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# LAW SCHOOL TRAINING OF AMERICAN INDIANS AS LEGAL-WARRIORS

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## Introduction

*I faced a choice of whether to pursue music or do what my community needed . . . . So I made a real pragmatic choice and sort of buckled down to a long trek from college through law school with the single purpose in mind of becoming a lawyer and working on behalf of Indian tribal governments. There were so many questions of tribal jurisdiction, state jurisdiction, governmental authority, land rights, water rights. I felt that the*

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*way to be a warrior, or protector, of the people was to become a lawyer.*

— Susan Williams<sup>1</sup>

Law and jurisprudence in the United States have always included three sovereigns: the federal government, the states, and the American Indian tribes.<sup>2</sup> The law and jurisprudence developed by the Indian nations continues the evolution in self-government that predated the European invasion of the Americas. Thus, historically, the Indian nations are the first sovereigns within the boundaries of the United States. The Indian sovereigns' complex and growing number of interactions with the federal and state sovereigns have enlarged demand for legal professionals among the American Indian population.

American Indians are not living artifacts. They are twentieth-century people engaged in both preserving and transforming a cultural way of life. The simultaneous conservation and innovation of indigenous peoples continues an immemorial pattern among the native peoples of the Americas.<sup>3</sup>

Consequently, the goal of tribal lawmaking is not to copy Anglo-American law. Tribal nations are laboratories for beneficial non-Anglo-American concepts in law. The legal-warriors creating new tribal law are innovators who work outside of the restrictions of mainstream culture and law.<sup>4</sup>

1. Norma Libman, *The Way to Be a Warrior Was to Become a Lawyer*, CHI. SUN. TRIB., Oct. 28, 1990, at C3 (interview with Susan Williams, Sisseton-Wahpeton Sioux, an attorney whose inspirational model was her great-great-grandmother, a Sioux warrior).

2. The term "American Indian" includes American Indian and Alaskan Native political entities for the purposes of this article. Alaskan Natives, Aleuts, Inuits, and others maintain distinct cultural identities, but these are not pursued for this discussion of the body of law designated as American Indian law and of law school practices. The term "tribes" is also used for general discussion though the indigenous nations use varied terms for their collective identity, e.g., nation, pueblo, band, community, rancheria, colony, and village. The most recent listing of approximately 550 "entities" that are federally recognized demonstrates the variety of self-designations used by the indigenous nations. See Notice, 60 Fed. Reg. 9250 (1995).

3. Tribal people also speak of themselves as "Native Americans"; as a descriptor, this term is used, along with American Indian in this article. The conserving and innovating pattern among indigenous peoples of the Americas was essential for their survival as they encountered changing environmental conditions, the Europeans, and new life forms. Neither the tribal nations nor their individual members fit the "living artifact" image of much popular culture that treats Indians as people existing at a historical set point, not in the twentieth century. See Clara Sue Kidwell, *Systems of Knowledge, in AMERICA IN 1492: THE WORLD OF THE INDIAN PEOPLES BEFORE THE ARRIVAL OF COLUMBUS* 369 (Alvin M. Josephy, Jr., ed., 1992) [hereinafter *AMERICA IN 1492*]; Peter Iverson, *The Navajos After 1492: A Perspective on Native Peoples and Cultural Change* (Feb. 28, 1992), in *THE OXFORD HISTORY OF THE AMERICAN WEST* (Clyde A. Milner II et al. eds. 1994)). See generally PETER IVERSON, *THE NAVAJO NATION* (1981).

4. See Gloria Valencia-Weber, *Tribal Courts: Custom and Innovation in Common Law*, 24

This new professional, the legal-warrior, is the focus of this article.<sup>5</sup> The use of sovereign power by Indian nations to create new law demands a new form of lawyering for the tribes to thrive as contemporary governments. Collaterally, this new professional requires different training than that traditionally offered by law schools. Neither the occupation of legal-warriors nor their legal training can be "generic" if they are to advocate effectively for their peoples.

This article explores four areas involved in training lawyers appropriate to the needs of tribal nations. First, the American Indian tribes, as the indigenous sovereigns, present legal needs and opportunities unique from other minority groups. Development of Indian law depends on the exercise of sovereign power by the Indian nations, not constitutional equal protection of an ethnic minority. The architectural work of developing the governments, i.e., creating tribal law and operating tribal courts, calls for the legal-warrior's critical ability to meld customary perspectives with knowledge and skills acquired in legal professional training.

Second, the specialty of American Indian law as jurisprudence is affected by the training opportunities for American Indians in law schools. Specialists in American Indian law are important, regardless of their ethnic identity. Only American Indian individuals, however, can have the dual identity of indigenous community members and of practicing attorneys. Legal-warriors are cultural as well as legal advocates. Legal-warriors are necessary if Indian law, especially the federal law, is to be "decolonized." Decolonization requires the challenging of doctrines with disabling effects upon native peoples, such as the plenary power doctrine. Decolonization also requires that American Indians speak for themselves, reversing the

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N.M. L. REV. 225 (1994). The use of custom and innovation in tribal nations was historically necessary for survival and is evident in the creation of contemporary tribal statutory and common law. This article describes the historical and cultural pattern of preservation and innovation manifested in contemporary tribal court opinions. This symposium issue of the *New Mexico Law Review* on American Indian law has other articles on tribal courts.

5. "Legal-warrior" is a gender-neutral choice, used here to describe the protective service performed by attorneys. Though it is my choice of term, it reflects views of Indian people. The author was particularly affected by Rayna Green's (Cherokee) call for American Indian and Alaskan Native nations to enable their members to obtain a university education and become "scholar-warriors." See Libman, *supra* note 1; Rita Sabina Mandosa, *Another Promise Broken: Reexamining the National Policy of the American Indian Religious Freedom Act*, 40 FED. BAR NEWS & J. 109 (1993) (quoting Tiger O'Rourke, Yurok Indian, as stating, "We still need our line of warriors, but now they've got to be legal warriors. That's the war now, and its the only way we're going to survive."); Wayne L. Hicks, *Native American Law Firm Makes House Calls*, DENV. BUS. J., Mar. 15, 1991, at 10 (quoting Cynthia Limerick, scholar of Western History, as stating, "From warriors to lawyers, [w]hat they once fought for on the battlefield they now fight for in the courtroom."). Compare these authorities with MAXINE HONG KINGSTON, *THE WOMAN WARRIOR* (1976) (describing women as warriors in Chinese society).

history of outside advocates speaking for Indians instead of acting as collaborators with American Indian attorneys.

The third area explored in this article is the limited pool of potential legal-warriors. The population of American Indian students who enter and complete undergraduate education is small. The negative impact on the admission to law schools, other professions, and graduate studies handicaps the tribal nations.

Fourth, the small body of American Indians who enter and complete law school reveal the emerging pool of legal-warriors. One cannot assume or prescribe that all or most American Indian attorneys will specialize in Indian law; specialization is an individual's career choice. However, the law school experience, the financial and curricular resources devoted to American Indian needs, and the outcomes for American Indians who graduate from law school greatly determine whether an American Indian can become a legal-warrior. If law schools are to produce legal-warriors, then the institutions must affirmatively embrace major changes in their curriculum and environment for legal training. This legal-warrior (*instead* of yet another generic lawyer) is a necessary contemporary response to the increasing needs of the tribal sovereigns.

### *I. The Indigenous Sovereign's Need for Legal-Warriors*

#### *A. The Indigenous Sovereign*

American Indian tribes' status as nations on the North American continent preceded the invasion by the European powers and persisted throughout the conflicts among them. In these encounters, the American Indian tribes were treated as sovereigns within the law of nations. The tribes were recognized as nations in international law before the formation of the republic,<sup>6</sup> then in the Constitution,<sup>7</sup> and later in Supreme Court

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6. See generally, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 47-58 (Rennard F. Strickland et al. eds., 1982) [hereinafter COHEN]. Covering the pre-Revolutionary period (1532-1789), this edition summarizes the basic tenet under the law of nations: that American Indian nations are sovereign powers whose governments and ownership of land should be honored. In this period, Francisco de Victoria and others established the recognition of this nation-state status which was not subordinated or obliterated by European powers' claims based on divine rights or discovery. The intense legal and religious disputes about theories on the status of the indigenous people in the New World, most intense in the Spanish monarchy, arose after the initial experiences in the Americas. The basic tenets of sovereignty survive in contemporary American Indian law. See also ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (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).

7. Constitutional recognition of the tribal nations occurs with the exclusive federal authority empowering Congress "to regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. The treaty power applies. *Id.* at art.

decisions upholding this political status.<sup>8</sup>

The legal history includes federal government policies that cyclically aimed to exterminate the Indian tribes as nations, as identifiable populations, and as cultures.<sup>9</sup> Conversely, the federal government recognized and protected in varying degrees the indigenous nationhood and promoted the use of sovereignty for self-governance. Today, the meaning and boundaries of the sovereign power of the American Indian nations remain ambiguous. But ambiguity coexists with one certainty: Tribal power is unlike that of the federal and state sovereigns.

The tribal nations persist in exercising a sovereignty whose basis lies outside the foundation of a social contract. The tribal nations' sovereignty is not defined by the "mutuality of concession" that formed a national union with retained powers for the states.<sup>10</sup> The "involuntary annexation" of tribal nations produced a unique "preconstitutional and extraconstitutional" relationship that has not resulted in coherent theory or guidance for

II, § 2, cl. 2. Another provision excludes "Indians not taxed" from those to be counted as part of the U.S. population for purposes of determining representative districts or apportioning direct taxes. *Id.* at art. I, § 2, cl. 3; *cf. id.* at amend. XIV (restating exclusion of "Indians not taxed" while eliminating the limitation on counting slaves). Other provisions in the constitution which provide exclusive federal power over Indian affairs include the war power and the power over federal property. *Id.* at art. I, § 8, cl. 11; *id.* at art. IV, § 3, cl. 2. *See generally* COHEN, *supra* note 6, at 58-74 (covering the nation-to-nation relations and treaties between the Indian tribes and the emerging U.S. republic in the Revolutionary War period and the early Constitutional period).

8. From early Marshall Court decisions through the most recent court decisions, the Supreme Court has maintained the status of American Indian tribes as sovereigns within the United States. They are "distinct, independent political communities" whose status as sovereign governments was not lost because of a protectorate relationship with the United States. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557-61 (1832). As nations, the tribes are qualified to exercise powers of self-government because of their original tribal sovereignty, not because of a delegation of power from the federal government. *United States v. Wheeler*, 435 U.S. 313, 323-24 (1978); *see also* *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991).

9. *See generally* FRANCIS P. PRUCHA, *INDIAN POLICY IN THE UNITED STATES: HISTORICAL ESSAYS* (1981); *THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S* (Sandra L. Cadwalader & Vine Deloria, Jr. eds., 1984); ROBERT H. KELLER, JR., *AMERICAN PROTESTANTISM AND THE UNITED STATES INDIAN POLICY, 1869-82* (1983).

10. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991); *see* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 701-02 (1989). According to Resnik,

Indian tribe cases offer more than a chance to display appropriate sensitivity to the experiences of many within this country. Indian cases provide vivid insight into three central themes for federal courts' jurisprudence to explore: 1) whether and when the United States will tolerate subgroups that seek to be different and distinct and to express such distinctions by self-governance; 2) whether such differences can be sustained, given the interdependencies of the subgroup and the federal government; and 3) whether distinct governance structures are to be desired and preserved or forbidden and eroded.

*Id.*

relationships among the sovereigns.<sup>11</sup> The plenary power doctrine, used to justify federal authority, generates particularly sharp criticism. The doctrine arouses disrespect because of its inaccurate presumptions, such as the Europeans' "discovery" of the Indian nations and the assumption of racial and cultural superiority of the Europeans.<sup>12</sup>

A critically different cultural perspective operates on the Indian side of the encounters.<sup>13</sup> These encounters in a legal context produce American Indian law and the concepts that become part of the jurisprudence of the United States.

The formation of American Indian law appropriate for Indians depends on the recognition of the importance of indigenous viewpoints by both tribal members and outsiders. Generally speaking, the indigenous viewpoint evolved from communal societies bound to coexist with nature. This cultural viewpoint is important when American Indian nations create legislated and common law. In the design and administration of tribal government, the customs of the communal society serve as the foundation. This is especially true in the creation of American Indian common law, in which tribal courts draw from customs in addition to appropriate principles from federal and state law.

The author supports tribal and legal communities who advocate the legal training of American Indian individuals who want to specialize in American Indian law. But the author does not assume that all Indian students in law schools desire to nor should become Indian law specialists. Attorneys who are American Indian should participate anywhere in society where decisions

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11. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 112-13 (1987). While "[p]owerful moral and historical considerations support this special tribal status [sovereignty]," *id.* at 112, this does not remove the philosophical disquiet. Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 417-20 (1992) [hereinafter Pommersheim, *Liberation*]; *see also* Robert J. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 842 (1990); Frank Pommersheim & Terry Pechota, *Tribal Immunity, Tribal Courts, and the Federal System: Emerging Contours and Frontiers*, 31 S.D. L. REV. 553 (1986) [hereinafter Pommersheim & Pechota, *Tribal Immunity*].

12. Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for Decolonized Federal Indian Policy*, 46 ARK. L. REV. 77 (1993) [hereinafter Clinton, *Redressing*]; Robert Laurence, *Learning to Live with the Plenary Power of Congress Over the Indian Nations: An Essay in Reaction to Professor Williams' Algebra*, 30 ARIZ. L. REV. 413 (1988); Robert Laurence, *On Eurocentric Myopia, the Designated Hitter Rule and "the Actual State of Things,"* 30 ARIZ. L. REV. 459 (1988); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219 (1985) [hereinafter Williams, *Algebra*]; Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 439 (1988) [hereinafter Williams, *Learning*]. *See generally* FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* (1975).

13. *See infra* part IV.C on cultural conflict.

affect the lives of Indian people. However, the governance needs of tribes raises a unique demand for lawyers. Just as tribal nations need not sacrifice their cultural identity to become functional and respected governments, neither should Indian law students sacrifice cultural commitment as the price of legal training. Unlike other clients, tribes construct governments and require the cultural sensitivities as well as the skills of a new class of lawyer — the legal-warrior.

### *B. Legal-Warriors as Architects of Governments*

Contemporary American Indian nations need legal-warriors, not just additional generic lawyers. These professionals must harness their legal training to create law based on tribal custom. And they must respond to important old and new issues that continue to affect tribal governments. Derived from traditional tribal social structure, the legal-warrior class now includes men and women.

The legal-warrior metaphor must be distinguished from the popular romanticism that has misconstrued the native peoples since European contact.<sup>14</sup> Some American Indian individuals will object to the use of "legal-warrior" because of the risk it will perpetuate Hollywood romanticism and other sources of stereotypes, e.g., noble savages and noble losers. But, the metaphor will find acceptance among many other American Indians and Canadian Natives. They will approve the connection to the enduring cultural community, its values, and the roles assigned to protect tribal interests. Those interests are not at risk in military combat as in the past. Today, legal-warriors defend their tribes in state and federal courts, promulgation agencies, corporate boardrooms, and state and federal legislatures. They fight states and prominent individuals such as Donald Trump when they perceive self-interests threatened by tribal activities.

"Legal-warrior" is an appropriate historical and contemporary descriptor for the class of attorneys who identify as members of tribal nations and serve as their advocates. Often against great odds, these attorneys protect the rights that define the indigenous nations within the United States. Among the tribal nations that preexisted the United States the warrior class or society bore the responsibility for protecting the collective interests of the tribe. The tribe recognized qualified members and assigned specialized duties to them.<sup>15</sup> Tribes often designated roles for internal leadership and

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14. See generally ROBERT F. BERKHOFFER, JR., *THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT* (1979); Rayna Green, *The Pocahontas Perplex: The Image of Indian Women in American Culture*, 16 MASS. REV. 698 (1975); Rayna Green, *Native American Women*, 1980 SIGNS 248.

15. ANGIE DEBO, *THE ROAD TO DISAPPEARANCE* 1-36 (1984) (describing Muskogee Creek structure which designated war and peace functions, including White or Peace towns and Red or War towns, and individual achievement as a requirement for office and duties in governance); James W. Zion, *Harmony Among the People: Torts and Indian Courts*, 45 MONT. L. REV. 265,



for external duties with the non-Indian world, including military defense. Ewers's study of the effects of the horse upon native communities pointed out that the warrior class remained vital in pedestrian and horse cultures. "[T]he requirement of outstanding war achievement for band leadership had social value. It insured that men who rose to power in the band were brave and experienced warriors qualified to lead in the formation of plans for the protection of the band . . . [I]t was necessary that political leaders be warriors of proved mettle."<sup>16</sup> Political and judicial leadership provide continuity between the pre-twentieth century warrior and today's need for the legal-warrior.

Deficiencies in equity and substantive law argue for greater participation of American Indians in the legal profession. The number of legal-warriors graduating from law schools cannot be deemed as adequate.<sup>17</sup> First, the equitable participation of American Indians in the legal profession is lacking. Second, tribal governments are not able to develop adequate tribal law and judicial systems. Third, the low graduation rate of American Indians from law schools perpetuates a deficiency in the judicial system of the United States. Participation in the legal profession by the diverse constituencies of the nation is essential to legitimize and enrich a country proclaiming the value of its multicultural citizens.

In addition to equity issues, the work of American Indians trained as legal-warriors is critical to the "decolonization" of American Indian law. Decolonizing Indian law involves at least two activities: (1) challenging and changing the pervasive doctrines that erode tribal self-determination, and (2) increasing the number of tribal advocates who are American Indian attorneys. Attorneys with tribal membership provide a new forceful legal voice for the tribal objections to plenary power and other doctrines that disable tribes. The plenary power doctrine gives Congress unfettered power to determine if and how tribes continue to exist as the "dependent

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272 (1984) (attributing worth to the Blackfoot warrior society as a model for protecting individual rights and common benefits in contemporary American Indian life); see also JAMES WELCH, *THE INDIAN LAWYER* 105-06 (1990). Welch states:

Mostly Sylvester [Yellow Calf] wanted to get into a school with a decent prelaw program. He had made up his mind that he wanted to at least see if he could hack law studies. He had read an article in a magazine that the guidance counselor had given him about Indian lawyers. The article called them the "new warriors" and predicted that Indian law and water law — both of which figured prominently on reservations — were the fields to choose in the seventies and eighties. The guidance counselor, a young woman named Lena Old Horn, who had thought about a law career herself (and still hadn't given up on the notion), told Sylvester that he had the talent and dedication to be one of these new warriors.

*Id.*

16. JOHN C. EWERS, *THE HORSE IN BLACKFOOT INDIAN CULTURE, WITH COMPARATIVE MATERIAL FROM OTHER WESTERN TRIBES* 246 (1955).

17. See *infra* part IV.D on graduation data for American Indian law students.

sovereigns" established in early Supreme Court decisions.<sup>18</sup> Other doctrines disable tribes from using their autonomy or protecting their interests. The trust doctrine, for instance, allows the federal trustee to represent the tribes and competing entities without the conflict of interest in common law or private trusts.<sup>19</sup>

Robert N. Clinton has pointed out that two developments in the past twenty-five years allowed the perspective and voice of Indian people to be heard in federal Indian law.<sup>20</sup> One was the federal statute providing federal court jurisdiction and standing for tribes, regardless of amount in controversy.<sup>21</sup> The second development was the increase in the number of Indian attorneys. The important early cases in Indian law involved outsiders asserting interests that overlapped with tribal rights. But these decisions were made without direct tribal participation. Federal Indian law evolved as the white man's law *about* Indians, rather than as a jurisprudence shaped by Indian involvement. The good intentions of outsiders and third parties have not prevented harm to Indians as tribes and individuals. For example, the allotment policy resulted in the loss of two-thirds of Indian lands.<sup>22</sup> Third parties as advocates have not disappeared as federal attorneys and public interests groups continue to litigate, but not always in accord with tribal wishes.

