

# WHOSE SOVEREIGNTY? TRIBAL CITIZENSHIP, FEDERAL INDIAN LAW, AND GLOBALIZATION

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*This Article is adapted from a speech given by Stacy Leeds at the Sixth Annual Canby Lecture Series held at Arizona State University's Sandra Day O'Connor College of Law. Stacy Leeds is the Dean of the University of Arkansas Law School, which recently launched a new Indigenous Food and Agriculture Initiative to complement their long-standing LL.M. Program in Agricultural and Food Law. In her presentation, Dean Leeds draws on her experience both as an Indian Law professor and tribal judge to reflect on how tribal governments are viewed from the outside and how tribes might evolve the dialogue and interact with external audiences including other sovereigns across jurisdictional lines.*

## I. INTRODUCTION

As the Dean of the Law School at the University of Arkansas, I routinely meet alums, lawyers and business leaders who are very intellectually engaged in a variety of legal and political issues. Given my work and background, they genuinely want to know more about Indian law and the workings of modern tribal governments, but have seldom had meaningful access to a narrative beyond what our educational system has provided from pre-school to post-graduate work. Like many law schools, federal Indian law has been a part of the upper level elective choices in given years, and other substantive courses give some attention to the areas most likely encountered in a general practice, such as federal Indian Child Welfare legislation's applicability to family law practice in state trial courts.

It is understandable how Indian law and tribal communities are marginalized in the mainstream for the sake of practical applicability and

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because of the relatively small demographic impact of tribal populations. Even with that understanding, I remain dismayed at the disconnect that can exist between communities that share close geographic proximity, are well-suited for mutual economic benefit, yet have so little interaction. Case in point, our law school is located in the heart of Fayetteville, Arkansas—less than 60 miles from Tahlequah, Oklahoma, the capital and government seat of the largest tribe by population in the United States.

I meet business men and women who successfully enter new markets abroad and partner with sovereigns around the globe who might willingly engage in commerce inside of Indian country if they only knew how to start that dialogue, or if they had faith that the tribe would be receptive to such partnerships. Initial dialogues rarely begin with a presumption that tribal communities share the common goals and economic development desires of their mainstream counterparts, yet the longer I spend trying to bridge the gap between different communities, the more pronounced the commonalities become.

It all roots me in the process of thinking through how tribes might evolve the dialogue and interact with other individuals and sovereigns across jurisdictional lines, not only in neighboring communities in close proximity to Indian country, but also with other potential partners around the globe, and it causes me to focus on what barriers currently prohibit or stifle this.

The Article will address the concepts of tribal citizenship, Federal Indian Law, and globalization in reverse order, beginning with a discussion on globalization and then concluding with how tribes interact with their own tribal citizens.

## II. INTERNATIONAL LAW & GLOBALIZATION

First, a rather elementary question: what does international law have to do with Indian Law and tribal governance in the United States? It is a question that scholars are asking more and more in contemporary literature. It is a question that would get a strange look, however, if asked in the middle of a tribal political season when tribal citizens were deciding which council man or woman, or which principal chief, for whom they would likely cast a ballot. Nevertheless, it certainly is a question that formed a key inquiry in the early foundational cases upon which the modern field of Federal Indian Law is based.

In all three of the Marshall Trilogy cases, *Johnson v. M'Intosh*,<sup>1</sup> *Cherokee Nation v. Georgia*,<sup>2</sup> and *Worcester v. Georgia*,<sup>3</sup> international law

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1. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

played a role in defining and limiting tribal property rights and in defining and then limiting tribal sovereign stature relative to the United States and European sovereigns. In those early cases, international law as interpreted by the United States courts can be summed up in three basic concepts. To oversimplify:

1. European powers will not fight with each other over which Indian lands they will pursue or try to acquire.<sup>4</sup>
2. Tribes, and perhaps individual Indians, have pre-existing dominion over land and property rights that are not easily definable but nonetheless real and deserving of respect.<sup>5</sup>
3. All tribes lack the power to engage in international relations because the tribes are physically inside the territory of the United States; some tribes have consented to come within the protection of the United States, so they do not really need to play on the international stage.<sup>6</sup>

In the time that has passed since these cases were decided, international law and norms have changed radically. But somehow, in the United States, the international law discussion as it related to tribal sovereignty stalled, doomed by scholars and lawyers alike to never evolve past the prevailing thought of the early 1830s. After the Court's explication of foundational principles in the Marshall trilogy cases, the domestic Indian Law discussion stopped, silent for nearly 175 years until 2010, when President Obama announced his support for the U.N. Declaration on the Rights of Indigenous Peoples.<sup>7</sup> Even as late as the 1990s, conventional wisdom told us that would be impossible: Indian Law was somehow different, because the United States would never be bound by or reference international law.

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2. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

3. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

4. *Johnson*, 21 U.S. at 573–74.

5. *Worcester*, 31 U.S. at 542–43.

