

INDIAN LAW AND AMERICAN INDIANS IN THE LAW SCHOOLS

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I. INTRODUCTION

My interest in Indian law arises from a mix of personal and professional experience. I grew up in Indian country in Phoenix, Arizona, as a mestiza, that is, someone of Mexican Indian and mixed race heritage. In my professional work I followed my personal interest into Indian law and established the first two Indian law certificate programs in the ABA law schools.¹This summary is part of work in progress, to be published when data are complete.²

First, what is Indian law? It is part of the law of nations or states in international law, though not states in the federalism of the United States (U.S.). It is the enduring and inherent sovereignty of tribes that distinguishes American Indians/Native Americans³ from minorities who invoke equal protection as primary constitutional protection. In the history of U.S. law schools, only recently has Indian law entered and developed into a

¹ At University of Tulsa and the University of New Mexico Schools of Law.

² The author's previous publications in this subject matter include Gloria Valencia-Weber, "Law School Training of American Indians as Legal-Warriors," 20 American Indian L. Rev. 5 (1996); Rennard Strickland and Gloria Valencia-Weber, "Observations on the Evolution of Indian Law in the Law Schools," 26 New Mexico L. Rev. 153 (1996); Gloria Valencia-Weber, "American Indian Law and History: Instructional Mirrors," 44 J. Of Legal Education 251 (1994). In research to revisit this subject, Sherri Thomas, UNM School of Law, Class of 2005, provided valuable assistance.

³ Both American Indian and Native American are terms used to describe members of the indigenous nations within the U.S. Additionally, sometimes the term Alaska Native is used to distinguish tribes outside the lower 48 states. For convenience of style, American Indian will be used and includes all tribes and their members.

specialized concentration at a core of schools. This movement reflects the increasing public impact across the U.S. because tribes have retained governing authority and rights that affect non-Indians. The U.S. Supreme Court has held that membership in a federally recognized tribe is a political status, not race.⁴ Thus, the law affecting Indians and the law made by tribal governments increasingly are part of our national law.

Second, American Indian students have a history of low numbers in the enrollment of U.S. law schools. Despite being included in affirmative action laws as individuals, they have not benefited significantly so as to reduce their invisibility in the law schools. Beyond the interest in the diversity of the nation's legal professionals, American Indian law professionals are needed as leaders of their communities. Nation-building is a continuing activity for tribal peoples; they seek to retain customary values in distinct governments while innovating to meet new challenges.

Finally, some issues will arise as both the subject matter of Indian law and the culturally committed Indian students will challenge the viewpoints of mainstream law and its inherent assumptions. Whether Indian law is respected enough as "real" law so that law schools commit capital and long-term institutionalizing remain issues at U.S. law schools.

II. INDIAN LAW: SUI GENERIS

A. What It Is and Is Not.

Indian law was generated because American Indian tribes were the first sovereigns within U.S. borders. As indigenous nations, they were pre-constitutional, were involuntarily incorporated into the constitutional principles and structure, and continue as

⁴ Morton v. Mancari, 417 U.S. 535 (1974).

extra constitutional in their international law status.⁵ The tribes have retained the four primary characteristics of a sovereign, long established in international law: a defined territory, distinctly identified citizens, a form of government that exercises authority; and the ability to maintain relations with other states.⁶ The European powers with colonizing ambitions made treaties and established diplomatic relations with the tribes in response to their political status. *This status as a sovereign is the most important right for tribes and their members.* Individual members derive their critical rights from their tribe's political status.

Thus, American Indians are more than another racial minority whose status and rights arise from the constitutional doctrines of equal protection and due process. Yes, Indians are racially distinct and they are protected as individuals by the constitutional and federal regimes that outlaw discrimination in employment, education, voting and other areas of general federal statutes. However, since the early days of the republic when the Marshall Court decisions construed the relations among tribes, states and the national government, the core principles affecting Indians arise from the exclusive nation-to-nation relationship with the federal government.

This historical relationship also established an outsider legal status for American Indians akin to citizens of foreign nations. Individual Indians were not automatically born as U.S. citizens until a 1924 statute decreed this status.⁷ From 1884 through 1924 for

⁵ Charles F. Wilkinson, *American Indians, Time and the Law* 112-13 (1987).

⁶See Montevideo Convention on the Rights and Duties of States and Restatement (Second) of Foreign Relations Law of the United States.

⁷ See 8 U.S.C. §1401(b) (2000).

individual Indians seeking U.S. citizenship, the U.S. Government required special qualifications, a renunciation of tribal citizenship, and a special naturalization ceremony.⁸

See Appendix A.

Today 562 tribes are federally recognized in this relationship, with other tribal groups seeking to re-establish their political relationship with the national government.⁹

The historical and legal relationship endures with the two controlling principles of tribal sovereignty and the federal trust relationship with tribes. Each principle has been crafted and modified by Congress exercising the Article I power over Indian commerce; the Supreme Court's federal common law decisions that created Congressional plenary power in Indian matters; enforceable treaties made under the Constitution's treaty authority; and Congressional statutes and regulatory regimes. Tribal sovereignty as jurisdiction has expanded and narrowed depending on the subject matter and political climate of the time.

