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## Including Indian Law in a Traditional Civil Procedure Course: A Reprise, Five Years Later

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# INCLUDING INDIAN LAW IN A TRADITIONAL CIVIL PROCEDURE COURSE: A REPRISÉ, FIVE YEARS LATER

Cynthia Ford\*

## I. INTRODUCTION

I am honored to have been asked to write a piece for this symposium. I believe strongly in the need to mainstream Indian law issues into the traditional law school curriculum, and I am glad to have the opportunity to reflect on my more recent experiences teaching Indian law subjects in my traditional law school courses. In 1996, I published a piece entitled "Integrating Indian law into a Traditional Civil Procedure Course."<sup>1</sup> In the intervening five years, I have continued to revise and expand the Indian law component of the Civil Procedure course at the University of Montana, and I have added more Indian law subjects to my Remedies course as well. At the same time, the substance of Indian law in Civil Procedure has changed dramatically,<sup>2</sup> and many other professors have shared their knowledge and strategies on including Indian law in Civil Procedure and other law school courses. This symposium provides an excellent opportunity to synthesize these disparate factors into an improved strategy for teaching Indian issues to all law students. It also allows me to identify shortcomings in my first article and address them here.

## II. STUDENT REACTION AT THE UNIVERSITY OF MONTANA

When I recently reread my 1996 piece, I was mortified to see that although I had surveyed law professors across the country and had carefully studied the catalogs and course offerings of most law schools in

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\* I would like to thank my research assistant, Kyle Karinen, for his hard and productive work, and sensible suggestions. I would also like to acknowledge the support of the Institute for Law School Teaching at Gonzaga, which funded my original work in this subject. Lastly, I thank Dartmouth College for first making me aware of the importance of self-education and of Indian life.

1. 46 Syracuse L. Rev. 1243 (1996).

2. First and foremost, the Supreme Court turned to the cases on which my original teaching packet centered on in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Nev. v. Hicks*, 121 S. Ct. 2304 (2001); and *Atkinson Trading Co. v. Shirley*, 121 S. Ct. 1825 (2001).

the United States, I largely ignored the viewpoint of those most affected by my decision to include Indian law in Civil Procedure: my students. Over the years, I have had many informal discussions with students about studying tribal court civil jurisdiction as part of Civil Procedure II,<sup>3</sup> and I had some sense that the students generally were positive about learning about the subject. However, I had never actually directly asked the student body as a whole whether, in retrospect, they felt the time spent on Indian law in Civil Procedure was worth the effort.

This spring, I set out to find out what my students thought about the inclusion of Indian law in their civil procedure course. I did this both to pass this information on to you for your consideration, and to also adjust my own course materials if I found a clear trend among Montana students, which I thought warranted a change.<sup>4</sup> I publicized my desire for student input three ways. First, I announced in my classes this spring that I was writing a follow-up piece on including Indian law in Civil Procedure and that I would like their comments in writing and anonymously.<sup>5</sup> Second, I sent an e-mail with the same request to all enrolled students at the law school, who number about 225, hoping to get some feedback from upper-class students who had more experience in the law and more time to put the subject in perspective. Lastly, I reiterated my request at the end of the final exam in Civil Procedure, inviting students who had time then to write something, to e-mail, or to drop comments at my office after the exam.

I received a total of twenty responses, nineteen in e-mail form, and one at the end of a first year Civil Procedure exam.<sup>6</sup> It appears that eight

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3. Largely due to my own memory of having to digest *Pennoyer v. Neff* and *International Shoe* (discussing jurisdictional issues in Civil Procedure), I choose now to concentrate on the Rules of Civil Procedure in the first year fall course, and then to learn how to locate the appropriate courthouse in the second semester, after the students have gained some skill in reading and applying cases.

4. I tell my students at the outset of the course that time constraints will prevent us from covering many important subjects which they will need to be competent civil litigators, and that probably the most valuable thing they will learn in the course is how to educate themselves when they encounter a civil procedure subject we did not treat in class. In the final analysis, though, it is we professors who must make the hard choices, including some subjects at the expense of others. I am a moderate in the debate about the role of student opinion in making these choices. On the one hand, I want my students to be engaged; clearly, student opinion reflects the degree of engagement in particular subjects. On the other hand, I have twenty-four years of experience in the law which they do not, and which gives me a far more solid base for predicting which subjects will be important to them and their clients after they leave law school. Sometimes, professors see links between subjects, which students, left to their own devices, might miss.

5. In the Spring, I teach Civil Procedure II to the entire first year class and an upper level Remedies class that usually enrolls about thirty-five graduating seniors and five precious second year students. All had been exposed to the unit on tribal courts in Civil Procedure II.

6. Because most of the responses were in e-mail form, I could generally guess the writers' identities through their user names as well as the content. I do not know who the person who commented on the exam was, but I do know that he or she was a first year student.

of the writers had just finished their first year, five had just completed their second year, and seven were about to graduate from law school. I divided the comments into three specific categories: "Great;" "OK, but . . .;" and "No." I am pleased to report that seventeen out of twenty responses were very favorable. Of the students said that they felt the Indian law portion of Civil Procedure was very important and should be continued, if not expanded. Seven of the eight first year students who responded said they greatly appreciated the information and approach.<sup>7</sup> The second year students all agreed. Among the third year class, students on the eve of graduation, there was more of a split: five indicated that I should continue and possibly expand inclusion of Indian law in Civil Procedure; one expressed satisfaction with the course material as currently structured, but said that it was enough; and one vehemently opposed discussion of Indian law in Civil Procedure at all.

