

2020

## The Indigenous Decade in Review

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### Recommended Citation

Christine Zuni Cruz, *The Indigenous Decade in Review*, 73 SMU Law Review Forum 140 (2020).

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# SMU Law Review Forum

Volume 73

April 2020

140–155

## THE INDIGENOUS DECADE IN REVIEW

Christine Zuni Cruz\*

### ABSTRACT

*This Article considers the decade, 2010 to 2019, in respect to indigenous peoples in the United States. The degree of invisibility of indigenous peoples, in spite of the existence of 574 federally recognized tribes with political status, is a central issue in major cases and events of the decade. Land and environment, social concerns, and collective identity are the three areas through which this Article considers the decade. The Declaration on the Rights of Indigenous Peoples, endorsed in 2010, sets a measure for the nation-state's engagement with indigenous peoples possessed of self-determination. The criticality of a new place in the American consciousness for the political status of indigenous peoples in the United States going forward is a feature of the decade.*

### I. INTRODUCTION - ON VISIBILITY

In considering the question posed for this Article—what was the greatest challenge faced by indigenous peoples in America in the last decade and how should it be addressed in 2020 and beyond—I focus on the unifying theme of the decade's major legal challenges: the lack of visibility and intense marginalization of indigenous peoples in the United States. This invisibility relates to the lack of respect, comprehension, and honoring of the political status of indigenous peoples within the nation's social, political, and cultural framework. Others have identified invisibility as a primary issue in respect to indigenous peoples.<sup>1</sup> I use invisibility to highlight the marginalization and discriminatory treatment that arise as a result of pushing indigenous peoples, possessed of self-determination, “to the edge of the state,” so aptly described by Mãivan Chech Lãm two decades ago.<sup>2</sup>

In May 2019, the first Native American women elected to Congress, Representatives Sharice Davids and Debra Haaland, introduced a bill to address

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1. E.g., Crystal Echo Hawk, *The False Narratives, Invisibility, and the Erasure of Native Peoples Must End*, INDIAN COUNTRY TODAY (Aug. 7, 2018), [https://newsmaven.io/indiancountrytoday/opinion/the-false-narratives-invisibility-and-the-erasure-of-native-peoples-must-end-LTIMfzcjzUeeO\\_ELS7c4nQ/](https://newsmaven.io/indiancountrytoday/opinion/the-false-narratives-invisibility-and-the-erasure-of-native-peoples-must-end-LTIMfzcjzUeeO_ELS7c4nQ/) [<https://perma.cc/L6HK-FLZH>].

2. See MAIVÂN CLECH LÂM, *AT THE EDGE OF THE STATE: INDIGENOUS PEOPLES AND SELF-DETERMINATION*, at xvii–xxvi (Richard Falk ed., 2000).

the issue of murdered and missing indigenous women.<sup>3</sup> H.R. 2438 is entitled the “Not Invisible Act of 2019.”<sup>4</sup> It is also the first bill in history sponsored by four representatives who are members of federally recognized tribes.<sup>5</sup> Representative Debra Haaland’s press release captures two aspects of invisibility and marginalization. First, as the troubling statistics have come to reveal high numbers of murdered and missing indigenous women in both the United States and Canada, this issue has gone on without adequate redress.<sup>6</sup> The problem would remain unnoticed without the action of the indigenous families and communities affected bringing it forward. The lack of visibility of, concern for, and knowledge about indigenous peoples by states, provinces, nation-states, and the people who make up those entities necessitates active participation of indigenous peoples. Second, that it was a historic first in the two-century-plus history of the U.S. House of Representatives to have a measure introduced by four Native American representatives—two of them Native women elected for the first time in 2018<sup>7</sup>—speaks to the relegation of Native peoples to the edge of American democratic institutions. Both firsts are prime examples of the “wrongness of firstness.”<sup>8</sup>

From 2014 to 2015, I spent a year in Saskatchewan, Canada, as the Robert H. Arscott Saskatchewan Law Foundation Endowed Chair at the University of Saskatchewan College of Law. A major contrast between Canada’s and the United States’ nation-state relationships with indigenous peoples was the *presence* of indigenous peoples in the national political, social, and cultural consciousness of Canada. It was evident in national and local media and political discussions. Continuous nightly national news coverage of indigenous peoples was something that I could recall only intermittently over a lifetime in the United States—first during the seventy-three-day siege of Wounded Knee in 1973, then in a short burst in the coverage of the hantavirus medical mystery in 1993,<sup>9</sup> and most recently in the 2016–2017 coverage of the No-DAPL protests. These were specific, singular events that created the literal once-in-a-decade-or-two presence of indigenous peoples in daily U.S. national media coverage for brief, intense periods of time. These events represent a flash in the U.S. national conscience or awareness.

What I saw in Canada was a move towards a normalizing presence and incorporation of indigenous peoples, not only in national and local media

3. Press Release, Representative Debra Haaland, Haaland Leads Historic Bill to Increase Focus on Missing and Murdered Indigenous Women (May 1, 2019), <https://haaland.house.gov/media/press-releases/haaland-leads-historic-bill-increase-focus-missing-and-murdered-indigenous> [<https://perma.cc/8UAL-PKLL>].

4. *Id.*; see H.R. 2438, 116th Cong. (2019).

5. Press Release, Representative Debra Haaland, *supra* note 3.

6. *Id.*

7. *Id.*; Bill Bostock, *The First Two Native American Congresswomen Hugged on the House Floor After They Were Sworn In to the Most Diverse Congress Ever*, BUS. INSIDER (Jan. 4, 2019, 5:17 AM), <https://www.businessinsider.com/deb-haaland-sharice-davids-hug-in-congress-first-ever-native-americans-2019-1> [<https://perma.cc/VJA7-EFVB>].

8. See Christine Zuni Cruz, *Toward a Pedagogy and Ethic of Law/Lawyering for Indigenous Peoples*, 82 N.D. L. REV. 863, 864–68 (2006) (describing the “wrongness of firstness” in terms of the wrong associated with being the first person of any color who is the first at anything).

