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# LAW SCHOOLS HARM GENÍZAROS AND OTHER INDIGENOUS PEOPLE BY MISUNDERSTANDING ABA POLICY

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Law schools justifiably seek to enroll a diverse student body in order to enrich the academic experience and environment, and to provide attorneys who will serve all segments of our society. American law schools enjoy the constitutional right to maintain such diversity.<sup>1</sup> Indeed, accreditation standards promulgated by the American Bar Association (“ABA”) require it.<sup>2</sup> The Association of American Law Schools carries a similar mandate.<sup>3</sup>

In seeking to create a diverse student body, law schools offer applicants the opportunity to identify their backgrounds. There generally is no “diversity police” checking on the accuracy of the self-identification as a member of a minority group by a law school applicant. However, there is one glaring exception. That involves Native Americans.<sup>4</sup> Law schools generally want to pursue the worthy and lawful goal

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1. See *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (holding a law school had a “compelling interest in maintaining a diverse student body”).

2. AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2018–2019, at 12–13 (2018), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2018-2019ABASStandardsforApprovalofLawSchools/2018-2019-aba-standards-chapter2.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABASStandardsforApprovalofLawSchools/2018-2019-aba-standards-chapter2.pdf).

3. THE ASS’N OF AMERICAN LAW SCHOOLS, BYLAWS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, INC. § 6-3(c) (2016), <https://www.aals.org/about/handbook/membership-requirements/>.

4. Without intending offense or a lack of sensitivity, throughout this article we will use the terms, *Indian*, *Native American*, and *Indigenous People* interchangeably. Steven L. Pevar, the author of one of the leading legal treatises, explains his use of the term, “Indian” as follows: “Considerable thought was

of ensuring that Indians have an opportunity for a legal education. Yet, due to a serious misunderstanding among American law schools, Genízaros<sup>5</sup> and other non-tribal affiliated Indians are often precluded from pursuing this goal because they cannot emphasize their indigenous backgrounds. In fact, as shown below, these applicants could be viewed as fraudulent or dishonest in the process. It is more than likely that law schools are simply overlooking a second, critical part of the relevant admissions policy.

This issue is rooted in the 2011 American Bar Association policy which reads as follows: “[T]he American Bar Association urges the Law School Admissions Council and ABA- approved law schools to require additional information from individuals who indicate on their applications for testing or admission that they are Native American, including Tribal citizenship, Tribal affiliation or enrollment number, and/or a ‘heritage statement.’”<sup>6</sup>

In this article, we will first examine how the ABA policy came to be and how it is being misapplied. Second, we will briefly consider who can document tribal affiliation, thus satisfying the first part of the ABA test. Third, we will explore the Genízaro reality, demonstrating the heritage that should satisfy the second part of the ABA Resolution. Finally, we will explain how the misapplication of this ABA policy is unintentionally perpetuating a badge of servitude upon the Genízaro people.

The consequences of this law school approach have potentially devastating impact beyond law schools. The best legal minds in the country seem not to understand that their own ABA Resolution would allow them to include as Indians those who can demonstrate their identity with a “heritage statement” in the absence of tribal enrollment. Thus, it is very likely that other schools, entities, and individuals also fail to grasp that fact.

It is important from the outset to note that we are not urging that law schools in any fashion deny admission to tribally-enrolled Indians nor add to their burdens in the law school application process. We understand that some schools will continue to require “proof of citizenship” from an applicant as one method to establish Indian identity. However, for the reasons to follow, we would urge that schools which are going to continue to demand “papers” should also understand that a heritage statement is a meaningful method of ensuring that Indigenous diversity includes those “without papers” but who nonetheless can demonstrate their Indigenous heritage. Genízaros and others descend from slaves whose proof of tribal identity was stolen from them when they were captured and forced into slavery. They have

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given to using *Native American* rather than *Indian* in this book. *Indian* was chosen for several reasons. For one, many Indians use the terms *Indian* and *Native American* interchangeably, but there seems to be a preference for the word *Indian*. For instance, noted Indian author and scholar Vine Deloria, Jr. uses the word *Indian* in all of his books rather than *Native American*. In addition, most Indian organizations and groups, including the National Congress of American Indians and the Society of American Indian Government Employees use *Indian* in their titles. Moreover, virtually all federal Indian laws (such as the Indian Reorganization Act) and federal agencies (such as the Bureau of Indian Affairs) use *Indian*.” STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 1, n\* (4th ed. 2012).

5. As discussed in this article, Genízaros descend from Indian slaves whose proof of tribal identity was stolen from them when they were captured and forced into slavery. See *infra* Section “Genízaro Nation.”

6. AM. BAR ASS’N, RESOLUTION 102 (2011) (emphasis added), [https://www.americanbar.org/content/dam/aba/directories/policy/2011\\_am\\_102.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/2011_am_102.authcheckdam.pdf).

maintained their culture and identity through the oral traditions handed down from their ancestors. Recently, Genízaro scholars have begun the process of documenting the Genízaro history and experience. It is time for law schools, and as a result, other educational institutions, to recognize these realities.

### “BOX-CHECKING” AND ABA/LAW SCHOOL RESPONSE

With *Grutter*'s approval of including race as a “plus” factor in law school admissions, law schools across the country continued with efforts to enroll minority students.<sup>7</sup> Among the groups that law schools chose to include in the affirmative action programs were Native Americans. However, concern began to develop among some within the Native American legal community that a problem they called “box checking” was developing. In 2011, a report prepared by the ABA identified this problem as follows:

The fraudulent self-identification as Native American on applications for higher education is particularly pervasive among law school applicants. Anecdotally, it is well-documented within the Native American legal community that a large percentage of individuals in law school who identified themselves on their law school application as “Native American”, were not of Native American heritage and have had no affiliation either politically, racially, or culturally within the Native American community. This phenomenon is so pervasive it is commonly understood and referred to within the Native American community as “box-checking”.<sup>8</sup>

This concern actually had its genesis in 2007. In that year the National Native American Bar Association (NNABA) joined with the Coalition of Bar Associations of Color to pass a resolution which condemned the “large percentage of individuals in law school who identified themselves on their law school application as Native American, who were not of Native American heritage and in fact had no affiliation either politically, racially, or culturally within the Native American community.”<sup>9</sup> The resolution called upon law schools “to not perpetuate this academic ethnic fraud by not requiring sufficient documentation of Native American citizenship and refusing to enforce academic fraud, despite decades of requests by the Native American legal community.”<sup>10</sup> The NNABA reached out to law schools requesting that their law school applications be changed. The NNABA requested that any applicant who indicates Native American status would have to provide tribal affiliation to the law school. In 2010, Harvard Law school received the

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7. *Grutter v. Bollinger*, 539 U.S. 306 (2003). Prior to *Grutter*, law school affirmative action programs were implicitly approved in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). *Grutter* subsequently made explicit the ongoing constitutionality of these efforts.

