

# THE FORGOTTEN SOVEREIGNS

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## ABSTRACT

*Our federal system includes 564 federally recognized American Indian nations, most of which have their own sovereign lands, governments, and court systems, and who interact every day with the state and federal systems. Yet most legal thought overlooks our sovereign Native American nations and legal heritage. Although much of American law and policy intersects tribal jurisdictions, such issues generally appear in the law school curriculum only in specialized, upper-level courses. This Article argues that the three-sovereign system should provide the fundamental framework for the United States legal system across the legal curriculum and provides several concrete examples for how to introduce it. It also argues that many law courses should touch upon how their disciplines impact tribal jurisdictions and their citizens.*

*By changing our fundamental orientation toward the role of tribal sovereigns in the U.S. system, we will advance the academy's goals of scholarship, teaching, and service. First, we will accurately represent to our students the true structure and diversity of our tripartite federal system. Second, we can improve learning by using direct and comparative tribal perspectives for fundamental legal principles and methods. Third, we can further the social justice mission of legal education by raising awareness of tribal sovereignty among future advocates and lawmakers.*

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## I. INTRODUCTION

*"Inherent sovereignty means having those rights like language and buffalo medicine, rights that form the very foundation of who we are as Kiowa people. Kiowas . . . hold these rights to be as self-evident and unalienable as those rights upon which the United States was originally founded. These are our rights to life, liberty, and the pursuit of happiness. Just as the founding fathers of the United States saw their rights to be endowed by their Creator, I too see my peoples' rights to exist and govern as being endowed by my Creator."*<sup>1</sup>

— Chairman Billy Evans Horse

*"This rich legal tradition does not exist because it was recognized by the courts, . . . but rather because the tribes never ceased to act as sovereign peoples and never gave up their 'old law.'"*<sup>2</sup>

— Prof. Sidney L. Haring

Our federal system teems with literally *hundreds* of sovereign governments. But tell this to most law students, lawyers, or even law professors, and it is very likely you will receive a quizzical look in response. In law school, most of us are taught to think of only one sove-

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1. Billy Evans Horse & Luke E. Lassiter, *A Tribal Chair's Perspective on Inherent Sovereignty*, 10 ST. THOMAS L. REV. 79 (1997), reprinted in SOVEREIGNTY, COLONIALISM AND THE INDIGENOUS NATIONS: A READER 33 (Robert Odawi Porter ed., 2005). Chairman Horse represents the Kiowa Tribe of Oklahoma. See *id.*

2. SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 292 (1994).

reign nation: the United States of America. At best, we sometimes also think of the fifty states and the U.S. territories as having vestiges of their historical sovereignty. But very few people will think of our 564 federally recognized American Indian nations,<sup>3</sup> of which a great number have their own sovereign lands, governments, and court systems, and who interact every day with the state and federal systems. It is as though, through the centuries of systematic removal, assimilation, and termination, our sovereign Native American nations and legal heritage simply have been forgotten.

Although we and our graduates are increasingly practicing in tribal jurisdictions, rarely are they mentioned anywhere in the law curriculum, save for specialized, upper-level courses in federal Indian law, gaming, and the like. As legal educators, we can help to redeem this long-standing problem by teaching our students within the three-sovereign federal framework, as well as by including some of the major intersections between tribal law,<sup>4</sup> federal Indian law,<sup>5</sup> and state law in our varied courses.

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3. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 40218 (Aug. 11, 2009).

4. It is important to distinguish the federal law that governs the relationship between Native American nations and the national government from the internal law of Tribal nations themselves. Internal tribal law is indigenous to the people; federal Indian law is law created by the United States and affects Indian nations and persons. See Cynthia Ford, *Integrating Indian Law into a Traditional Civil Procedure Course*, 46 SYRACUSE L. REV. 1243, 1249 & n.20 (1996).

5. Choosing acceptable names to denote indigenous societies is often difficult. For example, although historically the word "Indian" is a colonial creation and has often been used in a pejorative sense, it is also a term of art within the U.S. Code that has been carried over into many state and tribal legal systems. ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 129-33 (4th ed. 2003). Lives are forever changed and entire cases rise and fall on federal-law definitions for the terms "Indian" and "Indian country." See *id.* at 129-39. "Native American" is sometimes criticized as overly broad. JEFF CORNTASSEL & RICHARD C. WITMER, *FORCED FEDERALISM: CONTEMPORARY CHALLENGES TO INDIGENOUS NATIONHOOD*, at xiv (2008). "Tribe" is also sometimes criticized as pejorative because it tends to carry with it the racial connotations of "non-white" and "non-European." See *id.* In this Article, I try to restrict the use of "Indian" to situations suggested by the historical context or by Indian status under federal law. The words "indigenous" and "Native" seem to be accepted widely in North American indigenous communities, but certainly they can never be perfect when used by outsiders. To demonstrate that these terms are intended to be used respectfully, they are capitalized here when used to describe peoples. The word "Aboriginal" is not used here, not only because it, too, can carry unintended pejorative connotations when used by nonindigenous persons, but also because the term could too easily confuse readers by summoning references to the Indigenous peoples of Australia. "Indigenous" is probably the least controversial term in popular use today and is gaining particular prominence in international law. Cf. LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES* 2 (1999) (using "indigenous peoples" in the global, international context). Accordingly, although the terms are far from ideal, I tend to use "tribe," "Native American," and "Indian" or "American Indian" to connote the Indigenous peoples within the lower forty-eight states and "indigenous" to refer to colonial-indigenous dynamics generally.

Because audience, tone, and professional voice are so critical to professional education, professors probably should discuss with their students the problems inherent in

Most law graduates enter practice with no significant exposure to federal Indian law, tribal law, or tribal government, even though Indigenous nations are a rich feature of our nation's legal landscape.<sup>6</sup> Our collective lack of understanding about the relevance of tribal law and government to the national legal scene perpetuates itself in law firms, courts, and bar associations across the country.<sup>7</sup> For example, how many law firms automatically screen all family law clients and cases involving children for Indian Child Welfare Act issues, including tribal court jurisdiction?<sup>8</sup> How many general business and contracts attorneys are familiar enough with tribal jurisdiction problems to foresee all the issues that arise when a nontribal entity contracts with an Indian nation or conducts business within sovereign Indian borders?

Like most attorneys, I spent my educational and legal practice years ignorant of the vast, vibrant, growing world of tribal governments and courts thriving all around us. My eyes did not open until I was introduced to clinical teaching at a school that happened to have a leading Indian law program and clinic.<sup>9</sup> I count myself fortunate that my lack of knowledge did not lead me on a collision course with malpractice as a former litigator. But more importantly, I feel grateful for the richness I have now received, particularly for the awakening to the vast role that cultural literacy plays in effective and holistic lawyering.<sup>10</sup> We must not merely hope that our own students will be so lucky to encounter experiences and mentors to prepare them for this aspect of practice; instead, we should prepare them to practice in

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screening and selecting ethnic, racial, and other social terminology that can have discriminatory connotations or hidden biases, assumptions, and judgments.

6. See Barbara P. Blumenfeld, *Integrating Indian Law into a First Year Legal Writing Course*, 37 TULSA L. REV. 503, 503-04 (2001).

7. Frank Pommersheim, "Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community, 71 U. COLO. L. REV. 123, 124, 129 (2000) (arguing that we fail to prepare our students for practice when we perpetuate ignorance of the three-sovereign system, Tribal nations, and tribal courts).

8. See Blumenfeld, *supra* note 6, at 504.

9. The Indian Legal Clinic at the Sandra Day O'Connor College of Law, Arizona State University, Tempe, Arizona, is a division of the law school's heralded, flagship Indian Legal Program, and it collaborates with the law school's regarded and dynamic Clinical Program. Washburn University School of Law, which has one of the nation's longest-standing and acclaimed clinical programs, is also one of the few law schools to boast a Tribal Law and Practice Clinic, under the design and leadership of Professor Aliza Organick. See generally Aliza G. Organick, *Creating a Tribal Law Practice Clinic in Kansas: Carving the Peg to Fit the Hole*, 82 N.D. L. REV. 849 (2006) (describing the process and challenges of creating a tribal court practice clinic).

10. Christine Zuni Cruz, *Toward a Pedagogy and Ethic of Law/Lawyering for Indigenous Peoples*, 82 N.D. L. REV. 863, 876-77, 892-93 (2006) [hereinafter Zuni Cruz, *Toward a Pedagogy*].

a world in which tribal communities play a vibrant role, culturally, legally, politically, and economically.<sup>11</sup>

By changing our fundamental orientation toward the role of tribal sovereigns in the United States, we can advance the academy's goals of scholarship, service, and teaching. First, we can improve scholarship by fulfilling the imperative of accurately representing the true diverse structure of our tripartite federal system and teaching it across the curriculum. This will better prepare our future advocates and lawmakers, who will be increasingly confronted with issues involving sovereignty in both domestic and international practice.

Second, we can fulfill the social justice component of our service imperative by introducing students early to the concept of strong, valid, vibrant tribal courts and governments, as well as to some of the deeper aspects of their socio-historical underpinnings. In doing so, we can help to take the first, tentative steps toward ameliorating centuries of their marginalization by the dominant legal system and the educational system that supports and forms it. This approach can also make a small, but significant, step in creating a more welcoming and respectful educational environment for Native American students and faculty.

Third, fulfilling these two imperatives provides numerous opportunities to improve teaching and learning by using direct and comparative tribal perspectives to introduce fundamental legal principles and methods. These teaching opportunities can be pursued in ways that are much less daunting than they may initially sound.

Parts I through V of this Article will illustrate the academic imperatives for introducing the "third sovereigns"<sup>12</sup> across the entire law school curriculum and will also provide the very general legal background needed to understand its basic socio-historical underpinnings. Part VI will provide some suggestions for how to introduce tribal legal studies and federal Indian law throughout students' educational experience, after touching upon some basic pedagogical considerations. It cites to many sources for assistance in teaching federal Indian law and tribal law in courses like Civil Procedure, Federal Courts, Property, and so on.

In order to accomplish these objectives, however, one first needs to develop a basic understanding of the historical doctrines that continue to shape federal Indian law, as well as the historical traumas that

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11. See Gabriel S. Galanda, *A Need to Know Indian Law*, OR. ST. B. BULL. 62, 62 (2003) (arguing in favor of adding federal Indian law to the subjects tested on the Oregon bar examination) [hereinafter Galanda, *A Need to Know Indian Law*]; Gabriel S. Galanda, *Reservations of Right: A Practitioner's Guide to Indian Law*, THE BRIEF 64, 68 (2002) [hereinafter Galanda, *Reservations of Right*].

12. In a fair schema, Tribal nations would be called the first sovereigns!

arose from them.<sup>13</sup> In particular, this Article will explore how the doctrine of discovery is embedded within the federal government's stance toward tribal sovereignty and Native American peoples, and how it expressed itself through federal cultural assimilation programs. Because the history of federal-tribal relations is so marred by vast human-rights abuses, it would also do the readers, our students, and Native American communities a disservice not to recognize the ethnic and cultural genocide of Native American people<sup>14</sup> when introducing these topics.

On a pragmatic level, this historical foundation is also relevant to the two imperatives of academic accuracy and social justice, as well as to the goal of improving teaching and learning. Understanding federal Indian law's roots in the doctrine of discovery helps to illuminate the source of the federal government's ideological hostility toward tribal sovereignty. An examination of the Supreme Court decisions in which this doctrine is embedded, particularly *Johnson v. M'Intosh*, shows that this ideological thread endures. It also illuminates how our tripartite state-federal-tribal system came to be.

Finally, the historical study below is also important to developing an appreciation for the traumatic contextual backdrop against which Native American Nations continue their struggle for wider recognition of their sovereignty as preexistent and independent of Western recognition.<sup>15</sup> For legal educators of non-Native descent, understanding even these few, select examples of federal assimilation policy may help to spark an internal posture of recognition and respect for the importance of sovereignty to Native American peoples. Increased awareness has direct relevance to legal educators and to our social justice mission because acknowledging that history is important to demarginalizing Native American students and faculty.

As it relates to the classroom experience itself, this history is a "new" topic for many of us and our students. The natural curiosity that results from cross-cultural examples has been proved to enhance learning. Furthermore, touching upon the history of tribal-federal relations can demonstrate the centrality of social, racial, and cultural critique to legal studies and law practice.

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13. HARRING, *supra* note 2, at 7-10.

14. See generally Lindsay Glauner, *The Need for Accountability and Reparation: 1830-1976 The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 929-54 (2002).

15. See Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 196-97 (2001) (arguing that Native peoples should locate the source of their sovereignty from inside their own societies, rather than solely within the "dominant society's appraisal" of that sovereignty as arising from federal law).

An examination of this shameful aspect of American legal history will inevitably be painful to encounter. But it has the potential to inspire future attorneys and policymakers to question legal structures and philosophies. The motivation to think critically about the law may encourage the law reform needed to prevent more human rights abuses on our soil.

## II. LEGAL AND HISTORICAL BACKGROUND

### A. “Discovering Heathen Lands”

*“[A]ll those . . . to whom this has been notified, have received and served their Highnesses, as lords and kings, in the way that subjects ought to do, with good will, without any resistance, immediately, without delay . . . But, if you do not do this, . . . I certify to you that with the help of God, we shall powerfully enter into your country, and shall make war against you in all ways and manners that we can, and shall subject you to the yoke and obedience of the Church and of their Highnesses; we shall take you and your wives and your children, and shall make slaves of them, and as such shall sell and dispose of them as their Highnesses may command . . . .”*<sup>16</sup>

— *The Requerimento*

At the heart of today’s tribal-federal relations is the colonial doctrine of discovery.<sup>17</sup> A discussion of this doctrine contains unavoidable references to Christianity in the sense of Christendom—in this context manifesting as a more harmful alliance between “secular princes and priestly authorities,”<sup>18</sup> as opposed to the belief system of those who follow the Christian faith. From this point onward, references to Christianity should be read in this way. According to Professor Michael Blumm and others, the doctrine actually was applied before the conquest of the New World via “the medieval Catholic Church’s efforts to impose the authority of the Pope over non-Christian ‘heathens and infidels’ who occupied the Holy Lands of the Middle East.”<sup>19</sup> The Church aimed to “replace the ruling infidels with Christian believers whose power would derive from, and be subject to, the Pope in Rome.”<sup>20</sup> In *Pagans in the Promised Land*, Steven T.

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16. STEVEN T. NEWCOMB, *PAGANS IN THE PROMISED LAND: DECODING THE CHRISTIAN DOCTRINE OF DISCOVERY* 34-36 (2008) (quoting directly from a Spanish decree made to Indigenous peoples upon contact that contains the very essence of the colonial mindset shaped by the doctrine of discovery).

17. Michael C. Blumm, *Retracing the Discovery Doctrine: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 713-14 (2004).

18. NEWCOMB, *supra* note 16, at ix.

19. Blumm, *supra* note 17, at 719.

20. *Id.*

Newcomb outlines the origins of the doctrine of discovery, how it was imported and woven into the very fabric of U.S. property law, and the cognitive maps that underlie it. His central thesis is that federal Indian law is a “continental manifestation of the world-historical mission of [the Conqueror cognitive model] to bring all Creation into its domain.”<sup>21</sup>

Newcomb’s work “cracks the code”<sup>22</sup> behind the Supreme Court’s decision in *Johnson v. M’Intosh*,<sup>23</sup> in which the imperative of “discoverer’s title” encountered the obstacle of “Indian occupancy.”<sup>24</sup> He explains that the United States’ stance toward Native Americans is “rooted in the idea . . . that the first ‘Christian people’ to discover lands inhabited by ‘heathens’ has ultimate dominion over and absolute title to those lands,”<sup>25</sup> an idea enshrined by Justice Marshall in *Johnson v. M’Intosh*. This thinking expressed itself time and again in the U.S. colonial policy of clearing the land of its indigenous populations so that it could be controlled and annexed, and it resulted in genocide in the form of unthinkable numbers of massacres.<sup>26</sup> Whether one agrees about the extent to which the cognitive model of the Conqueror is embedded within key Supreme Court cases like *Johnson v. M’Intosh*, there can be no doubt that the central method of classifying Native American people as “subhuman” and “heathens” dominated large portions of U.S. law and policy during the assimilation era.

### B. *Discovery as the Root of the Modern Tri-Sovereign System*

While a study of the binary state/federal system can be approached from the Revolutionary era, the roots of the true, three-sovereign federal model begin, from a Western standpoint, in the dawn of the invasion and conquest of the Americas. A holistic study of that age reveals several different Western thought streams at work, sometimes at odds and sometimes in tandem.<sup>27</sup> Yet the common theme that emerges is that the conqueror model described by Newcomb provides the thread of continuity running through the confused morass of federal jurisprudence regarding Indigenous peoples,

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21. NEWCOMB, *supra* note 16, at ix-x.

22. *Id.* at xi.

23. 21 U.S. 543 (1823).

24. NEWCOMB, *supra* note 16, at xi.

25. *Id.* at 11.

26. William Bradford, “*With a Very Great Blame on Our Hearts*”: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 22-25 (2003) [hereinafter Bradford, *Reparations*].

27. Cf. ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 54 (2005); CLINTON ET AL., *supra* note 5, at 18-118 (surveying an “uneven history” from the colonial period, to removal and assimilation, to self-determination, to the “devolution” of federal programs to states and tribes); NEWCOMB, *supra* note 16, at 108.

in which the courts maddeningly tend to rule against Native interests even when it is plainly illegal or incongruous to do so.<sup>28</sup> According to Newcomb, the influence of at least one Roman legal tradition, *res nullus*, allowed a sovereign to claim newly discovered lands when those lands had not been “subdued” by the peoples who lived there.<sup>29</sup> The missionary fervor of the age of discovery added an additional religious component to the discovery doctrine that prevailed at the time, which was that nonbelievers were not entitled to any dominion over the lands they occupied.<sup>30</sup> This principle is seen in the outrageous command of the *Requerimento*, a document addressed to the Indigenous peoples whom the Spanish government was determined to subdue, and which is quoted in part at the beginning of this Section.

Attempting to moderate this draconian stance, the Spanish jurist and theologian, Francisco de Vitoria, at first argued for greater recognition of Indigenous peoples as human beings as a matter of *natural* law, which would allow them to continue to occupy their homelands despite their heathen status under *divine* law.<sup>31</sup> De Vitoria’s views had some influence in the New World, leading to an early notion of indigenous sovereignty<sup>32</sup> that later influenced Anglo-American legal philosophy and policy<sup>33</sup> in its relatively few overtures toward tribal rights of self-determination. Although the United States engaged some Native nations on a loosely international basis during the early years of the treaty-making era,<sup>34</sup> that posture seems to have had more to do with political expediency. Certain Indian nations were still in a more powerful bargaining position than the colonies. One oft-cited reason is that the fledgling United States feared that key Indian nations would side with foreign powers. This remained true until the United States defeated Britain in the War of 1812.<sup>35</sup> In another example, around the time of the Declaration of In-

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28. *See generally* DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT (1997) (describing the doctrinal patchwork underlying federal-to-tribal law as a series of “masks” used to soften the appearance of racial, ethnic, religious, and class oppression). Wilkins’s three classes of masks are the constitutional/treaty masks, civilizing/paternalistic masks, and nationalist/federalist masks. *Id.* at 8-16. *See generally* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 33-45 (2005) (“A long-established language of racism that speaks of the American Indian as an uncivilized, lawless, and warlike savage can be found at work throughout the leading Indian law decisions of the nineteenth-century U.S. Supreme Court.” (footnote omitted)).

