

Demarginalizing Tribal Law in Legal Writing



Tonya Kowalski
Associate Professor of Law
Washburn University School of Law
Tonya.Kowalski@washburn.edu

Under one government or another, the Anglo-American legal system has been operating in North America for hundreds of years. By way of comparison, American Indian legal systems have been flourishing in North America¹ for ten to twenty thousand years:²

American Indian tribal nations . . . have always governed themselves in accordance with their own ways. . . . The first forms of law and order appeared long before the arrival of the Europeans, and usually involved the resolution of disputes involving hunting, fishing, and gathering rights, privileges and territories. There also was a sophisticated system for dealing with criminal acts, as well as negligent acts. . . . The Anishinaabek often taught each other general rules of behavior for all people by relating stories linked to the landscape. . . . It is the stories, which are easily remembered and can be told again and again down through generations that created the structure of American Indian traditional and customary law.³

They have influenced our national constitution⁴ and furnished core principles of alternative dispute resolution.⁵ They have also provided sustainable, community-based forms of justice that continue to survive and to thrive, serving their people and interacting with state and federal jurisdictions.

Nevertheless, American Indian tribal law and courts continue to be marginalized by legal education.⁶ Native American nations typically are not discussed in required courses and are rarely introduced during first year as the original, inherent, 565 sovereign governments existing within U.S. borders. The core curriculum never mentions their 200 sovereign court systems, even though our graduates practice in those courts regularly on behalf of both tribal and non-tribal interests. Professors Rennard Strickland and Gloria Valencia-Weber highlight the severity of this gap in the curriculum:

Our modern life and laws are replete with continuous issues in which Indian[s] and non-Indians are affected by the interests of the indigenous sovereigns and their

1 See MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* 1-5, 10-16 (Wolters-Kluwer 2011); DUANE CHAMPAGNE, *SOCIAL CHANGE AND CULTURAL CONTINUITY AMONG NATIVE NATIONS* 107, 111 (AltaMira Press 2007)

2 Cf. CHAMPAGNE, *supra* note 1, at 107, 111. Professor Champagne notes that by Western scientific and some Indigenous standards, the First Peoples of North America have populated the continent for about ten to twenty thousand years. *Id.* He also stresses that according to many other Indigenous sources of knowledge, such as creation stories, many of our First Nations have occupied this land since “time immemorial.” *Id.* at 107-12.

3 FLETCHER, *supra* note 1, at 11.

4 See Kathryn McConnell, *Iroquois Constitution Influenced That of U.S., Historians Say*, available at <http://www.america.gov/st/washfile-english/2004/September/20040924120101AKllennoCcM9.930056e-02.html>

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

6 Cf. 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, 127 (2000) (“A substantial amount of the adversity and difficulty present throughout the history of Indian law stems from the fact that the tribal sovereign is consistently marginalized, if even discussed, in the context of our constitutional democracy. With the increasing prominence and visibility of tribal courts, we are in danger of repeating this harmful process of neglect and indifference unless there is broad and informed scholarly exegesis, insight, and effort that acknowledges and bridges the common themes within the fields of Indian law and federal courts.”); See also LORETTA FOWLER, *TRIBAL SOVEREIGNTY AND THE HISTORICAL IMAGINATION* xvii (University of Nebraska Press 2002) (“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 . . .”)

members. The . . . debate about Indian gaming spans the nation; it is not a controversy isolated in the Indian Country of the Southwest, but also erupts in Connecticut and New Jersey. . . . Other significant issues for Indians and non-Indians include, but are not limited to, land and water rights, children subject to the Indian Child Welfare Act, and development of natural resources—all areas in which tribal people have interests and entitlements. Failure to expose all law students to some opportunity for Indian law training presents an incomplete picture of this country when contemporary life involves law from *three* sovereigns.⁷

It should be no great surprise, then, that tribal justice systems continue to be disrespected and threatened⁸ by many state and federal courts, particularly the United States Supreme Court.⁹

As educators on the front lines, law professors who teach legal writing can help to demarginalize tribal justice systems by introducing them as valid and vibrant institutions. While many professors can see the value in introducing tribal justice systems, they may also experience understandable reluctance due to the widespread fear that those systems are inscrutable and

perhaps even unprofessional or illegitimate.¹⁰ In addition, the American legal system is typically introduced during the first week of classes—a period that is not only hectic, but very sensitive for making a positive first impression on students. Professors may not be eager to begin with a topic that seems not only exotic, but also fraught with opportunities to appear unknowledgeable.¹¹

Fortunately, the rewards outweigh the risks. While it is true that tribal justice systems are deep and culturally varied, the basic facts about tribal sovereignty and courts remain accessible. They also tend to generate much more student interest than the traditional state and federal material alone. Taught together, the three sovereigns can generate better learning through comparative models, as well as some excellent “teachable moments” for developing cross-cultural literacy. Some basic concepts follow.

Sovereign Nations. American Indian tribes are considered by federal law to be sovereign, “domestic dependent” nations within the United States. Although they are subject to Congressional plenary power, they have inherent, Indigenous sovereignty¹² that predates contact with Europeans. They come from different cultural and language groups, and have their own internal, ancestral common law in addition to the law “received”¹³ from the Anglo-American justice system.

Statistics. As of 2011, there are 565 federally-recognized tribes listed in the Federal Register.¹⁴ Just over 340 of them are found in the lower 48 states. The rest are Alaska

7 Rennard Strickland & Gloria Valencia-Weber, *Observations on the Evolution of Indian Law in the Law Schools*, 26 N.M.L. Rev. 153, 160-62 (1996).

