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# INTEGRATING INDIAN LAW INTO A FIRST YEAR LEGAL WRITING COURSE

Barbara P. Blumenfeld\*

## I. INTRODUCTION

Since 1986, I often have assigned my second semester 1L legal writing students an open research appellate problem involving relatively complex Indian law issues. While teaching at Wayne State University Law School the problems went only to students in my writing sections: generally between forty and fifty first year students. At University of New Mexico School of Law, because of the nature of the legal writing program and my role as director, the appellate problem that I design is assigned to the entire first year class: usually slightly over 100 students. This paper first explores my reasons for using Indian law in this general first year course and why I think that it is a learning experience that transcends the specific subjects being taught. The paper then discusses my approaches to designing the Indian law problems that I use and how I introduce the problems to the students.<sup>1</sup> A discussion of student reactions to receiving Indian law problems follows, which includes general reactions, as well as more specific reactions from students located in a mid-western industrial city (Detroit) and from students located in an area with a strong Native American presence (Albuquerque and the Southwest).

## II. WHY INCORPORATE INDIAN LAW INTO A LEGAL WRITING COURSE?

This is a hard question for me since incorporating Indian law into the mainstream law school curriculum seems as natural as teaching Contracts or Constitutional Law; thus, rather than asking why integrate Indian law, I would ask "How could one not include Indian law?" With Indian issues a growing concern, and with Native peoples more

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1. That portion of this paper is more specifically directed to legal writing teachers who have some basic understanding of "problem design" in general.

prominent in the legal field, I do not understand how one cannot at least reference Indian law. I had a personal interest in Indian issues long before law school, yet I had no exposure to Indian law during my legal education. Thus, as a new legal writing teacher, when I was faced with the task of developing a problem that would both challenge and educate students, I turned to Indian law.

### A. *Why Indian Law*

Students should be introduced to Indian law during their legal educations. Prior to entering law school, many students may have a total lack of awareness that this body of law exists or of its possible relevance to issues they may face in their legal practices. They should not leave law school with the same lack of awareness.

Indian law issues have the potential of arising in many areas of routine law practice. For example, there may be Family Law issues involving Native American children and implicating the Indian Child Welfare Act. Likewise, jurisdictional issues may arise related to gaming or other Native American enterprises and their interaction with non-Native peoples, or when injuries occur on reservation land. There are few courses that prepare students for these and other potential Indian law issues. Even when such courses do exist, they are likely selected only after required and "bar" courses and only when a student has some idea of what the course might be about and why it might be relevant to a practice of law that does not specialize in Indian law. Students can be given some understanding of the relevance of Indian law if it is introduced throughout the general law school curriculum, and especially during the first year.

Just as Native American legal issues are not isolated, neither are Native American peoples. Indian tribes and native peoples are located throughout the United States.<sup>2</sup> Even those few states without tribes have tribal members located within their borders.<sup>3</sup> Most state courts as

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2. As of March 13, 2000, there were "556 tribal entities recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of their status as Indian tribes." *Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 65 Fed. Reg. 13298 (Mar. 13, 2000). According to the 1990 census, the American Indian, Eskimo and Aleut population was 1,959,234. U.S. Census Bureau, *General Population and Housing Characteristics: 1990* <[http://factfinder.census.gov/servlet/BasicFactsTable?\\_lang=en&\\_vt\\_name=DEC\\_1990\\_SF1\\_DP1&\\_geo\\_id=01000US](http://factfinder.census.gov/servlet/BasicFactsTable?_lang=en&_vt_name=DEC_1990_SF1_DP1&_geo_id=01000US)> (accessed Oct. 3, 2001). The estimated population for November 1 of the year 2000 was 2,448,000. U. S. Census Bureau, *Annual Population Estimates by Sex, Race, and Hispanic Origin, Selected Years from 1990 to 2000, with Short-Term Projection to November 1, 2000* <<http://www.census.gov/population/estimates/nation/intfile3-1.txt>> (accessed Sept. 23, 2001).

3. Specific Native American state populations (excluding the District of Columbia), according to the 1990 census, range from 1,703 to 286,611. U.S. Census Bureau, *Population of States by Race and Hispanic Origin: April 1, 1990* <<http://www.census.gov/population/estimates/state/srh/srhmars.txt>> (accessed Sept. 23, 2001). Cities with a population greater than 100,000 all include some percentage of

well as courts in most federal circuits face Indian law issues.<sup>4</sup> Thus, regardless of where students may end up practicing, they may have Native American clients or Native Americans with whom they or their clients must interact. Additionally, as noted above, they may face Indian law issues as part of their routine practice. Given the opportunity, and armed with an understanding of this area of law, some students might choose to specialize in Indian law.

