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Lawyering for Groups: The Case of American Indian Tribal Attorneys

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LAWYERING FOR GROUPS: THE CASE OF AMERICAN INDIAN TRIBAL ATTORNEYS

Kristen A. Carpenter* & Eli Wald**

Lawyering for groups, broadly defined as the legal representation of a client who is not an individual, is a significant and booming phenomenon. Encompassing the representation of governments, corporations, institutions, peoples, classes, communities, and causes, lawyering for groups is what many, if not most, lawyers do. And yet, the dominant theory of law practice—the Standard Conception, with its principles of zealous advocacy, nonaccountability, and professional role-based morality—and the rules of professional conduct that codify it, continue to be premised on the basic antiquated assumption that the paradigmatic client-attorney relationship is between an individual client and an individual attorney. The result is a set of rules and a theory of law practice that often ill fit the practice of group lawyers.

This Article explores the theoretical and practical challenges of group lawyering through the study of lawyers for American Indian tribes. We believe that a focus on tribal lawyers furthers two important goals. First, the individualistic impulse of the dominant theory of law practice is so ingrained that it forecloses the possibility of challenging and imagining genuine group-based alternatives. In order to truly see the shortcomings of the Standard Conception and conceive of alternatives to it, one must start not with an abstract theory of group representation, but with a detailed study of the meaning, needs, interests, and realities of actual groups and build a corresponding theory from the ground up. Second, the story of tribal lawyers, an important narrative of both the legal profession and of tribes, is still largely untold. This Article thus aims to challenge the homogeneity of the Standard Conception of law practice and to begin the process of imagining group-based alternatives to it, while at the same time telling part of the story of tribal lawyers.

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INTRODUCTION

Today’s scholars of the legal profession are asking profound questions about what changes in the practice of law mean for global governance, including issues of corporate power, state sovereignty, and human rights.¹ This conversation necessarily entails consideration of the many forms of client organization, and indeed human association, comprising our profession and society. And, yet, the conversation is stymied by the absence of theoretical and descriptive accounts capturing the phenomenon of lawyering for groups. Instead, the professional obligations of lawyers remain largely conscripted to a model of individual lawyering, envisioning a lawyer representing a singular person or entity in litigation, that fails to

1. See, e.g., David B. Wilkins & Mihaela Papa, *The Rise of the Corporate Legal Elite in the BRICS: Implications for Global Governance* 36 B.C. INT’L & COMP. L. REV. (forthcoming 2013) (manuscript at 1–3).

account for developments in the practice of law.² This gap in the scholarship, in turn, reflects insufficient treatment of group lawyering in the rules regulating the profession.

In this Article, we explore the challenges of group lawyering through the study of lawyers for American Indian tribes—groups that have, for hundreds of years, engaged lawyers in their multifaceted, intergenerational struggles to survive the forces of conquest and colonization. Today, there are 566 federally recognized Indian tribes, most of which engage lawyers as advocates in their quest for political self-determination, cultural and religious freedom, and socioeconomic well-being.³ Indian tribes share some common characteristics with other groups and entities, namely that they are collective associations of individuals often united by history, kinship, language, and culture, and bound together by social, economic, and political concerns. On the other hand, as we describe below, tribes are also different from many groups in the United States in that they are recognized as sovereigns, with reserved rights of governance over their territories and citizens.⁴ Despite the extensive and rich experiences of the lawyers who represent tribes, these stories have for the most part escaped notice in the professional responsibility literature.

We believe that a focus on tribal lawyers furthers two important goals. First, the individualistic impulse of the basic model of law practice and its emerging alternatives is so ingrained that it forecloses the possibility of challenging and imagining genuine group-based alternatives. In order to truly see the shortcomings of the basic model and conceive of alternatives to it, one must start not with an abstract theory of group representation, but with a detailed study of the meaning, needs, interests, and realities of actual groups and build a corresponding theory from the ground up. Second, the story of tribal lawyers, an important narrative of both the legal profession and of tribes, is still largely untold. This Article thus aims to challenge the homogeneity of the standard conception of law practice and to begin the

2. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (describing the (then) relatively new phenomenon of lawyering for groups).

3. For background on American Indian tribes and their contemporary situations, see ROBERT T. ANDERSON, BETHANY BERGER, PHILIP P. FRICKEY & SARAH KRAKOFF, *AMERICAN INDIAN LAW: CASES AND COMMENTARY*, 1–13 (2008). Like this and other sources, our Article uses the terms “American Indian” and “Native American” interchangeably.

4. See COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 4.01 (Nell Jessup Newton ed., 2005). Beyond the foundational concept of Indian tribes as political sovereigns within the U.S. legal system, there is a great deal of scholarship considering various legal, political, sociological, racial, cultural, and religious aspects of Indian tribes vis-à-vis other groups. While we cannot replicate these arguments here, we refer the reader to the following articles and sources cited therein. See Kristen A. Carpenter, *Real Property and Peoplehood*, 27 STAN. ENVTL. L.J. 313, 344–63 (2008) (drawing from political, sociological, and legal theory on groups, associations, and political entities to describe American Indian tribes as “peoples” entitled to treatment as such in litigation about property and religion); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 807–38 (2007) (situating the “sovereign” status of tribes within domestic and international literature on minority groups and human rights).

process of imagining group-based alternatives to it, while at the same time telling part of the story of tribal lawyers.

We should be clear at the outset that the story we tell is neither exhaustive nor general; each of the several hundred tribes has its own experience, culture, and objectives in legal representation, which we can only begin to evoke here. Moreover, we do not wish to overstate the role of lawyers in the historic survival or contemporary revitalization of Indian tribes, much of which is attributable to the resilience of tribal members and lifeways rather than the law or legal profession. Nevertheless, there are lessons to draw from our analysis of tribal lawyering, and they are broader than simply identifying a list of potential revisions to particular rules—for example, to include references to cultural literacy as an aspect of attorney competence (though that would be a good start). Rather, we argue that the story of tribal lawyers reveals an overarching need to create space for competing diverse visions and professional ideologies to emerge alongside the dominant ideology of the standard conception—ideologies that will in turn inform and shape the Model Rules of Professional Conduct and the role of lawyers for both groups and individuals.

Finally, to the extent that American individualism, as a broad-based social and cultural phenomenon, is the cause of lawyers' rules of conduct and professional ideologies, revising the rules and rethinking the ideology that informs them may accomplish little. Similarly, to the extent that the subordination of American Indians reflects deep historical, political, racial, and economic factors, any changes to the legal profession may promise only modest remedial effect. We believe, however, that professional rules and roles not only reflect but also shape and inform the conduct of American lawyers and that challenging the dominant standard conception may result in more effective and empowering lawyering for groups, including Indian tribes.

In Part I, we describe the "Standard Conception," the dominant professional ideology that undergirds the American Bar Association's (ABA) Model Rules of Professional Conduct, as based on a model of individual lawyering that fails to reflect the challenges of lawyering for groups, and further explain why the example of tribal lawyering is an illuminating example. In Part II, we provide a short history of American Indian tribal lawyering, situating the role of the contemporary tribal attorney against the history of American Indian experiences in the legal system and analyzing a rich set of examples from the American Indian Law literature describing and theorizing the role of the tribal attorney. In Part III, we explore how the basic features of the Standard Conception—that is, zealous advocacy, nonaccountability, and professional role-based morality—as well as specific rules of conduct that codify it sometimes fit poorly with the representation of Indian tribes and other groups. In Part IV, we synthesize the lessons learned from our study of tribal lawyers and the legal profession and compare and contrast them with the experiences of other lawyers for groups, including government, public interest,

community, and class action attorneys. Our analysis generalizes some of the lessons from tribal lawyering and other instances of lawyering for groups to expose the limitations of the Standard Conception and the rules of professional conduct. Finally, we identify and describe new professional rules and statements emerging from Indian Country, suggesting that these models begin to contemplate aspects of effective representation, client empowerment, and personal identity as they inform tribal representation and may enlighten the practice of group lawyers more broadly.

I. LAWYERING FOR GROUPS: A PRACTICE IN SEARCH OF A THEORY

Historically, the practice of law involved an individual client represented by an individual attorney.⁵ And while practice realities have evolved—clients now include corporations, communities, governments, and causes; lawyers include law firms of all sizes and sorts; and representation includes litigation, negotiation, mediation, lobbying, and other activities—the theory of law practice and the regulation of lawyers have been slow to catch up. Theories of law practice and lawyers’ professional identity by and large assume and address the role of individual lawyers. And the regulation of lawyers, notably the ABA’s Model Rules of Professional Conduct (Rules) and the state rules based on them, continue to, if only implicitly, assume and regulate individual lawyers, representing individual clients in litigation.⁶

Within this framework, the dominant theory of law practice is the Standard Conception, a role-morality theory based on the twin principles of zealous advocacy and lawyers’ nonaccountability for the goals they help clients bring about. The Standard Conception treats individual lawyers as the focus of inquiry, has little to nothing to say about law firms, and assumes, often implicitly, individual clients. The leading critics of the Standard Conception, both those who accept role morality and argue about the details of its guiding principles and those who reject role morality in favor of common morality, all similarly assume the lawyer and client to be individuals.⁷

It is therefore not surprising that the vast majority of the Rules that implement and give life to the Standard Conception purport to regulate the conduct of individual lawyers assumed to be serving individual clients. The sole exception when it comes to lawyering for groups is Rule 1.13, titled *Organization As Client*, providing: “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”⁸ Rule 1.13 then addresses substantive and structural aspects

5. See generally David B. Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, in *EVERYDAY PRACTICES AND TROUBLE CASES* 68 (Austin Sarat et al. eds., 1998); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

6. See *infra* Part III.C.

7. See *infra* Part III.A.

8. MODEL RULES PROF’L CONDUCT R. 1.13(a) (2012).

of representing organizational clients, which largely involve ascertaining the “best interests” of the organization and observing the chain of “authority” in communications with officers.⁹ In these and other ways, the Rule reduces the multiplicity of persons and interests potentially involved in organizational representation into a single “legal entity” model.¹⁰ Put differently, Rule 1.13, the only Rule that purports to deal with clients who are not individuals, largely likens organizations to individuals for purposes of articulating the lawyer’s professional obligations.

There is, of course, legal precedent for treating organizational clients like individuals. The U.S. Supreme Court long ago held that corporations are legal persons¹¹ and, as a practical matter, it is helpful for lawyers to be able to rely on corporate hierarchies (such as the authority of the chief executive officer) and norms (like the business judgment rule) to shape their representation of clients who observe them.¹² Yet deeming corporations legal persons such that they can enter into binding legal contracts, sue, and be sued is very different than assuming either that corporations are legal persons for all purposes or that groups of people are akin to corporate entities. As scholars have begun to discuss, some client groups, such as governments, communities, and causes, are not organizations in the corporate sense, and representing them requires a more nuanced approach than merely treating them as such.¹³ These and other groups raise major questions for legal representation—including the challenges of determining the group’s objectives, ascertaining who speaks for the group, and addressing divergent constituencies within it—that remain largely unaddressed by the rules pertaining to individual clients.

As the legal profession continues to grow, some scholars have criticized the “one-size-fits-all” Standard Conception and regulatory approach adhered to by the organized bar and its leaders. With so many lawyers doing so many different things, it is hard to see how the myth of the “One Bar” can be sustained. Any professional ideology and rules of professional conduct purporting to suit everybody may end up being a poor fit for many, and a more contextual framework may be needed. Our claim, however, is a related but slightly different one. We argue that not only are the Standard Conception and the Rules that built on it—with their core commitments to individualism, autonomy, and the pursuit of self-interest—sometimes a poor fit for group lawyers, but that they also tend to obscure, if not

9. *Id.* R. 1.13(b).

10. *Id.* R. 1.13 cmt. 1 (defining an organizational client broadly as “a legal entity”).

11. *See Santa Clara Cnty. v. S. Pac. Ry. Co.*, 118 U.S. 394 (1886); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

12. *See, e.g.,* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005).

13. *See infra* Part IV.

altogether preempt, important questions about the rule of law and the role lawyers play in contemporary society.¹⁴

To explore and substantiate our argument about the need for a theory of group lawyering, we turn to the context of tribal lawyers. By the term “tribal lawyers,” we mean lawyers for Indian tribes, and particularly for the hundreds of federally recognized tribes that maintain a political relationship with the United States. We do not focus on lawyers for individual Indians, Indian-owned businesses, or tribal judges except to the extent they are implicated by the question of tribal lawyering. The historical, cultural, and political contexts in which tribes engage lawyers reveal the limitations of a model of professional responsibility that treats groups as faceless individuals, without any particularized consideration of the group’s internal structure or values, its relationship with the society around it, or its aspirations for the future. As we describe below, some of the issues raised by tribal lawyering are specific to American Indian experiences and others are illuminating to broader questions of lawyering for groups.

American Indian tribes had, by the time Europeans arrived in the “new world,” already been living according to their own traditional laws and cultural norms for thousands of years. Tribal leaders, who traditionally performed internal dispute resolution and external diplomacy functions, found themselves on the front lines in treaty negotiations with European nations in the seventeenth century. Some of tribes’ first experiences with Anglo-American lawyers came in mid-nineteenth century litigation over treaty rights, with mixed results.¹⁵ Since the 1800s, Indian tribes have been hiring lawyers to represent them in matters local, national, and international, wherein the tribe is nearly always, in one way or another, fighting for its survival in a difficult legal landscape. Today, tribal governments, particularly through their executive and legislative branches, engage lawyers to represent the tribe on a variety of matters, from litigation and business dealings with third parties, to internal legal reform and institution building. Tribes have formed offices of in-house counsel¹⁶ and attorneys general, whose responsibilities may be enumerated in the tribal

14. For an evocative theoretical discussion of the role of lawyers in promoting democracy, see, for example, Aziz Rana, *Statesman or Scribe: Legal Independence and the Problem of Democratic Citizenship*, 77 *FORDHAM L. REV.* 1665 (2009).

15. See generally MATTHEW L.M. FLETCHER, *THE EAGLE RETURNS: THE LEGAL HISTORY OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS* 13–55 (2012) (describing the role of traditional leaders or *ogemuk* in certain Anishinabe societies); ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800* (1997) (describing the early treaty experiences of Haudensaunee, Delaware, Shawnee, Fox, Cherokee, Creek, and other tribes).

16. See, e.g., *The Tulalip Tribes of Washington Office of Reservation Attorney*, TULALIP TRIBES, <http://www.tulaliptribes-nsn.gov/Home/Government/Departments/LegalReservationAttorney.aspx> (last visited Apr. 19, 2013) (“The mission of the Office of Reservation Attorney is to support, defend and advance the interests of the Tulalip Tribes of Washington by providing quality legal services to tribal policy makers and staff.”).

constitution or legislative code.¹⁷ When it comes to standards of representation, many tribes have adopted their own rules of professional responsibility dictating that tribal lawyers should serve their clients much as any other lawyer would in the organizational model of Rule 1.13.¹⁸

As Judge William Canby has succinctly explained, today's tribal attorney is "often a major influence on tribal affairs."¹⁹ It is against this backdrop that we pose the question of whether the Rules' approach of analogizing tribes to individual clients based on the Standard Conception theory of law practice, is a sensible one. Many tribal rules of professional responsibility borrow from the ABA's Model Rules, and for the most part they initially seem to work relatively well in guiding lawyers who represent tribes.²⁰ And yet complex challenges of culture, history, constituency, agency, representation, and identity arise. First, the very understanding of the role of the lawyer as zealous advocate in an adversarial system may be culturally and politically antithetical to tribal societies in which the operative norms favor the collective well-being of the group and values such as harmony and balance. Furthermore, the assumption that the client seeks to pursue its autonomy and advance its goals in an adversarial fashion to the exclusion of others does not always reflect tribal objectives.

Second, as described in greater detail below, any legal representation of American Indian tribes confronts the weight of history in which law has often been used to legitimize egregious moments of European conquest and American colonization—such as the dispossession of Indian lands, relocation of Indian people, and destruction of Indian religions and

17. See, e.g., *AG Opinions*, CHEROKEE NATION, <http://ag.cherokee.org/Opinions.aspx> (last visited Apr. 19, 2013) ("Article VII, Section 13, of the Cherokee Nation Constitution states: There shall be created an office of the Attorney General. The Attorney General shall be a citizen of the Cherokee Nation, admitted to practice law before the highest court of any state of the United States. The Attorney General shall represent the Nation in all criminal cases in the courts of the Nation, and in all civil actions wherein the Cherokee Nation is named as a party, and shall have such other duties as the Council may prescribe by law. The Attorney General shall be appointed by the Principal Chief and confirmed by the Council for a term of five (5) years. The Attorney General shall be authorized to designate such prosecutors and other assistants as deemed necessary to carry out the duties of office, and may only be removed from office in conformance with Article XI of the Cherokee Nation Constitution.").

18. See, e.g., Rob Roy Smith, *The Council's Counsel: The Ethics of Representing Tribal Councils*, MORRISSET, SCHLOSSER, JOZWIAK, & SOMERVILLE (July 2006), http://www.msaj.com/ISB%20CLE%20July2006_06.htm.

19. See WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* 72 (2009).

20. Compare *In re the Model Rules of Professional Conduct*, A-CV-41-92 (Navajo May 17, 1993), available at <http://www.navajocourts.org/NNBARulesConduct.htm#A-CV-41-92> (adopting ABA Model Rules with amendments, additions, and exceptions), with *In re the Adoption of Rules for Attorneys, Application to Bar, Discipline, and Oath*, No. JAT AD-99-01 (Cherokee Jan. 29, 1999), available at <http://www.cherokeecourts.org/Portals/73/Documents/CNBA/JAT-AD-99-01.pdf> (adopting the State of Oklahoma's Rules of Professional Conduct as a "minimum standard" of conduct for lawyers admitted to practice before the Cherokee courts but noting that if there is a conflict between the Oklahoma courts' interpretation of those rules and the Cherokee courts' interpretation, "the Cherokee law shall prevail").

culture.²¹ During various periods of federal Indian policy, the injection of Anglo-American law into tribal communities has been an explicit tool of government “assimilation” programs designed to eradicate tribal cultures and governing structures.²² For all of these reasons, the Rules’ reference to the lawyer as an “officer of the legal system” may render the lawyer an outsider or even a threat to the tribal existence and raises questions about the lawyer’s accountability to the client community.²³

Yet, in today’s period of tribal “self-determination,” in which tribal people are revitalizing and decolonizing all aspects of their governments and institutions, the position and responsibilities of the tribal lawyer have also begun to change. Tribal lawyers are now called on to assist with not only treaty rights litigation but also negotiating the contours of government-to-government relationships with states and the federal government; economic development and financial matters; the process of internal legal reform, including the revision of tribal codes and constitutions, and the rebuilding of tribal dispute resolution institutions; and even human rights advocacy in international forums. Through these activities, which constitute the “decolonization” of federal Indian law and the “revitalization” of Indian communities, tribes are identifying the core competencies and values they seek in legal representation and taking the initiative to license and hire attorneys who meet those standards.²⁴ At this transformative time, a rich understanding of the role of tribal lawyers is very much needed.

In fact, many of the challenges faced by tribal lawyers in daily practice may not be addressed by the Rules. Pursuant to Rule 1.13, for example, a tribal lawyer is expected to represent her client and, in this case, “the client of the tribal attorney is the entire tribe, not its individual members”²⁵—a prescription that flows directly from the entity model described above. Yet, tribes have multivalent goals and interrelated constituencies that may transcend a model based on corporate clients. As a practical matter, for example, the attorney may report to the tribe’s executive or legislative branch, but sometimes individual tribal members may believe that the tribal attorney should represent them. While this problem is often resolved by

21. See generally ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).

22. See, e.g., JUSTIN B. RICHLAND, *ARGUING WITH TRADITION: THE LANGUAGE OF LAW IN HOPI TRIBAL COURT* 8–21 (2008) (describing the history of federal Courts of Indian Offenses as instruments of federal control over Indian behavior, and challenging the legacy concerned with the contemporary attempt to transform these courts into tribal justice systems).

23. See CANBY, *supra* note 19, at 73 (“Because the tribal attorneys are often not tribal members or even Indians, they must to some degree be considered an outside influence affecting tribal self-government.”).

24. See, e.g., RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE* 32 (2009) (describing the Navajo Nation Supreme Court’s authority over the Navajo Bar Association, an organization that licenses attorneys and lay advocates who practice law in the Navajo Nation).

25. See CANBY, *supra* note 19, at 69.

explanation of the client identity or referral to other counsel, sometimes it is more fraught. The tribal attorney may be the only attorney located on or near the reservation community. In some tribes, subgroups of tribal members may claim to represent the tribe in some capacity; indeed, the government recognized by the United States may operate alongside a traditional leadership structure in which clan mothers, village leaders, or religious priests have a role in decision making.²⁶ Moreover, for decades, tribes could only hire lawyers through contracts approved by the United States—even in cases against the United States—creating conflicts of interest endemic to the relationship. In these cases, the Rules' simplistic answer to the question of "whom does the attorney represent" does not always provide sufficient guidance to the complicated issues faced by the tribal attorney.

Thus tribal lawyers face questions about whom or what entity or constituencies they represent. And these are not the only questions that arise in the context of tribal lawyering. How are concepts of loyalty, liability, fairness, and confidentiality construed in the particular tribal culture?²⁷ How should tribal lawyers balance their obligation to limit the tribe's liability (for example, by defending the tribe's inherent sovereign immunity) with the commercial demands of financial investors and civil rights claims of tribal citizens? How should a particular tribal client's interests be construed against the situation of Indian tribes across the United States? How should the tribal attorney envision her role against the backdrop and structure of federal Indian law that makes tribes both extraconstitutional entities and critical players in the experiments of American conquest and colonialism, democracy, and pluralism?²⁸

While some of these questions are particular to the experience of Indian tribes as extraconstitutional entities maintaining indigenous cultures against a history of colonization, others illustrate broader tensions in group lawyering, in which the existing model's individualistic approach fails to capture the challenges of group representation. Scholars have long noted shortcomings in the model of "corporate" representation, which, following

26. See, e.g., *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 710 (2d Cir. 1998) (describing a challenge to the federal government's recognition of a tribal representative over the objection of other community members with traditional authority); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 877 (2d Cir. 1996) (describing traditional and newer forms of governance operating among Seneca communities).

27. See *Navajo Nation v. Crockett*, 7 Navajo Rptr. 237 (1996) (stating that an employee with a grievance should "talk things out" with supervisors before turning to external channels of review and coercive redress).

28. See generally Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 436 (2005) ("[T]he more fundamental problem [of federal Indian law] is that, without an interrogation of the immense normative problems of a constitutional system created by colonialism, the answers generated by the [Supreme] Court are doomed to reflect a ruthless pragmatism consistent with even the modest respect for tribal prerogatives that traditional federal Indian law sometimes reflected in appreciation of our colonial past. At bottom, we have every right to be confused about both the internal incoherence of Indian law and the asymmetry between that body of doctrine and its external analogs.").

Rule 1.13, focuses on hierarchical decision-making processes and declares a lawyer's allegiance to the interests of the entity defined to be the interest of its shareholders only to yield in reality to the authority and interests of the executives who hire and fire lawyers.²⁹

Even more troubling, the individualistic nature of the basic model of lawyering casts a long shadow on emerging alternative models of group representation. The model of the "government lawyer" serving a singular entity, for example, belies many other possible ways to envision the "client" of the government attorney, including (1) the public interest; (2) the government as a whole; (3) the branch of government in which the lawyer is employed (e.g., executive, legislative, or judicial); (4) the particular agency or department in which the lawyer works; and (5) the responsible officers who make decisions for the agency.³⁰

Similarly, "cause lawyering," in which the group is conceived in terms of a particular normative position, can be challenging because it requires assessing the cause and ascertaining who speaks for it—moves that may or may not account for group dynamics and values.³¹ Lawyering for "minorities"—typically seeking civil rights for groups subordinated by race, gender, class, religion, sexual orientation, or other status—may struggle to appreciate and give voice to the varied experiences, values, identities, and beliefs of group members.³²

In many settings, the instruction that the lawyer must serve her client in the traditional model fails to answer some of the difficult questions. Instead, it serves to only start a conversation: for purposes of the client-attorney representation, who and what is the client? What does it mean to represent a group of individuals, interests, and values? What does it mean to be a group lawyer? On these questions, the Rules are often silent. Usually, when they are, the theoretical literature exploring theories of law practice, professional ideology, and role morality can be of use to practicing lawyers in providing a context against which to assess their professional conduct, duties under the Rules, and role obligations as well as necessary guidance regarding the exercise of professional judgment.³³ But to the extent that these theories are still grounded in the paradigm of the individual lawyer representing an individual client, they fail to illuminate

29. See *infra* Part IV.A–B.

30. See Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 796, 797 n.41 (2000) (citing Roger C. Cramton, *The Lawyer As Whistleblower: Confidentiality and Government Lawyer*, 5 GEO. J. LEGAL ETHICS 291, 296 (1991)).

31. See, e.g., ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 279–90 (2013).

32. See GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 24 (1992) (critiquing a particular approach to cause lawyering as "regnant lawyering" and preferring, instead, a model of community lawyering, especially in low-income communities); KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER 4 (2012) (challenging the conventional view that the civil rights lawyers of the 1960's represented a "unified minority group").

33. See MODEL RULES OF PROF'L CONDUCT pmbl. (2012).

key questions in group lawyering, such as the many questions that confront lawyers for Indian tribes.

Put differently, we argue that lawyering for groups is not only a practice without a theory, but to some extent, a practice not knowing it lacks a theory. Indeed, we assert that in purporting to apply to all lawyers—group lawyers included—the dominant Standard Conception obscures the need to develop a theory of law practice and rules of conduct that fit lawyering for groups. Ultimately then, perhaps lawyering for groups can be better described not as a practice without a theory, but rather as practice stuck with an ill-fitting yet powerful theory that would benefit from additional reflection, including consideration of alternatives that have begun to emerge both in practice and in the literature.