The task of increasing the number of American Indians trained to represent tribal interests has passed to American Indians themselves. As legal-warriors they "have become a direct and visible presence in the development of the law which so critically affects them."<sup>23</sup> An increase in the number of legal-warriors would place them in a positions as creators, primary advocates, and equally empowered collaborators. The legal-warrior would work with those who seek to defend the rights of tribes and their members. Contemporary American Indian life provides substantive reasons for focusing on the need for a new legal professional and, inseparably, the innovative work designing tribal law.

Melding legal concepts with cultural sensitivities is the challenge facing tribal governments and, ultimately, the legal-warriors graduating from law schools. The legal-warriors' expertise is essential to develop tribal courts and law as part of American jurisprudence and international law.<sup>24</sup> The

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18. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557-59 (1932).

19. *Nevada v. United States*, 463 U.S. 110, 135-44 & n.15 (1983).

20. Clinton, *Redressing*, *supra* note 12, at 91.

21. 28 U.S.C. § 1362 (1988).

22. ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 331 (1970) [hereinafter DEBO, HISTORY OF THE INDIANS] ("[S]tatistically . . . Indian holdings declined from 138,000,000 acres in 1887 to 47,000,000 in 1934.").

23. Clinton, *Redressing*, *supra* note 12, at 92.

24. For a historical and legal account of the Indian nations and the increasing importance of these nations and American Indian law as part of the international law that addresses the rights

establishment of tribal judicial systems requires principles often absent in the dominant legal system. Developing and documenting tribal law based on custom calls forth the legal-warrior's cultural knowledge, imagination, and integrative skill to produce new jurisprudence.

The inadequate size of the legal-warrior class is evident from the tribal activity undertaken to meet the governmental and economic development needs of the indigenous nations.<sup>25</sup> Federally and state-recognized tribes, pueblos, and governmental entities are exercising their sovereignty through self-government.<sup>26</sup> Legal-warriors are needed for what Monroe E. Price

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of indigenous peoples, see generally Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660; S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective* (1989) in 1989 HARVARD INDIAN LAW SYMPOSIUM 191 (Harvard Law School Publications Center 1990); *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507 (1987); John Howard Clinebell & Jim Thompson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 BUFF. L. REV. 669 (1978).

25. Approximately 550 tribal government entities are the indigenous nations of concern in this article. Entities recognized as sovereigns and eligible for benefits and services from the United States, primarily the Bureau of Indian Affairs, include tribal entities in the lower 48 states and Alaskan governmental entities. See 60 Fed. Reg. 9250 (1995). The Alaskan entities include villages as well as corporations formed through the provisions of the Alaska Native Claims Settlement Act. Consequently, status as a sovereign nation, with the power of self-governance over communally owned territory, does not exist for some Alaskan organizations recognized by the federal government as eligible for federal programs. Additionally, there are some 230 extant and functioning tribes that have not been recognized by the federal government. Rachael Paschal, Note, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 WASH. L. REV. 209, 209 (1991). Unrecognized tribes may apply for federal recognition through the "federal acknowledgment process" established by Bureau of Indian Affairs regulation, rather than congressional act. 25 C.F.R. § 83 (1989) (originally codified at 25 C.F.R. § 54). Since the acknowledgment process began in 1978, 120 Indian groups have petitioned for federal recognition; final determinations have been made on only nineteen petitions. Paschal, *supra*, at 215-16; see also W.W. Quinn, Jr., *Federal Acknowledgement of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. § 83*, 17 AM. INDIAN L. REV. 37 (1992); W.W. Quinn, Jr., *Public Ethnohistory? Or, Writing Tribal Histories at the Bureau of Indian Affairs*, PUB. HISTORIAN, Spring 1988, at 71. Because the acknowledgment standards require complex documented information incompatible with oral societies and the duration of the application review, American Indian tribes and organizations have repeatedly asked Congress to act and expedite the process. See H.R. 671, 104th Cong., 1st Sess. (1995) (introduced in the Senate as Senate Bill 479) (establishing administrative procedures to extend federal recognition to certain Indian groups and to establish a commission to assume Department of Interior's authority to recognize a petitioning Indian group's tribal status); Timothy Egan, *Indians Become Foes in Bid for Tribal Rights*, N.Y. TIMES, Sept. 6, 1992, at A8 (reporting 21 petitions for acknowledgment have been determined, with eight tribes succeeding in obtaining federal recognition through 25 C.F.R. § 83); Final Rule Amending 25 C.F.R. § 83, Procedures for Establishing that an Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280 (1994).

26. Sovereignty and the power of self-determination have remained the recurring legal doctrines of federal law. While sovereignty has been limited since the early Supreme Court enunciation in *Cherokee* and other Marshall era decisions, sovereignty endures and is recognized.

calls their "architectural skills".<sup>27</sup>

[T]he architectural skills of the lawyer are much in demand. He should constantly consider the sorts of innovative legal constructs that will provide for exploitation of resources in a way that is compatible with the cultural needs of his clients. Here, as in other respects, the lawyer for Indian poor must be as resourceful as the lawyer for the wealthy. Lawyers for the rich have devised schemes to allow a culture to continue: the spendthrift trust, the personal holding company, the foundation, the Philadelphia nun, the generation-skipping trust — all designed to allow a group of people to live in a style to which it has grown accustomed, hindered as little as possible by the incursions of change in the society at large. Moreover, the rich have often taken the perspective that their way of life should be available not only for them, but for generations to come as well. They ask not only that their assets be preserved, but that they grow, and they ask as well that those assets produce a sufficiently ample income to give the owners freedom to pursue activities of their own choice. The Indians ask no less of their lawyers. They seek economic development that is consistent with their style of life . . . .<sup>28</sup>

Though Price's statement about architectural skills was made in the context of individualized representation of American Indians, his observations apply equally to attorneys employed by tribal governments.

A government's structure must be harnessed for achieving the tribe's political, social, and economic survival. Cultural survival depends on the economic development of tribal resources: land, water, minerals, wildlife, agricultural and natural resources. Survival depends most on the key tribal resource: members, especially the children. Retaining the active membership of the young requires governance to promote individual employment and income allied to the traditional collective.

Contemporary American Indian governments are designing and

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Protection of tribal sovereignty is aimed at promoting self-governance and economic development, both critical elements for self-determination. This article is not a critical review of the sovereignty concept in American Indian law. Rather, the existence of this power is acknowledged as the foundation that creates a special need for American Indians trained in legal knowledge and skills, as tribal nations use sovereign power to organize and operate governments.

27. Monroe E. Price, *Lawyers on the Reservation: Some Implications for the Legal Profession*, 1969 ARIZ. L.J. 161; see also GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 3 (1992) ("[L]awyer[ing] itself had to be remade as part of any effort to transform the world.").

28. Price, *supra* note 27, at 197. Price wrote about legal services attorneys on the reservation.

structuring executive, legislative and judicial branches; drafting and enforcing ordinances, legislation, and court rules; establishing special purpose corporations for economic development; providing health, safety, educational, and environmental services that interface with some state and federal regulatory schemes; and performing other essential governmental tasks that require legal knowledge. Some tasks are those performed by any sovereign's government, but others arise from the tribal and federal government relationship. These are the designing tasks for the legal-warriors. The designers' must integrate the internal element, i.e., the tribe's cultural values, with unavoidable externals, such as the tribe's historical relationship with the federal government.

The unique relationship between American Indians and the federal government creates legal interactions extending much further than with other ethnic populations in the United States. This greater degree arises from the numerous issues and their complexity. The status of American Indian nations as dependent sovereigns creates continuous disputes before the federal courts as tribal activities intersect with state or federal concerns, e.g., gaming, environmental regulation, and custody of children. Moreover, Congress's use of plenary power to define the nature and scope of the Indian nations' sovereignty creates continuing dialogue, tension, and new legislation to address emerging issues.<sup>29</sup> Significant federal legislation covers diverse areas, including jurisdiction over children,<sup>30</sup> protection of Indian arts and crafts,<sup>31</sup> gaming enterprises,<sup>32</sup> jurisdiction and control of environmental regulation,<sup>33</sup> and protection of graves and cultural

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29. The vast federal authority and "plenary power" over Indian nations lacks universal acceptance. See, e.g., Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 46-59; Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, Limitations*, 132 U. PA. L. REV. 195, 197-98, 207-28, 236 (1984); Williams, *Learning*, *supra* note 12; Indian Law Resource Ctr., *United States Denial of Indian Property Rights: A Study in Lawless Power and Racial Discrimination* (1981) (position paper presented at the International Non-Governmental Organization Conference on "Indigenous Peoples and the Land," Palais des Nations, Geneva, Switzerland, Sept. 1981), in NATIONAL LAWYERS GUILD, *RETHINKING INDIAN LAW* 15 (1982); Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self Government*, 33 STAN. L. REV. 979, 996-1001 (1981) [hereinafter Clinton, *Isolated*]; RUSSEL R. BARSH & JAMES Y. HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 257-69 (1980).

30. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended in scattered sections of 25 U.S.C.).

31. Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662 (codified in scattered sections of 18 U.S.C. and 25 U.S.C.); Indian Arts and Crafts Act of 1935, ch. 748, 49 Stat. 891 (codified as amended at 25 U.S.C. §§ 305-305e (1988)).

32. Federal Indian Gaming Act, 25 U.S.C. §§ 2701-2721 (1988).

33. Federal environmental laws allow the EPA administrator "to treat" Indian Tribes as States." See, e.g., Safe Drinking Water Act, 42 U.S.C. § 300j-II (1988); Clean Water Act, 33 U.S.C. § 1377(e) (Supp. V 1993); Clean Air Act, 42 U.S.C. § 7401 (Supp. V 1993).

artifacts.<sup>34</sup> Indisputably, no other ethnically identifiable population has so complex a relationship with the national government and its legislature.<sup>35</sup> In congressional lawmaking affecting individualized and broad tribal issues, legal-warriors are needed to inject Indian views in the legislative debate.

The Supreme Court has complicated the previously exclusive federal-tribal relationship through decisions that recognize certain state interests.<sup>36</sup> Since the 1960s, the indigenous nations have increasingly exercised their sovereignty resulting in more interactions with states.<sup>37</sup> Legal-warriors are needed for the inevitable jurisdictional questions that arise among the state, federal, and tribal authorities touched by new and nongeneric legal issues.

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34. Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (Supp. V 1993).

35. Price, *supra* note 27, at 163 ("Because the very existence of Indian organizations [and governments] is now dependent on the pleasure of Congress, law has taken on a role in the life of Indians that it has thankfully not assumed over the life of almost any other group. The [federal] government's power is of life and death dimensions."); *see also* Thomas W. Christopher & Frederick M. Hart, *Indian Law Scholarship Program at the University of New Mexico*, 1970 U. TOL. L. REV. 691, 692 (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 457 (1942)) (describing the "basic materials of Federal Indian Law" as 4264 statutes, 389 treaties, 1725 reported cases, 523 opinions of the Attorney General, etc., 838 Interior Department rulings, 629 legal texts and articles, 141 tribal constitutions, 112 tribal charters, and 301 congressional reports and miscellaneous). The almost 50 intervening years since Cohen's assessment have only increased the federal legal complexities through which American Indians must traverse.

36. *See, e.g.*, *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 113 S. Ct. 1985 (1993) (holding that the state cannot impose income taxes or motor vehicles taxes on tribal members who live in Indian country); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) (holding that tribal sovereign immunity precludes state from collecting sales tax on sales to tribal members occurring on trust lands of a federally recognized tribe, though taxes can be imposed on sales to nonmembers); *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (holding that, pursuant to federal law, the tribe has a protectable interest that permits the tribal government to impose zoning regulations on fee land within the closed area of reservation while this authority does not extend to "open" areas); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (holding that state interest and related services suffice to impose severance tax on oil and gas produced by non-Indian lessees on reservation lands); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (holding that the state cannot regulate tribal bingo enterprises because of the compelling federal and tribal interests in Indian sovereignty and self-government, including tribal self-sufficiency and economic development); *Rice v. Rehner*, 463 U.S. 713 (1983) (holding that the state's established interest in licensing liquor sales dominates when the tribe has not traditionally regulated).

37. *See supra* note 2 (regarding tribes and governments recognized by the federal government). States also recognize tribes for state government purposes. The purpose and determination of federal and state recognition are independent of each other. Some state governments have established specific state agencies and commissions to promote and manage relations with Indian governments. Approximately 36 states operate special purpose commissions, agencies, or official liaisons. Governor's Interstate Indian Council, Directory (August 1993). For the nature of the tribal-state relations and specific products of the relationship, e.g., agreements on taxation, human services, water, gaming, etc., *see* Frank Pommersheim, *Tribal-State Relations: Hope for the Future?* 36 S.D. L. REV. 239 (1991).

The indigenous governments' needs and the work of legal-warriors call for specialized architectural skills.<sup>38</sup> The tribal governments need attorneys who can build on traditional institutions, such as the continued cultural practice of alternative dispute resolution and the shared custody of children. The ability to design with existing cultural mechanisms is more probable when members of the tribal nations retain their own enduring cultural values and identity while they obtain professional legal training.

The small number of Indian attorneys is simply not enough for the governmental needs of the established and the emerging tribal nations seeking federal recognition. The evolving indigenous nations face a dearth of legal professionals for the important work of protecting and structuring sovereignty into working governments.<sup>39</sup>

### *C. The Tribal Architects' Work and Governmental Legitimacy*

Attorneys representing Indian government interests protect the present and the future of American Indian nations. More is at stake than discrete legal events. Every contract or litigation choice involves responsibilities

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38. The reasons underlying the need for American Indians trained in the legal profession have not changed since the pioneer programs to produce these attorneys began. In 1970 Dean Thomas W. Christopher and Professor Frederick M. Hart of the University of New Mexico stated four reasons: The federal obligation from treaties and acts to provide education for Indians; the unique tribal status as nations possessing limited sovereignty; the enduring and distinct culture of American Indians; and the correspondingly unique body of jurisprudence in American Indian law. Christopher & Hart, *supra* note 35, at 698.

39. Focusing on the work of designing governments does not deny the need for the many areas of legal work in which American Indians as individuals and political entities require legal representation. Nor does this focus assume that the continuing development of tribes into functioning governments exercising the power of a sovereign is an outcome welcomed by all states and federal agencies. In litigation and before Congress, states advocate to further limit, if not terminate, the sovereign status underlying tribal self-governance.

The Oklahoma Tax Commission has been aggressive in trying to expand state power at the cost of terminating tribal power. See *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 113 S. Ct. at 1990-92 (relating State's argument that reservation and Indian country were disestablished); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 509-11 (relating State's argument against the existence of sovereign immunity and tribal lands qualifying as Indian country where tribe could exercise jurisdictional control). At the national level legislative attacks include the Ancient Indian Land Claims Settlement Act (House Bill 5494), introduced in 1982 in response to tribal nations' litigation on land claims, which would have extinguished Indian legal rights and legal claims to their homelands. See Robert T. Coulter, *An Analysis of the "Ancient Indian Land Claims Settlement Act,"* in *RETHINKING INDIAN LAW*, *supra* note 29, at 121. Coulter's analysis was submitted during the hearings on House Bill 5494. See also 1 AMERICAN INDIAN POLICY REVIEW COMM'N, FINAL REPORT, 95TH CONG., 2D SESS. 573-83 (Comm. Print 1977) (dissenting views of Rep. Meeds); Robert N. Clinton, *Isolated*, *supra* note 29 (arguing that the "Native Americans Equal Opportunity Act" would have abolished all hunting and fishing rights that Indian tribes derive from treaties). The existence of such opposition further supports the need for legal-warriors who can traverse the shoals of the political system while guided by the fundamental values of an indigenous nation.

beyond the moment. Oren Lyons, an Onondaga Nation Faithkeeper, reminds that Indian nations and their attorneys must

look to see how it's going to affect those future generations. How are we protecting them? How are we safeguarding? . . . [T]hey are going to look back on this time and say "Who was that who gave away my land?" . . . That's in your hands right now. This is the generation. When you talk about client relationships, you're talking about the future of nations. It's a great responsibility.<sup>40</sup>

Among the Onondaga and other tribes, tribal decisions must be made for the next several generations. Accountability to tribal members, especially future generations, is a major element in the legitimacy achieved through the tribal lawyer's work.

Lyons and many other indigenous nations' leaders recognize that legal professionals are essential if their governments are to command respect, especially when nonmembers are subject to tribal law and courts. Whether nonmembers attribute legitimacy to tribal governments also pushes the tribes' legal professionals to produce laws and judgments that demonstrate integrity. The tribes seek attorneys who share a cultural vision manifested in a tribe's own governmental forms. Technical and visionary abilities must combine when architectural skill is used to design and operate the executive, legislative, and judicial components of an indigenous nation. Moreover, "Tribal courts are increasingly being called upon to decide complex litigation that compels the use of law-trained people."<sup>41</sup> Because the judicial system underlies the integrity attributed to a sovereign, the tribal courts are a special area that needs the legal-warriors.<sup>42</sup> The architectural role and implementive work of legal-warriors informed in tribal culture is important in building the legitimacy of these developing court systems.

Some indicators of the growing legitimacy of tribal courts include: (1) the increase of legally trained Indian people within the many judicial systems; (2) the revisions in tribal constitutions and code; (3) the continued recognition of tribal courts by the United States Supreme Court, as well as

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40. Oren Lyons, *When You Talk About Client Relationships, You Are Talking About the Future of Nations*, in *RETHINKING INDIAN LAW*, *supra* note 29, at iv, v.

41. Pommersheim & Pechota, *Tribal Immunity*, *supra* note 11, at 677.

42. The term "tribal courts" encompasses the courts created through the exercise of sovereign authority by tribes or by the authority of the Bureau of Indian Affairs (BIA), Department of Interior, to establish the Court of Indian Offenses. Indian Civil Rights Act, 25 U.S.C. § 1301(3) (1988). "'Indian court' means any Indian tribal court or court of Indian offense . . ." *Id.*



state courts; and (4) the development of customary law.<sup>43</sup> Each of these four elements supports the need for training more legal-warriors.

Increasing numbers of tribal court judges, prosecutors, public defenders and officers are attorneys.<sup>44</sup> Specialized Indian law training is combined with programs commonly available to state and federal judges and court officers. The National American Indian Court Judges Association has provided training for judges and staff for about twenty years. Some tribal judges attend both the National Indian Justice Center at Petaluma, California, and the Judicial College at Reno, Nevada, which is used to train state judges.<sup>45</sup> In all positions in a court system that require legal training, the legal-warriors contribute to the legitimacy of the tribal court. The need for law-trained personnel should not eliminate the work of nonlawyers in customary courts. These nonlawyers have knowledge of tribal custom and other matters that make them valuable in the collaborative production, with lawyers, of tribal law that commands respect both internally and externally.<sup>46</sup>

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43. Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M. L. REV. 49, 61 (1988) [hereinafter Pommersheim, *Contextual Legitimacy*].

44. OKLAHOMA INDIAN BAR ASS'N, DIRECTORY OF INDIAN NATIONS AND TRIBAL COURTS IN OKLAHOMA (1993). Oklahoma has 33 "tribal" courts, comprised of tribally authorized courts and CIO/CFR courts; some tribes use both types of courts. "The majority of tribal judges in Oklahoma are licensed attorneys and serve as judges on a part time basis." *Id.* at 2; see also UNITED STATES COMM'N ON CIVIL RIGHTS, THE INDIAN CIVIL RIGHTS ACT (1991).