Indian law is especially relevant to Native American law students. The number of Native Americans and Alaskan Natives enrolled in ABA accredited law schools rose from 140 in the academic year 1971-72 to a high of 1,116 in academic year 1996-97, and was 952 in academic year 2000-2001.<sup>5</sup> Some Native American students may be interested in Indian law simply because of their cultural heritage; others may have come to law school with the single-minded purpose of using their education to work on a particular Indian issue important to them and their tribe. In either case, the effect on these students of ignoring Indian law is akin to the effect on an African American student of ignoring the history of race relations and civil rights litigation. How can a student be expected to take his or her education seriously when his or her identity as it exists in the law is essentially erased?<sup>6</sup> If we, as legal educators, seriously want to encourage diverse peoples—including Native Americans—to attend law school, we must make the educational experience relevant to them. In doing so, not only do the Native

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American Indians and Alaska Natives, according to the 2000 Census. U.S. Census Bureau, *Population by Race and Hispanic or Latino Origin, for States, Puerto Rico, and Places of 100,000 or More Population: 2000* <<http://www.census.gov/population/cen2000/phc-t6/tab05.txt>> (accessed Oct. 3, 2001).

4. A search using Westlaw, conducted on June 14, 2001, of the West key number topic for Indian law, for the period Jan. 1, 2000 through June 1, 2001, revealed federal court opinions issued by or within all circuits except the Fourth Circuit. That search also revealed opinions issued by state courts located within the geographic area of all federal circuits including the Fourth Circuit. Additionally, a comparison of Michigan and New Mexico (the two states in which I have taught Indian law problems) revealed only one fewer state court opinion in Michigan than in New Mexico and the same number of federal district court opinions from federal district courts within both states.

5. American Bar Association, *Minority Enrollment Statistics* <<http://www.abanet.org/legaled/statistics/minstats.html>> (accessed June 21, 2001). These statistics also indicate that, in academic year 1985-86, the year I assigned my first Indian law problem, the American Indian and Alaska native enrollment was 463. *Id.* In 2000-2001 that enrollment has more than doubled. *Id.*

6. Merely acknowledging that Indian law exists can make the law school experience more manageable for Indian students as demonstrated by an experience that I had with an Indian student early in my teaching career. Following his first year of law school, the student, who had not done well, was asked to repeat his legal writing course. He was placed in my legal writing section because I used Indian law problems: the thought being that he would be more comfortable in my class. While I did not turn to Indian law until the second semester, I met with this student early in the year and learned how isolated he felt as the only Native American student in his class. We were able to discuss Indian law generally and I encouraged him to research, on his own, various Indian issues that might be related to his other substantive courses and to share his research with his classmates. As he did so, this student became more engaged in his legal education, his grades improved, and he felt somewhat less isolated.

American students benefit, but so do their classmates, who, in the course of discussing Indian law issues, will learn something of the cultural context of Indian law from their Native American classmates.

To ignore Indian law leaves a hole in the legal education of all students. Because it is essential to a complete legal education, the question is not "why teach Indian law," but rather, "how can we not teach it?" And, because we introduce important concepts during the first year of law school, it makes sense to incorporate Indian law into first year courses.

### B. *Why in Legal Writing*

Legal writing has always dealt with issues of social concern. In a 1994 survey to which 53 law schools responded, 51 reported using legal writing problems dealing with issues of diversity and social concern.<sup>7</sup> When I began teaching legal writing in 1985, my colleagues suggested that I turn to programs such as *60 Minutes* to get ideas for research problems.<sup>8</sup> "Hot topics" for legal writing problems often include issues of discrimination and harassment, individual rights, and current political topics such as homelessness or the environment. It is only natural that Indian law should also be one of the "hot topics" dealt with in legal writing.

"[M]any legal issues can be fully appreciated only in their social context[.]"<sup>9</sup> Legal writing courses are uniquely suited to introducing Indian law along with its historical and cultural background. By employing a problem approach as opposed to the traditional substantive case law approach, legal writing courses can incorporate the broader social context and cultural aspects of Indian law into the problems created and assigned. Moreover, in the process of conducting the research involved in writing a memo or brief, the students will learn something about the history of Indian law generally, both from the case law itself and from secondary sources that students use early in their research. For example, regardless of the precise issue involved, students will become aware of the relationship between the federal government and the Indian tribes and will learn something about the different periods of relations between the two. Students will at least see reference to early cases addressing the relationship and the basic rights of tribes

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7. See Charles R. Calleros, *In the Spirit of Regina Austin's Contextual Analysis: Exploring Racial Context in Legal Method, Writing Assignments and Scholarship*, 34 *John Marshall L. Rev.* 281, app. (2000).

8. There are probably two primary reasons for using of this type of subject matter for legal writing problems. One is often the interest of the legal writing teacher who is creating the problem and the teacher's interest in raising students' consciousness about a particular issue of concern to the teacher; the other is simply the desire to create a problem that will capture and hold students' interest over a prolonged period of time.