II. A SHORT HISTORY OF AMERICAN INDIAN TRIBAL LAWYERING

This part provides a historical overview of American Indian experiences with lawyers, with two aims in mind: first, to introduce some of the foundational rules and structures of Indian law, and second, to highlight the role of lawyers in developing the field. While this history is deep and broad, we do not aim to provide exhaustive treatment, but rather to highlight key moments with relevance for our later discussion of contemporary American Indian tribal lawyering.

A. Origins

Traditionally, Indian tribes had leaders and representatives for internal and external matters.³⁴ As Matthew Fletcher writes about early Anishinabe communities, each band or group of families was represented by an *ogemuk* whose authority derived from success at activities such as warfare, hunting, or singing, and who secured their power through service to the community.³⁵ In other instances, leadership may have been inherited among certain lineages, societies, or families.³⁶ In many tribes, leaders with skills of oratory, knowledge of tribal law, and other indicia of community legitimacy were charged with representing the town, village,

34. While most tribes had terms for “leader,” it is less clear that they had “lawyers.” An interesting project would be to assess how various tribes describe lawyers in their own languages. In the Cherokee language, the noun for “lawyer” is “*ditiyohihi*,” a word that is related to the verb “*atiyohiha*” or “he is arguing.” DURBIN FEELING, CHEROKEE-ENGLISH DICTIONARY 59, 207 (1975); see also Matthew L.M. Fletcher, *Dibakonigowin: Indian Lawyer As Abductee*, 31 OKLA. CITY U. L. REV. 209, 209 n.1 (2006) (noting that in the Ojibway language “*dibakonigowin*” means “[j]udgment undergone or received”).

35. See FLETCHER, *supra* note 15, at 14–15 (citing Benjamin Ramirez-Shkwegnaabi, *The Dynamics of American Indian Diplomacy in the Great Lakes Region*, 27 AM. INDIAN CULTURE & RES. J. 53 (2003)).

36. See, e.g., GELYA FRANK & CAROLE GOLDBERG, *DEFYING THE ODDS: THE TULE RIVER TRIBE’S STRUGGLE FOR SOVEREIGNTY IN THREE CENTURIES* (2010) (describing that the leadership of the Yokuts—ancestors of the contemporary Tule River Indian Tribe—descended from the Eagle lineage, consistent with the role of the eagle in the tribal creation story).

band, or tribe in external relations. Leaders represented their communities in intertribal diplomacy, and negotiations concerning land, hunting, trade, war, religion, and other matters often commemorated in agreements and treaties among tribes. As with religion, subsistence practices, and social organization, leadership in many tribes was geared toward maintaining relationships among community members, observing the relationship between human beings and the natural world, and other activities geared toward the collective well-being and survival of the tribe.³⁷

It was these traditional tribal leaders, sometimes with the assistance of translators, who usually represented tribes in their seventeenth to nineteenth century treaty negotiations with European nations, colonial governments, or the United States.³⁸ And while tribes do not appear to have been formally represented by legal counsel in most treaty negotiations, they often negotiated quite successfully to retain key property and sovereignty rights, as well as obligations of protection from the United States. Yet it is also true that the treaty process was fraught with linguistic and cultural misunderstandings, as well as fraud and coercive practices by federal agents.³⁹ Notwithstanding these complicated origins, the resulting treaties were (usually) ratified by Congress, forming the basis for the legal relationship between tribes and the United States and becoming the “supreme Law of the Land.”⁴⁰

B. Power and the Legal System

When it came time to litigate Indian treaties in court, tribes were represented by counsel in cases that are also fraught with complex legacies and interpretations. In the famous case of *Cherokee Nation v. Georgia*⁴¹ in 1831, for example, the Cherokees engaged former U.S. Attorney General William Wirt to sue to enjoin Georgia from extending its laws over the Cherokee Nation, based on its claim that the state’s activity violated the Treaty of Hopewell (1785) and the Treaty of Holston (1791) between the

37. For accounts of tribal norms and cultures, see, for example, Amy Bowers & Kristen A. Carpenter, *Challenging the Narrative of Conquest: The Story of Lyng v. Northwest Indian Cemetery Protective Association*, in *INDIAN LAW STORIES* (Carole Goldberg, Kevin K. Washburn, Philip P. Frickey eds., 2011) (describing the Yurok, Tolowa, and Karuk tribes); WILMA MANKILLER & MICHAEL WALLIS, *MANKILLER: A CHIEF AND HER PEOPLE* 16–30 (1999) (describing Cherokee origins and traditions); CHARLES WILKINSON, *THE PEOPLE ARE DANCING AGAIN: THE HISTORY OF THE SILETZ TRIBE OF WESTERN WASHINGTON* 11–53 (2010) (describing the Siletz tribes).

38. See, e.g., FLETCHER, *supra* note 15, at 17–27, 44–51, 61–69 (describing the role of *ogemuk* in the Treaties of 1835 and 1855).

39. See, e.g., STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* 49–84 (2005) (discussing language and cultural differences, questions of authority and land value, use of liquor, forgery, and fraud as factors affecting the legitimacy of land sales by Indian nations to colonial governments and settlers). For additional background on the federal-tribal treaty relationship, see generally VINE DELORIA JR., *BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE* (1974).

40. U.S. CONST. art. VI, cl. 2.

41. 30 U.S. (5 Pet.) 1 (1831).

Cherokee Nation and the United States.⁴² The *Cherokee Nation* lawsuit occurred during a period of violence and instability when Georgia's citizens were increasingly threatening Cherokee life, liberty, and property. The Court dismissed *Cherokee Nation* for lack of original jurisdiction, on grounds that the Cherokee Nation was not a "foreign state" entitled to sue Georgia pursuant to Article III.⁴³ In 1832, the Cherokee Nation enlisted Wirt to raise the treaty claims again, this time in a defense of two Christian missionaries who had been arrested within the boundaries of the Cherokee Nation by Georgia authorities. Wirt won the second case, with Chief Justice Marshall holding in *Worcester v. Georgia*⁴⁴ that, as a matter of federal law, including the treaties, Cherokee Nation was an independent territory in which the laws of the state of Georgia could have no force.⁴⁵

Despite the holding in *Worcester*, politics quickly intervened, with President Andrew Jackson, Georgia, and white citizens all refusing to bend to the Supreme Court's authority.⁴⁶ In 1835, the United States induced a faction of Cherokees, opposing the elected Principle Chief and most Cherokee people, to sign the Treaty of New Echota ceding all of their eastern lands in exchange for new lands in Indian Territory (present-day Oklahoma).⁴⁷ The majority of Cherokees continued to resist, but after losing property to local militias and then being physically corralled into federal stockades, the Cherokees were relocated to Indian Territory via the Trail of Tears, a devastating experience during which 4,000 people, or approximately one-quarter of the population, died.⁴⁸

As the *Cherokee* cases begin to suggest, the relationship between Indian tribes and their lawyers has long implicated issues of the greatest magnitude. By most accounts, the Cherokees had an excellent lawyer in these cases.⁴⁹ Additionally, as described in greater detail below, the Cherokee leaders went into the litigation with their eyes wide open about the strategy, believing that an appeal to the courts was the best remaining chance of preserving the Cherokee Nation, particularly after having already petitioned the executive and legislative branches for relief. Moreover, Wirt

42. *See id.*

43. *See id.*

44. 31 U.S. (6 Pet.) 515 (1832).

45. *Id.*

46. *See* Rennard Strickland, *The Tribal Struggle for Sovereignty: The Story of the Cherokee Cases*, in *INDIAN LAW STORIES*, *supra* note 37.

47. *See id.* at 77–78.

48. These figures are somewhat contested, with "population lost" estimates as low as 2,000 and as high as 10,000, depending on the methodology. For discussion, *see* CHARLES C. ROYCE, *THE CHEROKEE NATION OF INDIANS 170–78* (1975); RUSSELL THORNTON, *THE CHEROKEES: A POPULATION HISTORY* 74 (1990).

49. Compare Matthew L.M. Fletcher, *2010 Dillon Lecture: Rebooting Indian Law in the Supreme Court*, 55 S.D. L. REV. 510, 518 (2010) (describing Wirt as "one of the most influential, well-known, and successful appellate advocates in the nation"), with Carey N. Vicenti, *The Social Structures of Legal Neocolonialism in Native America*, 10 KAN. J. L. & PUB. POL'Y 513, 518 (2001) ("It should be noted, though, that the Cherokee Nation relied for legal advice upon persons who were not members of the nation, nor sworn to any allegiance to the nation.").

did convince the Supreme Court to strike down Georgia laws threatening the political autonomy of the Cherokee Nation. From a federal common law perspective, *Cherokee Nation* and *Worcester* are arguably good precedents, establishing the status of tribes as “domestic dependent nations” subject to the authority and protection of the United States, with reserved rights of sovereignty and property. These holdings constitute some of the “foundational principles” of federal Indian law, which leading scholars have described as protecting the tribal existence.⁵⁰

Yet, as a practical matter for the Cherokees, even the best legal advocacy did not protect them from horrific losses of life, homeland, and culture during the Trail of Tears, or the intergenerational harms that ensued.⁵¹ Additionally, some critics charge that by filing the case in the “courts of the conqueror,” Wirt fatally compromised his clients’ position—and indeed the legal position of all Indian tribes to follow.⁵² Why should tribes, whose existence predated the Constitution and who did not consent to the constitutional compact, recognize the power of the Supreme Court at all? After Wirt filed these cases, these questions became largely moot and the language of *Cherokee Nation* and *Worcester*, based in significant part on nineteenth century notions of Indian racial inferiority, now defines the legal status of all 500-plus tribes in the United States.⁵³ Viewing the Supreme Court’s early Indian jurisprudence in this light, certain critics characterize the *Cherokee* cases, along with the 1823 case of *Johnson v. McIntosh*, as judicial attempts to “legitimize” American Indian conquest, against all moral and legal instincts to the contrary.⁵⁴

Given that these early cases still form the foundational principles of federal Indian law, any account of the relationship between tribes and their lawyers must acknowledge the highly charged nature of this history. From the beginning, lawyers have played a powerful role in American Indian life and even the most valiant efforts to advocate for tribes in the U.S. legal

50. See, e.g., David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1574 (1996).

51. See Chadwick Smith & Faye Teague, *The Response of the Cherokee Nation to the Cherokee Outlet Centennial Celebration: A Legal and Historical Analysis*, 29 TULSA L.J. 263, 266 (1993) (“For the majority of Cherokees, the Trail of Tears is still an open wound.”).

52. See Vicenti, *supra* note 49, at 518.

53. See ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 47–70 (2005) (identifying Marshall’s overt appeal to Indians’ alleged racial inferiority as a basis for federal supremacy in Indian affairs).

54. See, e.g., *id.* 78–79, 112. The Cherokee cases are the final two in what is known as the “Marshall Trilogy” in which the Chief Justice announced what came to be the foundational principles of federal Indian law. The first of these, *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), has also been roundly criticized. See, e.g., WILLIAMS, *supra* note 21, at 316–17 (“Johnson’s acceptance of the Doctrine of Discovery into United States law preserved the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples. . . . While the tasks of conquest and colonization had not yet been fully actualized on the entire American continent, the ordinary legal rules and principles of federal Indian law set down by Marshall in *Johnson v. McIntosh* and its discourse of conquest ensures that future acts of genocide would proceed on a rationalized, legal basis.”).

system may be perceived alternatively as courageous acts of legal resistance, insidious compliance with the colonial project, or something in between.

C. Loyalty and Conflicts

After the foundational cases, the relationship between tribes and their lawyers only became even more fraught with ethical and professional issues. In 1871, Congress not only ended treaty-making with tribes but also passed legislation requiring tribes to obtain federal approval before they could engage attorneys, even in suits against the United States.⁵⁵ Ostensibly passed to protect tribal leaders from unscrupulous professionals, this statute often delayed, impeded, and compromised Indians' access to legal services into the contemporary era.⁵⁶

Yet individuals, including several early American Indian lawyers, maneuvered around bureaucratic limitations to represent tribes.⁵⁷ Perhaps the first Indian woman admitted to practice law, Lyda Burton Conley, was a Wyandotte Indian born in 1869 near present-day Kansas City.⁵⁸ She enrolled at the Kansas City School of Law, graduated, and was admitted to the Missouri State Bar in 1902. Foreshadowing the experience of many American Indian lawyers to follow, Conley's professional work took on a very personal dimension. Despite treaty provisions to the contrary, the federal government announced in 1906 that it would lift trust restrictions on

55. See Act of March 3, 1871, ch. 120, 16 Stat. 544 (1871) (codified as amended at 25 U.S.C. § 81 (2006)) (requiring approval by the Secretary of the Interior on contracts between any person and any Indian tribe or individual Indian for the payment of money or thing of value). Congress later confirmed the requirement for secretarial approval of attorney contracts in the Indian Reorganization Act of 1934, Pub. L. No. 73-383, § 16, 48 Stat. 984, 987 (codified as amended at 25 U.S.C. § 476 (2006)). Congress finally repealed the Secretary's approval authority over attorney contracts, with certain exceptions, via the Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. 106-179, 114 Stat. 46. Thus it was not until 2000 that most tribes could hire an attorney without approval of the United States.

56. In one telling story, tribal attorney Ken Bellmard describes that when he tried to represent the Tonkawa Tribe in claims that the Bureau of Indian Affairs (BIA) had interfered with tribal elections, he had to get the same BIA to approve his attorney contract. See, e.g., Ken Bellmard, *Endeavoring To Persevere: Becoming and Being a Tribal Attorney*, 9 KAN. J.L. & PUB. POL'Y 752, 756 (2000) ("During our ongoing disputes with the BIA, it took approximately one year for the local agency office to approve my contract with the Tonkawa Tribe, whereas the individual acting as attorney for the [the political faction allegedly favored by the BIA] was approved by the BIA in a week or less.").

57. There is great debate and interest in the question of who was the "first" American Indian attorney. Of course this question is complicated by the fact that in early American history, individuals could read for the bar without being formally admitted to practice. For some early candidates, see Rennard Strickland, *Yellow Bird's Song: The Message of America's First Native American Attorney*, 29 TULSA L.J. 247, 247 (1994) (identifying Cherokee John Rollin Ridge, 1827–1867, as the first American Indian attorney). See also *The Cherokee Tobacco Case*, 78 U.S. 616, 616 (1870) (in which Cherokee E.C. Boudinot may have been both a party and attorney).

58. See Stacy L. Leeds & Elizabeth Mashie Gunsaulis, *Resistance, Resilience, and Reconciliation: Reflections on Native American Women and the Law*, 34 T. JEFFERSON L. REV. 303, 307–17 (2012).

Wyandotte land and permit the sale of the tribal cemetery to developers.⁵⁹ Conley's mother and grandmother, as well as many others were buried in the tribal cemetery, prompting Conley and her sisters to take their shotguns and protect the graves around the clock. After numerous trips to jail, Conley decided to try another model of advocacy. Taking the case all the way to the Supreme Court, Conley argued in *Conley v. Ballenger*⁶⁰ that the Secretary of the Interior should be enjoined from selling an Indian burial ground.⁶¹ Although the Supreme Court rejected her claim, Conley's passionate advocacy attracted then-Senator (and later Vice President) Charles Curtis, a Kaw tribal descendant, to visit the cemetery and introduce legislation to protect it from development.⁶²

The Wyandotte case ultimately served as the antecedent for the movement to protect American Indian gravesites, and Conley has become a hero to contemporary women. Yet, the Wyandottes' situation was also exceptional, as very few tribes in the early 1900s were fortunate enough to have a tribal member, trained as a lawyer, who could stand up so effectively for tribal rights to property and culture. This was the "assimilation" era in which the official federal policy was to eradicate tribes, convert Indians to Christianity, replace subsistence lifestyles with farming, break up reservations, and force Indians to enter mainstream society as taxpaying individuals rather than as members of Indian tribes.

More typical, and ultimately emblematic, of tribal legal experiences during the assimilation era was the case of *Lone Wolf v. Hitchcock*,⁶³ in which the Kiowa Tribe lost its challenge to the government's allotment of 2.5 million acres of tribal lands.⁶⁴ In *Lone Wolf*, the Kiowas argued that the "Jerome Agreement," in which the government had coerced or forged tribal consent to the allotment (and obtaining less than the number of signatures required by treaty), violated their Fifth Amendment rights to property.⁶⁵ The Kiowas, like the Cherokees before them, hired a lawyer with a tremendous amount of experience, former U.S. Congressman and federal judge William M. Springer—whose fees were paid both by the Indian Rights Association and by Texas cattlemen who were leasing Kiowa

59. Treaty with the Wyandotte, U.S.-Wyandot, Jan. 31, 1855, 10 Stat 1159.

60. 216 U.S. 84 (1910). The case was styled *Conley v. Ballenger* because the Supreme Court would not admit Conley to practice, forcing her to become a named plaintiff and make the oral argument pro se. Conley could not find an attorney who would move for her admission to the Court. See Kim Dayton, *Trespassers, Beware! Lyda Burton Conley and the Battle for Huron Place Cemetery*, 8 YALE J.L. & FEMINISM 1, 23–27 (1996).

61. See *Conley*, 216 U.S. at 88.

62. See Dayton, *supra* note 60, at 26–27.

63. 187 U.S. 553 (1903).

64. *Id.* at 568 (upholding the power of Congress to abrogate a treaty and allot the lands of Kiowa tribe).

65. The Jerome Commission, staffed in part by lawyers, was the government agency responsible for negotiating allotment agreements with tribes, though as scholars have noted, the Commission often used coercive tactics. See WILLIAM HAGAN, *TAKING INDIAN LANDS: THE CHEROKEE (JEROME) COMMISSION 1889–93*, at 236–37 (2003) (describing these tactics as applied to the Cherokee Nation).

lands.⁶⁶ In a case that has been forever vilified since, the Supreme Court held in *Lone Wolf* that Congress was perfectly free to abrogate the tribe's treaty rights and distribute the reservation lands to individual Indians, selling off the "surplus" to white citizens.⁶⁷ *Lone Wolf* came to stand for the most expansive formulation of the government's "plenary power" over Indians, and the early 1900s were generally regarded as the low point of tribal well-being on every social, economic, and cultural measure.

Eventually, Congress repudiated the allotment and assimilation policy with another act that also had ramifications for legal representation. In 1934, Congress passed the Indian Reorganization Act (IRA) to confirm the ongoing existence of tribes and encourage them to form constitutional-style governments.⁶⁸ Of course, some tribes had retained their own traditional governance and others rejected the IRA outright. Still, with model constitutions and informational memoranda distributed by the Bureau of Indian Affairs (BIA) and active federal involvement in the drafting and approval process, hundreds of tribes did adopt IRA constitutions, and these documents did not always reflect traditional forms of tribal leadership or culture.⁶⁹ The Harvard Project on American Indian Economic Development (HPAIED) has argued that many IRA constitutions were both difficult to administer and mismatched with tribal values. As HPAIED scholar Manley Begay has written, for example, the Crow Tribe "operated under a constitution drafted with significant non-Native legal advice" that "not only produced an enormous, unwieldy legislature, but . . . paid no respect to a nation traditionally governed by strong clans . . . and hierarchies of chiefs."⁷⁰

Once in place, however, IRA governments became the entities empowered (with federal permission) to hire lawyers, even if these governments did not necessarily reflect the will of the people. As Charles Wilkinson has written evocatively about the Hopi tribe, for example, the lawyer who represented the IRA tribal government negotiating a major lease for coal mining on tribal lands in the 1960s was almost certainly not

66. See Angela R. Riley, *The Apex of Congress' Plenary Power over Indian Affairs: The Story of Lone Wolf v. Hitchcock*, in INDIAN LAW STORIES, *supra* note 37, at 208. We do not mean here to suggest that Springer's quality of representation was tainted by a conflict of interest, but rather to challenge and contextualize the conceptions of lawyers' loyalty and allegiance to group clients.

67. *Id.* at 223.

68. Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (2006)).

69. There is a good bit of discussion in the literature about the extent to which the federal government was involved in the drafting and adoption of these constitutions. FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS xvi-xxix (David E. Wilkins ed., 2006) (Cohen was "opposed to the idea of sending out canned constitutions" to tribes and he made clear his view "that constitutions must be worked out in the first place by the Indians in the field.").

70. See Manley A. Begay et al., *Development, Governance, Culture: What Are They and What Do They Have To Do with Rebuilding Native Nations?*, in REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 34, 51 (Miriam Jorgensen ed., 2007).

representing in any meaningful way the traditional village and clan leaders for whom the deal was a cultural anathema.⁷¹ And of course it did not help that the Hopis' lawyer was suspected of representing the coal company at the same time.⁷² Yet the Crow and Hopi tribal lawyers, and others during the IRA period, had enormous power, both structural and personal, over the tribes they represented.

While Indian tribes had long been pressing treaty claims, the Indian Claims Commission Act of 1946⁷³ gave them a new platform from which to do so, and the ensuing claims process became a major source of business for lawyers. Like many major events in federal Indian law, the creation of the Indian Claims Commission (ICC) reflected complicated federal motives, with mixed results for the tribes.⁷⁴ On the one hand, federal lawmakers sought to provide a venue for the redress of longstanding Indian claims that had otherwise defied legal resolution, a development that many Indians and their supporters viewed favorably.⁷⁵ Lawyers engaged by tribes devoted themselves, sometimes heroically, to building massive records, complete with historical, geographic, and ethnographic testimony, in support of multiyear and even multidecade Indian land claims, and sometimes they won large awards.⁷⁶

On the other hand, the ICC was formed at the beginning of the "termination" era when Congress would increasingly seek to end the special relationship with tribes, sell off tribal lands and resources, and integrate individuals into mainstream society.⁷⁷ To those ends, the determination to resolve outstanding Indian treaty claims was part of the government's larger objective to get out of the Indian business, notwithstanding its many promises to the tribes and their ongoing needs. Moreover, there were major misunderstandings that plagued the ICC litigation: in some cases, the Indian tribal leaders believed that they were seeking actual restitution of the lands, all while their lawyers were filing claims for monetary remedies, of which the lawyers could collect up to 10 percent in contingency fees.⁷⁸ On

71. See CHARLES WILKINSON, *FIRE ON THE PLATEAU: CONFLICT AND ENDURANCE IN THE AMERICAN SOUTHWEST* 105–23, 276–313 (1999) (discussing the role of the long-time Hopi general counsel in representing the tribe in coal mining matters vis-à-vis Peabody Coal and the Navajo Nation).

72. See *id.* But see *United States v. Navajo Nation*, 537 U.S. 488, 513–14 (2003) (denying Navajo Nation's breach of trust claim in a case where the Interior officials' ex parte communications with Peabody Coal led to approval of a coal mining lease at rate of 12.5 percent instead of 20 percent, for a loss of \$600 million to the tribe).

73. See Act of Aug. 8, 1946, ch. 907, 60 Stat. 939 (codified at 25 U.S.C. § 1a (2006)).

74. See Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 468–71 (1994). See generally Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753 (1992) (reviewing a number of ICC cases).

75. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, at 1.06.

76. See CHRISTIAN W. McMILLEN, *MAKING INDIAN LAW: THE HUALAPAI LAND CASE AND THE BIRTH OF ETHNOHISTORY* 166–83 (2007).

77. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, at 1.06.

78. See Charles F. Wilkinson, *The Indian Claims Commission*, in INDIAN SELF-RULE 151–55 (Kenneth R. Philp ed., 1986); see also Traci N. Zlock, Note, *The Native American*

this point, most commentators agree the ICC narrowly construed its authority to award equitable remedies, preferring instead monetary awards that were often unsatisfying to the tribes.⁷⁹ In one infamous case, the Supreme Court upheld a \$106 million award to the Sioux Nation for the taking of the Black Hills, but the Sioux people refused to accept any money for their sacred lands.⁸⁰ The non-Indian lawyers collected \$10,595,943, while the Indians continue—to this day—to live in poverty and seek the return of their land.⁸¹ In another case, a band of Western Shoshone claimed that the lawyer alleging to represent them had not been so authorized,⁸² and in still another, a tribe claimed that the lawyers had stipulated to reservation boundaries excluding lands on which tribal members were then living.⁸³ The courts upheld the judgments in these cases over the tribes' objections about their lawyers. In short, the ICC period brought many lawyers into the practice of Indian law, with great potential to remedy historic wrongs, but left a legacy of Indian disappointment in, and in some cases contempt for, the legal profession.⁸⁴

D. Legal and Political Empowerment

Finally, after decades of shifting federal Indian policy reflected in the discussion above, a sea change occurred in the 1960s and 1970s, ultimately leading to the tribal "self-determination" era. As part of the war on poverty launched in the mid-1960s under the Office of Economic Opportunity, federally funded legal services programs were established around the country to provide legal services to poor and disadvantaged people.⁸⁵ Many of these programs were located on or near Indian reservations and

Tribe As a Client: An Ethical Analysis, 10 GEO. J. LEGAL ETHICS 159, 160 (1996) (stating that "[a]lmost ten percent of the tribes who successfully litigated claims pursuant to the ICCA refused to accept their monetary awards despite the abject state of poverty in which they often lived").

79. See DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 269 (6th ed. 2011).

80. See *United States v. Sioux Nation*, 448 U.S. 371 (1980).

81. See EDWARD LAZARUS, BLACK HILLS, WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES 1775 TO THE PRESENT 403–28 (1991); see also Kirsten Matoy Carlson, *Priceless Property*, GA. ST. U. L. REV. (forthcoming 2013) (manuscript at 2–3), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2030248 (noting that even though the Treasury Department account in which the *Sioux Nation* award was deposited now holds over a billion dollars, the Sioux tribes refuse distribution because "money—even \$1.3 billion dollars—could not compensate them for the taking of their beloved Black Hills").

