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Four Questions on Critical Race Praxis: Lessons From Two Young Lives in Indian Country

Cover Page Footnote

Professor, University of New Mexico ("UNM") School of Law, and Director, Southwest Indian Law Clinic. This Essay is dedicated to all incarcerated young men (and those who spent their youth incarcerated), and especially to our young men of color. In particular, it is dedicated to my client, and also to my son, Agoyo/Paxola pu sun h - hauquameumhim (be strong). Acknowledgements: Margaret Montoya, Gerald Lopez, Robert Cruz, Manuel Cruz Zuni, Ann Strahan, my research assistant, and all my clinical students in the 2004 and Spring 2005 semesters, Edward, Evelina, and Tessa Lucero, Ray Twohig and Betsy Salcido. Korikem. My thanks to symposium organizer Professor Sheila Foster for the opportunity the symposium presented to continue a thread of discourse begun so many years ago. My thanks also also to the symposium presenters and participants for the stimulating day dedicated to critical race lawyering, and especially to Professor Gerald Lopez for his keynote address, which so clearly spoke to the perfect imperfection and significance of family and their impact on our work.

FOUR QUESTIONS ON CRITICAL RACE PRAXIS: LESSONS FROM TWO YOUNG LIVES IN INDIAN COUNTRY

Christine Zuni Cruz*

INTRODUCTION

The Critical Race Lawyering Symposium in New York City brings me from Albuquerque, New Mexico. As I travel the day before the symposium, I reflect on the amount of time it will take. I leave Albuquerque at 8:23 a.m. and I am scheduled to arrive in New York City at 4:05 p.m., via Chicago. Given the two-hour time difference between the East Coast and the Rocky Mountain regions, I begin my day boarding the plane as the sun is rising in the morning sky and end it at my destination where the sun is setting. Even in this day and age of rapid transportation, it takes an entire day just to travel. The difference in time and place is not lost on me. As I leave Albuquerque aboard the plane, the beauty of the vast and empty brownness of the earth below awes me, as it always does. The uninhabited and open high desert around Albuquerque quickly diminishes the small city. As I draw closer to the east, first to Chicago, and then to New York City, I look down from the plane upon approach at the vastness of the cities. I cannot help but think of the accounts I recall reading of the official delegations of Native leaders sent to the east coast by railroad to meet the "Great Father," a tactic employed to convince them to lay down their arms and cease armed resistance.¹ Upon seeing the population in the East, these leaders were deeply affected by the knowledge that the waves of

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1. See 1 Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 176 (1984).

settlers intruding upon their lands came from a vast sea of people. As we approach New York City at the end of the day, I glimpse from the air the natural growth of trees and brush here and there and then all the buildings, which have replaced them.² I think of the Native peoples of this place upon which one of the most prominent cities in the world now stands—the Lenape,³ I learn later. I leave my own Native lands this morning and understand I will enter those of other Native peoples of New York State,⁴ Ancient Nations, some of whom, like the Lenape, are among “the disappeared”⁵ within their own territory⁶—Algonquin territory. I admire their territory from the air and think of how beautiful it must have been before the buildings were here, situated near the ocean and beside the rivers.⁷

This Essay developed from a brief panel presentation delivered at the Critical Race Lawyering Symposium at Fordham University School of Law. It picks up on a discussion on lawyering for indigenous peoples in *[On The] Road Back In: Community*

2. Evan Pritchard, *Native New Yorkers: The Legacy of the Algonquin People of New York* 7 (2002). “The island of Manhattan was once hilly and green for the most part, but then it was either leveled or land-filled to make it unnaturally flat and more convenient for urban living.” *Id.*

3. As Pritchard notes:

The Lenape, usually translated *len*, or “human” and *ape*, or “person,” are an ancient riverine people of Algonquin stock. Their unique nature-revering but sophisticated culture took shape at least as early as 1000 B.C.E. in and around Manhattan, and eventually spread at least two hundred miles in every direction before any known contact with white explorers.

Id. at 7.

4. They include the Poospatuck Nation, Unkechaug Indian Territory that I had visited a few years before with my husband Robert Cruz, located just outside New York City, and the well-known members of the Iroquois Confederacy still present in their original territory.

5. The term “the disappeared” has been used in reference to the missing and suspected murdered indigenous peoples by the military in Central America. See generally Jennifer Harbury, *Bridge of Courage: Life Stories of the Guatemalan Compañeros and Compañeras* (1994). I apply the term here to refer to the invisibility of indigenous peoples in their original territories, whether caused by marginalization, dispersion, removal, death, or absorption.

6. “[T]he predominant nation of the Lenape to occupy New York City during the last millennium were the Munsee, a people virtually written out of the history books not because of their insignificance, but precisely because of their painful significance in United States and Canadian history.” Pritchard, *supra* note 2, at 8. “Descendants of New York City Lenape were removed by treaty at least twenty times and sent to Oklahoma, Ontario, and Wisconsin, where they were subjected to poverty, disease, and death.” *Id.* at 10.

7. As imagined by others:

Fed by a small lake where City Hall now stands, Canal Street was once a stream that led to the Hudson River. The environment was pristine. The air smelled unusually sweet and dry, and schools of playful dolphins escorted ships into harbor. The air was so filled with birds that sometimes you could hardly hear conversation.

Id. at 2 (citing Edwin G. Burrows & Mike Wallace, *Gotham: A History of New York City to 1898*, at 6 (1999)).

Lawyering in Indigenous Communities, an earlier article I wrote.⁸ In [*On The*] *Road Back In*, I discuss the role of culture in community lawyering for indigenous peoples. In this Essay, I explicitly address the role of race and color in community lawyering while discussing critical race lawyering in Indian country.⁹

My approach in this Essay is to address the panel's topic—Critical Race Praxis—by answering the questions posed for the panel in the symposium program from my perspective as an Indian law practitioner living and working in Indian country. The Critical Race Praxis panelists explored the relationship between critical race theory and lawyering practice. The following questions were set forth: How does, or might, critical race theory inform lawyering practice? Is there such a thing as “critical race lawyering” and, if so, how might it differ from other styles of lawyering? What is the role of the lawyer in helping clients or communities realize racial justice goals? What duties do attorneys seeking social change owe to their clients?

Before I begin addressing the questions, I comment generally on the relationship between critical race theory and lawyering practice and teaching. Next, I describe the approach I use in considering the topic and answering the four questions, using the analysis of one case to tie the questions and answers together, and to demonstrate an application of theory to practice. I answer each of the four questions in the context of my work representing indigenous peoples. Though I touch on issues that arise from my experience teaching in a clinical law program within a legal institution, my perspective in this Essay is that of lawyer, as opposed to clinical supervisor,¹⁰ applying critical

8. Christine Zuni Cruz, [*On the*] *Road Back In: Community Lawyering in Indigenous Communities*, 5 *Clinical L. Rev.* 557 (2000). I note throughout the article some of the thoughts I carry into this Essay.

9. My introduction and relationship to critical race scholars and their work comes from my participation in LatCrit conferences beginning in 1997 (San Antonio, Texas, LatCrit II, 1997) at the invitation of Professor Margaret Montoya, my colleague at UNM School of Law, whom I have worked with closely on both clinical and critical race endeavors. The relationship of Native peoples to LatCrit scholarship is an issue that has been addressed in several LatCrit conferences, a few of which I have been privileged to participate in (San Antonio LatCrit II 1997, Miami LatCrit III 1998, and Lake Tahoe LatCrit IV 1999 conferences). A few Native voices in the critical race scholarship have emerged, the most recognized of which is Robert Williams. The LatCrit movement has addressed issues of *mestizaje*, the intersection of Latina/o and indigenous peoples. A Native critical race collaborative, similar to the LatCrit movement, is not as clear, though Native scholars have a long history of post-colonial scholarship. The majority of Native scholarship in law is in Federal Indian law, a segment of which addresses the decolonization and racial critique of Federal Indian law and nationalism. See, e.g., Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourse of Conquest* (1990).

10. On the role of the clinical teacher as supervisor, see generally Justine A. Dunlap & Peter A. Joy, *Reflection-in-Action: Designing New Clinical Teacher Training by Using Lessons Learned from New Clinicians*, 11 *Clinical L. Rev.* 49 (2004), addressing the need for training of clinicians who are moving from direct representation of clients to supervision of students engaged in direct representation.

race theory in the legal analysis of one case. I also weave in my own personal thoughts and experiences. These voices are reflected in the italicized text—the bold italics relate my thoughts as lawyer seeking to apply a critical race analysis to my client’s situation, the unbolded italics reflect personal thoughts, not necessarily connected to the case but reflective of the life experience that informs my view and work as lawyer.¹¹ The unbolded text reminds me of our need to be aware of our own personal reflections and experiences and how they affect us as lawyers.

