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# TOWARD A PEDAGOGY AND ETHIC OF LAW/LAWYERING FOR INDIGENOUS PEOPLES

CHRISTINE ZUNI CRUZ\*

## *On Being the First—First Person Reflections*<sup>1</sup>

### *A Word on Reflection*

*One of the most important aspects of clinical practice and clinical teaching is that it allows reflection. Students practice law in a manner meant to encourage reflection of that practice, to allow them to learn, and to consider their lawyering approach. “Reflection” is a noun that comes from a late Latin word meaning the act of bending back. The more common meanings of the word are something produced by reflecting; a thought idea or opinion formed or a remark made as a result of meditation; consideration of some subject matter, idea, or purpose. The less common meanings include: turning back, return, an effect produced by an influence, an often obscure or indirect criticism.<sup>2</sup> These are my reflections, divided into four parts. The first is on the wrongness of firstness. The second on elitism- they fit the more common meanings of the word. My last two reflections fit the more obscure meanings.*

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1. This reflection is a speech I delivered at the University of New Mexico Law School’s Ninth Annual Academic Convocation and Gathering of Communities in October 2002, after I had received tenure. My tenure represented the first tenured appointment of a Pueblo person in law in the University’s history. The Convocation is held to introduce and welcome our incoming and continuing native and Indian Law students to the community. The speech is on file with the author.

2. WEBSTER’S NEW COLLEGIATE DICTIONARY 989 (9th ed. 1991).

## I.

*The Wrongness of Firstness*

*Being designated the first anything is a bit surreal, especially if you are the first person of whatever color who is the first at anything. Consider the [2002] interview of Harry Belafonte by Larry King that was prompted by Mr. Belafonte's frank criticism of Colin Powell, the first African American to serve as Secretary of State in this country.<sup>3</sup> In a statement on a San Diego radio station, Mr. Belafonte said:*

*There's an old saying in the days of slavery. There are those slaves who lived on the plantation, and there were those slaves who lived in the house. You got the privilege of living in the house if you served the master . . . [exactly the way the master intended to have you serve him].<sup>4</sup> Colin Powell was permitted to come into the house of the master.<sup>5</sup>*

*In introducing his provocative guest, Mr. King tells the audience that he was with Mr. Belafonte in Miami Beach when he became the first black to stay in a Miami Beach hotel in Florida.*

*Within the first thirty seconds, this interview, sparked by the stir caused by the slave metaphor evoked in Belafonte's expression of disapproval of a prominent "first," swirled in the interviewer's memory of another "first." It caused me to reflect on the complexity, the difficulty, and ultimately, the wrongness of firstness.*

*Being first, and the attached significance to being first, when "firstness" is attached to your ethnicity or color, says more about our societies and our institutions than it says about the "first person." These firsts, whether that experienced by Mr. Belafonte or that experienced by Mr. Powell, reflect on the racism and discrimination that exist, be it in a hotel, the State of Florida, or the institutions and the government of this country. This doesn't mean that firstness is not about the first person, however. Because as Belafonte went on to explain, whenever someone [within our group] emerges that has the position of authority or power to*

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3. CNN.com, *Transcripts: CNN Larry King Live, Interview with Harry Belafonte, aired Oct. 15, 2002–21:00 ET*, <http://archives.cnn.com/TRANSCRIPTS/0210/15/1kl.00html> [hereinafter CNN Interview with Harry Belafonte] (on file with the author).

4. Harry Belafonte's remarks were made "[i]n an interview on San Diego radio station KFMB-AM . . . ." The bracketed remarks are available at CNN.com, *Belafonte Won't Back Down from Powell Slave Reference*, <http://archives.cnn.com/2002/US/10/15/belafonte.powell/> [hereinafter Belafonte Won't Back Down] (last visited Jan. 31, 2007).

5. The unbracketed comments were aired in live audio in the Larry King Live interview. CNN Interview with Harry Belafonte, *supra* note 3.

*make a difference in the ways things are done, expectations run high.<sup>6</sup> But as Belafonte pointed out, the expectations run high around the issues and the policies served by the person,<sup>7</sup> as opposed to the first person themselves. In his words:*

*The idea that you work in the house of the master is almost in itself its own opportunity to do some mischief and to make a difference, but when you are in that place and you help perpetuate the master's policy that perpetuates oppression and pain for many others, then something has to be said about it.<sup>8</sup>*

*What does it mean for this institution, the sole law school in the state [of New Mexico], to have its first Pueblo law professor tenured at this school? It causes me to think of all those Pueblo people before me, all those Indian people before me, for that matter, with their great intellect and intelligence, for whom the legal profession was never an option, and I think, "What a loss." In the specific context of Pueblo people, I think, "What a loss," because Pueblo people have been involved with outsider legal systems since the 1500s. It was over 450 years ago that the Spaniards first encountered the Pueblos, not far from [Albuquerque],<sup>9</sup> and there are accounts of Pueblo delegations appearing before audiencias in Mexico,<sup>10</sup> and protectores being appointed for Indians.<sup>11</sup> Under the Spanish and the Mexican legal systems there were no [Pueblo] Indian attorneys, and it is always necessary to point out, lest we forget, it wasn't until very recently, under the American system, that we even had Indian attorneys [in any number]. In the last forty years, in the late sixties and early seventies, we saw our first Indian attorneys<sup>12</sup> and in July of 2002 the University of New Mexico (UNM) officially tenured its first Pueblo law professor.*

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6. CNN Interview with Harry Belafonte, *supra* note 3.

7. *Id.*

8. Belafonte Won't Back Down, *supra* note 4.

9. In 1539, the Franciscan friar Marcos de Niza's guide and companion, Esteban, a Moroccan slave from Azamore, arrived at the Zuni village of Hawikuh. JOE S. SANDO, PUEBLO NATIONS EIGHT CENTURIES OF PUEBLO INDIAN HISTORY 50 (1992). This was the first encounter recorded by the Spaniards with the New Mexico puebloan peoples. *Id.*

10. CHARLES R. CUTTER, THE PROTECTOR DE INDIOS IN COLONIAL NEW MEXICO, 1659-1821 1-2 (1986) (providing an account of Pueblo of Cochiti delegation in Mexico City).

11. See Title 6, Law 1-14, Recopilación de Leyes de Los Reinos de Las Indias (1681) in S. LYMAN TYLER, THE INDIAN CAUSE IN THE SPANISH LAW OF THE INDIES 181-88 (1980) (providing for the reauthorization of protectors and defenders of Indians).

12. Sam Deloria, *Legal Education and Native People*, 38 SASK. L. REV. 22, 22 (1974) (stating that "in 1967 . . . there were . . . five Indian law students in the United States, and about thirty Indian lawyers in the United States, i.e., lawyers who were identifiable as Indian and working in Indian affairs.").

*That means that people I knew in my parents' generation, in my grandparents' generation, were excluded from a legal education. The exclusion was systematic. In the 1960s, only one percent of all the Indians in the country had four or more years of post-secondary education.<sup>13</sup> In 1961, sixty-six Indians received degrees from four-year colleges.<sup>14</sup> The thought behind the Indian education system at the turn of the century was not to produce doctors and lawyers for Indian country, but to produce farmers and ranchers and domestic help. World War II changed that [premise] and we began to see our first college graduates. The Civil Rights movement opened the educational opportunities, making college and professional school opportunities more readily available to Indian people. Despite the fact that law and courts have been the primary mechanism through which the rights of Indian people have been affected, Indian people have only been involved in the legal profession for the past thirty to forty years. As I consider the centuries' long legal history of our people under the Spanish, the Mexican, and the American systems, I always find that [fact] astounding.*

*Since the sixties, UNM has been one of the most effective law schools in the nation in producing Indian attorneys through the Pre-Law Summer Institute,<sup>15</sup> through its enrollment of Indian law students, and through the development of an Indian law curriculum to prepare students for the practice of Indian law.<sup>16</sup> It has produced a lot of firsts [for New Mexico]: the first Indian metropolitan court judge, first Indian district court judge, first Indian state senator, and so on. There are a lot of firsts besides me, a lot of firsts still to come, because Indian people have not had access to so many public and private institutions, legal or otherwise. Every time we hear of a "first" person, we need to think not only of the promise that a*

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13. U.S. Census Bureau, Decennial Census of Population, 1940 to 2000, Census 2000 PHC-T-41 (on file with author). A Half-Century of Learning: Historical Statistics on Educational Attainment in the United States, 1940 to 2000, Table 4 (on file with author). Percent of Population 25 Years and Over with a Bachelor's Degree or Higher by Sex, Race, and Hispanic Origin, for the United States: 1940 to 2000 (showing 1.9% of the American Indian and Alaska Native population 25 years and over with a Bachelor's degree or higher in 1960) (on file with author).

14. MARGARET CONNELL SZASZ, EDUCATION AND THE AMERICAN INDIAN: THE ROAD TO SELF-DETERMINATION SINCE 1928 134, 291 (1979) (citing Annual Report of the Secretary of the Interior, 1961).

15. Deloria, *Legal Education and Native People*, *supra* note 12, at 23 (providing that the program started in 1967); *see also* Heidi Estes & Robert Laurence, *Preparing American Indians for Law School: The American Indian Law Center's Pre-Law Summer Institute*, 12 N. ILL. U. L. REV. 278, 278 (1992) ("The Pre-Law Summer Institute has always been administered by the American Indian Law Center, Inc. (AILC), located at the University of New Mexico School of Law in Albuquerque, New Mexico.").

16. Rennard Strickland & Gloria Valencia-Weber, *Observations on the Evolution of Indian Law in The Law Schools*, 26 N.M. L. REV. 153, 166 (1996).

*door has been opened that will never be shut again, but reflect on the lack of access their firstness represents.*

*I just saw John Trudell on his latest tour this past weekend. He has these words in one of his songs:*

*My heart doesn't hurt anymore  
But my soul does, maybe  
That's what souls are for, to  
Take the hurt the heart can't take<sup>17</sup>*

*It reminded me of a story Professor Margaret Montoya told me. It's a story about being first that I'd like to share with you, because there are so many firsts yet to be accomplished, and it is likely that each of you represent or will represent some first in your legal careers.*

*She said being first is hard on the soul of that first person, because it is like we are put through a sieve not made for us. And going through that tiny hole that wasn't designed for us, hurts, bruises, and tears us; but as we go through that hole, we also misshape that hole, making it larger for those who follow us, so that it doesn't hurt and tear and bruise the next person coming after us quite so much; and that pretty soon, the hole is appropriately shaped for those like us, who follow, so that they pass through easily, so much so, that there is not even the knowledge of the assault on the soul of that first person. I understand that line, "[m]y heart doesn't hurt anymore, but my soul does" and I suspect, most of you will, if you don't already.*

*We understand [that] critical mass is an important concept for the success of native law students in an institution of higher learning, because isolation is not good. We must likewise understand it is an important concept for the success of native faculty. How many law schools have a critical mass of native law students? How many law schools have tenured a native faculty member? How many law schools have more than one tenured native faculty member on their faculty? How many law schools have native faculty members from the same territory [that] their school sits in? The numbers of schools are only a handful, and as you answer these questions the number gets smaller and smaller, until the last, for which the answer is one, maybe two. One of the greatest challenges UNM Law School faces is to keep its momentum going and to add to its*

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17. JOHN TRUDELL & MARK SHARK, *Doesn't Hurt Anymore*, on BONE DAYS (ASITIS Productions 2001).