9. Calleros, *supra* n. 7, at 281.

and tribal members. This history, which may be news to many students,<sup>10</sup> allows for a better understanding of Indian issues generally.

The important connection of writing and thinking is well noted.<sup>11</sup> "Writing is a tool that enables people in every discipline to wrestle with facts and ideas."<sup>12</sup> Legal writing problems tend to be long-term assignments that absorb students' attention over a period of weeks.<sup>13</sup> The students tend to become involved in and care about the issues that are analyzed and argued in their assignments; their analysis of, and critical thinking about these issues, is usually in more depth than when they are simply reading decided opinions for class discussion. Students often comment that the subjects they learned most about are those about which they were required to write a paper.<sup>14</sup> Thus, if one is going to touch on a subject area not otherwise covered, legal writing is a good place to do so. And, because legal writing is traditionally a first year course, students who become interested in Indian law have two years in which to pursue their study of the area in further detail.

Because students tend to become more engaged in legal writing problems they tend to discuss the problems with one another at length and in detail. As such, particularly if the class is diverse, the students will see the problem and the issues from different perspectives.<sup>15</sup> "[S]tudents [from different cultural backgrounds] can educate one another about differences in our society[.]"<sup>16</sup> If the class is fortunate enough to have Native American members, these students can share their perspective of the Indian law issues with their classmates. At the same time, alienation that Native American students might feel in the law school setting can be reduced as they enjoy the status of "insider" on the problem.<sup>17</sup>

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10. Every year that I have students working on an Indian law problem, I have more than a few who inform me that they had no idea about this history of Indian relations. While students may have a general sense that "Indians were treated badly," they have no idea of the complex history that lies behind such a statement.

11. See e.g. Janice Haney-Peritz, *Making a Difference: Thought, Signs and the Teaching of Writing in Thinking, Reasoning and Writing* 3 (Elaine P. Maimon et al. eds., Longman 1989) ("[W]riting creates situations in which students can learn to think."). "Thinking and writing are closely interrelated. How we think influences our writing, and the process of writing, in turn, changes our thinking." David Mushman & Bridget A. Franks, *Intellectual Development: Formal Operations and Reflective Judgment in Thinking, Reasoning and Writing* 9 (Elaine P. Maimon et al. eds., Longman 1989).

12. William Zinsser, *Writing to Learn* 49 (Harper & Row 1988).

13. The Indian law appellate problems that I assign are given to students approximately five weeks before the final brief is due. Following submission of the briefs there are approximately two weeks devoted to oral argument of the case.

14. A student has asked me more than once why all classes don't incorporate the intensive research and writing required of them in their legal writing class, commenting that at the end of their first year it is the subject about which they wrote their appellate problem that they feel they have the deepest understanding and greatest command.

15. Calleros, *supra* n. 7, at 291.

16. *Id.*

17. Cf. Calleros, *supra* n. 7, at 292.

There are other pedagogical reasons for using Indian law issues in a legal writing course. Research is usually a part of, or closely tied to, the first year legal writing course. Basic sources and strategies for researching Indian law can be taught as part of the research segment of the course. These sources and strategies can then be put to use as the students research a specific issue within this substantive area of law. By putting the more abstract knowledge about sources in general to use in the context of a specific problem, students are more likely to commit to their long-term memory an understanding of the sources and how to use them.

When assigned an Indian law writing problem, students must put to use general legal research and writing skills in a substantive area of law that they have not yet studied. This demands more of their critical thinking and analysis skills than if they are simply required to apply legal principles that they have already studied in another class. The students must truly understand the research process; must be able to read, understand and articulate legal principles that are new to them; must be able to carefully and critically read relevant cases and other materials; and must be able to synthesize this material and then apply it to a specific fact situation. They will be asked to do much the same in their real world jobs as clerks and attorneys. Thus, giving the students an Indian law problem in their first year writing course forces them to use the basic reasoning and writing skills they will use later in practicing law. Furthermore, because the problems are designed to be challenging but not impossible, when the students have completed their assignments they will have a sense of confidence in their abilities, which will serve them well as they move forward in their legal careers.

Thus, assigning an Indian law problem in a legal writing course benefits the students' general learning experience by both strengthening their skills and informing them about an important body of law. It also benefits the students in a social sense by giving them an understanding of cultures and peoples of which they may be unfamiliar, yet with whom they may interact in their law practices. Finally, it benefits Native American students by giving them a sense of inclusiveness in the law school experience.