I travel alone; throughout the trip my thoughts are on my twenty-two year old son, who will be in court in Albuquerque the next morning—the day of the symposium. He has been arrested and incarcerated for several weeks for driving while intoxicated (“DWI”). He was stopped early on a Saturday morning on Central, near the nightclubs in the renovated area of downtown Albuquerque. He was initially stopped for losing traction, and then cited for not having a driver’s license on him and driving while intoxicated. He was not able to bail out upon arrest prior to arraignment. By the time we had taken his truck out of impoundment and calmed down sufficiently to consider posting bail, he has been arraigned and his bond is set at \$5000, cash only, because he has a “record.” A record comprised primarily of traffic citations since he was eighteen, and other charges, which had been dismissed or pled to, created quite a list, as I heard repeatedly from different sources. A \$5000 cash only bond was an amount high enough to present an impediment, and though his uncle offered to put up the bond, he refused the offer. Because he has no job and he is in school, the cash bond means he is staying in jail. Being a lawyer and a mother, I am conflicted. Past failures to appear on his traffic citation, a bond revocation, and a list of priors paint a picture of him and I know a judge will have difficulty seeing the person we know as son, elder brother, nephew, cousin, grandson, friend. He is in school, and he doesn’t believe the court will let him out, so he plans to withdraw. As a mother, I despair at the record, some of which I knew about, the extent of which I was unaware. Alcohol is evidencing itself as an issue in his young life. “Let the jail speak to him,” his father says. The morning of the symposium, he is scheduled for trial. He has entered a plea of not guilty. He indicated to me that he may change his plea and do his time, but he’ll talk to his lawyer first. We expect some resolution. His aunt and uncle will be there at the hearing; they have a relationship with one another. He is “piba”¹² to them, they are

My client’s case shifted from a clinic case to a case I assumed on a pro bono basis with assistance from my students, due to the court’s practice rules limiting “lay advocacy” to members of the community, a criteria only the initial clinical student who opened the case could meet. I had entered my appearance assuming the case would be concluded before the conclusion of the initial student’s clinical semester.

11. Zuni Cruz, *supra* note 9, at 567-68 (noting that crossing cultural boundaries requires the attorney to consider his/her own cultural view, including life experiences, influences, and resulting views).

12. Reciprocal *Tiwa* term for god-child, literally “wet head.”

“piba”¹³ to him. At the same time he is scheduled to stand trial in Albuquerque, Gerald López begins his keynote address in New York City at the Critical Race Lawyering Symposium.

I. THE RELATIONSHIP BETWEEN CRITICAL RACE THEORY AND LAWYERING PRACTICE

My son’s story finds its way into this Essay through the keynote address delivered by Professor Gerald López at the symposium. Professor López speaks about his family, and in particular about his brother in East L.A. As I listen intently to Professor López, I think of my son, which is all the more reason I am so greatly affected by what I hear. I realize, as people of color, as people who love our families, our people, we don’t engage in critical race analysis in the abstract. We are a part of the analysis. We experience the impact of race, color, and culture in the context of power. It is in the stories of our fathers, our sisters, our children, all those within our communities. It is a compelling story that must be told and must be included in the analyses of the law that our profession engages in. If we don’t speak them, no one else will.

Intertwined in the legal issues our clients present to us, their lawyers, are stories, histories, both public and private, justice, and healing quests. The stories our clients bring to us, their lawyers, are always much more poignant and far-reaching than the lawyering profession typically trains us to inquire into and utilize in their representation. These stories are important in our own development as lawyers who represent and advocate for others individually and collectively. I relate an idea of lawyering that seeks to identify, understand, and utilize these intertwined matters that clients bring to their legal advocates. These intertwined matters can be used in individual cases and over the long term in advocacy for Native rights and in indigenizing¹⁴ justice in Native communities.¹⁵

I am actively engaged in the practice of Indian law and in the representation of Native clients. Race, color, and culture are imbedded in my work as a lawyer because of the law I practice, the

13. Reciprocal *Tiwa* term for god-parent.

14. I use the term “indigenizing” to describe the process of reframing justice systems within the indigenous community to be compatible to the indigenous community world view. For a discussion of indigenization, see Robert B. Porter, *Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples*, 5 *Yale Hum. Rts. & Dev. L.J.* 123 (2002). For a related idea, see Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 *Stan. L. & Pol’y Rev.* 191 (2001).

15. See Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 *Colum. Hum. Rts. L. Rev.* 235 (1997); Christine Zuni Cruz, *Tribal Law As Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Tradition into Tribal Law*, 1 *Tribal L.J.* 1 (2000).

people I represent, and who I am. Race, color, and culture have relevance to what I view as advocacy. Critical race lawyering, if it can be described, has at a minimum a consciousness of race in the analysis of legal issues, an awareness of the impact of culture and color, and how such consciousness of race, culture, and color all operates in the context of power.¹⁶ The context of power is a critical qualifier of these three variables; in some power structures, all three are relevant; in others, only one may dominate; and in still others, they may give rise to related dynamics, such as horizontal violence within the context of a particular community of color. For example, whether a matter is before a state or tribal court may completely change the relevancy or dynamics of race, color, or culture.

A. *The Law of White Spaces in Teaching and Practice*

The relationship between critical race theory and lawyering practice is initially found in what the lawyer considers as relevant in the analysis of the case. But first, lawyers must engage in this analysis, seeing not only the trees (the legal problems), but also the forest (the context in which the legal problem sits).¹⁷ What lawyers see is related to their training. Is this training found in law schools? I teach in a clinical law program and have found that “a concern with making issues of race, and consciousness of the embodiment and color of doctrine, visible within the elite enclaves that elaborate and reproduce legal knowledge” can be resisted and presents an overwhelming challenge to the institution, the law professors, and the law student body alike.¹⁸ I have reflected on this challenge since I began teaching. The emerging scholarship on the law of white spaces has provided a clearer understanding to me not only of the challenges that exist in imparting this lawyering technique in legal institutions, but also the challenge that exists when employing a critical lawyering approach in other elite enclaves, such as the courtrooms we practice in (and within the bar itself). The law of white spaces considers “the emotional and epistemic relationships between the white participants, [and] the[ir] internal relationships” and is one of “nonrecognition, silence, or

16. My colleague, Professor Margaret Montoya, points out the relevance of power to this analysis.

17. To play on the expression, oftentimes lawyers cannot see the forest for the trees. Richard Delgado describes it as a “gestalt switch”:

As in a drawing by Escher, a figure will stand out only if we focus on the background and ignore the foreground at which we have been staring. If we constantly skirmish with the legal foreground when it is the background that has causal efficacy, we are unlikely to get anywhere.

Richard Delgado, *Shadowboxing: An Essay on Power*, 77 Cornell L. Rev. 813, 823 (1992).

18. Peter Goodrich & Linda G. Mills, *The Law of White Spaces: Race, Culture, and Legal Education*, 51 J. Legal Educ. 15, 19 (2001).

denial” of race, color, culture, and their privileging or disabling impacts.¹⁹ The law of white spaces operates in white space.²⁰

I have found that law students in Indian law courses and the Indian law clinic are more willing to explore the intertwined racial and cultural matters connected to the legal problems clients present and to consider their relationship to legal representation. Perhaps this is because the political status/racial distinction of Native peoples is blurred together in Indian law. Federal Indian law is legally justified based on the political status of tribe members.²¹ Nevertheless, Indian people are racialized peoples. It is not always easy for students of Indian law to deal with either race or culture, but it seems even more difficult to discuss the relationship between race and culture and lawyering for those outside the Indian law area. Over the years, I have made presentations to lawyers and students on cultural considerations in representing clients. I feel the discomfort, the puzzlement, and resistance to the idea that a lawyer should factor the culture, community, and race of their clients into their representation. Comments range from “I think if you just treat any client with respect you won’t have any problems” (of course, everyone wants to be treated with respect, but respect, like everything else, is cultured) to “I’m not sure what to do with this information.” I often wondered if it was the message or the messenger, concluded it was probably both, and strove to improve the material and the delivery. I often thought of the audience and the space, but I never put the two together.

