Observations on the Evolution of Indian Law in the Law Schools

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OBSERVATIONS ON THE EVOLUTION OF INDIAN LAW IN THE LAW SCHOOLS
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PART I: TEACHING INDIAN LAW AS A JURISPRUDENTIAL CURIOUSITY: FROM THE MARGINS TO THE MAINSTREAM OR GOOD-BYE TO THE JOYS OF MARGINALIZATION

Rennard Strickland: I want to tell you how truly pleased I am to be here today, in fact, so pleased that I left the Association of American Law Schools (AALS) Executive Committee in Washington and flew in last night so I could be here.

I worked on a new title for my speech today. I’ve retitled it “Teaching Indian Law as a Jurisprudential Curiosity: From the Margins to the Mainstream or Good-bye to the Joys of Marginalization.” Gloria Valencia-Weber asked me, I think because I am of those conflicted schizophrenic folk who pretend to be both a legal historian and a professor of law and jurisprudence. Samuel Taylor Coleridge said that lawyers and historians are exactly the opposite. The historian is the person who stands at the back of the boat looking at the waves that are behind you. The distinguished legal historian Calvin Woodward said that the historian wants antecedents, the older the better. The lawyer wants precedents, the more recent the more persuasive.

I’m here sort of in my historian role to talk about how we have gotten to where we are today. Nobody trusts me to ever know where we are today. One of the awful things about being a dean is that you don’t have much control over what happens. Cases come, crises arise and you have to deal with them as they are there. It’s not a scheduled, easy existence. I have tried to finish a book for the University of Oklahoma Press on American Indian Painting and Sculpture at the same time that I was trying to work on this history of teaching Indian Law, all while completing a long overdue manuscript for the University of New Mexico Press. Those of you who know me know that I believe anything that can be used for two or three or four purposes is good. I was the original academic recycler. In the process of putting together that Indian art
manuscript which was delivered a week and a half ago, Ed Wade and I developed a matrix or a paradigm or one of “them things” that you had to have to make it really academic.

We called this guide the “Triple A’s” in response to what was happening in Indian arts, painting and sculpture, and I thought, “Well, maybe this fits or can be sort of twisted and superimposed on what was happening, and is happening, with law and the teaching of law.” In the Indian arts book, Ed Wade and I looked at what happened with painting and sculpture. We concluded that there were three stages of the various movements, and the stages tend to repeat themselves. You go through them and then start over. The first was what we called “affirmation.” On the Indian side, there was a strong desire to affirm those things that have been and are a strong part of the culture. This was a response to the desire of non-Indians to annihilate those things that were part of Indian culture. The second phase we describe as “adaptation,” an effort to adjust to “living with the world” as it exists and to modify. Third, the final phase, we came to call the period of “appropriation”—a time in which the Indian culture takes those things which were a part of the non-Indian culture that was forced upon them and figures out how to appropriate those aspects in order to achieve the important things that in stage one were being affirmed.

Willa Cather said there are only two or three stories and they go on happening as if they had never happened before. I believe she is right. Many of these things that have happened in all areas of Indian life and culture are happening again and again. I suggest that as we look at the history and development of teaching Indian Law we think about, in addition to the “Triple A’s,” the three P’s—programs, publications, and pupils.

Let me begin with some ancient history. I hate to use the word “backdrop” because in Indian Law when people talk about backdrop it’s usually something they lower from the stage to hit Indians on the head. There is, however, an important backdrop against which all these things happen, and that is marginalization, colonization. If you look at Indian Law and the teaching of Indian Law in the history of legal education, you will find a void. Also, another very noble group of folk are missing: women and other minorities. Legal education historically was about an extremely small part of the population. That’s true in the earliest proprietary law schools, it’s true as we moved into the office to apprentice the study of law, and it is also true as the universities began to emerge in law as well. There are a number of lost Indian lawyers. People of Indian heritage who, in fact, spent a substantial part of their careers in the nineteenth and twentieth centuries, who were trained in the law schools, but were trained in the same way everyone else was trained. I want to note two or three of those people and make the point that even in the absence of law school programs, the possibilities for “others” as lawyers is still there. Let me go quickly through the points at which I have seen some intersection of Indian law questions in legal education and the teaching about law.
The first president of the Association of American Law Schools, James Bradley Thayer, whom we know as a major figure in evidence and constitutional law, was also the leader of a group known as "Friends of the Indians." All of us know the results of the Friends of the Indians. I did an article, more years ago than the one Gloria quoted, in which I said, "With such friends, who needs enemies?" This was a kind of approach in and out of the academy that said, "We know what is best for the Indian." And it led to the adoption of the most disastrous allotment programs in history of Indian relations. Angie Debo and Father Francis Paul Prucha went back and looked at this era in their work. They discovered that the Indians were saying all of the disastrous things that have happened would happen if these programs were adopted. Apologists for the "Friends of the Indians" asked how they could have known that allotment would not work. Well, they could have listened. In my own research I located more than 100 petitions and protests written by Indians and Indian tribes which were submitted to the Congress and the Friends of the Indians that said these programs would not work. This was a period in which the academy was a patronizing friend to the native warrior.