Rather than paraphrase and risk warping the students' thoughts, I will just reprint some of the pithier comments.

The first year students responded as follows:

[M]ost interesting and enlightening. I think it is a good thing for everyone to at least be aware of and somewhat educated about. [W]hat I did not like was the confusing and disjointed state of affairs Indian Civ Pro was in. Maybe if law schools pay more attention to the issue, it will result in a complete, and much more reasonable than it currently is, adjudication of the full extent of Indian jurisdiction and, therefore, fully flush out the power we are truly willing to extend to their court systems.

I found the tribal material very helpful and think it would be beneficial to expand the program. The interesting thing about the material for me is how raw it is. There is just so much room to shape it and set precedents. Because many of us are going to be the ones doing the shaping, you should definitely keep the subject going strong.

The Tribal Jurisdiction segment was incredibly interesting . . . and if I had another year . . . I would definitely take Indian law electives I think the brief overview we were given was sufficient. It is important for potential lawyers to realize the significant differences and unique characteristics involved with tribal law—exposure, even on a limited basis, may help to increase advocacy in this area of law. I would think that not being educated about the possible exclusive jurisdiction if a tribe would be subject to a malpractice claim. . . . [T]he best reason for including tribal jurisdiction as part of the course is that education goes a long way in overcoming misconceptions, prejudices, etc.

I think the amount of time spent on tribal law is about right, and I think

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7. The remaining first year student said that he found the material interesting, but questioned its relevance to actual practice issues, especially given all the other issues Civil Procedure covers.

it's worthwhile . . . . [It] seems like the Civil War was largely fought over the issues subject matter jurisdiction covers.

[From a Native American student, with whom I'd already had a conversation on this subject:] First, I think that the portion of the class that is dedicated to Indian law and jurisdiction is valuable. Having said that, I recall that several if not many of the students were equally confused by the matter, in part I believe, because tribal jurisdiction is in a state of flux and in part because the amount of time spent seemed like a mere soundbite . . . many students need more introductory information about Indians and sovereignty in general before they can conceptualize the complexity of the challenges that face the many tribal courts and counsels. I don't know if it is realistic to fully give an understanding anyway, but it has certainly been my experience that even the most educated Americans often lack even a fundamental understanding of the tribes or their history, much less their role in self governance as domestic dependent sovereigns. This is mostly due to lack of attention in history and government classes at nearly every level of the educational system to accurately reflect on the role that Indians have played in the development of the country.

[From a student from the former U.S.S.R.:] I really liked this part of the class. It was interesting for me (and I assume useful for my classmates who are going to practice in the U.S.) to learn about rights Tribal courts have and the rules that differ from state and federal ones. I think any U.S. lawyer should know these basic rules, because there is a great chance to get a case that involves tribal territory or member. I would . . . like to spend . . . at least one more class on this part.

[From another Native American student:] Good job on Indian law. You were really good about explaining the three types of government in the U.S. Many people have this misconception there are only 2, state and federal, but from the get-go, you nailed it down—three: federal, state, and tribal. I liked the policy considerations that you and Maylinn speak about. The effects of Red Wolf of State, on tribal self governance and determination. It's funny how the U.S.S.C giveth with one hand and taketh away with the other. But I think, and many people from back home say the same thing, that the Red Wolf case was bad from the beginning. These kids were drinking ETOH; this has always been a hindrance on the reservations. What people say is that if try to benefit from doing something wrong, its going to do more harm than good. So just leave it alone, because public policy on Indians in Montana and the U.S., they don't know want to think: 'Why do Indians want this or that? They're not part of the U.S, they're on the rezs 'separate' from the U.S.' so when a tribal brings down a \$300 million dollar lawsuit, America is thinking 'Whoa?! Can they do that?' and many people think tribes shouldn't be able to do that, cause 'they lost the war,' they're drunks, losers, stupid, poor, blah, blah. But people on the reservation knew that when that ruling came down 'Ahh, they're not going to let Indians do that

to white people. They'll find some way around it.' And many other tribes, legal scholars, and government leaders thought the Crow tribe were stepping out of bounds. They were thinking, 'Man, we were just now getting along, AVOIDING court, negotiating trying to PREVENT further destruction of tribal sovereignty.' And what do you KNOW? It happened, NO exhaustion, NO full faith and credit—only comity, so by trying to get money from being drunk, really didn't help anybody but the U.S. government—the people last, the tribes would try to help. But then again, there is the argument of 'hey, we're playing by the rules' and the law is the law. It's like an Indian woman going to a sale in a department store—50% off all merchandise in store—including top of the line clothes. The Indian woman doesn't get asked for help, goes and finds clothes she likes herself, then goes to pay for them, and the store says, 'Oh, I'm sorry, that rack of clothes is not on sale—that's all regular price.' (Weird analogy, I know) but that's the way Indians feel. Class was good, very worthwhile. I don't know how you would improve it. Maybe by getting more of the history to build a better foundation . . . . Maybe during introduction—go through the history then . . . you could go through pre-colonization and today—that might improve the class.

[I]t is interesting. My question poses, how many will ever apply this in practice. It seems more appropriate as an elective course, for those who intend to specialize. However, I find it as interesting as any topic in our civil procedure reading, but there is SO many other things to learn already. There is only so much memory in my mental database. Would my education be better served to master the topics that I know I'll apply on a continuous basis?

