

# The Ubiquitous Ubity of Native American Law

by Matthew C. Kane



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Indian law permeates the legal landscape in the United States, touching on an extraordinarily wide variety of topics. Professor Lindsay Robertson, a friend and colleague, describes federal Indian law as “covering issues in criminal law, property law, contracts, constitutional law, international law, and civil jurisdiction, all in a context of a complex history of inter-governmental relations played out against a backdrop of often profound cultural difference.”<sup>1</sup> To illustrate, a few recent cases with ties to my home state of Oklahoma:

## Murder

Patrick Murphy was convicted of mutilating and murdering his girlfriend’s ex-husband in 1999. After his death sentence was upheld by the Oklahoma Court of Criminal Appeals (a remarkably lengthy and complex process),<sup>2</sup> Murphy sought federal habeas review. The key issue was whether Murphy should have been tried in state or federal court. Although both defendant and victim were members of the Muscogee (Creek) Nation, the parties disputed whether the crime had been committed on the Creek Reservation, as contemplated by the Major Crimes Act, 18 U.S.C. § 1151(a). If so, the federal courts, not the state, had jurisdiction.

In August 2017, the Tenth Circuit issued a lengthy and detailed opinion, carefully reviewing a number of historical statutes and treaties to conclude that Murphy was subject to exclusive federal jurisdiction.<sup>3</sup> It was true that the reservation lands had been divided into individual parcels and a much larger percentage of whites presently live on the lands rather than members of the Muscogee (Creek) Nation. Critically, however, the United States had never acted to de-establish the Creek Reservation. The state’s request for a rehearing en banc was rejected.<sup>4</sup>

The Murphy case has already generated interest in the civil arena since it could lead to greater tribal control over reservation lands but also different processes for acquiring land, something the Comanche Nation is arguing in an attempt to prevent the construction of a Chickasaw Nation casino.<sup>5</sup> Given such significant criminal and civil ramifications, it would seem likely that the

Supreme Court will take up the case in the near future.

## Earthquakes

A number of lawsuits have been filed in various jurisdictions in Oklahoma, relating to an increase in seismic activity earlier in the decade.<sup>6</sup> In addition to such federal and state cases, plaintiffs’ counsel in several putative class actions recently filed a new matter on behalf of the Pawnee Nation in the Pawnee Tribal Court seeking to recover for damage to several historic Pawnee government buildings.<sup>7</sup> The Pawnee Tribal Court ruled that tribal jurisdiction exists, allowing the case to move on to the discovery phase.<sup>8</sup> Thus, litigation involving many of the same events, putative plaintiffs, plaintiffs’ counsel, defendants, counsel, and defendants now spans state, federal, and tribal courts.

## Custody

In the early 2010s, the media was captivated by the case of Baby Veronica, whose noncustodial father sought to prevent the adoption of the child by a non-Native American couple. With the support of the Cherokee Nation, he prevailed at the trial and appeal court levels in South Carolina before the case was reversed by the Supreme Court in a 5-4 decision, finding that parts of the Indian Child Welfare Act (ICWA) did not apply to noncustodial parents.<sup>9</sup>

More recently, the foster parents in a somewhat less publicized case involving the custody of a child under ICWA sought certiorari to the Supreme Court. *R.P. and S.P. v. Los Angeles County Department of Children and Family Services et al.*<sup>10</sup> involved the removal of Lexi, a 6-year-old girl who was 1/64 Choctaw (and a member of the Choctaw Nation of Oklahoma), from her California foster parents for placement with her sibling in a non-Native American home in Utah. The California state courts ruled in favor of the new placement, finding the petitioners did not have standing to challenge the ICWA placement preferences, through which the Choctaw Nation sought the placement with the sibling.<sup>11</sup> On Jan. 9, 2017, the Supreme Court denied certiorari.<sup>12</sup> ☺

With Recent Jurisprudence and U.S. Asylum Law”, plus student member articles like “The Right to Education in the United States and Abroad: A Comparative Analysis of Constitutional Language and Academic Achievement” and “Labor Rights in Cambodia and Female Construction Workers”. We were pleased to include a number of law student members in the publishing process.

The FBA ILS actively supports the FBA’s Special Task Force on Diversity and Inclusion and wants to call particular attention to a Nov. 7, 2017, report issued by the New York State Bar Association

House of Delegates that said that “women attorneys remain considerably underrepresented in courtrooms across the state as well as in alternative dispute resolution ... [and] comprise about 25 percent of attorneys in lead counsel roles in courtrooms statewide.”<sup>11</sup> ☉

## Endnote

<sup>11</sup>N.Y. STATE BAR ASS’N, IF NOT NOW, WHEN? ACHIEVING EQUALITY FOR WOMEN ATTORNEYS IN THE COURTROOM AND IN ADR (Nov. 2017), <http://www.nysba.org/WomensTaskForceReport>.

