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American Indian Legal Scholarship and the Courts: Heeding Frickey's Call

Matthew L.M. Fletcher*

American Indian legal scholarship, which rose from virtual nonexistence in the 1950s, appears to have been very influential on the courts during the 1960s and 1970s. Every decade since the 1960s has seen a dramatic increase in the number of law review articles on the subject. Courts cited to a substantial number of the American Indian law articles published in the 1960s, 1970s, and early 1980s, but that citation pattern has since leveled off. While district and appellate courts continued to cite American Indian legal scholarship in a more limited manner, Indian law scholarship appears to have had almost no influence on the Supreme Court's Indian law decisions since the 1980s.

To reverse this trend, Professor Philip P. Frickey called for dramatic changes to the goals and methodologies of American Indian legal scholarship. He argued for severe limits on mere doctrinal scholarship, especially repetitive criticism of Supreme Court jurisprudence. Instead, Frickey argued in favor of

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* Professor of Law and Director of the Indigenous Law and Policy Center, Michigan State University College of Law. Reporter, Restatement, Third, The Law of American Indians. Thanks to Wenona Singel, Kate Fort, Kristen Carpenter, Angela Riley, and Ken Akini. The data generated from the study in Part III is available here: Matthew L.M. Fletcher, *American Indian Legal Scholarship and the Courts: The Appendices* (MSU Legal Studies Research Paper No. 12-23, 2012), available at <http://ssrn.com/abstract=2151257>. I prepared this paper for the Henderson Center's Fall 2012 Symposium, "Heeding Frickey's Call: Doing Justice in Indian Country," and it expands upon concepts I previously explored in Matthew L.M. Fletcher, *Toward a New Era of American Indian Legal Scholarship: An Introductory Essay for the American Indian Law Journal*, 1 AM. INDIAN L.J. 1 (2012), available at <http://www.law.seattleu.edu/Documents/ailj/Fall%20Issue/FletcherIntroductionFinal.pdf>.

more grounded and empirical scholarship, work that could inform the Court about the realities on the ground in Indian country. This short paper aims to discuss the state of American Indian legal scholarship that led to Frickey's call and the impact that Frickey's charge has had on the scholarship since.

Part I provides a short history of American Indian legal scholarship and helps to define and frame the rise and supposed fall of the influence of Indian law scholarship. Part II describes Frickey's call to reorder Indian law scholarship by grounding it in empirical research. Part III roughly tracks the citation record of Indian law scholarship in federal, state, and tribal courts. The numbers support Frickey's concern that, at the Supreme Court level, American Indian law articles are overlooked in Indian law cases. However, the numbers also show that the lower courts still rely on Indian law scholarship to a significant extent. Part IV offers my comments on the legal scholarship market and where the new Indian law scholarship fits. I argue that the kind of scholarship Frickey envisioned is not well-suited to the elite law review market, which generally prefers a different type of scholarship. Finally, the Appendix is a list of articles produced in the five years or so since Frickey's call that, in my view, have overcome the law review market's hurdles to meet Frickey's criteria—a sort of celebration of the impact Frickey's call already has had on the academy.

I.

BRIEF HISTORY OF AMERICAN INDIAN LEGAL SCHOLARSHIP

Understanding American Indian law's brief history is crucial to the understanding of its current challenges. Although American Indian law has been developing since the time of the Founding, only in the latter half of the twentieth century has Indian law received any kind of proper attention by the legal academy. The first true scholar of Indian law, Felix S. Cohen, was not even a full time law professor.¹ The first law professor to develop materials on American Indian law for law students appears to have been Ralph Johnson at the University of Washington Law School in the 1960s.² He helped to usher in a small but growing collective of American Indian law programs in the 1970s,³ though not without uncertainty. Rennard Strickland, one of the first American Indian law professors, recalled that his dean wrote a letter of recommendation that said he was "bright" and a "hard worker," but "he spends an immense amount of time on Indian questions. Someday we hope he will devote his time to the law."⁴ Monroe E. Price's 1973 casebook,⁵ based on informal teaching

1. See DALIA TSUK MITCHELL, *ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM* 3–6 (2007).

2. See Rennard Strickland & Gloria Valencia-Weber, *Observations on the Evolution of Indian Law in the Law Schools*, 26 N.M. L. REV. 153, 158–59 (1996).

3. See DAVID H. GETCHES ET AL., *FEDERAL INDIAN LAW: CASES AND MATERIALS* xiii (1979).

4. Strickland & Valencia-Weber, *supra* note 2, at 157.

materials he developed at the California Indian Legal Services with luminaries such as David Getches,⁶ was the first of its kind to be published by legal publishers.⁷ Finally, one cannot ignore Vine Deloria, Jr.'s importance, of course. His book, *Custer Died for Your Sins: An Indian Manifesto*⁸—probably the most widely read book written by an American Indian—started modern scholarship.⁹

The first generation of American Indian law scholars was dominated by successful practitioners like Getches. The very people that helped to litigate the major cases of the early decades of the modern era of Indian law would become the first law teachers, dedicated to developing Indian law classes and programs.¹⁰ As these practitioners joined law faculties, they often continued to litigate and practice.

This first generation of American Indian law scholarship still represents the peak of importance and influence for Indian law scholarship to date. Works by Reid Chambers,¹¹ Monroe Price,¹² Carole Goldberg,¹³ Charles Wilkinson,¹⁴ David Getches,¹⁵ and Rennard Strickland¹⁶ were enormously successful, both in their placements in the highest-ranked reviews—probably not such a big deal to the authors then, as it is to scholars now—and in their remarkable influence on the courts. Much of the early scholarship was historical and descriptive. This was very useful at the time, given that no one really knew how these

5. See MONROE E. PRICE, *LAW AND THE AMERICAN INDIAN: READINGS, NOTES AND CASES* (1973).

6. See MONROE E. PRICE, *NATIVE AMERICAN LAW MANUAL* (1970).

7. See GETCHES ET AL., *supra* note 3, at xiii.

8. VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* (1969).

9. Cf. Daniel R. Wildcat, *Preface*, *DESTROYING DOGMA: VINE DELORIA, JR. AND HIS INFLUENCE ON AMERICAN SOCIETY* viii, viii-ix (Steve Pavlik & Daniel R. Wildcat eds., 2006) (referring to *Custer* as “classic” and referring to Deloria as “one of the most important intellects and social justice activists of the last century”).

10. See, e.g., Matthew L.M. Fletcher & Kristen A. Carpenter, *David Getches: A Tribute to a Leader and a Scholar*, 59 *FED. LAW.*, Apr. 2012, at 42, 43 (noting how Getches was the lead attorney in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), the so-called “Boldt decision”).

11. E.g., Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 *STAN. L. REV.* 1213 (1975); Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 *STAN. L. REV.* 1061 (1974).