8 Cf. Pommersheim, *supra* note 6, at 124, 129 (arguing that law schools’ failure to “identify and discuss the tribal sovereign, particularly tribal courts, seriously restricts, even distorts, the purview of contemporary federalism” and that “[t]he marginalization of tribal courts within the canon of federal courts’ textbooks and scholarship only makes it more likely that tribal courts will continue to be marginalized in federal courts’ jurisprudence itself.”).

9 See generally, e.g., DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT* (1997); ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005); Matthew L.M. Fletcher, *The Supreme Court’s Indian Problem*, 59 HASTINGS L.J. 579 (2008). These and many other authorities explain the often hostile relationship between the United States Supreme Court and American Indian tribal sovereignty and other tribal interests.

10 See Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 293, 347 n. 252 (1998).

11 Tribal law’s exotic reputation tends to blind many to its rightful place as another doctrinal field to be researched and analyzed. Almost every week in our classrooms, we use student questions that address topics outside of our fields to model the reality that lawyers are experts in legal methods, not repositories of fixed knowledge.

12 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)

13 Christine Zuni Cruz, *Toward a Pedagogy and Ethic of Law/Lawyering for Indigenous Peoples*, 82 N.D. L. REV. 863, 882-85 (2006).

14 75 Fed. Reg. 60810, 60810-14 (October 1, 2010).

Featured Articles

Native Villages. Hawaiian Native sovereignty has not yet been recognized by Congress. Today, the federally recognized tribes have approximately 290 trial courts and 150 appellate courts,¹⁵ all in systems of varying “structure, jurisdiction, and substantive norms.”¹⁶

Federal Constitutional Status. The U.S. Constitution treats the tribes and Indian peoples as separate entities from the United States or the individual states for purposes of federal law.¹⁷ Individual Indians were later decreed United States citizens by an act of Congress,¹⁸ and a modified version of the Bill of Rights was imposed on the sovereign tribes in the form of the Indian Civil Rights Act.¹⁹ Early Supreme Court decisions, particularly the “Marshall Trilogy,”²⁰ interpreted the few references to Indians in the Constitution to mean that the federal government had the exclusive right to trade with tribes and to govern their relations with states and settlers. For this reason, even today, tribal relationships with the states are governed in great part by tribal-state compacts when not in conflict with federal law, particularly in the areas of law enforcement and gaming.²¹

Government Models. Like other governments around the world, not all tribes use an American-style, three-branch government model with a separation of powers, although many do. For example, one nation may have judicial and legislative branches, but they may come under the purview of a tribal council. The reasons for these differences are often cultural, and the many varieties are expressions of community priorities and inherent sovereignty.

Justice System Models. Tribal court systems vary and each unique system is an expression of its people’s

sovereign nationhood. In addition to trial courts of general jurisdiction and certain trial courts organized under the Code of Federal Regulations, tribal courts often (but not always) have at least one level of appellate review. Some have their own internal appellate courts, and others use regional, inter-tribal appellate courts. Tribal justice systems also often have alternative, traditional forums for resolving crimes and other disputes. These are sometimes called Peacemaker Circles, sentencing circles, and Healing-to-Wellness Courts. Many modern, Anglo-American forms of alternative dispute resolution were influenced by earlier Native American justice models.²²

Jurisdiction. Both civil and criminal jurisdiction are very complex in matters affecting Indian persons and Indian country. Jurisdiction varies by tribe, state, and treaty. Tribal jurisdiction sometimes overlaps with state or federal jurisdiction, and is sometimes supplanted by them via statute.²³ Jurisdiction also can vary even by the individual plot of land involved within tribal borders, as well as by the Indian status of the persons involved. Fortunately, these special jurisdictional rules are not necessary for academics to understand in order merely to introduce beginning law students to tribal justice systems, although they can make for interesting writing problems. They can also open students to the fundamental notion that court powers are determined by the legislative, executive, and judicial expressions of sovereignty among the various nations and states within the tri-federal system—as well as the conflicts between them.²⁴ ■

Further reading:

Barbara Blumenfeld, *Integrating Indian Law into a First Year Legal Writing Course*, 37 *Tulsa L. Rev.* 503 (2001)

Tonya Kowalski, *The Forgotten Sovereigns*, 36 *Fla. State U.L. Rev.* 765 (2009)

Samantha Moppett, *Acknowledging America’s First Sovereign: Incorporating Tribal Justice Systems into the Legal Research and Writing Curriculum*, 35 *Okla. City U.L. Rev.* 267 (2010).

15 Sen. Comm. Indian Affairs, *Tribal Courts and the Administration of Justice in Indian Country*, 110th Cong. 1 (July 24, 2008) (opening statement of Sen. Byron L. Dorgan).

16 Newton, *supra* note 10, at 291-92.

17 See U.S. Const. art. I § 2 (“Indian commerce” and “Indians not taxed” clauses).

18 8 U.S.C. § 1401(b) (2006).

19 25 U.S.C. §§ 1301-03 (2006).

20 *Johnson v. M’Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

21 See Oliver Kim, *When Things Fall Apart: Liabilities and Limitations of Compacts Between State and Tribal Governments*, 26 *HAMLIN L. REV.* 48, 49-53 (2002).

22 See BARRETT & BARRETT, *supra* note 5, at 43-44.

23 For example, several states hold concurrent jurisdiction under Public Law 280, which is codified in large part at 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (2006).

24 See Tonya Kowalski, *The Forgotten Sovereigns*, 36 *FLA. STATE U.L. REV.* 765, 802-21 (2009).