8. AM. BAR ASS'N, *supra* note 6, at 5.

9. *Id.* at 1 (quoting COALITION OF BAR ASSOCIATIONS OF COLOR, RESOLUTION: ACADEMIC APPLICATION ETHNICITY FRAUD (2007)).

10. *Id.* (quoting COALITION OF BAR ASSOCIATIONS OF COLOR, RESOLUTION: ACADEMIC APPLICATION ETHNICITY FRAUD (2007)).

correspondence and updated its application requiring Native American applicants to identify their tribal affiliation.<sup>11</sup>

By 2011, the American Bar Association adopted the resolution (“Resolution”) in its House of Delegates, noted above, as follows: “Resolved, that the American Bar Association urges the Law School Admissions Council and ABA – approved law schools to require additional information from individuals who indicate on their applications for testing or admission that they are Native American including Tribal citizenship, Tribal affiliation or enrollment number, *and/or a “heritage statement.”*”<sup>12</sup> This Resolution should leave the door open for non-tribal affiliated Indians to claim Native American status on their applications by providing a “heritage statement” regarding their Indian identity. However, it began to appear that many law schools were nonetheless foreclosing anyone but a tribally-affiliated Indian from claiming the preference, notwithstanding the language of the ABA Resolution and notwithstanding the diversity factors which permit the implementation of affirmative action programs in the first place. It is difficult, in any event, to see how the admission of a non-tribal affiliated Indian denies admission to any tribal affiliated Indians, unless a law school is enforcing a strict quota on the number of its Indian applicants. Such a quota system, of course, would be unlawful.<sup>13</sup> Demanding proof of tribal membership also seemed to impose a burden upon Indian applicants that other race-minority applicants do not have to meet.

There is another potential problem with demanding “proof” by virtue of tribal enrollment, of an Indian applicant. The NNABA and law schools were determined to root out “fraud” in the assertion of Indian identity in law school admissions. To ultimately gain admission to the practice of law, a person generally has to obtain a law degree from an accredited school, and take and pass the requisite bar exam.<sup>14</sup> But there is another very important qualification. Applicants must demonstrate that they are of good moral character.<sup>15</sup> The reason for this requirement is for the protection of the public. Obviously State Bar regulators are not interested in granting a law license to someone who has the necessary intellectual and educational background but who lacks sufficient good moral character.

In this regard, bar examiners conduct background investigations of applicants for admission to the Bar. A critical component is the determination that the applicant has been honest in all respects, including on his or her law school application. In a number of circumstances students who had allegedly misrepresented something on their law school applications faced a character and fitness investigation and hearing before they could be admitted to the practice of law.<sup>16</sup>

It is foreseeable, that if some law school applicant who identifies as Indian and identifies himself or herself as such on a law school application, the law school

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11. *Id.* at 8.

12. *Id.* (emphasis added).

13. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319 (1978); Grutter v. Bollinger, 539 U.S. 306, 334 (2003).

14. *E.g.*, TEXAS BOARD OF LAW EXAMINERS, RULES OF THE SUPREME COURT GOVERNING ADMISSION TO THE BAR OF TEXAS 3–5 (2017), <https://ble.texas.gov/txrulebook>.

15. *E.g.*, *id.* at 4.

16. *E.g.*, *In re* Bar Admission of Martin, 510 N.W.2d 687, 692 (Wis. 1994).

could request proof of tribal membership. When the student fails to provide that, two negative things could occur. First, the student might not be admitted. Second, even if the student is admitted, at the time that the applicant applies to the bar exam, a bar examiner might conclude that there was dishonesty in law school application. Bar examiners are not bound by an admission decision. Bar examiners will make their own independent character and fitness determination as to whether an applicant was honest in his or her law school application.

**Are law schools foreclosing non-tribal affiliated Indians from qualifying as “Native American” in the application process?**

The authors of this article prepared a survey to determine whether there is any evidence that law schools are failing to offer applicants the opportunity to prove their Native American identity through the use of heritage statements. We selected schools traditionally identified as being in the top ten best law schools in the country. We also selected a number of state schools. We selected a few private, non-elite schools. We posed the following questions to a total of twenty-five law schools and the Law School Admissions Council:

Would you be so kind as to let us know whether your school gives positive consideration to the Native American status of an applicant. If so, what criteria do you utilize, if any, to verify that an applicant who claims to be Native American is in fact Native American?

Also, we would like to know whether your school gives positive consideration to individuals claiming an ethnic or minority status other than Native American. If so, we would be interested in learning whether your school takes any steps to verify the ethnicity of applicants who claim some ethnic or racial background other than Native American.

We did not intend to survey and report the results from every law school in the country. Rather, we attempted to determine whether there was some evidence that at least some schools were continuing to misapply the American Bar Association Resolution in that non-tribal Indians were foreclosed from any consideration as Indian, and indeed, might even be considered to be “fraudulent” in the application process by such identification. We received a total of eight written and two oral responses. They confirmed our concerns. No school even mentioned heritage statements although several referred to proof of Indian status by the furnishing of tribal enrollments. The names of the schools are being withheld, although the correspondence is on file. Here are some representative responses.

One state school responded:

Regarding our policy towards Native Americans, we follow the guidance provided by the ABA August 8-9 resolution on the topic, including asking students if they are an enrolled member of a federally recognized tribe and to provide a copy of their enrollment

documentation.

([https://www.americanbar.org/content/dam/aba/directories/policy/2011\\_am\\_102.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/directories/policy/2011_am_102.authcheckdam.pdf)).<sup>17</sup>

Another state school responded:

The ethnic background of the applicant, per se, is not as important as the ability of the applicant to overcome challenges in life. We give consideration to the impact that the applicants' ethnic backgrounds have had on their lives. Their ability to handle life's victories and challenges, which may or may not be due to their respective ethnically diverse backgrounds, may be a positive or a negative; it depends on a complete review of the application. So, the result of reviewing all the information in the file may be positive or negative; it depends . . . For Native American applicants, we ask for their respective tribal affiliations. Some of these students will include their tribal registration numbers with this information. We also look for some type of personal or professional affinity or activity that involves the ethnic group. We currently do not ask for verification of any other ethnic minority group; but this dichotomy between Native American applicants and other ethnic minority applicants is something that we have discussed, as a group, in the past. With all ethnic minority groups, we also look for some type of personal or professional relationship, or activity, with the group in question.<sup>18</sup>

Still another state school answered:

Since we strive to follow the LSAC Statement of Good Admission and Financial Aid Practices, and are committed to a holistic file review, a student's ethnic or minority status is one of many factors we may consider. In past applications, if a student identified as AI (American Indian/Alaskan Native), they would receive a follow up question to identify their tribal affiliation and enrollment number. The question was not mandatory. We do not go so far as to verify a student's ethnicity, as it is up to the student to submit information that is 'accurate and true,' [ . . . ].<sup>19</sup>

And, the Law School Admission Council, the body which oversees the law school application process for all ABA-accredited law schools, responded to our inquiries as follows:

We are currently reviewing our practices regarding the collection of the additional information you mentioned below, along with our practices regarding how we collect information from other racial and ethnic groups. No decisions are imminent, however. We do not currently require candidates to report the racial or ethnic information; it is entirely self – reported. I am not certain whether

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17. Correspondence is on file with the authors (emphasis added).