6. *Cherokee Nation*, 30 U.S. at 17–18.

7. Media Note, Office of the Spokesman, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Dec. 16, 2010), available at <http://www.state.gov/r/pa/prs/ps/2010/12/153027.htm>.

And then discussion of Indian Law became a matter of domestic U.S. law and largely remained that way, until tribes started pushing the idea (albeit gently) that international law matters.<sup>8</sup>

In those 175 years of silence, there was still a lot to fill up the history books in the development of what we call the field of Federal Indian Law today, which is well-recognized for its complexity and confusion. This is due in large part to the inconsistencies of federal court cases, but also to a fragile and often shifting set of policy determinations as to how the federal government would deal with tribes, as well as how things played out on the ground in each tribal community. Those 175 years of case law, legislation, and executive policies led to a curious phenomenon that still shapes the practical environment in which tribes operate. In yet another oversimplification, if we were to narrow the field of Federal Indian Law into few basic tenets, they would sound something like this:

1. Indian Law relied on customary international law for its origin and involves the interpretation of treaties between two sovereigns, but is still considered a matter of domestic federal law.<sup>9</sup>
2. Tribes are considered to be both pre-constitutional and extra-constitutional, meaning that they are operating outside the bounds of the U.S. Constitution, having never been formally included within the federal union. Yet Congress is permitted to exercise plenary

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8. This push for recognition and enforcement of international law has come from a number of sources. Notable efforts include those of the National Congress of American Indians, the Organization of American States, and the Inter-American Commission on Human Rights. See *International Issues*, NAT'L CONG. OF AM. INDIANS, <http://www.ncai.org/policy-issues/tribal-governance/international-issues> (last visited Jan. 11, 2014) (summarizing the international lobbying efforts of the National Congress of American Indians since 1999); Archive of Documents of the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, COMM. ON POLITICAL & JURIDICAL AFFAIRS, PERMANENT COUNCIL OF THE ORG. OF AM. STATES, <http://www.oas.org/council/CAJP/Indigenous%20documents.asp> (last visited Jan. 11, 2014) (documenting the ongoing efforts of the Organization of American States to draft its own declaration regarding the rights of indigenous peoples); *Western Shoshone Homelands*, INDIAN LAW RES. CTR., [http://www.indianlaw.org/projects/past\\_projects/ws\\_dann](http://www.indianlaw.org/projects/past_projects/ws_dann) (last visited Jan. 11, 2014) (detailing the Inter-American Commission on Human Rights's decision that found the United States in violation of international human rights by claiming ownership to lands held by Mary and Carrie Dann/the Western Shoshone). It was not until the 1970s that there was a concentrated effort on behalf of some tribes within the United States to engage international pressure to enforce treaty rights. In 1974, the International Indian Treaty Council was formed, gaining NGO status in 1977. The contemporary indigenous international movement followed. ANGELIQUE TOWNSEND EAGLEWOMAN & STACY L. LEEDS, *MASTERING AMERICAN INDIAN LAW* 154–59 (2013).

9. *Supra* notes 1–3 (Marshall Trilogy).

authority to legislate limitations on internal tribal governance powers.<sup>10</sup>

3. Where Congress has not expressly taken powers away from tribes, the federal courts may rule that tribes simply lack the inherent authority to act in ways that other local governments act throughout the globe.<sup>11</sup> We have seen this in criminal jurisdiction, taxation, regulatory and adjudicatory jurisdiction, and others.<sup>12</sup>

What happened with tribes during that 175-year window largely was something that the rest of the world took little note of, unless they sought to emulate U.S. policy: on some occasions, other colonizing powers looked to U.S. Indian policy and copied American experiments, such as the forced assimilation and educational policies of the early 1900s.<sup>13</sup> Meanwhile, both the United States and the tribes within the United States tended to look only inward, buying into the notion that this was uniquely an American issue.<sup>14</sup> More recently, other indigenous populations worldwide have looked to some of the more positive aspects of the federal-tribal relationship, such as access to federal courts and a very modified version of self-determination, and aspired to replicate those concepts in their own countries.<sup>15</sup>

When the international arena for indigenous rights started to heat up in the 1970s and '80s, it was largely international indigenous groups, advocacy groups, or individuals through court cases that did the legwork, without a strong presence from a host of tribal governance leaders.<sup>16</sup> That continues to be the case today. But as the world indigenous movement began to gain steam, it was also not a notion that elected tribal leaders or individual tribal citizens made a top priority. This is understandable in some respects, but puzzling in others.

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10. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–66 (1903) (noting that Congress has always had plenary authority over tribal relations); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831).

11. *Montana v. United States*, 450 U.S. 544 (1981); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

12. *Montana*, 450 U.S. 544; *Oliphant*, 435 U.S. 191; *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976).

13. For a description of these policies in action, see K. Tsianina Lomawaima & Teresa L. McCarty, *When Tribal Sovereignty Challenges Democracy: American Indian Education and the Democratic Ideal*, 39 AM. EDUC. RES. J. 279 (2002).

