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Indian Identity--Post Indian Reflections

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INDIAN IDENTITY- POST INDIAN REFLECTIONS

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I. INDIANESS

American Indians face conflicting messages about the meaning of their identity. Arguments over who is an Indian within the Indian community reflect these conflicting messages. For example, it is argued that one must possess a quarter or more Indian blood to be an Indian. Alternatively, others argue that one's degree of Indian blood is less significant than one's cultural or religious perspective. According to this argument, one may brand another who does not "think like an Indian" as not a true Indian. Arguments over who or what is an Indian obscures our remembrance of who we are. These arguments do not bear out the realities of contemporary reality of Indianess.

The problem of Indian identity is that it is a term created outside the context of tribalism. The origin of the Indian as we understand the term can be traced to a particular moment in time; the instant Christopher Columbus looked across the bow of his ship and yelled, "hey look, Indians." Perhaps, those were not his exact words, however, we know at that moment the Indian came into being. Most significantly, the term Indian (as it pertains to the indigenous populations of the Americas) is an identity that did not exist prior to Columbus.

In addition to his geographic error, the Columbus term mistakenly describes the entire indigenous population of the Americas as a singular population. Although a modern standard dictionary defines an Indian as "[a] member of any of the aboriginal peoples of North America, South America or the West Indies,"[1] the very identity suggests singularity rather than diversity. It is this idea of a singular identity that causes problems. There were and are Hopi, Navajo, Miwok, but the term Indian merges these identities into a singular identity. It is a fictional identity.

By fictional, I mean that it did not have root in the particular culture or community of any one of those aboriginal peoples that were occupying the Americas in 1492. Rather, it is an artifice whose primary utility is that it distinguished the discoverer from the discovered. Ironically, the discovered now examine their identity through the term of discovery, i.e., the discovered now angst over their own Indianess.

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1. Websters II: New Riverside University Dictionary, 622

II. How Did We Arrive at Such a Point, and Why is This Relevant to a Law Conference?

The term Indian has been used as a means of oppressing tribal peoples by acting as a conduit that distributes and regulates power among competing tribal, state and federal institutions. In law, this is referred to as jurisdiction. Thus, the cases that address Indian identity are often jurisdictional conflicts. A judge may pronounce someone an Indian or not an Indian, and the consequences of that are real enough. In *St. Cloud v. United States*[2], "St. Cloud's claim that he is not an Indian under 18 U.S.C. §1153 raises a question about subject matter jurisdiction."[3] There the court explained that "the word Indian has become a legal term of art with varying definitions depending on the context."[4] What "context" really means here is: what are the power relations at stake. In this sense, Indian is a legal reality created and maintained for the express purposes of regulating and disbursing power. This legal reality, in turn, affects us (the fictional Indians) in a real physical way. To analogize to a litigation lesson, subject matter jurisdiction is always relevant.

Why talk about this at all? I believe that the term American Indian can be reappropriated from its western origins to help us as advocates and lawyers to better understand our own struggle to protect and preserve tribal communities. I suggest that the term Indian cannot be defined by reference to any set standard bases upon blood or cultural belief. It must be understood to describe a type of connection between an individual and tribal community. Thus, to be Indian is to possess a type of connection between oneself and a tribal community.

The implications of this connection definition is that it focuses our attention to the tribal community and our relation to it as a basis for identity rather than individual traits.

In turn, our struggles are not over rights as individuals, but our rights as a separate people and community. In this discussion, I suggest that this has always been the case and attacks against our peoples have often been waged by controlling what it means to be an Indian.

III. Conceptual Traps

I believe we fall into certain conceptual traps in thinking about ourselves as Indians. The blood quantum and cultural traditionalism are contemporary frameworks within which Indian identity is often discussed. It is useful to examine how these frameworks developed and how their use limits our ability to describe the

2. 702 F. Supp. 1456 (D.S.D. 1988).
3. *Id.* at 1458.
4. *Id.* at 1460.

diversity of the Indian life experience.

A. Traditionalists, Apples and Anthropologists

To discuss Indian in terms of tradition or culture is to discuss it in terms of a state of mind rather than upon one's biology. There are two extremes to this argument: the traditionalist and its opposition, the apple. Indian identity based upon one's "traditionalism" creates a standard of identity centered upon an archetype of what an Indian should be. Accordingly, one who embodies the archetype is an Indian, and the greater one deviates from it, the less one is an Indian. At some point, according to the argument, one has deviated enough such that he or she is no longer an Indian. An "apple" is a term used by many to describe one who is "red outside and white inside." It means that the one called an apple is not truly and Indian, because they don't think or act like an Indian, even though they appear Indian. The apple has deviated too much from the archetype.