18. Correspondence is on file with the authors (emphasis added).

19. Correspondence is on file with the authors (emphasis added).

or not law schools are requiring additional information from Native American applicants. I would guess that some are and some are not.<sup>20</sup>

Other law schools, including private law schools, responded to our inquiries only with generic written statements about their holistic admissions programs. They declined to specifically address our inquiry as to whether Indian applicants were required to provide tribal identification. One rational conclusion from that failure to respond to our request is that at least some of those schools fall in the category, noted by the Law School Admission Council, of schools that *do* require the additional information from applicants claiming to be Indian.

One school, however, which chose not to offer a written explanation, nonetheless confirmed orally that applicants claiming to be Indian would be asked to provide some proof. The school considered the provision of such information as “voluntary” yet conceded that if the student did not voluntarily provide the tribal enrollment information, the applicant would not be considered “Indian” for affirmative action purposes.

Thus, it appears that there is continuing misunderstanding that is working to the detriment of non-tribal affiliated Indian applicants to law schools. It is not a big leap to suggest that if the best legal minds in the law schools misunderstand that their own ABA resolution would allow them to include as Indians those who can demonstrate their identity with a “heritage statement” in the absence of tribal enrollment, other schools, entities, and individuals would also fail to grasp that fact. Note that in our survey, we asked law schools what criteria, if any, they utilized to verify that an applicant claiming to be Native American is in fact Native American. While some schools responded by indicating that they requested tribal enrollment documentation, *no* school responding to our survey even mentioned “heritage statements”.

#### HOW DOES AN INDIVIDUAL GAIN TRIBAL AFFILIATION?

It is a great oversimplification, but in most instances with legal significance, the determination of who is an Indian resides with a governing unit. Tribes have the power to determine the membership of the tribe, just as the government of the United States determines who is a citizen of the United States. However, a tribal determination that a person is a member of the tribe is not binding upon the United States.<sup>21</sup> Similarly, someone could be considered an Indian for federal purposes but still not be considered a tribal member by a tribe.<sup>22</sup> In addition, someone could be considered to be an Indian by a tribe and still not be considered to be an Indian under state law.

Issues become even more complicated because the United States government has adopted differing definitions of who is an Indian in statutes

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20. Correspondence is on file with the authors (emphasis added).

21. *C.f.* *United States v. Bruce*, 394 F.3d 1215, 1224 (9th Cir. 2005).

22. *See* *Halbert v. United States*, 283 U.S. 753, 762–63 (1931); *United States v. Bruce*, 394 F.3d at 1225 n.6.

regarding Indian benefits.<sup>23</sup> Although the Constitution of the United States mentions “Indian” twice, that term is not defined in the Constitution.<sup>24</sup> There are definitions of “Indians,” however, in federal legislation. Various statutes of the United States define “Indian” in at least thirty-three ways.<sup>25</sup> In many instances, Congress has created programs designed to assist Indians without even defining who qualifies. In those circumstances, the federal agencies administering the programs make the determination under varying and sometimes conflicting requirements.

In at least one instance, however, the federal government leaves the determination of whether a person is an Indian up to the individual. The United States Census Bureau allows people to self-report as Indians without any additional proof.<sup>26</sup> Under some circumstances, holding oneself out as an Indian might have an adverse effect in a criminal context. Proof that the defendant has self-identified as an Indian has been held sufficient to sustain a government prosecution under federal laws applicable to Indians at least where the Indian defendant lived on the reservation and “maintained tribal relations with the Indians thereon.”<sup>27</sup>

While the tribes, as sovereign entities, have the power to determine their own membership rolls, the United States government is not bound by that determination.<sup>28</sup> So if Congress creates a program to benefit Indians, it may refuse those benefits to someone even if that person is on the tribe’s membership rolls. Similarly, regarding healthcare benefits, Congress has allowed someone to qualify as an Indian even though that person is not a member of a recognized tribe.<sup>29</sup>

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23. Compare 25 U.S.C. § 2201(2) (2018) (“Indian means (A) any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner (as of October 27, 2004) of a trust or restricted interest in land; (B) any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C. 479) and the regulations promulgated thereunder; and (C) with respect to the inheritance and ownership of trust or restricted land in the State of California pursuant to section 2206 of this title, any person described in subparagraph (A) or (B) or any person who owns a trust or restricted interest in a parcel of such land in that State.”), with 25 U.S.C. § 5304(d) (2018) (“Indian means a person who is a member of an Indian tribe.”), and 25 U.S.C. § 5129 (2018) (“The term ‘Indian’ as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term ‘tribe’ wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words ‘adult Indians’ wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.”) (emphasis added).

24. Brooke Jarvis, *Who Decides Who Counts as Native American?*, N.Y. TIMES MAG. (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/magazine/who-decides-who-counts-as-native-american.html>.

25. *Id.*

26. See, e.g., U.S. CENSUS BUREAU, RACE & ETHNICITY, <https://www.census.gov/mso/www/training/pdf/race-ethnicity-onepager.pdf> (last visited March 30, 2019). Self-identification as “Indian” is also the standard in the United Nations Declaration on the Rights of Indigenous Peoples. G.A. Res. 61/295, art. 33 (Sep. 13, 2007).

27. *United States v. Antelope*, 430 U.S. 641, 646 n.7 (1977) (quoting *Ex parte Pero*, 99 F.2d 28, 30 (7th Cir. 1938)).

28. *Martinez v. S. Ute Tribe*, 249 F.2d 915, 920 (1957).

29. 25 U.S.C. § 1603 (13)(C) (West, Westlaw through 2017-2018 Legis. Sess.).

It is relatively easy to identify and enumerate the Indian tribes that have been recognized by the federal government.<sup>30</sup> There are currently five hundred seventy-three of them in this country. Two hundred thirty-one of those tribes are located in Alaska, and the remaining three hundred forty-two are scattered throughout thirty-four other states. New Mexico is the home of twenty-three federally recognized tribes. There is a very complicated process whereby tribes who are not currently federally-recognized can apply to the Bureau of Indian Affairs for formal recognition.<sup>31</sup>

By this process, a tribe of non-recognized Indians could become acknowledged by the federal government. Then, the members of that tribe could provide the tribal enrollment number identified in the first part of the ABA resolution. The regulations of the federal Bureau of Indian Affairs provide what appears to be a relatively simple mechanism to apply for such acknowledgment.<sup>32</sup> Any Indian group can file a letter with the Department of the Interior, submitting a petition that meets the qualifications in the regulations, and request formal recognition. But the bureaucratic realities including decades of waiting for decisions make this an unrealistic alternative for Indigenous people seeking to obtain a tribal enrollment number to submit with a law school application. This is particularly true for Genízaros, whose tribal identity, as explained below, was stolen when their ancestors were enslaved. That history of slavery described below has eliminated much of the historical evidence necessary to obtain federal acknowledgment as a tribe.

