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# [ON THE] ROAD BACK IN: COMMUNITY LAWYERING IN INDIGENOUS COMMUNITIES

Christine Zuni Cruz\*

For  
KIMO  
Jose A. Zuni  
(1921-1998)

## *I. Context: A Memory About Lawyers*

As a communications major in film and broadcasting, I took a film making course which required the production of a super 8mm film with an accompanying soundtrack. The film I produced was based on the lyrics, "You're my lawyer, you're my doctor, yeah, but somehow you forgot about me," from the song by Gil Scott Heron and Brian Jackson.<sup>1</sup> These lyrics

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1. GIL-SCOTT HERON & BRIAN JACKSON, *PEACE GO WITH YOU BROTHER, WINTER IN AMERICA* (Rumal-Gia Ltd. 1998). I recalled the lyrics as "you're my lawyer, you're my doctor, but sometimes I wish you were none," although this was not correct. When I tracked down the song and listened to it for this article, I heard a much broader message that I hadn't remembered. The song speaks not only of forgetting and creating distance with community, but with family, as well. The song, *Peace Go With You, Brother*, begins with several voices saying:

Now, more than ever, all the family must be together. Every brother, everywhere, feels the time is in the air. Common blood flows through common veins and the common eyes all see the same. Now more than ever all the family must be together.

Peace go with you, brother  
Though I ain't so proud anymore  
Peace go with you, brother  
Recognition don't come cheap anymore  
You're my lawyer,  
You're my doctor, yeah,

spoke to me of professionals who forget their communities or at least their communities' perspectives, needs, and sometimes their own roots. In turn, they are not respected and become despised for their indifference by those people who had different hopes and aspirations for what these professionals could do to help the general conditions of others in the community.

As I began to write this article, these lyrics and their message came to mind. At the time I produced the student film, I had no idea I would eventually become a lawyer, but I did know that whatever I did do, that I would consider working apart from or without relation to the Indian community and my own tribal community, in particular, as unconscionable.<sup>2</sup>

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but somehow you forgot about me  
and now,  
now, when I see you  
all I can say is  
peace . . .  
peace go with you, brother  
peace . . .  
peace to you brother  
Don't seem to matter much now just what I say  
peace go with you, brother  
You the kinda man  
who thinks he gotta have his own way.  
You're my father, you're my uncle,  
and my cousin  
and my son,  
but sometimes, sometimes,  
I wish you were none.  
But I manage to smile and I say,  
Peace go with you, brother.  
Peace go with you, brother  
Peace go with you, brother  
Don't make no sense for us to be arguing now  
Time is right up on us now, brother  
Don't make no sense for us to be arguing now  
All of your children and all of my children  
are gonna have to pay for our  
pay for our mistakes  
someday  
Yes, and until then,  
may peace guide your way  
Peace go with you, brother  
wherever you go  
Peace go with you brother

2. In high school and college one of the most frequent statements of encouragement we received from tribal leaders was to get an education "to help your people." It became a cliché, but one which carried the message that we were not free to educate ourselves for our own sakes. We had a responsibility which I translated for myself to mean that we were not to forsake our communities and those within our communities. Issues of postgraduate education and professionalization with their attendant aspects of assimilation and acculturation as well as the

The idea of professional success, especially in the elite legal profession, as being closely linked to community or having corresponding value to the community has directly affected my view of individual lawyering.<sup>3</sup> This idea runs counter to the norm.

## II. Context: Personal and Collective Perspectives

I am a member/citizen of the Pueblo of Isleta, one of the nineteen pueblos and one of the twenty-two tribal nations located in the state of New Mexico. I am also of San Juan Pueblo descent. Since leaving college I have had only one goal, and that has been to return "home" to use my education for "the people"<sup>4</sup>: an easy thing to say, but not an easy thing to accomplish. First of all, I had to travel what I like to call the "road back in," not an easy road to find, nor an easy road to travel. It seemed like all the roads leading out of the reservation were paved, many by the federal government, but you had to look long and hard for that road leading back in. The temptation of the "brain drain expressway" overcomes a lot of people, and they find themselves hurtling down that road to big cities and bright lights, some detoured for years, and others never to return. I found that, as you travel that road back in, you find yourself critically appraising and then discarding some of the baggage<sup>5</sup> you acquired when you were outside the community, perhaps because the road back in is a hard road, and you find that a lot of what you acquired is just heavy, useless baggage which is actually impeding your journey. I think that everyone who has gone outside the community, acquired a western education and is eventually effective within their own community, has a similar experience on this "road back in."<sup>6</sup>

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resistance that often accompanies them (within analyses of individual and collective identity) have been prominent themes in Critical Race Theory. See Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991); Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992); Margaret E. Montoya, *Mascaras, Trenzas y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185 (1994); Jennifer M. Russell, *On Being a Gorilla in Your Midst, or The Life of One Blackwoman in the Legal Academy*, 28 HARV. C.R.-C.L. L. REV. 259 (1993).