12. E.g., Monroe E. Price, *A Moment in History: The Alaska Native Claims Settlement Act*, 8 *UCLA ALASKA L. REV.* 89 (1979).

13. E.g., Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 *UCLA L. REV.* 535 (1975) [hereinafter Goldberg, *Public Law 280*]; Carole E. Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians*, 40 *LAW & CONTEMP. PROBLEMS* 166 (1976).

14. E.g., Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: As Long as Water Flows, or Grass Grows Upon the Earth—How Long a Time is That?*, 63 *CALIF. L. REV.* 601 (1975); Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 *AM. INDIAN L. REV.* 139 (1977).

15. E.g., NATIONAL AMERICAN INDIAN COURT JUDGES ASS'N, *INDIAN COURTS AND THE FUTURE* (David E. Getches, ed. 1978); David H. Getches, *Water Rights on Indian Allotments*, 26 *S.D. L. REV.* 405 (1981).

16. E.g., RENNARD STRICKLAND, *FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT* (1982).

doctrines came into play, and no one really knew the histories of the various tribal groups.

For example, Getches's first casebook laid the foundation for how American Indian law is now analyzed by grounding Indian law and policy in American history. That book identified the eras of American Indian law and policy¹⁷ that form the basis of literally all casebooks and treatises that followed.¹⁸ This organization of historical eras of Indian law and policy effectively framed how practitioners, courts, and scholars now discuss federal Indian law. While the success of these scholars likely had much to do with the originality of their scholarship and ideological climate of the era, I have to emphasize my continued amazement at the quality of their legal scholarship, especially in light of the fact that they were writing in a scholarly vacuum. It was also helpful that federal and state judges, like Justices Blackmun¹⁹, Brennan,²⁰ and Marshall,²¹ actually read and cited their works.²²

The field has changed dramatically since then. In the 1960s, there were only a small handful of American Indians known to be lawyers.²³ Now there are more than a thousand, perhaps two thousand, or more.²⁴ Federal government lawyers continue to populate the field representing the federal government, and many states are hiring or training Indian law specialists as well.

17. See GETCHES ET AL., *supra* note 3, at 29–119. Getches parsed the areas of American Indian law into the Pre-Revolutionary Precedents, Formative Years, the Era of Allotments and Assimilation, the Period of Indian Reorganization, the Termination Era, and the Self-Determination Era. *Id.*

18. See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47–206 (1982 ed.); MONROE E. PRICE & ROBERT N. CLINTON, LAW AND AMERICAN INDIAN 68–92 (2d ed. 1983); WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 9–31 (1981); CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 9–27 (1993); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§ 1.02–1.07 (Nell Jessup Newton ed., 2012 ed.); ROBERT T. ANDERSON, BETHANY BERGER, PHILIP P. FRICKEY, & SARAH KRAKOFF, AMERICAN INDIAN LAW: CASES AND COMMENTARY 15–162 (2008); see also STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 1–15 (4th ed. 2012).

19. *E.g.*, *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 503 n.11 (1986) (Blackmun, J., dissenting) (citing *Wilkinson & Biggs*, *supra* note 14); *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138, 150 n.10 (1984) (citing *Goldberg*, *Public Law 280*, *supra* note 13).

20. *E.g.*, *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 279 n.69 (1985) (Brennan, J., dissenting) (citing *Chambers & Price*, *supra* note 11); *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976) (citing *Goldberg*, *Public Law 280*, *supra* note 13).

21. *E.g.*, *United States v. Dion*, 476 U.S. 734, 739 n.6 (1986) (citing *Wilkinson & Volkman*, *supra* note 14); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 486 n.29 (1979) (Marshall, J., dissenting) (citing *Goldberg*, *Public Law 280*, *supra* note 13).

22. Judge William C. Canby, Jr., another early federal Indian law scholar (see, e.g., William C. Canby, Jr., *Civil Jurisdiction and the Indian Reservation*, 1973 UTAH L. REV. 206), joined the bench on the Ninth Circuit in 1980. He published the first edition of his *Nutshell* shortly afterwards. See CANBY, *supra* note 18.

23. Heidi Estes & Robert Laurence, *Preparing American Indians for Law School: The American Indian Law Center's Pre-Law Summer Institute*, 12 N. ILL. U. L. REV. 278, 278 (1992).

24. Philip S. Deloria, *The American Indian Law Center: An Informal History*, 24 N.M. L. REV. 285, 285 (1994) (estimating 1500 American Indian lawyers).

The practice of Indian law has also changed. From the time it was first distributed in 1940 until the 1990s, the *Handbook of Federal Indian Law* dominated the field, despite irregular updates, because it was the only place to turn for a basic and comprehensive grounding in every aspect of American Indian law.²⁵ Few scholars wrote much about the field of Indian law, and there was no electronic access to historical, legislative, and judicial documents like today. Many practitioners operated in the dark, as in Robert Traver's *Laughing Whitefish*, where a young lawyer does not discover the crucial legal theory to winning his Indian law-related case until the final pages, when he accidentally opens a small chapter in a family law treatise that covered the oddity of Indian law.²⁶

Now American Indian law is out in the open. Electronic databases make it easy to read even nineteenth-century Supreme Court decisions, and every Indian law case is quickly available as soon as it is decided. Cohen's *Handbook* is now being updated regularly, and it has competition.²⁷ Even subsets of Indian law are the subject of treatises.²⁸ This year, the American Law Institute announced that it would begin a Restatement of American Indian Law.²⁹

American Indian law scholarship has changed its tone and its aims since those early papers, in part because of the increasing number of American Indians who have become law professors.³⁰ Some of these scholars, most notably Robert Williams,³¹ came at the questions raised in Indian law from a

25. Felix S. Cohen, while a federal government employee, was the lead editor of the *Handbook*, which was released several times in various formats beginning in the late 1930s. See *Introduction*, in FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW viii–ix (1982 ed.). The Department of Justice partially updated the *Handbook* in 1958, an update that is almost universally reviled to this day. E.g., Robert L. Bennett & Federick M. Hart, *Foreword*, in FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW v (1971 ed.) (referring to the 1958 edition as a “vulgate version”). Scholars not affiliated with the federal government have published revised editions in 1982, 2005, and 2012. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (Nell Jessup Newton ed., 2012 ed.).

26. See ROBERT TRAVER, *LAUGHING WHITEFISH* 183–86 (1965) (Michigan State University Press 2011).

27. See WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* (5th ed. 2009); STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* (4th ed. 2012); CONFERENCE OF WESTERN ATTORNEYS GENERAL, *AMERICAN INDIAN LAW DESKBOOK* (Larry Long & Clay Smith eds., 4th ed. 2008).

28. See WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW IN INDIAN COUNTRY* (2005); ROBERT T. COULTER, *NATIVE LAND LAW* (2012).

