



Affiliated Tribes of Northwest Indians

2004 Mid-Year Conference Lincoln City, Oregon

RESOLUTION #04 - 65

"THE EXAMINATION OF INDIAN LAW ON STATE BAR EXAMINATIONS"

PREAMBLE

We, the members of the Affiliated Tribes of Northwest Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants rights secured under Indian Treaties and benefits to which we are entitled under the laws and constitution of the United States and several states, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the welfare of the Indian people, do hereby establish and submit the following resolution:

WHEREAS, the Affiliated Tribes of Northwest Indians (ATNI) are representatives of and advocates for national, regional, and specific Tribal concerns; and

WHEREAS, the Affiliated Tribes of Northwest Indians is a regional organization comprised of American Indians in the states of Washington, Idaho, Oregon, Montana, Nevada, Northern California, and Alaska; and

WHEREAS, the health, safety, welfare, education, economic and employment opportunity, and preservation of cultural and natural resources are primary goals and objectives of Affiliated Tribes of Northwest Indians; and

WHEREAS, Tribal economic development and the resulting increase in interaction of Indian nations and people, with non-Indian entities and individuals both on and off of the reservation, has given rise to an array of business transactions, regulatory issues and litigation matters between Tribal and non-tribal parties; and

AFFILIATED TRIBES OF NORTHWEST INDIANS**RESOLUTION # 04 - 65**

WHEREAS, the American public and their attorneys do not generally understand the legal import of our Indian nations' inherent sovereign rights; nor do they understand precisely how tribal self-governance and self-determination, and the laws and ways of Indian nations, affect and intersect Anglo-American legal principles; and

WHEREAS, if attorneys for the American public, particularly federal, state and local government, better understood the legal concepts of Tribal self-governance and Tribal jurisdiction, there would be fewer disputes and government-to-government dialogue would be greatly enhanced; and

WHEREAS, in February 2002 the State of New Mexico became the first state to test the topic of Indian law on its bar licensing exam, with a view towards educating public and private legal counsel and, in turn, the American public about the legal rights of sovereign Indian nations; and

WHEREAS, the majority of American states, which host large populations of Indian people and/or a significant presence of Tribal lands, including Washington, Oregon, California, Idaho, Montana, Nevada, Alaska, Colorado, Arizona, New Mexico, Utah, North and South Dakota, Oklahoma, Minnesota, Wisconsin, Michigan, New York, Maine, Connecticut, Louisiana and Florida, should likewise include the topic of Indian law on their bar licensing examinations; now

THEREFORE BE IT RESOLVED, that ATNI does hereby support the Association of Washington Tribes, and the Association's friends and colleagues in the Northwest Indian Bar Association, the Washington State Bar Association Indian Law Section and Idaho State Bar Indian Law Section, and the National Native American Bar Association, in their endeavor to have the topic of Indian law tested by state bar associations, so the American public can better understand the inherent sovereign rights of our Indian nations; and

THEREFORE BE IT FURTHER RESOLVED, that ATNI does hereby seek the assistance and collaboration of the American Bar Association, and the bar associations, boards of bar examiners and Supreme Courts in states such as Washington, Oregon, California, Idaho, Montana, Nevada, Alaska, Colorado, Arizona, New Mexico, Utah, North and South Dakota, Oklahoma, Minnesota, Wisconsin, Michigan, New York, Connecticut, Maine, Louisiana and Florida, to carry out the provisions of this Resolution; and

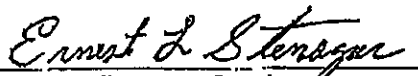
THEREFORE BE IT FINALLY RESOLVED, that this Resolution be immediately transmitted upon its effective date to the President and President-elect of the American Bar Association.


AFFILIATED TRIBES OF NORTHWEST INDIANS

RESOLUTION # 04 - 65

CERTIFICATION

The foregoing resolution was adopted at the 2004 Mid-Year Conference of the Affiliated Tribes of Northwest Indians, held at the Chinook Winds Casino and Convention Center in Lincoln City, Oregon on May 20, 2004 with a quorum present.


Ernest L. Stensgar, President


Norma Jean Loeie, Secretary

June 23, 2004



NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians Resolution #MOH-04-001

TITLE: The Examination of Indian Law on State Bar Examinations

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, Tribal economic development and the resulting increase in interaction of Indian nations and people, with non-Indian entities and individuals both on and off of the reservation, has given rise to an array of business transactions, regulatory issues and litigation matters between Tribal and non-tribal parties; and

WHEREAS, the American public and their attorneys do not generally understand the legal import of our Indian nations' inherent sovereign rights; nor do they understand precisely how tribal self-governance and self-determination, and the laws and ways of Indian nations, affect and intersect Anglo-American legal principles; and

WHEREAS, if attorneys for the American public, particularly federal, state and local government, better understood the legal concepts of Tribal self-governance and Tribal jurisdiction, there would be fewer disputes and government-to-government dialogue would be greatly enhanced; and

WHEREAS, in February 2002 the State of New Mexico became the first state to test the topic of Indian law on its bar licensing exam, with a view towards educating public and private legal counsel and, in turn, the American public about the legal rights of sovereign Indian nations; and

WHEREAS, the majority of American states, which host large populations of Indian people and/or a significant presence of Tribal lands, including Washington, Oregon, California, Idaho, Montana, Colorado, Arizona, New Mexico, Nevada, Utah, North and South Dakota, Oklahoma, Minnesota, Wisconsin, Michigan, New York, Maine, Connecticut, Louisiana and Florida, should likewise include the topic of Indian law on their bar licensing examinations.

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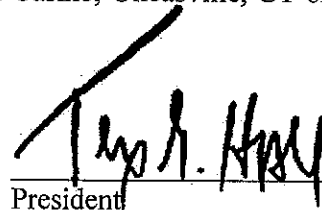
NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby support the Affiliated Tribes of Northwest Indians and the Association of Washington Tribes, and their friends and colleagues in the Northwest Indian Bar Association, the Washington State Bar Association Indian Law Section and Idaho State Bar Indian Law Section, and the National Native American Bar Association, in their endeavor to have the topic of Indian law tested by state bar associations, so the American public can better understand the inherent sovereign rights of our Indian nations.

BE IT FURTHER RESOLVED, that the NCAI does hereby seek the assistance and collaboration of the American Bar Association, and the bar associations, boards of bar examiners and Supreme Courts in states such as Washington, Oregon, California, Idaho, Montana, Colorado, Arizona, New Mexico, Nevada, Utah, North and South Dakota, Oklahoma, Minnesota, Wisconsin, Michigan, New York, Connecticut, Maine, Louisiana and Florida, to carry out the provisions of this resolution.

BE IT FINALLY RESOLVED, that this resolution be immediately transmitted upon its effective date to the President and President-elect of the American Bar Association.

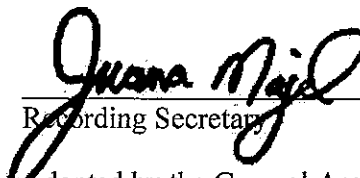
CERTIFICATION

The foregoing resolution was adopted at the 2004 Mid-Year Session of the National Congress of American Indians, held at the Mohegan Sun Hotel and Casino, Uncasville, CT on June 23, 2004 with a quorum present.



President

ATTEST:



Recording Secretary

Adopted by the General Assembly during the 2004 Mid-Year Session of the National Congress of American Indians, held at the Mohegan Sun Hotel and Casino, in Uncasville, CT on June 23, 2004.

WHEN THE STATE BAR EXAM EMBRACES INDIAN LAW: TEACHING EXPERIENCES AND OBSERVATIONS

GLORIA VALENCIA-WEBER[†] AND SHERRI NICOLE THOMAS^{††}

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^{††}Sherrí Nicole Thomas, Visiting Law Librarian, Lecturer III, at the University of New Mexico (UNM); J.D. University of New Mexico School of Law, 2005. Thomas serves as a reference librarian, heads the collection development of UNM Law Library's Indian law collection, and teaches Specialized Legal Research in Indian Law and Advanced Legal Research.

The history of the UNM School of Law and its role in the development of Indian law was aided by Philip "Sam" Deloria, Director of the American Indian Law Center; Gabriel S. Galanda, Northwest Indian Bar Association; Frederick M. Hart, Professor Emeritus and former Dean of the UNM School of Law; and Professor Leo M. Romero, former Dean of the UNM School of Law. These individuals provided valuable background; however, the authors take responsibility for the narrative in this article.

Valuable research assistance for this paper was provided by Alexandra Siek, Visiting Law Librarian, Lecturer III, at the UNM Law School and the UNM Law Students in the Law Library Research Pool.

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I. INTRODUCTION

In 2002, New Mexico became the first state to place Indian law on the state bar exam. This decision made basic knowledge of Indian law part of the competency expected of all licensed attorneys. This result arose from the University of New Mexico School of Law's (UNM) significant role as the only law school in the state. In combination with the social and political history of the state these elements produced this historic result.

This paper outlines the history of Indian law at UNM and discusses the formal process that placed Indian law on the state's bar exam. The discussion concludes with the immediate impact of this bar exam inclusion on the teaching of Indian law and the insights gained from the classroom experience. The perspectives offered herein are from the professor and a research librarian who was the tutor for the first course after the addition to the bar exam.

II. UNIVERSITY OF NEW MEXICO'S HISTORY WITH INDIAN LAW

A. UNM PIONEERING IN 1967: ESTABLISHING THE PRE-LAW SUMMER INSTITUTE

In 1967, the University of New Mexico School of Law (UNM) embarked on a pioneering commitment with two goals: to provide opportunity for American Indian¹ individuals to obtain training in law and to put Indian law into the law school curriculum. The commitment and resources devoted to achieving these two goals have had a major positive impact upon the lives of American Indian tribes² and their members who benefited from the legal education. Equally important has been the establishment of Indian law in the mainstream curriculum of those law schools that include *all* the forms of law within the borders of the United States.

1. Both "American Indian" and "Native American" are terms used to describe members of the indigenous nations within the U.S. Sometimes the term "Alaska Native" is used to distinguish tribes outside the lower forty-eight states. For convenience of style, "American Indian" and "Native American" will be used and includes all tribes and their members, including Alaska Natives.

2. Tribes are indigenous political entities that are federally recognized in the nation-to-nation relationship with the United States. The list of tribes in this political relationship is published annually. The latest is Indian Entities Recognized and Eligible to Receive Services, 70 Fed. Reg. 71194 (Nov. 25, 2005) (listing 561 tribal entities). This list also shows the various terms that tribes use for self-identity, including tribe, pueblo, nation, village, confederation, etc. Indian groups can also re-establish their status through the Acknowledgement process. See 25 C.F.R. pt. 83 (2003).

The project to open the lawyer's profession to American Indians was led by the Dean of the Law School, Thomas W. Christopher, and a faculty member, Frederick M. Hart (who later became Dean of the Law School). These two obtained the grant to underwrite the costs of a summer institute to prepare American Indian students to enter law school.³ This grant was part of the administration of President Lyndon Johnson's "War on Poverty" programs. The economic condition of American Indians in the United States was confirmed repeatedly by data that showed them to be at the lowest poverty levels among the general population. Abject conditions on the reservations and in urban areas were accompanied by the lack of legal representation to advocate and protect the rights of American Indians. There were critical rights in treaties that obtained land cessions for the majority population, benefits from state and federal programs, and individuals' civil rights that were violated without redress. In 1967, the Ford Foundation and other sources estimated that only about twenty-five American Indians were part of the legal profession in the United States.⁴

An immediate first creation was the Pre-Law Summer Institute (PLSI) to prepare indigenous students to enter law schools across the United States. The two-month program developed then remains the unique institution that propelled the success of American Indians in law schools and in the legal profession.⁵ It is a "boot camp" experience, where students are introduced to law courses, legal research and writing, and Indian law. It is not a remedial program, but one to develop a core understanding of law in some basic courses, such as contracts or torts. Students also learn some Indian law because it is not taught in some of the schools the students will be entering. The cohort relationship among students from diverse tribes and law schools also creates networks for the future work of these attorneys.