9. See *Tracking a Mysterious Disease: The Detailed Story of Hantavirus Pulmonary Syndrome (HPS)*, CTR. FOR DISEASE CONTROL, <https://www.cdc.gov/hantavirus/outbreaks/history.html> [<https://perma.cc/W7QK-HJDS>] (last reviewed Aug. 29, 2012).

coverage but also in the political and cultural mix. While this in and of itself does not resolve issues, it does represent an understanding of the political relevance of indigenous peoples at the local and national levels. Another affirmation of significance was the Aboriginal Peoples Television Network's dedicated media channel over which native entertainment, news, and documentaries streamed day and night.<sup>10</sup> This level of visibility was in stark contrast to the United States.

John Ralston Saul, a leading Canadian public intellectual, writes of a turnaround in aboriginal presence in Canada and refers to this as an indigenous "comeback" related to recognition, acknowledgment, and reconciliation.<sup>11</sup> Recognition, acknowledgment, and reconciliation are indeed healthy antidotes for invisibility, marginalization, and alienation.

As I reflected on this difference between nation-states, I compared the population of Native peoples in the United States and Canada. Canadian national household survey information from 2011 showed that there were 1,400,690 aboriginal-identity individuals in the population, comprising 4.3% of the national population of Canada.<sup>12</sup> This compared to the U.S. Native American population of 5.1 million in the 2011 American Community Survey, or 1.6% of the U.S. population.<sup>13</sup> While the Canadian indigenous population was one-fifth the size of the Native American population, because the Canadian population is smaller than the U.S. population, indigenous peoples represented a higher percentage of the overall Canadian population. Additionally, Canada's indigenous population is more diverse than that of the United States, representing 634 First Nation,<sup>14</sup> fifty-one Inuit,<sup>15</sup> and numerous Métis communities in various provinces. Still, this could not account for the visibility difference given that the total Canadian indigenous population was smaller in number and also reflected a relatively small total percentage of the overall national population.

The invisibility of indigenous peoples in the United States' social, political, and cultural consciousness runs deep. In considering the various, critically important legal issues to indigenous peoples in the United States over the past decade, invisibility and marginalization contribute to continuing challenges experienced by Native Americans. Indigenous peoples seem to have a virtual—but not a real—

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10. See *The Development of Aboriginal Broadcasting in Canada*, MEDIA SMARTS, <http://mediasmarts.ca/digital-media-literacy/media-issues/diversity-media/aboriginal-people/development-aboriginal-broadcasting-canada> [https://perma.cc/9YZV-B4ZT] (last visited Oct. 13, 2019).

11. JOHN RALSTON SAUL, *THE COMEBACK* 6, 16 (2014).

12. STATS. CAN., *ABORIGINAL PEOPLES IN CANADA: FIRST NATIONS PEOPLE, MÉTIS AND INUIT* 6 (2011), <https://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.pdf> [https://perma.cc/W8VN-FERE].

13. *Profile America Facts for Features: American Indian and Alaska Native Heritage Month: November 2012*, U.S. CENSUS BUREAU (Oct. 25, 2012), [https://www.census.gov/newsroom/releases/archives/facts\\_for\\_features\\_special\\_editions/cb12-ff22.html](https://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb12-ff22.html) [https://perma.cc/XCM3-D58Y].

14. René R. Gadacz, *First Nations*, CANADIAN ENCYCLOPEDIA, <https://www.thecanadianencyclopedia.ca/en/article/first-nations> [https://perma.cc/Q5KR-ZTSM] (last updated Aug. 6, 2019).

15. *About Canadian Inuit*, INUIT TAPIRIIT KANATAMI, <https://www.itk.ca/about-canadian-inuit/> [https://perma.cc/NB3C-A8NU] (last visited Oct. 13, 2019).

presence in the political frame. Indigenous peoples exist in cases and legislation but not as visible political actors in the domestic realm.

To marginalize is to relegate a subgroup “to an unimportant or powerless position within a society or group.”<sup>16</sup> Such marginalization leads to the invisibility of the subgroup, including the needs and wants of the subgroup. Indigenous peoples have been described as marginalized and invisible within many nation-states. The United Nations (UN) Department of Economic and Social Affairs released the fourth edition of the *State of the World’s Indigenous Peoples* in 2019, identifying a “‘persistent invisibility’ of indigenous peoples in official statistics, noting that a 2011 study found that only 43% of 184 countries and territories attempted to collect statistical data on indigenous peoples living in their territories.”<sup>17</sup> While countries in the Americas were among those who did collect such data in numerous studies, indigenous peoples are nonetheless often labeled as “statistically insignificant” in the United States.<sup>18</sup> Even where such data are collected, non-tribe-specific data can be misleading due to the high degree of diversity amongst indigenous peoples. Statistics gathered at a national level represent 574 federally recognized tribes—and perhaps more if state-recognized or unrecognized tribes are represented.<sup>19</sup> Acknowledging tribal diversity is important for any non-tribe-specific data collected at the state or federal level. Given tribes’ unique status, failure to take such diversity into account or to collect and analyze data due to statistical insignificance are flaws in data analysis. Ultimately, general statistics lead to the melding of politically autonomous units into one racial category and fail to treat indigenous peoples as distinct political units with collective significance and authority (and tremendous diversity) within the political frame of the nation—unlike any other racial group. This contributes to invisibility and marginalization at both the state and national governmental levels. The UN identifies a critical part of indigenous peoples’ invisibility within nation-states: lack of any data.<sup>20</sup> I would emphasize the lack of any *nuanced* data.

In considering the major legal events of the decade, I focus on three areas: (1) land and environment; (2) social concerns; and (3) indigenous collective identity. I conclude by considering the criticality of a new place in the American

16. *Marginalize*, MERRIAM-WEBSTER, <https://merriam-webster.com/dictionary/marginalize> [https://perma.cc/9RQN-2C2C].

17. Catherine Benson Wahlén, *Indigenous People Update Finds “Persistent Invisibility” in Official Statistics*, INT’L INST. FOR SUSTAINABLE DEV. (Sept. 17, 2019), <https://sdg.iisd.org/news/indigenous-peoples-update-finds-persistent-invisibility-in-official-statistics/> [https://perma.cc/GS94-7QZV].