*accomplishments by remaining on the cutting edge, and to know enough to recognize and keep from falling off that edge.*

## II. *Elitism*

*In explaining his remarks about Colin Powell, Harry Belafonte said he was disappointed that Colin Powell went along with and didn't stand up to the current administration in its decision about the current conflict in Iraq. He said he expected more from the first black person in a position to make a difference. He expressed similar concerns regarding Condelezza Rice.<sup>18</sup> In short, he expressed his disappointment in the black elite.*

*If you look at statistics on educational attainment among Indian people, you will see that obtaining the Juris Doctorate, [which] allows us our entrée into the legal profession, places us in a very small percentile of the total Indian population.*

*From 2000 census data we know that 26.1% of the white population, [14.3]% of the black population and 10.[4]% of the hispanic population, twenty-five years and older, have a bachelor's degree or more.<sup>19</sup> From the 1990 Census data, 9.3 % of the American Indian/Alaskan Native population had bachelor degrees or more.<sup>20</sup> If you look at the percentage of each group [in 2000] with advanced degrees the percentages are even smaller. Nine and one-half percent of the white population, [4.8]% of the black population, and 3.[8]% of the hispanic population have advanced degrees.<sup>21</sup> Unfortunately, we do not yet have this data from the 2000 census for the Indian population, but a 1998 A.B.A. Report on the Experiences of Native American Women Lawyers estimated [that] there are approximately 1,200 to 1,500 Native-American attorneys in the United States.<sup>22</sup> The 2000 census shows there are about four million American Indians and Alaska Natives alone or in combination with one or more*

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18. CNN Interview with Harry Belafonte, *supra* note 3.

19. U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT: 2000 5 (2003), available at <http://www.census.gov/prod/cen2000/dp12kh00.pdf> [hereinafter 2000 EDUCATIONAL ATTAINMENT CENSUS].

20. U.S. CENSUS BUREAU, WE THE AMERICANS: OUR EDUCATION 6 (1993), <http://www.census.gov/apsd/wepeople/we-11.pdf> (referencing figure 6).

21. 2000 EDUCATIONAL ATTAINMENT CENSUS, *supra* note 19, at 5. Census data indicates that 3.9% of American Indians and Alaska Natives have advanced degrees. *Id.*

22. A.B.A., *The Burdens of Both, The Privileges of Neither, A Report on the Experiences of Native American Women Lawyers* 3 (1998), available at <http://www.abanet.org/minorities/ftp/nativeamerburdens.pdf> [hereinafter 1998 A B.A. Report on N.A. Women Lawyers].

*racess.*<sup>23</sup> *You do the projection and the math. We must also look at the percentage we represent within our own tribes. Comparing three of the largest American Indian Tribes—16.1% of the Cherokee population, twenty-five years or older, have four or more years of college, 7.6% of the Navajo, and 5.6% of Tohono O’odham, twenty-five years or older have four or more years of college.*<sup>24</sup> *Some Pueblos and tribes have yet to see their first law graduate. We represent the very small percentage of the Indian population that has acquired access to a profession that has had the most profound impact on our people as a whole. Lawyers are among the highest paid; in New Mexico the 2001 Social and Economic Indicators Report shows them as the highest paid among thirty types of selected occupations in the state.*<sup>25</sup> *And yet, 2002 poverty figures for the nation show 25% of the Indian population is in poverty, that’s one in four people.*<sup>26</sup> *From the 1990 census, we find even more jarring figures for the state of New Mexico. Forty-six percent of the native population was in poverty.*<sup>27</sup> *As native attorneys, we represent a very small percentage of our population who have acquired the education to understand, to maneuver within the outside legal system. We possess a unique knowledge and, whether we like it or not, whether we embrace it or not, a responsibility. We know better than to confuse this knowledge with wisdom, or to think western education can be*

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23. U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS 2000 1 (2001), available at <http://www.census.gov/prod/cen2000/dp1/2kh00.pdf>.

24. U.S. CENSUS BUREAU, SELECTED SOCIAL AND ECONOMIC CHARACTERISTICS FOR THE 25 LARGEST AMERICAN INDIAN TRIBES: 1990, <http://www.census.gov/population/socdemo/race/indian/ailang2.txt> (referencing Table 2). The 2000 Census shows 16.1% of the Cherokee, 7.6% of the Navajo, and 5.6% of the Tohono O’odham, 25 years or older have four or more years of college. *Id.* See also U.S. CENSUS BUREAU, PROFILE OF SELECTED SOCIAL CHARACTERISTICS 2000 (2001), available at [http://factfinder.census.gov/homeaian/sf2\\_sf4.html](http://factfinder.census.gov/homeaian/sf2_sf4.html).

25. NEW MEXICO ANNUAL SOCIAL & ECONOMIC INDICATORS 2001 (on file with author). This report indicates that lawyers are still number one with a mean hourly wage of \$42.68 per hour. *Id.* See generally N.M. DEP’T OF LABOR, BUREAU OF ECON. RES. & ANALYSIS, NEW MEXICO ANNUAL SOCIAL & ECONOMIC INDICATORS 43 (2006), available at <http://www.dol.state.nm.us/pdf/API-2006.pdf> [hereinafter *New Mexico DOL 2006 Annual Social and Economic Indicators*].

26. NEW MEXICO POVERTY REPORT (2002) (on file with author). The national percentage of poverty is still one in four or 25.4%. U.S. CENSUS BUREAU, 2005 AMERICAN COMMUNITY SURVEY: POVERTY STATUS IN THE PAST 12 MONTHS, available at [http://factfinder.census.gov/servlet/STSelectServlet?\\_ts=179255028971](http://factfinder.census.gov/servlet/STSelectServlet?_ts=179255028971).

27. U.S. CENSUS BUREAU, *New Mexico Poverty Status in 1989 by Race*, <http://www.census.gov/hhes/www/poverty/census/cph1187.html> (last visited Jan. 31, 2007). 2000 census data indicates that for the native population in New Mexico, 34% are in poverty. This figure is down from 46% in 1990. U.S. CENSUS BUREAU, CENSUS 2000 DEMOGRAPHIC PROFILE HIGHLIGHTS: SELECTED POPULATION GROUP AMERICAN INDIAN AND ALASKA NATIVE ALONE OR IN COMBINATION WITH ONE OR MORE OTHER RACES, NEW MEXICO FACT SHEET, [http://factfinder.census.gov/servlet/SAFFFactsCharIteration?\\_submenuId\\_factsheet\\_2&\\_sse=on](http://factfinder.census.gov/servlet/SAFFFactsCharIteration?_submenuId_factsheet_2&_sse=on) (last visited Jan. 23, 2007).



*interchanged with indigenous knowledge, and if we don't, it doesn't take long within our communities to be set straight.*

*When I was an undergraduate, I studied political science, specifically [of] third world countries, because of the parallels I saw within Indian tribes. I became acutely aware of what was then referred to as the brain drain. Indian lawyers are a rare and valuable resource, and you must recognize this, and our nations must recognize this. It's a two-way deal, Indian professionals must be willing to yield their value and Indian tribes must value them. It is not a simple thing, this idea. Consider the statement of one respondent in the A.B.A. study:*

*Indian people seem to have bought into this attitude [of non-Indian superiority] and seem to believe non-Indians can do it better, trusting their opinions more, hiring them for key positions.<sup>28</sup>*

*Don't misunderstand me here; I'm not saying [that] non-Indians can't represent Indian people or tribes. We don't have enough Indian people in the profession to turn away our non-Indian allies. I'm talking about self-determination. Stemming the brain drain is key to self-determination. And what is self-determination? I like Professor Jim Anaya's definition best, and I repeat it as often as I am given the opportunity:*

*... [S]elf-determination is ... grounded in the idea that all [peoples] are equally entitled to control their own destinies. Self-determination gives rise to remedies that tear at the legacies of empires, discrimination, suppression of democratic participation, and cultural suffocation.<sup>29</sup>*

*Many things brought me home, after years of being educated away from home, one of them was this understanding [that] I gained—this understanding of the detrimental effect of the loss of educated people to the strength of the community. It really is much harder to do things at home, but the reward is so much greater.*

*But we must also recognize that our western legal training does not provide the universal solution to every issue we encounter in Indian Country. We are trained in the legal knowledge, skills, and systems used outside of our territories, but we must learn to be careful with this training within our own territories. There is something about indigenous knowledge that causes western knowledge to pale beside it.*

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28. 1998 A.B.A. Report on N.A. Women Lawyers, *supra* note 22, at 9.

29. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 75 (1996).

*We are autochthonous, a term used in describing people who live by being chthonic, that is by living in or in close harmony to the earth.<sup>30</sup> Our legal tradition can be described as autochthonous legal tradition. The chthonic legal tradition rejects formality in the expression of law and is characterized by the oral tradition.<sup>31</sup> Even as we move into this new millennium, we are still people grounded in the land.*

*We are humble people. We all know Indian people who are surprised to learn that they fall below the poverty guidelines because material things are not their measure of worth. And yet, when I learned that the dropout rate in Dulce<sup>32</sup> was the highest in the state at 30%,<sup>33</sup> that McKinley County with a 73% majority Indian population leads the state in poverty,<sup>34</sup> I know there is something wrong in the distribution of resources, and my legal training sends me looking for those legal tools to dismantle the discrimination and injustice that lie behind these figures. But what is the legal tool that will dispel racism, what is the legal tool that will put food on the table, and which theory of law will give a quality education to Indian students and what is the legal remedy for the devastating effects of alcohol within our communities?*

*That is our challenge. The people have high expectations of what lawyers can do.*

### III.

#### *Feet on the Ground/Head to the Sky (on not losing hope or getting lost)*

*I had the opportunity to hear Rosario Pu Gomez, the Guatemalan Maya-Quiche woman representative of the survivors of the death squads in*

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30. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 57 n.5 (2000).

31. *Id.* at 58-59.

32. Dulce is the headquarters for the Jicarilla Nation and is located within the Jicarilla Apache Nation in northern New Mexico. The 2006 Social and Economic Indicators report for New Mexico indicates that the dropout rate at Dulce has decreased to 11.1%. *New Mexico DOL 2006 Annual Social and Economic Indicators*, *supra* note 25, at 54.

33. New Mexico school data (on file with the author). The highest drop out rate in 2006 is in the House School District. The House School District is a very small district located in east central New Mexico. *New Mexico DOL 2006 Annual Social and Economic Indicators*, *supra* note 25, at 54.

34. New Mexico Poverty data (on file with the author). The 2006 Social and Economic Indicators report for New Mexico indicates that McKinley County with a 76.4% majority Indian population still leads the state with a 36.1% poverty rate. *New Mexico DOL 2006 Annual Social and Economic Indicators*, *supra* note 25, at 48.

*the Guatemalan civil war, speak on three occasions while she was here in New Mexico.<sup>35</sup> I was struck by her constant focus.*

*From the 1998 American Bar Association (ABA) Report on the Experiences of Native American Women Lawyers, we find “like other women of color, the most pervasive challenge Native American women face in law school is the need to repeatedly prove their competence.”<sup>36</sup> We know generally law students’ self-confidence plummets during law school; it is a struggle to maintain self-esteem. The law school environment can be difficult. I can say this after three years as a student and [after] nine years as a visiting and tenure-track professor.*

*Keep your feet on the ground by not losing sight of the realities of whatever situation you are dealing with. Don’t get side-tracked by bright lights or the lack of bright lights. Don’t lose sight of who you are. You need focus. Your reality is law school. You’re not home, you’re not a lawyer yet, and there is a lot to learn, but it’s your reality for now. It’s not glamorous, it’s mostly hard work and as the ABA report found, it can be a hostile, isolating and alienating environment to you in many ways.<sup>37</sup>*

*Keep your feet on the ground, and your head to the sky. Be hopeful, look to the future, keep the vision that brought you to law school, maintain your spirituality and be proud of yourself and your accomplishments. You’ll be out, using the knowledge and skills you acquired here in a relatively short time. You’ll be adding to the knowledge and skill as you determine soon enough. And do the same thing once you’re out there practicing; don’t lose sight of whatever the realities are, and keep your head to the sky.*

*Before I close, I need to recognize the one person who saw me as a professor, before I even saw it myself, and that is my husband, Robert. He said to me, “You ought to be teaching.” I believed him, that’s how I come to be here. I also want to recognize my eldest son, Manuel. Manuel was*

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35. Rosario Pu Gomez is an indigenous human rights leader. She visited UNM School of Law in 2001 to speak about the claim she, along with Nobel Peace Prize winner Rigoberta Menchu Tum and numerous other Guatemalans, filed in Spain to bring former Guatemalan dictator General Efraín Rios Montt and other leaders to justice under the provisions of the Spanish laws against genocide and torture and the principal of universal jurisdiction. In 2003, the Spanish Supreme Court found no jurisdiction existed except as to those Spanish citizens who were victims. *In re* City of Madrid, Decision No. 327/2003 (Feb. 25, 2003), available at <http://www.derechos.org/nizkor/guatemala/doc/stsgtm.html>. Rosario’s grandparents and other relatives were killed in a massacre in Cantón Pamacebal Segundo on January 2, 1982. See Central Court Proceedings #1, Federal Court, Preliminary Inquiries 331/99, Judicial Decree (Mar. 27, 2000), <http://www.pangea.org/impunitat/autoenglish.html> (last visited Oct. 22, 2006) (originally finding jurisdiction). She is also involved in work to gain reparations for the victims of Guatemala’s violent war and is a leader of Campesino Unity Committee (CUC).