Federal trust was developed to justify and ameliorate the cessionary taking of tribal lands and resources by the national government in treaties and laws. The presumption is that the federal government acts to protect tribes from non-Indians and

⁸ Office of the Secretary, Dep't of the Interior, Doc. 89-94.04b, Attorneys, and Agents, Competent Indians 5-6 (Central Classified File 1936-1937). There was a distinct ceremony for the Indian male and for the Indian female. He shot his last arrow, accepted the plow and agreed to "live the life of the white man." The female accepted a workbag and purse and agreed to choose "the life of the white woman—and the white woman loves her home." See also 4 Smithsonian Inst. Handbook of North American Indians 233 fig. 1 (1988) for photo and explanation of the ritual for admission to U.S. citizenship. Also Gloria Valencia-Weber, "Racial Equality: Old and New Strains and American Indians," 80 *Notre Dame L. Rev.* 333, 347-350 (2004).

⁹ The list of tribes in this political relationship is published annually. The latest is Indian Entities Recognized and Eligible to Receive Services, 68 *Fed. Reg.* 68, 180 (U.S. Bureau of Indian Affairs, Dec. 5, 2003). This list also shows the various terms that tribes use for self-identity, including tribe, pueblo, nation, village, confederation, etc. Indian groups can also re-establish their status through the Acknowledgement process. See 25 C.F.R. Part 83 (2003).

from the states.¹⁰ Thus, the federal trustee has a duty to protect the lands, natural resources, water, money and any tangible resource that belongs to tribes and to individual members.¹¹

Federal policy is the historical umbrella for pursuing the protection of tribal sovereignty and implementing the federal trust. Policy, enforced by statutes and regulations, has produced the unique body of law in Title 25 of the U.S. Code and the Code of Federal Regulations exclusively devoted to Indians. Federal policy has veered between pushing tribal governments into disappearing via assimilation schemes and strengthening tribal autonomy and self-governance.¹²

Additionally, one must remember the international law element of Indian law, present at the time of the encounters with the European sovereigns entering the Americas and still developing. Indian law of the U.S. is a critical part of the human rights expansion that is establishing norms to protect the rights of indigenous peoples throughout the world.¹³

B. Indian Law in the Law Schools

How Indian Law entered the American Bar Association (ABA) accredited law schools reflects a continuing interactive pattern involving non-Indian and American Indian teachers and scholars. Serendipitous relationships are significant, such as during the New Deal era when Felix Frankfurter was a friend of Felix S. Cohen, who was a federal attorney. First, in the Department of Justice, Cohen led a task force to develop

¹⁰ As stated by the Court in *U.S. v. Kagama*, “They [Indians] owe no allegiance to the States and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies.” 118 U.S. 375,384 (1886)

¹¹ *U.S. v. Mitchell* (Mitchell II), 463 U.S. 206 (1983).

¹² A helpful summary of the history of Indian policy is in Robert N. Clinton, Carole E. Goldberg & Rebecca Tsosie., *American Indian Law: Native Nations and the Federal System, Cases and Materials* 18-50 (4th ed. 2003).

¹³ S. James Anaya, *Indigenous Peoples in International Law* (2004).

principles of Indian law to guide the government and, ultimately, attorneys working with Indian law. Frankfurter, not yet a Supreme Court Justice, appealed to President Franklin Delano Roosevelt to not terminate the task force.¹⁴ The timely transfer to the Department of Interior saved the task force. This move nurtured the only treatise on Indian law, the Felix S. Cohen Handbook of Federal Indian Law, published in 1942.¹⁵ This scholarly treatise, with subsequent revisions, continues to anchor the concepts and understandings in Indian law to guide teachers, scholars and practitioners.¹⁶

The first Indian law teachers introduced Indian law issues in their constitutional law and property courses and then moved their materials and interest to a focus on Indian law. In the late 1960s distinct Indian law courses entered the law schools at the University of Washington under Professor Ralph Johnson¹⁷ and at the University of New Mexico. Collateral developments also pushed the expansion of Indian law as enforceable law and jurisprudence, not as abstract or cultural studies. Among the leading creative forces were the Legal Services Corporation, units who trained attorneys who then entered law schools as teachers, and the establishment of the Native American Rights Fund.

In 1967 the University of New Mexico School of Law (UNM) began its pioneering work to train Indians in law and to put Indian Law in the general curriculum. Dean Tom Christopher and Professor Fred Hart (who later became the dean) led this effort. Four activities undertaken then continue to have impact on Indian law and on the pool of Indians who are now attorneys. First, to prepare Indian students before they entered law schools throughout the nation, UNM established the Pre-Law Summer

¹⁴ Strickland and Valencia-Weber, "Observations," supra note 2 at 156.

¹⁵ On Cohen's significance see Valencia-Weber, "Law School Training of American Indians," supra note 2 at 26, n. 65.

¹⁶ The next publication will be in 2005 by LexisNexis books.

¹⁷ Strickland and Valencia-Weber, "Observations," supra note 2 at 159.

Institute (PLSI) under the auspices of the school's American Indian Law Center (AILC). PLSI, a two-month academic program, was primary in increasing the number of Indian attorneys from approximately 25 in 1967 to over 2,000 today. [See discussion, pages 12, 14-15.] Second, UNM took account of the state and the Southwest region, their public issues and populations, and decided that training Indians in the legal profession would serve public needs. Third, the basic Indian Law course was introduced and seeded the development of today's Indian Law Certificate program. Lastly, UNM rescued the Felix S. Cohen Handbook with a commitment to republish Cohen's original 1942 edition, which was no longer available, and to publish updated editions.¹⁸

The New Mexico decisions of 1967 continue to generate resources for learning opportunities beyond the usual classroom. The Indian Law Certificate Program offers some thirty hours of regularly scheduled courses from which the student must complete twenty-one hours. The program is open to any student enrolled at the law school and was not intended as a program only for American Indians. The long-term UNM commitment involves tenured faculty members who specialize in Indian law; the Southwest Indian Law Clinic (SILC), a natural development from UNM's national leadership in clinical education; research and Indian community projects with tribes, The Tribal Law Journal, the only online journal focusing on the internal law made by tribal governments;¹⁹ and a special Indian law collection in the UNM Law School Library. All UNM students experience Indian law in various ways in courses outside the certificate courses, e.g., the first-year moot court problem generally is on Indian law.