14. *Id.* at 289–93 (describing tribal and federal efforts to reform assimilative education policies).

15. See generally Robert J. Miller, *The International Law of Colonialism: A Comparative Analysis*, 15 LEWIS & CLARK L. REV. 847 (2011).

16. See EAGLEWOMAN & LEEDS, *supra* note 8.

And what has been the focus of tribes within the United States since the 1970s? It has been nation-building, or nation rebuilding. Tribes have prioritized time and spent limited resources on rebuilding government infrastructure, launching economic development ventures, and revamping tribal court and justice systems that largely laid dormant for decades; tribes have focused on controlling their own school systems and healthcare facilities, initiating language revitalization, revising constitutions, and undertaking a complete overhaul of legal infrastructures as a matter of tribal law.<sup>17</sup> This has been time well spent, and priorities have mostly been well-aligned.

But tribal communities must also stop and take in all that is going on around the globe. It is time for a reinvestment and a reconsideration of the role of American Indian tribes in the global scene. Part of this engagement, of whether the tribes in the United States want to be part of the international dialogue will, and is, happening with or without tribal control. Tribes now and in the next century will have to think strategically about where they want their place to be relative to other economic and political players, and they will have to be mindful that all decisions made in the exercise of sovereignty will impact how others will affirm or reject those claims to sovereignty. Certainly some tribes are already seeing this potential and have entered global markets by exporting agricultural and other goods internationally.<sup>18</sup> But tribes must also look to the very narrative they are telling themselves, and the perception that narrative creates for those who

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17. See *Education*, NAT'L CONG. OF AM. INDIANS, <http://www.ncai.org/policy-issues/education-health-human-services/education> (last visited Jan. 11, 2014) (describing legislative reform efforts for better education of tribal citizens); see also Bryan McKinley Jones Brayboy, *Toward a Critical Race Theory in Education*, 37 URB. REV. 425 (2005) (advocating for tribal perspectives in higher education); *Tribal Health Care Implementation*, NAT'L CONG. OF AM. INDIANS (last visited Jan. 11, 2014) (describing NCAI's promotion of health care reform, including launch of [tribalhealthcare.org](http://tribalhealthcare.org)); Nat'l Cong. of Am. Indians, *Support to Develop Bureau of Indian Education Pilot Programs for Language Immersion in Elementary and Secondary Schools within Indian Country*, Res. #TUL-13-047 (Oct. 2013), available at [http://www.ncai.org/attachments/Resolution\\_RpCVVWvdTEIzLjVLSetryUFCnKKLSaHjRdLKdlGNFhalnzeWhQd\\_TUL-13-047%20Final.pdf](http://www.ncai.org/attachments/Resolution_RpCVVWvdTEIzLjVLSetryUFCnKKLSaHjRdLKdlGNFhalnzeWhQd_TUL-13-047%20Final.pdf).

18. See Edward Gresser, *Navajo farm exports: \$2-\$3 million per year*, PROGRESSIVE ECON. (Sept. 4, 2013), <http://progressive-economy.org/2013/09/04/navajo-farm-exports-2-3-million-per-year/>; Erin Tindell, *FAS Programs Help Promote Native American Foods Worldwide*, USDA BLOG (Nov. 26, 2013, 1:30 PM), <http://blogs.usda.gov/2013/11/26/fas-programs-help-promote-native-american-foods-worldwide/>. Tribes have promoted economic development projects outside of international agricultural exports, as well. See Robert J. Miller, *Inter-tribal & International Treaties for American Indian Economic Development*, 12 LEWIS & CLARK L. REV. 1103, 1108–09 (2008) (discussing examples such as the acquisition of Hard Rock Cafe by the Seminole Tribe of Florida, the automotive wiring plants of the Mississippi Choctaw Tribe, and the Navajo Nation's trade agreement with Cuban food supplier Alimport, among others).

are watching. That narrative has been one of difference. For approximately 175 years, the United States has thought of Indians as a purely domestic matter, and tribal citizens and tribal governments, for the most part, bought into this narrative: American Indian tribes and tribal governments are so unique, so different from indigenous peoples in other countries, so different than other sovereigns around the globe, that they exist alone on a conceptual space as a tribal government *within the United States*.

Part of this is a survival narrative, both cultural and political, but it can also be counterproductive when advancing a case for sovereign recognition. Advocates for tribal sovereignty have worked hard to make tribal courts distinctively tribal and culturally responsive to the communities they serve. Tribal courts struggle to be just enough like state and federal courts that they will be recognized as legitimate, yet spend a lifetime trying to keep the tribe in tribal courts so that tribal communities will view them as their own courts serving a local population and will utilize this relatively new system of governance, often a constitution or governmental structure that has only been in place for a few decades.