The Cheyenne River Sioux Tribe also advised the Commission that since 1986 it has made a concerted effort to upgrade its judiciary and legal staff. As of 1990, its chief judge was an attorney who was a former assistant attorney general for the State of Arkansas; two of its three appellate court judges had law degrees (one of whom was Frank Pommersheim, who has taught and published on Indian law matters); the tribal prosecutor was a graduate of Georgetown University Law Center; the tribe's attorney general and assistant attorney general were both graduates of Harvard Law School and the tribe's summer law clerks in the legal department were both Harvard Law students.

*Id.* at 50 n.92. It is noteworthy that neither the federal constitution nor some state constitutions expressly require that judges be trained and licensed attorneys. The practice of appointing only attorneys is an evolutionary result. Non-attorneys have served in state judicial systems including tenure as justices of the peace.

45. Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225, 228-29 (1989) (describing selection of Navajo judges with continuing evaluation and training) [hereinafter Tso, *Process*]; Michael D. Petoskey, *Tribal Courts*, 67 MICH. B.J. 366, 369 (1988) (describing the structure, authorizing legislation and training of tribal court of the Grand Traverse Band in Michigan); Michael Taylor, *Modern Practice in Indian Courts*, 10 U. PUGET SOUND L. REV. 231, 236 & n.22 (1987) (listing as judicial training resources the American Indian Lawyer Training Program of Oakland, California; the Indian Law Center at the University of New Mexico; the Federal Legal Services Corporation; and the BIA). The Native American Bar Association, in conjunction with law schools and bar associations, provides training for lawyers and judges. See Indian Civil Rights Act, 25 U.S.C. § 1311(3)(4) (1994) (providing for the establishing of "proper qualifications" and educational classes for the training of judges of Court of Indian Offenses).

46. The collaborative work of nonlawyers is important to tribal courts and congruous with

Lawyers are at the center of drafting and revising tribal constitutions and codes. Revision of generic Indian Reorganization Act constitutions is often the first step in making tribal governments responsive to modern needs.<sup>47</sup> The codification of civil, regulatory, and criminal authority has increased as indigenous nations reduce fears that tribal justice consists of unstructured, arbitrary, and capricious procedures and substantive law.<sup>48</sup>

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the increased legal expertise of judges and judicial officers. Persons who have functioned in traditional dispute resolution through their status and skill as elders, peacemakers, advocates, and community representatives are important in the use of custom which renders just and appropriate outcomes. Some of these roles are formalized in tribal systems, e.g., the Council of Elders in Sitka villages; the Peacemaker Courts of the Navajo and the Seneca; the sponsor who agrees to assist a traditionally married couple in the Laguna Pueblo. See Tso, *Process*, *supra* note 45. Recently, the Native American Bar Association and the Indian Law Support Center, operated by the Native American Rights Fund, initiated a historical series of conferences: National Conference on Traditional Peacemaking: Remaking Justice (Sept. 20-22, 1993, Arizona State University); National Conference on Traditional Peacemaking and Modern Tribal Justice Systems (Oct. 29-30, 1992, Albuquerque, N.M.) The papers from these conferences comprise a unique, rich, and creative resource for attorneys, tribal judges, tribal government officials, and those who study tribal courts. See also Special Issue, *Native American Perspectives on Peacemaking*, 10 MEDIATION Q. 321 (1993); ALTERNATIVE DISPUTE RESOLUTION MANUAL (Legal Education Series, National Indian Justice Ctr. 1989).

47. Modern tribal constitutions break away from the boilerplate IRA model. The IRA model did *not* include a judiciary. Revised tribal constitutions create an independent judiciary and, more importantly, create governmental independence from the control of the Secretary of Interior. Additionally, the IRA boilerplate constitutions provided that the Secretary would have to approve tribal ordinances. This power lacks any statutory basis for requiring the Secretary to approve or veto ordinances. See ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: CASES AND MATERIALS* 362-79 (3d ed. 1991); SENATE COMMITTEE ON THE JUDICIARY, 88TH CONG., 2D SESS., SUMMARY REPORT OF HEARINGS AND INVESTIGATIONS BY THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS 1-4 (Comm. Print 1964).

48. In *Duro v. Reina*, the Supreme Court refused to make nonmember Indians subject to tribal criminal jurisdiction without the individual's consent and participation in the political entity. *Duro v. Reina*, 495 U.S. 676, 688 (1990).

While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often "subordinate to the political branches of tribal governments," and their legal methods may depend on "unspoken practices and norms."

*Id.* at 693 (quoting COHEN, *supra* note 6, at 334-35). Tribal courts are conscious of the fears of non-Indians and of nonmember Indians, e.g., the Intertribal Court of Appeals statement:

We in this Indian court understand and must accept the racial fear that would be felt by non-Indians if they were to appear in an Indian tribal court to account for a criminal act. This is the same fear felt by many, many Indians who must face white judges, prosecutors and juries in states often hostile to Indians' presence within their boundaries.

*Miller v. Crow Creek Sioux Tribe*, 12 Indian L. Rep. (Am. Indian Law. Training Program) 6008, 6009 (Intertribal Ct. App. 1984). In his concurrence in *Miller*, Judge Gregory urged that tribal codes and decisions be written and reported because "[t]he *wasicu* (whites) have, with compounded progression, used words or lack of them against Indians. . . . The written word is a tool which must be learned and used as it is the modern day weapon." *Id.* at 6013. In a case

Litigation in tribal courts should provoke an innovative response among the adept attorney participants. Because of the recency of many tribal courts,

[M]uch tribal court litigation involves cases in which there is no controlling authority. This alone suggests the possibility for innovative and creative lawyering, which, as a necessary by product, can help forge a meaningful and enduring tribal jurisprudence.

Conversely, treating tribal court litigation as so much "business as usual" risks courting a colonial jurisprudence of imitation, a jurisprudence guided by the expedience and propinquity of available state court decisional law rather than a jurisprudence grounded in authenticity and cultural integrity with global horizons. The depth and quality of tribal court jurisprudence is largely the product of the engagement and critical intelligence of the practicing and judging bar — a bar which must now rise to the challenges of both culture and history *and* individual client representation.<sup>49</sup>

As Frank Pommersheim reminds above, *all* attorneys involved in the tribal courts have critical contributory roles.

Customary law does not necessarily mean unwritten, irregular, or inconsistent rules. When code drafting, briefs, decisions, and common law pronouncements are skillfully executed, the fairness and specificity should increase the legitimacy attributed to the tribal courts. Codification and publication are recent additions to indigenous Indian law.<sup>50</sup> Establishing

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where four jurisdictions had entered five orders, the Sitka Community Association Tribal Court articulated five elements which demonstrate that the tribal court was both competent and most appropriate for a fair resolution. *Hepler v. Perkins*, 13 Indian L. Rep. (Am. Indian Law. Training Program) 6011, 6018-19 (Sitka Community Ass'n Tribal Ct. 1986); *cf.* *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (holding that exhaustion of tribal court remedies is required in diversity cases, and that diversity statute was not intended to limit the jurisdiction of the tribal courts or impair tribal sovereignty in this way); *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985) (holding that until petitioners have exhausted the remedies available in the tribal court it would be premature for a federal court to consider any relief under 28 U.S.C. § 1331).

49. Pommersheim, *Liberation*, *supra* note 11, at 454.

50. Publication is available to tribal courts through the *Indian Law Reporter*, published by the American Indian Lawyer Training Program. In 1983 the *Reporter* subsumed the *Tribal Court Reporter*, which was also published by the same training program. The Navajo Nation appears to have the only tribal reporter which contains all major opinions of the courts of the Navajo Nation since 1969: *The Navajo Reporter, Official Reports of Cases Argued and Decided in the Supreme Court and the District Courts in the Navajo Nation*, published by Navajo Community College Press, Tsaile, Ariz. To date, availability of publication has not produced regularity of publication for tribal court opinions. The Westlaw and LEXIS systems have not incorporated tribal court decisions into their databases. Indian law cases are included in the computer systems

tribal law as written public law is an integrative challenge for the legal-warriors.

If modern tribal nations are to govern effectively, they need lawyers who are neither generic nor stereotypical anachronisms. The concept of the legal-warrior is misunderstood if this legal professional is treated as a romantic stereotype, a continuity of the popular cultural legacy from "Tonto" through *Dances with Wolves*. The warrior stereotype carries the notion of noble and courageous individuals, usually male, who suffer defeat in combat with the dominant society. These roles created by non-Indian script writers attribute positive characteristics to warriors without changing the ways of dominant society.

The acceptance of noble combat resulting in inevitable defeat runs counter to the legal-warrior's objective to establish the legitimacy of tribal law and to make new external law (state or federal) when tribal self-determination is at stake. For tribal law and judicial institutions to command respect within and without indigenous societies, the dominant social and legal culture must also change. Eradicating European imperialistic elements in Indian law, what Robert A. Williams, Jr. calls "Americanizing the White Man's Jurisprudence," will require more than romanticism and posturing.<sup>51</sup> Like women, African Americans, and other historically disenfranchised populations, American Indians must redefine their status and establish rights that others must respect. Unlike other groups, the status of American Indians is inseparable from indigenous sovereignty.

The legal-warriors must work to "radically redefine contemporary conceptions of their [tribal nations] rights and status in domestic and international law."<sup>52</sup> Russel R. Barsh reminds us that generic lawyers "are trained to a discipline of conceptual conservatism."<sup>53</sup> The legal-warriors must look beyond the safe, established, and narrow grounds of prior litigation. They must appreciate the relationship between what they do and what they hope to change.<sup>54</sup> Legal-warriors must understand that the

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when these cases are reported by the state and federal courts. Some tribes established written and published laws during the 19th century, e.g., the Cherokees. See RENNARD STRICKLAND, *FIRE AND SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* 107 (1975). The recent revisions in Cherokee law were published by the Cherokee Nation with West Publishing. Cherokee Nation Code Annotated (West Publishing 1993). Contemporary views on the need for publication include those stated in *Miller*, 12 Indian L. Rep. (Am. Indian Law. Training Program) at 6012-13 (Gregory, J. concurring) (urging that "true Indian law" should be written and "recorded for all time, so that it may be used, followed, and remembered"); James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. IND. L. REV. 89, 107 (1983); Fredric Brandfon, *Tradition and Judicial Review in the American Indian Tribal Court System*, 38 UCLA L. REV. 991, 1014 n.143 (1991); Taylor, *supra* note 45, at 238-41.

51. Williams, *Algebra*, *supra* note 12, at 297.

52. *Id.*

53. BARSH & HENDERSON, *supra* note 29, at 254.

54. GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE*

individual-rights basis of majority law both misleads and threatens tribal community-based interests. These advocates must not expect only to repeat what lawyers did in the past. As architects of tribal law and officials in tribal courts, they engage in the "hard work" Pommersheim advocates, which "must transcend the ravages of colonialism while simultaneously animating traditional values in contemporary circumstances."<sup>55</sup> In the history of the United States and of the tribal nations, this is singularly difficult work for legal professionals.

Different lawyering is essential when tribes as political communities struggle to maintain enduring communal values while managing the complexities of contemporary life. Certainly this new lawyer must know the legal tools of the past and must evaluate them for contemporary usefulness. However, to insure tribal continuity, legal-warriors will need to use entirely new legal concepts, theories, and strategies. "Unless tribes insist that their legal representatives advance new theories — and reward them for their additional effort at it — cases will continue to be brought on the safest and narrowest grounds."<sup>56</sup> When successful, the legal-warriors will create new solutions by harnessing the strengths of indigenous custom and external models of law.<sup>57</sup> American Indian law is the specialty in which the contributions of these professionals become part of American jurisprudence.

## II. American Indian Law in Jurisprudence

As jurisprudence, American Indian law is unique. There is no counterpart in statutes, case law, and regulations that applies only to one identifiable ethnic population.<sup>58</sup> A whole body of law has been generated because indigenous nations defeated countless schemes to make them terminate, assimilate, or otherwise disappear. In the popular and political consciousness of the United States, American Indians are frequently categorized as minorities or ethnic populations.<sup>59</sup> The indigenous nations pointedly remind us, however, that as political entities they retain a singular, complex, and unparalleled relationship with the federal government.

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LAW PRACTICE 5 (1992). "Effective lawyering, like good living, demands an openness to new insights and a willingness to scrutinize even those solutions that seem to work consistently." *Id.* at 66; see also Gerald P. Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989).

55. Pommersheim, *Liberation*, *supra* note 11, at 424.

56. BARSH & HENDERSON, *supra* note 29, at 255.

57. Pommersheim, *Contextual Legitimacy*, *supra* note 43, at 62-63.

58. Chapters 25 of the United State Code and of the Code of Federal Regulations are exclusively devoted to American Indians.

59. *E.g.*, Titles VI and VII of the U.S. Civil Rights Act of 1964 treat American Indian individuals as an ethnic minority for equal opportunity purposes. *But see* Morton v. Mancari, 417 U.S. 535 (1974) (exempting tribal governments from this law of general applicability).

While Indian law specialists often represent the tribes, the composition of the class of Indian law specialists remains unclear.<sup>60</sup> Even with inadequate data, however, estimates can be made. One estimate derives from attorneys who claim American Indian Law as an active area of their work. Unfortunately, this is a fluid number, with no general agreement among the databases consulted. The 1990/1991 edition of the *Directory of American Indian Law Attorneys*<sup>61</sup> lists approximately 1500 attorneys who are "active in the field of Indian law." These attorneys are not identified by ancestry.

The Native American Bar Association (NABA), a national organization, reports that its national membership has not exceeded 200.<sup>62</sup> Again, this reported number of specialists includes predominantly Indian and some non-Indian individuals. While the numbers may be uncertain, the importance of the specialty is not.

The advocacy of skilled and knowledgeable lawyers affects how effectively Indian law protects enduring Indian interests. In addition to specialists employed by the tribe, the history of the development of Indian law includes the work of advocacy organizations such as the National Indian

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60. Only limited information exists about two groups of attorneys, those who specialize in American Indian law and those who are identifiable as American Indian among attorneys in general. The data in the cited information bases are incongruously collected. The American Bar Association, for instance, does not obtain information on racial or ethnic identity on its membership forms. The ABA conducted a voluntary membership census in 1994-95 where members could respond to a question on ethnicity. Of the 30,000 plus members who used the option, out of a total membership of 339,476, the identity asserted was Caucasian 92.6%; African American 3.3%; Hispanic 2.5%; Asian Pacific 1.4%; and American Indian .18%. Telephone Interview with Rachel Patrick, Staff Director, ABA Commission on Opportunities for Minorities in the Profession (Sept. 21, 1995); Memorandum to ABA Staff from Karen Gruenke (May 4, 1995) (concerning membership census). Obvious gaps occur even in systematic collection, e.g., the Law School Admissions Service data on applicants, admissions, and enrollment capture the current year of activity, but cannot account for individuals who were previously admitted but delayed their entry into law school.

61. NATIVE WORD RESEARCH & PUBLISHING, *DIRECTORY OF AMERICAN INDIAN LAW ATTORNEYS* (Susan K. Bristow & Edgar T. Bristow eds., 1990-1991). According to the editors, the list was compiled from multiple sources, e.g., attorneys of record on reported cases from 1986 through 1990, diverse bar association memberships, legal services with Indian law units and attorneys, law school teacher directories, private law firms, and government attorneys including tribal attorneys.

62. Telephone Interview with Arvo Q. Mikkanen, President of NABA (Sept. 22, 1995). According to Mikkanen, national membership ranges from 175 to 200, with the core membership from Colorado, Oklahoma, and New Mexico. Oklahoma's impact is related to the large number of federally recognized tribes in the state; the activities of the 36 tribes generate work for legal professionals. Continuous litigation has arisen from Oklahoma tribal government activities challenged by the Oklahoma State Tax Commission, e.g., *Oklahoma Tax Comm'n v. Sac & Fox*, 113 S. Ct. 1985 (1993); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991). Some state bar associations have a specialty section for American Indian law, including Arizona, Colorado, New Mexico, Oklahoma, and Wisconsin.

Youth Council and the Native American Rights Fund. The advocacy of these organizations, especially on important issues at historical moments, has expanded the autonomy of Indian tribes. These organizations provided early opportunities for legal-warriors, and their performance as advocates continues to provide models for today's generation.<sup>63</sup>

The devotion to Indian law by individuals who are not tribal members invokes appreciation. Indeed, one must acknowledge that the development of American Indian law involves the valuable work of individuals who are not Indian in ancestry.<sup>64</sup> Direct representation tests the advocate's legal knowledge and skills, plus the ability to appreciate a culture outside the non-Indian attorney's experience. Furthermore, the specialists communicate the significance of Indian law to the legal structures in this country. Particular individuals warrant recognition, especially Felix S. Cohen, whose legal brilliance and ethical commitment established primary principles in Indian law.<sup>65</sup> The decolonizing of Indian law does not preclude non-Indians from being effective advocates, especially in collaboration with the emerging cohorts of legal-warriors. As the smallest ethnic population in the United States, the tasks are too daunting for Indians to attempt without the aid of allies.

Indian law, as jurisprudence, and its specialized practitioners have injected American Indian interests into the legal dialogue of the republic.

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63. Hicks, *supra* note 5, at 3 (describing the Native American Rights Fund); see also Sharyn Rosenbaum, *What Do Native Americans Want*, BARRISTER, Summer 1989, at 26 (vol. 16, no. 2) (same); Kathy Haq, *The Law and the Golden Eagle*, BARRISTER, Summer 1988, at 16 (vol. 15, no. 2) (describing the new generation of Indian-rights attorneys and the work of the National Indian Youth Council).

64. Rennard Strickland, *An Essay: Take Us by the Hand: Challenges of Becoming an Indian Lawyer*, AM. IND. L. REV., vol. 2, no. 2, at 47, 57-58 (published in 1974) [hereinafter Strickland, *Essay*]. Strickland reminded American Indians in the American Indian Law Center summer program at the University of New Mexico that

because we know the superiority of much of the Indian way for Indian problems, we cannot afford to reject legal help simply because the offer comes from non-Indian sources. . . . [T]here is more to be done than we will ever be able to do, more than all the Indian lawyers combined can begin to tackle. Furthermore, we need the support of all people and the good-will of all our fellow citizens.

*Id.*

65. Among Felix S. Cohen's many achievements was his 1942 *Handbook of Federal Indian Law*. "[T]he Indian people never had a better friend or guide than Felix Cohen." Strickland, *Essay*, *supra* note 64, at 57; DAVID GETCHES & CHARLES WILKINSON, *FEDERAL INDIAN LAW* 137 (2d ed. 1986) (calling Cohen's 1942 handbook "one of the greatest treatises in all the law; like Blackstone, [Cohen] sorted, analyzed, and compiled a mass of previously diffuse authorities in order to give Indian law a center. It became, in Justice Frankfurter's words, 'an acknowledged guide for the Supreme Court in Indian litigation.'") (quoting FELIX FRANKFURTER, *OF LAW AND LIFE AND OTHER THINGS THAT MATTER: PAPERS AND ADDRESSES OF FELIX FRANKFURTER, 1956-1963*, at 143 (Philip B. Kurland ed., 1965)); see also DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW: CASES AND MATERIALS* 226-29 (3d ed. 1993) (discussing Cohen's zealous defense of tribal sovereignty and influence on tribal retention of this power).

Who will advocate for American Indian rights begins with an inquiry into who benefits from higher education and specialized training.