29. NEWCOMB, *supra* note 16, at 104-07.

30. *Id.* at 107-10.

31. *Id.* at 108; *see also* ANGHIE, *supra* note 27, at 18. Quixotically, he later changed his stance, arguing that Indian peoples could not enjoy sovereignty because they were pagans and therefore subject to Spanish and Christian war and subjugation. *Id.* at 26-28.

32. Blumm, *supra* note 17, at 720-21.

33. *Id.* at 721-23.

34. *See* CLINTON ET AL., *supra* note 5, at 21.

35. *See id.* at 22, 25.

dependence, the new Americans needed protection and provisions from the Delaware (Lenni Lenape) People in order for their army to travel safely Westward over Delaware territories.<sup>36</sup> The Treaty with the Delaware resulted.<sup>37</sup>

As immigration, colonization, and statehood enveloped Indian lands and the new Americans became more powerful, better fed, and better armed, federal policy had the freedom to revert to its true philosophical orientation toward Indigenous peoples: that it is the divine right and mandate of “civilized” peoples to dominate, subjugate, annihilate, and assimilate Indigenous people culturally, linguistically, technologically, ethnically, racially, and spiritually.<sup>38</sup> This dynamic is seen in the federal government’s primary use of the Protestant church as a weapon of assimilation.<sup>39</sup> By fiat of Western law, the status of Indian nations morphed to a new category of internal political sovereign,<sup>40</sup> later defined as the “domestic dependent nation.”<sup>41</sup> Although some scholars have noted that outright, mass termination of Indian nations is no longer likely,<sup>42</sup> the reality is that tribal political sovereignty remains under continual threat from the exercise of federal plenary power,<sup>43</sup> which Newcomb traces directly to the doctrine

36. Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 118-19 (2002) (discussing the evolution—and devolution—of North American colonial relations with the Native nations the colonials encountered).

37. CLINTON ET AL., *supra* note 5, at 22.

38. See WILKINS, *supra* note 28, at 1-18 (identifying three separate types of legal consciousnesses or “masks” in the history of U.S. Supreme Court opinions affecting the federal government’s relationship with Native American nations: the constitutional/treaty mask, the civilizing/paternalistic mask, and the national/federal mask); see also ANGHIE, *supra* note 27, at 13-31 (describing the same colonial orientation as applied to Indigenous peoples worldwide and demonstrating how colonial attitudes still are enshrined in international law); Blumm, *supra* note 17, at 719; Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZ. L. REV. 739, 744-45 (1990).

39. See Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 773-87 (1997) (describing how the Board of Indian Commissioners used primarily Protestant missions to run agencies and schools to “civilize” the Indian).

40. In the case of Native American communities, it is crucial to distinguish political sovereignty from cultural sovereignty, which is immutable and interminable by any earthly power. See CLINTON ET AL., *supra* note 5, at 220 (citing Dagmar Thorpe, *Sovereignty, A State of Mind: A Thakiwa Citizen’s Viewpoint*, 23 AM. INDIAN L. REV. 481, 481-84 (1998-99)); Coffey & Tsosie, *supra* note 15, at 196-97.

41. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831).

42. See, e.g., Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 317, 340 (2006).

43. See, e.g., William Bradford, *Beyond Reparations, An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1, 66 (2005) [hereinafter Bradford, *Beyond Reparations*] (“[T]hat which Congress can give, Congress can take away. Any settlement of Indian claims must therefore be understood as dependent not upon the honor of the U.S. but rather upon the inconstant will of a majority of its legislative branch. Under the current legal regime, should a future Congress elect to reclaim monies paid as compensation, take property purchased with such monies without paying compensation, or even terminate each and every Indian tribe, dissolve each and every reservation, and criminalize each and every aspect of Indian culture, nothing-nothing-save for any resulting moral outrage at such a naked as-

of discovery.<sup>44</sup> According to the plenary power doctrine, Indian nations, as political entities, exist only at the sufferance of Congress: Congress is free to limit or terminate that sovereignty at will.<sup>45</sup>

Although the Native nations' power to self-govern is greatly eroded, their governments still retain the residual political power to control some of their internal affairs—for example, to contract with outside organizations and governments; to determine their own membership; to pass laws; to create courts; and to enforce tribal laws against members, resident Indians, and non-Indian entities that subject themselves to tribal law.<sup>46</sup> That said, in many cases, these powers are overseen by a Bureau of Indian Affairs often described, in kinder words, as paternalistic.<sup>47</sup> Historically, federal jurisprudence has recognized tribal power to self-govern under limited circumstances. For example, in the 1880s, the Supreme Court held that the Cherokee Nation was not required to adhere to federal grand jury requirements guaranteed by the United States Constitution's Fifth Amendment.<sup>48</sup> Similarly, in the late 1970s, the Court held that a Navajo Nation member prosecuted in Navajo District Court was not protected by the federal Double Jeopardy Clause from prosecution for

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sertion of power will stand in its way."); Coffey & Tsosie, *supra* note 15, at 195 ("Given the dismal history of federal Indian policy, which includes among other things the disastrous termination policy of the 1950s, which sought to end the trust relationship with specific tribes and assimilate their members into the dominant society, it seems a bit optimistic to hope that Congress will always stop short of such annihilation. . . . [A]s the political tide turns against group-based rights and the distinctive status of Native peoples, it may well be that the optimists are a bit short-sighted.").

44. See NEWCOMB, *supra* note 16, at 109-10.

45. CLINTON ET AL., *supra* note 5, at 439-61 (discussing the roots of the modern doctrine, including the landmark rulings in *United States v. Kagama*, 118 U.S. 375 (1886), *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), and *United States v. Sandoval*, 231 U.S. 28 (1913)); Bradford, *Beyond Reparations*, *supra* note 43, at 66 ("Under the doctrine of plenary power, Congress has nearly absolute and unreviewable dominion over Indian tribes, and, in concert with the political question doctrine, plenary power precludes judicial undoing of fraudulent treaties, proscribes the review of takings, insulates violations of treaty provisions, and withdraws Indian property, culture, religion from the protection of the Constitution."). Interestingly, Professor Merriam notes that during the early years of the Union, the concept of popular sovereignty was virulently opposed by the South because it undermined the basis for slavery. C.E. MERRIAM, JR., HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU 168-69 (Faculty of Political Science of Columbia University, Eds., The LawBook Exchange, Ltd., Union, N.J., Pub. 1999). By analogy, if Native American people have a right to self-govern, they cannot be so easily controlled.

46. See CLINTON ET AL., *supra* note 5, at 219-414 (enumerating and describing in detail the bases for the inherent sovereignty: the power to exclude from tribal boundaries, to create constitutions, to establish courts, to reject a governmental model based on the separation of powers, to exercise sovereign immunity, to define membership, and to oversee elections); JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 122 (2004).

47. See HARRING, *supra* note 2, at 13; WILKINS, *supra* note 28, at 166.

48. *Talton v. Mayes*, 163 U.S. 376, 384 (1896).

the same offense by a separate sovereign in the United States District Court.<sup>49</sup>

One key outgrowth of the paternal, top-down relationship imposed on the Tribes by the federal government is the unique relationship known as the federal trust responsibility: “The ‘trust relationship’—or alternatively the ‘trust responsibility’ or ‘guardian-ward relationship’—is loosely defined as the political relationship between federally recognized Indian tribes and their members and the federal government.”<sup>50</sup> The trust relationship requires the federal government to provide many services to the Tribes, which can include beneficial tax status related to other governments, support from federal agencies like the Bureau of Indian Affairs, Indian Health Service, Department of Housing and Urban Development, specified treaty rights, and so on.<sup>51</sup> Even here, in a relationship that might to the uninitiated seem benign, the legacy of the discovery doctrine persists in that Native Americans fundamentally are viewed as less able than other cultures and races to manage their own affairs.<sup>52</sup> This continued Euro-centrism is supported by Newcomb’s evidence that, in the realm of federal Indian law, the United States and Native American Nations often remain in a posture of Christian conqueror and heathen conquered.<sup>53</sup>

So far, this Subsection has discussed sovereignty through the lens of the Western paradigm, which is still dominated by a fundamental orientation of conquest. As Newcomb and other indigenous scholars point out, even this agonizing history of political sovereignty can never take away the inherent right of self-determination<sup>54</sup> often referred to as cultural sovereignty. According to Wallace Coffey and Professor Rebecca Tsosie, indigenous cultural sovereignty must be defined in indigenous terms, which varies among communities. Commonalities would likely include an emphasis on relationships and responsibilities among humans, their communities, the land, and all creation, as well as foundations in living indigenous tradition, such as oral history, lifeways, spirituality, and language.<sup>55</sup> When we look at the sovereignty paradigm described by indigenous speakers

49. *United States v. Wheeler*, 435 U.S. 313, 330-32 (1978) (superseded by statute).

50. Matthew L.M. Fletcher, Commentary, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 490 n.22 (2006) [hereinafter Fletcher, *Politics, History, and Semantics*].

51. *Id.* at 490 & nn.22-28 (referencing citations to the U.S. Code).

52. See ANGHIE, *supra* note 27, at 55; CORNTASSEL & WITMER, *supra* note 5, at 3-83 (describing how myths about Native Americans held by the dominant culture threaten to keep Native communities in marginalization).

53. NEWCOMB, *supra* note 16, at 125-27.

54. *Id.* at 112-13.

55. See generally Coffey & Tsosie, *supra* note 15 (describing an alternate model for conceptualizing tribal sovereignty in terms of inherent, collective rights and cultural continuity, rather than within the limited confines of modern political sovereignty).

and writers, we can see that at least pragmatically, Western-style political sovereignty surely is crucial to tribal communities' survival in the modern era versus a hegemonic state/federal system. At the same time, defining indigenous collective rights merely in terms of political sovereignty is still another type of "received" construct, a "zero-sum game" that can do violence to the indigenous consciousness and way of life.<sup>56</sup> The aspects of political sovereignty recognized by the U.S. federal government, at best, represent an uneasy truce that will hopefully one day be left behind, in favor of a truly plural legal system characterized both by Western law and by the varied legal cultures of the many tribal communities within the United States.<sup>57</sup>

*C. Assimilation as an Expression of the Discovery Doctrine*

*"I believe in immersing the Indians in our civilization . . . and when we get them under, holding them there until they are thoroughly soaked."*<sup>58</sup>

— Colonel Richard Pratt, Founder, U.S. Training & Industrial School at Carlisle, Pennsylvania

If U.S. federal Indian law is based on the desire to fulfill the mission of the Conqueror cognitive model "to bring all Creation into its domain,"<sup>59</sup> then the cultural means to that end are found in the many programs designed to achieve the total assimilation of Native American peoples. The underlying narrative of the Conqueror cognitive model formed the basis for laws enabling programs of assimilation. At the time, ethnic cleansing or assimilation of Indigenous peoples was considered an understandable byproduct of the right of dominion over conquered lands.<sup>60</sup> As with almost any discussion of federal Indian law, the historical context is indispensable.<sup>61</sup> Not only is it part of the narrative of modern Native American peoples, it is also one of the only sources of logical coherence in modern federal Indian law jurisprudence, which has been criticized as being in a state of disarray, often dishonest to any underlying principles that might favor Tribal

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56. Taiiaki Alfred, "Sovereignty"—*An Inappropriate Concept*, in PEACE, POWER, RIGHTEOUSNESS: AN INDIGENOUS MANIFESTO (1999), reprinted in SOVEREIGNTY, COLONIALISM AND THE INDIGENOUS NATIONS: A READER 67, 68 (Robert Odawi Porter ed., 2005).

57. HARRING, *supra* note 2, at 24.

58. NATIVE AMERICAN TESTIMONY: A CHRONICLE OF INDIAN-WHITE RELATIONS FROM PROPHECY TO THE PRESENT, 1492-2000, at 215-16 (Peter Nabokov ed., Viking Penguin 1999) (1978).

59. NEWCOMB, *supra* note 16, at x.

60. See Bradford, *Reparations*, *supra* note 26, at 22-25.

61. Dussias, *supra* note 39, at 775.

nations or people,<sup>62</sup> and as something that the Supreme Court “makes . . . up as they go along.”<sup>63</sup>

The federal government arguably began its formal assimilation policies regarding Native American children with the U.S. Board of Indian Commissioners’ “Civilization Fund” of 1819, which was developed to deal with the “Indian problem.”<sup>64</sup> But in many ways it was a continuation of indoctrination programs put in place by the Spanish and pursued even earlier by private trading companies.<sup>65</sup> Through that program, missionary organizations ran boarding schools designed to remove children from their Tribes and families, often forcibly,<sup>66</sup> including social conditioning,<sup>67</sup> abduction,<sup>68</sup> and extortion through the withholding of food rations,<sup>69</sup> in order to “civilize” them.<sup>70</sup> Their goal was to “kill the Indian [to] save the man within.”<sup>71</sup> This assimilation program was accompanied and followed by transracial adoption programs also designed to achieve cultural genocide<sup>72</sup> and ultimately to terminate Tribes as peoples and as nations.<sup>73</sup> These policies are highlighted by the infamous “Peace Policy” era of 1869-1882,<sup>74</sup> but most people are shocked to learn that they continued well into the latter part of the twentieth century and that no significant congressional intervention occurred until the passage of the Indian Child Welfare Act of 1978.<sup>75</sup>

One of the hallmarks was the forced conversion to Christianity through education policies: “[E]ducation ‘cuts the cord that binds [Indians] to a Pagan life, places the Bible in their hands, substitutes the true God for the false one, Christianity in place of idolatry . . . cleanliness in place of filth, industry in place of idleness.’”<sup>76</sup> In such schools, children’s names were changed, their language was forbidden, and their hair was cut short, “sometimes as part of a public ri-

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62. Matthew L.M. Fletcher, *The Supreme Court’s Indian Problem*, 59 HASTINGS L.J. 579, 587-93 (2008) [hereinafter Fletcher, *The Supreme Court’s Indian Problem*].

63. *Id.* at 579 (quoting Judge Roger L. Wollman).

64. H.R. REP. NO. 104-808, 15 (1996).

65. NATIVE AMERICAN TESTIMONY, *supra* note 58, at 213 (citing the Virginia Company as one example).

66. Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 59 (2008).

67. *Id.*

68. H.R. REP. NO. 104-808, 15 (1996) (cited in Graham, *supra* note 66, at 48).

69. *Id.*

70. *Id.*

71. Graham, *supra* note 66, at 70.

72. *Id.* at 66-70.

73. *Id.* at 48 (citing H.R. REP. NO. 104-808, 15-16 (1996)).

74. See Dussias, *supra* note 39, at 777-84.

75. H.R. REP. NO. 104-808, 15-16 (1996).

76. See Dussias, *supra* note 39, at 783 & n.70 (quoting via other sources 1887 SUPERIN. OF INDIAN EDUC. ANN. REP. 131).

tual in which they renounced Indian origins.”<sup>77</sup> A wide variety of educational literature of the time viewed these types of actions as necessary to civilize and “Christianiz[e] children of pagans.”<sup>78</sup> Similar policies of cultural assimilation or genocide have been used around the world to carry out the colonization of Indigenous peoples. Some of many such examples worldwide include China’s programs to erase or vilify the study of Tibetan language, culture, and religion among Tibetan schoolchildren.<sup>79</sup> A common theme in the colonization of both Tibet (by China) and India (by Britain) was also the need to bring civilized religion or culture to a “backward” or “heathen” society.<sup>80</sup>

The legacy of the discovery doctrine is not limited to North America. The drive to assimilate and exterminate Indigenous peoples in order to colonize their lands has a powerful racial corollary in Australian history. The infamous “Protector of the Aborigines,” A.O. Neville, who wielded considerable power over their lives, believed that “half-caste”<sup>81</sup> children of mixed-race Aboriginal/White descent could be saved through racial cleansing, to be achieved by continued dilution of Aboriginal ancestry in successive generations. He published his views in his 1947 book, *Australia’s Coloured Minority*.<sup>82</sup> It contains disturbing multigenerational photographs<sup>83</sup> designed to show the positive results of such cleansing (the “truths of biological assimilation”).<sup>84</sup> In one photo, an indigenous mother, her daughter, and grandson are shown from right to left. The grandmother’s features are identified as those of a person of full Aboriginal descent. Her daughter’s features are presented as more ambiguous. Her grandson, the boy on the left hand side of the photo, had features identified as strongly Caucasian. The boy on the left is promoted as the positive outcome, free to lead a life unburdened by the yoke of being ethnically different and inferior.<sup>85</sup>

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77. NATIVE AMERICAN TESTIMONY, *supra* note 58, at 216.

78. *Id.* at 214.

79. See RACIAL DISCRIMINATION IN CHINESE-OCCUPIED TIBET: A REPORT SUBMITTED TO THE UNITED NATIONS COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION 13-14 (2001), available at [http://www.tibetjustice.org/reports/final\\_brief\\_2001.html](http://www.tibetjustice.org/reports/final_brief_2001.html).

80. See Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 MICH. J. INT’L L. 1, 4 n.12 (2000).

81. Jennifer Clarke, Note, *Cubillo v. Commonwealth*, 25 MELB. U. L. REV. 218, 231-32 (2001) (discussing the use of “half-caste” as a legal term of art in Australian legal history).

82. A.O. NEVILLE, *AUSTRALIA’S COLOURED MINORITY: ITS PLACE IN THE COMMUNITY* (1947).

83. See Roslyn Poignant, *The Photographic Witness?*, 6 CONTINUUM: AUSTL. J. OF MEDIA & CULTURE (John Richardson ed., 1991), <http://www.mcc.murdoch.edu.au/ReadingRoom/6.2/Poignant.html>.

84. *Id.* (citations omitted).