There is another method to obtain federal recognition and an enrollment number. Tribes can also obtain federal recognition by virtue of legislation to that effect.<sup>33</sup> However, obtaining formal recognition from the Congress of the United States would be problematic. It is difficult to see how one group of people in the Southwest could exert sufficient political influence over the majority of the members of the House of Representatives and then the Senate of the United States in order to obtain passage of such recognition. Most likely any requests would be referred to committees which would then defer to the Bureau of Indian Affairs.

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30. See *Federal and State Recognized Tribes*, NATIONAL CONFERENCE OF STATE LEGISLATORS (last visited Feb. 12, 2019), <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx>.

31. The current regulations are set out at 25 C.F.R. §§ 83.1-83.46. The obstacles to federal recognition are formidable. A quick examination of the success rate for tribes seeking formal recognition through the Board of Indian Affairs process is quite discouraging. During the time period from 1978 to 2012 a total of 352 groups sought recognition as federally recognized tribes through this process. In the follow-up, only 87 of these were able to satisfy all the requirements for submission of completed applications. Only 17 were ultimately recognized by the Department of Interior. However, another 19 were resolved by merger with other tribes or by congressional action. Of the 87 with submitted and completed applications 33 were denied recognition and as of 2014, 18 groups were still bogged down in the quagmire of seeking federal recognition. Emily Ann Haozous et al, *Blood Politics, Ethnic Identity, and Racial Misclassification among American Indians and Alaska Natives*, 2014 J. ENVTL. & PUB. HEALTH (2014). The Bureau of Indian Affairs maintains a website providing a detailed listing of the status of recognition petitions, and outlining the process for new petitions. See *Office of Federal Acknowledgment*, US DEPARTMENT OF THE INTERIOR, INDIAN AFFAIRS (last visited Feb. 12, 2019), <https://www.bia.gov/as-ia/ofa>.

32. 25 C.F.R. §§ 83.1-83.46 (2018).

33. See e.g. Lumbee Recognition Act, Pub. L. 84-570, 70 Stat. 254, H.R. 4656 (84<sup>th</sup>) (1956).

These processes are not a problem in the context of law school applications for those who already possess a tribal enrollment certificate recognized by the federal government. Tribally-enrolled Indians carry a certificate — the equivalence of a citizenship document — proving membership in a tribe. They can easily satisfy the first portion of the ABA Resolution test, requiring proof of tribal affiliation.<sup>34</sup> Yet the ABA Resolution does not limit “Native American” identity to only those with formal recognized tribal affiliation. How is it that some might claim to be Native American, without that certificate? What type of “heritage statement” could possibly satisfy the second prong of the ABA Resolution? We turn to a consideration of the Genízaros as one example.

### GENÍZARO NATION

In our previous writings, we have identified how Genízaros came to be.<sup>35</sup> Well-intentioned admissions officers at ABA accredited law schools would want to understand how these people, who identify as Indian, could satisfy the second prong of the ABA resolution if given a chance to demonstrate their Indian heritage. So we spend a few minutes with that explanation.

#### 1. Historical Summary

Spanish colonialism in the Southwest required labor and the indigenous people provided that source. Some natives worked voluntarily for the clergy while others were enslaved and made to work for Hispano colonialists. But the matter is not as simple as Spaniards enslaving Indians, although that practice was widespread. Plains Indians also had a history of enslaving other Indians<sup>36</sup> and were eager to sell some of their captives to the Spanish.<sup>37</sup> Spanish law, the *Recopilacion de Leyes de los Reynos de las Indias* 1681, provided religious authority for the purchase of natives—the Christian obligation to ransom captive Indians from non-Christian Indians.<sup>38</sup> In 1694, the “moral” basis for the purchase of Indian slaves was further justified by a horrible incident involving Pawnee children slaves.<sup>39</sup> Their Navajo captives attempted to sell these children to the Spanish.<sup>40</sup> When the Spanish declined, the Navajos beheaded the children.<sup>41</sup> The King of Spain, Charles II, then ordered that in the future captives should be purchased, with royal funds if need be, to prevent

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34. ABA RESOLUTION, *supra* note 6.

35. Bill Piatt, *Entrada: Slavery, Religion and Reconciliation*, 13 INTERCULTURAL HUM. RTS. L. REV. 1, 1–46 (2018); Moises Gonzales, *The Genízaro Land Grant Settlement of New Mexico*, 56 J. SW. 583, 583–602 (2014).

36. Lolita Buckner Inniss, *Cherokee Freedmen and the Color of Belonging*, 5 COLUM. J. RACE & L. 100, 106 (2015).

37. WARREN A. BECK, *NEW MEXICO: A HISTORY OF FOUR CENTURIES* 78 (Univ. of Oklahoma Press, 1982).

38. Malcolm Ebright, *Genizaros*, NEW MEXICO HISTORY, (Oct. 29, 2018), <http://newmexicohistory.org/people/genizaros> [<http://archive.fo/kP9Y2>].

39. *Id.*

40. *Id.*

41. *Id.*

further slaughters of native children.<sup>42</sup> Thus, with the official sanction of the Spanish crown and the Catholic Church behind them, Hispano colonists and Pueblo Indians purchased and enslaved Indians.

These captives became known as “Genízaros.”<sup>43</sup> Trade fairs sprung up for the purpose of trafficking of the Genízaros.<sup>44</sup> Spanish law attempted to distinguish the trafficking of Genízaros from other forms of slavery.<sup>45</sup> Outright slavery had been outlawed as the results of the efforts of Fray Bartolome de las Casas (1484–1566) who had led the outcry against earlier Spanish mistreatment of the indigenous peoples.<sup>46</sup>

At least theoretically, at some point the Genízaros could purchase their freedom or be released by their masters.<sup>47</sup> However, the distinction was without significance—Genízaros were denied status as either Spanish or members of the Pueblos or Tribes, were not free to leave their masters without the consent of the masters, and unless they were fortunate enough to be recruited to serve in the land grant outposts created to ward off attacks by Plains Indians described below, toiled without compensation.<sup>48</sup> Theoretically, the Genízaros, also called criados, (servants), coyotes, or by other names were to become free at the end of their servitude.<sup>49</sup> Genízaros were purchased by Hispanos, by Pueblo Indians, and sometimes even by other Genízaros.<sup>50</sup>

## 2. Ethnogenesis

The emerging story about the evolution of identity and cultural practices of the Genízaro people of New Mexico is sometimes referred to by contemporary scholars as “Ethnogenesis.”<sup>51</sup> They explain that Genízaros are North American Indians of mixed tribal derivation living among the Hispanic population in Spanish fashion. That is, having Spanish surnames from their masters, Christian names through baptism, speaking a simple form of Spanish, and living together or sprinkled

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42. *Id.*

43. See Moises Gonzales, *The Genízaro Land Grant Settlement of New Mexico*, 56, 4 J. SOUTHWEST 583 (2014); Ebright, *supra* note 38. The term “genizaro” was a variation of the Turkish word “yeniceri” or “janissary”. These terms described Christian captives of the Turks who were forcibly abducted as children. They were trained as soldiers, and served as defenders of the Ottoman Empire.

