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DIBAKONIGOWIN:¹ INDIAN LAWYER AS ABDUCTEE

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Walking in downtown Spokane alone, after
dinner with the Indian woman I love,
with the same Indian woman who loves me,
I was stopped by an Indian man, a stranger,
drunk, sitting in the shade, as transient
as every other Indian in the country.
“Hey, cousin,” he asked. “What tribe you are?”
“Spokane/Coeur d’Alene,” I said and he shook
my hand. “What’s your name?” he asked and I told

1. “Judgment undergone or received.” FREDERICK BARAGA, A DICTIONARY OF THE OJIBWAY LANGUAGE—PART II 109 (1880) (Minnesota Historical Society Press 1992).

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him.

“Hey,” he said. “You’re that writer.

I like some of your poems.” He touched my hand again and I touched his, not pretending to know his exact story, but understanding how close my life has often used the same words as his. How easy it would have been to call him by less than his real name, how easy it would have been to see him as a white man in Indian skin, how easy it would have been to make war on him

Sherman Alexie²

The Indian lawyer³ is a figure of critical importance to the future of Indians and Indian tribes. As late as 1968, there were fewer than twenty or thirty lawyers of American Indian ancestry.⁴ Tribal leaders have long yearned for more Indian lawyers. Albert White Hat, a Lakota language instructor and Sun Dance leader, encapsulated this argument when he said, “[W]e need Indian lawyers . . . [t]o master the Western culture, English language and come home when you are ready. We will take you to a sweat lodge and tell you what we want and what we need.”⁵ Another Lakota tribal leader, Ike Schmidt, said, “Much of the time tribes don’t have the appropriate daily legal advice, but we are starting to see more Indian lawyers.”⁶ And, since the late 1960s – and each year since – there are more and more Indian lawyers. As Melody McCoy, a Cherokee Indian and graduate of the University of Michigan law school,

2. Sherman Alexie, *In Response to Elizabeth Cook-Lynn’s Pronouncement That I [Am] One Of The New, Angry (Warriors) Kind Of Like Norman Schwartzkopf and Rush Limbaugh*, 9 WICAZO SA REV. 9, 9 (1993).

3. I use the term “Indian lawyer” in this paper as my own term of art. Herein, I refer to “Indian lawyer” to mean a lawyer who is an Indian. Most of the time, these Indian lawyers of which I speak work in the area of American Indian law, Federal Indian law, Tribal law, or its various incarnations, but not always. Commentators that are quoted herein, however, may use “Indian lawyer” to connote any lawyer, Indian or non-Indian, that works on behalf of Indians or Indian tribes.

4. See John Echohawk, Address at the University of North Dakota’s Northern Plains Indian Law Center 2004 Distinguished Speaker Presentation (March 30, 2004).

5. Albert White Hat, *Panel V: Revitalizing Economies, Preserving Cultures & Protecting the Environment: Striking the Balance in South Dakota and Indian Country*, 7 GREAT PLAINS NAT. RESOURCES J. 62, 63 (2002).

6. Ike Schmidt, *Panel V: Revitalizing Economies, Preserving Cultures & Protecting the Environment: Striking the Balance in South Dakota and Indian Country*, 7 GREAT PLAINS NAT. RESOURCES J. 64, 65 (2002).

said in 2000:

[T]here are many more Indian lawyers and lawyers practicing Indian law. Thousands, perhaps, whereas when [the Native American Rights Fund] started there were fewer than two dozen. A few tribes today have full-fledged legal departments. Over 250 tribes have tribal court systems. Federal Indian law is a regular course at many law schools.⁷

And these Indian lawyers have begun to permeate some niches of power in the American legal system. When he was head of the Bureau of Indian Affairs, Kevin Gover recalled a meeting:

where the Justice Department was there, along with some folks from Capitol Hill, and the leadership of the Bureau of Indian Affairs were there, and I looked around the room and just started counting all the Indian lawyers that were in that room. Basically, all of us were Indian lawyers. Thirty years ago, there were less than a dozen Indian people who were attorneys, and look at us now.⁸

And yet, the narrative employed by commentators to describe the Indian lawyer is in fundamental contradiction. On one hand, the Indian lawyer sometimes is hailed as a savior, a shining beacon of light and hope for Indians and Indian tribes. On the other hand, the Indian lawyer sometimes is vilified as a sell-out, both legally and culturally. Indian lawyers are contradictions; they have planted roots in several cultures and subcultures – tribal culture, non-Indian culture, and legal culture. As one Indian lawyer admitted,

There are lots of Indian lawyers who have been influenced by forces outside their tribal identity; there are influences of schools, churches, other people, and the influences of living away from the homeland with its sacred places to remind them of who they are. The dilemma is there: external thinking and

7. Milo Mason, *Melody Lynn McCoy*, 14 NAT'L RESOURCES & ENV'T, 198, 215 (2000) (quoting Melody McCoy, a lawyer with the Native American Rights Fund).

8. Kevin Gover, "There is Hope": *A Few Thoughts on Indian Law*, 24 AM. INDIAN L. REV. 219, 219 (2000).

philosophy and internal tribal identity.⁹

As such, Indian lawyers are uniquely qualified to be on the forefront of developing tribal government political and legal structures. Often, their task is to infuse this development with traditional and cultural relevance rarely exhibited in the past with non-Indian lawyers. Indian culture, tradition, and discourse are directly relevant to an Indian lawyer's job.

An example of this contradiction is within the views of Professor Robert Odawi Porter, a Seneca Indian who has worked as lawyer both in and out of Indian Country and is now a law professor at Syracuse University Law School. At one point early in Professor Porter's scholarly career, he referred to his former Indian lawyer colleagues as "sovereignty warriors."¹⁰ Upon further reflection, Professor Porter has written that he views Indian lawyers as acute threats to tribal sovereignty.¹¹

Perhaps the opposite of Professor Porter in some ways is Sam Deloria, a Lakota Sioux from Standing Rock who moved out of legal practice and became Director of the American Indian Law Center in Albuquerque. When speaking of Indian law professors Deloria made these comments that also relate to Indian lawyers:

The saddest thing of all is the number of Indian academics who basically yearn for a time which never existed, when Indian sovereignty was like Superman in a universe without kryptonite. That never even happened for Superman. Somebody always had a little rock of kryptonite to whip out and Superman was toast. But we have sad, misguided scholars dropping out of what's happening because, as one said to me, "I can't participate in a project that tells the tribes what they can't do." My God. That's

9. Claudeen Bates Arthur, *The Role of the Tribal Attorney*, 34 ARIZ. ST. L.J. 21, 25 (2002).

10. See Robert B. Porter, *Tribal Lawyers as Sovereignty Warriors*, 6 KAN. J.L. & PUB. POL'Y 7 (1997). Indeed, the current chairman of the Hoopa Valley Tribe, Clifford Lyle Marshall, a lawyer himself, sought attorneys applying for a staff attorney position with the Tribe that demonstrated the qualities of a "sovereignty warrior" in order to qualify for the position.

