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SHADOW WAR SCHOLARSHIP, INDIGENOUS LEGAL  
TRADITION, AND MODERN LAW IN INDIAN COUNTRY

Christine Zuni-Cruz

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# SHADOW WAR SCHOLARSHIP, INDIGENOUS LEGAL TRADITION, AND MODERN LAW IN INDIAN COUNTRY

Christine Zuni Cruz\*

*this idea of the shadow war  
—a war of words and thinking—  
to protect mental sovereignty works  
in conjunction with promoting  
understanding and dispelling or  
countering disinformation in respect  
to the indigenous legal tradition  
and tribal law*

## I. INTRODUCTION

This essay comments on the multi-layered experience of establishing an electronic law journal for the serious, scholarly treatment of the Indigenous (Chthonic) Legal Tradition and the law “of” Indigenous Peoples, as opposed to the nation-state law “concerning,” “about,” or “for” Indian tribes. It addresses the challenges to both the enterprise of seeking to write and publish about an oral legal tradition and its emerging modern, and written, offshoot in an electronic format, and of doing so in an academic and technological setting that contradicts and opposes the enterprise. It lays out the thought, the vision, the obstacles, and the concerns of the endeavor.

The “shadow war” is a term I borrow from the analysis of the Zapatistas’ use of the Internet. The shadow war describes a conflict fought on “symbolic rather than real terms.”<sup>1</sup> In respect to the Tribal Law Journal—and scholarship on the Indigenous legal tradition and law *of* Indigenous Peoples—it is a war of words and ideas.<sup>2</sup> Donald L. Fixico calls it “wars of the minds,” recognizing:

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1. Jerry W. Knudson, *Rebellion in Chiapas: Insurrection by Internet and Public Relations*, 20 MEDIA, CULTURE & SOC'Y 507, 507 (citing Alma Guillermoprieto, *The Shadow War*, THE N.Y. REV. OF BOOKS, Mar. 2, 1995, at 34-43). “Shadow war” was employed by *New Yorker* writer Alma Guillermoprieto in reference to the Chiapas uprising: “The shadow war springs from and plays on a native Mexican tradition of ritual gesture that is shared by warriors and audience alike . . . .” Guillermoprieto, *supra*, at 39. A shadow is cast by a real object, and in this case, real conflict and loss of lives. As of 1998, “[b]efore the Mexican government declared a unilateral truce on 12 January [1994], some 196 persons lost their lives—a figure that includes a few victims on both sides in rare truce violations since then.” Knudson, *supra*, at 507.

2. See Knudson, *supra* note 1, at 507.

The wars fought between Indians and the whites were more than just over land—they were wars of the minds. The American mainstream thinks in a linear fashion, which is very different from the circular fashion of traditionalists. These two are at odds when both are not realized, as by one not knowing the other one.<sup>3</sup>

Antonio López speaks of maintaining “mental sovereignty” with respect to outside influences.<sup>4</sup> López and Fixico express two important aspects of the Journal’s endeavor, making the Indigenous legal tradition and modern law explicit, while at the same time promoting mental sovereignty with respect to the development of modern forms of law within Indigenous communities.<sup>5</sup>

Speaking of mental sovereignty in the face of pressing and unrelenting outside influences is important to Indigenous endeavors. Sovereignty involves the idea of absolute authority within separate spheres and autonomy or freedom from outside control. Mind or mental sovereignty is a powerful concept; it takes the concept of sovereignty inward where it operates internally and is personal. Mental sovereignty speaks to me of the ability to be able to think in a different manner; it is more than thinking independently, though that is a part of it. It represents the idea of being able to maintain an autonomous way of “knowing,” without having that way eradicated or compromised, even in the face of constant bombardment or immersion in another way of thinking, while maintaining the ability to operate accordingly. There are very different ways to think, to process information, or to view and approach matters, all of which involve how one views the world. In this case, I am thinking of western and Indigenous ways of knowing or thinking. To maintain an Indigenous worldview, to value Indigenous knowledge, and to draw upon it is to maintain Indigenous mental sovereignty. It is the cure for the colonial mentality, in which the native is eclipsed by thinking the colonizer’s way is more worthy or superior.

I draw on the analysis of the Zapatistas’ use of the Internet because their use of the technology was analyzed and commented on widely. It garnered attention and study that has proven helpful in considering the Internet and its use in the work of the Journal. The shadow war the Indigenous Peoples of Chiapas waged on the Internet was serious, and it showed us many things about the utilization of this technology on behalf of Indigenous Peoples.<sup>6</sup> The Chiapas insurgency’s shadow war fought its conflicts in symbolic terms on the Internet, “spilling more ink than blood,” requiring “as many computer disks as bullets,” and reaching the country’s

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3. Antonio López, *Circling the Cross: Bridging Native America, Education, and Digital Media*, in LEARNING RACE AND ETHNICITY: YOUTH AND DIGITAL MEDIA 109, 110 (Anna Everett ed., 2008) (quoting DONALD L. FIXICO, THE AMERICAN INDIAN MIND IN A LINEAR WORLD 15 (2003)).

4. *Id.* at 117. López speaks of mental sovereignty in the face of mass media, stating “though it is important for mainstream society to be familiar with Native issues . . . the flood of commercial media . . . threatens language, cultural integrity, and mental sovereignty.” *Id.* Likewise, the flood of American law into tribal communities threatens the foundational principles of Indigenous values, beliefs, ethics, and political and social organization. Preservation of the “Native intellect and philosophy” is important; “otherwise, as one tribal leader stated, ‘we’ll end up being white people speaking Indian languages.’” Therese Bissell, *The Digital Divide Dilemma: Preserving Native American Culture While Increasing Access to Information Technology on Reservations*, 2004 U. ILL. J.L. TECH. & POL’Y 129, 145-46 (citing Laura M. Dellinger, *Tribal Colleges Growing: AIHEC Spring Conference Shows Vitality*, INDIAN COUNTRY TODAY, Apr. 10, 2002, at D1).

5. López, *supra* note 3, at 110, 117.

6. The shadow war metaphor appropriately “springs from and plays on a native Mexican tradition of ritual gesture that is *shared by warriors and audience alike*.” Guillermprieto, *supra* note 1, at 39 (emphasis added). The shadow war is “[t]he only kind [of war] the EZLN can afford, a symbolic one, fought with communiqués, bellicose gestures, and elaborately staged theatrical events.” The metaphor evokes theatrical themes; it must be remembered that what is at stake is very real. *Id.*

conscience, the foreign press, and global allies.<sup>7</sup> Military victory was never the object; indeed that the Nation's response could be a military one was checked through effective communiqués “mobiliz[ing] public opinion and bring[ing] pressure to bear on authorities to act cautiously.”<sup>8</sup> The Internet itself, its speed, and the ability to disseminate information and opinion to national and foreign journalists, allowed for a war of words, and provided a decided advantage to the Zapatistas. The technological dimensions of the Internet, including “a relative lack of centralized control, the reconfiguration of notions of proximity, . . . decentered author interactivity and an alliance-building capacity . . . facilitate a particular type of communication and contribute to a broadening of the discourse.”<sup>9</sup> This is particularly true for Indigenous Peoples who stand at a disadvantage resulting from power imbalances leading to ideological, political, economic, and social injustices, which push them to the periphery of discussions. Consider Marcos' first communiqué of August 1992:

Half of the 3.2 million inhabitants of the state do not have potable water and two-thirds have no sewage system. Some 55 percent of national hydroelectric energy comes from Chiapas, yet only a third of the homes there have electricity. Some 1.5 million people have no medical services, mainly the 1 million [I]ndigenous people, including the 300,000 Tzotziles, 120,000 Choles, 90,000 Zoques and 70,000 Tojolabes. More than 30 percent of the state's inhabitants are illiterate and 32 percent speak only their Indian language. Schools, where they exist, are ramshackle buildings with untrained teachers and few instructional materials. They offer education only to the third grade, and 72 percent of the children do not complete first grade.<sup>10</sup>

It is the use of this technological tool to focus, frame, and affect the internal and external discourse which is the thread that draws us together.