B. *Making the Invisible Visible*

The law of white spaces explains what I felt, but could not see, what I encountered, but could not quite understand or seek to address. In fact, the law of white space operates beyond legal institutions, extending out to all of the spaces in the dominant society, and as such, is pertinent not only to law teaching, but to law practice. Understanding the culture of “the included, those who perceive themselves to be without color or unaffected by discrimination”²² by people of color who must operate within, and interact with, the dominant structures constructed by the included is just as important as the included needing to understand their whiteness and how it impacts their operation with and within communities of color. The law of white spaces operates on several premises, including “the silent

19. *Id.* at 16.

20. Brown space also exists and that space can be colonized, but that is another subject.

21. *See, e.g.,* Morton v. Mancari, 417 U.S. 535, 553 (1974) (finding that differential treatment of Indians is not based on race); Norman Vieira, *Racial Imbalance, Black Separatism, and Permissible Classification by Race*, 67 Mich. L. Rev. 1553, 1579 (1969) (noting that not all Federal Indian law can be explained on a racially neutral basis).

22. Goodrich & Mills, *supra* note 18, at 17.

assertion of the superiority of the norm,"²³ which includes "the silencing of questions of race as in any sense pertinent to knowledge, or teaching, of law."²⁴ This silencing of questions of race extends to preparation for practice and in practice itself. In the larger cultural context, the authors discuss the threat posed by discourse "that makes race conscious and institutionally visible" among whites.²⁵ Silence is also used to exclude, through indifference, noncommunication, suppression of information, and nonrecognition.²⁶ These authors conclude that increased "knowledge of the meaning and experience of race,"²⁷ and more "conscious[ness] of its significance to white privilege, and its corresponding discrimination" make the dominant majority increasingly threatened.²⁸ Because this "knowledge threatens to disrupt the system of benefits that whites enjoy, greater efforts are made to suppress the relevance of race to knowledge, and to silence the questioning of culture or the dynamics of inside and outside."²⁹ Also, "[d]enial, tacit consensus, externalization and subjectification . . . operate to mask strategies of domination."³⁰

While the article by Professors Peter Goodrich and Linda Mills helps explain what happens in the legal institutions of knowledge, it also helps in understanding what happens in the practice of law in legal systems of justice. As such, the law of white spaces not only helps to explain the resistance to teaching critical race lawyering approaches, but also the challenges to utilizing critical race approaches in the practice of law. As I consider the four questions in respect to critical race praxis, acknowledging the existence of the law of white spaces is the starting point for putting critical race lawyering into practice.

I telephone my sister that evening to find out what has happened in court. She tells me that they did not bring my son to court, and that the court will reschedule the hearing. How could they forget to bring him to court, I wonder. When I visit my son, he tells me that they transported him to court late. The court reschedules him for the next week. I am in court for his next hearing. The incarcerated wear bright orange wardrobes. All are men of color of various ages. The courtroom is busy with people—public defenders, assistant district attorneys, private attorneys, clients, family, and friends of the defendants present that morning. My sister and niece are there already. My son has decided to plea, and in exchange for his plea to the charges of DWI and no license, the losing traction citation is

23. *Id.*

24. *Id.* at 18.

25. *Id.*

26. *Id.*

27. *Id.* at 19.

28. *Id.*

29. *Id.*

30. *Id.* at 20.

dropped. My son has completed a jail treatment program, and has computed the mandatory ninety-day sentence for DWI and looks to that date for release, of which he has by now served more than half. He enters his plea and the court turns to his record and comments on it. The court determines that it needs a pre-sentence report, specifically a recommendation on his eligibility for the newly established Native drug court. No finality today. As we talk over breakfast, my sister tells me that before I got there the court dismissed several cases, all involving the same charge as my son's. She comments on the more favorable treatment accorded those not presently incarcerated and represented by private attorneys. I think of the older black man in bright orange wardrobe removed from the courtroom for talking loudly to the court clerk because he wanted to know something. There was also the middle-aged Asian man who needed an interpreter. The court became impatient with the amount of time the sidebar attempt to communicate with his attorney was taking and set him up for a jury trial rather than wait for the outcome. He was also wearing bright orange. What will happen next, my sister wants to know. Sentencing, I reply. How much time can he be sentenced to? Ninety days for DWI, ninety days for no license, but I add that I do not believe the ninety days for no license will be imposed. Can we speak on his behalf? Yes, sure, I say. She tells me about an article she read in the newspaper about attorneys complaining that their clients are held in jail without being sentenced. Yes, that can happen if they cannot meet bond, I say, my mind returning to the men of color in bright orange sitting together, and my son's \$5000 cash bond, which is the equivalent of a \$50,000 surety bond. I decide I will call a friend to ask some questions.

C. Approach

In this discussion of critical race lawyering, I address only the analysis of the case, I do not discuss the use of critical race theory in all areas of re/presentation,³¹ such as, for example, oral argument, interviewing, counseling, and the pursuit of extra-legal remedies or other methods of addressing disagreement or sanctioning behavior. I use parts of one client's story³² to relate an approach to case analysis,

31. Melissa Harrison & Margaret E. Montoya, *Voices/Voces in the Borderlands: A Colloquy on Re/Constructing Identities in Re/Constructed Legal Spaces*, 6 Colum. J. Gender & L. 387 (1996) (analyzing the lawyer's difficult task of re/representing the Other).

32. I do so with his express permission and with his request for anonymity. I endorse his anonymity as his lawyer. I have previously addressed the difficulty in talking about clients for other reasons associated with working within tribal communities and concerns for non-exploitation. As a lawyer, I am careful in the information shared; as a Native, I am careful because the appropriation of voice from Native peoples has an oppressive history. See Zuni Cruz, *supra* note 9, at 561-62. In giving his approval for me to discuss critical race lawyering in conjunction with his case, my client said that he thought it was important that people know what happened in his case. I understand that I tell a story about him, and that it is not his own story;

which seeks to use a community lawyering approach³³ that is conscious of race, culture, and color in the context of power. In doing so, I seek to address the panel topic and answer the questions posed by the panel topic. I relate the client's story strictly from the attorney perspective, told in the context of a critical race analysis.

The client perspective remains silenced. Silenced literally as allowed under U.S. constitutional law³⁴ and Federal Indian law.³⁵ Silenced as a method of illustrating and highlighting the attorney's role in giving voice to the client in attorney-client representation and as a mechanism for demonstrating the attorney's perspective and its role in analysis. The client voice is silenced as illustrative of the silencing of voice by the American system of justice. The client can be silenced whether by virtue of a protective civil right in criminal matters, or due to the technicality of a system that requires individuals to be represented to participate in the system and so as not to jeopardize themselves. The silence of the client emphasizes the privilege and the responsibility given the attorney. It is important to recognize, however, that voicelessness or silence does not carry the same meaning in all cultures,³⁶ and through the silence of the client's voice, we can more readily feel the impact of silence and consider its complexity.

rather, it is his lawyer's story. He has a different story. Likewise, I relate a story about my son. It is not the same story he will tell. Client stories are theirs and their voices are their own. The barriers to telling our client's story in the court, lead us to tell our stories of them in our scholarship. I believe that there are always ethics to be observed with respect to obtaining the consent of a client to use his story in scholarship. *But see* Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 *Geo. J. Legal Ethics* 1 (2000) (suggesting that client consent should not always be a prerequisite to writing and publishing stories about cases). The ethics are incredibly complex because, although the lawyer's voice is not the client's voice and the client's voice is not the lawyer's voice, the lawyer's voice in scholarship is derived from the client's situation. Indigenous peoples have long been the "subject" in academic discourse, and Indigenous academics and others raise critical issues in exploring solutions and in critiquing effects of such academic discourse. *See, e.g.*, Luke Eric Lassiter, *Authoritative Texts, Collaborative Ethnography, and Native American Studies*, 24 *Am. Indian Q.* 601 (2000); Evan B. Towle & Lynn M. Morgan, *Romancing the Transgender Native, Rethinking the Use of the "Third Gender" Concept*, 8 *GLQ: J. Lesbian & Gay Stud.* 469 (2002). For a highly creative and collaborative approach to telling the client and case story by nonlawyers, see Don Monet & Skanu'u (Ardythe Wilson), *Colonialism on Trial, Indigenous Land Rights and the Giksan and Wet'suwet'en Sovereignty Case* (1992) (using the authors'—a cartoonist and a journalist/client—drawings and commentary as well as testimony and arguments from the trial to tell the story of a three and one-half year trial on the land rights of the Giksan and Wet'suwet'en).

33. *See* Zuni Cruz, *supra* note 9, at 557, 565-90.

34. *See* U.S. Const. amend. V.