85. See Alan Charlton, *Conceptualizing Aboriginality: Reading A.O. Neville’s Australia’s Coloured Minority*, AUSTRALIAN ABORIGINAL STUD., Fall 2001, at 47, 57 (“The argument, presumably, is that the offspring of a legalised union between white and ‘Coloured’ would more likely be accepted in white society, making it more likely again that these

Assimilationist policies are not mere history. As just one of countless examples, the disintegration of cultural, tribal, and familial ties that resulted from “the stolen generations,”<sup>86</sup> including the imposition of fundamental shame about race and identity, has resulted in entire generations of people experiencing deep conflict when considering how to identify themselves. My husband, who is partly of Chickasaw ancestry, recently spoke the names of his Chickasaw ancestors out loud as he read them from the tribal enrollment documents that his grandmother had assembled for her family. After a period of hesitance about not feeling “authentic enough,” he found the resolve to enroll in the Chickasaw Nation when he encountered the insidiously captioned photographs from A.O. Neville’s book. He spoke of his initial uncertainty when reconnecting with his Nation and explained his reasons for enrolling even though family history, geography, and a culture of assimilation had separated his mother from her own mother for most of their lives:

This feeling of doubt would have pleased Mr. Neville, and those like him, because their policies instilled it within us, like a time-release capsule full of shame. If I hadn’t enrolled, then I’d be the “boy on the left.” I’d reinforce the shame that surrounded my grandmother when she lost custody of my mom as an “unfit mother.” I would have reinforced the racial attitudes my mother faced from some of her relatives. If I hadn’t enrolled, a part of me would always have been missing. That part is the Tribal line of people, culture, and blood that I would have rejected.<sup>87</sup>

Assimilation policies were not limited to children. The United States also used missionaries for another nefarious purpose: to enforce on Indian lands the widespread bans on Native religious practices as “savage . . . and heathenish.”<sup>88</sup> Federal policy actually criminalized such spiritual rites as the Sioux Sun Dance, the activities of religious leaders, and the possession of ceremonial objects.<sup>89</sup> The early 1900s saw the outlawing or suppression of many Pueblo dances

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children would later be able to interbreed within white society. . . . [Neville] states that he sees colour prejudice as ‘the main stumbling-block towards assimilation.’ The effort to overcome this white prejudice by organising marriages so that the ‘colour’ is eventually ‘bred out’ seems a case of destroying the race so that it may be saved. One obvious tenet of the Neville plan is that Aborigines must be remade in some way, so as to fit them for a new, assimilated life. Equally obvious is that this plan is to be imposed upon them, regardless of their opinion on the matter[.]” (citations omitted) (citing NEVILLE, *supra* note 82, at 72)).

86. “Stolen generations” is the term usually applied to the victims of assimilation and boarding school programs in Australia and Canada. T.S. Twibell, *Rethinking Johnson v. McIntosh (1823): The Root of the Continued Forced Displacement of American Indians Despite Cobell v. Norton (2001)*, 23 GEO. IMMIGR. L.J. 129, 196 (2008).

87. Personal narrative of Kent Corkum (on file with author).

88. Bradford, *Reparations*, *supra* note 26, at 44.

89. Dussias, *supra* note 39, at 788-89.

considered to be “evil.”<sup>90</sup> In a sort of twisted irony, authorities actually used the tribally based (but federally created) Courts of Indian Offenses to criminally punish their own members for engaging in such spiritual practices<sup>91</sup> so fundamental to their identities, life ways, and survival. It was not until the late 1970s that Congress enacted the American Indian Religious Freedom Act (AIRFA), which declared a policy to protect and promote Native American religious traditions.<sup>92</sup> Even then, AIRFA is only a first step, as it contains no enforcement provisions.<sup>93</sup>

To summarize, the foundations of tribal sovereignty arise foremost out of our First Peoples’ inherent sovereignty, which contains not just a political component derived from a history of international relations and self-governance, but also from cultural sovereignty and the collective right to self-determination as peoples. To understand how both kinds of sovereignty have come under attack from hostile state and federal governments, it is important to understand that the United States have actually committed many undisputed acts of cultural and ethnic genocide against its Native American nations. Finally, as legal educators and legal reformers, we should realize that the roots of continued state and federal hostility toward Native American nations lie in the doctrine of discovery, and if that dynamic is to change, so must the entire underlying worldview.

### III. THE SOCIAL JUSTICE IMPERATIVE

*“[T]he minority voice is the most important voice to consider. The minority voice expresses the things that are going wrong, . . . the things that we’re being aggressive about or trying to overlook and sweep under the carpet or shove out the door. One of the things our leaders said is that if you ignore this minority voice it will create conflict in your community and this conflict is going to create a breakdown that’s going to endanger everyone.”*<sup>94</sup>

— *Jeannette Armstrong*

Introducing students early to the concept of strong, valid, vibrant tribal courts and governments can help to form the first, tentative steps toward ameliorating centuries of their marginalization in the

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90. *Id.* at 802.

91. *Id.* at 792, 802; see also CLINTON ET AL., *supra* note 5, at 340.

92. 42 U.S.C. § 1996 (2006).

93. See Alfonso Ortiz, *American Indian Religious Freedom: First People and the First Amendment*, 19.4 CULTURAL SURVIVAL Q. 26, 26 (1995).

94. Jeannette Armstrong, *An Okanagan Worldview of Society*, in ORIGINAL INSTRUCTIONS: INDIGENOUS TEACHINGS FOR A SUSTAINABLE FUTURE 66, 69-70 (Melissa K. Nelson ed., 2008).

legal system and in the educational system that supports and forms it. First, acclimating students to a culture of social justice and community lawyering arguably is one of the primary missions of legal education.<sup>95</sup> As Professor Sedillo Lopez has observed, it should be axiomatic that any good professional should have among her skills the ability to reflect on how to improve the legal system of which she is a vital part.<sup>96</sup> To vindicate that mission, we should continually innovate in our educational goals and methods.<sup>97</sup>

What we choose to include in the mandatory, first-year curriculum is much more important in articulating this message about priorities than which courses we offer as electives, even though both are essential.<sup>98</sup> While we cannot address all of the unlimited examples of social justice concerns in the classroom, we can incorporate examples to illustrate some of the forces that create injustice in our world, such as racism. What students need to hear early in their law school experience is that these issues are important to the elite of their profession:

Students are learning not only from the courses they take but also from the moral culture or atmosphere of their classrooms and the law school campus more broadly. . . .

In law school, students learn from both what is said and what is left unsaid. There is a message in what the faculty address and what they do not. When faculty routinely ignore—or even explicitly rule out-of-bounds—the ethical-social issues embedded in the cases under discussion, whether they mean to or not, they are teaching students that ethical-social issues are not important to the way

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95. See Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 CLINICAL L. REV. 307, 314 nn.50-51 (2001).

According to Professors Baillie and Bernstein-Baker, several roots gave rise to the philosophy that law schools have a duty to inculcate in students a commitment to bettering the public interest. They range from the inherent, historical values of the professional community to the inclusion of public service in the Model Rules of Professional Conduct. James L. Baillie & Judith Bernstein-Baker, *In the Spirit of Public Service: Model Rule 6.1, The Profession and Legal Education*, 13 LAW & INEQ. 51, 64-66 (1994). The social justice mission was heightened by the renaissance of clinical legal education during the Civil Rights Era. Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1465 (1998); see also WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 92 (2007). Nevertheless, the idea of lawyering for social change remains “counter-cultural” in law school and in law practice. William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. SOC. JUST. 7, 9-11 (2007).

96. Sedillo Lopez, *supra* note 95, at 310 n.19.

97. Professor Sedillo Lopez distinguishes between the social justice mission—the decision to impact our students and communities in a certain way—and educational goals, which are the methods for creating that impact. *Id.* at 310 n.15.

98. Cf. Anita Bernstein, *On Nourishing the Curriculum with a Transnational Law Lagniappe*, 56 J. LEGAL EDUC. 578, 578-79 (2006) (making similar arguments in support of including transnational law in the first-year curriculum).

one ought to think about legal practice . . . with important long-term effects on how they approach their work.<sup>99</sup>

Professor Zuni Cruz has observed that some culturally based instruction is important to teaching for social justice:

[C]ritical “literacy” skills that will allow [law students] to “read” the world, both Indian and non-Indian are useful for achieving social justice work. Cultural literacy, in particular is an important pedagogical tool for indigenous peoples and those who seek to work on their behalf as legal professionals.<sup>100</sup>

By incorporating this pedagogical tool, law professors help to train students in the profession’s expectations for their behaviors and attitudes, including culturally sensitive practice.<sup>101</sup> For example, as it relates to professionalism, promoting respect for tribal institutions aids students by training them against the kinds of culturally insensitivity occasionally displayed by non-Native attorneys practicing in tribal court.<sup>102</sup>

As scholars and teachers, when we accept the responsibility to address social injustices against Native American communities, we can do something, regardless of our backgrounds, to support and nourish outsiders’ awareness of Indigenous peoples:

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99. SULLIVAN ET AL., *supra* note 95, at 140; *see also* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 129 (2007).

100. Zuni Cruz, *Toward a Pedagogy*, *supra* note 10, at 901.

101. *See* Pamela Edwards & Sheila Vance, *Teaching Social Justice Through Legal Writing*, 7 LEGAL WRITING: J. LEGAL WRITING INST. 63, 66-67 (2001).

102. Ford, *supra* note 4, at 1260-61 (“Including Indian law in the mainstream Civil Procedure course work also should help inculcate in future lawyers appropriate respect for the tribal courts and tribal judges, just as those same future lawyers absorb their professors’ attitudes towards state and federal courts and judges. Currently, many tribal court judges report that the nonreservation attorneys who appear before them seem to have little regard for the tribal courts in general and their judges in particular.”). In her article, Ford shared her personal experiences as a tribal court judge as well as her conversations with other tribal court judges:

I observed this attitude during my service as Chief Judge for the Suquamish Tribal Court of the Port Madison Reservation in Washington state, even though I am both law-trained and non-Indian. I have heard many other tribal court judges express this sentiment. Most recently, at a conference in July 1995, entitled *Dispensing Justice in Indian Country: Preserving Tribal Sovereignty Through Judicial Decision Making*, a group of tribal court judges repeated this complaint. One of them stated that her tribe had never had a separate bar examination for admission to practice in its courts, but because so many attorneys appearing in her court had not even bothered to read the pertinent sections of the tribal code and the court’s rules of procedure, she now advocated such an examination. Even federal judges are not immune from this attitude. This attitude does a disservice both to the tribal courts and to the clients whose cases are to be decided by them. Bluntly stated, it reflects an abhorrent combination of lawyerly arrogance and racism, whether conscious or not, as well as poor judgment.

*Id.* at 1261 n.66.

Engaging students and academicians in the study, research, and understanding of indigenous justice systems and law creates a space for intellectual strengthening of ideas, and critical analysis of present structures of law and justice operating in Indian country, an essential component of true indigenous self-determination.<sup>103</sup>

We should not leave this task up to the professors who teach upper-level federal Indian law courses. Nor should these issues be left to professors of Color alone.<sup>104</sup> Including ethical-social issues like race and colonialism in our classroom conversations helps to avoid students' serious critique that "law schools create people who are smart without a purpose."<sup>105</sup>

As law professors, we should seek to engage all of our students, including those who are culturally or otherwise alienated by traditional, Eurocentric models of education. Several scholars have noted that acknowledging the mostly ignored contributions of Native Americans to our historical and legal landscape helps to demarginalize our Native students.<sup>106</sup> For example, I read a very moving comment on a teacher evaluation from my first year in which the student expressed relief and appreciation for the inclusion of tribal government in the curriculum.<sup>107</sup>

This type of acknowledgement plays a great role in perhaps the most significant expression of the effort to demarginalize Native American law students: the attempt to increase their numbers on campus and retain them when they arrive. Many of these students play an integral part in the survival of their communities in the face of a government and society that, historically, has often sought either to annihilate or to completely disempower them.<sup>108</sup> According to the latest data from the American Bar Association, in the 2008-2009 academic year, there were 1,198 enrolled law students who self-identified as American Indian or Alaska Native.<sup>109</sup> Compare this to the latest census data, which indicates that the indigenous popula-

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103. Zuni Cruz, *Toward a Pedagogy*, *supra* note 10, at 884.

104. *See infra* note 144.

105. SULLIVAN ET AL., *supra* note 95, at 142.

106. *E.g.*, Blumenfeld, *supra* note 6, at 505-06.

107. The student, who both humorously and poignantly described herself as "Black and White and Red all over," expressed joy at the brief moment of demarginalization, noting that it was one of the only times she felt that contributions from her cultural heritage were considered relevant to the study of law.

108. *See* Gloria Valencia-Weber, *Law School Training of American Indians as Legal Warriors*, 20 AM. INDIAN L. REV. 5, 42-45, 50-56 (1996).

109. American Bar Association, American Indian or Alaska Native J.D. Enrollment 1971-2009, <http://www.abanet.org/legaled/statistics/charts/stats%20-%2011.pdf> (last visited Nov. 30, 2009).

tion of the federally recognized Tribes and Alaska Native communities alone is just under two million.<sup>110</sup>

To say that tribal governments should be included in the curriculum is not to exclude other minority students. Members of Native American communities have a unique legal standing in the nation—a standing that touches upon virtually every area of law. By virtue of the federal trust responsibility and treaty relationship with Indian nations, Indian peoples arguably are the only people with a legally defined racial and ethnic status.<sup>111</sup> Moreover, addressing social justice issues through “outsider stories” also benefits students who come from the dominant culture, as well as those who identify with other “outsider groups.”<sup>112</sup>

The atmosphere of acknowledgment that is so crucial to the demarginalization, recruitment, retention, and respect of Native American law students is especially important in the first weeks of the students’ law school experience, including law school orientation. These weeks are “a critical juncture that can create a sense of inclusion and belonging, or repeat patterns of alienation that plague students who have been historically excluded from higher education.”<sup>113</sup> Recognizing non-Anglo American legal systems early in law school can contain surprising symbolic power: “Subordinated peoples in colonial and neocolonial situations not only contend with social institutions of dominance. They also face symbolic dominance, for example, ideologies that reflect cultural constructions of the dominant order and that rationalize that order. These rationalizations may come to be unconsciously accepted . . . .”<sup>114</sup>

In conclusion, educational theorists posit “communities of practice” as a key element facilitating effective learning.<sup>115</sup> For better or worse, as the key symbolic guides of those learning communities, law professors usually serve as their students’ first role models for professional behavior.<sup>116</sup> They have the opportunity to instill respect for Native American peoples and sovereigns.<sup>117</sup> We, as academics, both Native and non-Native, can take small but significant steps toward

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110. U.S. DEPT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, OFFICE OF TRIBAL SERVICES, AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT, at i-ii (2003), <http://www.indianaffairs.gov/idc/groups/public/documents/text/idc-001777.pdf>.

111. CLINTON ET AL., *supra* note 5, at 119, 129-37.

112. Edwards & Vance, *supra* note 101, at 64.

113. Paula Lustbader, *You Are Not in Kansas Anymore: Orientation Programs Can Help Students Fly over the Rainbow*, 47 WASHBURN L.J. 327, 331 & n.19 (2008) (appearing in an issue devoted to Washburn’s recent Humanizing Legal Education Symposium).

114. LORETTA FOWLER, TRIBAL SOVEREIGNTY AND THE HISTORICAL IMAGINATION, at xvii (2002).

115. SARAH LEBERMAN ET AL., THE TRANSFER OF LEARNING: PARTICIPANTS’ PERSPECTIVES OF ADULT EDUCATION AND TRAINING 2 (2006).

116. SULLIVAN ET AL., *supra* note 95, at 156.

117. Ford, *supra* note 4, at 1260.

healing the legal marginalization of Native Americans when we encourage and mentor this and other types of cultural literacy.

#### IV. ACADEMIC ACCURACY

*“The judicial systems of the three sovereigns—the Indian tribes, the Federal government, and the States—have much to teach one another. While each system will develop along different lines, each can take the best from the others. Just as a ‘single courageous State may, if its citizens choose, serve as a laboratory . . .’ for the development of laws, the experiments and examples provided by the various Indian tribes and their courts may offer models for the entire nation to follow.”*<sup>118</sup>

— *The Honorable Sandra Day O’Connor*

The United States is a three-sovereign legal system. When introducing new students to the fundamental concepts underlying this system, scholarly accuracy requires us to include Tribal nations and courts in any general discussion. Thus, while comparative tribal legal studies are an excellent vehicle to teach many topics, introducing them is also a matter of important academic and historic accuracy as well as of curricular integrity.<sup>119</sup>

No instruction on the U.S. legal system can be complete without mention of the “third” sovereigns: the 564 federally recognized<sup>120</sup> Indian nations within U.S. borders, all of which have the innate right to self-determination<sup>121</sup> as well as limited governmental sovereignty

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118. Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 5-6 (1997) (citation omitted and emphasis added) (quoting in part *New State Ice Co. v. Liebmann*, 285 U.S. 310, 311 (1931) (Brandeis, J., dissenting)).

119. See Rennard Strickland & Gloria Valencia-Weber, *Observations on the Evolution of Indian Law in the Law Schools*, 26 N.M. L. REV. 153, 161 (1996) (“As a matter of integrity in the curriculum, Indian law should be taught as the indigenous sovereigns and their laws have a continuity which precedes the creation of federal and state law in the United States.”).

120. US Department of the Interior Indian Affairs, <http://www.bia.gov> (last visited Nov. 30, 2009). There are also anywhere from dozens to hundreds of Native American tribes within the borders of the United States that have not been recognized by the government for purposes of federal law. See WILKINS, *supra* note 28, at 2 (“The quoted figure does not include state-recognized tribes, nor does it include the more than one hundred nonrecognized groups which are in the process of petitioning the federal government in the hope of securing federal recognition.”). Denial of federal recognition destroys these communities’ ability to obtain the benefits of the federal government’s trust responsibility. See Fletcher, *Politics, History, and Semantics*, *supra* note 50, at 490 n.22.

121. *E.g.*, Vine Deloria, Jr., *Self-Determination and the Concept of Sovereignty*, in ECONOMIC DEVELOPMENT IN AMERICAN INDIAN RESERVATIONS 22 (Roxanne Dunbar Ortiz ed., 1979).

according to the current state of federal law.<sup>122</sup> Many of them have their own governments,<sup>123</sup> court systems,<sup>124</sup> and integral borders,<sup>125</sup> and yet they are largely ignored by the law school curriculum.<sup>126</sup>

Justice Sandra Day O'Connor emphasized the tri-sovereign nature of our federal system in a 1997 speech:

Today, in the United States, we have *three types of sovereign entities*—the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country. The part played by the tribal courts is expanding. As of 1992, there were about 170 tribal courts, with jurisdiction encompassing a total of perhaps one million Americans.<sup>127</sup>

Federal, state, and tribal jurisprudence is replete with cases and legislation documenting the tug of war between the three types of government over competing sovereign interests.<sup>128</sup> Despite the existence of these nearly 600 sovereign Tribal nations within U.S. borders, only one of the most popular legal method textbooks, Professor Calleros' *Legal Method and Writing*, significantly notes the relevance of Native American nations and courts in its chapter on U.S. governments and court systems.<sup>129</sup>

122. *See generally* CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 241-303 (2005) (providing a big-picture overview of the evolving nature of tribal sovereignty today).

123. RICHLAND & DEER, *supra* note 46, at 41-72.

124. *See id.* at 89-112.

