policy%20Insights%20Brief_VAWA_020613.pdf.

90. Suzy Khimm, *The Violence Against Women Act Is on Life Support*, WASH. POST (Jan. 25, 2013, 3:37 PM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/25/the-violence-against-women-act-is-on-life-support> (citing the "epidemic of domestic violence among Native Americans"); Rebecca Solnit, *A Rape a Minute, a Thousand Corpses a Year*, HUFFINGTON POST (Jan. 24, 2013, 10:25 AM), http://www.huffingtonpost.com/rebecca-solnit/violence-against-women_b_2541940.html ("Speaking of epidemics, one of three Native American women will be raped.").

91. NATIVE AM. WOMEN'S HEALTH EDUC. RES. CTR., INDIGENOUS WOMEN'S DIALOGUE: ROUNDTABLE REPORT ON THE ACCESSIBILITY OF PLAN B AS AN OVER THE COUNTER (OTC) WITHIN INDIAN HEALTH SERVICE 10 (Feb. 2012), *available at* <http://www.naho.ca/wp-content/uploads/2012/03/Plan-B-Report.pdf> (emphasis added).

92. Kirsten M. Carlson, *UN Special Rapporteur Investigates Epidemic of Violence Against Indian Women in the United States*, TURTLE TALK (Jan. 29, 2011, 12:24 PM), <http://turtletalk.wordpress.com/2011/01/29/un-special-rapporteur-investigates-epidemic-of-violence-against-indian-women-in-the-united-states/>.

93. LAWRENCE A. GREENFELD & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, AMERICAN INDIANS AND CRIME (1999), *available at* <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=387>. For an updated version, see STEVEN W. PERRY, BUREAU OF JUSTICE

level of victimization in the lives of Native people, including data that Native people have experienced rates of violence at two and one half to three times higher than the mainstream population. Since 1999, those statistics have been affirmed, verified, and replicated by a number of different sources including state and tribal entities.⁹⁴ Amnesty International investigated the high rates of sexual violence, which resulted in intense media attention to the problem.⁹⁵ What I wanted to speak specifically about is the data — the one in three data and the three out of five data — and talk about the challenges with relying on that data.

The first problem we have to confront is that a lot of this data is national in scope. Using this data to describe problems in all tribal nations is problematic because each community is different. Tribal governments have struggled for over a century with the "one size fits all" federal approach to problem solving in tribal communities. Our tribal communities are often lumped into a single category (e.g., "Indian Country" or "Native people"), which does not account for the wide disparity in specific problems faced by individual sovereign nations.

Most of the time, we don't have specific data about individual tribal communities, and of course the crime rates are not the same in every single community. When the national data does not reflect the reality in a particular community, there tends to be some skepticism about that data. The other problem with the national data is that it often does not distinguish between on-reservation crime and off-reservation crime.

STATISTICS, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992-2002 (2004), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=386>.

94. University of Delaware criminologist Ronet Bachman is the leading statistician on violence against Native women in the United States. See Ronet Bachman et al., *Estimating the Magnitude of Rape and Sexual Assault Against American Indian and Alaska Native (AIAN) Women*, 43 AUSTL. & N.Z. J. CRIMINOLOGY 199 (2010). Other studies which support these findings include Shira Rutman et al., *Reproductive Health and Sexual Violence Among Urban American Indian and Alaskan Native Young Women: Select Findings from the National Survey of Family Growth (2002)*, 16 MATERNAL & CHILD HEALTH J. S347 (2012); DANETTE BUSKOVICK & ELIZABETH A. PETERSON, U.S. DEP'T OF JUSTICE, DOMESTIC VIOLENCE: RESULTS FROM THE 2008 MINNESOTA CRIME VICTIM SURVEY (2009), available at https://www.unitedwaytwincities.org/_asset/fphxh5/2009_Domestic_Violence_Report.pdf; PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

95. AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2007), available at <http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf>.

In order to understand how to use this information, it is important to understand how this data is collected and how the numbers are crunched. I should preface my remarks on data by clarifying that I do not have training in statistics. However, I think lawyers should have a basic understanding of how data is collected and published. I apologize for the very cursory overview that is based on my understanding of how this process works.

Much of this data is collected by the federal government through victimization surveys.⁹⁶ Prior to victimization survey development, the only way to "count" crime was to consider the number of police reports that were filed. Those of you who are victims or work with victims know that most of these crimes are never reported to police.⁹⁷ So relying on law enforcement report data or prosecution data does not yield accurate results.

The "victim survey" method was developed to contact random samples of the population (via telephone in most cases) and ask them a series of questions regarding their experience with crime.⁹⁸ If a survey respondent indicates that she has been a victim of crime, she is asked a series of questions about the type of crime, the race of the perpetrator, and so on. Victimization surveys are the true origin of much of our knowledge because most victims don't officially report crime — especially sexual assault crimes. Prior to the development of victimization surveys, there was no way to account for crimes never reported.

Fortunately, the sample sizes in many of these studies have become large enough that American Indian and Alaska Native data has become "statistically significant." If the data is not a "statistically significant sample," then it is simply pooled with other groups of people who do not constitute a statistically significant sample and categorized as "other." This

96. See, e.g., Jennifer L. Truman & Michael Planty, *Criminal Victimization, 2011*, BUREAU OF JUST. STAT. BULL., Oct. 2012, at 1, available at <http://bjs.gov/content/pub/pdf/cv11.pdf>; LYNN LANGTON ET AL., BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010 (Aug. 2012), available at <http://bjs.gov/content/pub/pdf/vnrp0610.pdf>; JANET L. LAURITSEN ET AL., BUREAU OF JUSTICE STATISTICS, METHODS FOR COUNTING HIGH-FREQUENCY REPEAT VICTIMIZATIONS IN THE NATIONAL CRIME VICTIMIZATION SURVEY (2012), available at <http://bjs.gov/content/pub/pdf/mchfrv.pdf>.

97. See Weaver, *supra* note 89, at 1556; *Victimization Surveys*, U. OF ARIZ. RAPE & SEXUAL ASSAULT SURVEILLANCE PROJECT, <http://www.u.arizona.edu/~sexasslt/victimization.html> (last visited Feb. 7, 2013).

98. See *Survey Methodology for Criminal Victimization in the United States*, BUREAU OF JUST. STAT., http://bjs.ojp.usdoj.gov/content/pub/pdf/ncvs_methodology.pdf (last visited Apr. 2, 2013).

is commonly seen in criminology studies that classify Americans as "White, Black, and Other."

But it is still important to remember that this data is based on anonymous surveys using random sample methodology. In at least one series of major studies, the U.S. Census Bureau is a central player, and statisticians design these survey projects to ensure scientific validity.⁹⁹ Since 1999, the data has been consistent in terms of the very high rate of crimes, particularly in tribal communities. I am not aware of a single study (federal, state, or tribal) containing a statistically significant group of American Indians/Alaska Natives where the data *doesn't* suggest that Native people suffer the highest rates of victimization in the United States.

However, one major problem with the data from a federal Indian law perspective is that the National Crime Victimization Survey ("NCVS") and National Violence Against Women Survey ("NVAWS") studies don't ask the survey respondent to identify whether a crime occurred on or off reservation land.¹⁰⁰ That piece of information is crucial when trying to resolve jurisdictional questions and develop solutions to these high rates of crime.

Another potential weakness of victimization surveys is the likelihood that a survey respondent may not wish to disclose a crime like sexual assault, especially if she lives with her abuser. A Native woman may decline to disclose that she has been victimized because the survey is sponsored by the federal government, especially if she doesn't trust the results will be anonymous. Again, these victimization surveys are a vast improvement over the older way of collecting crime data through reports, but I think it is fair to say that the numbers may not reflect the true gravity of the situation.

I'd like to return to my second point — the problem with not knowing whether these crimes tend to occur in Indian Country.¹⁰¹ Again, the data simply doesn't tell us. The issue of the race of the perpetrator comes up in this context because these victimization surveys are telling us that most perpetrators of violence against Native women are non-Native. Clearly, *Oliphant* immediately becomes an issue when you start talking about

99. *Data Collection: National Crime Victimization Survey*, BUREAU OF JUST. STAT., <http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=245> (last visited Apr. 2, 2013).

100. *Id.*; TJADEN & THOENNES, *supra* note 94, at 23.

101. Indian Country is defined at 18 U.S.C. § 1151 (2006), and includes reservations, dependent Indian communities, and allotments. Tribes only have criminal jurisdiction over crimes perpetrated by Indians within Indian country. When a crime occurs off-reservation, even if a tribal member is a defendant, the tribe lacks criminal jurisdiction.

that.¹⁰² One thing is clear: *Native women report in these victimization surveys that most of their perpetrators are non-Native.*¹⁰³ This is an anomaly in American criminology. Most violent crime in America is intra-racial.¹⁰⁴ In other words, if you are a white victim, your perpetrator is more likely than not to be white; if you are a black victim, your perpetrator is more likely than not to be black. The only exception to that general pattern is that Native women report their attackers and abusers to be non-Native as opposed to Native. This is scientifically valid data.

There is skepticism and cynicism in some circles about the interracial statistics.¹⁰⁵ Some of that skepticism might be based on the fact that most violent crime in the United States *is* intra-racial. Why would the experience of Native women be different? And are we letting Native men "off the hook" by only talking about the non-Native perpetrators?

Frankly, I think the debate is a bit of a distraction, but we have to confront it because it is driving much of the discussion about an *Oliphant* fix, including provisions in the VAWA 2013. From my perspective, even if only one non-Native man rapes one Native woman on one reservation, that tribe should be able to assert criminal jurisdiction over that case. So from that perspective, I don't see the need to *prove* that most perpetrators on reservations are non-Native. *Oliphant* should be fixed because it was the wrong decision and is inconsistent with tribal sovereignty.¹⁰⁶ For example, suppose the data showed that only a minority of Native women reported their attacker/abuser was non-Native. Under those facts, I still think the

102. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that tribes cannot prosecute non-Indians for crimes committed in Indian country).

103. See GREENFELD & SMITH, *supra* note 93, at 7.

104. See RONET BACHMAN ET AL., VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND THE CRIMINAL JUSTICE RESPONSE: WHAT IS KNOWN 38 (2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/223691.pdf> [hereinafter WHAT IS KNOWN].

105. See Scott Seaborne, *Crime Data Misrepresented to Serve Hidden Tribal Agenda*, INDIAN COUNTRY TODAY (June 14, 2012), <http://indiancountrytodaymedianetwork.com/opinion/crime-data-misrepresented-to-serve-hidden-tribal-agenda-118360>. But see Carole Goldberg & Kevin Washburn, *Goldberg and Washburn: Lies, Damn Lies, and Crime Statistics*, INDIAN COUNTRY TODAY (July 25, 2008), <http://indiancountrytodaymedianetwork.com/node/93310>.

106. Many legal scholars and practitioners have explained the flaws in the *Oliphant* decision and called for its reversal by Congress. See, e.g., L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996); John P. LaVelle, *Petitioner's Brief — Reargument of Oliphant v. Suquamish Indian Tribe*, 13 KAN. J.L. & PUB. POL'Y 69 (2003); Frank Pommersheim, Lara: *A Constitutional Crisis in Indian Law?*, 28 AM. INDIAN L. REV. 299, 303 (2003-2004).

Oliphant fix is justified because tribal nations should have authority over all crimes that happen on their lands. However, studies showing that most perpetrators of violence against Native women are non-Native are certainly a compelling reason to fix *Oliphant*.

In addition to a general skepticism about the percentages of non-Native perpetrators, there is the community-specific concern. A minority of tribal nations is so remote or closed that non-Native people are largely absent. Tribal members in such communities may not see many non-Native people in their community. So when the data suggests most perpetrators are white, those tribal members may be understandably skeptical of the data's accuracy. If the data doesn't reflect the reality in a particular community, then the data is met with skepticism by members of that community.

And then, of course, we have the urban issue. Some of the critique I have heard about the racial component of these victimization surveys is that they actually reflect "urban stats." The argument here is along the lines of, "these aren't numbers that are happening on reservations; they are happening off the reservation," so tribal jurisdiction is not relevant. Tribal jurisdiction is irrelevant for off-reservation crime, so if the numbers are more reflective of urban settings, critics say we don't need to adjust tribal criminal jurisdiction.

So we really can't say for certain whether most Native women who experience crime on tribal lands are more likely the victims of Native people or non-Native people. However, whether the rate is 20% non-Native or 80% non-Native, Congress should correct *Oliphant*. Future studies in this area should include this critical data point so we can address skepticism about the data.¹⁰⁷

Here's another interesting facet of the interracial statistic debate. When someone critiques the data by suggesting that the numbers reflect the reality in urban settings but not reservation settings, we are still left with a really problematic situation. If the data *is* more accurate in the urban settings, shouldn't we be concerned that most Native women in *urban* settings are reporting this high rate of inter-racial crime? Again, remember that most

107. The National Institute of Justice ("NIJ") is authorized "to conduct research on violence against American Indian and Alaska Native women in Indian Country" pursuant to the Reauthorization of the Violence Against Women Act of 2005, Title IX, Section 904(a)(1)(2). *Violence Against American Indian and Alaska Native Women: Program of Research*, NAT'L INST. OF JUST., <http://www.nij.gov/nij/topics/tribal-justice/vaw-research/welcome.htm> (last visited Apr. 2, 2013). The work at NIJ is being informed by experts and federal stakeholders, although no date has been announced for publishing a report. *Id.*

crime in the United States is intra-racial. Since we know that Native women are reporting this high rate of inter-racial crime, this suggests there is a significant problem regardless of tribal jurisdiction.