44. See Ebright, *supra* note 38.

45. *Id.*

46. *Id.*

47. *Id.*

48. See Gonzales, *supra* note 43, at 584; Ebright, *supra* note 38.

49. See Ebright, *supra* note 38.

50. Simon Romero, *Indian Slavery Once Thrived in New Mexico. Latinos Are Finding Family Ties to It.*, N.Y. TIMES (Jan. 28, 2018), <https://www.nytimes.com/2018/01/28/us/indian-slaves-genizaros.html>.

51. Ethnogenesis is defined as, “the process by which a group of people becomes ethnically distinct: the formation and development of an ethnic group.” *Ethnogenesis*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/ethnogenesis> (last visited Feb. 10, 2019). The formation and development of Genízaros as a distinct group is outlined by Professor Moises Gonzales. See *supra* note 43.

among the Hispanic towns and ranchos.<sup>52</sup> And these scholars refer us back to additional historic antecedence of these indigenous, yet, federally unrecognized Indians.

The Spanish colonizers who arrived in New Mexico in the late 1500s and settled in what is now Santa Fe in 1609 needed a source of labor. The obvious and available source were the Indians populating that area. While both the early colonists and the Church found the labor of their slaves to be critical in tending their households, fields and churches, the entire communities were constantly at risk of attack by marauding nomadic tribes including the Apache, Comanche, Kiawa, Navajo and Ute. In order to protect the settlements, early on the Spanish determined to allow groups of Genízaros to live together outside of the settlements to serve as the first line of defense.<sup>53</sup> “The first known defensive settlement of Genízaros was located in the Analco area just south of the Santa Fe River where the San Miguel Church now stands. The Spanish even allocated Pueblo Indian servants to these Genízaros. On the first day of the Pueblo Revolt of 1680,<sup>54</sup> jealousy of the treatment afforded to these Genízaros, led the Pueblo Indians to nearly wipe out the community.”<sup>55</sup> The Spanish were pushed south in the 1680 revolt to an area which is now the El Paso, Texas area. Many Genízaros fled south with them. When the Spanish returned in 1692, they resumed the process of utilizing Genízaro slaves and servants in their expanding settlements and found a need for more of them.

What was the source of additional Genízaro slaves? According to Fray Angélico Chávez, a 20th century scholar of New Mexico, Genízaros emerge in the 18th century as servants and captives primarily from Plains indigenous nations such as the Comanche, Apache, Ute, Kiowa, and Pawnee.<sup>56</sup> Chavez also argues that Genízaros as an identity faded away in New Mexico after Mexican Independence in 1821.<sup>57</sup> However, the continuance of Genízaro cultural practice in communities spread across New Mexico still exist today.<sup>58</sup>

The Plan de Iguala was created on 24th of February 1821 to assert Mexican Independence and serve as the guiding principal of law until the Mexican Constitution was adopted in 1824. The plan asserted racial equality in Mexican Society and the term “genízaro,” or caste terms associated with racial classification such as coyote, mestizo, mulato, and castizo were dropped from use in official documents and Catholic Church records. By the middle of the 1700s, Governor Tomás Vélez Cachupín deployed a plan for New Mexico where landless Genízaros and mixed Indian castes could assist in establishing a network of defensible buffer settlements to protect the primary governing centers of Santa Fe, Santa Cruz, and

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52. Chávez, Fray Angélico, eds. Alfonso Ortiz and William T. Sturtevant. 1979. “Genízaros,” in *Handbook of North American Indians: Southwest*. Vol. 9: 198–200. Washington, DC: Smithsonian Institution.

53. See Gonzales, *supra* note 43, at 591–93.

54. See Piatt, *supra* note 35, at 15.

55. Ebright, *supra* note 38.

56. Chávez, Fray Angélico, eds. Alfonso Ortiz and William T. Sturtevant. 1979. “Genízaros,” in *Handbook of North American Indians: Southwest*. Vol. 9: 198–200. Washington, DC: Smithsonian Institution.

57. *Id.*

58. See *infra* Section 3 Genízaros Maintain their Indigenous Heritage.

Albuquerque. Beginning with the first Genízaro settlement of Belén established in 1741, Cachupín established Genízaro settlements or settlements with enclaves of Genízaros at Belén (1740), Las Trampas (1751), Abiquiú (1754), Cañón de Carnué (1763), and San Antonio de las Huertas (1767).<sup>59</sup> The purpose of establishing these communities was to reduce the attacks by Comanches, Utes, Apaches, Kiowas, and Navajos that were threatening the survivability of both Pueblo and Hispano communities of Northern New Mexico.<sup>60</sup> Cachupín would specify that these communities be established in compliance with the Laws of the Indies which required the construction of compact defensible settlements as well as a system of equitable distribution of land and water for both individual and communal use.<sup>61</sup> Governor Cachupín believed establishing community land grants by Genízaros in frontier settlements was a way to move this landless indigenous population living in servitude into land ownership.

At the start of the 18<sup>th</sup> century, the Comanche and Ute would form a political and economic alliance and began to war with Pueblo communities of New Mexico. With Ute assistance, Comanches incorporated themselves into the emerging slave raiding and trading networks on New Mexico borderlands. By the time the Comanche arrived in the region, commerce in Indian captives was an established practice in New Mexico, stimulated by the ambiguities in the Spanish legal and colonial system.<sup>62</sup> The mutual warfare of raiding and the expansion of slavery and captivity in New Mexico's economy in the eighteenth century between the Comanche, Ute, Navajo, Apache, Pueblo, and Spanish communities began to reposition the concepts of ethnic identity, kinship and belonging among groups.

By the mid-eighteenth century, a slave trade market emerged in New Mexico that transformed the economy and further promoted violence based on the value of captive women and children. Thus, slavery and accompanying social and economic factors led to the ethnogenesis and emergence of Genízaro ethnic identity occupying a space between Spanish, Pueblo Native, and Mestizo groups. Scholars such as Maria Josefa Saldana-Portillo remind us that, "Comanche and Apache raiding increased exponentially in the two decades following Mexican Independence, . . . . Not only did the number of raids increase, they became more devastating."<sup>63</sup> The indigenization of Genízaro communities continued until the forced removal and settlement of Apaches, Comanche, Utes, and Navajo on reservations during the latter part of the nineteenth century.

### 3. Genízaros Maintain their Indigenous Heritage

Many Genízaro communities embody their indigenous connections through ritual dance performances in communities such as Alcalde, Rancho de Taos, Placitas, Atrisco, and Carnue/La Madera based on captivity and slavery of the 18th century. Religious pilgrimages also play a large part in this heritage. Law school admissions

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59. Gonzales, *supra* note 43.