11. See, e.g., Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75 (2002) [hereinafter Porter, *Meaning*]; Robert B. Porter-Odawi, *Two Kinds of Indians, Two Kinds of Indian Nation Sovereignty: A Surreply to Professor LaVelle*, 11 KAN. J.L. & PUB. POL'Y 629 (2002) [hereinafter Porter, *Two Kinds*].

our money that sent this guy to school. In the old days, when my people sent out some scouts, if they went over the hill and saw 500 Crow Indians standing there cleaning their weapons, were they supposed to come back to the camp and say, "No problem, man, nothing happening?" They would get fired as scouts. Whatever our personnel system was in those days, they wouldn't be sent out. But we have scholars that want to look over the state of the law and come back and say, "Hey, we've got unlimited sovereignty, it's just that we've got a screwed up country that won't recognize it." Well, that's helpful.¹²

That the Indian lawyer must face these conflicting responses from Indian friends, family, tribal members, and commentators is entirely consistent with and predicted by the genre of Indian abductee stories.¹³ The odyssey of the Indian abductee described in countless Indian stories, tales, and legends is a metaphor for the journey that Indian lawyers take from Indian Country to law school and back. Unfortunately, the ending of the journey of the Indian abductee is often exile. The literary discourse of the Indian abductee blends in with the cultural discourse about and experiences of Indian lawyers and the legal discourse in which Indian lawyers engage. Indian lawyers are tasked with creating and participating in tribal courts, tribal policymaking, and tribal economies. Their charge is complicated by the important task of attempting to retain and cultivate tribal uniqueness and strengths through the development of these structures that, before this age, were uniquely non-Indian constructs. The Indian abductee literature provides an avenue for analysis and discussion of the contradictions inherent in many Indian lawyers. Indian lawyers should be made aware that their difficulties are not necessarily unprecedented in the culture. There may even be plausible solutions contained in the literature. This paper calls for Indians to make decisions in order to avoid exile for Indian lawyers from

12. Sam Deloria, *Commentary on Nation-Building: The Future of Indian Nations*, 34 ARIZ. ST. L.J. 55, 55-56 (2002).

13. This piece is not concerned with the abduction stories, usually told by Euro-Americans about white women and children abducted by Indians during the conquering of North America. See, e.g., SCOTT ZSECH, CAPTURED: A TRUE STORY OF ABDUCTION BY INDIANS ON THE TEXAS FRONTIER (2004); Michael Sturma, *Aliens and Indians: A Comparison of Abduction and Captivity Narratives*, 36 J. POPULAR CULTURE 318 (2002) (comparing alien abduction stories with stories of abduction by Indians told by non-Indians); Phillips D. Carleton, *The Indian Captivity*, 15 AM. LITERATURE 169 (1943).

their communities, the very communities for which they have made significant sacrifices.

Part I of this piece details several examples of the Indian abductee stories. This part details the stories of Pocahontas as told by Dr. Paula Gunn Allen, the Xebeche/Nobody character in Jim Jarmusch's film *Dead Man*, and the Jicarilla Apache story of the fox that brought fire to the world. Part II details the disdain and criticism Indians have heaped upon Indian lawyers, including both valid and unreasonable arguments. This part draws upon a short story by Sherman Alexie to describe how non-lawyers already detest lawyers. This part also explains why so many Indians detest lawyers based on the history of their betrayal by lawyers. Moreover, this part examines the legal arguments articulated against the strategies employed by Indian lawyers and the accusations that they are neo-colonizers. Part III discusses and analyzes the James Welch novel, *The Indian Lawyer*, an impressive fictionalization of the pressures and contradictions of being an Indian lawyer. Part IV concludes this piece by arguing that Indian lawyers have a great deal to bring to the table and, in spite of even their worst legal strategies, defy their labeling as neo-colonizers. In fact, Indian lawyers have an unusual amount of experience and education to bring back to their tribal communities. Their contradictions can be a genuine asset.

I. THE ABDUCTEE IN INDIAN STORIES AND LEGEND

In her epic rendering and retelling of the Pocahontas myth, legend, history, and biography, Dr. Paula Gunn Allen detours a moment to describe the skeletal structure of the "abduction narrative."

Essentially, the story goes, in its barest outlines, something like this. There is a maiden who, as it turns out, is of significant note among her people. Some overwhelming force – call it conqueror, caveman, star husband, holy people, manito, Dracula, E.T., or God, as you will – kidnaps her. She is taken to wherever, where she is made to eat something that will bind her to the force forever, made to take up modes of speech, dress, and worship that will have the same effect, or made to fall madly in love with the abductor, perhaps marry him. Eventually, after a number of twists and turns in the plot, she returns to her people, village, nation, or husband, and brings with her some invisible gift that results in an eternal change in the condition of her

people. Then she goes back to the world of the Invisibles – call it her death, the madhouse, enslavement in her husband’s palace, or the convent. The change is wrought, and nothing is ever the same. The end.¹⁴

According to Dr. Gunn Allen, abduction tales are an important and widespread element in Indian “Oral Tradition.”¹⁵ The story of Pocahontas is a prototypical Indian abduction story. Described by Dr. Gunn Allen, “[Pocahontas] was abducted by the English and held at a rudimentary boarding school – the first of many devoted to the purpose of ‘civilizing Indians’ – that was distant from James Fort, as the English version has it.”¹⁶ The details of her abduction by Captain James Argall (or Argyll) involve luring her, a teenager, onto an English ship under a pretext, and then issuing a ransom note to her tribe, the Powhatan.¹⁷ Long story short – the Powhatan leader did fulfill the terms of the ransom note, Pocahontas was baptized as a Christian, renamed Lady Rebecca because she was supposedly the daughter of the Powhatan “king,” married to Englishman John Rolfe, moved to England, and died at the age of twenty or twenty-one.¹⁸ The kicker is, according to Dr. Gunn Allen, it is likely Pocahontas basically agreed to abduction by the English.¹⁹ Perhaps the Powhatan “king” did not pay her ransom in order to leave “her to function as a ‘mole’ or ‘sleeper.’”²⁰

Moreover, this element of voluntary abduction is a theme running through many Indian abduction stories. Dr. Gunn Allen describes the Lenape abduction story where a young woman is taken away (apparently without much of a fight) by a man of the Thunder people.²¹ They travel to one of the Great Lakes and the young man takes the woman underneath the surface, where they live for some time with his mother. Eventually, she undergoes an ordeal, is saved by the Thunder people, and returned to her people. Unfortunately, she is fundamentally changed by her experiences and cannot remain with her people. She returns to go

14. PAULA GUNN ALLEN, POCAHONTAS: MEDICINE WOMAN, SPY, ENTREPRENEUR, DIPLOMAT 122 (2003).

15. *Id.* at 113.

16. *Id.* at 18.

17. *See id.* at 57.

18. *See id.* at 18, 58-59.

19. *See id.* at 123-24.

20. *Id.* at 133.

21. *See id.* at 115-16.

live with the Thunder people.

The abduction story recurs in virtually every Oral Tradition, Indian or not. Dr. Gunn Allen cites Sakakawea (abducted by the Hidatsa), Helen (abducted by the Trojans), and Guinevere of Camelot as examples of abduction stories.²² In her words, “there are thousands of abduction narratives in the ancient Greek, pre-Greco-Roman, and European mythic traditions.”²³ Other examples of Indian abduction stories include the Ojibway story of Eshkebug and Sky-Woman, sort of a reverse abduction story where an Indian abducts a supernatural being;²⁴ the Ojibway story of the robin, where a docile young man attempting his first vision is taken away by spirits of music and light to become a robin;²⁵ the Odawa story of an infant kidnapped by Toad Woman and held for years;²⁶ the Odawa story of the voluntary kidnapping of Wa-wass-ko-na by her desired lover, Neoma, and subsequent involuntary abduction by the powerful evil suitor, Motchi Manitou (or Matchimanitou);²⁷ the Passamaquoddy story of Blue Flower, who was kidnapped by another tribe but bravely refused to submit to marrying any of her kidnappers in loyalty to her beloved, and was rewarded;²⁸ the Anishinaabe story of Nanabozho’s cousin, who is kidnapped and murdered;²⁹ the Winnebago story of the Orphan-Boy kidnapped by Thunderbird and recovered by his tribe;³⁰ and the Ojibway story of Winonah, who failed to heed her mother’s warning, wandered off, and fell in love with (or was raped by, depending on where the story appears) a Manitou (a supernatural being; a spirit), gave birth to four supernatural male beings, but ultimately died of loneliness.³¹

The motif of abduction and captivity appears in modern American Indian literature as well. Barney Furman Bush, a Seneca and Cuyuga

22. *See id.* at 116-19.