### *III. Indian Undergraduates: The Potential Legal-Warriors*

#### *A. The Undergraduate Pool*

The demographic picture of American Indians in higher education reveals a historical trend unchanged in the present-day failed outcomes for many young people from indigenous nations. One cannot explain, in the sense of justifying any result, the low proportions of American Indian legal professionals. However, some correlative relationships are self-evident. The high dropout rate of American Indian youth from high school relates directly to all too frequent poverty, inadequate housing, poor health care, and meager educational resources of contemporary American Indian life. When these elements deaden the mind and spirit, it is not surprising that woefully inadequate numbers of youth succeed in entering and completing college. One American Indian law student commented that by the time he reached undergraduate school, he had cumulative barriers to overcome. His prior education in inadequate schools, plus unhealthy experiences at home, told him that academic learning was neither valued nor expected of him. And, like many Native American law students, he had not known any lawyers (or other professionals) to help him form a vision of becoming an attorney.<sup>66</sup>

The success of American Indians in attaining a formal education leading to productive roles in society has historically been measured by the terms of non-Indian society. Acculturation to the point of loss of Indian identity and assimilation in the non-Indian world are key indicia.<sup>67</sup> Despite this history, "[o]ver the years Native American communities have persisted and found ways to use education as a bridge of communication between themselves and American society."<sup>68</sup> Recent activity within and without tribes aims to use education for more than communication. Education and

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66. "Although many Native American parents value education for their children, their expectations of the results of education are often vague because they themselves have limited educational experiences . . . [they are less likely] to be able to tell their children what graduate education might demand or what opportunities it might present." Clara Sue Kidwell, *Higher Education Issues in Native American Communities*, in *MINORITIES IN HIGHER EDUCATION* 239, 244 (American Council on Educ. 1994).

67. See generally MARGARET CONNELL SZASZ, *INDIAN EDUCATION IN THE AMERICAN COLONIES, 1607-1783* (1988) [hereinafter SZASZ, *INDIAN EDUCATION IN THE COLONIES*]; MARGARET CONNELL SZASZ, *EDUCATION AND THE AMERICAN INDIAN: THE ROAD TO SELF-DETERMINATION SINCE 1928* (1977).

68. Kidwell, *supra* note 66, at 254. Connell Szasz also recounts how the Indians educated by missionaries in the colonial period "attained the unique position of cultural broker. This liaison role enabled them to serve as intermediaries between their own people and Euroamericans and Afro-Americans." SZASZ, *INDIAN EDUCATION IN THE COLONIES*, *supra* note 67, at 263.



advanced knowledge should provide power to tribal people when they relate to the rest of the nation.

Reports on American Indians as public school enrollees, undergraduates, students in law schools, and as participants in the legal profession reflect the historical pattern of being "uncounted" in the life of the nation. Institutionalized data collections have failed to address or measure the degree of participation of American Indians. The national census, the United States Department of Education, and the American Bar Association (ABA) each acknowledge an inability to report based on past methods.<sup>69</sup> However reported, it is clear that without a successful core of American Indian college graduates there will be a persistent shortage of all professionals who can serve the future generations.

The critical core of law students must emerge from the inadequate numbers succeeding in high school and at the university level. Though American Indians are among the populations inadequately documented in the education demographic data, there undoubtedly exists a high dropout rate at the secondary level. The dropout rate ranges from 36% to the higher loss of 51% in urban settings.<sup>70</sup> Almost 50% of American Indian children entering high school drop out.<sup>71</sup> When American Indian high school graduates enroll in college, one-half leave by the end of their freshman

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69. Pending the release of the 1990 census data, collected through new methods aimed to provide fuller information on American Indians, the U.S. Department of Commerce census educational reports were based on the 1980 collection. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *WE, THE FIRST AMERICANS* (1988 ed.). Similarly, Department of Education reports also have not regularly reported on American Indian youth. U.S. DEP'T OF EDUC., *YOUTH INDICATORS: TRENDS IN THE WELL-BEING OF AMERICAN YOUTH* 139 (1991) (stating that separate data on American Indian or Alaskan Natives "are not available"); U.S. DEP'T OF EDUC., *DIGEST OF EDUCATION STATISTICS: 1990* (1991) (same). The ABA does not collect data on the ethnic self-identity of its members.

See also ROBERT MACCRATE, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM* 15 (student ed. 1992). This edition was "published to make available to those who are contemplating a life in the law, a picture of the legal profession as a whole." *Id.* at v. In section C, "The Belated Opening to Minorities and Diversity," American Indians or Alaskan Natives are mentioned, but all demographic data are on African American lawyers. *Id.* at 15.

70. EILEEN M. O'BRIEN, *AMERICAN COUNCIL ON EDUC., AMERICAN INDIANS IN HIGHER EDUCATION* 4 (1992). O'Brien's study summarizes the data on American Indians from numerous sources, including the primary governmental agencies cited in the previous footnote as well as private studies.

71. Amy Pyle, *American Indians Face Long Odds at College*, L.A. TIMES, Nov. 11, 1990, at B3 (reporting 50% dropout rate among American Indian college freshman in findings of studies cited, including *Issues for the Future of American Indian Studies* (1985) released by the University of California at Los Angeles American Indian Studies Center); see also Kidwell, *supra* note 66.

year.<sup>72</sup> One description of this situation captures the severity of the pre-college losses among American Indians:

The general lesson to be learned here is that less than 60 percent of Native American high school students complete the 12th grade, and that less than 40 percent of those students go on to college. More simply, if 100 Indian students enter the 9th grade, only 60 will graduate from high school. Of these graduates, a mere 20 will enter academe, and only about three of these will receive a four-year degree.<sup>73</sup>

Clearly, the pool is insufficient to generate large numbers of students who can become legal-warriors or other professionals.

The primary source of information for the next generation of attorneys is the enrollment in the 3300 institutions of higher education that report to the United States Department of Education. In Fall 1993, the total college enrollment was 14,306,000 students.<sup>74</sup> Of that total, 3,245,000 were minority students, including 121,681 American Indians.<sup>75</sup> Between 1982

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72. O'BRIEN, *supra* note 70, at 6 (stating that a 1989 survey of the 79 institutions where 75% of American Indian college students are clustered showed some 53% left after the first year). Deborah J. Carter and Reginald Wilson state:

College persistence remains a critical issue for American Indian and Alaska Native students. Approximately 29 percent of American Indian and Alaska Native first-time, full-time freshmen graduate within six years, compared with 53 percent of all students. . . . Consequently, American Indian and Alaska Native adults are less than half as likely as the general U.S. adult population to earn a four-year degree.

DEBORAH J. CARTER & REGINALD WILSON, THIRTEENTH ANNUAL STATUS REPORT: MINORITIES IN HIGHER EDUCATION 5 (1995) [hereinafter THIRTEENTH ANNUAL STATUS REPORT]. The thirteenth annual report included a special focus on American Indian and Alaska Native education. Michael Pavel et al., *Special Focus: American Indian and Alaska Native Demographic and Educational Trends*, in THIRTEENTH ANNUAL STATUS REPORT, *supra*, at 33; see also THIRTEENTH ANNUAL STATUS REPORT, *supra*, at 4-5. The succinct report is a basic starting point for planners of programs for American Indian students.

73. Bobby Wright & William G. Tierney, *American Indians in Higher Education: A History of Cultural Conflict*, 23 CHANGE 11, 23 (1991) ("American Indian Voices in Higher Education" edition).

74. SAMUEL F. BARBETT ET AL., NATIONAL CTR. FOR EDUC. STATISTICS, ENROLLMENT IN HIGHER EDUCATION: FALL 1984 THROUGH FALL 1993, at 1 tbl. 1 (U.S. Dep't of Educ. 1995) (No. NCES 95-238) [hereinafter HIGHER EDUCATION ENROLLMENT STATISTICS]; THIRTEENTH ANNUAL STATUS REPORT, *supra* note 72, at 68 tbl. 3; NANCY B. SCHANTZ, NATIONAL CTR. FOR EDUC. STATISTICS, TRENDS IN RACIAL/ETHNIC ENROLLMENT IN HIGHER EDUCATION: FALL 1978 THROUGH FALL 1990, at 1 tbl. 1 (U.S. Dep't of Educ. 1992) (No. NCES 92-024) [hereinafter TRENDS IN RACIAL/ETHNIC ENROLLMENT]; see also Christopher Shea, *Women and Minorities Led the Way in a Year of Slow Enrollment Growth*, CHRON. HIGHER EDUC., Jan. 26, 1994, at A32; Jean Evangelauf, *Minority-Group Enrollment at Colleges Rose 10% from 1988 to 1990, Reaching Record Levels*, CHRON. HIGHER EDUC., Jan. 22, 1992, at A33.

75. HIGHER EDUCATION ENROLLMENT STATISTICS, *supra* note 74, at tbls. 1, 5c; see also TRENDS IN RACIAL/ETHNIC ENROLLMENT, *supra* note 74, at 3-4. Some increases are evident: In

and 1993, enrollment for American Indian students increased 38.6%.<sup>76</sup> The increasing trend was also reflected in the 2.0% increase between 1992 and 1993 for American Indian students.<sup>77</sup>

American Indian enrollment reached 0.9% of all enrollments in Fall 1993. Enrollment grew to 0.8%, the same percent that American Indians comprise of the United States population, only in Fall 1991 and Fall 1992.<sup>78</sup> However, population proportion alone does not define the needs of America's native peoples. The undergraduate enrollment drastically shrinks because one-half of the American Indian freshmen drop out by the end of their first year. For the 1,900,000 American Indians in the United States,<sup>79</sup> the loss of able students has a significant impact on the member pool that achieves occupations requiring university degrees.

The small enrollment base shrinks to an alarming level by the time of college graduation. American Indians constituted 0.5% of the bachelor's degree recipients in 1992, after comprising only 0.4% since 1976-1977.<sup>80</sup> As 0.8% of the national population, American Indians who graduate are approximately one-half of the simplest equity need. The numbers have increased from 3326 in 1977 to 5176 in 1992.<sup>81</sup> Recent bachelor's degree recipients provide the bulk of the law school applicants, although some returning students add to the numbers filing applications to law schools.

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1990 the American Indian enrollment included 95,000 undergraduates, 6000 graduate students, and 1000 first-professional-degree students. THIRTEENTH ANNUAL STATUS REPORT, *supra* note 72, at 70 tbl. 5.

76. THIRTEENTH ANNUAL STATUS REPORT, *supra* note 72, at 68 tbl. 3.

77. *Id.*

78. HIGHER EDUCATION ENROLLMENT STATISTICS, *supra* note 74, at 2 tbl. 1a; U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS: AMERICAN INDIAN AND ALASKA NATIVE AREAS, 1990 CP-1-1A (1992) [hereinafter 1990 CENSUS]; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CENSUS BUREAU RELEASE OF 1990 CENSUS COUNTS ON SPECIFIC RACIAL GROUPS at 2 tbl. 1 (1991); *see also* Felicity Barringer, *Census Shows Profound Change in Racial Makeup of the Nation*, N.Y. TIMES, Mar. 11, 1991, at A1. The 1990 Census also compiled increasing numbers of persons identifying as American Indian though they previously asserted another ethnic identity. The effect on indigenous nations from such newly discovered or asserted identity is unclear. *See* Dirk Johnson, *Census Finds Many Claiming New Identity: Indian*, N.Y. TIMES, Mar. 5, 1991, at 1.

79. 1990 CENSUS, *supra* note 78, at 1 tbl. 1.

80. THIRTEENTH ANNUAL STATUS REPORT, *supra* note 72, at 73 tbl. 9; *see also* LAW SCHOOL ADMISSION COUNCIL/LAW SCHOOL ADMISSION SERVS. INC., MINORITY PARTICIPATION IN LEGAL EDUCATION AND THE PROFESSION: A COMPENDIUM OF DATA 18 tbl. III-2 (1990) [hereinafter MINORITY DATA COMPENDIUM].

81. THIRTEENTH ANNUAL STATUS REPORT, *supra* note 72, at 73 tbl. 9; NATIONAL CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 1994, at 278 (U.S. Dep't of Educ. 1994) (No. NCES 94-115); MINORITY DATA COMPENDIUM, *supra* note 80, at 18-19.

### B. The Applicant Pool for Law Schools

Another important statistical portrait is the law school application rate for American Indians. In 1984-85 American Indians comprised 0.6% of the total applicants; from 1985-86 through 1989-90 the percentage remained constant at 0.5% of the applicant pool.<sup>82</sup> Then in 1990-91, the number of American Indian applicants increased to 0.6%, followed by an increase to 0.7% sustained in 1991-92 and 1992-93, ultimately reaching 0.8% in 1993-94.<sup>83</sup> Additional understanding of the situation is gained by examining the applications for three recent periods. The Law School Admission Services (LSAS) reported that 97,719 applicants sought admission to ABA-approved schools as the 1992 entering class.<sup>84</sup> In 1992-93, the applicant total was 91,892, then it further decreased to 89,633 in 1993-94.<sup>85</sup>

The factual story of American Indians in these recent application cycles requires scrutiny of the applicant numbers and percentages. For American Indians, the next cohort of legal-warriors, the LSAS reported a 14% increase in applications in 1991-92. Thus, American Indian applicants increased from 553 in 1990-91 to 640 in 1991-92.<sup>86</sup> Consequently, American Indians comprised 0.7% of the 1991-92 applicant pool.<sup>87</sup> Percentages must be separated from the actual increase in number of American Indian individuals who applied. During the 1992-93 application cycle American Indians again comprised 0.7% of the pool, but the actual number of applicants declined to 607. Because of the decline in total applicants, the percent remained the same while American Indian applicants declined from 640 in the 1991-92 cycle. Both numerical and percent gains occurred in the 1993-94 application cycle when 702 Indian applicants comprised 0.8% of the applicant pool. American Indians are a notably small proportion of the United States population and of the applicant pool. The increases or decreases that might not have impact on other populations measurably affect the available human resource of the indigenous population.

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82. MINORITY DATA COMPENDIUM, *supra* note 80, at 22; LAW SCHOOL ADMISSION SERVS., NATIONAL STATISTICAL REPORT: 1989-90 THROUGH 1993-94, at A-9 tbl. 1 (1995) [hereinafter NATIONAL STATISTICAL REPORT]; Telephone Interview with Robert Carr, Director of Data Services, Law School Admission Services (Feb. 29, 1992).

83. NATIONAL STATISTICAL REPORT, *supra* note 82, at A-9 tbl. 1.

84. *Id.* (reporting on the 176 ABA-approved schools).

85. *Id.*

86. *Id.*

87. *Id.* Note the decline in applicants from 99,327 in 1990-91 to 89,633 in 1993-94. *Id.* The applicant count refers only to the individuals who apply. For instance, because of multiple applications by each individual, the 1991-92 cycle generated 455,000 applications from 92,500 applicants. *Year-End Data Report*, LAW SERVICE REP. (Law School Admission Council/Law School Admission Servs., Newtown, Penn.), June/July/August, 1992, at 13 (No. 92-3).

The application process for law school is complex, costly, and demands motivation from the student, even if the applicant receives waivers for test and application fees. While the LSAS centralized application service can minimize paperwork, special programs are needed to prepare and increase the number of applicants. The ideal program begins long before the application period. Production of talented applicants requires nurturing, mentoring, and counseling from all involved with American Indian youth. Intervention must start before the undergraduate years, as early as possible. Students need to believe that their talents can be developed for all professions and occupations.<sup>88</sup> Every means possible, from preschool through the undergraduate period, must be harnessed to generate this belief.<sup>89</sup>

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88. Chief Dan George captured the nature of the belief and determination:

There is a longing among the youth of my nation to secure for themselves and their people the skills that will provide them with a sense of purpose and worth. They will be our new warriors, their training will be much longer and more demanding than it was in the olden days. Long years of study will demand determination. Separation from home and family will demand endurance. But they will emerge with their hand held forward not to receive welfare but to grasp a place in society that is rightly ours.

Roger Carter, *University of Saskatchewan: Program of Legal Studies for Native People*, 4 CAN. COM. L.J. 28 (1980) (quoting Chief Dan George).

89. Students require guidance and must envision themselves as legal professionals. Law schools, of necessity, must reach into the undergraduate educational process. It is insufficient to wait until the end of the undergraduate period to intervene. Students need to know more than just how to fill out the forms, when to take the LSAT, and how to timely file an application. Law school programs need direct contact with undergraduate American Indians, especially the students concentrated in two-year colleges. Law schools need to program and subsidize contact between these undergraduates and Indian law students who have survived and thrived in law school. Physically bringing the potential Indian law students into the law school buildings is essential to overcome the feeling expressed by one Indian undergraduate who stated, "That place was not built for us."

In their 1993 report, Carter and Wilson summarized what is needed at the undergraduate level, provided models and references:

Integrated and comprehensive academic support services are vital to reducing student attrition. Because many African American, Hispanic, and American Indian students are less likely than majority students to seek out academic advisors and counselors, academic advising systems that are both supportive and proactive are key to retaining these students. The five most critical components in effective academic advising are (1) proactive interventions; (2) small-group tutorials; (3) an emphasis on study skills, learning strategies, and test-taking techniques; (4) improvement of students' basic skills; and (5) quality teaching. Mentoring and advising help students make the link between coursework and careers and encourage staff to identify academic problems early so that they can intervene before problems threaten persistence.

DEBORAH J. CARTER & REGINALD WILSON, TWELFTH ANNUAL STATUS REPORT: MINORITIES IN HIGHER EDUCATION 32-41 (1994). Exemplary programs are briefly described in THIRTEENTH ANNUAL STATUS REPORT, *supra* note 72, at 52-55.

This article cannot discuss in detail the models for preparing American Indians in the academic and motivational foundation needed for law studies. The content and goal of such

Providing special programs for American Indian youth is not universally accepted as the duty of institutions nor as a publicly funded activity. Some Indians as well as non-Indians feel that an individual student's interests and talent should suffice to motivate him or her to academically excel and develop a career focus. Philosophical beliefs about individualism, stigmatizing, and fiscal constraints propel these viewpoints into the continuing debate in our society about how far affirmative intervention must reach. An Indian law student commented on these differing viewpoints and added, "I believe we need 'special treatment.' How can this wide a gap [in educational preparedness] eventually fill and correct itself?"<sup>90</sup> My response to this controversy, within and without tribal communities, is to advocate for special programs as opportunities available to Indian students. Certainly undergraduates can and do "opt in or opt out." Each level of school (grade school through college) and each institution needs to develop its own model,

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preparation is known; what is missing is implementation by institutions, including law schools. The skills that pre-law preparation should provide have been particularized. Heidi Estes & 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) (describing the program to produce "high quality law students capable of taking advantage of what law schools have to offer"); Michele Minnis, *Toward A Definition of Law School Readiness*, in *SOCIOCULTURAL APPROACHES TO LANGUAGE AND LITERACY: AN INTERACTIONIST PERSPECTIVE* 347 (Vera John-Steiner et al. eds., 1994) (pointing out that traditional law training demands specialized literacy skills, acquired before law school, which are not part of the preparation of many non-White students).

Readers are referred to the models being considered as a result of the Latino/Native American/Native Canadian Law School Access Conference, in Albuquerque, N.M., on March 5-7, 1992, sponsored by the Law School Admission Council. The Association for Tribal Institutions and the member presidents of the tribal colleges participated. Possible models for law include bridge programs with the tribal colleges as have been established in other professions. Existing models in other professions include Project 1000 at Arizona State University and the In-Med Program operated by the Association of American Indian Physicians and the University of North Dakota Medical School. Through the In-Med program, high school and college students participate in enrichment coursework in the basic science and writing courses and summer work with mentoring physicians. The American Indian Science and Engineering Society also runs a program for high school and college students. See Norbert Hill, *AISES: A College Intervention Program That Works*, CHANGE, March/April 1991, at 24.