There is a second period which I like to think of, or describe as, the "scientific" or "anthropological" period. Of course, the most famous figure of that is another president of the Association of American Law Schools, the fiftieth AALS President, Karl Llewellyn, whose classic study work, "The Cheyenne Way," with E. Adamson Hoebel continues to fund projects for the University of Oklahoma Press more than fifty years after it was published. In 1995, I became, I think, the third president of the Association of American Law Schools that had a professional academic interest in Indian Law. Those of you who know me know that I may smile a lot, but I am somewhat of a mean person deep down. The president-elect gets to select the site for the annual retreat. So, among the sadistic things I did when I was elected, I took the AALS Executive Committee to Mohonk for their annual retreat, the site of the original conferences of the Friends of the Indians. I did this because I had never been there and I wanted to see it. Mohonk remains more than a 100 years after the conference and operates as a very successful New York summer resort. I also wanted to make the point to my good colleagues on the AALS Executive Committee that we should not be smug about the things that we know and be judgmental about those things we thought were right and wrong.

Next, Indian legal education moved into a period in which there was substantial association between the academy and legal education and the Indian. What I call the "New Deal Academic Chorus" brought in people such as Justice William O. Douglas from Yale, and Carl McFarland, one of the lost figures of that era, who was the president of the University of Montana and dean of the law school at the University of Montana. He was one of President Roosevelt's first Solicitors General. He called Felix S. Cohen into his office and said, "This Indian stuff is really messed up and I come from Montana and I think this is important."
Shouldn't we be doing something to gather all of this together?" Then, of course, Felix S. Cohen, who in so many ways remained a son of the academy no matter where he happened to be, and his friend worked on Indian law. His friend was Felix Frankfurter; the Cohen *Handbook* survived primarily because of the relationship of Felix Frankfurter and Felix S. Cohen. Many of you know that Cohen's father was a great academic, a major scholar, who had been a roommate of Felix Frankfurter's. Well, McFarland left the Department of Justice; World War II was on the horizon; there wasn't much interest in this "Indian thing." It was always marginalized and without a solicitor who was interested. Cohen was called into the office of the Attorney General one day, according to Mrs. Cohen (Lucy Kramer), who is still with us, and was told, "We have decided to abolish your task force. All that time you spent doing those fifty mimeograph volumes of Indian material, it's just taken a lot of time and we're going to reassign you." And so they were reassigned.

Cohen went to see his friend Felix Frankfurter, who at that time had not yet been put on the Supreme Court, and said "what can we do about this?" Frankfurter went to see his friend, Franklin Delano Roosevelt. The next Monday the task force was shifted from the Department of Justice, where it had been abolished, to the Department of Interior. Roosevelt apparently had said, "I can't overrule the Attorney General of the United States. I can't do what you are asking me to do." And Frankfurter said, "Oh no, no, no, no, I am not asking you to overrule the Attorney General, I am asking you to reestablish." Roosevelt said, "Oh, I can do that." So it went from Justice to Interior.