36. 1998 A.B.A. Report on N.A. Women Lawyers, *supra* note 22, at 6.

37. *Id.*

*eleven when I started teaching, he's a young man now. I learned a lot from Manuel, from being a mother, from mothering a son amidst blatant and subtle racism and discrimination [and] benign neglect, which are a part of [New Mexico's] tri-cultural history and [buried beneath the] mythology [of tri-cultural harmony]. As a mother of two Indian sons, I do not apologize for my directness about racism and discrimination, because it is young men of color who carry the brunt of both in our society. The Inmate Profile for New Mexico shows that for FY 2000, 75% of the inmates were Native American, black, oriental, or hispanic, 30% were under thirty years of age, and 65% had twelve or less years of education and of the 5,295 person incarcerated, 4,857 are male.<sup>38</sup> There are strong correlations between males of color, poor education, and incarceration. My sons, my family, my people, and the challenges they face are my reality.*

#### IV.

#### *Remember the People and Go Home*

*We are "Indian" because we belong to a tribal community. Our identity arises from our relationship to a community. In whatever you do, do not forget that community. I don't pretend to ignore the complexities of what going home can mean. Do something for your community, live in it, do some legal work for it, retire to it, visit it. There is a sign that hangs in the American Indian Law Center (AILC) written in the Zuni language. When I worked at the AILC I found the literal interpretation of that sign. It is:*

*"The people, holding them in your hand, do not let them fall."*

*You hold the people in your hand. Don't let them fall.*

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38. FY 2000 Inmate Profile for New Mexico (on file with author).

## I. INTRODUCTION

Pedagogy is, in part, a technology of power, language, and practice that produces and legitimates forms of moral and political regulation, that construct and offer human beings particular views of themselves and the world. Such views are never innocent and are always implicated in the discourse and relations of ethics and power. “To invoke the importance of pedagogy is to raise questions not simply about how students learn but also how educators . . . construct the ideological and political positions from which they speak.”<sup>39</sup>

Scholarship related to clinical law teaching and law teaching, more generally, is abundant.<sup>40</sup> Scholarship regarding the teaching of Indian law<sup>41</sup> and clinical teaching in Indian law clinics<sup>42</sup> has been produced on a much more modest scale. Scholarship on the pedagogy of such teaching is less prevalent. Educators have considered pedagogy in respect to the oppressed,<sup>43</sup> and in respect to ethnic and racial identity,<sup>44</sup> nationality,<sup>45</sup>

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39. Margaret E. Montoya, *Voicing Differences*, 4 CLINICAL L. REV. 147, 162 n.49 (1998) (quoting HENRY GIROUX, *BORDER CROSSINGS: CULTURAL WORKERS AND THE POLITICS OF EDUCATION* 81 (1992)).

40. Two journals publish scholarship directly related to legal education and clinical legal education. The *Journal of Legal Education*, a quarterly publication of the Association of American Law Schools (AALS), holds as its primary purpose to foster an exchange between ideas and information regarding legal education. The *Clinical Law Review*, a semi-annual peer-edited journal, which is jointly sponsored by the Association of American Law Schools, the Clinical Legal Education Association (CLEA) and New York University School of Law, devotes itself to lawyering theories, issues, and clinical legal education.

41. Gloria Valencia-Weber, *Indian Law and American Indians in the Law Schools*, Address before the Race, Law, and Curriculum Workshop, 1 UNIV. OF FLA. (n.d. 2005) (on file with the author); Gloria Valencia-Weber, *Law School Training Of American Indians As Legal-Warriors*, 20 AM. INDIAN L. REV. 5 (1996) [hereinafter *Law School Training*]; Strickland & Valencia-Weber, *supra* note 16; G. William Rice, *There and Back Again-An Indian Hobbit's Holiday: "Indians Teaching Indian Law"*, 26 N.M. L. REV. 169 (1996). In 1996, the University of New Mexico School of Law held a conference on the teaching of Indian Law and the development of Indian Law clinics. Some of the presentations from that conference were produced in the *New Mexico Law Review*, volume 26, in 1996.

42. See, e.g., Christine Zuni Cruz, *Four Questions on Critical Race Praxis: Lessons From Two Young Lives In Indian Country*, 73 FORDHAM L. REV. 2133 (2005); Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLINICAL L. REV. 195 (2002); Christine Zuni Cruz, *[On The] Road Back In; Community Lawyering In Indigenous Communities*, 5 CLINICAL L. REV. 557 (1999), reprinted in 24 AM. INDIAN L. REV. 229 (2000); Renee Taylor, *All My Relationships*, 26 N.M. L. REV. 191 (1996); Robert Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741 (1996).

43. See PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (Myra Bergman Ramas trans., The Seabury Press 1970) (1968).

44. See, e.g., Peter Goodrich & Linda G. Mills, *The Law of White Spaces: Race, Culture and Legal Culture*, 51 J. LEGAL EDUC. 15 (2001); Kimberlé Williams Crenshaw, *Foreword: Toward A Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1998); Alfred Mathewson, *Why I Sing All That Jazz in Antitrust and Corporate Law Courses or Race in*

gender, and sexuality, and some have considered all of them together.<sup>46</sup> Indigenous educators have approached the education of indigenous peoples by taking into consideration the differences in “knowing” that indigenous and non-indigenous people possess to articulate a unique approach to education that bridges the two.<sup>47</sup> In this paper, I consider my own approach to teaching about law/lawyering for indigenous peoples in the clinical setting, as well as in teaching about the law of indigenous peoples and suggest the emergence of a unique pedagogy and ethic of law and lawyering (law/ying) for indigenous peoples. In doing so, I do not intend to exclude the work of others in this area or overclaim my position in the development of such a pedagogy by articulating it here.

Since native peoples entered the legal profession and the legal academy, the perspectives that they bring as indigenous peoples have been reshaping the profession and the academy.<sup>48</sup> Likewise, non-indigenous lawyers and academicians have been active in the evolution of the

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Ordinary Course: Utilizing the Racial Background in Antitrust and Corporate Law Courses (n.d.) (unpublished manuscript) (on file with the author).

45. See, e.g., Jill Ramsfield, *Is “Logic” Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom*, 47 J. LEGAL EDUC. 157 (1997).

46. See, e.g., Montoya, *supra* note 39 (providing commentary on the work of three clinical scholars published in the same issue of the *Clinical Law Review*). See also Jane Harris Aiken, *Striving To Teach “Justice, Fairness, And Morality”*, 4 CLINICAL L. REV. 1 (1997); Kimberley E. O’Leary, *Using “Difference Analysis” To Teach Problem-Solving*, 4 CLINICAL L. REV. 65 (1997); Carolyn Grose, 4 CLINICAL L. REV. 109 (1997); Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993).

47. See, e.g., GREGORY CAJETE, *LOOK TO THE MOUNTAIN: AN ECOLOGY OF INDIGENOUS EDUCATION* (1994).

48. See, e.g., Zuni Cruz, *Four Questions*, *supra* note 42; John Borrows, *Creating an Indigenous Legal Community*, 50 MCGILL L.J. 153 (2005); John Borrows, *Fourword: Issues, Individuals, Institutions and Ideas*, 1 INDIGENOUS L.J. vii (2002); James (Sa’ ke’ j) Youngblood Henderson, *Postcolonial Indigenous Legal Consciousness*, 1 INDIGENOUS L.J. 1 (2002); Victoria Sutton, *American Indian Law-Elucidating Constitutional Law*, 37 TULSA L. REV. 539 (2001); Zuni Cruz, *The Road Back In*, *supra* note 42; Robert B. Porter, *Tribal Lawyers as Sovereignty Law Warriors*, 6 KAN. J.L. & PUB. POL’Y 7 (1997); G. William Rice, *Of Cold Steel And Blueprints: Musings Of An Old Country Lawyer On Crime, Jurisprudence, And The Tribal Attorney’s Role In Developing Tribal Sovereignty*, 7-WTR KAN. J.L. & PUB. POL’Y 31 (1997); Williams, Jr., *supra* note 42; Rice, *supra* note 41; Taylor, *supra* note 42; John Burrows, *Constitutional Law From A First Nation Perspective: Self-Government And The Royal Proclamation*, 28 U. B.C. L. REV. 1 (1994); Robert Yazzie, *Law School As A Journey*, 46 ARK. L. REV. 271 (1993); Deloria, *Legal Education and Native People*, *supra* note 15; P.S. Deloria & Robert Laurence, *What’s An Indian: A Conversation About Law School Admissions, Indian Tribal Sovereignty And Affirmative Action*, 44 ARK. L. REV. 1107 (1991); Rennard Strickland, *An Essay: Take Us By The Hand: Challenges of Becoming An Indian Lawyer*, 2 AM. INDIAN L. REV. 47 (1974); Monroe E. Price, *Lawyers on the Reservation: Some Implications for the Legal Profession*, 1969 L. & SOC. ORDER 161; Francisco L. Olguin & Albert E. Utton, *The Indian Rural Poor: Providing Legal Services in a Cross-Cultural Setting*, 15 KAN. L. REV. 487 (1967).

practice<sup>49</sup> and teaching of Indian Law.<sup>50</sup> However, what I seek to consider is how an indigenous perspective of law and justice changes how law is practiced and viewed. Additionally, in distinguishing between the practice of law outside tribal communities and the practice of law within tribal communities, I examine the concept of the training of “legal warriors.”<sup>51</sup> In all of this, I suggest that a different pedagogy and ethic of law/ying is necessary to prepare law students for practice within, with and on behalf of Indigenous communities/nations. Further, in approaching the legal education of indigenous peoples and those who will advocate for them, it is important to prepare future lawyers to respect and understand the native frame of reference that can affect their legal representation in critical ways.

Learning the dominant pedagogy and ethic of law/lawyering is not enough because indigenous peoples even in our modern time operate according to a legal tradition, which has guided them since time immemorial. This legal tradition oftentimes is submerged beneath a modern government structure, and sometimes derails the lawyer’s best laid legal plan; other times the principles imbedded in the American legal tradition derail the legal tradition, leaving confusion and frustration in the community in its wake. Lawyers working within indigenous communities are thoroughly trained in the American legal system. They are often not prepared for their encounters and the clash of their training with the indigenous legal tradition.

In this paper, I seek to articulate an emerging pedagogy, one that springs from my experience teaching in an Indian law clinic, but also one that it tied to my experience as a lawyer and as an Associate Justice of an indigenous appellate court. I also seek to address other issues related to

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49. Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231 (1987); see also LAURENCE HAUPTMAN, TRIBES & TRIBULATIONS, MISCONCEPTION ABOUT AMERICAN INDIANS AND THEIR HISTORIES 111 (1995) (describing some of the major work of non-Indian attorneys on behalf of Indian peoples); Tracy N. Zlock, *The Native American Tribe as Client: An Ethical Analysis*, 10 GEO. J. LEGAL ETHICS 159 (1996).

50. David H. Getches, *Dedication To Professor Ralph W. Johnson*, 72 WASH. L. REV. 995 (1997); Frank Pommeshiem, *Democracy, Citizenship, And Indian Law Literacy: Some Initial Thoughts*, 14 T.M. COOLEY L. REV. 457 (1997); Cynthia Ford, *Integrating Indian Law into a Traditional Civil Procedure Course*, 46 SYRACUSE L. REV. 1243 (1996). The *University of Tulsa Law Review* published essays on the “mainstreaming” of Indian Law presented at the A.A.L.S. Section on Indigenous Nations and Peoples 2002 annual meeting. See Cynthia Ford, *Including Indian Law in a Traditional Civil Procedure Course: A Reprise, Five Years Later*, 37 TULSA L. REV. 485 (2001); Barbara P. Blumenfeld, *Integrating Indian Law Into A First Year Legal Writing Course*, 37 TULSA L. REV. 503 (2001); Kenneth H. Bobroff, *Indian Law in Property*, 37 TULSA L. REV. 521 (2001); Victoria Sutton, *supra* note 48; Jack F. Williams, *Integrating American Indian Law into the Commerical Law and Bankruptcy Curriculum*, 37 TULSA L. REV. 557 (2001).