See D. Michael Pavel et al., *Ethnic Fraud, Native Peoples, and Higher Education*, 10 THOUGHT & ACTION: NEA HIGHER EDUC. J. 91 (1994) (warning of deceptive counting of students as American Indian, which can deny opportunity to bona fide tribal members, inflate the numbers of American Indian students enrolled, and contribute to inaccurate reports of dropout rates). For other issues involved in the education of tribal people, see WILLIAM G. TIERNEY, OFFICIAL ENCOURAGEMENT, INSTITUTIONAL DISCOURAGEMENT: MINORITIES IN ACADEME — THE NATIVE AMERICAN EXPERIENCE (1992); John W. Tippeconnic III, *The Education of American Indians: Policy, Practice and Future Direction*, in *AMERICAN INDIANS: SOCIAL JUSTICE AND PUBLIC POLICY* 180 (Donald E. Green & Thomas V. Tonnesen eds., 1991); Karen Swisher & Donna Deyhle, *Styles of Learning and Learning of Styles: Educational Conflicts for American Indian/Alaskan Native Youth*, 8 J. MULTILINGUAL & MULTICULTURAL DEV. 345 (1987).

90. Student's Response to Author's Draft of this Manuscript (Mar. 1994) [hereinafter Student's Response].

appropriate to its situation. Enabling the academic and personal development of Indian youth, to the maximum of each individual's abilities, is a defensible institutional activity. The enriching work done by students is an individual's activity, yet it is part of the larger picture of creating benefit for the lives of other Indians.

For law studies, Indian students need a strongly developed belief in the importance of law and its place in the life of American Indians. Pommersheim offers a view that law

is particularly resonant with issues and concerns in Native American communities where law has played and continues to play a dominant, if not dominating role in tribal life. This third view sees law as a "culture which constitutes a world of meaning and action. It is a culture that establishes and maintains community through its practice of language. In this sense the law is an ethical and political activity and should be understood and judged as such."<sup>91</sup>

Somehow, American Indian students must appreciate this view of law in order to master the necessary undergraduate skills and the long-term hard work.

The feeder states and colleges that produce American Indian law school applicants indicate limited sources for the legal-warrior pool. The latest census data indicating where American Indians reside correlates with the limited sources. The 1990 census shows Oklahoma and California with the largest documented American Indian population, 252,420 for Oklahoma and 242,164 for California.<sup>92</sup> These two states consistently are the largest producers of American Indian law school applicants. They are the only states with a double-digit percentage of law school applicants in the application cycles spanning 1988-89 and 1992-93. In the 1993-94 application period, California schools produced 20.8% (146 applicants) of the American Indian applicant pool and Oklahoma produced 12.5% (88 applicants).<sup>93</sup> A comparison of the American Indian population in each

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91. Pommersheim, *Liberation*, *supra* note 11, at 435 (quoting JAMES BOYD WHITE, JUSTICE AS TRANSLATION xii (1990)). Pommersheim rejects the formalistic and legal realist approach as capable of providing the motivating appreciation needed for the demanding work of creating tribal law. See also Robert M. Cover, *The Folktales of Justices: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 181 (1985). Cover describes law as a bridge in normative space connecting our understanding of the "world-that-is" with our projections of alternative "worlds-that-might-be," including "alternative norms." He argues, "Law connects 'reality' to 'alterity' constituting a new reality with a bridge built out of committed social behavior." Pommersheim and other scholars in Indian law recognize that creating new tribal law, an alterity, requires commitment and hard work. See generally Pommersheim, *Liberation*, *supra* note 11.

92. 1990 CENSUS, *supra* note 78, at 1 tbl. 1; Barringer, *supra* note 78, at A1.

93. NATIONAL STATISTICAL REPORT, *supra* note 82, at D-16; see also MINORITY DATA

state with its productivity reveals that all states fail to prepare a proportional number of these students for legal professional training.<sup>94</sup>

Another productivity measure is the number of colleges producing the American Indian applicants. When compared nationally to other ethnic population pools, the American Indian applicants graduate from the smallest number of identified colleges and universities.<sup>95</sup> Approximately eighteen schools continually generate the core of the national applicant pool for the legal-warrior class.

The small number of institutional producers of potential law students is unjustifiable as an educational norm for the needs of American Indians and their nations. First, the small number of applicants from *all* colleges and universities is an indefensible national performance. Second, some states and their institutions evade their responsibility to produce qualified American Indian law school applicants. An express or acquiescent rationale may be operating: the states with geographical concentrations of American Indians are the ones to produce the pool for professional and graduate studies. California and Oklahoma are the leading producers of bachelor's degrees conferred to American Indians as well as the sources of the law school applicants.<sup>96</sup> These two states' performance do not excuse other states that ignore the post-secondary educational needs of American Indians.<sup>97</sup>

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COMPENDIUM, *supra* note 80, at 24.

94. Compare MINORITY DATA COMPENDIUM, *supra* note 80, at 24 and NATIONAL STATISTICAL REPORT, *supra* note 82, at D-16 with 1990 CENSUS, *supra* note 78, at tbl. 1.

95. NATIONAL STATISTICAL REPORT, *supra* note 82, at D-18. California, with thirteen schools, and Oklahoma, with seven schools, are key producers. The top five institutional producers of American Indian law school applicants and their number of applicants in the 1993-94 cycle include: University of California at Los Angeles (25); University of Oklahoma (24); Northeastern Oklahoma State University (21); University of California at Berkeley (16); and Stanford University (10).

American Indians do not have an alternative to majority institutions as do African Americans in the historically Black colleges. The recent development of Indian colleges has produced a limited number of mostly two-year institutions. These schools survive in a perilous condition because of their rural isolation, lack of property tax bases, lack of experienced personnel, lack of accreditation, and multijurisdictional relationships. The federal acts passed to aid in the development of Indian colleges have failed to effectively deliver the funds needed and have exacerbated the federal administrative barriers. See Michael A. Olivas, *Indian, Chicano, and Puerto Rican Colleges: Status and Issues*, 9 BILINGUAL REV. 36, 38-41, 45-49 (1982) (no. 1); Michael A. Olivas, *The Tribally Controlled Community College Assistance Act of 1978: The Failure of Federal Indian Higher Education Policy*, 9 AM. INDIAN L. REV. 219 (1981); Michael Marriott, *Indians Turning to Tribal Colleges For Opportunity and Cultural Values*, N.Y. TIMES, Feb. 26, 1992, at A13; O'BRIEN, *supra* note 70, at 8, 9 (profiling tribally controlled community colleges). The 103rd Congress passed legislation to assist tribally controlled colleges by providing land-grant status as a means to provide financial support. See Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518.

96. THIRTEENTH ANNUAL STATUS REPORT, *supra* note 72, at 92-97.

97. Anthony J. Scanlon, *The History and Culture of Affirmative Action*, 1988 B.Y.U. L. REV.



Populations of all ethnic groups, including American Indians, are dispersed throughout the country. The United States has become a multicultural nation in more than rhetorical terms. The 1990 Census confirmed the quantitative increase and nationwide dispersal among all identifiable ethnic groups.<sup>98</sup> Especially noteworthy is the increase in numbers and spread throughout the fifty states of individuals claiming American Indian ancestry and identity.<sup>99</sup> This increase in American Indian identified persons shows a dramatic change from the last census.

Increased professional school enrollment of American Indians will not occur without new concerted efforts by institutions. Each undergraduate student must work to achieve academic proficiency, but colleges and universities must provide the opportunities for the individual's achievement. Institutional responsibility includes providing support and tutoring services at the undergraduate level. This enabling process should include preparation for the LSAT and other preadmission examinations. Many able and interested American Indians succeed in undergraduate studies without special assistance. However, institutionalized enrichment is necessary for making admission to law school a possibility for more American Indian students capable of succeeding in law school.

#### *IV. The Law School Experience for Legal-Warriors*

American Indians enrolled in law school encounter three areas of stress: money, academic preparation, and cultural adjustment. The immediate impact comes from insufficient money for support during law school and inadequacy of the undergraduate preparation for the law coursework. Financial and academic factors are the formidable barriers to entering and completing law school. The third factor, the cultural isolation and shock, may be less obvious, yet can become determinative. Isolated as individuals or alienated by Anglo-American legal concepts counter to their cultural framework, many American Indians retreat and leave law school. This section addresses these three areas of concern which interact to affect the production of legal-warriors. It concludes with a discussion of resources, including faculty and curriculum, which could reduce the barriers to success in law school.

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343, 352 ("Each school, in trying to recruit more minority students for itself, although based on the best of motivations, harmed the totality of affirmative action by making it a local problem instead of an urgent national task.").

98. U.S. Dept't of Commerce, Census Bureau Releases 1990 Census Counts on Specific Racial Groups tbls. 6A, 6B, 6C (Release No. CD 91-215, June 12, 1991) [hereinafter *Census Release*]; see also Barringer, *supra* note 78.

99. Census Release, *supra* note 98, at tbl. 4a; Johnson, *supra* note 78.

*A. Enrollment and Financial Support*

The enrollment pattern in law schools repeats the prior history of low numbers of undergraduate enrollment, graduation, and application to law school. The 1994-95 enrollment for the Juris Doctor (J.D.) degree was 128,989 students.<sup>100</sup> Minority students, with 24,611 enrollees, comprised 19.1% of the total enrollment.<sup>101</sup> This enrollment was an increase from 1993-94 with 22,799 ethnic minority students who comprised 17.8% of enrollment.<sup>102</sup>

In Fall 1994 American Indian students continued a recent pattern of significant increases of enrollment, with 962 enrollees comprising 0.75% of total enrollment, a marked increase over the Fall 1993 enrollment of 873.<sup>103</sup> The increasing pattern appeared in 1992 when American Indian students made a 12% increase from the previous year's enrollment with 776 students enrolled in J.D. programs.<sup>104</sup> The 1991 fall enrollment had an increase of 25%, with 692 enrollees compared to 554 in Fall 1990. Yet American Indians remain the smallest core among all the minority groups.<sup>105</sup> The enrollment increases are notable, yet only in Fall 1994 has enrollment approached the 0.8 American Indian proportion of the national population. Given the special needs of tribal sovereigns and Indian individuals, one can still question whether American Indian representation should be this small. The increasing application rates of American Indians in recent years, if sustained, could change the enrollment rate so as to have a positive impact on the legal-warrior pool.

The representation of American Indians in legal education reveals limited growth which could, if sustained, contrast with the stagnation of their participation in higher education, in all fields. Kidwell reports that numerical gains do not result in gains in the proportional enrollment of American Indians in higher education:

The numerical size of these Native American populations is such that a small increase or decrease in the numbers can cause a large increase or decrease in percentages relative to total Native American population while causing little if any change relative to the overall population. Given census statistics

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100. SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, ABA, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES FALL 1994, at 66 (1995) [hereinafter ABA REVIEW OF LEGAL EDUCATION].

101. *Id.* at 66, 70.

102. *Id.*

103. *Id.* at 69.

104. *Id.*

105. *Id.* at 68-69. Data are collected for four-year levels of law school, spanning full-time and part-time students.

showing rapid numerical growth and high percentage changes for the Native American population in the United States (a 38% increase between 1980 and 1990, compared with 9% growth for the United States population as a whole), it appears that Native American percentages in higher education should have risen at proportional rate. They have not.<sup>106</sup>

Kidwell and others have pointed out that this "virtual stagnation"<sup>107</sup> applies to American Indian participation across all areas of higher education — undergraduate, graduate, and faculty populations. For the small number of American Indian law students, their dispersal among the law schools easily produces numerical and, concomitantly, cultural isolation. The isolation, in combination with money problems, work against the students' success.

Lack of money is the leading barrier for minority students seeking admission into law schools. For American Indian students the problem may be especially severe. Standard formulas for determining need can erroneously attribute wealth to Indian families. Possession and use of tribal trust land and grazing permits are not the equivalent of private fee or personal ownership in majority society. Communally owned or trust status assets are outside of individualistic ownership and can lead to problems in financial aid calculations as some Indian properties cannot become liquid assets to fund education. Moreover, on the average, American Indian incomes are low and are inadequate for law school costs.<sup>108</sup>

American Indians experience poverty at more significant levels than other populations in the United States<sup>109</sup> and this directly affects the enrollment in professional schools. In Sam Deloria's words,

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106. Kidwell, *supra* note 66, at 246.

107. *Id.*

108. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *WE THE . . . FIRST AMERICANS* (1993 ed.) (summarizing characteristics of American Indian, Eskimo, and Aleut populations from the data collected in the 1990 Census). The demographic picture of the indigenous peoples in this recent report includes the following: The median family income was below that of all Americans: \$21,750, compared with \$35,225 for the total U.S. population. For every \$100 U.S. families received, American Indian families received \$62. *Id.* at 6. Poverty rates were higher than the national poverty rate: 31% of American Indians living below the poverty level as compared to a 13% poverty rate among the national population. *Id.* Among American Indians 25 years old and over, only 66% were high school graduates or higher, compared with 75% of the general U.S. population. *Id.* at 4.

For more information on these and similar disparities, see SUSAN GUYETTE & CHARLOTTE HEATH, *ISSUES FOR THE FUTURE OF AMERICAN INDIAN STUDIES* 40-43 (1985) (American Indian Studies Ctr., Univ. of Cal. at Los Angeles) (listing lack of money as the top-ranked factor causing failure in college enrollment); Kidwell, *supra* note 66, at 243-45.

109. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *1990 CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS, UNITED STATES, 1990 CP-2-1*, at 4 tbl. 1.

[T]he largest cause of Indian dropouts has not been the culture shock that experts like to talk about, or the irrelevance of the curriculum that Indian and campus politicians like to talk about. It has been the lack of money . . . to give a student the money to support himself [herself] and his [her] family, so that he [she] can concentrate fully on his [her] studies.<sup>110</sup>

While the need is increasing because of rising tuition and inflation, money to support American Indian students is decreasing with funding cuts as well as inflation.

Vacillating federal policies exacerbate the money problem of American Indian students and violate agreements with tribes. Curtailment of federal support programs involves more than a financial inconvenience shared with the general population. For many tribal nations the elimination of federal funding is a violation of federal contractual promises and responsibilities. In numerous treaties and federal acts, the federal government promised to provide for the education of Indians. The agreements and statutes, often obtained through coercion, mandated land cessions from the indigenous sovereigns in exchange for educational and other services.<sup>111</sup> The federal government's conduct involves formalized ethical commitments, not just a generalized equity issue. The federal government's contemporary conduct follows a history of failure to meet obligations for the education of American Indians.

The shifts in federal policy impose loss of scholarship dollars, and no gains. For instance, the federal government announced a major policy reversal in December 1990 that jeopardized the financial resources available to aid American Indian students. The U.S. Department of Education declared that minority scholarships reserved only for members of specific racial or ethnic groups were in violation of Title VI of the Civil Rights Act

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110. Sam Deloria, *Legal Education and Native People*, 38 SASK. L. REV. 22, 26 (1974). Though identified in 1974, the financial and social problems facing American Indian law students remain unchanged. Deloria's account of the Indian Law Scholarship Program at the University of New Mexico lists the problems facing American Indian law students when they reach law school as money ("enough money"), isolation in a hostile environment, excessive involvement in campus politics, and excessive involvement in the affairs of the home community. *Id.* at 23.

The author's experience as a law teacher confirms the problem. Repeatedly, American Indian students have acknowledged not being prepared because they could not get their course texts until a financial aid check was issued, some weeks after classes began. Whether awaiting money from personal or institutional resources, American Indian students rarely have a "safety net" for these emergencies.

111. Vine Deloria states: "Records that do exist show conclusively, however, that Indian nations ceded their lands to the federal government with great reluctance and they did so in the end largely on the basis of federal promises to educate their children." Michael A. Olivas, *Indian, Chicano, and Puerto Rican Colleges: Status and Issues*, 9 BILINGUAL REV. 36 (1982) (quoting VINE DELORIA, *A BRIEF HISTORY OF THE FEDERAL RESPONSIBILITY TO THE AMERICAN INDIAN* 13 (1979)); see also *id.* at 54 app. B (listing selected "Treaties Dealing with Indian Education").

of 1964.<sup>112</sup> This was a new interpretation of the law. It produced confusion and caution in how schools funded minority scholarships. Ultimately, the Clinton administration's Secretary of Education announced that colleges could legally offer minority scholarships to promote diversity or to remedy past discrimination.<sup>113</sup>

The 1990 announcement rescinded a policy to increase the underrepresented ethnic participation in the legal profession. The rescission continued when the Education Department announced a change in the Patricia Roberts Harris Fellowships that have funded underrepresented minorities in professional and doctoral programs.<sup>114</sup> The proposed change to exclude law studies was withdrawn after opposition from law and educational associations.<sup>115</sup> The proposed exclusion was ironic because the program honors the memory of a prominent African American lawyer and legal educator.

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112. Scott Jaschik, *Secretary Seeks Ban on Grants Reserved for Specific Groups*, CHRON. HIGHER EDUC., Dec. 11, 1991, at A1; Scott Jaschik, *U.S. May Bar Solicitation of Gifts for Minority Scholarships*, CHRON. HIGHER EDUC., Jan. 8, 1992, at A24; Michael A. Olivas, *Federal Law and Scholarship Policy: An Essay on the Office for Civil Rights, Title VI, and Racial Restrictions*, 18 J. C. & UNIV. L. 21 (1991); U.S. Dep't of Educ., Statement by U.S. Secretary of Education Lamar Alexander Regarding Scholarships for Minority Students 1-2 (Dec. 4, 1991); Nondiscrimination in Federally Assisted Programs, 56 Fed. Reg. 64,548 (1991). The Department of Education's proposed regulations distinguished between an institution's own funds that cannot be used to create scholarships where race is a condition of eligibility and "privately funded race-exclusive scholarships" which are permitted. However, the proposed regulations could bar universities from soliciting gifts specifically to support minority students. See also Scott Jaschik, *Alexander Tells Colleges They Can Continue To Offer Minority Scholarships While He Conducts Review*, CHRON. HIGHER EDUC., Mar. 27, 1991, at A22; Scott Jaschik, *New Questions Arise About U.S. Policy on Aid to Minorities*, CHRON. HIGHER EDUC., June 26, 1991, at A1 (reporting that the policy holding that minority scholarships are illegal was retained in Department of Education codification system, which guides investigations, despite earlier statement of intent to suspend policy).

113. Scott Jaschik, *Education Department Upholds Most Minority Scholarships*, CHRON. HIGHER EDUC., Feb. 23, 1994, at A24 col. 2.

114. *Report from the President: Obstacles to Diversity*, LAW SERVS. REP. (Law School Admission Council/Law School Admissions Servs., Newtown, Penn.), Feb.-Apr. 1991, at 2 (issue no. 91-2) [hereinafter *Obstacles to Diversity*] (concerning U.S. Department of Education American Indian fellowships and allocation to law students).