These efforts exemplify the balancing act between internal and external legitimacy that Indian attorneys and Indian judges within the United States must engage in on a daily basis. We convince ourselves, or let others convince us, that it is a problem uniquely ours, but though this is certainly a problem that plagues Indian country today, it is by no means a problem that belongs to Indian country alone, nor is it a problem unique to indigenous populations: this is a problem of *perception*, a peculiar evil that arises from societal stereotypes about minority populations.<sup>19</sup> Overcoming this problem

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19. When a predominately white, Eurocentric rubric controls the assessment of validity of governmental systems, particularly of non-white populations, those systems will almost certainly endure unwarranted criticism. Indigenous populations do suffer egregiously from false characterizations arising from this practice. See *infra* note 33 and related discussion of *Talton v. Mayes*; see also Julie Cassidy, *Sovereignty of Aboriginal Peoples*, 9 IND. INT'L & COMP. L. REV. 65, 91–93 (1998) (discussing the Australian High Court's Eurocentric model for assessing aboriginal governments in *Coe v. Commonwealth* (1993) 118 ALR 193 (Austl.)).

However, indigenous communities are not alone in being perceived as less valid from a Eurocentric standpoint. All over the world, governmental systems and the people who had developed them were deemed inferior by European colonizers; nearly 85% of the globe had been subjected to colonialism by the early 1930s. See ANIA LOOMBA, COLONIALISM/POSTCOLONIALISM 19 (2d ed. 2005).

Too often we assume the validity of some governments even when there are clear instances of abuses of power, but do not extend the courtesy of that assumption to other governments, where the denial of validity seems to be speculation based only on stereotypes, with no evidence that rights are being violated. For example, Russia has been condemned recently by human rights organizations for passing homophobic legislation, but the international community disputes the laws themselves, not the Russian government's existence or the

of perception is a crucial step in arriving at a place where governments can maintain sovereignty. If we look at the practical reality of nation-building around the globe, we see that this perception problem, far from being unique to Indian country, also presents itself in other localities.<sup>20</sup> Though certainly tribal communities face their own particular challenges, they are not alone in confronting misconceptions about their governmental systems.<sup>21</sup> If tribal governments can find common threads in the similar struggles of other nations currently engaged in the process of building and strengthening governmental systems, communities can start to reconstruct their own narratives and, if they choose to do so, advance their own interests on the international stage. For one example of a nascent nation working diligently to gain recognition and establish its own legitimacy as a sovereign, I turn my focus briefly to Eastern Europe and the country of Moldova.<sup>22</sup>

Moldova is a small post-Soviet country whose modest population declared independence in the early 1990s.<sup>23</sup> In 2011, the country was in the down-and-dirty throes of nation-building, working to implement their second constitution in two decades. During this process, Moldova endured a significant time gap where it had no president,<sup>24</sup> lacked a fully functioning executive branch, and had only a very young judicial system struggling to get its citizens, over which it exercised jurisdiction, to respect the courts and the judges.<sup>25</sup> During this process, it also sought to gain external respect for

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Russian people's ability to govern themselves. Meanwhile, the international community has been skeptical of the statehood of countries in the former Soviet Union since its collapse.

20. Negative perception of governmental systems by the international community can even block nation-state status entirely. For example, though the Palestinian Authority has been the governing body of the West Bank and Gaza Strip for twenty years—since the Oslo Accords in 1994—that governing body seems no closer to achieving international recognition of statehood than it was two decades ago, and only recently gained “nonmember observer status” in the United Nations two years ago in 2012.

21. See LOOMBA, *supra* note 19.

22. Dean Leeds visited the Republic of Moldova last spring with a group of University of Arkansas students enrolled in the law school's Rule of Law course, taught by Professor Christopher Kelley. Her observations during her visit form the basis for this section.

23. *The World Factbook: Moldova*, CIA.GOV, <https://www.cia.gov/library/publications/the-world-factbook/geos/md.html> (last updated Dec. 6, 2013).

24. Moldova's political uncertainty from 2009 until March of 2012 centered significantly on its three failed attempts during that time to elect a president. *See id.* (under tab “Government”) (describing Moldova's failed election attempts).

25. A 2011 European Commission report noted that Moldova's justice system had not yet caught up to its legislative arm, with courts still citing to the Civil Code rather than newer laws; the report also notes that Moldova enacted substantive justice system reforms in October of that year. Eur. Comm'n, *ENP Country Progress Report 2011—Republic of Moldova* 3,



good governance from Moldova's surrounding peer countries, new and old, in hopes of one day being considered for EU membership.<sup>26</sup>

Moldova's struggle for sovereignty and recognition on the international stage should sound very familiar, for the problems Moldova faces in its fight to be perceived as a sovereign by peer nations are not at all unlike the problems faced by tribal governments seeking the same. The architecture might look different, but to sit in Moldova is to sit inside Indian country. Moldova's citizens are having the same debates and considerations taking place inside tribal government buildings; they are also having some discussions that tribal governments need to have. Their biggest concern, for example, was how to attract economic development in order to develop a stable economy and in turn fund their government and make a better life for their families. And how do they go about doing that? They spend their time and energy on making viable government infrastructure, and particularly focused on judges and court systems that have the trust of both their own citizens and but also the outside world, particularly investors who are willing to trust this infrastructure, to provide fair and just results that are predictable, because everyone knows and has easy access to the rules going in and faith that those rules will be followed.