What factors make it more likely that a Native victim in an *urban* setting is more likely than not to be attacked by a non-Native? If Native women are being targeted for sexual assault, there may very well be a hate-crime component to some of these crimes. There is a sense that there is a "rapeability" factor that comes from a product of the United States' long history of anti-Indian and anti-woman policies, which have become part of the fabric of our society.¹⁰⁸ I think that many advocates would agree with me that in some predator circles, Native women are perceived as less than human and therefore they don't deserve protection from the legal system. This perception becomes enhanced for drug addicted or prostituted women, and predators may target Native women and girls precisely because they are marginalized and fall outside the protection of the law.

As lawyers and policy makers, we need a plan of action to fully address the problem of sexual assault against Native women. In my opinion, there are three categories of action needed. Some of these efforts are underway, but much more needs to be done.

The first category is the reform of federal law. Control over violent crime on reservations should be placed back in the hands of tribal governments. The Tribal Law and Order Act¹⁰⁹ and the VAWA 2013¹¹⁰ are a good start toward returning and restoring jurisdiction where it belongs — with tribal governments.

The second category of action is to strengthen the internal capacity of tribal courts to adjudicate crimes like rape and child sexual abuse. There are tribes that have been prosecuting these crimes for a long time, but they are few and far between. As more resources become available and jurisdiction is restored, more tribal governments will be able to take on these kinds of crimes. However, one of the problems I have found in my research is that there are many problematic sex crime laws on some tribal books. There are sexual assault ordinances at the tribal level that replicate state law from the 1940s or 1950s, when we had really bad rape laws across America.

108. See ANDREA SMITH, CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE (2005) (providing a full discussion of how this dynamic has developed in the United States).

109. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258.

110. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

Many of these problematic tribal rape laws were adopted in the time of "boilerplate" or "model tribal codes" — where a law was simply adopted by a tribal council without modification.¹¹¹ The Bureau of Indian Affairs developed a "Model Code for the Administration of Justice by Courts of Indian Offenses" in the 1970s, which was "nothing more than a redraft of the old Bureau regulations."¹¹² These problematic tribal codes are usually not reflective of traditional tribal values and can make it difficult for a tribal prosecutor to charge and prosecute crimes against women and children.

For example, I have reviewed tribal sexual assault laws that include things like spousal exemption, which prevents a tribal prosecutor from charging a man who rapes his wife. That is an out-dated Anglo-American law, but still a part of some tribal laws.¹¹³ Another example is the problem of defining sexual assault as requiring physical force instead of a lack of consent. In some tribal codes, there remains a requirement that the tribal prosecutor show physical force in order to secure conviction.¹¹⁴ Physical force is uncommon in cases of sexual assault. Perpetrators generally use other kinds of force, like coercion and threats.

111. See, e.g., PAWNEE TRIBE OF INDIANS CODE § 234 ("It shall be unlawful to intentionally, wrongfully, and without consent subject another, not his/her spouse, to any sexual contact."); CHEYENNE RIVER SIOUX TRIBE LAW & ORDER CODE § 3-4-18(4) ("[T]he jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private, when such are not otherwise corroborated."); SAULT STE. MARIE CODE § 71.1801(4) ("No prosecution may be instituted or maintained for rape, deviate sexual contact, or sexual assault unless the alleged offense was brought . . . within thirty (30) days after its occurrence."); LAWS OF THE CONFEDERATED SALISH & KOOTENAI TRIBES § 2-1-601 (requiring "force" or incapacitation).

112. Russel Lawrence Barsh & J. Youngblood Henderson, *Tribal Courts, the Model Code, and the Police Idea in American Indian Policy*, 40 LAW & CONTEMP. PROBS. 25, 26 (1976).

113. See, e.g., MARICOPA AK-CHIN INDIAN COMMUNITY OF ARIZ. CODE § 4.20 ("A person who commits, or attempts to commit, an act of sexual intercourse with another not his spouse . . ."); CHEYENNE RIVER SIOUX TRIBE LAW & ORDER CODE § 3-4-18(1) ("code relating to sexual offenses shall not apply to conduct between married persons"); CONFEDERATED TRIBES OF UMATILLA INDIANS CODE § 85(B) ("'Female' means a female person who is not married to the actor.") *Disclaimer: These tribal codes are provided as examples and are not intended to blame or embarrass any particular tribal communities.*

114. See, e.g., TULALIP TRIBES OF WASH. CODES & REGULATIONS § 3.6.1; FORT PECK COMPREHENSIVE CODE OF JUSTICE § 220 (1986); CHEYENNE RIVER SIOUX TRIBE LAW AND ORDER CODE § 3-4-16; CONFEDERATED TRIBES OF UMATILLA INDIANS CODE § 85(C); CONFEDERATED TRIBES OF THE COLVILLE RESERVATION CODE § 3-1-10.

Most states have reformed rape law such that lack of consent is sufficient to prove sexual assault. So tribal laws that include a physical force requirement are really replicating very antiquated old Anglo-American rape law. While we are reforming federal law we also have to reform tribal law so that we can put the control back into the hands of the tribal governments in a very practical way. If jurisdiction is restored to tribal governments, tribes must be able to effectively prosecute those crimes, or very little changes for the lives of victims.

The third category is to pay attention to services for our Native women living outside the reservation — often in urban areas. For example, most of the money from the VAWA 2013 is earmarked for tribal governments and reservation-based advocacy programs. I understand there is not enough money to go around and all advocacy programs struggle with a lack of resources. The advocacy programs in tribal communities are absolutely critical to help secure justice for survivors. However, that money is not largely available to urban community centers and Native-based advocacy programs off reservation. Since most Native women don't live on reservations,¹¹⁵ we are not fully addressing the problem of violence against Native women if we don't secure funding and support for off-reservation programs. In federal Indian law, we are obviously focusing on tribal jurisdiction (for good reason); but in practice, we are missing a huge portion of our survivors who don't live on reservations.

So those are my three recommendations for moving forward to address violence against Native women: First, continue to reform federal law and advocate for restoration of tribal authority; second, ensure that tribal governments have the law and the training in place so that they can take action in cases of sexual violence; and third, make sure that urban women are not forgotten. Practitioners and scholars in Indian law should be cautious when relying on data. We must be cognizant of how the data is collected and how we use it. Research is a powerful tool for federal Indian law reform. *Mvto* (Thank you).

M. Alexander Pearl, NALSA Alum; Assistant Professor, Florida International University College of Law

It is an honor to be invited to this conference to say a few words about Indian law, Professor Frickey, and “grounded scholarship.” We are here today to honor Professor Frickey and remember his call to make legal

115. WHAT IS KNOWN, *supra* note 104, at 17; TINA NORRIS ET AL., U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 12-13 (2012).

scholarship relevant for — and grounded in — tribal communities. Attendees and participants at this conference include tribal advocates, academics, law students, and practitioners of many different disciplines and backgrounds. The diversity of people, professions, and perspectives on tribal communities contribute to Professor Frickey's suggestion that legal scholarship provides Native people with a voice, while also moving federal Indian law and policy.

I would like to bridge the comments made during this conference with the sentiment expressed by Rovianne Leigh. As Ms. Leigh stated, we are here today in California where there are more than 100 federally recognized tribal communities. My goal in bringing focus to California's Indian Country, and the criminal justice issues these tribal communities face, is to highlight the distinct challenges facing these communities.¹¹⁶

It is not obvious that there can be such a monumental difference between Indian tribes in California and those located in many other states. I came to law school from Oklahoma, where I was born and raised. As a member of the Chickasaw Nation of Oklahoma, I understood Oklahoma tribal communities. But experiencing Northern California presented me with new perspectives on the significant diversity of Indian Country. This changed a lot of my views about what policies are appropriate for individual Native communities. The differences between Northern California, Southern California, and the Central Valley are not just geographic. These regions all contain unique politics, cultures, and norms in both tribal and non-tribal communities. For example, Oakland is a major urban Indian center bringing together Indians from all over the country.¹¹⁷ Indeed, Oakland's Indian population has a history all its own. The same goes for the histories of Southern California tribes and those located in rural Northern California.

116. I use the term "Indian Country" to describe generally the areas where tribal communities are located. It is defined in federal statute as follows:

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (2006).

117. See generally COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 93-108 (Nell Jessup Newton et al. eds., LexisNexis 2012); SUSAN LOBO, URBAN VOICES: THE BAY AREA AMERICAN INDIAN COMMUNITY (2002).

One thing common to all California tribal communities, however, is Public Law 280.¹¹⁸ Prior to 1953, the longstanding general rule was that state law, including criminal law, did not apply in Indian Country.¹¹⁹ For centuries, tribal governments were the only entities with criminal jurisdiction in Indian Country.¹²⁰ In 1883, the Supreme Court in *Ex parte Kan-Gi-Shun-Ka* (*Ex parte Crow Dog*) confirmed that a crime committed by an Indian against another Indian did not give rise to federal jurisdiction.¹²¹ In response, Congress passed the Major Crimes Act, granting federal authorities the power to investigate, enforce, and prosecute certain crimes occurring in Indian Country.¹²² The federal statutes creating federal jurisdiction did not preclude tribal jurisdiction, but states lacked jurisdictional authority.¹²³ This all changed in 1953 with the enactment of Public Law 280. Affecting only five mandatory states, including California, Public Law 280 precluded federal jurisdiction and conferred jurisdictional authority on the state government to enforce and prosecute crimes occurring in Indian Country, thereby flipping the general rules regarding criminal jurisdiction.

Most people familiar with Indian law and Native people understand why Public Law 280 was — and remains — wildly unpopular in tribal communities. States and tribes have long clashed with one another.¹²⁴ The Supreme Court has even recognized they are often the “deadliest enemies.”¹²⁵ To be fair, states were not necessarily thrilled about Public

118. Pub. L. No. 83-280 (1953) (codified as amended at 18 U.S.C. § 1162 (2006), 25 U.S.C. §§ 1321-1326 (2006), & 28 U.S.C. § 1360 (2006)).

119. See generally *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

120. See generally *Ex parte Kan-Gi-Shun-Ka*, 109 U.S. 556 (1883); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779 (2006).

121. *Kan-Gi-Shun-Ka*, 109 U.S. at 570-72.

122. Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (current version at 18 U.S.C. § 1153, 3242 (2006)); Washburn, *supra* note 120, at 803-05; see also Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002).

123. *United States v. Wheeler*, 435 U.S. 313, 329 (1978); *United States v. Lara*, 541 U.S. 193, 207 (2004).

124. See Matthew L.M. Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 73-87 (2007); Ezra Rosser, *Caution, Cooperative Agreements, and the Actual State of Things: A Reply to Professor Fletcher*, 42 TULSA L. REV. 57 (2006).

125. *United States v. Kagama*, 118 U.S. 375, 384 (1886) (“[Indian tribes] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies.”).

Law 280 either, since it did not simultaneously increase funding commensurate with the newly obtained enforcement authority and caseload.

After nearly sixty years, Congress finally amended Public Law 280.¹²⁶ In the Tribal Law and Order Act of 2010 ("TLOA"), Congress allowed Indian tribes located in mandatory Public Law 280 states to request the Department of Justice to re-assert criminal jurisdiction.¹²⁷ If the federal government accepts jurisdiction, the result would be tri-partite jurisdiction, shared among federal, state, and tribal governments. This is perhaps a step in the right direction, as an attempt to level the playing field across Indian Country by providing tribal governments in California with similar opportunities for protecting their communities as those living in South Dakota and other states not subject to Public Law 280. The law potentially re-establishes the federal-tribal law enforcement relationship for California tribes, whereas tribes in non-Public Law 280 states have not been denied the involvement of federal law enforcement and prosecution.

However, there is much more to Public Law 280 and its long-running consequences in California than the simple question of which government has the authority to enforce and prosecute crimes. There are over 100 federally recognized Indian tribes in California and only a small percentage have comprehensive courts and police forces. This is a dramatic difference compared to tribes in non-Public Law 280 states.¹²⁸ Why the great distinction? It is difficult to say, and is more complex than this brief essay can summarize, but Public Law 280 has played a role. State governments were allowed to enforce what essentially are foreign laws upon tribal communities with very different values, norms, and cultures. As a result, independent tribal justice systems from these communities have not had the space to emerge and mature. Even though Public Law 280 did not affirmatively preclude tribes from exercising criminal jurisdiction, the overlay of a foreign legal regime impacted the ability of tribal communities

126. 25 U.S.C. § 1326 (2006). Congress passed amendments to Public Law 280 in 1968. The amendments required tribal consent in order to transfer jurisdiction from the federal government to the state government. No tribe ever consented to a transfer after the passage of this amendment.

127. Pub. L. No. 111-211, § 221, 124 Stat. 2258, 2271.

128. CAROLE GOLDBERG & DUANE CHAMPAGNE, U.S. DEP'T OF JUSTICE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 (2008), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>; STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, CENSUS OF TRIBAL JUSTICE AGENCIES IN INDIAN COUNTRY, 2002, at 3 (2005), *available at* <http://www.bjs.gov/content/pub/pdf/ctjaic02.pdf> (out of the eighty-eight California tribes that participated in the census, seventy-four relied on state courts).

to engage in self-determination and cultural expression through creating legal regimes.