Establishing PLSI was integral to establishing the American Indian Law Center (AILC) at UNM to direct and administer the summer program and other projects.⁶ The first Director of AILC was Robert Bennett (Oneida),

3. See Philip S. Deloria, *The American Indian Law Center: An Informal History*, 24 N.M. L. REV. 285 (1994); Thomas W. Christopher & Frederick M. Hart, *Indian Law Scholarship Program at the University of New Mexico*, 2 U. TOL. L. REV. 691 (1970).

4. Deloria, *supra* note 3, at 291 (describing a survey conducted by Thomas W. Christopher and Frederick M. Hart that found about twenty-five American-Indian lawyers in the nation and fifteen law students who were American Indian); Theodora Lurie, *Shattering the Myth of the Vanishing American*, FORD FOUND. LETTER, Winter 1991, at 5; Sharyn Rosenbaum, *What Do Native Americans Want*, BARRISTER, Summer 1989, at 26.

5. See generally Rennard Strickland & Gloria Valencia-Weber, *Observations on the Evolution of Indian Law in the Law Schools*, 26 N.M. L. REV. 153 (1996); Gloria Valencia-Weber, *Law School Training of American Indians as Legal-Warriors*, 20 AM. INDIAN L. REV. 5 (1996); Deloria, *supra* note 3; Christopher & Hart, *supra* note 3.

6. Deloria, *supra* note 3, at 293.

who had been Commissioner of Indian Affairs in 1966-1969. He was succeeded by the present Director, Philip "Sam" Deloria (Standing Rock Sioux). In 1977 AILC became an independent Indian governed organization that has remained located at the Law School at UNM. AILC is the oldest Indian-controlled and operated legal public organization in the country. AILC concentrates its principle efforts in preparing entering students for law school, developing tribal governmental institutions, and strengthening the various relationships of tribal governments with federal, state, local, and other governments.⁷ Projects involving the Law School and AILC, especially the PLSI program, keep the collaborative relationship going.

The success of PLSI is incomparable in legal education and is the most successful program in the history of Indian education. AILC and PLSI continued despite the loss of funds to promote the inclusion of under-represented groups in the legal profession. The federal funding for PLSI has declined, and in 1986 and 1987, it was denied any federal funding. PLSI has persisted by AILC piecing funds from various sources. Moreover, PLSI has had major impact on present day participation of American Indians in the legal profession. These nearly forty years of summer PLSI graduates (trained in cohorts of twenty to forty students) have undeniably been the primary force for the current estimate of over 3000 American Indians among the legal professionals of this country.⁸ Many PLSI graduates entered the UNM School of Law.

The story of PLSI and AILC is inseparable from the history of Indian law at UNM as an institution and its curriculum. Indian law's role in the curriculum and, ultimately, its inclusion in the New Mexico Bar exam constitute the remainder of this paper.

B. PUTTING INDIAN LAW IN THE MAINSTREAM CURRICULUM

Today approximately 64 of the almost 200 law schools accredited by the American Bar Association (ABA) offer a course in Indian law in their

7. American Indian Law Center, Inc., *About AILC*, <http://lawschool.unNewMexico.edu/ailc/index.php> (last visited Oct. 5, 2006).

8. A.B.A. Comm'n on Racial and Ethnic Diversity in the Profession, *Statistics About Minorities in the Profession from the Census*, <http://www.abanet.org/minorities/links/2000census.html> (last visited Nov. 26, 2006) (referencing 2000 U.S. Census Bureau). In a special tabulation of the 2000 Census performed for the A.B.A., American Indian attorneys are reported in two categories. *Id.* For American Indian ancestry only, 1,730 individuals are 0.2% of all attorneys. *Id.* American Indians who also have other origins add 2,810 attorneys, 0.3% of all attorneys. *Id.*

Note that A.B.A. does not collect data on the race of members. It is a "corrective" for its past history of denying membership to African Americans, which led to the separate formation of the National Bar Association founded by African American attorneys.

curriculums.⁹ Some of these courses are not strictly law doctrine and practice courses, but part of legal history courses. The basic course is often only sporadically offered, and not by a tenure track full-time faculty member, but by adjuncts or visitors. Sometimes it is a course to provide contrastive enrichment to the mainstream curriculum, perhaps connected to international law.

The current situation has not changed significantly since one of the authors last reviewed the status of Indian law.¹⁰ It is often overlooked in the core curriculum and frequently taught in the cheapest way without any institutional commitment. The energy and innovation in developing Indian law is still concentrated in the Indian Country states, west of the Mississippi. The development of Indian law historically has involved special awareness and knowledge among the key individuals and institutions in the leadership and relationships with tribes.

Professor Ralph Johnson is generally credited with teaching the first Indian law at the University of Washington Law School around 1966-1967. Professor Johnson's notes and materials, dittoed in the technology of the time, were the source that other teachers used as no casebooks or published materials existed.¹¹ Additionally, Professor Johnson accepted the challenge of his law students, Indian and non-Indian, to move Indian law studies beyond the classroom. In the real world the treaty rights of the Northwest tribes, especially fishing rights, were only rights on paper without active use for tribes and their members. Thus, the seeds were planted for the advocacy that produced the ultimate Supreme Court decisions sustaining the treaty rights.¹² Professor Johnson's work clearly set a model that others have followed.

Around the same time of Professor Johnson's work, UNM joined in introducing Indian law into the curriculum. However, in the 1980s and the 1990s, UNM experienced the loss of full time faculty to teach Indian law.

9. A.B.A., *Section of Legal Education & Admissions to the Bar*, <http://www.abanet.org/legaled/approvedlawschools/alpha.html> (last visited Dec. 15, 2006). The course catalogs for each school were used to find out about the Indian law courses, clinics, programs, etc. offered at each institution, along with information about the faculty members teaching these courses. There is no accrediting or formal organization in Indian law that collects and reports standardized information on programs.

10. See generally Strickland & Valencia-Weber, *supra* note 5.

11. Strickland & Valencia-Weber, *supra* note 5, at 158 (describing Professor Johnson's role). David Getches developed a manual for Legal Services attorneys doing Indian law that served as a basis for his casebook. See David Getches, Dean of University of Colorado School of Law, Address at the University of North Dakota Indian Law Conference: The Pedagogy of American Indian Law, *Teaching the Trilogy* (Oct. 13, 2006).

12. See the "Boldt" cases, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).

In this period visiting faculty and others filled in the gaps. Ultimately, the faculty and a core of American Indian law students acted to correct a truth-in-packaging problem that existed. When appointed as Dean, Leo M. Romero focused on rebuilding two programs at the law school: Indian Law and Natural Resources. Lured by the reputation of the PLSI program at AILC, the students were disappointed after their entry into UNM in the lack of Indian law courses at the law school itself. Dean Romero was concerned that the program was living on a reputation that was not matched by the reality. In 1991, as part of his Deanship, he obtained a new tenure track faculty position to rebuild the Indian law curriculum.

This faculty opportunity aimed to restore UNM's leadership in Indian law based on regularly scheduled courses and instructional experiences to be offered to all students. The UNM chapter of the Native American Law Students Association (NALSA) was active in pressing for reconstruction of the Indian law curriculum and fully participated in the screening of the candidates for the newly created faculty position.

Author and faculty member, Professor Valencia-Weber was hired to invigorate the Indian law curriculum in the fall of 1992. At the University of Tulsa College of Law, this faculty member had established the first Indian Law Certificate in an American Bar Association (A.B.A.) accredited law school. At UNM, a review of Indian law as taught elsewhere, and of the concerns of the indigenous nations within the state and region, informed the design of the Indian Law Certificate Program. The UNM law school faculty formally established the twenty-one-hour course of study in 1994. Thus, UNM became the second A.B.A. school to establish a certificate program. Since that time there has been expansive growth in the over thirty some hours of courses offered and the expansion of the faculty to include four members¹³ who focus their teaching and scholarly work in Indian law. The curriculum includes the Federal Indian law as well as the internal law of tribal sovereigns.

Additionally, UNM has "mainstreamed" Indian law into basic courses that every student experiences. These include, but are not limited to, the basic first year courses (torts, contracts, etc.), the advocacy course with an Indian law problem for the moot court,¹⁴ and as a part of advanced courses such as federal jurisdiction, conflicts of law, and business associations.

13. Professor Kenneth "Kip" Bobroff, John LaVelle, and Christine Zuni Cruz, plus Professor Valencia-Weber.

14. Barbara Blumenfeld, *Integrating Indian Law into a First Year Legal Writing Course*, 37 TULSA L. REV. 503 (2001); Kenneth Bobroff, *Indian Law in Property: Johnson v. M'Intosh and Beyond*, 37 TULSA L. REV. 521 (2001).

UNM's long-term investment in Indian law includes other significant resources. After an alumnus Senator Leonard Tsosie (Navajo) secured a legislative appropriation, the law school established the Southwest Indian Law Clinic (SILC) in 1994. Among law schools this is a first, as it resulted in a full-time tenured Director, Professor Christine Zuni Cruz (Isleta/San Juan Pueblo), and a year-round clinic that serves Native-American clients.¹⁵ Given UNM's long-standing national leadership in clinical education, SILC was a natural intersection of two important areas in legal training. A related development is the *Tribal Law Journal*, the first on-line journal that focuses on internal law made by tribal peoples to govern themselves.¹⁶ SILC and the *Tribal Law Journal* reflect the active role that students have in the UNM curriculum. SILC resulted from a successful project led by a student, Jacque Rashleger (Tlingit/Haida), to obtain a legislative appropriation to establish a clinic in Indian law. For the *Tribal Law Journal*, students were primarily responsible for the creation and design.

Another milestone for UNM was the support of Dean Frederick M. Hart to re-establish and re-publish Felix S. Cohen's *Handbook of Indian Law*, the only treatise in this subject. Dean Hart provided the critical money from the law school. In conjunction with the AILC, the 1942 edition was re-published. It had been out of print and not available for newer generations of students, attorneys, and judges. Subsequently, the *Handbook* was revised in 1982, and more recently in 2005, as projects of the AILC. This effort at UNM is only one among others, such as the special Indian law collection in the library,¹⁷ that demonstrates the institution's commitment to the substantive importance of Indian law.

UNM is the only law school in the state and it has generally enjoyed public support for responding to the needs of the state. The achievements in Indian law are part of the state's pride, voiced in editorials in New Mexico newspapers and other public forums.¹⁸ UNM has trained over 230

15. 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 (1999-2000); Christine Zuni-Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness: [Re] Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. 1 (2000).

16. See University of New Mexico Law School Tribal Law Journal, <http://tlj.unm.edu/> (last visited Oct. 5, 2006).

17. See University of New Mexico Law Library for Indian Law resources, <http://lawschool.unm.edu/lawlib/research-guides/indian-law/index.php> (last visited Oct. 5, 2006).

18. Scott Sandlin, *UNM Law School Honors Fred Hart's Contributions*, ALBUQUERQUE J. (N.M.), Nov. 22, 2002, available at <http://www.abqjournal.com/venue/personalities/800720venue11-22-02.htm>; Scott Baldauf, *Mixing Tribal Traditions and U.S. Law*, THE CHRISTIAN SCI. MONITOR June 5, 1998, at 4; Editorial, *Law School Program Aids Indian Students*, ALBUQUERQUE J. (N.M.), Oct. 19, 1997, at B2.

American Indian individuals in J.D. studies, and they are among the established national leaders in Indian law.¹⁹ As of May 2006, eighty-three students have graduated with the Indian Law Certificate and fifty-six of these are American Indian or Indigenous individuals from outside the U.S. There is also state pride that the law school's enrollment reflects the racial diversity of the state, with forty-five percent²⁰ of the current enrollment being persons of ethnic identity.²¹ The law school has not been subjected to external attacks on its admission practices, such as those which triggered the *Grutter v. Bollinger*²² case in the Supreme Court.²³ With its singular role as New Mexico's law school and its pioneering work in the development of Indian law, conditions were favorable for making Indian law a part of the New Mexico Bar Exam.