23. *Id.* at 118-19.

24. *See* BASIL JOHNSTON, OJIBWAY HERITAGE 94-102 (University of Nebraska Press 1990) (1979).

25. *See id.* at 128-31.

26. *See* JOHN C. WRIGHT, THE CROOKED TREE: INDIAN LEGENDS OF NORTHERN MICHIGAN 57-62 (1996).

27. *See id.* at 79-82.

28. *See* MARGOT EDMONDS & ELLA E. CLARK, VOICES OF THE WINDS: NATIVE AMERICAN LEGENDS 320-22 (1989).

29. *See id.* at 247-50.

30. *See id.* at 161-63.

31. *See* JOHNSTON, *supra* note 24, at 151 (describing Winonah as falling in love); BASIL JOHNSTON, THE MANITOUS: THE SUPERNATURAL WORLD OF THE OJIBWAY 17-18 (1995) (describing Winonah as being “ravaged”).

poet and short story writer, wrote in *Taking A Captive/1984*, excerpted here:

My son you are born by
mistake in another world where
your vision lingers
too long
too long to teach those who
seek wisdom from the future
....
Here in my center M'qua [Black Bear] seeks
power to bring you home sniffs
the air for winter
Too soon Shemagana peoou [Foreign cold, threat of winter]
Your real name awaits
Come into your dreams my young
captive hear the hawk shriek
as he soars outside your window
Come into the lodge of winter
dreams hibernate with the
bear.³²

Bush's poem describes how a child of an Indian in the modern era, raised in the dominant society without the immersion of Native culture, is much like a captive that must be brought home. Moreover, M'qua, or Mukwa, is an animal that represents the warrior clan, the clan that physically defends the tribal community. This could also be said of Indian lawyers. There is also an interconnection (and contradiction) here between this poem and a major theme that runs throughout American Indian literature that is relevant here – "alienation and individualism."³³ The literature of Natives straddling the lines of two cultures, Indian and non-Indian, often focuses on particular individuals and their blood quantum or personal identity as a Native or Indigenous person,³⁴ distracting attention from a needed "focus on the importance of

32. Barney Furman Bush, *Taking A Captive/1984*, in *NATIVE NORTH AMERICAN LITERARY COMPANION*, at 85, 85-87 (Joseph Bruchas, Janet Witalec & Sharon Malinowski, eds. 1998).

33. Devon A. Misesuah, *Finding Empowerment through Writing and Reading, or Why am I Doing This?*, 28 *AM. INDIAN Q.* 97, 101 (2004).

34. *See id.* at 97-98.

traditions, sovereign rights, and the tribes as a whole.”³⁵ *Taking A Captive/1984* can be read as another in a long line of alienation narratives, but the emphasis on teaching in the first stanza shows a recognition that those who have acquired ideas and knowledge from the outside can still be welcomed back into the lodge.

Another element of the abductee is an unusual characteristic that often causes the individual to leave the community. Dr. Gunn Allen argues that the abductee (usually a woman, but not always) is one who “possess[es] some unique characteristic. In general, their characteristic can be summed up as somehow deviant, somehow wayward, or somehow ‘outside the loop.’”³⁶ A critical corollary (or the opposite side of the same coin) to the abductee narrative is the narrative of loss of a loved one (the captive) or the split personality of the abductee. These themes frequently run in Native poetry. For example, Maurice Kenny, a Mohawk, wrote the poem *They Tell Me I Am Lost*, excerpted here:

although I hide in the thick forest
 or the deep pool of the slow river
 though I hide in a shack, a prison
 though I hide in a glass of beer
 or high on steel girders over the city
 or in the slums of that city
 though I hide in a mallard feather
 or in the petals of the milkwort
 or a story told by my father
though there are eyes that do not see me
 and ears that do not hear my drum
 or hands that do not feel my wind
 and tongues which do not taste my blood

I am the string, the bow and the arrow³⁷

Kenny’s poem describes the conflict of a Native person living (hiding) in the non-Native world, but who nevertheless retains his Native identity. Moreover, this person retains a positive power yet to be

35. *Id.* at 101.

36. GUNN ALLEN, *supra* note 14, at 118.

37. Maurice Kenny, *They Tell Me I Am Lost*, in NATIVE NORTH AMERICAN LITERARY COMPANION, *supra* note 32, at 272, 274-75.

released, but the effects are not guaranteed to be constructive. A bow is a tool of hunting and providing for the community, but it is also a weapon.

That the abductee is not always welcome back home when she returns is also a critical theme in the narratives. Dr. Gunn Allen posits that Pocahontas is now sometimes vilified by “radicalized Native people” who believe she was “a traitor to her people, favoring the English over them.”³⁸ In fact, Pocahontas never returned home. One of the more interesting stories that include this theme is the story of Xebeche in the Jim Jarmusch film, *Dead Man*.³⁹ Though Jarmusch is not an Indian, he apparently did a lot of research into Indian-white relations and history during the writing of his screenplay and the shooting of the film.⁴⁰ In the film, Xebeche (played by Gary Farmer, an Anishinaabe), tells the story about how he was considered an outcast as a child because he was the product of a union between Blood and Blackfoot parents, kidnapped by British soldiers, paraded around North America and then England in a cage, successfully mimics the white man’s ways enough to convince them to educate him, bides his time and escapes. When he returns to his home, his people name him Xebeche (He Who Talks Loud, Says Nothing) and exile him. He prefers the name Nobody, recalling the Greek legend Ulysses, who preferred not to let anyone know his name.⁴¹ At the conclusion of *Dead Man*, Xebeche is killed while defending his friend, the main character played by Johnny Depp. Xebeche can never return home. Similarly, one of the most famous examples of the motive of the exile appearing in Native literature is N. Scott Momaday’s young man who goes off to war in *House Made of Dawn* and can only reintegrate into the community through traditional ceremonies.⁴²

Another element of the abductee story is where the captive returns, often with a great gift, but is unable to share in the gift. The Jicarilla Apache story of the origin of fire is the story of the wily fox who wishes to bring fire to the world.⁴³ He begins his journey by imitating the geese

38. GUNN ALLEN, *supra* note 14, at 131.

39. See DEAD MAN (Miramax 1995).

40. See JACQUELYN KILATRICK, CELLULOID INDIANS: NATIVE AMERICANS AND FILM 174 (1999) (“[H]e did his homework”); JONATHAN ROSENBAUM, DEAD MAN 35 (2000) (discussing Jarmusch’s on-site cultural advisor).

41. See KILATRICK, *supra* note 40, at 174.

42. See N. SCOTT MOMADAY, HOUSE MADE OF DAWN (1968) (University of Arizona Press 1996).

43. See EDMONDS & CLARK, *supra* note 28, at 105-06.

and learning to fly, but his flying is imperfect. He falls and finds himself in the walled village of the fireflies, where a fire is always burning at the center. Naturally, the fireflies will not let him leave with the fire, so he has to trick them. He takes a piece of cedar bark and attaches it to his tail. The fox ingeniously invents the drum and begins to sing, using the bark attached to his tail as a drumstick. The fireflies are distracted and do not notice right away when the fox lights the bark with the fire. With the help of the cedar tree, he escapes the walled compound and is able to pass the burning bark to the hawk, who then passes it to the crane. Fire spreads all over the earth thanks to the guile of the fox. The fireflies catch up to the fox and punish him by denying him the ability to use fire forever. Though the fox brought fire to the world, especially the Apaches, he is unable to share in the benefits. The wily fox is, like Pocahontas and Xebeche/Nobody, the prototypical Indian abductee and, for the purposes of this piece, is an excellent metaphor for the Indian lawyer.