Use of the term “shadow war” raises the question of who is at war and what is at stake. In this shadow war, there are many battlefronts. There is contested ground neither side has won; there is ground that is held by one, but where the battle is not over. Some are involved in the battle over jurisdiction; others are in the battle over the law itself. Process, power, and control are yet other contested areas. For some the battle is with the nation-state; for others it is within. Ultimately it is a battle that pits the chthonic legal tradition against the dominant legal tradition of the nation-state.

## II. THE *TRIBAL LAW JOURNAL* AS AN ELECTRONIC JOURNAL—IDEALS, GOALS, ASPIRATIONS

The *Tribal Law Journal*<sup>11</sup> is the first law journal dedicated exclusively to scholarship on Indigenous law, that is, the law of *specific* Indigenous nations and peoples. Indigenous law includes both the chthonic<sup>12</sup> or Indigenous legal tradition and the “modern” and emerging law of

7. Knudson, *supra* note 1, at 507, 509.

8. *Id.* at 508, 515; Russell, *infra* note 15, at 399.

9. Russell, *infra* note 15, at 402.

10. Knudson, *supra* note 1, at 513 (citing J. ROSS & F. BARDACKE, SHADOWS OF TENDER FURY, THE LETTERS AND COMMUNIQUEs OF SUBCOMANDANTE MARCOS AND THE ZAPATISTA ARMY OF NATIONAL LIBERATION (1995); L. Conger, *Mexico: Zapatista Thunder* 115 CURRENT HIST. (Mar. 1994)) (internal citations omitted).

11. University of New Mexico School of Law *Tribal Law Journal*, <http://tlj.unm.edu> (last visited May 19, 2008). *Tribal Law Journal* is the name selected by the founding student staff in 2000. I served as faculty advisor and sponsor to the students as we established the *Journal* and as the *Journal's* present Editor in Chief.

12. “Autochthonic” is a term used for Indigenous peoples meaning “[a]ny of the earliest known dwellers in a region; an original inhabitant, an aboriginal” or “[a] human being living in his or her place of origin.” 1 THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 152 (1993). “Chthonic legal tradition” is the term

these Indigenous nations and peoples. It does not include the nation-state's law on Indigenous Peoples, commonly referred to in the United States, as federal Indian law. Thus, the *Journal* focuses on law developed and emerging from Indigenous Peoples themselves.<sup>13</sup> It is also the first electronic law journal in the general area of Indian law.

Several ideals, goals, and aspirations were at play in the origin of the *Journal*, and they influenced the decision to create an electronic journal as opposed to a print journal. In this essay, I speak from my perspective as faculty sponsor and as advisor to the founding staff.<sup>14</sup> First and foremost was the concern of audience and the understanding that the audience was and is "glocal." The idea of grounding oneself locally, but understanding global interrelationships is extremely important to Indigenous thought and knowledge. The term "glocal" values the significance of place (local) and the interconnectedness of the whole earth (global) to place.<sup>15</sup> For Indigenous Peoples the relationship extends to the universe. In fact, this is a hallmark of Indigenous knowledge systems.<sup>16</sup> It is relevant to Indigenous "law" because the Indigenous legal tradition is diffused within the Indigenous knowledge systems.<sup>17</sup> Locality is critical to Indigenous knowledge systems, and therefore to Indigenous legal traditions, which are grounded

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employed by H. Patrick Glenn in his book, *LEGAL TRADITIONS OF THE WORLD*. Glenn identifies the chthonic legal tradition as one of seven major legal traditions in the world. See H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 56-85 (2000). Another term used is "consuetudinary law." See Kenneth Bobroff, *Diné Bi Beenahaz'áanii: Codifying Indigenous Consuetudinary Law in the 21st Century*, 5 *TRIBAL L.J.* (2005), [http://tlj.unm.edu/tribal-law-journal/articles/volume\\_5/dine\\_bi\\_beenahazaanii\\_codifying\\_indigenous\\_consuetudinary\\_law\\_in\\_the\\_21st\\_century/index.php](http://tlj.unm.edu/tribal-law-journal/articles/volume_5/dine_bi_beenahazaanii_codifying_indigenous_consuetudinary_law_in_the_21st_century/index.php) (last visited May 19, 2008). I prefer Indigenous legal tradition, though I use chthonic legal tradition as well.

13. Oftentimes nation-state law and international law affect Indigenous law and the *Journal*, in recognition of this "cusp" or overlap, also publishes scholarship which considers these areas.

14. The founding students have their own perspectives, and we have heard annually from a past staff member since 2006 at our Law School's *Tribal Law Journal* reception. That perspective changes over the years with each new group of student editors and staff. The Founding Student Staff, as reflected on the staff page, is comprised of: Bidtah Becker, (Navajo and Preview Issue Editor), Lynn Trujillo (Sandia/Taos/Acoma), Jason Hauter (Maricopa), Randy Ash (Dine'), Katie O'Connor, Eddie Garcia (Tohono O'odham), Danielle Her Many Horses (Oglala Lakota), Lisa Lang (Haida), and Mark Welliver (Citizen Band Potawatomi). Preview Issue Staff, [http://tlj.unm.edu/about\\_us/vols/preview.php](http://tlj.unm.edu/about_us/vols/preview.php) (last visited May 19, 2008). There were other students who enrolled in the first Law of Indigenous Peoples course and assisted with the effort to establish the *Journal* at the school. The founding students' perspective can be found on the *Journal* site, History of the Tribal Law Journal, [http://tlj.unm.edu/about\\_us/history.php](http://tlj.unm.edu/about_us/history.php) (last visited May 19, 2008).

15. López, *supra* note 3, at 111. This applies likewise to globalization. Globalization cannot be defined without considering its converse, localization; the dialectical processes are simultaneous and have a profound impact on each other. In the broadest sense, globalization is the intensification of worldwide relations that connect distant localities in such a way that local happenings are shaped by far off events and vice versa. Globalization is characterized by a sense of shrinking distance brought about by the dramatic reduction in the time it takes to travel places, either physically or representationally through electronically mediated images and text. For Giddens, spatial proximity is the process of stretching social relations across distance. But the importance of connectivity brought about through globalization goes beyond the technological accomplishments of communication and transport. Adrienne Russell, *The Zapatistas Online, Shifting the Discourse of Globalization*, 63(5) *INT'L COMM'N GAZETTE*, 399, 401-02 (2001) (internal citations omitted).

16. MARIE BATTISTE & JAMES (SAKEJ) YOUNGBLOOD HENDERSON, *PROTECTING INDIGENOUS KNOWLEDGE AND HERITAGE* 41-43 (2000) (discussing the relationship and connection of place to global and celestial forces).

17. Christine Zuni Cruz, *Law of the Land—Recognition, Resurgence, and Place of Indigenous Legal Tradition in Indigenous Law and Justice Systems* 13 (unpublished manuscript, on file with the author).

But if, one looks at 'law' from an [I]ndigenous perspective, it is in operation everywhere—even in those places where law is not supposed to be, not expected, because it is intertwined with everything else. That is the nature of [I]ndigenous knowledge, and the [I]ndigenous legal tradition is an aspect of that knowledge. *Id.*

in specific ecological orders.<sup>18</sup> What is local to one Indigenous people is international to another and vice versa. The global reach of the Internet and our ability through the *Journal* to link Indigenous Peoples—at present, those literate in English and generally, those with territories within English speaking nation states—worldwide is a tremendous advantage.<sup>19</sup> As of 2004, 840 million people were online, with 32.5% of those individuals residing in English speaking countries.<sup>20</sup> Related to reach and audience was the concern that the *Journal* be freely and easily accessible to Indigenous Peoples in particular.

In considering the electronic format of the *Journal*, several things were influential. We saw that using an electronic format would allow us to offer the *Journal* for free, without subscription costs. We were also aware that the likelihood that Indigenous Peoples would subscribe to or encounter a paper law journal was not high.<sup>21</sup> As a result we have found ourselves a part of the open access movement in legal scholarship.<sup>22</sup> An online format also freed us from the expense of a paper journal, something not lost on our *Journal*, which required the approval of the faculty of our small state school with three existing paper journals.<sup>23</sup> We were, of course, also influenced by the ecological consequences of publishing in an electronic format as opposed to a print format and the production and publication flexibility we would have with electronic publishing.<sup>24</sup> As Jason Lewis and Skawennati Tricia Fragnito recognized:

History has shown us that new media technologies can play a critical role in shaping how Western, technologically oriented cultures perceive Aborigines. The camera, for instance, taught people that we all wore headdresses and lived in teepees. Cinema claimed that we spoke in broken English—if we spoke at all. The World Wide Web has offered us the possibility to shape our own representations and make them known. Traditional mass media such as newspapers, magazines, television, and film are expensive to produce and distribute and

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18. BATTISTE & HENDERSON, *supra* note 16, at 41-42 (stating “the ultimate source of knowledge is the changing ecosystem itself”).