III. PUTTING INDIAN LAW INTO THE NEW MEXICO STATE BAR EXAM

A. THE NEW MEXICO BAR PROJECT AND PROCESS

While it is common for attorneys to bump into Indian law issues in the course of handling matters such as contracts, family law, natural resources, and water law, many lack formal study of Indian law. When their clients' needs point to an Indian law intersection, it has been the common experience for them to seek advice from UNM Indian law faculty. They also show up at the UNM Law Library, a central resource for all attorneys in the state, and ask librarians to assist the attorney in filling his/her knowledge gaps. In both types of instances, the naïve attorney wants "instant" and short answers to fill the substantive law gap. While warranting respect for recognizing that Indian law knowledge is involved and they do not have it, these attorneys also lack awareness of the complexity of Indian law. Even

19. *E.g.*, John Echohawk, founder of the Native American Rights Fund; Kevin Gover, former Assistant Secretary for Indian Affairs; many tribal court judges including Robert Yazzie, former Chief Justice of the Navajo Supreme Court; Justice Lorene Ferguson, current Justice of the Navajo Supreme Court; numerous tribal, state, and federal officials; state court judges, etc.

20. University of New Mexico School of Law Registrar Enrollment Statistics, Total Enrollment 2006-2007 (on file with author).

21. According to the 2000 Census, the total population of New Mexico was 1,819,046 (100%). U.S. Census Bureau, *Fact Finder*, http://factfinder.census.gov/home/saff/main.html?_lang=en (follow "Fast Access" hyperlink and select "New Mexico," then follow "2000" hyperlink) (last visited Oct. 5, 2006). The state's diversity is reflected as: 44.7% White, 42.1% Hispanic or Latino, 9.5% American Indian and Alaska Native, 1.9% Black or African American, 1.1% Asian, 0.1% Native Hawaiian or Other Pacific Islander. *Id.*

22. 539 U.S. 306 (2003).

23. *See generally id.* (challenging the University of Michigan's admission of minority students to the Law School).

among attorneys knowledgeable about Indian law, because of inconsistency, non-uniformity, and recent United States Supreme Court decisions, one must answer with conditioners and situational context. Simple and definitively correct two to three sentence answers are not what anyone should seek in Indian law! These interactions with attorneys, sometimes desperately seeking help, are sometimes highly unsatisfactory for all involved.

Lack of licensed attorneys who are competently knowledgeable of Indian law has exacerbated the hardships faced by low income Indians when they need representation. The ethical private attorneys tell prospective clients that for Indian law work they should seek representation from appropriately trained lawyers. This cautionary pattern has also been part of some pro bono and legal aid organizations. For example, when Professor Valencia-Weber arrived in Albuquerque in 1992, the major pro-bono project to provide guardians ad litem for children, did not include Indian children because the organization and its staff lacked expertise in the Indian Child Welfare Act. Consequently, SILC at UNM and the Rio Grande Pueblos Office of Legal Aid that specializes in Indian law continuously have full caseloads and long waiting lists. This type of negative impact on low-income Indian people and families needing legal assistance is part of the justification in Washington to add Indian law to the bar exam. Washington was the second state to succeed in adding this subject. The Washington advocates proffered to decision-makers evidence of the hardship on Indian individuals and families when their low incomes prevented them from protecting their rights and interests.²⁴

In response to the evident lack of Indian law competency among New Mexico licensed attorneys, the state's Native American Bar Association and lone law school took action. The project to place Indian law on the state bar was completed in seven months. It began as a project request from a New Mexico Native American Bar Association officer and UNM law school alumnus, William Bluehouse Johnson (Isleta/Navajo), who has also been a tribal court judge for several Pueblos. Judge Johnson is part of a

24. Letter from John C. Sledd, Attorney, Native American Unit of the Northwest Justice Project, to Board of Governors, Washington State Bar Association (Oct. 11, 2004) (on file with the North Dakota Law Review).

[I]ntake lawyers tell me that three-quarters of volunteer lawyer programs and most staff legal service lawyers will not handle Indian or tribal law cases. Ignorance of the law is a major reason why. As a result, poor Native Americans get help for only one in ten important legal problems, according to the statewide legal needs study. Non-Natives get help for one problem in seven. Both statistics are shocking, but the disparity for Native people is an intolerable discrimination.

Id.

core of Indian law practitioners, Indian and non-Indian, who collaborate on providing CLE instruction on Indian law.

SILC accepted the task as one of the non-litigation projects that students undertake, along with their direct representation of clients in tribal, state, and some federal forums. Professor Kip Bobroff was the clinic instructor supervising a student, Calvin Lee (Navajo), in fall 2001. Basic research for the project began with determining if there had been any occurrences of Indian law on the New Mexico bar exam, and inquiry into the actual process involved in adding new subjects to the exam. The SILC project leaders (Bobroff, Lee, and Johnson) discussed the project and obtained information from attorneys and others who might have an interest in adding this subject of importance into ordinary practice in New Mexico. Their research and discussions provided the structure for drafting a proposal to include Indian law as a New Mexico bar exam subject. In conjunction with the drafting of the proposal, the project leaders secured support from the New Mexico affiliate of the Native American Bar Association, members of the Indian Law Section of the NM Bar, and other attorneys in the state.

The SILC project produced the proposal on December 4, 2001. The proposal states that knowledge of Indian law was increasingly necessary for competent representation in the face of the specific key conditions in New Mexico. The conditions include:

1. The important role of American Indians in New Mexico where the individuals constitute 9.5% of the state's population (173,483 persons in 2000 census).
2. The control of New Mexico's twenty-three tribes and pueblos of over 10% of the state's land area (some 8,169,407 acres in trust) where complex jurisdictional issues arise among the tribal, state, and federal governments.
3. The increased Indian economic activities that involve non-Indian parties as business participants or employees in areas of gaming, taxation, and natural resources development.
4. The additions to Indian law from the New Mexico legislature and courts in laws relating to the tribes and pueblos, with cross-border enforcement and collaboration in the areas of child support, education, taxation, and crime control.
5. The long established training in Indian law at the UNM School of Law across the curriculum as well as in specialized courses in Indian law so that any student can learn the basics.

6. The need for fair and informed discourse of Indian law where attorneys, judges, and legislators acknowledge inexperience in this area of law that handicaps the legal decisions that are made.

7. The improved conditions for a fair trial when the attorneys and judges can engage in informed processes on the Indian law issues and will be able to educate the public about these matters so as to reduce misunderstandings about the tribal and state relations.

Thus, the reality of New Mexico was captured in the proposal, accompanied by supportive statements for the adoption of the proposition.

The proposal was presented to the New Mexico State Board of Bar Examiners, an advisory board of the New Mexico Supreme Court who would ultimately decide the matter, and was placed on the Board's December 8, 2001, meeting agenda. The Board unanimously voted to recommend that the proposal be adopted by the New Mexico Supreme Court. Justice Gene E. Franchini of the New Mexico Supreme Court, who attended the board meeting on behalf of the supreme court, considered the recognition and inclusion of Indian law on the bar exam as long overdue, "I am just real happy that we are the first in the nation to get off the dime on this issue This is a real important area of law and applicants for the New Mexico Bar should be aware of significant questions of law which arise in this area."²⁵ Michael P. Gross, a Santa Fe lawyer and member of the Board of Bar Examiners stated, "Indian law issues confront lawyers on a daily basis around the state, and an astounding number are ignorant about these laws."²⁶

On February 28, 2002, the New Mexico Supreme Court approved the inclusion of Indian law in the state bar exam, to be implemented with the February 2003 exam. Besides giving a one-year notice to those taking the bar, the court also changed its Rule 15-203 of the Rules Governing Bar Examinations²⁷ to include Indian law as well as federal income tax. With this action, New Mexico became the first state in the union to recognize the importance of Indian law as a competency requirement for all state licensed attorneys.

25. Kris Axtman, *New Status for Indian Law: It'll Be on the Bar*, CHRISTIAN SCI. MONITOR, June 4, 2002, at 3.

26. News Release, N.M. State Board of Bar Examiners (Mar. 19, 2002) (on file with author).

27. New Mexico State Board of Bar Examiners, Rule 15-203, *Subjects for Examination*, available at www.NewMexicoexam.org/rules/rules203.htm (last visited Oct. 5, 2006). "The areas of concentration which may be covered include: 5. Indian law, including subjects such as federal Indian law, criminal and civil jurisdiction in Indian country and Indian child welfare act under state and federal law." *Id.*

Because Indian law is one of twenty-three subjects that the New Mexico Bar Exam can address, it has not been included on every offering of the exam. The bar exam includes six essay questions where the Indian law may be tested. As of July 2006, it has been on the bar exam three times.²⁸ The focus of the essay questions has included the Indian Child Welfare Act, tribal jurisdiction over non-members in civil and criminal matters, and sovereign immunity. The questions are drafted by practitioners in Indian law selected by the bar examiners, as is the case in other subject areas. UNM Indian law professors, to date, have not been asked nor have any indicated that they seek to draft the essay questions on this topic. Potential conflict of interest or ethical issues of questions possibly favoring UNM graduates over others taking the exam would counsel taking caution in this matter.

In summary, the history of Indian law in New Mexico's law school created a supportive environment within the bar and that state's population. While hostility to the sovereignty of the tribes and pueblos does exist in New Mexico, it has been countered by positive relationships with tribal governments. The ugly political rhetoric found in states with tribal populations has lesser impact than elsewhere because of the contributions of the tribes and pueblos to the economic strengths of the state. Besides the tourist attractions centered on tribal culture, the many jobs created for Indians and non-Indians in the tribal ventures are acknowledged. In the common concern for the safety of all citizens in the state, the tribal and state governments have begun to share offender records on DWI violations in both jurisdictions. In this state environment, the process of adding Indian law to the test of competency for all the state's attorneys was completed in seven months with broad support.

B. OTHER STATES' EXPERIENCES IN PLACING INDIAN LAW ON STATE BAR EXAMS

Other states have experienced efforts to add Indian law to the state bar exam, and Washington has succeeded in becoming the second.²⁹ After New Mexico's success, the National Congress of American Indians (NCAI) passed a resolution encouraging the inclusion of Indian law in state bars, especially those states with "large populations of Indian people and/or a

28. Review of New Mexico Bar Exams since and including February 2003. Questions appeared on the February 2003, July 2004, and July 2006 exams.

29. Gabriel S. Galanda, *Bar None! The Social Impact of Testing Federal Indian Law on State Bar Exams*, THE FED. LAW., Mar. 2006, at 30.

significant presence of Tribal lands.”³⁰ NCAI named twenty-one states that fit these descriptors. In April 2006, Gabriel S. Galanda, who led the Washington effort, stated that bar leaders in Arizona, Oklahoma, Wisconsin, Montana, Oregon, Idaho, and California were considering whether to add Indian law.³¹

The Washington state campaign took approximately two years to obtain the addition of Indian law.³² On October 22, 2004 the Washington Board of Governors voted unanimously in favor of the Indian law inclusion. While generally receptive to adding this subject matter, a concern of the Board of Governors was how meaningful questions would be drafted.³³ In contrast to New Mexico, this Board specified the four areas in which the exam will test: tribal sovereignty, tribal civil and criminal jurisdiction, tribal sovereign immunity, and the Indian Child Welfare Act.³⁴ As in New Mexico, in Washington, the Indian law issues may be interwoven in questions covering other subjects or may be stand-alone questions.