18. See Mandalit Del Barco, *Now Starring in Children’s Cartoons: Authentic Indigenous Characters*, NAT’L PUB. RADIO (July 17, 2019, 12:01 PM) (internal quotation marks omitted), [www.npr.org/2019/07/17/740804272/now-starring-in-childrens-cartoons-authentic-indigenous-characters](http://www.npr.org/2019/07/17/740804272/now-starring-in-childrens-cartoons-authentic-indigenous-characters) [https://perma.cc/6YDM-NV7G].

19. NAT’L CONGRESS OF AM. INDIANS, TRIBAL NATIONS & THE UNITED STATES: AN INTRODUCTION 11 (Feb. 2020), [www.ncai.org/tribalnations/introduction/Indian\\_Country\\_101\\_Updated\\_February\\_2019.pdf](http://www.ncai.org/tribalnations/introduction/Indian_Country_101_Updated_February_2019.pdf) [https://perma.cc/88MY-NY93].

20. DEP’T OF ECON. & SOC. AFFAIRS, DIV. FOR SOC. POLICY & DEV., STATE OF THE WORLD’S INDIGENOUS PEOPLES, at 165, U.N. Doc. ST/ESA/328 (2009), [www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP\\_web.pdf](http://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf) [https://perma.cc/9UF6-9K48].

consciousness for the political status of indigenous peoples in the United States going forward.

## II. LAND AND ENVIRONMENT

The endured trauma of actual physical removal from indigenous peoples' territorial connection to the American landscape and its ecosystems is one layer of invisibility for indigenous people. This erasure is historical and is represented in the physical removal, movement, and disappearance of indigenous peoples, as well as in restricted access to and reduction of larger territories that occurred as the continent was settled. This indigenous absence in, movement away from, and reduction of access to significant, previously occupied territories also facilitated a wiping of indigenous relevance from the national conscience, affecting the continued and significantly diverse indigenous presence throughout the nation today. Only thirty-five of fifty states today have reservations,<sup>21</sup> and most reservations represent a tiny fraction of former territories.<sup>22</sup>

Land is of utmost importance to indigenous peoples. Seven of the fifteen Indian law cases decided by the U.S. Supreme Court since 2010<sup>23</sup> and many of the legislative initiatives of Congress affecting indigenous peoples during this same period are connected to land, including its acquisition, protection, and use. Land is an aspect of indigenous identity. It is the basis of indigenous peoples' knowledge systems and their chthonic, or indigenous legal tradition.<sup>24</sup> The entirety of the country was the territory of indigenous peoples, some of whom are no longer, some of whom were removed from original territories, some of whom are not federally recognized, and many of whom still remain on or near reserved lands and original territories.

That tribes existed “[a]s separate sovereigns pre-existing the Constitution”<sup>25</sup> is

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21. See *Federal and State Recognized Tribes*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx> [<https://perma.cc/TY6T-NKRM>] (last updated Mar. 2020).

22. See, e.g., Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 881 (1995).

23. See *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019) (upholding the right to hunt off reservation under an 1868 treaty between United States and Crow Tribe); *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018) (concerning a competing claim of acquisition of parcel of land adjacent to tribe's land); *Patchak v. Zinke*, 138 S. Ct. 897 (2018) (concerning a parcel of land taken into trust on behalf of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians); *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) (holding Congress did not diminish the Omaha Indian Reservation); *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016) (challenging enforcement of a regulation banning operation of a hovercraft on a river within a federal preservation area); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014) (challenging state action enjoining an Indian tribe from operating land located outside reservation); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) (challenging decision of Secretary of Interior to take a parcel of land into trust); *United States v. Tohono O'Odham Nation*, 563 U.S. 307 (2011) (concerning breach of fiduciary duty of funds and property owned by a tribe).

24. For more on the chthonic legal tradition, see H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 60-97 (5th ed. 2014), and JAMES YOUNGBLOOD HENDERSON, *FIRST NATIONS JURISPRUDENCE AND ABORIGINAL RIGHTS: DEFINING THE JUST SOCIETY* 116-77 (2006).

25. *United States v. Bryant*, 136 S. Ct. 1954, 1962 (2016) (internal quotation marks omitted) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)).

not the beginning point for most discussions of this country's political history, much less in discussions of its existing political makeup.<sup>26</sup> For the most part, little time, thought, or place is given to the original peoples of the United States who remain—much less to those who have been “disappeared,”<sup>27</sup> removed, or pushed from original territories. This convenient erasure of history of place gives rise to invisibility of indigenous peoples in the American conscience—not only in places where they no longer remain but also in the very places they remain. In other settler-colonial nations like Australia, New Zealand, and Canada, the indigenous practice of land acknowledgement across territories has been adopted.<sup>28</sup> This land acknowledgement, meant to be respectful, is not without its cruel irony, however, given that it is often acknowledged in places of most significance, forever lost to settler-colonials.

### III. NO DAPL AND BEARS EARS

The most nationally significant events this past decade regarding indigenous lands did not play out in the highest court in the land. They came from legal decisions made, or unmade, by the exercise of legal power at the state, lower-federal-court, and federal-administrative levels. The Dakota Access Pipeline was approved despite massive protests at Standing Rock.<sup>29</sup> The declared Bears Ears national preservation area was reduced.<sup>30</sup> Both of these major land issues were rooted in tribal actions taken to protect presently reserved lands (in the case of the Dakota Access Pipeline) and historical territory (in the case of the Bears Ears Monument).

My legal specialty is the indigenous legal tradition, one of seven major legal traditions in the world.<sup>31</sup> This legal tradition sits within an indigenous knowledge frame that stems from particular ecological orders. It is this legal tradition that gives rise to deep protectionist values Native American tribes have toward land and ecosystems. Despite the legal challenge of the Standing Rock Sioux Tribe to

26. See Catharine A. MacKinnon & Kimberlé W. Crenshaw, *Reconstituting the Future: An Equality Amendment*, 129 *YALE L.J.* F. 343, 354 (2019) (“The material and spiritual dimensions of lives shaped by the theft of land and national integrity from Native Americans . . . are . . . framed in sociopolitical discourse as natural and inevitable, rather than as the contemporary manifestations of a ruthlessly constitutionalized colonial and imperial regime.”).