19. I realize a journal in English has its limits and look forward to the day we can transcend language barriers, either with the development of technology or with the addition of resources. Transcending colonial languages, particularly Spanish, is a first goal; including Indigenous languages is a present endeavor. English is also a colonial language.

20. Bissell, *supra* note 4, at 135 (citing Global Reach, Global Internet Statistics (by Language), <http://global-reach.biz/globstats/index.php3> (last visited May 19, 2008)).

21. While the costs of subscriptions to print journals are not prohibitively expensive, law review journals are not the medium of choice for individuals; in fact, the typical law review journal is not written for the lay reader, but instead for other scholars and legal researchers.

22. See Carol A. Parker, *Institutional Repositories and the Principles of Open Access: Changing the Way We Think About Legal Scholarship*, 37 N.M. L. REV. 431, 446 n.90 (2007). In fact, we were concerned that Indigenous peoples should have the ability to freely access written scholarship on the Indigenous law without having to pay.

23. At the time our *Journal* was under consideration, UNM School of Law published the *New Mexico Law Review*, the *Natural Resources Journal*, and the *U.S.-Mexico Law Journal*, all print publications. The *U.S.-Mexico Law Journal* is no longer published by the school.

24. Initially, the ecological consideration was to create a paperless publication. However, one of the least discussed issues in our country is the impact energy policy and technological research exert on Indian Reservations. [One] would be remiss not to reflect on the fact that what we are talking about is encouraging the use of electronic devices that are powered by the consumption of extractive resources, such as coal, fossil fuels, and water. Some also believe that engaging computers intensifies this process. [Additionally] . . . “[t]he advance of computers is contributing to a loss of ecological sensitivity and understanding, since the very process of using computers, particularly educating through computers effectively excludes an entire set of ideas and experiences that heretofore had been building blocks for developing connection with earth . . . computers alter the pathways of children’s cognition.”

López, *supra* note 3, at 120 (citing Jerry Mander, *Technologies of Globalization*, in THE CASE AGAINST THE GLOBAL ECONOMY 356-57 (1996)).

consequently exclude Aboriginal peoples. On the internet, we can publish for a fraction of the cost of doing so in the old media; we can instantly update what we publish in order to respond to misrepresentations, misunderstandings, and misreadings; and we can instantly propagate our message across a world-spanning network. And we don't need to fight through any gatekeepers to do so.<sup>25</sup>

The multimedia capabilities of the Internet, including the oral and visual means of communication are important given orality in the Indigenous legal tradition. The multi-media capacity of the *Journal* and of electronic publishing generally allows us to extend our reach to communities and practitioners. While at present the *Journal's* interactivity is modest, we hope to continue to add to the transcribed word and recorded lecture, including interviews and conversation with not only scholars and practitioners, but native intellectuals including elders speaking in native languages. The ability to not only read, but to see and hear speakers has importance given the subject matter of our *Journal*.

Most important is the subject of the *Journal*. Information about Tribal courts, tribunals, and dispute resolution systems and tribal law is generally lacking; scholarship is scattered and less prominent than that on federal Indian law.<sup>26</sup> As a general proposition, tribal voices are lacking. It is also the intent of the *Journal* to create and introduce a cadre of writers and thinkers in this area.

The first volume of the *Journal* was produced in 2000; we are in our eighth year of publication. We look forward to the day language barriers can be more easily transcended. Much is occurring in Central and South America with respect to constitutional reforms,<sup>27</sup> recognition of Indigenous dispute resolution systems, traditional law,<sup>28</sup> and Indigenous justice

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25. Jason Lewis & Skawennati Tricia Fragnito, *Aboriginal Territories in Cyberspace*, 29.2 CULTURAL SURVIVAL Q. 29, 29-30 (2005).

26. It is important to note that the scholarship in this area has increased dramatically over the years, from virtually none to a cumulative body of work. The scholarship on Tribal Courts alone has increased significantly from the 1960s and 1970s to the present. For example, an informal search of the legal database using tribal courts as a search term and selecting only those articles which focused on Tribal Court jurisdiction, enforcement of orders, exhaustion or systems revealed a marked increase in scholarship from the 1960s and the 1970s to the present. In addition, a search completed by this author yielded approximately 195 articles spread throughout 96 different law school journals and bar magazines. It should also be noted that Tribal Court jurisdiction, enforcement of orders and exhaustion are subjects in which federal and state laws figure predominantly, and though Tribal Courts may be the subject of the articles, federal or state law, as opposed to Tribal Law, is often the focus. The Tribal Law Journal seeks to focus more specifically on Tribal Law.

27. See, e.g., L. Roberto Barroso, *The Saga of Indigenous People in Brazil: Constitution, Law and Policies*, 7 ST. THOMAS L. REV. 645 (1995); Rainer Grote, *The Status and Rights of Indigenous Peoples in Latin America*, 59 HEIDELBERG J. INT'L L. 497 (1999) (surveying constitutional and legal protections of Indigenous rights in contemporary Latin America); Lisa Valenta, *Disconnect: The 1988 Brazilian Constitution, Customary International Law, and Indigenous Land Rights in Northern Brazil*, 38 TEX. INT'L L.J. 643 (2003); Donna Lee Van Cott, *Andean Indigenous Movements and Constitutional Transformation: Venezuela in Comparative Perspective*, 30(1) LATIN AM. PERSPS. 49 (2003); Donna Lee Van Cott, *Latin America: Constitutional Reform and Ethnic Right*, 53 PARLIAMENTARY AFF. 41 (2000); Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 74-89 (1999) (discussing Brazil and other countries of Latin America).

28. In the first *Tribal Law Journal* article translated from Spanish to English, we became aware of the constitutional law in Ecuador that provides for recognition of the Indigenous legal tradition. Agustin Grijalva, *The Status of Traditional Indian Justice*, 2 TRIBAL L.J. (2001), [http://tlj.unm.edu/tribal-law-journal/articles/volume\\_2/agustin/index.php](http://tlj.unm.edu/tribal-law-journal/articles/volume_2/agustin/index.php) (last visited May 19, 2008).



issues at the nation-state level.<sup>29</sup> In addition, new developments are occurring at the international level.<sup>30</sup> The ability of Indigenous Peoples to communicate directly in a common language without intermediaries is critical, even if the common language is not their own. Multi-lingualism is an important aspect of educational goals for native children. Maintaining native languages is extremely important, as is obtaining proficiency in more than one European language or major native language for future Indigenous global relations. Multi-lingualism—not mono-lingualism, or even bi-lingualism—is the ideal.

The multi-media capabilities of the Internet were especially appealing given the capacity for oral and visual communication. The Indigenous legal tradition is marked by orality, and the idea of communicating not only in writing but by spoken word was very important in the *Journal's* early decision to publish electronically. The modest interactivity that the site could provide, to see and hear speakers, in addition to *reading* the spoken word through transcribed interviews, and written articles was sufficient to prompt a decision to move from establishing a print journal to creating an online journal. Other influences on the decision were related to the desire to reach an audience beyond scholars, and to be more accessible to practitioners as well as Indigenous communities and others interested in Indigenous law and legal systems worldwide. The ability to link other resources on the Web and to imbed links within articles is another tremendous advantage to Web publication. We have found, however, that imbedding and maintaining links in articles requires additional support not yet secured to the *Journal* and to this point this has not been a feature of *Journal* publication, other than as provided by individual authors.