29. American Law Institute, *ALI Begins Work on Three New Restatements*, THE ALI E-REPORTER (Oct. 2012), http://www.ali.org/_news/reporter/12oct/12oct.html.

30. See Matthew L.M. Fletcher, *On Becoming an American Indian Law Professor* 2 (MSU Legal Studies Research Paper No. 10-12, 2012), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=2058557 (noting “a few dozen” law professors who are members of federally recognized tribes). My colleague Kate Fort wonders if how law schools now select law professors has changed the tenor of Indian law scholarship as well.

31. Professor Williams is arguably the most influential and most cited Indian law scholar since Felix Cohen. See, e.g., ROBERT A. WILLIAMS, JR., *SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION* (2012); ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005); ROBERT A.

different point of view. Williams focused on Indian law's inherent and historic racism, and he also engaged the field in more theoretical inquiries. Along with Bob Clinton (who actually came along in the 1970s),³² Philip Frickey,³³ and many others,³⁴ the papers of the 1980s and 1990s started to call out the federal and state judiciaries for their discriminatory practices and ideologies.³⁵ Theoretical attacks on the colonialism of the nineteenth century and the neocolonialism of the twentieth century became ever-present and acceptable.³⁶ Some scholars went so far as to argue that even accepting basic principles of Indian law was to buy into the racist, colonialist regime.³⁷ Indian law scholars also began developing the field of American Indian tribal law, the law of the internal governance by tribal governments.³⁸

WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE 1600–1800* (1997); Robert A. Williams, Jr., *The Algebra of Federal Indian Law The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219. His masterpiece, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990), is the most influential study on the legal history of the origins of federal Indian law. He has also co-authored the leading casebook on federal Indian law since 1993. See DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, JR., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* (3rd ed. 1993).

32. See, e.g., Robert N. Clinton, *Isolated in Their Own Country A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979 (1981); Robert N. Clinton, *Criminal Jurisdiction over Indian Lands A Journey through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).

33. See, e.g., Philip P. Frickey, *A Common Law for Our Age of Colonialism The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999); Philip P. Frickey, *Adjudication and Its Discontents Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996); Philip P. Frickey, *Marshalling Past and Present Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137 (1990).

34. E.g., Milner S. Ball, *Constitution, Courts, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1 (1987); Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993); Nell Jessup Newton, *Federal Power over Indians Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984); Judith Resnik, *Dependent Sovereigns Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989); Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991); Gerald Torres & Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence The Mashpee Indian Case*, 1990 DUKE L.J. 625; Gloria Valencia-Weber, *Tribal Courts Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994); Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471.

35. E.g., Richard Guess, *"Motherhood and Apple Pie" Judicial Termination and the Roberts Court*, 56 FED. LAW., Mar./Apr. 2009, at 52.

36. E.g., Robert N. Clinton, *Comity & Colonialism The Federal Courts' Frustration of Tribal-Federal Cooperation*, 36 ARIZ. ST. L.J. 1 (2004); Robert B. Porter, *Indian Gaming Regulation A Case Study in Neo-Colonialism*, 5 GAMING L. REV. 299 (2001); Carey N. Vicenti, *The Social Structure of Legal Neocolonialism in Native America*, 10 KAN. J.L. & PUB. POL'Y 513 (2000).

37. See, e.g., Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75, 91–92 (2002) (arguing that Indian lawyers and law professors are complicit in the undermining of Indigenous nation sovereignty).

38. E.g., Nell Jessup Newton, *Tribal Court Praxis One Year in the Life of Twenty Indian*

The quantity of American Indian law scholarship is now at an all-time peak and growing. During the 1990s and the 2000s, hundreds of Indian law papers came out. Scholars and practitioners are publishing many significant law review articles each year. Law students, who usually lead the field in terms of locating the cutting-edge, exciting issues in law, also write an enormous amount. Scholars are publishing several significant monographs each year as well.³⁹ However, influence of these papers on the courts, especially the Supreme Court, appears to have waned during the past two decades. The Supreme Court, which was shifting to the right ideologically,⁴⁰ had little use for theoretical scholarship alleging that the institution of the Supreme Court was racist. Meanwhile, tribal interests began losing at unprecedented rates before the Supreme Court.⁴¹

II.

FRICKEY'S CALL

Commenting on the troubling decline in American Indian law scholarship's influence on the Supreme Court, many scholars began arguing that what was missing from Indian law scholarship was practical, pragmatic, and empirical research and scholarship on all areas of Indian law that federal and state court judges would find compelling. Sam Deloria has long argued that theoretical and doctrinal papers were virtually useless exercises, and scholars like Frank Pommersheim had demanded work that provided outsiders useful information about the reality of Indian country life.⁴² Finally, Professor Frickey simply concluded that Indian law scholarship had failed.⁴³

Tribal Courts, 22 AM. INDIAN L. REV. 285 (1998); Frank Pommersheim, *Tribal Court Jurisprudence A Snapshot from the Field*, 21 VT. L. REV. 7 (1996).

39. In the last few years, American Indian legal scholars and practitioners published several books. *E.g.*, RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW* (2009); WALTER R. ECHO-HAWK, *IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED* (2010); FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* (2009); ROBERT A. WILLIAMS, JR., *SAVAGE ANXIETIES: THE INVENTION OF WESTERN CIVILIZATION* (2012).

40. See generally HERMAN SCHWARTZ, *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* (2003); JEFFREY TOOBIN, *THE OATH* (2012).

41. See Alex Tallchief Skibine, *Teaching Indian Law in an Anti-Tribal Era*, 82 N.D. L. REV. 777, 781 (2006); see also David H. Getches, *Beyond Indian Law The Rehnquist Court's Pursuit of States' Rights, Colorblind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280–81 (2001) ("Tribal interests have lost about 77% of all the Indian cases decided by the Rehnquist Court in its fifteen terms, and 82% of the cases decided by the Supreme Court in the last ten terms. This dismal track record stands in contrast to the record tribal interests chalked up in the Burger years, when they won 58% of their Supreme Court cases.") (footnotes omitted).

42. See FRANK POMMERSHEIM, *BRAID OF FEATHERS* 7–56 (1995).

43. See Philip P. Frickey, *Transcending Transcendental Nonsense Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649 (2006); see also Conference Transcript, *The New Realism The Next Generation of Scholarship in Federal Indian Law*, 32 AM. INDIAN L. REV. 1, 3–4 (2007) (quoting Philip Frickey: "People like Sam Deloria have said this before, and in some cases, like Sam, for many years.").