35. *See* Indian Civil Rights Act, 25 U.S.C. § 1301(4) (2000).

36. *See generally* Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 *U. Mich. J.L. Reform* 263 (2000).

II. HOW DOES, OR MIGHT, CRITICAL RACE THEORY INFORM LAWYERING PRACTICE?

In order to move to a legal analysis which factors race, culture, and color into the case, the lawyer must be willing to move the client beyond the realm of the individual. In the practice of Indian law, this is almost reflexive because the identity of Native peoples as Indian lies in their relationship with their indigenous nation. One is Indian because of the mutual relationship with one's indigenous people. Seeing an individual as belonging to a community immediately broadens the analysis of any legal matter. Racial and cultural issues imbedded in a legal problem emerge more clearly in the context of community; and understanding the community can help the lawyer understand the client much better. Consciousness of race and culture requires the practitioner to place the individual within a larger community and consciousness of space, whether white or brown, and assists in understanding the barriers that may be encountered and must be addressed in the representation. This improves the analytical skill of the practitioner. The legal knowledge one brings to an analysis may be sufficient to adequately represent an individual in our adversarial legal system, but a critical race analysis allows one not only to represent, but also to understand and place the client in a larger justice context and hopefully address justice issues.

Knowledge of critical race theory brings awareness that in the context of power, race, color, and culture impact the legal situations of clients. There is always more to a client's legal situation than the technical legal matter.

A young Indian man comes to our attention when his grandmother calls our clinic asking if we can help him. She relates that he has been incarcerated for several weeks under the authority of the tribal court and she wants us to represent him before the court. We agree to interview him. We discover our twenty-one-year-old potential client has two different aggravated assault charges pending against him. On the most recent of the charges, he has changed his plea from not guilty to guilty and has been sentenced. We agree to represent him on the earlier charge he has remaining before the tribal court. Within days of our entry of appearance and request for continuance to prepare for trial, he is transferred to federal custody for federal prosecution of the same aggravated assault charge he has just pled guilty to and is serving a sentence for at the tribal level. Our client is facing double jeopardy, but under Federal Indian law, which has usurped tribal criminal jurisdiction for certain "major" crimes, his double jeopardy is legal. Indians committing "major" crimes in Indian Country against another Indian may legally be tried twice for the same crime.

From this fact pattern, several initial factors emerge when one considers the information using a critical race analysis. The facts

reveal and raise more pertinent factors than necessary to defend a criminal charge. These include the operation of family, sovereignty, the history of Federal Indian policy, insider/outsider status, Indian community norms, and socialization as significant factors. These factors, at least from a critical race perspective, are germane to the representation of the Native client and the overall analysis of the case. Some of the factors are directly related to the actual representation, others to the understanding of the case and to situating the client within the context of his community as an aspect of community lawyering within indigenous communities.

This initial analysis emerges in part from the theory that connects race, history, and the law with the colonial underpinnings found in critiques of Federal Indian law.³⁷ The importance of insider/outsider status discussed extensively in critical race scholarship applies in a different context to those inside communities of color and is critical to representation of individuals belonging to these communities by those outside the community.³⁸ Narratives of individuals invariably connect to narratives of family and community and are a part of the storytelling, narrative, and voice present in critical race scholarship.³⁹ If we fail to see and respect these connections in our clients' stories, we fail to see our clients in their proper context. Still other factors, while somewhat removed from the actual representation or strategy of the case, are embedded in the legal position the client finds himself in and they are therefore important to representation in a "big picture" analysis of the current issues that Native peoples find themselves struggling with. Here I would include the struggle that is going on for the "soul" of Indian justice in tribal communities. The struggle continues today between the imposed American norms of justice in

37. See generally Williams, *supra* note 10. See also Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (1994).

38. Alice G. Abreu, *Lessons from LatCrit: Insiders and Outsiders, All at the Same Time*, 53 U. Miami L. Rev. 787 (1999) (discussing the duality of insiders/outsiders); Bryan McKinley Brayboy & Donna Deylle, *Insider-Outsider: Researchers in American Indian Communities*, 39 *Theory into Prac.* 163 (2000) (insider research and "outsider" insider research).

39. Delgado, *supra* note 18, at 818. "Recently, outsider jurisprudence has been developing means, principally 'counterstorytelling,' to displace or overturn... comfortable majoritarian myths and narratives. A well-told counterstory can jar or displace the dominant account." *Id.*; Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 Cal. L. Rev. 61, 80 (1996) (on the lack of "due process of legal storytelling" in the legal system); Robert L. Hayman, Jr. & Nancy Levit, *The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality*, 84 Cal. L. Rev. 377 (1996) (reviewing Richard Delgado, *The Rodrigo Chronicles: Conversations About America and Race* (1995)) (addressing the specific potential of storytelling). The keynote address by Gerald López at this symposium and his powerful personal narrative regarding his work and its connection and relationship to his brother, his family, and his community serves as an example of the power these relationships hold in the development of critical race theory scholarship.

Native communities, communities that still operate on indigenous norms that emerge in the peoples' everyday social reality, and arise from a separate consciousness.⁴⁰

Later, still other factors emerged, such as generational trauma,⁴¹ alcohol and its particular position in the lives of Native peoples,⁴² political and social dynamics within the Indian community,⁴³ law, and the ever present dynamic of race. In this case, a significant factor was not only the race, but also the tribal membership status of everyone involved, from the victims, to the police, the prosecutor, the lawyers, to the judge.

Generational trauma, the oppressive force of alcohol in the Native community, modern Native communities, and the operation of law within these communities are only a small part of Native post-colonial and Native studies scholarship, both domestically and internationally.⁴⁴ Intersectionality within indigenous communities is an emerging area of discussion.⁴⁵

The courtroom limits us and challenges us in terms of the narratives and stories we can tell within its strictures, but the stories we can develop in our analysis of our client's legal situation are limitless. Critical race theory and techniques inform our analysis in the practice of law. We practice in white space that resists this approach and that emphasizes the individual to the extent of preventing seeing the patterns of discrimination against the collective⁴⁶ (practice in brown space surrounded by white space). By engaging in an in-depth analysis of the individual case, when one pulls back, one cannot help but see the pattern hidden in the whole.

40. See generally Zuni Cruz, *supra* note 9; Robert Yazzie, Healing as Justice: The American Experience, at <http://www.usask.ca/nativelaw/publications/jah/yazzie.html> (last visited Feb. 19, 2005); James (Sa'ke'j) Youngblood Henderson, *Exploring Justice As Healing* (last visited Feb. 19, 2005), at <http://www.usask.ca/nativelaw/publications/jah/henderson2.html>.

41. Eduardo Duran & Bonnie Duran, Native American Post-Colonial Psychology (1995); Maria Yellow Horse Brave Heart & Lemyra M. DeBruyn, *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 Am. Indian & Alaska Native Mental Health Res. 60 (1998) (historical unresolved grief of American Indians and its link to current social pathology in Native peoples), available at <http://www.uchsc.edu/ai/ncaianmhr/journal/eightwo.pdf>.

42. See Duran & Duran, *supra* note 41, at 93-156; Yellow Horse Brave Heart & DeBruyn, *supra* note 41, at 69-70.

43. See Duran & Duran, *supra* note 41, at 27-30; Yellow Horse Brave Heart & DeBruyn, *supra* note 41, at 70.

44. See, e.g., Marie Battiste & James (Sa'ke'j) Youngblood Henderson, Protecting Indigenous Knowledge and Heritage, A Global Challenge (2000).

45. See, e.g., Bonita Lawrence, *Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview*, 18 Hypatia: J. Feminist Phil. 3 (2003); Andrea Smith, *Not an Indian Tradition: The Sexual Colonization of Native Peoples*, 18 Hypatia: J. Feminist Phil. 70 (2003).

46. We also practice in "brown" space, in tribal court systems; this brown space is entirely surrounded by white space, exerting a pressure that can be felt.