125. As Professor Blumenfeld notes, even those states without reservations may have substantial numbers of Native communities. *See* Blumenfeld, *supra* note 6, at 504-05 & nn.2-3.

126. The legal writing curriculum is just starting to evolve into acknowledging Tribal nations at those law schools with strong, highly regarded Indian and tribal law programs like those at Arizona State University and the University of New Mexico. At New Mexico, for example, legal writing director Barbara Blumenfeld uses writing assignments based on federal Indian law problems to help introduce them to the topic early in their careers. *See generally id.* (describing how to introduce first-year law students to federal Indian law through legal writing assignments). This gradual evolution is possible wherever there are open minds. At Washburn University School of Law, Professors Michael Hunter Schwartz, Aliza Organick, and I are collaborating on materials to very briefly introduce the three-sovereign system in Schwartz's groundbreaking, week-long orientation program for new first-year students, which is based on his Expert Learning for Law Students system and textbook. *See* MICHAEL HUNTER SCHWARTZ, EXPERT LEARNING FOR LAW STUDENTS (2005). Professor Blumenfeld already has been doing so for quite some time during the orientation program at New Mexico. Blumenfeld, *supra* note 6, at 509 n.20.

127. O'Connor, *supra* note 118, at 1.

128. *See generally, e.g.*, CORNTASSEL & WITMER, *supra* note 5 (arguing that racism and other social constructs lie at the heart of contemporary federal-tribal and state-tribal tensions concerning gaming, taxation, land, and so on); WILKINS, *supra* note 28 (exposing the history of federal jurisprudence concerning Indian nations as an arm of mostly anti-Indian federal policy).

129. CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 23 (5th ed. 2006).

There is an increasing call among legal scholars familiar with federal Indian and tribal law to introduce it to students across the curriculum.<sup>130</sup> The arguments for increasing students' exposure to federal Indian law topics even during the first year come from many sources: more states now are testing federal Indian law on their respective bar exams;<sup>131</sup> our students increasingly are encountering federal Indian and tribal law issues in practice and are appearing in tribal courts;<sup>132</sup> the psychology of learning suggests that students enjoy better comprehension and retention when learning is based on surprising and fresh examples from unexpected places;<sup>133</sup> and comparative legal studies have the potential to increase skill in critical thinking.<sup>134</sup>

Professor Frank Pommersheim is one of a number of scholars to challenge the academy to make right its oversight of the three-sovereign system, noting that our collective failure to "identify and discuss the tribal sovereign, particularly tribal courts, seriously restricts, even distorts, the purview of contemporary federalism."<sup>135</sup>

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130. See generally Symposium, *Native American Law Essays on Integrating Indian Law into Law School Curricula*, 37 TULSA L. REV. 481 (2001) (collecting essays on the integration of federal Indian law into the law school curriculum); Symposium, *The Pedagogy of American Indian Law*, 82 N.D. L. REV. 605 (2006) (compiling articles on the pedagogy of federal Indian law).

131. See generally Gloria Valencia-Weber & Sherri Nicole Thomas, *When the State Bar Exam Embraces Indian Law: Teaching Experiences and Observations*, 82 N.D. L. REV. 741 (2006) (describing how federal Indian law came to be tested on the New Mexico bar examination and how it impacted the teaching of that subject at the University of New Mexico School of Law). As of this writing, New Mexico, South Dakota, and Washington test federal Indian law. See Rules for the New Mexico Board of Bar Examiners § 15-203(B)(8) (2007), available at <http://www.nmexam.org/rules/rules203.htm>; South Dakota Unified Judicial System, New Indian Law Question on Bar Exam, <http://www.sdjudicial.com/index.asp?category=news&nav=8&record=126> (last visited Nov. 30, 2009); Washington State Bar Association, Washington State Bar Examination Subjects, [http://www.wsba.org/lawyers/licensing/bar\\_examination\\_instructions\\_2.htm](http://www.wsba.org/lawyers/licensing/bar_examination_instructions_2.htm) (last visited Nov. 30, 2009). Similar movements are underway in Arizona, California, Idaho, Montana, Oklahoma, Oregon, and Wisconsin. Valencia-Weber & Thomas, *supra*, at 754. According to a recent blog, the Multistate Performance Test (MPT), a practical skills component, recently consisted of a case file requiring the student to analyze and resolve a tribal court jurisdiction problem. Posting of Matthew L.M. Fletcher to Turtle Talk, <http://turtletalk.wordpress.com/2008/01/18/july-2007-ny-state-bar-exam-indian-law-question> (Jan. 18, 2008, 3:04 A.M.). The MPT is required in thirty-two states. NATIONAL CONFERENCE OF BAR EXAMINERS AND ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR EXAMINATION REQUIREMENTS 21 (2008), available at [http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp\\_Guide/CompGuide.pdf](http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/CompGuide.pdf).

132. See Galanda, *Reservations of Right*, *supra* note 11, at 68.

133. Cf. Walter Otto Weyrauch & Maureen Anne Bell, *Autonomous Lawmaking: The Case of the "Gypsies"*, 103 YALE L.J. 323, 332 n.20 (1993) ("In his comparative law classes Weyrauch found that students were persistently more interested in tribal law than in the laws of western Europe.")

134. See Jonathan Hill, *Comparative Law, Law Reform and Legal Theory*, 9 OXFORD J. LEGAL STUD. 101, 105-06 (1989); Vernon Valentine Palmer, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, 53 AM. J. COMP. L. 261, 264-66 (2005).

135. Pommersheim, *supra* note 7, at 124.

Even though our omissions may, until now, have been inadvertent, we can no longer claim to accurately teach the federal system without discussing the tribal sovereigns and courts and the Supreme Court's activities in that area.<sup>136</sup> In the Sections below, this Article will provide the core knowledge base and tools for doing so.

Moving beyond the issue of accuracy and into the pedagogical incentives, "treating a whole category of domestic legal systems as invisible"<sup>137</sup> fails our students by establishing a cracked foundation and distorted framework for analyzing legal problems:

With continued economic development on tribal lands, our students are increasingly likely to represent clients who will interact with tribal governments or private entities and perhaps litigate in tribal courts, even if the students do not intend to practice in tribal communities. Nonetheless, students might easily miss that point unless they are introduced fairly early in their legal education to the values and needs of Native American communities or at least the existence and method of their legal systems.<sup>138</sup>

In addition to teaching the federal law that impacts Native American people and nations, the internal, indigenous law of Tribes overflows with rich comparative legal studies that can be used to enhance comprehension and retention, not to mention cultural literacy skills. For example, since I began using tribal law and government as a comparative system for teaching fundamental concepts in legal analysis, such as sources of law, paths of review, and types of authority, many of my students more quickly absorb these concepts on a much deeper, intuitive level, rather than memorizing them in rote. As a result, their professional judgment about choices such as which authorities to cite is developing at a much faster pace, allowing us to spend more time on advanced topics. Even better, the comparative study also provides a valuable opportunity for increasing cultural literacy through the appreciation of diversity in societal structures in different sovereign states, such as constitutions and court systems, as well as the cultural groundwater from which they spring.

The *Journal of Legal Education* recently completed a multi-issue exploration on integrating transnational law into the legal curriculum.<sup>139</sup> It seems that many U.S. law schools are considering adapting the legal curriculum for a more global environment even before recognizing, in those same courses, the importance of an enormous and

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136. *Id.*

137. Charles Calleros, *In the Spirit of Regina Austin's Contextual Analysis: Exploring Racial Context in Legal Method, Writing Assignments and Scholarship*, 34 J. MARSHALL L. REV. 281, 284 (2000) [hereinafter Calleros, *Exploring Racial Context*].

138. *Id.*

139. Carrie Menkel-Meadow & Mark Tushnet, *From the Editors*, 56 J. LEGAL EDUC. 477, 477 (2006).

influential comparative legal system within our own borders.<sup>140</sup> Many of the reasons asserted for globalizing the curriculum are strikingly similar: our students are increasingly encountering transnational issues in practice; professionalism requires a less isolationist perspective; professionalism requires the ability to respectfully and competently navigate unfamiliar legal rules and court systems; law schools have an obligation to imbue their students with the kind of civic responsibility and moral/ethical compass necessary to navigate the global landscape; and comparative study encourages our future lawyers' thoughtfulness about law reform.<sup>141</sup>

*Best Practices for Legal Education* identifies “[a] commitment to justice” as the first principle of professionalism.<sup>142</sup> When the Carnegie Foundation for the Advancement of Teaching produced its study on legal education, it identified six major goals, one of which is “[f]orming students able and willing to join an enterprise of public service.”<sup>143</sup> One way in which law professors can help to further a commitment to justice and public service is to take incremental steps toward ameliorating the long history of oppression and marginalization of Native peoples by legal entities.<sup>144</sup>

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140. Cf. Bernstein, *supra* note 98, at 578-79 (“[I]t is important for first-year law students to gain experience in transnational law, both for purposes of their later legal education and to prepare them for the kind of law practice that they are likely to engage in after graduation.” (quoting American Association of Law Schools, 2006 Annual Meeting Program Brochure, What is Transnational Law and Why Does it Matter?)).

141. Cf. *id.* at 581-86 (critiquing the different types of provincialism found in the U.S. legal curriculum with respect to transnational law); Helen Hershkoff, *Integrating Transnational Legal Perspectives into the First Year Civil Procedure Curriculum*, 56 J. LEGAL ED. 479, 481-84 (introducing the various arguments for incorporating a “transnational perspective” into Civil Procedure).

142. STUCKEY ET AL., *supra* note 99, at 84-85.

143. SULLIVAN ET AL., *supra* note 95, at 22. The other five goals are “[d]eveloping in students the fundamental knowledge and skill, especially an academic knowledge base and research,” “[p]roviding students with the capacity to engage in complex practice,” “[e]nabling students to learn to make judgments under conditions of uncertainty,” “[t]eaching students how to learn from experience,” and “[i]ntroducing students to the disciplines of creating and participating in a responsible and effective professional community.” *Id.*

144. In any outsider’s effort to help correct the injustices levied on a different community, we must face the risk of doing harm rather than good. It is crucial not to speak for the community or to assume its wants and needs; the community must be consulted. This ethical code comports with modern clinical law practice and pedagogy. See Sedillo Lopez, *supra* note 95, at 325 (noting that one of the values of community-based clinics is to expose students to holistic problem solving, rather than assuming an understanding of the client’s problem and desired outcomes).

The risk of well-intentioned blundering is multiplied manifold when taking actions that impact indigenous communities. Because Indigenous peoples are too often either romanticized or targeted for assimilation, it is too easy for even the well-intentioned scholar to make biased assumptions and self-concerned decisions about how to interact with those they wish to understand or assist. One glaring example is the harm wrought by anthropologists and other academics and researchers on indigenous communities worldwide, which continues today despite wider-spread recognition and attempts to remedy the problem. Cf.

Before proceeding, it may help to understand some of the possible reasons why the academy historically has omitted indigenous law and government from mainstream legal studies. First, one pragmatic concern could be that the law curriculum already is bursting at the seams and that it is unrealistic to think that we can expose our students to everything they might need to know in practice. Fortunately, the gap between desire and reality may not be as large as we imagine. In fact, there may be unexpected benefits and cost savings down the road. In my experience, adding the third sovereign actually does far more to enhance students' understanding of law and legal methods than to cloud it. As a result, future instructors will inherit students more able to transfer their learning from the previous context into the current one.

Students and professors do not need to plumb the depths of federal Indian or tribal law to understand that our federal system also includes many tribal sovereigns and that the intersections between sovereigns create interesting issues in diverse topics like child custody, business transactions, taxation, and criminal jurisdiction. As Professor Cynthia Ford has observed, "continued *brief* discussion of Indian law connections throughout the required curriculum should sensitize students to look for Indian law issues in cases," making them more likely to identify the need for further self-education or to associate an expert in the field.<sup>145</sup>

Second, another reason for forgetting the third sovereigns may be reluctance to engage the socially challenging aspects of the material. Professor Grijalva suggests that what may lie at the heart of this reticence is actually anxiety<sup>146</sup> or the fear of the unknown.<sup>147</sup> The exoti-

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VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS 78-100 (1969) (providing an indigenous perspective on the folly of colonial and neo-colonial anthropology with respect to Indigenous peoples). See *generally* DEVON A. MIHESUAH, NATIVES AND ACADEMICS: RESEARCHING AND WRITING ABOUT AMERICAN INDIANS (1998) (collecting viewpoints on proper methods for researching and writing about Native American people); SMITH, *supra* note 5 (proposing methods for decolonizing research about Indigenous peoples); SHAWN WILSON, RESEARCH IS CEREMONY: INDIGENOUS RESEARCH METHODS (2008) (proposing a uniquely indigenous approach to such research).

Here, too, there is a risk that a law professor writing about how to incorporate tribal legal concepts into the mainstream legal writing curriculum may overstep her role and risk telling the wider world how it should help another community, without consulting that community first. There is a risk that I may misstep, but I wish to answer the call for White faculty to join faculty of Color in raising diversity and cultural literacy issues in the classroom. For example, this express call was made in our discussions in the Community Lawyering breakout group at the 2008 AALS Conference on Clinical Legal Education in Tucson, Arizona. My aim here is to write as an outsider to other outsiders about what the dominant society can do to open itself and embrace its place in the plurality.

145. Ford, *supra* note 4, at 1257-58 (emphasis added).

146. Cf. James M. Grijalva, *Compared When? Teaching Indian Law in the Standard Curriculum*, 82 N.D. L. REV. 697, 710-12 (2006) (addressing reader concerns that using Indian law materials may elicit a strong emotional response in some students, ranging from shame and guilt about the more egregious colonial policies like assimilation to xenophobia

cization<sup>148</sup> of Native Americans is so entrenched in popular lore and memory that it seems to make what would otherwise be another interesting layer of legal complexity into a near-archetypal encounter with the enigmatic “Other.”<sup>149</sup> Add to this mix some understandable fears about stumbling into inadvertent racial and ethnic stereotypes or other offenses, and the anxiety level understandably increases.

Third, some scholars who advocate integrating federal Indian law across the curriculum have observed that the silence surrounding tribal law and nations stems from the fear that tribal legal matters require expertise in the field and are too inscrutable, or irrelevant, to address outside of specialty courses.<sup>150</sup> Fortunately, there is no apparent reason to treat Indian law differently from other complex topics. For example, lawyers widely agree that both Family Law and Trusts and Estates courses should alert students to the importance of researching tax ramifications, even if tax otherwise exceeds the scope of the course and the professor’s expertise. As teachers, we can identify major intersections with federal Indian law, leaving the rest to more specialized courses or further research.

Furthermore, lawyers and law professors are trained as generalists, equipped with all the necessary skills to understand the essentials of Indian law concepts like sovereignty, court structures, and custom-based reasoning. As law professors, the very core skill we model to our students is how to problem solve in a profession where the rules constantly change and every case is unique.

Finally, on a more mundane level, very few law professors have been exposed to federal Indian or tribal law in their own legal education<sup>151</sup> or in practice. Unless they specialize in the field or live in a

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stemming from historical fears and resentments). See also Edwards & Vance, *supra* note 101, at 74-75, which discusses teacher comfort levels when using cross-cultural writing assignments.

147. THE AMERICAN HERITAGE DICTIONARY (4th College ed. 1985) (defining anxiety as “1. A state of uneasiness and apprehension. 2. A state of apprehension, uncertainty, and fear resulting from the anticipation of a threatening event or situation.”).

148. WILLIAMS, *supra* note 28, at 33-45 (tracing the history of Western notions of “Indian savagery”); see also CLINTON ET AL., *supra* note 5, at 61-63 (discussing “savagism in federal conceptions of Indians”).

149. See SMITH, *supra* note 5, at 2. See generally Daan Braveman, *Tribal Sovereignty: Them and Us*, 82 OR. L. REV. 75 (2003) (exploring how the archetype of the Indian as “other” forms one root of contemporary federal-tribal tensions).

150. Grijalva, *supra* note 146, at 699-713 (exploring pedagogical foundations for teaching Indian law across the curriculum and responding to readers’ perceived obstacles regarding teacher preparedness and student frustration).

151. See Ford, *supra* note 4, at 1256; Grijalva, *supra* note 146, at 707 & n.79. Professor Grijalva suggests that most members of the legal academy and federal judiciary hail from the same set of elite law schools, which, at least in the past, have not devoted resources to Indian law. *Id.*; see also SULLIVAN ET AL., *supra* note 95, at 89-90. Contrast this with those law schools in the plains and western states, where the sense of closeness to Indian country is more strongly felt.

region with visible tribal activity in the mainstream, they may also fail to perceive the force with which tribal law and peoples continue to gain prominence in the dominant socio-legal system. Indian law's practical relevance to our students is manifold because such problems are increasingly arising in mainstream law practice. This is not surprising, given Tribes' broad land base and increasing economic development nationwide:

Indian tribes occupy more than 55 million acres of reservation lands in 30 states. Reservation businesses generate \$246 million in tax revenue annually for state and local governments, and \$4.1 billion in annual tax revenue for the federal government. In 2001, gaming tribes generated \$13 billion in direct and indirect economic activity.<sup>152</sup>

Looking at the impact on just one state illustrates even better that ordinary practitioners increasingly need to understand and apply federal Indian and tribal law:

Consider: 1) In 2002, Oregon's eight gaming tribes generated \$370 million in revenue, contributing \$8.5 million to local government and state non-profit groups; 2) Oregon tribes currently employ thousands of Indian and non-Indian employees. For example, the Confederated Tribes of Grand Ronde employ 1,500 Oregonians, and the Cow Creek Band of the Umqua Tribe employs 1,200; 3) Oregon tribes occupy nearly one million acres of land in the State.<sup>153</sup>

As just one example of the impact of tribal economic development on the practice of transactional law, the same author notes the increasing activity of Fortune 500 companies like Wal-Mart and AT&T in the development of tribal lands.<sup>154</sup>

In conclusion, using tribal law as a comparative study better prepares lawyers for practice because, among other things, there are many points of contact between tribal law and Anglo-American law within our federal system.<sup>155</sup> As one author noted, ordinary practitioners easily can encounter complicated tribal jurisdiction problems in child custody and adoption, probate, automobile accidents, enforcing judgments, taxation, property development, and even run-of-the-mill slip-and-fall cases, if they occur in a place like a tribal casino.<sup>156</sup>

Because the benefits to our students are many and the costs to us as teachers are far fewer in comparison, we can and should give our students the basic framework to recognize that tribal and Indian law issues exist in practice. As we will see, the professor can choose how

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152. Galanda, *Reservations of Right*, *supra* note 11, at 66 (bullet points omitted).

153. Galanda, *A Need to Know Indian Law*, *supra* note 11, at 62.

154. *Id.*

155. See Zuni Cruz, *Toward a Pedagogy*, *supra* note 10, at 901.

156. Galanda, *A Need to Know Indian Law*, *supra* note 11, at 62.

far “down the rabbit hole” to go; the issue of primary and imperative importance is the proper representation of the three-sovereign system, which can be addressed within the normal class time allotted to introduce the overall U.S. legal system.