Doctrinal articles decrying the Supreme Court's common law decisions, often tinged or even dominated by theoretical claims that the Court was a racist or colonialist institution, were ineffective, not to mention repetitive.⁴⁴ What Frickey wanted was a new realism, with legal scholars focusing on empirical research about Indian Country,⁴⁵ a hot commodity in current legal academia. Frickey's major insight was his recollection about how he would have researched a question about tribal courts when he clerked for Justice Marshall in the 1970s.⁴⁶ He claimed his research would have uncovered very little about the on-the-ground realities of Indian country, and that very little had changed since then. He cited as an example Justice Souter's concurrence in *Nevada v. Hicks*.⁴⁷ The opinion, severely skeptical about the fairness to nonmembers available in tribal courts, is supported with assumptions and negative inferences partially taken from scholarly materials out of context.⁴⁸ Frickey suggested that Justice Souter simply did not know better, and that it was the job of good legal scholars to inform the Court.

Frickey's call originally came in a *Connecticut Law Review* symposium article celebrating the publication of the 2005 edition of *Cohen's Handbook of Federal Indian Law*. He summarized what he would call new realism in American Indian legal scholarship:

First, it should recognize that tribal advocates cannot rely upon transcendental nonsense—like an abstract formulation about the nature and extent of tribal sovereignty—to defeat federal judicial expectations about tribal behavior. Second, writing in the field needs to work toward a functional jurisprudence, in which objective, scholarly work interrogates the law and life on the ground, to make transcendental nonsense more difficult to deploy for anyone on any side of a dispute, but especially by the Supreme Court⁴⁹

The next year, Frickey hosted a conference at the University of California, Berkeley to delve into his conception of “new realism,” and opened the conference by suggesting that young Indian law scholars “shift away from doctrinal writing . . . toward more grounded, more empirical engagement.”⁵⁰ A few years later, in his last address, Frickey labeled his call as “pragmatic instrumentalism.”⁵¹

44. See Conference Transcript, *supra* note 43, at 4–6 (quoting Philip Frickey).

45. See Frickey, *supra* note 43, at 660–61.

46. See *id.* at 665.

47. *Id.* (citing *Nevada v. Hicks*, 533 U.S. 353, 383–85 (2001) (Souter, J., concurring)).

48. See *id.* at 665 n. 54 (“Justice Souter cited a law review article by Dean Newton, which actually supports precisely the opposite set of conclusions.”) (discussing Newton, *supra* note 38, at 344 n.238).

49. *Id.* at 660 (citing *Duro v. Reina*, 495 U.S. 676 (1990)).

50. Conference Transcript, *supra* note 43, at 3–4 (quoting Philip Frickey).

51. Philip P. Frickey, Address at University of Kansas Conference on Tribal Law and Institutions, Feb. 2, 2008, *Tribal Law, Tribal Context, and the Federal Courts*, 18 Kan. J.L. & Pub. Pol’y 24, 32 (2008).

Frickey did not further define what he meant by new realism—with the exception of referencing several articles he believed were exemplary—but he did articulate a goal to which future scholarship should strive:

Ultimately, the scholarly enterprise in law cannot simply be bound up with law reform. Whatever the law is at a given time, the goal of the scholarly enterprise must be, at least in part, to transcend doctrinal issues and try to help legal institutions better understand the nature, effects, and limits of law. Legal scholarship is a subpart of scholarship in general, and one goal of scholarship in general is to improve our knowledge about the world. The larger, non-Indian community simply does not know very much about tribal institutions and law. And what they don't know tends not to hurt the larger community, but instead, to hurt tribes.⁵²

Frickey's call to new realism, with its charge to future scholars to help non-Indian law specialists learn about Indian country, is a powerful statement. But what does it mean? Frickey's new realism means many things, but the overarching goals are important. Here are a few of the specifics:

- Indian law scholars should engage in empirical scholarship in Indian country. In the 2007 conference, he asked a true empirical scholar to summarize how to do social science research (empirical research).⁵³
- There is a void of useful information about Indian country. In Frickey's 2008 address, he argued that he would be hard-pressed to cite any legal scholarship at all “about the law in action in Indian country, the law on the ground.”⁵⁴
- There is less need for law review articles, what with the recent publication and updates of Cohen's Handbook.⁵⁵ He argued that scholars should refrain from “writ[ing] the twenty-seventh article saying Oliphant was wrongly decided, often repeating what others have said, as if our saying it somehow adds anything.”⁵⁶
- Indian law scholars should make a true commitment to scholarly objectivity. As he said in 2007, “[v]irtually everyone in the field is committed to the notion of tribal self-government and tribal sovereignty. . . . [T]here are Burmese tiger traps we can walk into fairly blithely if we turn to grounded work without attempting to reflect our own normative frame against the objective evidence.”⁵⁷

52. *Id.*

53. *See* Conference Transcript, *supra* note 43, at 43–59 (quoting remarks of Anne Joseph).

54. *See* Frickey, *supra* note 51, at 32.

55. *See* Conference Transcript, *supra* note 43, at 4 (quoting Frickey).

56. *Id.* at 5 (citing *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

57. *Id.* at 7.

Frickey's broad statements about the state of the scholarly field encouraged young scholars to re-examine it. He was correct in noting areas in which empirical scholarship would very useful, such as the prosecution declination rates in Indian country crime for the various United States Attorney's Offices around the country.⁵⁸ Even today, no one really knows how many tribal courts there are or how many non-Indians work for tribal governments and enterprises. But he was wrong in his suggestion that no one was writing about the realities on the ground.⁵⁹ Scholars since the 1970s have been writing on tribal court practice, economic and governmental practices, and on-reservation legal and political realities.⁶⁰ As a matter of fact, if Frickey had been asked to research tribal courts when he clerked for Justice Marshall in the 1979 Term, he would have found two major empirical studies on tribal courts.⁶¹ However, in Frickey's defense, these studies are dated, have not been replicated, were far from scientific, and would not have been much use for Justice Souter two decades later; meaning that Frickey's argument retains the powerful ring of truth.

Yet, the time Frickey and others proclaimed the failure of Indian law legal scholarship, law review articles and other materials on tribal governance and economies were considerable.⁶² This work is generating solutions and ideas for solutions that are inside-out, meaning they are recommendations originating from Indian tribes, rather than from Congress or through litigation.⁶³ The finest

58. See Conference Transcript, *supra* note 43, at 5 (quoting Philip Frickey). We now have much of that information. See *Examining Federal Declinations to Prosecute Crimes in Indian Country*, Hearing Before the Comm. on Indian Affairs, 110th Cong. 40–45 (2009) (statement of M. Brent Leonhard, Deputy Att'y Gen., Confederated Tribes of the Umatilla Indian Reservation).

59. Frickey highlighted the work of now-Dean Kevin Washburn, now-Dean Stacy Leeds, and Professors Bethany Berger, Carole Goldberg, and Sarah Krakoff as exemplary of his view of new realism. Frickey, *supra* note 43, at 661–65.