¹⁸ An account of the Handbook's development and revival is in Felix S Cohen's Handbook of Federal Indian Law vii-xi (Rennard Strickland & Charles F. Wilkinson, eds., 1982 ed.)

¹⁹University of New Mexico School of Law Tribal Law Journal, at <http://tlj.unm.edu>.

The law schools who developed Indian law have generally been the public law schools in Indian Country,²⁰ not the Ivy League or elite law schools. This leadership remains the pattern, though private law schools joined in. The development of Indian law is anchored to the geography where issues continually arise at the intersection of the three sovereigns – the tribe, the state and the federal government. However, the inclusion of Indian law elsewhere is expanding as public interest issues constantly arise throughout the U.S. More than gaming is at stake, though it often provocatively occupies the public spotlight. Some of the public issues that inject Indian law into the life of the nation include land, natural resource development, water, environmental regulation, taxation, and child custody and adoption because of the preemptive Indian Child Welfare Act.

An unscientific search to identify the schools at which at least one basic Indian law course is taught generated an estimate of 43 schools among 190 ABA accredited schools.²¹ Beyond the basic course, an estimated 25 law schools offer specialized certificates or focused specialized training, which includes two LL.M programs at the University of Tulsa and the University of Arizona.

Strong programs require investment in tenure - track faculty who specialize in Indian law and institutionalized Indian law clinics. Our continuing UNM dialogues and collaboration with tribes reveal their skepticism about law schools when programs depend solely on soft money. Tribes have experienced that adjunct and visiting faculty

²⁰ Indian Country is not just a descriptive term, but a statute Congress passed in 1948 in an attempt to give coherence to how tribes exercise jurisdiction across three types of land: formal reservations, dependent Indian communities and all Indian allotments. 18 U.S.C. § 1151(2000). The public law schools in the geographical section of the U.S. where the Indian Country jurisdiction was most applicable were involved in the development of Indian law.

²¹ This data gathering, still in process, is based on the American Bar Association Web site, <http://www.abanet.org/legaled/approvedlawschools/approved.html>, accessed 6/21/2005, and searches of the individual schools' descriptive literature and websites.

and clinical services disappear when external or discretionary money ends and there never was an institutional long-term commitment.

Ultimately, it is tribes and their members who provide the validation for what we do in the law schools. Have we moved the law away from the ethnocentric ugliness of the Supreme Court cases that justified the dominant society's "greed and grab" of Indian land and resources because the indigenous people were "savages" and needed to be civilized?²² Indian law, while complex and intellectually demanding, nonetheless is about the lives of real people who need some historical wrongs redressed so they can succeed as twenty-first century indigenous governments. The challenge for law schools is to break with the history of mainstream institutions that have failed to assist the indigenous peoples of this country.

III. AMERICAN INDIANS: LAW STUDENTS AND ATTORNEYS

A. The Barriers to Entering Law School

American Indian law students, in their low numbers and the scarcity of published data on their presence, reflect the many years in which they were ignored in the outreach of U.S. law schools. Much of the post-Civil Rights era efforts and reporting on inclusion of minority or racially identified students in colleges and universities failed to include data on American Indians because their presence was insufficient for reporting purposes.²³ These students remain the smallest in number and as percentage of students in the ABA accredited law schools.

²² These negative descriptors are evident in numerous Indian law decisions from the Supreme Court, see *Johnson v. M'Intosh*, 543, 72-573, 590 (1823) whose concepts and terminology then recur in subsequent cases. See also *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

²³ E.g., *Educational Attainment in the United States: 2003*, Population Characteristics, Current Population Reports, Nicole Stoops, U.S. Census Bureau (issued June 2004), at 4: "Data on American Indians and Alaska Natives, and Native Hawaiians and Other Pacific Islanders, are not included in this report because the sample was not sufficiently large."

Before looking at the enrollment data, one needs acknowledge the barriers to law school for so many American Indian students. Data from the U.S. Census and other sources document that American Indian communities, in rural and urban settings, have the highest levels of poverty, unemployment, substandard housing and high percentages of members with insufficient education and occupational skills.²⁴ Whether Indians obtain the necessities for an adequate standard of life depends on how the three governments (tribe, state and federal) provide, for instance, adequate schools and health services.²⁵ Essential services have been hostage to whether the federal government provides the funding or services promised in treaties and statutes in exchange for land cessions and whether states ignore the state's share of responsibilities to Indians who are its citizens. States often assume the federal government will provide. Moreover, as the ongoing *Cobell v. Norton* lawsuit has established, the federal government has historically not been a responsible trustee in managing trust assets and rendering income payments to the Indian beneficiaries, tribes and individuals, who depend on these funds.²⁶

Among the barriers, money - the simple the lack of it - is the biggest problem for Indian students who otherwise qualify for admission into law schools. Other barriers include not being able to envision themselves as attorneys and relating law studies to the needs of their families and communities. Models of law professionals in the Indian communities are not common, especially among the rurally isolated. Undergraduate

²⁴ Poverty 1999, Census 2000 Brief, by Alemayehu Bishaw and John Iceland, 5-8, U.S. Department of Commerce, Issued May 2003.; The U.S. Census Data on American Indians: 1990 v. 2000, Report Compiles Economic and Social Indicators on a Decade of Striking Change, the Harvard Project on American Indian Economic Development at the Kennedy School of Government, <http://www.ksg.harvard.edu/hpaied/pubs/cabazon.htm> (January 8, 2005).