Then there's a forgotten phase of this war period that I think very few people know anything about. After the war, a number of young lawyers came into the academy from blue-chip, silk-stocking law firms. Then the Indian Claims Commission was brought into being. In what I call "pro bono blue chippo," the great law firms were asked to take on these Indian clients so they could help them in preparing claims for the Indian Claims Commission. A number of very young lawyers who had come back from the war and were just starting in the firms ended up with these cases. Well, of course, the cases turned out to earn more money for those firms than anybody could have realized. But they also created an interest in a group of very bright young lawyers, many of whom ended up in the academy. Robert S. Hunt, who was a colleague of Ralph Johnson's and mine at the University of Washington, was one of those, and he told me about this experience and the impact it had on his generation of legal academics. I don't think many of them ever ended up teaching Indian Law, but in my early years in teaching a great number of people would say to me, "Yeah, I did some work early on in Indian Law," and they were very sympathetic toward it. A number of them told me that they had taught Indian Law in their Constitutional Law courses and had begun to move it into other courses. In some ways, it is a capitalist version of what happened with the Office of Economic Opportunity and legal services. Indian Law in many ways is like the
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potato chip of the T.V. ads. It is jurisprudentially so tasty that once people who are very bright have seen what is there, they find it hard to go back to "A to B remainder to C."

One of the major influences on Indian Law and the teaching of Indian Law in the academy has been the law librarian. Law librarians have been responsible for the creation within the academy of the resources necessary for us to pursue this area. Many of the great figures in American law librarianship have been drawn to Indian Law: Marian Gallagher, at the University of Washington, and Laura "Lolly" Gassaway were both individuals who were presidents of their association. The Sabatino bibliography that was published here in New Mexico was a breakthrough in organizing these materials. These law librarians have made a tremendous difference. I particularly have an enormous gratitude to George Grossman who was a law librarian at Utah and then Northwestern and is now at one of the California law schools. When I was getting ready to go to the University of Tulsa, the University of Washington was looking at me as a possible faculty member. I asked my dean if he would write a letter of recommendation for me and he wrote a letter to the University of Washington that said, "Rennard is a very bright young man," and at that time that was the correct age if not the correct intellectual characterization, "and he is quite a hard worker; however, he spends an immense amount of time on Indian questions. Someday we hope he will devote his time to the law." At Tulsa, George Grossman was our inspector from the ABA one year. The wife of a faculty member had come into my office and said to me, "The ABA is going to come here and they're going to tell you to stop doing this Indian stuff and get to work in real legal things that matter." Well, Grossman, of course, was on the team and was then chair of the ACLU section on American Indians and we spent time at the Thomas Gilcrease Institute, looking at the library and the resources. When the report came out it said, "The most interesting and important thing that has happened at the University of Tulsa is their interest in Indian programs."

Next in my outline are deans and associate deans. Treat them well. They do in fact make judgments, particularly about money and schedules, and they can and have historically been a strong source of support. Much of what has happened in Indian Law and legal education is the result of very strong support from deans who thought this ought to happen, and who more than once got in trouble with their faculties because they bypassed normal procedures to create activities that were important. In Orlando, at the AALS meeting three years ago, the deans of all of the public law schools in the west met to talk about what was happening. I think it was a very energizing experience for the deans. There are so many truly exciting new programs, centers, and activities underway at American law schools.

Now let me move quickly through some stages of the development in teaching of Indian Law. I look at this in about three stages. First, there were the property-based courses. Property was what Indian Law was about or primarily about before the second world war. Indian Law was
first taught, for example, at the University of Oklahoma, University of Tulsa, Oklahoma City University, very soon after the turn of the century. But it was taught primarily in terms of what do you do to move Indian land into the mainstream. I used to be mighty self-righteous about this until after the death of Joe Rarick. For more than thirty years Joe taught Indian law at the University of Oklahoma and his widow, Louise, gave me all of his materials. Well, let me tell you that, what he was teaching was, in fact, very much what we teach in American Indian Law courses today. He was teaching *Worcester v. Georgia* and he was teaching Treaty Rights. He was serving as a subversive agent. Nobody on that faculty, particularly the dean, had any idea that he was covering these concepts. I'm not sure they would have allowed it to continue.

The result of lots of that teaching, whether in Property Law or Constitutional Law, was the education of people like the Cherokee lawyer Earl Boyd Pierce. I discovered that during the 1920s and 1930s when he first represented the Cherokee Nation, he would go to tax sales on Indian Land, buy the land, and would then write on his little portable typewriter a deed that would say, “To the Cherokee Nation in trust.” So all over eastern Oklahoma there is Indian trust land listed and carried by the Bureau as trust land, the deeds for which were all typed on his little portable typewriter, bought, and taken in trust. Next are the constitutionally-based courses. Indian Law found itself quickly in Constitutional Law. For example, the course that John Ely taught in the seventies at Yale was a Constitutional Law variant.