82. See, e.g., *United States v. Dann*, 470 U.S. 39, 41–45 (1985) (holding that Western Shoshone had been compensated for their land even though they refused to cooperate in distribution of the funds).

83. See, e.g., *Pueblo of Santo Domingo v. United States*, 647 F.2d 1087 (Ct. Cl. 1981) (holding that the tribe's request to withdraw from a 1969 stipulation made by its attorney without its permission was untimely).

84. See Vicenti, *supra* note 49, at 527; see also E. Richard Hart, *The Indian Claims Commission*, in INDIAN SELF-RULE, *supra* note 78, at 156–58 (describing the problems of legal representation in other Indian Claims Commission cases).

85. See CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 191–98 (2005).

helped tribes develop infrastructure and obtain legal representation in key cases.⁸⁶ California Indian Legal Services was founded in 1967 to represent tribes and individual Indians who had long been denied any legal rights or recognition in California or nationally.⁸⁷ In Washington, D.C., the National Congress of American Indians presented a collective voice in national Indian politics, and leaders such as the Standing Rock Sioux tribal member Vine Deloria, who graduated from law school in 1970, articulated the case for American Indian self-government.⁸⁸ Through these and other vehicles, American Indians made clear that they were here to stay and newly inspired to assert their collective and individual rights.

Eventually, the United States realized that it could no longer keep trying to “end the Indian problem.”⁸⁹ In 1970, President Richard Nixon announced the birth of a new policy of “self-determination” that would respect tribal autonomy in governance, education, economic development, and culture, while maintaining historic federal obligations to support all of these initiatives. The Indian Self-Determination and Education Act was passed in 1974 and followed by dozens of statutes promoting the goals that Nixon had announced.⁹⁰ At the same time, tribes experienced victories in major court cases, including the recognition of off-reservation fishing rights in *United States v. Washington*, with the capacity to restore tribal subsistence practices.⁹¹ The tribes in *Washington* were represented by lead counsel David Getches of the new Native American Rights Fund (NARF), established in 1969 with funding from the Ford Foundation, to improve representation for Indian tribes.⁹² From its inception, NARF devoted itself to providing the best legal representation for tribes, a concept that would soon include American Indian leadership of the organization. In 1973, Getches relinquished the NARF directorship to John Echohawk, a Pawnee Indian who had graduated from the University of New Mexico Law School, and who would develop NARF into the nation’s preeminent public interest firm advocating for Indian tribes. As Echohawk later recounted, suggesting a dynamic of empowerment in tribal advocacy, “There were not very many Native American attorneys around in those days but [Getches] understood the importance of Native American leadership in the organization. He was my mentor and supported me in becoming the Executive Director in 1973.”⁹³ Along with many dedicated non-Indian lawyers, American Indian

86. See, e.g., Bowers & Carpenter, *supra* note 37, at 489, 503–07 (on the role of poverty-prevention programs and legal services organizations in the revitalization of the Yurok, Karuk, and Tolowa tribes and their legal strategies in the 1960s and 1970s).

87. See *CILS History*, CAL. INDIAN LEGAL SERVICES, <http://www.calindian.org/about/cils-history> (last visited Apr. 19, 2013).

88. See WILKINSON, *supra* note 85, at 102–12.

89. See RED POWER: THE AMERICAN INDIANS FIGHT FOR FREEDOM (Alvin Josephy, Jr. et al. eds., 1971).

90. See Indian Self Determination & Education Assistance Act, 25 U.S.C. § 450 (2006).

91. *United States v. Washington*, 66 F.R.D. 477 (W.D. Wash. 1974).

92. See NATIVE AM. RTS. FUND, <http://www.narf.org> (last visited Apr. 19, 2013).

93. John Echohawk, Remarks at the David H. Getches Memorial (Aug. 11, 2011), available at <http://dirwww.colorado.edu/law/faculty/getches/speeches/echohawkjohn.pdf>.

lawyers brought their experience, energy, and empathy to major cases in Indian law. One of the first Indian women attorneys at NARF, the Ponca-Creek lawyer Yvonne Knight, explained, “When you go out there to represent Indian people, you see your family, your brothers, your sisters, your nephews, your mother and father, your grandparents. You realize the devastating impact that society can have on people because they are a different culture, because their skin is a different color.”⁹⁴

Things were clearly changing in the legal representation of tribes by the 1970s. In 1978, the Indian Law Resource Center (ILRC) was established by Tim Coulter of the Citizen Potawatomi Nation, to advocate for indigenous peoples in both domestic and international forums.⁹⁵ Even more broadly, tribal members, in partnership with non-Indian allies, were taking the lead in Indian law matters. Indeed, an explosion in tribal lawyering went hand-in-hand with the self-determination era.⁹⁶ As tribes reasserted treaty rights and tested the bounds of tribal sovereignty, they needed litigators. As they became more involved in business transactions, especially gaming and complex financing, they needed commercial lawyers. As they pressed for legislative solutions to policy problems, they needed lobbyists. As they developed legal departments, court systems, and legislative-regulatory infrastructure, they needed government lawyers. As they began to engage in the international human rights system, they needed advocates at the United Nations, Organization of American States, and so on.

For many of the same reasons of empowerment and opportunity, more and more American Indians started going to college and law school during the self-determination era. The American Indian Law Center at the University of New Mexico, first under the leadership of Fred Hart and Tom Christopher, and later Philip “Sam” Deloria, launched a program to recruit and prepare American Indians for law school, providing rigorous training and a pipeline for American Indians in the profession.⁹⁷ As a result of student advocacy, universities around the country, including Harvard, which was originally chartered to educate both “English” and Indian youth, were recognizing an obligation to recruit Indian students and teach Indian law.⁹⁸ At law schools, professors from both the academy and practice

94. See *Modern Day Warrior: NARF Attorney Yvonne Knight Retires*, NATIVE AM. RTS. FUND (Oct. 26, 2007), <http://narfnews.blogspot.com/2007/10/modern-day-warrior-narf-attorney-yvonne.html>.

95. See *Message from the Executive Director*, INDIAN L. RESOURCE CENTER, <http://www.indianlaw.org/about/executive> (last visited Apr. 19, 2013).

96. See Lewis Kamb, *As Tribes Prosper, They Need Lawyers*, SEATTLE POST-INTELLIGENCER (Oct. 13, 2003), <http://seattlepi.com/local/article/as-tribes-prosper-they-need-lawyers-1126827.php>.

97. See *Our History*, AM. INDIAN L. CENTER, INC., <http://www.ailec-inc.org/History.htm> (last visited Apr. 19, 2013).

98. See, e.g., *Brief History of HUNAP*, HARV. U. NATIVE AM. PROGRAM, <http://www.hunap.harvard.edu/about-hunap/welcome> (last visited Apr. 19, 2013) (“The education of Native Americans is woven into the long history of Harvard University. The Charter of 1650, by which Harvard University continues to be governed, pledges the University to “the

including Rennard Strickland, Ralph Johnson, Monroe Price, Reid Chambers, and many others were developing federal Indian Law into a discrete field of study attracting both Indian and non-Indian students who intended to practice in the field.⁹⁹

From 1988 to 2001, thirteen members or descendants of tribes, namely S. James Anaya, Raymond Cross, Heather Kendall-Miller, Rodney Lewis, Arlinda Locklear, Melody McCoy, Marilyn Miles, Terry Pechota, G. William Rice, Martin Seneca, Dale White, Jeanne Whiteing, and Susan Williams, appeared as counsel for tribal interests before the Supreme Court in major American Indian cases that determined tribal rights in tax, water, property, religion, jurisdiction, and other areas.¹⁰⁰ Many others participated in major legislative movements, such as the notable Pawnee attorney, Walter Echo-Hawk, whose advocacy for American Indian human remains and religious freedoms, contributed to the passage of several major statutes. Time and time again, these attorneys recounted a personal dimension of their advocacy. As Echo-Hawk said after the burial of hundreds of thousands of Indian remains, "Many of them were likely my own relatives."¹⁰¹ Tom Fredericks, a member of the Mandan, Hidatsa, and Arikara Nation, who has shared the indelible childhood memory of losing the family ranch to government condemnation of reservation lands, went on to represent tribes in government, regulatory, and transactional matters,

education of English and Indian youth. Caleb Cheeshahteumuck of the Wampanoag Tribe, Class of 1665, was the first Native American to graduate from Harvard. . . . Despite the University's pledge in its Charter to actively facilitate the education of American Indian youth, it was not until 1970 that a program was established to specifically address Native American issues."). Dozens of American Indian graduates of Harvard Law School have gone on to prominent careers as tribal lawyers. *See, e.g.,* Emily Dupraz, *For the Next Generation: Two Brothers Advocate for the Sovereignty of Their People*, HARV. L. BULL., Summer 2008, available at http://www.law.harvard.edu/news/bulletin/2008/summer/cn_02.php (describing the careers of Steve Emery and Mark Van Norman, Cheyenne River Sioux tribal members and Harvard Law School graduates who have devoted their work to Indian law at the tribal and federal levels); *see also* Patrice Kunes, *Living the Lessons We Have Learned: A Native American Student Ponders the Lives of Her Harvard*, HARV. GAZETTE (Apr. 29, 2010), <http://news.harvard.edu/gazette/story/2010/04/living-the-lessons-we-have-learned/>.

99. *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) (identifying early teachers and scholars of federal Indian law).

100. *See* Diane J. Schmidt, "The First 13" Brings Together Indian Law Pioneers, NAVAJO TIMES, Apr. 5, 2012, available at <http://navajotimes.com/politics/2012/0412/040512law.php>; *see also* Press Release, Am. Indian Law Ctr., Inc., First 13 Native American Attorneys To Argue Before the U.S. Supreme Court Unite at Legal Symposium (Mar. 12, 2012), available at <http://www.ailec-inc.org/PDF%20files/AILEC%20-%20First%20Thirteen%20Press%20Release.pdf>.

101. Janet Varnum, *Walter Echo-Hawk II: Fighting for Justice*, STATE, <http://state.magazine.okstate.edu/content/profile-walter-echo-hawk-ii> (last visited Apr. 19, 2013) ("Echo-Hawk's work on groundbreaking legislation includes the American Indian Religious Freedom Act of 1978, the National Museum of American Indians Act of 1989, the Native American Graves Protection and Repatriation Act of 1990 and the American Indian Religious Freedom Act Amendments of 1994."); *see also* Jack F. Trope and Walter R. Echo-Hawk, *The Native American Graves Protection And Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35 (1992).

especially concerning land and natural resources.¹⁰² Many non-Indians have also demonstrated lifelong commitments to advocate for tribes and have done so with great success.¹⁰³

Not long ago, the tribal attorney and Mohawk tribal member Dale White observed, “Indian law is definitely a ‘growth industry’” with more and more opportunities for tribal lawyers.¹⁰⁴ As we write in 2013, the practice of Indian law is still growing and changing. NARF, along with the ILRC, legal services organizations, and dozens of law firms, both large and small, are providing legal counsel directly to tribes—in tribal, state, federal, and international matters.¹⁰⁵ Many of the 566 federally recognized tribes have in-house legal counsel, and many have entire legal departments and offices, both on reservations and in Washington, D.C. The number of American Indian lawyers has grown from estimates of twenty-five total in the 1960s to over 3,000 in 2006.¹⁰⁶ The Federal Bar Association¹⁰⁷ and ABA¹⁰⁸ both have sections devoted to American Indian Law, and there is a very active network of professionals in the field, including national, state, and tribal bar associations devoted to Indian law practice.¹⁰⁹ The self-determination movement continues to thrive in Indian Country, shaping both external relations with federal and state governments and the internal revitalization of tribal law, institutions, and societies. There have been major setbacks, such as the Supreme Court’s backlash against American Indian rights from

102. See Linda Sailer, *Fredericks Dedicates Life to Indian Law*, DICK. PRESS, (Sept. 28, 2011), <http://www.thedickinsonpress.com/event/article/id/51634/>.

103. There are hundreds of examples around the country; at NARF alone, the senior staff attorneys Kim Gottschalk, Steven Moore, Don Wharton, and others are known for their lifetime commitments to American Indian tribal rights.

104. See Dale T. White, *Tribal Law Practice: From the Outside to the Inside*, 10 KAN. J.L. & PUB. POL’Y 505, 509 (2000). For additional stories of tribal lawyers, see, for example, Dupraz, *supra* note 98 (recounting the education and careers of Cheyenne River Sioux Attorneys Steven C. Emery and Mark Van Norman who were instructed by their grandfather, “Takoja (Grandson), there are many people on the reservation that need help. Before you return home, learn a skill that will let you provide assistance to your relatives.”); Bruce Frankel, *Standing Her Ground: A Native Alaskan, Once a School Dropout, Defends Her People’s Claims to Much of the State*, PEOPLE (Feb. 23, 1999), <http://www.people.com/people/archive/article/0,,20124560,00.html> (describing the life, education, and career of Alaska-native attorney Heather Kendall-Miller).

105. For a list of small, medium, and large firms with specialties in American Indian law, see *Best Law Firms*, U.S. NEWS & WORLD REP., <http://bestlawfirms.usnews.com/search.aspx?practice-area-id=79&practice-area=Native+American+Law&order-by=practice-area&page=1> (last visited Apr. 19, 2013). While we draw from very rich sources on tribal lawyering, we note in particular that there is a paucity of literature on large firm representation of Indian tribes, and that the fields of Indian law and professional responsibility would benefit from additional work in this vein. Additional areas of research would include study on the newest generation of tribal attorneys, graduating from law school after 2000, whose stories are not described in detail in the literature.

106. See *Our History*, *supra* note 97.

107. See, e.g., *Indian Law Section*, FED. B. ASS’N, <http://www.fedbar.org/sections/indian-law-section.aspx> (last visited Apr. 19, 2013).

108. See, e.g., *Committee on Native American Concerns*, AM. B. ASS’N, <http://apps.americanbar.org/dch/committee.cfm?com=IR514000> (last visited Apr. 19, 2013).

109. See NAT’L NATIVE AM. B. ASS’N, <http://www.nativeamericanbar.org/> (last visited Apr. 19, 2013).

1988 to the present, but overall this is a time of unprecedented growth and opportunity in American Indian law. It is this legal landscape, with all of its professional opportunities and challenges that the contemporary tribal lawyer inhabits.

E. The Contemporary Tribal Lawyer

By “tribal lawyer,” we mean a lawyer who represents an American Indian tribe. This definition excludes federal government lawyers who often work on Indian law matters, both for and against tribes, but are formally representing the United States.¹¹⁰ It also excludes, for the most part, lawyers for individual Indians, unless those individual Indians are elected tribal leaders whose participation in litigation actually signifies the tribe’s participation. Tribal lawyers can be American Indian or not, and we comment below on some of the particular issues raised by this question of identity. We should say at the outset that there are now thousands of lawyers working for Indian tribes and we cannot name all of them or describe the work of each.

The paradigmatic example of the tribal lawyer is one who works exclusively or primarily for one of the 566 federally recognized Indian tribes. Depending on the size of the tribe, the office might have one to ten lawyers who work on a variety of issues. A tribal lawyer who is “in-house,” usually lives and works on or near the reservation of the tribal client; tribal lawyers who work at firms or other organizations live and work in cities, small towns, and rural areas around the country. If a typical job description for tribal attorney exists, it is to represent the tribe acting through its elected officials—possibly including the tribal president, chief, or chair; the legislative counsel; and other leaders—in the business of tribal government. Tribal attorneys provide advice on the enactment and interpretation of legislation; represent the tribe in tribal, state, and federal court litigation; negotiate with the local, state, and federal governments; maintain relationships with the BIA and other federal agencies; and advise the tribe on financial matters and commercial transactions.¹¹¹ Substantively, tribal lawyers may work on everything from an initial political and organizational struggle for federal recognition, to cultural questions surrounding the repatriation of religious items, to complex financings for casinos and other commercial developments, to major litigation over treaty rights and jurisdiction.¹¹²

110. See, e.g., Lawrence Baca, *Reflections on the Role of the United States Department of Justice in Enforcing the Indian Civil Rights Act*, in *THE INDIAN CIVIL RIGHTS ACT AT FORTY* (Kristen Carpenter et al. eds., 2012).

111. Bellmard, *supra* note 56, at 755.

112. Consider the example of John Petoskey, a Michigan lawyer who served as in-house counsel for his tribe, the Grand Traverse Bay Band of Odawa and Chippewa Indians, from 1987 to 2010. During that time, according to news reports, the Grand Traverse Bay Band

Tribes also engage outside counsel for legal representation, either to serve as general counsel if they do not have an in-house office or for representation in specialty areas. Boutique law firms specializing in federal Indian law and large law firms with departments in federal Indian law handle many of these needs. Some tribes have a “go-to” law firm with whom they have worked for generations, while others shop for the appropriate counsel in a particular case, and still others keep a lot of their work in house.¹¹³

Tribal attorney Ken Bellmard has been an attorney for several Oklahoma tribes and written reflectively about his work.¹¹⁴ He describes his career as spanning many substantive areas and skill sets, and highly affected by politics. Bellmard is a Kaw tribal member who was first hired by the 300-member Tonkawa Tribe and quickly received an education in tribal lawyering:

The Tonkawa Tribe is . . . established pursuant to a page and one-half constitution, and governed by a elected committee of three people. The fact that the Tonkawa Tribe was governed by just three people allowed the Tribe to deal with matters very quickly and efficiently, but because the Tribe was so small family relationships were very strong and very contentious. My education as a tribal attorney was about to begin.

With respect to client identity, Bellmard is clear that “[b]eing a tribal attorney for a small tribe for the most part requires one to be an advocate for the tribe’s government, *i.e.*, the elected body.”¹¹⁵ In this capacity, as the

“evolved from a small Indian tribe that operated on a shoestring budget for years after its federal recognition in 1980 to a major economic powerhouse and employer in northern Michigan that runs two casinos and the Grand Traverse Resort & Spa.” Bill O’Brien, *Longtime GT Bond Attorney Let Go*, REC.-EAGLE (Feb. 3, 2010), <http://record-eagle.com/local/x1512274558/Longtime-GT-Band-attorney-let-go>. A graduate of PLSI and the University of New Mexico Law School, Petoskey represented his own tribe in a wide array of work including litigation, commercial transactions, intergovernmental diplomacy, and internal institution building. See Matthew L.M. Fletcher, *John Petoskey’s Legal Career (So Far)* . . . Updated, TURTLE TALK (Feb. 3, 2010, 4:18 PM), <http://turtletalk.wordpress.com/2010/02/03/john-petoskeys-legal-career-so-far/>. After twenty-three years, Petoskey lost his in-house position to political “restructuring” and went on to become a partner at a national Indian law boutique. *Grand Traverse Band Eliminates General Counsel Post*, INDIANZ.COM (Feb. 3, 2010), <http://www.indianz.com/News/2010/018250.asp>.

113. For another detailed example of the work and career of a tribal attorney and tribal legal department, see, for example, Gayle Johnson & Venus Prince, *Legal Department*, POARCH CREEK NEWS, July 2009, at 5, available at http://www.poarchcreekindians.org/assets/pdf/newsletter_jul_2009.pdf. Venus McGhee Prince, a Poarch Creek tribal member who is the Attorney General for her tribe in Alabama, explains that she leads a four member legal department whose job is “to protect all Tribal assets, defend the integrity of the Tribe, and assist and advise all Tribal entities in their pursuit of progress.” *Id.* In terms of the client, the attorneys are “responsible for providing legal services and representation to the Tribe, its Tribal Council, Tribal Government, and all Tribal authorities, commissions, enterprises, and other entities.” *Id.* Consistent with this mission, “the Legal Department does not currently provide direct legal services to individual Tribal Members,” but recognizes a need and “has proposed the creation of a Legal Aid.” *Id.*

114. Bellmard, *supra* note 56, at 755.

115. *Id.*

legal representative for the tribe acting through its tribal government, the tribal attorney will (1) “be involved in intra-tribal disputes (removals and recalls)”; (2) “necessarily be involved in disputes with the state and local government (sovereignty issues)”; and (3) “will be involved in disputes with the Bureau of Indian Affairs (BIA).”¹¹⁶ Bellmard describes the latter disputes as the most difficult for him and his tribal clients, remembering instances where, in his view, the BIA seemed to retaliate when the tribe took “progressive” positions.¹¹⁷ After the Tonkawa leadership decided to work on a nuclear waste facility, the BIA allegedly supported a group of tribal citizens who tried to remove the elected officials.¹¹⁸

Bellmard describes these external and internal impediments to representing the tribe as frustrating—saying that he learned that “you cannot expect much help from the BIA and that at any given time half the tribal membership is going to think you are a devil.”¹¹⁹ An equally frustrating experience occurred when, during his representation of the Osage Tribe, the United States “de-recognized” the Osage Nation (which would later be restored). Bellmard notes that he went on to more “positive and professionally rewarding” experiences as attorney for the Miami Tribe, and also worked for the Absentee Shawnee, Otoe-Missouri, Ponca, and Comanche Tribes.¹²⁰ In this process, he developed certain skill sets, such as in commercial dealings, and recognized other areas, such as repatriation, in which he lacked the necessary cultural competence and referred the matter to another attorney.¹²¹

Several points can be generalized about the work of the tribal attorney in the self-determination era. Many tribes are still involved in major litigation, especially in cases testing the scope of treaty rights and tribal jurisdiction. Some of these cases may be resolved through intergovernmental agreements, particularly in the tax and gaming contexts. Relatedly, many tribes are engaged in major development projects to fund the tribal government and economy. And, internally, tribal governments are focused

116. *Id.*

117. *Id.*

118. *Id.* at 755–56 (“[A] group of Tribal members attempted to remove the officials and this process was supported by the BIA. During testimony that was given in the Tonkawa CFR Court it came to light that the removal petition in question had been drafted with the input of the BIA. . . . The resulting federal court case regarding the BIA interference with the Tonkawa election process in *Combrink v. Babbitt* resulted in a victory for the tribal plaintiffs. The victory was however hollow. By the time the decision came down a subsequent election had been held and the plaintiffs, worn down from their continuing battles with the BIA had retired from tribal politics, the land claim in Texas was not supported and the waste site gambit was lost. Six years after the Tonkawa Compact was approved the Tribe has never taken advantage of their right to a form of Class III gaming.”).

119. *Id.* at 756.

120. *Id.* at 756–60.

121. *Id.* at 757–58; see also Teddye Snell, *Media Ousted from UKB Meeting*, TAHLEQUAH DAILY PRESS (Nov. 7, 2011), <http://tahlequahdailypress.com/local/x471035951/Media-ousted-from-UKB-meeting> (describing Ken Bellmard as “Attorney General” for the United Keetoowah Band of Indians in incident where press was barred from tribal government meeting).

on “nation building” including the reform of legal institutions and law, such as tribal courts and legislative codes. Tribal lawyers find themselves representing tribes in all of these capacities and more. As Bellmard’s comments begin to suggest, this work brings both particular challenges and opportunities for the tribal lawyer.

Over the course of his career, Bellmard says that he “changed from a young attorney wanting to ‘save’ all the Oklahoma tribes into a cynical experienced attorney who understands that all tribes are different and are potential competitors to one another in the business world. . . . I have become more of a ‘mechanic’ rather than an ‘evangelist.’”¹²² This point is critical and underscores the notion that the work and role of the tribal attorney is just as fraught with ethical complexity as any other practice, if not more so. The anecdotes described in this Article, with a few obvious exceptions, should not be oversimplified to suggest that there is a dichotomy between “good” and “bad” attorneys for tribes. If anything, the involvement of tribes in government, business, culture, and religion suggests that tribal lawyers will be called on to juggle different values and objectives.¹²³ Moreover, as tribes work to emerge from layers of subordination experienced through the colonial process, they and their lawyers engage in various strategies, some of which may be more or less appealing to certain constituencies and audiences.¹²⁴ Today’s tribal lawyer may be fighting to protect tribal sovereignty against the encroachments of state and federal governments, and doing so as a lobbyist, jockeying for influence with legislators;¹²⁵ working to address tribal poverty and unemployment through economic development strategies that include

122. Bellmard, *supra* note 56, at 759.

123. See, e.g., Gale Couery Toensig, *Poarch Creek Band Stops Controversial Casino Expansion on Hickory Ground Sacred Site*, INDIAN COUNTRY TODAY, Oct. 17, 2012, available at <http://indiancountrytodaymedianetwork.com/article/poarch-band-stops-controversial-casino-expansion-on-hickory-ground-sacred-site-140654> (describing communications by tribal attorneys representing tribal leaders on opposite sides of proposal to develop casino on historic Creek town site and burial ground).

124. See generally Kristen A. Carpenter & Angela R. Riley, *The Jurisgenerative Moment in Indigenous Human Rights*, 102 CALIF. L. REV. (forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2220573.

