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Symposium: Native American Law--Foreword

Melissa L. Tatum

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SYPOSIUM: NATIVE AMERICAN LAW

FOREWORD

Melissa L. Tatum*

Indian law was once considered an obscure, niche field. Dean Rennard Strickland has recounted how, early in his career, one of his letters of recommendation stated that "Rennard is a very bright young man . . . and he is quite a hard worker; however, he spends an immense amount of time on Indian questions. Someday we hope he will devote his time to the law."¹ Over the last two decades, however, Indian law has become an increasingly important and accepted area of law.² Several law schools have developed specialty programs in Indian law as part of their juris doctor curricula,³ and two law schools are now offering LL.M. degrees in the field.⁴

* Associate Professor and Co-Director, Native American Law Center, The University of Tulsa College of Law; Chair, AALS Section on Indigenous Nations and Peoples 2001-2002. The essays in this symposium were prepared as part of the Section's panel presentation for the January 2002 annual meeting. Each of the authors has also prepared a set of course materials and an accompanying teacher's packet. Professors interested in obtaining copies of these materials should contact Professor Tatum at The University of Tulsa College of Law or via e-mail at melissa-tatum@utulsa.edu.

1. Rennard Strickland & Gloria Valencia-Weber, *Observations on the Evolution of Indian Law in the Law Schools*, 26 N.M. L. Rev. 153, 157 (1996).

2. For a brief history of Indian law, see Cynthia Ford, *Integrating Indian Law into a Traditional Civil Procedure Course*, 46 Syracuse L. Rev. 1243, 1251-1257 (1996); Strickland & Valencia-Weber, *supra* n. 1, at 153.

3. The University of Tulsa College of Law was the first to formalize one of these programs, with its Native American Law Certificate. Strickland & Valencia-Weber, *supra* n. 1, at 166. Other law schools have followed suit. They include: Arizona State University; the University of Kansas; and the University of New Mexico. See Arizona State University College of Law, *Indian Legal Program* <<http://www.law.asu.edu/programs/Indian/history.asu>> (accessed Oct. 7, 2001); University of Kansas School of Law, *Tribal Lawyer Certificate Program* <<http://www.law.ukans.edu/>> (accessed Oct. 7, 2001); University of New Mexico School of Law, Programs and Institutes, *Indian Law* <http://lawschool.unm.edu/programs_institutes/indian.htm> (accessed Oct. 8, 2001).

4. The University of Tulsa offers an LL.M. in American Indian and Indigenous Peoples Law, see The Native American Law Center at the University of Tulsa College of Law, *LL.M. in American Indian and Indigenous Law* <<http://www.law.utulsa.edu/zope/indianlaw/llm>> (accessed Oct. 8, 2001), and the University of Arizona offers an LL.M. in Indigenous Peoples Law and Policy. See The University of Arizona College of Law, *Master of Laws (LL.M.) in Indigenous Peoples Law and Policy*

Despite its growing acceptance, however, Indian law is still often viewed as a niche field, one that is important only to a small subset of scholars and attorneys. Even as more schools offer a basic course in Indian law, there is an entrenched belief that Indian law is separate and apart, offering nothing to the more generalized study of law. In 1989, Professor Judith Resnik wrote her *Dependent Sovereigns* article, exploring what Indian law has to offer federal courts' jurisprudence.⁵ Eleven years later, Professor Frank Pommersheim wrote his *Open Letter to the Federal Courts' Teaching and Scholarly Community*, discussing the relevance of Indian law to federal courts' jurisprudence and inviting more attention to the field. It is clear from Professor Pommersheim's article that little progress occurred in those intervening years.⁶

This pattern of sparks of interest, followed by a fizzle, has continued with respect to other areas of law. Articles have been published discussing the relevance of Indian law to both conflicts⁷ and civil procedure⁸ and calling for integration of Indian law into those portions of the law school curriculum,⁹ yet little headway has been made. It is the goal of this symposium to continue the push for integration of Indian law into other law school courses.

Two primary obstacles exist to this endeavor. First, many professors and students simply do not understand why Indian law is relevant to them. Second, most textbooks do not mention Indian law and many professors lack the background and training to create their own materials.¹⁰ This symposium will hopefully continue the process of chipping away at both these obstacles.

Indian law is relevant to a wide variety of courses and has much to offer both students and professors. Since most students do not understand the relevance of Indian law, they need to be educated that such a thing exists and can crop up in many seemingly straightforward

<<http://www.law.arizona.edu/depts/triballaw/llm/llmbrochure.htm>> (accessed Oct. 8, 2001). St. Thomas has also begun offering an LL.M. in Intercultural Human Rights, which, although focusing on international human rights, includes a component involving international indigenous peoples law. See St. Thomas University School of Law, *LL.M./M.A. in Intercultural Human Rights* <<http://www.stu.edu/humanrights/>> (accessed Oct. 8, 2001).

5. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. Chi. L. Rev. 671 (1989).

6. Frank Pommersheim, "Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community, 71 U. Colo. L. Rev. 123 (2000).

7. Wendy Collins Perdue, *Conflicts and Dependent Sovereigns: Incorporating Indian Tribes into a Conflicts Course*, 27 U. Toledo L. Rev. 675 (1996).