51. See, e.g., Valencia-Weber, *Law School Training*, *supra* note 41 (referring to the “legal-warrior”); Henderson, *Postcolonial Indigenous Legal Consciousness*, *supra* note 48, at 3 (referring to Indigenous lawyers as “legal warriors”).

being a member of the legal academy situated outside of a native epistemology, which influences law within native communities through teaching the professionals who will become important actors. Some academicians also influence law through direct interaction as a result of lawyering within tribal court systems, on behalf of tribes and individual natives and judging within a specific community.

I begin by addressing the current pedagogy employed in training indigenous students in law, as well as explore the preparation of so-called “legal warriors.” I propose a reframing of this preparation by employing an indigenous “perspective” and “intellectual tradition”<sup>52</sup> of leadership during times of war (war/external leadership) and times of peace (peace/internal leadership)<sup>53</sup> as a device to illustrate the differences in approach when operating inwardly (internally) and outwardly (externally). Among the Pueblos, leadership responsibility is related to the internal and external nature of matters.<sup>54</sup> In Part III, I address the role of the academician in respect to indigenous justice and in Part IV, I look at the emerging pedagogy of law/lawyering for indigenous peoples that emerges from the indigenous legal tradition. In Parts V and VI, I briefly consider scholarship and theory and praxis. I conclude by advocating both exposing students to the indigenous legal tradition as a contrastive approach to teaching Indian

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52. John Borrows, *supra* note 48 (introducing a First Nation perspective into legal narrative and employing the Trickster as a First Nation “intellectual tradition”); *see also* Elizabeth Cook Lynn, *American Indian Intellectualism And The New Indian Story*, 20 AM. INDIAN Q. 57 (1996).

[T]he American Indian intellectual” is to many people a bizarre phrase. . . It is as though the American Indian has no intellectual voice with which to enter into America’s important dialogues. The American Indian is not asked what he thinks we should do about Bosnia or Iraq. He is not asked to participate in Charlie Rose’s interview program about books or politics or history. It is as though the American Indian does not exist except in faux history or corrupt myth.

*Id.* (internal citations omitted).

53. *See, e.g.*, Law 90, *The Great Law of Peace of the People of the Longhouse, Kaianerekowa Hotinonsionne* (White Roots Of Peace, Mohawk Nation at Akwesasne, Roosevelttown, N.Y.) (on file with the author). Law 90 states:

When the Five Nations Council declares war, any chief of the League may enlist with the warriors by temporarily renouncing his sacred chieftainship title which he holds through the nomination of his women relatives. The title then reverts to them and they may bestow it upon another temporarily until the war is over, when the chief, if living, may resume his title and seat on the council.

*Id.* The five War Chiefs of the League were not permitted to participate in the proceedings of the Council of the League, but they were to convey messages, “take up arms in case of emergency” and “lay the cases, questions, and propositions of the people before the Council of the League.” *Id.* at 37. *See also* SHARON O’BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS* 20 (1989) (“Iroquois law further decreed that civil chiefs should not also serve as war leaders. If a chief felt obliged to lead a war expedition, he was required to relinquish his civil position.”)

54. O’BRIEN, *supra* note 53, at 29.



law and by providing students with a pedagogy that allows them to utilize “literacies of power” and to carry them into their work as professionals.

## II. INDIGENOUS PEOPLES AND THE PEDAGOGY AND ETHICS OF LAW/LAWYERING

The pedagogy and ethics of law/lawyering in United States law schools is based on American educational principles, values, logic,<sup>55</sup> and law.<sup>56</sup> It is designed to prepare lawyers who will practice within the American legal system. Even if one seeks to engage the American legal system, seeking systemic or fundamental change in the law, one must first learn how to be a lawyer in order to participate in the system. This is the first premise behind the admission and education of Indigenous Peoples in law schools.<sup>57</sup> The exposure to and education of Indigenous Peoples in the American legal tradition has motivated Indigenous lawyers and scholars to question and challenge fundamental principles in federal Indian law.<sup>58</sup> However, indigenous peoples do not exist exclusively within an American legal system and it is time to move beyond the first premise in the education of Indian students in law schools.

The logic, values, and principles in American law quite simply are not the same as those in indigenous legal traditions and placing the burden on each indigenous law student to balance the meeting of the two on their own, means that we are not preparing them for the difficult challenges they will encounter as tribal advocates, nation-builders, and leaders. Federal Indian law, American law, and advocacy courses provide only partial preparation for such work.

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55. Ramsfield, *supra* note 45.

We teach inductively, giving students little pieces of doctrine, convention, and practice, asking them to put the pieces together. We reward those who do so quickly. This method resembles a scientific approach, where the observer collects data and poses a theory that explains the data, much as lawyers must do when they “observe” the client’s account of what happened and connect that account with the law it invokes.

*Id.* at 158. Likewise, “cultures create their own ‘logic’ in problem-solving.” *Id.* at 160-61.

56. See GLENN, *supra* note 30, at 205–50 (2000) (describing the common law tradition).

57. Deloria, *Legal Education and Native People*, *supra* note 12. Deloria expresses the view that the “whole point of law school is to learn what the machine looks like and then to drive it.” *Id.* at 25-26. He explains that native students are in law school “to learn how to be lawyers” and to learn how to be good technicians “so that they could have the tools to work within their view of the world effectively.” *Id.* at 34, 35. Additionally, he provides that “both the educators and the Indian students should concentrate on the techniques and skills.” *Id.* at 38.

58. See, e.g., ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990); Robert Odawi Porter, *The Inapplicability of American Law To The Indian Nations*, 89 IOWA L. REV. 1595 (2004); Henderson, *Postcolonial Indigenous Legal Consciousness*, *supra* note 48.

A. DRAWING FROM AN INDIGENOUS FRAMEWORK OF LEADERSHIP  
AND ETHICS FOR LAWYERING

I teach both in the clinic and in the general curriculum. I have taught a course on the Law of Indigenous Peoples, addressing both the traditional and modern law of indigenous peoples for several years. The teaching of a course on the Law of Indigenous Peoples, in particular, has informed my teaching and understanding of law/lawyering for indigenous peoples. The legal tradition of Indigenous peoples includes law on leadership and ethics, which are both elements of law/ying. In reflecting on these legal traditions, it is clear to see the connection between the indigenous legal tradition and how law and practice in indigenous communities and for indigenous peoples are related to ideas imbedded in this legal tradition.<sup>59</sup>

Each tribe has unique traditional law in respect to leadership, including how leaders should behave, how leadership is bestowed, and how leaders should relate to their people. A common framework for leadership in indigenous communities in the United States is that of war and peace chiefs, or red and white governments, operating on the premise that leadership shifted during times of war and times of peace.<sup>60</sup> Such a dichotomy recognizes that a certain type of leadership is needed for times of war, and another for times of peace. It also recognizes the difference between leadership exercised against enemies and that exercised towards or in respect to the people. Further, leadership can be divided internally and externally.

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59. GLENN, *supra* note 30, at 56 (2000) (describing it as a chthonic legal tradition).

60. RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 22 (1975). “War and peace are separate activities which require two distinct political organizations, as well as dual obligations for all men and women.” *Id.*

Each Cherokee Village had two distinct governmental structures, a white, or peace, government and a red, or war, government. The white government was supreme in all respects except the making of war. During times of peace the white government controlled all tribal affairs. In times of war the red government was in control of all tribal affairs. The two governmental structures were never in operation at the same time. The white government was essentially a stable theocracy composed of the older and wiser men of the tribe, which constituted a tribal gerontocracy. The red organization was, on the other hand, flexible, responsive to changing conditions and controlled by the younger warriors.

*Id.* at 24. See also SANDO, *supra* note 9, at 13-15 (describing the present day powers of the War Chief and his assistants in Pueblo government, and the theocratic power of the Cacique, and the authority of the Governor); PAULA GUNN ALLEN, THE SACRED HOOP, RECOVERING THE FEMININE IN AMERICAN INDIAN TRADITIONS 18-22 (1992) (discussing the “internal” and “external” power of the red and white governments in the Southeast and the “internal” and “external” power of the Pueblo offices of the “cacique” and the “war captain”); Ernesto Lujan, *Traditional Dispute and Conflict Resolution—Pueblo of Taos*, Materials presented at the Indigenous Justice Conference: Justice Based on Indian Concepts in Santa Fe, N.M. (n.d. 1993) (on file with the author).

The concept of the “legal warrior” who engages in legal skirmishes against the forces that would challenge indigenous nations and their sovereignty has been embraced as a description of indigenous peoples who are prepared in law school to lawyer on behalf of tribes.<sup>61</sup> The war leader prepares the people for battle with the enemy, decisions often have to be made in the heat of battle, and by a process different than such decisions might otherwise be made outside battle, and of course, such decision-making is driven by the interest of protecting the people and prevailing over the enemy. Such is the leadership exercised by the War Chief or the Red Government. The enemy must be studied and their ways taken into account to exploit their weaknesses. This type of leadership is crucial at time of war.

The preparation of law students as “legal warriors” then is appropriate for the times when the indigenous lawyer is fighting forces that seek to challenge the sovereignty of the nation or in some manner harm the people.<sup>62</sup> American law schools are good at preparing “legal warriors” or war leaders. Federal Indian law courses help the legal warrior know the law of the opponent or enemy to sovereignty. Other law school courses help the “warrior” understand American law and procedure so that it may be utilized to help the warrior maneuver the legal territory, when the warrior is operating in that territory. Perhaps the war metaphor will also help us to consider what happens when the war effort results in loss as opposed to victory.<sup>63</sup> War losses direct the discourse to strategic retreat, retrenchment, the need for new strategies, the need to consider collateral damage and the costs of new wars, or the employment of guerilla warfare in a legal metaphorical sense. The war metaphor certainly puts one on the highest guard, alert and aware of all that can be lost.

However, at times of peace, when the leadership was not dealing with an enemy, the “warrior” was not the prevalent leader. Peace time calls for a different type of leader and a different type of leadership. In some

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61. Valencia-Weber, *Law School Trainings*, *supra* note 41 (“legal-warriors”); Porter, *Tribal Lawyers as Sovereignty Warriors*, *supra* note 48 (“sovereignty warriors”); Henderson, *Postcolonial Indigenous Legal Consciousness*, *supra* note 48 (“legal warriors”). *See also* HAUPTMAN, *supra* note 49, at 109 (1975) (providing a non-lawyer perspective and the phrase “warriors with attaché cases”). An interesting border is one between “warrior” and “hostile;” when is the lawyer a warrior and when is the lawyer a hostile? Hauptman also addresses “hostiles” as a stereotype. *Id.* at 49. Gerry Spence provides a related but different metaphor regarding the lawyer as “hunter.” GERRY SPENCE, *THE MAKING OF A COUNTRY LAWYER* (1996) (describing the lawyer’s work as “killing in the courtroom”).

62. One of my Indian Law professors, Professor Fred Ragsdale, often referred collectively to both the litigated federal Indian law cases we studied and the cases yet to come, such as *Wild Beast v. Sovereign Nation*. Interestingly, we never discussed who was the wild beast and who was the sovereign nation.