Regardless of why California Indian tribes have fewer formal criminal justice systems it is important to understand the need for a community to have comprehensive and well-functioning criminal justice systems. There is great emphasis, well-deserved, on the importance of addressing the epidemic of violence and sexual assault against Native women.¹²⁹ The statistics on that issue are simply astounding.¹³⁰ It is not difficult to imagine that adequately addressing this problem in California will require a different solution than those implemented in non-Public Law 280 states.

As an example, there are provisions in the TLOA, as well as the recently passed reauthorization of the Violence Against Women Act ("VAWA 2013"), that provide tribal courts with jurisdictional authority to arrest, try, and punish non-Indian offenders.¹³¹ While this is a laudable provision with the appropriate policy in mind, it does little to help most of California Indian tribes, which lack comprehensive courts and law enforcement. The expansion of jurisdictional authority for a tribal court does no good to an Indian tribe lacking a justice system. Even with these national policy changes in the TLOA, many of the pressing issues for California Indian tribes will persist because the solutions are not tailored for the circumstances of these communities.

Another point often absent from the congressional discussion about criminal issues in Indian Country concerns tribal choices to adopt formal western-style court systems or to use tribal customary law based systems. Many tribes successfully employ both.¹³² This is a fundamental aspect of

129. See AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2006), available at <http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf>.

130. Statistics show that one in three Native women will be raped in her lifetime. TJADEN & THOENNES, *supra* note 94, at 22; see also *Native Women: Protecting, Shielding, and Safeguarding Our Sisters, Mothers, and Daughters: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. (2011) (statement of Sarah Deer, Assistant Professor, William Mitchell College of Law).

123. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120-23.

132. See, e.g., *The Peacemaking Program of the Navajo Nation*, NAVAJO NATION, <http://www.navajocourts.org/indexpeacemaking.htm> (last visited Jan. 27, 2013); *Peacemaking Court*, CHICKASAW NATION JUD. DEP'T, <http://www.chickasaw.net/Judicial-Department/Courts/Peacemaking-Court.aspx> (last visited Oct. 15, 2013); James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1983).

self-determination and directly bears on that which a criminal justice system is intended to do — express the morality of the community.¹³³ At a basic level, tribal communities must be able to adequately protect themselves and their members. The method by which this is done should come from within the tribe rather than from the outside.

This is a fundamental criticism of Public Law 280. It was an external law forced upon certain Indian tribes that required an outside entity to apply foreign law to communities with very different cultural practices. While the TLOA's potential for bringing the federal government back into the fold is an improvement for tribes in mandatory Public Law 280 states, such a policy does not recognize the unique challenges facing California Indian Country given their unique history with Public Law 280. Simply re-establishing the federal-tribal relationship for California tribes fails to address the need for comprehensive and culturally relevant tribal justice systems arising from within the community. In sum, it fails to address the principle of self-determination — that Indian tribes have the ability to create solutions that work best for their own community.

My hope is that the discussion on criminal jurisdictional issues starts to recognize the unique position of California Indian tribes. One possible way to draw attention to this is by working with California tribal communities. That is what this conference is about and why there are people other than legal academics contributing to this discussion. Learning and writing about tribal communities gives those “discrete and insular minorities” a voice and broadens the academic perspective.¹³⁴

This is part of what Professor Frickey identified as lacking in legal scholarship. Talking about the law in a vacuum does not assist Native people, and it provides little rationale for why a change in law or policy would be warranted. It would be remarkable to go and work with tribal communities and assist in identifying problems, characteristics, and solutions specific to them. The potential benefit may well extend to Indian Country generally by adding to the public knowledge about how tribal communities operate and what needs are most pressing.

Unfortunately, we know so little about many aspects of the criminal issues in Public Law 280 in Indian Country. Professor Carol Goldberg at UCLA has lead the charge by collecting important empirical information

133. Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 782-83 (2006) (“Criminal law is the formal legal institution in which communities express important collective decisions as to what is right and what is wrong within their communities.”).

134. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

about Public Law 280 tribal communities.¹³⁵ But she is one of the few people doing this type of work. It would be fascinating to do a case study working with a California tribal community that is interested in better understanding the kinds of issues that it is encountering. Proceeding in this manner creates an opportunity for grounded scholarship to drive policy choices that ultimately empower tribal communities.

BERKELEY LAW'S RESPONSIBILITY FOR HEEDING FRICKEY'S CALL

Matthew Fletcher, Professor of Law and Director of the Indigenous Law & Policy Center, Michigan State University College of Law

The good thing about this conference is how Berkeley is taking Indian law and Indian Country seriously. I remember when I wrote my paper about the Supreme Court's certiorari process and its effects on tribal petitions, I wanted to hear what former Supreme Court clerks would say about my theory, and whether they thought it was very important.¹³⁶ I was writing about what is known as a "cert pool." Some of the justices were in the cert pool and some were not, but I was critiquing the cert pool. The former clerks who were working for justices in the cert pool hated my paper, and the ones who were not in the cert pool, which included Professor Frickey, thought it was a pretty good paper. But one professor, who was a Supreme Court clerk, said to me, just after spending a good deal of time being critical of my conclusions, (and I'm paraphrasing) that the paper reminded her of how the reality of being a student clerk is that you get a lot of "dogs." She referred to "dogs" as what clerks called cases they don't like, such as tax cases, bankruptcy cases, probate cases, and Indian cases.¹³⁷ The clerks don't want to work on those.

When they get an Indian case, an Indian cert petition, or a prisoner cert petition — a prisoner habeas case — they don't pay much attention to them. They give them the barest amount of interest, unless the prisoner or the Indians have won in the lower court, and I'm quoting now, "Because that's not supposed to happen." The great thing about having Berkeley, an institution that frankly people like the Supreme Court will listen to, hold this conference is to help alleviate the disconnect — that we see on the Court, in the federal courts, the state courts, and maybe sometimes in the

135. GOLDBERG & CHAMPAGNE, *supra* note 128.

136. See Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933 (2009).

137. E.g., JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 54 (2012).

tribal courts. But what we have heard today is what is going in Indian Country, so there are my two cents.

Katherine Florey, Professor of Law, University of California at Davis

My name is Katherine Florey. I am a Professor of Law at University of California ("UC") Davis. I am also a Berkeley Law graduate and a student of Phil Frickey's. I can certainly say that I would not have the Indian law specialty that I do now as an academic if it were not for taking Phil Frickey's class, and I want to do everything I can to ensure that future Berkeley law students have the same opportunities.

I absolutely agree with everything that you have said from your perspective as students. I wanted to add a slightly different perspective as a professor at UC Davis, a program that has only recently demonstrated a commitment to Indian law. I know it is difficult for us at UC Davis to recruit Native students, and we too, like Berkeley, lose a lot of students to Colorado, Arizona, and Arizona State universities. But I think the lack of an Indian law program at Berkeley also really hurts the profession and hurts the representation of Native American interests in the judicial branch and elsewhere. If you look at the kind of schools that produce a lot of clerks on circuits like the Ninth, that are dealing with a lot of Indian law issues, it is extremely important that the students who get those kinds of positions be exposed to Indian law and Native issues. The document that the Native American Law Student Association ("NALSA") put together shows that Berkeley's program falls short compared to those at University of Washington, UCLA, and a number of other schools.

But I think it is also an important point that Indian law is appallingly under-taught in schools that produce a lot of clerks. Looking at the negative judicial decisions that have occurred in the past few decades, I think one driving force has been that judges are not necessarily informed about these issues, and their clerks are not necessarily informed about these issues. So it is really important, not only from the standpoint of attracting and retaining students at Berkeley, but also in marrying the interests of students who want to learn about this topic with the resources of Berkeley and its ability to place clerks, for students with Indian law knowledge to have better representation in the judiciary.

I did a little research yesterday and looked at other law schools that are in the same tier as Berkeley — that is, schools historically in the top ten that produce a lot of Ninth Circuit and Supreme Court clerks. This academic

year, Berkeley is not alone in not offering a basic Indian law class.¹³⁸ In fact, from what I could find from this academic year, only Columbia, University of Pennsylvania, Harvard, and Yale appear to be teaching regular survey Indian law classes.¹³⁹ There are no Indian law classes offered this year at Michigan, Virginia, or Stanford universities.¹⁴⁰ New York University has a one-credit class in taxation issues, so that is the only way Indian law makes its way into the curriculum.¹⁴¹ And again, this is just not enough in terms of what law schools need to do to educate the people who are going to be clerks and going to communicate Indian law issues to the wider judicial community. So I think that is another important dimension of the problem.

From the perspective of someone else who teaches at a UC, we have a very strong Native American Studies undergraduate program, and many of the students in that program are Native students from California. A lot of them feel that if they want to go to law school, they have to go out of state.¹⁴² I think that is very unfortunate. It is great that other law schools are offering high-quality programs,¹⁴³ but there are some specifically

138. This information is based on my search of publicly available course listings at the schools mentioned. In all cases, I searched on the terms "Native," "Indian," and "tribal" to determine what courses were being offered.

139. The online catalogs I searched to obtain this information are accessible at *Browse*, COLUMBIA LAW SCH., <http://www.law.columbia.edu/courses/browse> (last visited Apr. 17, 2013); *Course Registration for Upper-Level Law Students*, PENN LAW: UNIV. OF PA. LAW SCH., <https://www.law.upenn.edu/registrar/2l-3l-and-llm.php> (last visited Apr. 17, 2013); *Search for Courses*, YALE LAW SCH., <http://ylsinfo.law.yale.edu/wws/prereg/CourseGridParams.asp> (last visited Apr. 17, 2013); and *Course Catalog*, HARVARD LAW SCH., <http://www.law.harvard.edu/academics/curriculum/catalog/> (last visited Apr. 17, 2013).

140. Online catalogs for these institutions are at *Office of Student Records*, MICH. LAW: UNIV. OF MICH. LAW SCH., <http://www.law.umich.edu/currentstudents/registration/Pages/default.aspx> (last visited Apr. 17, 2013); *Current Courses*, UNIV. OF VA. SCH. OF LAW, <http://lawnotes2.law.virginia.edu/lawweb/course.nsf/CbTbN> (last visited Apr. 17, 2013); and *Office of the Registrar*, STANFORD LAW SCH., <http://www.law.stanford.edu/organizations/offices/office-of-the-registrar/stanford-law-class-schedule-grids> (last visited Apr. 17, 2013).

141. See NYU's online course listing at *Course Descriptions*, NYU LAW, <http://www.law.nyu.edu/academics/courses/index.htm> (last visited Apr. 17, 2013).

142. I do not have precise statistics on the percentage of Native American undergraduates at UC Davis at who leave California to attend law school, but the issue has frequently arisen in my conversations with members of the Native American Studies department as well as with law students who have mentioned the limited nature of UC Davis's Indian law offerings as a reason why they almost chose another law school.

143. Only twenty-four law schools across the nation offer Indian law programs or clinics. Some of those include Arizona, Arizona State, Colorado, Minnesota, University of Oklahoma, and Washington. See *Law Schools Offering Native Law Programs*, TURTLE

Californian issues,¹⁴⁴ and people who have ties with California and the California tribes should have some opportunity to stay close to home if they want. I absolutely agree that as part of the public law system and as a historically strong public law school with a commitment to the public interest, offering a strong Indian law program is really something Berkeley needs to do.

INTERNATIONAL HUMAN RIGHTS AND INDIAN COUNTRY

Joseph Bryan, Assistant Professor of Geography, University of Colorado at Boulder

Even though I received my Ph.D. in Geography at UC Berkeley across the campus from where Phil Frickey taught at Boalt Law School, I only had a vague understanding of who he was. So when I was first invited to attend this conference, "Heeding Frickey's Call: Doing Justice in Indian Country," I had to first find out who Frickey was so I could hear his call and try to answer it. In a short crash course of reading Frickey's work, I gleaned a few things that I wanted to engage with my remarks.¹⁴⁵ First and foremost, it's clear that Phil Frickey was well aware of the eloquent and sophisticated legal rationale behind federal Indian law. Those qualities formed a central problem that he engaged with time and again, namely that Indian law, for all its eloquence and sophistication, risked obscuring a meaningful understanding of what Indian peoples' lives are actually like.¹⁴⁶ The more

TALK, <http://turtletalk.files.wordpress.com/2009/04/law-schools-offering-indian-law-programs.pdf> (last visited Apr. 17, 2013). The only law school among the five University of California law schools to offer such a program is UCLA. *See id.*

144. For example, numerous California ballot propositions, such as California Proposition 5, the Tribal-State Gaming Compacts Initiative (1998), affect the negotiation process for gaming compacts between California tribes and the state.

145. My reading of Frickey's work here is by no means comprehensive. In the spirit of the conference at which it was presented, my intention instead was to use it as prompt for reflection on future directions in scholarship and advocacy regarding indigenous peoples. For a more thorough discussion of Frickey's work, see *Tribute Issue in Honor of Philip P. Frickey*, 98 CALIF. L. REV. 1101 (2010); *see also* Sarah Krakoff, *The Last Indian Raid in Kansas: Context, Colonialism, and Philip P. Frickey's Contributions to American Indian Law*, 98 CALIF. L. REV. 1253 (2010).