125. The most infamous tribal lobbyist of all time, Jack Abramoff, “was at the center of a lobbying conglomerate that defrauded Indian tribes of millions and used much of that money to try to win favor with members of Congress and their senior staff members.” Neil A. Lewis, *Abramoff Gets Four Years in Prison for Corruption*, N.Y. TIMES, Sept. 5, 2008, at A13. While Abramoff, who was convicted of corruption and tax evasion and sentenced to four years in prison, engaged in conduct that was clearly illegal, other lobbyists face more nuanced ethical dilemmas, such as how to handle tensions between wealthy and poor tribal interests, tribes with and without large land bases, and whether to represent corporate or state interests adverse to tribes other than the particular client. In the best models, tribal lobbyists partner with other Indian activists to pass important legislation, such as the Violence Against Women Act with its new provisions for American Indian women. See, e.g., Rob Capriccioso, *President Barack Obama’s VAWA Law Signing Spotlights Native Women Warriors*, INDIAN COUNTRY TODAY, Mar. 11, 2013, available at <http://indiancountrytodaymedianetwork.com/2013/03/11/president-barack-obamas-awa-law-signing-spotlights-native-women-warriors-148105>.

casino gaming, payday lending, or natural resource extraction;¹²⁶ or defending the tribe's interests in choosing its own citizens, developing its institutions, and protecting tribal finances—in cases that may pit the tribe against minorities excluded from tribal citizenship, employees trying to organize labor unions, or individuals injured on tribal property.¹²⁷ In the next part, we analyze the role of tribal lawyers in the myriad contexts where they work against the backdrop of the professional responsibility literature's conceptions of the role of lawyers more generally.

III. PROFESSIONAL IDEOLOGY, ROLE, AND RULES MEET TRIBAL LAWYERING

In this part we seek to integrate the story of Indian tribes and the law with conceptions of lawyering. We first describe the dominant model of lawyering, known as the Standard Conception, as it reflects a strong attachment to the rule of law and representation of clients as individuals. We then consider how Indian tribes often come to legal representation with different baselines—namely a complicated relationship with the rule of law, and core interests held by a group with particular cultural values—that reveal certain limitations of the Rules as they apply in the attorney-tribal client relationship.

A. The Dominant Professional Ideology and Role of American Lawyers

The American legal profession consists of well over a million lawyers who practice in a variety of practice areas, arenas, and organizational settings. And while these lawyers subscribe to different schools of thought, pursue different values, and promote different commitments, they by and large adhere to a dominant professional ideology grounded in a few basic assumptions about the rule of law and the role of lawyers. In America, opined Thomas Paine, “law is king” constituting the social glue that holds our diverse melting pot together. Law is a civic religion; its constitutive documents—the Declaration of Independence, the Constitution, and the Bill of Rights—capture and define what it means to be an American. The rule of law is not merely an acceptance of law and order as a necessary condition, but an embrace of the rule of law as a constitutive feature of America that embodies a way of life in which law emerges not merely as a way to resolve disputes but as the way to engage in private and public decision making. In particular, it is a conception of law that treats

126. For a primer on tribal economic development, see Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. REV. 597, 599–608 (2004) (describing the right to development as a human right that requires nuanced analysis of social, cultural, and other conditions in indigenous context).

127. For examples of tribal court cases evaluating civil rights in Indian Country, see MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* 351–82 (2011).

individuals and the exercise of individual autonomy as the basic unit of society.¹²⁸

Lawyers, accordingly, are high priests of this civic religion, aristocratic members of a ruling class, guardians of the rule of law, which means zealous advocates of individual autonomy. Law is thus understood as a shield against intrusion on the individual and celebrated as a sword in defense of individual autonomy and the aggressive pursuit of self-interest. And this conception of law and lawyers is by no means a theoretical or abstract exercise. It informs the Standard Conception of American lawyers' professional ideology, is reflected in its twin postulates of zealous advocacy and nonaccountability, and it defines the role of lawyers.¹²⁹

The principle of zealous advocacy portrays lawyers as knights in shining armor. Whether defending individuals against accusations of wrongdoing by the state or other individuals, or negotiating claims on behalf of clients' self-interest, lawyers emerge as a positive force pursuing the most important of values: clients' exercise of individual autonomy. Lawyers' "warm zeal" and aggression on behalf of clients is explained exactly in terms of the cardinal importance of the subject of defense—the individual and his or her zone of autonomy.¹³⁰

Nonaccountability neatly follows. Exactly because autonomous clients are celebrated as the core unit of society, and the goal of lawyers is to enhance clients' autonomy, clients and clients alone are morally and legally deemed responsible for the objectives of the attorney-client relationships. Lawyers, the mouthpiece of clients, are not morally or otherwise accountable for the goals they help clients pursue exactly because making lawyers responsible would compromise the position of clients as autonomous kings vested with sole authority and thus responsibility for their conduct. Finally, the Standard Conception informs the role of American lawyers as first and foremost representatives of clients, with only

128. Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1879–1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51, 51–74 (Gerard W. Gawalt ed., 1984) (exploring the elevated role and status of lawyers in American society); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 301–11 (Henry Reeve trans., 1900) (discussing the status of lawyers as America's aristocracy); THOMAS PAINE, *COMMON SENSE* 29 (1776) (observing "that in America The Law Is King"); Russell G. Pearce, *Lawyers As America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381 (2001).

129. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 115–16; see also Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617; Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 672–75 (1978). See generally Russell G. Pearce, *Professional Responsibility for the Age of Obama: Reviewing David Luban, Legal Ethics and Human Dignity*, 22 GEO. J. LEGAL ETHICS 1594, 1600 (2009) (book review); Murray L. Schwartz, *The Zeal of the Civil Advocate*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 150–71 (David Luban ed., 1984).

130. Eli Wald, *Loyalty In Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 ST. MARY'S L.J. 909 (2009); see also Pepper, *supra* note 129.

token references to the minor roles of officers of the legal system and public citizens.¹³¹

Critics of the Standard Conception, to be sure, abound. William Simon, for example, grounds his theory of law practice and the role of lawyers in justice, rather than in the pursuit of client interests narrowly conceived. Lawyers should not, argues Simon, help clients pursue goals that impose injustice on others, and lawyers should listen to clients' conceptions of justice rather than impute to their clients objectives and goals. But ultimately, what emerges from Simon's theory is a herculean lawyer, a social engineer of sorts who knows best how to pursue justice on behalf of clients.¹³² Tony Kronman, another critic of the Standard Conception, bemoans the decline of lawyers as statesmen, philosopher kings, and social engineers who, through the exercise of practical wisdom and professional judgment, act as the benevolent governing class and natural leaders of our society.¹³³ Brad Wendel advocates near religious allegiance or fidelity to the law, in which the law is put on a pedestal and lawyers become its high priests.¹³⁴ Ironically, common to all of these critics of the Standard Conception is an unquestionable belief in the law as a positive, desirable constitutive aspect of American life. Simon never questions the centrality of law to justice, and all three scholars conceive of lawyers as powerful actors vested with great responsibility for the public and private good. Even David Luban, who rejects role morality and advocates for common morality as the cornerstone of lawyers' professional ideology and role does not question the centrality of law and the inherent relevance of the rule of law to core values such as fairness and dignity.¹³⁵

B. The Dominant Ideology and Tribal Lawyering

It is exactly this profound trust and love of the law, in its Anglo-American incarnation, that American Indian tribes do not necessarily share. Indeed, European and American legal institutions and actors used the rule of law to displace, or attempt to displace, tribes' own legal traditions and systems, and thereby disrupt tribal governments and cultures.¹³⁶ In a

131. See *infra* Part IV for a discussion of the application of the Standard Conception to group lawyers, including government attorneys.

132. See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 54–62 (1998).

133. See generally ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

134. See generally W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO THE LAW* (2010).

135. See generally DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* (2007). For a critical analysis of the role autonomous self-interest plays in contemporary thinking, practice and regulation of lawyers, see Russell G. Pearce & Eli Wald, *The Obligation of Lawyers To Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1 (2011); Eli Wald & Russell G. Pearce, *Beyond Cardboard Lawyers in Legal Ethics*, 15 LEGAL ETHICS 147 (2012) (reviewing W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010)).

136. Rennard Strickland, *Take Us By the Hand: Challenges of Becoming an Indian Lawyer*, 2 AM. INDIAN L. REV. 47, 55 (1974).

historical context, then, the rule of law stood not as a desirable cornerstone of society but as a more complicated device that tribes confronted during the process of conquest and colonialism.

On the one hand, European and American governments relied on the rule of law as a “legitimizing” factor in the dispossession of Indian lands, removal of Indian peoples, and imposition of colonial, state, and federal governing powers.¹³⁷ In this view, the rule of law was a foreign tool of colonialist aggression, and lawyers were not knights in shining armor but manipulative instruments of abuse who, even in good faith, fatally compromised tribes’ positions and values.¹³⁸ Whereas the rule of law is billed by the Standard Conception as America’s social glue, to tribes, the very same law functioned to justify conquest and impose Anglo-American values and expediencies on Indian claims. As the discussion above about the Marshall Trilogy suggests, the Supreme Court first justified conquest of American Indians by reference to the Doctrine of Discovery. Subsequently, tribes found that the courts would change and modify the rule of law to facilitate the colonial project. Tribes negotiated treaties in good faith, only to have the Supreme Court hold that Congress could break them;¹³⁹ tribes litigated their ancient land claims in the ICC, only to learn that the courts would limit their remedies to monetary damages.¹⁴⁰ Today, the Supreme Court tells us that even when tribes reacquire their own treaty-guaranteed lands on the open market, they cannot reclaim governing authority over them because equities and statutory interpretation favors the non-Indian settlers and governments that prefer state jurisdiction.¹⁴¹ In these experiences, the law, legal system, and lawyers are all instruments of the colonizing machine. If the law is “king,” it is a monarch bent on oppressing American Indian people.

From another perspective, however, Indian tribes have always been agents of their own realities. Even faced with horrible choices in the face of destructive forces, tribal leaders have nonetheless made meaningful and informed choices, including use of the rule of law as a tool of resistance. In the 1830s, for example, the Cherokees were faced with mounting personal violence and destruction of property at the hands of white settlers. It was only when petitions to Congress and the President failed that the Cherokee National Council authorized Principal Chief John Ross to resort to the

137. The leading source here is WILLIAMS, *supra* note 21.

138. See Vicenti, *supra* note 49.

139. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (holding that congressional abrogation of Indian treaty’s land guarantees is a nonjusticiable political question).

140. See, e.g., Newton, *supra* note 74, at 469.

141. See *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 (2005) (“The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders.”). For scholarship criticizing the *Sherrill* opinion, see Sarah Krakoff, *City of Sherrill v. Oneida Indian Nation of New York: A Regretful Postscript to the Taxation Chapter in Cohen’s Handbook of Federal Indian Law*, 41 TULSA L. REV. 5 (2005); Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605 (2006).

courts to try to save the Cherokee Nation.¹⁴² The Cherokee Nation used a deliberative process in its decisions to engage legal counsel in the struggle, seeking to hire the most effective lawyers, even while struggling to pay them.¹⁴³ Ross's own view of the situation, as articulated to the Cherokee National Council, was that "in the appearance of impossibilities, there is still hope,"¹⁴⁴ a statement that suggests not naïveté but resilience in the face of overwhelming odds.

Moreover, despite the immediate devastation suffered by the Cherokees and other tribes during the Removal era, it is also true that the rules announced in the *Cherokee Nation* and *Worcester* cases—that Indian nations retain reserved rights of self-governance and property, and the United States has an obligation to protect those interests until such time as it chooses expressly to extinguish them—have in many cases served a real and meaningful function for tribes.¹⁴⁵ As we write in 2013, 566 federally recognized tribal nations remain self-governing entities, often focused on revitalizing their cultures and societies, with some legal protection against the encroachments of states.¹⁴⁶ Yet, when those tribes are faced with challenges, they again often turn to the American legal system to vindicate their rights, sometimes successfully. Courts, along with the legislative and executive branches, do recognize treaty rights, self-government, and federal trust obligations, to some extent.¹⁴⁷ In this perspective, the law is indeed a powerful tool for American Indian advocacy.

At the end of the day, both narratives reveal certain core truths. The United States has used the law as a tool of conquest and colonization with devastating effects on Indian tribes; *and* tribes have used the law as a tool

142. See GARY E. MOULTON, JOHN ROSS, *CHEROKEE CHIEF* 34–52 (1978). Moulton describes in great detail the Cherokee Nation's advocacy before Congress, as well as to the President and the judiciary, including the engagement of seven lawyers for litigation in the Georgia courts, followed by the engagement of William Wirt for the Supreme Court. See *id.* at 44–45.

143. *Id.* at 44–45 (describing the Nation's struggle to cover attorney fees and the ineffectiveness of some of the lawyers in the state court actions).

144. *Id.* at 41.

145. See, e.g., CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 14 (1987) (stating that the "old laws" of federal Indian law, namely treaties and treaty substitutes, created a "measured separatism" for Indian nations, reservations and territories where they could maintain self-government and culture, albeit in limited fashion).

146. See FLETCHER, *supra* note 127, at 67–92 (describing tribal justice systems); Catherine T. Struve, *Sovereign Litigants: Native American Nations in Court*, 55 VILL. L. REV. 929, 934–35 (2010) (same); see also Matthew L.M. Fletcher, *Looking to the East: The Stories of Modern Indian People and the Development of Tribal Law*, 5 SEATTLE J. SOC. JUST. 1 (2007) [hereinafter Fletcher, *Looking to the East*]; Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57 (2007) [hereinafter Fletcher, *Rethinking Customary Law*]; Matthew L.M. Fletcher, *The Supreme Court's Legal Culture War Against Tribal Law*, 2 INTERCULTURAL HUM. RTS. L. REV. 93 (2007) [hereinafter Fletcher, *The Supreme Court's Legal Culture War*].

147. See Getches, *supra* note 50, at 1620–22, 1630–52 (describing the Rehnquist Court's departure from the rules of federal Indian law and expressing hope for a return to foundational principles).

of resistance and protection, with some success in the legal institutions of the United States. Today, as a result, the conversation among Indian law scholars often focuses on how best “decolonize” Indian law, both in its federal and tribal law incarnations.¹⁴⁸ Suggestions include reversing problematic rules of federal Indian common law,¹⁴⁹ engaging in federal legal reform through legislative and administrative programs,¹⁵⁰ promoting advocacy in international human rights forums,¹⁵¹ and a more intense focus on the role of tribal institutions in reforming their own laws.¹⁵² On the last point, tribes today are revitalizing their own tribal legal systems—legal systems that in many respects have been infected with the vestiges of colonialism—by reinfusing their own legal institutions with tribal values, norms, and procedures that have both internal and external legitimacy.¹⁵³ In short, the relationship between tribes and the law is complicated one and lawyers play a complicated role in it.

148. See, e.g., Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 121 (1994) (discussing reform of federal Indian law); Robert B. Porter, *Building a New Longhouse: The Case for Government Reform Within the Six Nations of the Haudenosaunee*, 46 BUFF. L. REV. 805, 934 (1998) (advocating decolonization efforts within tribal nations); Robert B. Porter, *A Proposal to the Hanodaganyas To Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM 899, 904 (1998); 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, 220–26 (discussing federal Indian law as colonial and vision for reformation).

149. Williams, *supra* note 148, at 293 (calling for the “surrender” of the “doctrine of discovery”).

150. See Philip P. Frickey, *Adjudication and Its Discontents, Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1777–84 (1997) [hereinafter Frickey, *Adjudication and Its Discontents*] (calling for advocates to consider decolonization of federal Indian law through a move from adjudication of rights to a sovereign-to-sovereign relationship in which tribes work with Congress and administrative agencies on legal problems); Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 TULSA L. REV. 5, 32 n.149 (2003) (“Of course, [Oliphant and Duro] are ‘only’ federal common law, so Congress may alter them Or can it?”).

151. See, e.g., S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 7 (2004) (“International law’s embrace of human rights . . . engenders a discourse that is an alternative to the state-centered, historical sovereignty one, a discourse that has yielded results within the international system for indigenous peoples.”).

152. Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 865–66; cf. AUSTIN, *supra* note 24, at xvii (describing “a unique side to tribal court jurisprudence in the United States . . . [that] involves retrieving ancient tribal values, customs, and norms and using them to solve contemporary legal issues”); JOHN BORROWS, *CANADA’S INDIGENOUS CONSTITUTION* 23–55 (2010) [hereinafter BORROWS, *CANADA’S INDIGENOUS CONSTITUTION*] (describing sources and categories of indigenous law including sacred, natural, deliberative, positivistic, and customary); JOHN BORROWS, *RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW* xii (2002) [hereinafter BORROWS, *RECOVERING CANADA*] (“[T]he power of Aboriginal law can still be discerned despite the pervasiveness of imported law.”).

153. Compare *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring) (expressing concerns about non-tribal members faced with tribal court jurisdiction, including whether their rights will be protected and whether they will be familiar with the applicable law), with AUSTIN, *supra* note 24, at xvii (on the importance of using tribal norms in tribal justice systems).

Here we seek to integrate this story—of Indian tribes and the law—with conceptions of lawyering. We reflect on the limitations of the dominant model and alternative conceptions that are already functioning in American Indian communities and that may enlarge the understanding of group lawyering more broadly. The dominant understanding of law produces and legitimizes the Standard Conception of zealous advocacy and lawyers' nonaccountability as the baseline for lawyering. In tribal contexts, a different understanding of law undermines the legitimacy of the Standard Conception. The core inherent unit of representation in the case of tribes is not an individual but the tribe, and the core mission is not the assertion of individual autonomy but collective group rights, self-determination, and the preservation of cultural values and tradition.

Zealous representation, as typically construed, may not be a sufficiently capacious model for effective representation of goals that necessarily require attention to relationships and the revitalization of the tribal community. To be sure, zealous advocacy is appropriate in some circumstances—for example, when the effective representation of tribes calls for aggressive advocacy vis-à-vis powerful federal, state, or corporate interests. It may even be appropriate when tribes defend against suits by tribal members.¹⁵⁴ We emphatically support the idea that tribes, like all other clients, deserve a well-trained lawyer who will use the law to advocate powerfully for them.¹⁵⁵ For generations, the lack of access to

154. Tribal members sue tribes over a variety of claims, from employment discrimination in employment to liability for injuries sustained on tribal properties. A poignant category of cases concerns tribal membership, cases with great import in the self-determination and decolonization era, and great ramifications for lawyering and ethics. The foundational case is *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), in which Julia Martinez, a Santa Clara woman, after years of internal advocacy, challenged a discriminatory tribal membership rule in federal court, arguing that the Indian Civil Rights Act of 1978 imposed a standard of equal protection on tribal government. The tribe defended, and won, on grounds that the ICRA did not provide a cause of action or waive sovereign immunity except for habeas cases. Julia Martinez was represented by Richard Collins, then of DNA Legal Services, a provider of individual legal services located on the Navajo reservation, along with Alan Taradasah and Tim Vollman. All three would go on to very distinguished careers in federal Indian law. The Pueblo was represented by Marcelino Prelo, Jr., a practitioner in New Mexico, with a number of amicus briefs submitted by other Indian tribes and prominent lawyers in the field. See Gloria Valencia-Weber, *Three Stories in One: The Story of Santa Clara Pueblo v. Martinez*, in INDIAN LAW STORIES, *supra* note 37, at 456 n.17. As several waves of scholarship have considered, the case arguably pitted individual (women's) rights against tribal rights, see CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 66 (1987), as well as American-style rights and litigation against tribal kinship and methods of dispute resolution. See, e.g., Gloria Valencia-Weber, Rina Swentzell & Eva Petoskey, *Indigenous Women's Reflections*, in THE INDIAN CIVIL RIGHTS ACT AT FORTY, *supra* note 110, at 39–52. We note that *Martinez*, and contemporary membership cases such as that of the Cherokee Freedmen (African descendants who claim treaty-based membership in the Cherokee Nation) could provide very interesting case studies of the professional responsibilities of the lawyers for the individual claimants and for the tribes, alike. See S. Alan Ray, *Race or a Nation? Cherokee National Identity and the Status of Freedmen's Descendants*, 12 MICH. J. RACE & L. 387 (2007).

155. See Sam Deloria, *Legal Education and Native People*, 38 SASKATCHEWAN L. REV. 22, 25–38 (1974).

such legal counsel was a major, disempowering factor for tribes. But in an era of self-determination and decolonization of Indian law, zealous advocacy is by no means the default *modus operandi* in every instance of tribal representation. Indian law is increasingly characterized by intergovernmental negotiations and transactions with business partners that may call for constructive engagement as much as robust assertions of rights.¹⁵⁶ Even with respect to litigation, some advocates have suggested that the most contested tribal claims—such as religious freedoms and treaty rights—should be decided with attention to the “intercultural” relations that must inform what they see as the ultimate goal of “reconciliation.”¹⁵⁷ This point is particularly apt when it comes to conflicts with neighboring communities, which may include longtime non-Indian residents or other indigenous peoples.¹⁵⁸ Within the tribal community, zealous advocacy may disrupt tribal relations, such as those within clans or societies, or usurp the authority of traditional dispute resolution by village or religious leaders.¹⁵⁹

Similarly, while nonaccountability may be appropriate in the context of empowering individual clients to assert their autonomous self-interest while acting as the client’s mouthpiece, it is far from intuitive or inevitable in cultures where all individuals, including legal professionals, may be expected to be accountable to the community, its needs, and its values.¹⁶⁰ Again, there are difficulties associated with this view. Additional professional and ethical obligations, particularly emerging and undeveloped

156. Examples include tribal-industry agreements in natural resources arrangements to tribal-state agreements on a variety of regulatory matters. *See, e.g.*, Matthew L.M. Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, 43 TULSA L. REV. 73 (2007) (discussing tribal-state relations on law enforcement, taxation, environmental regulation, and casino gaming); Lynn Slade, *Indian Tribes: Business Partners and Market Participants*, *Natural Resource Development on Indian Lands* (2011) (unpublished manuscript), available at www.modrall.com/files/1411_tribal_industry_partners.pdf (discussing natural resource partnerships among tribes, industry, and the federal government).

157. *See, e.g.*, Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1664–70 (2000); Howard J. Vogel, *The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict over Native American Sacred Sites on Public Land*, 41 SANTA CLARA L. REV. 757, 758–60 (2001).

158. *See* Robin Kimmerer, *The Rights of the Land: The Onondaga Nation of Central New York Proposes a Radical New Vision of Property Rights*, ORION MAG. (Nov./Dec. 2008), <http://www.orionmagazine.org/index.php/articles/article/3647> (“The Onondaga people know the pain of displacement too well to inflict it on their neighbors.”).

159. *See, e.g.*, Kristen A. Carpenter, *Individual Religious Freedoms in American Indian Tribal Constitutional Law*, in *THE INDIAN CIVIL RIGHTS ACT AT FORTY*, *supra* note 110, at 189–93 (discussing the reluctance of certain tribal courts to hear cases regarding religious matters typically addressed by traditional religious leaders). *See generally* RICHLAND, *supra* note 22, at 42 (discussing the treatment of Hopi claims, traditionally involving clan, gender, and religious dimensions, in the modern tribal court system). For a discussion of relational self-interest as an alternative theory, *see* Pearce & Wald, *supra* note 135; Wald & Pearce, *supra* note 135.

160. *See, e.g.*, Amelia V. Katanski, *Writing the Living Law: American Indian Literature As Legal Narrative*, 33 AM. INDIAN L. REV. 53, 64–73 (2007) (on themes of accountability, spirituality, recovery and nation-building as they pertain to legal advocacy in an Anishinabe community, as illustrated by Winona LaDuke’s fictional work, *LAST STANDING WOMAN*).

ones, may disincentivize lawyers from taking Indian clients, diminishing the opportunities for tribes to secure the best possible advice and counsel. This may be particularly true when tribes need lawyers who practice in specialized areas—commercial lending or appellate advocacy—where a responsibility to become expert on American Indian culture and history has simply not been part of the lawyer’s training. Yet, it is also true that without some guidance on accountability, lawyers may play an unwitting role in extending the legacy of conquest and harming the indigenous clients that they seek to serve.¹⁶¹

Importantly, challenging the dominant understanding of law and the professional ideology of lawyers is not an academic exercise. While the dominant culture of autonomous self-interest no doubt impacts lawyers irrespective of their specialized professional ideology and rules of professional conduct, the Standard Conception informs and shapes the Rules of Professional Conduct that actually govern the behavior of practicing lawyers. Accordingly, an individually inspired, autonomy enhancing ideology that ill fits the practice of lawyers for groups will tend to produce Rules that ill serve tribal lawyers.

C. From Ideology to Role and Rules

The Preamble to the Model Rules states that a lawyer “is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”¹⁶² A plain reading of the Preamble might suggest that a lawyer’s role may be conceived of as a three-legged stool, with all three components of the role—representative of clients, officer of the legal system, and public citizen—weighing equally. But it is clear that the Rules treat representation of clients in the spirit of empowering individual pursuit of self-interest as a lawyer’s primary goal. Rules 1.1–1.18, 2.1–2.4, 5.1–5.7, and 7.1–7.6 essentially deal with the role of the lawyer as a client representative. Only the much briefer sections 3 and 4 deal with some limited duties as an officer of the court, and section 6 indirectly states some aspirational duties as a public citizen. Indeed, the only specific elaboration in the Rules regarding the lawyer’s role as an “officer of the legal system” as opposed to an officer of the court comes in the Preamble. Comment 5 states cryptically that “[a] lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it,”¹⁶³ and comment 13 states that “[l]awyers play a vital role in the preservation of society. The fulfillment of this role requires

161. *See, e.g.*, SAMUEL P. KING & RANDALL W. ROTH, *BROKEN TRUST: GREED, MISMANAGEMENT & POLITICAL MANIPULATION AT AMERICA’S LARGEST CHARITABLE TRUST* 97–103 (2006) (discussing the role of lawyers in the mismanagement of the “Bishop Trust,” established by Native Hawaiian royalty in the 1880s to fund education for Hawaiian children).

162. MODEL RULES PROF’L CONDUCT pmbl. (2012).

163. *Id.* cmt. 5.

an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.”¹⁶⁴ Comment 13 is nothing short of ironic because other than that very comment, nothing in the Rules “serves to define” the relationship of lawyers with the legal system.