63. *See generally*, HAUPTMAN, *supra* note 49.

societies, one could not function as a war leader or a warrior and a peace leader at the same time<sup>64</sup> and in others, the leaders are two completely separate individuals with divisions of authority separated in terms of their internal or external nature.<sup>65</sup>

Therefore, in preparing law students for lawyering, we must also prepare them for law/lawyering internally within the community or “peace leadership”, as well as preparing them to be “legal warriors” or “war leaders” when they are operating against threats to sovereignty *external* to the community. The peace chief exercises leadership differently than the war chief. Internally, lawyers are dealing with the people and must adapt their style of lawyering, much like the peace chief exercised a different type of leadership. During peace time decision-making is handled differently. There is more time to focus on process rather than a need to make immediate and quick life or death decisions. A shift must occur because the lawyer is not at war with the people internally. Likewise, internally, knowledge of the internal law of the people is more important than knowledge (of the law) of the outside. Not all native law students are prepared in the study of the traditional law and contemporary law of their own nation or other indigenous nations; they rarely study their own legal histories, and if they do, often it is on their own or after they leave law school, or occasionally before they come to law school.

### III. THE ACADEMIC AS OUTSIDER OR ACADEMIC PERSPECTIVES ON INDIGENOUS JUSTICE

In discussing this emerging pedagogy, I begin with a consideration of indigenous justice, as it is my teaching of the Law of Indigenous Peoples that has served to influence my teaching of law/ying and practice in clinic.

The terminology we choose is significant. As Paulo Freire states, “[T]o speak a true word is to transform the world.”<sup>66</sup> What exactly is “indigenous justice?” Is it the justice delivered by our tribal courts? Or is it the justice that is unique to indigenous nations, which stems from our purely indigenous (traditional) law? Indigenous justice, by virtue of the

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64. The Great Law of Peace, *supra* note 53, at Law 90 (“When the Five Nations Council declares war, any chief of the League may enlist with the warriors by temporarily renouncing his sacred chieftainship title which he holds through the nomination of his women relatives. The title then reverts to them and they may bestow it upon another temporarily until the war is over, when the chief, if living, may resume his title and seat on the Council.”)

65. SANDO, *supra* note 9 (explaining when cacique appoints the War Chief and the Governor). In this modern time, the War Chief continues to care of matters outside the village. Lujan, *supra* note 60.

66. FREIRE, *supra* note 43, at 87.

need to refer to it as “indigenous” hints at a different type of justice, (perhaps even a “separate justice,” but unlike the one Samuel Brackel spoke so disparagingly of),<sup>67</sup> it carries a promise of an indigenous type of justice. Is it different? Is indigenous justice different from the dominant form of Anglo-American justice? I believe that indigenous peoples have a different sense of “justice,” and while justice can transcend color and cultural differences, native peoples have a concept of justice that differs from Anglo-American justice. Even so, we must recognize that indigenous systems of justice have been colonized and as such have incorporated Anglo-American legal processes and law. So, is indigenous justice characterized more by the constricted space it is allowed to operate within and as it has been misshapen by the dictates of federal Indian law? This external influence has affected indigenous justice, but I surmise a colonized sphere cannot fully contain indigenous justice. Indigenous justice is bound up with that part of indigenous law that represents the essence of who indigenous peoples are, as reflected in our creation stories and journey narratives, our placement and movement on the land, our responsibilities and relationships to one another and to all that occupy our place/space with us.<sup>68</sup> It is all of this that I seek to explore as an academic whose focus of study is indigenous law.

I will begin first with the “academic perspective” and discuss the influence the academician exercises through scholarship, teaching, and “praxis.”<sup>69</sup> “Academic” perspective suggests the perspective gained through intellectual study, research and serious consideration of indigenous justice. It also raises the specter of distance, maybe professional distance, and maybe institutional distance, but also of elitism, elitism of the professional in whatever field, but of the legal profession in the present context. We need to address all of these. It is significant that “indigenous”

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67. SAMUEL BRACKEL, *AMERICAN INDIAN TRIBAL COURTS: THE COST OF SEPARATE JUSTICE* (1978). Though it may have been the hope of some, separate and identical was never part of the bargain. See CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW* 14-19 (1987) (discussing the creation of a “measured separatism” free from interference to indigenous nations in the United States as a promise and outcome of treaty negotiations).

68. Christine Morris, *Jurisprudential Reading of Plains Of Promise* (n.d. 2006) [hereinafter *Jurisprudential Reading*] (unpublished thesis, Griffith University) (on file with the author). This theses captures the complex position of present day aboriginal peoples to the original and evolving aboriginal law, the individual rights and responsibilities to rebalance and “answer the call of the powerful land,” and the law of relationships which lead to the “balance of nature, culture, and law” through a “jurisprudential reading” of *Plains Of Promise*, a novel by Australian aboriginal author, Alexis Wright.

69. FREIRE *supra* note 43, at 87 & n.1. “There is no true word that is not at the same time a praxis.” *Id.* Footnote one indicates word linked to reflection and action is “praxis,” word without action is “verbalism” or rhetoric and word without reflection is “activism,” or “action for action’s sake.” *Id.* at 88.

justice and “indigenous” law have emerged in legal academia. In my opinion, this is due largely to the influence of indigenous peoples in the legal profession and in academia generally. The significance of an intellectual discourse in indigenous law and indigenous justice studies is tremendous. It is an important piece of self-determination for native peoples to engage in an exchange, a dialogue, a creation of a space through words to explore ideas and thoughts about justice and law from our perspectives and within our nations. It represents a critical shift from the focus in law and legal studies on federal Indian law. This is in large part due to the shift in thinking that occurs when the indigenous themselves (previously the subjects of study and objects of representation) are involved in the legal profession and its institutions. But, at the same time, it raises some important points for consideration related to the distance of most institutions and many academicians from indigenous peoples, governments, and communities.

Here, two points are critical: first, in indigenous law and justice, the expertise lies without the institutions. It lies in the people, in the land,<sup>70</sup> within the communities, and often in indigenous languages, peoples, and texts radically different from that of legal institutions. The second point is the need to interrogate the role of academicians and legal elites in the emerging justice systems and in developing law within tribal nations. Is the role of the academician solely to stimulate discourse,<sup>71</sup> or to control and influence (in the way that elites trained in the dominant institutions tend, indeed are trained, to do so as to reinforce the existing structure), or is it to stimulate critical thinking, promote dialogue to engage the people<sup>72</sup> affected by “indigenous justice” and law in the very creation of this indigenous justice and law? All are possible. They occur in some fashion throughout Indian Country and raise some caution not only for academicians but also for indigenous communities that utilize academicians and other legal elites in their justice systems, as well as in the development of law. As professionals educated in the western legal tradition, are we as academicians seeking to replicate what we know or are we seeking to dialogue with those within our community to arrive together at a system of justice and to develop law that reflects our indigenous selves in the time, in the place and political space we presently occupy (even as we seek to transcend these limitations)? As an indigenous academician I have to question my success

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70. Morris, *Jurisprudential Reading*, *supra* note 68, at 9. (“[L]and and humans are inexorably spun into a pattern of legal relationships.”).

71. FREIRE, *supra* note 43, at 96.

72. *Id.*

in stimulating critical thinking and discourse and resist replicating the dominant structures of justice and law at the tribal level at all times.

Secondly, it is necessary to address the pedagogical influence of the academician in teaching about indigenous justice and law. Why is or should legal academia be interested in indigenous justice issues/concepts? There are several reasons for those institutions invested in teaching and researching Indian law. First, federal Indian law is only a part of the picture. Second, the study of indigenous justice systems and law represent the most critical aspect of indigenous self-determination in this country. Both are emerging from a dormant stage generally. The development of “indigenous” justice systems and “indigenous” law represent the possibility of a (re)emergence of ways of thinking partially submerged beneath the reorganized government structures and law. These “reorganized” government structures were put in place to “help” Indian tribes ravaged by loss of people, land, and a way of life pursuant to the Indian Reorganization Act (IRA),<sup>73</sup> and countless other federal Indian law continue in this vein.<sup>74</sup> This possibility of a re-emergence is linked to a clear understanding of the history of Indian nations in respect to their systems of political organization, governance, structure, and law. It is also linked to an understanding of the “cultural invasion”<sup>75</sup> the IRA represented in terms of the political organization of tribal nations. Engaging students and academicians in the study, research, and understanding of indigenous justice systems and law creates a space for intellectual strengthening of ideas, and critical analysis of present structures of law and justice operating in Indian country, an essential component of true indigenous self-determination.

This has been occurring in many different places across the nation in a variety of ways, as well as around the indigenous world, but I will describe my involvement in the study of indigenous law/justice systems as a way of showing the complexity of this endeavor. My work at UNM began in the clinic with the representation of clients in tribal jurisdictions, but I quickly

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73. Indian Reorganization Act, 25 U.S.C. §§ 461-479 (2000).

74. *See, e.g.*, Okla. Indian Welfare Act, 25 U.S.C. §§ 501-509 (2000) (allowing the Five Civilized Tribes to organize under the Indian Reorganization Act); Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (2000) (binding indigenous governments to federal constitutionally enshrined rights); Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1601-1629h (2000) (converting Alaska Native Nations into chartered Alaska corporations and encouraging economic development along corporate and capitalist lines); Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (2000); Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2000) (regulating tribal economic development in the gaming industry).

75. FREIRE, *supra* note 43, at 152 (discussing cultural invasion as a “phenomenon, [where] the invaders penetrate the cultural context of another group, in disrespect of the latter’s potentialities; they impose their own view of the world upon those they invade and inhibit the creativity of the invaded by curbing their expression”).

realized that the federal Indian law courses and a tribal courts course we offered were not enough to prepare students for work before tribal tribunals. Nor did these courses completely prepare students for the project work tribes asked us to engage in, or ultimately, for the work students would encounter after law school. So I began teaching a course on the Law of Indigenous Peoples, which focuses specifically on the uniqueness of the internal law of Indian nations. We also offer Navajo Law and Procedure. We also implemented a Journal on the law of indigenous peoples, which is presently called the *Tribal Law Journal*, an electronic journal, accessible across the indigenous world.<sup>76</sup>

It is hard to separate out an “academic” perspective because my “academic” perspective is informed by the fact that I am also an indigenous person from Isleta Pueblo and Ohkay Ówíngéh,<sup>77</sup> and an enrolled member of the Pueblo of Isleta. I have served as an Associate Justice for my Pueblo’s Appellate Court for seven years, and as a former trial level judge for other Pueblos and as an administrator and appellate court judge for the Southwest Intertribal Court of Appeals (SWITCA) prior to that. I am a practicing attorney and I teach both in the clinic and in the classroom as a professor. All of these affect my “academic” perspective as a teacher and a scholar, significantly.

As an indigenous academic there are at least four areas that are of equal interest to me in indigenous justice and law. The first is critical legal study, that is, the analysis of federal Indian law from a critical perspective, particularly focusing on race, color, and power to question their resultant impact on law and justice. Examining power and privilege internally is also of interest to me. The second is looking at the impact of colonization in respect to tribal justice systems, tribal law, and current trends of decolonization, as well as those which lead to reinforcing colonization or lead to new forms of colonization. Third, I am interested in exploring the current challenges from a historical perspective and looking at the current approaches to meet those challenges in tribal efforts to take care of ourselves as indigenous peoples with the right to self-determination. Fourth, I am interested in the study and application of the law of indigenous peoples. I am particularly interested in practical aspects of how we use and value our own thinking, our indigenous knowledge and epistemologies in this

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76. University of New Mexico, Tribal Law Journal, <http://tlj.unm.edu> (last visited Jan. 22, 2007).

77. Formerly known as San Juan Pueblo (de los Caballeros), the name given by Don Juan de Oñate in 1598, tribal members officially changed the Spanish name to their original name, Ohkay Ówíngéh, in September 2005. The translated English meaning is “Place of the Strong People.”



process.<sup>78</sup> I see this intellectual movement as critical not only within individual indigenous nations but in creating dialogue and support across and between indigenous peoples worldwide. Across the national boundaries of Bolivia, Australia, Papua New Guinea, and throughout the South Pacific, I have engaged in international dialogues about indigenous justice and law with indigenous peoples. Though we stand in different relationships to our national governments, it is clear our own indigenous law plays an essential role in our futures.