I contact my friend to discuss the legal aspects of the case raised by my sister's questions; we talk and options appear. After my son's sentencing, bond is discontinued by the court. It is possible, however, to ask the court that bond be set, to argue that bond be set at a lower amount, and to seek his release pending sentence. However, that would mean that he would have to serve time imposed after sentencing if he were released. It is possible to appeal the court's action on the bond, though the court's jurisdictional period would probably lapse by the time an appeal was heard. I ask about the practice of addressing the judge in that particular court, and receive some suggestions around that: testimony from a family or a friend of the family is common during sentencing. When I visit my son next, I speak with him about the possibility of pursuing release pending sentencing. He declines, saying that he would rather get through serving the sentence he knows will be imposed, but this time he speaks of serving 180 days, not 90. "The court is not interested in anything I had to say, I know the court will give me the full time," he says flatly. I disagree, ninety days for no license? "Didn't you see what happened in the court?" he asks. "Your aunt and I want to address the court on your behalf," I say. "Good luck" is his reply. "Didn't you see what happened in court?" he asks again. I'm beginning to wonder what additional perspective he had that day, besides being several feet closer to the bench. Maybe because he was wearing bright orange he could feel or hear something I could not. "Well, we want to say something," I say. "The court moves so fast," he observes. "You're right," I agree, remembering the impatience of the court, maybe it will be better to write letters.

The grandmother's call is the first word we receive of the case. She is worried; she is worried about the situation, about her grandson, about his need for help. Legal issues touch entire families, and in indigenous communities, they reach beyond the nuclear family to the extended family and beyond. We hear from a lot of female relatives in our work. Later, we discover that the legal issue of aggravated assault arose from a familial dispute, a domestic dispute between two brothers. This explains a bit more. It explains the grandmother's agitation, but the agitation went deeper because of the second charge that has already gone through the tribal system and is clearly on its way to the federal system—the federal system with its harsher penalties, the federal system with its infamous prison system, the federal system far removed in so many ways from the tribal community. And then we meet with our client. He is a young twenty-one, a high school graduate who had done well academically. We learned that he had recently changed his pleas on some of the charges against him. Pleas of guilt are numerous in Indian country before both tribal courts and before federal courts. This arises from the clash between the American legal norm of silence, of presumption of innocence, and of burden of proof and the indigenous norm of accountability, of voice, and of justice as healing and mending. Before we can begin our

investigation, he is gone, released to the federal authorities, under the Major Crimes Act of 1885,⁴⁷ in 2004.

III. IS THERE SUCH A THING AS “CRITICAL RACE LAWYERING”
AND, IF SO, HOW MIGHT IT DIFFER FROM OTHER STYLES OF
LAWYERING?

Critical race lawyering in Indian country is community lawyering that takes into account race, culture, and color in the context of power. Does it exist? Yes. Does it differ from other styles of lawyering? Yes. It differs from traditional lawyering in that the race, color, and culture of the client, the lawyer, and all parties including the judge, are factored into the lawyering; it differs in that the client is not attended to without taking into consideration the context of the client’s community. It differs in that it is much easier to handle only the legal issue the client brings and send the client on his way than it is to struggle with a broader analysis of the client’s legal problem, to factor that into the legal solution and then to build on that experience in the case and in future representation so as to reach broader justice goals for the community. It is not easy, and it is not painless to either the client, the practitioner, or others in the justice arena.

I use two case studies in clinical teaching that impart important lessons in critical race lawyering. One of these cases is that of Gordon House.⁴⁸ The *House* case is a New Mexico case that began with a collision on Christmas Eve in 1992. Gordon House is a Navajo man from Thoreau, New Mexico,⁴⁹ who was charged with vehicular homicide, causing great bodily injury. His drunk and reckless driving led to a freeway collision between his truck and a passenger car, which caused the death of Melanie Cravens and her three daughters aged five, seven, and nine, and critical injury to her husband Paul.⁵⁰ The accident caused a media sensation from the night of the collision until

47. 18 U.S.C. § 1153 (2000).

48. The Gordon House case is one that could and should be thoroughly analyzed; here, I seek only to raise specific points. The case was challenged all the way to the Supreme Court of New Mexico, and denied certiorari by the U.S. Supreme Court. *State v. House*, 25 P.3d 257, 260 (N.M. Ct. App. 2001). However, Gordon House has filed an application for a writ of habeas corpus, which is currently before the U.S. District Court for the District of New Mexico. See Petitioners First Memorandum of Law in Support of His Application for a Writ of Habeas Corpus Pursuant to 28 USCA § 2254, *House v. Bravo* (No. CIV 02-0178) (arguing that the Fourteenth Amendment prohibits the state from obtaining a venue transfer that “deprives a defendant of any practical possibility that members of his race will be in the venue from which the petite jury is selected”).

49. Ed Asher, *Milford Vents Fury on Man Who ‘Killed My Babies,’* Albuquerque Trib., June 16, 1994, at A1.

50. *Key Developments in the Case Against Gordon House*, Albuquerque J., June 19, 1994, at A1 [hereinafter *Key Developments*].

the third trial of Gordon House, when he was convicted.⁵¹ House was driving east in the westbound lanes of Interstate 40, west of Albuquerque at the time of the collision.⁵²

The other case is that of Patrick Hooty Croy. The Croy case arose in California in 1978 when Patrick Hooty Croy was charged with the homicide of a police officer, attempted murder of several other officers, and robbery.⁵³ His initial defense was that of diminished capacity.⁵⁴ The incident began with an altercation in a store where Croy and four of his relatives had stopped to buy beer. A police unit chased the group to the small Croy cabin where twenty-seven police officers surrounded them and a shootout ensued, resulting in the death of one police officer and injury to another.⁵⁵ Croy was convicted of murder, attempted murder of two police officers, assault on four officers, and robbery, resulting in a death sentence.⁵⁶ On appeal, all charges but conspiracy and assault were overturned and he received a new trial. At the retrial in 1990, Croy was acquitted.⁵⁷

A study of these two cases reveals distinct approaches taken by their defense counsel.⁵⁸ In the *House* case, defense counsel successfully argued against the first-degree depraved mind murder charges originally sought by the prosecutor as racially motivated because House was a Navajo and the accident victims were white.⁵⁹ Additionally, the intense media coverage of the trial, the prejudices of the jury pool,⁶⁰ and the comments of the District Attorney characterizing the accident as a "massacre" revealed the undeniable racial tension present in the case. Defense counsel worked with House's family and his Navajo community, other tribal communities, his client's Native spiritual beliefs, and his client.⁶¹ The trial was initially moved from Albuquerque because of the intense pre-trial

51. House was tried three times. The first trial ended in a conviction for DWI and a mistrial on the vehicular homicide charges, the second trial ended in a mistrial, and the third trial ended in a conviction after the trial was moved from Taos, New Mexico to Las Cruces, New Mexico. *House*, 25 P.3d at 260.

52. *Id.* at 259-60.

53. See Denise Ferry, *Capitalizing on Race and Culture: The Croy Acquittal and Its Application to Future Minority Cases*, 19 Cal. Att'y's for Crim. Just. 48 (1992).

54. *Id.*

55. *Id.*

56. *Id.*

57. See *id.*

58. Ray Twohig represented Gordon House in the three trials, two of which were held in Taos, New Mexico and the third in Las Cruces, New Mexico. He also represented House on appeal. The California Appellate Legal Project successfully overturned Croy's conviction. Croy was represented by Tony Serra and won an acquittal upon retrial. See *id.*

59. *Key Developments*, *supra* note 51.

60. Ed Asher, *Prejudices Emerge in Jury Selection for House*, Albuquerque Trib., June 8, 1994, at A1.

61. This information comes from discussions and presentations Twohig has participated in at the invitation of the author.

publicity to Taos, and then again to Las Cruces. The demographical difference between Taos and Las Cruces in terms of Native population is significant.⁶² The stereotype of the drunken marauding Indian was inescapable. The collision resulted in the overhaul of DWI and liquor laws, including lowering the level of presumed intoxication to .08 percent and increased penalties for repeat drunk drivers and those whose level of intoxication is .16 or higher⁶³ in the state of New Mexico. The intense focus on DWI continues today.⁶⁴

The Croy case demonstrates the expansion of the cultural defense, which is typically associated with the state of mind of the defendant to mitigate sentencing, to the use of culture in the entire case.⁶⁵ In Croy, the defense used the historical relationship between the Indian community and the white settlers to explain the actions of Croy and his companions in running from the police and refusing to surrender to them. The existing racist relationship between the white population and the Indian population in the county was incorporated into the case. The miscommunication and mistrust and prejudice were used to show the misunderstanding that led members of the

62. U.S. Census Bureau, Population by Race in Both Dona Ana County and Taos County New Mexico, available at http://factfinder.census.gov/servlet/DTTable?_bm=y&context=dt&-ds_nameDec_2000 (last visited Feb. 23, 2005). The 2000 census shows that Dona Ana County is 1.4% Native American while Taos County is 6.5% Native American. *Id.* At the time of trial, the 1999 census showed that Dona Ana County had a 0.8% Native American Population. *Id.*

63. *Key Developments, supra* note 51.

