Demarginalizing Tribal Law in Legal Writing

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Under one government or another, the Anglo-American legal system has been operating in North America for hundreds of years. By way of comparison, American Indian legal systems have been flourishing in North America for ten to twenty thousand years.

American Indian tribal nations... have always governed themselves in accordance with their own ways. The first forms of law and order appeared long before the arrival of the Europeans, and usually involved the resolution of disputes involving hunting, fishing, and gathering rights, privileges and territories. There also was a sophisticated system for dealing with criminal acts, as well as negligent acts. The Anishinaabek often taught each other general rules of behavior for ten to twenty thousand years:

Our modern life and laws are replete with continuous issues in which Indian[s] and non-Indians are affected by the interests of the indigenous sovereigns and their

They have influenced our national constitution and furnished core principles of alternative dispute resolution. They have also provided sustainable, community-based forms of justice that continue to survive and to thrive, serving their people and interacting with state and federal jurisdictions.

Nevertheless, American Indian tribal law and courts continue to be marginalized by the legal education system. Native American nations typically are not discussed in required courses and are rarely introduced during first year as the original, inherent, 565 sovereign governments existing within U.S. borders. The core curriculum never mentions their 200 sovereign court systems, even though our graduates are often in these courts regularly on behalf of both tribal and non-tribal interests. Professors Rennard Strickland and Gloria Valencia-Weber highlight the severity of this gap in the curriculum:

It should not be a great surprise then, that tribal justice systems continue to be disregarded and threatened by many state and federal courts, particularly the United States Supreme Court.

As educators on the front lines, law professors who teach legal writing can help to demarginalize tribal justice systems by introducing them as valid and vibrant institutions. Law professors can see the value in introducing tribal justice systems, they may also experience understandable reluctance due to the widespread fear that those systems are inscrutable and perhaps even unprofessional or illegitimate. In addition, the American legal system is typically introduced during the first week of classes—a period that is not only hectic, but very sensitive for making a positive first impression on students. Professors may not be eager to begin with a topic that seems not only exotic, but also fraught with opportunities to appear unknowledgeable.

Fortunately, the rewards outweigh the risks. While it is true that tribal justice systems are deep and culturally varied, the basic facts about tribal sovereignty and courts remain accessible. They also tend to generate much student interest than the traditional state and federal material alone. Taught together, the three sovereigns can generate better learning through comparative models, as well as some excellent “teachable moments” for developing cross-cultural literacy. Some basic concepts follow.

Sovereign Nations. American Indian tribes are considered as federal law to be sovereign, “domestic dependent” nations within the United States. Although they are subject to Congressional plenary power, they have inherent, Indigenous sovereignty that predates contact with Europeans. They come from different cultural and language groups, and have their own internal, ancestral common law in addition to the law “received” from the Anglo-American justice system.

Statistics. As of 2011, there are 565 federally-recognized tribes listed in the Federal Register. Just over 340 of them are found in the lower 48 states. The rest are Alaska

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1 See Matthew L.M. Fletcher, American Indian Tribal Law 1-5, 10-16 (Wolters-Kluwer 2011); Diane Champagne, Social Change and Cultural Continuity Among Native Nations 107, 111 (AlaMira Press 2007)

2 Cf. Champagne, supra note 1, at 107, 111. Professor Champagne notes that by Western scientific and some Indigenous standards, the First Peoples of North America have populated the continent for about ten to twenty thousand years. Id. He also stresses that according to many other Indigenous sources of knowledge, such as creation stories, many of our First Nations have occupied this land since “time immemorial.” Id. at 107-12.

3 Fletcher, supra note 1, at 11.
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American Indian tribal nations . . . have always governed themselves in accordance with their own ways. . . . The first forms of law and order appeared long before the arrival of the Europeans, and usually involved the resolution of disputes involving hunting, fishing, and gathering rights, privileges and territories. There also was a sophisticated system for dealing with criminal acts, as well as negligent acts. The Anishinaabek often taught each other general rules of behavior for all people by relating stories linked to the landscape . . . It is the stories, which are easily remembered and can be told again and again through generations that created the structure of American Indian traditional and customary law.2

They have influenced our national constitution3 and furnished core principles of alternative dispute resolution.4 They have also provided sustainable, community-based forms of justice that continue to survive and to thrive, serving their people and interacting with state and federal jurisdictions. Nevertheless, American Indian tribal law and courts continue to be marginalized by the mainstream legal education. Native American nations typically are not discussed in required courses and are rarely introduced during first year as the original, inherent, 565 sovereign governments existing within U.S. borders. The core curriculum never mentions their 200 sovereign court systems, even though our graduates interact with them regularly on behalf of both tribal and non-tribal interests. Professors Rennard Strickland and Gloria Valencia-Weber highlight the severity of this gap in the curriculum:

Our modern life and laws are replete with continuous issues in which Indian[s] and non-Indians are affected by the interests of the indigenous sovereigns and their tribes.