60. E.g., FRANK POMMERSHEIM & ANITA REMOROSKI, *RESERVATION STREET LAW: A HANDBOOK OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES* (1979); FRANK POMMERSHEIM, *BROKEN GROUND AND FLOWING WATERS: AN INTRODUCTORY TEXT – WITH MATERIALS ON ROSEBUD SIOUX TRIBAL GOVERNMENT* (1977); Michael J. O'Brien, *Children Indian Juveniles in the State and Tribal Courts of Oregon*, 5 AM. INDIAN L. REV. 343 (1977); Michael Taylor, *Modern Practice in the Indian Courts*, 10 U. PUGET SOUND L. REV. 231 (1987); Richard B. Collins et al., *American Indian Courts and Tribal Self-Government*, 63 A.B.A. J. 808 (1977).

61. E.g., NATIONAL AMERICAN INDIAN COURT JUDGES ASS'N, *supra* note 15 (reporting the results of a lengthy national study of 23 tribal courts); SAMUEL J. BRAKEL, *AMERICAN INDIAN TRIBAL COURTS: THE COST OF SEPARATE JUSTICE* (1978) (reporting the results of a large, informal study of tribal courts by the American Bar Foundation).

62. E.g., Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 TULSA L.J. 73, 156–61 (1999) (interviews with Alaskan Natives about the practical impact of the Supreme Court's decision.); Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments A Tribal Court Perspective*, 76 N.D. L. REV. 311, 346–60 (2000) (empirical study); Thomas P. Schlosser, *Tribal Civil Jurisdiction over Nonmembers*, 37 TULSA L. REV. 573 (2001) (historical survey of tribal court jurisdiction); Pat Sekaquaptewa, *Key Concepts in the Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32 AM. INDIAN L. REV. 319 (2007) (critical examination of tribal common law development).

63. My favorite example is the paper by my colleague and partner, Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 SAN DIEGO L. REV. 567, 611–25 (2012) (proposing an

scholarship in the past five years fits Frickey's "tribal realism," though it is not entirely clear if it was inspired by Frickey's prescription or if it was instead building on decades of nascent scholarly work that came before it. Why does this body of work not already constitute a "new realism" for American Indian law? Why is this work discounted, undervalued, or ignored? Is it invisible?

The next section looks at the citation patterns of federal, state, and tribal courts as a means of judging Frickey's assessment. How frequently do courts cite to American Indian legal scholarship?

III.

CITATION PATTERNS BY FEDERAL, STATE, AND TRIBAL COURTS (1959-PRESENT)

This section collects data that sheds a little light on the allegation that American Indian legal scholarship is not influential. I collected a list of all of the law review articles available at HeinOnline and Westlaw dating back to the nineteenth century that primarily discuss an aspect of Indian law. I collected, with the help of Ken Akini, a dataset of the number of cases decided by state and federal courts that involved an aspect of Indian law. I conclude that the data supports a conclusion that American Indian legal scholarship's influence on courts has waxed and waned to some extent, but that the overall influence of scholars on the courts has been respectable, if not impressive.

This first table documents the percentage of cases involving an aspect of American Indian law that include a citation to an American Indian law article.

**TABLE 1: Federal, state, and tribal court citations to
American Indian legal scholarship**

| <i>Time period</i> | <i>Cases decided</i> ⁶⁴ | <i>Cases with citations</i> ⁶⁵ | <i>Percentage</i> |
|--------------------|------------------------------------|---|-------------------|
| 1959–1965 | 178 | 4 | 2.2 |
| 1966–1970 | 150 | 4 | 2.7 |
| 1971–1975 | 318 | 25 | 7.9 |
| 1976–1980 | 388 | 37 | 9.5 |
| 1981–1985 | 469 | 63 | 13.4 |
| 1986–1990 | 470 | 71 | 15.1 |
| 1991–1995 | 625 | 65 | 10.4 |

intertribal human rights treaty that dispenses with tribal dependence on federal, state, and international legal norms).

64. Many thanks to Ken Akini for gathering this information, which is the number of cases including at least one Westlaw headnote key number 209 – "Indians."

65. I added up the cases in Appendices 1 and 2 in Matthew L.M. Fletcher, *American Indian Legal Scholarship and the Courts: The Appendices* 3–80 (MSU Legal Studies Research Paper No. 12-23, 2012), available at <http://ssrn.com/abstract=2151257> [hereinafter Fletcher, *The Appendices*].

| <i>Time period</i> | <i>Cases decided</i> ⁶⁴ | <i>Cases with citations</i> ⁶⁵ | <i>Percentage</i> |
|--------------------|------------------------------------|---|-------------------|
| 1996–2000 | 1367 | 96 | 7.0 |
| 2001–2005 | 1744 | 90 | 5.2 |
| 2006–2012 | 1852 | 138 | 7.5 |
| <i>Total</i> | 7561 | 593 | 7.8 ⁶⁶ |

A recent study concluded that, between 1950–2008, about 7.6 percent of federal court of appeals opinions cited to a law review article.⁶⁷ The 7.8 percent citation rate for American Indian legal scholarship that includes all courts is about the same. However, our comparison is slightly different, in that my study includes federal district court cases, which usually do not include citations, and I counted only Indian law-centered articles.⁶⁸ I think it is fair to conclude that American Indian legal scholarship is at least as influential as the overall law review corpus.

The next table details the percentage chance that a court will cite a law review article focusing on American Indian law.

TABLE 2: American Indian legal scholarly articles cited in federal, state, or tribal opinions

| <i>Time period</i> | <i>Articles published</i> ⁶⁹ | <i>Articles cited in opinions</i> ⁷⁰ | <i>Percentage</i> |
|--------------------|---|---|-------------------|
| Pre-1960 | 79 | 4 ⁷¹ | n/a |
| 1961–1965 | 19 | 6 | 31.6 |
| 1966–1970 | 61 | 16 | 26.2 |
| 1971–1975 | 202 | 46 | 22.8 |
| 1976–1980 | 280 | 70 | 25.0 |
| 1981–1985 | 271 | 48 | 17.7 |

66. This is the *mean*, not the total of the percentage column.

67. See David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345, 1359 (2011).

68. The American Indian law scholarship citation rate for federal circuit courts is 9.8 percent (149 cases with citations out of a total of 1524 federal appellate decisions).

69. I searched HeinOnline for this information, finding all articles that mention anything about “Indians,” “Indian tribes,” “Native Americans,” “tribal courts,” and “Indian courts.” I filtered down that massive number using the relevance function in HeinOnline, and reviewed the titles of the articles to make a determination if the article focused primarily on some aspect of Indian law.

70. I added up the citations in Appendix 3 of Fletcher, *The Appendices*, *supra* note 65, at 81–133. This number is the number of articles published in this timeframe that are cited, as opposed to cases within this timeframe that cite articles.