The action of the New Mexico Bar Examiners triggered off discussions in other states to add Indian law to the state bar exam, most recently with the inclusion of the subject on the South Dakota bar exam.³⁵ The situations in other states are variously reported, and in all public accounts the action in New Mexico is mentioned. In Montana, a staff attorney for the Montana Legislature reported a ten to fifteen year struggle to place Indian law on the bar exam.³⁶ However, the Chairman of the Montana Board of Bar

30. The National Congress of American Indians (NCAI), Resolution #MOH-04-001 (June 23, 2004) available at <https://www.ncai.org/ncai/data/resolution/midyear2004/04-001.pdf>. NCAI identified as the appropriate states: Washington, Oregon, California, Idaho, Montana, Colorado, Arizona, Nevada, Utah, North and South Dakota, Oklahoma, Minnesota, Wisconsin, Michigan, New York, Maine, Connecticut, Louisiana, and Florida. *Id.*

31. Galanda, *supra* note 28, at 29. See also Leigh Jones, *A New Bar Exam Hurdle: Indian Law; Two States Now Have Indian Law on Bar Exams, With Four More Lining Up*, 27 NAT'L L.J., Nov. 1, 2004, at 4 (col.1); Richard Walker, *American Indian Law Added to Washington State Bar*, INDIAN COUNTRY TODAY, Nov. 17, 2004, at D1.

32. Jones, *supra* note 31, at 4.

33. *Id.*

34. Rob McDonald, *Move Validates Long-Ignored Legal Principles*, SPOKANE SPOKESMAN-REV., Oct. 29, 2004, at B1; Walker, *supra* note 31, at D1.

35. The South Dakota Board of Bar Examiners has adopted Indian law as a bar exam subject area effective January 1, 2007, under Regulation 3, which reads:

Indian Law includes basic principles of federal Indian law, including but not limited to civil and criminal jurisdiction, the Indian Civil Rights Act, the Indian Child Welfare Act, and the Indian Gaming Regulatory Act. It does not include tribal laws or customary laws. Indian Law is tested by one 30-minute essay question.

REGULATIONS OF THE BD. OF BAR EXAMINERS STATE OF SOUTH DAKOTA R. 3 (2007) available at <http://www.sdjudicial.com/index.asp?title=regulations&category=bar examination&nav=42>.

36. Todd Struckman, *Spirit of the Law*, MISSOULA INDEP., Sept. 29, 2002, available at <http://www.missoulanews.com/Archives/News.asp?no=2687>.

Examiners questioned whether all lawyers need to know Indian law, which he categorized as a "detailed subspecialty" like securities law.³⁷

The discussion in Minnesota was further energized when Governor Tim Pawlenty, a lawyer, made an inaccurate statement about treaty hunting and fishing rights.³⁸ A conference at the University of Idaho College of Law included discussion about including Indian law to the state bar exams of Idaho, Oregon, and Washington (which had not completed its inclusion process at this time).³⁹ Efforts have also been reported in Arizona and Oklahoma, but these have not resulted in placing Indian law in these states' bar exams.⁴⁰ All of the "possible" states have law schools where Indian law is taught so the adoption of Indian law into the bar exam will have impact upon these schools and how they train their students.

IV. ENROLLMENT IMPACT IN THE CLASSROOM

This discussion has descriptive data and the observational experiences of the two authors in their instructional roles *after* Indian law was placed among the New Mexico Bar Exam subjects. The first author has been the primary professor for the basic Indian law course at UNM; the second author was a student in the class and subsequently served as the tutor for the largest class in the history of this course.

A. ENROLLMENT IN THE BASIC INDIAN LAW COURSE

In the fall of 2004, there was an immediate impact in the enrollment in the basic or first course in Indian law. The most recent New Mexico Bar Exam had included an Indian law question and accounts about its difficulty reached the third year students at UNM. The pattern had been to offer this course in the fall semester so that students (especially second years) could prepare for the advanced Indian law courses that follow. Generally that enrollment had ranged from twenty to thirty students, which made the class small enough for active discussion that allowed participation of enrollees. However, in this fall 2004 class, there were some seventy persons in class the first day! This overflow strained the room's capacity as well as the

37. *Id.* (providing a quote from Randy Cox, who said the Board of Bar Examiners would create questions on Indian law if the Montana Supreme Court asked for such).

38. Deborah Locke, *Pawlenty Could Use a Class in Indian Law and Rights*, ST. PAUL PIONEER PRESS, May 22, 2003, at A15.

39. Jack McNeel, *American-Indian Law Practitioners Stress Importance of Fee-to-Trust Land Issue*, INDIAN COUNTRY TODAY, Feb. 25, 2004, available at <http://www.indiancountry.com/content.cfm?id=1077574249&print=yes>.

40. Correy E. Stephenson, *Tribal Courts Gaining Mainstream Status in Legal World (Indian Law)*, LAW WEEKLY USA, Jan. 17, 2005, available at http://www.lawyersweeklyusa.com/subscriber/archives_FTS.cfm?page=usa/05/1170579.htm.

professor's preparedness for handling such a massive change in the classroom climate.

The official enrollment settled at sixty-two students after the usual "shop and drop" for courses that students do. Reviewing this situation, the Indian law faculty and Dean decided that it would be best to offer this basic Indian law course during each semester. Since then, we have offered a fall and spring course, with separate professors who have coordinated the textbook selection.

At UNM our experience does not yet allow us to make hard conclusions about why and what is happening among our enrollment pattern. So what we present are preliminary observations and conclusions.

B. WHY STUDENTS ENROLL

It has been the professor's practice to obtain from students on the first day of class an oral introduction of themselves and a brief explanation of why they are taking the basic Indian law course. With the fall 2004 course students wrote this information on an index card so that our Indian law curriculum planning might obtain some helpful information. From the data collected from the fall 2004, 2005, and 2006 classes, the following profile has been constructed.

Based on the professor's recall of the class profile *before* Indian law was placed on the New Mexico Bar Exam (hereinafter "Pre-Bar Exam"), there are some distinct reasons that students gave for enrolling in the class. The professor kept these reasons in mind during the course and related the laws and cases to these interests where appropriate. Some of the statements given by students include:

1. American Indian students have personal and professional interests in Indian law, in practicing Indian law in the state, region or in national forums. These students often stated Indian law is "why I came to UNM."
2. Non-Indian students have interests similar to the American Indians in the first category. Frequently, these individuals have joined the UNM NALSA, which welcomes membership from any student with an interest in American-Indian policy and law.
3. Students, Indian and non-Indian, have related interests in areas such as natural resources, environmental law, and human rights law. Some are enrolled in the UNM Natural Resources Certificate program.

4. Students, generally non-Indian, have made a "reality" judgment that they would have to deal with Indian law to practice in this state and region. Sometimes the students voiced skepticism about the viability of tribal sovereignty and the ensuing laws, but had a pragmatic approach on how to prepare for work as a legal professional.

5. Students take Indian law for intellectual curiosity reasons and to take advantage of the special opportunities available at UNM.

6. Students, few from another post-baccalaureate program, often the history graduate program, are allowed to take the course with the professor's permission.

Because of UNM's concerted efforts to recruit and admit American Indian individuals for law studies, in this Pre-Bar Exam period half of the class was frequently composed of Native American students. In the 2006-2007 academic year, for instance, UNM has forty students representing twenty-five Indian nations, including six of New Mexico's Pueblos. Many of these Native American students enter law school after working for tribes, non-profit organizations, and state and federal agencies focused on Indian interests, e.g., cultural restoration, environmental regulation, development of natural resources, legislative work, tribal court forums, and family and children's services. The small size of the class proved comfortable for these Native students to offer experiential examples that fit the laws, policies, and cases being studied.

Creating a discussion climate that is comfortable for *all* students is a commonly shared goal of the Indian law faculty. Reciprocity among all the students was not unusual and often carried over into out-of-class relationships. We know the quality of our instruction and of the learning process is significantly improved with a class atmosphere where Indian and non-Indian students freely communicate.

The enrollment *after* Indian law was put on the bar exam (hereinafter "Post-Bar Exam") was especially disruptive because of the "small school, small class" culture that makes UNM distinct. UNM Law School purposefully has a small student enrollment (total of 348 in 2006-2007) and emphasizes teaching in small classes. Also, the faculty student ratio of one faculty member per ten or eleven students favors the development of relationships where faculty know the students and vice versa. Students seeking to hide in the backbench generally have a hard time getting lost in our classes or remaining anonymous in the law school community. The jump in Post-Bar enrollment produced a changed environment in more than the number of persons crammed into one classroom.

The reasons that students stated on the index cards in the fall 2004 Post-Bar Exam period revealed motives that had not been evident in the Pre-Bar Exam period. Some students frankly expressed the "fear and loathing" that many feel about the bar exam itself. When their statements touched on Indian law as part of the last test of their qualifications to be law professionals, an interest in Indian law itself was lacking. More than one student stated that it was a forced choice of "either the Indian law course or tax course," so that the former was the lesser of two evils. They knew they would have to contend with these new subjects on the bar exam, the last true "bar" before licensing. Indian law was the area in which they had least experience or interest from their past studies.

Of course, the class continued to attract the type of students who gravitated to Indian law in the Pre-Bar Exam period, but now they did not substantially constitute the enrollees. Present were the Indian and non-Indian students with special interest in Indian law, with related interests, with pragmatic appreciation of the importance of Indian law, and with an intellectual interest in law or from a graduate study in another field. These students persisted, but now, in the aggregate, they were about half the class. Their contributions took longer to emerge than in the prior classes. The new class members seemed to outnumber the former students, if not in number then in overt participation.

Some of the "newer" students pushed a narrower interest in the class discussions. In law teaching, there has always been the segment of students who seek to learn only the hard rules, the bright-lines of law. As has bedeviled Indian law practitioners, teachers, and scholars, the stability and predictability of hard rules and bright-lines are not characteristic of Indian law. The new, different students did not appreciate discussions of political theories underlying law and how public policy is constructed and changed over time. These two elements are recurring in meaningful dialogues in Indian law. Some changes, intended by the professor and others that arose from the interactions, were unavoidable in the reconfigured "big" class.

V. CLASSROOM DIALOGUE: CHALLENGES IN THE SUBSTANTIVE AND IN INTERACTION

A. PEDAGOGICAL APPROACH BEFORE INCLUSION OF INDIAN LAW ON THE BAR

With distinct negative memories of law school instruction where only one end of the semester exam measured one's knowledge, Professor Valencia-Weber has deliberately created a different evaluation method. Generally, Professor Valencia-Weber has students complete three problem-type assignments during the course; they are part of the total points used to calculate the course grade. The students anonymously turn in answers using coded numbers assigned by the law school registrar. These assignments cover sovereignty, trust theory, and the last one involves the intersection of tribal, state, and federal jurisdiction. The last one is essentially a mini exam and serves as the basis for the course review before the final exam.

It has been the instructor's practice to grade each individual student's submission. The students also receive an explanatory sheet (not a model answer) that identifies the key doctrines that an answer should have included as well as related ideas that increase the points for the answer. These assignments reflect the real-life situations in Indian Country where each of three assignment topics or issues arise. Students also receive a "cut and paste" set of answers selected from those submitted that show how some class members, in their varied ways, provided on-target answers.

To make the grading manageable, there is a one-page limit on the assignment answer. Hopefully, this limit prods the students to think about what they analyze and write. It is also realistic if one considers the page limits of local Federal Court rules, e.g., one single spaced page equals at least two double spaced pages and some Federal Courts have limits of sixteen to twenty double-spaced pages. Some students still hand in "stream of consciousness" drafting until they realize that they are losing points in the calculation of their final grade. These assignments are work for the students and the teacher. However annoying the assignments are during the course, at the end of the course, this is a feature of class that the students rate quite positively. This approach allows them to correct their understandings before the final and to fill the gaps in their grasp of Indian law.