#### IV. TEACHING LAW/YERING APPROACHES

*[T]he heritage of an indigenous people is not merely a collection of objects, stories and ceremonies, but a complete knowledge system with its own concepts of epistemology, philosophy, and scientific and logical validity. The diverse elements of an indigenous people's heritage can only be fully learned or understood by means of a pedagogy employed by these peoples themselves, including apprenticeship, ceremonies, and practice.<sup>79</sup>*

Teaching students the original law of tribes has aided my understanding that this law wrestles with the legislated law of tribes and the match is intensified the greater the gulf between the two.<sup>80</sup> The original and traditional law of indigenous peoples is the foundation of a native frame of reference, which influences thought and behavior of those socialized in that law. The native frame of reference in the traditional law has helped me to see how and where it impacts the law/lawyering of indigenous peoples and how it informs law/lawyering. It is these intersections that I seek to explore as aspects of pedagogy for teaching law/lawyering for indigenous peoples within the indigenous community.

In teaching in an Indian law clinic in which we engage in both individual and group representation there are several important aspects of lawyering that have been significant in our work. It is these particular aspects of lawyering that have led me to an understanding that in respect to lawyering for native clients, there are basic components of teaching students to work effectively with native clients that form a unique pedagogy

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78. MARIE BATTISTE & JAMES (SA'KE'J) YOUNGBLOOD HENDERSON, PROTECTING INDIGENOUS KNOWLEDGE AND HERITAGE: A GLOBAL CHALLENGE 36 (2003); CAJETE, *supra* note 47.

79. Erica-Ilene A. Daes, U.N. Economic & Soc. Council, *Preliminary Report of the Special Rapporteur: Protection of the Heritage of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1994/31 (n.d. 1994).

80. Zuni Cruz, *Tribal Law as Indigenous Social Reality*, *supra* note 42. My colleague, Adjunct Professor Robert Yazzie, calls the two laws "life way" and "law way," respectively.

for teaching law/ying for indigenous peoples. Most, though not all, are familiar to community or clinical lawyering and Indian law practitioners, but all must be examined in their particular application to law/ying for indigenous peoples within their territories and in the context of a native frame of reference. Of course, they inform “war” lawyering external to the community, but my focus is on adding to the skill base law students already possess as a result of the training they receive to engage in practice in the American legal system to protect against incursions from without the community or when advocating outside the community. The ultimate point being that while advocacy outside the indigenous community is important, one must be conscious of law/ying technique when without and when within the indigenous community and this is the unique pedagogy with which I am concerned.

#### A. TEACHING CULTURAL AND RACIAL “LITERACY” SKILLS

I have addressed both culture and race in earlier pieces on lawyering for indigenous peoples.<sup>81</sup> I have used both “community lawyering” and “critical race praxis” to describe such lawyering.<sup>82</sup> Some indigenous scholars raise the concern that the racial categorization of indigenous peoples or the use of race as a basis for analyzing treatment of indigenous peoples is problematic and to be avoided because of the lack of responsibility race-based critiques place on indigenous peoples including not taking responsibility for “our complicity with colonization,”<sup>83</sup> its emphasis on victimization and because it forces the reliance “on Eurocentric solutions and remedies rather than our own.”<sup>84</sup>

“Race” is assumed as a “natural” category, rather than a socially constructed category. Racism is a social context that focuses on observable physical difference as the basis for categorizing people and making decisions. An example of this context is the view that

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81. Zuni Cruz, *Road Back In*, *supra* note 42; Zuni Cruz, *Four Questions*, *supra* note 42.

82. I see my work in this area as evolving and as I said in *On The Road Back In*, as “a work in progress . . . a continuing dialogue with my community and outsiders.” Zuni Cruz, *Road Back In*, *supra* note 42, at 599.

83. Henderson, *Postcolonial Indigenous Legal Consciousness*, *supra* note 48.

84. *Id.* Christine Morris, an Australian Aboriginal scholar at Griffith University expresses similar thoughts. Morris, *Jurisprudential Reading*, *supra* note 68, at 16.

By repositioning the role of the invader from one central to cause, to that of the perimeters of influence, [Alexis] Wright *disempowers* the invaders law as being the “determinant” of the future of the people. Furthermore, by taking the breach back to the Dreaming, Wright is arguing that it is a breach inherent to the Law of the Land and must be solved by Indigenous . . . legal system[s], rather than the invader’s legal system.

*Id.*

the [Canadian] constitutional rights of Indigenous peoples are race-based rights, rather than basic human rights.<sup>85</sup>

Further, Indigenous ecological orders, “do not base . . . relationships on the Eurocentric categories of ‘rights’, ‘race’, or ‘blood.’”<sup>86</sup>

These are compelling points worthy of struggling with, for those involved in race-based theorizing in respect to indigenous peoples. Critical race theory raises hard questions that I find necessary to address both in respect to the existence of racism against indigenous peoples in the United States and elsewhere, as well as in respect to internalized aspects of racism that operate both in indigenous individuals and communities. Though race is not embraced as an indigenous construct and has been imposed on us, it is important to discuss both race and racism to take apart and defuse its destructive application to indigenous peoples, historically and presently. At the same time, I acknowledge that it is important not to allow it to eclipse our responsibility for our complicity, our choices and our failures to follow our own laws, which have consequences more severe than racism in the assessment of some indigenous peoples.<sup>87</sup>

Culture is likewise a contested term as it categorizes aspects of indigenous knowledge systems and uncouples them from that knowledge system which stems from a specific ecological order.<sup>88</sup> Furthermore, there is not an Indian culture, as there are diverse indigenous peoples in the United States. This is an important point relative to law. An added concern to legal advocates is the knowledge that law and policy can be established for all indigenous nations as the result of one case involving a specific fact pattern. For the legal warriors, the stakes for taking cases to state and federal appellate courts, and in particular, the Supreme Court can be high.

On this cautionary note, I use both “culture” and “race,” acknowledging that both are imposed and constructed terms used in the places where indigenous peoples and non-indigenous peoples converge, keeping in mind they exist outside the indigenous frame of reference. I have increasingly come to connect the overall potentiality/capacity to effectively lawyer for Indigenous peoples as requiring both cultural and racial

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85. *Id.* at 24.

86. *Id.* at 45. Certainly, controversy over individual rights was seen in the passage of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 (2006), in particular from the Pueblos of New Mexico. See Donald L. Burnett, Jr., *An Historical Analysis of the 1968 “Indian Civil Rights Act”*, 9 HARV. J. LEG. 557, 601, 614 (1972).

87. Morris, *Jurisprudential Reading*, *supra* note 68, at 16.

88. BATTISE & HENDERSON, *supra* note 78, at 35.

“literacy.” These “literacies of power”<sup>89</sup> are a necessary part of the pedagogy required to prepare both indigenous and non-indigenous students for their work with indigenous communities and are necessary both in respect to work within and without the indigenous community. My focus here is on their importance to work within the indigenous community. There are 561 federally recognized tribes in the United States, 332 in the lower 48 states, and 229 in Alaska.<sup>90</sup> Diversity among indigenous peoples is a hallmark of their existence. Cultural literacy skills are not optional in the practice of Indian law, even if one is Indian, and they are fundamental whether one is working internally or externally.

I must clarify here that I use the term cultural literacy to encompass, as well as to significantly expand, what others refer to as “cultural competence.” I specifically reject the term “cultural competency” because I do not believe outsiders to indigenous cultures can become “competent” in an indigenous culture; there are too many aspects of indigenous knowledge that are not accessible to outsiders of the culture, even to those outsiders who spend their lives studying the culture.<sup>91</sup> Competency assumes a level of understanding that I believe is attainable only by insiders to a culture. Additionally, cultural “competency” imparts an understanding of another’s culture that borders on arrogance. I would prefer, myself, to refer to my skill set as “literacy” rather than “competence” in respect to the many indigenous peoples we work with in the clinic. In New Mexico, twenty-three different indigenous nations<sup>92</sup> have their homelands or portions of their homelands and many more nations are represented in the general population of the state.<sup>93</sup> While I reject the “competency” terminology, I do not reject the underlying skill set that seeks to prepare legal

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89. DONALDO MACEDO, *LITERACIES OF POWER, WHAT AMERICANS ARE NOT ALLOWED TO KNOW* 118 (2006) (literacy as involving not only learning to read and write but “knowing how to read and write the world”).

90. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 70 Fed. Reg. 71, 194 (Nov. 25, 2005).

91. Anthropologists who have studied indigenous cultures and have acquired knowledge about the culture by virtue of being outsiders are not aware of what they do not know, only of what they do know.

92. There are nineteen Pueblos, including the Pueblos of Acoma, Laguna, Isleta, Zuni, Sandia, Santa Ana, Zia, Jemez, San Felipe, Santo Domingo, Cochiti, Tesuque, Poquaque, San Ildelfonso, Nambe, Santa Clara, Ohkay Ówíngéh, Taos, and Picuris. In addition the Jicarilla Apache Nation, Mescalero Apache Nation, the Navajo Nation and the Ute Mountain Ute have lands within the state of New Mexico.

93. For example, during one semester, the Southwest Indian Law Clinic serviced individuals from twenty-three different tribal backgrounds.

professionals to lawyer effectively across cultural and other aspects of difference.<sup>94</sup>

### 1. *Cultural Literacy*

Cultural “literacy” rejects the existence of “our ‘common’ Western cultural history.”<sup>95</sup> Donald Macedo explains further:

For the notion of cultural literacy to become useful, it has to be situated within a theory of cultural production and viewed as an integral part of the way in which people produce, transform, and reproduce meaning. Cultural literacy must be seen as a medium that constitutes and affirms the historical and existential moments of lived experience that produce a subordinate or lived culture. Hence, it is an eminently political phenomenon and must be analyzed within the context of a theory of power relations and understanding of social and cultural reproduction and production. By “cultural reproduction,” I refer to the collective experiences that function in the interest of the dominant groups rather than in the interest of the oppressed groups that are victimized by the policies of the dominant ideology. I use the term “cultural production” to refer to specific groups of people producing, mediating, and confirming the mutual ideological elements that emerge from and reaffirm their daily lived experiences. In this case, such experiences are rooted in the interests of individual and collective self-determination.<sup>96</sup>

Cultural literacy requires an analytical framework that engenders respect because one has to make an effort to understand an indigenous person’s broader frame of reference or knowledge system.<sup>97</sup> Those who

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94. Some of this scholarship specifically speaks of cultural “competence.” See Carwina Weng, *Multicultural Lawyering: Teaching Psychology To Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 372 (2005) (“multi-cultural competence”); Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 313 (2002); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyering*, 8 CLINICAL L. REV. 33, 35 (2001). Many writing about lawyering across cultures do not use the term. See Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807, 1809 (1993); Lorraine Bannai & Anne Enquist, *(Un)Examined Assumptions and (Un)Intended Messages: Teaching Students To Recognized Bias In Legal Analysis And Language*, 27 SEATTLE U. L. REV. 1, 3 (2003).

95. MACEDO, *supra* note 89, at 43.

96. *Id.* at 48.

97. *Id.* at 47 (quoting Henry Louis Gates, Jr. who stated, “Beyond the hype and the high-flown rhetoric is a pretty lonely truth: there is no tolerance without respect and no respect without knowledge.”)

interact with a community as lawyers do so in such a manner as to impact cultural re/production, and cultural literacy helps lawyers to move indigenous communities from cultural reproduction to cultural production.

Racial “literacy” is “a transformative process [and] is based on two ideas; first, that “race” involves several ways of coding and decoding information and second, that these racial codes can be reinscribed with new meanings . . . .”<sup>98</sup> Racial literacy informs law/ying both internally and externally. I seek here only to generally introduce the concept as I am working with Professor Margaret Montoya to demonstrate racial literacy.<sup>99</sup> We have thus far discussed the following mechanisms of racial coding: legal categories, images and false histories, stereotypes and slurs, numerical facts (data), and linguistic markers.