Indian tribes have the same issues. What is the difference?

Moldova has the support of other international sovereigns and partners. The United States and multiple European powers had embassies directly supporting the development of Moldova's courts. Though Moldova is one of the poorest countries in Europe in terms of GDP,<sup>27</sup> many an international partner had an interest in seeing their courts develop into court systems that would have unquestioned legitimacy.<sup>28</sup> One of those partners is the American Bar Association, which has an office in Chisnau, Moldova. That's right: the ABA has staffers on the ground,<sup>29</sup> in the form of a Rule of

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MEMO/12/XXX (May 15, 2012), *available at* [http://ec.europa.eu/world/enp/docs/2012\\_enp\\_pack/moldova\\_memo\\_2011\\_en.pdf](http://ec.europa.eu/world/enp/docs/2012_enp_pack/moldova_memo_2011_en.pdf).

26. *See Moldova, EUR. UNION EXTERNAL ACTION SERV.*, [http://eeas.europa.eu/moldova/index\\_en.htm](http://eeas.europa.eu/moldova/index_en.htm) (last visited Jan. 11, 2014) (describing the EU-Moldova European Neighbourhood Policy Action Plan for integrating Moldova into the European economy and social structures).

27. Moldova occupies the 140th slot out of 189 countries when ranked according to GDP. World Bank, *Gross Domestic Product 2012* (2012), <http://databank.worldbank.org/data/download/GDP.pdf>.

28. Press Release IP/10/361, Eur. Comm'n, International Development Partners Support Moldova's Vision for a Better Future (Mar. 24, 2010), *available at* [http://europa.eu/rapid/press-release\\_IP-10-361\\_en.htm](http://europa.eu/rapid/press-release_IP-10-361_en.htm).

29. *Moldova, AM. BAR ASS'N*, [http://www.americanbar.org/advocacy/rule\\_of\\_law/where\\_we\\_work/europe\\_eurasia/moldova.html](http://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_eurasia/moldova.html) (last visited Jan. 9, 2014).

Law initiative,<sup>30</sup> aimed at advancing Moldovan court systems and helping develop a strong professional association of lawyers for the growing Moldova bar association.

Modern tribal courts may be decades older than the courts in Moldova. The Cherokee Supreme Court, for example, predates the courts in Moldova by over 150 years. Yet there is one clear senior and more stable sovereign in this comparison. If tribal governments and particularly their court systems are going to be viewed on equal footing with other sovereigns, we are going to have to prioritize correcting what is essentially a perception problem. This problem arises from a case out of the Cherokee Nation's court system. It was decided in 1896, but it remains important to our future dialogue.

### III. PERCEPTION PROBLEM

As previously mentioned, one of the many curious matters about Federal Indian Law to federal judges who entertain cases arising in tribal courts, is the fact that the protections of the United States Constitution do not apply to constrain tribal governments in their exercise of power over individuals or corporations who find themselves before tribal court, such as basic criminal jurisdiction or matters of taxation or environmental regulations. That notion came from *Talton v. Mayes*,<sup>31</sup> a case that gave us more than just a rule of law: it also perpetuated this problem of perception that continues to trouble tribal communities and governments today.

*Talton* was a criminal law case in which a tribal citizen was convicted of murdering another tribal citizen (a lawyer) and sentenced to death.<sup>32</sup> The case went to trial in the Cherokee courts, where the defendant was afforded a grand jury prior to the indictment, was represented by counsel, had his case presented to a jury, and was also afforded a post-conviction sentencing hearing.<sup>33</sup> All of the proceedings were transcribed as part of the extensive judicial records of the Cherokee Nation.<sup>34</sup> Following conviction at the tribal trial court, but before exhausting the Cherokee appellate process, the defendant sought habeas relief in a federal court, arguing that his United States constitutional rights had been violated because the Cherokee Nation

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30. ABA Rule of Law Initiative, AM. BAR ASS'N, [http://www.americanbar.org/advocacy/rule\\_of\\_law.html](http://www.americanbar.org/advocacy/rule_of_law.html) (last visited Jan. 9, 2014).

31. *Talton v. Mayes*, 163 U.S. 376 (1896).

32. *Id.* at 376–77.

33. See *Cherokee Nation v. Talton*, 51 Cherokee Nation Papers 176–97 (Dec. 28, 1892) (on file with the author), *sub nom.* *Talton v. Mayes*, 163 U.S. 376 (1896) (on file with the author) (handwritten transcript of Cherokee trial court proceedings that preceded the Supreme Court adjudication of *Talton v. Mayes*).