II. THE CONTRADICTORY NARRATIVE ABOUT THE INDIAN LAWYER

One would think that the need for Indian lawyers is unquestionable. With the rise of treaty rights awareness⁴⁴ and the shifting of federal policy away from assimilation and termination to self-determination⁴⁵ in the 1960s and 1970s, the need for legal help to pave the way for Indians and Indian tribes is apparent. Michigan Indians, for example, believed in the late 1970s that the “complex legal dealings with the United States government” required the education and training of a new generation of Indian leaders.⁴⁶ In the intervening decades, the need for educated Indian leaders, particularly Indian lawyers, remains. As one commentator noted:

Indian history is taught in pre-collegiate courses as a footnote to

44. See Peter J. Aschenbrenner, Comment, *State Power and the Indian Treaty Right to Fish*, 59 CAL. L. REV. 485, 486-87 (1971) (“In seeking to protect their fishing activity against restriction by state fish management agencies, Indian have advanced a broad interpretation of this treaty fishing provision and on occasion have claimed the right to fish free from any state regulation.”).

45. See Robert Ericson & D. Rebecca Snow, Comment, *The Indian Battle for Self-Determination*, 58 CAL. L. REV. 445, 463 (1970) (discussing President Richard M. Nixon’s statement that recommended “legislation to aid Indian self-determination”).

46. NATIVE AMERICAN ORAL HISTORY PROJECT, *THE TREE THAT NEVER DIES: ORAL HISTORY OF THE MICHIGAN INDIANS* 151 (Pamela J. Dobson ed. 1978).

American history, sanitized of the genocide and savagery perpetrated by the pioneers and the American military on Indians. It is no wonder that the very idea of what constitutes Indian culture as held by non-Indian lawyers and jurists who enforce the constitutional guarantees of equal protection, is a product of popular movies and the occasional trip to an Indian art market for the very fortunate.⁴⁷

Indian lawyers are a conduit for expanding knowledge within tribal governments and communities about modern legal, political, and economic issues and opportunities. Consequently, they are a key to moving forward and developing.⁴⁸

The goal (dream) of moving off the reservation to attend college and then law school and then returning home to their families has become a reality for many Indians.⁴⁹ Many of the best and brightest young Indians are encouraged to excel in grade school and move on to college. Modern Indian lawyers practicing in Indian Country are gratified with their work and contributions to the advancement of Indians and their tribes. One prominent Indian lawyer stated, "Let me conclude by saying that I have absolutely no regrets becoming an Indian lawyer. We, as tribal attorneys, are in a fraternity, so to speak, of people who share a lot of the same goals."⁵⁰ Another prominent Indian lawyer stated, "It's just exciting to me to think I could help my people by getting an education . . . and by bringing back what I've learned back to the reservation."⁵¹

47. Sherry Hutt, *If Geronimo Was Jewish: Equal Protection and the Cultural Property Rights of Native Americans*, 24 N. ILL. U. L. REV. 527, 532 (2004).

48. See Tama William Potaka, *Maori Experiences and Federal Indian Law*, 51 FED. LAW., April 2004, at 36, 41 ("Furthermore, U.S. Indian lawyers and legal advocates, like Maori legal advocates, need to promote greater working knowledge concerning international trade and finance if indigenous peoples are to participate fully in international affairs.").

49. See Carey Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE, November-December 1995, at 134, 139 [hereinafter Vicenti, *The Reemergence*]. Cf. Tom Carr, *GT Band applauds diversity ruling*, TRAVERSE CITY (MICH.) RECORD-EAGLE, June 25, 2003 (noting that the Grand Traverse Band of Ottawa and Chippewa Indians were "getting its first influx of university grads coming back to the tribe in the last five to 10 years").

50. Dale T. White, *Tribal Law Practice: From the Outside to the Inside*, 10 KAN. J.L. & PUB. POL'Y 505, 510 (2001).

51. Lewis Kamb, *As Tribes Prosper, They Need Lawyers; Special Role Played By Indian Attorneys Gets Special Attention*, SEATTLE POST-INTELLIGENCER, Oct. 13, 2003, at A1, (quoting Leona Colegrove, tribal attorney for the Quinault Indian Nation).

Despite these apparently positive developments, Indians do not always look upon Indian lawyers with approval. In fact, Indians usually abhor and loathe attorneys. Sherman Alexie's poignant short story, *Lawyer's League*,⁵² is a nice example of how Indians view lawyers in general. In the story, the main character, a young and ambitious half-Indian, half-Black politico with a bright future is asked to join an informal basketball league in which all the players are lawyers – white lawyers. He is an athletic man with a reputation as an excellent baller and, though not a lawyer, he agrees to join. In his first game, his team assigns him to guard the best player in the league: Big Bill. In his first possession, Big Bill scores on the young politico. The politico sees that he has decent competition and responds by dunking over Big Bill. Big Bill nullifies the points, asserting, "There's no dunking."⁵³ The politico doesn't like this "[h]ouse rule,"⁵⁴ but plays on. On his next possession, the politico doesn't dunk, but he does rise above the rim and drop the ball in, indicating that he could have dunked easily had he chosen to. Big Bill again disputes the points, again arguing that the politico had dunked. Understandably frustrated, the politico lets it drift. And the next time the politico handles the ball, he dribbles circles around three players, including Big Bill, and scores. Once more, Big Bill waves off the points asserting, "That spinning-traveling garbage We don't play that kind of ball here."⁵⁵ A predictable argument begins. It ends with Big Bill saying, "[G]o home, son."⁵⁶ Violence ensues. This story exemplifies how a group of lawyers (or even just one) can turn something good and fun into a deeply unpleasant experience. Alexie highlights the bad lawyer's competitiveness, self-centeredness, and reliance upon technical rules to win at all costs. It is an old Indian story told in a new atmosphere. Indians have seen this behavior in their legal dealings with non-Indians, especially in treaty interpretation.⁵⁷

Indian stories are replete with tales of book-smart lawyers without a clue about Indians or Indian Country. In a Colville story⁵⁸ that also

52. See SHERMAN ALEXIE, *Lawyer's League*, in TEN LITTLE INDIANS, at 53 (2003).

53. *Id.* at 63.

54. *Id.*

55. *Id.* at 65.

56. *Id.* at 67.

57. Due to the overly technical and restrictive interpretation of Indian treaties by non-Indian lawyers and politicians, treaties should be "carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives." *Tulee v. Washington*, 315 U.S. 681, 685 (1942).

58. See *A Tribal Attorney*, in NATIVE AMERICAN READER: STORIES, SPEECHES AND

indicates how Indians feel about tribal lawyers, a “Tribal Attorney” asked the tribal leader to show him around the reservation. They ride a pair of horses and at each cave or tunnel, the leader gets off his horse, goes to the entrance, and yells, “Wooo, Wooo.” When the attorney asks why the leader does this, he says there is an old legend about a beautiful girl who lives in one of the caves and he wants to be the first to see her. Later, the leader goes off and leaves the attorney to return alone. Seeing a tunnel, the attorney tries the “Wooo, Wooo” trick, but it is a train tunnel and he is run over. This story exemplifies on a couple of levels (and with Indian humor) the Indian views of their lawyers. First, it shows how Indians believe that lawyers lack real common sense. This lawyer foolishly believes that calling “Wooo, Wooo” into a tunnel will bring an Indian girl. Second, it shows how the tribal leader’s willingness to trick the lawyer into doing something incredibly dangerous, strongly implying that the leader, representative of the entire tribe, holds malice for the lawyer.