²⁵ See A Quiet Crisis, Federal Funding and Unmet Needs in Indian Country, U.S. Commission on Civil Rights, July 2003.

²⁶ Cobell v. Norton, 334 F. 3d 1128 (D.C. Cir. 2003). This is an ongoing saga where Secretaries of the Treasury and Interior in the Clinton and Bush administrations have been held in contempt of court for failing to perform their duties.

counseling, mentoring and support services that promote academic success are what many Indian students need but often do not experience.²⁷ The Indian students who are marginally performing, as well as those who have intellectual achievements, may not realize their value as persons with potential for academic accomplishments. Beyond affirmation of personal worth, the students need to know how their talents and education can become means for improving the lives of their family, tribe and the national Indian community.

Sometimes the perspectives of indigenous people, their cultural values, are seen as educational impediments because the guiding principle is not individualism, but communal and consensual relations.²⁸ A common indigenous world view anchors the individual in relationships to others in the family, clan and tribal networks. An individual member has entitlements, which arise from one's role and responsibilities carried out in interdependent relations. Indigenous people are also bound to the natural world, with the responsibility of stewardship for land and natural resources.²⁹ This general statement allows for the modes with which each tribe lives out a distinct way of life. In my experience, this relational viewpoint motivates most Indian students. They do the hard work of demanding educational studies because of their commitments to their families and community and to preserve the continuity of their culture.

²⁷ See Valencia-Weber, "Law School Training," supra note 2 at 31-36 for discussion of barriers and undergraduate preparation.

²⁸ Id. at 45-49; Thom Tso, "The Process of Decision Making in Tribal Courts," 31 *Ariz. L. Rev.* 225,233 (1989)(Retired Chief Justice of the Navajo Nation Supreme Court describing relationships with other persons and nature, "our understanding of our place"); Clara Sue Kidwell (Choctaw/Ojibwe), "Ethnoastronomy as the Key to Human Intellectual Development and Social Organization," in *Native Voices: American Indian Identity and Resistance*, 5, edited by Richard A. Grounds, George Tinker & David Wilkins (2003) (Describing the relational perspective of indigenous peoples). See generally Richard Erdoes & Alfonso Ortiz, *American Indian Myths and Legends* (1984)(Accounts of emergence and creation based on coexistent relations).

²⁹Kidwell, "Ethnoastronomy," supra note 28, describes the relation to nature and science with examples. The other sources cited in note 28 also provide insights into the relational perspective.

As for the demands of law school, the Pre-Law Summer Institute (PLSI) developed at UNM has a successful record in preparing Indian law students that is unmatched in its impact in law. PLSI was established in 1967 by UNM with an Office of Economic Opportunity grant, the “war on poverty” monies from President Lyndon Johnson’s administration. PLSI, a two-month program, was established at the American Indian Law Center (AILC) of the Law School. In 1976 AILC became an independent institute that advocates for tribal governments and conducts research and policy studies on issues affecting tribes and their members. However, AILC remained located at the UNM where Sam Deloria is the director, and AILC continues to offer the PLSI program in collaboration with the UNM Law School.³⁰ PLSI is essentially a “boot camp” with graded courses in selected basic areas of law such as contracts or property. Besides the exposure to substantive law, there is emphasis on developing the students’ research, reasoning and writing skills. PLSI is not a remedial program, but prepares students who will enter law schools across the U.S. for the hard work of law studies and ultimate success as lawyers.

B. Indians as Law Students and Attorneys

One result of UNM’s work with the PLSI is that significant leadership in Indian Law has come from UNM graduates. While the PLSI serves students entering many law schools, UNM has trained a significant core of these students. The UNM Indian alumni since the 1967 initiation of PLSI are prominent in their achievements in Indian law. The

³⁰ For description of PLSI, Heidi Estes and Robert Laurence, “Preparing American Indians for Law School: The American Indian Law Center’s Pre-Law Summer Institute,” 12 N. Ill. U. L. Rev. 278 (1992); Philip S. Deloria, “The American Indian Law Center: An Informal History,” 24 N.M. L. Rev. 285 (1994); Philip S. Deloria, “Legal Education and Native People,” 38 Sask. L. Rev. 22 (1974). For Canadian adoption of the PLSI model, Donald J. Purich, “Affirmative Action in Canadian Law Schools: The Native Student in Law School,” 51 Sask. L. Rev. 79 (1986-87).

Native American Rights Fund (NARF), the leading advocate for Indian peoples' rights, was established by the first Indian graduates: John Echohawk, director of NARF, and senior attorneys Yvonne Knight and Walter Echohawk. Kevin Gover, the Undersecretary for the Interior, heading the BIA in President Clinton's administration, is now a law professor at Arizona State University. Among the alumni who are academics are professors Christine Zuni Cruz of the UNM program and Aliza Organick, who began teaching at Washburn University this year and has established an Indian law clinic.