Next we move into what I call the Indian student inspired Indian course. After we began to have Indian students in Indian Law courses, we began to address questions that Indians themselves might offer. One of the greatest pioneers of Indian legal education, Ralph Johnson, who is with us today, taught one of those very early courses. We were such a small group at that time that we shared our mimeographed materials. I still have on my shelf Ralph’s early mimeographed materials, and there were so few materials around at the time that papers and seminars that Ralph’s students did were often mimeographed and distributed. One cannot forget the pioneering work that Monroe Price undertook and New Mexico mimeographed his casebook in early editions.

The legal services movements of the sixties and seventies brought a whole new generation of teachers of Indian law into the academy. The roots of much legal assistance for Native peoples goes back to that era, including the California Rural Legal Services, Native American Rights Fund (NARF), the University of Wisconsin Indian clinic program and even the special scholarships program of the Indian Law Center of the University of New Mexico. Leaders in the academy such as David Getches, Charles Wilkinson, Richard Collins and Steve Herzberg illustrate the significance of the transition.

I am exceeding my allotted time but, in conclusion, I want to talk about some impacts. The impact that these programs had was substantially beyond the numbers. The Cohen *Handbook of Federal Indian Law* was revised, I think, primarily because Sam Deloria and Fred Hart were
willing to go out on a limb. There was no money for the revision. A 
historical note for those of you who are planning the next revision. The 
Department of Interior, through the Solicitor’s office, was about to 
contract with West Publishing to have their staff-based green-eyeshade 
people do a revision of the handbook. When a group of us went to 
Dean Hart and said, “This can’t happen, this is too important and too 
sophisticated. You need the Indian Law people.” Fred said, “Well it 
needs to be done, we’ll do it. I’ll sign the contract and agree to raise 
the money to do it.” Reid Chambers who was Solicitor for Indian Affairs 
had come from UCLA and he and New Mexico struck a deal which 
preserved the integrity of the process. And that was how it happened, 
a dean and program went out on the line to do it.

There are other examples. I believe the Northwest Fishing cases, the 
so-called Boldt cases, United States v. Washington,¹ would not have 
happened but for the scholarship that Ralph Johnson and the group of 
people at the University of Washington undertook. I think the University 
of Washington in this area and its teachers and its students made a 
tremendous contribution. Much of what’s happened in New Mexico is 
traceable to programs here at UNM. The things that have happened, I 
think, of a positive nature in Wisconsin are in many respects traced to 
that program. When I was at the University of Wisconsin, it’s the only 
time I have ever had a governor of the state call a press conference to 
personally attack me. We did a report for Senator Daniel K. Inouye on 
the fishing controversy. Any Oklahoma politician knows that if you 
ignore what happens at the University, it just sits in a drawer and gathers 
dust. Well, Governor Thompson did not quite understand that; three 
days after he held the press conference, he had to go to Washington 
and meet with Inouye and agree on four of the five terms that he had 
said he would never, ever consider doing.

I want to close with an advertisement. I’ve just become chair of the 
Law School Admission Council’s Test Development and Research Com-
mittee, and we have and will formally announce a research grant program. 
Bob Clinton’s colleague, Michael Saks, from the University of Iowa, will 
chair. This research grant committee will have from $350,000 to $375,000 
on a yearly basis to award to individuals and groups who are doing 
research on legal education. The charter of the Law School Admission 
Council provides as its second objective, promoting and funding research 
on legal education. The research grant program is to be broadly cast 
and not limited to either empirical or psychometric research or research 
focusing exclusively on the admissions process. I believe Leigh Taylor 
made me the chairman of this committee because I have a reputation 
for spending money. Former New Mexico Dean Fred Hart was my model; 
Fred always spent the money.

¹ 384 F. Supp. 312 (W.D. Wash. 1974), aff’d, 520 F.2d 676 (9th Cir. 1975). cert. denied, 
In conclusion, let me return to the field of Indian arts and crafts. When Captain Cook began collecting the art of Native People on his great voyage, the works were labeled as "ethnographic curiosities" but today many of those same works are viewed as masterworks of fine art. When Indian Law came to the academy, it too was a jurisprudential curiosity. I do not believe it is only my Indian Law chauvinism which leads me to say that the field has now become significantly more central as teachers, tribes, and Indian lawyers have moved from affirmation to adaptation to appropriation. For it is in the appropriation stage, whether in law or in art, that the people learn to use the institutions of the colonizers for their own benefit. And that, is for this generation, our challenge!