146. In Frickey's own words:

I suggest that future Indian law scholarship should be less formalistic and doctrinal-less treatise-like-and more sensitive to Cohen's brand of legal realism. In my judgment, this kind of scholarship in federal Indian law should be simultaneously more grounded and more theoretical. If doctrine is at least as subject to evolution here as in other fields of law, scholarship should aspire to

developed federal Indian law became, the further it drifted from actually administering justice to the people who it was supposed to protect. That problem was striking to me, resonating with my own work on the role of mapping indigenous land claims, which I will explain in a moment.

It also leads to a second and related point evinced by Frickey's work, regarding how federal Indian law does not always exist in direct relationship to Indians' everyday lives. As such, the legal recognition of rights risks silencing actual Indian voices, further excluding Indian people from society through their inclusion within the legal system.¹⁴⁷ A third point I gleaned from Frickey's work regards the law and its relationship to colonialism. Frickey offered a compelling view when he noted that federal Indian law amounts to a means of governing colonialism rather than doing away with it altogether.¹⁴⁸

Taken collectively, these three points underscore Frickey's concern with justice. It was not a doctrinal vision of justice as the law applied. Instead it was a more deliberative, evolving sense of justice meant to prompt a discussion about what we, as people joined together by a commitment to do

explain and prescribe Indian law where, according to Cohen, it counts-on the ground. What actually happens on Indian reservations concerning the creation, evolution, and implementation of law is a subject about which the broader legal community has few conceptions, and most of those are probably inaccurate. If, as legal realism suggests, the law that counts is the law in action, and the law in action should be measured by a bottom-up consequential calculus rather than some top-down consistency with abstract doctrine, the legal community cannot hope to understand, much less appreciate, federal Indian law without a much better sense of grounded reality.

Frickey, *Transcending*, *supra* note 1, at 650.

147. As Frickey stated:

Virtually all the writing by law professors and, so far as I can tell, mostly by other academics as well, that might have relevance to tribal institutions and law has involved abstract discussions of judicial decisions, the refinement of adversarial arguments about the meaning of tribal sovereignty, the trust relationship between the federal government and tribes, and so on. Now, there is nothing wrong with this, it is all well and good and contributes to a better understanding of ideas in the area. But the work has not grappled with the law on the ground in Indian country, as mediated through tribal institutions. There is a virtual void of information on this score in the scholarly literature. Is it any wonder that federal judges do not stop to second-guess their instinctive suspicions about such matters?

Frickey, *Address*, *supra* note 3, at 28; *see also* Frickey, *Transcending*, *supra* note 1.

148. Philip P. Frickey, (*Native*) *American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 434 (2005).

justice for indigenous peoples, might do collectively in the future. My remarks are thus intended as a contribution to that debate.

Since the 1990s, my research has focused largely on the application of international human rights standards for indigenous peoples, rather than the federal Indian law that figured prominently in Frickey's work. Nonetheless, I think international human rights law faces many of the same problems Frickey identified in federal Indian law. In particular, if you read the United Nations Declaration on the Rights of Indigenous Peoples or the International Labor Organization's Convention 169 ("ILO 169"), or even the draft text of the American Declaration on the Rights of Indigenous Peoples, it's not hard to miss how they conjure a general idea of indigenous peoples as a subject of international law through the enumeration of the rights they are said to possess.

Much as Frickey noted with regard to United States federal Indian law, international human rights standards describe a particular kind of individual. That individual is one whose rights are at once a function of his or her membership in an indigenous group *and* as a potential citizenship in a state. There is good reason for this characterization. One of the founding points raised by the discourse of indigenous rights has been to call attention to indigenous peoples' chronic condition of statelessness. The legal framing of that problem proposes a remedy, namely that through legal recognition of rights indigenous peoples can be included within state societies, often as citizens. This point is an extremely important one, a result of decades of advocacy work by indigenous peoples aimed at bringing a notion of collective rights into the present.

And yet, in spite of that effort, it is worth pointing out that much like federal Indian law, international indigenous rights continues to rely on state recognition as a key condition for being able to exercise those collective rights. In that dynamic, a familiar problem comes into view, making the exercise of rights contingent upon their recognition and guarantee by a sovereign state.¹⁴⁹ Indigenous peoples' chronic statelessness compounds this problem, since it is the outcome of historical displacement and dispossession.¹⁵⁰ Remediating that condition thus requires more than a

149. This problem has persistently haunted human rights, a point articulately set forth in HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* (2d ed. 1958).

150. In the U.S. context, Frickey openly asked,

How might one figure out what powers tribes have lost by virtue of their dependent status? The Court has never seriously considered this a historical test. Indeed, how would it figure out at what point in time a particular tribe lost a particular power that had, by hypothesis, never been taken away by treaty or

doctrinal or formal legal recognition of rights. It raises a fundamental question: can states protect the very people that they historically excluded from their society? The point might seem overly philosophical or “academic,” but it is worth pointing out that it defies a simple yes or no answer.¹⁵¹

By way of elaborating and grounding that point, let me now turn to my own work. Since 2001, much of my work has focused on efforts to implement the Inter-American Court of Human Rights’ ruling in the case of *Awas Tingni v. Nicaragua*. Many of you are likely aware that in 2001, the indigenous Mayangna community of Awas Tingni won a landmark legal ruling from the Inter-American Court of Human Rights.¹⁵² The Court is a part of the Inter-American System that includes the Inter-American Commission on Human Rights, and its ruling holds broad significance for indigenous rights in the Americas. In its ruling, the Court affirmed that Awas Tingni has a collective right to property established by their customary use and occupancy of land and resources. The Court’s ruling illustrates the trend in international law for using property to recognize a broad range of rights claimed by indigenous peoples.¹⁵³

In the *Awas Tingni* case, the Inter-American Court equated the concept of property with the concept of territory elaborated in international indigenous rights law.¹⁵⁴ Arguments made by lawyers representing Awas

statute, but instead by the unwritten, mystical evolution of the relationship between the United States and this tribe (or all tribes), as seen through the eyes of non-Indian judges?

Frickey, *Transcending*, *supra* note 1, at 659. Answering that question was thus much more than simply a matter of demystification through simple historicism. Instead, Frickey implied that it created the basis for an entirely new approach to the importance of the law. *Id.*

151. I take heed of Frickey’s injunction that “scholarship in federal Indian law should be simultaneously more grounded and more theoretical.” *Id.* at 650-51.

152. S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT’L & COMP. L. 1, 1 (2002).

153. S. James Anaya, *Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend*, 16 COLO. J. INT’L ENVTL. L. & POL’Y 237, 238-39 (2005); *see also* S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33 (2001).

154. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 26, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf; International Labour Organisation [ILO], Convention No. 169

Tingni facilitated the Court's interpretation, rendering territory as property and thus making it something that states could recognize. The shift in emphasis was more than a matter of semantics. It minimized the perceived threat that indigenous territorial claims posed to state sovereignty while underscoring the fundamental importance of control over land and resources. Maps made by the community were key to this process. The maps were made in close adherence with the legal definition of territory found in documents like ILO 169, while at the same time demonstrating the feasibility of recognizing the community's claim in terms of bounded notions of property.¹⁵⁵

In spite of the community's legal success, it took seven years — until December 2008 — for the Nicaraguan government to comply with the Inter-American Court's ruling and issue Awas Tingni a title. What happened in those seven years warrants scrutiny. As I just mentioned, the legal content of the Inter-American Court's decision made an important, progressive statement about the basis for recognizing indigenous peoples' land and resource rights. But the Court also deferred the duty to determine the specific extent and location of those rights to the government of Nicaragua. The move was a predictable but intriguing one, especially if you read the transcripts of the proceedings before the Inter-American Court.¹⁵⁶ As many of you know, the community's lawyer and current UN

Concerning Indigenous and Tribal Peoples in Independent Countries, arts. 13-14, Jun. 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991).

155. S. James Anaya & Theodore Macdonald, *Demarcating Indigenous Territories in Nicaragua: The Case of Awas Tingni*, 19 CULTURAL SURVIVAL Q. 69 (1995), available at <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/nicaragua/demarcating-indigenous-territories-nicaragua-case>; see also Joel Wainwright & Joe Bryan, *Cartography, Territory, Property: Postcolonial Reflections on Indigenous Counter-mapping in Nicaragua and Belize*, 16 CULTURAL GEOGRAPHIES 153 (2009) [hereinafter Wainwright & Bryan, *Cartography*].

156. In their presentations before the Inter-American Court of Human Rights, Nicaraguan officials repeatedly demonstrated their utter lack of knowledge of the area where Awas Tingni is located beyond their insistence that the land in question belonged to the state. The following exchange between Awas Tingni witness Jaime Castillo Felipe and the Government of Nicaragua's lawyer is revealing of this dynamic:

Government of Nicaragua (GON): Yes, Sir. Mr. Castillo, could you tell us what distance you normally cover to hunt and fish?

Witness Jaime Castillo Felipe (through interpreter): In all the area over which we have the run of the land, we make use of different activities, without other options to work them there.

GON: Excuse me, what distance do you cover to hunt, to fish?

Witness Jaime Castillo Felipe: He does not specify the distances, but rather

Special Reporter on Indigenous Rights, S. James Anaya, made a series of brilliant arguments about state definitions of property. In particular, he drew attention to how Nicaragua had used the indeterminacy and arbitrariness of its definition of property to justify racialized dispossession, not just of Awas Tingni residents, but of indigenous peoples in general by claiming “empty” lands for the state. That indeterminacy also presented an opportunity for recognizing indigenous peoples’ own definitions of property as a matter of basic human rights. During the implementation of the *Awas Tingni* ruling, state officials flipped Anaya’s argument back at the community, effectively accusing the community of arbitrarily delimiting its claim. While state officials nominally recognized the Court’s ruling, they insisted on verifying Awas Tingni’s claims. What’s more, they effectively tasked Awas Tingni with proving that state recognition of the community’s right to property would not disrupt other groups’ use and occupancy rights.

The state’s position created a whole range of problems that figured prominently in the seven-year delay between the ruling and the actual transfer of title. In particular, the claim boundaries mapped by Awas Tingni were contested — at times violently — by neighboring indigenous Miskito communities. These Miskito communities contested the boundaries that were drawn on the map, saying that the Mayangna residents of Awas Tingni had taken land from them and created significant ethnic tensions. Thus, in spite of a long history of shared inhabitation of this space, titling Awas Tingni’s claim required splitting the area into bounded claims, stoking fears of an ethnic conflict between groups that might otherwise be considered equally indigenous. At the same time, the conflict over boundaries also obscured the very different historical and cultural bases for the communities’ respective claims.

Without going into a long and drawn out explanation of how those arguments worked, suffice it to say that the Miskito have historically been much more politically powerful in eastern Nicaragua than the Mayangna. That inequality was reinforced by the Miskito-dominated regional government’s efforts to adjudicate the overlap between the communities’

he takes all the area which belongs to him, so he is not interested right now in saying from here to there.

GON: Really, the State of Nicaragua is interested in knowing that distance.

Witness Jaime Castillo Felipe: In this case it is the government’s obligation to go and recognize or know the terrain and not be asking the length without seeing things.

Case of the Mayangna (Sumo) Community of Awas Tingni: Transcript of the Public Hearing on the Merits, 19 ARIZ. J. INT’L & COMP. L. 129, 139 (2002).

claims. That process cut Awas Tingni's claim roughly in half before the state even began to survey the area for title. It also created a great deal of uncertainty at the community level over who was getting what rights to what land. In response, many young men took to preemptively logging in the overlapping areas, often aided and abetted by unscrupulous logging agents and regional politicians with a hand in the region's quasi-legal logging trade. As a result, when Awas Tingni finally received their title in 2008, half of their land claim had already been taken away or ceded to other communities, the forest had been depleted, and they faced serious tensions with many of their Miskito neighbors.

Those problems, however, were only rarely linked to the Inter-American Court's ruling. Instead they were repeatedly blamed on the general levels of political dysfunction and corruption found in Nicaragua. The characterization of these problems as domestic or regional ones allowed the international status of the Awas Tingni ruling to stand. They also reproduced a familiar division between the universal rationale of international human rights and the messy reality of domestic politics. That distinction was reinforced by Anaya's celebratory account of the 2008 titling ceremony in Awas Tingni that was published in the *Indian Country Today*, heralding the event as a milestone in international indigenous rights.¹⁵⁷

Anaya's claim about the international significance of Awas Tingni's victory was not inaccurate. It did, however, fail to grapple with the complexity of events on the ground. In January 2009, one month after the titling ceremony, I went to Awas Tingni to hear for myself what community residents thought of the affair. I had no way of anticipating the political obstacles I was about to encounter. To get to the community I had to navigate a series of road blockades mounted by neighboring Miskito communities barring access to Awas Tingni. The Miskito language radio stations in the region crackled with threats to kidnap the leaders of Awas Tingni, holding them ransom in exchange for the community's title. Neighboring communities further threatened to rip up and destroy Awas Tingni's title, insisting that the Nicaraguan government to title their lands first before addressing Awas Tingni's claim.