I also connect literacy to “perspective” and in my joint work with Professor Montoya we address how race is “read.” The use of the term “literacy” allows one to think about race and culture in terms of illiteracy, functional illiteracy, semi-literacy, “reading,” “text,” and how the “word” (whether of statutory law, case law, media or history, for example) can connect one or disconnect one from the world.<sup>100</sup>

Regardless of whether cultural or racial differences (or both) exist between attorney and client, cultural and racial literacy skills assist the Indian law practitioner because they help one read the indigenous world internally, as well as, the dominant society external to the indigenous community in which the indigenous must also operate. Internally, whether one will require both cultural and racial literacy skills is dependent on the attorney.<sup>101</sup> For Indian attorneys, racial and cultural literacy skills are helpful where the attorney does not share the same tribal affiliation with the client, because power constructs can operate in different manners in respect to Indian people internally and around culture and race, even within the same state and differ greatly across indigenous nations. They can also be helpful even if the attorney and client are both from the same indigenous

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98. Margaret Alarid Montoya & Christine Zuni Cruz, *A Narrative Braid Examining Racial Literacy* (n.d.) (unpublished work) (on file with the author). The definition is that of Professor Montoya. I use the term in the same way my colleague, Professor Margaret Montoya and I use the term in our forthcoming paper. An example of the use of racial literacy is the approach used in my article *Four Questions, Two Lives*, *supra* note 42.

99. Montoya & Zuni Cruz, *supra* note 98.

100. MACEDO, *supra* note 89, at 15-25 (discussing how an instrumentalist approach to literacy leads to an inability to link the reading of the word with the reading of the world further exacerbating unjust, asymmetrical power relations, sacrifices the critical analysis of the social and political order, and produces functional illiterates, and semi-illiterates able to read the word but unable to read the world).

101. Zuni Cruz, *Road Back In*, *supra* note 42, at 570-71, n.30, Graph B (insider and outsider attorneys have different experiences inside communities).

communities.<sup>102</sup> For non-Indian attorneys, both cultural and racial literacy skills are fundamental when working within and external to the indigenous community.

Cultural literacy includes the ability to “critically analyze the social and political structures that inform . . . realities.”<sup>103</sup> The introduction of culturally literate people into the legal profession or structure as lawyers, judges, professors, and law students has resulted in an increasing questioning of how indigenous knowledge systems relate, interact, and how they are displaced by or are reinforced by practices, structures, laws, and procedures of tribal systems.<sup>104</sup> The relationship between culture (including behavior and values), law and justice is such that they cannot be easily separated from one another.

Thus, a grasp of indigenous knowledge systems, relationships, beliefs, expressions, values, and an understanding of one’s own as well the dominant cultural milieu (as they are at odds with or in sync with the culture one is working with) are important to cultural literacy.

At the heart of cultural literacy in respect to indigenous peoples is an understanding of indigenous knowledge.<sup>105</sup> Familiarity with the indigenous legal tradition, as an aspect of that knowledge, is important to lawyers involved in the representation of indigenous peoples and indigenous nations. The link between indigenous legal tradition and the operation of law and justice within indigenous communities cannot be ignored in the internal practice of law, even if the fact that an indigenous legal tradition exists and is important to study has been ignored by most legal institutions in the country. The identification of the indigenous legal tradition as one of the seven most important legal traditions of the world proves that not all, however, are blind to its importance and pervasiveness.<sup>106</sup>

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102. *Id.*

103. MACEDO, *supra* note 89, at 17.

104. *See, e.g.*, Justin B. Richland, *What Are You Going To Do With The Village’s Knowledge? Talking Tradition, Talking Law in Hopi Tribal Court*, 39 L. & SOC. REV. 235 (2005).

105. *See* BATTISE & HENDERSON, *supra* note 78, at 35-56.

106. *See generally* GLENN, *supra* note 30, at 318-19. Glenn identifies the indigenous legal tradition as a Chthonic legal tradition; he also identifies the Talmudic, the civil law, the Islamic, the common law, the Hindu and Asian legal traditions as the present major legal traditions of the world. His manuscript “was awarded the Grand Prize of the International Academy of Comparative Law at the XV International Congress of Comparative Law, Bristol, U.K., in August 1998.” *Id.* at coverpage.

## 2. *Assimilation, Acculturation, and Tradition*

There are complex interactions between ethnocentrism, eurocentrism, assimilation, and acculturation that come into play in cultural literacy in respect to indigenous peoples. Ethnocentrism operates to center one's own race or ethnic group. One's assumptions or preconceptions originate in the standards and customs, for example, of one's own race or group. Ethnocentrism is characterized by a tendency to evaluate other races or groups by criteria specific to one's own race or group. Eurocentricity presupposes the superiority of Europe and Europeans (and white Americans) in the world. Both have operated against indigenous peoples outside their communities. However, both operate within indigenous communities as well. Ethnocentrism operates as one would expect, each indigenous peoples centers its own criteria; but Eurocentricism operates internally in the sense that it has been internalized through the educational process in community members and professionals assisting the community through institutionalized practices and as it is tied to the expectations of external funders. Added to this are forces of assimilation and acculturation, with individuals in the community functioning as acculturated or assimilated individuals within the dominant and Eurocentric culture, even as they are situated within their own community.

Understanding indigenous knowledge systems and indigenous law and their relationship to existing political, social and justice systems assists the legal professional within the community. Cultural literacy allows one to see how they are important to legal practice and advocacy within the community, but without as well.

Indigenous knowledge systems are not uniform across all indigenous peoples,<sup>107</sup> though "strands of connectiveness" do exist.<sup>108</sup> Additionally, indigenous knowledge is a diverse knowledge that is spread throughout different people in many layers.<sup>109</sup> Finally, indigenous knowledge cannot be categorized in the same manner as is Eurocentric thought,<sup>110</sup> which raises challenges to those who are trained to look at law as a separate category of knowledge, as lawyers are taught in American institutions. The most important aspects of indigenous knowledge are that it is connected to a specific "ecological order" and that both the natural and spirit world are involved in its understanding.<sup>111</sup> The "best way to understand indigenous

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107. BATTISTE & HENDERSON, *supra* note 78, 35-56.

108. *Id.* at 41.

109. *Id.* at 36.

110. *Id.*

111. *Id.*



knowledge is to be open to accepting different realities” and indigenous peoples’ worldviews as “cognitive maps of particular ecosystems,”<sup>112</sup> which is why cultural literacy is helpful to work with indigenous peoples. Most challenging to book schooled students, “Indigenous perspectives of Indigenous knowledge are not found in the literature, to learn about indigenous perspectives requires a different method of research.”<sup>113</sup>

Indigenous ways of knowing share the following structure: (1) knowledge and belief in unseen powers in the ecosystem; (2) knowledge that all things in the ecosystem are dependent on each other; (3) knowledge that reality is structured according to most of the linguistic concepts by which Indigenous Peoples describe it; (4) knowledge that personal relationships reinforce the bond between person, communities and ecosystems; (5) knowledge that sacred traditions and persons who know these traditions are responsible for teaching morals and ethics to practitioners who are then given responsibility for this specialized knowledge and its dissemination; and (6) knowledge that an extended kinship passes on teaching and social practices from generation to generation.<sup>114</sup>

Given the above, I have found that teaching Law of Indigenous Peoples, which concentrates on the traditional and contemporary aspects of existing indigenous legal systems, helps provide students with an opportunity to begin to understand the complexities of the indigenous legal tradition and to locate it within indigenous knowledge systems. Students have an opportunity to contrast the indigenous legal tradition with the American legal system, thus providing them with an understanding that assists them in future work within and on behalf of indigenous peoples and aids in their “cultural literacy.” Indigenous peoples and societies are affected by this legal tradition and that is why it is important to be familiar with the legal tradition. It aids an understanding of present day social, political, and legal realities in Indigenous communities.

## B. METHODOLOGY

I have addressed what I believe is a pedagogical approach to preparing students for the practice of law/ying within indigenous communities. Clinical law teaching also demands a methodology. Methodology is what mmuch of the clinical scholarship addresses. Here I only intend to sketch

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112. *Id.* at 40.

113. *Id.* at 41.

114. *Id.* at 42.

out some of the methodologies, which I believe are important, and leave elaboration to a separate and more thorough examination. Using the indigenous legal tradition as a framework for considering law/ying within indigenous communities, I have identified the following as critical to law/ying methodology: interdisciplinarity, process, consensus-building, narrative and voice, indigenous language, place (both knowing one's "place" and knowledge of place), knowledge of original law and legal tradition of specific indigenous communities, land, and peoples. I will only briefly address each of them here.

### C. INTERDISCIPLINARITY

Interdisciplinarity is not new to legal practice<sup>115</sup> clinical legal education<sup>116</sup> and certainly not to the University of New Mexico law clinic.<sup>117</sup> In respect to lawyering for indigenous communities and peoples, the holistic approach to the problems that bring indigenous peoples before the court is a part of most indigenous legal traditions. Justice involves helping the parties to resolve underlying problems and healing the breaches caused by conflict. There is a need for more than court rulings because how can a court pronounce sobriety or right relationships? There is a need for lawyers in indigenous communities to collaborate with other helping professions, including those who help people heal in a very broad sense of the word, through faith, health, spirituality, forgiveness, and especially through sobriety.

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115. Alexis Anderson, Lynn Barenberg, & Paul R. Tremblay, *Lawyer's Ethics in Interdisciplinary Collaboratives: Some Answers to Persistent Questions*, Legal Studies Research Paper Series, Research Paper 101 (Boston Coll. Law Sch. 2006), available at <http://ssrn.com/abstract=92159>; Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319 (1999).

116. Anderson et al., *supra* note 115, at n.4 (citing clinical scholarship on interdisciplinary work).

117. My clinical colleague, Professor Michael J. Norwood, has long advocated interdisciplinarity in lawyering. See generally J. Michael Norwood & Alan Paterson, *Problem-Solving In A Multidisciplinary Environment? Must Ethics Get In The Way Of Holistic Services?*, 9 CLINICAL L. REV. 337 (2002). The UNM Law Clinic has utilized Dr. Sam Roll, of the University of New Mexico Psychology Department, as a consultant housed in the clinic. See Samuel Roll, *Cross-Cultural Considerations in Custody and Parenting Plans*, 7 CHILD & ADOLESCENT PSYCHIATRIC CLINICS OF N. AM. 445 (Apr. 1998). Professor Kenneth Bobroff, in our joint work in the Southwest Indian Law Clinic, was instrumental in creating a large multi-disciplinary team to work with one of our native clients who was seeking to have her children returned to her by a tribal court. Professor Margaret Montoya holds a secondary appointment at the UNM School of Medicine (Department of Family and Community Medicine) and has worked on issues arising in delivery of legal services across cultures and collaborates on medical-legal issues arising in the delivery of health services. Additionally, our law school's dean has addressed interdisciplinarity in her scholarship. Suelyn Scarnecchia, *An Interdisciplinary Seminar in Child Abuse and Neglect with a Focus On Child Protection Practice*, 31 U. MICH. J.L. REFORM 33 (1997).

#### D. PROCESS

Process is a sensitive aspect of working with indigenous peoples. How something is approached can be more important than the end result. Process is imbedded in indigenous knowledge systems, and lawyers who are familiar with process as it is modeled in indigenous knowledge systems and legal tradition can benefit greatly from such awareness. Reliance on the adversarial method of lawyering may not be the best approach given the size of indigenous communities,<sup>118</sup> inter-relationships, and in achieving non-legal desired results. Indigenous communities are decidedly not the same as the artificial communities that surround them. Most members of small indigenous communities have long-standing relationships with one another and will continue in such relationships for the remainder of their lives and for future generations and can have histories in past generations. The processes imbedded in indigenous knowledge systems and legal traditions arise from this reality of tribal existence.

#### E. CONSENSUS BUILDING

The skill of building consensus is related to process, in that lawyering internally is done among a relatively small group of people who are related in several different ways and for the most part, will continue in relationships with one another long after the lawyer has closed her file. Consensus was a major principle in most deliberative actions taken by indigenous communities. That has changed in most communities with the introduction of principles of majority rule imbedded in IRA constitutions. However, the benefit of consensus to these communities has not diminished.