Worse, the only clear reference to a lawyer’s role as a public citizen is even shorter, appearing in comment 6:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. . . . Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.¹⁶⁵

The same comment reminds lawyers of their allegiance to the lofty rule of law: “In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”¹⁶⁶

The individual emphasis in the Rules grounded in the conceptions of client autonomy and self-interest, based on the professional ideology of the Standard Conception and captured in the Preamble is then reflected in many of the pertinent Rules, an emphasis that ill fits the representation of groups.

1. Competence

Rule 1.1 defines competence to encompass “*legal* knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹⁶⁷ The Rule’s focus is on legal knowhow. Comment 1 explains that,

[i]n determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyer’s training and experience in the field in question In many instances, the required proficiency is that of a general practitioner.¹⁶⁸

Comment 2 adds, “Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve” and comment 8, titled *Maintaining Competence*, states that “[t]o maintain the requisite knowledge and skill, a lawyer should keep abreast of *changes in*

164. *Id.* cmt. 13.

165. *Id.* cmt. 6.

166. *Id.*

167. *Id.* R. 1.1 (emphasis added).

168. *See id.* cmt. 1.

the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”¹⁶⁹ Nowhere does the rule or comments suggest the possible relevance of other aspects of competence, such as knowledge of tribal history, culture, and political organization.

Legal competence is of course an important aspect of an effective attorney-client representation. But the narrow legalistic focus of Rule 1.1, and its failure to even contemplate the inherent importance of cultural competence are lamentable, foreclosing analysis and even awareness of an important feature of representing groups such as tribes. Proposed federal legislation to settle Navajo and Hopi claims on the Little Colorado River recently went down when grassroots Navajos protested concessions to a power plant and waiver of future claims.¹⁷⁰ In a recent presentation, Navajo activist Nicole Horseherder attributed the Navajo president’s initial support for the legislation in part to a lack of understanding, by elected officials and tribal attorneys, of the cultural values of traditional Navajos.¹⁷¹ Nothing in Rule 1.1 alerts a conscientious attorney to the relevance of cultural considerations as an aspect of competence. In this sense, the legalistic emphasis of the rule obscures, and even excludes, inherently important aspects of the representation of tribes.

The importance of competence about tribal culture, history, and political organization and their marginalization by the Rules were amplified by the fact that, until the “self-determination” era, tribal lawyers were mostly non-Indians, outsiders to tribes.¹⁷² Indian law practitioners and scholars have long argued for increased attention to tribal values and culture in legal processes at every level.¹⁷³ Pragmatically minded scholars have wondered about the typical lawyer’s competency in this regard. In an interesting commentary, the late Professor Phil Frickey observed:

[Scholars] have demonstrated that indigenous practices and values have influenced federal Indian law, and under a broader conception of the field, should influence it more substantially in the future. But how can any transformation of the field occur when judges, cabined by the blinders of precedent, will dismiss such indigenous aspects as irrelevant, and when (largely non-Indian) scholars, though often sympathetic, will have difficulty identifying the Indian side of the story, much less integrating it into conceptual arguments for reform of the field.¹⁷⁴

Of course the prescient Frickey largely answered his own question, though the response to his rhetorical question is much clearer now with sixteen

169. *Id.* R. 1.1 cmt. 8 (emphasis added).

170. Kimmerer, *supra* note 158.

171. See Nicole Horseherder, Presentation, Heeding Frickey’s Call, Berkeley Law School (Sept. 28, 2012). Coauthor Professor Carpenter attended this presentation.

172. *Supra* notes 58–67 and accompanying text.

173. See, e.g., Robert B. Porter, *Tribal Lawyer As Sovereignty Warriors*, 6 KAN. J.L. & PUB. POL’Y 7, 13–14 (1997).

174. Frickey, *Adjudication and Its Discontents*, *supra* note 150, at 1178.

years of hindsight. One way to transform the field with indigenous perspectives is to rely on indigenous lawyers, who often do have the community ties, cultural knowledge, and worldviews that enable them to bridge Anglo-American and tribal law.

Robert B. Porter once opined:

Suffice it to say, I cannot imagine a time when there has been a greater need for tribal lawyers. . . .

To fight these sovereignty battles, we need good, strong lawyers in the trenches—our sovereignty warriors. . . .

. . . .

In my view, it is extremely important that more native people, especially those from reservation communities, enter the legal profession and become tribal lawyers. . . . *Native People have a knowledge of their community that no other person does.*¹⁷⁵

To be clear, we are not suggesting that only Native Americans are competent to represent tribes, or that by virtue of being a Native American one is inherently better positioned to represent tribes. Indeed, just as “[a] lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar,” and a “lawyer can provide adequate representation in a wholly novel field through necessary study,”¹⁷⁶ all lawyers may acquire the necessary cultural competence to represent tribes. In particular, non-Indian attorneys or Indian attorneys who are representing a tribe other than their own may learn the relevant cultural knowhow to competently represent their clients.¹⁷⁷ Our point is that nothing in Rule 1.1 suggests or alerts lawyers to that need, and the legalistic training and indoctrination of lawyers indeed discourages if not excludes the acquisition of such knowledge.

Consider the late Navajo attorney and judge Claudeen Bates Arthur’s admonition to address difficult questions by envisioning the role of the lawyer through Navajo worldview. That worldview can probably only be completely accessed by individuals who are brought up with that cultural training, have resided within the sacred homeland of the Navajos, and know their kinship relations through the Navajo clan system. Today, the Navajo Nation Supreme Court has a choice of law rule dictating that the court must defer to Navajo law over state or federal law whenever possible.¹⁷⁸ While

175. Porter, *supra* note 173, at 13–14.

176. MODEL RULES PROF’L CONDUCT R. 1.1 cmt. 2 (2012).

177. See, e.g., Kristen A. Carpenter, *Interpreting Indian Country in State of Alaska v. Native Village of Venetie*, 35 TULSA L.J. 73, 142, 152 n.439 (2000).

178. NAVAJO NATION CODE ANN. tit. 7, § 204(A)–(B) (“In all cases the courts of the Navajo Nation shall first apply applicable Navajo Nation statutory laws and regulations to resolve matters in dispute before the courts. The Courts shall utilize *Diné bi beenahaz’áanii* (Navajo Traditional, Customary, Natural or Common Law) to guide the interpretation of Navajo Nation statutory laws and regulations. The courts shall also utilize *Diné bi beenahaz’áanii* whenever Navajo Nation statutes or regulations are silent on matters in dispute before the courts.”). Justice Ray Austin explains,

much of this law is available in codified written form, other Navajo law remains in the customary practices and oral tradition of the people.¹⁷⁹ Navajo attorneys and others who have become knowledgeable about Navajo law, culture, and community are likely to be the advocates with competence on these matters.

It seems certain that many tribal lawyers grasp what is at stake for their clients and accept the responsibility to practice with respect for their cultures and traditions. As Dale White has noted, “[W]e should always remember who is affected by our work. Long after we attorneys have done our work, picked up our papers, closed up our briefcase, and gone home, the tribe and its members will still be there. We must never forget that fact.”¹⁸⁰ Indian lawyers, such as Raymond Cross, have articulated their understanding of such concepts as the *wouncage*, or Sacred Trust, “an expression of the communal reverence shown by the people of a tribe or community for the originating force that makes the wind, that brings the clouds, that carries the rain, that falls to the grass, that feeds the buffalo to nourish the man.”¹⁸¹ Tribal lawyers keeping such concepts in mind as an overarching discipline are potentially some of the strongest advocates for tribal communities, advocates who retain their connection to the community, able to step into the non-Indian legal and political world to effectively speak for the community.

In addition to explicit authorization, the choice of law statute determines the order by which the court applies the laws. The Navajo statute requires that the Navajo Nation courts first apply Navajo statutory laws and regulations and then Navajo common law, if a statutory law does not address the issue. Navajo common law can be used to interpret Navajo statutory laws and non-Navajo laws. Next, the Navajo Nation courts can resort to ‘applicable federal laws or regulations’ in the absence of applicable Navajo law. Last in the order of preference is state law.

Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations*, 11 WYO. L. REV. 351, 362–63 (2011).

179. There is also the related question of language ability. It is certainly not the case that one must be fluent in a tribal language to represent a tribe; indeed, many tribal members and leaders do not speak their tribal languages. On the other hand, the revitalization of tribal law often requires research into tribal customary law, which exists in the unique language of the tribe. The Navajo Supreme Court, for example, often publishes passages of court opinions in Navajo, particularly when it cites to the Navajo Fundamental Law. Concepts such as “*ke*” or “*hozho*,” which are critical to Navajo dispute resolution do not translate perfectly into English. Additionally, on a practical level, some tribal clients—whether individuals or the entire tribal council—may prefer to conduct legal business in the Native language. Ann Kelly, *Kickapoo Tribal Council To Meet* (Jan. 15, 2004), <http://newsok.com/kickapoo-tribal-council-to-meet/article/1885792> (discussing complaints that surfaced when the Kickapoo Tribal Council conducted budget meetings in Kickapoo, which some members of the community could not understand). In both of these ways, ascertaining customary law and representing Native language speakers, the tribal lawyer with Native language familiarity may have a qualification that is extremely important to the reform and decolonization of tribal law.

180. White, *supra* note 104, at 510.

181. Fletcher, *supra* note 34, at 236 (citing PAUL VANDEVELDER, *COYOTE WARRIOR: ONE MAN, THREE TRIBES, AND THE TRIAL THAT FORGED A NATION* 244 (2004) (paraphrasing Raymond Cross)).

Next, tribal leaders and scholars alike agree that some of the most important work in tribal lawyering is in the project of legal reform and institution building. As Matthew Fletcher has argued, “[T]he days of making pie-in-the-sky arguments in federal court—and winning—are behind us. There has to be another method of preserving and enhancing Indian and Indian tribal rights than pounding down the courthouse door. It is these strategies that Indian lawyers can assist more than any others.”¹⁸² In addition to their work “on the front lines” of major litigation, Fletcher argues, tribal lawyers are critically involved in “the development of tribal law and political structures.”¹⁸³

During the era of self-determination, tribes are reclaiming historic governing functions and updating them consistent with contemporary circumstances.¹⁸⁴ Tribal lawyers may be deeply involved in constitutional reform, setting up court systems and drafting or revising tribal codes. Many current needs directly reflect changes occurring in the self-determination era. Since 1988, tribes have been able to contract with the federal government to administer their own federally funded hospitals, schools, and other programs. They also may be eligible to assume increased regulatory powers over natural resources and environmental regulation within their reservations.¹⁸⁵ As a result of the 2010 passage of the Tribal Law and Order Act, tribes are revising their criminal codes to provide for increased sentences and procedural safeguards for defendants.¹⁸⁶

To these institution-building tasks, tribal lawyers bring important skills of policy analysis, legislative drafting, constitutional and statutory interpretation, contract preparation, and so on. Notably, however, these skills are precisely those that conventional legal education—focused on the case method—may be the least likely to address. Moreover, as accounts of tribal constitutional reform suggest, much of the initiative draws from the will of the people as much as the input of legal professionals.¹⁸⁷ Still, tribal

182. *See id.* at 234–35.

183. *Id.* at 235.

184. *See, e.g.*, Keith Steven Richotte, Jr., “We the Indians of the Turtle Mountain Reservation . . .”: Rethinking Tribal Constitutionalism Beyond the Colonialist/Revolutionary Dialectic (June 2009) (unpublished Ph.D. dissertation, University of Minnesota), *available at* http://conservancy.umn.edu/bitstream/54709/1/RichotteJr_umn_0130E_10395.pdf.

185. For example, Congress amended the Safe Drinking Water Act (SDWA) in 1986 and the Clean Water Act (CWA) in 1987, providing the Environmental Protection Agency with the authority to treat “Tribes as States” and regulate water quality within the reservation.

186. *See, e.g.*, HOPI CODE pmbl. (2012), <http://www.hopi-nsn.gov/LinkClick.aspx?fileticket=Mdd%2BgJeO1Rk%3D&tabid=169> (“This Hopi Code is established by the Hopi Council in order to ensure that those who violate the rights of the Hopi people to live in a peaceful, crime-free environment are appropriately removed from our Villages and rehabilitated before they are allowed to return. Respect for the rights of others is a basic tenet of the Hopi way of life. It is further the intent of this Hopi Code to adopt the essential provisions of the United States Government’s Tribal Law and Order Act of 2010.”).

187. *See, e.g.*, AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 83–104, 272–86, 323–33 (Eric D. Lemont ed., 2006) (including first-person testimony of tribal citizens involved in constitutional reform).

attorneys are likely to have more training in these skills than others in tribal government or communities, and will often be called on, for example, to assist in constitutional reform or tribal code drafting.¹⁸⁸

To be effective in tribal legal reform in an era of self-determination, tribal lawyers must be mindful of the relationship between tribal culture and government, and the ascendant norm of revitalizing tribal customary law for contemporary contexts.¹⁸⁹ And it is here again that the lawyer's competence, as defined by Rule 1.1, must include—but regrettably does not incorporate—not only facility with legal institution building but also knowledge about, and respect for, the particular tribal culture. As the Pueblo lawyer and law professor Christine Zuni Cruz has put it, those who seek to work with tribal people must seek “cultural literacy,” including the ability to “critically analyze the social and political structures that inform . . . realities.”¹⁹⁰ Given the interrelationship of law and culture,

a grasp of indigenous knowledge systems, relationships, beliefs, expressions, values, and an understanding of one's own as well the dominant cultural milieu (as they are at odds with or in sync with the culture one is working with) are important to cultural literacy.

At the heart of cultural literacy in respect to indigenous peoples is an understanding of indigenous knowledge. Familiarity with the indigenous legal tradition, as an aspect of that knowledge, is important to lawyers involved in the representation of indigenous peoples and indigenous nations. The link between indigenous legal tradition and the operation of law and justice within indigenous communities cannot be ignored in the internal practice of law, even if the fact that an indigenous legal tradition exists and is important to study has been ignored by most legal institutions in the country. The identification of the indigenous legal tradition as one of the seven most important legal traditions of the world proves that not all, however, are blind to its importance and pervasiveness.¹⁹¹

While Professor Zuni Cruz has written evocatively about the professional aspects of representing both individual and tribal clients,¹⁹² her words here have special resonance for the work of the tribal attorney in internal legal reform.¹⁹³ Her comments also support current thinking in effective norms

188. TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS OF N.D., CONSTITUTIONAL CONVENTION AND REVISION PROCESS 2001–2002 (Jerilyn DeCoteau ed., 2003) (on file with the author).

189. AUSTIN, *supra* note 24, at xvii.

190. Christine Zuni Cruz, *Toward a Pedagogy and Ethic of Law/Lawyering for Indigenous Peoples*, 82 N.D. L. REV. 863, 892 (2006) (quoting DONALDO MACEDO, LITERACIES OF POWER, WHAT AMERICANS ARE NOT ALLOWED TO KNOW 17 (2006)).

191. *Id.*

192. See, e.g., Christine Zuni Cruz, *[On the] Road Back in: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557, 574 (1999) (“While an individual's relationship to her community may be a close and integral one or a complicated and distant one, an attorney must consider its nature in order to understand the client decisions.”).

193. See also Christine Zuni Cruz, *Tribal Law As Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law*, 1 TRIBAL L.J. 1

of tribal governance, based as they are on the notion of congruency between traditional tribal culture and contemporary institutional organization.

Political economists Joe Kalt and Stephen Cornell coined the term “cultural match” to describe a contemporary tribal government whose structure and values sufficiently correspond with traditional norms to make it functional.¹⁹⁴ As a diagnostic tool, the concept of cultural match is very helpful in explaining why certain forms of government do not work for certain tribes—for example, a model of centralized government with a singular powerful head of state will often present problems for a tribe maintaining a tradition of decentralized, local leadership held by multiple family groups. Even with this insight, however, it is difficult to turn to the challenge of what Kalt and Cornell call “nation building” or the actual work of building institutions that will simultaneously reflect the traditional values of tribes and function in a changing and modern society.

It is precisely in this most sensitive of functions—the decolonization of tribal law and the reassertion of tribal culture—that tribal lawyers may bring the most to the table. But how can they do it? Several tribal lawyers and scholars provide some ideas. Robert Porter, a Seneca lawyer and law professor who recently served as President of the Seneca Nation, and then joined an international law firm in New York,¹⁹⁵ has long argued for tribal lawyers to revitalize tribal law consistent with tribal traditions. As he writes: “[T]ribal lawyers are in a critical position to influence the redeveloping of tribal sovereignty through the redevelopment of the tribal legal, governmental, and political infrastructure. To me, tribal lawyers must be sovereignty warriors if the Indian nations are to survive.”¹⁹⁶ As one might expect about the work of a “warrior,” the lawyer’s task is not easy here. Porter explains, “While the tribal client must initiate efforts to revise and reform tribal societies, it is the tribal lawyer who usually does the heavy lifting in terms of effectuating the details of these initiatives.”¹⁹⁷ This heavy lifting requires the tribal lawyer to be particularly attentive to certain risks and in some ways to depart from conventional legal training.

As Porter articulates:

If the tribal lawyer does nothing other than, for example, borrow the state domestic relations law when drafting the tribal domestic relations law, the lawyer is doing nothing other than advising the tribe to replicate itself in the image of the dominant society. . . . Because of the way lawyers are

(2001), available at http://tlj.unm.edu/tribal-law-journal/articles/volume_1/zuni_cruz/index.php (arguing that tribal sovereignty is strengthened when the laws of an indigenous nation are based on internalized values and norms).

194. See Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances of Economic Development on American Indian Reservations*, in WHAT CAN TRIBES DO?: STRATEGIES IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 17–21 (Stephen Cornell & Joseph P. Kalt eds., 1995).

195. See Robert Odawi Porter, *Senior Counsel*, SNR DENTON, http://www.snrrenton.com/people/p/porter_robert.aspx.

196. Porter, *supra* note 173, at 13.

197. *Id.* at 12.

trained, this mistake can be easily made. Going to a book answer—a book of state laws—is what the Anglo-American-trained lawyers are taught. Mindlessly borrowing state laws, especially laws governing social behavior, can, in my view, be the equivalent of the forced assimilation efforts to destroy tribal societies seen in the nineteenth century. The difference here is that it is self-induced and perpetually reinforcing, rather than externally imposed.¹⁹⁸

To realize the potential of decolonization in the law reform process, Porter urges that:

[T]ribal lawyers should have an added professional obligation to their clients, in addition to their advocating, counseling, and negotiation functions. This obligation is the obligation to help heal the injustice and wrong-doing, the broken social, legal, political, and economic systems within our communities, and the injuries inflicted by colonization.¹⁹⁹

Such “added professional obligations” must include, we believe, a commitment to developing cultural competence and cultural literacy far greater than the legal competency imagined by Rule 1.1.

If Porter identifies a key role for tribal lawyers in the process of institution building—counseling clients about decolonizing and healing measures in law reform—other scholars provide guidance about the underlying philosophical and substantive content of tribal law reform. Professor Duane Champagne notes that for many tribes, there will be resistance to any reform and changes may be modest.²⁰⁰ Traditional tribal governance may have severely eroded over the generations, such that it is not possible to recover it.²⁰¹ Moreover, traditional institutions may not have the capacity or orientation to deal with the market economy or national polity.²⁰² Indeed, as Keith Richotte points out, tribal advocates may not be serving their clients well if they project an irreconcilable conflict between “traditional” and “colonial” government.²⁰³ The modern reality of most tribes requires advocates to embrace legal pluralism and the possibility of multiple, contested meanings.²⁰⁴

Some tribes will retain their existing constitutions or codes as a base and the lawyer may be constrained to suggesting the places where the tribe is able to make certain provisions more reflective of tribal culture, remove

198. *Id.*

199. *Id.* at 13.

200. See Duane Champagne, *Remaking Tribal Constitutions: Meeting the Challenges of Tradition, Colonialism, and Globalization*, in AMERICAN INDIAN CONSTITUTIONAL REFORM, *supra* note 187; see also VINE DELORIA, JR. & CLIFFORD M. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 19 (1984) (“It is important to recognize that, given the decades of erosion traditional cultures have suffered and the scarcity of viable alternatives available in the twentieth century, the present organization of tribal governments is not necessarily an unreasonable compromise between what might have been and what was possible to accept.”).

201. Champagne, *supra* note 200, at 13–34.

202. See *id.* at 12.

203. Richotte, *supra* note 184.

204. *Id.* at 176.

federal influence, or simply to improve administration.²⁰⁵ Other tribes may attempt more comprehensive reform, for example through a constitutional convention,²⁰⁶ or the creation of new institutions such as Peacemaker Courts or Elders Council for dispute resolution and juvenile matters. Professors Matthew Fletcher and John Borrows have written about the challenges and opportunities of uncovering tribal customary law.²⁰⁷ Putting a fine point on the skill set, Justice Ray Austin of the Navajo Supreme Court writes:

[T]here is a unique side to tribal court jurisprudence in the United States . . . [that] involves retrieving ancient tribal values, customs, and norms and using them to solve contemporary legal issues. . . . The modern Navajo Nation courts are adept at this way of problem solving. This method is itself a lesson embedded in the Navajo Creation Scripture and Journey Narratives. These narratives are the Navajo people's oral history beginning with the primeval universe.²⁰⁸

Similarly, according to Claudeen Bates Arthur, the use of tribal customary law is key to survival as distinct peoples:

I believe we must preserve the fundamental, internal essence of tribal identity. Tribes must decide for themselves what is important for their survival as tribal people. For the Navajo people, these are the fundamental philosophy and laws ordained by the Holy People, which are those concepts that remain unchanged despite the intrusions from outside and those things that were there when we came to our homeland between the four sacred mountains.²⁰⁹

The question of how the tribal lawyer should help the tribe pursue cultural revitalization may seem to fall outside of the scope of Rule 1.1. It may appear to be very "complicated," Arthur wrote, "but if I react to this task as a Navajo person, as a Native thinker, the answer is simple."²¹⁰ The Navajo worldview orients along the four directions and provides guidance about how to approach each cycle of the day or of life, from origins in the east, to planning in the south, to living in the west, to hope, faith, and restoration in the north. Having focused for so long on survival, the Navajo people, including their leaders, have not adequately moved into the

205. Champagne, *supra* note 200, at 13–31.

206. Eric Lemont, *Overcoming the Politics of Reform: The Story of the Cherokee Nation Constitutional Convention*, in AMERICAN INDIAN CONSTITUTIONAL REFORM, *supra* note 187, at 287 (describing the 1999 Constitutional Convention of the Cherokee Nation).

207. Compare BORROWS, RECOVERING CANADA, *supra* note 152, at xii ("[T]he power of Aboriginal law can still be discerned despite the pervasiveness of imported law."), with BORROWS, CANADA'S INDIGENOUS CONSTITUTION, *supra* note 152, at 23–55 (describing sources and categories of indigenous law including sacred, natural, deliberative, positivistic, and customary), Fletcher, *Looking to the East*, *supra* note 146, Fletcher, *Rethinking Customary Law*, *supra* note 146, and Fletcher, *The Supreme Court's Legal Culture War*, *supra* note 146.

208. AUSTIN, *supra* note 24, at xvii.

209. Claudeen Bates Arthur, *The Role of the Tribal Attorney*, 34 ARIZ. ST. L.J. 21, 23 (2002).

210. *Id.*

planning and execution phases—for example, in the preservation of sovereignty and culture. Tribal lawyers here have a particular role to play. As Bates recounts:

Many times lawyers for tribes take on roles of leadership because they are perceived as having knowledge. And yes, they do have knowledge; they are trained in the ways of the outside world and can deal with external issues for tribes. But lawyers are often asked to provide leadership on internal matters. The word for “leader” in Navajo is *Nataanii*. But the word means more than just leadership in political circles; the word embodies the idea that the person referenced is also a spiritual individual. *Nataanii* were individuals who had lived life and become wise. They were people with integrity. They had gone through the four-step process over and over again, around and around the circle, building each time on previous experience, and because of this could guide and plan for the survival of the community. Therefore, Indian tribal lawyers, if they are truly to function as leaders of tribal governments, must be wise, spiritual people because tribes are depending upon them for their very survival.²¹¹

One hopes, she writes, that they are “spiritual people of unquestioned integrity fully remembering the internal tribal concepts that are fundamental to the survival of the tribe.”²¹² Of course this prescription, as Arthur notes, goes straight to questions of identity and authority, issues that we discuss next.

2. Allocation of Authority Between Client and Attorney

Rule 1.2(a) vests in clients, as opposed to lawyers, the sole authority to determine the goals of the representation. The rule states in relevant part that, “a lawyer shall abide by a client’s decisions concerning the objectives of representation.”²¹³ The rule further empowers clients to participate in selecting the means by which their objectives are to be achieved, noting that [a lawyer] “shall consult with the client as to the means by which [goals] are to be pursued.”²¹⁴ Comment 1 explains, “Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer’s professional obligations.”²¹⁵

Such lofty language, reflecting the emphasis of individual autonomy in lawyers’ professional ideology, is a far cry from common practice realities in the representation of tribes. As scholars have suggested in their analysis of IRA approved governments, Rule 1.2 notwithstanding, it was the Crow and Hopi tribal lawyers who exercised enormous power over the tribes they represented, not the tribes who controlled the objectives or their lawyers.²¹⁶

211. *Id.*

212. *Id.* at 25.

213. MODEL RULES PROF’L CONDUCT R. 1.2(a) (2012).

214. *Id.*

215. *Id.* R. 1.2 cmt. 1.