Fortunately for me, I was able to wait several days until the blockades were temporarily lifted in order to allow political parties to campaign in the

157. S. James Anaya, *Anaya: Nicaragua's Titling of Communal Lands Marks Major Step for Indigenous Rights*, INDIAN COUNTRY TODAY (Jan. 5, 2009), <http://indiancountrytodaymedianetwork.com/ictarchives/2009/01/05/anaya-nicaragua%25e2%2580%2599s-titling-of-communal-lands-marks-major-step-for-indigenous-rights-83485>.

communities in advance of the upcoming regional elections. When I arrived in Awas Tingni, people were genuinely shocked to see me. Once they finished asking me how I got there, they began to tell me about the events that transpired in the month following the award of their title. In particular, they spoke of how they felt like they had won their case and obtained a title only to feel “jailed” (*encarcelado*) in the community by the ensuing blockades and threats.

So what went wrong? I’ve spent a lot of time thinking about that question since 2009, and I am still working out my analysis on that. But there are a few things we can rule out. The problems of the Awas Tingni case were hardly caused by bad lawyers. To the contrary, Awas Tingni had one of the best lawyers in the business working for them. Nor could the problems be attributed to an error in the Inter-American Court’s ruling — though I would raise the question of whether or not we really want to equate territory with property.¹⁵⁸ Was it because of a bad map? Yes and no. The map was made according to the best abilities of the people working on it at the time, but the ensuing boundary conflicts should be used to rethink how we go about making and using these kinds of maps in future land claims.

The problems associated with implementation of the Awas Tingni case raise a number of deeper questions that resonate with those raised in Frickey’s work. Most prominently, the problems of implementation affirm the persistence of institutionalized racism in spite of legal recognition of rights. That challenge is one faced daily by residents of Awas Tingni in spite of their international legal success. This point was brought home to me on that visit in 2009 when one of my long-time friends in the community said, “We have a title now, but we no longer have a territory.” Put differently, the community had legal recognition of its rights but lacked the political space in which to exercise them.

Now it is easy to sit here in the United States and say that the problems residents of Awas Tingni face are not questions of international law but rather of disrespect for the rule of law. In short, they are “domestic” problems chronically found in postcolonial settings where states simply fail to apply the law. Both Miskito opposition to Awas Tingni’s title and the Nicaraguan government’s delay in implementation demonstrate just how

158. Joe Bryan, *Rethinking Territory: Social Justice and Neoliberalism in Latin America’s Territorial Turn*, 6 GEOGRAPHY COMPASS 215 (2012); see also Wainwright & Bryan, *Cartography*, *supra* note 155.

much ongoing forms of colonialism shape legal recognition of indigenous rights.

Nor are the problems of implementation a matter of “external” international law freed from colonialism contrasting with ongoing forms of “internal” colonialism practiced in countries. As Frickey’s point about the role of the law in governing colonialism makes clear, the connections are much more complex. Here, Frickey’s work suggests the importance of deemphasizing a “formalistic” or “doctrinal” reading of the law in order to take stock of how indigenous peoples envision their rights and the exercise of those rights.¹⁵⁹ That does not mean abandoning or turning away from the law, much less the concept of rights. Instead, it underscores that while there is a law to denounce injustice and inequality, in the law itself there is no justice.¹⁶⁰ That point has been raised by many people, and it is important to heed their call. But the real purpose of that statement is to turn our attention elsewhere, toward a consideration of the social basis for rights themselves.

Thinking about how rights are exercised and enjoyed requires setting aside the law for a moment in order to recognize that indigenous peoples and Indians alike cannot ultimately rely on states for protection and guarantee of their rights. They have to rely on other people. To enjoy rights in any meaningful sense requires having others who recognize them and guarantee them in exchange for the same. In short, we are dependent on others to enjoy our rights.¹⁶¹ This point is deceptively simple and yet essential to recognize. It deemphasizes the central importance of state sovereignty as necessary to guaranteeing rights. Instead, it shifts attention to creating the kinds of social relationships that will allow for the practice of more meaningful forms of self-determination.¹⁶² Awas Tingni’s experience underscores the importance of that task.

159. Frickey, *Transcending*, *supra* note 1, at 650. This point is insightfully elaborated through Sarah Krakoff’s arguments with regard to the distinct, “experiential” meaning of “sovereignty” for members of the Navajo Nation. Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1114 (2004). For an alternative engagement with a similar notion, see ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800* (1999).

160. Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority”*, 11 CARDOZO L. REV. 919 (1990) (translated by Mary Quaintance).

161. JUDITH BUTLER, *PARTING WAYS: JEWISHNESS AND THE CRITIQUE OF ZIONISM* (2012).

162. For a more concrete discussion of what this might look like, see generally Joe Bryan, *Walking the Line: Participatory Mapping, Indigenous Rights, and Neoliberalism*, 42 GEOFORUM 40 (2011). For a thorough and distinct, yet not unrelated, discussion of the

But my sense of the importance of that task is scarcely limited to my experiences with Awas Tingni. Instead it resonates across the string of experiences I've had working on indigenous rights with regard to oil development in Ecuador, conservation and land loss in Alaska, land claims brought by the Mapuche in Chile, the politics of federal recognition of tribes in California, and, most recently, from my time with Zapotec communities in Oaxaca, who refuse the idea of private property altogether. As I hear it, heeding Frickey's call means using those claims and struggles to think through the prospects for justice, listening to indigenous peoples' own assessments of that process. This is certainly what I have tried to do in Awas Tingni, but the task is broader than that. It involves a broader conversation among indigenous peoples. Briefly put, I would wager that a part of that task requires moving away from the emphasis on the legal recognition of specific rights and toward using the law to create and maintain the spaces and relationships necessary for the enjoyment of rights that I have proposed here. In that task lies the hope for creating possibilities for self-determination in terms that work for people, indigenous and otherwise.

Amy Bowers Cordalis, Staff Attorney, Native American Rights Fund

It is great to be back at Boalt Hall. Thank you for the invitation to speak at this conference. I am an attorney at the Native American Rights Fund ("NARF") and a member of the Yurok Tribe of Northern California. I appreciate the comments made today regarding California Indians. It makes me feel good and warms my heart to know that people are thinking of us.

Today I am going to talk about implementation of the United Nations ("UN") Declaration on the Rights of Indigenous People ("Declaration") in the United States.¹⁶³ NARF has represented the National Congress of American Indians in the negotiation of the Declaration since 1999. The Declaration was adopted by the UN in September of 2007 and was endorsed by the United States in December of 2010.¹⁶⁴ The Declaration confirms "the collective rights of Indigenous Peoples as human rights" and rights to self-determination, religion, education, land and resources, and

philosophical and epistemological contours of this argument, see JODI A. BYRD, *THE TRANSIT OF EMPIRE: INDIGENOUS CRITIQUES OF COLONIALISM* (2011).

163. Declaration on the Rights of Indigenous Peoples, *supra* note 154.

164. See *United States Finally Endorses Historic United Nation's Declaration on the Rights of Indigenous Peoples*, NARF LEGAL REV., Winter/Spring 2011, at 1, 1 (vol. 36, no. 1) [hereinafter *United States Finally Endorses UN Declaration*], available at <http://www.narf.org/pubs/nlr/nlr36-1.pdf>.

culture.¹⁶⁵ NARF believes the Declaration has great potential to increase tribal sovereignty in the United States.

Currently, Indian Country is just beginning to implement the Declaration. There were not many tribal leaders involved in the negotiation of the Declaration in the UN — mostly indigenous communities and peoples from other countries participated. Tribes in the United States started to take interest in the Declaration after the United States endorsed it in 2010.¹⁶⁶ Now, tribal leaders are reviewing the Declaration and considering how it might support their communities. At the national level, various Native American rights organizations are reviewing the Declaration and hosting meetings to implement the Declaration in the United States.

In my remarks today, I challenge Indian Country to create a strategic national implementation plan for the Declaration that would consist of three points. The first would be to familiarize ourselves with the Declaration and review federal Indian law for areas that fall short of the rights in the Declaration. Second would be to hold the United States government accountable to implement the Declaration and interact with tribal governments in a manner consistent with the Declaration. The third and final point would be to encourage tribal governments and leaders to use the Declaration in day-to-day advocacy. The Declaration is a new helpful tool for Native American advocates to rely upon in litigation, negotiation, and legislation. With strategic planning, we can ensure the most beneficial use of the Declaration in the United States.

The obligation of developing a national strategic implementation plan for the Declaration rests with us, the lawyers, tribal leaders, and academics working in Indian Country. We have a professional obligation to familiarize ourselves with the rights in the Declaration. Based on our understanding, we can begin to bolster our clients' positions.

Critical to our inquiry into the Declaration and its implementation is examining federal Indian law for inconsistencies with the rights recognized in the Declaration. There are several areas of federal Indian law that fall short of the rights in the Declaration. At NARF, we have already identified areas of the law inconsistent with the Declaration. For example, Article 28 of the Declaration states that the taking of aboriginal land is compensable in

165. *Id.*

166. President Barack Obama, Remarks by the President at the White House Tribal Nations Conference (Dec. 16, 2010), *available at* <http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference>.

the form of new property or compensation.¹⁶⁷ *Tee-Hit-Ton Indians v. United States*¹⁶⁸ is in direct conflict with this Article, holding that the taking of aboriginal land is not compensable.

Further, Articles 1 and 3 of the Declaration recognize the right of indigenous peoples to “self-determination.”¹⁶⁹ There is debate about the scope of this right, but at minimum, it is the right to form a government and make laws for your own people. *Santa Clara Pueblo v. Martinez*¹⁷⁰ suggests that Congress has “plenary authority to limit, modify, or eliminate the powers of local self-government” and the right of self-determination, which is entirely inconsistent with Articles 1 and 3 of the Declaration.¹⁷¹ These are just two examples. A thorough review would reveal many more inconsistencies.

The second part of a national strategic plan to implement the Declaration is holding the United States government accountable for meeting the standards in the Declaration. The Obama Administration signed the Declaration with several conditions.¹⁷² The most meaningful of the conditions is the Administration’s claim that the Declaration is an aspirational document, which is “not legally binding or a statement of . . . international law.”¹⁷³ The Declaration is a statement of morals and political goals about how the United States should interact with indigenous people.¹⁷⁴ Indian Country had hoped the United States would categorically support the Declaration and was disappointed by the conditional endorsement. Nonetheless, President Obama stated in a speech announcing the United States support of the Declaration, “The aspirations [the declaration] affirms . . . are one[s] we must always seek to fulfill . . . But what I want to be clear: What matters far more than words — what matters far more than any resolution or declaration — are actions to match those words.”¹⁷⁵ As a community, we need to hold their feet to the fire to ensure

167. Declaration on the Rights of Indigenous Peoples, *supra* note 154, at 10-11.

168. 348 U.S. 272, 290-91 (1955).

169. Declaration on the Rights of Indigenous Peoples, *supra* note 154, at 4.

170. 436 U.S. 49, 56 (1978).

171. Declaration on the Rights of Indigenous Peoples, *supra* note 154, at 4.

172. U.S. DEP’T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: INITIATIVES TO PROMOTE THE GOVERNMENT-TO-GOVERNMENT RELATIONSHIP & IMPROVE THE LIVES OF INDIGENOUS PEOPLES (Dec. 9, 2010), *available at* <http://www.state.gov/documents/organization/153223.pdf>.

173. *Id.* at 1.

174. *Id.*

175. Obama, *supra* note 166.

their interactions with tribal governments meet the standards in the Declaration.

One immediate concern regards tribal consultation. The Obama Administration has adopted tribal consultation policies for federal agencies.¹⁷⁶ Generally, the consultation policies require the United States to “consult” Native American tribes anytime tribal rights or interests could be affected by a government action.¹⁷⁷ Tribal leader consent is not required to take action that could affect a tribal interest. Article 19 of the Declaration requires nation states to work with indigenous peoples “to obtain their free, prior and informed consent” before taking any action that may affect the rights of indigenous people.¹⁷⁸ The United States consultation policies require consultation on actions that could affect tribal interests, but do not require the seeking of consent and thus establish a lower standard of government-to-government relations than in the Declaration. Because consultation informs the United States’ interaction with Native American tribes, this is another significant inconsistency between the Declaration and federal policy.

The inconsistency between the Obama Administration’s consultation policies and Article 19’s right to free, prior, and informed consent presents an opportunity to hold the United States accountable for meeting the standards in the Declaration by improving consultation policies in a manner consistent with the Declaration.¹⁷⁹

The third and final part of a national strategic implementation plan would be using the Declaration in Native American communities. When we, as a community of lawyers, professors, and tribal advisors understand the rights in the Declaration, although we may not agree on their scope, we can begin to use it in day-to-day advocacy.

NARF is currently working on this. For example, we have relied on the Declaration to support damages claims against the United States. We have referenced it in testimony before the Senate Committee on Indian Affairs in support of the right of free, prior, and informed consent.¹⁸⁰ We have

176. OFFICE OF THE PRESS SEC’Y, MEMORANDUM ON TRIBAL CONSULTATION (Nov. 5, 2009), *available at* <http://www.whitehouse.gov/the-press-office/memorandum-tribal-consultation-signed-president>.

177. *Id.*

178. Declaration on the Rights of Indigenous Peoples, *supra* note 154, at 8.

179. *See United States Finally Endorses UN Declaration*, *supra* note 164, at 8.