### III. DESIGNING INDIAN LAW PROBLEMS FOR LEGAL WRITING COURSES<sup>18</sup>

The following is based on the traditional first year model legal writing curriculum: basic skills and objective writing taught during the first semester; persuasive brief writing taught in the second semester. The Indian law problems that I design are appellate brief writing

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18. For examples of specific problems along with teacher's notes on those problems, see the course materials compiled in conjunction with this panel presentation.

assignments used in the second semester persuasive writing segment. These are complex problems designed to challenge second semester students; the general principles that I discuss in designing these problems could be used in creating similarly complex objective writing assignments for second semester students.

#### A. *General Considerations*

Indian law problems are best suited to second semester students with a working knowledge of basic legal writing skills. During the first semester when students' focus needs to be on learning these basic skills, problems with potentially strong emotional content simply get in the way of such learning. Moreover, if the subject matter itself is completely foreign to students, it can hinder their focus on learning basic skills.<sup>19</sup> Indian law problems are also relatively complex and therefore better suited to second semester students. While one could incorporate Indian law into the first semester with a simple closed memo problem, it would be necessary to pare down and edit the issues and relevant law. In so doing one would lose the beauty and the complexity of Indian law problems as teaching tools as well as give up the broader sociological learning possible with more complex problems.

In looking forward to assignment of an Indian law problem in the second semester, research training during the first semester can include relevant Indian law sources. This can include review of Indian law treatises and other secondary sources. It can also include incorporating Indian law cases, statutes, or digest key numbers into basic research training.<sup>20</sup> When actually creating an Indian law problem, the same general considerations go into the planning as when creating any legal writing problem: the teacher should have specific learning goals in mind for the problem and should be able to articulate how the assignment fits in with the overall goals of the course.<sup>21</sup> Additionally, "designing a good appellate brief problem takes considerable time and effort."<sup>22</sup> Because

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19. Of course, this is precisely the problem for students from different cultures, including some Native American students: the traditional law school fare deals with subjects that may be foreign to them. Nonetheless, for the majority of students, the more mundane and traditional problems work better for teaching basic skills. In the early stages of legal writing I like to use problems dealing with subjects that students likely have some sense about prior to law school: simple real estate issues; simple contract issues; elements of a crime; etc. Such topics also rarely incite strong emotional responses that might get in the way of learning basic reasoning and writing concepts. Once these basic skills are internalized, I can turn to more complex problems with an emotional component, such as many Indian law issues.

20. I actually introduce Indian law during the orientation program at the University of New Mexico when I introduce court structures and systems to my students. In addition to federal and state court systems, I briefly cover tribal courts.

21. See Diana V. Pratt, *Teacher's Manual to Accompany Legal Writing A Systematic Approach* 42 (2d ed., West 1993).

22. *Id.* at 69.



the appellate problem will likely be the final assignment of the year, it should give the students the opportunity to exercise the skills that they have learned throughout the course. These may include various research skills beyond simple case and statutory research: computer assisted research; research of legislative history; administrative regulations loose leaf services; and legal research on the Internet. Certainly the problem should involve more complex issues than earlier assignments and should require a greater depth of analysis. There should be sophisticated organizational concerns. Because it is an appellate problem there should be the opportunity to make policy as well as purely legal or factual arguments.<sup>23</sup> An Indian law problem can fit most if not all of these needs.

While moot appellate problems are typically set in the United States Supreme Court, I most frequently choose to set my problems in an intermediate appellate court. Students will argue in these courts far more frequently than in the Supreme Court.<sup>24</sup> I try to design the problems so that I can set them in a federal circuit that has not yet decided the precise issue. The students will then have relevant and binding law from the Supreme Court along with persuasive precedent from other circuits, with that persuasive precedent sometimes conflicting amongst the circuits.

To find appropriate issues one need only keep abreast of developments in Indian law. One can review cases filed on appeal. One can look through appropriate journals both legal and non-legal. One can search relevant key numbers in the West system. There are also Web sites that will suggest "hot topics" in Indian law.<sup>25</sup>

Once a specific Indian law topic is selected, the teacher must thoroughly research the topic and design a fact situation that allows both sides to make persuasive arguments. The precise issues need to be narrowed so as to be manageable and they need to be clearly defined, either explicitly or implicitly in the materials accompanying the assignment. This can often be accomplished by writing a lower court opinion that eliminates certain issues, or by having the parties concede certain points. Thus, for example, that something is located within Indian Country could be agreed to by all parties so as to eliminate this question from a problem whose issue is whether or not a particular regulation applies to a specific business whose location within Indian Country could be disputed.

I believe that creating a hypothetical fact situation is superior to

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23. *Id.* at 70.

24. *See id.* at 71.