216. See *supra* note 71 and accompanying text.

Similarly, in ICC litigation, tribes often believed they were pursuing the objective of land restitution, while their lawyers were filing claims for monetary remedies, a clear violation of Rule 1.2.²¹⁷

Moreover, the compounded effect of the interplay of various individually inspired rules is evident in the relationship of Rules 1.1 and 1.2 and their harmful impact for group clients. The now-classic example of the usurpation of the Sioux Nation's authority per Rule 1.2(a) in the litigation involving the Black Hills by lawyers who sought, and by a justice system that allowed for, damages rather than preservation of the sacred land was enabled by the definition of competency in Rule 1.1. There, the lawyers seeking damages on behalf of the clients may have been legally competent, yet their failure to appreciate the admittedly complex, and perhaps even evolving, cultural and political norms of their clients led them to pursue a legal strategy that their clients' ultimately perceived as disempowering and indeed devastating to their future as Lakota and Dakota peoples.²¹⁸ Consider comment 2 to Rule 1.2, which states in relevant part that:

On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.²¹⁹

Client deference to the "special knowledge and skill of their lawyer" makes ample sense when the relevant knowledge in question is legal, but makes little sense when the relevant knowledge is cultural of which the lawyers are ignorant. One might have expected the comment to instruct lawyers to defer to clients on such matters, but the comment unfortunately obscures and even forecloses analysis of this delicate issue. It states, "Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected."²²⁰ The very example given by the comment, deference to clients on issues of expenses to be incurred, is revealing: it eliminates the space for a meaningful conversation about the actual goals of the clients.

The risks of attorney paternalism, usurpation of clients' authority, and factors of racial subordination and cultural misunderstanding that contribute to these problems are, of course, not unique to the representation of groups

217. See *supra* note 78 and accompanying text.

218. Thirty-two years after the decision in *Sioux Nation*, and with the award in that case still sitting in a U.S. Treasury account, a young Lakota lawyer named Chase Iron Eyes was involved in a social media campaign to raise \$9 million dollars to enable the Great Sioux Nation to recover a small portion of the Black Hills that was being sold by a private rancher. See Christina Rose, *Pe Sla Purchase Guarantees Sacred Land Will Be Used for Ceremonies*, INDIAN COUNTRY TODAY (Dec. 21, 2012), <http://indiancountrytodaymedianetwork.com/article/pe%E2%80%99sla-purchase-guarantees-sacred-land-will-be-used-ceremonies-146500>.

219. MODEL RULES PROF'L CONDUCT R. 1.2 cmt. 2 (2012).

220. *Id.*

such as tribes.²²¹ A rich body of literature calls upon lawyers to engage in “client-centered” representation, listen and defer to clients’ actual goals and avoid imputing goals to clients they do not actually seek.²²² Yet two unique features of group-representation are worth highlighting here. First, calls for client-centered representation have sometimes, and increasingly so recently, been hijacked by advocates of zealous client autonomy and naked pursuit of self-interest.²²³ In the case of tribes, the risk is replacing one set of imputed goals—paternalistic goals determined by lawyers rather than clients—with another set of imputed goals—attributing to tribes the desire to pursue naked self-interest rather than objectives possibly shaped by different cultural norms.

Second, the extent and gravity of usurping clients’ goals may be of a different and perhaps greater magnitude in the representation of groups such as tribes compared to the representation of individuals in other contexts. Lawyers engaged in the decolonization of tribal law and the reassertion of tribal culture, in self-determination projects of groups, and in institution building for people owe a special, particular duty to the people they represent. As Professor Porter notes, exactly because of the power exercised by tribal lawyers effectuating the details of representation, lawyers must defer to the authority of their group-clients on such matters. Tribal lawyers, argues Porter, “should have an added professional obligation to their clients . . . to help heal the injustice and wrong-doing, the broken social, legal, political, and economic systems within our communities.”²²⁴

Next, building on the near fetish of individualism and the exercise of autonomy by clients, Rule 1.2(b) complements Rule 1.2(a) by stating the nonaccountability principle: “A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”²²⁵ Comment 5 adds that, “representing a client does not constitute approval of the client’s views or activities.”²²⁶ In the context of representing empowered individuals, Rule 1.2(b) conveys (more) sensibly that, because it is the client, and the client alone, who determines the goals of the representation, a lawyer is not morally or otherwise accountable for the objectives he or she helps the client pursue. In the context of

221. Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 391 (1997) (“Lawyers limit the client’s legal options both by devaluing racial components of a client’s legal claim and through cultural ignorance.”).

222. See generally William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones’s Case*, 50 MD. L. REV. 213 (1991); Wald, *supra* note 130, at 914–16; Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747 (2008).

223. Pearce & Wald, *supra* note 135, at 25–39.

224. Porter, *supra* note 173, at 13.

225. MODEL RULES PROF’L CONDUCT R. 1.2(b) (2012).

226. *Id.* cmt. 5.

representing groups such as tribes, however, Rule 1.2(b) is far from intuitive or inevitable. Asserting moral distance from a client seems sensible and appropriate when the subject matter of representation is litigation or business negotiation. It is not as compelling in the case of a lawyer who is engaged in helping clients pursue projects such as cultural revitalization.²²⁷

Rule 1.2(c) appears at first relevant to mitigating these issues of moral distance and accountability. It states that “[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”²²⁸ The rule seems to allow tribal lawyers, especially outside counsel, to attempt to limit the scope of representation to a particular litigation or business transaction rather than to broader nation building and self-determination. Yet while such a technical subsection may risk masking the complex true nature of representation of tribes, it cannot resolve the real challenges inherent in the representation. Even if a contemporary William Wirt could have written a limited scope representation clause into his retainer with the Cherokees in cases such as *Cherokee Nation*, such a clause would not and could not change the fact that by recognizing the power of the Supreme Court over tribes, the lawyer (and his client) has implicated not only the Cherokee Nation’s own moral, cultural, and sovereignty claims but also the claims of all other Indian tribes that may be bound by newly announced rules of Indian law.

Indeed, Rule 1.2(c) seems to forbid such a use of the Rules. The Rule itself conditions limited scope representation upon informed client consent, which tribes may very well refuse to grant in these circumstances. Moreover, comment 7 states that “although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances,” and adds that “[a]lthough an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”²²⁹ The comment’s cross-reference to Rule 1.1 is ironic: a limited scope representation would be a relevant factor in assessing a tribal lawyer’s competence if and only if Rule 1.1’s conception of competence included competence about tribal culture, history, and political organization. It is difficult to imagine the tribal representation—even the most sophisticated financial lending arrangement, for example—that would not invoke, at least to some degree, these factors.

227. Arthur, *supra* note 209, at 23.

228. MODEL RULES PROF’L CONDUCT R. 1.2(c).

229. *Id.* R. 1.2 cmt. 7.

3. Conflicts of Interest

Rule 1.7 aims to protect attorney loyalty to clients by forbidding lawyers from representing clients when the attorney-client relationship is tainted by a conflict of interest. Rule 1.7(a) states that a “lawyer shall not represent a client if the representation involves a concurrent conflict of interest,” and goes on to define a “concurrent conflict of interest” in terms of “directly adverse” clients,²³⁰ or in circumstances in which the representation of one client gives rise to “a significant risk” of a “material[] limit[ation]” regarding the representation of another client, “a former client or a third person or by a personal interest of the lawyer.”²³¹ Rule 1.8 applies the conflict rule in common fact patterns,²³² and Rule 1.9 defines and forbids conflicts vis-à-vis former clients.²³³ If a conflict of interest arises, the Rules generally allow a client to cure the defect by giving informed consent to the conflict.²³⁴ Comment 1 explains, “Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client,” and comment 6 adds that

[t]he client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer’s ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client’s case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer’s interest in retaining the current client.

Yet the Rules only demand that lawyers avoid legal conflicts of interest as defined by Rules 1.7–1.9 and do not preclude representations tainted by other types of conflicts. For example, comment 6 states that: “On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest . . . ,”²³⁵ and comment 24 generally allows lawyers to represent clients with positional and ideological conflicts of interest, stating that a lawyer may

take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest.²³⁶

230. *Id.* R. 1.7(a)(1).

231. *Id.* R. 1.7(a)(2).

232. *Id.* R. 1.8.

233. *Id.* R. 1.9.

234. *Id.* R. 1.7(b)(4), 1.9(a).

235. *Id.* R. 1.7 cmt. 6.

236. Comment 24 does note,

The Rules' defense of attorney loyalty to clients in terms of disallowing representations tainted by legal conflicts of interest affords group clients—tribes included—some protection, although the narrow reach of the Rules did not preclude the non-Indian lawyers for the Sioux Nation from collecting their contingency fees while their clients remained poor and dissatisfied with the resolution of the case.²³⁷

More importantly, however, the Rules' focus on legal conflicts to the exclusion of positional, ideological, or other types of conflicts obscures some important questions related to the representation of tribes. As S. James Anaya wrote with respect to his work in *Nevada v. Hicks*, tribal lawyers face a number of challenging conflicts questions in tribal representation.²³⁸ As Anaya put it, "[H]ow do we advise our Indian or tribal clients when we see Federal Indian Law, which was once understood to be a friendly body of doctrine, being emasculated by the federal courts to the detriment of tribal interests?"²³⁹ There are a number of specific implications of this problem, which go to questions of client goals and identity under Rules 1.2 and 1.7.

First, what to do when the tribal client expects and deserves his day in court, but the lawyer knows that the case, if it ends up in the Supreme Court, has a 70 to 80 percent chance of losing (or worse)?²⁴⁰ Should the tribal attorney counsel his client to expend precious resources on the very slim chance of vindicating tribal sovereignty and property? Second, and relatedly, should the attorney counsel the client about the ramifications for *other* tribes? In each of the Supreme Court's recent jurisdiction cases, the situation for the tribes has gotten progressively worse, and the tribal lawyer can now probably predict that his client's interests may set a precedent with harmful results for the other 565 tribes. How, if at all, should that information affect the lawyer's advice about strategy? Third, what should

A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client.

Id. R. 1.7 cmt. 24.

237. See *supra* notes 80–81 and accompanying text.

238. See S. James Anaya, *The Ethical Dilemma of Doing Federal Indian Law*, Paper Delivered to the Federal Bar Association's Annual Indian Law Conference (Apr. 4–5, 2002) (on file with the authors).

239. See *id.*

240. See David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280–81 (2001) ("Beyond the departures from settled law, the cases [from the mid-1980s through the October 2000 Term] show a stunning record of losses for Indians. 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. It would be difficult to find a field of law or a type of litigant that fares worse than Indians do in the Rehnquist Court. Convicted criminals achieved reversals in 36% of all cases that reached the Supreme Court in the same period, compared to the tribes' 23% success rate." (footnotes omitted)).

the tribal lawyer do when the “best” precedents—often, in jurisdiction cases, the Supreme Court’s historic decisions in *Cherokee Nation* and *Worcester*—are cloaked in racist language and discriminatory reasoning now abhorrent to the tribal client and indeed most of American society? Or, as Anaya put it, how should the lawyer assess the “difficult choices presented by the effort to advance tribal interests within a body of law that rests on problematic, if not illegitimate, doctrinal tenets”?²⁴¹ These already complex challenges are further complicated by the fact that tribal clients are not insulated from the dominant culture of aggressive individualism and narrow pursuit of self-interest, let alone America’s love affair with litigation, such that a tribal attorney who does bring these issues to the attention of clients may be dismissed or ignored.

Rule 1.7, to be sure, offers some limited guidance regarding these questions. In assessing whether positional conflicts amount to prohibited legal conflicts of interest, comment 24 to Rule 1.7 states:

Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, *the significance of the issue to the immediate and long-term interests of the clients involved* and the clients’ reasonable expectations in retaining the lawyer.²⁴²

Note, however, that a tribal lawyer would only be prohibited from representing conflicting interests pursuant to comment 24 if both tribes were *current* clients, and even then the “significance of the issue to the immediate and long-term interests of the clients involved” would be but “relevant factors.” Similarly, comment 26 notes that

conflicts of interest . . . arise in contexts other than litigation . . . [and] [r]elevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer’s relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree.²⁴³

The analysis is instructive but limited in scope: it directs a lawyer’s attention only to current representations of clients and focuses on the likelihood of legal disagreements.

Our concern with Rule 1.7 as it pertains to the representation of tribes is that it may lead lawyers to a quick resolution that no conflict limits their representation of tribes, and worse will foreclose the space for any meaningful discussion of the impact of litigation strategy and precedent on other tribes for the formalistic and unpersuasive reason that such other

241. See Anaya, *supra* note 238, at 3 (“[H]ow do we advise our Indian or tribal clients when we see Federal Indian Law, which was once understood to be a friendly body of doctrine, being emasculated by the federal courts to the detriment of tribal interests.”).

242. MODEL RULES PROF’L CONDUCT R. 1.7 cmt. 24 (2012) (emphasis added).

243. *Id.* R. 1.7 cmt. 26 (emphasis added).

tribes are not the lawyer's client. Moreover, nothing in the Rules' approach even suggests analysis of the impact on future tribal generations or the impact on culture, tradition, or relationships. Tribal advocacy organizations, such as the Native American Rights Fund and National Congress of American Indians, have developed programs to track Indian law cases and provide strategic advice including the likelihood of success, impacts on other tribes, and framing of the claims—with an eye to assisting in particular cases and preserving tribal sovereignty more broadly.²⁴⁴ Yet there is little in the Rules to guide such efforts.

Consider litigation settlement. Settlement often requires tribes to compromise on some of the rights and values held most dearly by the tribal membership. As Susan Williams has written about in her work on water law settlements, there may well be constituencies among the tribe for whom water is a sacred element whose value transcends quantification or distribution in property terms.²⁴⁵ In land claims and treaty cases, rights promised by the United States generations ago have often motivated tribal advocacy for generations and there can be a real loss—culturally and politically—associated with relinquishing historical claims.²⁴⁶ For all of these reasons, the tribal attorney may find it challenging to counsel his or her clients about settling major claims—challenges about which Rule 1.7 and its legalistic approach to conflicts are silent.

Implementation of settlements can also be difficult. A much-heralded example of successful tribal-federal negotiation is in the recent resolution of claims that the Department of the Interior had mismanaged tribal trust fund accounts going back to the allotment era.²⁴⁷ The United States agreed to pay forty-two tribes over one billion dollars to resolve these claims. Individual tribes, some of which were represented by individual counsel and others by NARF, received major monetary awards. These settlements brought some closure on claims that had been a major stain on the federal-tribal relationship and some vindication for the tribes that had been raising the issue for so long. But when those awards reached the tribal communities, questions arose about how to use the money. Some tribal leaders who tried to implement tribal values about collective welfare and planning for future generations lost their jobs, or were pressured to release

244. See Richard Guest, *Tribal Supreme Court Project*, NATIVE AM. RTS. FUND, <http://www.narf.org/cases/supctproj.html> (last visited Apr. 19, 2013).

245. See, e.g., Susan Williams, *Missouri River Dialogue: Tribal and Conservationist Perspectives*, 7 GREAT PLAINS NAT. RESOURCES J. 35, 36 (2002). Susan Williams, a member of the Sisseton-Wahpeton Dakota Nation, is well known as a leading tribal lawyer in the Indian water law field. She successfully argued the *Big Horn River* water adjudication before the U.S. Supreme Court and has counseled tribes on numerous water rights settlements. See also Susan Williams, *Indian Winters Water Rights Administration: Averting New War*, 11 PUB. LAND L. REV. 53 (1990).

246. See Carlson, *supra* note 81 (analyzing why the Sioux Nation has repeatedly rejected over \$1 billion dollars in compensation for land taken by the United States over 100 years ago).

247. *Judge Approves \$3.4 Billion in Indian Royalties Settlement*, N.Y. TIMES, June 21, 2011, at A18.

the funds on a per capita basis to individuals.²⁴⁸ Tribal attorneys may find themselves caught in the middle.²⁴⁹ In addition to the upheaval in certain tribes, the trust fund settlement has also inspired a dispute over fees among tribal lawyers who represented tribes at various stages in the litigation.²⁵⁰ Yet, difficulties in implementation and postsettlement fees do not obscure the fact that tribal attorneys achieved a victory of monumental proportions in the tribal trust fund cases. Despite the limits of the U.S. legal system in providing real justice or healing for Indian people, tribal lawyers continue to push in this direction, often heroically so.

Or consider the increased involvement of tribes in business dealings to raise revenues for essential governmental functions like police and safety services, administration, and regulation.²⁵¹ While in-house tribal counsel may engineer and execute these deals, it is also true that tribes sometimes hire outside counsel, particularly for complex lending and financial matters. At least two major sets of ethical issues arise in these kinds of dealings, both of which evoke the issue of client “loyalty” not envisioned or addressed by the conflict rules. In the first instance, tribal attorneys are under considerable pressure to structure tribal law and contracts in a way that both attracts outside investment and respects internal norms. Tribal codes are often not well developed, and this kind of work may be a threshold requirement, pushed by tribal leaders and outside business partners alike. In the rush to create an environment conducive to business, tribes may adopt foreign commercial codes without sufficient attention to existing law or tribal values.²⁵²

In contract negotiations, moreover, investors and other partners often want tribes to waive their sovereign immunity as a condition of the transaction, and the tribal attorney must guide her client through these nuanced considerations. On the one hand, the waiver of sovereign immunity can be difficult or unappealing for tribal members concerned about the limited resources and survival of the tribe itself,²⁵³ and on the

248. See Heather Scofield, *Business Director Says Settlement Could Help Tribe's Financial Future*, DURANGO HERALD (Apr. 23, 2012), <http://www.durangoherald.com/article/20120424/NEWS01/704249922/Business-director-says-settlement-could-help-tribe%E2%80%99s-financial-future>.

249. See Jim Mimiaga, *Ute Mountain Utes Get Their Long-Awaited Checks*, FOUR CORNERS FREE PRESS (Sept. 27, 2012), <http://fourcornersfreepress.com/?p=829> (“[L]ast month the tribal council agreed to pay out the money to individuals. [The] tribal council attorney . . . would only say, ‘They listened to the people.’”).

250. See Ron Capriccioso, *Native American Rights Fund Fires Back at Cobell Lawyers Over Fees*, INDIAN COUNTRY TODAY (Sept. 19, 2012), <http://indiancountrytodaymedia.network.com/2012/09/19/native-american-rights-fund-fires-back-at-cobell-lawyers-over-fees-134793>.

251. ROBERT J. MILLER, RESERVATION “CAPITALISM”: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY (2012).

252. See, e.g., Wenona T. Singel, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 15 KAN J.L. & PUB. POL’Y 357, 358–60 (2005).

253. See, e.g., R. Spencer Clift, *The Historical Development of American Indian Tribes; Their Recent Dramatic Commercial Advancement; and a Discussion of the Eligibility of Indian Tribes Under the Bankruptcy Code and Related Matters*, 27 AM. INDIAN L. REV. 177,

other hand, the decision to grant a waiver of tribal sovereign immunity is itself a sovereign act,²⁵⁴ and one practiced by state and federal governments on a regular basis.

Other lawyers sometimes struggle with questions about the impact of dispute resolution and precedent on nonparty group members who may be similarly situated. Cause lawyers, for example, often worry about strategic selection of cases for litigation and about the filing of a case by an individual that may be inconsistent with the cause. Like tribal lawyers, however, the experience of cause lawyers, who after all inherently represent causes rather than individuals, serves to demonstrate the shortcomings of the conflicts rules and the exclusionary force of the narrow scope in terms of not providing an arena in which important questions about the representation of groups may be aired.²⁵⁵ *Wouncage—Sacred Trust*²⁵⁶—may not be appropriate in all tribal attorney-client relationships, but conflicts of interest rules that increasingly deem wouncage a foreign inconceivable concept ill fit group representation, tribes included.

4. Organization As Client

Rule 1.13 is the only instance in which the Rules acknowledge and attempt to address clients that are not individuals. Subsection 1.13(a) states that “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents,”²⁵⁷ but not these constituencies. But of course, comment 1 acknowledges, “[a]n organizational client . . . cannot act except through its officers, directors, employees, shareholders and other constituents,”²⁵⁸ and, therefore, a lawyer for an organization will practically represent the organizational client by dealing with its constituencies, which in turn may confuse the constituencies as to whom the lawyer represents. “In dealing with an organization’s directors, officers, employees, members, shareholders or

180 (2003); see also Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practice Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT’L L. & POL. 531, 567–68 (1994) (“We have . . . never viewed the casino as anything but a temporary measure. The casino is not a statement of who we are, but only a means to get us to where we want to be. We had tried poverty for 200 years, so we decided to try something else.”). Ray Halbritter is a member of the Oneida Indian Nation who decided to attend law school after his aunt and uncle died in a house fire on the reservation; the tribe lacked emergency services and the state did not send theirs. Halbritter used his law degree to become a tribal leader and work on economic empowerment, a position that requires him to negotiate contemporary market opportunities including casino gaming with traditional tribal values about leadership and community. *Id.* at 560–68.

254. Kristen A. Carpenter & Ray Halbritter, *Beyond the Ethnic Umbrella and the Buffalo: Some Thoughts on American Indian Tribes and Gaming*, 5 GAMING L. REV. 311, 315 & n.34 (2001).

255. See Deborah J. Cantrell, *Sensational Reports: The Ethical Duty of Cause Lawyers To Be Competent in Public Advocacy*, 30 HAMLINE L. REV. 567, 571–74 (2007) (arguing that cause lawyers must be skilled in “public advocacy campaign[s]”).

256. See *supra* note 181; *infra* note 313 and accompanying text.

257. MODEL RULES PROF’L CONDUCT R. 1.13(a) (2012).

258. *Id.* R. 1.13 cmt. 1.

other constituents,” subsection 1.13(f) states that “a lawyer shall explain the identity of the client [the organization] when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”²⁵⁹

While Rule 1.13 primarily contemplates corporate organizations,²⁶⁰ it is intended to guide the practice of lawyers who represent clients who are not individuals. Comment 9, for example, states that “the duty defined in this Rule applies to governmental organizations.”²⁶¹ Yet applying Rule 1.13 to organizations other than corporations is easier said than done. In the context of corporate clients, the application of subsection 1.13(a)—a corporate lawyer represents the corporation, not its various constituencies such as the board of directors, the officers, the employees, or the shareholders—makes ample sense because of two features of the corporate entity. First, American corporate law defines the only purpose of a for-profit corporation to be profit maximization on behalf of shareholders. Thus, practically speaking, stating that a corporate lawyer represents the corporation means that the corporate lawyer’s clear and only role is to help the corporation pursue profit maximization, and the only remaining question is who is authorized to speak and act for the corporation in pursuit of this one goal. Second, American corporate governance law specifies a clear corporate hierarchy, such that a corporate lawyer knows exactly who is authorized to speak and act for the corporate client. Indeed, it is exactly this very hierarchy that subsections 1.13(b) and 1.13(c) rely on in specifying the duties of the organizational lawyer in going up the corporate ladder.²⁶²

Outside the corporate context, however, Rule 1.13 loses much of its guiding force. To begin with, without the simplistic definition of the corporate entity and its only permissible profit maximizing goal, stating that a lawyer represent the organization and not its constituencies simply serves to highlight the question of what it means to represent an organization. Consider the governmental lawyer. Comment 9 acknowledges that:

Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. . . . Thus, when the client is a governmental organization, a

259. *Id.* R. 1.13(f).

260. Comment 1, for example, states:

Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. “Other constituents” as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

Id. R. 1.13 cmt. 1.

261. *Id.* R. 1.13 cmt. 9.

262. *Id.* R. 1.13(b), (c).

different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.²⁶³

Next, many noncorporate organizations lack the clear hierarchy of corporations, or for that matter, lack any hierarchy at all. In such circumstances, the issue of who is authorized to speak and act on behalf of the organization becomes a complicated and complex affair.

Attempting to apply Rule 1.13 to tribal lawyers exemplifies the confusion the Rules may cause. A straightforward and commonly accepted application of subsection 1.13(a) suggests that a tribal attorney represents the tribe, and not its constituencies, such as the tribal president, chief or chair, the legislative counsel or other leaders, or tribal members. So far, so good. But what does it mean to represent the tribe? Unlike a corporation, a tribe does not have one simple goal such as profit maximization, but a complex array of possibly conflicting objectives and goals. Moreover, in the corporate sphere, not only does a clear hierarchy exist, but decisions made by the authorized constituencies are insulated from scrutiny by the business judgment rule.²⁶⁴ Accordingly, a corporate lawyer need only identify the authorized constituency pursuant to the hierarchal structure and then usually simply follow the instructions given by the constituent, without having to worry about the legitimacy of the instructions. But in the case of tribes, the existence of a hierarchal structure may fail to account for other constituencies or representatives of the tribe—a classic example being that religious elders or medicine people may be better situated than elected tribal leaders to handle sacred sites or repatriation matters. In short, the representation of tribes often entails complex questions regarding what it means to represent a tribe and who is authorized to speak and act on behalf of the tribe, questions that a mechanical application of Rule 1.13 simply cannot resolve.

Consider subsection 1.13(g):

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.²⁶⁵

The Rule makes sense in the corporate context. If, for example, the chief executive officer wishes to have the corporate attorney represent her, the "appropriate official," here the board of directors, will give its informed consent on behalf of the entity or, if the board wishes to be represented by the corporate attorney, a majority of independent board members will give

263. *Id.* R. 1.13 cmt. 9 (citation omitted).

264. *See, e.g.,* Bebachuk, *supra* note 12.

265. MODEL RULES OF PROF'L CONDUCT R. 1.13(g).

its informed consent.²⁶⁶ But what if the tribal president asks the tribal attorney to represent him? It is not always clear who can give informed consent to the representation in the spirit of Rule 1.13(g).