Indians who enter the legal profession work in tribal, state and federal government positions across the U.S as well as private law firms and corporations, public interest organizations and pro bono, public defender and legal services providers. Generally, these indigenous lawyers work wherever decisions are being made that affect the lives of Indian people. UNM has led in the production of these professionals and has graduated 216 American Indian attorneys. Since the Indian Law Certificate program was established in 1994, sixty-nine individuals have completed the specialty training and forty-nine of them are American Indian or indigenous individuals from outside the U.S. The significance of this UNM achievement can be understood in the context of the national data on the enrollment and graduation rates of American Indians from U.S. law schools.³¹

The most recent ABA data available for the 2003-2004 academic year provides the historic profile showing American Indians among the last with opportunity to enter and graduate from law school and the least in numbers in both enrollment and graduation.

³¹ Author has not yet obtained the graduation data.

The enrollment of American Indian J.D. (full- and part-time) students for 2003-2004 can be summarized:³²

| | <u>American Indian students</u> | <u>Total Minority students</u> | <u>Total All J.D. Students</u> |
|------|---------------------------------|--------------------------------|--------------------------------|
| 2003 | 1048 | 28,325 | 137,681 |
| | 396 1st Yr. | | |
| | 341 2 nd Yr. | | |
| | 291 3 rd Yr. | | |
| | 20 4 th Yr | | |

Thus, American Indians constitute .76 percent of all J.D. students and 3.7 percent of the total minority students.

In considering any data on American Indians, one must be keep in mind that small numbers have different impact with regard to their relationship to the total American Indian population and the overall population being considered. Numerical gains do not result in gains in the proportional enrollment of American Indians in higher education.³³

The 2000 census shows 2,475,956 American Indians (including Alaska Natives) and 4,119,301 American Indians who also have other origins. These two total to 2.4 percent of the U.S. population.³⁴ Overall, this data on Indian student enrollment demonstrates a significant gap in the production of legal professionals who are American Indians and not in proportion to the general Indian population.

The census data also show the impact of PLSI in increasing the number of attorneys who are American Indian. When PLSI began, it was estimated that twenty-five

³² Section of Legal Education and Admissions to the Bar, American Bar Association, Office of the Consultant on Legal Education to the American Bar Association, Take-offs from the 2003-2004 Annual ABA Law School Questionnaire, Table C-4 (February 2004). See also, Section of Legal Education & Admission to the Bar, American Bar Association, A Review of Legal Education in the United States Fall 1994 (1995).

³³ Clara Sue Kidwell, "Higher Education Issues in Native American Communities," in Minorities in Higher Education 246 (American Council on Education 1994).

³⁴ The American Indian and Alaska Native Population, supra note 23 and note 25 and infra note 37.

American Indians were lawyers in the U.S.³⁵ The years of PLSI programs since 1967, with cohorts from 25 to 40 students per summer, have been a major force in creating the over 2,000 Indian attorneys that have been documented. In a special tabulation of the 2000 Census performed for the ABA, American Indian attorneys are reported in two categories. For American Indian ancestry only, 1,730 individuals are 0.2% of all attorneys. American Indians who also have other origins add 2,810 attorneys, 0.3% of all attorneys.³⁶ The total of 4,540 attorneys, constituting 0.5 per cent, is below the 2.4 per cent of the U.S. combined population of American Indian and Indian mixed with another origin.³⁷ The measure of PLSI's success is not only in the number of Indian attorneys it has enabled, but also that many connect their professional work to the concerns of tribes and their members.

These data form an incomplete picture of American Indians in law schools and what is known about the number of attorneys who are American Indians. What constitutes an adequate number of Indian attorneys involves more than just a proportionate relationship between the legal professionals and the indigenous population. For the needs of tribal nations, the number of American Indians with opportunity for law studies is inadequate. Recall that there are 562 federally recognized tribes, each at various stages of nation building. To function as successful governments, tribes need legal professionals to design governmental structures, draft legal codes, construct judicial

³⁵ Theodora Lurie, 22 The Ford Foundation Letter 5, Report on Native American Rights Fund (Winter 1991).

³⁶ ABA Commission on Racial and Ethnic Diversity in the Profession, Statistics About Minorities in the Profession from the Census, Source: U.S. Census Bureau, Census 2000 Special Tabulation, <http://www.abanet.org/minorities/links/2000census.html>; retrieved 1/31/2005.

³⁷ The American Indian and Alaska Native Population: 2000, Census 2000 Brief, by Stella U. Ogunwole, C2KBR/01-15. Census data involves self reporting, "box checking," so the American Indian numbers do not match and are likely to exceed the number of individuals that federally recognized tribes acknowledge to be members.

system, and perform the multiplicity of tasks for governments with Indians and non-Indians within their jurisdiction. Indian attorneys perform daunting work, as they must retain the core customary values in their work while responding to the impact of the external world and technology. Because this is not work for generic attorneys, the training in law for Indian individuals is critical to the success of the members, their tribe, and law schools as enabling institutions.

IV. INDIAN LAW AND INDIANS IN THE CLASSROOM: SOME ISSUES

If and when Indian law and Indian students become part of the law school's commitment, issues of contention can arise. Some are specific to the unique nature of Indian law and the extent to which it is integrated into the core curriculum. What happens between Indians and non-Indians, as students and teachers, in the classroom involves pedagogical planning and readiness to deal with the unforeseeable and the serendipitous situations. I have taught Indian law since 1992, including the basic course that is the foundation for advanced study in areas such as economic development in Indian Country, children's law, Indian water rights, gaming, Indian tax systems, and conflicts of law and Indian law. Indian and non-Indian students with a commitment to Indian law and related areas such as natural resources have been the enrollees.

Recently New Mexico became the first state to put Indian law on the bar exam, thus making it part of every attorney's requisite knowledge.³⁸ The impact of this state decision has been immediately felt at UNM, as the basic Indian law course enrollment

³⁸ Washington State followed and other state bars in Indian Country have proposals pending to make Indian law part of the state bar exam.

has more than doubled.³⁹ While my observations arise at UNM, I feel these issues are likely to occur in other law school settings.