### III. THE SHADOW WAR METAPHOR

*We did not go to war on January 1 to kill or have them kill us. We went to make ourselves heard.*<sup>31</sup>

-Subcommander Marcos

Alma Guillermoprieto's shadow war metaphor employed to describe the Chiapas uprising in January 1994 and the manner in which the Indigenous insurgency employed the Internet to their advantage to communicate their position, as well as to inform the world of the actions of the Mexican government is an apt one.<sup>32</sup> In the analysis of the employment of the Internet by the Zapatistas and Subcommander Marcos' adept communicative and public relations skill, several important points emerge in respect to the Internet, its use by Indigenous Peoples, and the resultant effect.<sup>33</sup> There are analogies that arise in this analysis that can be made in respect to the

29. See, e.g., Rachel Sieder, *The Judiciary and Indigenous Rights in Guatemala*, 5 INT'L J. CONST. L. 211 (2007).

30. See, e.g., S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33 (2001).

31. Knudson, *supra* note 1, at 508 (citing J. Simon, *The Marcos Mystery*, 22 COLUM. JOURNALISM REV. 9 (1994)).

32. *Id.* at 507.

33. See, e.g., Russell, *supra* note 15; Knudson, *supra* note 1. For other analytical treatments of the role of the Internet in grassroots struggles and specifically in respect to Chiapas see generally Harry Cleaver, *L'insurrezione nel Chiapas e le prospettive della lotta di classe nel nuovo ordine mondiale* [*The Chiapas Uprising and the Future of Class Struggle in the New World Order*], RIFF-RAFF: Attraverso la produzione sociale 133-45(1994), available at <http://www.eco.utexas.edu/facstaff/Cleaver/chiapasuprising.html> (last visited Apr. 5, 2008); John Arquilla & David Ronfeldt, *Cyberwar Is Coming!*, 12 COMP. STRATEGY 141 (1993), available at <http://www.angelfire.com/az/sthurston/Cyberwar.html> (last visited Apr. 5, 2008); Harry Cleaver, *The Zapatistas & The Electronic Fabric of Struggle*, <http://www.eco.utexas.edu/faculty/Cleaver/zaps.html> (last visited Apr. 5, 2008); Charles Swett, *Strategic Assessment: The Internet*, <http://www.fas.org/cp/swett.html> (last visited Apr. 5, 2008); John Wehling, *Netwars and*

creation of an electronic journal for tribal law scholarship and development of Indigenous legal tradition. There are also differences.

The “war” of words and thinking, the maintenance of “mental sovereignty,” the cost-effectiveness of the electronic medium, and the movement away from “gatekeeping” have already been mentioned as reasons why an electronic journal was attractive, but there is a deeper analysis that is important to make explicit. In her examination of the Zapatistas online, Adrienne Russell identifies four major areas that are also particularly useful in the discussion of the creation of an online journal on the law of Indigenous Peoples.<sup>34</sup> They include: (1) decentering the author, which encompasses the correction of inaccurate information—disinformation, and a change in the norms of content; (2) interactivity; (3) alliance building; and (4) discussion.<sup>35</sup> All the above points that emerge in the analysis of the use of the Internet by the Zapatistas are applicable to our work. I chose to frame the work of the *Journal* as shadow work, or shadow war scholarship, because the idea is the same. We need to look a bit closer, however, to see how this might work for a scholarly journal within the legal profession.

I want to begin with considering how this idea of the shadow war—a war of words and thinking—to protect mental sovereignty works in conjunction with promoting understanding and dispelling or countering disinformation in respect to the Indigenous legal tradition and tribal law. I do so in the specific context of Indigenous Peoples in the United States, and how the shadow war applies to the creation of a place in cyberspace exclusively for communicating writings and resources on Indigenous law.

It is very important to begin the discussion by acknowledging the challenging situation Indigenous Peoples find themselves in with respect to maintaining autonomy within nation-states and the place *mental* sovereignty, the war of words, and thinking occupies. This is true not solely in the area of law, though that is the focus in the context of this discussion. Indigenous Peoples struggle for the right to exist autonomously—to maintain their culture, thought, and lands against a tremendous tide that opposes this autonomy. This is no less true in the area of their law, political order, and justice systems. Consider the results of the first round of peace talks with the Zapatistas:

1. Recognition for the first time of the ‘autonomy’ of Mexican Indians, eventually including the right to adopt their own forms of government in their communities according to their customs.
2. Right to ‘multicultural’ education, taught in their own languages.
3. Move toward ‘adequate’ representation in state and national congresses.
4. Exemption of Chiapas Indians from the requirement that they must be members of the monolithic Institutional Revolutionary Party to stand for election.
5. Overhaul of the local courts and district attorney’s office in Chiapas to give Indians greater representation.
6. Creation of a special Indian human rights office and an office for resolving Indian land disputes.<sup>36</sup>

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*Activists Power on the Internet*, <http://www.spunk.org/library/comms/sp001518/Netwars.html> (last visited Apr. 5, 2008).

34. See generally Russell, *supra* note 15.

35. *Id.* at 405-12.

36. Knudson, *supra* note 1, at 514 (citing J. Preston, *Mexico and Insurgent Group Reach Pact on Indian Rights*,

It is an incredibly complex situation. There is simultaneously a struggle external to Indigenous communities against oppression, discrimination, marginalization, and exploitation, while at the same time there is a struggle to maintain an Indigenous autonomy within. Within, Indigenous Peoples seek to maintain a space that is separate and distinct from the outside. Maintaining this internal space gives rise to the need to mediate the space where the two meet at their borders and where they may overlap internally. What this means in terms of the *law* of Indigenous Peoples has become an increasingly challenging question, largely because of the pressure from outside to resist any but the most benign form of difference. Religious, legal, and political differences have not been well-tolerated historically. One endeavor of the *Journal* is to make scholarly and professional voices on *Indigenous* law accessible to the Indigenous communities directly affected by the scholarship and by the legal profession itself. Accessibility encourages accountability; accessibility can also create or influence movement. This remains true whether that be oppositional movement—to completely change direction; tangential movement—to change course trajectory; or parallel movement—to remain on the same course or track.

Likewise, it is the *Journal's* goal to bring together in one accessible place, theory and scholarship specifically focused on Indigenous law for reflection and consideration. Both the Indigenous legal tradition and the emerging modern law are often greatly affected by outside forces to conform to outside law and interests. While paper law journals publish such scholarship, the scholarship remains scattered throughout numerous journals. A goal of the *Tribal Law Journal* is to bring the voices, not only of the authors who choose to publish with the *Journal*, but of others—leaders and elders—together in one place and in various forms to serve as a source point of current thought, as well as an archive of past thought. In short, the idea is to change and greatly expand the idea of a law journal. The electronic journal allows us to keep all issues online, a great advantage in terms of accessibility and concentration of information.

Another purpose of the *Journal* is to combat disinformation, as well as to encourage the serious understanding of Indigenous, or chthonic, law and reveal the trajectory of the direction of the modern law of Indigenous Peoples through our focus solely on that law. In the United States, our adherence to chthonic legal tradition is being used to limit our jurisdiction over our territories and the people within those territories. It is used in the negative sense, in respect to the unacceptability of traditional law being applied to non-Indians and . . . other Indians not of a particular tribe. . . . [T]here is great concern about what this does to the rights they enjoy as American citizens. In some sense there is a degree of recognition of the very real difference between the chthonic legal tradition that survives in [I]ndigenous communities in the United States and the common law tradition of the country. However, the real problem is that there is not a serious understanding of the chthonic legal tradition. United States Supreme Court [J]ustices write of traditional law as if unknowable rules will be applied to unsuspecting non-Indians in some unjust manner within our tribal court forums as justification for asserting that tribal court jurisdiction does not extend to the non-Indians who live, work and enter our borders. In *Duro v. Reina*, Justice Kennedy spoke of “unspoken practices and norms” in reference to legal method. I’m still trying to figure out what this refers to within a chthonic legal tradition, which is characterized by orality. In *Nevada v. Hicks*, Justice Souter laments the unwritten nature of traditional law and the difficulty of sorting out the complex mix of law for outsiders. To me, the

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N.Y. TIMES, Feb. 15, 1996, at A12); see Marco Palau, *The Struggle for Dignity, Land, and Autonomy: The Rights of Mexico's Indigenous People a Decade after the Zapatista Revolt*, 36 COLUM. HUM. RTS. L. REV. 427 (2005).