64. Five bills have been introduced into the 2005 New Mexico Legislative Session so far this session. They include: S. 157, 47th Leg., 1st Sess. (N.M. 2005) (establishing a Native American substance abuse subcommittee of a behavioral health planning council to include DWI issues), available at <http://legis.state.nm.us/Sessions/05%20Regular/bills/senate/SB0157.pdf>; H.R.J. Memorial 42, 47th Leg., 1st Sess. (N.M. 2005) (establishing an interim legislative committee to study the San Juan county DWI treatment program, 30% of whose participants were less likely to be rearrested after five years following arrest than nonparticipants), available at <http://legis.state.nm.us/Sessions/05%20Regular/memorials/house/HJM042.pdf>; S. 587, 47th Leg., 1st Sess. (N.M. 2005) (prohibiting the retail sale of alcohol to persons convicted of DWI for a period of five years), available at <http://legis.state.nm.us/Sessions/05%20Regular/bills/senate/SB0587.pdf>; H.R. 472, 47th Leg., 1st Sess. (N.M. 2005) (lowering the legal alcohol concentration level for persons with a prior DWI conviction), available at <http://legis.state.nm.us/Sessions/05%20Regular/Bills/House/HB0472.pdf>; H.R. 502, 47th Leg., 1st Sess. (N.M. 2005) (increasing penalties for DWI offenders), available at <http://legis.state.nm.us/Sessions/05%20Regular/Bills/House/HB0502.pdf>. Examples of some recent articles in the Albuquerque Journal, New Mexico's leading news source, include the following: *Ex-Judge Spends Two Days at Home Under House Arrest*, Albuquerque J., Feb. 5, 2005, at E2 (sentencing of a prominent convicted DWI offender); *Graduation Day*, Albuquerque J., Jan. 21, 2005, at B4 (Native American Drug Court graduation); Martin Salazar, *Liquor Splits Española*, Albuquerque J., Nov. 28, 2004, at B4 (disproportionate liquor outlets).

65. Ferry, *supra* note 53, at 48.

community to believe that the Indians had planned the confrontation with the county sheriff's department.⁶⁶

History plays an important part in understanding the present situation of Native peoples. How is it that a young man should be taken from the tribal community for more punishment by the federal government after already being punished by that community? A historical understanding is probably the best companion to legal analysis in Indian country. If one looks at Ex Parte Crow Dog,⁶⁷ the precursor to the Major Crimes Act, one sees that the federal government was not satisfied with the traditional punishment imposed for murder and so enacted law to take jurisdiction over several major crimes occurring between Indians. However, indigenous domestic nations began to adopt the American system of justice, enacting criminal laws that provided for punishment by imprisonment and fines, and so, today, Indians can be incarcerated for a lesser or even the same offense by both their tribal community and the federal government. The federal government has in recent years taken great interest in violent crime, family violence, and child sexual abuse in Indian country.⁶⁸ Likewise, the tribes' interest in pursuing these crimes is understandable. The Tribal nation is in fact the community that experiences the disruption. But the individual who experiences the dual prosecution cannot help but feel the burden. The Major Crimes Act not only takes the individual out of the community but places the judgment of the wrongdoing in a framework outside the community that experienced the wrong. Why? To insure proper punishment? To insure the punishment is harsh enough? Is it that the tribal justice system cannot be trusted to accord the rights that justify dispensing greater punishment than one-year imprisonment and a \$5000 fine? Or because there is a risk a tribe might not want to impose long imprisonment sentences on its own people? I believe it is all of these, and this factor in the case brings back the critique of the Major Crimes Act anew in my mind. But other thoughts surface, the high number of Native men involved in the federal system, the seriousness and stigma of federal prosecution, and conviction for our young client. The interrelationship between

66. *Id.* at 49.

67. 109 U.S. 556 (1883).

68. See *Indian Child Protection and Family Violence Prevention Reauthorization Act of 2003: Hearing on S. 1601 Before the S. Comm. on Indian Affairs*, 108th Cong. (2003), available at <http://www.usdoj.gov/otj/s1601testimony.htm>; see also *Contemporary Tribal Governments: Challenges in Law Enforcement Related to the Rulings of the United States Supreme Court: Hearing Before the S. Comm. on Indian Affairs*, 107th Cong. 68 (2002) (statement of Tracy Toulou, Director, Office of Tribal Justice), available at <http://www.usdoj.gov/otj/tracytestimony072002.htm>; *Justice Department's Fiscal Year 2002 Budget to Support Initiatives in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 107th Cong. 741 (2002) (statement of Tracy A. Henke, Principal Deputy Assistant Attorney General, Office of Justice Programs), available at <http://www.usdoj.gov/otj/statementTracy03-05-2002.htm>.

the federal proceeding and the tribal proceeding becomes evident after we next see our client in federal custody.

There are over five hundred indigenous nations in the United States. These nations share similarities, but their differences matter when one is working within the tribal justice system. One's ability or perhaps agility in understanding and respecting insider/outsider status is of tremendous significance when working within tribal communities.⁶⁹ The tribal legal systems, unlike the state and federal systems which are linked together, are autonomous not only from one another, but from the state and federal systems. Navigating and interpreting insider/outsider status is delicate work, nevertheless the dynamic of one's status enters into the work of a lawyer in Indian country.

My client and I do not come from the same indigenous community. Though we are both Native, he is an insider to his community and I am an outsider. He is an insider and so I rely on him and his family for the help and understanding that I need and that comes only from them as insiders to the community. I consider the different layers of my outsidership. I am of another indigenous community, I am a professional lawyer licensed by the state, I don't live or work in the community, I don't speak the Native language of that community. Every other actor in the courtroom is an insider in the sense that they are employees or members of the tribe, or both, except for me. But there are various degrees of outsidership. The judge, though an insider, is not a member, not uncommon as tribes seek to hire law-trained individuals, Native and non-Native. Some believe this is a mark of neutrality, and I remind myself neutrality is highly valued in non-Indian dispute resolution. Being evenhanded is valued in Native communities and can be found in principled members of the community who recognize their responsibility in deciding issues in small communities where all are related in some manner; neutrality in this sense being more principled than a neutrality based simply on lack of relationships. So my client is not known to the judge in the classic sense that causes some discomfort in small communities: prior knowledge of his family lineage, place in the community, reputation, and general behavior in the community. But ironically, he is known to the judge in ways that cause lawyers discomfort in any court: prior appearances before the court, existence of a record, appearance before the court of close family members. I am a lawyer who wants to protect my client with a lawyer's understanding. I am not in a state or federal court; I am in a tribal court with its own law and process (and interpretations of each), different from other courts. I understand this, yet the tribal criminal system is modeled on the American criminal system. This is the first time my client has ever been represented in

69. Zuni Cruz, *supra* note 9, at 570 & n.30, 571 & tbl. B, 577-78.

tribal court and my lawyer instincts in criminal defense mode guide me. I resist being the classic outsider lawyer. I am determined to rely on the instincts of my insider client, but I cannot escape being the outsider lawyer. Outsiderness, in itself, can yield burdens which must be taken into consideration in representation. It is difficult to determine the impact of being an outsider on the outcome, so it is important that I have clear guidance from the client on the representation. What are the boundaries of the outsider in internal Native justice systems? From a tribal nationalist perspective the answer is: inside the parameters set by those internal to the Native community. And yet what are the results of lawyering and judging and prosecuting without consciousness of such boundaries for those who are not internal to the community? What are the results without clear parameters being set by those internal to the community? What are the results when the parameters are being set by those who come from outside the community? This was not my community, I was very aware of this. This was my client's community and I was prepared to help him seek from his own community what he believed in; I had no idea how hard that would prove to be, so I had to constantly remind myself that he, not I, lived in the community and he, not I, was subject to the justice he was trying to obtain. Constant, unrelenting consciousness of outsider status is an aspect of critical race practice in indigenous communities. They are not our communities, even if they are like our communities; they are unique Indian communities. Working within my own community, I realize, helps me to understand this as an absolute principle.