The second year students responded as follows:

I found your treatment of tribal jurisdiction in Civil Procedure interesting and useful. I likewise find the jurisdiction nexus, or lack thereof, in legal issues dealing with tribal/federal/state relationships interesting. Regarding utility, even as an intern, I have had to deal with Indian law, particularly in water rights issues. It seems logical that anyone intending to practice law in Montana ought to have at least a basic foundation in Indian law.

I think it is worthwhile to keep teaching some aspect of Indian Civ Pro. At work, it has helped to give me a place to start at least once. It might be worthwhile to give a short political science lecture explaining the interrelation between the state, federal, and native governments (you may have done this. I honestly can't remember.) Anyhow, I don't know if it is worth more than several lectures, but I do think it should be in the curriculum somewhere. The Indian jurisdictions are a reality that is unlikely to go away and they are going to continue to gain strength. Students should at least know they exist.

I think it is extremely valuable that you incorporate Indian law issues into your Civ Pro course. Not only does it encourage people to take other

Indian law courses, but I think that in a state with 7 reservations, it is almost unconscionable NOT to. In short, I am glad you did it, and it was well worth my time.

I enjoyed the tribal jurisdiction component of Civ Pro. For those of us who plan to practice in Montana, I think it is particularly important to know. And, I will probably take an Indian law course next year, and the introduction to that subject in Civ Pro had at least something to do with my interest in the subject.

[In its entirety] I found the Indian stuff interesting and relevant. Thanks.

The third year students responded as follows:

I really enjoyed the section in civ pro on Indian jurisdiction. I think the emphasis is just right. I really appreciated the fact that you always mentioned the tribal issues and the fact that there are seven reservations in Montana, etc. I probably would have taken Indian Law anyway, but I was really glad to have a base of knowledge going into it. I think it's really important that Indian law issues get brought up in substantive courses.

[On the other hand:] I'm not sure that civ. pro. is the proper place to bring in even more fed. Indian law. I think you touched upon the subject thoroughly enough, and anyone interested can take Fed. Indian law. I took FIL and loved it, but, no offense [:)], I definitely was not stimulated to take the course from civ. pro. Either a person wants to take FIL or they don't. Procedural issues aren't going to sway someone one way or the other.

I really appreciated the Indian jurisdictional issues you taught in Civil Procedure and feel it was very worthwhile and essential . . . . [I]t would be totally unacceptable to eliminate that subject entirely from your course. However, I don't know how the time spent on it could be increased, given the other course requirements. As far as taking other Indian law courses, it would be helpful if you included as part of your class a more complete description of what the Indian law courses cover.

I do not think the amount of time you spent considerably helped me in understanding Indian law. Also, I firmly believe that dabbling into something a little in a substantive course is equally as dangerous as positive for a student. It detracts from the overall purpose of the particular course and certainly it is dangerous to address Indian law topics in a 2 or 3 class session . . . . However, I think a course in Indian Laws should be a required course for graduation at the University of Montana. . . .

I think you should continue to incorporate Indian Law into the Civil Procedure course. It is very valuable.

Your discussion of tribal jurisdiction was the first encounter I had with the differences between federal Indian law and state/federal law. It did motivate me to take Federal Indian Law which I thoroughly enjoyed. If I

didn't take Federal Indian Law and you did not talk about it in civ. pro., I would not be aware of the critical differences between federal Indian law and other law. In Montana, that awareness is critical to ANY practice. We come across federal Indian law issues at my [paid] work often. When I worked at my clinical, Montana Legal Services, those issues came up in dealing with clients. It is a difficult subject to address in a few class periods, but just raising the awareness that questions as to state jurisdiction exist, is extremely important . . . . (And unless a student takes an Indian law course, issues of tribal sovereignty are not addressed in any other class except Family Law, where Prof. Patterson discusses ICWA.) When I left civ. pro. I felt like I had absolutely no understanding of how tribal jurisdiction issues were resolved but at least I was aware there were problems. It would help to know that what you are teaching is just the tip of a very large iceberg. It would be nice to spend a little more time in class on tribal jurisdiction, with just a little more background information on federal Indian law in general. That would sort of help to put it into context. What I did take from your class, however, was that issues of tribal jurisdiction are very fluid . . . . Frankly, in Montana, I think there should be a question on the bar about tribal jurisdiction b/c it is so important. It has come up at every law firm I have worked for.

Indian law is an important area to include in civil procedure and should be included in more of the substantive law areas. If nothing else, having been exposed to Indian law makes a student more aware that additional research and precautions are necessary. If every attorney would pause when presented with an Indian party or issue then the education is working. Indian law issues also encourage students to be culturally sensitive. You are the only substantive law professor at this University teaching students to recognize Indian law issues and we, as students, are better off for it.

### III. CHANGES I WILL MAKE AS A RESULT OF THE STUDENT COMMENTS

I am glad to see that, for the most part, students who had some exposure to Indian law issues in Civil Procedure think that I should continue this practice; their comments strengthened my resolve to do so. Additionally, the specific comments made by several students have helped me identify some changes that I need to make in presenting the material.