115. *Federal Programs for Law Schools and Law Students*, AALS NEWSLETTER (Ass'n of Am. Law Sch., Washington, D.C.), Nov. 1991, at 8, 8 (issue no. 91-4). The next issue of the AALS Newsletter reported on the House Subcommittee on Postsecondary Education proposal to divide Harris grants into two categories: doctoral and "masters and professional programs." Betsy Levin, *Notes from the Executive Director*, AALS NEWSLETTER (Ass'n of Am. Law Sch., Washington, D.C.), Feb. 1992, at 6, 6 (issue no. 92-1) [hereinafter Levin, *Notes from the Executive Director*]. Initially unclear was whether the J.D. degree would be placed into the latter category that limits funding for two years only. Concerted and cooperative efforts by higher education associations resulted in the House staff agreeing to allow law school funding for "the normal period of study, up to three years" and to clearly designate women and members of traditionally underrepresented groups as the priority targets for the fellowships. *Id.*

Another rescissionist attack was made on the federally funded pre-law programs which are critical for minority students. Preparation for law school work, a second critical factor in student survival, encompasses special pre-law school programs as well as undergraduate education. Special programs or summer institutes train students in basic skills before they obtain admission to or enroll in law school. These models have been developed by the American Indian Law Center (AILC) located at the University of New Mexico's School of Law<sup>116</sup> and the Council on Legal Opportunity (CLEO) institutes.<sup>117</sup> In addition, some law schools operate their own summer programs for promising minority students who lack some of the traditional indicia used in admissions, e.g., the University of New Mexico's Instituto Program and the University of Oklahoma's Admission by Performance Program.

In a surprise decision in December 1990, the Education Department announced that it would solicit competitive proposals for the CLEO Summer 1991 institutes, a reversal of prior funding procedures.<sup>118</sup> After

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116. The American Indian Law Center (AILC) Program located at the University of New Mexico's (UNM) School of Law, the pioneer in the United States, started in 1967 with funds from the Office of Economic Opportunity and remains separate from CLEO institutes. AILC then became an independent Indian-controlled research center which remains located at the UNM School of Law. See 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) [hereinafter Deloria, *Legal Education*]. AILC remains the primary program for preparing Indian students for law school and the increase in the number of attorneys who are American Indian is directly related to the AILC program's work. See Estes & Laurence, *supra* note 89.

Because of shared information, there are some similarities among programs at UNM, the CLEO institutes and a similar program developed in Canada at the Native Law Centre at the University of Saskatchewan's Law School. See Donald J. Purich, *Affirmative Action in Canadian Law Schools: The Native Student in Law School*, 51 SASK. L. REV. 79 (1986-87); Patricia A. Monture, *Now That the Door Is Open: First Nations and the Law School Experience*, 15 QUEEN'S L.J. 179, 195-200 (1990).

For over 20 years CLEO has provided regional institutes with six-week courses that not only teach students basic skills, but also give them an additional credential to strengthen their law school application. More than 500 minority students have benefitted from these programs, which have received congressional funding since 1970.

117. CLEO was formed with federal and private financial support in 1968 and is a joint program of organizations including, but not limited to, the ABA, the Association of American Law Schools, the Law School Admission Council. See Scanlon, *supra* note 97, at 349-52; Henry Ramsey, Jr., *Affirmative Action at American Bar Association Approved Law Schools: 1979-1980*, 30 J. LEGAL EDUC. 377, 385-86 (1980) (summarizing CLEO's origins); Wade J. Henderson & Linda Flores, *Implications for Affirmative Admission After Bakke: Preliminary Analysis of Academic and Bar Performance of Council on Legal Education Opportunity Program Fellows, 1968-78*, in *TOWARDS A DIVERSIFIED LEGAL PROFESSION 13-65* (David M. White ed. 1981); Vincent Panella & James McPherson, *Do You See What I See?: Two Writers Look at CLEO*, 1970 U. TOL. L. REV. 559, 571.

118. *Obstacles to Diversity*, *supra* note 114, at 2. During the Reagan administration a similar unexpected decision created uncertainty, shortened time for recruitment, and resulted in summer

congressional pressure, the Department of Education withdrew the Request for Proposals (RFP) for the 1991 summer institutes.<sup>119</sup>

In the Clinton Administration, future federal funding still remains uncertain for pre-law school enrichment or fellowships during law school.<sup>120</sup> Policy and program changes affect the number of American Indians who become legal-warriors. The roller coaster history of funding means that, regardless of treaty and statutory obligations, increased American Indian enrollment in law schools remains problematical.

## *B. American Indian Law Students: A Cultural Framework*

### *1. The Law School Environment*

Completing law school depends also on the degree to which there is a "critical mass" of similar students who can reduce isolation and cultural alienation. Most law students suffer confusion and isolation to some degree. The discomfort arises from the peculiar form of law education that is distinct from undergraduate and graduate school. The "Socratic" method of teaching, even when humanely done, imposes stress upon most students.

The generalized discomfort of law students does not capture the nature of the American Indian students' isolation when they are the smallest number of ethnic students. Except for a few institutions, the student is likely to be one of maybe two or three Indian students. Students at the law schools which succeed in recruiting American Indians face a better situation, but even those students report a constant struggle to maintain a personal equilibrium.<sup>121</sup> In the law school setting, a visible and positively

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programs with unfilled student spaces.

119. *The Association's Activities in the Governmental Relations Area*, AALS NEWSLETTER (Ass'n of Am. Law Sch., Washington, D.C.), Apr. 1991, at 9, 9 (issue no. 91-2) (providing an account of the efforts by the AALS, CLEO, the ABA Section on Legal Education, and the Law School Admission Council to persuade the Department of Education that the summer 1991 institutes would face timing and planning problems if the Request for Proposals (RFP) process were used). Nonetheless, the Department of Education issued the RFP on March 12, 1991. After congressional pressures, the RFP was withdrawn and CLEO's plans proceeded for the summer 1991 institutes. *Id.*

120. As one indicator of the financial insecurity, the 1991 RFP that was withdrawn projected a reduction in the number of participants by an increase in the student stipends. When more students need these summer institutes than there are slots, this is a harsh manipulation of the concurrent need of adequate support for recipients. Additionally, the Bush administration's budget proposed zero funding for the summer institutes. *Id.*; see also *Federal Programs for Law Schools and Law Students*, *supra* note 115, at 8. Funds for CLEO institutes were sequestered, preventing the preparation of institutional proposals for summer 1992, which meant there would be no summer 1992 institutes. On December 31, 1991, the Department of Education agreed that the institutes would be funded and that proposals should be submitted. See Levin, *Notes from the Executive Director*, *supra* note 115, at 6-7.

121. The author has not made a concerted effort to ascertain where all the American Indian students are enrolled; the reported information was fortuitously acquired. One of my New Mexico

perceived group of students who identify with indigenous peoples can do much to reduce their isolation. An active chapter of the Native American Law Students Association (NALSA) can provide critical social support as well as collaborate with academic support services provided by an institution. NALSA provides national activities, such as an annual moot court competition, which provide enrichment especially valuable to the Indian student in an isolated situation.

A student who is the only or one of few American Indians at an institution, especially if that school has a hostile environment, is at peril as an "outsider."<sup>122</sup> One survivor described the situation:

[I]t is easy to recognize this "something missing" feeling. . . . The feeling that "something" is missing, is knowing that you are an outsider. Often, this feeling is internalized. The student is left feeling that there is something the matter with me because I do not fit in here. Many of us want to leave after first year, if indeed we were fortunate enough to be one of the ones who did not fail (and I believe there is a direct relationship between the "something missing" feeling and failure at law school).<sup>123</sup>

An "outsider" status signifies not just an individualistic misfit, but also the cultural conflict that arises when American Indians retain a strong commitment to their collective identity as members of a tribe, pueblo, band, clan, or village. Loyalty to a third sovereign, the tribal nation, within the United States boundaries, is a unique situation. Problems arising from a dual membership in two nation-states within the United States border distinguishes American Indian students from other students who have

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students reported her shock and pain at being exposed to some "ignorant statements" from other students, including the assertion that Indian students get "full ride" money grants. She exclaimed, "If we did get everything free, why are we still so poor!" Student's Response, *supra* note 90; see also Estes & Laurence, *supra* note 89, at 282 ("[M]ost Indians will find themselves to be the only Indian in the class, or one of only two or three. The Institute seeks to let students know they are not, in fact, alone in their study of the law. By gathering in New Mexico for the summer, they identify themselves as the "class of 19xx" and retain some of the identification as they disperse across the country.").

122. Patricia A. Monture, *Now that the Door is Open: First Nations and the Law School Experience*, 15 QUEEN'S L.J. 179, 185 (1990) (Monture is a member of the Mohawk Nation and a law school teacher); see also Deloria, *Legal Education*, *supra* note 116, at 23 (stating that institutional hostility includes antagonistic statements made personally to American Indian students about their qualifications for law school, generally attributing a lack of qualifications that were overlooked because of affirmative action, as well as institutional patterns that tell the student the law school is not committed to graduating the American Indian students who attend it); Minnis, *supra* note 89, at 382-85 (describing the outsider experience of minority law students). Minnis counseled, "You will become painfully aware you are an unskilled player in a game that is the legacy of the privileged. The game is alien to your upbringing." *Id.* at 382.

123. Monture, *supra* note 122 at 185.



outsider experiences in law school. Cultural conflicts provoked by law school training may become a formidable barrier to success, even when money, pre-law preparation, and ethnic peers have been provided. Those who become successful as legal-warriors must understand that cultural conflict originates with the collision of different fundamental values held by majority and indigenous cultures.

Differentially treated by commentators, the impact of cultural conflict is variously experienced by American Indian law students. Some commentators express concern about the cultural shock that becomes an insurmountable barrier to a student's success in law school. Philip S. Deloria has urged that legal educators and Indian students concentrate on the knowledge, techniques and skills expected of legal professionals.<sup>124</sup> Success in the mastery of legal knowledge and skills should be the foremost goal, though Deloria does not excuse institutional hostility to Indian culture which interferes with students' success.<sup>125</sup> Purich cites reports that the more acculturated or assimilated the student is, the more likely he or she will succeed in school.<sup>126</sup> It is questionable whether acculturation that is *both* personally and professionally disabling, when imposed upon students, is acceptable as a norm of legal training.

A student's success in school will be affected by the degree to which he or she can recognize and manage the cultural differences that occur in the reasoning process used when working with legal concepts. An important difference exists between Anglo-American legal concepts and the internal concepts through which many American Indian students view their world or reality.<sup>127</sup> Clara Sue Kidwell states:

The academic world stresses rational thought and constant questioning of what constitutes "truth." Native American

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124. Deloria, *Legal Education*, *supra* note 116, at 38.

125. *Id.* at 38-39 (stating that, in retaining Indian identity, "what problem there is, is for Indian people to concern themselves with, not law schools"). In recent conversations Deloria has indicated that a concern for quality legal training does not alter a law school's responsibility to eradicate cultural barriers that interfere with Indian students' success. Cultural barriers lacking any pedagogical justification can become unthinkingly institutionalized.

126. Purich, *supra* note 116, at 83 (citing *Report on Special Admissions at Boalt Hall*, 28 J. LEGAL EDUC. 353, 391 (1977)). Retaining and strengthening the tribal identity may be even more important for acculturated students with limited experiences with tribal communities. The removal of Indian peoples from their communities was not limited to the nineteenth-century policies of the federal government; the post-World War II relocation programs placed many Indians in geographical isolation. The career choices of students with disrupted cultural connections will be affected by the degree to which cultural identity can be comfortably integrated.

127. Joan B. Kessler, *The Lawyer's Intercultural Communication Problems with Clients from Diverse Cultures*, 9 NW. J. INT'L L. & BUS. 65, 77 (1988) ("[A] lawyer would be ethnocentric in thinking that all people would perceive the United States legal system in the same manner, or even that all people would perceive the running of a negotiation session, as a lawyer would.").

communities stress acceptance of common values and belief in long-held traditions and customs. . . . Power is not in abstract theories about truth but in knowledge of the on-going social relationships and activities of family and friends. The cultures of the non-Native academic world and the Native American community are quite different. Native American students face the challenge of mastering a new environment and, in many cases, justifying the existence of their own cultures in the academic world where they find themselves.<sup>128</sup>

Understanding the cultural disparity is the first step for those who want to minimize the negative effect on the law student's performance.

The enrollment at law schools has radically changed in the last thirty years with the inclusion of women and members of ethnic minorities, but law schools have generally not changed their curriculums or methods of teaching in ways that recognize the participatory change. Law schools "have retained traditional methods of teaching and performance expectations more appropriate to the exclusively white male student body of earlier years."<sup>129</sup> If laws schools are to succeed in recruiting, retaining, graduating, and appropriately training American Indians in law, the cultural framework that accompanies these students into the classroom must be directly recognized.

## 2. A Shared Cultural Viewpoint Among American Indians

A commonality exists in the values and perceptions of the many indigenous peoples that starkly contrasts with the values and views asserted by the majority culture in the United States. I acknowledge the risk of

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128. Kidwell, *supra* note 66, at 250. Even when American Indian students overcome Indian socialization and inject an individual viewpoint in the Socratic discourse in class, they can feel the brunt of the cultural divide. One of my law students said,

I often feel is it even worth the fight. You feel like you are spinning your wheels. On paper Indian tribes are considered a sovereign, but in reality are we really? Part of the frustration Indian students feel is that when we speak — we are looked upon as radicals or "an Indian on the warpath again" — because we feel and voice so strongly about our ways, our view points and we want to protect them. But we must make a choice, do we rock the boat or do we just sit and be quiet.

Student's Response, *supra* note 90.

129. Minnis, *supra* note 89, at 347. Minnis points out that contemporary legal education is designed for "good students" who mirror the characteristics of traditional law professors — from middle and upper-class society, the dominant culture, and the culture that has shaped the law. She adds:

Accordingly, they are inclined to accept without question beliefs that are characteristic of that culture and that give them an advantage in law school. In short, their personal histories have taught them to confront the world aggressively; they esteem reasoning over other ways of knowing, individual accomplishment over collective accomplishment, and competition over cooperation.

*Id.*

generalizing too broadly, yet comparing the views on community, the individual, and conflict resolution show the difference between tribal cultures, which emphasize community, and the majority, which focuses on individual rights.<sup>130</sup>

The Lockean philosophy which influenced the formation of the new United States republic presents communities as the basic political entity established to protect individual rights. Community results because of the consent of individuals. The political community creates the civilization and its components, including law. In the constitutional social contract, the Indian nations were not participants, but this preclusion of the indigenous nations does not explain the cultural divide. Both majority and indigenous cultures value the maintenance of community through law or rules of conduct. Beneath the surface resemblance there is a difference.

As an initial difference, indigenous people with a traditional orientation prefer communal values over individualism as a guiding principle for the laws that govern conduct. This preference does not mean that individual interests are ignored. What the rules provide, protect, and prescribe for individuals must also act to preserve the cultural values of a collective framework. Pommersheim's insightful discussion of individual rights and collective rights points out that tribal societies are built on relational foundations.<sup>131</sup> This foundation does not mean that individual rights are inconsistent with tribal interests. Rather, the key questions are: Which

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130. The difference has been a historical constant, with powerful and devastating consequences for Indian people. Consider the statement by Sen. Henry Dawes, engineer of the Dawes Allotment Act and policy to break up communal landholding governments, in 1883 when he described the Cherokee Nation:

The head chief told us that there was not a family in that whole nation that had not a home of its own. There was not a pauper in that nation, and the nation did not owe a dollar. It built its own capitol, in which we had this examination, and it built its schools and its hospitals. Yet the defect of the system was apparent. They have got as far as they can go, because they own their land in common. It is Henry George's system, and under that there is no enterprise to make your home any better than that of your neighbors. There is no selfishness, which is at the bottom of civilization. Till this people will consent to give up their lands, and divide them among their citizens so that each can own the land he cultivates, they will not make much more progress.

ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 21-22 (1940) (quoting BOARD OF INDIAN COMM'RS, ANNUAL REPORT 90-91 (1885)). Dawes' statement was made after the forced removal of the Cherokees to Oklahoma, where their success in rebuilding failed to protect or caused them to become subject to the Allotment acts which followed the 1883 statement. See also Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 325 (1986) (describing nineteenth and early twentieth century federal policy to remold the American Indian family into the gender restrictions, individualism, and property ownership practices of the majority society).

131. Pommersheim, *Liberation*, *supra* note 11, at 435-41. Pommersheim builds on the work of MARTHA MINOW, *MAKING ALL THE DIFFERENCE* (1990), where relational structures guide how to treat individuals who bear the stigma and pride of being different.

rights and values ought to exist? How can designated rights be held by an abstract individual, independent of social context, relationships with others, or historical setting?<sup>132</sup> For tribal people, the real-life relational framework is key to how individuals should treat each other.

Numerous sources state that the universal feature of human society is the existence of conflict among individuals.<sup>133</sup> The survival of the society or formally organized community depends on the resolution of the inevitable conflicts among individuals and between member interests and the interests of the community. The system designed to resolve conflicts is the law, which is culturally variable.

The resolution of conflict demonstrates another difference as the objective for indigenous nations and their members is to restore individuals to a universal harmony.<sup>134</sup> The end result should not establish individuals as winner and loser. Individual interests are considered as part of a larger perspective. The individual and the community are part of the kinship that exists among all life forms and the environmental elements.<sup>135</sup> Harmony

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132. *Id.* (citing Minow, *supra* note 131, at 149-52; MARY ANN GLENDON, *RIGHTS TALK* (1991)).

133. See KATHERINE NEWMAN, *LAW AND ECONOMIC ORGANIZATION: A COMPARATIVE STUDY OF PREINDUSTRIAL SOCIETIES* 1-49 (1983) (surveying and summarizing theories of legal evolution and the response to conflict from Maine, Durkheim, Weber, and Hoebel, through contemporary legal ethnographers such as Laura Nader and Max Gluckman).

134. Tso, *Process*, *supra* note 45, at 233. Tso, the Chief Justice of the Navajo Nation Supreme Court, stated:

We refer to the earth and sky as Mother Earth and Father Sky. These are not catchy titles, they represent our understanding of our place. The earth and sky are our relatives. Nature communicates with us through the wind and the water and the whispering pines. Our traditional prayers include prayers for the plants, the animals, the water and the trees. A Navajo prayer is like a plant. The stem or the backbone of the prayer is always beauty. By this beauty we mean harmony. Beauty brings peace and understanding. It brings youngsters who are mentally and physically healthy and it brings long life. Beauty is people living peacefully with each other and with nature.

*Id.*; see also James W. Zion, *Harmony Among the People: Torts and Indian Courts*, 45 MONT. L. REV. 265 (1984) (providing an introduction to the value of harmony, with citations to the anthropological literature).

135. DEBO, *HISTORY OF THE INDIANS*, *supra* note 22, at 1-18. With the caveat that specific American Indians should be respected and understood for their particular culture, Debo presented their commonly held views. In the indigenous peoples' relationship with nature, they adapt and respectfully coexist with animals, plants, and the land itself. The "white man sought to dominate and change the natural setting." *Id.* at 3. According to Geronimo,

For each tribe of men Usen created He also made a home. In the land for any particular tribe He placed whatever would be best for the welfare of that tribe. When Usen created the Apaches He also gave them their homes in the West. He gave them such grain, fruits, and game as they needed to eat. . . . He gave them a pleasant climate and all they needed for clothing and shelter was at hand. Thus it was in the beginning: the Apaches and their homes each created for the other by Usen himself. When they are taken from these homes they sicken and die.

is at the center of the relationship among all life forms, including humans, animals, and plants.