There are many forces at work within communities and communities of color must be considered in their unique aspects. There are both positive and negative forces, which it is helpful to understand. Oppressed communities have dynamics that have been identified mostly in negative terms, and it is important to remember the positive dynamics of communities of color. The theory of inter-generational trauma⁷⁰ and its operation within indigenous communities is worthy of specific consideration with respect to lawyering. It has been employed both in the fields of health and social services, but has great significance in lawyering and tribal justice studies as well.⁷¹ The general theory links the history of indigenous peoples, such as the loss of land, to the impact that traumatic history had on successive generations of indigenous nations. It traces the trauma of the negative history on the behaviors of indigenous peoples

70. See Duran & Duran, *supra* note 41; Yellow Horse Brave Heart & DeBruyn, *supra* note 41.

71. I first encountered the theory in the late 1980s when I attended a conference for social workers in Indian country. Dr. Anne Latimer presented a three-hour workshop on the application of the theory within indigenous communities. The usefulness of the theory in terms of the tribal justice system was apparent to me, then a trial tribal court judge for a small indigenous nation.

from generation to generation to explain the present behaviors of those within indigenous communities today.

Beginning and Ending Song⁷²

Part 1

Yes, you Honor, Judge.
 Yes, you Honor, Judge.
 Yes, you Honor, Judge.
 You Honor, you Honor, Judge.
 Now I ask you, Judge.
 Now I ask you, Judge.
 Now I ask you, Judge.
 I ask you now, Judge.
 Where's my land, Judge?
 Where's my land, Judge?
 Where's my land, Judge?
 Where is my land, Judge?
 Where's my life, Judge?
 Where's my life, Judge?
 Where's my life, Judge?
 Where is my life, Judge?
 Where is my life, Judge?

I grew up in a family of seven. We lived on the reservation and then on two different Indian agencies among other Indian families of many different tribes, one in Colorado and one in Nevada.⁷³ I experienced my own Indian family, and different Indian families on the reservation, off the reservation, and at Indian agencies growing up. I understand from my own experience the generational trauma of indigenous peoples, the impact of family, and family choices of sobriety, or the lack thereof. Family history has a direct impact on the lives we lead. The same family history can affect us differently. Bad family history can have the predictably bad effects or surprisingly no visible effect on the siblings who experienced the same or similar history. Understanding an individual client in relation to family and to the indigenous community is important in work with indigenous peoples. The identity of an indigenous person is bound up in the identity of the collective, that is, the indigenous peoples from whom the individual descends. It is necessary to look and to see and to understand how the experience of the collective impacts the experience of the individual. Inter-generational trauma helps to explain and put in perspective destructive behaviors and has been used by the healing professions to better understand, address, and assist in altering the behaviors.

72. See generally Simon J. Ortiz, *Out There Somewhere* 135 (2002).

73. See Evelina Zuni Lucero, *On the Tip of My Tongue, An Autobiographical Essay*, in *Here First, Autobiographical Essays by Native American Writers* 247 (Arnold Krupat & Brian Swann eds., 2000). My sister, Evelina Zuni Lucero, describes our experience as a family in her autobiography. As she inscribed in my copy, “[t]he same blood within us”

Inter-generational trauma has its place in the work of the legal profession working with indigenous peoples and within indigenous domestic nations as well. In looking at our client's legal issue, it was readily apparent that the underlying problem was alcohol abuse. If the issue of alcohol was or could be addressed by courts, courts might be effective sites for solving many problems. But what order can a court give to address the problem? Perhaps we should be spending more of our time and effort and resources in helping people embrace sobriety than in the criminal justice system, which seeks to jail, fine, and order sober lives for actions committed when the individuals were not sober. Bad acts are punished, but there seems to be little emphasis on encouraging sobriety, except as a part of punishing bad acts related to a person's lack of sobriety. For oppressed communities, there is a challenge in a call for sobriety, but there is likewise a challenge to the communities' institutions to recognize and view their role in encouraging sobriety rather than to stay and remain in the helpless position of punishing rather than confronting the issue. This is one of the larger justice issues in the case.

I tell my sister that letters to the court seem like the better option. I want the court to hear the family's voices, to consider what we have to say. My sister, her husband, and I write separate letters. As I write my letter I realize I am, in the eyes of the court, going to be viewed in the role of mother, not the most persuasive voice for her son. I know I will feel better saying something than I will remaining silent. It is more important that I speak than what I speak. To me, the underlying issue is alcohol. Sobriety is a precious gift, I tell my son. It is a valuable thing, not to be freely surrendered, because it can slip out of one's control and be lost. Earlier, I've told him he has to be careful because we've seen this happen in the lives of our family, on both sides of his family. Sobriety is resistance for indigenous peoples and of critical importance to us. Alcohol, in particular, represents oppression in the lives of indigenous peoples. I want him to recognize oppression and not be fooled by anything that would have him participate in his own oppression. We punish the lack of sobriety, while doing little to promote sobriety.

While this Essay is focused on representing the individual, and not on representing either the community or the individual as representative of a group of individuals within the community, which is the subject of another article, community issues invariably and inevitably arise in the representation of the individual, and these individual justice stories highlight them for the community. The uneasy meeting of American and indigenous justice within the tribal system is a site of ambiguity and promise. It is a site of tremendous import to indigenous nations.

I have served as a tribal court trial judge or as an appellate court justice within the Pueblo communities for over twenty years. I have appeared and practiced in tribal courts over the same span of

time. Tribal justice is a focus of my work. For the most part my experience is in the small, self-contained, indigenous Pueblo communities. Tribal courts have a ubiquitous history. Pueblo communities had indigenous methods of resolving disputes prior to the appearance of Spanish, Mexican and later, Anglo-American legal systems. There are traces of Spanish and Mexican influences still, but the most predominant intrusion is, and continues to be, Anglo-American. The courts are not completely indigenous dispute resolution mechanisms, entirely created and springing from within, instead these courts are or have been affected by imposed/imported/adopted influences by the successive colonizing forces—affected by a form of legal imperialism. Absent the influence of traditional law and traditional leaders, these court systems, like Anglo-American systems, seek to address only the singular, and specific legal matter brought before the court. There is a flaw in this method because it ignores basic premises of indigenous thought in resolving disputes: addressing the underlying cause of the discord and healing—healing for the individual, among the disputants, and within the community. The criminal process, which is affected by the Indian Civil Rights Act's admonishments of protected rights of individuals in criminal proceedings,⁷⁴ obscures the traditional law of healing, the measure of kindness and mercy mixed in with the discipline that humbles, but seeks to help, to support, to forgive, to provide guidance and instruction. One year of incarceration and/or a \$5000 fine is the maximum to which tribes are sternly limited. This is the extent of the last set of civilizing instructions provided to tribal governments under the Indian Civil Rights Act ("ICRA") of 1968⁷⁵ at the end of the termination era. Incarceration and fines cannot be the extent of justice provided in indigenous communities whose peoples are in need of healing from oppression from without, from horizontal violence from within, and from the ravages of addiction. It is bitter irony that tribes today must incorporate the traditional law and methods that the civilizing influences of Anglo-American law and order (including courts and codes of law) were to have brought to them, to reinsert basic notions of justice recognized as integral to their way of living, thinking, and being. The civil rights protections set forth in ICRA, such as notice, ability to have the accused, accuser, and witnesses present, and the ability to have another speak on one's behalf were not unknown in traditional dispute resolution and provided notice and opportunity to be heard and protected against the problems of hearsay. But the protections against the power of the state to incarcerate were not so easily incorporated into an indigenous dispute resolution system that did not know incarceration as a punishment, even for the gravest offense of murder. The existence of the state as a legal entity, the burden on the state to prove beyond a reasonable doubt, the right

74. 25 U.S.C. § 1302 (2000).

75. *Id.* §§ 1301-1341.

of the accused to remain silent, introduced foreign elements into a system in which resolution of disputes were between the injured and the injurer, where speech and accountability and not silence was valued. It is no wonder there is an ill-fit between Anglo-American style justice, law and process, and indigenous peoples. It is the square peg of western thinking forced in the round hole of indigenous thought, and there is great work that must done where the two intersect.

We represent our client in tribal court. The sovereign indigenous nation's interest in prosecution is undeniable. Yet because the potential impact outstanding charges and punishment could have in how my client's federal time was served, the tribal criminal charges took on a serious dimension, beyond the typical implications of misdemeanor charges.

IV. WHAT IS THE ROLE OF THE LAWYER IN HELPING CLIENTS OR COMMUNITIES REALIZE RACIAL JUSTICE GOALS?

What is a racial justice goal? Is it vindication on an individual basis? Is it recognizing a discriminatory pattern or practice and ending it? Is it giving voice? Is it restoring dignity, restoring self-determination? If racial justice is any or all of these, then these are all within the lawyer's role, but it is also in recognizing that winning in an adversarial judicial system is not the only way to win.