25. One such valuable Web site is Indian-Law.Com that is designed for Indian law practitioners and which also has links to other useful Internet sites. It can be found at <<http://www.indian-law.com>> (accessed Oct. 7, 2001).

using a real case. The problem can then be geared to meet specific learning goals, and as such, be more pedagogically sound than when using a real case. In creating a fact scenario the teacher can design the problem so that both sides have reasonable arguments to make and the problem is fairly well balanced. Because Indian issues can give rise to strong emotions, it is important not to create a "good guy-bad guy" scenario. When a real case is used one loses some control over the issues as well as risks the case being decided on appeal before the students have completed their assignment. Moreover, the students will likely have access to the actual briefs in the case. In contrast, if rather than basing the problem on a real case, a real case is relevant law for the fictional problem, the teacher may be able to use the briefs from the actual case as a teaching tool in class. The students will become familiar with the actual case as precedent and can then study the briefs asking such questions as: why is or is not the author persuasive on this issue? How is the policy argument made by the author relevant to our case? How might we make a similar argument in our briefs?

In creating my appellate assignments, I create a fictional tribe that is involved in the litigation. I believe that this is superior to using an established tribe, first because the teacher has more control over the problem than if the students are given an actual tribe with its complete and often confusing history. There may be aspects of that history or of the tribe's structure that will interfere with the overall soundness and pedagogy of the specific problem. Secondly, by creating a fictional tribe with some allusions to general Indian history, the students will do some background research of Indian history generally. This research serves them well not only in giving context to the specific problem, but also in giving them a general context for Indian issues that they may face in the future.

In creating the fictional tribe, first and foremost it must be realistic. It should not be a caricature of the white man's Indian. Nor should it be idealized. The tribe and the individuals who comprise it must seem to be real people; indeed they will become real to the students as they work with the problem over the several weeks during which it is assigned. Once I have decided the location that best suits the problem for legal analysis purposes, I design a tribe and perhaps a reservation that fits that locale. This requires research of actual tribes in the area: their customs, their history, their treaties, etc.<sup>26</sup> In addition to using the

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26. Thus, for example, when a tribal café played a prominent role in one of my problems, I determined that the best setting for the problem was a P.L. 280 (for the subject matter of this statute and its official citation, consult *infra* n. 30) state in the Seventh Circuit. I set the tribe and its café in Wisconsin and researched traditional foods of Great Lakes tribes so that I could create a menu from the restaurant as part of the record that the students received. This not only gave the tribe more realism, it also gave students some insight into traditional foods of actual tribes in the area.

general library, I am fortunate to have a sister who is an anthropologist with a specialty in Native American cultures. I often run my fictional tribes and their customs by her for confirmation that they are believable. While not everyone has such a family resource, everyone creating problems has access to a library. Whatever the means of accessing information, it is essential to use these resources. To do otherwise not only defeats many of the benefits of incorporating Indian law into the curriculum; in my opinion it is also insulting to Native peoples.<sup>27</sup>

Part of creating the problem is creating teacher's notes to accompany it. These are especially important if others besides the problem's creator will be involved in teaching the problem. These others might include other legal writing faculty or teaching assistants. These teacher's notes, beyond summarizing the specific problem and issues, must give some general background about the area of law so that those using the problem can be effective teachers. Even if no one else will be using the problem, the teacher's notes are a useful tool from which to draft any bench brief required for oral argument.<sup>28</sup> They are also useful if at some time you choose to reuse a problem, allowing you to refresh your memory about it before setting about bringing research up to date and making any necessary modifications in the problem.

#### *B. Writing the Problem*

Once I have determined the issues to be addressed in the appellate problem I am designing, I summarize the law and arguments for each side of each issue. I then try to design a problem that will allow both sides in the problem to have some significant arguments and authorities. I try to create facts so that one side does not seem like a clear winner. I try to fit the facts with the law, so that when the law is analyzed and applied to the facts, again neither side is a clear winner. Once I have established this general scenario I write the actual problem.

Because this is an appellate problem, I write both a lower court opinion and create some portion of a lower court record. In writing the lower court opinion I reference some key cases. I also establish the basic facts about my fictional Indian tribe: whether it is a recognized tribe; number of enrolled members; size and location of their reservation; if it has a treaty and if so, any key provisions; etc. While some of this

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27. The realism should begin with the naming of the tribe and any individuals involved. It is hard for students to take seriously a tribe named "Tanto Wannabe" or an Indian client named "Tom A. Hawk." While such types of names are often used in an attempt to be light-hearted with students, in my opinion they only send a message that the problem is not to be taken seriously and perhaps that the underlying issues are something to joke about.

28. One attorney who judges our students' oral arguments each year has told me that he looks forward to my bench briefs on the Indian law problems because he sees them as a way of educating himself and keeping abreast of this area of law.

information may not be relevant to the issues in the problem, it helps to establish the tribe as believable. It also serves to introduce the students to some key concepts of Indian law. I also use the lower court opinion as a vehicle for explaining new or difficult terms or concepts that may be relevant to the particular issues involved in the problem.