8. Ford, *supra* n. 2.

9. See Ford, *supra* n. 2; Perdue, *supra* n. 7.

10. See Ford, *supra* n. 2, at 1256 ("Most law professors attended law school at a time when Indian history and culture was not generally taught to undergraduates, and Indian law was even rarer in the law school curriculum than it is today. Thus, as law professors, we are even less likely to have been exposed to basic Indian law than our current students.").

contracts or torts cases.¹¹ Since students often view Indian law as a separate niche, one irrelevant to them, they see no need to enroll in a basic Indian law course.¹² The failure to mention Indian law in other courses simply reinforces this belief.¹³ One of my colleagues tells the story of representing a tribal government in a collection dispute. On behalf of the tribe, he offered the company a reasonable settlement offer, which was rejected by the company's attorney in the belief the company had an open and shut case. That attorney was quite shocked to have the collection action dismissed on the grounds of tribal sovereign immunity. Some exposure to Indian law in law school might have allowed that attorney to avoid making such a basic mistake. And the opportunities for mistakes are exponentially increasing as tribes become more economically active and integrated into the national economy.

For professors, Indian law offers a wealth of possibilities. On the more prosaic end of the scale, knowledge of Indian law and its relevance to each of our areas of expertise allows us to be better teachers and to better prepare our students for the modern practice of law. On the more theoretical end, knotty jurisprudential problems abound.¹⁴ Where and how do Indian tribes fit in our federal structure? What are the powers and responsibilities of Indian tribes? These questions reach into virtually every area of law. The essays that follow explore just five of those areas: Civil Procedure, Legal Writing, Property, Constitutional Law, and Commercial Law and Bankruptcy.

Professor Cynthia Ford starts us off with an update of her 1996 article, *Integrating Indian Law into a Traditional Civil Procedure Course*. Five years ago, she included a survey of Civil Procedure professors as part of her article.¹⁵ This time around, in addition to updating the substance of the relevant law, she has included a survey of her students, with some interesting results. Professor Barbara Blumenfeld next turns us to a look at ways to integrate Indian law into a first year legal writing course. In addition to discussing the benefits Indian law brings to legal writing, she also explores typical student reactions to Indian law and how to overcome student objections.

In the third essay, Professor Kenneth Bobroff examines the ways Indian law fits into and enhances the basic first year Property course. Professor Victoria Sutton then sets out methods of incorporating Indian law into Constitutional Law, including a look at some key historical

11. See e.g. G. William Rice, *There and Back Again—An Indian Hobbit's Holiday* "Indians Teaching Indian Law," 26 N.M. L. Rev. 169, 171 (1996).

12. See Ford, *supra* n. 2, at 1244.

13. Cf. Ford, *supra* n. 2, at 1258 ("[D]iscussion of Indian law by a professor who teaches substantive courses perceived as being in the mainstream of the curriculum also reinforces the importance of the subject of Indian law[.]").

14. See e.g. Pommersheim, *supra* n. 6.

15. See Ford, *supra* n. 2, at app. B.

context. Finally, Professor Jack Williams concludes the symposium by demonstrating how Indian law complements commercial law and bankruptcy courses. Professor Williams' essay is of specific relevance to those who teach contracts, banking, corporations, bankruptcy, and the UCC courses. It is of general relevance to all of us, as it demonstrates the degree to which Indian tribes and tribal businesses are integrating themselves into the national economy.

These are just a sampling of the courses to which Indian law is relevant. Indian law is also extremely pertinent to federal courts, conflicts, First Amendment, children and the law, civil rights, environmental law, and international law, just to name a few. Hopefully, then, this symposium will be the first in a series, rather than another spark that fizzles.

To help make sure that this symposium ignites at least a modest fire, the five authors have also addressed the second obstacle (lack of materials and knowledge to create materials). Each of the five has prepared a set of course materials and an accompanying teacher's manual, creating a self-contained packet for professors interested in incorporating Indian law into their courses. Any professor interested in obtaining a copy of these materials should contact me.¹⁶ These five packets (for civil procedure, legal writing, property, constitutional law, and commercial law and bankruptcy) are hopefully just the start of the materials bank. I also invite any other professor who incorporates Indian law into a course to submit course materials and accompanying teachers' manuals. Advertising and distribution of these materials will be an ongoing project of the AALS Section on Indigenous Nations and Peoples.

One final objection can be raised to the incorporation of Indian law, and that is lack of time. It is true that professors have only so much class time available and face difficult decisions about what to cover and what to cut. The task of many first year professors is often further complicated by a decrease in the credit hours allotted to their courses. At the end of the day, each professor must make an independent determination of what material to include in each course. That decision, however, must be an educated decision, and the final goal of this symposium is to provide that education, to make the strongest possible case for at least some mention or inclusion of Indian law. In closing, let me just refer to the 1996 articles by Professors Ford and Perdue, in which they each conclude that the value of Indian law makes it worthy of inclusion.¹⁷ It is my hope that the following essays will lead you to the same conclusion.

16. I can be reached at The University of Tulsa College of Law or via e-mail at melissatatum@utulsa.edu.

17. See Ford, *supra* n. 2, at 1280; Perdue, *supra* n. 7, at 678-79.