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118. Tribal nations vary greatly in population number. Using the 2000 Census as a point of reference, the spread in numbers of individuals identifying as belonging to a particular American Indian or Alaska Native nation vary from several thousand to hundreds, or less. For instance, the two Apache Nations in New Mexico show a total of 7,027 identifying as Mescalero and 3,500 as Jicarilla. Among the nineteen Pueblo, numbers range from the high of 10,122 for Zuni Pueblo and the low of 323 and 324 for Picuris Pueblo and Sandia Pueblo, respectively. The Navajo Nation shows 298,187. These numbers provide an indication of the range of size between tribes. With the exception of the Navajo Nation, in New Mexico there are 21 tribes between 10,122 at the high end and 323 at the low end. Of course many other variables come into play in determining the actual population of indigenous communities, but these figures provide a good indication of relative size of indigenous communities. *See*, U.S. Census Bureau, Census 2000 PHC-T-18, special tabulation, American Indian and Alaska Native Tribes in the United States: 2000 (on file with author).

#### F. NARRATIVE AND VOICE

The power of story among indigenous peoples is tremendous. The use of narrative and voice by lawyers in tribal courts is an opportunity to reclaim a tradition. Likewise the use of client narrative and voice can be empowering to clients and lawyers, and could be more creatively used by lawyers both within and external to the community.

#### G. LANGUAGE

Language is power and it is the tool of the lawyer. How we say things can create new ways of thinking of things and new ways of how we understand things. This power lies both in the language and writing of the lawyer and of the court. Likewise, native law students should be encouraged to study and learn their indigenous languages, as it is a critical aspect of understanding the indigenous legal tradition of their peoples.

#### H. PLACE

I use the term “place” to remind insiders and outsiders of their place within indigenous communities, I use it also to remind lawyers to be mindful of where they are. Tribal Court is not state court and state court is not Tribal Court. Lawyers must adjust their strategies when representing indigenous peoples in state systems and likewise, must adjust their attitudes in tribal courts. Tribal courts are sites of cultural production, yet the lawyer—native and non-native—often treats tribal courts as sites of the cultural reproduction of state court systems. Additionally, members of indigenous communities find themselves temporarily, and sometimes permanently, outside their indigenous homeland. Law can be carried, affecting both person and place.<sup>119</sup>

#### I. ORIGINAL LAW AND INDIGENOUS KNOWLEDGE/LAND/PEOPLES

Lawyers must be knowledgeable and prepared to argue traditional law. This means they must know how to find it, where to look for it, and how to articulate it. Likewise, they must be willing to step outside the American legal tradition and Eurocentric approach to the legal profession. They must be willing to look at their clients and indigenous peoples as resources for and understanding of the legal tradition. They must be able to read

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119. Morris, *Jurisprudential Reading*, *supra* note 68, at 17 (“[P]eople must be mindful of their behavior as it may be having some unknown effect in another place.”). *See also*, Lawrence Grossberg, *The Space of Culture, The Power of Space in THE POST-COLONIAL QUESTION, COMMON SKIES, DIVIDED HORIZONS* 169 (Chambers & Curti eds., 1996) (challenging “culture’s equation with location or space”).

different “texts” and be flexible enough to look for and find law in radically different places than in written words in a bound text.

## V. SCHOLARSHIP

Finally, I’d like to talk generally about current scholarship and projects as a way of connecting pedagogy, scholarship, and praxis and demonstrating perspective. Last year I published an article in the *Fordham Law Review* in what I anticipated as the first in a series of articles on criminal justice in Indian country titled *Four Questions on Critical Race Praxis: Lessons from Two Young Lives in Indian Country*.<sup>120</sup> A component of the article is a critical examination of how federal, tribal and state courts operated in the criminal sentencing of two separate cases involving young Indian men, whose stories are related through personal lawyer narrative. Charles R. Lawrence, III, weaves together much of my thought of the significance of personal narrative to legal scholarship:

The Word [teaching, preaching, healing] is an articulation and validation of our common experience. It is a vocation of struggle against dehumanization, a practice of raising questions about reasons for oppression, an inheritance of passion and hope. By contrast I am struck by the strong sense of alienation that I have felt from the role of “scholar” . . . The scholar is “objective.” He views his work as a value-free inquiry, an effort to clarify the world rather than change it. He is guided by an orthodoxy that equates objectivity with emotional disengagement, cognitive distance, and moral indifference. It is the work of those who remain cool and distant in the face of suffering or anger because it is not their liberation, their humanity, which is at stake.<sup>121</sup>

Like Lawrence, my work

“is grounded in the particulars of a social reality that is described by the experiences of people of color.” . . . It recognizes the subjectivity of perspective and the need to tell stories that have not been told and that are not being told. Our voices and the voices of our parents and grandparents are valuable not just because they tell a different story, but because as outsiders we are able to see more clearly that what we see is not all that can be seen . . . . This burden/gift of dual subjectivity enables those who bear it to

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120. Zuni Cruz, *Four Questions*, *supra* note 42.

121. Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2238 (1992).

recognize and articulate social realities that are unseen by those who live more fully within the world of privilege.<sup>122</sup>

My follow-up article will explore the idea of “justice as healing” and consider *Regina v. Gladue*,<sup>123</sup> a Canadian Supreme Court decision on Canadian law permitting the consideration of the life situation of native defendants to assist the Court in developing alternatives to incarceration. *Gladue* reports to the Court, as they are known, routinely explore issues of inter-generational trauma and historical trauma as they have impacted native defendants’ lives.<sup>124</sup> These reports give inter-generational and historical trauma a prominence and place of recognition in the justice system. The “spirit wounds”<sup>125</sup> native men and women carry lead to self-medicating coping mechanisms, with the most widely self-prescribed pain-reliever being the legal drug alcohol, followed closely with a host of other, mostly illegal drugs.<sup>126</sup> The connection between “crime” in Indian Country and alcohol and other illegal “pain-relievers” is significant.<sup>127</sup> Abuse of alcohol is a symptom of a deeper spirit wound, and I propose indigenous justice systems can and should serve as sites for healing and be more involved in understanding historical and intergenerational trauma in the lives of our people and in the healing of people, and not serve merely as the blind measurer of guilt and innocence and administrator of punishment. The tribal approach to criminal justice is drawn directly from the Anglo-American approach, yet tribal justice systems have room to create an

122. *Id.* at 2239. See also, Mario L. Barnes, *Black Women’s Stories and the Criminal Law: Restating the Power of Narrative*, 39 U.C. DAVIS L. REV. 941, 943-958 (2006) (employing narrative methodology to chart the space between law as it is imagined and law as it is experienced, contains a helpful literature review on narrative).

123. *R. v. Gladue*, [1999] 1 S.C.R. 688 (Can.).

124. Mandy Eason, *Without Borders—Applying the Gladue Principles to Sentencing American Indian Offenders* (n.d.) (unpublished student paper, University of New Mexico School of Law) (on file with author).

125. I relate this term to “spirit injury”, and “spirit murder” used by Adrien Katherine Wing and Patricia Williams. Adrien Katherine Wing & Sylke Merchan, *Rape, Ethnicity, And Culture: Spirit Injury From Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1, 1 (1993). The authors speak of “spirit injury” as “disregard for others whose lives qualitatively depend on our regard,” drawing upon Patricia Williams’ concept of “spirit murder.” *Id.* at 1. See Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law’s Response to Racism*, 42 U. MIAMI L.REV. 127, 129 (1987) (characterizing “racism as a crime, an offense so deeply painful and assaultive as to constitute...‘spirit-murder’”). See also Adrien Katherine Wing, *Brief Reflections Toward a Multiplicative Theory and Praxis of Being*, 6 BERKELEY WOMEN’S L.J. 181, 186 (1990-1991) (“...[S]pirit-murder consists of hundreds, if not thousands, of spirit injuries and assaults—some major and some minor—the cumulative effect of which is the slow death of the psyche, the soul, and the persona.”)

126. Substance use and substance use disorders among American Indians and Alaska Natives, <http://www.oas.samhsa.gov/> (last visited Jan. 31, 2007).

127. Bureau of Justice Statistics, *Drugs and Crime Facts: Drug Use and Crime*, <http://www.ojp.usdoj.gov/bjs/dec/duc.htm> (last visited Jan. 31, 2007).

approach to respond to what we see in the people and to use our justice to help heal. Recognizing the historical and intergenerational causes of the spirit wounds will reveal what Christine Morris, an Australian aboriginal scholar, calls breaches in indigenous law that need to be addressed.<sup>128</sup> Drug courts recognize that addiction is a physical and psychological dependency that needs to be addressed on an individual level, historical and intergenerational trauma recognize the breaches that have occurred to us a group, and across generations that require a healing that involves families and the community as a whole. Healing of the people is an aspect of the indigenous legal tradition and a necessary prerequisite to further the exercise of self-determination.

Finally, I am currently working on an article on Indian identity. I chose not to focus on the legal definition of Indian or membership status, but rather on the wider scheme of identity. This allows me to explore identity politics, race, color, political status, as well as power and privilege within the membership laws of tribes. My ultimate focus is on the membership law of tribal sovereigns as a form of indigenous law related to our existence for which we must recognize as ultimately reaching into the future of our survival.

Scholarship, as an extension of pedagogy, as pragmatic and as legitimately encompassing lived experience and narrative, is necessary to understand and to transform social reality.<sup>129</sup> For me, scholarship is not far from pedagogy nor is it disconnected from action.

## VI. THEORY AND PRAXIS

I also find myself reflecting and writing on the development of the Isleta Appellate Court. In an initial issue paper published by the Australian Institute for Aboriginal and Torres-Strait Islanders Studies I wrote of the creation of the Isleta Appellate Court in 1999.<sup>130</sup> The Appellate Court is composed of tribal members who are lawyers and laypersons. This composition has raised profound issues related to language, traditional law,

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128. Morris, *Jurisprudential Reading*, *supra* note 68, at 16. It is important to note, such breaches in indigenous law are not necessarily remedied by any action of a court of law.

129. Lawrence, *supra* note 121, at 2239. “[O]ur scholarship must strive to be both pragmatic and utopian. Our work must respond to the immediate needs of the oppressed and subordinated. Education must involve both action and reflection. Theory must be informed by active struggle, and in turn it must inform that struggle. But we are also keepers of the dream. We are gifted by an ability to imagine a different world—to offer alternative values—if only because we are not inhibited by the delusion we are well served by the status quo.” *Id.*

130. Christine Zuni Cruz, *Indigenous Pueblo Culture and Tradition in the Justice System: Maintaining Indigenous Language, Thought, and Law in Judicial Review*, 2 LAND, RIGHTS, LAWS: ISSUES OF NATIVE TITLE, paper no. 23 (Australian Institute of Aboriginal and Torres Strait Islander Studies 2003) (on file with the author).

and the creation of a place for indigenous knowledge, epistemology, and for non-lawyers as holders of indigenous law and knowledge. As we develop, we continue to encounter challenges raised by the place we find ourselves now as a court dealing with what I call, with no intention of disrespect, a “quirky” mixture of western/traditional law—which is our form of “modern” “internal” law: There are western spheres of law that exist within this modern indigenous law in the form of our Constitution which was adopted pursuant to the IRA and codes. This work produces an incredibly fertile resource for reflection on indigenous justice and law.

Our clinical work also permits me/us to work on projects related to the development of internal law, but in a particular context, given our adherence to principles of community lawyering, which I lay out in [*On the Road Back In: Community Lawyering in Indigenous Communities*].<sup>131</sup> Currently we are working on a workbook for New Mexico Pueblo and tribal communities to use in developing law to meet the particular needs of the elders in the community. I/We could not agree to produce an update of a “model” tribal code on elder law.

## VII. CONCLUSION

In preparing law students who intend to practice within tribal communities or who will represent tribal interests and work with tribal communities, I believe it is important to expose them to the indigenous legal tradition in a contrastive approach to the American common law tradition. I agree that law students must be trained in the American common law tradition and must be equipped to function and to excel as professions within that model and law schools have been successfully doing just that; however, I believe that this is only the beginning point. Within our tribal communities and at the other numerous intersections, borders, and points of convergence, indigenous nations and the outside world meet/clash/interact; there are hard issues that I believed can be informed by an understanding and knowledge of the indigenous legal tradition. Likewise, in preparing students for the profession and to return to indigenous communities or to assist such communities, critical “literacy” skills that will allow them to “read” the world, both Indian and non-Indian are useful for achieving social justice work. Cultural literacy, in particular is an important pedagogical tool for indigenous peoples and those who seek to work on their behalf as legal professionals.

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131. Zuni Cruz, *supra* note 42, at 571-90.