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6 Cf. Frank Pommersheim, “Our Federalism” in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts: Teaching and Scholarly Community, 71 U. COLO. L. REV. 123, 127 (2000) (“A substantial amount of the adversity and difficulty present throughout the history of Indian law stems from the fact that the tribal sovereign is consistently marginalized, if even discussed, in the context of our constitutional democracy. With the increasing prominence and visibility of tribal courts, we are in danger of repeating this harmful process of neglect and indifference unless there is a broad and informed scholarly exegesis, insight, and effort that acknowledges and bridges the common themes within the fields of Indian law and federal courts.”); See also Loretta Fowler, Tribal Sovereignty and the Historical Imagination xviii (University of Nebraska Press 2002) (“Subordinated peoples in colonial and neocolonial situations not only contend with social institutions of dominance. They also face symbolic dominance, for example, ideologies that reflect cultural constructions of the dominant order and that rationalize that order. These rationalizations may come to be unconsciously accepted . . . “).
8 Pommersheim, supra note 6, at 124, 129 (arguing that law schools’ failure to “identify and discuss the tribal sovereign, particularly tribal courts, seriously restricts, even distorts, the purview of contemporary federalism” and that “[t]he marginalization of tribal courts within the canon of federal courts’ textbooks and scholarship only makes it more likely that tribal courts will continue to be marginalized in federal courts’ jurisprudence itself.”).
9 See generally, e.g., David E. Williams, American Indian Sovereignty and the U.S. Supreme Court (1997); Robert A. Williams, Jr., Like a Loaded Weapon: The Redheffer Court, Indian Rights, and the Legal History of Racism in America (2005); Matthew L.M. Fletcher, The Supreme Court’s Indian Problem, 59 HASTINGS L.J. 579 (2008). These and many other authorities explain the often hostile relationship between the United States Supreme Court and American Indian tribal sovereignty and other tribal interests.

Members. The . . . debate about Indian gaming spans the nation; it is not a controversy isolated in the Indian Country of the Southwest, but also erupts in Connecticut and New Jersey . . . Other significant issues for Indians and non-Indians include, but are not limited to, land and water rights, children subject to the Indian Child Welfare Act, and development of natural resources—all areas in which tribal people have interests and entitlements. Failure to expose all law students to some opportunity for Indian law training presents an incomplete picture of this country when contemporary life involves law from three sovereigns.7

It should be no great surprise, then, that tribal justice systems continue to be respected and threatened8 by many state and federal courts, particularly the United States Supreme Court.9

As educators on the front lines, law professors who teach legal writing can help to demarginalize tribal justice systems by introducing them as valid and vibrant institutions. Should professors can see the value in introducing tribal justice systems, they may also experience understandable reluctance due to the widespread fear that those systems are intractable and perhaps even unprofessional or illegitimate.10 In addition, the American legal system is typically introduced during the first week of classes—a period that is not only hectic, but very sensitive for making a positive first impression on students. Professors may not be eager to begin with a topic that seems not only exotic, but also fraught with opportunities to appear unknowledgeable.11

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11 Tribal law’s exotic reputation tends to blind many to its rightful place as another doctrinal field to be researched and analyzed. Almost every week in our classrooms, we use student questions that address topics outside of our fields to model the reality that lawyers are experts in legal methods, not repositories of fixed knowledge.
14 75 Fed. Reg. 60810, 60810-14 (October 1, 2010).

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This is not to say that all law school courses cannot benefit from introducing a global perspective. This introduction is the goal of a series of texts published by West called the “Global Issues” series. See West Academic Pub’g, Global Issues Series, http://www.westglobeissues.com/ (last visited Oct. 11, 2011).