180. *Fulfilling the Federal Trust Responsibility: The Foundation of the Government-to-Government Relationship: Oversight Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. (2012) (statement of Melody McCoy, Staff Attorney, Native American Rights Fund).

authored letters to the Obama Administration relying on the Declaration to support tribal rights to intellectual property. We hope the Declaration will be used in the re-negotiation of the Columbia River Treaty between Canada and the United States. Article 36 of the Declaration confirms the right of indigenous peoples to work together across international borders.¹⁸¹ This enables the Salish people in the United States and Canada to meaningfully participate in the renegotiation of this Treaty. Such participation could result in increased protection of Salish interests.

It is up to Indian Country to implement the rights in the Declaration. We give life to the Declaration by making the rights it recognizes our mantra in day-to-day advocacy. I have learned from Yurok tribal leaders that believing in having rights greater than those recognized today pays off. For most of the twentieth century, the State of California did not recognize the Yurok Tribe's federally reserved fishing rights. This was devastating to our people, who relied upon salmon from time immemorial for their livelihood and subsistence.

In the 1970s, the opportunity arose to negotiate Yurok fishing rights with the State of California and the United States. Yurok elders and tribal leaders battled with state game wardens and officials about whether Yurok people had fishing rights. The Yurok leaders never faltered in their position over years of negotiations: they had federally reserved fishing rights, despite losing most of their tribal land to allotment. The statement that we have federally reserved fishing rights became a mantra, repeated in each negotiation. Finally, the State of California heard us. Finally, the federal government supported those rights. After years of repeating the same mantra, the Yurok leaders secured our fishing rights. Those rights became a reality.

This story teaches us to stay true to our position. We must believe in having rights greater than those recognized today. The Declaration presents an opportunity for us to believe that tribes in the United States can have better rights than those currently recognized in federal law. It is up to us to believe and advocate for those rights to make them a reality. By considering these three steps, we can begin to outline our country's strategic implementation plan for the Declaration.

In closing, I want to share a story. When I was a student at Boalt Hall in 2007, I had a conversation with a fellow 3L student who realized I was Native American. She asked me, and I quote, "Does your family live on a

181. Declaration on the Rights of Indigenous Peoples, *supra* note 154, at 13.

tribe?" She didn't misspeak; she used the word tribe as a geographic location.

That question really got to me. This student was a 3L who had risen through the education system in the United States and was about to graduate from a very prestigious law school. She didn't even know how to use the word tribe in a proper way. This demonstrates that there is an atrocious lack of knowledge in the United States about Native American people and tribal governments. This country's educators, Native American people, and advocates have a moral obligation to teach the next generation of leaders that indigenous peoples are here to stay, and that we have a unique set of inherent rights recognized in the Declaration and federal law. The Declaration is a strong statement that 150 nations across the world acknowledge indigenous peoples.¹⁸² These Nations confirm indigenous peoples' human rights and the right to self-determination; rights to our land, water, culture, religion, and education. One hundred fifty nations agreed on these rights.

We as indigenous people and advocates have a moral obligation to teach the next generation about these rights. Professor Frickey's work was partly about this; teaching Indian law to a broader community, a community of privilege, and a community that is very powerful. I hope Boalt Hall will continue his legacy. I hope the collective community of Native American peoples and advocates will join NARF in developing a national implementation plan for the Declaration that results in its most beneficial use to improve the rights of Native American peoples and governments. Thank you.

RACE, LAW, AND CULTURE

Matthew Fletcher, Professor of Law and Director of the Indigenous Law & Policy Center, Michigan State University College of Law

Good to see you again. I was here yesterday too. My name is Matthew Fletcher, Grand Traverse Band of Ottawa and Chippewa Indians, and this goes back to what was started yesterday, some of the things Phil Frickey said when he was talking about new realism. I think this panel is designed to highlight some of those things, particularly things like practical scholarship, tribal duties, tribal law, intellectual honesty, and scholarly

182. *United States Finally Endorses UN Declaration*, *supra* note 164, at 1.

objectivity.¹⁸³ We have something like that on this panel. I think these scholars strive for that.

Let me just briefly introduce the order of speakers, and then I'll say just a few words before Bethany gets up. But our first speaker is Bethany Berger. She is really the best and most impressive legal history scholar we've had in the field¹⁸⁴ since Rob Williams.¹⁸⁵ Following her is B.J. Jones. B.J. is a tribal judge, and as someone mentioned earlier, I like to refer to B.J. as a man who wrote the book on the Indian Child Welfare Act.¹⁸⁶ It really does not get any more grounded than that. He had the great quote, which I think could be attributed to a lot of people, but I remember him saying it the best and the loudest because of his voice, which is "Do tribal people really need a federal solution to everything?" The next speaker will be Heather Kendall Miller, who has done amazing work on tribal sovereignty in Alaska and especially since the *John v. Baker* decision,¹⁸⁷ which is probably one of the more remarkable Indian law decisions in the modern era, if not ever. And then we will conclude with Kristen Carpenter, who will be talking about her powerful paper on limiting principles to American Indian religious freedom.

We should talk more about scholarly objectivism and limiting principles, which are some of those most powerful words that we in the community often do not want to hear. But, as Phil Frickey often said, we don't really see the other side of that law. Phil said it in a way that was kind of scary and leads us into traps. It's amazing to me, and I'm glad it was Kristen who really took the time to write her article about limiting principles that she's finishing up right now about sacred sites, litigation, and religious claims.¹⁸⁸ It is so impressive, but it is sad that it took more than twenty years for this article to come out after the Supreme Court asked us in 1986,¹⁸⁹ 1988,¹⁹⁰

183. See generally Frickey, *Transcending*, *supra* note 1; Frickey, *Address*, *supra* note 3.

184. See generally Bethany R. Berger, "Power over This Unfortunate Race": *Race, Politics, and Indian Law in United States v. Rogers*, 45 WM. & MARY L. REV. 1957 (2004).

185. See generally ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).

186. See B.J. JONES, MARK W. TILDEN & KELLY GAINES-STONER, *THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN* (2d ed. 2008).

187. *John v. Baker*, 982 P.2d 738 (Alaska 1999).

188. See, Kristen A. Carpenter, *Limiting Principles and Empowering Practices in American Indian Religious Freedoms*, 45 CONN. L. REV. 387 (2012).

189. See *Bowen v. Roy*, 476 U.S. 693 (1986).

190. See *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

and 1990.¹⁹¹ “Where are your limiting principles? We have been waiting for a long time for these limiting principles.” Well Kristen has the answer.

Just for one more minute before we get going, this panel topic is about race and culture Indian law, and once again there is a paper of mine over here.¹⁹² My new goal is to get all of these re-prints and give them out at conferences. Take one with you and enjoy it or recycle it. But the panel, in some ways, is inspired by a couple of cases that really highlight this kind of trap that Phil Frickey was talking about.

In 1974, the Court decided *Morton v. Mancari*,¹⁹³ which we all know is this big case where the way we interpreted it (I say this facetiously), but the way we interpret it is if there is a law that benefits Indians, the law is valid. Courts apply the political status classification. We don't have to apply the Fifth and Fourteenth Amendments; we don't have to apply strict scrutiny. But if the law does not benefit Indians, well then that is racism. It is sort of a “you win or the other side loses;” those are the only two options.

We get into this trap and then, in 1978, the Supreme Court decided *Santa Clara Pueblo v. Martinez*.¹⁹⁴ Both of these cases highlight something that has become a big trap for Indian Country, and it derives from this notion of tribal membership. The *Mancari* case says it is okay to do things for the benefit or disadvantage of Indians, so long as it is based on politics. Tribal membership is the core of that. The problem is, in *Santa Clara Pueblo v. Martinez*, where tribes can articulate forms of tribal membership, is that they do so in a way that is downright “illiberal”, to quote Angela Riley,¹⁹⁵ who really should be here as well. We have to recognize that there are illiberalisms in Indian law and Indian Country, and what we need to do to deal with that.

This illiberalism that Angela wrote about and continues to write about has led us, in some ways, into a trap. Tribes do not have jurisdiction over most non-members in their community; they do not have much jurisdiction over anything unless it is on land that the tribe owns or is owned by a tribal member. That's not good enough. So what we have is an expression of

191. See Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Land Use & Institutionalized Persons Act of 2000 (RLUIPA) § 3, 42 U.S.C. § 2000cc-1 (2006), *as recognized in* Sossamon v. Texas, 131 S. Ct. 1651 (2011).

192. See Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 WYO. L. REV. 295 (2011).

193. 417 U.S. 535 (1974).

194. 436 U.S. 49 (1978).

195. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799 (2007).

realism that Phil Frickey would have very much appreciated and this panel is a great way to finish this conference.

Bethany Berger, Professor of Law, University of Connecticut School of Law

So now, I've got the easy task of giving an overview of the role of race, culture, and membership in Indian status in twelve to fifteen minutes! I am going to try and use technology, which may not work so well, and if it doesn't work I'll give it up.

I'm going to do four things: first, talk about common misunderstandings about the role of race in Indian status; second, talk about the varied role that race and descent actually do play in Indian status; third, consider and quickly dismiss challenges that federal Indian law and the special status of American Indians is racist because of the relationship between race and Indian status; and fourth, consider and — not quite so quickly, but ultimately — dismiss challenges to membership or citizenship criteria that depend on descent as racist.

Here is the first of the technology efforts. This is a little movie and, I warn you, this is propaganda created by the Cherokee Nation as part of their dispute regarding the exclusion of people descended from those listed on the Freedmen Rolls rather than the so-called Cherokee by Blood rolls.¹⁹⁶ Nevertheless, it reveals a reality of Indian Country that challenges easy equations between race and Indian status. In short, even after the controversial amendments to the criteria for Cherokee citizenship, one only needs to trace a lineal descendant to the rolls created between 1898 and 1914. Cherokee citizens can look black, white, Latino, or any combination of races, as well as looking like what people think an Indian looks like. Publications like the Washington Post said that the Cherokee Nation was excluding its black people.¹⁹⁷ If you know anything about the way the citizenship criteria work, that wasn't what happened, and the video illustrates this. Equating tribal descent requirements with racial requirements is not that easy to do.

196. *Cherokee Ancestors*, MEET CHEROKEE NATION CITIZENS, <http://www.meetthecherokee.org/TakeAction/WatchOurVideo/tabid/1715/Default.aspx> (last visited Mar. 14, 2013). For a good discussion of the various rolls, and why Cherokee by Blood is a misnomer, see *Allen v. Cherokee Nation Tribal Council*, JAT-04-09, 2006 WL 5940403, at *6-8 (Cherokee Jud. App. Trib. Mar. 7, 2006).

197. Ellen Knickmeyer, *Cherokee Nation to Vote on Expelling Slaves' Descendants*, WASH. POST, Mar. 3, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/02/AR2007030201647.html>.

I will tell two more stories that reveal common misunderstandings about the relationship between descent, race, and Indian status. First is the story of Wanda Sykes, whose roots were traced back to free blacks in 1683 on the show *Finding Your Roots* with Henry Louis Gates, Jr.¹⁹⁸ In later interviews about the show, Sykes quipped, "I'm so disappointed that he didn't get me any casino money out of this! Come on Skip, tell me I'm a relative of Pocahontas. I would have retired."¹⁹⁹ Everybody here can probably see some of the things that are wrong with this statement.

First Pocahontas' Pamunkey tribe isn't recognized by the federal government, one of many requirements to engage in legal gambling on Indian land. Sykes, in other words, is probably doing a whole lot better than the current day Pamunkey. Second, even if the Pamunkey were recognized, virtually all tribes require, at a minimum, that citizens trace their descent to an individual on a roll created around 1900, some before and some after.²⁰⁰ So simply being descended from Pocahontas wouldn't help Sykes a whole lot.

Of course, Sykes was joking. At the time Skip told her about her roots, she actually got teary eyed thinking about the difficulty of remaining free and black for all those generations of slavery. But these kinds of misunderstandings aren't confined to comedians. A more disturbing example comes from Supreme Court Justice Robert Jackson. In his comments in the 1952 oral argument of *Brown vs. Board of Education*, he said, "In some respects, in taxes at least, I wish I could claim to have a little Indian blood."²⁰¹ First, as with Ms. Sykes, a little Indian blood wouldn't do much for him. Second, Indians pay virtually all federal taxes.²⁰² Third, to be eligible for any kind of immunity from any state taxes, Justice Jackson would have to live near his reservation, not in Washington, D.C.²⁰³ So, even

198. *Finding Your Roots* (PBS television broadcast May 13, 2012), available at <http://www.pbs.org/wnet/finding-your-roots/video/john-legend-and-wanda-sykes/>.

199. Felicia R. Lee, *Family Tree's Startling Roots*, N.Y. TIMES, Mar. 20, 2012, at C1.

200. See *Rice v. Cayetano*, 528 U.S. 495, 526-27 (2000) (Breyer, J., concurring) (listing tribal membership laws and noting that none accord membership based on descent from a member as early as 1778).

201. *BROWN V. BOARD: THE LANDMARK ORAL ARGUMENT BEFORE THE SUPREME COURT 29* (Leon Friedman ed., 2004) (1969).

202. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 680 (Nell J. Newton et al. eds., LexisNexis 2012) [hereinafter COHEN].

203. See *id.* at 697; *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160-61 (1980); *United States ex rel. Cheyenne River Sioux Tribe v. South Dakota*, 105 F.3d 1552, 1559-60 (8th Cir. 1997).

those with tremendous power over what Indian status means do not understand what it actually is.