#### V. THE INCENTIVES FOR TEACHING AND LEARNING

*“[E]very society needs educated people, but the primary responsibility of educated people [is] to bring wisdom back into the community and make it available to others.”*<sup>157</sup>

— *Vine Deloria, Jr.*

I have argued that it is necessary to teach the three-sovereign model of the U.S. federal system and to recognize the importance of indigenous law and legal systems as a matter of social, moral, historical, and academic imperative. Happily, there are also sound, strong teaching and learning incentives for doing so, and they are well grounded pedagogically in both the field of adult education called Transfer of Learning and in contemporary comparative law pedagogy. The next Section previews the desired learning outcomes for law professors and students. In the Sections that follow, the Article then provides the more detailed pedagogical and substantive knowledge required to begin teaching both the three-sovereign system and comparative studies in the law classroom.

##### A. *Some Promising Teaching and Learning Outcomes*

The incentives for teaching tribal governments and law throughout law school, particularly during the first year, include a deeper understanding of fundamental systems and structures, better knowledge retention and skills transfer, increased cultural literacy, and heightened awareness of the role of culture in law and advocacy.

First, the broader, tri-governmental model better helps students to understand the fundamental relationships between multiple governments, including such basic concepts as jurisdiction and choice of law. The simplest reason is that it is easier to understand dynamics when given more than one example. A strict state-federal study reveals only one major, binary jurisdictional relationship in isolation, and municipal examples cannot serve in the same role because they are so clearly subservient subdivisions without traces of residual national sovereignty. When tribal governments are added to the classroom discussion, students gain two more governmental relationships

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157. Derrick Jensen, *Where the Buffalo Go: How Science Ignores the Living World: An Interview with Vine Deloria*, SUN MAG., July 2000, available at <http://www.derrickjensen.org/deloria.html>.

for comparison and contrast, both tribal-federal and tribal-state. Once the class is ready to move beyond formalistic comparisons, recognizing tribal sovereigns within the federal system shows, as no other example can, how the struggle for sovereignty is at the root of not only tribal—but also the state and federal—tug of war over power and resources. As we will continue to see below, these roots predate the Constitution, formed the basis for many of its key elements, and continue to shape legal reality today. For example, studying the relationship between the United States, states, and Tribes in an ordinary first-year Civil Procedure class helps students to understand “general concepts of exclusive and concurrent jurisdiction.”<sup>158</sup>

Second, increasing the number of jurisdictional and cultural contexts for classroom examples increases the likelihood of transfer of learning to new contexts. “Transfer of Learning” is a field of study that encompasses many disciplines and is largely concerned with how students can generalize skills and knowledge for translation from the classroom to the professional world.<sup>159</sup> Theorists have found that schematics, or “mental models,”<sup>160</sup> foster transfer by encouraging students to perceive similarities between existing knowledge and new situations where that knowledge can be applied.<sup>161</sup> Expanding our schema to include more examples of government, sovereignty, and jurisdiction increases the chances that law students will be able to transcend the traditional examples when they encounter novel problems in practice.

Moreover, when educators provide comparative examples for analogy and distinction, they increase the likelihood that students will also be able to cognitively “bridge” skills to new and more attenuated contexts.<sup>162</sup> Therefore, transfer theory lends support to the idea that introducing comparative tribal legal studies will lead students to an increased ability to comprehend other areas of law. The sorts of skills that might be transferred from learning a three-sovereign model might include such diverse abilities as understanding intergovernmental jurisdictional tensions; the relevance of historical and social context in law and legal systems; the role of subtle sources of law, such as policy and social custom; the role of race and culture in legal discourse; and the ability to read and think more critically in all of these areas.

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158. Ford, *supra* note 4, at 1268.

159. See LEBERMAN ET AL., *supra* note 115, at 1.

160. *Id.*; see also ROBERT E. HASKELL, TRANSFER OF LEARNING: COGNITION, INSTRUCTION AND REASONING 82-83 (Academic Press 2001).

161. See LEBERMAN ET AL., *supra* note 115, at 15.

162. See D.N. Perkins & Gavriel Salomon, *Teaching for Transfer*, EDUC. LEADERSHIP, Sept. 1988, at 28-29 (1988) (arguing that using analogies helps students to transfer learning from one context to another and citing a cross-cultural analogy between slavery and apartheid as an example).

Finally, comparative tribal legal studies can help train novice attorneys to see the law through a more culturally literate lens. As Professor Weng notes, it should be axiomatic that increased cultural self-awareness is a crucial first step in multicultural lawyering training because “awareness of one’s own culture allows more accurate understanding of cultural forces that affect the lawyer, the client, and the interaction of the two.”<sup>163</sup> Without respectful cross-cultural awareness, lawyers cannot adequately perform such fundamental tasks as counseling clients<sup>164</sup> and developing case theory.<sup>165</sup>

### B. Pedagogical Foundations

#### 1. Transfer of Learning

The field of Transfer of Learning studies how teaching techniques and curricular design can be used to help students apply skills learned in one context to a new context with varying degrees of attenuation. Its leading theorists, Drs. David Perkins and Gavriel Salomon, argue that Transfer of Learning methodologies can help enhance critical reasoning, which arguably is the grand aim of higher education.<sup>166</sup> In fact, the skills involved in learning about the third sovereign form a very comfortable fit with the characteristics of critical reflection identified by learning transfer theorists, which are the following: (1) “Questioning the taken-for-granted assumptions of communities”; (2) “Focusing on the social, political and historical nature of the experience”; (3) “Considering power relations”; and (4) “Seeking emancipation.”<sup>167</sup>

As for their model, Perkins and Solomon center their ideas around the simple proposition that the farther apart the two learning contexts, the more difficult it will be for students to apply what they learned earlier. The two ends of the spectrum are called “near” and “far” transfer. “Near” transfer occurs more easily. Perkins and Solomon refer to this as a “low-road” transfer.<sup>168</sup> One example might be learning to brief a torts case from the Ninth Circuit Court of Appeals and then using that experience to brief a contracts case from the California Supreme Court. Another might include examining the sovereign basis for general trial court jurisdiction in tribal court and using it to comprehend the sovereign basis for general trial court juris-

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163. Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 401 (2005).

164. *Id.* at 381-83.

165. Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 REV. L. & SOC. CHANGE 109, 143, 152, 167-73 (1994).

166. See D.N. Perkins & Gavriel Salomon, *Teaching for Transfer*, 46 EDUC. LEADERSHIP 22, 23 (1988).

167. LEBERMAN ET AL., *supra* note 115, at 54.

168. *Id.* at 4-5.

diction in *state* courts, as well as the contrasting limited jurisdiction in the trial courts of the limited federal sovereign.<sup>169</sup>

In contrast, “far” transfer requires a cognitive leap that takes much more conscious effort from the student, which is why it is sometimes called “high-road” transfer.<sup>170</sup> There, an example might include studying the dynamics of colonial conquest in the field of federal Indian law and then, in one’s law practice, using that experience to consider the social and racial implications in U.S. immigration law when representing a Latina client applying for asylum. It might also include using a comparative example from indigenous law to understand the “bundle of sticks” theory of American real property law and being able to later use that experience as an advocate to examine the relationship between a landlord and tenant in a complex lease-to-own case.

In order to effectuate low- and high-road transfers, educators are asked to consider using techniques called “hugging” and “bridging,” respectively.<sup>171</sup> While the details are beyond the scope of this work,<sup>172</sup> the essence of the approach is to use “superficial stimulus” to trigger the otherwise automatic application of knowledge to near contexts and to bring a much greater effort to encouraging the “deliberate mindful” transfer of skills to far contexts.<sup>173</sup> In some situations, teachers and students can use “forward-reaching” transfer to discuss in advance how skills will apply in future experiences and “backward-reaching” transfer to identify how already-acquired skill sets can help to solve a current problem.<sup>174</sup> The low-road/high-road model of learning transfer highlights why it is important to use ongoing dialogue to discuss not only the present relevance of the topic at hand, but also its relationship to past and future professional skills and situations. Even more, it shows that unless educators address key skills like critical thinking and cultural literacy across the curriculum, such far transfer is not very likely to happen. Accordingly, while the core pedagogical basis for teaching the third sovereign and comparative tribal examples is probably found in comparative legal stu-

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169. See *infra* Part VI.D (Selection of Authority and Path of Review) (discussing sovereignty as the basis for limited versus general jurisdiction among the trial courts of the three sovereigns).

170. See Perkins & Salomon, *supra* note 166, at 25-27.

171. See *id.* at 28-29.

172. Good general sources for legal education include David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191 (2003), and Michael Hunter Schwartz, *Teaching Law by Design: How Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347 (2001). See also Tonya Kowalski, *The Cartography of Legal Inquiry* (NYLS Clinical Res. Inst. Paper No. 9/10 #6), available at <http://ssrn.com/abstract=1478997> (working paper).

173. Perkins & Salomon, *supra* note 166, at 25.

174. *Id.* at 26.

dies, it is the conscious use of transfer tools that makes enhanced learning a reality.

## 2. Comparative Legal Studies

Modern comparative tribal studies can be used to train novice attorneys to see the law through a more culturally literate lens. Although comparative law has suffered understandable criticism as a tool for making positivist pronouncements about other cultures,<sup>175</sup> the comparative study of legal systems is emerging with a new, more globally and culturally literate identity.<sup>176</sup> Today, a better approach is to use comparison as a means to cultural self-awareness and as a mirror through which to understand and think critically about one's own legal culture and institutions.<sup>177</sup>

Not only is a comparative study helpful, it may also actually be *necessary* in order to properly introduce indigenous legal systems to our students in juxtaposition to the Anglo common-law tradition.<sup>178</sup> Moreover, for any attorney who may one day practice in tribal courts or encounter federal Indian law issues, studying the Anglo common law tradition is only the beginning; he or she must also explore the other "points of convergence" with other domestic and international legal systems.<sup>179</sup>

There are several very recent and promising examples of the use of comparative indigenous law in the general law curriculum. Professor Walter Otto Weyrauch of the University of Florida College of Law uses Roma<sup>180</sup> tribal law as a comparative model to teach his students about private law by including sources often incorporated into public law, such as customary law.<sup>181</sup> In his comparative law courses, he has found that "students [are] persistently more interested in tribal law than in the laws of western Europe."<sup>182</sup> In addition to Roma law, he has also uses studies of Inuit and African tribal law.<sup>183</sup>

175. Cf. Palmer, *supra* note 134, at 264-65 (describing the "postmodern critique," which challenges comparativists to investigate the social context beyond the positive law).

176. Cf. WERNER MENSKI, *COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA* 25-81 (Cambridge Univ. Press 2d ed. 2006) (proposing a new approach to comparative law based on the globally conscious perspective, with an emphasis on plurality, culture, and respect for difference).

177. See Weng, *supra* note 163, at 382-83.

178. Zuni Cruz, *Toward a Pedagogy*, *supra* note 10, at 901.

179. *Id.* (observing that both indigenous law students and those who wish later to serve indigenous communities must be well-schooled in both legal traditions in order to skillfully navigate the "intersections").

180. Still popularly but perhaps pejoratively referred to as "Gypsy." Weyrauch & Bell, *supra* note 133, at 334-35.

181. *Id.* at 332 n.20.

182. *Id.*

183. *Id.*

Another convincing example of how to use indigenous law to contextualize U.S. law comes from a Property class at Drake University. Professor Jerry Anderson compares communal Hmong hunting rights with Wisconsin property law, which places a much greater emphasis on private ownership, in order to help students understand the “bundle of sticks” model for private property and how cultural approaches to property can affect certain “sticks,” such as the right to exclude.<sup>184</sup> In yet another doctrinal subject, Professor Jack Williams of Georgia State University has observed that “[a] study of Indian commercial law in the traditional commercial law class provides a delightful portal into a better understanding of the Anglo-American commercial tradition.”<sup>185</sup>

(a) *Avoiding a Positivist Framework*

One common pitfall in comparative study is to lapse into the seductive practice of positivism—using contrasts to pronounce which system is better, usually because it agrees with the scholar’s own personal or cultural value system.<sup>186</sup> Another is to engage in “wishful thinking” in order to discover surface commonalities that cannot survive close scrutiny.<sup>187</sup> This risk is particularly great when comparing indigenous systems with the purpose of locating a pan-indigenous law or culture, which leading scholars agree would undermine cultural diversity and survival among Native peoples.<sup>188</sup>

For these reasons and many others, critical legal theorists have challenged comparativists to go beyond that discipline’s positivist roots and to delve further into the social underpinnings of contempo-

184. Jerry L. Anderson, *Comparative Perspectives on Property Rights: The Right to Exclude*, 56 J. LEGAL EDUC. 539, 544-45 (2006).

185. Jack F. Williams, *Integrating American Indian Law into the Commercial Law and Bankruptcy Curriculum*, 37 TULSA L. REV. 557, 565 (2001) [hereinafter Williams, *Integrating American Indian Law*].

186. See Hill, *supra* note 134, at 107; see also MENSKI, *supra* note 176, at 150-60 (criticizing the positivist fixation on formal structures and on the divorce of law from its moral context).

187. Hill, *supra* note 134, at 107. Professor Hill provides the example of the post-World War I movement in Europe to use comparative law to bolster a legal unification agenda, which supporters thought would help the cause of the League of Nations. *Id.* at 109. Menski observes that while comparativists should revisit the urge to identify syncretic elements in a simplistic way, the task of forging cross-cultural comparisons is so infinitely complex that it naturally entails some experimentation and even speculation. MENSKI, *supra* note 176, at 67.

188. Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1648 (2000) (“Self-determination for Native American people exists at the tribal level and not at a supratribal level as American Indians. American Indians acknowledge their historical and ancestral linkages through clans and migrations. But the oral histories and traditions of each specific tribe are quite particular and reside as sacred knowledge with members of that tribe.”).

rary legal systems<sup>189</sup> in an effort to understand both the organic cultural influences from the people who comprise the community, but also any “received” law<sup>190</sup> such as systems imposed by colonial powers.

Professor Palmer contends that pragmatic, results-oriented approaches can be balanced with critical concerns about ethnocentrism by adopting a flexible methodology oriented toward the researcher’s goals.<sup>191</sup> He identifies three types of comparativists, who each have different goals for their studies: the academic, the legislative reformer, and the lawyer seeking applications to help resolve a particular legal problem.<sup>192</sup> How much the researcher must balance the need for pragmatic results with the need to account for ethno-social context arguably depends on two primary factors: (1) the intended goal and audience for the study and the limitations of resources like time and money and (2) the availability of ethnographic evidence.<sup>193</sup> According to Palmer, just as a mixed legal culture is possible<sup>194</sup> when a community creates a new legal culture from both original and received law, it is also possible to find a relative peace within the inherently imperfect effort to understand and compare another culture and its institutions.<sup>195</sup> Accordingly, using Palmer’s decisionmaking matrix, the teacher of any comparative study should first identify the goal and audience for the study and the availability of resources to provide ethnographic context.

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189. See Palmer, *supra* note 134, at 264-65.

190. See MASAJI CHIBA, *ASIAN INDIGENOUS LAW: IN INTERACTION WITH RECEIVED LAW* 1-12 (1986) (Masaji Chiba ed., 1986); Zuni Cruz, *Toward a Pedagogy*, *supra* note 10, at 882-85 (describing the dialectic between received/imposed law from colonial and other outside sources and the emergence/resurgence of community-generated indigenous law); see also Aliza Organick & Sarah Sargent, Syllabus, *Comparative Law: Understanding Method and Theory* (Summer 2008) (on file with author; availability subject to permission from original authors).

191. See Palmer, *supra* note 134, at 289.

192. *Id.*

193. See *id.* at 288-90; cf. Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness: [Re]Incorporating Customs and Traditions into Tribal Law*, 1 *TRIBAL L.J.* (2000), [http://tlj.unm.edu/tribal-law-journal/articles/volume\\_1/zuni\\_cruz/index.php](http://tlj.unm.edu/tribal-law-journal/articles/volume_1/zuni_cruz/index.php) (discussing the risks and rewards of decolonizing and reindigenizing tribal law, including the problems inherent in developing a hybrid system and in reducing to writing law that was intended to be maintained and transmitted in oral form).

194. Of course, whether a hybrid system is desirable is another matter beyond the scope of this Article. See generally Christine Zuni Cruz, *Strengthening What Remains*, 7 *KAN. J.L. & PUB. POL’Y* 18 (1997) [hereinafter Zuni Cruz, *Strengthening What Remains*] (arguing that American Indian Nations should seek their own, indigenous solutions to internal legal problems).

195. See Palmer, *supra* note 134, at 276, 289.

(b) *Discerning Indigenous Laws and Institutions from Western or “Received” Examples*

This Article proposes introducing students both to a new model of American federalism and to the study of law through comparative tribal and indigenous examples. What may feel confusing is that the two ideas sometimes intersect and sometimes do not. In other words, learning about law and systems through the three-sovereign lens is sometimes purely a study in Western law, sometimes purely a Western/indigenous comparison, and more often a blend of the two.

The key is to understand that there is a broad spectrum of interaction between indigenous and Western colonial law. On one end, a great deal of laws and systems are directly imposed on tribal communities by the dominant society. In the middle, others are largely Western but are “received”<sup>196</sup> by tribal communities and adopted with varying degrees of customization or even indigenization.<sup>197</sup> The word “received” connotes that the laws or systems were adopted, although there are arguably varying degrees of coercion involved in any such event. On the other end of the spectrum, a myriad of examples are deeply indigenous in that they represent a traditional approach preceding and surviving interaction with colonial constructs. For example, when we compare chthonic<sup>198</sup> approaches to “property” with Western models, as in hunting and fishing rights cases, it is much more likely that we are very close to the “pure” comparative end of the spectrum of teaching possibilities because a chthonic indigenous approach predates and survives contact with Western peoples.

In contrast, when we discuss how federal policies have impacted Native peoples through assimilation, removal, and so on, we are more solidly within the Western paradigm in that the indigenous perspective obviously was not acknowledged or included (and indeed, was targeted for destruction). On that end of the spectrum, the teaching value of the three-sovereign system has less to do with compara-

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196. See CHIBA, *supra* note 190, at 7-9. In his introductory materials, Professor Chiba defines received law within the transnational context as “law which is received by a country from one or more foreign countries,” whether by choice or by force. *Id.* at 7. He also notes that whether indigenous and received law operate in relative harmony or in discord varies greatly from country to country. *Id.* at 8.

197. Native scholars and communities are also exploring how to decolonize their internal law. See Zuni Cruz, *Strengthening What Remains*, *supra* note 194, at 23 (“The challenge Indian nations face today is developing justice systems which are relevant to the people and which meet community needs, and most importantly do not unilaterally substitute Western principles for indigenous concepts.”).