27. See Christine Zuni Cruz, *Four Questions on Critical Race Praxis: Lessons from Two Young Lives in Indian Country*, 73 *FORDHAM L. REV.* 2133, 2133–34 (2005), for an example of the use of the “disappeared” for original peoples from original territories.

28. See Ellen McGirt, *On Whose Land Do You Sit?*, *FORTUNE* (July 23, 2019), <https://fortune.com/2019/07/23/on-whose-land-do-you-sit-raceahead/> [<https://perma.cc/2XWW-XXWE>]; see also Monika Batra Kashyap, *Unsettling Immigration Laws: Settler Colonialism and the U.S. Immigration Legal System*, 46 *FORDHAM URB. L.J.* 548, 575 (2019) (defining land acknowledgement as “making a statement recognizing the traditional territories of the Indigenous peoples who have lived on the land before the arrival of settlers”).

29. Rebecca Hersher, *Army Approves Dakota Access Pipeline Route, Paving Way for the Project's Completion*, *NAT'L PUB. RADIO*, <https://www.npr.org/sections/thetwo-way/2017/02/07/513951600/army-approves-dakota-access-pipeline-route-paving-way-for-the-projects-completi> [<https://perma.cc/5DTQ-X7YX>] (last updated Feb. 17, 2017, 4:45 PM).

30. Joe Fox et al., *What Remains of Bears Ears*, *WASH. POST* (Apr. 2, 2019), <https://www.washingtonpost.com/graphics/2019/national/bears-ears/> [<https://perma.cc/B2WX-U23F>].

31. See Zuni Cruz, *Toward a Pedagogy*, *supra* note 8, at 892 n.106.

the Dakota Access Pipeline—which was relocated to avoid Bismarck, North Dakota, in the event of a breach but not relocated to avoid affecting the water supply of the Standing Rock Sioux Tribe—the pipeline was approved. The Standing Rock Sioux Tribe was in court again in 2019 seeking to avoid the doubling of the pipeline’s capacity.<sup>32</sup> A city objected and had a pipeline relocated.<sup>33</sup> A tribe objected and engaged in massive protests, and the pipeline was not only approved but may now double in size.<sup>34</sup> Both the invisibility and marginalization of indigenous peoples throughout American history contribute to such an outcome. Perhaps a city is woven into the American system in a way that the Lakota and Dakota Nations—and other indigenous peoples—are not.

The Bears Ears Monument was approved by executive order near the end of the Obama Administration.<sup>35</sup> It was reduced 85% in size by the Trump Administration.<sup>36</sup> The reduction was to allow for resource extraction, grazing, logging, and vehicle use in the area.<sup>37</sup> The Bears Ears Monument involved the work of an intertribal coalition consisting of the Navajo Nation, Zuni Pueblo, Ute Mountain Ute, Ute, and Hopi tribes to protect culturally significant lands outside the reserved lands of these tribes.<sup>38</sup> The back-and-forth exchanges to preserve and subsequently retract those protections between the U.S. government and U.S. tribes is not new. The change in protections because of extractable natural resources is also not new. That it continues through the nearly two-and-a-half centuries of American governance is illustrative of the politically unstable word of the national government to indigenous peoples of the United States. That this is still happening to indigenous peoples in the second-plus century of this country’s existence is illustrative of an accepted practice. It is also connected to the failure to accept the sovereign and original presence of indigenous peoples in the United States as arising from unique covenant relationships to land and ecology outside of a common law understanding of land as property-commodity or real estate to be developed and owned or sold. The unique legal and political status of indigenous peoples, which stems from the chthonic legal tradition, is a reality not hardwired into the legal frame of the nation and is thus invisible to most but necessary to understand and recognize in order to give full realization to their

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32. Phil McKenna, *Standing Rock Asks Court to Shut Down Dakota Access Pipeline as Company Plans to Double Capacity*, INSIDE CLIMATE NEWS (Aug. 20, 2019), <https://insideclimatenews.org/news/20082019/standing-rock-dakota-access-pipeline-impact-assessment-court-double-capacity> [<https://perma.cc/6RVA-BRMJ>].

33. *Id.*

34. *Id.*

35. Proclamation No. 9558, Establishment of the Bears Ears National Monument, 82 Fed. Reg. 1139 (Dec. 28, 2016).

36. See Josh Dawsey & Juliet Eilperin, *Trump Shrinks Two Huge National Monuments in Utah, Drawing Praise and Protests*, WASH. POST (Dec. 4, 2017), [https://www.washingtonpost.com/politics/trump-scales-back-two-huge-national-monuments-in-utah-drawing-praise-and-protests/2017/12/04/758c85c6-d908-11e7-b1a8-62589434a581\\_story.html](https://www.washingtonpost.com/politics/trump-scales-back-two-huge-national-monuments-in-utah-drawing-praise-and-protests/2017/12/04/758c85c6-d908-11e7-b1a8-62589434a581_story.html) [<https://perma.cc/F47A-PMFY>].

37. Darryl Fears & Juliet Eilperin, *Trump Officials Say a New Plan Will Protect Bears Ears. Others Call It ‘Salt in an Open Wound.’* WASH. POST (July 27, 2019, 8:34 AM), <https://www.washingtonpost.com/climate-environment/2019/07/26/trump-officials-say-new-plan-will-protect-bears-ears-others-call-it-salt-an-open-wound/> [<https://perma.cc/TJ9C-W364>].

38. Establishment of the Bears Ears National Monument, 82 Fed. Reg. at 1139.



claims.