The relational foundations of indigenous lives are reflected in the customary guidance and language of tribes. For the Navajos the cultural framework is manifest in the Peacemaker Courts of the Navajo Nation. The Navajo Nation Peacemaker Court materials state as the operating principles for those before that traditional body: "K'ei is kinship which arranges correct conduct of the individuals within a family unit. . . . *Doonee* is the clan group where rules of correct conduct, with fellow clan groups of the same tribe, are foremost. *Bahoddaatah* is the innate nature and responsibility of an individual[s] existence."<sup>136</sup> The Lakota concept of *Tiyospaye* captures the same concerns for relational harmony and is defined in some glossaries as relatives living together, a band or division of the tribe.<sup>137</sup> Pommersheim points to the relational fabric of tribal life and law as inseparably manifest in the legal decision whether to grant standing in a custody dispute to a member of the extended family or *tiyospaye* who is neither the mother nor the father of the child.<sup>138</sup> The content of these tribal beliefs and legal practices affirm the continuing guidance of communal, rather than individualistic, values.

Conflict arises when the individual is out of balance or in disharmony with other community members and elements in the universe. Conflicts are not framed in individual rights: who has personal entitlements and who has violated cognizable rights. Abuse of the individual is addressed, but the

*Id.* Compare the creation account in the Old Testament: "And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it; and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." *Genesis* 1:28 (King James). For other accounts of emergence and creation based on coexistent relations, see generally RICHARD ERDOES & ALFONSO ORTIZ, *AMERICAN INDIAN MYTHS AND LEGENDS* (1984); Peter Iverson, *Taking Care of the Earth and Sky*, in *AMERICA IN 1492*, *supra* note 3, at 85.

136. Philmer Bluehouse, *The Navajo Nation Peacemaker Court: An Introduction I* (July 7, 1992), in *Traditional Dispute and Conflict Resolution*, Indigenous Justice Conference, Santa Fe, N.M. (Dec. 8-9, 1993). The Navajo Nation's justice system aims to enable "people to be in peace with themselves and others." *Id.*; see also Bill Donovan, *Peacemakers Do Justice to Navajos; Alternative Court Influences Behavior with Help of Family*, ARIZ. REPUBLIC, Apr. 5, 1993, at A1 (describing a Peacemaker resolution of domestic violence involving relatives and friends).

137. Debra Lynn White Plume, *The Work of Sina Wakan Win Okolakiciye: Sacred Shawl Women's Society*, in CAROLYN REYER ET AL., *CANTE OHITIKA WIN (BRAVE-HEARTED WOMEN): IMAGES OF LAKOTA WOMEN FROM THE PINE RIDGE RESERVATION, SOUTH DAKOTA 71-72* (1991).

138. Fommersheim, *Liberation*, *supra* note 11, at 438; see also *Moran v. Rosebud Housing Auth.*, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6106 (Rosebud Sioux Ct. App. 1991) (finding an injunction issued as a result of disturbance between neighboring residents of a tribal housing project to be overbroad and contrary to the Lakota commitment to elders and extended family or *tiyospaye* because order barred the restrained party and her children from the entire housing project where the grandmother lived).

context is not finite to the individual victim and offender. Restoration of the individual's physical and mental well being involves others in the understanding of the problem and its resolution. Traditional forms of problem resolution include nonadversarial forums in which respected elders, family, and band members contribute to the outcome. When the resolution occurs, the individual and the community can resume a life which promotes harmonious relationships.<sup>139</sup> Accommodation and compromising, not win-or-lose strategies, contribute to the desired traditional outcome.

With a traditional background, the individual Indian law student will likely experience cultural shock in law school. The degree of shock will depend on the relationship with his or her community. The American Indian student with the desire to become a legal-warrior must consider the enduring value that he or she places on the home community's beliefs and practices. The existence and effect of cultural conflict in the law school setting is an enduring concern of indigenous and minority people.<sup>140</sup> Cultural disparity is likely in both the social environment and the course content of law school.

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139. Taylor, *supra* note 45, at 255-56. Taylor states:

In order to effectively represent an individual plaintiff with a claim for violation of civil rights against a tribal agency or official in an Indian court, a non-Indian lawyer must learn about the tribal culture, customs, and law that are the basis of the tribal concept of civil rights. This is especially important when the client is an Indian. The Indian client usually wants to remain an effective and respected part of the reservation society, whether his lawsuit is won or lost, and this result may be compromised if the goal of the lawsuit is not somewhat consistent with the tribal understanding of personal rights.

*Id.* Katherine Newman notes that Gluckman and Nader state a "master norm" in some cultures is one that emphasizes balance. "The ultimate goal of dispute settlement is to return social relationships to their normal state." NEWMAN, *supra* note 133, at 47.

140. Deloria, *Legal Education*, *supra* note 116, at 35. Deloria stated:

My own experience, and my experience with other Indian students, is that the "world view" of most Indian students starts from an assumption that in a very superficial sense could be seen as interdisciplinary. The problem that Indian students have is in forcing themselves to stop thinking about the world as continuous existence of which they are a part, and instead to discipline themselves to learning techniques — to learn how to be a good plumber so that they could have the tools to work within their view of the world effectively.

*Id.*; see Rennard Strickland, *Redeeming Centuries of Dishonor: Legal Education and the American Indian*, 1970 U. TOL. L. REV. 847, 870 [hereinafter Strickland, *Redeeming Centuries*] ("A former staff member of one Indian program . . . concluded 'many of the traits which an Indian possesses militate against making it in law school — he just doesn't think in legal terms and patterns.'") (quoting Woodrow B. Sneed, Cherokee, former Associate Director of Indian Law Center, University of New Mexico). For discussions of similar conflicts facing native students in Canadian law schools, see Monture, *supra* note 122, at 188-89; Purich, *supra* note 116, at 83-85. For a discussion regarding Chicano (Mexican-American) law students with cultural preferences for conciliatory communication, see Leo Romero et al., *The Legal Education of Chicano Students: A Study in Mutual Accommodation and Cultural Conflict*, 5 N.M. L. REV. 177, 198-202 (1975).

### C. Cultural Conflict and Law School Resources

#### 1. Anglo-American Law as a Source of Conflict and Enrichment

In the curriculum and course content, the law school world of legal ideas, some cultural conflicts are inevitable. In property law the Anglo-American principle of individual owners controlling land remains alien to tribal people who see themselves as stewards of communally possessed land. Among many indigenous people of the United States, one can never truly own the land; the individual and the tribal entity are stewards only.<sup>141</sup> In criminal law, the principle of restitution remains in customary tribal laws. Incarceration or deprivation of an individual's liberty is seen as inadequate because it does not provide a remedy for those who suffered losses. Moreover, incarceration expels, rather than reconciles, the offender with the community. It was failure of the dominant culture to understand restitutionary values in *Ex parte Crow Dog* that led to passage of the Major Crimes Act and the imposition of federal Courts of Indian Offenses (CFR courts) on tribes in the 1880s.<sup>142</sup>

In the area of tort law, even the federal law recognizes the indigenous view that injuries require remedies to more than the individual victim, but to others who have also suffered. First, carelessness, rather than negligence, is the standard.<sup>143</sup> Additionally, factors such as the parties, the impact on others besides an individual victim, the environment where the charged misconduct occurred, and other cultural elements are considered.<sup>144</sup> When

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141. See DEBO, HISTORY OF THE INDIANS, *supra* note 22, at 4 (quoting various American Indian speakers who stated, "The earth here is my mother," and, "The earth is part of my body . . .," and that dismemberment occurs when land is surveyed and alienated from the community); see Estes & Laurence, *supra* note 89, at 285 (noting Indian student difficulties with future interests in property); *In re Charley Nez Wauneka, Sr.*, 13 Indian L. Rep. (Am. Indian Law. Training Program) 604 (Navajo 1986); *In re Joe Thomas*, 15 Indian L. Rep. (Am. Indian Law. Training Program) 6053 (Navajo 1988) (describing Navajo law in property and probate which allocates possessory rights by communal, family, and clan interests, not individualistic fee principles).

142. See CLINTON ET AL., *supra* note 47, at 33-41 (regarding Courts of Indian Offenses in response to *Ex parte Crow Dog*, 109 U.S. 556 (1883) (denying authority to try and punish an Indian for the murder of another Indian because tribes retained their "self government . . . [and] the maintenance of order and peace among their own members"). For discussion of tribal custom, as belief and usage as conduct in conformance with belief, and the relationship between customary law and tribal courts, see Valencia-Weber, *supra* note 4.

143. 25 C.F.R. § 11.500(b) (1995) ("Where the injury inflicted was the result of carelessness of the defendant, the judgment shall fairly compensate the injured party for the loss he or she has suffered.").

144. 25 C.F.R. § 11.500(a) (1995) ("In all civil cases the Court of Indian offenses *shall* apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinances or customs of the tribe occupying the areas of Indian Country over which the court has jurisdiction, not prohibited by Federal laws." (emphasis added)); 25 C.F.R. § 11.501(b) (1995) ("Where any doubt arises as to the custom and usages of

injury is deliberately inflicted and liability has been determined, "the judgment shall impose an additional penalty upon the defendant, which additional penalty may run either in favor of the injured party or in favor of the tribe."<sup>145</sup> Tribes vary, by customary belief, how an individual's contributory behavior will be treated in tort.<sup>146</sup> In the courts of the Navajo Nation, cases resulting from tortious and some criminal acts can be placed in the jurisdiction of the Peacemaker Courts where nonadversarial traditional procedures seek to restore the relationships among all who have been affected.<sup>147</sup> Consequently, the offender's reconciliation and restoration to harmony can involve remedial behavior directed toward the victim, the victim's family, a clan and the larger tribe. The contemporary tools of Anglo-American law include increased use of alternative dispute resolution methods. The nonadversarial approaches can create a relationship between the customary framework of some Indian students and what they learn in law schools.

In some areas of law the cultural discomfort requires extra efforts from American Indian students. Courses on wills, trusts and estates can impinge on the particular beliefs that some tribal cultures have about death and property. Among some pueblo people and the Navajos, speaking of the deceased is not proper behavior except in circumscribed circumstances. Failure to respect such cultural customs can jeopardize the journey of the deceased into the next world. A law student disclosed to me, "The greatest conflict was in the wills and trust course in which the focus is on the preparation for death, a subject avoided by [my] culture. I took the course in preparation for the bar, but the feeling of disharmony prevailed throughout the semester."<sup>148</sup> Yet, other tribes have specific rituals and practices which involve speaking about and honoring the deceased so that the passage beyond the mortal experience is facilitated. How law schools acknowledge and how Indian law students manage conflicts raises questions of practicality for each.

The underlying conflicts in principles of law and the particular remedies of law can be acknowledged in the courses. The respect an acknowledgement provides may be sufficient to ease the Indian students'

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the tribe the court may request the advice of counselors familiar with these customs and usages.").

145. 25 C.F.R. § 11.501(c) (1995).

146. Compare *Howard v. Sharp*, 10 Indian L. Rep. (Am. Indian Law. Training Program) 6027 (Colorado River Tribal Ct. 1983) (adopting comparative negligence standard) with *Boren v. Victorino*, No. 12-ACT-7940 (Acoma Pueblo Tribal Ct., May 14, 1980) (holding contributory negligence not part of customary law and not barring plaintiff's recovery).

147. Tom Tso, *The Tribal Court Survives in America*, 25 JUDGES J. 22 (1986); James W. Zion, *Harmony Among the People: Torts and Indian Courts*, 45 MONT. L. REV. 265 (1984); James W. Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1983); Valencia-Weber, *supra* note 4, at 244-56.

148. Student's Response, *supra* note 90.



concerns and educate the other students. Anglo-American justice remains an individualistic model, targeting specific persons as victims and offenders, limiting who can participate and recover by rules of standing and other doctrines so that everyone affected cannot be a party or intervene. For *all* students discussing the contrast between the individualistic and communal bases for law can help illuminate more than the values of another cultural perspective. Such discourse can also reveal some of the emerging communitarian contentions in law that the dominant legal process fails to redress social problems like environmental disasters where few individuals or entities qualify as a party with cognizable interests. This type of discourse respects, without condescension or sideshow aspects, the communal values which serve as the engine for much tribal justice. As a bona fide element of the legal dialogue, the communal perspective allows the traditional American Indian law student to find some zone of compatibility.

For American Indian law students, cultural conflicts require personal skills and decisions about how to separately value the Anglo-American law beliefs and the indigenous beliefs about justice. They should not be required to make a dichotomous choice of one over the other. Robert Yazzie, Chief Justice of the Supreme Court of the Navajo Nation, has identified the challenge in his metaphor of law school as a journey:

You will pick up some souvenirs on your trip in the form of Anglo rules, principles, and procedures. The trick is to put them in perspective. Win-and-lose adjudication is alien to Indian values, which promote discussion and problem-solving. . . . To the extent that knowledge of Anglo methods is necessary to defend tribes against outside forces, you need to know it. Otherwise, you should always remember that Indians have survived because (1) they chose the best from the outside culture, (2) they have appropriately used what they learned, and (3) they have rejected that which is not useful or which is destructive.<sup>149</sup>

Recognizing what is important and why is requisite for the legal-warrior's work of selecting from different legal systems what is productive for the tribal nation's legal system.

If one considers the cultural disparity then the American Indian law student's puzzlement can be understood. Of course, some Indian students ably manage the cultural confusion. For many students, how well they manage the social and cultural discomfort depends on supportive faculty and American Indian student peers. Law schools increasingly respond to varied

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149. Robert Yazzie, *Law School as a Journey*, 46 ARK. L. REV. 271, 273 (1993).

student needs such as single parents' need for child care; programs that reduce the cultural conflict are similarly justified.<sup>150</sup> The provision of services or activities to address cultural conflict is especially important in the first year of law school when failure or dropout is a greater risk. Intervention does more than meet an individual's survival needs. Investment in programmatic assistance can validate the perception that more than one cultural viewpoint informs professional training.

## 2. Curriculum, Courses, and Faculty

Few schools offer law courses, institutes, or other training opportunities that substantively relate legal training to the concerns of American Indians.<sup>151</sup> Such offerings are not typical in the 176 schools accredited by the ABA and who are members of the American Association of Law Schools (AALS). Only two schools in this author's knowledge offer

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150. Scanlon, *supra* note 97, at 357. Scanlon states:

Affirmative action at the law school level should not have been seen as a separate admissions problem. This is one of the most extraordinary elements of the culture. Appropriate attention to support and retention issues, especially those not directly related to academic concerns, would have stemmed the discontent that must have been leading to word of mouth sentiment working against law school recruiters anxiously seeking law students. . . . The recruiting element of the culture is most unfortunate. Most notably . . . there is a preference to obtain minorities already cultured to the academic and economic aristocracy of the more competitive schools.

*Id.*

151. See Estes & Laurence, *supra* note 89, at 284. The authors state:

[T]here has always been a course in Federal Indian Law. Many of the students will be attending law schools where such a course does not exist; yet, at the same time, many will wish to return home to practice Indian law in one of its many forms. For many students the course in the summer will be their only exposure to the subject.

*Id.* Over 20 years ago Strickland described the institutional existence of training programs in law colleges as "small and fragmented." Strickland, *Redeeming Centuries*, *supra* note 140, at 847, 866. The situation remains unchanged. There is no compilation, directory, or coordinating entity for such programs in the AALS, ABA, or other organizations. Institutions which regularly offer coursework in Indian law and provide access to specialized institutes, certificate degrees, or other programs which instruct beyond one basic Indian law course, include the law schools of American University, University of Arkansas, Arizona State University, University of Arizona, University of Colorado, University of Iowa, University of Minnesota, University of Montana, University of New Mexico, University of North Dakota, University of Oklahoma, Oklahoma City University, University of South Dakota, University of Tulsa, University of Utah, University of Washington, and University of Wisconsin. This is not an authoritative list, but derived from the author's communication with those who teach in Indian law and a report prepared by Jacqueline Rashleger, student at the University of New Mexico School of Law, September 25, 1992. Jacqueline Rashleger, Report on Indian Law Programs Nationwide (Sept. 25, 1992) (submitted to the University of New Mexico Law School administration and to the author). Rashleger, a third-year student, then successfully advocated before the New Mexico legislature for the funding that established the Southwest Indian Law Clinic.

specialized knowledge and skills in the form of an Indian Law Certificate Program, the University of New Mexico and the University of Tulsa. For non-Indian students the scarcity of training in Indian law is a deprivation of a rich part of the jurisprudence of the United States. For Indian students, the loss is more substantial. Besides the omission from their training of the main source of federal common law, the indigenous students suffer from insufficient training for those whose professional work will be in Indian law. Of course, the omission also exacerbates the cultural isolation between someone from an indigenous culture and the mainstream students.

The lack of Indian law in law school training also raises the issue whether law schools sharing geographical proximity with tribal nations and populations are failing in more than curriculum. Especially where state funded institutions fail to prepare their graduates on the particular issues raised in Indian law, as they affect Indian individuals and others who are citizens of the state, one can question whether the institutional mission is adequate or being performed at all. Additionally, law schools located in Indian Country who do not provide Indian law training push Indian law students away to the schools that are responsive.

Some state funded law schools do provide direct experience for their students, Indian and non-Indian, in clinics and other settings where Indian law issues are the focus. With a mandate and funds from the state legislature, the University of New Mexico (UNM) has established the Southwest Indian Law Clinic. Other state schools such as Arizona State University, University of Arizona, University of Colorado, and University of Montana operate some form of a clinical unit. Additional direct experience, not representing clients, is possible through externships. At UNM, these experiences include judicial clerking in tribal court systems, placement in urban Indian service agencies, externships with the Regional Office of the Solicitor for the Department of Interior, and Indian law-focused units of the Legal Services Corporation. External experiences also allow students contact with attorneys who are American Indian and can serve as mentors. Besides the state law schools, the role of private schools, especially those who claim leadership in legal education, should be questioned if schools persist in ignoring such an important area of United States law.

New voices and perspectives are changing the legal dialogue everywhere so that institutional barriers can be overcome. Law schools should lead, not reluctantly join in, as important legal questions are raised and resolved. "[T]he message is that the existing law program does not deserve to be supplemented, but, rather, should be rebuilt to serve the needs of *all* the students law schools have committed themselves to educate."<sup>152</sup> Providing

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152. Minnis, *supra* note 89, at 384. If law schools provided even *one* regularly scheduled basic course in Indian law, the curriculum would be enriched and *all* students would have

legal training in Indian law, in the classroom and experiential situations, can only strengthen the role of law schools as institutions responsive to the multitude of issues of the late twentieth century: cultural diversity within the United States and diversity among nation-states in international relations. When appropriately structured, training in Indian law provides a mutual benefit to the law school and the tribal nations. For law schools the curriculum is greatly enriched and establishes the school as a responsible institution in a local and national context. For the tribal governments, their autonomy is respected when they have a voice in how they can best be assisted by law students. This respect contrasts with the abuse of tribal autonomy in past relationships between Indian people and majority society.

The number of culturally related training opportunities is related to the faculty resources. The regularity of training opportunities depends on the number of law faculty members who specialize in teaching American Indian law<sup>153</sup> and the significantly smaller numbers of faculty who self-identify as American Indian.

The law teachers with indigenous cultural identities are even less visible than the students. The ABA data for 1994-95 shows thirteen full-time law teachers identified as American Indian.<sup>154</sup> To complete the picture, the ABA lists fourteen deans and administrators. Allowing for slippage in reporting and adding in the eleven reported adjunct teachers, *thirty-eight individuals serve as the most culturally related teachers and mentors for the present generation of legal-warriors*. Among those in full-time instruction, the presence of American Indians verges on invisibility.

American Indians, other ethnic minorities, and women all lack equitable representation among law teachers. Underrepresented among full-time law teachers, these groups all are subject to institutional efforts to affirmatively include minorities and women in the legal professorate and the resistance provoked by such efforts. Both the efforts to include and the resistance to include reflect episodic political fashion.<sup>155</sup> Concerted consciousness

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opportunity to acquire the minimum knowledge for a legal professional.