34. *Id.*

grand jury only consisted of five people, where the United States Constitution required six to serve on a grand jury.<sup>35</sup>

The case made its way up to the United States Supreme Court, where it was only the second case arising from a tribal court and following a tribal decision on the merits (the first, of course, being *Crow Dog*<sup>36</sup>). In *Talton* as in *Crow Dog*, the United States Supreme Court properly ruled that the case should not be in federal court, and that the defendant had no rights under the U.S. Constitution to protect against the exercise of tribal power.<sup>37</sup>

The *Talton* problem, the problem of perception versus reality, still matters in present day discussions about tribal sovereignty. It is one of the biggest barriers in getting the outside world to recognize the full jurisdiction of tribal courts as courts of general jurisdiction—just like the courts in Montana. One needs only to read the U.S. Supreme Court cases from the last three decades, where there has been a marked decline in the types of tribal court jurisdiction the federal courts recognize, to see the subtle yet unmistakable continuation of this perception problem.

In *Oliphant v. Suquamish Indian Tribe*, the Supreme Court ruled that tribal courts and tribal governments lacked jurisdiction in criminal matters over any non-Indians.<sup>38</sup> Years later, in *Duro v. Reina*, the Court refined this ruling, holding that tribes have criminal jurisdiction over their own members only, not over members of other tribes.<sup>39</sup> Seven years later, the Court addressed civil jurisdiction in *Strate v. A-1 Contractors*,<sup>40</sup> declining to depart from its earlier ruling in *Montana v. United States*<sup>41</sup> and holding that in the absence of a treaty or statute to the contrary, tribal courts do not have jurisdiction over civil suits brought against nonmembers. *Nevada v. Hicks*<sup>42</sup> addressed tribal court authority to adjudicate civil claims against state officials executing a search warrant against a tribal member on a reservation

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35. *Id.*

36. *Ex Parte Kan-gi-shun-ca (Crow Dog)*, 109 U.S. 556 (1883) (holding that the United States had no jurisdiction over an Indian person committing crimes against another Indian person within tribal territory). *Crow Dog* led to the passage of the Major Crimes Act, which allows federal courts to prosecute Indian offenders for a limited list of felony crimes. *See* Major Crimes Act, 18 U.S.C. § 1153 (2012).

37. *Talton v. Mayes*, 163 U.S. 376, 382–83 (1896).

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

39. *Duro v. Reina*, 495 U.S. 676 (1990). Though Congress subsequently superseded *Duro* by amending the Indian Civil Rights Act to acknowledge tribal jurisdiction in criminal matters over all Indians within tribal territory, *see* Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646, its original holding still bears witness to a presumption of inferiority in tribal court proceedings.

40. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

41. *Montana v. United States*, 450 U.S. 544 (1981).

42. *Nevada v. Hicks*, 533 U.S. 353 (2001).

for crimes occurring elsewhere; a unanimous Court found that the tribal courts have no such authority and that civil rights violations were properly protected by state and federal courts.

In the *Oliphant* decision, the *Duro* decision, the *A-1 Contractors* decision, the *Hicks* decision, and the *Lara* decision, there is certainly implicit language expressing concerns about tribal courts. They presume that tribal courts are subpar.<sup>43</sup> They presume that tribal judges cannot be as impartial to a non-tribal interest as their state or federal counterparts can be.<sup>44</sup> They presume that defendants in tribal courts never have attorneys.<sup>45</sup> They presume that tribal courts, because they are not bound by the text of the U.S. Constitution, do not extend due process, basic civil rights or basic fairness to the people who appear before it.<sup>46</sup> And on what evidence do they base these fears upon?

I ask that rhetorically, because in *Oliphant*, *Duro*, *A-1 Contractors*, *Hicks*, *Lara*, or in any case that has ever gone to the U.S. Supreme Court out of a tribal court, there has never been a single instance where the defendant has raised a due process concern about the way that things were handled by the tribal court. In federal court, litigants have only ever argued that they simply did not want the tribal courts to have power over them, irrespective of their conduct.

And whether it is fair or not, there is an undeniable perception that tribes are not doing enough to protect the civil rights of individuals who come before them. We have seen this play out in two legislative debates in Congress in the past few years, most recently with the Violence Against Women Act and again with the Tribal Law and Order Act.<sup>47</sup>

In December of 2012, members of Congress briefly refused to pass the Violence Against Women Act (VAWA) in part because it attempted to incorporate provisions of a modest *Oliphant* fix.<sup>48</sup> This solution recognized tribal court jurisdiction in a very limited sense for the criminal prosecution of protection order violations. The Senate version retained the *Oliphant* fix

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43. See *Oliphant*, 435 U.S. at 196–98 (quoting H.R. REP. NO. 23-474, at 91 (1834)) (“With the exception of two or three tribes, who have within a few years past attempted to establish some few laws and regulations among themselves, the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint.”).