The hard fact of the Dakota Access Pipeline is that it was moved to avoid harm to a city's water supply. Why would a city's concern be given more weight than a tribal nation's? If a tribal nation is not seen as an equivalent and viable political unit and part of the power structure of the nation in the same way towns, cities, and states are, their political status is rendered invisible. The protection of the culturally significant lands of the Bears Ears Monument lasted eleven months.<sup>39</sup> While the reduction of the monument is being challenged in court, plans for use of the lands removed from protection move forward.<sup>40</sup> The cultural value and significance of land in its natural state versus its development and transformation are embedded in two competing legal traditions—the indigenous legal tradition and the American common law legal tradition. Legal pluralism is at play when the claims of indigenous peoples, based on the indigenous legal tradition, are raised within the courts operating according to the American common law legal tradition. Accommodation of the indigenous legal tradition would revolutionize the justice system for indigenous peoples. When this recognition is not accorded, the indigenous legal tradition is rendered invisible.

#### IV. SOCIETAL CONCERNS

Cases and legislation also highlight the issues faced by indigenous women and children. These issues are exasperated by jurisdictional divides stemming from historic political relationships, resulting in discrimination, oppression, and marginalization across the divisions and allocations of power.

The U.S. Supreme Court decided *Adoptive Couple v. Baby Girl*,<sup>41</sup> a 2013 case that arose out of South Carolina involving the Indian Child Welfare Act (ICWA).<sup>42</sup> The ICWA was designed to protect Indian children from “unwarranted removal . . . from [their] families due to the cultural insensitivity and biases of social workers and state courts.”<sup>43</sup> The Court determined that the ICWA did not apply. According to the Court, the biological father, a member of the Cherokee Nation, never had custody of his child and had relinquished his rights after birth via text when presented with adoption pleadings—in a manner that did not comply with the Act had it been found applicable.<sup>44</sup> The father sought custody when informed that his four-month-old child was to be adopted.<sup>45</sup> Relying on the Act's language and English dictionary definitions of the words

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39. Fox et al., *supra* note 30.

40. Fears & Eilperin, *supra* note 37.

41. 570 U.S. 637 (2013).

42. *Id.* at 641.

43. *Id.* at 649 (emphasis omitted); see Leah Litman & Matthew L.M. Fletcher, *The Necessity of the Indian Child Welfare Act*, ATLANTIC (Jan. 22, 2020, 6:00 AM), <https://www.theatlantic.com/ideas/archive/2020/01/fifth-circuit-icwa/605167/> [<https://perma.cc/FE22-UJGD>].

44. *Adoptive Couple*, 570 U.S. at 643–44; see *id.* at 672 (Sotomayor, J., dissenting) (stating that any voluntary consent father gave to adoption “would have been invalid unless written and executed before a judge and would have been revocable up to the time a final decree of adoption was entered” under 25 U.S.C. § 1913(a), (c)).

45. *Id.* at 692 (Sotomayor, J., dissenting).

“continued” and “breakup,” the Court determined that the ICWA was only intended to protect parents’ custodial rights over a child in an existing parental unit prior to removal for adoption.<sup>46</sup> The unfortunate impact of this case was that the interpretation of the Act was based on selected words not defined by statute at the expense of the spirit of the Act.<sup>47</sup> The most desirable children to be adopted are newborns, and single mothers are particularly vulnerable. This was documented in the abuse by private adoption agencies when the Act was initially passed in 1978.<sup>48</sup> Nevertheless, the majority found that the relationship of a single Indian father to his child did not fit within the protections of parental “custody” or “existing” familial ties.<sup>49</sup> The father’s and the tribe’s critical point of protection was lost largely because fatherhood occurred out of wedlock. The Court’s majority also ignored issues of collective identity that I consider further in the next section.<sup>50</sup>

In 2010, Congress enacted the Tribal Law and Order Act (TLOA).<sup>51</sup> The Act increased the severity of punishment tribal courts could impose on Indian defendants to three years and a \$15,000 fine for a single offense.<sup>52</sup> The TLOA permits stacking of sentences up to a cumulative total of nine years, provided tribes observe certain requirements pertaining to defense counsel, presiding judge, public laws, and trial record.<sup>53</sup> The Act also created “tribal liaison[s]” and “Special Assistant United States Attorneys” to increase the federal prosecution of violent and minor crime in Indian country.<sup>54</sup> Congress also passed the Violence Against Women Reauthorization Act of 2013,<sup>55</sup> allowing tribes to prosecute non-Indians for domestic violence provided that certain due process protections are implemented.<sup>56</sup> In 2016, the U.S. Supreme Court decided *United States v. Bryant*, ruling that uncounseled tribal-court convictions could be used against a Native defendant for a felony conviction of domestic assault as a habitual offender without violating the defendant’s Sixth Amendment right to counsel.<sup>57</sup>

The irony of both the expansion of tribal jurisdiction over non-Indian domestic

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46. *Id.* at 647–48, 651–52 (majority opinion).

47. *Id.* at 679 (Sotomayor, J., dissenting) (“The majority chooses instead to focus on phrases not statutorily defined that it then uses to exclude Birth Father from the benefits of his parental status. When one must disregard a statute’s use of terms that have been explicitly defined by Congress, that should be a signal that one is distorting, rather than faithfully reading, the law in question.”).

48. *Id.* at 642 (majority opinion).

49. *Id.* at 650.

50. *See infra* Section V.

51. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, tit. II, 124 Stat. 2258, 2261–301 (codified in scattered sections of 25 U.S.C. (2018)).

52. 25 U.S.C. § 1302(a)(7)(C).

53. *Id.* § 1302(a)(7)(D); *see* MAUREEN L. WHITE EAGLE ET AL., TRIBAL LAW & POLICY INST., TRIBAL LEGAL CODE RESOURCE: TRIBAL LAWS IMPLEMENTING TLOA ENHANCED SENTENCING AND VAWA ENHANCED JURISDICTION, at i, [http://www.tribal-institute.org/download/codes/TLOA\\_VAWA\\_3-9-15.pdf](http://www.tribal-institute.org/download/codes/TLOA_VAWA_3-9-15.pdf) [https://perma.cc/489T-Q4RS] (last updated Mar. 2016).

54. 25 U.S.C. § 2810(a), (d).

55. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified as amended in scattered sections of the U.S.C.).