This basic Indian law class has also used videos that are appropriate for specific topics or cases during the class. Three videos or films were used to connect to specific doctrinal ideas and cases read during the course. In

conjunction with reading material on the medieval views of the indigenous peoples of the Americas, *The Controversy at Valladolid* (a French film) captures the theological, political, and legal debate at the Council of Burgos in Spain in 1550. Whether the indigenous peoples of the New World were human and warranted a status other than as slaves invoked the historic debate between Bartolome de las Casas and Juan Gines de Sepulveda, each noteworthy in the policies of Spain and the Catholic Church.⁴¹ *Indians, Outlaws, and Angie Debo*⁴² presents the culmination of removal, allotment and post-allotment abuses in Oklahoma of Indians and their property rights. Both *Valladolid* and the *Debo* film capture fully in different times and settings the dominating and colonizing powers' ability to exploit the indigenous peoples and find ways to deny that the original Natives had rights that others were bound to respect. *The Peyote Road*⁴³ features the *Oregon v. Smith*⁴⁴ case involving peyote use and religious free exercise rights. The spiritual world and beliefs of the Native American Church are presented by Reuben Snake, the spiritual leader of the Church, and respected theologians who validate the substantive right that the Supreme Court would not protect. Overall, in this class the films functioned to expand the law knowledge that prior class discussion had tried to establish for the cases.

B. CHANGES IN PEDAGOGICAL APPROACH

The large enrollment alone required changes in the professor's pedagogical approach. With sixty-two students in the fall 2004 class, personal grading was not possible. Additionally, that semester the professor

41. This is a French film, with English subtitles, which Professor Valencia-Weber was fortunate to obtain a copy while out of the U.S. The film is on file with the authors.

42. *Outlaws, Indians, and Angie Debo* (PBS television Oct. 18, 1988) (on file with authors). For more information on this broadcast documentary, see Barbara Abrash, *Case Study: Indians, Outlaws and Angie Debo*, www.centerforsocialmedia.org/resources/print/case_study_iindians_outlaws_and_angie_debo_i/ (last visited Nov. 26, 2006). Barbara Abrash was a producer of the documentary. *Id.* This documentary was produced by WGBH in Boston and broadcast over PBS in the first season of the American Experience in 1988. *Id.* It won the Erik Barnow Award of the Organization of American Historians as "Best Film of the Year" in 1989. *Id.* The first author was one of the organizers of the project that produced this film. *Id.* Unfortunately, the video became unavailable in the PBS catalog, despite a continuing demand for it. *Id.* Currently, an effort is being made to re-license and make the video available again. *Id.*

43. *THE PEYOTE ROAD* (Kifaru Productions 1992) (on file with authors). This film was distributed by Kifaru Productions, San Francisco, CA. It is part the Native American Religious Freedom Project established to reverse the impact of the decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which denied free exercise protection to Native American Church members who use peyote.

44. *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

was also teaching constitutional law, a large class in UNM terms of some forty students.

The immediate adjustments included adding a tutor to handle the recurring questions that arise in Indian law.⁴⁵ For the three assignments, the professor and the tutor worked out core scoring sheets for her to use. These sheets identified for the students the key ideas and doctrines that a responsive answer would have included and a check-off where the student had performed. Then the professor prepared the explanatory sheet (not a model answer) that presented the key ideas and rationale for how a strong answer would be constructed. Additionally, the tutor arranged review sessions and responded to students' questions on the class listserv. Questions that were likely to be common to other students were also referred to the professor and distributed to the class listserv. Thus, students would have different options for raising questions and reducing their confusion in a timely way. While some teaching devices were immediately accepted as helpful, the screening and grading of the assignments invoked some concerns and negative reactions that required continuous adjustments.

For the professor and tutor, there was also more planning involved in how to approach the class content. The informality that in smaller classes created unforeseen and enriching dialogue did not seem to naturally occur in this class. More planning included developing worksheets with questions for critical cases like *Morton v. Mancari*,⁴⁶ so that students could be prepared for a focused discussion. The professor had always used panels of students assigned to be "starters" for the class discussion and these in the larger class required more deliberation to assign the panels. Some class members would have been content to simply attend class and not participate in a voluntary way.

Before the increased enrollment, the videos or films were shown for added historical perspective and to promote discussion. The films were now imperative in providing historical context for the majority of the large class. The former class environment included more students with historical knowledge acquired because of their pre-existing interest in indigenous peoples.

C. SUBSTANTIVE CHALLENGES

The elements of the "big" class produced some substantive challenges during the Indian law course. At times, at the start of the class the professor experienced the challenge as a questioning of her qualifications as a law

45. See Part VI for the tutor's perspective by the second author, Professor Thomas.

46. 417 U.S. 535 (1974).

teacher. This is not new to those among the last to enter the law professoriate; being a clearly identifiable ethnic person and female compounds the process and unpleasantness. This type of challenge was experienced earlier in the professor's career when teaching courses *not* in Indian law, that is, remedies, constitutional law, and immigration law. Confrontational student behavior on the instructor's qualifications in Indian law was new. Eventually, the Indian law class settled down to business after three to four weeks. The professor decided that the more important challenge was to the substantive merits of Indian law itself.

The questioning about Indian law itself centered on whether tribes were truly sovereigns and governments whose authority warranted respect as part of the law-making jurisdictions within the borders of the United States. The political status of the indigenous nations, the effect on non-Indians of the laws made by tribal and pueblo governments, and the role the tribal governments have in New Mexico in conjunction with state and federal law were discernable strands of this questioning. The "inconvenience" of having to master some basics in Indian law for the New Mexico Bar Exam was evident as these basics did not fit the subject matter of the students' prior coursework.

Moreover, the inconvenience and real-life impact of Indian law on the lives on non-Indians exploded out on the first day of class. Having presented the students with the course structure and the order in which the substantive content would be covered in the course, the professor asked if the students had questions. The first question was from a vexed non-Indian student who wanted to know what law basis could possibly allow the Pojoaque Pueblo Police to stop him on the highway on their lands and issue him a ticket for a vehicular violation. The student made it clear that the Pojoaque Pueblo's authority over non-Indians was unacceptable and of questionable validity. For the next three weeks this same student and the same type of questioning, sometimes connected to the public safety, roiled and distracted the class.

Providing bona fide answers based on New Mexico law that enables the numerous cross-jurisdictional agreements between and among tribes, state, and municipal governments⁴⁷ did not allay this contentious voice. Especially in matters of public safety, the cooperative agreements and cross-jurisdictional deputizing are important in New Mexico. For instance, New Mexico has a critical problem of injuries and deaths caused by DWI

47. N.M. STAT. ANN. § 29-1-11 (1978) (amended 2005); *id.* § 4-41-10 (1978). *See* New Mexico Op. Att'y Gen. 121 (1957-1958) (affirming sheriffs' authority to commission special deputies under prior law, including tribal police officers).

offenders. So the tribes and the state are sharing records on DWI offenders to penalize and stop the repeat offenders. There is a recurring questioning among some of New Mexico citizens and certain attorneys that the Pueblo and Tribal Police can exercise authority to stop non-Indians on the roadways.

Certainly skepticism about tribes as sovereigns with jurisdictional authority is part of teaching Indian law. In enabling or voicing that skepticism the professor can pedagogically enable the students' understanding. It is important to make the core distinctions between the indigenous sovereigns and, starting from the Marshall trilogy cases, the foreign nations, states, and municipalities. Teaching the sources of the respective powers and their limits, as they have developed in federal common law and congressional acts, is a recurring theme in the basic Indian law course. In the instance of this class, a few other students joined in the questioning and jousting about how and when tribal jurisdiction should ever extend over non-Indians.

In this large class, the hostility to the tribes as governments extended into contentions that states' rights should preclude tribal jurisdiction and laws extending to the non-Indian citizens of a state. This states' rights approach was voiced repeatedly from a student that other professors acknowledge is among the brightest in terms of high grades. The existence of the unique jurisdictional authority of tribes, eviscerated as it has been by the Supreme Court's decisions, did not just puzzle. It absolutely rankled this states' rights viewpoint. Why did the Tenth and Eleventh Amendments, in protecting states' rights, not immunize the state and its citizens from the reach of tribes? Extrapolations of *Seminole Tribe of Florida v. Florida*⁴⁸ decision underlay this viewpoint. Discussion about constitutional law itself and what some Supreme Court Justices and scholars see as the jurisprudential mine field of states' rights could not complete this discourse.

After some three to four weeks of replays on the theme of challenging tribes' authority and jurisdiction, the majority of the class joined in the efforts to make the class meet its purpose. These students manifested an impatience and resentment of the small number of non-Indians who were disrupting the class. By their behaviors, in and out of the classroom, the majority of students showed that they wanted to tend to the business of learning Indian law. Perhaps, the small contentious group had simply dissipated its energy. The class then moved on to a more productive cycle of work.

48. 517 U.S. 44 (1996) (Congress lacked the power to abrogate state Eleventh Amendment immunity in the Indian Gaming Regulatory Act).

This account in Part V is from Professor Valencia-Weber. There is also a perspective from the former student and tutor for the course, Sherri Nicole Thomas, the second author, who offers experiential insights.

VI. OBSERVATIONS FROM PROFESSOR THOMAS AS A STUDENT AND AS A TUTOR

Professor Valencia-Weber has outlined the history of Indian law at New Mexico's law school, as well as how challenging the teaching of the unique subject of federal Indian law can be. This section is comprised of observations by Professor Thomas as she experienced an Indian law class through two lenses in two very different environments. The first was as a student in a "traditional" Indian class at UNM, and the second as a tutor in the unforeseen aberration that the first author referred to as the "big" class.

My first observation is this: Learning federal Indian law is not an easy task, but teaching it is a Herculean feat. If any legal issue involves the inclusion of federal Indian law, a layer of complexity is added. The complex nature of Indian law lies in its distinct history and evolution.⁴⁹ Historically, indigenous people of the United States were classified in a grey area between recognition as sovereign nation-states and symbiotic entities. Classification of United States' indigenous governments as distinct political entities means the body of law surrounding this status grows parallel to the rest of American jurisprudence, with tenuous intersections. This vacuum of legal evolution casts a shadow of illogical development on federal Indian law for the uninitiated, making it a difficult subject to teach to law students who reject or do not recognize that there is a difference between popular American history and the history of American indigenous peoples.

This difficulty was highlighted through my experience within one year of being a student in an Indian law class and then being a tutor for the same subject. Professor Valencia-Weber has outlined the pedagogical differences between the Pre-Bar Exam class that I was a member of and the Post-Bar Exam class that I tutored.

A. AN INDIAN LAW STUDENT'S EXPERIENCE

In the fall 2003 Indian law class, I enjoyed participating in a class of about twenty-five students. It was a diverse group, but it was a respectful

49. Professor Valencia-Weber discussed the difficulty of using orderly terminology in the teaching of Indian law. I use the term "evolution" because it conveys my appreciation of the changing nature of the law, and how its interpretation adjusts to modern social climates, sometimes without logical development.

one. Questions about Indian issues came after a student had read a section, or in the course of class discussion. There was not a problem of "jumping the gun" to get to bright-line rules. If a line of questioning breached into a future topic to be covered, it was tabled under a consensual agreement that a better relational understanding could be achieved when a designated topic became the focus.

Substantively, the course was well outlined. One of the unique features of Professor Valencia-Weber's approach is to begin with European history that pre-dates and foreshadows the Euro-American treatment and interaction with indigenous populations. To learn that the use of reservations to evict populations from ancestral lands started in Ireland is shocking and provocative.⁵⁰ What it creates for many non-Indian students is a connection point of similar history that evokes a different level of interest in the development of Indian law in proper historical context. This creates a fuller and contextual understanding of the "conqueror's ideology" used to justify creating subordinating regimes for the Natives.

The importance of historical context is emphasized through the films that are shown in class. The *Valladolid Controversy*⁵¹ depicts the historical disconnect between the colonizing governments and the indigenous people that they must deal with in order to build empires. *Indians, Outlaws and Angie Debo*⁵² relates the very recent history and difficult continuing task of compiling a fair and accurate history of the treatment of the indigenous people and tribes of North America. The last film, *The Peyote Road*⁵³ educates students about the religion that is at the core of the *Smith*⁵⁴ case. Without explanation of what that religion is, students cannot fully appreciate the impact of the case's holding.