I will articulate more clearly at the outset of the class exactly what will be studying in terms of tribal court jurisdiction and why I include this material in the course. Second, I will reinstate a more detailed historical lecture to set the tribal court issues into a larger context, which should also help illuminate the fundamental nature of those issues and the similarity of recent jurisdictional battles of the late twentieth and early twenty-first centuries to the physical battles fought in the nineteenth century: the struggle for power between multiple governments as co-occupants of the same land. Recently, as I have



added more cases to this segment and felt a corresponding time pressure, I have begun to let the initial explanations slip. Based on the student comments, I now know believe that this is a false economy.

I agree in large part with the critical third year student who wrote: “[d]abbling into something a little in a substantive course is equally as dangerous as positive for a student. It detracts from the overall purpose of the particular course and certainly it is dangerous to address Indian law topics in a 2 or 3 class session.” I do not disagree, either, with the student’s conclusion that the subject should be dropped from Civil Procedure in favor of requiring an Indian Law class for graduation from University of Montana. However, as a practical matter, this change will never happen.

First of all, the trend at Montana over the past decade has been to reduce required classes and to increase elective course offerings. Even those subjects that most faculty believe should continue to be required have suffered credit reduction, forcing my colleagues and me to substantially pare down the contents of the required classes and to offer more advanced material in electives. Secondly, although my colleagues support my right to add tribal court issues to Civil Procedure, it is telling that only one other substantive professor actually addresses Indian law in his own course.<sup>8</sup>

Thus, the choice is not between each student getting a little Indian law or a lot; it is between each student getting a little Indian law or none. It seems to me that the danger of total ignorance is greater than the danger of “dabbling.” I will explicate both dangers to the class, and try to ensure that each student knows that he or she has only a very small glimpse into a rich and complex area of the law. I will also beef up my “advertisements” for Indian law courses, to conform to one student’s suggestion that I describe exactly what resources are available at our school for students who do want to develop some expertise in the area.

In this same vein, I will continue my current practice of inviting the Director of the Indian Law Clinic<sup>9</sup> to attend those Civil Procedure classes in which we deal with tribal issues, both so that she can add her perspectives and substantive knowledge to the class discussion and because she is a positive inducement to students to take more Indian law courses. I try to make it clear to the class that Professor Smith is the *real* expert on Indian law issues, but that I have some experience in the area and have thought it important enough to educate myself in order to teach them. This way, they can see both the value of self-

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8. Professor David Patterson teaches an extremely popular course in Family Law. He devotes a segment of that class to the Indian Child Welfare Act, and invites the director of Montana’s Indian Law Clinic, Professor Maylinn Smith, to teach that segment.

9. Professor Maylinn Smith directs Montana’s Indian Law Clinic and teaches a course entitled “Tribal Courts, Tribal Jurisdiction.” She has been a tribal judge for the Southern Ute Tribe.

education and the value of consulting an authority when you are over your head. Of course, these two virtues transcend any one subject, including Indian law, and represent the most important lessons I want the students to take from their first year in law school.

IV. ADAPTING TO CONTINUOUS CHANGE AND A THOUSAND SHADES OF GRAY:  
INDIAN LAW AS LIFE

The biggest challenge in incorporating Indian law into Civil Procedure is the rate and extent of change in the law on tribal issues. When I began teaching Civil Procedure in 1990, I felt that I adequately covered tribal jurisdiction in a couple of hours. I started with a short historical overview of federal Indian policy in enormous brushstrokes, moved quickly into the establishment and current structure of tribal courts, and then began to work with some basic cases.<sup>10</sup> In retrospect, those not-so-distant days seem blissfully simple.

For my purposes, I needed only three United States Supreme Court cases<sup>11</sup> and one illustrative tribal court decision to communicate the basic concepts.<sup>12</sup> In conjunction, these cases showed the students that there were such things as tribal courts, and that they had real and sometimes exclusive power over civil actions, depending on the Indian status of the parties and whether the cause of action occurred on or off the reservation.<sup>13</sup> Language in all three United States Supreme Court cases emphasized the right of reservation Indians to self-govern, and the importance of the tribal judiciary as part of that self-government.<sup>14</sup> In *National Farmers Union*, the Court expressly forbade federal courts from determining the federal question of whether a tribal court had subject matter jurisdiction in a civil action brought in tribal court until all tribal judicial routes had been exhausted.<sup>15</sup> *LaPlante* extended this requirement of tribal court exhaustion to cases brought in federal court as diversity actions, rather than federal question cases.<sup>16</sup> *Smallsalmon* showed the work of a tribal judge doing just what the Supreme Court had hoped: a complete and scholarly analysis of the arguments for and against tribal jurisdiction over a particular dispute which involved both Indian and non-Indian parties, and which arose on the reservation.<sup>17</sup>

Although the students had some difficulty with the four original

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10. See Ford, *supra* n. 1, at 1721.

11. *Williams v. Lee*, 358 U.S. 217 (1959); *Natl. Farmers Union v. Crow Tribe*, 471 U.S. 845 (1985); and *Iowa Mutual Insurance v. LaPlante*, 480 U.S. 9 (1987).

12. *Smallsalmon v. Allen*, 16 I.L.R. 6054 (C.S. & K. Tr. Ct. 1989) (tribal court opinion denying a motion to dismiss for lack of subject matter jurisdiction).

13. *Id.*; see *Williams v. Lee*, 358 U.S. 217 (1959).

14. *E.g. Williams*, 358 U.S. at 220.

15. 471 U.S. 845 (1985).

16. 480 U.S. 9 (1987).