PART II: WHY AND HOW WE TEACH INDIAN LAW

Gloria Valencia-Weber: Rennard's narrative is important in this attempt to review what preceded our present status as teachers of Indian law. I am grateful for the account of the particularistic events and individuals; it is clear that significant opportunities in Indian law were quirks of fate created by the New Deal elections, World War II, the creation of the Legal Services Corporation, and let us not forget, Earl Boyd Pierce and his dynamic typewriter. My portion continues themes in Rennard's discussion, namely, why and how we teach Indian law. Embedded in these themes are also questions about who benefits from the instruction besides law students; the recently developed Indian law clinics create opportunities for explicit benefits for Indian communities. My response to Part I is focused on three principles for continuing the evolution of Indian law in the law schools.

At this point in the history of the United States and the indigenous sovereigns, law schools must affirmatively act to (1) teach Indian law as part of the jurisprudence within the boundaries of the United States, (2) educate American Indians in law for reasons beyond equity, namely the unique needs of the over 500 tribal governments and their members, and (3) change their curriculum and environment to incorporate the benefit from the viewpoints of indigenous peoples which can enhance the law of the United States. These principles will measure the success of the approximately 176 ABA accredited law schools in meeting the challenges of a society entering the twenty-first century with contemporary tribal people who defeated schemes to eliminate them. The links among these three ideas are inseparable and the failure of some law schools to teach Indian law affects their success in recruiting and graduating Indian students.

Our morning session, which began with a circle discussion in which people described the Indian law instruction at their schools, revealed that

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the idiosyncratic history Rennard presented continues as teachers and students struggle to overcome the lack of resources. Clearly, everyone uses the serendipitous opportunities presented when others, including the tribes, join in the efforts to provide instruction in Indian law. Yet it is clear that much of Indian law instruction, in the classroom and in clinical settings, is done "on the cheap." Indian law clinics, a frontier form of instruction, are especially vulnerable to the repeated situations where the clinics are subject to waivers, in effect, that no institutional commitment is intended if the soft money disappears. This morning's discussion revealed programs staffed entirely by adjunct teachers, less than full-time teachers who drive long distances to teach on week-ends, and students who camp out in tents during their summer externships in order to work with tribes. Contending with the stings of insects makes graphic the idea that those who work at the frontiers of law must bear the stings of misfortune. The limited, insecure dollars and the lack of institutional support for these teachers and students provoke two responses. First, as one fortunate to teach in a school with a history of spending money on Indian law, I respect the achievements of those who succeed under shameful conditions in making Indian law part of legal education. Second, the discussion further affirmed my thoughts about the three principle tasks facing law schools.

A. Indian Law in the Jurisprudence of the United States

As a matter of integrity in the curriculum, Indian law should be taught as the indigenous sovereigns and their laws have a continuity which precedes the creation of federal and state law in the United States. This conference is being held at the Indian Pueblo Cultural Center, operated by one of longest existing governmental bodies in the United States, the All Indian Pueblo Council. This Council continues the body that preexisted the Spanish and the English in United States territory; through this confederacy the pueblos exercise their governmental powers. Like the Six Nations Confederacy in New York, the Haudenosaunee, the two indigenous confederacies predated the European entry in the Americas. In the five hundred years since European entry, the indigenous sovereigns have not surrendered their power to enforce their laws over people within their territories.

Our modern life and laws are replete with continuous issues in which Indian and non-Indians are affected by the interests of the indigenous sovereigns and their members. The national debate about Indian gaming spans the nation; it is not a controversy isolated in the Indian Country of the Southwest, but also erupts in Connecticut and New Jersey. Proposals for what I call "The Donald Trump Relief Act" would eliminate
tribal gaming, since according to Trump, the operators do not look like Indians to him, are prey for organized crime, and interfere with his constitutional rights to the special benefits granted his gaming enterprises.\textsuperscript{4} Other significant issues for Indians and non-Indians include, but are not limited to, land and water rights, children subject to the Indian Child Welfare Act, and development of natural resources—all areas in which tribal people have interests and entitlements. Failure to expose all law students to some opportunity for Indian law training presents an incomplete picture of the jurisprudence of this country when contemporary life involves law from three sovereigns.