What is missing from Professor Valencia-Weber's outline of the Pre-Bar Exam class is that until my class, the Indian law final was open book. By the fourth week, we were informed that our final would be closed book. It was accurately reasoned that an open book exam does not effectively

50. See generally NICHOLAS P. CANNY, *THE ELIZABETHAN CONQUEST OF IRELAND: A PATTERN ESTABLISHED 1565-76* (1976); WILLIAM CHRISTIE MACLEOD, *THE AMERICAN INDIAN FRONTIER* (1968). For materials used in conjunction with those listed above, see ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* (1990); ROBERT A. WILLIAMS, JR., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1 (1983). The course uses the fifth edition of the textbook, *Cases and Materials on Federal Indian Law*, which contains edited versions of material from the William's text book listed above. DAVID H. GETCHES, CHARLES F. WILKINSON, & ROBERT A. WILLIAMS, JR., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* (5th ed. 2005).

51. See *supra* note 41 and accompanying text.

52. See *supra* note 42 and accompanying text.

53. See *supra* note 43 and accompanying text.

54. See *supra* note 44 and accompanying text.

prepare students to take the bar exam. This made a substantive review of the class at various intervals imperative for student success. The three assignments due throughout the semester required the students to complete a review and analysis of the cases for each topic, and compose a well-thought out answer that was more than regurgitation of black-letter law. To receive full value for an answer, the student was required to incorporate the factual elements of a hypothetical question and apply the law.

The crucial aspect of these exercises was that the students were able to decipher where they were in the process of grasping the basic principles of Indian law. They also gained invaluable insight to how the instructor graded exams, as well as receiving individual feedback on their work. No other class I took in law school, outside of my first year mid-terms, offered those benefits. However, I feel that Indian law is such a difficult creature to handle that these benefits are actually necessary tools in the process of learning the subject.

B. AN INDIAN LAW TUTOR'S OBSERVATIONS THROUGH THE LENS OF AN INSIDER

The request for a tutor in a non first-year law class is unusual. As a second year student, it is accepted that you have acquired adequate skills to survive law school. When I was asked to tutor, I knew there was something amiss. After hearing about the new enrollment count, I recognized that the instructional workload for teaching an Indian law class that would be similar to the interaction and feedback driven class I had experienced could not be managed by a professor who was teaching two expansive subjects in the same semester. However, the reality of how much stress the new student make-up would affect the class's structure did not have full impact until the first class.

Professor Valencia-Weber has already given an accurate description of the types of questions and challenges to her authority she received throughout the semester, but that started with that first class session. This was fall 2004, and I was a 3L. This is significant because I had spent two years socializing and learning with a significant number of the big class's students. I had insight to what type of students they were in class, and had a sense of what "normal" classroom behavior was for most of these students.

It was surprising to see what a transformation some of my peers had made from inquisitive respectful students to distrustful inquisitors. It sounds harsh, but that was the tone taken by the students that challenged Professor Valencia-Weber. I will not say that the students were outwardly disrespectful. However, I will say they were testing her arsenal of

knowledge, creating an environment that felt insecure with hints of hostility and animosity.

Most perplexing though, was that they were challenging her on two different levels. First they were questioning her credentials to teach a law school class, and second they were questioning the validity of the class's subject matter. The challenges seemed to be tied: "How could a competent individual educated in law believe that tribal peoples are sovereigns?" In reality, I cannot know what thoughts were actually running through these students' minds, but with my prior knowledge of their behaviors and their current actions, it was a good educated guess.

My worst fear was that my peers were evaluating the professor on her appearance, which is definitely female, and definitely a member of a minority group. In retrospect, perhaps my fear was a self-defense mechanism, as I could be described the same way. I also have to acknowledge that being an Indian woman who has always been affected by Indian law⁵⁵ I found that the way the questions were presented had a degree of disrespect toward the legitimacy of Indian culture and Indian people. It translated sub-consciously that these students, my peers, were questioning *my* legitimacy as a law student.

What was most disappointing about this experience was that I chose to attend the University of New Mexico because New Mexico is home. Furthermore, the law school offers opportunities to learn and work with tribes and retains a wealth of Indian law resources. Finally, at the University of New Mexico, my culture would be accepted with out a lot of explanation. These in-class challenges undermined my sense of security and put me on the defensive as an individual. However, these thoughts had to be placed into the proper perspective of trying to teach an unwieldy subject in such an environment.

Setting those feelings aside, I wondered how it would be possible to learn a subject in which appreciation and respect for cultural and traditional knowledge served as an anchor for context in learning the law. Growing up "Indian" on a reservation that was not my own created a unique perspective for me. Culture of my host people was a part of my daily life, and I experienced how important the context of their culture was to the application of their law. I was still able to retain my own cultural identity while I learned from my host culture, and received reciprocal respect. These students were of the majority culture and the exposure of the use and abuse of federal power over Indians, so different from non-Indians' historical

55. Professor Thomas is Black and American Indian, and she grew up on the Diné (Navajo) Reservation, but is an enrolled Tiwa (Taos Pueblo) member.

memory or experience, probably felt like an attack on their way of life. Learning an aspect of your history that you did not know existed can be difficult to accept, especially when there are aspects that are repellent to modern morality. However, I ultimately concluded that these students had very few excuses for their behavior. This was not their first exposure to repellent laws, as they had already studied historical issues regarding civil rights in constitutional law. They had to accept and learn from that part of history to fully appreciate the laws in that area, so they would also have to do it for this class.

The worst aspect of the Post-Bar Exam class is that an environment was created that was not conducive to a free-flow of ideas, or sharing experiences. That was one of the best parts of the Pre-Bar Exam class I took. Our lectures were enriched by individuals fully participating and not feeling they may have to defend themselves. This problem had to be addressed, and it was not going to be easy.

C. A TUTOR'S WORK IS NEVER DONE

My original role was to assist the instructor by alleviating some of the tangible workload such a large class would generate. In my mind, a graduate level tutor is expected to conduct small group sessions and reviews, evaluate student work, and work with individual students who may need or request assistance.

It was after the first class that I felt my role was expanded to also assist in management of intangible issues. I went to class to provide moral support for the instructor, and after class I sought mechanisms to diffuse the time bombs of confusion and frustration in the students that were not involved in the repartee. Professor Valencia-Weber and I held debriefing sessions after each class, to assess what each session had accomplished in covering materials. We had to find a middle ground that would effectively and civilly quiet the provocateurs, so the rest of the class could move on with their Indian law education.

Class time became an interesting sociological experiment for me. While listening to the lecture, I was assessing the students by their responses to the material by noting their facial expressions and whether they were uncertain of what to write in their notes. The class was held in a seventy-five-person capacity room, set up in lecture hall fashion. The doors opened to a sunken room with five levels descending to the instructor's desk and lectern. I sat near the bottom and looked up and around to watch

students.⁵⁶ I sought out students and requested feedback so that I could discuss the remarks with the instructor, and we could then devise ways to address these issues through lecture or handouts.

Outside of what I felt was the covert duty of assessing the students' in-class progress, I had five responsibilities: creating the first drafts of the grading sheets we used for the three in-class assignments, grading the in-class assignments, conducting review sessions, answering subjective questions from the students, and serving as the instructor's sounding board. These duties are listed in the order of difficulty, painful to pleasant.

The grading sheets were the most difficult because they served as an objective mechanism to lay over subjective work of individuals' answers. While objectivity is the goal of grading any law school assignment or exam, the instructor and I felt that the normal "best answer" outline would not be sufficient, especially since I was grading the assignments. We crafted the grading sheets as shields against challenges. In the end, after grading more than 180 papers, only four challenges came, and two of those challenges were from one of the class "talkers."

Application of these grading sheets to student work was not difficult, just tedious. The goal is not to take points away, but to give points and help them do better on the next assignment, or at least help them study for the final. I had to stop myself from thinking, "How could they not get that? It was written on the blackboard!" I wrote copious notes in the margins explaining to them what they did right and what they did wrong, gave suggestions on what they could do to improve the organization of their work, and encouraged the students to see me or the professor if they had any questions.

Preparation for the review sessions was not difficult. I had been through the class already, graded the papers, and therefore had a sense of what areas the students were having difficulty with. What was interesting was that the same six students attended those review sessions, and none were the rabble-rousers. I do know that these review sessions were taped for audio, but I do not know if or how often the recordings were reviewed. Any questions I thought would be useful for review, I would disseminate to the instructor and the rest of class.

Questions coming from individual students outside the review sessions were received sporadically until the end of the semester. My final official act as tutor was to accept questions through phone and e-mail until

56. During the first weeks of class, this classroom arrangement seemed to add to my insecure feelings during the classroom challenges. From my vantage point, the disruptive students seemed to be literally and figuratively "looking down" on the subject matter and its instructor.

midnight the night before the final. I was rather busy starting from 10:00 a.m. the morning before the final until 2:00 a.m., the morning of the final. The questions spanned from "can you explain what criminal jurisdiction tribal courts have over Indians and non-Indians," to "what conditions must be met for a tribal court to have jurisdiction to hear a federal question?" These were coming from those students who decided they could do selective reading and listening and cram for whatever the in-class assignments did not cover.

The most enlightening and rewarding part of that semester was meeting with Professor Valencia-Weber to discuss how she was going to approach the next class. She would take whatever feedback I had collected and decided what could be addressed in class and what could not. She would walk through her lectures with me so we could try and identify what would be problem areas, and find ways to avoid them. These sessions were incredible learning experiences. I learned something new every time I met with her, gaining some new perspective on Indian law or finding a new facet in the process of educating law students. I gained valuable insight to what it is that law professors do, and how draining and consuming the process of teaching can be. It was perhaps the most educational experience of my law school career.

In the end, everyone passed. It was satisfying on two different levels. The first feeling of accomplishment came as validation of our tag-team effort at teaching had worked. Secondly, that the students who had questioned the validity of Indian law had to learn it as it stands, whether or not they agreed with its logic or lack of it.

VII. PERSPECTIVES AND LESSONS: TEACHING AS A WORK IN PROGRESS

A. THE ETERNAL DUTY OF LAW TEACHERS

Teaching Indian law in a state that includes that subject on the state bar exam does not change what is the eternal duty of those fortunate to be a teacher of law. Teaching experience should help the professor to better perform the process between designing the course syllabus and the actual delivery of instruction in the classroom.

First, we must always think as thoroughly as possible why the case or statute matters and what principles it announces, affirms or rejects in the history of how Indian law reached its present state. Use of the terms like "evolution" or "development" for Indian law are risky given the historical incoherence of this body of law. Teaching this law requires honesty and the

use of terms that qualify, condition, and situate what is being discussed. This need to caveat the materials certainly can frustrate teachers and students. Orderly descriptive terms are not always appropriate. The historical roller coaster of changing policies has veered among the themes of colonial *appropriation* of tribal property; *assimilation* of indigenous peoples to the point of disappearance as distinct political entities and individuals; and then variable degrees of protection and evisceration of the *autonomy* as tribal sovereigns.⁵⁷ These recurring themes: appropriation, assimilation, and autonomy (the "Big A's" as some call them), are outside the basic law that anchors traditional law training, e.g., contract, tort, etc. most familiar to students.

The insecure situation of indigenous nations as political entities has been aggravated by the Supreme Court decisions since the late twentieth century. At this point the Supreme Court's jurisprudence in Indian law merits the harsh criticism it receives from practitioners and scholars.⁵⁸ *In effect, rather than by direct honesty, the Court's decisions have produced that no non-Indian, in her/his person or property, should be subject to the jurisdictional authority of a tribal sovereign.* Only in narrow, prescribed situations will tribal jurisdiction over non-Indians be permitted, like the *Montana*⁵⁹ and *Oliphant*⁶⁰ strictures that the Court crafted without established law sources for the doctrines introduced.