17. 16 I.L.R. 6054 (C.S. & K. Tr. Ct. 1989).

cases, they were generally able to synthesize and apply them.<sup>18</sup> In their final exams, the students included a consideration of tribal courts in response to an essay question asking them to identify court systems, which would be appropriate for a resolution of a fictional dispute.<sup>19</sup> That was, and is, my primary goal: to have them start off considering all three possible court systems in their initial analysis, rather than the two typically taught to law students,<sup>20</sup> and then to have some basic idea about how to start to choose among them. In the end, students concluded that a litigant in tribal court must exhaust all tribal routes to challenge tribal jurisdiction before going to federal court for relief.

As time went on, I added another case to the unit:<sup>21</sup> *Red Wolf v. Burlington Northern*.<sup>22</sup> Like *National Farmers Union*, this case began as a straightforward personal injury action. Crow tribal members were killed when their car was hit by a train at a crossing on the reservation.<sup>23</sup> The victims' families sued the railroad in Crow Tribal Court.<sup>24</sup> The railroad went to the United States District Court seeking an injunction against tribal court proceedings, alleging that the tribal court lacked subject matter jurisdiction.<sup>25</sup> The class discussion of *Red Wolf* serves as another assessment of whether the students understood the teaching of *National Farmers Union* and *LaPlante*.<sup>26</sup> Under these cases, the federal court had no choice but to deny the motion because the Crow Tribal Court processes were not complete. In fact, that is exactly what the United States District judge did. The judge obeyed the Supreme Court and sent the case back to tribal court for completion of its proceedings.

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18. The primary difficulty students had was distinguishing *National Farmers* from *LaPlante*. Their confusion often revealed an incomplete understanding of federal subject matter jurisdiction, particularly the difference between a federal question case and a diversity of citizenship case. Thus, going over these two tribally related cases killed two birds with one stone: it illuminated the nature of federal judicial power, and it introduced the difficult balance of power between the federal and tribal courts.

19. All of my past final exams are available to our students (and you) on the University of Montana School of Law Web site. In eight of the past ten years, I have written essay or short answer questions, which required analysis of the tribal court material. The frequency of this material on the exams helps convince the students that I think it is really important, and certainly motivates them to master the subject. This year, I decided not to have a specific Indian law question on the exam. I know that some students felt shortchanged because they devoted so much attention to the tribal court segment, but in the long run, they will thank me, I hope. Of course, we also studied many non-tribal subjects that I did not include in the exam.

20. "This situation reinforces my belief that our law schools only teach one kind of civil procedure and that any mention of the 'third sovereigns' is met with a blank stare. The civ pro classes should at least MENTION that tribal courts have their own procedures." E-mail from Lindy Grell to Tribal Courts & Jurisdiction listserv (May 2, 2001) (copy on file with author).

21. See Ford, *supra* n. 1.

22. 106 F.3d 868 (9th Cir. 1997).

23. *Id.* at 869.

24. *Id.*

25. *Id.*

26. See *Natl. Farmers*, 471 U.S. 845; *LaPlante*, 480 U.S. 9.

The Crow Tribal Court then held a jury trial, resulting in a verdict for the plaintiffs of \$250,000,000.<sup>27</sup> The railroad filed a notice of appeal to the Crow Court of Appeals, consistent with the existing United States Supreme Court authority. However, like most states, the Crow Rules of Appellate Procedure require a supersedeas bond in order to postpone execution pending an appeal.<sup>28</sup> Because of the size of the verdict, the railroad's bond was enormous.<sup>29</sup> The railroad made a preliminary attempt to have the bond reduced by the tribal court, but before the tribal court could finally rule on the request, the railroad again went to federal court, seeking an injunction against enforcement of the tribal court judgment.<sup>30</sup> This time, the United States District judge granted the railroad's motion and enjoined further tribal court proceedings, ruling that the tribal court had no jurisdiction over the Red Wolfs' action.<sup>31</sup> The victims of the accident appealed. The Ninth Circuit held, 2-1, that the federal trial court's injunction violated the precepts of *National Farmers Union* and *LaPlante* because the railroad had not exhausted its tribal remedies before coming to federal court.<sup>32</sup>

I added this Ninth Circuit opinion to the materials for two reasons. First, the majority demonstrated the proper application of the two Supreme Court cases. Second, the dissent bluntly articulates his reservations about tribal court power over non-members in general and in particular about what he sees as a disproportionate deference to tribal courts over state courts.<sup>33</sup>

In teaching this case, I observed that the fact that a Federal Circuit court judge could express those opinions gave several class members each year the courage to express similar thoughts which they might otherwise have concealed for fear that they were politically incorrect. Class discussion became much more open. At the same time, the first *Red Wolf* decision from the Ninth Circuit cemented the actual substantive doctrine of tribal court exhaustion for the students.

In April of 1997, however, tribal court civil jurisdiction (and my neat teaching packet) exploded. Only ten years after *LaPlante* the Supreme Court (unanimously) made a U-turn in *Strate v. A-1 Contractors*,<sup>34</sup> speeding off with hardly a glimpse in the rearview mirror at *National Farmers Union*, and *LaPlante*, forlorn and abandoned by the roadside. According to *Strate*, *National Farmers Union* and *LaPlante* neither

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27. *Red Wolf*, 106 F.3d at 869.

28. *Id.*

29. The railroad would have to post bond in the amount of the judgment. See *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1062 (9th Cir. 1999).