A. Is Indian law “real law?”

One core issue is that some non-Indians disbelieve or resist the idea that tribes are governments and, even more, reject the idea that tribes should have authority under law over the person or property of non-Indians. This perspective has root in the view that sees American Indians only as another minority population. The myth that Indians somehow disappeared adds to this inaccurate view of the contemporary status of tribal governments.

The questioning of Indian law relates to the Supreme Court decisions since the late twentieth century that have increasingly removed jurisdiction from tribes over critical subject matter and non-Indians and non-member Indians.⁴⁰ This Court trend certainly contributes to the non-Indian expectation that tribes never can have jurisdiction over non-Indians in their person or property. Unfortunately, the Court’s undermining of prior Indian law jurisprudence contributes to conflation of the political status of Indians with race.

In geographical areas that include overlapping jurisdictions, financially stressed state and local governments, as well as the federal government, enter agreements with tribes that extend tribal jurisdiction. For common purposes, such as protecting health and public safety, these agreements cross deputize law enforcement officials and safety staff

³⁹ In Fall 2004 there were 62 students enrolled, exceeding the previous average course enrollment of 25.

⁴⁰ For analysis of these cases and their impact, see David H. Getches, “Beyond Indian Law: The Rehnquist Court’s Pursuit of States’ Rights, Color-Blind Justice and Mainstream Values,” 86 *Minn. L. Rev.* 267 (2001); Sarah Krakoff, “Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty,” 50 *Am. U. L. Rev.* 1177 (2001); Gloria Valencia-Weber, “The Supreme Court’s Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets,” 5 *Univ. of Penn. J. of Const. Law* 405 (2003).

such as fire fighters. In Indian Country,⁴¹ it is a common experience for Indian and non-Indian individuals to physically move and transact matters in the jurisdictional space of three governments. Moreover, urbanization has reduced much of the open space that once separated tribal lands from municipalities. See Appendix B for example of contemporary tribal and state agreement.

Resistance to valuing Indian law is tied to the ignorance of how Indians as political entities fit in the history and legal structure of the U.S. The pre-Constitutional relations between the indigenous nations and the European powers who entered the Americas involved critical interests on both sides.⁴² After the successful revolution, the Euro-Americans, in order to create the new republic, continued the treaty making and nation-to-nation relations. In order to secure land cessions from the Indian nations, peaceful relations between Indians and non-Indians, and commerce and trade relationships, Indians are in the Constitution as an exclusively federal domain. Besides the authority to Congress “to regulate ...Commerce with the Indian tribes,”⁴³ there are other constitutional provisions, especially the treaty power, which exclude the states.⁴⁴

In the early decisions of the Supreme Court, tribes were found not to be states nor foreign states, and not subject to state sovereignty. In *Worcester v. Georgia*,⁴⁵ the Supreme Court affirmed the retained sovereign status of tribes and held that state laws had no power over the tribe and its lands. Preemptive laws, such as the still existing

⁴¹ See supra note 20 on Indian Country statute.

⁴² See generally, Felix S. Cohen's Handbook of Federal Indian Law 47-58 (Rennard F. Strickland, et al eds., 1982) for the 1532-1789 period.

⁴³ U.S. Const. Art. I, §8, cl. 3.

⁴⁴ Other applicable constitutional provisions include: “Indians not taxed” to be excluded from those counted for representation in Congress or apportioning direct taxes, U.S. Const. Art. I, §2, cl.3; id. amend. XIV, §2 (retaining the exclusion of “Indians not taxed”); the war power, id. art. I, §8, cl. 11; and power for federal property, id. art. IV, §3, cl. 2.

⁴⁵ Worcester v. Georgia, 31 U.S. 515, 560(1832).

Trade and Intercourse Acts,⁴⁶ make federal relationships, policies and law the controlling authority.

Moreover, the Supreme Court crafted the doctrine of Congressional plenary power, which reserves federal control over vast subject matter affecting Indians. Thus the exclusive Title 25 of the United States Code and the Code of Federal Regulations that govern ordinary aspects of Indian peoples' lives. In affirming and strengthening tribal sovereignty, many federal statutes exercise federal authority while enabling the tribes' ability to be governed by their own laws.⁴⁷ The Indian Child Welfare Act (ICWA),⁴⁸ for instance, expressly removes state jurisdiction in favor of the tribes in specific situations involving non-divorce custody of children in foster care and adoption.⁴⁹

Indian law now means more than just the federal law, but also the law that tribes make and enforce. The Supreme Court recognized the tribes' inherent sovereignty, preexisting the Constitution, in *United States v. Wheeler*.⁵⁰ The Court affirmed that tribes have the power to make their own laws and be governed by them without infringement by states.⁵¹ It is the tribes' twentieth century use of governing power that has produced many of the controversies with states and non-Indians. The current Supreme Court's project to reconstruct federalism to advance state power has changed Indian law. To favor states, the Court has since the late twentieth century removed significant jurisdiction from

⁴⁶ The Trade and Intercourse Acts passed between 1790 and 1834. E.g., 1 Stat.127 (1790); 2 Stat. 139 (1820); 4 Stat. 729 (1834).

⁴⁷ See David H. Getches, Charles Wilkinson, Robert A. Williams, Jr., Cases and Materials on Federal Indian Law 230-233 (4th ed 1998) for general discussion of Congress passing acts to increase tribal autonomy and governance.