This story also, by juxtaposition, brings another element of the Indian lawyer to light, the element of the lawyer as mystic or conjurer, especially from the point of view of an Indian, the client.⁵⁹ Professor Rennard Strickland wrote, “Certainly in the life of the contemporary Indian the lawyer stands in what seems to be a conjurer’s role, calling upon courtroom incantations and magical formulas, but always evoking the doctrines from the discourse of conquest.”⁶⁰ It appears, then, that the lawyer is a conduit of magic, but the lawyer’s tool is black magic, magic of the evil kind.

Indians are wholly justified in fearing and resenting lawyers, having been victims of cold-blooded legal strategies and blatant conflicts of interest. Professor Carey Vicenti, a non-lawyer but also a tribal court judge, noted:

Indians were fortunate in the first several decades of their

POEMS, at 33, 33-34 (Jerry D. Blanche, ed. 1990).

59. Cf. JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 261 (1990) (“[The lawyer] must be ready to speak the client’s language as fully as she can, yet ready also to turn to the judge, or other lawyer, and speak in terms – about jurisdiction, say, or conflicts of laws – that will, initially at least, be wholly foreign to the client.”).

60. Rennard Strickland, *Dances With Lawyers: Wolves, Judges, and Other Medicine Men*, 69 TEX. L. REV. 995, 997 (1991) (reviewing ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990)).

captivity to avoid a relationship with lawyers. Where lawyers have offered to help, they have primarily hindered, supporting the allotment policy and the granting of citizenship. Lawyers pursue legal rights in a disembodied puritanical fashion as if social justice must necessarily flow from the redress of legally cognizable rights. They refuse to enter those grounds where rights might be articulated but not legally recognized.⁶¹

Professor Vicenti then described the role played by lawyers in the eradication of Indian land claims through the mechanism of the Indian Claims Commission:

The Indian Claims Commission and its work formed a significant part of the structure of tribal relations, more so than may be thought at first glance We got paid off. We received no interest on the going rate of land. But desperation makes for the most convenient of settlements. We were offered a cash settlement to forever lose claim to lands from which we were born. The money, at the urgings of our attorneys, bought our silence, but did not buy our memories

This era of land claims settlement was not one of conciliation between the United States and Indian tribes And worse, we fell into the hands of new “friends.” In order to preserve to ourselves the best outcome under these duressful circumstances we were urged by federal officials to employ legal counsel. And we did. But this became yet another phase in our colonization. We fell to the mercy of lawyers. Now, a patronage alliance was formed. Council members, leaders of Indian America, not being in a position to evaluate the advice of legal counsel, were obliged to accept such advice. They were advised to accept the money and to assume an attitude of success. It was like a “Jedi mind trick.”⁶²

Other commentators have criticized Indian lawyers (in this case, non-Indians) for conceding important legal questions in oral argument before the Supreme Court. For example, in the *Santa Clara Pueblo v.*

61. Carey N. Vicenti, *The Social Structures of Legal Neocolonialism in Native America*, 10 KAN. J.L. & PUB. POL’Y 513, 527 (2001).

62. *Id.*

Martinez⁶³ oral argument, commentators strongly condemned tribal non-Indian advocates for conceding that Congress had authority over the internal workings of Indian tribes.⁶⁴ These commentators also rebuked the attorney for the Suquamish Tribe for conceding that Indian tribes had most of their sovereignty diminished by the federal government in the *Oliphant v. Suquamish Indian Tribe*⁶⁵ oral argument.⁶⁶ Most persuasively, the commentators criticized attorneys for the Sioux Nation for choosing the strategy of trying to secure money damages for the loss of the Black Hills rather than following the strategy demanded by their clients for the return of the Black Hills.⁶⁷ And, perhaps most notorious, is the non-Indian attorney who represented both sides of an arms-length transaction between the Hopi Tribal Council and a mining company, a deal which ultimately left the Hopi Tribe's sacred lands ravaged by strip mining and finances exploited by extremely low royalty revenues.⁶⁸ More recently, non-Indian lawyers and lobbyists have been accused of improperly and excessively charging four tribes millions of dollars for access to the Republican Party leadership.⁶⁹

Professor Robert Odawi Porter has been harshly critical of the strategies of many advocates for Indian tribes, Indian or non-Indian alike. In a 2002 article,⁷⁰ Professor Porter condemns Indian lawyers (and has

63. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

64. See Seven Tullberg & Robert T. Coulter, *The Failure of Indian Rights Advocacy: Are Lawyers to Blame?*, in RETHINKING INDIAN LAW, at 51, 52 (National Lawyers Guild Committee on Native American Struggles, ed. 1982).

65. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

66. See Tullberg & Coulter, *supra* note 64, at 52.

67. See *id.* at 53 (discussing *Sioux Nation v. United States*, 448 U.S. 371 (1980)); see also Elizabeth Cook-Lynn, Book Review, 8 WICAZO SA REV. 100, 100-01 (1992) (reviewing EDWARD LAZARUS, JR., *BLACK HILLS, WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES 1775 TO THE PRESENT* (1991)):

The agenda of this book, then, in spite of the author's disclaimers, are severalfold: to justify the arbitrary acceptance of the judgment monies over the client's objection; to press, belatedly, for that tribally rejected solution as the only logical and pragmatic thing to do; to legitimize the U.S. Claims Commission's principle . . . that Indian land acquired by theft cannot be returned to its original owners; and, most offensive of all, that white lawyers know what is best for their 'blind' Indian clients . . .

68. See Charles F. Wilkinson, *Home Dance, the Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest*, 1996 BYU L. REV. 449, 478.

69. See Demetri Sevastopulo, *Top US lobbyists resigns over tribal contracts*, FINANCIAL TIMES (LONDON), March 5, 2004, at 2; Jonathan Groner & Kristen A. Lee, *Lobbyists For Indian Tribes Fear Image May Suffer*, LEGAL TIMES, Mar. 8, 2004, at 1.

70. Porter, *Two Kinds*, *supra* note 11.

developed a new way of teaching the next generation of Indian lawyers⁷¹) as attorneys “who are really helping to build a new wall of colonial domination in the lives of Indigenous peoples one brick at a time.”⁷² Professor Vicenti shares Professor Porter’s view that Indian lawyers educated in the modern law school are “self-colonizing . . . [,] advis[ing] our own peoples that we did not possess the legal authority to, for instance, exercise criminal authority over non-Indians because *Oliphant v. Suquamish* said so.”⁷³ It appears that Indian lawyers, according to these commentators,⁷⁴ can be tools of the adversary. In addition to reiterating the critique of non-Indians conceding colonialist arguments before the Court, Professor Porter adds that a new generation

71. Professor Porter’s new, “narrower agenda,” when teaching Indian law students is as follows:

Armed with this realization, I have focused my educational approach considerably in relation to educating Indian students. No longer do I simply teach them what I know about becoming a lawyer and leaving it to them to figure out how best to serve their future Indigenous individual or governmental clients. Instead, I teach them the truth about America’s agenda to destroy the Indian nations and how they, as American trained lawyers, can use their skills to rebuild their own nations in the image of their own people in addition to dismantling the oppressive colonial system to keep it from doing any more harm to our nations.

Id. at 647. See generally ROBERT ODAWI PORTER, SOVEREIGNTY, COLONIALISM AND THE INDIGENOUS NATIONS: A READER (2005).

72. *Id.* Professor Porter’s example of an Indian lawyer who helps to build this “wall” is former Assistant Secretary of Indian Affairs Kevin Gover. See *id.* at 654 n.47.