characterization of traditional law as problematic because it is oral and unwritten represents an attack on the continued existence of our legal tradition because the underlying message is that we will gain more power and authority if we assimilate, if our law and our government and justice systems are just like the United States' system. In my opinion, it is a great deception. It is also a continuation of the message that our legal tradition is inferior, when in fact it is a legitimate legal tradition, different yes, less than—absolutely not.<sup>37</sup>

Consider the mischaracterizations—disinformation—of the Indigenous legal tradition and judicial systems expressed in the recent line of United States Supreme Court cases dealing with tribal jurisdiction. In *Oliphant v. Suquamish Indian Tribe*,<sup>38</sup> the Court stated:

Until the middle of this century, few Indian tribes maintained any semblance of a formal court system. Offenses by one Indian against another were usually handled by social and religious pressure and not by formal judicial processes; emphasis was on restitution rather than on punishment. In 1834 the Commissioner of Indian Affairs described the then status of Indian criminal systems: “With the exception of two or three tribes, who have within a few years past attempted to establish some few laws and regulations among themselves, the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint.”<sup>39</sup>

The Court went on to state the principle that “Indian tribes . . . [gave] up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress . . . would have been obvious a century ago when most Indian tribes were characterized by a “want of fixed laws [and] of competent tribunals of justice.”<sup>40</sup>

In *Duro v. Reina*,<sup>41</sup> the Supreme Court stated:

While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often “subordinate to the political branches of tribal governments,” and their legal methods may depend on “unspoken practices and norms.”<sup>42</sup>

In *Strate v. A-1 Contractors*,<sup>43</sup> the tribal court is characterized as “an unfamiliar court.”<sup>44</sup> In *Nevada v. Hicks*,<sup>45</sup> Justice Souter, in his concurrence stated:

[T]ribal law is still frequently unwritten, being based instead “on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,” and is often “handed down orally or by example from one generation to another.” The resulting law applicable in tribal courts is a complex “mix of tribal codes and federal, state, and traditional law,” which would be unusually difficult for an outsider to sort out.<sup>46</sup>

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37. Zuni Cruz, *supra* note 17, at 8-10 (footnotes omitted).

38. 435 U.S. 191 (1978).

39. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 (1978) (citing, H.R. REP. NO. 23-474, at 91(1834)).

40. *Id.* at 210.

41. 495 U.S. 676 (1990).

42. *Id.* at 693 (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, 334-45 (rev. ed. 1982)).

43. 520 U.S. 438 (1997).

44. *Id.* at 459.

45. 533 U.S. 353 (2001).

46. *Id.* at 384-85 (citations omitted).

These excerpts evidence the Supreme Court's general lack of willingness to acquaint itself or to look deeper for specific information. The Court does not speak with knowledge, familiarity, or understanding of the Indigenous, or chthonic, legal tradition. It speaks of the modern law of Indigenous Peoples in the United States in only the most general and broad terms. Finally, the Court does not speak specifically of the law in respect to the tribes before it. It is clear both the Indigenous legal tradition and the modern law of tribes need to be better expounded by legal scholars and professionals, and native peoples themselves, to promote a better understanding and respect for both. The general statements of the Supreme Court concerning the chthonic legal tradition of Indigenous Peoples of the United States are erroneous. Indigenous Peoples were not without law or systems of dispute resolution, nor were their traditional leaders without authority. It is difficult to say whether the Court's statements of the Indigenous legal tradition reflect true lack of knowledge or a deliberate attempt to distort information, or whether they reflect limited sources of information and limited exposure to the chthonic legal tradition. The assertions in *Oliphant* that "a century ago . . . most Indian tribes were characterized by a 'want . . . of competent tribunals of justice,'"<sup>47</sup> offenses were handled "not by formal judicial processes" and that "[u]ntil the middle of the century, few Indian tribes maintained any semblance of a court system" are telling.<sup>48</sup> The Supreme Court clearly revealed its hegemonic milestone—the presence of the courts of the common law tradition—as "the" mark of the beginning of recognizable, even if not entirely legitimate, dispensation of justice by tribes. Indigenous legal tradition preceded the common law systems introduced to tribes and in fact, the chthonic legal tradition continues to exist along side the adopted common law systems today. The ability to make information heretofore missing from legal texts available through computer mediated technology is an important development, and in this respect an electronic Indigenous law journal seeks to dispel disinformation and increase understanding, in a way that was not possible with the old media.

Traditional media has in the past raised effective barriers to Indigenous Peoples both in terms of cost and accessibility to the media. The Internet has lowered such barriers, thus alleviating both prohibitive costs and gate-keeping, which have effectively kept many from engaging in knowledge dissemination and production.<sup>49</sup> Computer-mediated communication represents freedom from the expense of print media as well as from the control of media producers. "During the initial uprising, the commercial media . . . refused to reproduce Zapatista material and this refusal by the media seriously constrained the ability of the Zapatistas to get their message out."<sup>50</sup> "Expanding the discourse" "to include the neglected segments of the population" is possible through "a war of words" with computer-mediated communication in a way it was not with traditional, costly, forms of print publication and film.<sup>51</sup> Computer mediated communication is quick, far-reaching, less controlled, accessible, less expensive, and has opened

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47. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978).

48. *Id.*

49. With respect to the Zapatistas, "Televisa, the national television network aligned with the Mexican ruling party, the Institutional Revolutionary Party (PRI), and most of Mexico's major news media limited their coverage of the rebellion, downplaying its significance and denouncing the Zapatista leadership as foreign intellectuals or communists . . ." Russell, *supra* note 15, at 399; see, e.g., Patricia R. Powers, *Native Americans and the Public: A Human Values Perspective*, 2006-07, Native American Media Symposium Report, available at [http://www.fcni.org/pdfs/nat\\_amer/na\\_mediasymp\\_report.pdf](http://www.fcni.org/pdfs/nat_amer/na_mediasymp_report.pdf) (last visited Apr. 5, 2008). "Lack of money, numbers, and access to commercial media has meant that [I]ndigenous peoples in the United States lack control of their public portrayals." Powers, *supra*, at 23.

50. Russell, *supra* note 15, at 400.

51. *Id.* at 402.

avenues previously not there for Indigenous Peoples.

Russell speaks of “norms of content” changing in online discourse.<sup>52</sup> While much of the content of the discourse in respect to the Chiapas uprising—information exchange through listservs—differs from the content in an electronic legal journal, we have seen how the electronic medium has affected the “norms of content” as well.<sup>53</sup> In addition to the content one normally finds in a print law review—scholarship by both professors and students—we publish resources, including a handbook of tribal courts in the state of New Mexico,<sup>54</sup> a treatise on tribal law,<sup>55</sup> issue papers,<sup>56</sup> streaming excerpts of lectures,<sup>57</sup> and interviews.<sup>58</sup> There is much more space in an electronic journal and it is easier to update. The cost to publish is minimal and the content is permanently available.

While the space is mediated by a faculty editor and student editors, and is not as open as a listserv or Wikipage, authors are more easily “decentered” online than in print mediums.

The shift in the role of the author is also prompted by the breakdown of opposition between author and reader on the Internet, and the responsibilities traditionally restricted to authors are shifted to or at least shared by the readers. According to Mitra and Cohen: “The author is expected to give the reader the potential to transcend the role of a passive reader to [become] an active reauthor of the text as he or she follows and explores the links offered by the primary author . . . the author is no longer bound to producing a preferred meaning but only offers a large set of potential meanings.”<sup>59</sup>

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52. Russell, *supra* note 15, at 405. “Norms” or rules about what the content must look like on the internet vary. The electronic format of our *Journal* allowed us to greatly expand and change our type of content and therefore has changed our “norm” from that of paper law journals.

53. Usenet group postings were created “in response to a rising demand for information about the Zapatistas.” *Id.* at 404.

Information exchange on the Internet is not regulated by any one central organization or set of ideas, unlike more traditional media outlets, where content is regulated by an elaborate combination of industry forces and professional norms and procedures. The postings . . . vary in terms of language, length, content and narrative form. They range from announcements of protests to rumors of official press releases. By comparison with those that govern the mainstream news industry, the norms and codes that shape Chiapas are less formal and procedural: postings express similar points of view more often than they exhibit similar approaches of writing and reporting.