198. The term “chthonic” connotes a worldview with a fundamental orientation toward human relationships with each other, with nature, with the Earth, and with the very cosmos, differing greatly from the materialist perspective of many modern cultures. From a legal perspective, one of the most profound examples is the Western emphasis on individual, rather than community property ownership. See Zuni Cruz, *Toward a Pedagogy*, *supra* note 10, at 871.

tive study and more to do with raising awareness about this nation's legal history. Many of the most useful examples will fall somewhere in the middle. When discussing customary law as a source of law, we can compare indigenous and Western forms of customary law as sources of law to analyze a legal problem, but students can also learn more about how the common law evolves by looking at how customary law is sometimes memorialized in a written, common law format in tribal courts that use many Western legal methods.

In some aspects, the three-sovereign federal model is by its very nature Western and colonial because it is the colonial mindset that places Indigenous peoples in a subordinate role. In other ways, it will always have an indigenous component because Indian nations are not mere political communities; they are also bound by culture, kinship, and so on as aspects of their cultural sovereignty.<sup>199</sup> Cultural sovereignty is inherent and cannot be defined, given, or taken away by outside forces. Of course, it is probably not easy to say that indigenous components are an acknowledged "part of" the three-sovereign system because they have been so greatly attacked, ignored, or marginalized by the national federal system.

## VI. MAJOR APPLICATIONS IN THE LAW CURRICULUM

This Section proposes three essential applications for comparative tribal legal studies. The first is to better understand the United States legal system. The second is to illuminate key legal analytical tools like sources of law and weight of authority. The third is to teach critical thinking, narrative reasoning, and cultural literacy. In all three situations, the audience consists of student attorneys in search of skills that will aid them in what we hope will be a thoughtful, socially engaged, and aware law practice.

### A. *Cautionary Notes*

In the early weeks of law school, it is a victory merely to inform students that American Indian nations exist as political entities<sup>200</sup>

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199. See generally Coffey & Tsosie, *supra* note 15 (describing cultural sovereignty as an alternate basis for conceptualizing tribal sovereignty).

200. See Organick, *supra* note 9, at 858-59.

In spite of the fact that Washburn has offered the seminar class on Native American law over the last several years, it has been an area of law that only few students have been exposed to. One of the first questions I ask my students in the first small group setting is, "Before coming to my class, did you know there was such a thing as a tribal court?" It is rare for even one hand to be raised. I follow that question with, "How many of you know how many tribes reside in the state of Kansas?" Since I came to [Washburn] in the fall of 2004, not one student has been able to answer that question correctly. I emphatically contend that this is not their fault. Before the State of New Mexico required

and have sovereignty. And yet, as discussed earlier, the topic never can be divorced from its historical and cultural context. So far, the way I address this tension is always to caution the students—both in our class discussions and in caveats on my handouts and diagrams—that the cultural and legal representations are necessarily simplistic because the topic is far too complex for the scope of the course. It is important to stress the rights of indigenous communities to strengthen their own traditions, even when those values clash with Western values. In a study of government systems, this topic might arise when explaining that Tribes have rich diversity in their structures and that they do not necessarily follow the three-branch model with separation of powers.<sup>201</sup> When comparing sources of law, which can include both Western customary law and indigenous custom and tradition, teachers need to provide some ethnographic context for the communities involved in the problem.<sup>202</sup> Although this may sound difficult at first, there are good examples from tribal court decisions that take the time to explain the use of customary evidence.<sup>203</sup>

In addition to the need for contextualization, it is also important to know that even a very brief layperson's overview of tribal sovereignty is probably always going to be provocative—or at least surprising—topic for the uninitiated, another byproduct of the ostracization of indigenous history and issues in American education. Like slavery, the history of tribal sovereignty raises deep questions about the United States' colonial past and the role of all three branches of government in the process. In particular, confronting the kind of ethnic and cultural genocide described earlier can be shocking for younger minds, who usually have been taught the more positive aspects of American history, and can even result in a degree of denial. Ultimately, this difficult transition is a valuable step toward developing a more critical and holistic view of the law and its role in the larger concept of "justice." Based on Professor Ford's long experience in integrating federal Indian law into Civil Procedure, it is best to ar-

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that federal Indian law be tested on the state bar exam, I'm not sure how many UNM students could have answered that same question correctly. As a result of the lack of federal Indian law or tribal law in the broader curriculum, students do not realize how many ways, as practitioners in Kansas, they will need to have a basic understanding of federal Indian law and how to practice in a tribal court.

*Id.* (citation omitted).

201. See Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 347 & n.252 (1998) (noting the tensions between Western lawmakers and the need for tribal diversity in sovereign governance).

202. Calleros, *Exploring Racial Context*, *supra* note 137, at 281, 284.

203. One such example is the Yakima wedding trade case discussed below. See *infra* Part VI.C (Sources of Law and Forms of Reasoning).

ticulate from the beginning of the term why she includes that material in the course.<sup>204</sup>

In my legal analysis course, I sometimes begin by laying out the statistics showing the increasing economic impact that Tribes have on the federal and state economies, the fact that almost any legal topic can intersect with Indian law, and some real or hypothetical examples of situations where “ordinary” state and federal law practitioners will likely encounter Native clients or Indian and tribal law issues. I have also grown into discussing the underlying socio-ethno-historical-political context and am still learning how to do so effectively and efficiently.

Finally, because modern tribal sovereignty is still in grave danger from aggressive federal<sup>205</sup> and state<sup>206</sup> governments, newcomers to the field, including our students, need to understand that Native American nations must proceed with caution in testing the bounds of their ability to exercise otherwise sovereign powers. This understanding can aid a student’s introduction to the need to take caution when dealing with clients from other cultures, as lawyers from outside the client’s culture and society sometimes can do more harm than good when presuming to act in their best interests.<sup>207</sup>

204. Ford, *supra* note 4, at 1268-69.

205. See, e.g., Fletcher, *The Supreme Court’s Indian Problem*, *supra* note 62, at 587-93 (arguing that the Supreme Court tends to adopt doctrines designed to carry out federal policies hostile to tribal sovereignty).

206. See CORNTASSEL & WITMER, *supra* note 5, at xv, 4 (describing how the modern practice of “(d)evolving” certain federal trust responsibilities to states forces Native nations to negotiate with them for many of their sovereign rights and also arguing that state leaders tend not to act in “good faith” when attacking Native nations’ rights to govern their own affairs and territories).

207. See Strickland & Valencia-Weber, *supra* note 119, at 155. Professor Strickland provides one particularly vivid and devastating example of the perils of cultural illiteracy in legal practice and scholarship:

The first president of the Association of American Law Schools, James Bradley Thayer, whom we know as a major figure in evidence and constitutional law, was also the leader of a group known as “Friends of the Indians.” All of us know the results of the Friends of the Indians. I did an article, more years ago than the one Gloria quoted, in which I said, “With such friends, who needs enemies?” This was a kind of approach in and out of the academy that said, “We know what is best for the Indian.” And it led to the adoption of the most disastrous allotment programs in history of Indian relations. Angie Debo and Father Francis Paul Prucha went back and looked at this era in their work. They discovered that the Indians were saying all of the disastrous things that have happened would happen if these programs were adopted. Apologists for the “Friends of the Indians” asked how they could have known that allotment would not work. Well, they could have listened. In my own research I located more than 100 petitions and protests written by Indians and Indian tribes which were submitted to the Congress and the Friends of the Indians that said these programs would not work. This was a period in which the academy was a patronizing friend to the native warrior.

*Id.*

*B. Teaching the Three-Sovereign Model as an Introduction  
to the U.S. Legal System*<sup>208</sup>

Using federal Indian law as a comparative teaching tool is especially useful in the areas of federal intergovernmental structural relationships and court systems.<sup>209</sup> The pedagogy Section above discussed how adding additional interjurisdictional relationships to the federal model enhances learning. There is an even deeper reason that can lead to a more profound understanding of these relationships: it is each of the three government's sovereignty (or vestiges thereof) that forms the fundamental basis for their borders, jurisdiction, drive for ethnic, community, or national self-determination, and so on. tribal examples make this dynamic feel real and current: sovereignty is of such vital importance to the survival of Native nations that it provides the richest comparative study with which to sift out what sovereignty means to different players in the federal system and to how the "game" is played.

Legal writing<sup>210</sup> professors and law school orientation curriculum designers are well poised to shape students' early impressions of how Indian nations, citizens, and their laws "rate" within the U.S. federal system.<sup>211</sup> Because the most explicit, discrete discussions of the legal system take place in orientation programs and legal writing classrooms during the first semester, this Section will speak primarily to creating those kinds of introductory modules.<sup>212</sup> Earlier, we discussed

208. Local government is omitted here because it does not enjoy all of the historical hallmarks of sovereignty discussed here (e.g., the innate right of a people to determine their own society, governance, and destiny). While it is true that municipalities share some features such as community self-governance and, in many matters, the threat of state/federal supremacy or hegemony, we do not usually think of municipalities as enjoying the same type of internationally recognized "statehood" as did colonies during the Colonial period and Tribes during the Treaty period.

209. Williams, *Integrating American Indian Law*, *supra* note 185, at 567 (describing the field's usefulness in teaching "sovereignty and the judicial and adjudicatory process").

210. "Legal writing" is used interchangeably here with other descriptors for the sake of variety. The course name "Legal Method" is sometimes adopted to summarize all the components of a classic one-year legal writing curriculum, including analysis, research, writing, and sometimes clinical skills like client interviewing, counseling, and dispute resolution. It is probably a more complete and accurate descriptor than the customary moniker, "legal writing." Cf. Roy M. Mersky, *Legal Research Versus Legal Writing Within the Law School Curriculum*, 99 *LAW LIBR. J.* 395, 396 (2007) ("Legal writing instructors have been forced to embrace legal research, legal writing, remedial writing, basic writing, grammar, legal method, advocacy, counseling, and a whole smorgasbord of other activities.").

211. See SULLIVAN ET AL., *supra* note 95, at 104-11 (noting the crucial role that legal writing courses play in bridging the theory/practice divide and describing how innovations like scaffolding, modeling, peer feedback, and contextual learning have transformed the pedagogy of written legal analysis). Law librarians also deserve praise for helping to build interest in Indian law in legal education. See Strickland & Valencia-Weber, *supra* note 119, at 157.

212. Because the applications presented here are designed to illuminate existing curriculum topics and not to add to them, bridging the indigenous law gap need not overburden an already bursting first-year legal writing curriculum or faculty.

the roots of the modern tribal-federal relationship as based on the colonial doctrine of discovery. To complete a basic understanding of a three-sovereign framework, it is also necessary to consider the relationship between the state and federal governments so that it can be cautiously compared to the tribal-federal dynamic.<sup>213</sup> I argue that the state-federal relationship is based on the tension between the original colonial sovereigns, the states, and the ostensibly limited national sovereign that they created and invested with some of their innate powers—and that while the tribal-federal relationship has different roots, Tribal nations share some important features of a primordial, original sovereign as they relate to legal systems. After examining the state-federal dynamic, this Section addresses how to teach this model in the classroom setting.

### 1. *State and Federal Sovereignty from the Western Perspective*

During the Revolutionary War, the prevailing philosophy, epitomized by Locke and enshrined in the Constitution, was that the power to govern comes from the people themselves and that the government serves at their will.<sup>214</sup> This conception differed greatly from European ideas of sovereignty, which by this time had succumbed to the political philosophy of the Divine Right of Kings. This doctrine, which developed from the ruling elite's opposition to the populist revolutions of the age, posits that the source of all political sovereignty vested in God, rather than in the people.<sup>215</sup>

Despite the colonists' desire for a federal form of government, their experiences in Europe taught them that local control often is less prone to abuses of power. Thus the states determined to retain many important aspects of their original sovereignty, while ceding others to the new, national sovereign.<sup>216</sup> Therefore, when the states ratified the Federal Constitution, they intended to create a federal government with limited powers.<sup>217</sup> When they joined the Un-

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213. There is also an uneasy, complicated, and perhaps even more historically hostile relationship between states and Tribes that goes beyond the scope of this Article. See generally CORNTASSEL & WITMER, *supra* note 5 (analyzing the roots of historical state-tribal tensions in cultural and racial bias); Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73 (2007) (advocating for state and Tribes to enter into a new period of increased cooperation); Aliza Organick & Tonya Kowalski, *From Conflict to Cooperation: State and Tribal Court Relations in the Era of Self-Determination*, 45 COURT REV. 48 (2009) (arguing that it is in the states' interests to forge more cooperative relationships with Native nations).

214. MERRIAM, *supra* note 45, at 159 n.1.

215. See *id.* at 52-62.

216. See *id.* at 160-61.

217. See *id.* at 162 ("The [C]onstitution does not abolish altogether the [s]tate governments; it makes them 'constituent parts of the national sovereignty' and leaves them in possession of 'certain exclusive and very important portions of sovereign power.'" (quoting THE FEDERALIST NO. 9 (Alexander Hamilton))). States were to "retain all the rights of so-

ion, new states retained remaining aspects of the greater sovereign whole.<sup>218</sup> As a result of this new world brand of “divisible sovereignty,”<sup>219</sup> states ostensibly have all general sovereign powers not ceded to the federal government, and in many respects their courts behave like courts of general jurisdiction, not strictly limited like their federal counterparts.<sup>220</sup>

Merriam traces the evolution of American-style sovereignty after this period, when it began to take on a more nationalistic flavor in order to survive the conflict with the South during the Civil War.<sup>221</sup> Merriam argues that since then, sovereignty cannot reasonably be divided and truly rests not in the states or in their individual citizens, but in American society as a whole.<sup>222</sup> Perhaps this change in philosophy, which seems to have occurred during the Spring of Nations, is the reason we see such a strong centralized government today despite its foundation in the notion of a divided, popular sovereignty.

From a Western and international law perspective, modern sovereignty since the seventeenth century has several traditional hallmarks, all of which now are being challenged by globalization. In addition to control by a single political authority, “[s]overeign states have four characteristics, three of which are negotiable: territory, population, a government with control over the territory and population, and international recognition. In practice, only international recognition is non-negotiable.”<sup>223</sup> Scholars contend that modern sovereignty is now being forced to bend under pressure from changing international political philosophies. For example, the international community increasingly recognizes the right to intervene in human rights catastrophes. Further, globalization permeates borders with open markets, plural societies, and rapidly evolving technology.<sup>224</sup>

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vereignty which they before had, and which were not, by that act, exclusively delegated to the United States.’” *Id.* (quoting THE FEDERALIST NO. 32 (Alexander Hamilton)).

218. *Id.* at 163.

219. *See id.* (noting that the idea of a divided sovereignty between the nation and its member states was early acknowledged by the Supreme Court, most clearly in *Chisolm v. Georgia*, 2 U.S. 419, 435-36 (1793)).

220. In the sense that the states and federal government can be considered one, divided sovereign instead of two, the “three-sovereign system” may be a misnomer, but it is probably still a helpful one for students because in practicality, they still are working with three very distinct types of governments. *See* O’Connor, *supra* note 118.

221. MERRIAM, *supra* note 45, at 171-80.

222. *See id.* at 180-82.

223. MARYANN CUSIMANO LOVE, *BEYOND SOVEREIGNTY: ISSUES FOR A GLOBAL AGENDA* 3 (2d ed. 2003).

224. *See id.* at 14-15.

## 2. *Teaching the Three-Sovereign Model*

Tribal communities in the United States have a unique kind of political sovereignty, with some parallels to the state/federal sovereign but also with many fascinating distinctions.<sup>225</sup> While they do not enjoy the modern, international model of sovereignty as a separate state, they possess many integral aspects of nationhood that remain very important in advocating for their political right to exist as peoples.<sup>226</sup> Thus, teaching the federal system to law students goes beyond high-school level civics lessons about the three branches of government and separation of powers. Instead, while there is some basic review on concepts like the separation of powers, the emphasis lies on the interplay between government structures and the court systems in the new context of the litigation process.<sup>227</sup> Teaching these topics within the conceptual framework of sovereignty<sup>228</sup> helps to explain why there are separate governments and court systems and when the path of appellate review must cross from one sovereign's courts to another. It can also show how the struggle for self-determination creates these boundaries.

Before going further into the benefits of comparing the relationship between states, Tribes, and the federal government, please note that narrower attempts to compare states and Tribes are fraught with pitfalls but that explaining them to students is part of what makes the three-government model so instructive. While it is fair to invoke the state/tribal comparison in some situations, it also falls apart in others and can even cause harm to Tribal peoples. While Tribes have inherent sovereignty as peoples and the historical evidence to claim a sovereignty closer to modern statehood, the reality is that their political sovereignty has been usurped over time by Congress and the Supreme Court. Thus, while it is commonly agreed among Indian law scholars<sup>229</sup> and Native American nations<sup>230</sup> that

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225. See generally WILKINSON, *supra* note 122, at 241-303 (providing a big-picture overview of the evolving nature of tribal sovereignty today).

226. See Robert Odawi Porter, *Conceptions of Indigenous Sovereignty*, in SOVEREIGNTY, COLONIALISM AND THE INDIGENOUS NATIONS: A READER 3 (Robert Odawi Porter ed., 2005).

227. See, e.g., CALLEROS, *supra* note 129, at 13-26 (teaching the legal system in terms of the three branches as sources of law and in terms of court structures as paths of review); LINDA H. EDWARDS, LEGAL WRITING & ANALYSIS 13-28 (2003) (same); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE 3-14 (5th ed. 2005) (same).

228. By suggesting that sovereignty is the most helpful organizing principle in this early stage of legal education does not mean that I condone the positivist view that the law itself is a product of sovereign will and not the natural law of the people. See ANGHIE, *supra* note 27, at 40-52 (contrasting naturalist, humanist, and positivist jurisprudence).

229. See Robert Laurence, *The Unseemly Nature of Reservation Diminishment by Judicial, as Opposed to Legislative, Fiat and the Ironic Role of the Indian Civil Rights Act in Limiting Both*, 71 N.D. L. REV. 393, 393 (1995).

those nations ideally should be considered distinct peoples with the right to self-determination under international law,<sup>231</sup> it is also understood that the power to exercise that sovereignty does not exist at this time in its rightful form. Instead, it is severely constricted by a confusing and inconsistent maze of statutes, regulations, and judicial doctrines developed during disparate periods of colonial history.<sup>232</sup> Accordingly, Professor Goldberg warns that while the state comparison is often used by Indian law professors to demonstrate that Tribes should share similar sovereign powers, it has been used detrimentally by the Supreme Court to impose the doctrine of federal plenary power over Indian Tribes.<sup>233</sup>

Fortunately, we do not need to make harmful generalizations in order to use the three-sovereign model as a teaching tool. Comparing states and Tribes helps students to understand general versus limited powers by identifying a very broad pattern: those sovereigns that have general, residual powers (no matter how eroded in modern times) are those that “came before.” We see this idea expressed consistently among such varied groups from “states’ rights” proponents to members of indigenous communities. The fundamental premise is that of a community’s right to self-determination, which forms one of the core principles of contemporary international law,<sup>234</sup> even in the face of globalization.