60. *Id.*

61. Ebright, *supra* note 38.

62. PEKKA HAMALAINEN, THE COMANCHE EMPIRE 26 (2008).

63. MARÍA JOSEFINA SALDAÑA-PORTILLO, INDIAN GIVEN: RACIAL GEOGRAPHIES ACROSS MEXICO AND THE UNITED STATES, 124 (2016).

officers who are willing to listen to a Genízaro heritage statement could not doubt the sincerity of the Indian identity of those who participate in these cultural and religious celebrations. Those admissions officers would have to conclude that the inclusion of Genízaro students would add to the educational diversity law schools seek to achieve by admitting Indian students into their institutions. While volumes could be written of these cultural expressions, a brief summary of several of them might illustrate the clear Indian identity of Genízaros.

a) *Comanchitos dance*

Imagine for a moment what it must have been like for the Indian children who had been captured by other Indians and then sold to members of another community. Consider the horror that these children had witnessed and the suffering they were enduring being separated from their families and tribe. Imagine the fear in these children as they were brought into another community where they would now spend the rest of their lives.

Assume, though, for just a minute, that the new community was interested in making the transition for these children as easy as possible. After all, it was in the interest of the slaveholder to maintain some semblance of a positive relationship with the slaves. So, the communities would welcome the children and begin their initiation into the tribe by the performance of the dance. Comanche Indians from the plains were one of the primary suppliers of slave children and thus the name given to these children was *Comanchitos*. They were not Comanches; rather they were members of the Ute, Apache, or other tribes captured by Comanches. Genízaro descendants today re-enact the dancing which served as a welcoming ceremony to the newly-captured and enslaved Indian children in earlier times. In Indian costume, and to the beating of drums, they dance the dance, and chant the lyrics, performed by their ancestors over the centuries. It is a dramatic, moving, and at the same time, simple expression of the Indian identity Genízaros have maintained. Anyone interested in seeing a performance of this dance can attend those which occur in Carnuel, New Mexico, in the mountains east of Albuquerque.<sup>64</sup>

b) *Matachines dance*

This *danza* is performed throughout northern New Mexico in Genízaro and Indian communities. Important presentations of the dance occur in August of each year in Bernalillo (the oldest continuous Matachines dance in New Mexico), Carnuel, Alcalde and others. An observation of the *Danza of the Matachines* is included as part of the introduction of a book by Sylvia Rodríguez<sup>65</sup>, and that introduction appears on the State of New Mexico's historical website:

The Matachines dance is a ritual drama performed on certain saint's days in Pueblo Indian and Mexicano/Hispano communities along the upper Rio Grande valley and elsewhere in the greater Southwest. The dance is characterized by two rows of masked male dancers wearing mitrelike hats [*cupile*] with long, multicolored ribbons down the back. In the upper Rio Grande valley of New Mexico, these ten or

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64. Professor Gonzales is one of the dancers and provided this oral history.

65. SYLVIA RODRÍGUEZ, *THE MATACHINES DANCE: RITUAL SYMBOLISM AND INTERETHNIC RELATIONS IN THE UPPER RÍO GRANDE VALLEY* 1–2 (1996).

twelve masked figures are accompanied by a young girl in white, who is paired with an adult male dancer wearing a floral corona. They are joined by another man or boy dressed as a bull and by two clowns. The crowned man dressed like the other dancers is known as Montezuma, or El Monarca, while his female child partner is called La Malinche. The dance is made up of several sets of movements accompanied by different tunes, usually played on a violin and guitar. The procession and recession that typically bracket it, takes roughly forty-five minutes.

Most scholars agree that the Matachines dance derives from a genre of medieval European folk dramas symbolizing conflict between Christians and Moors, brought to the New World by the Spaniards as a vehicle for Christianizing the Indians. Iberian elements merged with aboriginal forms in central Mexico, and the syncretic complex was transmitted to Indians farther north, including the Rio Grande Pueblos, probably via Mexican Indians who accompanied the Spanish colonizers. As performed today in the greater Southwest, the Matachines dance symbolically telescopes centuries of Iberian-American ethnic relations and provides a shared framework upon which individual Indian and Hispanic communities have embroidered their own particular thematic variations.<sup>66</sup>

The view that the dance is meant to celebrate *La Malinche*, the Indian who mothered the mixed-race children of the Southwest resulting from her relationship with Hernan Cortez, the sixteenth century Spanish conqueror of Mexico, is the reason that the Genízaro community of Carnue performs the dance at the Feast of San Miguel in August each year. They view the *Matachines* as a celebration of their origin.<sup>67</sup> The co-author of this article, Professor Gonzales, is one of the *danzantes*. Professor Piatt, a fellow co-author of this article, had the privilege of witnessing the beautiful *danza* held at Carnuel on August 10, 2018, held at sundown in the spectacular mountain setting east of Albuquerque.

c) *Tortugas Pueblo pilgrimage*

Genízaro cultural and religious celebrations are not limited to northern New Mexico. In southern New Mexico, in the Las Cruces area, “Los Indigenes de Nuestra Senora de Guadalupe” (“The Indigenous People of Our Lady of Guadalupe) have maintained their Tortugas Pueblo for centuries. Although not a federally recognized tribe, Tortugas Pueblo clearly identify as Indian. And in addition to other religious and cultural celebrations, a three-day celebration “Our Lady of Guadalupe Fiesta” takes place each year.

One of the portions of the celebration is an annual pilgrimage which was celebrated for the 108th time in 2018. It involves a dramatic walk from the Casa de Pueblo in the unincorporated town of Tortugas within the Las Cruces metropolitan area. On the first day of the feast December 10, 2018, dancers in traditional Native American costumes performed at the Pueblo. An all-night vigil in honor of Our Lady of Guadalupe followed. Then, the early morning hours before sunrise, pilgrims gathered to register for the procession up the mountain. Families and pilgrims

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66. Sylvia Rodriguez, *The Matachines Dance*, N.M. HIST., <http://newmexicohistory.org/people/the-matachines-dance> (last visited Feb. 8, 2019).

67. Zita Fletcher, *Matachines keep 323-year-old promise*, RIO RANCHO OBSERVER (July 25, 2016), [http://www.rroserver.com/news/article\\_174c702e-5061-11e6-ab11-87c9b486cf34.html](http://www.rroserver.com/news/article_174c702e-5061-11e6-ab11-87c9b486cf34.html).

gathered from New Mexico, Arizona, California, Mexico and also included a group from Chicago. In the early morning hours, the image of the Virgin of Guadalupe was taken to the nearby sanctuary where pilgrims gathered in a large circle. Native American rituals including tobacco smoke and prayers to the four cardinal directions were raised and the procession began. Some of the walkers proceeded barefoot, others wore only socks on their feet. Hushed conversations took place as the pilgrims began their five-mile march from Tortugas, at about 3900 feet elevation, toward the top of Tortugas Mountain, at an elevation of about 5000 feet. The procession began at sunrise, arrived at the base of the mountain just before 9:00 a.m., and the pilgrims proceeded up the pathway. At the top, some pilgrims had already gathered to set up small campfires. Walkers fashioned crosses, and affixed them to their quites (walking sticks prepared from the stalks of the Yucca plant).