*Id.* at 405.

54. NEW MEXICO TRIBAL COURT HANDBOOK, (2007 ed.), 6 TRIBAL L. J. (2006), <http://tlj.unm.edu/handbook/index.php> (last visited Apr. 5, 2008).

55. Matthew L.M. Fletcher & Zeke Fletcher, *A Restatement of the Common Law of the Grand Traverse Band of Ottawa and Chippewa Indians*, 7 TRIBAL L. J. (2007), [http://tlj.unm.edu/tribal-law-journal/articles/volume\\_7/a\\_restatement\\_of\\_the\\_common\\_law\\_of\\_the\\_grand\\_traverse\\_band\\_of\\_ottawa\\_and\\_chippewa\\_indians/index.php](http://tlj.unm.edu/tribal-law-journal/articles/volume_7/a_restatement_of_the_common_law_of_the_grand_traverse_band_of_ottawa_and_chippewa_indians/index.php) (last visited May 19, 2008).

56. Larry EchoHawk & Tessa Meyer Santiago, *Issue Paper: What Tribes Can Do to Combat Child Sexual Abuse*, 4 TRIBAL L. J. (2004), [http://tlj.unm.edu/tribal-law-journal/articles/volume\\_4/abuse/index.php](http://tlj.unm.edu/tribal-law-journal/articles/volume_4/abuse/index.php) (last visited Apr. 5, 2008).

57. Senator Albert Hale, Speech at New Mexico Tribal Leader Summit on Tobacco: Its Impacts on Health, Economics, Jurisdiction and Sovereignty (Apr. 27, 2004), <http://tlj.unm.edu/multimedia/hale.php> (last visited May 19, 2008); Chief Harry Wallace, Speech at University of New Mexico School of Law part of Southwest Indian Law Clinic Lecture Series (Nov. 1, 2001), <http://tlj.unm.edu/multimedia/speech.php> (last visited Apr. 5, 2008).

58. Interview with Harry Wallace, Elected Chief of Unkechaug Nation, in TRIBAL L.J. (Apr. 27, 2004), <http://tlj.unm.edu/multimedia/wallace.php> (last visited May 19, 2008).

59. Russell, *supra* note 15, at 406 (citing Ananda Mitra & Elisia Cohen, *Analyzing the Web: Directions and Challenges*, in *DOING INTERNET RESEARCH: CRITICAL ISSUES AND METHODS* (1999)) (alterations in original).

The Internet allows for the inclusion of “information ignored by the mainstream and, more than mere information, it offers perspectives and contexts, the inclusion of which would be considered ‘unprofessional’ and beyond what is feasible considering the time and budgetary constraints” of traditional legal publishers.<sup>60</sup> There is not a single reality of the Indigenous legal tradition and modern law in Indian country, just as there is not a single reality of Indigenous legal history; there are “multiple realities.” Concentrating these multiple realities in one place, as well as placing the credibility and authority of those who write in this area in a more publicly accessible place allows “scholarship” to be viewed by those researched, and it allows different approaches and perspectives to be put side-by-side in a manner not previously possible.

The most important aspect of an electronic journal lie in its capacity for alliance building among Indigenous Peoples themselves, between Indigenous Peoples and their allies worldwide, for interactivity, and for facilitating discussion. The Internet allowed the Zapatistas to obtain allies, instantly update supporters of events, get their message through unfiltered, and mobilize actions in areas far removed from Chiapas as well as draw supporters to Chiapas. This was an incredible lesson for Indigenous Peoples.

The alliance building capabilities of the Internet were demonstrated by the Zapatista supporters’ ability to use “computer networks as a political tool, organizing with less regard for geography than has been possible for traditional national political movements.”<sup>61</sup> The Internet is certainly a tool for organizing with no regard for geography; its world wide capabilities, ability to shrink distance and time, and organize and concentrate information have allowed us to reach specific audiences, make connections, and share knowledge in a way that greatly facilitates the Indigenous movement with respect to Indigenous legal tradition worldwide. With respect to the building of alliances, the Zapatistas’ use of the Internet was key. The alliances constructed by the *Journal* are less overt. In fact, the goal of the *Journal*—to develop respectful treatment, serious scholarship, and understanding of the chthonic legal tradition and modern law of Indigenous Peoples—rides on an existing current. This current—although we did not create it—has not received much attention in the legal world. It has largely run beneath the surface, though not deliberately underground, and has now “surfaced” by the *Journal*’s pointed goal of developing permanently available “scholarship,” primarily written scholarship, accessible to all. The source of the underlying current is the knowledge of traditional peoples and the social consciousness of Indigenous Peoples. Within the current are the contributions of other disciplines like anthropology, ethnology, and sociology. Alliances may result between or across disciplines, organizations and institutions, native governments, and other entities. Alliances among Indigenous Peoples as well as with non-Indigenous Peoples are also critical.<sup>62</sup> “By strengthening the resources of democratic culture, transnational links made possible through [computer mediated communication] are creating grassroots globalization; more opportunity exists to collectively solve problems common to societies everywhere—problems manifested locally, such as those related to human rights, environmental issues and peace.”<sup>63</sup> I would specifically add legal tradition and justice. Even through computer mediated

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60. Adrienne Russell, *Chiapas and the New News: Internet and Newspaper Coverage of a Broken Cease-Fire*, 2 JOURNALISM 197, 214 (2001).

61. Russell, *supra* note 15, at 409.

62. Within the *Journal* staff itself, students are both Indigenous and non-Indigenous. Students become eligible for staff membership by enrolling in the Law of Indigenous Peoples course and the writing they produce for the course is submitted to the *Journal* for consideration for publication. Increasing the understanding of the subject begins with those involved in producing the *Journal*.

63. Russell, *supra* note 15, at 410.

communication facilitated by a legal institution and editors, like the *Journal*, Indigenous Peoples have founded a “communications media” to focus discussion on their law allowing “‘peripheral visions’ [to] reach the center through new lines of global communication.”<sup>64</sup>

Russell comments that the interactivity of the Internet is being touted as one of the Internet’s most valuable resources, yet recognizes that for sites built and created for “supporters,”<sup>65</sup> “dissenting opinion is rare, often inveighed against, or used as a sort of literary anvil against which to shape more forceful . . . rhetoric.”<sup>66</sup> She wonders if “the all-inclusive discourse touted by proponents of the democratic potential of the Internet” exists.<sup>67</sup> We experienced our own set of issues with interactivity with our readers. We were forced to disable the comment function of our program, when we were bombarded with Hollywood ads for posters of Billy Jack and links to pornographic sites with objectionable and strong language choking out the occasional comments at the end of articles. Perhaps that is the result of the artificiality of the interaction that the Internet allows; nevertheless a modest form of interactivity continues through e-mail, and has connected us to Indigenous Peoples across the world. As the voices of the Zapatistas “call[ed] into question the truth generated through the traditional news media and fragment[ed] the power of the Mexican government to enjoy exclusive control over the ability to define the Mexican nation,” so the *Journal* seeks to call into question the truth generated by the government and its power to enjoy exclusive control over the ability to define the legal tradition and law of Indigenous Peoples.<sup>68</sup>

#### IV. REALITIES AND CHALLENGES

Recognizing that language, literacy, and poverty can be barriers to worldwide communication and access to technology, we began the *Journal* knowing that our reach would be greater with an electronic journal than with a print journal. However, there were, and are, other matters of concern which are important to address.

Many Indigenous Peoples do not have access to basic technology. In 1999, “39% of Native Americans . . . in rural areas [had] telephone service, [compared to] 94% of Native Americans living in urban areas.”<sup>69</sup> Nationally, 47% of on-reservation households have telephone service, but this varies from tribe to tribe; for example, the Navajo Nation figures show only 22% had telephone service.<sup>70</sup>

“[A]bout 60% [of Native Americans] live in tribal areas or . . . surrounding counties.”<sup>71</sup>

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64. *Id.* at 411.

65. *Id.* at 408 (referring to her readers as “supporters”).

66. *Id.*

67. *Id.* at 408-09.

68. *Id.* at 412 (citing Alejandra Moreno Toscano, *TURBULENCIA POLÍTICA: CAUSAS Y REZONES DEL 94* (1996)).