44. See *Hicks*, 533 U.S. at 384 (Souter, J., concurring) (“Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges.”).

45. See *Duro v. Reina*, 495 U.S. 676, 693 (1990) (discussing the “special nature” of tribal courts, relying on *Talton v. Mayes*, 163 U.S. 376 (1896), for support).

46. *Id.*

47. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261.

48. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, §§ 901–910, 127 Stat. 54, 118–26 (Title IX—Safety for Indian Women).

necessary for ensuring that local tribal communities could intervene.<sup>49</sup> But after this bill had passed the Senate and the House took up the bill, passing its version with a vote of 222–205, the solution had disappeared, replaced instead by a provision that would have allowed the federal government, through U.S. district courts, to issue protective orders.<sup>50</sup> After an extended legislative battle, Congress did eventually approve the version of the bill that contained the *Oliphant* fix in late February of 2013,<sup>51</sup> but in gutting that language from the original bill and making it a point of contention during debates, the House sent a clear message about its perception of tribal courts.

Before this more recent fight over VAWA, with the passage of the Tribal Law and Order Act<sup>52</sup>—which extends sentencing capabilities from one year to three<sup>53</sup> in some instances, we can see that the new requirements of the Act again raise the perception problem. The act requires law-trained judges, and it requires defendants to have access to public defenders if the tribe is going to take full advantage of the enhanced possibilities.<sup>54</sup> It reinforces the perception that most tribal courts are run by non-law-trained judges and the perception that tribal courts do not allow defense counsel. That is the exception, not the rule. But just as in *Talton*, though the facts on the ground and the mainstream understanding do not align, domestic policymakers still legislate on the basis of misconceptions, and tribes continue to face a very real perception problem.

So what do we do about this problem with the way tribes are perceived, and what does a world that is getting smaller have to do with it?

First, we need to have frank conversations at the community level. These conversations must be informed by the understanding that given the diversity of situations that exist with different tribes, there cannot be a one-size-fits-all solution in Indian country. Some tribes will decide that they want their courts to remain courts where the litigant base remains exclusively tribal citizens. They will decide that it is not that tribe's priority to engage on an international level, to seek recognition of sovereignty, or to have a fully functioning court of general jurisdiction that serves both the tribal citizenry and the non-citizens that come within its jurisdiction.

But for those tribes that seek full domestic and international recognition to the same extent as other nation-states, the world is simply a different

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49. S. 1925, 112th Cong. (2012).

50. H.R. 4970, 112th Cong. (2012).

51. *House Passes Violence Against Women Act*, NAT'L CONG. OF AM. INDIANS (Feb. 28, 2013), <http://www.ncai.org/news/articles/2013/02/28/house-passes-violence-against-women-act>.

52. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261.

53. *Id.* § 234.

54. *Id.*

place. These tribes must recognize that the eyes of the world are watching. They must recognize that there are generally accepted international norms with which sovereigns must be willing to comply. If a tribe is already doing these things, as most of them are, then the next step is for the tribe to tackle the perception problem, taking control of its own narrative and rewriting the story to reflect what is factually happening on the ground.

Confronting the perception problem means addressing the presumptions about tribal court systems, where reality differs wildly from the perception, where due process rights and basic notions of justice and fair play do exist, where courts do have well-trained judges and attorneys. Sometimes, however, addressing the perception problem will mean taking a hard look at that reality and acknowledging where efforts might be needed to bring that reality into alignment with international norms for sovereign powers. Easy access to records of tribal law and problems of citizenship rights are two such problems facing tribes as they engage in this critical assessment of perception versus reality.

One of the perceptions of tribal courts is that tribal law is elusive and inaccessible. The perception is that litigants cannot access tribal cases or tribal codes.<sup>55</sup> While many tribal websites do have some version of this type of information,<sup>56</sup> given the technological advances available and the technological savvy-ness of tribes, there is no reason not to promote these information systems, improve existing systems, or develop databases where they do not presently exist. We know from the facts of *Talton* that tribal court cases have long been as meticulously recorded as any state or federal case might be. Marketing the existence and accessibility of that information to the world at large will help fight the perception of tribal law as something that is impossible to work with because it cannot be found.

Around the world, tribal governments are not considered a “niche” area unique to America without practical application or interest to others. For example, the Johannes Gutenberg-Universität Mainz (Mainz University), located near Frankfurt, Germany, has a vibrant American Studies program

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55. This perception persists in the United States Supreme Court today. See Bonnie J. Shucha, *‘Whatever Tribal Precedent There May Be’: The (Un)Availability of Tribal Law 2–3* (Univ. of Wis. Legal Studies Res. Paper No. 1227, 2013), available at <http://ssrn.com/abstract=2308056> (quoting Chief Justice John Roberts in colloquy with counsel during oral argument in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), in which he presumes that tribal precedent is unavailable because it is not published).