In speaking of Indian law, we must clarify that in our time it means the law made by and enforced by the indigenous nations, not just the law non-Indians created and imposed on tribal people. The challenge now is to inject into Indian law the concepts, based on consensual community principles rather than individualism, which tribes embrace in their codes and tribal common law. Much of what has traditionally been called Indian law are the constructs of non-Indians, built upon ethnocentric presumptions that Euro-Americans made about Indians being savages and uncivilized. That language remains in the federal law, for instance, since its first articulation in the Marshall Court decisions in the early period of the United States as a republic.\textsuperscript{5}

The task in the federal and state law is to “decolonize” the laws which exert force over the daily lives of Indian people. Indian law and constitutional scholars voice the need to remedy the malignant results because law concerning Indians remains at an intersection with the colonial perceptions of Indian people, which continue to deny them autonomy and fairness. The efforts, however imperfect, to decolonize the law affecting other populations, such as minorities and women, have changed from the inherent inferior status and unjust disabilities dictated by the law of the early days of the republic. The unchanged views of tribal people are also tied to the intervention by third parties acting as the protectors and advocates for American Indians. The activism of non-Indian third parties underlies the decision in \textit{Worcester v. Georgia}, the Lake Mohonk Conference at which the allotment policy was crafted by the Friends of the Indians, and, more recently, legal services attorneys and environmentalists.

Vesting Indian law with tribal perspectives means that American Indians must be active as creators, advocates, and lawyers to speak for themselves. This does not mean that non-Indians cannot work in Indian law. First, decolonizing Indian law to reduce injustice for Indians is a formidable undertaking and too daunting for people who constitute less than one percent of the United States population. Second, non-Indians such as Felix S. Cohen and Nathan Margold, have demonstrated the contributions


that non-Indians can make. The combined work of people of ethical conscience and good will is necessary to overcome the five hundred year history of campaigns to end tribes as governments, distinct cultures, and as populations. This morning we heard an account where one environmental group would provide an anthropologist for the tribal people, but insisted that the non-Indian environmental group appoint the attorney representing the Indians in a lawsuit. American Indians must be engaged as respected peers and collaborators with cultural perspectives as well as legal skills which contribute to the decisions made in the legal context.

B. Indian Students in Law Schools, the Legal-Warriors

Because a new legal professional, the legal-warrior, is critical to the development of tribal governments, training Indians in law involves more than an equity issue of producing more generic law graduates who are Indian. Tribes strive to develop governmental structures and law that reflect their indigenous customs and practices. As architects of tribal governments, their legal systems, and as advocates for the collective interests, the legal-warriors must meld their cultural knowledge with training in Anglo-American law. Monroe E. Price described the architectural role in ways similar to those the most wealthy and empowered expect their lawyers to ensure that a culture can continue: "[They] have often taken the perspective that their way of life should be available not only for them, but for generations to come . . . . They ask not only that their assets be preserved, but that they grow . . . . The Indians ask no less of their lawyers. They seek economic development that is consistent with their style of life . . . ." In their work as drafters of codes, designers of enforcement and judicial systems, administrators in tribal government and tribal enterprises, legal-warriors must use the best of the indigenous principles that contributed to tribal continuity.

Combining legal training with the customary values severely tests Indian law students who are committed to working in their communities. We know that these students encounter cultural conflicts in ways not faced by other law students. Robert Yazzie, Chief Justice of the Navajo Supreme Court, has used the metaphor of a journey to describe law school for Indian students:

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.\(^7\)

Indian students in law schools are engaged in the “Three A’s” that Rennard mentioned. These “Three A’s” constitute, as scholars have documented, the conservation and innovation practices which produced continuity for tribal peoples. In order for tribal people to survive as contemporary indigenous societies—as governments who render services and accountability to all who are affected by the use of sovereign power—the tribal world, if it is to retain its distinct cultural identity, cannot simply copy the surrounding states and municipalities. While verisimilitude would comfort some non-Indians, and perhaps result in non-Indians perceiving the tribal governments as bona fide and legitimate, this imitative route would ultimately eviscerate customary wisdom.