73. Vicenti, *supra* note 61, at 528 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)); see also Glenn T. Morris, *Vine Deloria, Jr., and the Development of a Decolonizing Critique of Indigenous Peoples and International Relations*, in NATIVE VOICES: AMERICAN INDIAN IDENTITY & RESISTANCE, at 97, 110 (Richard A. Grounds, George E. Tinker & David E. Wilkins, eds. 2003) (“Unfortunately, since the publication of [VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE (1974)], two generations of attorneys, both Indian and non-Indian, have been trained – most of them indoctrinated to accept the very assumptions that Deloria so vigorously challenged, and most of them internalizing those assumptions.”) (footnote omitted).

74. Even those who disagree with Professor Porter’s views about Indian lawyers tend to malign them. Professor John LaVelle argued in his 2001 response to an earlier Porter article that “we do not truly protect our sovereignty[] when we send a fleet of lobbyists, consultants, and lawyers to Washington every time our interests are being negatively affected We really should be blaming the lobbyists, lawyers, and consultants who mislead us” John P. LaVelle, *Strengthening Tribal Sovereignty Through Indian Participation in American Politics: A Reply to Professor Porter*, 10 KAN. J.L. & PUB. POL’Y 533, 558 (2001).

of Indian lawyers is doing the same thing.⁷⁵ As Professor Porter concluded:

Viewed together, then, the lawyers and law professors who uncritically practice in and study the field of “federal Indian law” are complicit in the effort of the United States to subordinate Indigenous conceptions of Indigenous nation sovereignty to the American conception. Against the backdrop of the longhouse and the castle, “doing federal Indian law” is the equivalent of filling in the moat and paving over the longhouse with the body of American law.⁷⁶

With these highly regarded scholars so strongly denigrating Indian lawyers, it is not surprising to read that some Indian lawyers are, for example, unwilling to practice in tribal courts.⁷⁷ Others agree to work for their own tribes reluctantly, fearful of tribal politics⁷⁸ and conflicts of interest.⁷⁹

The criticism of Indian lawyers extends beyond their legal strategies, but to their contribution and presence in the tribal communities they left to pursue their professional education. Indian lawyers often undergo extensive social scrutiny and must wade through waves of suspicion directed toward them. Moving away from the reservation for seven years or more creates a real or apparent cultural divide between the Indian lawyer and those he or she left behind. This is true for any educated Indian. Often, educated Indians (and others) are considered to be “assimilated.”⁸⁰

75. See Porter, *Meaning*, *supra* note 11, at 95 (citing *Nevada v. Hicks*, 533 U.S. 353 (2001)).

76. *Id.* at 99.

77. See Elizabeth E. Joh, *Custom, Tribal Practice, and Popular Justice*, 25 AM. INDIAN L. REV. 117, 124 (2000-2001); Vicenti, *The Reemergence*, *supra* note 49, at 140.

78. Cf. SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 294 (1989) (“A . . . criticism is that tribal councils too often involve themselves in the administrative and business operations of the tribe. In other words, council members may control hiring, firing, or budgetary decisions on the basis of their political needs (e.g., to ensure reelection instead of on sound, objective administrative and business practices.”).

79. See Gerald L. Hill, *Conflicts of Interest for Tribal Lawyers Representing Their Own Tribes*, 8 KAN. J.L. & PUB. POL'Y 147 (1999).

80. Cf. O'BRIEN, *supra* note 78, at 294 (“Critics also charge that tribes too frequently are governed by an elite group of assimilated tribal members who do not represent the more traditional members.”).

Despite the fact that tribal leaders typically base at least part of their political campaigns on education – attempting to realize a goal of sending as many young tribal members off to school as possible – when those young members come home, they often return under a cloud of suspicion or even jealousy.⁸¹

Though he is not a lawyer, Sherman Alexie, the prominent Spokane/Couer d'Alene writer, is an example of this phenomenon. He has written extensively about his childhood growing up in Indian Country and not always with the glow of fond memories. Sometimes, the stories about his home are brutal. As a result, “[w]hen Alexie returns home, the reaction is mixed [H]e is sometimes snubbed as the big-shot city writer.”⁸²

Unfortunately, it rarely improves on the outside. Indian lawyers have to defend themselves even from non-Indian lawyers. Lawrence R. Baca, a Pawnee Indian who works for the Civil Rights Division in the Department of Justice, wrote about one experience where another attorney asked him to prove his Indian credibility:

A few years ago, I walked into another attorney's office and introduced myself. She looked at me and said, “I thought you were supposed to be an Indian. I mean, you're obviously not culturally Indian. You do not dress like an Indian!” I said, “Yes, I do. I wear a suit and tie to the office because I'm an Indian lawyer. I'd wear beads and feathers to the office if I were a professional Indian . . . but I'm not, I'm an Indian professional.”⁸³

The impact of this suspicion directed toward educated (and successful) Indians is multiplied when the returning Indian is a lawyer. The underlying, concentrated suspicion of Indians toward lawyers often intensifies the negative view of the returning Indian. This reaction is sometimes exemplified by a refusal to hire the Indian lawyer for whatever reason. And when the Indian lawyer is hired, often tribal

81. Matthew L.M. Fletcher, *The Drug War on Tribal Government Employees: Adopting the Ways of the Conqueror*, 35 COLUM. HUM. RTS. L. REV. 1, 25 (2003).

82. Timothy Egan, *An Indian Without Reservations*, N.Y. TIMES, Jan. 18, 1998, at 19 (Magazine).

83. Lawrence R. Baca, *Diversity and the Federal Bar Association*, 50 FED. LAW., Feb. 2003, at 23, 30.

members and tribal leaders behave awkwardly toward him or her, sometimes with overt antagonism. In many instances, the tribal leadership will receive the advice of an Indian lawyer with skepticism and refuse the advised course of action unless a non-Indian lawyer seconds the recommendation. To be fair, however, many (if not most) Indian lawyers return home to the equivalent of a ticker-tape parade and quickly garner the trust of the tribe's members and its leadership. Nevertheless, this distrust and rejection of Indian lawyers by tribal communities recurs.

The negative reaction to the return of Indian lawyers is not unlike the reaction of Indians to the return of an abductee to the tribal community. Often, the Indian who leaves is an exceptional student the community identifies as having potential, much like the abduction stories where the maiden refuses to marry or is unusually intelligent. While away at college and law school, the Indian who leaves acquires a tangible skill, a skill that is much needed but in short supply within the tribal community. When the Indian lawyer returns, he or she is often treated with disdain, much as Xebeche's people treated him. An Indian woman taken from her family and adopted into a non-Indian family encountered parallel behavior from Indians in her community when returning to her community as an adult to attend tribal community college.⁸⁴ In some unfortunate instances, the Indian lawyer, like Xebeche, leaves his or her community, becoming an exile, either voluntarily or involuntarily. Though the Indian lawyer brings significant benefits to Indians and Indian tribes, he or she is sometimes denied the benefit of participating fully in these advantages, like the wily fox who brought fire to the Jicarilla Apaches. Indian lawyers have to "walk in two worlds to survive."⁸⁵

III. REAL AND UNREAL INDIAN LAWYERS: JAMES WELCH'S *THE INDIAN LAWYER*

In 1990, renowned Blackfeet Indian writer James Welch published

84. See Mary Black Bonnett, *Blood Flowing in Two Worlds*, in GENOCIDE OF THE MIND: NEW NATIVE AMERICAN WRITING, at 13, 13-30 (MariJo Moore, ed. 2003). "When I first started attending the tribal college, other students were really mean . . . I was extremely upset and told Auntie. She said to me, 'They are disturbed because you got to get away from all the poverty and had the opportunities that many of them never had.'" *Id.* at 17.