At the top of the mountain, Bishop Emeritus Ricardo Ramirez celebrated mass in both English and Spanish. Thereafter, the pilgrims returned to the Pueblo for prayers, the rosary and ceremonies. The following day, another mass was celebrated. Again, members of the Pueblo performed Native American dances. At noon, a traditional meal of albondigas (meatballs), macaroni, beans and red chile was served to all who gathered.<sup>68</sup>

These, and other Genízaro cultural and religious celebrations have endured, without federal recognition, for centuries. They demonstrate that the Indian identity of their participants will continue to endure, whether or not Harvard law school or any other law school recognizes that identity in the absence of “papers.”

#### 4. Recognition by the State of New Mexico

The Genízaro communities are primarily located in the high mountain buffer communities where they have occupied since their organization in the 18th century by Tomas Velez Gachupin as well as pockets of urban centers organized in family kinship networks. The communities such as the Pueblo de Abiquiu, Carnue, Ranchos de Taos, San Antonio de Las Huertas, and San Miguel del Vado are still organized under community land grants. According to New Mexico law<sup>69</sup>, community land grants are political subdivisions of the state with the powers to self-govern and manage communal land, water and cultural resources. Through a cultural system known as “Querencia”, Genízaro land grant communities leverage a complex system of governance, social ritual societies, and kinship based on a legacy of native captivity, slavery, and community reciprocity for over three generations. In 2007, the New Mexico State Legislature passed Legislative Memorial 59 to acknowledge Genízaro identity and contribution to the State’s history: “Therefore be it further resolved, that the senate recognize the existence and importance of this indigenous group and the presence and importance of its descendants today.”<sup>70</sup>

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68. Photos of this event and a lengthier description can be found on the Tortugas Pueblo website: *History*, TORTUGAS N.M., <http://tortugasnm.org/history> (last visited Feb. 8, 2019). See also Josh Bachman, *Follow the Pilgrims’ Journey from Pueblo to Mountaintop*, LAS CRUCES SUN NEWS (Dec. 11, 2018), <https://www.lcsun-news.com/picture-gallery/news/2018/12/11/2018-fiesta-our-lady-guadalupe-pilgrimage-tortugas-mountain/2281763002>.

69. N.M. STAT. ANN. § 49 (2018).

70. A MEMORIAL RECOGNIZING THE ROLE OF GENIZAROS IN NEW MEXICO HISTORY AND THEIR LEGACY.

Although, the Genízaro people are not federally recognized as a tribe, this group has navigated a process of self-governance and self-recognition to maintain an indigenous cultural identity that has spanned Spanish, Mexican, and American rule.

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WHEREAS, indigenous captivity and servitude were common in frontier society that became New Mexico; and

WHEREAS, various indigenous peoples, including Apache, Dine (Navajo), Pawnee, Ute and Comanche, were captured; and

WHEREAS, indigenous people became part of New Mexican communities and households through capture in war, kidnapping, trade fairs, punishment for crimes, adoption, abandonment and the sale of children; and

WHEREAS, baptismal records reveal that at least four thousand six hundred one captive indigenous persons were baptized between the years 1700 and 1880, becoming part of Spanish, Mexican and territorial households; and

WHEREAS, numerous primary source records document the captivity, presence and experience of indigenous people displaced in this way, including marriage records, court cases, wills and censuses; and

WHEREAS, the experiences of captives, while varied, included being raised and serving within households, and sometimes remaining in a captor's home for a lifetime; and

WHEREAS, the practice of taking Indian captives lasted through the Mexican and into the American period in New Mexico; and

WHEREAS, there were many terms to describe Indian captivity and servitude in New Mexico, including "cautivos", "criados", "coyotes" and "famulos" but the most common used prior to 1821 and into the Spanish colonial period was the term "genizaro"; and

WHEREAS, the term "genizaro" derives from the Turkish word "yeniceri" or "janissary", terms used to describe Christian captives who, as children, had been forcibly abducted, traded and trained as the nucleus of the Ottoman empire's standing army; and

WHEREAS, genizaro families could be found in various communities throughout the colony, including the major villages of Albuquerque, Santa Cruz de la Canada, Santa Fe and El Paso del Norte; and

WHEREAS, in the mid-eighteenth century, many genizaros were again relocated strategically at the edges of Hispanic communities, thus providing both an initial line of defense against raiders and the foundation for communities such as Abiquiu, Belen, Carnuel, Las Trampas, Ojo Caliente, Ranchos de Taos, San Miguel del Vado and Tome; and

WHEREAS, by 1776, genizaros comprised at least one-third of the entire population of the province; and

WHEREAS, genizaros and their descendants have participated in all aspects of the social, political, military and economic life of New Mexico during the Spanish, Mexican and American periods; and

WHEREAS, eventually the migration patterns of cautivos and genizaros paralleled that of all New Mexicans with communities extending southward to El Paso del Norte (Ciudad Juarez) and northern Chihuahua, Mexico, as well as northward in Colorado and beyond; and

WHEREAS, the direct result of the Indian slave trade was the emergence of generations of racial and cultural mixtures often referred to in the colonial period with terms such as coyotes, colores quebrados, lobos and mestizos; and

WHEREAS, many New Mexicans can trace their ancestry to these indigenous peoples;

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE STATE OF NEW MEXICO that the important role of genizaros and their descendants have had in the social, economic, political and cultural milieu of New Mexico and the United States be recognized; and

BE IT FURTHER RESOLVED that the house of representatives recognize the existence and importance of this indigenous group and the presence and importance of its descendants today; and

BE IT FURTHER RESOLVED that a copy of this memorial be transmitted to the office of the state historian."

H.R. Mem'l 40, 48th Leg., Reg. Sess. (N.M. 2007), <https://www.nmlegis.gov/Sessions/07%20Regular/final/HM040.pdf>; S. Mem'l 59, 48th Leg., Reg. Sess. (N.M. 2007), <https://www.nmlegis.gov/Sessions/07%20Regular/final/SM059.pdf>.

**TOWARD RECOGNITION OF THE VALIDITY OF NON-TRIBALLY  
AFFILIATED INDIGENOUS PEOPLE.**

Genízaros can demonstrate their Native American heritage. They should be given the opportunity to qualify as Native American under the explicit terms of the ABA resolution. They have been deprived of the opportunity to demonstrate their formal tribal affiliation because their ancestors were forcibly abducted, usually as children, and enslaved. Yet in small mountain communities, and in some urban areas, they practice the traditions and the dances handed down to them by their ancestors. Their oral histories are replete with evidence of the slavery they endured and have overcome.