IV. THE EXPERIENCE OF AMERICAN INDIAN TRIBAL LAWYERS AS A MEANS OF QUESTIONING LAWYERING FOR GROUPS

In a thought-provoking article, Phyllis Bernard asks whether the Rules and the role-morality they embody serve as a suitable foundation for lawyers engaged in tribal peacemaking.²⁶⁷ Bernard's inquiry can be generalized to encompass questioning whether the Standard Conception and the Rules serve as a useful and legitimate basis for understanding the role and practices of Native American lawyers, and indeed group lawyers more generally. Bernard argues that the basic model of legal ethics is premised on "an overriding ethical obligation to protect her client's individual rights—at all costs—against encroachment by the values of the community."²⁶⁸ This "individualistic paradigm," in which the lawyer's role is one of a "champion of individual's rights,"²⁶⁹ may be inconsistent with the vision of the role of lawyers representing tribes and committed to tribal peacemaking because the fundamental unit, or client, is not an individual but a group—a tribe and its values. Bernard then explores whether moving away from the individual client as a constitutive feature of understanding the lawyer's role is consistent with the dominant professional ideology and the Rules.

Bernard, of course, is not alone in questioning the fit of the individualistic dominant Standard Conception and the Rules that codify it as the professional baseline for lawyers representing groups. Scholars and practitioners representing groups, ranging from governmental attorneys, cause lawyers, public interest, and community lawyers to class action and corporate lawyers, have long argued that the Standard Conception and the Rules that give life to it ill fit their practices. Geoff Hazard, for example, has noted that "[m]any of the discussions regarding ethics of government lawyers proceed from the premise that the client-lawyer relationship between government lawyers and government entities is 'different' from the counterpart relationship in private practice,"²⁷⁰ and another commentator opined that

[t]raditional approaches to the responsibilities of government lawyers have failed to provide a robust framework for analyzing the question of

266. *Id.*

267. Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyers' Ethics in Tribal Peacemaking*, 27 U. TOL. L. REV. 821, 823 (1996).

268. *Id.* at 843.

269. *Id.* at 844–45.

270. Geoffrey C. Hazard, Jr., *Conflicts of Interest Representation of Public Agencies in Civil Matters*, 9 WIDENER J. PUB. L. 211, 212 (2000) (citing Jeffrey Rosenthal, *Who Is the Client of the Government Lawyer?*, in *ETHICAL STANDARDS IN THE PUBLIC SECTOR* 13 (Patricia E. Salkin ed., 1999)).

how government lawyers should exercise their discretion. . . . [T]his failure is a result of an attempt to apply a model of legal ethics that is ill-suited to the unique role of government attorneys.²⁷¹

Austin Sarat and Stuart Scheingold, leading authorities on cause lawyering, have observed that within the traditional ideological and regulatory framework, cause lawyers are a “deviant strain” of the profession,²⁷² and Shauna Marshall has noted that the community lawyering model “departs from the traditional focus of a lawyer’s work—representing an individual client.”²⁷³ Even securities lawyers have been challenged to abandon the Standard Conception and act as gatekeepers in the public interest.²⁷⁴

Thirteen years after the publication of his pioneering *Should Trees Have Standing? Toward Legal Rights for Natural Objects*,²⁷⁵ Christopher Stone revisited his thesis and explained that rather than intending to focus on trees and other natural objects, his goal was to explore the representation of all “disinterested entities” defined as “various sorts of . . . membership sets,” including tribes, nations and corporations,²⁷⁶ and question whether even if we can “fit [disinterested entities] into the legal framework . . . ought we do so?”²⁷⁷ Similarly, we question the need to fit group lawyers, tribal lawyers included, into the standard legal framework of lawyering. “What I am suggesting is the validity of, and not merely recognizing the convention of, moral discourses that map membership entities, and consider them according to their own governance,”²⁷⁸ added Stone, and, “by ‘validity’ I mean that such discourses are capable of adding to, rather than, as reductionism has it, distracting from, the insight and direction which our moral lives require.”²⁷⁹ Stone concludes by arguing that “the position I am advancing is not disregarding of axioms or principles, but is skeptical of the single-minded stress on them.”²⁸⁰

Following Stone, our point here is not to wholly discredit the Standard Conception or the Rules. It should be acknowledged that some commentators do believe that the Rules fit and should apply to group lawyers,²⁸¹ and many tribal lawyers and clients rely on the Rules to useful

271. Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170, 1191 (2002).

272. CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., 2001).

273. Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147, 212 (2000).

274. John C. Coffee, Jr., *The Attorney As Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293 (2003).

275. Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

276. Christopher D. Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1, 21–22 (1985).

277. *Id.* at 39–40.

278. *Id.* at 137.

279. *Id.*

280. *Id.* at 142.

281. See, e.g., Nancy J. Moore, *Who Should Regulate Class Action Lawyers?*, 2003 U. ILL. L. REV. 1477 (arguing that the Rules should apply without any significant amendments).

effect. Rather, like other scholars of group lawyering, we wish to question the wisdom of accepting the Standard Conception and the Rules as both the start and finish point for understanding and assessing the conduct of group lawyers and to argue that the experiences of tribal lawyers suggest that a reductive adherence to the Rules may be unhelpful and even harmful for group lawyers and their clients. Just as Stone “would displace the quest for a single, all-encompassing framework, pretentious to govern all moral thought, with an effort to develop different planes, each appropriate to separate moral activities,”²⁸² we argue that treating the individualistic Standard Conception and the Rules that follow it as a single all-encompassing framework for assessing the conduct of lawyers is a mistake. Instead, like Stone, we believe that the experiences of tribal attorneys amount to “different planes” of legal ethics that allow for “the role of imagination in the development of ethical capacities.”²⁸³

The lessons that emerge from our analysis of tribal lawyering are broader than simply identifying a list of potential revisions to particular Rules, such as the rewriting of the concept of competence in Rule 1.1 to include meaningful references to cultural, historical, and political knowhow and literacy (although this would be desirable). Rather, the insights that emerge speak to the need to create a space for competing diverse visions and professional ideologies to emerge alongside the dominant ideology of the Standard Conception—ideologies that will in turn inform and shape the Rules and the role of lawyers for both groups and individuals. In the next sections we outline a few such possible visions and then share examples of Indian tribal and organizational codes and statements that reflect these visions.

A. From “Zealous Advocacy” to “Effective Representation”

Zealous advocacy reflects the individualistic impulse of the basic model. It assumes an individual client who establishes clear objectives and seeks to pursue them either in an adversarial fashion in litigation or aggressively across the negotiation table. It further assumes both that clients will be best served by zeal and that lawyers’ main role is advocacy vis-à-vis an opposing party. And indeed, for many individual clients and some group clients, zealous advocacy is the very essence of effective representation. But zealous advocacy is simply not a broad enough category to encompass the range of needs for all clients, especially group clients.

Gary Bellow, reflecting on the meaning of effective representation as a political attorney for groups, concisely captured the limitations of zealous advocacy reduced to adversarial aggressive litigation:

to the conduct of class action lawyers); Nancy J. Moore, *Who Will Regulate Class Action Lawyers?*, 44 LOY. U. CHI. L.J. 577 (2012) (same).

282. Stone, *supra* note 276, at 142.

283. *Id.* at 142–43.

In some of the efforts, we sought rule changes or injunctive relief against particular practice on behalf of an identified class. . . . Some strategies were carried out in the courts. At other times we ignored litigation entirely in favor of bureaucratic maneuvering and community and union organizing. Even when pursuing litigation, we often placed far greater emphasis on mobilizing and educating clients, or strengthening the entities and organizations that represented them, than on judicial outcomes.²⁸⁴

Importantly Bellow notes, “always, we employed the lawsuit . . . as a vehicle for gathering information, positioning adversaries, asserting bargaining leverage, and adding to the continuing process of definition and designation that occurs in any conflict.”²⁸⁵ It is not that group lawyering is inconsistent with aggressive litigation; rather, group lawyers ought not come to understand zealous advocacy as consisting first, foremost, and perhaps of nothing more than aggressive litigation. Such a narrow approach risks misunderstanding and even betraying the goals of group clients and the role of lawyers for them.

The same insight emerges from the experiences of government lawyers: “The conventional wisdom, however, suggests that zealous representation of clients is inappropriate for government lawyers. Most lawyers and judges who have considered the ethical responsibilities of the government lawyer have assumed that government counsel should temper their advocacy in the interests of ‘justice.’”²⁸⁶ Such tempered zeal is warranted notwithstanding the fact that government lawyers wish to win cases they litigate and is justified given the broader goals of the government lawyers and her client—the government—to seek justice.²⁸⁷

Consider Robert Porter’s work on the meaning of indigenous national sovereignty. Professor Porter argues that lawyers have usurped the authority of tribes and have advanced an Americanized notion of sovereignty causing tribes a significant harm. In some instances, Porter notes, lawyers’ advice to the Seneca Nation was “more insidiously transformative than any edict emanating from the mouth of some BIA official” and “there was simply no way for our former president to know that this attorney was destroying his own uniquely Seneca conception of sovereignty by passing on as gospel the anti-Indian sovereignty views of the United States Supreme Court.”²⁸⁸

284. Gary Bellow, *Steady Work: A Practitioner’s Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297, 300 (1996).

285. *Id.*

286. Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 955 (1991).

287. Berenson, *supra* note 30, at 813–35; Steven K. Berenson, *The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers’ General Duty To Serve the Public Interest*, 42 BRANDEIS L.J. 13, 17–31 (2003).

288. Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75, 92 (2002).

As this example potentially suggests, sometimes an important aspect of group representation entails not external needs vis-à-vis opposing parties but rather internal needs of building identity and group relations. For such groups, effective representation might require, at times, not narrow zealous advocacy but tentative and mindful facilitation. A group lawyer in these circumstances might better serve her clients by abandoning warm zeal, aggression, and a combative posture and replacing them with what Deborah Cantrell, writing about lawyers and social change, calls “an approach of curiosity,”²⁸⁹ fostering not the naked pursuit of individualistic self-interest but representation in the spirit of building webs of relationships within groups and vis-à-vis others.²⁹⁰

With the benefit of Cantrell’s insights, one might reimagine the conversation between a tribal nation and its lawyers.²⁹¹ Rather than merely advising the client about the Supreme Court’s view of Indian rights (and the likelihood of losing most cases), the lawyer might listen carefully to the tribal leaders’ description of the interests and goals associated with rights claims, and then advise the client accordingly. As one example, the Onondaga Nation of New York is working with its lawyers to resolve historic land claims, but rather than focus purely on tribal rights, it has identified objectives including the clean-up of local natural resources and restoration of relationships with non-Indian neighbors. At the insistence of tribal leaders, the Onondaga land-claim complaint drafted by attorneys Joe Heath and Curtis Berkey calls for “healing of the land and water . . . with all people who live within the Onondaga original territory.”²⁹² While still pursuing litigation, the Onondaga Nation’s lawyers are working on a strategy that includes community meetings, relationship building, and a discussion of shared interests.

To reiterate, we are not questioning the appropriateness of zealous advocacy in all instances. Some tribes may want to pursue the most aggressive litigation or transactional strategy available, and given their history of oppression and dispossession, they may well be entitled, if not necessarily likely to prevail in today’s courts. But some tribes may want to take a different approach. In this regard, we are mindful of the powerful work of Aziz Rana, who has suggested an ethic of “democratic lawyering”

289. Deborah J. Cantrell, *Lawyers, Loyalty and Social Change*, 89 DENV. U. L. REV. 941, 966–67 (2013).

290. *Id.* at 964–66; see also Pearce & Wald, *supra* note 135, at 32–52 (criticizing lawyering that reflects and legitimizes autonomous self-interest and calling for a relational approach to the practice of law). See generally ROBERT K. VISCHER, MARTIN LUTHER KING JR. AND THE MORALITY OF LEGAL PRACTICE (2013).

291. Porter, *supra* note 288, at 92–93 (“[L]awyers representing Indigenous peoples generally fail to adequately take into account their client’s own sovereignty perspective [T]his mentality has the effect of promoting within the lawyer a practice style that has the effect of ensuring conformity with the American conception.”); see also Robert B. Porter-Odawi, *Two Kinds of Indians, Two Kinds of Indian Nation Sovereignty: A Surreply to Professor LaVelle*, 11 KAN. J.L. & PUB. POL’Y 629, 646–47 (2002).

292. See *Review of the Onondaga Land Rights Hearing in NYC*, ONONDAGA NATION (Oct. 15, 2012), http://www.onondaganation.org/news/2012/2012_1015.html.

in which the lawyer works on the “creation of processes for participatory citizenship as a potential solution to class disagreement.”²⁹³ Therefore, we question a single-minded emphasis on zealous advocacy as the obvious baseline for all lawyers, group lawyers included. We are suggesting that such an all-encompassing framework may at times be inconsistent with the effective representation of clients and worse, suppress imaginative alternatives to effective group lawyering. Our analysis suggests some of these alternatives. In lieu of narrow-minded zeal reduced to aggressive litigation, all lawyers but especially group lawyers, need to be curious, open-minded, and knowledgeable about other approaches to effectively representing clients.²⁹⁴

Next, group lawyers, even when Rule 1.13 allows them to identify who is authorized to speak on behalf of the group, ought not show too great a deference to the authorized constituency, especially in representing what Paul Tremblay has called “loosely-structured groups.”²⁹⁵ Warm zeal and great deference to clients are certainly often justified, especially in the representation of individual clients. But reductive zeal, when combined with strong deference to clients, might be counterproductive—even harmful—in the context of group clients. Writing about community lawyers, Tremblay compellingly argues that, “[j]ust as powerless group members ought not to be dominated by the professional lawyers in suits, it is similarly true . . . that powerless group members ought not be dominated by the more vocal and educated leaders within the community.”²⁹⁶ This insight rings true in the representation of tribes as well as other group clients: “To the extent that corporate law principles applied to the . . . group setting require the lawyer to honor the instructions of the entity’s ‘duly authorized constituents,’ the paradigmatic counseling responsibility of a . . . group lawyer might serve to ‘reproduce hierarchy,’ even when the lawyer adopts [a] respectful and humble posture.”²⁹⁷

Finally, letting go of a reductive construction of “zealous advocacy” might open the door to better, broader education for group lawyers in appropriate circumstances. Here, we mean more than the important recognition of the shortcomings of too narrow a reading of competency per Rule 1.1, and its expansion to include the notions of cultural competency and literacy. We mean to evoke, following Tony Alfieri, the notions of pedagogy of community and public citizenship, as well as mindfulness of group identity and spirituality.²⁹⁸

293. See Rana, *supra* note 14, at 1728.

294. Cantrell, *supra* note 289; see also Bellow, *supra* note 284.

295. Paul R. Tremblay, *Counseling Community Groups*, 17 CLINICAL L. REV. 389, 421–54 (2010).

296. *Id.* at 461–62.

297. *Id.* at 462 (citations omitted).

298. Anthony V. Alfieri, *Educating Lawyers for Community*, 2012 WIS. L. REV. 115, 118–30; Susan D. Bennett, *Little Engines That Could: Community Clients, Their Lawyers, and Training in the Arts of Democracy*, 2002 WIS. L. REV. 469.

B. From “Nonaccountability” to “Client Empowerment”

The principle of nonaccountability reflects a commitment to honor the autonomy and decision-making authority of individual clients. It signifies the deference of lawyers-agents to clients-principals. Exactly because clients alone are exercising their autonomy and determine the objectives of the relationship, lawyers are nonaccountable for the goals they help bring about. But for some individual clients and many group clients, lawyers simply do not play the role of mere agents. Rather, lawyers take a more proactive role in designing and participating in determining the goals of the representation. In such circumstances, respect and pursuit of client empowerment simply does not require nonaccountability and may in fact demand lawyer accountability.

Cause lawyers, in contrast to the Standard Conception, are anything but nonaccountable. In fact,

[l]awyer[ing] is for them attractive precisely because it is a deeply moral or political activity, a kind of work that encourages pursuit of their vision of the right, the good, or the just. Cause lawyers have *something to believe in* and bring their beliefs to bear on their work lives.²⁹⁹

As noted by Gary Bellow, “[w]e were not detached professionals offering advice and representation regardless of consequences; we saw ourselves responsible for, and committed to, shaping those consequences.”³⁰⁰ Similarly, a government lawyer, while “adopting as central the duties of loyalty, zeal, and confidentiality, puts relatively greater emphasis on the duties of the lawyer to the court and to innocent third parties”;³⁰¹ that is, she feels accountable for the outcomes she helps bring about.

In turn, lawyers’ accountability to the causes of their clients raises a well-explored concern about attorneys’ usurpation of clients’ autonomy and power in the attorney-client relationship.³⁰² Accountability to clients when lawyers believe in, and have a stake and an interest in, the outcome of the representations, is a serious concern experienced by many group lawyers and their clients, from cause lawyers³⁰³ to class action attorneys.³⁰⁴

299. STUART A. SCHEINGOLD & AUSTIN SARAT, *SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING* 3 (2004).

300. Bellow, *supra* note 284.

301. *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, *supra* note 271, at 1171.

302. The problem of paternalism vis-à-vis clients, it should be noted, is of course not unique to group lawyers. See generally Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Simon, *supra* note 222; Wald, *supra* note 222.

303. See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (exploring the tension between the goal of desegregation sought by cause lawyers and the interests of actual clients—parents who were often as interested in the quality of public education received by their children as they were in the overall objective of desegregation). See generally CHEN & CUMMINGS, *supra* note 31, at 289–90.

304. See, e.g., John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 292 (2010) (Class actions do “solve the problem of providing a feasible remedy for ‘negative value’ claims—that is, those claims that, while

Moreover, as Deborah Cantrell thoughtfully points out, “hyper-loyalty” to clients and their objectives entails serious risks beyond usurping clients’ autonomy. Hyper-loyalty is dangerous and could become inconsistent with effective representation because it limits the range of strategies, relationships, and solutions group lawyers might entertain with an open mind on behalf of clients.³⁰⁵

As was the case with zealous advocacy, we do not wish to wholly undermine nonaccountability nor to belittle the challenges associated with lawyers’ accountability for clients’ goals. We do, however, believe that the experiences of tribal lawyers and other group lawyers highlight the shortcomings of strict adherence to the principle of nonaccountability as the benchmark for attorney professionalism. Instead, we want to suggest client empowerment as a boarder principle that is inclusive of traditional nonaccountability in appropriate circumstances as well as of lawyer accountability in other instances.

By client empowerment we do not mean merely the avoidance of paternalism by lawyers vis-à-vis clients in the client-centered representation tradition,³⁰⁶ nor do we ignore the inherent risk of disempowering clients by the very exercise of lawyers’ accountability to clients’ objectives. As we have seen, imputing goals to clients and treating clients paternalistically is not a new charge leveled against lawyers.³⁰⁷ Rather, by empowerment of clients we mean “the promise to unite client/community autonomy with systemic reform so that community members become the authors of their own stories and the agents of their own change,”³⁰⁸ a process that takes enabling, promoting, and respecting group decision making as its goals.³⁰⁹ It is, admittedly, a risky process that acknowledges the dangers of lawyers’ accountability, usurpation of clients’ autonomy and power, and hyper-loyalty. But it is a necessary risk, especially in lawyering for loose groups, a context in which lawyers “are not simply carriers of a cause but are at the same time those who shape it, name it and voice it,”³¹⁰ exactly because of the loose nature of decision making and exercise of authority within the group.³¹¹

meritorious, have an enforcement cost in excess of their individual value. But this benefit comes at the cost of creating principal-agent problems that remain intractable despite repeated efforts by Congress and the court to curb highly visible abuses.”).

305. Cantrell, *supra* note 289, at 955–63; Wald, *supra* note 130.

306. GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978); DAVID BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991).

307. Simon, *supra* note 222.

308. CHEN & CUMMINGS, *supra* note 31, at 318–19.

309. Lucie E. White, *Seeking “. . . the Faces of Otherness . . . ”: A Response to Professors Sarat, Felstiner and Cahn*, 77 CORNELL L. REV. 1499, 1501–09 (1992).

310. Ronen Shamir & Sara Chinski, *Destruction of Houses and Construction of a Cause: Lawyers and Bedouins in the Israeli Courts*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 231 (Austin Sarat & Stuart Scheingold eds., 1998).

311. Tremblay, *supra* note 295.

Porter, for example, is specific in his view of what is required of tribal lawyers: “The attorney representing an Indigenous nation has just as much an obligation to advise his or her client of that nation’s views of its own sovereignty as it does the American view.” Viewed in this light, Porter’s statement that “I teach [students] the truth about America’s agenda to destroy the Indian nations and how they, as American trained lawyers, can use their skills to rebuild their own nations in the image of their own people”³¹² sounds like a call to embrace not partisan zealous advocacy and nonaccountability but instead effective representation and client empowerment.

A move away from a narrow conception of nonaccountability in appropriate circumstances might allow group lawyers to better serve their clients. Consider, once again, the Rules’ approach to conflict of interests, and, in particular, to positional and ideological conflicts. In the context of representing individuals and some entity clients, the Rules’ narrow construction of conflicts may be quite sensible; moreover, it probably reflects the practice and business realities of many law firms, large and small. Indeed, some have called for further narrowing Rules on conflicts to better reflect the demands of the market for legal services.³¹³

Consider, for example, the situation of commercial law firms whose experience in complex transactions on Indian reservations yields opportunities to represent both tribes and non-Indian investors. Even lawyers deeply committed to tribal sovereignty as a general matter can find themselves challenging it if they represent a non-Indian party in a deal that falls apart, much to the chagrin of some tribal clients who expect “their” lawyers to defend tribal jurisdiction, immunity, and sovereignty more broadly. Tribes may face similar questions when they assess the loyalty of lobbyists or litigators who represent tribes on certain matters and advocate against them in others. At an even finer grain, some tribes will not appreciate it when an attorney moves from representing one tribe to another.

Of course this concern is not unique to Indian tribes as clients. Lawyers may face similar pressures to advocate consistently with a certain position in everything from employment litigation to intellectual property rights. Moreover, from the client’s perspective, it may be wise to take stock of the fact that the law firm lawyer is likely to have a broader set of potential conflicts and loyalty issues than the in-house lawyer. Moreover, the fact that some clients have greater expectations of attorney loyalty to the group, industry, or cause does not mean, of course, that a group and its lawyers cannot mutually agree on a more narrowly tailored duty of loyalty. It does mean, however, that lawyers would be well served to acknowledge the different loyalty expectations of different clients. Perhaps, as Tracy Zlock

312. Porter-Odawi, *supra* note 291, at 647.

313. See, e.g., Daniel J. Bussel, *No Conflict*, 25 GEO. J. LEGAL ETHICS 207 (2012) (arguing, *inter alia*, that “wholly unrelated” matters should never trigger a conflict of interest pursuant to Rule 1.7).

suggests in the Indian context, some lawyers for groups should be subject to special communication and disclosure requirements when representing clients that expect and, indeed, reasonably need greater loyalty.³¹⁴

*C. Challenging the Primacy of Professional Identity over
Nonprofessional Identity*

Nonaccountability explains the primacy of professional identity over nonprofessional identity pursuant to the Standard Conception. Because clients, and clients alone, exercise authority over setting the objectives of the attorney-client relationship, and lawyers are reduced to mere mouthpieces on behalf of clients, lawyers are implicitly encouraged to practice law qua lawyers with a universal professional identity divorced from any aspects of their personal identity. Exactly because lawyers are nonaccountable to the objectives pursued by their clients, their personal identities, values, and commitments are irrelevant to their practice of law and their professional identity.

Leading scholars of the profession have challenged such “bleached-out professionalism” and have explored the complex and nuanced ways in which personal identity does and should help inform and shape a lawyer’s professional identity.³¹⁵ Our analysis—in particular our questioning of nonaccountability as the only and obvious baseline of lawyering—joins such calls for further exploration of the interplay of professional and personal identity and cautions against unreflectively accepting the dominance of the former over the latter.

Of course, some lawyers may choose to accept the primacy of law and its conception of universal professional identity over aspects of their personal identity. For example, some Jewish lawyers practicing in the mid-twentieth century chose professional identity as lawyers as a means toward assimilation and becoming American.³¹⁶ For these lawyers, the answer to the question “what does it mean to be a Jewish lawyer” exemplifies the supremacy of law over their ethnoreligious identity: to be a lawyer first, then Jewish, in the sense that one’s ethnoreligious identity is secondary to one’s professional identity. The same prioritization of professional identity over personal identity, at least in the workplace, resounds with many other lawyers as well.³¹⁷

314. Zlock, *supra* note 78, at 183.

315. David B. Wilkins, *Beyond “Bleached Out” Professionalism: Defining Professional Responsibility for Real Professionals*, in *ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION* 207, 218–25, 230–34 (Deborah L. Rhode ed., 2000); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 *CORNELL L. REV.* 1259 (2000); *see also* DEVON W. CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA* (2013).

316. JEROLD S. AUERBACH, *RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION* (1990).

317. *See* Carbado & Gulati, *supra* note 315, at 1262 (exploring how “incentives and pressures to signal and work one’s identity shape the workplace behavior and experiences of outsider groups, such as women and minorities”).