57. For helpful summaries of the history of Indian policy, see ROBERT N. CLINTON, CAROLE E. GOLDBERG, & REBECCA TSOSIE, *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM, CASES AND MATERIALS* 18-50 (4th ed. 2003); ROBERT N. CLINTON, NELL JESSUP NEWTON, & MONROE E. PRICE, *AMERICAN INDIAN LAW: CASES AND MATERIALS* 137-64 (1991).

58. See Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PENN. J. CONST. L. 405 (2003). This article analyzes the lack of any historical and legal basis for claims of "inherent" state authority in relationships with tribal governments or jurisdiction over tribal territory. *Id.* See also David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001). Getches analyzes the Indian law decisions of the Burger Court (sixty-seven cases in seventeen terms) and Rehnquist Court (forty cases in fifteen terms). *Id.* at 280. Moreover, he reviews the three trends of the Rehnquist era that concurrently affect Indian law cases: state interests prevail; attempts to protect specific rights of racial minorities fail; and mainstream values are protected.

59. See *Montana v. United States*, 450 U.S. 544 (1981). So far in Supreme Court cases, none of the Montana exceptions have found and sustained tribal jurisdiction. See also Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1178 (2001) (providing an exhaustive review of the incrementalism in the current Supreme Court's approach to Indian law and providing an in-depth analysis of cases since 1991, twenty-eight involving Indian law questions, of which twenty-two were decided against the tribes or tribal litigants); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993) (discussing how Indian law embodies the tension between colonialism and constitutionalism and how Chief Justice Marshall's sensitive approach of balancing the two has since been abandoned, yet could enable a

Next, we must think concretely in how to teach the complex ideas and how to make the distinctions that matter, e.g., the policy shift from allotment to the Indian Reorganization Act. Whatever pedagogical devices we use, we must still try to connect the current set of cases, statutes, and materials to the previous set in some way. Sometimes, in the face of “naked” doctrines introduced in cases like *Montana* and *Oliphant*, which lack any generative source in prior understandings and precedence, we must be honest that we cannot create substantive content for the Court’s empty shells. Yet, the students need to know that in civil analysis they will need to work through the *Montana* exceptions and the crazy-quilt structure of criminal jurisdiction in Indian Country.⁶¹

Finally, we need to use methods to evaluate if students understand and master the critical content of Indian law, other than one big final exam at the end of the course. For teachers there is always the tension about how to use our time, especially if one is working for retention and tenure in the professoriate. Yet, the periodic check ups are beneficial to everyone as intervening evaluations reveal what students understand and can apply in writing in response to realistic problems. They tell the teacher about critical confusion if a significant number of students are demonstrating the need for clarification. Students have stated their appreciation for the opportunity to correct key understandings, without a big cost, before the final exam. The three assignments, this professor’s device, reduces the “ambush” effect on the final exam as the students have express notice of what they are expected to master.

B. RELATING TO THE STATE LAW

All of the above duties of a conscientious teacher of Indian law take a special element when Indian law is on the state bar. It is not proposed that we should teach a bar preparation course. But, we must address the juncture and distinctions that state legislation and courts have crafted in the area of Indian law. New Mexico, like other states, has exercised its authority to create law that is distinct from federal law. In the civil and criminal law that are distinct in New Mexico as state law or as federal law is where the

jurisprudence appropriate for the constitutional ideals and the powers of the contemporary governments of tribes and the national government).

60. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

61. See Major Crimes Act, 18 U.S.C. §§ 1152, 1153 (2000) (reserving criminal jurisdiction for felonies in federal government, with concurrent jurisdiction for tribes in misdemeanors); *Duro v. Reina*, 495 U.S. 675 (1990) (denying tribal jurisdiction over a non-member Indian). *Duro* was “overruled” when Congress amended 25 U.S.C. § 1301 to provide tribes with jurisdiction over non-member Indians who commit misdemeanors on tribal jurisdictional territory. 25 U.S.C. § 1301 (2000). The amendment was upheld in *United States v. Lara*, 541 U.S. 193 (2004).

students' can learn more about how political autonomy is used. In practical concerns, there are definite areas to which the drafters of the Indian law questions on the bar exam will gravitate.

For instance, in the Indian Child Welfare Act (ICWA), the New Mexico Legislature has gone beyond simply incorporating the ICWA. In the Children's Code New Mexico has strengthened the procedures to protect the interests of the qualifying Indian child.⁶² E.g., New Mexico law requires a guardian ad litem for the child and does not assume that the attorneys for the parties will adequately protect the child's best interests.⁶³ As competent attorneys, the New Mexico practitioners are expected to master this scheme. When the New Mexico Supreme Court adopted Indian law into the state bar exam, it expressly stated, "Indian child welfare act under state and federal law."⁶⁴ Moreover, this law reinforces the political status of the tribes and the federal preemption of state law in mandating how New Mexico courts will treat Indian children, their parents, and extended families.

In June 2006, the New Mexico Supreme Court issued a decision on criminal jurisdiction that affirmed the jurisdictional boundaries of Indian Country⁶⁵ so as to exclude state jurisdiction. In *New Mexico v. Romero*,⁶⁶ the New Mexico court reviewed two cases where the American Indian defendants committed injury offenses that occurred on fee property within the boundaries of the pueblos' current or original territorial boundaries. In the first of the consolidated cases, the offense occurred at Pojoaque Pueblo, with non-Indian victims, on private land within the Pueblo boundaries. The Pojoaque member defendant was charged with aggravated battery and child abuse after a stabbing incident. In the second case, both defendant and victim were members of Taos Pueblo and the aggravated battery occurred on a privately owned mall in the town of Taos. This Taos municipal location was within the Taos Pueblos original boundaries. The Supreme Court held that the 1924 Pueblo Lands Act⁶⁷ had not altered the definition of Indian Country so as to allow state jurisdiction. Thus, the prosecution in these cases was left to the Federal Government and, under the Major Crimes Act, the concurrent jurisdiction of the Pueblo for any misdemeanor

62. 25 U.S.C. § 1903(4) (2000) (defining "Indian child").

63. N.M. STAT. ANN. §§ 32A-5-4, 32A-5-33 (2005).

64. N.M. Bar Examination R. 15-203(B)(5), available at <http://www.nmexam.org/rules/rules203.htm>.

65. Indian Country Statute, 18 U.S.C. § 1151 (2000) (defining Indian Country as tribal trust lands, dependent Indian communities, and Indian allotments).

66. *New Mexico v. Romero*, 142 P.3d 887 (N.M. 2006).

67. *Romero*, 142 P.3d at 896. The Act was created to settle adverse possession and contested claims to private fees on pueblo lands. *Id.*

offenses under Pueblo law. This important case attracted much attention in the state and fourteen of the state's nineteen pueblos submitted amicus curiae briefs.⁶⁸

The Federal District Court in Santa Fe has also introduced a new way to look at the choice of law in a medical malpractice case arising within the Pueblo lands in an Indian Health Service Hospital. In *Cheromiah v. U.S.*,⁶⁹ Judge Martha Vasquez held that Acoma Pueblo had civil authority under the Federal Tort Claims Act. Especially significant, the court held that the New Mexico law with a medical malpractice cap did *not* apply. The court found that the contested situation met the two *Montana* exceptions for tribal jurisdiction, consensual relationship and action affecting the health and welfare of the tribe. The court rejected that it was bound by prior unpublished cases in this area because tribal law had not been invoked nor decided upon in the prior cases. The court stated, "[T]he fact that it [application of tribal law] has never been done, standing alone, does not mean that it is not what the law requires."⁷⁰ Thus, the federal court in New Mexico has also created an innovative approach that distinguishes the law within this state. While cases subsequent to *Cheromiah* in other jurisdictions have differed from or rejected the case's approach,⁷¹ the legal dialogue has opened in a new area of Indian law.

The New Mexico ICWA statutory scheme and the two cases discussed are only three examples of the New Mexico quality that must be included for the connection to the larger doctrines, such as tribal autonomy as a political entity, as well as the specific choices made in this state.

VIII. CONCLUSION

In teaching Indian law in an Indian Country state, where it is part of the state bar exam, be flexible. This is the additional guide to those previously listed. Classes subsequent to the fall 2004 "big" class have resumed a more normalized twenty to thirty students range. While each class has its own personality, the teaching approach and devices can be adapted to each situation. The obvious "blowback" from the last Indian law question on the

68. Amicus curiae briefs were submitted by the following Pueblos: Santa Clara, Laguna, San Juan, Santa Ana, Taos, Acoma, Tesuque, Cochiti, Jemez, Isleta, Sandia, Zia, Pojoaque and Zuni. Professor Kip Bobroff on behalf of the American Indian Law Center, Inc. and the UNM Native American Law Students Association also submitted amici curiae.

69. 55 F. Supp. 2d 1295 (D.N.M. 1999).

70. *Cheromiah*, 55 F. Supp. 2d at 1306.

71. See *LaFromboise v. Leavitt*, 439 F.3d 792 (8th Cir. 2006); *Bryant ex rel. Bryant v. United States*, 147 F. Supp. 2d 953 (D. Ariz. 2000); *LaFromboise v. Thompson*, 329 F. Supp. 2d 1054 (D.N.D. 2004). To date, there has not been an appeal beyond the one to the 8th Circuit.

bar exam affects the enrollment and the love, tolerance, or dislike during the students' class experience.

Additionally, in New Mexico, where Indian law issues are a continual area of legislative proposals and court decisions, one must remain alert and flexible. Old Indian law issues continue and new ones arise as the interactions between Indians and non-Indians intersect all personal and commercial relations. Teaching our students to develop this awareness is also part of training them to be competent law professionals. UNM graduates do acknowledge the value of what they learn in Indian law. The July 2006 bar exam had an ICWA question, one of the six state essay questions. Afterwards several graduating students sent messages of gratitude to the professor for what they had learned. Certainly the appreciation of our former students is important in keeping the teachers of Indian law motivated and enthusiastic.

The addition of Indian law to the state bar expands the value of Indian law. This official status reinforces why Indian law teachers remain so committed to this area of law. Most important of all reasons, making Indian law officially visible and active should promote respect for the tribes and members whose lives are most affected by this unique body of law.

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Indian Law

Focus On

***26 INDIAN LAW ON STATE BAR EXAMS: A SITUATIONAL REPORT**

Gloria Valencia-Weber [FN1]

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IN 2002, NEW MEXICO became the first state to include questions about Indian law on the bar exam, thus advancing the formal recognition of the functional role that Indian law has within national and international law. Three states (New Mexico, Washington, and South Dakota) now include knowledge of the basics of how the indigenous sovereigns intersect with state and federal sovereigns when assessing attorneys' competence.

Some Reasons Why Indian Law Matters

Including Indian law on state bar exams formally recognizes and legitimates Indian law and thus challenges the disrespect to which tribal governments are often subjected in the United States. Indian law is often characterized as federal Indian law—essentially the law that an external authority has passed in order to control the lives of tribes and their members. However, Indian law also involves the laws that indigenous peoples have enacted for the purpose of self-government. Tribal laws affect the relationships between people who are not Indians and states as well as those of individuals who are not members and are customers, employees, contractors, and partners in tribal ventures. Everyday life in Indian country involves relationships and movement within multiple jurisdictions in a geographical area. For example, in the urban Phoenix area, the simple act of crossing a traffic light can determine if the person is within the jurisdiction of the state or the tribe.