⁴⁸ 25 U.S.C. §1901 et seq.

⁴⁹ 25 U.S.C. §1911 delineates the exclusive tribal jurisdiction and concurrent tribal and state jurisdiction. Absent certain exceptions, the tribal law and tribal courts "shall" decide non-divorce custody placements, foster care and adoptions.

⁵⁰ U.S. v. Wheeler, 435 U.S. 313 (1978).

⁵¹ Williams v. Lee, 358 U.S. 217 (1959).

the tribes over non-Indians engaged in activities within tribal boundaries. Congress has only selectively corrected the Court with legislation to make jurisdiction across the three sovereigns' boundaries more coherent.⁵²

Treaties, Supreme Court decisions, federal common law and federal statutes have both affirmed and divested the retained sovereignty of tribes. Today critical subject matter such as land, natural resources, water rights, child custody and taxation remain subject to federal and tribal laws. These laws affect the lives of many Indians and non-Indians, so Indian law warrants its role in the law school curriculum and is integral to traditional subjects of the curriculum.⁵³ Accordingly, more than just Indian law students should learn Indian law.

B. Indian Law Students in Law School

Who is an Indian?

An immediate issue when a law school decides to recruit or admit Indian students is “Who is an Indian?” Or, put another way, is this applicant only a “box checker?” Recall that in *Morton* the Supreme Court held that being a member of a tribe is a political membership arising from the political status of the individual's tribe. Thus, being an Indian as a legal status involves being recognized as a member by a federally recognized tribe. As political membership, there are official means of qualification that do not exist for other U.S. racial minorities. Thus, tribes and their members are increasingly upset by

⁵² See *Duro v. Reina*, 495 U.S. 676 (1990) (holding tribe may not exercise criminal jurisdiction in misdemeanor offense over non-member Indian). *Duro* was corrected by Congress amending the Indian Civil Rights Act (ICRA), 25 U.S.C. 1301 (4) (2000) (restoring tribes' inherent sovereignty and jurisdiction over nonmember Indians), affirmed in *U.S. v. Lara*, 124 S.Ct. 1628 (2004) (Congress has authority to restore tribes' inherent sovereignty and jurisdiction in the ICRA amendment).

⁵³ In 2002 The University of Tulsa Law Review published an edition dedicated to how Indian law fits in the basic curriculum. The articles expressly addressed how Indian law fits into civil procedure, the first-year research and writing course, property, constitutional law, commercial law and bankruptcy. 37 *University of Tulsa L. Rev.* 481 (2001).

the claims of colleges and universities touting their Indian enrollment based solely on “box checking” by applicants.

Because of the multiple ways to establish one’s membership in a federally recognized tribe, many tribes question data based on “box checkers” not required to provide some evidence that the claimant is recognized as a specific tribe’s member.⁵⁴ State law schools already do political status determinations when screening for students who are eligible for resident tuition and some international student requisites. Unreviewed box checking has been called a form of academic fraud, perhaps pushed by the pressures on schools to achieve affirmative action goals.⁵⁵ As victims of legal and historical events, many genuinely Indian-by-descent individuals lack access to documentation. For instance, in the Allotment period (1871-1934) many full bloods resisted the break up of communal lands and refused to register for the allotment rolls. Yet, admission procedures can accommodate these students where tribes treat these individuals as community members.

Indians and Non-Indians in the Class Room

The context of UNM may be atypical in that participation of Indian students is visible and significant, but the pedagogical issues are not likely to differ from other

⁵⁴ The means include, but are not limited to, being listed by name as a member on the tribal rolls created by the tribe’s law and qualifications; establishing the name of a lineal ancestor who appears as an Indian by blood on the base roll of a federally recognized tribes (these were rolls often created in the 19th century to enable the application of federal statutes, such as the Allotment Act of 1887 that broke tribes’ communal lands into individual allotments); possessing a Certificate of Degree of Indian or Alaska Native Blood (CDIB) that is required to qualify for federal entitlements reserved for members of federally recognized tribes, e.g., Indian Health Services. With multiple means, a bona fide member can generally obtain documented evidence that he/she is recognized as a member of a specific tribe. Membership laws and qualifications, set by tribes and recognized by the Department of Interior, are complex and not flawless. See Proposed Rule: Certificate of Degree of Indian or Alaska Native Blood, 65 Fed. Reg. 20,775 (2000).

⁵⁵ D. Michael Pavel et. al., “Ethnic Fraud, Native Peoples, and Higher Education,” 10 Thought and Action NEA Higher Education J. 91 (1994)(Warning of deceptive counting of students as American Indian, which denies opportunity to bona fide tribal members, inflates the numbers of American Indians enrolled, and contributes to inaccurate reports of dropout rates).

schools. Our Fall 2004 total enrollment was 316 students and included 35 American Indian students. We do not presume for Indian students that Indian law is their focus, yet most of the Indian students take at least one of the Indian law courses. From my conversations with Indian law teachers at other schools, there is reason to believe some classroom situations occur everywhere.

Indian law involves so much history of cultural domination by non-Indians, the Euro-Americans (often called “White” people), the professor must work to create a safe climate in which the law can be studied as law. The first day of class, I explicitly state that this is not a “White guilt” course. I remind students that we will be studying and analyzing law, which in this area uses ugly concepts and language. From the earliest Marshall Court decisions, European cultural superiority allegedly justified the taking of land and resources from American Indians. As findings of fact or law, the indigenous peoples of the U.S. were determined to be “savages” in need of “civilizing.”⁵⁶ Indian and non-Indian students justifiably react to these ideas and imperialistic descriptors as not the kind of law they should be obligated to uphold as attorneys. I remind them that what matters is what they, as future lawyers, will do to correct the injustices the past imposes on present-day Indians. Moreover, because all lawyers should work to produce justice, Indian law provides a great opportunity for non-Indians and Indians to collaborate to improve the law of this nation.