85. *Id.* at 20.

The Indian Lawyer,⁸⁶ the story of Sylvester Yellow Calf, a thirty-seven-year-old Stanford educated attorney. In the novel, Yellow Calf works for a law firm doing yeoman's work for a non-Indian firm away from the community in which he grew up. He is reasonably successful as a lawyer, been appointed to the state parole board, and enjoys notoriety for playing basketball in college. Early in the novel, he is offered a chance to run for Congress. His political career stalls when he is blackmailed. Eventually, he acquits himself by confronting his blackmailers. The novel concludes when Yellow Calf goes to work on treaty rights and land claims litigation on behalf of a tribe not his own.

Yellow Calf's story includes virtually all of the elements of the Indian abductee stories. His journey begins in high school, where he is an excellent student and outstanding basketball player. A non-Indian sportswriter sets him apart from his teammates in a deeply paternalistic and racist article in the form of a public letter to Yellow Calf urging him not to become like the other Indian sports stars and succumb to drink and despair.⁸⁷ From the day that article is published, his relationship to his team and his community changes dramatically. He is already isolated:

He had always been a little different – he studied hard, he took care of his grandparents as much as they took care of him, he didn't drink at all, he was always the best athlete even as a little kid – but now without dwelling on it, he knew he had become an outsider to all but the old people.⁸⁸

His distance from his community is lengthened when he applies for law school a few years later. He hears about how Indian lawyers are the "new warriors"⁸⁹ and enters law school seeking to become a sovereignty warrior, only to end up working in a non-Indian law firm on non-Indian legal issues. The closest he gets to working with Indians is when he sits

86. See JAMES WELCH, *THE INDIAN LAWYER* (1990). For a good nonfiction book about a famous Indian lawyer, Raymond Cross, now a law professor at the University of Montana, see PAUL VANDEVELDER, *COYOTE WARRIOR: ONE MAN, THREE TRIBES, AND THE TRIAL THAT FORGED A NATION* (2004). This book is also a history of the Mandan, Hidatsa, and Arikara tribes' fight to restore their homeland, taken by the federal government for a deeply misguided dam-and-flood project in North Dakota.

87. The letter reads in part, "Many of your teammates will . . . fall by the wayside, perhaps to a life of drink and degradation – so much a part of Indian experience – but you will, must, carry the torch." WELCH, *supra* note 86, at 102-05.

88. *Id.* at 110.

89. *Id.* at 106.

before an Indian inmate applying for parole from the state penitentiary. Early in the novel, he dreads his life:

He had always been different, even back there on the reservation, and now he was different in a white man's town in a white man's world of briefcases, suits, law, and politics. Even Buster Harrington, the senior partner of the law firm, had begun to push him to become more like his young white colleagues.⁹⁰

Yellow Calf's journey concludes when he agrees to represent the Standing Rock Sioux Tribe in a "landmark case in Indian Country."⁹¹ He drops his old life in the non-Indian world and takes up the mantle of "new warrior," but does not yet return home.

The academic scholarship reviewing *The Indian Lawyer* was, compared to Welch's earlier novels, sparse, and it does not identify the elements of Yellow Calf's journey as a prototype Indian abductee story. One commentator focuses on Yellow Calf as a victim of the dominant society's need for exceptional Indians to be role models for all other Indians.⁹² Another commentator focused on Yellow Calf as the epitome of the reservation basketball star, unable even after success in the outside world, to enjoy that success without the home crowd watching the cheering.⁹³

The commentary on this novel appears to argue that Yellow Calf's journey from reservation Indian, to directionless Indian lawyer, to "new warrior" working on a "landmark case in Indian Country" is, while imperfect because he does not return to his own community, a very upbeat ending with the proper respect given to the preservation of Indian identity, of Indianness – a "new warrior."⁹⁴ One commentator noted:

Here the wheel comes full circle. Sylvester entered "the outside world" seventeen years ago to become a "new warrior," but

90. *Id.* at 38.

91. *Id.* at 305.

92. See Karsten Fitz, *Bridging the Gap: Strategies of Survival in James Welch's Novels*, 20 AM. INDIAN CULTURE & RES. J. 131, 134 (1996).

93. See Sidner J. Larson, *The Outsider in James Welch's The Indian Lawyer*, 18 AM. INDIAN Q. 495, 500-02 (1994).

94. See Robert F. Gish, *New warrior, New west: History and Advocacy in James Welch's The Indian Lawyer*, 15 AM. INDIAN Q. 369, 374 (1991); Darin Saul, *Intercultural Identity in James Welch's Fools Crow and The Indian Lawyer*, 19 AM. INDIAN Q. 519, 524 (1995).

without any connection to his tribal background. Now he returns, although to a different reservation, to represent American Indians in the “legal war” against the special interest groups of the United States. His political activism and sense of ethnic (pan-Indian) responsibility demonstrate that he now knows his place in time and history. In this arena, Sylvester can help preserve Indian land, which is the foundation for the survival of the American Indian nations today.⁹⁵

Though *The Indian Lawyer* is a fine novel, the “landmark case” portion of the ending is by far the least believable. Indian tribes are unlikely to engage in a search for Indian lawyer diamonds in the rough to handle major treaty rights disputes in federal court, particularly one lacking litigation experience or a reputation as a sovereignty warrior. There are numerous reasonably priced national firms, many staffed by Indian lawyers, to do this work (not to mention big-market, high-reputation law firms looking for interesting pro bono work)⁹⁶ or, of course, the venerable Native American Rights Fund.⁹⁷ For better or for worse (and there are stories either way), these firms are where Indian tribes would turn before considering an Indian lawyer down on his luck.

These commentaries attaching such a high importance to Yellow Calf’s new job miss the mark. This is not to say that Indian lawyers should not participate in “landmark” cases. Many Indian lawyers participate in such cases and are very successful.⁹⁸ Others work in D.C. as lobbyists or with the federal government.⁹⁹ Still others are employed in firms as transactional lawyers, working on the financing of large tribal economic development projects. Not everyone goes back to their own tribal community to take over the tribal attorney’s office. Each Indian lawyer has to choose an individual road. And this is where the commentary on *The Indian Lawyer* fails most completely. It assumes

95. Fitz, *supra* note 92, at 140.

96. See VINE DELORIA, JR. & CLIFFORD LYTLER, AMERICAN INDIANS, AMERICAN JUSTICE 144 (1983) (discussing how tribal leaders tend to employ powerful corporate law firms if they can afford to); Arlinda Locklear, *Morality and Justice 200 Years After the Fact*, 37 NEW ENG. L. REV. 593 (2003) (a transcript of a speech by an Indian lawyer who litigates Indian land claims and treaty rights and is of counsel to a large D.C. firm).

97. Cf. Tracy Labin, *We Stand United Before the Court: The Tribal Supreme Court Project*, 37 NEW ENG. L. REV. 695 (2003) (describing the Native American Rights Fund’s participation in Indian law Supreme Court cases).

98. See Vicenti, *The Reemergence*, *supra* note 49, at 140.

99. See *id.*

(much like the lawyer in Lawrence Baca's narrative) that Indian lawyers must return home. Even the commentator that, in my opinion, most succinctly analyzes the novel asserts, "[M]any would say he has not progressed by electing to work on Indian water rights."¹⁰⁰ Who is this "many"? Indians? Tribes? Other Indian lawyers? Here is insidious paternalism, the assumption that an Indian lawyer would be subject to criticism for not working exclusively and forever only for his or her own tribe.