Of those governments with innate sovereignty—the Tribes in particular and also the states—we see the tendency toward retained powers such as the creations of government, including courts, as well as general jurisdiction in the courts as compared to the federal government, although some troubling dicta from the Supreme Court suggests that tribal courts’ freedom to assert their rightful general jurisdiction is under threat.<sup>235</sup> Just as the original colonial sove-

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230. This Article does not address the unique situation of Alaskan Native communities, which more often have a corporate-style structure imposed upon them, *see* CLINTON ET AL., *supra* note 5, at 143, or Hawaiian peoples, who are still debating whether obtaining federal recognition and domestic dependent nation status would serve them or harm them. *See generally* David Keanu Sai, *A Slippery Path Towards Hawaiian Indigeneity: An Analysis and Comparison Between Hawaiian State Sovereignty and Hawaiian Indigeneity and Its Use and Practice in Hawai‘i Today*, 10 J.L. & SOC. CHALLENGES 68 (2008) (examining the recent movement toward Hawaiian “tribal” sovereignty as problematic, given Hawai‘i’s internationally recognized sovereign status as late as the 1840s).

231. *See, e.g.*, WILKINS, *supra* note 28, at 25-27.

232. *See generally id.* (exploring the various historical Supreme Court doctrines in federal Indian law as “masks” for furthering federal antitribal initiatives over the years).

233. Carole Goldberg, *Critique by Comparison in Federal Indian Law*, 82 N.D. L. REV. 719, 727-35 (2006).

234. ANGHIE, *supra* note 27, at 35, 196 (explaining that the United Nations adopted the doctrine of self-determination to aid the process of decolonization beginning in the 1960s and 1970s).

235. The notion of tribal courts as courts of general jurisdiction was criticized by Justice Scalia’s majority opinion for *Nevada v. Hicks*, a case denying tribal court jurisdiction

reigns, the states, have the right to establish their own court systems in the manner they see fit, Tribal nations have the power to create their own courts by an internal legislative act or by constitution. A small number of Tribal nations also choose not to adopt a law and order code or a traditional model and instead use the late nineteenth century federal model called the Courts of Indian Offenses.<sup>236</sup> In contrast, the federal government is limited in its judicial design by the Constitution.

To make the contrast even more vivid, students are often surprised to learn that Native American nations also have the power *not* to create a Western-style court system, sometimes choosing instead to keep traditional dispute resolution systems outside of the modern government structure or even to revitalize traditional methods as an alternative to (or improvement upon) models preferred by the dominant society.<sup>237</sup> This freedom enhances any discussion of modern sovereignty and self-determination by showing the primacy of the people themselves in creating their own governing structures.<sup>238</sup> The healthy diversity in tribal examples also provides a unique and more historically accurate jumping-off point for introducing other justice models, such as modern American forms of alternative dispute resolution, which have some origins in Native North American societies.<sup>239</sup>

To summarize, when students understand the fundamental differences between different types of sovereigns, the reasons why judicial models may differ from jurisdiction to jurisdiction is not so difficult for students to grasp—those that “came before” have much more power to creatively design solutions that work for their people. Those that are created by other sovereigns may be more constrained. Moreover, students can take note of the role of a constitution in establishing the framework in the state and federal systems versus those Tri-

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when Nevada officers completed a search on Fallon Paiute-Shoshone reservation trust lands. *Nevada v. Hicks*, 533 U.S. 353, 367 & n.8 (2001). Nevertheless, the Court’s discussion of tribal general jurisdiction, which appears to be dicta, focused on legislative restriction on tribal criminal jurisdiction over nonmembers and concluded that when jurisdiction is restricted in certain areas, it cannot be general. *Id.* The Court’s discussion does not take into account tribal courts’ inherent jurisdiction over general tribal matters that have not been legislated away, which has much more in common with state jurisdiction (which, by the way, also has many areas legislated away by federal law) than with federal jurisdiction. *See id.*

236. Courts of Indian Offenses were created by the Bureau of Indian Affairs and enshrined in the Code of Federal Regulations in order to enforce a Code of Indian Offenses, which originally attacked many traditional ways of life. CLINTON ET AL., *supra* note 5, at 340. The tribes that use CFR/COI Courts are listed at 25 C.F.R. § 11.100(a) (2009).

237. Zuni Cruz, *Strengthening What Remains*, *supra* note 194, at 18-19.

238. *Cf. id.* at 18 (arguing that by virtue of their inherent sovereignty, Indigenous peoples have the power to design their own systems of law and government consistent with their cultural values).

239. JEROME T. BARRETT & JOSEPH P. BARRETT, A HISTORY OF ALTERNATIVE DISPUTE RESOLUTION: THE STORY OF A POLITICAL, CULTURAL, AND SOCIAL MOVEMENT 43-44 (2004).

bes that, whether by outside influence or as an exercise of self-determination, chose not to use a constitutional model.

It is not critical for the instructor to immediately understand all of the details about different types of tribal legal models and their origins in the complex history of federal regulation, including the often surprising information that not all tribal governments use a separation of powers model.<sup>240</sup> The key point is that nations, whether federal, state, indigenous, or another nation-state, should enjoy the power to choose for themselves. Gaps in understanding can actually serve enculturation into the profession by demonstrating that lawyers are not expected to be experts in most legal topics, only in the skills needed to solve problems and to advocate.

### C. Sources of Law and Forms of Reasoning

Because students traditionally are indoctrinated with case law theory in their other first-year courses, they often develop a skewed perspective of which law controls a given problem. Understandably, they draw the inference that the study of precedent is more important than statutes, regulations, and other authorities. In fact, first-term law students barely register those other forms on their radars, particularly such overlooked forms as customary reasoning. Thus the casebook method inadvertently trains students habitually to overlook binding authorities:

Although training in legal research and writing is an accepted part of the first-year curriculum, few students learn transnational legal research in their first year. Nor do they learn alternative conceptions of source material. The “provincial” overemphasis on decisional law at the expense of statutes and scholarship has been extensively critiqued over the decades in these pages and elsewhere. To build on this critique, one might repeat that methodological provincialism can fail a lawyer who would do better as an advocate, a few years later, with the help of these alternative routes to a favorable outcome.<sup>241</sup>

Many professors who teach legal methods courses are working to bridge the gap by introducing statutes and regulations earlier in the first-year curriculum. Once again, domestic comparative study provides a basis for a more intuitive understanding of the all the different sources of applicable law. By teaching to the three-sovereign model, one single comparative system provides every kind of primary law source under one roof. Not only do Native American nations have

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240. See CLINTON ET AL., *supra* note 5, at 360-61.

241. Bernstein, *supra* note 98, at 585-86 (citations omitted).

their own constitutions, codes, regulations and case law,<sup>242</sup> they are also governed or impacted by federal and state laws and regulations and are parties to international agreements in the form of treaties with the federal government.

The tribal example also provides a fascinating window into the very creation of law and legal institutions. As Professor Blumenfeld notes, opening the world of tribal court decisions to law students highlights the importance of a community's right to self-determination and its need for law that meets local priorities and values. This approach "can lead to an interesting and eye-opening comparative analysis of some fundamental principles of legal method that we commonly teach in a more limited way in a legal writing class."<sup>243</sup> For example, although a number of tribal communities have comprehensive, Western-style written codes,<sup>244</sup> many others are in an explosively creative period of code writing. Many others may have chosen not to commit too many societal rules to writing and instead rely upon oral tradition to form their body of law. Still others may adopt a hybrid system by choice or by the necessity of dealing with a society fractured between assimilated members and traditional members, for lack of better terms.<sup>245</sup> As with all things indigenous, the diversity is too rich to constrict to Westernized models.

Perhaps the most vivid example supplied by a comparative study of sources of law is customary law, a pervasive but typically overlooked form of law and reasoning in the Anglo system. In her popular text, Linda Edwards identifies several types of legal reasoning commonly used by lawyers, depending on the source of law around which the reasoning revolves: rule, case analogy, policy, social principle, social custom, and narrative.<sup>246</sup> Forms like principle, custom, and narrative are less often discussed or even recognized in law school or

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242. Any generalization about tribal structures or culture is always a gross generalization subject to myriad exceptions. I have tried to limit my use of generalizations or to explain them, but the amount of detail required to do so with scholarly precision would vastly exceed the scope of this Article and may not even ultimately be achievable from a cross-cultural standpoint.

243. Calleros, *Exploring Racial Context*, *supra* note 137, at 285.

244. *See, e.g.*, Tribal Law & Policy Institute, Tribal Court Clearinghouse: Tribal Laws/Codes, <http://www.tribal-institute.org/lists/codes.htm> (last visited Nov. 30, 2009).

245. *See* Zuni Cruz, *Strengthening What Remains*, *supra* note 194, at 19-22.

246. EDWARDS, *supra* note 227, at 55-62. According to Edwards, rule-based reasoning argues for an outcome based on a binding legal provision, such as a statute or judicial holding, *id.* at 55-56; analogical reasoning contends that a matter should be resolved based on how it compares to the facts and holding in other cases, *id.* at 56-58; policy-based reasoning influences the decisionmaker that the proposed outcome is the better one for societal interests (e.g., the economy), *id.* at 58-59; principle-based reasoning invokes equitable concerns like "morality, justice, fair-play, equality, democracy, or personal freedom," *id.* at 59; custom-based reasoning sounds in cultural behavioral norms, *id.* at 59-60; and narrative reasoning uses time-honored storytelling techniques to compel the reader to intuit the "right" result, *id.* at 60-62.

practice, so they can be difficult for students to grasp. Once again, tribal law provides a helpful comparative domestic system for understanding the outer boundaries and uses of customary law.

Customary law, as distinguished from international customary law, is defined by socially understood, uncodified behavioral norms.<sup>247</sup> In modern jurisprudence, customary law typically comes into play in interpreting U.S. constitutional law,<sup>248</sup> in creating international law,<sup>249</sup> or in filling in gaps in the domestic law where statutory and common law have not yet spoken. By their very definition, customary rules have a long history of adoption and practice by the wider community. From a legal standpoint, “[s]uch norms become law as a result of uniform practice or acceptance and, at least theoretically, become law even before an authoritative or juridical body has an opportunity to assess their status as law.”<sup>250</sup>

For example, a jurisdiction without codified traffic rules might rely on customary rules for behavior at four-way intersections in a lawsuit between actors in an automobile collision.<sup>251</sup> In the Edwards text, the author provides the example of a minor who buys a used car and later seeks to avoid the contract. In the absence of a clear statute or common law rule, the court might adopt as the law of the case a customary rule that adults do not engage in arms-length bargains with minors, but rather with their parents or guardians.<sup>252</sup>

Lawyers and law professors alike often underestimate the role of customary law in Western society, as well as its importance to everyday legal decisions—and thus to law practice. As Professors Weyrauch and Bell describe, customary law rarely is expressly cited in any Western opinion, but is used often, usually to correct the unpalatable results that come from a forced and legalistic application of settled law.<sup>253</sup> The court may use flexible legal tools like the abuse of discretion standard or canons of construction to inject the more humane, common-sense expectations of the community into the result. This process takes place on a relatively instinctive level: “Appellate judges may not even be aware that this is their source of law.”<sup>254</sup>

These examples seem clear enough, but today, prolific codification and pervasive electronic access to both published and unpublished

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247. LON L. FULLER, ANATOMY OF THE LAW 71 (1968).

248. See Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57, 61-62 (2007) [hereinafter Fletcher, *Rethinking Customary Law*].

249. E.g., Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119, 127 (2007).

250. *Id.*

251. *Id.*

252. EDWARDS, *supra* note 227, at 60.

253. Weyrauch & Bell, *supra* note 133, at 330.

254. *Id.*

case law make it difficult to convince students that they ever will need to understand or apply customary law. Tribal law provides a fascinating modern example of customary law in frequent use. By teaching customary law, our students can learn to read case decisions and other primary sources more critically.

In my class, I sometimes supplement textbook readings on legal reasoning with a customary law exercise borrowed from Justin Richland and Sarah Deer's college-level textbook, *Introduction to Tribal Legal Studies*.<sup>255</sup> There, the authors use a succinct judicial opinion from the Yakima Nation Tribal Court about a traditional Yakima Nation wedding. The exercise is intended to illustrate how both written rules and indigenous "custom and tradition"<sup>256</sup> are used as forms of legal reasoning to decide modern cases—even where the nation's written code already has spoken.

In *Marriage of Napyer*, the Yakima Nation Tribal Court validated the traditional marriage of Helen Sohappy Napyer and Louis Napyer, Sr., finding that the couple's family representatives completed the recognized components of a Yakima wedding trade, including the exchange of traditional suitcases, clothing, meals, dishes, and roots.<sup>257</sup> The customary law was proved through the testimony of a recognized tribal elder.<sup>258</sup> A code provision allowed the court to elect to apply customary law in place of a conflicting tribal statute on the validity of marriages.<sup>259</sup>

In one class, I asked my students to reflect on the following questions about sources of law in the *Napyer* case and to write a succinct paragraph in response:

The tribal court found sources of applicable law in the tribal code and in tribal custom and tradition. How did the court go about determining the nature of the customary law? Why did the court favor custom as the governing law in this case? From what source of law did the court derive its authority to choose customary law over

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255. See RICHLAND & DEER, *supra* note 46, at 302-03. The usefulness of this case to teach customary law also was noted in passing by Professor Jack Williams of Georgia State University College of Law, who uses other tribal court cases to reveal the role of customary law in Anglo-American commercial law. Williams, *Integrating American Indian Law*, *supra* note 185, at 568 & n.81.

256. In tribal law, tradition is distinguished from custom. While custom is a set of long-held behaviors or practices recognized and practiced by a community, tradition refers more specifically to dispute resolution methods and methods for transmitting the law from generation to generation, often orally. Zuni Cruz, *Strengthening What Remains*, *supra* note 194, at 22-23.

257. In re the Marriage of Napyer, 19 INDIAN L. REV. 6078, 6078 (1992).

258. *Id.*

259. Some tribal codes prefer customary law to codified law while others prohibit its use. Fletcher, *Rethinking Customary Law*, *supra* note 248, at 65. Still others may leave the source of law to judicial discretion.

codified law? In a future case, could the same court use the *Napier* decision as a source of law? What kind of law would it be?<sup>260</sup>

Most of the students, now in their third week of law school counting orientation, ably described that the customary law came from the testimony of a tribal elder. This led to an interesting discussion about how not all sources are written, even in modern Western jurisprudence. Some are oral, such as in this tribal court example; others are understood implicitly among members of society and may be proved by historical example or even by a sort of judicial notice.

In the third question, students then were challenged to explore the interplay between sources. Almost all identified the Code as the source of the very authority that the court later used to contradict it. The last question was designed to see if students could identify the case decision as a source of law itself.

In hindsight, it might be even more productive to work in still more examples of legal reasoning from the Edwards book.<sup>261</sup> For example, there was a clear line of reasoning by the principle at play when the court made an implicit determination that customary law is inherently superior to rule-based law because it promotes the cultural continuity of the people. Moreover, policy reasoning arguably also was at work in that the court questioned in dicta whether the code provision could be enforced when it violated federal statutes.

This question could have been made better and less directive, allowing the students to make more of the connections on their own, by instead informing the students that they were being challenged to detect different forms of legal reasoning at work in the opinion and asking them to name one example of each. This was the first year that I assigned a written exercise based on the reading and was uncertain about whether students would be distracted by the tribal law aspect. But placing the discussion in a legal context different from—but relevant to—the state/federal paradigm actually seemed to make the subject more exciting, which anecdotally confirms Professor Weyrauch's observation.<sup>262</sup>

To conclude, our class could have explored the intersections between customary and other types of reasoning in an Anglo-American case, but the epiphany that several types of legal reasoning can take place in the same opinion probably would not have been as interesting. The new context and comparative example gave the material a fresh feeling.

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260. On file with author.

261. See EDWARDS, *supra* note 227, at 55-62 (identifying the six different types of legal reasoning discussed near the beginning of this Section).

262. See Weyrauch & Bell, *supra* note 133 (observing that students are often more stimulated by tribal comparative law than by Western comparative examples).

In the coming years, I plan to add an extra step because I fear that leaving the exercise solely in the tribal context may unduly exoticize the material for newer law students; they may come away thinking that customary reasoning really only takes place in the tribal context and is not something they really will have to worry about much at all in practice. I plan now to ask the students to identify the types of reasoning in two cases, one Anglo and one tribal. The Anglo case will contain at least one arguable example of customary reasoning. By studying the two cases together, the exercise should realize the comparative potential. It is not necessary to say that the same type of customary reasoning is at work in both cases; that will never be true. As with any comparative study, the community values underlying the customs probably will be very different. That difference makes the inquiry all the more fascinating, increasing the likelihood of learning and retention. For example, Professor Williams noted that when he teaches commercial law, he points to the harmonizing orientation in tribal court opinions:

[T]ribal courts seek to repair relationships even in the commercial context. Thus it is not unusual to witness a tribal court order a party to apologize, to ask for [forgiveness], and to make restitution. Common to most Indian tribes is the heartfelt belief that no individual, and by extension no commercial activity, is more important than the harmony of life.<sup>263</sup>

Here, it would be both fruitless and unnecessary to idealize that the same values that underscored the validation of the *Napyer* marriage—which include the very survival of a culture and people—are the same as would underscore the need to protect minors in the Western culture from the consequences of a disparate capacity to bargain at arm's length.

The *Napyer* exercise can be extended to build critical reading skills into the lesson. In another written question, I ask the students to think about the *Napyer* case and to distinguish between what parts of the decision come from customary law and what parts come from statutes, including the provision allowing the court to consider customary law in the first place. I also ask them to comment on whether the court should use customary reasoning when there is a suitable written code provision in place. This can lead to an interesting discussion about societal values. For example, speaking overly generally, Western or Westernized legal systems may place a premium on written law—perhaps because it can be ascertained by a comparably very large and presumably diverse population—while indigenous societies, often also plural on a smaller scale, may better value orally transmitted law or traditional practices because they

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263. Williams, *Integrating American Indian Law*, *supra* note 185, at 569.

play an important role in that community's efforts to survive with its culture, language, values, and lineage intact.

While it may sound complex and involved, the entire discussion of customary law might take only about twenty minutes, divided between two class periods devoted to introducing legal reasoning. The students should only spend about twenty to thirty minutes on the exercise. Most class time is spent on rules and analogies, a moderate portion on policy, and the smallest increments on custom, principle, and narrative.

In summary, using tribal law examples to demonstrate a modern, domestic use for customary law opens students to the possibility that sources of law can derive from places beyond cases, statutes, and regulations. By taking off the blinders of Anglo-Saxon jurisprudence early, in the first few weeks of legal education, we may increase the chances that students will develop a category for deeper, original thinking and problem solving.