56. For ease of reference, compare tribal court web resources compiled by the Tribal Law & Policy Institute, which is available at <http://www.tribal-institute.org/lists/justice.htm>.

with a specialty in American Indian Studies.<sup>57</sup> The program has over 400 students enrolled, students who know and can speak in depth about the existence of tribal courts, who have heard of cases that have been issued by modern tribal courts. There are potential allies and advocates that want to see tribal sovereignty recognized as on par with other sovereigns. But many of these allies and advocates do not see the biggest obstacle to gaining international status to be whether or not the United States would allow it, but whether or not tribes would play by the same international standards that other court systems are bound by.

Two issues present themselves here: the disenrollment of tribal citizens and the right to counsel. Potential allies and advocates around the world, like the students at Mainz, have heard of the Cherokee Freedmen<sup>58</sup> and other disenrollment cases<sup>59</sup> dealing with limitations or foreclosures on citizenship rights, and they are troubled by them. Some have even argued that disenrollment rises to the level of an international human rights violation.<sup>60</sup> They also wonder how it is possible that criminal defendants do not have a guaranteed right to counsel if they cannot afford one.<sup>61</sup> While

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57. See *Study Programs*, MAINZ UNIV. (Oct. 15, 2010), <http://www.amerikanistik.uni-mainz.de/101.php>.

58. In 2006, the Cherokee Nation Supreme Court declared unconstitutional a statute that set forth citizenship criteria more restrictive than the Cherokee Constitution of 1975; the statute imposed a blood quantum requirement that precluded membership for Cherokee Freedmen, descendants of former slaves of Cherokee citizens. See *Lucy Allen v. Cherokee Nation Tribal Council*, JAT-04-09, at 19 (Okla. Trib. Mar. 7, 2006), available at [http://www.cherokeecourts.org/Portals/73/Documents/Supreme\\_Court/Opinions/JAT-04-09%2054-Opinion%203-7-06.pdf](http://www.cherokeecourts.org/Portals/73/Documents/Supreme_Court/Opinions/JAT-04-09%2054-Opinion%203-7-06.pdf). Thereafter, the constitution was amended to add a blood quantum requirement, effectively overturning the Court's decision. See Council of Cherokee Nation, *A Resolution Proposing an Amendment to Article III, Section I of the Cherokee Nation Constitution of 1975 and Article IV, Section 1 of Cherokee Constitution of 1999 Pursuant to Article 15, Section 2, Determining Criteria for Citizenship Into the Cherokee Nation*, Res. No. 63-06 (June 12, 2006), available at <https://cherokee.legistar.com/LegislationDetail.aspx?ID=269192&GUID=CC3D5329-AEB6-463F-B139-E97457031884>.

59. See generally *Cahto Tribe of Laytonville Rancheria v. Dutschke*, 715 F.3d 1225 (9th Cir. 2013) (holding that disenrolled members had no right to appeal tribe's decision to the Bureau of Indian Affairs); *Jeffredo v. Macarro*, 599 F.3d 913 (9th Cir. 2010) (dismissing petition of disenrolled appellees who had not exhausted tribal remedies); *St. Germain v. U.S. Dep't of Interior*, No. C13-945RAJ, 2013 WL 3148332 (W.D. Wash. June 19, 2013) (denying plaintiff disenrollees petition for a temporary restraining order against tribe).

60. Greg Rubio, *Reclaiming Indian Civil Rights: The Application of International Human Rights Law to Tribal Disenrollment Actions*, 11 OR. REV. INT'L L. 1 (2009).

61. Although the Indian Civil Rights Act provides for access to counsel, it fails to include financial appropriations to pay for such counsel. See Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–1304 (2012); see also THE INDIAN CIVIL RIGHTS ACT AT FORTY 311–13 (Kristin A. Carpenter, et al. eds., 2012) (discussing the right to counsel and ineffective assistance of counsel in the context of the Indian Civil Rights Act).

most of the time that is not the case, and most tribes have public defender systems, it is a possibility and it does happen.

Both the Cherokee Nation and the other tribes have a very complex set of circumstances surrounding the citizenship issue that will continue in the tribal political and historical dialogue long after any of us are here. It is a complicated issue to be certain. But while there is no doubt that tribes, like any other sovereign, have the legal right to determine their citizenship and make changes over time, we live in a world where every act of every government will be reviewed globally, and tribes must be very mindful of the political capital they choose to spend. Exercising a sovereign right without thinking through all the positive and negative consequences is not a thing of the future, or even of the present.

#### IV. CONCLUSION

In an overwhelming majority of contexts, tribal court systems, judges, and attorneys should be proud of the quality of the institutions they serve. Tribal systems in their best moments stand equal to any government around the globe. But we are only as good as the good we do relative to our most vulnerable citizens, and tribes must be mindful of that. Whether or not it is fair, tribes are operating under the powerful scrutiny of the eyes of the international community, sometimes more so than other sovereigns. If tribes decide that they want a seat at that international table, they must be prepared to acknowledge this perception problem and take positive steps to confront it.