Just as tribal governments cannot fulfill the stereotypes, positive and negative, that outsiders may expect, likewise the legal-warriors cannot follow the scripts written by non-Indians. The term is based on the customary role of warriors as advocates for their people, as protectors of tribal interests in whatever form and forum the intersection occurs with outside cultures. Consequently, the legal-warrior is not a generic lawyer nor a noble savage, doomed to inevitable defeat, as the scripts of Hollywood have depicted. As a legal professional, the legal-warrior is committed to injecting into the legal and social dialogue the ideas of justice derived from a tribal perspective, long ignored, which could shift outcomes from individualistic win-lose paradigms to a communal model of mutual benefits. Many Indian students enter law school with a tribal viewpoint that values common interests, with individual well-being protected because of a relational context with people and nature. With the qualification that each tribe retains particularized customary beliefs and practices, one can state that there is a common indigenous world view that differs from mainstream society. To educate men and women to become legal-warriors with the potential to benefit tribal and nontribal societies, the environment and curriculum of the law schools must also be redesigned.

C. Indian Students, the Law School Environment and Curriculum

The Indian student in law school is likely to experience isolation simply because of the numerical enrollment in United States law schools. In the 1994-95, enrollment for the Juris Doctor (J.D.) degree was 128,989 students.\(^8\) Of this national enrollment, only 962 were American Indian law students.\(^9\) This was an all-time high, but nonetheless the students from indigenous backgrounds constituted 0.75% of the law student population. Unless the Indian man or woman was among the few law schools

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9. Id. at 69.
who attain a critical mass of Indian law students, it is most likely that the student's cultural isolation was intensified by the lack of others with similar identity.

The low numbers of Indian law students are certainly related to the three big barriers for entering and succeeding in law school: money or the lack of it, adequate preparation for law school studies, and cultural isolation. Money from all sources for Indian law students keeps shrinking. The federal government's long-standing treaty obligations to provide for education in return for land cessions by tribes has not sheltered these law students from the political wars that reduce or terminate appropriations. While legal and ethical obligations to tribal people exist independent of affirmative action law, the funding for Indian education suffers the misfortunes of fiscal cuts and attacks on programs which aim to provide equity for women and ethnic minorities.

The preparation for law studies, besides being a key factor in Indian students' success in law school, has also become a political hostage. Undergraduate programs to prepare Indian students in critical written and oral communication skills and other academic support programs are among the victims of state and federal budget cuts. A unique program for law studies, the Pre-Law Summer Institute for Indian Students, was established at the University of New Mexico School of Law in 1967. It is administered by the American Indian Law Center, directed by Philip S. Deloria, and is now an independent, Indian-controlled, non-profit organization located at the UNM School of Law. Because of this national program, which prepares Indians students who enter law schools throughout the United States, the number of Indian attorneys grew from estimated twenty lawyers to possibly one-thousand today. Yet this program, despite its record of success, also was cut from federal funds and its future is unclear.

Cultural isolation or marginality as an "outsider" is a common experience for Indian law students. Of course, some Indian students manage well any cultural disparities. Professor Patricia Monture-Angus, a Mohawk who is among the few indigenous law teachers, captured the cultural dislocation voiced by a sizeable number of students: "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 the first year ... "10 The primary source of cultural misfit stems from the common indigenous viewpoint that values communal relationships as the guide for life and law, rather than individual rights.

Both the law school's social environment as well as the formal curriculum can produce daily reminders that an indigenous person is outside the institution's mission. Courses in property, trusts, and wills, for instance, emphasize individual fee title and control that are alien to students

grounded in stewardship as the connection to land. Of course, we want our Indian students to pass the bar exams on these subjects; however, the curriculum content could reduce cultural stress by including other ways to view the subject matter.

For the Indian students who enter law schools, only a small number will have access to law school curricula that recognize the importance of Indian law so as to provide any curricular resources in the area. Faculty who are American Indian are among the rarest of law school resources. The most recent ABA data for 1994-95 shows thirteen full-time law teachers identified as American Indian, an invisible few among approximately 4,818 full-time law teachers. Our conference demonstrates that the entry of American Indians into the law professorate is very recent. These indigenous voices are raising different visions of Indian law, but they are also the untenured, facing extra demands and expectations from within the academy and outside in the Indian communities.