30. *Red Wolf*, 106 F.3d at 869.

31. *Id.*

32. *Id.* at 871.

33. *Id.* at 871-74.

34. 520 U.S. 438 (1997).

established tribal court jurisdiction nor required exhaustion of tribal court processes challenging that jurisdiction before going to federal court.<sup>35</sup> Rather, as *Strate* recasts them, the two earlier cases merely “describe an exhaustion rule [based on comity principles] allowing tribal courts initially to respond to an invocation of their jurisdiction; neither [case] establishes tribal-court adjudicatory authority, even over the lawsuits involved in those cases.”<sup>36</sup>

Even more startlingly, *Strate* for the first time applies the rule of *Montana v. United States*,<sup>37</sup> a case about tribal authority to regulate non-Indian fishing,<sup>38</sup> to limit tribal judicial power. The general rule expressed in *Montana* and adopted by *Strate* for tribal courts is that “absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.”<sup>39</sup> The *Montana* court established two exceptions to this general rule, which *Strate* said applied in its jurisdiction analyses.<sup>40</sup> First, “[A] tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases or other arrangements.”<sup>41</sup> Second, “[A] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe.”<sup>42</sup> The *Strate* court held that neither of these exceptions applied, so that the general rule of limited tribal authority stood.<sup>43</sup>

Finally, the bottom line in *Strate* is completely different from the result in *National Farmers Union* on very similar facts. The Supreme Court concluded in *Strate* that the tribal court lacked subject matter jurisdiction and that the federal trial court should enjoin further proceedings in the tribal court without requiring exhaustion of tribal processes.<sup>44</sup> In *National Farmers Union*, where the non-Indian defendant injured the Crow plaintiff while driving a motorcycle on state school land within the Crow reservation boundaries, the Supreme Court, without

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35. *Id.* at 448.

36. *Id.*

37. 450 U.S. 544 (1981).

38. *Id.* at 499. I never included *Montana* in the tribal court civil jurisdiction materials because I did not think it was relevant. I still do not include it, so that I do not overly burden the students with reading a case, which does not directly discuss tribal courts. Instead, I tell the class about the factual backdrop of the *Montana* case and let them gather its essence from the Supreme Court's description of *Montana* in *Strate*.

39. *Strate*, 520 U.S. at 438.

40. *Id.* at 466.

41. *Id.*

42. *Id.*

43. *Id.* at 456-60.

44. *Id.*

stating that there was tribal jurisdiction, certainly did not even hint that there might not be, and required exhaustion.<sup>45</sup>

In *Strate*, plaintiff Fredricks, was injured in an automobile accident on a road running through the reservation.<sup>46</sup> The defendant, A-1 Contractors, was the employer of the driver who hit her; he was acting for his employer in connection with a landscaping contract between A-1 and the tribal government.<sup>47</sup> The driver and A-1 were non-Indians.<sup>48</sup> Ms. Fredricks was not enrolled herself, either, but she was the widow of a tribal member and the mother of five tribal members and apparently had lived her adult life on the reservation.<sup>49</sup>

Obviously, a discussion of tribal court civil jurisdiction must include the *Strate* decision. The harder question is whether that discussion should continue to include *Williams*, *National Farmers Union*, and *LaPlante*. I have chosen to add *Strate* to the existing discussion rather than supplant the first three cases wholly. I know that the students are confused and frustrated when they try to reconcile *Strate* and its progeny with the earlier cases. They see *Strate* describing *National Farmers Union* and *LaPlante* in terms that do not match their own direct readings of those cases; that causes them to question their own ability to read and comprehend cases at a point in the first year when they think they finally have “got it.” They see two different results from the same court on very similar facts, and they have to delve into another whole area of law—tribal regulatory authority—which was not even mentioned in the first two cases. Most of all, they perceive a bog where once there was some firm ground. Some of the student comments dealt with this. For example:

[S]everal if not many of the students were equally confused by the matter, in part I believe, because tribal jurisdiction is in a state of flux and in part because the amount of time spent seemed like a mere soundbite. . . .

When I left civ. pro. I felt like I had absolutely no understanding of how tribal jurisdiction issues were resolved, but at least, I was aware there were problems. It would help to know that what you are teaching is just the tip of a very large iceberg. . . .

Even more revealing are the large number of questions I deal with over and over in class, by e-mail, in individual conferences, and in the

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45. Technically, of course, as *Strate* notes, *National Farmers Union* did not expressly hold that there was tribal court jurisdiction over the dispute presented. On the other hand, the opinion is devoid of any intimation that the tribe did not have jurisdiction to adjudicate the case. After the Supreme Court ruled that the case should return to tribal court and must proceed to its tribal court conclusion before the federal court could even consider a challenge to tribal court jurisdiction, the parties settled.

46. *Strate*, 520 U.S. 438.

47. *Id.* at 443.

48. *Id.*

49. *Id.*

pre-exam review sessions. Anxiety runs high. They feel there must, or at least should, be some “right” answer that was possible at the beginning of the Indian law discussion and now has become impossible to divine.

Given this level of frustration, it certainly would take less time and be easier for the students to simply read *Strate* and dispense with the earlier cases. I think, however, that this simplicity would be a disservice to the students in terms of their complete understanding of the current state of Indian jurisdiction, in terms of their legal education vis-a-vis the common law, and in terms of their ability to adjust to change and uncertainty in life outside the law. Confusion and frustration are inherent in the tribal civil jurisdiction material. I am confused and frustrated too, because I am unsure about the impact of *Strate* and the future of tribal civil jurisdiction.