69. Bissell, *supra* note 20, at 129 (citing Emily L. Dawson, Note, *Universal Service High-Cost Subsidy Reform: Hindering Cable-Telephony and Other Technological Advancements in Rural and Insular Regions*, 53 *FED. COMM. L.J.* 117, 126 n.41 (2000)).

70. *Id.* at 137-38 (citing FCC, Promoting Deployment/Subscribership in Underserved Areas, Including Tribal and Insular Areas, [http://www.fcc.gov/Bureaus/Wireless/Factsheets/tribal\\_lands\\_fact\\_sheet.txt](http://www.fcc.gov/Bureaus/Wireless/Factsheets/tribal_lands_fact_sheet.txt) (last visited Apr. 27, 2004)).

71. *Id.* at 133 (citing EPA, AM. INDIAN ENVTL. OFFICE, RESOURCE GUIDE ch 1 pt. I.B.1, <http://web.archive.org/web/20060929214614/http://www.epa.gov/indian/resource/resource.htm> (last visited May 19, 2008)). Bissell notes the importance of carefully considering statistical data. *See id.* Oftentimes the high percentage of native peoples living off the reservation is misconstrued. When one considers that 60% of the population lives in tribal areas or within one county of the tribal area, the interpretation of the numbers of individuals residing off reservation is put in perspective. *See id.* Of this 60%, “[t]hirty-seven percent lived in tribal areas and 23% lived in the surrounding



Many Indigenous territories are geographically remote. The communities are often small, poor, and rural, with little access to technology, employment, or other opportunities. The population densities of most reservations are low. As a result of geographic isolation, the expense of providing access to technology affects the incentive of service providers and adds to the digital divide between reservation communities and other communities.<sup>72</sup> Computer use and connectivity increased dramatically in the United States from 1994 to 2001 when households with computers increased from 24.1% to 56.5%.<sup>73</sup> Likewise, Internet use rose from 18.6% in 1997 to 50.5% in 2001.<sup>74</sup> As of 2004, there were more computers in the United States than in the rest of the world combined.<sup>75</sup> The inevitable question is to what extent is the Indigenous population keeping up with the technological explosion. The World Summit on the Information Society convened by the United Nations and the International Telecommunication Union included in Article 15 of their Declaration of Principles that “particular attention must be given to the special situation of [I]ndigenous peoples, as well as to the preservation of their heritage and their cultural legacy” and included specific steps to do so in their Plan of Action.<sup>76</sup>

Technological advances in wireless connectivity—wireless networking systems in place of wired-systems—have provided a cost-effective way to extend Internet connection and Internet-based telephone services in remote, rural areas. The Navajo Nation, the largest Indian reservation in the United States, began installing wireless service in 2000 to install computers in chapter houses and Headstart classrooms.<sup>77</sup> Wireless connectivity has greatly increased the potential of Indigenous communities to become connected to the Internet.

The protection of Indigenous knowledge is a critical issue. There is a general concern on the part of Indigenous nations and peoples about revealing information. As we deal with Indigenous law, we deal with the Indigenous legal tradition which includes tribal beliefs, narratives, origin stories, and language. Indigenous Peoples have dealt with cultural appropriation but, even as they seek to reinvigorate their own cultures, modern technology is a double-edged sword.<sup>78</sup> There is a delicate balance between the research, the researched, and the

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counties; of the remaining population, 31% were residents of U.S. metropolitan areas and 9% lived in other non-metropolitan areas.” *Id.* at 133 n.33. Often individuals leave the reservation for employment reasons, that the majority of the Indigenous population live within a county of their homeland significantly alters the perception that native peoples completely abandon ties to reservation lands for an urban lifestyle. *See id.* at 134.

72. *But see* Deepak Prem Subramony, *Understanding the Complex Dimensions of the Digital Divide: Lessons Learned in the Alaskan Arctic*, 76 J. NEGRO ED. 57 (2007) (studying a technology-intensive, oil-wealth supported school system with a student body coming from traditional Iñupiat families where access to computers at school and community institutions has never been a problem).

73. Bissell, *supra* note 20, at 135 (citing FCC, TRENDS IN TELEPHONE SERVICE 17-6 (2002), available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/Reports/FCC-State\\_Link/IAD/trend502.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/Reports/FCC-State_Link/IAD/trend502.pdf)).

74. *Id.*

75. *Id.* at 136 (citing Frontline/World, India-Hole in the Wall, Facts and Stats, <http://www.pbs.org/frontlineworld/stories/india/didyouknow.html> (last visited May 19, 2008)).

76. World Summit on the Information Society, Geneva, Switz., Dec. 10-12, 2003, *Declaration of Principles*, ¶ 15, U.N. Doc. WSIS-03/GENEVA/DOC/4-E (Dec. 12, 2003), available at <http://www.itu.int/wsis/docs/geneva/official/dop.html>; see Jamie Brown & Tara Tidwell Cullen, *Indigenous Peoples at the World Summit on the Information Society*, 29.2 CULTURAL SURVIVAL Q. (2005), available at <http://www.cs.org/publications/csq/csq-article.cfm?id=1826> (last visited May 19, 2008).

77. Tara Tidwell Cullen, *Sovereignty Unplugged: Wireless Technology and Self-Governance in the Navajo Nation*, 29.2 CULTURAL SURVIVAL Q. (2005), available at <http://www.cs.org/publications/csq/csq-article.cfm?id=1835> (last visited Apr. 5, 2008).

78. Brown & Cullen, *supra* note 76. “Some American Indian tribes . . . refuse to put information about their cultures online because they believe that traditional knowledge should be passed on in specific ways to specific peoples, not

researcher.<sup>79</sup> The goal of the *Journal* is the scholarly treatment of the law of the Indigenous Peoples, including both their Indigenous legal tradition and the modern law. By this we mean to bring into legal scholarship discussion of Indigenous legal tradition and modern law where it has not been sufficiently treated as a subject of importance. We place on our authors the decision to publish the information they have gathered in their research. Student authors have the ability to decline an offer of publication of work they produce about tribal communities. Student writing emerges from the Law of Indigenous Peoples class that all students take as a requirement to serve as staff members. Some of the students write to achieve an understanding of the law of a tribal community for their own understanding and have not written with the intent to publish their research. Others may look to obtain permission from the community prior to publication, and yet others seek collaboration from within the community. Particularly in respect to Indigenous legal tradition our goal is to increase understanding generally of the framework Indigenous legal tradition emerges from, often in comparison with the present modern law, to provide a understanding of how the Indigenous legal tradition sits in relation to the modern law. Authors and students are invited to share their research protocols.

Reluctance about technology and its benefits are very real concerns in Indigenous communities. Here there are at least two concerns: first, that computers will take children's interest away from their traditions and families and expose them to bad things; second, that technological processes have a homogenizing effect on Native American communities.<sup>80</sup> Additionally, there is the view technology "subvert[s] emotional ties to people by the use of communications that serve to depersonalize," in contrast to communicating in "a healthy whole community, [where] the people interact with each other in shared emotional response."<sup>81</sup> On March 21, 2005 a young Ojibwe boy committed suicide after engaging in the second worst high school shooting since the Columbine shooting in 1999.<sup>82</sup> His Internet habits were a part of the story reported by the main stream press, including the international press.<sup>83</sup> There is no doubt this story comes to mind as an example of the negative influences of the Internet, no matter how tangential an influence the Internet may have had. However, there is an analysis of the lives of young native men that often is missed by institutions, mainstream media, public school systems, and legal systems alike.<sup>84</sup> From the glimpses and partial views of portions of this sixteen year-old's life provided by the media, it is certain the Internet could have played only a small part in a

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haphazardly to anyone who happens to come across a website." *Id.*

79. See, e.g., LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES, RESEARCH AND INDIGENOUS PEOPLES* (1999).

80. Bissell, *supra* note 20, at 143 (citing Jessica Dorr & Richard Akeroyd, *New Mexico Tribal Libraries: Bridging the Digital Divide*, COMPUTERS IN LIBRARIES, Oct. 2001, at 36, 40, available at <http://www.infotoday.com/cilmag/oct01/dorr&akeroyd.htm>. (last visited May 19, 2008); Duane Champagne, *Challenges to Native Nation Building in the 21st Century*, 34 ARIZ. ST. L.J. 47, 48 (2002)). See also López, *supra* note 3, at 117-18.