71. I should note here that this number might be somewhat inaccurate; I only counted citations in opinions written in 1959 and later.

| <i>Time period</i> | <i>Articles published</i> ⁶⁹ | <i>Articles cited in opinions</i> ⁷⁰ | <i>Percentage</i> |
|--------------------|---|---|-------------------|
| 1986–1990 | 363 | 61 | 16.8 |
| 1991–1995 | 664 | 108 | 16.2 |
| 1996–2000 | 731 | 85 | 11.6 |
| 2001–2005 | 640 | 68 | 10.6 |
| 2006–2012 | 863 | 52 | 6.0 |
| <i>Total</i> | 4173 | 564 | 13.5 |

Starting in 1959, courts have cited more than 13 percent of all American Indian law articles published. Note that prior to the 1970s, only a few dozen articles had ever been published in this field. The statistical highpoint of the field of scholarship came in the latter half of the 1970s, in which courts cited fully one-quarter of all American Indian law articles. That percentage has declined significantly since that time period, likely influenced by the sheer number of articles that have appeared.

This last table documents the percentage of Supreme Court cases involving an aspect of American Indian law that include a citation to an American Indian law article.

TABLE 3: U.S. Supreme Court Citations to American Indian Legal Scholarship in Indian Law Cases

| <i>Time period</i> | <i>Number of Indian law cases in the Supreme Court</i> | <i>Citations to Indian legal scholarship (total citations)</i> ⁷² | <i>Percentage</i> |
|--------------------|--|--|-------------------|
| 1959–1965 | 9 | 0 | 0.0 |
| 1966–1970 | 6 | 1 | 16.7 |
| 1971–1975 | 18 | 5 | 27.8 |
| 1976–1980 | 26 | 7 | 26.9 |
| 1981–1985 | 20 | 10 | 50.0 |
| 1986–1990 | 19 | 8 | 42.1 |
| 1991–1995 | 10 | 0 | 0.0 |
| 1996–2000 | 15 | 4 | 26.7 |
| 2001–2005 | 14 | 4 | 28.6 |
| 2006–2012 | 8 | 1 | 12.5 |

72. The number here is the total number of citations. For example, an opinion might cite to two Indian law articles. The number would then be two.

| <i>Time period</i> | <i>Number of Indian law cases in the Supreme Court</i> | <i>Citations to Indian legal scholarship (total citations)⁷²</i> | <i>Percentage</i> |
|--------------------|--|---|-------------------|
| <i>Total</i> | 145 | 40 | 27.6 |

Overall, the Supreme Court cites to American Indian legal scholarship (that is, law reviews) in about one-quarter of its cases that relate to Indian law. That percentage reached a high in the 1980s, with the Court citing Indian law articles in nearly half its Indian law cases. Since then, the Court has cited Indian law articles in less than 20 percent of its cases that deal with Indian law issues. The 27.6 percent overall figure is below (although perhaps not significantly below) the Supreme Court's overall citation percentage, which a recent study placed at 32.21 percent.⁷³ However, the authors of that study concluded that the Court's citation rate is increasing,⁷⁴ unlike its citation rate of Indian law scholarship.

Taken together, the data in these tables seems to support a conclusion that American Indian legal scholarship, while perhaps not as influential on the courts as it was during the 1970s, remains influential on the lower courts. However, that influence has appeared to wane considerably in the United States Supreme Court, at least in the last twenty years or so.

IV.

COMMENTS ON THE LEGAL SCHOLARSHIP MARKET'S POSSIBLE INFLUENCE ON FRICKEY'S CALL

The crisis of influence of American Indian legal scholarship that led to Professor Frickey's call seems to be real, but how should academics address the problem? Ironically, the biggest barrier to meeting Frickey's challenge and improving the influence of Indian law scholarship may be the law review market.

I suspect there are several problems with the market for legal scholarship that slows the impact of Frickey's Call. *First*, traditional legal scholarship is theoretical, and law faculties tend to disdain practical scholarship.⁷⁵ Many law faculties discourage practical scholarship—with the noted exception of serious statistical empirical work that is peer-reviewed in accordance with scientific principles—for a variety of reasons including an institutional inability to judge the quality of the work.⁷⁶ Legal scholars wishing to publish in the best reviews,

73. See Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court's Use of Legal Scholarship*, 106 NW. U. L. REV. 995, 998 (2012).

74. *See id.*

75. See William R. Slomanson, *Legal Scholarship Blueprint*, 50 J. LEGAL EDUC. 431, 437 (2000) ("Traditional wisdom counsels against topics involving the practical aspects of law practice.").

76. See Peter H. Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 331–33 (1989) (listing nine reasons why legal scholars do not produce much

and acquire the most influence and improve their reputations, are therefore strongly discouraged from publishing the very work that would be the most useful to Indian country. As one recent study of law review editors concluded:

Among the Top 15 segment, there was a general consensus that while a broad range of topics are likely to get published, narrow topics such as tax, civil procedure, and admiralty usually do not get published. Furthermore, articles with a pragmatic topic, such as professional responsibility and law school pedagogy, are unlikely to yield publication offers. . . . Fourth Tier respondents indicated preferences for a rather diverse range of topics, yet articles that were timely, practical, and citable were slightly favored. A few 4th Tier respondents commented that they were not looking for philosophical or theoretical articles but rather those involving practical legal analysis.⁷⁷

This survey suggests that top tier law reviews actively shy away from “pragmatic” scholarship, while lower tier law reviews favor that type of work.

Second, even if law professors attempted to write practical work about Indian country, that work is just as likely to be misinformed and incomplete as it would be grounded and concrete.⁷⁸ Academics are almost never close to Indian country, even in the west where most of Indian country is located. Scholars at law schools, generally speaking, have little or no knowledge about Indian country other than what they read. Their perception is skewed and even when they visit Indian country as tribal judges or to perform other work there (I include myself as a tribal appellate judge in this category), their perception is limited to a particular case and the court itself. They do not observe much of the inner workings of tribal governments. Even former in-house attorneys (like myself) and legal services lawyers that once worked in Indian country only saw a snapshot of the reservation. To say the least, law professors would have an incredibly difficult road to travel to acquire the overall context.⁷⁹

empirical research). Of course, this article is very dated, but some of the reasons remain valid, most notably lack of training in both scholars and faculty tenure reviewers and the concern that junior scholars should avoid empirical research until after tenure. *See id.* at 332–33 (numbers 8 and 9); *cf.* Lisa Fairfax, *Should Young Scholars Engage in Empirical Legal Research?*, THE CONGLOMERATE BLOG (July 18, 2006), http://www.theconglomerate.org/2006/07/should_young_sc.html (noting that law faculties still discourage junior scholars from embarking on empirical research).