56. *See* 25 U.S.C. § 1304(b)–(d).

57. *United States v. Bryant*, 136 S. Ct. 1954, 1959 (2016).

violence offenders and the ruling in *United States v. Bryant* is the difference in right-to-counsel protections accorded to Native defendants. Already impacted by heightened levels of incarceration, Native defendants have no right to appointed defense counsel in tribal courts for offenses with a prison sentence of one year or less and may be criminally charged in the federal system on those uncounseled tribal convictions for habitual federal criminal offenses under *Bryant*. Indians are also subject to the Major Crimes Act for major crimes committed in Indian country.<sup>58</sup>

The incarceration rate of American Indians is as high as or higher than other minority populations within the state and federal systems despite their numbers in the overall population. Addressing over-incarceration and over-policing of Native peoples and violence, particularly against women, must be considered in tandem. Both are endemic to unhealthy communities. The relationship between them is intertwined, bringing different types of harm to women, children, and families impacted initially by the violence itself and subsequently by the over-policing and incarceration of Native offenders.<sup>59</sup> It is the violence—leading to incarceration—that must be arrested. Increased law-and-order measures and incarceration are not the only responses to violence. The institutionalized violence of prisons, jails, and heavy policing cannot be the only answer to violence in the indigenous community provided by the federal and tribal governments.

In 2018, Congress passed the Ashlynnne Mike AMBER Alert in Indian Country Act, establishing tribal AMBER Alert systems within tribal lands.<sup>60</sup> Ashlynnne Mike was an eleven-year-old Navajo child who was abducted with her brother after being let off their school bus and was subsequently murdered on reservation lands near Shiprock, New Mexico.<sup>61</sup> An AMBER Alert could not be issued because the coordination of such alerts in the Navajo Nation had not been established.<sup>62</sup> In 2003, AMBER Alert plans “formed a nationwide plan that allowed law enforcement agencies across the country to alert the public when a child was abducted. These AMBER Alert plans, however, did not extend to tribal communities.”<sup>63</sup> The Ashlynnne Mike AMBER Alert in Indian Country Act facilitates spontaneous alerts to occur for situations arising in Indian country in the same manner as in state jurisdictions.<sup>64</sup> Jurisdictional divides between states and tribes can have life-and-death consequences if they are not identified and

58. See 18 U.S.C. § 1153(a).

59. See Zuni Cruz, *Four Questions*, *supra* note 27, at 2143–47.

60. Ashlynnne Mike AMBER Alert in Indian Country Act, Pub. L. No. 115-166, 132 Stat. 1274 (2018) (codified as amended at 34 U.S.C. § 20504).

61. Rachel Monroe, *The Delay*, *ESQUIRE* (Apr. 18, 2018), <https://www.esquire.com/news-politics/a19561163/ashlynnne-mike-amber-alert-navajo-reservation/> [<https://perma.cc/KST6-SGWW>].

62. *Id.*

63. U.S. DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, IMPLEMENTATION OF THE ASHLYNNNE MIKE AMBER ALERT IN INDIAN COUNTRY ACT OF 2018: A REPORT TO CONGRESS 2 (2019), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/252671.pdf> [<https://perma.cc/666K-UADE>].

64. *Id.* at iii.

addressed.<sup>65</sup> The Act provided for integration of tribal AMBER Alert systems into state AMBER Alert systems, made Indian tribes eligible for AMBER Alert grants, permitted the use of grant funds to integrate state or regional AMBER Alert communication plans with an Indian tribe, and allowed the waiver of the matching-funds requirement for grants awarded to Indian tribes.<sup>66</sup> Ashlynn Mike's tragic outcome illustrates the importance of carefully considering the jurisdictional divides among states, Indian country, and federal governments that impede rather than facilitate cooperation.

Finally, as stated at the beginning of this Article, the Not Invisible Act was introduced in early 2019.<sup>67</sup> The legislation aims to address the crisis of missing, murdered, and trafficked Native people by (1) engaging law enforcement, tribal leaders, federal partners, and (2) service providers and improving coordination across federal agencies.<sup>68</sup> This bill establishes an advisory committee of local, tribal, and federal stakeholders to make recommendations to the Department of the Interior and Department of Justice on best practices to combat the epidemic of disappearances, homicide, violent crime, and trafficking of Native Americans and Alaskan Natives.<sup>69</sup> I mention this pending legislation because it proposes an approach that is necessary to bring parties together across jurisdictions to think through solutions. This cooperative work needs to be done to bridge the federal, state, and tribal gaps and shared responsibilities.

I am currently engaged in work that emphasizes dialogue.<sup>70</sup> Tribal peoples have a rich oral tradition. Because of the disruptions caused by multiple forces to tribal societal fabric, there is a need to employ the essential element that ties oral collective societies together at every level—dialogue. Individuals, families, kinship groups, and informal community must be supported in rekindling and utilizing dialogue. The art of talking and thinking together is foundational to oral collective indigenous societies; this art must be practiced and is necessary at all levels, particularly as indigenous communities work through trauma and neglect toward healing and action. “[D]uring the period 1979 through 1992, homicide was the third leading cause of death of Indian females aged 15 to 34, and 75 percent were killed by family members or acquaintances.”<sup>71</sup> Within and outside of tribal communities, indigenous women and family units must be supported, and they themselves must support the turnaround from these statistics. Reasons and solutions are much more complicated than bare statistics. Colonial practices and the effort to absorb or eradicate had profound and lasting implications on the surviving indigenous peoples within the rising nation-state. In settler-colonial nations, indigenous peoples were colonized within their own lands, overcome by

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65. *Id.* at 2–3.

66. *Id.* at 1.

67. S. 982, 116th Cong. (2019).

68. *Id.* §§ 2, 4.

69. *Id.* § 5.

70. Christine Zuni Cruz, “You Know How We Do It,” Indigenous Methodology and Community Engagement (unpublished discussion paper) (on file with author).