The lower court transcript is a way to flesh-out the lower court opinion and to make the tribe seem more real. It also provides a window into Native cultures and traditions. Most of what I include in the transcript is probably not essential to the problem. Indeed, I usually establish in the lower court opinion that there is no question about the facts of the case, thus leaving the students with a question of law and a *de novo* standard of review. Yet, the transcript allows the basic facts of the case to be expanded so as to give a real sense of the tribe and its history and feelings about the issues involved as well as to present opposing views on those same issues.<sup>29</sup>

Overall, I design my problems with the hope that they will create a research situation allowing students to begin to understand something about Indian law in general as well as begin to develop some expertise about a specific Indian law issue. I also design them with the hopes that they will begin to give students some insight into Native Americans' unique cultures and concerns. And, because the problems are meaty and complex, they allow the students to demonstrate at the highest level all the research, reasoning, and writing skills that they have studied during their first year writing course.

#### IV. INTRODUCING THE PROBLEM AND STUDENT REACTIONS

Once the problem is designed and printed, it is distributed to the students who will then live with it for several weeks. To make this a positive and successful experience for the students, one must give some thought to how the problem is introduced. Even so, student reactions can vary depending upon the background and interests of the students.

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29. Thus, for example, as indicated, *supra* n. 26, instead of simply stating that a tribal restaurant served traditional foods, I created an actual menu from the restaurant that was included as an exhibit in the record. Similarly, in one problem the key question was whether the tribe involving had a treaty right to kill an endangered species as a part of a religious ceremony. While I only needed to state that the tribe killed the animal as part of an annual ceremony, I actually included several pages of testimony from tribal elders describing the significance of the ceremony. I also included testimony from Fish and Wildlife officers presenting the position in favor of protecting endangered species, even from this annual hunt. While such testimony was not essential to the legal questions in the problem, I believe it was essential to giving a more complete understanding of why these issues are important. Moreover, the testimony concerning the tribal religion and culture was well researched and based on beliefs of several tribes in the general geographic area in which I placed my fictional tribe. I had one student who, as a result of this problem and some of the readings it led her to, took at least one course outside of the law school on Native peoples.

### A. *Introducing the Problem*

Once students realize that an appellate problem awaits them as a future assignment, they begin to ask questions about it. When these questions arise I tell them that it will involve Indian law, but that beyond that I cannot be more specific. This general statement will gladden some students and will intimidate others. I generally tell them that it involves Indian law because that is an area of law that interests me, that I know something about, and because I am the one who designed the problem. I also tell them that I think it is an area of law that they should know something about and that this assignment will give them an opportunity to learn. This statement is more readily received in New Mexico, which has a strong Native American presence than it was when I was teaching in Detroit. But, in any event, the students know that an Indian law problem is coming.

When I first distribute the problem I generally summarize the key facts and procedural history of the problem, as well as give some general background that is relevant to the problem. Thus, for example, when a problem involved a question of whether a state statute was civil/regulatory or criminal/prohibitory for purposes of Public Law 280,<sup>30</sup> I gave a general explanation of Public Law 280 and its history. When a problem involved non-Indian fee-owned land within a reservation's boundaries, I gave a brief explanation of the allotment era. These explanations are intended only to give the students some very general background information so that they can go forward and research in detail on their own.<sup>31</sup>

When the problem is introduced, I also conduct a discussion and review of research sources and strategies. I assist the students, as a class, to develop an initial research plan, discussing what background sources might be helpful and what research is suggested by the lower court opinion. As the students' research progresses some portion of each class is devoted to discussing authorities and concepts that their research has disclosed, as well as general concepts and background that have become relevant to the students.

When the problem is assigned, students must be notified of which party they will represent. I begin by always assuring my students that there are good cases and good arguments for both sides. At the University of New Mexico, because of the nature of our writing program,

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30. *State Jurisdiction Over Offenses Committed By or Against Indians in the Indian Country*, Pub. L. No. 280, 18 U.S.C.A. § 1162 (West 2001).

31. At the University of New Mexico, I am fortunate to have colleagues on the faculty who are specialists in Indian law and who can be called upon to guest lecture. However, such input to the students must be used with caution since it can short circuit the necessary research that is part of the students' learning experience. Such guest lectures are best suited to later in the brief writing process when they can help students to clarify the research that they have conducted.

students are assigned to a particular side by legal writing section. Thus, when I introduce the problem, I also inform the students whether they are appellant or appellee. While I may have a strong positive or negative reaction from a few students,<sup>32</sup> and while perhaps a greater percentage would prefer to represent the Native American side of the problem, usually reactions are minimal since at this point the students know little about the problem.

When I taught at Wayne State University, I allowed my students to designate which side they wanted to represent, telling them that I needed a 50-50 split amongst my students and if necessary I would ask students to volunteer to take the side they had not selected. This was rarely necessary since the split in my classes was nearly always very close to 50-50.