This is perhaps understandable because what Indian status actually is varies a lot. I'm not going to talk about all of the different definitions of Indian status in detail, because we could be here all day. But even civil and criminal jurisdiction use different definitions of Indian. Criminal jurisdiction requires Indian descent plus recognition of the individual as an Indian by the federal government or an Indian tribe. This recognition does not have to include enrollment or even eligibility for enrollment but can be satisfied by some combination of residence on a reservation, receipt of benefits reserved for Indians, participation in tribal affairs, and other factors.²⁰⁴ Civil jurisdiction, in contrast, has no descent requirement but requires membership in the tribe within whose territory you actually are.²⁰⁵ And, as B.J. Jones knows much better than I do, the term Indian child under the Indian Child Welfare Act follows a different definition, requiring either membership or eligibility for membership plus being a biological child of a member.²⁰⁶

Tribal membership, in turn, just about always requires some measure of descent from tribal members or, occasionally, residence plus Indian heritage.²⁰⁷ Take even the South Dakota case where the court said that a

204. Compare *United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005) (holding that a woman who was one-eighth Chippewa but not enrolled in the tribe or recognized as Indian by the federal government should have had her affirmative defense of Indian status submitted to the jury to determine if she was Indian for purposes of criminal jurisdiction based on being born on a reservation, living on a reservation, participating in Indian religious ceremonies, being treated at Indian hospitals, and previous arrests by tribal authorities), with *United States v. Maggi*, 598 F.3d 1073 (9th Cir. 2010) (holding a 1/64 Blackfeet and 1/32 Cree man whose mother was a member of the Blackfeet Tribe, but who was ineligible for enrollment and had not lived on the reservation, was not Indian even though he was a "descendant member" eligible for tribal health care, education scholarships, and hunting and fishing rights, and who had been arrested and prosecuted by tribal officials several times).

205. COHEN, *supra* note 202, at 697; *Tribes of Colville*, 447 U.S. at 160-61; *Cheyenne River Sioux Tribe*, 105 F.3d at 1559-60.

206. 25 U.S.C. § 1903(4) (2006).

207. See, e.g., CONST. OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS art. II, § 1 (1988) (requiring descent from a member plus one quarter Indian blood, of which one-eighth must be Michigan Chippewa or Ottawa blood); CONST. OF THE GAY HEAD TRIBE OF MASHPEE WAMPANOAG (AQUINNAH) art. II, § 2 (amended 1995) (requiring trace descent from a person listed on the 1870 census roll); CONST. AND BY-LAWS OF THE CHEYENNE RIVER SIOUX TRIBE art. II, § 1 (amended 1992) (stating members are those of Indian blood on the 1934 census roll, those previously enrolled, and those born to Cheyenne River Sioux members who were resident on the reservation at the time of birth, plus those of

child of no known Native descent was an Indian child under the Indian Child Welfare Act because he had been adopted by members of the Cheyenne River Sioux Tribe and enrolled with the tribe.²⁰⁸ The enrollment of the child, in fact, violated Cheyenne River Sioux written law, which says you must be one-quarter Cheyenne River Sioux blood to become a tribal citizen.²⁰⁹ While the case suggests that tribes in practice do not fully implement their restrictive enrollment criteria, it also underlines how prevalent descent requirements actually are.

Moving to federal government benefits, like health care and education: they are all over the map. Some require membership in a recognized Indian tribe; some require descent plus some looser measure of affiliation; a few only require descent from any tribe, federally recognized or not.²¹⁰ Some tribes also provide governmental services or benefits not only to tribal members, but also “descendant members,” which are descendants of members with insufficient blood to enroll themselves.²¹¹

There is no easy definition of self-identification as Indian. It may be related to enrollment or descent but doesn't depend on either of those. African Americans whose ancestors served on Seminole Nation councils, crossed the Trail of Tears with the Seminoles, and who themselves grew up in Seminole country, identify as Seminole and Indian, regardless of blood or recognition by the Seminole Nation.²¹² Any number of things can make one the target of anti-Indian racism: perception as Indian, regardless of its reality;²¹³ asserting tribal benefits or rights as an Indian;²¹⁴ even claiming

Cheyenne River blood discretionarily admitted by a two-thirds vote of the tribal council); CONST. AND BY-LAWS FOR THE BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION OF MONTANA art. II, § 1 (amended 1978) (stating members are those on the 1935 census roll, those of Indian blood born to members while in residence prior to adoption of this ordinance, and those of one-fourth Blackfeet Indian blood born to blood Blackfeet members).

208. *In re Dependency & Neglect of A.L.*, 442 N.W.2d 233, 235 (S.D. 1989).

209. *See* CONST. AND BY-LAWS OF THE CHEYENNE RIVER SIOUX TRIBE art. 2 (amended 1992).

210. *See* COHEN, *supra* note 202, at 1375; Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041, 1083 (2012).

211. *See* *United States v. Maggi*, 598 F.3d 1073 (9th Cir. 2010) (describing descendant membership in Blackfeet Tribe).

212. *See* William Glaberson, *Who Is a Seminole, and Who Gets to Decide?*, N.Y. TIMES, Jan. 29, 2001, <http://www.nytimes.com/2001/01/29/us/who-is-a-seminole-and-who-gets-to-decide.html?pagewanted=all&src=pm>.

213. *Perkins v. Lake Cnty. Dep't of Utils.*, 860 F. Supp. 1262, 1278 (N.D. Ohio 1994) (proving plaintiff was an Indian was not a necessary element of employment discrimination claim based on Indian status).

Indian status when one does not look or act sufficiently Indian in the mind of the racist.²¹⁵

Nevertheless, Indian status is inextricably connected to Indian descent, even if the connections are varied and complex. Does that mean federal Indian law itself is racist? Is it true that, as some Republicans claim, Indian tribes cannot have jurisdiction over non-Indians who beat, rape, and abuse Indian women on tribal land because tribes are “racially exclusive?”²¹⁶ Of course not. *Jus sanguinis*, or descent-based citizenship, is the dominant rule outside of Great Britain and the United States.²¹⁷ It is also a rule of international law used for elections by populations in diaspora, such as the independence referendum in South Sudan.²¹⁸ In the tribal context, basing citizenship significantly on descent may be the only feasible rule.

Jus soli, or citizenship based on birthplace or long residence, would be vastly over and under-inclusive for tribes. In part, because of the long process of colonization, many Indian people can’t live in their tribal communities and access educational or employment opportunities that most of us take for granted.²¹⁹ According citizenship only to those born or domiciled in tribal territories would exclude more than half of those with significant connections to tribes. In addition, the same process of

214. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wis., Inc.*, 843 F. Supp. 1284, 1288-90 (W.D. Wis. 1994) (condemning those who asserted treaty-fishing rights as “welfare warriors” and “timber niggers” at the same time as alleging they weren’t sufficiently Indian).

215. Renee Ann Cramer, *The Common Sense of Anti-Indian Racism: Reactions to Mashantucket Pequot Success in Gaming and Acknowledgment*, 31 LAW & SOC. INQUIRY 313, 330 (2006) (quoting townspeople’s complaint to a reporter that “more than half [of the Mashantucket Pequots] are predominantly African American and the rest are mostly white. . . . They just want special privileges. These are guys who used to be on welfare.”).

216. See David B. Muhlhausen & Christina Villegas, *Violence Against Women Act: Reauthorization Fundamentally Flawed*, HERITAGE FOUND. (Mar. 29, 2012), <http://www.heritage.org/research/reports/2012/03/the-violence-against-women-act-reauthorization-fundamentally-flawed>; Press Release, Senator Jon Kyl, VAWA’s Long March to Reauthorization (Apr. 30, 2012), available at <http://votesmart.org/public-statement/688718/#.UUI2CzdbU3s>.

217. See Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case (1608)*, 9 YALE J.L. & HUMAN. 73, 73 (1997).

218. *The Southern Sudan Referendum Act: Frequently Asked Questions*, UNITED NATIONS MISSION IN SUDAN (Oct. 26, 2010), <http://unmis.unmissions.org/Portals/UNMIS/Referendum/The%20Southern%20Sudan%20Referendum%20Act%20FAQ.pdf>.

219. The average unemployment rate on reservations, for example, was 49% in 2005, and as high as 89% on some reservations. See COHEN, *supra* note 202, at 1321. While more tribes administer four-year colleges on their reservations, there are no research universities or elite schools on reservations. *Id.* at 1404-05.

colonization means that tribes today don't have control over who comes within, lives on, or is born within their borders.

The history of allotment, or the turn-of-the-century division and sale of tribal lands to non-tribal members, has resulted in large non-Indian populations owning property and having the right to live on reservations.²²⁰ The Supreme Court has interpreted allotment acts, as well as later cessions of use rights to non-Indians and states, to strip tribes of the right to exclude non-Indians from these lands.²²¹ Giving citizenship to all those born or long domiciled on reservations would result in many tribes being overwhelmed by individuals with little connection and often outright hostility toward those tribes.

Others have proposed a cultural test for tribal citizenship, to avoid reliance on descent. As I tell my students, do you know who would be the American Indians of the United States under such a test? Germans! In part because of the craze for the Native American adventure novels of turn-of-the-century German writer Karl May, a number of Germans actually study and re-enact the languages and ceremonies of Indian cultures that many in Native communities do not have a whole lot of time for.²²² An anthropologist friend of mine recalled being in a bar in Stuttgart and hearing a group next to him of Germans having a fluent conversation in Lakota. Despite efforts to reinvigorate tribal languages, not every patron of a diner in Lakota country (most Sioux reservations are dry, so there are no legal bars) could carry on such a conversation.

Is the demand for descent in tribal membership criteria itself caused by racism? As Matthew Fletcher has written, it certainly creates a whole lot of problems for tribes.²²³ And there clearly are racist elements in some of the debates about tribal membership. Nevertheless, as you saw in the *Our Cherokee Ancestors* video, the citizenship criteria adopted by the Cherokee Nation do not exclude those who fit the common racial definitions of black, white, Latino, or anybody else, so long as they can trace one ancestor to the Cherokee by Blood rolls.

220. See *id.* at 73 (discussing effect of allotment in turning reservations into checkerboards of white and Indian ownership).

221. See, e.g., *Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997); *Montana v. United States*, 450 U.S. 544, 554-55 (1981).

222. Rivka Galchen, *Wild West Germany: Why Do Cowboys and Indians So Captivate the Country?*, *NEW YORKER*, Apr. 9, 2012, at 40, available at http://www.newyorker.com/reporting/2012/04/09/120409fa_fact_galchen.

223. Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 *WYO. L. REV.* 295, 296 (2011).

Despite this, the dispute over enrollment of the descendants of those on the Cherokee Freedmen rolls cannot be separated from the racism of the Cherokee Nation's history of holding slaves, or from its present status as a people in the United States, a place where anti-African-American racism is often just below the surface. Equally often, as in the California cases, descent is used as a justification to exclude individuals for reasons that are largely political — ugly power plays regarding who should be in and who should be out of power, and who should get its benefits.²²⁴

But in most cases, the demand for descent comes from a desire to have a community that has cohesion with one's ancestors. If things were different — if reservations could be economically and socially self-sustaining communities, with full control over who lived and died there — descent should not be a prerequisite for membership. But we don't live in that world. In this world, descent is an important, perhaps necessary, tool for preserving community and furthering self-determination.

Thank you very much.

B.J. Jones, Director, Tribal Judicial Institute, University of North Dakota School of Law

I appreciate the fact that everyone is here to carry on the spirit of Phil Frickey. I actually knew Phil when he taught at the University of Minnesota Law School because I happen to be a tribal judge for the Prairie Island Indian community in Minnesota. I want to tell you the first time I met Phil, Phil and I were invited by the U.S. Court of Appeals for the Eighth Circuit to do a presentation at their annual conference when they were in the Twin Cities. The presentation was not to the district court judges or appellate judges; it was to the magistrates.

Magistrates are an interesting group because in many ways they feel like they should be treated like U.S. district court judges, and sometimes they carry a chip on their shoulder for that. I recall an interesting thing — that at the same time we were scheduled to present to the magistrates, the federal district court judges and appellate justices were hearing from the U.S. Supreme Court justice who was assigned to the Eighth Circuit at the time, Clarence Thomas. I think the magistrates were most interested in listening to Professor Frickey's presentation because of his reputation for reticence.

224. See Carmen George, *Dissension After Chukchansi Council Meeting*, SIERRA STAR (Oakhurst, Cal.), Dec. 29, 2011, <http://www.sierrastar.com/2011/12/28/57081/dissension-after-chukchansi-council.html>; James Dao, *In California, Indian Tribes with Casino Money Cast Off Members*, N.Y. TIMES, Dec. 12, 2011, http://www.nytimes.com/2011/12/13/us/california-indian-tribes-eject-thousands-of-members.html?pagewanted=all&_r=0.

We didn't know what he would talk about, being a non-garrulous fellow. As a result, we had an audience that was not that enthused about being there. Plus, you combine his reticence with our exciting topic — the tribal court exhaustion rule — and we did not have the most engaged audience.²²⁵

But Phil Frickey started talking to the magistrates and after Professor Frickey described “the tribal court exhaustion rule as a prudential doctrine,” one of the magistrates was apparently put off because he said to Professor Frickey, “please don't be condescending to us and treat us like one of your law students,” even though “prudential” is how the U.S. Supreme Court described the tribal court exhaustion rule.²²⁶ Nonetheless, this magistrate excoriated Phil Frickey for about three minutes about how the academic world is so removed from the realities of what Indian people face in tribal communities.