81. López, *supra* note 3, at 120 (citing Jeanette Armstrong, *Sharing One Skin: Okanagan Community*, in *THE CASE AGAINST THE GLOBAL ECONOMY* 469 (Jerry Mander & Edward Goldsmith eds., 1996)).

82. CNN.com, *School Gunman Stole Police Pistol, Vest*, <http://www.cnn.com/2005/US/03/22/school.shooting> (last visited May 19, 2008).

83. Bridget Murphy, *School Shooter Jeff Weise Reveals Nazi Sympathies on Internet*, <http://cc.msnsnscache.com/cache.aspx?q=73374806384743&mkt=en-US&lang=en-US&w=ce0f8c3d,97c71fa7&FORM=CVRE3> (last visited May 19, 2008).

84. Scott Richard Lyons, *INDIAN COUNTRY TODAY*, Apr. 6, 2005, available at <http://proquest.umi.com.libproxy.unm.edu>; see generally Christine Zuni Cruz, *Four Questions on Critical Race Praxis: Lessons from Two Young Lives in Indian Country*, 73 FORDHAM L. REV. 2133 (2005).

complex story.<sup>85</sup> Even the partial story, however, raises the questions and the concerns that brings this work on the Indigenous legal tradition, social consciousness, the war of ideas, and mental sovereignty together with the situation in Indigenous communities, the people of our communities, and the modern law within our communities.<sup>86</sup> It reminds me not so much of the dangers and fears of modern technology but of our need to find and hold that ground between the Indigenous legal tradition and the ever-present pressure to abandon it that will help us and our children, heal, live healthy lives, and enjoy a mental sovereignty that allows us to be Indigenous despite living within a technological world.<sup>87</sup>

Deepak Prem Subramony's study identified a link between Iñupiat male cultural adherence to subsistence hunting and gathering and the technology "which straddles those two worlds" but which did not necessarily embrace computer technology.<sup>88</sup> Subramony argues "for minority groups to truly empower themselves and overcome their digital disadvantages they should make the cultural transition from technology consumer to technology 'producer,' thus fundamentally changing the nature of their relationship with technology and the culture of the technology itself."<sup>89</sup> It appears critical, therefore, to consider how any technology can be used to support that which is identified as essential to a culture, because that is what will be most important to the incorporation of that technology for cultural production—and thereby move Indigenous Peoples away from cultural reproduction of the dominant culture and from being mere consumers of technology. This appears to be what Antonio López also advocates, when he stated, "Indigenous conceptions and practices of technology are embedded in a way of living life that is inclusive of spiritual, physical, emotional, and intellectual dimensions emergent in the world or, more accurately, particular places in the world."<sup>90</sup> Indigenous Peoples will adjust to the new technology, just as carefully as they adjusted to the paper culture, and perhaps more rapidly.<sup>91</sup>

## V. CONCLUSION—"LET OUR VOICES BE HEARD, LET OUR STORIES BE TOLD"<sup>92</sup>

We are engaged in a shadow war seeking to break through the stranglehold on information dissemination and the monopoly on information. The discussion of the law of Indigenous Peoples is decidedly not just for scholars. In fact, what scholars are writing needs to be considered, critiqued, accepted, or rejected by Indigenous Peoples. In short, a dialogue needs to be created among Indigenous Peoples and between Indigenous Peoples and their allies.

Recalling that the shadow war metaphor "springs from, and plays on, a native Mexican tradition of *ritual gesture* that is *shared* by warriors and audience alike," interaction is a critical

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85. For a comment that addresses several provocative and complicated issues raised by the event, see *Four Arrows, Prologue: Red Road, Red Lake – Red Flag!*, in UNLEARNING THE LANGUAGE OF CONQUEST, SCHOLARS EXPOSE ANTI-INDIANISM IN AMERICA (Wahinkpe Topa (Four Arrows, a.k.a. D.T. Jacobs), ed. 2006).

86. Lyons, *supra* note 84.

87. See Subramony, *supra* note 72, at 63-64 (discussing hunting, gathering, and subsistence cultural norms as influencing Iñupiat male interaction with technology).

88. *Id.* at 64.

89. *Id.* at 57.

90. López, *supra* note 3, at 114.

91. *Id.* at 123. Native peoples, who come from an oral tradition, are less conditioned by print media, are more adept at symbol management, and are visual and spatial thinkers, may "fare better as future operators of new media systems than those conditioned by print." *Id.*

92. University of New Mexico School of Law *Tribal Law Journal*, [http://tlj.unm.edu/about\\_us/index.php](http://tlj.unm.edu/about_us/index.php) (last visited May 19, 2008)

part of the shadow war.<sup>93</sup> We invite those who write in this area to join us in making legal scholarship in this area accessible to the public—especially the Indigenous public—in creating a depository of thought, thereby rejecting the scattering of thought, in developing alliances across the globe and beyond the borders of the United States, by seeking to publish legal scholarship, broadly defined, in our global e-journal. What is occurring in Chiapas, in La Paz, or elsewhere in the Indigenous world relates to what is happening in the Northern Territory of Australia and the Southwest United States in respect to the Indigenous legal tradition, the intrusions of the nation-states on that tradition, and the reaction to those intrusions. It is in open discussion, where traditional knowledge, the knowledge of those trained professionally in the law, and the lay intersect where dynamic things happen.<sup>94</sup> It is important that we connect with one another, yet maintain our mental sovereignty, our autonomy, our distinctness, and our differences, resisting the displacement or homogenization of our cultures, our legal methods, and inspire one another.

For example, outside critics and internal actors need to dialogue about “untenable and misleading dichotomous analyses of evil Western systems and their opposite holistic, spiritual [I]ndigenous ones” as well as the homogenization-of-justice approaches and power within diverse Indian communities.<sup>95</sup> No doubt, separate and piercing self-examination of specific Indigenous legal tradition and knowledge, including the location of influences from historical colonial policies, identifying specific Indigenous philosophy and belief stemming from specific ecological orders and their place in developing current law in Indigenous communities is needed.

However, it is at the place where diametrically opposed concepts meet that we can begin theorizing. The western/Indigenous justice dichotomy, or to be more precise, the common law/Indigenous legal tradition dichotomy is real. To dismiss and reduce a comparative approach to analyzing and comprehending the differences to evil and its opposite is to factor the Indigenous legal tradition paradigm out of the analysis. It continues the orthodox European tradition of maintaining a hegemonic analytic perspective and fails to factor in Indigenous ways of understanding the autochthonic legal tradition. There is the often deceptive inconsistency of the general and the specific; the divide between the real and the ideal; the opposition of the traditional to the modern that must be explored. There is the odd and awkward fit and fusion of traditional and modern. Finally, there are the tensions and knowledge gaps between the insider and the outsider, the competing methodologies and approaches of disciplines, especially between the two disciplines that produce the scholarship in this area—law and anthropology, as well as the competing paradigms of western and Indigenous knowledge. In the middle of all this lies Indigenous communities and peoples who must craft approaches that work for them. Dialogue is only the beginning—for those who believe that “law” is not solely the sphere of humankind, but lies in the land, and in the spirit—it is only a start.

I tell my students the *Tribal Law Journal* is more than a journal, it is a movement—a modest, humble movement—to encourage Indigenous Peoples to own their own law and to preserve the native intellect and philosophy.

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93. Guillermprieto, *supra* note 1 (emphasis added).

94. This is the concept behind appointing those with lay, traditional, and professional experience with “law” to the appellate court of the Pueblo of Isleta. See Christine Zuni Cruz, *Indigenous Pueblo Culture and Tradition in the Justice System: Maintaining Indigenous Language, Thought and Law in Judicial Review*, Issues paper no. 23, in 2 LAND, RIGHTS, LAWS: ISSUES OF NATIVE TITLE (Jane Anderson ed., 2003), available at <http://ntru.aiatsis.gov.au/ntpapers/ipv2n23.pdf>.

95. BRUCE G. MILLER, THE PROBLEM OF JUSTICE, TRADITION AND LAW IN THE COASTAL SALISH WORLD 10 (2000).