My client's "record" indicates he pled guilty or no contest to all the previous charges that had been brought against him, save one, which was dismissed. The charge I represent him on was only the second charge he had ever pled not guilty to and had not subsequently changed to a guilty or no contest plea. I submit there is a socialization to accountability that operates in indigenous societies that is not necessarily compatible with the underlying principles of American criminal law—innocence until guilt is proven, and silence. The socialization to be accountable cuts against the grain of the bedrock principles of Anglo-American criminal law in two ways. One, the socialization to be accountable requires that one takes responsibility for having a role in disruption, whether one is technically innocent or guilty of any or all of the elements of any specific crime; and two, it requires that you speak to the disruption, not hold silence. This socialization leads to guilty pleas by Native defendants who do not understand or internalize the Anglo-American concept of "innocence" under Anglo-American criminal law, which does not only mean "I did nothing at all wrong," but "I did nothing wrong because the state must meet its burden of proof beyond a reasonable doubt that I committed all the elements of a crime of which I am accused." This socialization also moves Native defendants to voice rather than to silence, to explain their role, their actions or their motives to the court.

I would like to report that I was successful in the defense of my client. But, I was not. Nevertheless, there can be winning in losing. To challenge and to resist can in themselves lead to satisfaction that resistance was registered and that the client voiced opposition to the charges, to the interpretation of the law, and to the ultimate decision. Sometimes giving voice, challenging, and resisting can be goals in themselves. Sometimes resistance and challenge at the individual level, despite losing, can lead to gains at the community level, it can lead to change over the long term, it can lead to future victory.

At sentencing, the pre-sentencing report indicates my son is not eligible for the Native American drug court. The court does not specifically acknowledge our letters, but seems to do so indirectly when addressing my son and admonishing him that the court is not his mother and will not follow him around asking if he has his license on him. A sense of dismissiveness is conveyed by the court's statement that all mothers are concerned for their "hijos," Spanish for sons. The use and application of the lone Spanish word to an Indian man by the English-speaking court is out of place. Later, I realize the statement is dismissive of the supportive, mutual responsibility between parent and adult child in our community that I sought to explain, obviously unsuccessfully, in my letter to the court. By the time of his sentencing, my son has already been incarcerated for 110 days. We hope for time served. His lawyer addresses his return to school, my son addresses his withdrawal from school as a result of his arrest and incarceration. I too, in my letter have asked the court to allow him to return to school. The court addresses his "extensive criminal record," his previous citations for driving without a license and then imposes ninety days for DWI, already served, and ninety days for driving with no license, exercising the full extent of the court's sentencing jurisdiction, stating that it was not swayed by his argument that the court take into consideration an opportunity to return to school versus more incarceration. School is a reward, and not as important as imposing the seriousness of not driving without a license on him through incarceration, the court informs him. The only one of all of us present who is fully expecting this is my son. The court also imposes fines, which it provides will be served with time. I learn later that this will add an additional thirty-two days to this sentence for a total of 212 days. My sixteen-year-old niece cries while my sister, her husband and I try to understand why he is given the full time outside the court. I didn't know he had a record, his uncle says. He has some charges I wasn't aware of, but his record is primarily traffic citations, and failure to appear on those traffic citations, I said. Why does he have so many traffic citations? he asks. Well, you remember his first car, the late model blue Cadillac, and then he had the Saab when we were in Tucson, with its cracked front windshield, and now the black truck with a camper. It was the way he drove and he is always misplacing or losing his license, but it is also his greater likelihood of being stopped because of the time, his location, what he is driving, being young, male, and brown. He fits a profile. I have

never been stopped for the cracked windshield on the Saab, but I'm a non-threatening middle-aged woman. We warned him about how the traffic offenses could all work against him someday. My sister says that the newspaper has been critical of the court's treatment of DWI cases and wonders about the influence of the criticisms on the front page the day before his hearing. I have no answers, really, and I wonder if I were somewhere in between denial and acceptance, surprised at the critical race analysis that comes so easily. Is that mother or lawyer speaking? My niece's reaction is that both of innocence and of a tender heart. My son is like an older brother to her. She expresses a deep mourning we all feel.

Beginning and Ending Song⁷⁶

Part 2

Fifty days jail.

Fifty days jail.

Fifty days jail.

You say I'll stay and pay, Judge.

Fifty dollar fine.

Fifty dollar fine.

Fifty dollar fine.

You say I'll pay or stay, Judge.

You say I'll pay, Judge.

You say I'll pay, Judge.

You say I'll pay, Judge.

You say I'll pay or stay Judge.

You say I'll pay or stay, Judge.

No, I say, Judge.

No, I say, Judge.

No, I say, Judge.

No way I'll pay or stay, Judge.

No, I say, Judge.

No, I say, Judge.

No, I say, Judge.

No way I'll stay or pay, Judge.

Yes, you Honor, Judge.

Yes, you Honor, Judge.

Yes, you Honor, Judge.

You honor no honor, Judge.

Yes, Your Honor, Judge.

Yes, Your Honor, Judge.

76. See generally Ortiz, *supra* note 72, at 157.

Yes, Your Honor, Judge.
You honor no honor, Judge.

You honor no honor, Judge.

The question, what is the role of the lawyer in helping clients or communities realize racial justice goals, recognizes two levels of justice goals, those on the individual level and those on the broader community level. Generally one informs the other, that is, the realization of racial justice for an individual client can translate into justice for the community and the realization of a racial justice goal for a community can translate into justice for the individual. But this is not always the case. Achieving racial justice for an individual can remain an isolated victory, and this is where the lawyer's role in tying individual victories to larger racial goals, in order to broaden the impact, can come into play. Likewise, a victory for a segment of the community may not be recognized as a goal for the entire community and this is where an understanding of the community is critical. But what if the client doesn't prevail? What is obtained then? Sometimes the client's perseverance through the process, the client's exercise of rights, and challenge of the system doesn't win a victory for him. But it may help the lawyer see something in the next case, prepare for the next opportunity. And sometimes clients can gain in other ways, in understanding oppression and resistance, in securing sobriety, in understanding and appreciating their support system, in strengthening themselves spiritually, mentally, and physically. Losing can also point out flaws in the system, which may be addressed by other mechanisms besides the legal process, such as legislative reform, social movement, or artistic endeavors.

V. WHAT DUTIES DO ATTORNEYS SEEKING SOCIAL CHANGE OWE TO THEIR CLIENTS?

Attorneys seeking social change owe their clients and their clients' community (or communities) understanding and respect. It is hard to imagine any disagreement with this statement; however, it is, of course, much easier to say than it is to accomplish. When one seeks to lawyer factor race, color, and culture in the context of power, one must be willing to deal with one's own race, color, and culture in the context of the attorney-client relationship as well as within the context of the case. It is important for attorneys to understand how their race and culture enter into the lawyer-client relationship, how the racial and cultural aspects of their clients and their clients' community affect the legal problem. It is also important that the attorneys consider how to bridge the racial and cultural differences with their clients, so that they do not interfere with the representation. Because of the tremendous diversity among indigenous peoples, this is a basic lesson.

In seeking social change, the attorney's ability to see and to understand the impediments to change is crucial. This is where theory informs practice. White space and white privilege are important theories to understand in the context of their natural opposition to bringing race and culture and color into the courtroom. Likewise, understanding brown space, those places where people of color dominate, is critical.

Doing no harm to those one is seeking to help through the practice of law to advance social change is a high standard. It means not participating in perpetuation of oppression, in replication of those things the attorney is seeking to remedy, be it discrimination, racism, sexism, oppression, or powerlessness. In privileged, elite positions as lawyers, scholars, and law professors, whether we occupy or move in white or brown space, or both, we have a high standard to meet if we are working to eliminate all those oppressions critical race theory so aptly identifies.

What duties do I owe to my client in seeking to make our courts more responsive to those they serve? Not to crowd his concerns out with my own agenda, not to jeopardize his individual matter to further a larger social agenda, but rather to add his experience to working towards that end.

When I told my son I was thinking of using his story in this Essay, and asked him how he felt about this he said, go ahead, it happened, it's over, as long as it won't hurt me when I'm a lawyer and a law professor. I believe in him, and I believe it will make him a better lawyer and a better law professor. When I asked my client whether I could use his story, he said, it's okay, I think people need to hear what happened. These young men are the heart of Indian country, what happened to them is important, but what happens to them is the story of our future.

CONCLUSION

Critical race lawyering in Indian country does exist. I seek only to articulate what I see, but mine is but one voice among many. In this work, as we peel back one layer of understanding of our situation, another reveals itself.