It is important for the class to experience this part of the common law process. Too often, law classes study the evolution of common law doctrines in retrospect, with the 20/20 vision of hindsight. The very excitement of the tribal court material is that the students are smack dab in the middle of the process; it’s easy to see where we have been and to wish for the “good old days,” but the path ahead twists and turns beyond our vision, and we have no crystal ball. On the other hand, the students themselves will live through the change and may be able to affect its course, rather than merely study what others have done. Some students do see this benefit:

[W]hat I did not like was the confusing and disjointed state of affairs Indian Civ Pro was in. Maybe if law schools pay more attention to the issue, it will result in a complete, and much more reasonable than it currently is, adjudication of the full extent of Indian jurisdiction and, therefore, fully flush out the power we are truly willing to extend to their court systems.

The interesting thing about the material for me is how raw it is. There is just so much room to shape it and set precedents. Because many of us are going to be the ones doing the shaping, you should definitely keep the subject going strong.

To continue the discussion about the nature of the common law, I ask the class how they would feel if they were counsel for National Farmers Union Insurance and settled the case, only to learn now that the Supreme Court might not have found tribal jurisdiction. This usually leads us to consider the larger questions of why the settlement cannot be undone, or early litigants cannot revisit judgments against them once an appellate court changes the law on their issue in a subsequent case. These subjects, of course, are covered in our Introductory program and other first year classes, but our discussion benefits from the fact that the students now have most of the first year

under their belts.

Once I decided to have the students read both *Strate* and the cases which preceded it, I went a step further so they could get a look at the direction courts might go in applying or limiting *Strate*. Again, the *Red Wolf* case serves as a terrific example. They have already read the first Ninth Circuit opinion in *Red Wolf* before they read *Strate*, because we proceed through the cases chronologically. Based on *National Farmers Union*, the class usually predicts that the railroad's attempt to gain relief from the United States Supreme Court is doomed to failure.

However, the Court decided *Strate* in the interim, and then remanded *Red Wolf* to the Ninth Circuit for reconsideration in light of *Strate*.<sup>50</sup> I added to the materials the Ninth Circuit's second opinion,<sup>51</sup> after the remand, which demonstrates starkly the difference between application of the *National Farmers Union's* approach and the *Strate* analysis. It is important to remember that on the first go-round in *Red Wolf*, the Ninth Circuit held that the Crow tribal court system process must continue to conclusion before the railroad could use the federal courts to challenge tribal jurisdiction.<sup>52</sup> In its second decision, the Ninth Circuit changed its holding, citing *Strate*, and found that the tribal court lacked subject matter jurisdiction and that the railroad did not have to exhaust the tribal court process.<sup>53</sup> The Supreme Court denied certiorari,<sup>54</sup> ending the case definitively in favor of the railroad. For the *Red Wolfs* and their lawyers, the *Strate* decision cost \$25,000,000.<sup>55</sup> For tribal courts and native sovereignty throughout the country, the cost of *Strate* continues to mount with each case.

The *Red Wolf* saga grips the students, partly because the underlying facts are even closer to *National Farmers Union* than the *Strate* facts were.<sup>56</sup> Different from *Strate*, and just like *National Farmers*, the *Red Wolf* plaintiffs and victims all were enrolled members of the

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50. *Strate*, 520 U.S. 801.

51. *Red Wolf*, 196 F.3d 1059. I do not bother with the Circuit's intermediate order remanding the case back down to the District Court after the Supreme Court's remand to it, or with the District Court's unsurprising post-*Strate* reconsideration, arriving at the same conclusion it reached before, that the tribal court had no jurisdiction, which the Ninth Circuit reversed in its first opinion. I do chart this tortured course through the courts so the students know each step occurred.

52. *Red Wolf*, 106 F.3d at 869, 871.

53. *Red Wolf*, 196 F.3d at 1059, 1066.

54. *Estates of Red Wolf and Bull Tail v. Burlington N. R.R. Co.*, 529 U.S. 1110 (2000).

55. *Red Wolf*, 106 F.3d at 869. During this complex process through the federal court system, the plaintiffs voluntarily reduced their judgment by 10%, to \$25,000,000, or \$5,000,000 to each of the five families of the decedents. The original judgment amount was \$250,000,000.

56. See *Natl. Farmers*, 471 U.S. 845; *Strate*, 522 U.S. 801; *Red Wolf*, 106 F.3d 868; *Red Wolf*, 196 F.3d 1059. Part of the attraction, too, is the fact that *Red Wolf* stems from our own state, which is inexplicably poorly represented in the national casebooks, which comprise most of the first year reading.



Crow Tribe.<sup>57</sup> In all three cases, the defendants were non-Indians.<sup>58</sup> The students cannot really tell if it was Mrs. Fredricks' non-Indian status, which drove *Strate* and often predict that the fact that the Red Wolfs were Indian would lead the Ninth Circuit to distinguish *Strate* and uphold its first decision.