77. Leah M. Christensen & Julie A. Oseid, *Navigating the Law Review Article Selection Process: An Empirical Study of Those with all the Power—Student Editors*, 59 S.C. L. REV. 175, 196 (2007) (footnotes omitted).

78. *See, e.g.*, Matthew L.M. Fletcher, *Cookson's Empirical Analysis of the Location of Indian Casinos (and Commentary)*, TURTLE TALK (July 1, 2011), <http://turtletalk.wordpress.com/2011/07/01/cooksons-empirical-analysis-of-the-location-of-indian-casinos-and-commentary/> (my commentary on J. Anthony Cookson's *Institutions and Casinos on American Indian Reservations: An Empirical Analysis of the Location of Indian Casinos*, 54 J.L. & ECON. 651 (2010)); Carole Goldberg, *In Theory, In Practice: Judging State Jurisdiction in Indian Country*, 81 U. COLO. L. REV. 1027, 1043–56 (2010) (criticizing Terry L. Anderson & Dominic P. Parker, *Sovereignty, Credible Commitments, and Economic Prosperity on American Indian Reservations*, 51 J.L. & ECON. 641 (2008)).

79. I mean this literally, in learning recently about the travels made by the members of Indian Law and Order Commission to Alaskan Native villages. *See* Troy Eid, Address, Introducing the Work

Consider, for example, scholarship dedicated to expounding upon the so-called *Montana* exceptions to the general rule that tribal governments and justice systems have no jurisdiction over nonmembers.⁸⁰ The standard law review articles on this line of cases criticize the doctrine, exclusively expounding upon disputed cases that fit within the genre, as opposed to the non-adversarial, day-to-day transactions that dominate modern tribal governance. The best writing so far on *Montana* is John LaVelle's history of the case,⁸¹ Tom Schlosser's history of tribal governance over nonmembers,⁸² and Sarah Krakoff's primer for federal court judges on the *Montana* cases.⁸³ But that history is not normative. Normative scholarship with true emphasis on the realities of nonmember activities in Indian country is nonexistent. What the Supreme Court and many law professors do not know is that almost every Indian tribe exercises civil jurisdiction over nonmembers *every single day* without so much as a peep of protest or controversy. Millions of non-Indians enter tribal casinos, are employed by tribal governments, reside in tribal housing, and enter into commercial relations with tribes every year—all but a few subject to tribal regulation and taxation.⁸⁴ Helpful scholarship would make it clear that the nonmembers opposing tribal jurisdiction are almost always *outliers*, often people who would oppose every government interaction that came their way. Law professors, lawyers, and judges read the cases that by definition involve disputes and not consensual relations—a view that provides a terribly inaccurate snapshot of Indian country. They see the worst of nonmember activity and the worst of tribal government activity and naturally assume that is the actual state of things in Indian country. It is not.

Third, perhaps the top law reviews that publish the top papers and the top scholars strongly disfavor, as an institutional matter, articles about the realities of Indian country. The best Indian law articles are narrow, in that they tend to cover one or a few tribes, but are also deep, in that they present an enormous amount of useful detail to readers.⁸⁵ A narrow and deep article about Indian

of the Tribal Law and Order Commission (TLOC), at Harvard Law School (Nov. 8, 2012).

80. See *Montana v. U.S.*, 450 U.S. 544, 565–66 (1981); see also *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 544 U.S. 316, 324 (2008) (noting that “whether a tribal court has adjudicative authority over nonmembers is a federal question”); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (holding that the tribal court lacked jurisdiction over a non-member).

81. See John P. LaVelle, *Beating a Path of Retreat from Treaty Rights and Tribal Sovereignty: The Story of Montana v. United States*, in *INDIAN LAW STORIES* 535 (Carole E. Goldberg, Kevin K. Washburn & Philip P. Frickey, eds. 2011).

82. See generally Schlosser, *supra* note 62.

83. See generally Sarah Krakoff, *Tribal Civil Judicial Jurisdiction Over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187 (2010).

84. Cf. *Plains Commerce Bank*, 544 U.S. at 329 (“First, [a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.”) (quoting *Montana v. United States*, 450 U.S. 544, 565 (1981)).

85. See, e.g., Russel Lawrence Barsh, *Coast Salish Property Law: An Alternative Paradigm for Environmental Relationships*, 12 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 1 (2005); Kristen A. Carpenter, *Interpretive Sovereignty: A Research Agenda*, 33 AM. INDIAN L. REV. 111 (2008); J.

country—a tribe-centered work of scholarship that practically and theoretically examines both issues and problems arising in Indian country and proposes an Indigenous solution to that problem—is all but doomed to a relatively poor placement in the rigorous and competitive market for law review articles.

Law review articles editors don't know the realities on the ground, and their markers or proxies for quality are the reputation of the law school from which the author teaches and the chances the subject matter will be cited by others at a high rate.⁸⁶ An article impressively detailing the governance considerations a small Indian tribe in Michigan, for example, that student editors have never heard of will not be accepted at many journals, and certainly not one that fits the category of an “elite” review.⁸⁷ Highly ranked journals want theories on broad subject areas, and are willing, in my opinion, to sacrifice depth on occasion in order to publish articles that are more likely to be cited by courts and scholars in large numbers.⁸⁸ Elite reviews publish elite scholars, and many elite scholars defend their often purely theoretical scholarship on the grounds that they are not speaking to judges or policymakers, but instead are speaking to other elite scholars.

Consequently, the Indian law articles that receive the most attention from elite reviews, and therefore elite scholars and judges, often are broad and shallow. They put all Indian tribes in the same doctrinal and theoretical boat, they often have inaccurate representations of Indian country realities, and they offer solutions that have little or no chance of being effective. To be sure, many are exceptional pieces of literature that add an enormous amount to the field. But there is a danger. That kind of work generalizes about Indian country, making it easier for the courts and others to generalize about Indian country.⁸⁹

Matthew Martin, *The Nature and Extent of the Exercise of Criminal Jurisdiction by the Cherokee Supreme Court 1823-1835*, 32 N.C. CENT. L. REV. 27 (2009).

86. See Christensen & Oseid, *supra* note 77, at 189 (“These results suggest that top ranked law schools are concerned with an author’s credentials. . . . The fact that the top law schools are influenced by where the author teaches may also reflect the popular notion that higher-ranked law journals publish articles about theory, whereas lower-ranked law schools publish articles that are either written by or useful to practitioners.”) (footnotes omitted); *id.* at 195 (“A Top 50 respondent commented, ‘I am most interested in publishing controversial topics—those ideas that are most likely to get cited.’”).