### *B. Student Reactions Generally*

Students pass through a series of stages as they work through the Indian law appellate problem.<sup>33</sup> Initially, they simply react to the facts of the problem, feeling that the outcome in the court below was fair or unfair. This reaction is primarily based on their own backgrounds, biases and prejudices. As a result of their personal belief systems they will assert that one side is right or wrong. At this point they tend to see the problem in black and white with no shades of gray. They will either be delighted or depressed that they are on a particular side of the problem. Because they have not yet begun their research, existing law will have little bearing on how they feel about the problem.

Almost immediately, as they realize that they must see what the law says about the problem, the students become intimidated. They look through the lower court opinion, they pull a secondary source off the library shelf, and they begin to think that the problem is too complex for them. They think, "I have not studied Indian law and I know nothing about Indian law so how can I be expected to write an appellate brief on the subject?" The students need to be reassured that while this is a new area of law for them, the skills they will be using are not new: they know how to research; they know how to read and synthesize cases; and they know how to apply law to a new fact situation. They just need to use these skills in the context of this problem. At the same time they must not be misled about the complexity of the problem or given any reason to assume that this is going to be an easy task.

This will be enough encouragement for some students who will immediately begin research. Others will put off beginning the research

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32. See *infra* discussion Part IV.D.

33. These stages are similar to those occurring when students are assigned a complex problem in any area of law. This similarity argues for including Indian law problems as part of typical legal writing course materials.

either because they, nonetheless, think it will be relatively easy or because they are still intimidated (or because it is just their nature to procrastinate). At this point, students need to be reminded that while they will be using skills they have already learned, it will still be a time consuming process to research and understand the problem, then to write the appellate brief and finally to present an oral argument. I suggest my students fill out a time line with personal deadlines for completing research, analyzing the problem, writing an outline, drafting various parts of the brief, etc. I also require my students to keep a research notebook, which I check on a weekly basis for some sign of progress.<sup>34</sup>

Once the students are involved in their research they will begin to think that they have the losing side. This happens to students representing both sides of the problem. They will also reach a point when they will feel totally overwhelmed by the amount of material their research has revealed. They may become utterly confused. This period requires regular time in class devoted to discussing what the ongoing research is revealing. Students need to discuss cases and be prodded to understand their meaning and how they can be viewed, interpreted, used or argued in a manner not detrimental to their position. They may need more elaborate explanations of some general Indian law concepts. They need to be prodded to remain focused on the issues and cases relevant to their problem. This presents a special problem when a student has become intrigued by Indian law generally and so wants to take the research beyond the problem at hand because of this more general interest. The student must be prodded back on point while at the same time encouraged to hold some of the broader questions for later study either in an Indian law class or perhaps as part of an independent study or for a journal article.

As students continue researching the problem, and through ongoing discussions in class, an understanding of the problem begins to take hold. The students start to grasp the law involved and use that law to develop arguments about the case. They now see the case in a new light. Rather than the early emotional or visceral reaction to the facts, the students see the case as lawyers, in light of the law. They begin to see the strengths and weaknesses of both sides' positions and they use this understanding to develop arguments supportive of their position. By the time they actually write their briefs, most students have become passionate advocates for their side.

When they have completed the problem, the students generally feel

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34. This notebook also allows me some further insight, beyond class discussion, of cases or concepts that might need some further clarification. The notebooks give some indication of when some further prodding or direction is necessary in order for students' research and understanding to be complete.

pleased to have developed some competency and understanding about this new area of law. Some may nonetheless question the relevancy of this new knowledge to them and their future legal careers. But there are other students who, as a result of having been assigned this problem, turn to further study of Indian law. Regardless of their opinion of how helpful the new knowledge may be to them personally, most students have an overall positive feeling about the Indian law appellate problem. This has been true at both schools at which I have used Indian law problems. There are, however, some differences in student reactions at the two schools.

### *C. Reactions of Students at an Urban Law School*

At Wayne State University Law School in Detroit, I often presented my students with an Indian law appellate problem. While I was teaching there, Indian law was not a high profile subject at the law school. Although there are indeed several Indian tribes in Michigan, their presence is not generally felt in Detroit.<sup>35</sup> I am sure that many of my students had no idea that there was an entire body of law devoted to Indian issues.

When my Wayne State students received the Indian law problems, there was rarely any real resistance to the subject matter. Indeed, while perhaps questioning its relevancy to them, the Wayne State students were generally intrigued by this unknown body of law. As the students became involved in their research, they often expressed shock at both the amount of law that exists and at the way Indians have been treated historically. Students were generally sympathetic to Native American issues, but in a detached way. These were things and peoples that they could talk about, but that they believed had little or no relevance to, and would never personally touch, their lives.