The existence of an Indian archetype, however, presents certain problems. If the thoughts and acts comprising the archetype are uniquely Indian, then what is uniquely Indian? What is unique is impossible to say given the diverse nature of tribes and the varying states of cultural change tribes have undergone since contact with the West. To suggest a consistent set of belief, thoughts or behaviors held by all Indians is problematic, at best.

However, some link identity to Indian spirituality. However, culture and spirituality pose substantial problems in a consistent archetype. What is culturally or spiritually Indian will be answered differently by different Indians, especially those from different tribes. It is not unreasonable to believe that different Indians could maintain different and opposing views of an Indian archetype grounded in culture or spirituality.

Tribal communities admittedly have maintained archetypes that embody characteristics, traits, and values they seek to emulate. These were unique expressions of each tribes' ideal person. However, it was understood that failure to conform to the archetype did not make you less a member of the tribe; rather it was an ideal toward which to aspire.

Alternatively, one can examine the traditionalist from a slightly different point of view. If there are no consistent essential elements to an Indian, then the archetype may describe what it is not. For example, "he is a traditionalist," may mean that he is not white or less white. Consistent with this view, one article on Indian law argues that "cultural dillution" was one cause of the declining population of American Indians.[5]

Reasoning such as this has come about, in part, because of the legacy of anthropology:

"Throughout American history, but especially within the twentieth century, there

5. Lenore A. Stiffarm and Phil Lane Jr., *The Demography of Native North America: A Question of American Indian Survival, in* THE STATE OF NATIVE AMERICA, 39-40 (M. Jaimes, ed.1992).

> has been a tendency for both Indian people and especially their white neighbors to associate 'Indianess' with the past. Fostered, in part, by anthropologists, many of whom were eager to investigate what they described as 'traditional Indian culture,' untainted by white contact, the concept of an Indian world 'pure and unchanged since time immemorial' has emerged as part of the popular concept about the history of tribal people."[6]

Anthropology created the concept of the ethnographic present. Between 1880 and 1930, the Smithsonian sent out a number of anthropologists to record "aboriginal culture" before the cultures died or were too "contaminated" by modern western culture. Underlying this process was the idea that there existed a pristine uncontaminated tribal culture.

Implicit in this line of thought is that the greater tribal cultures are influenced by contemporary western society the less pure (or more contaminated) they are. It is not difficult to make the next step, and conclude that a contaminated culture is less Indian. It is this lesson which on some level has been accepted by American Indians themselves.

Thus, the problem with linking Indian identity to a cultural archetype is that what is culturally or spiritually Indian varies from tribe to tribe, and varies within the same tribe over time. For example, it may be culturally acceptable to practice some form of Catholicism among the Pueblos of New Mexico and the Tohono O'odham, but not among the Hopi. Also, tribes with no cultural tradition of pow-wows now may have a number of tribal members fancy dancing on the pow-wow circuit. As tribal cultures change over time and across tribes, it is not merely problematic, but impossible, to construct an archetype that would universally characterize an Indian.

The archetype expresses the subjective values of the one offering it as a basis for Indian identity. Values clash and compete, and so do images of the archetype. The danger of the archetype is that it requires one ideal and its associated underlying set of values to prevail over competing ideals. If the archetype incorporates particular cultural practices and religious beliefs, can one sincerely disagree with the cultural practice or religious belief and still be an Indian? An answer might lie in an examination of Indians who have converted to Christianity.

Missionary efforts on Indian reservations have been successful to varying degrees. The 1992 phone directory for the Navajo Nation revealed twenty five churches with telephone numbers. The telephone directory for the Hopi reservation lists eight churches with telephone numbers. The telephone directories show a number of churches are located on the Hopi and Navajo reservations with presumably Hopi and Navajo congregations. It is not unreasonable to generalize at this point to suggest that this is not unusual, and it is likely that Christian churches exist on many reservations with Indian congregations.