Because of the “bad” history in the U.S., I start the course with where the concepts of cultural superiority and colonizing originated and were practiced before European powers arrived in the Americas. We cover the Spanish theocratic model, for which Professor Robert A. Williams, Jr., has amply provided scholarship, including the

⁵⁶ Johnson v. M'Intosh, supra note 22.

Papal donation system that European powers used to claim the lands of inferior peoples.⁵⁷

Then we cover British domination and colonizing of the Irish and Scots where contracts from the British Monarchs, Queen Elizabeth I and her successors, gave ambitious members of royalty the full power to exterminate the Gaelic peoples.⁵⁸ Moreover, in Ireland the British first established what they called “reservations” to confine the surviving Irish they had ejected from the land. In discussing the concepts used by any conqueror, there is space to deliberate about violent political domination that one nationality can use to disempower allegedly inferior or less than human beings.

The participation of American Indians has impact in the classroom interaction between students and in the quality of teaching. My first days of orientation on the content of Indian law remind students that Indian law involves complex ideas they probably have not confronted before. Indian law is an intellectually challenging composite of international law within our U.S. borders and a mix of constitutional and common law applied in arcane ways. The usual federal law analysis and jurisprudential tools, such as canons of construction, take a different form in Indian law.⁵⁹ Therefore, my basic rule is, “There are no stupid questions.”

Clearly, different cultural perspectives are offered by Indian students as compared to the other students in the class. Whether non-Indians understand and respect the enduring quality of tribal sovereignty sets a line of difference. Disregard for the most important Indian interest can keep Indian students from engaging non-Indians on a

⁵⁷ Robert A. Williams, Jr., The American Indian in Western Legal Thought (1990);

Robert A. Williams, Jr., “The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought,” 57 S. Cal. L. Rev. 1 (1983).

⁵⁸ See generally Nicholas P. Canny, The Elizabethan Conquest of Ireland: A Pattern Established 1565-76 (1976) and William Christie MacLeod, The American Indian Frontier (1968).

⁵⁹ Charles F. Wilkinson & John M. Volkman, “Judicial Review of Indian Treaty Abrogation: ‘As Long as Water Flows or Grass Grows Upon the Earth’-How Long a Time is That?” 63 Cal.L. Rev. 601 (1975) on the rules of construction for Indian treaties.

personal level outside the classroom. The non-Indian students who respectfully respond to the complexities of tribal sovereignty - frequently ethnic minorities and students with interests in the environment or human rights - become part of the collaborative relationships in and out of the class.

Moreover, Indian students' views and statements on Indian law have a real-life context on how Indian law has impact on them, their families and their communities. It is not personal stories that enter the classroom conversation; typically, Indian students do not disclose them in a large classroom. Often the Indian students relate the cases and laws to their tribe's experience governing, such as developing environmental regulation, natural resource planning and cultural restoration projects. Additionally, during the course some Indian students realize how far-reaching and controlling federal law is in their lives. In this mind-opening experience, they reevaluate their life patterns and perceive them differently, not just as matters unquestioned in everyday activities.

Indian students and non-Indian students' cultural perspectives can form an unbridgeable divide or can maximize the scope of understanding each obtain from the course. If students of different cultural viewpoints can treat as legitimate the principles of Indian law, even when disagreeing with specific instances as with other law, there is an expansion in substantive learning. Students can also increase the appreciation for each other. My special benefit has been that I continue to learn from all the students in these cross-cultural dialogues.

V. CONCLUSION

The inclusion of Indian law in law school curriculums, though fairly recent, is increasingly legitimate as the authority of tribes as sovereigns touches upon the lives of

Indians and non-Indians throughout the U.S. Since the pre-constitutional status of tribes as independent nations, the retained sovereignty is the most important right for the indigenous peoples within the U.S. As tribes exercise their governing authority, they regularly interact with the state and federal governments. These points of contact can invoke conflict as well as cooperation because of mutual interests.

In the expanse of subject matter that both states and federal governments transact with tribes, there are ample reasons why all lawyers need basic education in Indian law. Law schools need to consider how they do or do not teach Indian law and what long-term commitments can integrate Indian law in the basic curriculum. The participation of Indian law students energizes and enriches the law teaching, thus it is important in law school planning.

Indian students in law schools remain historically the least in numbers and, more important, insufficient for the special needs that tribes have as they engage in nation building. Besides the concern that law schools reflect the diversity of the U.S., Indian attorneys are needed for the combination of legal training and cultural sensitivities that they alone can offer. To produce Indian legal professionals, law schools need to respond with effective ways to recruit, admit and train individuals whose membership and participation in a tribe can be authenticated. Further, without adequate financial support, many talented Indian students will be denied real opportunity for a legal education.

When non-Indian and Indian students are in the Indian law class, there are different cultural perspectives involved. The viewpoint that law is anchored in individual rights, protected in the constitutional design of equal protection and due process, will

confront a different view. The indigenous perspective is anchored in consensus from interdependencies with family, clan and community, as well as with nature.

The respect that non-Indians give to the idea of tribes as sovereigns is critical for how the dialogues occur. As teachers we try to create mutual respect in the classroom, and it does not always happen. Nonetheless, it is a worthy goal to promote this civility while teaching students the substantive law and why Indian law matters.