87. I draw this conclusion, in part, on my own study about the likelihood of American Indian law scholarship showing up in general law reviews, where only a few articles appear in top ten law reviews. See generally Matthew L.M. Fletcher, *Federal Indian Law in General Law Reviews*, TURTLE TALK (Mar. 9, 2009), <http://turtletalk.wordpress.com/2009/03/09/federal-indian-law-in-general-law-reviews/>. Of course, there are exceptions to the rule I’m alleging, the best being Kevin Washburn’s *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709 (2006), Angela Riley’s *Good (Native) Governance*, 107 COLUM. L. REV. 1049 (2007), and Kristen Carpenter, Sonia Katyal & Angela Riley’s *In Defense of Property*, 118 YALE L.J. 1022 (2009). Those papers urged Indigenous solutions to tribal problems in modern America, and managed to be fairly broad and deep.

88. Cf. Richard Delgado, *The Imperial Scholar Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 564–65 (1984) (relating a law professor’s justification for citing a well-known scholar, as opposed to the best scholarly article).

89. Bob Clinton and Frank Pommersheim made similar points years ago. See POMMERSHEIM, *supra* note 42, at 11–36; see generally Robert N. Clinton, *Reservation Specificity and Indian Adjudication An Essay on the Importance of Limited Contextualism in Indian Law*, 8 HAMLIN L.

An opinion in a recent case involving the inherent jurisdiction of the tribal justice system for the Oneida Indian Nation of Wisconsin exemplifies this concern about judges making generalizations about tribal justice systems, with the opinion citing to numerous scholarly works, none of which touched in any detail on the inner workings of the Oneida Judicial Commission.⁹⁰

This final concern is a commanding counterweight to Frickey's call—the very scholars he recommended completely alter their focus likely will be punished in the law review market. I have yet to find a law review article on tribal law that fits what I call narrow and deep that has been published in a top ten, twenty, or even thirty law review.⁹¹ And unless the law review market changes in a dramatic fashion, a change I do not think anyone foresees, there might never be such an article placement. Junior scholars dependent on article placement for tenure are therefore discouraged from doing this type of research.

That said, several American Indian legal scholars are doing their damndest to meet Frickey's call. Federal and state judges are not the only audience. Legal scholarship is for practicing attorneys; tribal, state, and federal leaders; and many others, too. And so I conclude this short paper with my own reading list of recent work that unquestionably fulfills the call for new realism in American Indian legal scholarship. I include articles dating back five years or so that meet one or more of the criteria articulated by Frickey. I also add a list of excellent “nuts and bolts” articles. The lists are long, but certainly not exclusive.⁹²

Miigwetch.

REV. 543 (1985).

90. See *Kroner v. Oneida Seven Generations Corp.*, 819 N.W.2d 264, 285 n.6 (Wis. 2012) (Roggensack, J., concurring) (citing *Tribal Courts and the Administration of Justice in Indian Country*: Hearing on S. 576 Before the S. Comm. on Indian Affairs, 110th Cong. 7 (2008) (statement of Roman J. Duran, Vice President, National American Indian Court Judges Association)); *id.* at 280 (Prosser, J., concurring) (citing Raymond L. Niblock & William C. Plouffe, *Federal Courts, Tribal Courts, and Comity: Developing Tribal Judiciaries and Forum Selection*, 19 U. ARK. LITTLE ROCK L. REV. 219, 237–39 (1997)).

91. The closest article that may meet my demanding criteria is Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559 (2001), an outstanding work of legal history on tribal law that still purports to generally survey many numbers of different tribes and tribal groups.

92. I must add that the *California Law Review* has recently agreed to publish at least two articles involving Indian law: Kristen A. Carpenter & Angela R. Riley, *The Jurisgenerative Moment in Indigenous Human Rights*, 102 CALIF. L. REV. (forthcoming Feb. 2014), and Katherine J. Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. (forthcoming Dec. 2013).

APPENDIX: FLETCHER'S READING LIST

1. *Empirical Research*

- Terry L. Anderson & Dominic P. Parker, *Sovereignty, Credible Commitments, and Economic Prosperity on American Indian Reservations*, 51 J.L. & ECON. 641 (2008).
- Grant Christensen, *Judging Indian Law: What Factors Influence Individual Justice's Votes on Indian Law in the Modern Era*, 43 U. TOL. L. REV. 267 (2012).
- J. Anthony Cookson, *Institutions and Casinos on American Indian Reservations: An Empirical Analysis of the Location of Indian Casinos*, 53 J.L. & ECON. 651 (2010).
- J. Anthony Cookson, *Direct and Indirect Effects of Judicial Institutions: Evidence from American Indian Reservations* (Apr. 21, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1893693.
- Valentina P. Dimitrova-Grajzl et al., *Jurisdiction, Crime, and Development: The Impact of Public Law 280 in Indian Country* (Sept. 7, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2093681>.
- Patrick M. Garry et al., *Tribal Incorporation of First Amendment Norms: A Case Study of the Indian Tribes of South Dakota*, 53 S.D. L. REV. 335 (2008).
- CAROLE GOLDBERG & DUANE CHAMPAGNE, FINAL REPORT: LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280 (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/222585.pdf>.
- Ezra Rosser, *Protecting Non-Indians from Harm? The Property Consequences of Indians*, 87 OR. L. REV. 175 (2008).

2. *Tribe-Centered Scholarship*

- Justice Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations*, 11 WYO. L. REV. 351 (2011).
- Julie Bushyhead, *The Coquille Indian Tribe, Same-Sex Marriage, and Spousal Benefits: A Practical Guide*, 26 ARIZ. J. INT'L & COMP. L. 509 (2009).
- Kristen A. Carpenter, *Interpretive Sovereignty: A Research Agenda*, 33 AM. INDIAN L. REV. 111 (2009).
- Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L.J. 1022 (2009).

- Gavin Clarkson, *Wall Street Indians: Information Asymmetry and Barriers to Tribal Capital Market Access*, 12 LEWIS & CLARK L. REV. 943 (2008).
- Joseph Chilton, *The Jurisdictional “Haze”: An Examination of Tribal Court Contempt Powers over Non-Indians*, 90 N.C. L. REV. 1189 (2012).
- Barbara Creel, *Tribal Court Convictions and the Federal Sentencing Guidelines: Respect for Tribal Courts and Tribal People in Federal Sentencing*, 46 U.S.F. L. REV. 37 (2011).
- Angelique EagleWoman, *Tribal Hunting and Fishing Lifeways & Tribal-State Relations in Idaho*, 46 IDAHO L. REV. 81 (2009).
- Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243 (2009).
- John C. Hoelle, *Re-evaluating Tribal Customs of Land Use Rights*, 82 U. COLO. L. REV. 551 (2011).
- Mark A. Jarboe & Daniel B. Watts, *Can Indian Tribes Sell or Encumber Their Fee Lands Without Federal Approval?*, AM. INDIAN L.J., Trial Issue 2012, at 10.
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