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## In Sum

These cases are but a few examples of the far reach of Indian law. Attorneys must be aware of the potential for Indian law to affect their own practices, through a specific case itself or in companion litigation. Thankfully, the Federal Bar Association has a robust Indian Law Section that offers members an opportunity to learn about various aspects of the topic, interact with experts in the field, and engage in dialogue that could actually impact the development of the field. Key resources include *Cohen’s Handbook of Federal Indian Law*, the *Indian Law Reporter*, William Canby’s *American Indian Law in a Nutshell*, and the “Turtle Talk” blog from the Michigan State University College of Law.<sup>13</sup> But with that said, Indian law is an incredibly complex topic, making it quite difficult to be sufficiently educated through self-study. It is essential for the practitioner to recognize when to turn to specialists or obtain additional training.<sup>14</sup> ☉

## Endnotes

<sup>1</sup>Lindsay G. Robertson, *Teaching Indian Law*, 54 ST. LOUIS U. L.J. 891, 891 (2010). Professor Robertson is director of the American Indian Law and Policy Center and Chickasaw Nation endowed chair in Native American law at the University of Oklahoma College of Law.

<sup>2</sup>*Murphy v. State*, 54 P.3d 556, 560 (Okla. Crim. App. 2002); *Murphy v. State*, 66 P.3d 456, 458 (Okla. Crim. App. 2003).

<sup>3</sup>*Murphy v. Royal*, 866 F.3d 1164, 1169 (10th Cir. 2017) (opinion amended and superseded on denial of rehearing en banc by *Murphy v. Warden*, No. 07-7068, 2017 WL 5181761, at \*4 (10th Cir. Nov. 9, 2017)).

<sup>4</sup>*Murphy v. Warden* 2017 WL 5181761. at \*4.

<sup>5</sup>Petition, *Comanche Nation of Okla. v. Zinke et al.*, CIV-17-887-HE (W.D. Okla. Aug. 17, 2017), <https://www.indianz.com/IndianGaming/2017/08/21/14914080121.pdf>. See also Jacob McClelland & Molly Fleming, *How a Recent Court Decision Could Affect Casinos on Tribal Lands*, KGOU (Oct. 5, 2017), <http://kgou.org/post/how-recent-court-decision-could-affect-casinos-tribal-lands>.

<sup>6</sup>See e.g., *Adams v. Eagle Road Oil*, CJ-2016-78 (Pawnee Cnty., May 17, 2016); *Reid v. White Star Petroleum*, CJ-2016-543 (Payne Cnty.,

Dec. 5, 2016); *Sierra Club v. Chesapeake Operating*, CIV-16-134-F (W.D. Okla. Feb. 16, 2016).

<sup>7</sup>Petition, *Pawnee Nation of Oklahoma v. Eagle Road Oil LLC*, CIV-2017-003 (Pawnee Nation Dist. Ct. Mar. 3, 2017), <http://www.pawneenation.org/files/2017/Tribal-Court-Case.pdf>.

<sup>8</sup>Brandi Ball, *Pawnee Earthquake Suit Given Go-Ahead in Tribal Court*, CLEVELAND AM. (Nov. 1, 2017), [http://www.thelevelandamerican.com/news/pawnee-earthquake-suit-given-go-ahead-in-tribal-court/article\\_e5597990-bf2c-11e7-bf15-e35008182e81.html](http://www.thelevelandamerican.com/news/pawnee-earthquake-suit-given-go-ahead-in-tribal-court/article_e5597990-bf2c-11e7-bf15-e35008182e81.html).

<sup>9</sup>*Adoptive Couple v. Baby Girl*, 570 U.S. \_\_\_, 133 S. Ct. 2552, 186 L.Ed.2d 729 (2013).

<sup>10</sup>*R.P. & S.P. v. Los Angeles Cnty. Dep’t of Children & Family Servs.*, et al., No. 16-500 (Cal. Ct. App. 2016).

<sup>11</sup>*In re Alexandria P.*, 228 Cal. App. 4th 1322, 176 Cal. Rptr. 3d 468 (2014); *In re Alexandria P.*, 1 Cal. App. 5th 331, 204 Cal. Rptr. 3d 617 (Ct. App. 2016), review denied (Sept. 14, 2016), cert. denied sub nom. *R. P. v. Los Angeles Cnty. Dep’t of Children & Family Servs.*, 137 S. Ct. 713, 196 L. Ed. 2d 580 (2017).

<sup>12</sup>See generally Forrest Hanson, *Supreme Court WON’T Hear Case of Girl With 1/64 Indian Heritage Who Was Forcibly Relocated From the Foster Family That Tried to Adopt Her*, UK DAILY MAIL (Jan. 9, 2017, 2:37 PM), <http://www.dailymail.co.uk/news/article-4103136/Supreme-Court-wont-hear-American-Indian-girls-custody-case.html>.

<sup>13</sup>Additionally, the University of Washington School of Law provides a concise research guide on Indian Law. *Indian & Tribal Law Research*, UNIV. OF WASH. SCH. OF L. (updated July 22, 2015), <http://lib.law.washington.edu/ref/indian16.html#uw>.

<sup>14</sup>Of particular interest is my alma mater’s offering of an M.L.S. in indigenous peoples law, which can be completed entirely online, allowing a participant to gain a thorough understanding of both the fundamentals and current issues in Indian law in 15 months. See *M.L.S. in Indigenous Peoples Law*, UNIV. OF OKLA. COLL. OF L., <http://www.law.ou.edu/academics/programs/mls-program/mls-indigenous-peoples-law> (last visited Jan. 17, 2018).

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