Assessing attorneys' knowledge of Indian law when evaluating their competence affirms the historical fact that there are three sovereigns within U.S. borders (tribes, neo-state colonies that became states, and the federal government). The Euro-American practice of treaty-making affirmed the political status of tribal nations. The new federal government's exclusive relationships with tribes, enforced by statutes such as the Trade and Intercourse Acts, [FN1] manifested the importance of the political relationship that was essential for maintaining peaceful conditions and ceding land. Even though Congress and the U.S. Supreme Court have redefined indigenous sovereignty over the years, the political status of tribes has endured. The legal status of tribes continues to relate to the subject matter and the parties over which tribes can exercise jurisdiction. [FN2]

Twenty-first century life involves compelling interests of mutual concern to all jurisdictions in Indian country, and these interests benefit from common efforts anchored in the government's acknowledgment of Indian law. States, their municipal units, and Indian tribes cannot sufficiently fund the responsibilities that governments

have for the safety and security of persons within their jurisdiction. The significant size of tribal lands cannot be ignored if non-Indian jurisdictions expect to provide an orderly civil environment.

Cooperation, via compacts and agreements, expands the services available to secure the health, safety, and welfare of *all* people within a geographical area. Public discourse and court decisions can create the impression that litigation over turf lines is ever-present in all of Indian country, yet reality belies this picture. Enabled by policy and statutes, the cross-deputizing of law enforcement and other officials demonstrates that life on the ground in Indian country frequently occurs without inflexible borders. Roadway safety is a significant common concern, because vehicular offenses, especially those involving driving while intoxicated, cause injuries and deaths for everyone. This interest makes cooperating, cross-deputizing, and sharing offender databases a productive approach. Pre-emptive statutes, such as the Indian Child Welfare Act (ICWA), [FN3] have removed some jurisdiction from states. Thus, if the best interests of children are to be protected, states and tribes should collaborate on legal matters. Some states have integrated ICWA into state law and further expanded the legal protection provided to Indian children.

Ultimately, each state, its history, and its contemporary circumstances provide the basis for why familiarity with Indian law can strengthen the knowledge that licensed attorneys use to serve their clients and the public interest. State legislatures and courts make laws that expand the situations in which private and public decisions require an understanding of Indian law because of its impact on other issues, which include-but are not limited to- family law, education, public safety, criminal prosecutions, civil actions, environmental regulation, natural resources, and economic development.

***27 State Experiences in Including Indian Law on State Bar Exams**

In New Mexico, assessing knowledge of Indian law via the state bar exam was a response to the evident lack of competence on the topic among the state's licensed attorneys. The New Mexico Native American Bar Association (NABA), through its officer, William Bluehouse Johnson, initiated a request for the Southwest Indian Law Clinic at the University of New Mexico's School of Law to conduct research on past or potential placement of Indian law on the state bar exam. [FN4] The request led to a proposal to add Indian law to the state bar exam-a step that was supported by reasons and data. Johnson and the NABA submitted the proposal to the New Mexico State Board of Bar Examiners in December 2001, [FN5] and this board unanimously voted to recommend the proposal to the New Mexico Supreme Court. [FN6] On Feb. 28, 2002, the New Mexico Supreme Court approved the inclusion of Indian law in the state bar exam as of February 2003. Thus the historical first in Indian law was achieved. Questions dealing with Indian law have been included three times since then and have covered ICWA, tribal jurisdiction over nonmembers in civil and criminal matters, and sovereign immunity.

The process of including Indian law in New Mexico's state bar exam, which took seven months, was the result of the confluence of social, cultural, and legal relationships in the state's history. Other attorneys in the state joined the NABA in advocating the change, thus providing a non-Indian voice from practitioners in other areas of law. Private conversations among attorneys revealed incidents of attorneys providing legal services in ignorance of Indian law, which then required timely intervention by another attorney who had knowledge of Indian law in order to salvage the situation. Also critical was the pioneering work of the University of New Mexico's School of Law in Indian law since 1967, when it established the Pre-Law Summer Institute to prepare American Indian students for law school and to include Indian law in the basic curriculum.

New Mexico's success triggered similar efforts in other states. In 2004, the National Congress of American

Indians passed a resolution encouraging the inclusion of Indian law in state bar exams, especially those 21 states that have “large populations of Indian people and/or a significant presence of Tribal lands.” [FN7]

After about two years of trying to add questions on Indian law to the state bar exam, on Oct. 22, 2004, Washington became the second state to do so, when the Washington Board of Governors voted unanimously for the inclusion. In spring 2006, Gabriel S. Galanda, who led the effort in Washington, stated that bar leaders in Arizona, Oklahoma, Wisconsin, Montana, Oregon, Idaho, and California were considering whether to add Indian law. [FN8] Washington's experience revealed concerns that can challenge advocates of including Indian law on the bar exam. While generally receptive to adding this subject, one concern voiced by the Washington Board of Governors was how meaningful questions would be drafted.

South Dakota became the third state to add Indian law to the bar exam, effective Jan. 1, 2007. Unfortunately, information on how the advocacy for this inclusion was conducted and reactions to the decision have not surfaced in public statements from the South Dakota Board of Bar Examiners or in newspaper articles.

The efforts that are under way in other states point to the barriers that must be overcome and the need to include Indian law in state bar exams. In Montana, a staff attorney for the Montana state legislature reports a 10- to 15-year struggle to include questions on Indian law on the bar exam. However, the chair of the Montana Board of Bar Examiners questioned whether all lawyers need to know Indian law, which he categorized as a “detailed subspecialty” like securities law. In Minnesota, the need to test knowledge of Indian law was highlighted when Gov. Tim Pawlenty, a lawyer, made an inaccurate statement about treaty hunting and fishing rights. Efforts to add Indian law to the exam have also been reported in Arizona and Oklahoma, but these have not been successful. All the “possible” states have law schools where Indian law is taught; therefore, including questions on Indian law in the bar exam will have an impact on these schools and the way they train their students.

Plans and Efforts to Include Indian Law on Bar Exams

A review of the efforts to add questions about Indian law on bar exams reveals that planned advocacy and collaborative relationships are key. The advocacy for this integration of Indian law requires structuring as to how advocates will undertake the tasks in a way that will result in successfully persuading the official bodies that make the decision to do so. Generally, a board of bar examiners must consider and act on proposals to modify bar exams. This board's action may produce a recommendation to place questions on Indian law on the exam that is sent to the state's highest court or supreme court, which is the ultimate body that must authorize the addition and amend the rules that govern the state's bar exam.

The advocates' proposal must directly and simply state the principles or reasons for including questions on Indian law and provide the facts that support the addition. The proposal is a persuasive document, yet its function and language are not the same as a legal brief or law review. It may be helpful to include principles that have been articulated as part of the state's legal system. The reasons should be based on *52 the state's history of legal, social, and cultural relationships involving Indians and non-Indians. In addition, negative experiences in the past can be acknowledged, thereby providing an opportunity to correct or move beyond unproductive offensive events. Positive experiences can also be invoked as a way to strengthen the argument and demonstrate effective prior relations.

Advocacy efforts must point to the interface connecting Indian law, the tribal governments, and the interests

of the state and explicitly identify the benefits that will accrue to the state and the state's citizens who are not Indians. Indian law must be considered an appropriate fit as part of the laws affecting public and private decisions, not as remote "subspecialty" law. To strengthen the advocates' position, lawyers and legal organizations that are not directly involved in Indian law but have affinity interests need to be included in the effort. For example, natural resources and environmental law are areas that have intersecting interests with Indian law. Other public-interest groups that advocate for persons affected by Indian law can also be allies; for example, organizations that advocate for children continuously note that attorneys need knowledge of the Indian Child Welfare Act in order to provide competent legal services to Indian clients.

Persuading decision-makers that testing attorney's *53 knowledge of Indian law serves the general interests of the state and its citizens requires that advocates develop collaborative relationships with officials of tribal governments, who can certainly aid the effort in appropriate ways. In addition, opportune use of contacts with state government officials and judges can help establish a climate that is receptive to changing what a competent lawyer is expected to know. Existing relationships, as well as new contacts, can educate decision-makers in each state.

Even though efforts to add questions on Indian law to a state bar exam will vary in respective states, the need for testing this knowledge is constant. Recognizing and adding Indian law to the attorney's basic knowledge will advance the delivery of justice to indigenous peoples as well as to the non-Indians who share interests and the neighborhood.

[FN1]. *Gloria Valencia-Weber is a professor at the University of New Mexico School of Law and chair of the FBA's Indian Law Section's Committee on Indian Law in Bar Exams.* © 2007 Gloria Valencia-Weber. All rights reserved.

[FN1]. Stat. 137 (1790); 2 Stat. 139 (1802); and 4 Stat. 729 (1834).

[FN2]. *See, e.g., United States v. Lara*, 541 U.S. 193 (2004), where the Supreme Court upheld the congressional authority to shrink or expand criminal jurisdiction over nonmember Indians in misdemeanor prosecutions for on-reservation offenses; and *Montana v. United States*, 450 U.S. 544 (1981), where the Supreme Court denied civil jurisdiction over non-Indians on land owned in fee by non-Indians within the reservation unless the tribe can establish a consensual commercial relationship or that non-Indians' conduct threatens or affects the political integrity, economic security, health, and welfare of the tribe.

[FN3]. 25 U.S.C. § 1901 *et seq.*; *see* 25 U.S.C. § 1911.

[FN4]. Gloria Valencia-Weber and Sherri Nicole Thomas, *When the State Bar Embraces Indian Law: Teaching Experiences and Observations*, 82 THE UNIVERSITY OF NORTH DAKOTA LAW REVIEW 101 (2006).

[FN5]. The proposal stated that knowledge of Indian law was increasingly necessary for competent representation in the face of the following specific key conditions in New Mexico:

1. The important role of American Indians in New Mexico, where the individuals constitute 9.5 percent of the state's population (173,483 persons according to the 2000 census);
2. The control of New Mexico's 23 tribes and pueblos over 10 percent of the state's land area (some 8,169,407 acres in trust), where complex jurisdictional issues arise among the tribal, state, and federal

governments;

3. The increase in Indian economic activities that involve non-Indian parties as business participants or employees in areas of gaming, taxation, and natural resources development;

4. The New Mexico legislature's and courts' additions to Indian law of laws relating to the tribes and pueblos, with cross-border enforcement and collaboration in the areas of child support, education, taxation, and crime control;

5. The long-established training in Indian law at University of New Mexico's School of Law across the curriculum as well as in specialized courses in Indian law so that any student can learn the basics;

6. The need for fair and informed discourse of Indian law in which attorneys, judges, and legislators acknowledge inexperience in this area of law that handicaps the legal decisions that are made; and

7. The improved conditions for a fair trial when the attorneys and judges can engage in informed processes on issues related to Indian law and can educate the public about these matters so as to reduce misunderstandings about the tribal and state relations.

[FN6]. Justice Gene E. Franchini of the New Mexico Supreme Court, who attended the board meeting on behalf of the Supreme Court, considered the recognition and inclusion of Indian law as long overdue: "I am just real happy that we are the first in the nation to get off the dime on this issue. ... This is a real important area of law and applicants for the New Mexico Bar should be aware of significant questions of law which arise in this area." Kris Axtman, *New Status for Indian Law: It'll Be on the Bar*, THE CHRISTIAN SCIENCE MONITOR, June 4, 2002 at 3. This is a noteworthy statement, as Justice Franchini was the attorney for the plaintiffs in *Morton v. Mancari*, in which Indian preference in hiring and promotion at the U.S. Bureau of Indian Affairs was held to be a political status preference and not racial discrimination.

[FN7]. National Congress of American Indians, Resolution #MOH-04-001, June 23, 2004, available at www.ncai.org/ncai/data/resolution/midyear2004/04-001.pdf. This body identified the following states as appropriate states for this effort: Washington, Oregon, California, Idaho, Montana, Colorado, Arizona, Nevada, Utah, North Dakota, South Dakota, Oklahoma, Minnesota, Wisconsin, Michigan, New York, Maine, Connecticut, Louisiana, and Florida.

[FN8]. Gabriel S. Galanda, *Bar None! The Social Impact of Testing Indian Law on State Bar Exams*, 30 FED. LAWYER at 31 (Mar-Apr. 2006).

54-APR Fed. Law. 26

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