The commentary that best analyzes the novel identifies Yellow Calf as an "Interpreter," one "lost somewhere in between" the "white-oriented Indians" and the "Indian-oriented Indians."¹⁰¹ For this commentator, "[t]hings are more complicated than they seem, especially with regard to the emergence of the middle-class Indian, a combination as troubling as 'Indian lawyer.'"¹⁰² Herein lies the difficulty with Welch's ending – not all Indian lawyers end up heading a team of lawyers (or law students) in a major treaty rights case. If the ending is supposed to inspire Indian lawyers and other "Indian professionals" (to borrow Lawrence Baca's term) by striving to be the "superstar" or the "leader" or the powerful litigator that wows them all before the Supreme Court, it does a minor disservice to Indian lawyers. Indian lawyers are most needed not in the federal courts, but in the development of tribal law, tribal courts, and other tribal political structures.¹⁰³ It is here where the threat of assimilation carries the most weight¹⁰⁴ and where Indian lawyers have the most to contribute, the most insight, the most unique experience. These Indian lawyers can "interpret" non-Indian law alongside traditional law, choose which doctrines and methods best serve tribal communities, and advise their clients accordingly.

100. Larson, *supra* note 93, at 504.

101. *Id.* at 505.

102. *Id.*

103. For a recent example of materials gathered by Indian lawyers for the purpose of teaching Indian undergraduates and non-law student graduate students about tribal law and tribal governance development, see JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES (2004), and CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE (2004).

104. See FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE 100 (1995) ("Despite . . . enormous pressures, tribal courts continue their struggles to maintain their identities and to resist the ongoing forces of assimilation.") (italics added) (citing Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 750 (1989)); Steve Russell, *The Jurisprudence of Colonialism*, 25 LEGAL STUD. F. 605, 605 (2001) ("We study this law that has failed us, ironically, for utilitarian ends.").

IV. INDIAN LAWYER AS WILY FOX OR EXILE?

The Indian lawyer has quietly entered into the legends and stories and oral histories of Indian tribes. More than a few tribes owe their continued political existence to the strategies and advocacy of lawyers, Indian and not. In many ways, the Indian lawyer is as mystical a figure as any character in ancient legends.

In his brilliant and inspiring speech, *As You Will: Through the Looking Glass of Indian Law and Policy, or, The Challenge of Painting on an Unfinished Canvas*,¹⁰⁵ Professor Rennard Strickland, a Cherokee Indian, argued that the so-called "Indian problem" will slowly cease being mostly a legal problem, but instead will become a "bureaucratic" problem.¹⁰⁶ For Professor Strickland, "[W]e are now moving into an age where much of society no longer perceives the Indian problem as legal. Social planners are now attempting to fill the role that the lawyer has played."¹⁰⁷ It does appear that the larger battles that Indian tribes will be fighting in the next fifty years will be less about treaty rights, tribal government and court authority, and individual and tribal rights, but more about economic development, tribal government funding and revenues, and the preservation and acknowledgment of tribal culture. Assuming that Professor Strickland's prediction is accurate, the need for Indian lawyers would appear to be less acute in the future. It follows that the decisions being made every day by Indian lawyers have less and less value and may even cause harm.

But, I assert that the decisions made by Indian lawyers, especially as a critical mass of them begin to enter the halls of tribal councils and tribal communities, are becoming more and more critical. Indian lawyers are quick to recognize cultural and political strengths and limitations; they are quick to recognize political and sociological advantages and disadvantages to big picture tribal decisions. Professors Porter and Vicenti decry the "concessions" made by these Indian lawyers, but the days of making pie-in-the-sky arguments in federal court – and winning – are behind us.¹⁰⁸ There has to be another method of preserving and

105. See RENNARD STRICKLAND, *As You Will: Through the Looking Glass of Indian Law and Policy, or, The Challenge of Painting on an Unfinished Canvas*, in TONTO'S REVENGE: REFLECTIONS ON AMERICAN INDIAN CULTURE AND POLICY, at 99 (1997).

106. *Id.* at 111.

107. *Id.*

108. University of Colorado law school dean, David Getches, a leading litigator in the watershed Indian treaty rights case of the 1970s and 1980s, *United States v. Washington*,

enhancing Indian and Indian tribal rights than pounding down the courthouse door. It is these strategies that Indian lawyers can assist more than any others.

Indian lawyers remain amongst the most progressive, cutting edge lawyers to this day. They are on the front lines of treaty rights and trust property litigation, educational and economic equality, and, most importantly, the development of tribal law and political structures. Professor Vicenti acknowledged that the return of young tribal members to Indian communities resulted in an initial "brief era of acculturation," but the more recent trend is toward criticizing those legal values and structures that tribes had "imported" in favor of the restoration of tribal traditions and customs.¹⁰⁹ And in the words of Steve Russell, an Indian lawyer who was a state court judge and is now a professor, "Indians require a narrative wherein we have value without regard to power and therefore resistance is not futile. Within this narrative, we find the reason and the courage to assert that we will *not* be assimilated."¹¹⁰ It is extremely unlikely that Indian lawyers will go the way of the wily fox, never receiving the benefit of that which they bring, but I am not entirely certain that they will avoid the fate that befell Xebeche/Nobody, doomed

recognizes that federal courts are now the last place Indian tribes want to be. See David Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Colorblind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 281 (2001) (noting that the win rate before the Supreme Court is thirty six percent for convicted criminals and twenty three percent for Tribes); see also Matthew L.M. Fletcher, *Quick Empirical Study of Cert. Grants and Denials*, For the Seventh Generation blog (Aug. 22, 2007), available at <http://tribal-law.blogspot.com/2007/08/quick-empirical-study-of-cert-grants.html> (reporting that parties opposing tribal interests have a sixteen percent chance of having adverse lower court rulings reversed by the Supreme Court while tribal interests have only a three percent chance). Professor Porter agrees that Indian tribes cannot win in federal courts in the long run and implies that the proper path is to avoid federal court litigation. See Porter, *Meaning*, *supra* note 11, at 96.

109. See Vicenti, *The Reemergence*, *supra* note 49, at 139. Professor Vicenti's full statement on this matter is as follows:

Over the past two decades we have sent young tribal members off to schools and colleges to become educated about the western world. After the return of the first waves of educated Indians, we experienced a brief era of acculturation during which time we accepted the apparent necessity of adopting written laws and refining our western-style institutions of adjudication. But, in our new wave of educated tribal members returned home questioning the values which we previously uncritically imported, we now perceive our rights to culture as being part of a larger global more.

Id.

110. Russell, *supra* note 104, at 614 (emphasis in original).

to exile in one form or another. It seems certain that tribal attorneys have established themselves in tribal governments, in Indian Country, and in tribal courts. They accept the responsibility to fight these battles on behalf of Indians and tribes – and do so with respect for their cultures and traditions. As one Indian lawyer noted, “Finally, we should always remember who is affected by our work. Long after we attorneys have done our work, picked up our papers, closed up our briefcase, and gone home, the tribe and its members will still be there. We must never forget that fact.”¹¹¹ Indian lawyers such as Raymond Cross have articulated their understanding of such concepts as the wouncage, or Sacred Trust, “an expression of the communal reverence shown by the people of a tribe or community for the originating force that makes the wind, that brings the clouds, that carries the rain, that falls to the grass, that feeds the buffalo to nourish the man.”¹¹² Indian lawyers keeping such concepts in mind as an overarching discipline are potentially some of the strongest advocates for tribal communities, advocates who retain their connection to the community, able to step into the non-Indian legal and political world to effectively speak for the community. The question, then, is whether tribal communities will accept these “sovereignty warriors” or whether Indian lawyers will fade away into exile as Xebeche/Nobody and the wily fox.

Migwetch.

111. White, *supra* note 50, at 510.

112. VANDEVELDER, *supra* note 86, at 244 (paraphrasing Raymond Cross, University of Montana law professor).