71. *United States v. Bryant*, 136 S. Ct. 1954, 1959 (2016) (alteration in original) (internal quotation marks omitted) (quoting Violence Against Women and Department of Justice Reauthorization Act of 2005, § 901, 119 Stat. 3077–3078).

a population that overwhelmed and remains. Thus, for indigenous peoples in the Americas, overcoming the devastation of the indigenous legal, social, and political order is a decolonial movement—a move from resistance to re-existence,<sup>72</sup> whether in Mexico, in the United States, or in Canada. Re-existence requires indigenous peoples to reclaim dignity, right ourselves, mend the breaches, and find our way to the center where we belong.

Federal law impacts indigenous families, women, and children. The ICWA did not protect the male parent's relationship with the indigenous child and hence created an imbalance in protecting the indigenous family unit in *Adoptive Couple v. Baby Girl*. While the Violence Against Women Reauthorization Act of 2013 allows tribes to exercise jurisdiction over non-Indian offenders as long as certain criminal procedural safeguards are in place for non-Indian defendants, the law creates an unequal parallel system for prosecution of Native American defendants under the Indian Civil Rights Act, which does not require public defense for those facing incarceration for up to one year and firmly ties tribal court systems to American legal standards for jurisdiction to criminally prosecute non-Indians.<sup>73</sup> Tribes have long felt the sway of the American common law legal tradition over their legal development, marginalizing and creating tension with the chthonic legal tradition. The tribal grant of enhanced sentencing of Indian offenders is also conditioned on the provision of American criminal law process by tribal courts.<sup>74</sup> It conditions enhanced sentencing authority and increased jurisdiction on tribal-court adherence to American criminal law rights, process, and protections. The challenge of managing and understanding the meeting of two legal traditions—the common law legal tradition that emerged in contrast to the chthonic or indigenous legal tradition and the existence of both within indigenous communities—is profound and a part of creating legal orders capable of dealing with perceived, real, and created crisis in Indian country.

The division among three separate jurisdictional authorities for criminal acts—state, federal, and tribal—complicates the risks for Native American defendants, primarily male, in any jurisdiction. Further, the jurisdictional lines between tribes and states require coordination and can result in the loss of protection and life unless the federal government, states, and tribes actively integrate services irrespective of jurisdiction—like the AMBER Alert system designed to protect children.

The toll the jurisdictional divide among federal, state, and tribal polities takes on indigenous families and their safety is tremendous. Federal Indian country jurisdiction heightens criminal penalties for Native American defendants when offenses that can be tried in a tribal jurisdiction are either taken to federal court or tried in both courts.

The studied practice of naming state and federal governments as the only two sovereigns within the U.S. political framework does not reflect the existence of

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72. JEFF CONANT, *A POETICS OF RESISTANCE: THE REVOLUTIONARY PUBLIC RELATIONS OF THE ZAPATISTA INSURGENCY* 252 (2010).

73. See Barbara Creel, *The Right to Counsel for Indians Accused of Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 344-51 (2013).

74. *Id.* at 347-51.

tribal sovereigns, indigenous legal tradition, and the diversity of indigenous peoples and languages. The political table must accommodate tribes, states, and the federal government at the state and national levels. Ignoring tribal jurisdictions, peoples, and the chthonic legal tradition perpetuates a practiced rejection of indigenous political sovereigns by the settler-state and renders them invisible.

## V. INDIGENOUS COLLECTIVE IDENTITY

*Adoptive Couple v. Baby Girl* showed that the ICWA does not necessarily guarantee protections intended to be afforded by state-court systems under the ICWA unless American common law understandings of the family unit are adhered to.<sup>75</sup> Notably absent from the Court's consideration in *Adoptive Couple* was an understanding of the indigenous child's collective identity, her kinship relationship to her father and her tribe despite physical custody, and the child's cultural right to an indigenous identity—in short, an understanding of the critical nature of collective identity. Examining the child's degree of Indian "blood,"<sup>76</sup> a prominent factor in the Court's opinion, is interesting because the idea of "blood quantum" itself, now disfavored by the nation-state, was introduced to Indian tribes by the federal government over the long course of relations with tribes.<sup>77</sup> Though recorded, blood quantum is not used by the Cherokee Nation to determine membership.<sup>78</sup> The U.S. Supreme Court decision in *Adoptive Couple v. Baby Girl* illustrates a failure to recognize the importance of the tribal parent to the child as the basis of tribal identity and cultural survivance.

Indigenous identity is a collective identity. The continued existence of 574 tribes recognized by the federal government represents extensive diversity within the nation-state. That marginalization and invisibility exist are troubling given that these 574 tribes also have political status. Even when several tribes are clustered in one state, they still battle marginalization at the state level. Marginalization and invisibility also clearly exist in the political and cultural realms at the national level. This represents a failure to value and honor collective identity. Indigenous peoples, reduced to individual status and given one collective racial identity, are easily discounted as an insignificant racial minority in terms of the population. This negates their political existence as collective, federally recognized political sovereigns, their historical importance to the nation, and their unique historic and ongoing relationship to the land and territories. No other racial group has the same collective, legal, and political historical group identity. The existence of 574 tribes must be acknowledged in ways other than as individuals forming one large racial minority with statistically insignificant numbers in relation to the overwhelming number of the majority-settler population. Such marginality and invisibility are demonstrative of the overt discrimination toward tribes as a

75. See *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 651–56 (2013).

76. The child was "1.2% (3/256) Cherokee." *Id.* at 641.

77. *Id.* at 641–42.

78. *Blood Quantum*, AM. INDIAN ENTER. & BUS. COUNCIL, <https://aiebc.org/blood-quantum/> [<https://perma.cc/559M-P5BG>] (last visited Nov. 13, 2019).

collective political unit at a nation-state level.

In 2018, early in the Trump Administration, the Department of Health and Human Services took the position that because tribes are a race rather than separate governments, exempting tribes and their members from Medicaid work rules “would be illegal preferential treatment” and raises constitutional and federal civil rights claims.<sup>79</sup> This stunning pronouncement is contrary to constitutional provisions, established U.S. Supreme Court precedent, federal trust obligations, and treaties.<sup>80</sup> It represents a misunderstanding of federal Indian law to view tribes and their members solely as a socially constructed racial group.