In the first semester of legal writing, which usually focuses on objective analysis for purposes of advising a client, the student can consider what would happen if a client had a problem that had not yet been addressed by statute or case law or was still so little explored that the law was unsettled. It is not hard to envision such a situation in the new frontier of cyberspace, for example.<sup>264</sup> As the consulting attorney, where can the student turn for authority after laying the necessary groundwork in existing written law? After completing this exercise, one might see that a possible avenue is to look to the usage in that community.

#### D. *Selection of Authority and the Path of Review*

Novice law students often are flummoxed by the notion that the U.S. Supreme Court cannot decide every single legal issue within its borders with finality—that it must defer to other courts in some cases. The confusion about which courts can review which matters leads to difficulty in selecting authorities—for example, in determining which court's case law is binding versus merely persuasive. Traditionally, we ask students merely to memorize the axiom that state courts have the "last word" on issues of state law and the federal courts are the ones finally to decide issues of federal law. But we do not often challenge them to understand *why* our federal system oper-

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264. See PRZEMYSŁAW PAUL POLANSKI, CUSTOMARY LAW OF THE INTERNET: IN THE SEARCH FOR A SUPRANATIONAL CYBERSPACE LAW 111-18, 137-41 (2007); see also Scott Glover & P.J. Huffstutter, *Alleged MySpace 'Cyber-Bully' Indicted in Teen's Suicide*, L.A. TIMES, May 16, 2008, at B1 (reporting a notorious, recent cyber-bullying case that resulted in a teen's suicide and raised difficult questions about the application of statutes that did not contemplate this novel situation).

ates in this way, which, in our example, would empower them to reason through the authority selection problem independently.

In the first week of my class, I sometimes ask students to perform two short exercises designed to illustrate why this is so. I decided to compare a state/federal example to a tribal/federal example. I introduce the tribal example first because students usually come to this comparative law example with few preconceived notions about the answer or how the intersovereign relationship should work.

In the tribal-federal example, which is borrowed from Professors Clinton, Goldberg, and Tsosie, I asked students to read short excerpts from two cases lying at the foundation of the tribal-federal relationship, *Talton v. Mayes*<sup>265</sup> and *United States v. Wheeler*,<sup>266</sup> as well as the quote about sovereignty from Dagmar Thorpe above.<sup>267</sup> In those cases, the Court looked at tribal histories and recognized Tribes' status as independent, foreign nations with the power to decide their own internal matters despite the threat of hegemony from state or U.S. law.<sup>268</sup> In *Talton*, the Court held that the Cherokee (Tsalagi) Nation was not subject to the Grand Jury requirements of the Fifth Amendment to the U.S. Constitution. The question posed asked the students to think about the commonalities among all the authorities and to synthesize a principle:<sup>269</sup> *To what extent do the holdings and rationale in Talton and Wheeler support the descriptions of tribal sovereignty provided by the Mohawk Nation Council of Chiefs and Dagmar Thorpe?*<sup>270</sup>

Students routinely identified sovereignty as the governing principle in the Court's decisions not to impose state or federal law on the Tribe's decisionmaking process, regardless of their later grade performance in the course. Compare these two responses from students who later performed at opposite ends of the curve in the course:

The Nation believed that their sovereignty was from their Creator, and no one had the right to rule them. Their sovereignty could not be removed or given away to others. They had a right to create their laws to govern their people and property without outside interference. The U.S. Courts recognized these inherent powers that existed prior to the Constitution, and concluded that these powers should still be exercised by individual Nations.

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265. 163 U.S. 376 (1896).

266. 435 U.S. 313 (1978).

267. Thorpe, *supra* note 40.

268. The idea to juxtapose these three sources comes directly from the introduction to tribal sovereignty in CLINTON ET AL., *supra* note 5, at 219-30.

269. In this aspect, the exercise also starts to prepare students in the first week to think about distilling abstract principles from multiple sources in the process most legal writing professors refer to as the synthesis of a rule from multiple authorities.

270. The question posed also comes from CLINTON ET AL., *supra* note 5, at 220.

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Both cases look at the issue of tribal sovereignty and the ability of the tribes to infer judgment. They both seem to look at the history of the tribes, and the fact that they previously had sovereignty in these areas, and [that] not by implicitly or explicitly relinquishing this right, they maintain it. The parallels between these two cases and the Mohawk Nation Council of Chiefs and Dagmar Thorpe seems to hinge on the idea that they are a sovereign nation, granted these rights by a creator, and that these rights have not been abandoned. Therefore the rights are retained.

It is difficult to distinguish between the two answers. This was characteristic of the class's performance throughout the rest of the year on issues of selecting authority based on which sovereign's internal interests were at stake.

In the state/federal example, students were asked to read selections from the Johns & Perschbacher tome, *The United States Legal System: An Introduction*,<sup>271</sup> a text they are assigned for their orientation week program. The selections consist of a short reading on "multiple sovereignties" in the federal system, namely, the state and federal sovereigns. Then they were asked to answer a question designed to draw out the proper path of appeal. In the question, the California Supreme Court holds that a California statute requiring parental consent for abortion violates the California Constitution, which is broader than the Federal Constitution. Students are asked whether the California Attorney General can appeal the decision to the U.S. Supreme Court.<sup>272</sup> The answer requires them to determine whether they have encountered a state or federal issue and then to identify the path of appeal.

In their responses, students implicitly are being asked to incorporate their reading about sovereignty. On only their second day of class in law school, fifteen of the twenty students in the class answered the question correctly, reasoning that the California Supreme Court must make the final decision because (1) the laws of its sovereign were implicated; and (2) the Supremacy Clause was not triggered because California's Constitution offered the broader protection. For example, these responses come from a high-performing student and an average-performing student:

Unless said abortion practices violate federal law, the United States Supreme Court would not hear this case. State governments are considered sovereign and free to draft their [own] laws so long as the law does not conflict with federal laws. For this case

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271. MARGARET Z. JOHNS & REX R. PERSCHBACHER, *THE UNITED STATES LEGAL SYSTEM: AN INTRODUCTION* (2002).

272. *Id.* at 103.

to be heard by the US Supreme Court, the abortion practices would have to be outlawed by federal law. If this was the case, the federal government could apply the Supremacy Clause to preempt California from drafting such a law.

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I felt [at] first that the supremacy clause, which gives the federal government the ability to supersede state law over specific federal matters, would apply. . . . I reexamined from the text how the federal government received its powers. The states gave the power to the federal government over specific matters. Abortion would seem like a state matter . . . thus the state supreme court is the highest court that should [hear] this case . . . .

We followed these two exercises in class with a discussion about how sovereignty operates as the fundamental principle in deciding which court has the “last word” on the law of a particular land.<sup>273</sup> From a purely experiential viewpoint that is difficult to measure objectively, students seemed to perform better over the previous year in their ability to select and apply the proper binding source. For example, the previous year, students had some difficulty choosing between a federal and state statute as the binding authority for an attorney fee question arising from a state law cause of action under the Kansas Uniform Commercial Code.<sup>274</sup> We had to spend a considerable amount of time reviewing the rote material from the textbook in class. The following year, after the comparative example, no such problems were noted even in early memos, and some students even routinely added parenthetical explanations regarding the weight of authority when using persuasive sources in their open research memos.

When students receive more examples of how sovereigns evolved in the federal system, they can exercise critical thinking to identify patterns and construct for themselves the basic framework for American federalism: that states and Native American nations “came before” and therefore, their political sovereignty theoretically should be general, with limitations to be given up voluntarily—by ratification

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273. In appeals from tribal courts on federal issues, the federal district courts often apply a tribal abstention or exhaustion doctrine, often inconsistently and problematically. *See generally* Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN. L. REV. 241 (1998) (exploring the tribal court abstention/exhaustion doctrine generally).

274. It is possible that in the fall semester students may have been confused as to the state-law basis for any “uniform” act, but the secondary status of uniform and model laws already was discussed thoroughly in class in research exercises on secondary sources and in the introduction to reading statutes, which used the Kansas Commercial Code in an effort to streamline exercises with the current writing assignment.

or treaty—or, in the case of Tribal nations, chipped away by force.<sup>275</sup> This principle helps to identify when *state* courts usually will have general, not limited, jurisdiction and which primary authorities govern a problem.

For example, it is because the states and Tribes are sovereign that their internal courts alone have the authority to decide matters purely of intrastate or intratribal concern. The Kansas Supreme Court alone can say decisively what the Kansas Constitution means; the U.S. Supreme Court cannot. And, assuming the system functions properly, only the Navajo Supreme Court can say with finality what its own code provisions mean. Viewed another way, which sovereign's court system has final authority in a given matter versus the federal government depends on whether it involves the interpretation of federal law. By contrast, because the states and Tribes both have general powers over their internal affairs, jurisdiction and choice of law in disputes between the two is much more complicated.

In review, once the learning group establishes some definitions for sovereignty, it can explore details that will help it to determine the weight of authority. For example, using principles of sovereignty, students can now evaluate which jurisdiction has the “last word” on a given legal issue from a place of philosophical and political understanding rather than by sheer, rote memorization. The lines are not always clear: constant tension exists among and between all three sovereign types, as well as among the many individual sovereigns themselves, e.g., interstate and intertribal disputes. But students are better prepared to identify those complex issues and to exercise professional judgment about what law applies.

#### *E. Cultural Literacy Skills, Case Theory, and Narrative Reasoning*

Because earlier Sections of this Article addressed how comparative tribal legal studies enhance cultural literacy, this Section will focus more narrowly on the role of tribal and Indian law writing assignments as tools for teaching the cultural literacy component of professional skills courses. In those legal methods courses that also incorporate other simulated clinical components like client counseling, negotiation, and so on, the opportunities for training in cross-cultural awareness are even greater. Moreover, a problem containing cultural diversity issues creates an excellent springboard for teaching audience considerations in professional letter writing.

Of course, it is not necessary to use a tribal law or Indian law problem in order to carry out this goal, but such assignments offer

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275. This point is not intended to condone the historical use of a “state’s rights” argument to oppose federal civil rights initiatives, but rather to identify the roots of such movements, benign or not, in original sovereignty.

the added benefit of learning through domestic comparative examples. Professor Blumenfeld explores some of the reasons why.<sup>276</sup> First, because legal writing courses use contextual learning, they provide the time to deeply explore one very narrow question within its social context.<sup>277</sup> Because federal Indian law is such a complex topic, other first-year courses can only reasonably introduce the topic in much smaller servings—usually simplified out of necessity. Thus, legal writing is one of the best courses for introducing federal Indian law during the first year.

As an added benefit, students tend to become more engaged in the issues presented in long-term, rather than short-term projects<sup>278</sup> because, like any lawyer immersed in a case, they become experts on that narrow topic. Therefore, it is more likely that students who write on federal Indian law in their first-year legal method courses will become interested in taking upper-level courses in that area<sup>279</sup>—another way to ameliorate the marginalization of Indian law in education and in our collective legal consciousness.

Cases with diverse cultural contexts can also teach important communication skills for working with clients. Such a case framed within a federal Indian law problem can simultaneously teach students not only about cultural literacy in client representation and case development, but also about the three-sovereign nature of the federal legal system and how it works in reality. How to develop a federal Indian law problem for cultural literacy and other pedagogical goals has already been addressed in at least two articles,<sup>280</sup> and those lessons will not be repeated here.

When developing the cultural literacy component of a writing problem, it is important to incorporate some history and evidence of the different players' cultural reference points.<sup>281</sup> When there is sufficient evidence of the social, cultural, and racial considerations behind the different actors' beliefs and actions, students can learn how narr-

276. See Blumenfeld, *supra* note 6, at 506-12.

277. See *id.* at 506.

278. See *id.* at 507 & n.14.

279. See *id.*

280. See *id.* at 508-19; Calleros, *Exploring Racial Context*, *supra* note 137, at 282-97. In addition to the other electronic materials cited by Professor Blumenfeld, I also suggest the enormously popular Native American news website, Indianz.com, the news and events page for the Native American Rights Fund, [www.narf.org/events/news.htm](http://www.narf.org/events/news.htm), and Turtle Talk, a very active and informative blog run by the Indigenous Law and Policy Center at Michigan State University College of Law, at [turtletalk.wordpress.com](http://turtletalk.wordpress.com). Professor Blumenfeld notes that one can also review cases on appeal to find appropriate issues to use in problems. Blumenfeld, *supra* note 6, at 510. For a detailed discussion of how to use authentic cases to develop writing problems, see generally Elizabeth L. Inglehart & Martha Kanter, "The Real World": *Creating a Compelling Appellate Brief Assignment Based on a Real-World Case*, 17 PERSPECTIVES: TEACHING L. RESEARCH & WRITING 128 (2009).

281. See Calleros, *Exploring Racial Context*, *supra* note 137, at 286-91.

ative and critical legal theory play into their development of the theory of a case when diverse actors are present in a case. For example, in the Hmong hunting case mentioned earlier,<sup>282</sup> a good defense attorney will make sure that the narrative reasoning and the defense theory rest at least in part on the client's cultural orientation toward private and collective property. In this real, ripped-from-the-headlines case, a Hmong immigrant, Mr. Chai Vang, was hunting for food in Wisconsin and stumbled onto private property. He became involved in a violent altercation with six hunter/property owners and killed them with his semiautomatic rifle.<sup>283</sup> As cultural outsiders to the indigenous Hmong people of Vietnam, we can only conjecture, but this cultural divide caused by a difference in culture and legal philosophy may have helped to create the tragic turn of events. As Professor Anderson put it, "If hunting is seen as a necessity rather than a sport, depriving a Hmong [person] of access to hunting land might be somewhat equivalent to depriving Americans of access to breathable air."<sup>284</sup>

In a Chicano/a example, Calleros developed a contract damages problem based on a tailor's ruination of several special dresses for a young woman's coming-of-age ceremony and celebration, the Quinceañera.<sup>285</sup> By providing the students with witness testimony about the importance of this once-in-a-lifetime event to the young Chicana plaintiff within the context of its greater importance to her community, including religious, social, and ethnic relevance, he provided the raw materials for a powerful contextual narrative.<sup>286</sup>

When exploring the opportunities for teaching narrative and cultural literacy, we travel much further along the spectrum toward the need for greater cultural context. This is not impossible to do with some research, although care must be taken to use indigenous sources for information. The great Native American scholar and ac-

282. Anderson, *supra* note 184.

283. *Id.* at 544 & n.24 (explaining the case and citing to the electronic newspaper report).

284. *Id.* at 544.

285. Calleros, *Exploring Racial Context*, *supra* note 137, at 289-90.

286. In one of my appellate assignments, I tried to do something similar based on a case with which I had experience in practice. It involved a young indigenous, Tibetan woman's application for political asylum in the post-9/11 United States. One of the most troubling aspects of the USA PATRIOT and REAL ID Acts has been to bar applicants who have been the victims of kidnapping or coerced assistance by congressionally defined terrorist groups. See 8 U.S.C. § 1182 (2006) (inadmissible aliens); *id.* § 1158(b) (conditions for granting asylum); *id.* § 1231(a)(3) (detention and removal of aliens ordered removed). The legal problem required detailed statutory and regulatory interpretation. But the narrative was the true center of the theory of the case. I gathered materials designed to educate the student attorneys about the applicant's Tibetan heritage, including her own personal stories of abuse at the army's hands during China's colonial and military occupation and about the status and living conditions of refugees in Nepal. It took some time to gather country studies, first-hand accounts, and so on, but it was fascinating work and work that probably would gladly be shared by an eager research or teaching assistant.

tivist Vine Deloria, Jr., like many others, pointed out that outsiders often make the mistake of learning about Native American peoples by talking to other outsiders instead of to the people themselves.<sup>287</sup> In fact, to do so without knowing which sources can be trusted may be dangerous and inadvertently insulting. Instead, it is recommended to go to real court records for inspiration or to consult Native American scholars and lawyers who can help prevent the misunderstanding—or even inadvertent exploitation—that sometimes occurs during in-artful cross-cultural communication.

I have not found the time investment in performing this research any more onerous than creating other rich and compelling legal writing assignments. The safest approach is to model simulated cases on real cases involving Native Americans and their stories, as in the sample problems developed by Professors Calleros and Blumenfeld. For example, this spring, I will base an appellate brief assignment on an eagle feather case pending in the Tenth Circuit, which implicates federal eagle preservation laws, religious freedom, indigenous cultural sovereignty and property, and Indian status under federal law.

With this simple decisionmaking rubric in mind, we can see that not only is indigenous law a fertile ground for learning, but we also need not sacrifice ourselves in the process. Because I currently teach legal writing, I took a keen interest in Calleros' approach. It is my hope, however, that professors across all disciplines will adapt their courses in a similar way, in order to accommodate topics such as cultural literacy and the three-sovereign model of government.

## VII. OBSERVATIONS AND CONCLUSIONS

Comparative studies are valuable tools in both the doctrinal and skills classrooms, in that the abilities developed in understanding the underpinnings of tribal sovereignty, and the way that it plays out in daily practice, can be applied to other areas of law. As with many of the applications for Indian and tribal law in the first-year classroom, a brief introduction and illustration is all that is required to pique interest and to create the kind of energized atmosphere that Professor Weyrauch noticed when he introduced Roma law into his comparative law course.<sup>288</sup> Taking a few small risks with experimentation will open a world of fascination for the entire learning community.

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287. Jensen, *supra* note 157 (“Somehow it is presumed that scientists, and thus Europeans, know better than the Indians themselves how Indians got here and how they lived prior to Columbus. That attitude is patronizing at best. Instead of digging and analyzing, why don’t researchers just ask the Indians? And then, having asked, why don’t they take the answers seriously?”).

288. Weyrauch & Bell, *supra* note 133.

Even more importantly, introducing tribal and federal Indian law concepts into the general law school curriculum can create more humane lawyers with enhanced cultural literacy skills and increased respect for tribal sovereignty as well as the tribal courts and clients they are bound to encounter in their practice. Doing so also has the capacity to create an academic environment of recognition and respect toward Native American students and faculty. Understanding tribal law lends itself seamlessly to, and illustrates the centrality of, the pursuit of critical legal studies.

For future attorneys and policy makers of both Native and non-Native descent, my widest, most idealistic wish is that an encounter with this material, however brief, might act as one thin strand of influence within the stronger cord of many others, leading to a re-envisioning of their careers within a future described by Dr. John Mohawk<sup>289</sup> as a “postconquest, postmodernist, postprogressive era.”<sup>290</sup>

Given the perfect storm of political, economic, environmental, cultural, and legal issues gathering on the horizon, the need for this vision has never spoken so loudly, or so clearly as it does right now, at this very delicate moment.

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289. The late Dr. Mohawk was the former editor of *Akwesasne Notes*, an influential Native American publication.

290. Greg Cajete et al., *Re-Indigenization Defined*, in ORIGINAL INSTRUCTIONS: INDIGENOUS TEACHINGS FOR A SUSTAINABLE FUTURE 255 (Melissa K. Nelson ed., 2008).