Yet there is nothing inherently obvious about such a choice. Others may legitimately view their professional identity as secondary to their personal identity. Law can certainly be a useful tool, but it is not inherently constitutive of lawyers qua lawyers or of lawyers qua people. The late Navajo lawyer and judge Claudeen Bates Arthur wrote, “[M]y clan relationships tell me who I really am.”³¹⁸ These relationships, and the cultural identity that they reflect, create some tension between personal and professional identities. As she stated, “The dilemma is there: outside external thinking and philosophy and internal tribal identity.”³¹⁹ In her view, the way to reconcile this tension is to distinguish between internal and external matters:

[W]e must deal with internal matters from the standpoint of rules and law set forth by the Holy People. We must deal with external forces from the standpoint of their rules and laws, perhaps that is the Uniform Commercial Code, contracts, or other such subjects. Tribal lawyers should make those distinctions and remember to preserve and protect that which is internal if cultural sovereignty is to survive.³²⁰

In a similar vein, G. William Rice, a prominent professor, tribal attorney, and former elected leader of the United Keetoowah Band of Cherokee Indians, has explained that, from his perspective, “it makes no sense to adopt power, rank, and wealth as the measure of individual honor and attainment, and disregard our traditional standards of fairness, generosity, humble attitudes, and respectable actions in life.”³²¹ Indeed, tribal attorneys and Indian societies have access to “an alternative view of society, social processes, and human kind’s place on this earth.”³²² From this perspective, Rice proposes that “as Tribal Attorneys, then, we must protect and, where necessary, begin the process of recovering, our own tribal identities, governmental structures, social control methodologies, and dispute resolution systems.”³²³

While drawing on Native religion and culture for strength in legal practice, however, Pawnee attorney Walter Echo-Hawk articulates a clear line between the attorney and the client. As he explains:

As an attorney you’re an advocate for other people. The best attorneys are the ones that try to maintain a professional outlook . . . It can be very trying sometimes. You always have to maintain your professional duties. It’s not about you, it’s about your client. Try to be grounded in your own culture and spirituality that you have. That will give you strength.³²⁴

318. Arthur, *supra* note 209, at 21.

319. *Id.* at 25.

320. *Id.* at 25–26.

321. G. William Rice, *Of Cold Steel and Blueprints: Musings of an Old Country Lawyer on Crime, Jurisprudence, and the Tribal Attorney’s Role in Developing Tribal Sovereignty*, 7 KAN. J.L. & PUB. POL’Y 31, 51 (1997).

322. *Id.* at 52.

323. *Id.*

324. Dana Attocknie, *Warrior Nerd: Pawnee Fights of Native Rights*, OKLA. NATIVE TIMES, Feb. 2011, available at <http://www.crowedunlevy.com/Websites/crowedunlevy2010/>

Our point, to be clear, is not that there is something wrong with choosing to embrace one's professional identity as a lawyer as a constitutive or even dominant aspect of one's identity. Rather, it is that for many lawyers who are group members, including some Native Americans and other minorities, to accept law as completely defining one's professional role is to deny the past and to concede alternative conceptions of the future. It is also to ignore the discriminatory treatment that Native American lawyers may receive at the hands of others who will attribute, often incorrectly, stereotypes and assumptions about the confluence of their personal and professional identities.³²⁵

Moreover, the traditional Standard Conception discourse does not acknowledge a space for group/tribal identity as a meaningful aspect of one's professional identity. As we have seen, the counterweight for the professional identity is conceptualized as various "personal" aspects of one's identity, such that if one, as an individual lawyer, chooses to highlight her identity as a Native American, she is welcome to do so. But developing one's identity as a group member is simply not part of a discourse in an environment that enshrines individualism as its core value.

Yet such an exclusion of group identity as a meaningful component of one's professional identity is neither intuitive nor inevitable. Professor Strickland argues:

[One] must be both an Indian and a lawyer. By this, I do not mean that every Indian must serve only Indian clients or Indian cases or even that lawyers who are Indians should not choose to serve clients exclusively in a non-Indian world. But I personally think the rewards are greatest for the Indian lawyer who wants to direct himself toward legal problems for the Indian people.³²⁶

Robert A. Williams, Jr.,³²⁷ and Stacy L. Leeds,³²⁸ both prominent law professors and tribal members, have written evocatively about the American Indian community's expectations for them to apply their legal training and professional resources to problems in tribal communities. These expectations did not come as a huge surprise, as Williams tells it, because

I was raised in a traditional Indian home, which meant I was raised to think independently and to act for others. . . . [M]y upbringing meant that

Images/News/Echo-Hawk%20Article%20-%20Feb11.pdf (alteration in original) (quoting Walter Echo Hawk).

325. See generally Baca, *supra* note 110 (recounting his experiences as the first Native American attorney in the Justice Department); see also MARIA CHÁVEZ, *EVERYDAY INJUSTICE—LATINO PROFESSIONALS AND RACISM* (2011).

326. *Id.* at 52.

327. See generally Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741 (1997).

328. See Stacy L. Leeds, *A Tribal Court Domestic Violence Case: The Story of an Unknown Victim, an Unreported Decision, and an All Too Common Injustice*, in *WOMEN AND THE LAW STORIES* 456–58 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011). Leeds is now the Dean of the University of Arkansas Law School.

I had to endure probing questions at the family dinner table, asked by my elders, like, “Boy, what have you done for your people today?”³²⁹

He faced the same kinds of expectations when he became a law professor at the University of Arizona and local tribes began calling for legal assistance.³³⁰ Leeds received similar inquiries from tribes in Oklahoma and Kansas. Yet both Williams and Leeds were instructed by senior law school colleagues, and institutional pressures more generally, that spending substantial time on “service” would detract from the pursuit of legal scholarship and tenure. Nevertheless, as Leeds tells it, she chose to “say yes”—in her case by serving as a judge on many tribal courts—because “saying no to an American Indian community in need could leave that community without adequate legal assistance.”³³¹ Williams, too, ultimately chose to infuse his professional practice with cultural morality, creating an indigenous human rights clinic that would train students by representing tribal clients.³³²

Group morality may inhere not only in career choices but also in lawyering strategies. Some of the most difficult ethical cases in Indian Country pit tribal sovereignty against individual civil rights.³³³ In their most extreme formulation, these cases juxtapose tribal survival with individual liberties. But across Indian Country advocates have begun to consider that perhaps the characterization and treatment of these cases in such extreme, adversarial terms is itself a leftover of the colonial process that would be handled better by revitalizing distinctly tribal forms of dispute resolution that reconcile collective and individual rights. Wenona Singel—a prominent law professor and tribal court judge, as well as a citizen of the Little Traverse Bay Band of Odawa Indians—has, for example, advocated the development of an intertribal human rights tribunal that would rely on tribal norms and processes to address tribal and individual concerns.³³⁴ Professor Singel courageously acknowledges that

329. See Williams, *supra* note 327, at 743.

330. See *id.* at 758–59 (“[A]ll these requests for help started ‘interfering with my writing,’ not to mention my serious reading time. I had to make excuses, like ‘Gee, I’d like to help you out by taking your tribe’s land claim to the International Court of Justice at the Hague, but I’ve got to finish this law review article applying Frantz Fanon to Indian law that maybe a dozen or so people who also write on Indian law will read.’ . . . What these Arizona Indians really wanted me to do was to get off my critical race theory ass and do some serious Critical Race Practice. They didn’t give a damn about the relationship between hegemony and false consciousness. They wanted help for their problems, and I was a resource. That’s why they were so tough on me. See, to be a leader in an Indian community means going off the res to bring in resources to help the community. That meant that all these people asking me for help were assuming the responsibility of being Indian leaders which meant they could get right in my face and tell me to ‘act like an Indian’ and give something back, rather than take, take, take.”).

331. See Leeds, *supra* note 328, at 457.

332. See Williams, *supra* note 327, at 762–63.

333. See *supra* note 154 (discussing the *Santa Clara Pueblo* and *Cherokee Freedmen* cases).

334. See Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 SAN DIEGO L. REV. 567 (2012) (acknowledging tribes as potential violators of human rights and

tribes can be human rights violators—a point that is often difficult for tribal advocates and scholars to accept—but also have the capacity to provide their citizens with venues for redress.³³⁵

These examples show how several American Indian lawyers have embraced the morality of the community in which they are members—a morality that expects individuals with particular resources to contribute them for the good of the group—managing to successfully navigate professional pressures to the contrary. Such a professional group-identity may not appeal to all lawyers representing groups, or even to all American Indians representing tribes. But it is an important alternative to the Standard Conception, foreclosed by the dominant ideology and the Rules that implement it. Scholars of the legal profession have cautioned about the perils of making universal assumptions about clients, lawyers, and their relationships and have compellingly advocated for a careful study of the profession in context.³³⁶ Yet navigating the space between universalism and contextual analysis is often a challenging task. In particular, while attention to context, such as studying the experiences of tribal lawyers, is imperative, there is at the same time a legitimate concern and therefore a reluctance to associate special skill sets or experiences with particular groups. Such categorization smacks of essentialism or even discriminatory bias, especially when generalizations are made about political, racial, or ethnic minorities. And so it becomes difficult and highly charged to discuss the role of personal and group identity in the professional lives of tribal lawyers.

In American Indian communities, as well as other groups, identity questions are front and center, and these questions affect the professional lives of tribal lawyers. In particular, tribal members are usually very aware of an individual's relationship to the community, whether he or she is a relative, enrolled tribal member, or otherwise recognized by the community as an Indian—and the lawyer's status in this regard will almost certainly be a factor in the reception he or she receives by the community. As described above, a lawyer's membership in the community may help him or her access and imbue the community's values in practice. On the other hand, the lawyer's membership in an Indian tribe could also create conflicts of interest³³⁷ where, for example, the lawyer/member has a direct financial, political, or other stake in the outcome of a matter wherein the tribe is a party. We suggest, therefore, that the question of identity—professional, personal, and group—goes to the tribal lawyer's professional effectiveness

proposing a new intertribal dispute resolution system that would address human rights claims in a manner that respects tribal procedural and substantive norms of justice).

335. *See id.*

336. David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye*, *Scholar*, 66 S. CAL. L. REV. 1145 (1993).

337. *See* Gerald Hill, *Conflicts of Interests for Tribal Lawyers, Representing Their Own Tribes*, 8 KAN. J.L. & PUB. POL'Y 147, 149–54 (1999).

in a way that challenges the traditional divide between role morality and common morality/identity.

In typically compelling fashion, Norm Spaulding argues that lawyers should not too closely identify with their clients. A lawyer's role, asserts Spaulding, "is grounded in a logic of service, not identification,"³³⁸ pursuant to which lawyers ought to diligently represent clients "irrespective of any personal, moral, or ideological affinity between them."³³⁹ Moreover, "[i]dentification, by contrast, turns the role into an object of self-realization for the lawyer. Intense identification between lawyer and client—what I call 'thick professional identity'—is typically a self-interested perversion of the service norm."³⁴⁰ Spaulding's call for lawyers to reject thick professional identity is certainly plausible and persuasive in some contexts, especially in the individualistic sphere of criminal defense.³⁴¹ Indeed, we are not arguing that, to use Spaulding's terminology, thick professional identity is required of all tribal or group lawyers, or even that it is superior to or more desirable than thin professional identity. We do, however, believe that for some group lawyers, some of the time, group identity is relevant and plays a role in the construction of their professional identity and representation of clients. By denying that role and the space for exploring the relevance of thick (or at least thicker) professional identity, the Standard Conception does a disservice to both group clients and their lawyers.

D. Some Models from Indian Country

We have argued that the stories of tribal lawyers reveal the need for diverse visions and professional ideologies to emerge alongside the dominant ideology of the Standard Conception. To some extent, tribes and American Indian law organizations have begun to make space for these alternative conceptions. Several national and tribal bar associations, tribal legislatures, and other bodies have expressed concepts of client empowerment, attorney accountability, and tribal identity in their own statements of professional responsibility.

The National Native American Bar Association (NNABA), for example, states that its collective mission is "Representing Indian Nations not just Indian Lawyers."³⁴² In this regard the NNABA's purpose is about more than support for lawyers who happen to be American Indian and is also about more than promoting cross-cultural awareness. Instead, the NNABA

338. Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 6 (2003).

339. *Id.*

340. *Id.*

341. *Id.* at 101 ("[I]t strikes me as the highest order manifestation of service through thin identity—being willing to serve where the most dire need exists quite irrespective of whether one identifies with the personal attributes or positions of the clients one serves and quite irrespective of the prospects for material reward or social approval.").

342. NAT'L NATIVE AM. B. ASS'N, *supra* note 109.

articulates: “[M]ost of our lawyers are both U.S. citizens and citizens of their respective Tribal nations. Our members, therefore, also share the communal responsibility, either directly or indirectly, of protecting the governmental sovereignty of the more than 560 independent Native American Tribal governments in the United States.”³⁴³ This is a clear recognition and embrace of the relationship between the identity of the lawyer-members and a standard of professional conduct.³⁴⁴ The NNABA mission is not without complexity, given that it does not define the concept of “protecting governmental sovereignty” nor does it articulate how to weigh the interests of individual Indians or other parties against tribal governments. Yet, most American Indian lawyers will understand this statement as reflecting a relatively clear and commonly shared sense of professional obligation to advance tribal self-determination against other interests. As a general matter, the NNABA statements are important because, while they are not binding or enforceable, they set expectations for Indian lawyers wherever they practice and, in this regard, are arguably broader and more unifying than the reservation-based codes described below.

In another example, the National Tribal Judicial Center at the National Judicial College promulgated a “Sample Tribal Code of Judicial Conduct” in 2007.³⁴⁵ The project aims to equip tribal courts with tools that they need to foster a sense of institutional dignity and legitimacy, with external and internal constituents. These concerns are particularly acute with the passage of the Tribal Law and Order Act of 2010, restoring a certain measure of tribal court authority over criminal matters,³⁴⁶ and the increasing presence of business interests in Indian Country.³⁴⁷ As one attorney notes:

Private businesses are very afraid of the notion of a tribal court. Tribes have recognized that impression and have been trying to say, ‘This is a legitimate system The adoption of the model codes in wide usage, which people understand inside and outside the tribal context, would be helpful in that regard.’³⁴⁸

For some of these reasons, perhaps, the Sample Tribal Code incorporates much of the ABA Model Code of Judicial Conduct.

343. *Id.*

344. *Id.*

345. SAMPLE TRIBAL CODE OF JUDICIAL CONDUCT: A TEMPLATE (2007), available at http://www.judges.org/pdf/ntjc_samplecode.pdf.

346. Office of the Tribal Prosecutor, *Tribe Passes Enhanced Sentencing Law*, ONE FEATHER (August 23, 2012), <http://theonefeather.com/2012/08/tribe-passes-enhanced-sentencing-law/>.

347. Ed Finkel, *Economics and Culture Both Put Their Stamp on Ethics Rules in Tribal Courts*, ABA J. (Mar. 1, 2011), http://www.abajournal.com/magazine/article/economics_and_culture_both_put_their_stamp_on_ethics_rules_in_tribal_courts/ (quoting W. Gregory Guedel, Chair of the Native American Concerns Committee in the ABA Section of Individual Rights and Responsibilities).

348. *Id.* (quoting W. Gregory Guedel, Chair of the Native American Concerns Committee in the ABA Section of Individual Rights and Responsibilities).

Notwithstanding this substantial nod to uniformity, however, the drafters of the Sample Tribal Code contemplated certain considerations specific to tribal courts, including the fact that some tribal courts recognize nonattorney judges, use nonadversarial peacemaking techniques, or permit judges to receive culturally sanctioned gifts.³⁴⁹ Another key issue was “whether to prohibit ex parte communications with judges . . . in close-knit Indian communities where judges are looked to as community pillars in the broader sense.”³⁵⁰ In the words of seasoned tribal court judge B.J. Jones, “The tribal judge is more than an arbitrator of disputes. You’ve got to be actively involved in the community.”³⁵¹ To make room for these norms and values, the Tribal Sample Code was “designed to encourage tribal courts to tweak it as much as they want.”³⁵²

As the Sample Tribal Code foreshadows, tribes have begun to articulate their own professional norms, though various vehicles including tribal legislative codes, tribal constitutions, tribal bar associations, and even tribal attorney job descriptions. As we have noted above, this sovereign power to enact regulation within the tribal territory is one of the attributes that differentiates Indian tribes from most other groups in the United States. For example, the Navajo Nation, through its legislative code, prohibits the unauthorized practice of law on the reservation.³⁵³ To become eligible to practice in the Navajo Nation, an individual must become a member of the Navajo Nation Bar Association,³⁵⁴ with admission ultimately overseen by the Navajo Nation Supreme Court.³⁵⁵ Applicants must take the Navajo Bar Exam, which tests on general subjects (torts, contracts, domestic relations, and so on) and on Navajo law (e.g., Navajo children’s law, tribal jurisdiction, and peacemaking). The Navajo Bar Association requires a “prescribed course in Navajo law, culture, traditions and history” prior to sitting for the bar.³⁵⁶ The bar association’s website explains key legal terms in the Navajo language such as “*naalyeeh*,” a concept that is closely related to restitution and takes into account harmony, clan relationships, and hard feelings among people—and “*ke*” or a concept of equality, reciprocity, respect that facilitates consensual solutions.³⁵⁷ Not unlike certain U.S.

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.* (quoting Christine Folsom-Smith, a program attorney at the National Tribal Judicial Center).

353. NAVAJO NATION CODE ANN. tit. 7, § 606 (2005); NATION NATION CODE ANN. tit. 17, § 377.

354. See Navajo Nation Bar Ass’n, Inc., Bylaws § I(A), available at <http://www.navajolaw.org/New2008/bylaws.htm> (last visited Apr. 19, 2013).

355. See, e.g., Tafoya v. Navajo Nation Bar Ass’n, 6 Navajo Rptr. 141 (1989) (“While the NNBA does possess the power to conduct revocation proceedings, only the Navajo Supreme Court has the ultimate power to revoke a practitioner’s license and membership in the NNBA.”), reprinted in JUSTIN B. RICHLAND & SARA DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 405–16 (2d ed. 2010).

356. See Bylaws, *supra* note 354, § III(D)(4).

357. See Navajo Common Law, NAVAJO NATION B. ASS’N, available at <http://www.navajolaw.org/New2008/ncl.htm> (last visited Apr. 19, 2013).

states (e.g., New Hampshire and California), the Navajo Nation allows individuals who have not graduated from law school to take the bar³⁵⁸—but at the Navajo Nation, this track is reserved for members of any federally recognized tribe who have completed an undergraduate, paralegal, or other approved educational program.³⁵⁹ In these many respects, the Navajo Nation, through its legislative code and bar association, appears to address issues of ethics, culture competency, and individual Indian empowerment that have diminished representation of tribal clients in the past. Such an approach could be—and often is—modeled by other tribes with specific crafting to their own norms, values, and processes.³⁶⁰

Finally, we note that several tribes have begun to provide legal services for individual tribal members. As we noted above, tribal attorneys often receive legal inquiries from individual tribal members, but under an entity-based approach to representation, the tribal attorney is bound to decline, citing her singular duty to the tribe as client. That response is not particularly satisfying in the many tribal communities where attorneys and the money to pay for them may be in short supply, and where tribal members see the tribal attorney's office as a source of much-needed professional information. The Little Traverse Bay Band of Odawa Indians recently passed legislation creating an "Office of Citizens Legal Assistance" in the Legal Department of the Tribe.³⁶¹ The Office may assist tribal citizens with drafting and advice on matters such as estate planning, real estate, landlord-tenant issues, divorce, and guardianships.³⁶² The Office cannot, however, appear in tribal court or to assist in matters wherein the tribe is involved.³⁶³ In an analogous mode, the Office of the Reservation Attorney (ORA) of the Tulalip Tribes of Washington may "provide information, referral and legal assistance to Tulalip tribal members on minor matters where the assistance does not present an apparent conflict with the ORA's primary duty to provide legal counsel to the Tulalip Tribes."³⁶⁴ While traditional legal services, operated independently of tribes, have provided similar assistance,³⁶⁵ these new programs suggest an

358. This practice is coming under pressure with the recently passed amendments to the Violence Against Women Act that restore to tribal courts jurisdiction over non-Indian defendants in certain domestic violence matters.

359. Bylaws, *supra* note 354, § III(C).

360. See RICHLAND & DEER, *supra* note 355, at 405–34 (describing examples of professional responsibility standards, as articulated in tribal codes and court opinions, from the Colville Tribe, Sault Ste. Marie Tribe of Chippewa Indians, Navajo Nation, Bay Mills Indian Community, Fort Peck Tribe, and Hopi Tribe).

361. See WAGANAKISING ODAWA STAT. #2012-006 (2012), available at <http://www.ltbodawa-nsn.gov/odawaregister/legislative/Statutes/2012/WOS%202012-006%20Office%20of%20Citizens%20Legal%20Assistance.pdf>.

362. See *id.*

363. See *id.*

364. See, e.g., *Tulalip Tribal Codes*, TULALIP TRIBES, § IV, <http://www.tulaliptribes-nsn.gov/Home/Government/Departments/LegalReservationAttorney.aspx> (last visited Apr. 19, 2013).

365. See, e.g., *About Native Legal Net*, NATIVE LEGAL NET, <http://nativelegalnet.org/page/about-native-legal-net> (last visited Apr. 19, 2013) ("DNA People's Legal Services is a

understanding of a more capacious role for the tribal attorney's office in meeting the needs of citizens, albeit with careful attention to potential conflicts.

In our view, these examples begin to reflect the complex roles of lawyers for both groups and individuals. The Sample Tribal Code, albeit geared toward judges, offers a helpful model for how the Rules of Professional Conduct, designed for the classic model of individual lawyering, might be used in group settings. It sets a baseline of professional expectations, reflecting consensus on minimum standards for lawyers across the country, but leaves space for each tribe to express its own cultural norms and relationships, and to reflect its own tribal history and political structures. The NNABA Mission, in turn, suggests that bar associations and other groups of professionals can also take a role in articulating standards and expectations of attorney conduct that are more capacious and more responsive to particular groups. And tribal codes and bar associations increasingly recognize cultural competency, Indian empowerment, and the concerns of individual tribal members as within the considerations that attorneys for tribes should take into account, where possible.

We consider all of these examples important alternatives, modifications, and supplements to the ABA's Model Rules of Professional Conduct with their slim content on group lawyering. Notably, most of these tribal-specific statements of ethics are moderate variations on the Rules; they do not, for example, tend to discount the role of attorneys, adversarial proceedings, or U.S. law altogether. And they often acknowledge the utility of having a common baseline that provides some consistency across representation of Indian tribes. This approach is, like much legal reform occurring in Indian Country,³⁶⁶ a reasonable and manageable step toward decolonizing the relationship between tribes and their lawyers. It gives tribes and their lawyers a starting point for their common involvement in tribal, state, and federal legal systems—a set of minimum expectations that lawyers for tribes have often failed to meet in the past—while articulating and giving voice to Indian cultural and political norms where they depart from the mainstream. Beyond these examples, tribal governments, professional associations and organizations, along with other groups, will surely continue to develop additional alternatives and complements to the Rules.

501(c)(3) nonprofit legal aid organization working to protect civil rights, promote tribal sovereignty and alleviate civil legal problems for people who live in poverty in the Southwestern United States. Since 1967, DNA has provided free legal aid in remote portions of three states and seven Native American nations, helping thousands of low income people annually to achieve long lasting economic stability by providing access to tribal, state and federal justice systems.”); *see also* MICH. INDIAN LEGAL SERVICES, <http://www.mils3.org/> (last visited Apr. 19, 2013) (“Michigan Indian Legal Services provides legal services to low income Indian individuals and tribes to further self sufficiency, overcome discrimination, assist tribal governments and preserve Indian families.”).

366. *See* Champagne, *supra* note 200.

CONCLUSION

As lawyers and clients evaluate how best to use the power of the law and legal profession, there is perhaps something to be learned from the experience of tribal lawyers. In this vein, Rennard Strickland once retold the following story:

There was an Osage legend or prophecy which said that the white man would bring something with him that was of great value but that he would not know how to use it and that the Indian would take it and add to it and change it and that it would then be good and true and pure. Some say that this was Christianity and that when the Indian joined peyote with this new Christian religion that the prophecy was fulfilled. I think the same may be true of the statute and case law which the white man brought. Our challenge is to take that law and add to it and change it so that law can be good and true and pure not only for Indian people but for all people.³⁶⁷

The Standard Conception of lawyering, and the Rules of Professional Conduct that implement it, celebrate individualism, client autonomy, and lawyers' role morality. There is certainly room for such traditional representation of tribes and other groups under this dominant model of law practice, and tribal lawyers can also learn much from models of corporate, government, cause, and civil rights lawyering, each of which may be relevant to the particular legal challenges that they face. But at the end of the day, tribes are not necessarily like the other corporations, governments, causes, or minorities within the American legal landscape. They are Indian tribes, each with a particular history and contemporary reality that impacts their representation by lawyers. A theory of law practice and rules of professional conduct that build on it must acknowledge the range and diversity of clients, lawyers, and the relationships they form, and encourage the development of professional ideologies that reflect the commitments and values of lawyers for groups.

In this Article, we demonstrate that in some instances, the Standard Conception's norms of zealous advocacy, nonaccountability, and role morality, as well as specific Rules of Professional Conduct, ill fit and poorly guide the practice of tribal lawyers. Indeed, effective representation rather than zealous advocacy, client empowerment rather than lawyer nonaccountability, and tribal identity may be relevant factors in the relationship between lawyers and tribes. We argue that the experience of tribal lawyers compellingly challenges the dominant ideology and the Rules, and suggests not only the need to rethink and reimagine some aspects of the regulatory apparatus but also the professional ideology that legitimizes it.³⁶⁸ With the experience of legal oppression, and the ongoing

367. RENNARD STRICKLAND, *TONTO'S REVENGE* 119–20 (1997).

368. See John Levin, *Native American Issues and Legal Ethics*, CBA REC. (Sept. 2012), <http://www.johnlevin.info/legalethics/article/native-american-issues-and-legal-ethics> (suggesting increased awareness of American Indian issues offers insights that would benefit all lawyers about the ways in which “law—as an institution—categorizes people and the effect of that categorization when reflected back on society”).

commitment to community, tribes suggest additional conceptions of law and means of practicing it. The alternative conceptions described in this Article reflect tribes' particular experiences with conquest and colonization, their status as political sovereigns, and the current movement of tribal self-determination in governance, culture, and socioeconomics. More broadly, however, the representation of tribes suggests that all groups and even individuals may benefit from the emergence of alternative models of legal practice that make room for the values, identities, and experiences of groups and their lawyers.