In the singularly most significant legal act of the past decade, President Barack Obama endorsed the UN Declaration on the Rights of Indigenous Peoples in 2010<sup>81</sup>—even as the United States qualified its meanings<sup>82</sup> of the Declaration itself, adjusted by nation-states to reach adoption by the General Assembly.<sup>83</sup> Article 7 speaks of indigenous peoples’ right to a collective identity in addition to many other rights set as minimum standards for nation-states to recognize, comply with, and implement.<sup>84</sup> The fourth edition of the *State of the World’s Indigenous Peoples* indicates that only a few states have implemented the Declaration in a meaningful way.<sup>85</sup> The United States is not among those few states named in the report.<sup>86</sup>

The Cherokee Nation is currently pressing for its treaty right to send a representative to Congress.<sup>87</sup> Others have likewise raised the issue of indigenous tribal representation in Congress.<sup>88</sup> Lack of meaningful political representation within the state structure is an aspect of marginalization and invisibility. Indigenous peoples are thought of as individuals—individuals subject to

79. Dan Diamond, *Trump Challenges Native Americans’ Historical Standing*, POLITICO (Apr. 22, 2018, 7:07 AM), <https://www.politico.com/story/2018/04/22/trump-native-americans-historical-standing-492794> [<https://perma.cc/FM5Y-FSP4>].

80. See U.S. CONST. art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 2; *Morton v. Mancari*, 417 U.S. 535, 541–42 (1974); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 539 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831); *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 594 (1823).

81. U.S. DEP’T OF STATE, ANNOUNCEMENT OF SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 1 (Jan. 12, 2011), <https://2009-2017.state.gov/documents/organization/154782.pdf> [<https://perma.cc/SGE6-2KXS>].

82. DEP’T OF ECON. & SOC. AFFAIRS, DIV. FOR INCL. SOC. DEV., STATE OF THE WORLD’S INDIGENOUS PEOPLES: IMPLEMENTING THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, at 17, U.N. Doc. ST/ESA/371 (2019), <https://social.un.org/unpfii/sowip-vol4-web.pdf> [<https://perma.cc/7Y9C-VTSR>].

83. See Stefania Errico, *The UN General Assembly Adopts the Declaration on the Rights of Indigenous Peoples*, 11 ASIL INSIGHTS (Oct. 9, 2007), <https://www.asil.org/insights/volume/11/issue/25/un-general-assembly-adopts-declaration-rights-indigenous-peoples> [<https://perma.cc/K3QL-QPJP>].

84. G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples, at 4 (Sept. 13, 2007).

85. See Wahlén, *supra* note 17.

86. *Id.*

87. Morgan Krakow, *200 Years Ago, the Cherokee Nation Was Offered a Seat in Congress. It Just Announced Its Chosen Delegate.*, WASH. POST (Aug. 26, 2019, 12:18 PM), <https://www.washingtonpost.com/history/2019/08/26/years-ago-chokeee-nation-was-offered-seat-congress-it-just-announced-its-chosen-delegate/> [<https://perma.cc/QE3Q-ZFRY>].

88. Mark Trahan, *Congress Should Appoint Delegates to Represent Tribal Nations*, HIGH COUNTRY NEWS (Aug. 5, 2015), <http://www.hcn.org/articles/tribal-affairs-indigenous-voices-are-needed-to-make-us-a-better-democracy> [<https://perma.cc/5Y9T-7FBY>].

representation in Congress like all other individual citizens in the country. However, because indigenous peoples have a federally recognized collective identity, representation of 574 collective and diverse tribes is a question worthy of discussion in this representative democracy. The original peoples of the United States became a minority of the population, but they never lost their political status. As they became the minority within an overwhelming settler majority, their collective status continued and is deserving of recognition in a way currently nonexistent in both state and federal political realms.

#### VI. WHAT THE FUTURE MAY HOLD—NATIVE SOVEREIGNS AS VISIBLE

All of the highlighted legal questions raised over the past decade clearly point to the need to end the ongoing erasure and invisibility of the 574 tribal nations at the political, cultural, and social levels throughout the nation. The Declaration, cast in terms of human rights, points toward a way forward in respect to many of the fundamental matters raised—specifically media; political representation; recognition of collective identity and collective rights; consultation; free, prior, and informed consent; and, most importantly, self-determination.<sup>89</sup>

Tribal political status is in need of a new place in the consciousness of the United States. Realization of the humanity, aspirations, and recognition of the right to self-determination associated with the collective identity of indigenous peoples is embedded in the minimum human-rights standards set forth to guide the relationship of nation-states with indigenous peoples. Possessed of these human rights, indigenous peoples must themselves insist on adherence to these rights by the states which have sprung up around them. Indigenous peoples in the United States have agency to press for their realization. A mirror must be held up to the nation-state to reflect back the adherence, or lack thereof, to what are set forth as *minimum* standards. The individual states of the United States and the nation-state itself are equally responsible for adherence. The reflection is the reality of indigenous peoples' lived experiences. Tribes—collectively or individually—are capable of holding up that mirror for the individual states and the nation at large to see how the progression to full realization is met or lacking.

In the past three years, I have worked with student-researchers to produce a report for the State of New Mexico reflecting and delivering the message of where we are in respect to the minimum standards set forth in the Declaration.<sup>90</sup> It is through insistence on our own humanity, with its attendant *minimum* standards for an acceptable existence within nation-states not of our own choosing or making, that we have our own agency. It is likewise through an insistence on dialogue as equal political units, no matter our population, that we have the right to an existence within the state. It is a test of nation-states. The *minimum* standards are set. Moving forward into the coming decades to a realization of the

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89. See G.A. Res. 61/295, *supra* note 84, at 3-11.

90. CHRISTINE ZUNI CRUZ, SHADOW REPORT: INDIGENOUS CIVIL, POLITICAL, CULTURAL, AND HUMAN RIGHTS IN THE STATE OF NEW MEXICO, LAW, GAPS, AND EMERGING ISSUES (forthcoming 2020).



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Declaration is where we are headed.