A song, repeated by elders in Northern New Mexico, and passed down to the present generations, reflect this reality:

*El Comanche y la Comancha se fueron pa(r)a Santa Fe.  
A vender a sus inditos por azucar y café.<sup>71</sup>*

The lyrics reflect the memory of something quite disturbing:

*The Comanche and his wife went to Santa Fe.  
To sell their little Indians for sugar and coffee.*

The song is a remembrance of the brutal reality that for centuries in what is now New Mexico and the American Southwest, Indians, mainly children, were captured and kept as slaves. Variations of the song have been handed down and performed in New Mexico villages for centuries. These songs have helped to preserve these memories in the absence of record-keeping systems that have obliterated the ability of the descendants of these slaves to trace their history and establish their tribal identity.

It is clear that well-intentioned admissions officers might hesitate to recognize the claim by an applicant that he or she is Indian, in the absence of formal tribal affiliation. Yet the resolution requires that schools listen to the heritage statement by Genízaros and other non-tribal affiliated Indians. These statements could include summaries of the participation in Genízaro tribal or land grant governance, cultural events, and the like. They might also include summaries of genealogy and kinship through family history. They might even possibly include relevant DNA testing, as one of several indications of Indian heritage.<sup>72</sup>

And there are other non-tribally affiliated Indians to whom schools should listen. One of those, for example, is the Lumbee Nation. The Lumber River wanders for over 130 miles throughout the eastern portion of North Carolina. Prior to the arrival of European settlers, several Indian tribes lived along the river and in the

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71. JOHN DONALD ROBB, *HISPANIC FOLK MUSIC OF NEW MEXICO AND THE SOUTHWEST: A SELF-PORTRAIT OF A PEOPLE* 442 (2014). Note that the lyrics cited by Robb is one version, that he captured on one particular day. The oral tradition is not static. The singing and lyrics vary slightly from community to community. The more widely accepted version is that in the text, although Robb has captured a variation: "El Comanche y la Comancha se fueron para Santa Fe. A vender los comanchitos por azucar y café." The English translation in the text above is an accurate translation of both the version we reproduce in the text and the Robb version.

72. Note that some scholars do not believe that DNA evidence alone should qualify someone as being Native American. *See, e.g.,* KIM TALLBEAR, *NATIVE AMERICAN DNA: TRIBAL BELONGING AND THE FALSE PROMISE OF GENETIC SCIENCE* (2013).

swampland surrounding portions of it. Once Europeans arrived along the eastern coast of what is the United States, explorers moved into the area, and some intermarried with the natives. Free Africans and runaway slaves who found their way into the area, also intermarried with the Chewa people, and other tribes in the region. Most historians who have studied this migration agree that a Cheraw settlement on the Lumber River was in place by the middle of the 18th century. Several other tribes migrated to the area, intermarried, creating an identifiable “Lumbee English.” These inhabitants referred to themselves as “Lumbees” and have always identified themselves as Native American. It isn’t possible now for most Lumbees to trace their ancestry to an identifiable tribe due to the intermarriage, the passage of time and the inadequacy of record keeping. Lisa Rab, writing in *The Washington Post*, traced their struggle for full federal recognition in an article entitled, “What Makes Someone Native American?”<sup>73</sup> The Lumbees have sought full federal recognition for over 100 years now. Their heritage, and their identity, like that of the Genízaros, is Indian. Admissions officers should listen to the heritage statements of Lumbees.

There are several approaches which could be used to address the need for law schools to utilize heritage statements as one method of determining Indian identity. The root of the problem seems to stem from the relevant Resolution of the ABA, or at least a practical misunderstanding and misapplication of it. The ABA could attempt to fix the problem by revising the resolution. A new resolution could read,

The American Bar Association urges the Law School Admissions Council and ABA – approved law schools to require additional information from individuals who indicate on their applications for testing or admission that they are Native American. This information could include Tribal citizenship, Tribal affiliation or a Tribal enrollment number. However, it could include a ‘heritage statement.’ Of course, some individuals may choose to submit both. But neither one of the two factors (tribal document or heritage statement) should be given more weight than the other in the ultimate determination as to whether or not the applicant is Native American.

In the absence of a more explicit revision of the Resolution, a more immediate resolution must occur within law schools themselves. Some law schools are quite frankly utilizing an incorrect approach in applying the existing resolution. Law schools need to correct this by taking the affirmative steps to ensure that all indigenous people are given fair admission opportunities. In fact, only considering “papers” and not considering heritage statements might be violative of the call of *Bakke/Grutter/Fisher* to consider the “whole” individual in the admissions process.<sup>74</sup>

Even if schools agree to accept heritage statements there is still a possibility of “box checking.” That is, some applicants might be sophisticated enough, and tempted enough, to create fraudulent heritage statements. But this potential issue, to

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73. Lisa Rab, *What Makes Someone Native American?*, WASH. POST, (Aug. 20, 2018), [https://www.washingtonpost.com/news/style/wp/2018/08/20/feature/what-makes-someone-native-american-one-tribes-long-struggle-for-full-recognition/?noredirect=on&utm\\_term=.b31ddd5e9ac8](https://www.washingtonpost.com/news/style/wp/2018/08/20/feature/what-makes-someone-native-american-one-tribes-long-struggle-for-full-recognition/?noredirect=on&utm_term=.b31ddd5e9ac8).

74. The U.S. Supreme Court has consistently held that Equal Protection requires institutions with race-conscious admissions policies to undertake a holistic review of the applicant. *See generally* Fisher v. Univ. of Tex., 136 S. Ct. 2198 (2016). *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

the extent that there could be one, could be resolved by the law school's investigation of applicants where the school thinks there is potential fraud. For example, suppose an applicant includes in a heritage statement the claim to be a *danzante* in the Genízaro tradition. If the law school became suspicious that this was not true, it would be easy enough to request photos and video of the most recent performance together with a statement from others who witnessed it. This approach might impose additional burdens on some applicants who utilize heritage statements. But at the same time, it would ensure that all Indigenous people are afforded fair opportunities while still deterring the box checking which was the major purpose of the ABA's resolution in the first place.

In the meantime, full and fair consideration of the admission applications of Genízaros, Lumbees, and others will require some additional education and empathy on the part of admissions officers. While human nature probably will lead some who have no real Indian identity to claim such, not all who cannot produce "papers" are "fake Indians" or frauds. Some are Indians, the descendants of slaves, living a humble yet enriched life because of their heritage. Some of them would return with a legal education to their communities to assist other Genízaros, Lumbees, or other Indians to achieve an education, build a business, or otherwise support their communities in the maintenance of their heritage. Some might even then bring the legal challenges necessary to establish the rights of their fellow tribal members. Some might seek political office in order to assist in the process of development and recognition. As the gateway to the legal profession, law schools must faithfully and completely adhere to their own standards and fairly provide access to a legal education to non-tribally affiliated Indians. Otherwise, with all the best of intentions, law schools will continue to perpetuate the badges of servitude imposed upon Genízaros by contributing to the maintenance of the second-class status they and their ancestors have endured for centuries.