Regardless of who teaches Indian law, only about seventeen law schools offer instruction beyond one basic Indian law course. The history of Indian law demonstrates that innovative leadership exists. Moreover, this generative force is not from the elite schools who claim leadership in the law school world, but in states like Oklahoma. The University of Oklahoma established the American Indian Law Review; Oklahoma City University developed its Indian Law Resource Center, which provides training for tribes, their officers and judiciary; and the University of Tulsa created the first Indian Law Certificate Program. While I was directing the Tulsa program, the experience of the collaborative relationships among the three programs provided a supportive environment that I know is rare for law school faculty and students with interests in Indian law. The history of UNM—with the Pre-Law Summer Institute, the Felix S. Cohen Handbook, currently being revised, the Indian Law Certificate Program, and the development of the Southwest Indian Law Clinic—further shows that leadership is outside of the Ivy League. The academic leadership continues to come from Indian Country, law schools in Montana, Washington, Wisconsin, South Dakota, and states where open spaces no longer insulate the interaction between tribal peoples and others. Unfortunately, doing Indian law "on the cheap" is a characteristic of the wealthier schools as well as those strapped for funds by state funding or limited private endowments. The degree of institutional investment is related to the number of American Indians who graduate from law schools to increase the legal-warrior class.

11. Section on Legal Educ. & Admissions to the Bar, ABA, 1994-95 Annual Questionnaire Takeoffs, Minority Faculty Teaching Members tbl. B-6 (Mar. 27 1995) (Memo No. QS 9495-21).
12. Based on author's communications with teachers of Indian law, the schools are: 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, Oklahoma City University, University of Oklahoma, University of South Dakota, University of Tulsa, University of Utah, University of Washington, and University of Wisconsin. This is not presented as any form of official list as none exists.
The law school completion rate of American Indian and Alaskan Natives has tracked with the slow increase in admission and enrollments, yet production remains inadequate for indigenous needs. In the 1993-94 graduation cycle, 232 Native students constituted a record 0.6% of the 39,305 J.D. graduates. The graduation rates increased in small increments and stayed below 150 until the 1992 graduation. Given the two million American Indians and Alaskan Natives in the United States, these numbers may not seem so disproportionate.

When one considers the over 550 federally recognized tribes and the 200 plus in the process of qualifying for such a nation-to-nation relationship, then the picture of indigenous need is compelling. If at the time the United States republic experienced its formative growth, with thirteen states, a yearly production of legal professionals that was less than half the number of states would have been deemed inadequate. Contemporary tribes engaged in the critical development of functioning governments face an analogous scarcity of appropriately trained legal talent. This measure does not even take into account the needs of individual Indians who must contend with the power of Title 25 of the U.S. Code and Code of Federal Regulations. Through this body of law, individual Indians also have a unique relationship with the federal government, which reaches into everyday life to affect occupations, family relations, land title, probate and other matters in ways that no other citizens experience. The complexities of membership in three sovereigns require more than generic lawyers for the needs of Indian peoples in their collective status as governments and as individuals. Not only the training of lawyers must move beyond the generic, but the substance of Indian law itself must also evolve to include the indigenous vision.

D. The Future of Indian Law

While this essay has covered serious matters to tribal people, I do not want to overlook that Indian law involves intellectual stimulation combined with sheer enjoyment because of the richness of tribal societies, the generosity of their members, and the openness of the network of teachers of Indian law. This conference has a special quality, partly of reunion, but also of the joy of personally meeting the individuals whose work as teachers and scholars we value as the foundation of our field. Teaching Indian law is a continually demanding adventure, though sometimes the new court opinions and other developments demonstrate that there can be too much of a good thing. Certainly the questions are never answered. Moreover, rewards abound, even amid the heartbreaking court decisions,


because of the fellowship, grace, and humor provided by the Indians and non-Indians engaged in developing Indian law. Where else would one have the opportunity to construct a footnote to distinguish a hypothetical "fry bread test" for inclusion in a tribe's membership from a test for scientific evidence? This footnote opportunity arose in the kind of encounter with the non-Indian world that points out the need for a tribal voice in Indian law.

For American Indians to appropriate Indian law, to have it include their visions of how a just society functions, is today's challenge for both indigenous peoples and the law schools who train them. I cannot forget an Indian woman, the defendant in a murder trial, whose conviction was invalidated on appeal. With an equanimity developed after years of appeals, she stated that the most she hoped for from United States law was "more justice," but still expected less than just and fair treatment. The twentieth century has produced new settings, such as gaming and taxation, in which unresolved questions provoke legal discourse about how Indians obtain "more justice." All these disputes start with the underlying issue: how the first sovereigns within the United States boundaries will coexist with states and the federal government. There are mutual benefits if those relationships can be reconstructed with respect for each political entity and the abandonment of the blinders of colonialism. As teachers of Indian law we are at a historical point of opportunity. Law schools are primary environments in which the respectful discourse can begin so that the twenty-first century is a different story than the past indigenous encounters with Euro-America.