These Indians continue to live in the same tribal communities as their non-Christian brethren and share much of the same life experiences as other members of their tribe. Despite their conversion, many Indians do not see the converted Indian

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6. AMERICAN INDIAN IDENTITY: TODAY'S CHANGING PERSPECTIVES 7 (C. Trafazer, ed. 1989).

as being no longer a member of the tribe. On the San Carlos Apache reservation in July of 1994, the majority of the tribal councilmen were members of various Christian churches. Their election to office revealed that San Carlos Apaches saw these men as members of their tribal community despite their Christian beliefs.

Terms like traditional do not aid to understand the underlying nature of the Indian. The diverse and changing nature poses substantial problems in identifying a consistent definition of Indian identity.

B. Indian Identity, Status and Law

Indian identity has often been defined by one's degree of Indian blood. Some Indians argue that their identity is a function of their degree of Indian blood (or blood quantum). Accordingly, one who is a full blood Indian is more Indian than one who is less. The degree of Indian blood is obviously not a literal meaning, otherwise a blood transfusion would transform one's identity. Rather, it is a measurement of biological ancestry. Thus, one quarter Indian blood means that one fourth of one's ancestors were Indians.

The calculus in which degree of Indian blood is a factor in an Indian identity function has been embodied within the organic laws of many tribes. For instance, the amended Hopi constitution requires one quarter or more Hopi Indian blood to be eligible for tribal membership.[7] Whether the standard is one quarter or full blood, a standard based upon the degree of Indian blood has become an accepted standard of enrollment among many tribal governments.

Blood quantum is, in practice, usually determined by the establishment of a base roll of Indians within a tribe. The creation of this roll usually coincided with the establishment of a tribal government pursuant to the provisions of the Indian Reorganization Act (IRA)[8], although the blood quantum as a standard of Indian identity has an older history under the General Allotment Act.[9] The IRA defined an Indian based upon Indian descent and residency within a reservation.[10] The Tohono O'odham tribal roll is a typical example.[11] They base membership upon a tribal census (roll) dated January 1, 1937.[12] If one can establish descent from the base roll, then the applicant is eligible for tribal membership.

Most tribes require not only lineal descent, but a degree of blood requirement. A typical blood quantum requirement is one quarter degree.[13] This means that one fourth of direct ancestors must be Indian. In contrast, the Cherokee Nation does not set a quantum, but requires showing a direct descent from a person listed on the rolls from the General Allotment Act.[14] Thus, blood quantum is subject to criticism. First,

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7. *See* Hopi Constitution, art. II, § 2.
8. 48 Stat. 984 (June 18, 1934).
9. General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codifed as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, and 381(1994)).
10. *See* Wheeler-Howard Act, §19, 48 Stat. 984 (June 18, 1934).
11. *See* Tohono O'odham Nation, Const., art. I, §(a).
12. *See Id.*
13. *See* Markah Indian Tribe v. Clallam County, 440 P.2d 442, 444 (Wash. 1968).
14. *See* General Allotment Act, *supra* note 9.

any quantum is arbitrary, and will disenfranchise members of an Indian community who fall below the set quantum. Second, the blood quantum does not recognize tribal adoption practices which may include cross-racial adoptions.

An examination of early tribal adoption practices suggests that several tribes recognized cross-racial adoptions. For example, Joseph-Louis Gill was a famous white chief of the Abenaki. His parents were captured white children who were raised as Abenaki. Blood quantum was irrelevant in the Abenaki's determination of Joseph-Louis Gill's Indian identity. Thus, blood quantum may not describe who is and is not a member of a tribe from the tribes' perspective.

Although the blood quantum may be problematic from a tribal perspective, it is a vital element in federal law. In *Makah v. Clallam County*[15], the Supreme Court of Washington reiterated the federal definition of Indian and held that one essential test of Indian identity was a substantial degree of Indian blood.[16]

IV. INDIAN BLOOD

The legal conceptualization of the race of Indians began in a discussion of white identity.[17] The Supreme Court of the United States in 1846 was asked whether a white man became an Indian when he underwent tribal adoption.[18] In *United States v. Rogers*[19] the Court held no, and, in the process, set forth the discourse in which Indian identity would be discussed.[20]

Beginning in 1790, there were a series of acts regulating trade and intercourse with Indian tribes. Ostensibly, these acts regulated white men's trade and intercourse with Indians. One provision was federal court jurisdiction over white men who committed crimes in Indian country. These acts culminated with the passage of the 1834 Trade and Intercourse Act[21] which continued federal jurisdiction over crimes committed by white men in Indian country, but specifically exempted crimes committed by Indians, against Indians:

> And be it further enacted, That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States shall be in force in the Indian country. *Provided, The same shall not extend to crimes committed by one Indian against the person or property of another Indian.* [emphasis added][22]

15. 440 P.2d 442 (Wash., 1986).
16. *See id.* at 444.
17. *See* United States v. Rogers, 45 U.S. (4 How.) 567, 573 (1846).
18. *See id.* at 571-72.
19. 45 U.S. (4. How.) 567 (1846).
20. *See Id.* at 573.
21. 4 Stat. 739.
22. Regulation of Trade and Intercourse with the Indian Tribes, Ch. 161, 4 Stat. 733 (1834).

In *Rogers*, the Supreme Court was asked to define the term "Indian" as it was used in the act.[23]

In November of 1836, William S. Rogers, a white man, moved to Cherokee territory with no intention of returning to the United States.[24] Cherokee territory was then in Indian country.[25] Indian country was defined by the Trade and Intercourse Act as being west of the Mississippi River, outside the territory of Arkansas, and outside the states of Missouri and Louisiana.[26] There he settled and shortly thereafter married a Cherokee woman.[27] He was adopted into the tribe and recognized as a member of the Cherokee Nation.[28] He and his wife continued to live in the Cherokee territory and had several young children.[29] Seven years later, in 1843, she died.[30]

Rogers was indicted for murder in 1845 before the Arkansas District Court.[31] It was alleged that he killed another white man, Jacob Nicholson, who was similarly adopted into the Cherokee Nation.[32] As the murder took place in Cherokee territory, federal prosecutors moved to charge Rogers with the crime pursuant to the 1834 Trade and Intercourse Act.[33] Rogers argued that his Indian adoption and recognition as a Cherokee member changed his identity from a white man to an Indian.[34]

In a short opinion, The United States Supreme Court held that Rogers was indeed a white man and not an Indian.[35] Indian identity, as the Court saw it, was rooted in a racial identity: "[T]he exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, of the family of Indians."[36] The Court did not elaborate upon its meaning of race beyond the family of Indians.[37] In fact, there is little discussion regarding what it meant by this statement. Much more important to the Court was that Rogers was white.[38]

The Court's opinion is better understood when one examines the court's treatment of the relationships created by an adoption and those relationships terminated. An adoption is a : "[l]egal process pursuant to state statute in which a child's legal rights and duties towards his natural parents are terminated and similar rights and duties toward his adoptive parents are substituted."[39] Adoption is a legal event that severs the biological relationship form the parent and child relationship.

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23. *See* Rogers, 45 U.S. at 571-72.
24. *See id.* at 571.
25. *See id.* at 571-72.
26. *See* 4. Stat. 729, §1.
27. *See* Rogers, 45 U.S. at 568.
28. *See id.*
29. *See id.*
30. *See id.*
31. *See id.* at 571.
32. *See* Rogers, 45 U.S. at 571.
33. *See id.* at 570.
34. *See id.* at 567-68.
35. *See id.* at 573.
36. *Id.* at 573.
37. *See id.*
38. *See* Rogers, 45 U.S. at 572-73.
39. Black's Law Dictionary 49 (6th ed., 1990)

It transfers and substitutes these social and legal relationships to a new set of parents.

Rogers argued that his Cherokee adoption did not merely substitute familial relationships, but substituted political relationships.[40] In effect, he asserted an adopted citizenship, and a terminated citizenship. The transformation of his political identity occurred in the same way an adoption occurs. The new identity necessarily terminated the existing political relationship with the United States.[41]

The Court acknowledged that the Cherokee adoption may have created a new political relationship between Rogers and the Cherokee Nation.[42] Thus, it stated that Rogers' adoption may have created a Cherokee identity which would subject him to Cherokee law: "He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages."[43] In the language of the adoption analogy, the Court acknowledged an adoptive political relationship with the Cherokee Nation.[44] However, the Court found that this new relationship did not make Rogers an Indian.[45]

The Court found it troubling that a white man could become and Indian: "It would perhaps be found difficult to preserve peace among [tribes], if white men of every description might at pleasure settle among them, and, by procuring an adoption by one of the tribes, throw off all responsibility to the laws of the United States, and claim to be treated by the government and its officers as if they were Indian born."[46] It is here that the opinion in *St. Cloud v. United States* can be understood. Context is a discussion of considerations of power. Here, the Supreme Court acknowledged the reality that their inability to control identity had direct implications to the exertion of federal power on the frontier[47]. A white man who became an Indian would not be subject to the laws of the United States.