153. The AALS Directory of Law Teachers, published by the American Association of Law Schools, West Publishing Co., and Foundation Press, lists 84 law teachers specializing in "Native American Law" out of approximately 4818 full-time law teachers and 1954 deans and administrators. AMERICAN ASS'N OF LAW SCHOOLS, DIRECTORY OF LAW TEACHERS (1995); see also Section on Legal Educ. & Admissions to the Bar, ABA, 1994-95 Annual Questionnaire Takeoffs, Minority Faculty Teaching Members 1 tbl. B-6 (Mar. 27, 1995) (memo no. QS 9495-21) [hereinafter ABA Annual Questionnaire]. The law schools with some form of program employ more than one of these full-time professors. Allowing for the use of adjunct faculty, it is a safe generalization to state that the one basic course in Indian law is the exception, not a regularly staffed offering, at the 176 ABA-accredited law schools.

154. ABA Annual Questionnaire, *supra* note 153, at 1 tbl. B-6.

155. The legal journals reflect the cyclical response to the underrepresentation of women and ethnic minorities among the law professorate. *E.g.*, Peter M. Shane, *Why Are So Many People So Unhappy? Habits of Thought and Resistance to Diversity in Legal Education*, 75 IOWA L.

raising is needed to assure the inclusion of American Indians in whatever is undertaken to correct laggard institutional practices.<sup>156</sup> The inclusion of American Indians in the law professorate is integral to an equitable remediation. Their increased presence can only improve law schools as well as the outcomes for American Indian law students.

### *D. Outcomes and the Legal-Warrior Pool*

The completion or graduation rate of American Indian and Alaskan Native students has increased in numbers to reach a record in 1994 of 0.6% of the total of 39,305 law degrees awarded.<sup>157</sup> In 1980-81, ninety-four law

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REV. 1033 (1990); Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988); Carl A. Auerbach, *The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969-1975*, 72 MINN. L. REV. 1233 (1988); Scanlon, *supra* note 97; Portia Y.T. Hamlar, *Minority Tokenism in American Law Schools*, 26 HOWARD L.J. 443 (1983); Henry Ramsey, Jr., *Affirmative Action at American Bar Association Approved Law Schools: 1979-80*, 30 J. LEGAL EDUC. 377 (1980).

While inclusion in the law professorate is desirable, disadvantages and controversy accompany the faculty who are underrepresented. *E.g.*, Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991); Milner S. Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855 (1990); Leslie G. Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878 (1990); Richard Delgado & Derrick A. Bell, Jr., *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989); Derrick A. Bell, Jr., *Application of the "Tipping Point" Principle to Law Faculty Hiring Policies*, 10 NOVA L. REV. 319 (1986).

156. The Hispanic National Bar Association (HNBA) has resorted to a traditional cultural corrective, public shaming, by exposing those without shame ("*sin verguenzas*"). For the past six years the HNBA has issued a "Dirty Dozen" list of the law schools which lack any full-time, tenure-track Hispanic/Latino faculty. The schools selected for the list include the most selective schools as well as those in geographical areas with significant Hispanic population and/or a significant Hispanic enrollment at the law school. In 1989, certain states (New York, Colorado, Florida, and Texas) also received special "dishonorable" mention because of their large Hispanic population, yet no law school in the state had even one full-time Hispanic law professor. The effort has resulted in a noticeable increase in Hispanic/Latin faculty. Hispanic full-time tenure-track faculty have since been hired and Colorado has removed itself from the "dishonorable" list. According to Michael A. Olivas, Chair of the HNBA Law Professor Committee, "We now have over 112 professors, 15 Assistant or Associate Deans, and 13 Clinical or writing instructors." Michael A. Olivas, *LATINO LAW PROFESSOR NEWSLETTER* (Hispanic Nat'l Bar Ass'n), May 1995, at 2; *see also* Ken Myers, *Hispanic Bar Fires Annual Barb over Lack of Latino Professors*, NAT'L L.J., Oct. 25, 1993, at 4. The AALS data, used in the HNBA selection process, indicate that Hispanic faculty members meet the traditional qualifications for faculty (law review, clerkships, etc.) at rates which match and, in some instances, exceed the profiles of the non-Hispanic professorate.

157. Office of the Consultant on Legal Education to the ABA, ABA Section of Legal Educ. and Admissions to the Bar, *Number of Degrees Awarded to Minority Group Students* (Mar. 27, 1995) (memo no. QS 9495-25) [hereinafter ABA Memo QS 9495-25]; Office of the Consultant on Legal Education to the ABA, ABA Section of Legal Educ. and Admissions to the Bar, *Number of Professional Degrees Awarded at ABA-Approved Law Schools for 1994* (Mar. 27, 1995) (memo no. QS 9495-24).

degrees were awarded to American Indians; the last reported data of 1993-94 shows 232 American Indian graduates.<sup>158</sup> Since 1986-87, when 135 Indians earned the J.D. degree, the graduating cohort has crept upwards. However, only in the 1992 graduations, with 158 J.D.s earned, was a cohort of at least 150 finally achieved.

At first glance the 232 graduates in 1994 may not appear to be disproportionately low for the population of almost two million American Indians. Besides the ordinary individual needs of the two million, there are the unique legal problems not shared by other minorities. Issues, such as entitlements and restrictions on individual Indians, arise from the unparalleled relationship between the individual American Indians and federal law.<sup>159</sup> There are also the complex needs of the over 550 separate American Indian sovereigns and governments. Each of the nation-states, like the federal republic and the fifty states, must provide basic services to its constituents. The American Indian nations must operate governments based on some indigenous forms while integrating methods to meet the contemporary responsibilities facing all governments. Many graduates will not focus on Indian law. Those who do will provide only a small number to form the primary source of legal-warriors available to tribal nations.

The impact of the new graduates on the existing pool of legal-warriors is not a matter of simple mathematics. The number in the existing pool of legal-warriors is uncertain. The ABA, for instance, does not obtain information about racial or ethnic identity on its membership forms. One estimate of the ABA, based on voluntary participation in a membership census, resulted in approximately 611 members identified as American Indian from a total ABA membership of 339,476.<sup>160</sup>

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158. MINORITY DATA COMPENDIUM, *supra* note 80, at 70; ABA Memo QS 9495-25, *supra* note 157.

159. Federal statutes and regulations affect or control important areas of individual life not similarly regulated for non-Indians. *E.g.*, 25 U.S.C. § 283 (1988) (private relations, family and children) (providing for withholding rations to a family if children do not attend school); 25 U.S.C.A. § 373 (West 1995) (property and probate) (requiring Secretary of Interior's approval for a will to be valid); 25 U.S.C. § 85 (1988) (property management) (requiring consent of the United States for contracts made by any Indian where contract relates to tribal funds or property).

160. See Telephone Interview with Rachel Patrick, *supra* note 60 (describing ABA voluntary census on membership). Extrapolating from the 1994-95 membership census, .18% of ABA members claiming American Indian identity results in 611 members, if the .18% is applied to the total ABA membership of 339,476. Compare Michael Taylor, *Modern Practice in Indian Courts*, 10 UNIV. PUGET SOUND L. REV. 231, 236 n.21 (1987) (putting at 999 the number of American Indian law school graduates active in the U.S. as of 1980, and stating that this "statistic [was] derived from U.S. Bureau of Census data by the American Bar Association and Professor Leonard Rabinowitz of Northwestern University School of Law"). Stories on the Native American Rights Fund include the statement that the number of Indian lawyers has grown from under 25 in 1966 to over 700 today. See *Shattering the Myth of the Vanishing American*, FORD FOUNDATION LETTER, Winter 1991, at 5 (vol. 22, no. 3); Rosenbaum, *supra* note 63, at 26.

John Echohawk, of the Native American Rights Fund, provided another estimate of the pool of American Indian attorneys. Echohawk described the legal-warrior situation when he entered the UNM School of Law in 1967: "To be proportionately represented in the legal profession there should have been 1,000 Indian lawyers. Federal financial assistance for native Americans studying law has continued over the years and estimates today [1992] put the number of Indian attorneys at 600."<sup>161</sup>

Another account of the lawyers who are American Indian is in the 1990 Census. According to the self-identified respondents in the census, 1601 American Indians are lawyers and judges.<sup>162</sup> As with all data based on self-proclamation, these numbers are at variance with the numbers reported by tribes with regard to who they officially count as members. The elusiveness of an accurate measure of attorneys who can be identified as American Indian is accompanied by an information gap about employment outcomes.

Employment data indicate that minority legal professionals, including American Indians, enter government and public interest employment at a higher rate than nonminority graduates.<sup>163</sup> From reported data, it is not clear whether this employment includes working for American Indian governments or employers who specialize in American Indian law. Data specifying the type of governmental work (local, state, federal and military) do not list tribal governments. If such data exist, it could not be found by this writer.

Better employment data would enable one to track the career choices of American Indian graduates. They should be represented in all careers available to the legal profession, from those in corporations and law firms to the public sector in non-Indian governments and legal services agencies. Data are necessary to determine how well the legal professional pool meets the varied personal and tribal entity needs of American Indians, whether at the local, state or federal levels.

As a distinct area of legal work, American Indian law is also increasingly important in the international law framework of indigenous peoples' law.<sup>164</sup> To advocate for the protection of indigenous peoples' rights, often

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161. LAW SCHOOL ADMISSION SERVS. & LAW SCHOOL ADMISSION COUNCIL, THINKING ABOUT LAW SCHOOL: A MINORITY GUIDE 12 (1992).

162. *Detailed Occupation and Other Characteristics from the EEO File for the United States*, in U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF THE POPULATION, SUPPLEMENTARY REPORTS, 1990 CP-S-1-1, at tbl. 1.

163. NATIONAL ASS'N FOR LAW PLACEMENT, DIVERSITY IN THE LEGAL COMMUNITY: THE SEARCH FOR OPPORTUNITY, ERSSAMPLER SERIES, CLASS OF 1993, at 15, 29 (1994).

164. See generally GETCHES ET AL., *supra* note 65, at 973-1047 (ch. 15, "Comparative and International Legal Perspectives on Indigenous Peoples' Rights"); CLINTON ET AL., *supra* note 47, at 1201-1304 (ch. 9, "Other Response to Cultural Pluralism: A Broader Perspective"); Anaya, *supra* note 24.

accomplished through cooperative transnational efforts, the legal professional will need additional training to perform in international forums. The legal-warriors represent indigenous people in judicial forums and negotiations with governments. These legal professionals develop the international instruments such as the declarations and covenants that define and protect indigenous peoples' rights.<sup>165</sup> In establishing the norms of international law, the legal-warriors' work is especially significant.

One can argue the numerical insufficiency of the number of legal-warriors in various ways, but the need remains paramount. First, a proportional measure extrapolates from the number of attorneys some degree of benefit available to the ethnic population groups with which attorneys identify. Without adequate measures of the number of attorneys who self-identify as American Indians, a proportional approach is not useful, even if one assumes a satisfactory database and methodology.<sup>166</sup> Second, the complexity of American Indian law suggests that the expertise and knowledge necessary for protecting the interests of individuals and tribal governments cannot exist in the small numbers available. *At this point in the relations of American Indians, as individuals and as sovereigns, with the federal republic and its respective states, substantive need warrants an immediate and productive response from law schools in the training of legal-warriors.*

#### V. The Future of Indian Law: Some Voices

This article voices serious concerns, reflective of the author's own experiences, yet that voice is insufficient to present the struggle to become a lawyer when one is among those formerly excluded from the legal profession. At this point of some privilege as a law professor, I know that,

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165. E.g., Convention Concerning Indigenous and Tribal Peoples in Independent Countries, I.L.O. Conv. 169, I.L.O., 76th Sess. (entered into force Sept. 5, 1990), in 28 I.L.M. 1382 (1989); United Nations Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4SUB.2/1993/29 (Aug. 23, 1993). Both instruments aim to establish international norms that respect and protect the rights of indigenous peoples.

166. See Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993); INSTITUTES FOR LEGAL STUDIES, UNIV. OF WISCONSIN-MADISON, THE DEBASED DEBATE ON CIVIL JUSTICE (1992) (Disputes Processing Research Program, Working Paper DPRP 10-10). Galanter analyzed the charge that excessive numbers of attorneys exist in the U.S. in proportion to the U.S. and world population. He also studied the charge that this alleged disproportionality in lawyers produces excessive litigation and liability judgments. Galanter rejects both accusations because the sources of data and methodology, if any, are seriously flawed. "Counting lawyers comparatively is a daunting undertaking, plagued by poor data, and a bushel of apples and oranges problems." *Id.* at 2.

Galanter's careful critique should promote caution in anyone using proportional arguments, though his analysis may be too technical to affect those who use public forums to engage in lawyer-bashing.



despite the frankness and generosity provided me by American Indian law students, they must speak for themselves.

After some students reviewed an earlier draft of this article, some commented on the painful accuracy and somberness in the content. Promoting positive change, not despair, is why the people working at the frontiers of Indian law invest so much of their personal and professional energy. I did not want to discourage potential legal-warriors from considering law school as the place they can develop their abilities to thrive as contemporary tribal people. Consequently, I asked some American Indian law students to briefly answer this question: *Despite all the hardships, what in your law school experience has been beneficial and possibly convinced you that the struggle was worthwhile?*

Some of the responses received follow:

I *never* doubted going to law school would be worthwhile. As a Native American I recognized quickly how fortunate I am to be here and that, in itself, helps me when school gets tough. . . . [M]y law school experience has made my commitment to my Native American peoples and my rez [reservation] *stronger*. . . . Stronger because of the hell I went through last [the first] year. . . . Stronger in the Navajo way, using my corn pollen.

The most beneficial experience I had during . . . law school was the judicial externship with the Navajo Nation Supreme Court. . . . I was guided by the Justice, but at the same time given the freedom to explore and develop my own thoughts and ideas . . . [i]t gave me a sense of accomplishment and . . . the opportunity to put [my] law school training to practical use and serve my community.

I knew that my perspective would be different from those of many of my fellow students. What I did not understand is just how valuable that perspective can be. Very often how a particular legal issue may impact upon Indians and Indian tribes is not fully understood or questioned by my peers. [I]f I am able to share my perspective with my classmates and open a door or window into deeper understanding, I feel I have contributed to the legal community and that, indeed, makes the struggle worthwhile.

The most beneficial law school experience was . . . the clinical experience [which] enabled me to see first hand the legal issues that affect Indian people on or off the reservation. [P]roviding legal access to tribes or individuals was truly inspirational. My clients' appreciation made it worthwhile, too.

The most negative effect of law school is the isolation from family. This can be an enormous obstacle for a first year Indian law student. Exams and papers will not permit students . . . to participate at home. However, this incredible burden is eased by the support of those with common interests. I have met people

through law school who have dedicated their lives to securing the future of our culture. Meeting these people and learning from them has made law school worthwhile. While the missed dance will never be known, the hope that someday we may more firmly secure the rights of our children to participate in our culture effectively eases this burden.<sup>167</sup>

Everyone in the world of law should listen to these voices.

### *VI. Conclusion*

This article argues for two objectives: one, training more American Indian attorneys who can serve as legal-warriors and, two, changing law school environments and curricula to achieve the first goal. Multiple reasons justify modifications in the profession and institutions. Changes are needed in the profession and in Indian law to decolonize its jurisprudence from the disabling elements of the past. Late twentieth century law in the United States, if it is to be respectful of the liberty of all people, must be liberated from the companion elements that began in the 15th century. Initially, one must reject the exclusion of American Indians from being the advocates of the legal challenges asserted by indigenous peoples to protect their sovereignty and interests. Concurrently, Indian law must be freed from colonialist views about the European discovery and conquest of inferior indigenous peoples. In advocating these changes, I now point to the places in the legal world where key changes and decisions will have an impact.

First, the current low number of legal-warriors is insufficient for the needs of tribal governments, the indigenous sovereigns with the United States borders. The tribal need is not for more generic attorneys, but for professionals with the legal expertise and cultural sensitivity essential for designing governments, tribal law, judicial systems, and Indian common law. The legal-warrior's work demands architectural skills beyond those usually taught in law schools. The productive work of this new legal professional can increase the legitimacy attributed to tribal governments by those within and without the tribal sovereign's boundaries.

Second, within United States jurisprudence, American Indian law is where the legal-warriors can have a targeted positive impact. The lives of American Indians, as individuals and as political entities, continue to be affected by the unparalleled legal relationships with the federal government, and increasingly, with the states. Indian law must change if the domination-subordination vestiges of past centuries, now controlling the lives of tribes and individuals, are to evolve to more respectful, coexistent, and mutually beneficial relations among the three sovereigns in the United States.

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167. Students' written responses to author's question (Oct. 3, 1994) (on file with author).

Third, the success of American Indians in undergraduate education is directly tied to how effectively the tribal sovereigns can obtain the services of all professionals. The pool of American Indian undergraduates, severely reduced by early drop-out rates, points to an insufficient pool of potential legal-warriors.

Fourth, the American Indians who achieve admission and completion of law school remain a woefully small number. Once admitted, these students face the barriers of insufficient money, inadequate academic preparation, and cultural conflict with the norms of the majority perspective in legal training. Law schools must work to reduce these three factors which are determinative of whether American Indian law students succeed. Law schools' intervention must address both the supportive environment and the curriculum resources, that is, Indian law-related course work, training experiences, and faculty who identify as tribal members.

Ultimately, both equity and the integrity of United States jurisprudence argue for greater inclusion of American Indians in the legal profession. More than the interests of the one nation are at stake. Tribes as the persisting initial sovereigns need legal-warriors to construct and operate governments respected by their members, nonmembers, and the state and federal sovereigns. Tribal law, both enacted and from common law of tribal courts, must engender the tribal traditionalists' concern for the future seven generations of Indian peoples.

At stake in this historical moment are the respect for United States jurisprudence and all institutions (especially courts) which enforce legal doctrines and for the law schools which train legal professionals. The respect that Indian law garners from all, Indians and non-Indians alike, depends on how this law develops; it is a special body of law controlling the lives of a discrete and small population with a unique political status. Law schools are an important part of the complex questions raised by contemporary indigenous people. At issue is what law schools do and whether they respond by expanding their institutional and intellectual resources. Positive growth requires leaders and faculty in law schools who appreciate Indian law for its enriching power. I do not expect a tumultuous rush to accept the challenge. Perhaps the messages from the Indian law students will reach those who realize and act when opportunity arises in unforeseeable ways.

This report has addressed only legal professionals as protectors of the next generations; it does not posit that only lawyers can serve in this important role. American Indians need and deserve the skill and wisdom of all occupations in order to survive the problems arising from their unique history and the Euro-American entry on the continent.

The legally trained Indian person can be a "cultural worker," as Torres has defined the occupation.<sup>168</sup> Cultural workers are people involved in self-conscious political transformation. "Hence, not only lawyers, but all those who work with law in an attempt to transform culture" are cultural workers.<sup>169</sup> Their work will produce cultural alternatives, providing new perceptions of the world as well as innovative constructs in law for the Indian and non-Indian world.

Indigenous nations aim to do more than merely survive. They want to thrive as societies in which all members contribute to social, economic, and spiritual growth. Creating culturally appropriate law is key in the success tribes can achieve as contemporary governments. For American Indians as legal professionals to be part of that success, law schools must train more legal-warriors.

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168. Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043, 1061 n.87 (1988); see also Yazzie, *supra* note 149, at 273 (describing the transformational work of American Indian lawyers working in tribal law); Valencia-Weber, *supra* note 4 (describing innovative forces in tribal culture and lawmaking).

169. Torres, *supra* note 168, at 1061 n.87 (stating that "culture workers" also includes law teachers, "for whom law creates an opportunity to participate in social transformation").