When that prediction fails, they are forced to take another step in the legal reasoning process which they are just learning: if it is not necessarily the Indian status of the parties, something else must distinguish *National Farmers* from *Strate* and *Red Wolf*. The other factor, which the *Red Wolf* and *Strate* courts discussed, is the nature of the property on which the accidents occurred.<sup>59</sup> The Red Wolfs' accident occurred at a railroad crossing; the railroad had been given the right-of-way across the reservation by consent of the Crow Tribe.<sup>60</sup> In *Strate*, the accident occurred on a state highway on the reservation.<sup>61</sup> At first blush, the fact that the sites of the injury in both *Strate* and *Red Wolf* was non-Indian land on the reservation seems like a logical explanation for the difference between the results in those cases from *National Farmers*. However, I make the students look back to *National Farmers*, because at the time they first read that case, the nature of the land on which the plaintiff was injured seemingly did not matter, so long as it was within the external boundaries of the reservation.<sup>62</sup> On their second read of the case, they discover that that accident, too, occurred on non-Indian (state school land) on the same reservation as the Red Wolfs' accident.<sup>63</sup>

At this point, the class wants to know the bottom line: what to write on the exam and what to tell their clients once they are in practice. *Red Wolf*, after all, has not relieved the uncertainty engendered by *Strate*. "We know the question, but we don't know the full answer yet," is still the truth: the truth about tribal subject matter jurisdiction, the truth about the developing common law, and the truth about life. Especially for those whose undergraduate educations were in the hard sciences and younger students with less life experience, this truth is difficult to accept. Tribal court civil jurisdiction is just one more step towards acceptance.<sup>64</sup>

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57. *Red Wolf*, 106 F.3d 868; *Red Wolf*, 196 F.3d 1059.

58. See *Strate*, 520 U.S. 801; *Red Wolf*, 196 F.3d 1059; *Natl. Farmers*, 471 U.S. 845.

59. *Strate*, 520 U.S. at 454; *Red Wolf*, 196 F.3d at 1063.

60. *Red Wolf*, 106 F.3d at 869.

61. *Strate*, 520 U.S. 801 at 438, 442.

62. *Natl. Farmers*, 471 U.S. 845.

63. See *id.*; *Red Wolf*, 106 F.3d 868. This revisit reiterates another principle I stress throughout the year: do not rely on your memory. Instead, make sure that the rule or the case actually says what you think it does. Text is more reliable than human recollection.

64. Perhaps my next piece will be "Zen and the Art of Civil Procedure."

## V. CONCLUSION

For Civil Procedure professors and their students, there is no single right answer about what to include in our courses, or in life either. All we can do is our best to communicate the knowledge and model the ways of thinking, which we judge will best serve our students, their clients, and our society. I believe that to do our best, should acknowledge the place of Native Americans in the United States and of Indian law in the traditional law school curriculum, and help our students see larger life and law lessons in the Indian law material we teach. If we do this well, perhaps other law professors will broaden their courses as well. Keep up the good work, and please let me know if you have any comments or suggestions.

## VI. EPILOGUE

As yet another illustration of the flux in current Indian law, in the few months since I wrote this article in the late spring of 2000, the United States Supreme Court decided two more important Indian law cases: *Atkinson Trading Co. v. Shirley*<sup>65</sup> and *Nevada v. Hicks*.<sup>66</sup> Both merit consideration for inclusion in the teaching unit in Civil Procedure as the most recent examples of Supreme Court thinking on tribal power.

*Atkinson Trading* applied the Montana test to the Navajo Nation's attempt to impose a tax on nonmember guests of a hotel located in a "trading post" complex on fee land within the reservation boundaries. A unanimous Court found that neither of the Montana exceptions were satisfied, and held that the Tribe lacked power to impose the tax. Thus, although not in the tribal court jurisdiction context, the Court continued the trend foreshadowed by *Strate* of limiting tribal power. I have concluded that I will not require my class to read this decision, although it is fairly short and straightforward, but I will digest it for them in my lecture.

*Hicks* actually involved a question of judicial power and should be in the teaching unit. A tribal member filed a lawsuit in tribal court for alleged civil rights violations by state and tribal officials, which occurred during the execution of a search warrant at the plaintiff's home on the reservation. The state defendants brought a declaratory judgment action in federal court, asking that court to declare the tribal court lacked subject matter jurisdiction over the civil rights action against them. The District Court entered summary judgment for the plaintiff, which was affirmed by the Ninth Circuit.<sup>67</sup> The Supreme Court reversed and

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65. 531 U.S. 1009 (2001).

66. 121 S. Ct. 2304 (2001).

67. *Nev. v. Hicks*, 944 F. Supp. 1455 (D. Nev. 1996), *aff'd*, 196 F.3d 1020 (9th Cir. 2000).

remanded the case.<sup>68</sup> However, in marked contrast to the unanimous decisions in *Strate* and *Atkinson Trading*, the Court splintered sharply in its reasons for holding that the tribal court lacked jurisdiction. From a teaching standpoint, the various concurring opinions are a treasure trove; from a tribal power standpoint, they are quite frustrating. At the very least, they demonstrate the Court's continuing skepticism about tribal power. The division between members of the Court should also comfort those students who feel that the entire area is awash in confusion.

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68. Justice Scalia wrote the Court's opinion, joined by Chief Justice Rehnquist and Justices Kennedy, Souter, Thomas and Ginsburg. Justice Souter filed a concurring opinion, joined by Justices Kennedy and Thomas. Justice Ginsburg filed a separate concurrence. Justice O'Connor filed an opinion concurring in part and in the judgment, in which Justices Stevens and Breyer joined. Finally, Justice Stevens filed an opinion concurring in the judgment, in which Justice Breyer joined.