The Court found that the Cherokee Nation adoption did not sever William Rogers' duties and responsibilities to the United States: "Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibilities to the laws of the United States remained unchanged and undiminished. He was still a white man, of the white race, and therefore not with the exception of the act of Congress."[48] The link between race and identity served to control the boundaries of federal and tribal jurisdiction. Thus, Rogers was never allowed a complete adoption.[49] His natal ties were never severed.

Indians and white identities did not merely control federal assertions of power, but it also controlled tribal assertions of power. In *Ex Parte Morgan*,[50] the federal

40. *See* Rogers, 45 U.S. at 572.
41. *See id.*
42. *See id.* at 573.
43. *Id.* at 573.
44. *See id.*
45. *See* Rogers, 45 U.S. at 573.
46. *Id.*
47. *See id.*
48. *Id.*
49. *See id.*
50. 20 F. 298 (W.D. Ark., 1883).

district court used race to limit the Cherokee Nations' assertion of jurisdiction.[51] The federal district court of Arkansas was faced with an extradition request from the Cherokee Nation.[52] It found that it could only honor the request and order the extradition form Arkansas if the Cherokee Nations' courts could exert lawful jurisdiction over the defendant.[53]

The court asserted that the Cherokee Nation's criminal jurisdiction extended only over crimes committed by Indians against Indians.[54] Cherokee Nations' request alleged that Frank Morgan was a Cherokee citizen and that he committed murder on Cherokee territory.[55] It did not allege that he was an Indian: "The requisition of the chief recites that Frank Morgan is a citizen of Cherokee Nation. That does not of necessity show him to be an Indian, because he may become a citizen and still not be an Indian."[56] The court held that "Indian by blood ... as contra-distinguished from one who may be a member of the tribe."[57] An allegation of membership or citizenship without more did not establish Indian status.[58] Thus, Indian identity not only determined the extent of federal power, it also determined the extent of tribal power.

This I believe is one of the lessons of *Duro v. Reina*.[59] In *Duro*, the Salt River Indian Community attempted to assert criminal jurisdiction over a non-member Indian.[60] Salt River Indian Community asserted that federal Indian policy has long recognized tribal power to try non-member Indians.[61] In particular, they argued that federal definitions of Indian in federal statutes and programs apply to all Indians without respect to membership in a particular tribe.[62] The Court responded:

> "Congressional and administrative provisions [] reflect the Government's treatment of Indians as a single large class with respect to federal jurisdiction and programs. Those references are not dispositive of a question pf tribal power to treat Indians by the same broad classification. In Colville, supra, we noted the fallacy of reliance upon the fact that members and non-member Indians may be both 'Indians' under a federal definition as proof of federal intent that inherent tribal power must affect them equally."[63]

The Court clearly delineated between Indian for the purposes of analyzing tribal political power and Indian for the purposes of federal power. Indian for the purposes

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51. *See id.* at 308.
52. *See generally id.*
53. *See id.* at 309.
54. *See it.* at 308.
55. *See* Morgan, 20 F. at 308.
56. *Id.*
57. *Id.*
58. *Id.*
59. 495 U.S. 676 (1990).
60. *See id.* at 679.
61. *See id.*
62. *See id.* at 689.
63. *Id.* at 689=90. (citing *State of Wash. v. Confederated Tribes of the Colville Indian Reservation*, 477 U.S. 134, 161 (1980)).

of federal power meant ancestry and was not limited to enrolled status.

Indian identity is a legal construction about which federal and tribal power is analyzed. Its origin in *United States v. Rogers* dismissed tribal membership as a basis of Indian identity. Ancestry was the conceptual tool for controlling white political identity. The origins of the blood quantum in essence had little to do with describing tribal peoples.

I raise all of this to remind ourselves of our origins, our communities, and to focus our analytic discussion away from essentializing an Indian to an examination of our relation to community.

Importantly, this discussion also points out the existence of an entity, the community, whose death is our death. Hunting and fishing rights only exist because tribal communities exist, and those rights arise out of it. Attacks on those "group rights" are direct assaults aimed at killing that entity. Our role, as lawyers and advocates, is to maintain our vigilance against such assaults to protect that life entity.