These students were generally objective about the problems. They were also overwhelmingly thankful to have been introduced to this area of law of which they otherwise would have known nothing. I believe that the introduction of these problems generated further interest in, and study of, Indian law on the part of some students.

### *D. Reactions of Students at a School with an Awareness of Indian Law*

Most students at the University of New Mexico School of Law have some awareness of Indian law. Indeed, many students come to

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35. As of July 1, 1999, American Indians/Native Alaskans made up 0.6 percent of Michigan's population. The state is ranked twelfth in American Indian/Native Alaskan population. Most of this population is located in northern and rural areas of the state. U. S. Census Bureau, *States Ranked by American Indian and Alaska Native Population, July 1, 1999* <<http://www.census.gov/population/estimates/state/rank/aiea.txt>> (accessed June 21, 2001).



University of New Mexico specifically for its Indian law program. Additionally, some percentage of every entering class is Native American. The university is also located in a state with a high Native American population.<sup>36</sup>

While this higher consciousness of Indian law and Indian issues may make students initially more receptive to an appellate problem involving Indian law, it also creates some problems. Students have stronger biases that they may need to overcome in order to successfully address the assignment. They may have trouble viewing either side of the problem objectively. They may think that they know more than they do about Indian law and thus may either short change their research or misinterpret what their research reveals. Indian law issues in the news or in their personal history may color how the students view both the facts and the law of the assignment.

At the University of New Mexico, more students want the side of the problem that allows them to advocate on behalf of the Native Americans. If they are assigned to the other side, their immediate reaction is that they have been given the losing side.<sup>37</sup> Some students strongly believe that they cannot possibly represent anyone opposing an Indian client: they believe that to be on a side opposing Indians is to be both morally and legally in the wrong or on the "bad side." Students repeatedly need to be encouraged to view the problem objectively. They also need repeated reminders about the importance of understanding all sides of an issue. As work on the problem progresses, many students who resisted most strongly begin to see the benefit of having been given the non-Indian side of the problem. I have had several Native American students later thank me for forcing them to take an objective view of Indian law, ultimately allowing them to be a stronger advocate for Indian issues in other instances.

Students at the University of New Mexico have come to expect an Indian law problem as their appellate assignment. Recently I have noted that some of their reactions are more akin to typical student reactions to more traditional problem subject matter. Thus, students want to know how the problem will specifically help them in their New Mexico practice. For example, when I gave a problem involving a Public Law 280 issue, some students were annoyed not because it dealt with Indian law, but because New Mexico is not a Public Law 280 state. These students felt

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36. As of July 1, 1999, American Indians/Native Alaskans constituted 9.5 percent of New Mexico's population; the state is ranked fourth in Native population. U. S. Census Bureau, <<http://www.census.gov/population/estimates/state/rank/alea.txt>> (accessed June 21, 2001).

37. Actually, there may be some truth to this when it comes to the students' oral argument on the problem. We recruit judges from local attorneys, many of whom represent Indian tribes. We also use some tribal judges. While most of these people do their best to be fair, it is likely that in a few instances personal biases get in the way of impartial decisions.

that the Indian issues should have involved law applicable to New Mexico. Similarly, students would like to see all the problems either set in New Mexico or in the Tenth Circuit. These complaints are not about receiving an Indian law problem, but about the specific details of the problem. They are typical of legal writing students' complaints generally about legal writing problems. The nature of these complaints seems to indicate that the University of New Mexico students view Indian law as just another part of their first year experience.

#### V. CONCLUSION

When I was teaching at Wayne State, I wanted to open my students' eyes to the area of Indian law. At the University of New Mexico, where the students are aware of this body of law, my hope is to help them to take an objective, non-emotional approach to Indian law issues.

I would like to see a time when discussions such as this panel are unnecessary because Indian law is just another routine piece of the curriculum. In the meantime, integration of Indian law into other courses is one of the best ways to educate students about Indian law as well as perhaps interest them in further studies in the area. Legal writing is uniquely suited to this task because students work with problems over a period of weeks. This allows for more in-depth research and more time to comprehend complex issues. The problem nature of the course also allows for a discussion of the social and historical context of Indian law. And, because it is typically a first year course, introduction of Indian law into legal writing allows students who become interested in this area of law to further pursue it in their remaining law school careers.

I am told of one of my students who, the summer after his first year, proudly introduced himself to someone as "General Counsel for the Chicawa Tribe." The Chicawa Tribe was the fictional tribe created for his appellate problem. I hope that similar statements, not fictional, can be uttered with similar pride and confidence by many of my students at some time during their legal careers. Regardless, I take satisfaction in knowing that I have introduced students to an important and growing body of law, and I am confident that they can approach this law not with fear but with a sensitivity and understanding not only about the law itself but also about the people behind it.