So in order to accommodate the magistrates, Frickey then proceeded to use two and three syllable words throughout this presentation. Whenever he would use a word that was in any way legalese, he would turn to the magistrate and say, “that means this in real life.” I always found that commendable about Frickey, that he could dumb down Indian law even to the point that federal magistrates could understand it.

I currently spend most of my time as a tribal judge for several tribal communities in South Dakota and Minnesota. The bio in the program materials is very outdated and must be from the University of North Dakota (“UND”) Law School website. I worked at the UND Law School, which is the university that took fifty years to get rid of the Fighting Sioux nickname. So it takes us a while to update things. I am mostly a tribal judge now. I work for the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation in South Dakota, but I kind of traverse the Dakota/Minnesota border with a gavel in hand. I'm also a judge for Prairie Island, which is a small Dakota Sioux Tribe outside of the Twin Cities with one of the more profitable gaming enterprises in the nation, and for Pine Ridge, which is one of the poorer tribes in the nation. So I think I get a sense of some of the

225. The United States Supreme Court determined that before a non-Indian party can challenge a tribal court's jurisdiction over him in federal court, that party must first exhaust his tribal court remedies to permit the tribal court to determine its jurisdiction first. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851-53 (1985). Later the Court extended the same requirement to the exercise of federal court diversity jurisdiction over a dispute arising in Indian Country. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987).

226. *See Iowa Mut. Ins. Co.*, 480 U.S. at 20 n.14.

issues that go on in Indian communities on a daily basis. But I also teach, so I have some footing in the academic world.

I want to talk about race, culture, and law and examine how tribal courts have lost jurisdiction, especially jurisdiction over non-Indians.²²⁷ How did Indian tribes lose jurisdiction over the years, initially over non-Indians, and later over non-member Indians? As part of the Violence Against Women Act reauthorization ("VAWA 2013"), we now have an attempt to restore some semblance of jurisdiction over non-Indians in the arena of domestic violence.²²⁸ I heard Professor Deer talk about how critical it is that Indian tribes regain jurisdiction,²²⁹ and I concur with her opinion. There is a lot of vigilant opposition to this tribal jurisdiction from groups that surprised me, like the National Association of Criminal Defense Attorneys. Groups like this are vigorously opposed to any notion that Indian tribes should have jurisdiction over non-Indians.²³⁰

227. In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211-12 (1978), the United States Supreme Court held that Indian tribes lack the inherent authority to prosecute non-Indians who commit crimes within their territory because such jurisdiction was implicitly divested by their status as dependent nations and was not necessary to the exercise of their dependent status.

228. After *Oliphant*, the Supreme Court ruled that Indian tribes similarly lacked inherent jurisdiction to punish Indians from other tribes other than the tribe controlling the territory where the crime occurred in *Duro v. Reina*, 495 U.S. 676 (1990). This decision led to a complete void in criminal jurisdiction over certain offenders because of the General Crimes Act prohibition on federal jurisdiction over Indian on Indian crime. See 18 U.S.C. § 1152 (2012) (resulting in congressional action to overturn the *Duro* case by amending the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (2006), to make tribal court jurisdiction over non-member Indians commensurate with federal jurisdiction over Indians). This legislative fix is often times referred to as the "*Duro* fix" and was explicitly upheld in *United States v. Lara*, 541 U.S. 193 (2004). The *Duro* fix was considered a legitimate exercise of congressional authority to define tribal court inherent authority. The current attempt in the reauthorization of the Violence Against Women Act to expand tribal court criminal jurisdiction over non-Indian domestic violence offenders is similar to the *Duro* fix in that it would permit tribal court criminal jurisdiction in limited instances, provided certain rights are extended to non-Indian offenders (right to free counsel, right to have non-Indians on juries). This would thus appear to be consistent with *Lara*'s discussion on congressional authority over tribal affairs.

229. See Levi Rickert, *Muscogee Sarah Deer Talks Tribal Provision of VAWA on MSNBC's Up with Chris Hayes Show*, NATIVE NEWS NETWORK (Dec. 17, 2012, 6:30 AM), <http://www.nativenewsnetwork.com/muscogee-sarah-deer-talks-tribal-provision-of-avaa-on-msnbc-up-with-chris-hayes-show.html>.

230. See Matthew L.M. Fletcher, *Opposition Letter to Title IX of VAWA Reauthorization from Federal Defenders (and Commentary)*, TURTLE TALK (Apr. 25, 2012, 8:49 AM), <http://turtletalk.wordpress.com/2012/04/25/opposition-letter-to-title-ix-of-avaa-reauthorization-from-federal-defenders-and-commentary/>.

In 1990, I was a legal services/public defender on the Standing Rock Reservation. I recall when the Supreme Court decided *Duro v. Reina*. The U.S. Supreme Court said not only do tribal courts lack inherent jurisdiction over non-Indians, they lack jurisdiction over non-member Indians.²³¹ One year later, Congress reacted to *Duro* by restoring tribal court criminal jurisdiction over non-member Indians.²³² When you read *Duro*, it is apparent that the Court relied on the same legal reasoning as the Court in *Oliphant v. Suquamish Indian Tribe* by declaring tribes lacked jurisdiction over non-member Indians. The notion was that such jurisdiction was not necessary to tribal self-preservation and government and was thus implicitly divested.²³³

When I was a public defender in 1991, a group of us were concerned with tribes getting jurisdiction restored over non-members because the Supreme Court equated non-member Indians to non-Indians. Although we understood the huge vacuum in public safety this decision created, we also understood the fundamental notion that Native people should not have fewer rights than non-Indian persons.²³⁴ So we reached out to different entities to rally some support to oppose this bill. We got absolutely nothing. No one was willing to step up and say this was a violation of civil rights — that it is not appropriate for a tribe to assert jurisdiction over Indians from other reservations.

At the time, 10% of our clientele were Indians from other reservations. It piqued my interest: why would these entities comprised of civil libertarians dedicated to the rights of human beings be opposed to tribal jurisdiction over non-Indians, but be completely apathetic when tribes were permitted to re-assert jurisdiction over non-member Indians? Could it be that non-member Indians are not as worthy of protection vis-à-vis Indian tribes as non-Indians? Or perhaps there is the sense that non-member Indians, because they are Native, have a notion of tribal justice that non-Indians cannot conjure. It just struck me as odd, and as a result, I tried to go back

231. *Duro*, 495 U.S. at 696-98.

232. Congress amended the section of the Indian Civil Rights Act defining “Indian,” 25 U.S.C. § 1301(2) (2006), to reference the use of the term in federal criminal law jurisprudence, which includes all Indian persons, not just those who are members of the tribe where the offense occurred.

233. *Duro*, 495 U.S. at 684-88.

234. If the basis for the *Oliphant* decision was that it was fundamentally unfair for Indian tribes to assert authority over United States citizens who were not permitted to participate in that tribe’s government, the same logic would seem to prevail in cases involving Indians from other reservations.

and look at U.S. Supreme Court jurisprudence in this area to determine if Indian tribes lost this jurisdiction because of race, culture, or law.

Did Indian tribes lose their jurisdiction because of some legal reasoning? Was it due to some distinction based on race? Or was it purely cultural discrimination? I went back to *Ex parte Crow Dog*,²³⁵ a case you may find irrelevant to this discussion. However, it was in *Crow Dog* that the Supreme Court said the territorial court of Dakota had no jurisdiction to hang Crow Dog for killing Sinte Gleska on what is now the Rosebud Reservation.

One of the things the Court looked at in making its decision was the notion of fundamental fairness in the application of federal law to Crow Dog²³⁶ because at the time there was no federal law that specifically applied to intra-tribal crime on Indian reservations. The General Crimes Act at that time did not seem to permit prosecution of Indian-on-Indian crime because of the prohibition of federal jurisdiction over intra-tribal crimes.²³⁷ One of the things the Court looked at in *Crow Dog* that it later utilized in *Oliphant* was whether Crow Dog should be judged by the standards of another culture in a criminal prosecution — the standards of a superior people according to the Court. The Court said that Crow Dog was from a tribe that could not understand the western justice system, the legal system of a superior people.²³⁸

Later on in the case of *Oliphant*, the Supreme Court said tribes were implicitly divested of jurisdiction over non-Indians. The Court actually hearkened back to the language from *Crow Dog* and said that non-Indians should not be subjected to the standards of an inferior people in the arena of criminal jurisdiction.²³⁹ *Oliphant* cites *Crow Dog* for that proposition, even though *Crow Dog* had held that an inferior people — Natives, according to the Supreme Court — should not be subject to the laws of the superior American culture. This is not a race-based distinction. Instead, it is clearly a culturally drawn distinction — one nation's culture is so inferior that the

235. 109 U.S. 556 (1883).

236. *Id.* at 563.

237. 18 U.S.C. § 1152 (2012).

238. *Crow Dog*, 109 U.S. at 569 ("[A]s a dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor, and by education, it was hoped might become a self-supporting and self-governed society.").

239. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211 (1978) ("These considerations, applied here to the non-Indian rather than Indian offender, speak equally strongly against the validity of respondents' contention that Indian tribes, although fully subordinated to the sovereignty of the United States, retain the power to try non-Indians according to their own customs and procedure.").

nation should not be able to judge the superior nation's citizens in the criminal justice system.²⁴⁰

In *Duro*, the Supreme Court essentially ruled that *Oliphant* was applicable to non-member Indians because non-member Indians supposedly could not understand the unique Indian cultures and ways of another tribe.²⁴¹ That leads me back to the discussion being held now regarding restoration of tribal court criminal jurisdiction over non-Indians under VAWA 2013. It is a very modest proposal, essentially that tribes should be able to assert jurisdiction over certain non-Indians that commit domestic violence in tribal communities.²⁴² It gives tribes jurisdiction over non-Indians who commit domestic violence against tribal members when they live in the community and have a relationship with the tribal member or work for the tribe. That jurisdiction applies only in certain contexts, and only when certain procedural protections are afforded these non-Indians.²⁴³ In affording these procedural protections we basically countenance an assault upon tribal, cultural, and traditional practices in order to regain some jurisdiction.

For example, tribes would have to allow non-Indians to sit on tribal juries. Tribes would also have to grant court-appointed legal counsel to any non-Indian prosecuted under this special provision of jurisdiction, and there would be some form of expedited federal court review in excess of what is currently permitted under federal habeas corpus review under the Indian Civil Rights Act.²⁴⁴ I would not want to be the tribal judge that had to explain to a tribal member charged with the same crime as a non-Indian, who perhaps committed a domestic assault on his cousin, why the non-

240. *Id.*

241. *Duro v. Reina*, 495 U.S. 676, 688 (1990).

242. *See* S. 1925, 112th Cong. § 904(B)(i)-(iii) (2012) (permitting tribal court jurisdiction over non-Indian offenders who have "sufficient ties to the Indian tribe," meaning he/she must either reside in the Indian Country of the prosecuting tribe, be employed in the Indian Country of the prosecuting tribe, or be the spouse or intimate partner of a member of the prosecuting tribe).

243. The proposal would require that non-Indian defendants be entitled to the full panoply of constitutional protections, including due process rights and an indigent defendant's right to appointed counsel (at the expense of the tribe) in order to meet federal constitutional standards. This includes the right to petition a federal court for habeas corpus to challenge any conviction, to stay detention prior to review, and the explicit protection of "all other rights whose protection is necessary under the Constitution of the United States." *Id.* § 904.

244. 25 U.S.C. § 1303 (2006).

Indian gets free legal counsel and the tribe doesn't provide him with legal counsel. Would you want to be in that position? I do not think so.

I think that although I am in complete support of VAWA 2013 and its Native provisions, it strikes me as odd that there is so much opposition to it. Now I'm beginning to think, after looking at this legacy of cases starting with *Crow Dog*, that maybe we are giving up too much in VAWA 2013. Obviously the federal government thinks the only way tribes should assert jurisdiction over non-Indians is if tribes completely divest themselves of any traditional law and practice in its transactions with non-Indians. I am not sure tribes want to do that. If you look at some of the tribes that have gone toward a western system, where the traditions are still quite strong, they have some of the highest crime rates in the country.²⁴⁵ Why is that? Because the western system of justice does not respond to the core reason why criminal activity occurs in the Indian communities — the breakdown of relationships in tribal communities due to the imposition of non-tribal standards and customs.

So we have to step back and recognize that assaults on tribal justice systems are not race based, but are actually culturally based. At their core is the belief that Indian tribes cannot possibly administer justice in cases involving non-Indians because justice systems that incorporate culture and traditions have been legally decreed inferior and cannot possibly pass judgment on people from a superior culture. I am not sure we want to accept that premise as the quid pro quo for the restoration of jurisdiction.

245. See Timothy Williams, *Brutal Crimes Grip an Indian Reservation*, N.Y. TIMES, Feb. 2, 2012, http://www.nytimes.com/2012/02/03/us/wind-river-indian-reservation-where-brutality-is-banal.html?_r=0. This article discusses the Wind River Indian Reservation in Wyoming, where the United States increased law enforcement and prosecution funding in order to combat crime over a two-year period. This resulted in a 7% increase in violence on the reservation, something tribal members opined was the result of failing to respect tribal traditional peacemaking practices.