3. I believe remaining closely tied to the tribal community one comes from helps maintain perspective. For one, I believe there is a high degree of accountability for those who live and work within or for their own tribal communities. As a part of the community, we are known. The decisions, the choices we make impact us, our families and relatives, and our tribes.

4. English translation of the Tiwa word Isleta people use in reference to themselves.

5. Baggage can include western knowledge, approaches, assumptions and ideas which are not useful in work within native communities. One western assumption which is particularly important to discard is that one's degree, in and of itself, entitles one to any standing within the community. A degree, which is a western symbol of status or knowledge, does not carry equivalent symbolism in native communities.

6. In a similar analogy, the Chief Justice of the Navajo Nation Supreme Court, describes law

As a native person, a practitioner, and an instructor of Indian law, my view of community is profoundly affected by the uniqueness of tribal community and native identity.<sup>7</sup> This includes both the attributes of a community or nation of native peoples<sup>8</sup> and an individual's connection to that community.

The three voices I speak in — native, lawyer, and clinician — provide different perspectives. As native, I speak as a native person living within my native community; as lawyer, I speak from my experience in working within the community; as clinician, I speak combining the above voices, seeking to improve the lawyering done in the name of, on behalf of, for, and with native peoples and native nations. These voices inform my discussion of community and culture. The basis of my ideas stem from my experience of being part of a distinct native community, long served by lawyers and a profession external to the community. My perspective on community comes from my work within my own pueblo, and within other pueblos both as a lawyer and a judge. My perspective on culture is closely related to community, but it is also informed by the work I engaged in over several years to revise the New Mexico Children's code to provide greater cultural protection for native children and youth.

One of the main reasons I entered academia was to concentrate on what I term "insider" law in Indian Law. As a former tribal court judge for several pueblos and as an appellate judge, I saw first hand the conflict between traditional and modern anglo-american principles of law, and the tendency of anglo-american principles to be utilized to the exclusion of native principles not only in the structuring of systems, but also in the development of law. Law schools concentrate on teaching law students "federal Indian Law," or what I term "outsider" law which affects Indians. There is nothing particularly "Indian" about "federal Indian law." Little, if any effort, is spent on the

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school as a journey. He warns native students in a pre-law program about the "souvenirs . . . in the form of Anglo rules, principles, and procedures" they would acquire in their law school journey. "Not only must Indian lawyers make the trip back home, they must take care that the law which they bring back home does not destroy the home they return to." Robert Yazzie, *Law School as a Journey*, 46 ARK. L. REV. 271, 271-72 (1993).

7. For a discussion on the complexity of native identity, see David A. Mihesuah, *American Indian Identities: Issues of Individual Choices and Development*, 22 AM. INDIAN CULTURE & RES. J. 193 (1998). Mihesuah discusses the spectrum of native identity from those who claim to be Indian, but are not, to those who are culturally and ethnically Indian.

8. "A study by the United Nations contains the following definition: Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories; consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems." S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 5 n.2 (1996) (citations omitted).

concentrated and exclusive teaching of "insider" law — not only foundational and traditional precepts of indigenous law but also the internal law of tribes. As a consequence, few students are adequately prepared to approach work in indigenous communities, nor are they prepared to deal with the tension between traditional and "modern" (anglo-american) law. Even fewer are prepared to assist clients to appear in traditional courts or to argue traditional law in modern tribal courts.<sup>9</sup> This is not to say that federal Indian law is unimportant. In fact we require the federal Indian law course as a prerequisite for the Southwest Indian Law Clinic (SILC). It is only to say that "insider" law is equally critical and foundational to working with native communities.

My scholarship and teaching place me in a position to develop "insider law," and with it, an ethic of working within native communities and communicating the process and the result to "outsiders." This paper began with only one specific example or client story; I have since added a few more. Where they are used, I try to relate them as carefully as possible so as not to expose identities or otherwise abridge my own sense of appropriate disclosure of client (individual and community) information. I refer to all who worked on cases as attorneys, whether they were students attorney or attorneys in private practice. Some of my most instructive experiences as a lawyer or as a clinician simply cannot be related at all. This is an especially sensitive issue for me as a native writer who seeks to explain certain aspects of working with the native community. Native peoples have the experience of having been subjected to study and inappropriate disclosure of information by outsider academicians and scholars. In our recent past, pueblo communities have experienced the appropriation of community information by anthropologists and others; the outrage at the "informants" has become a part of our socialization against disclosure.

I deliberately strive in this paper to prevent placing either clients or communities in the position of feeling violated by my work with them for the sake of academic scholarship. We seek through our clinic to help without transgressing cultural and intellectual boundaries by preserving the trust of both individuals and communities through an ethic of non-exploitation. As a native academician and community lawyer, this is an extremely critical component of my work with native peoples and communities. The development of research principles by indigenous peoples to protect their communities, especially in relation to outside academicians is an outgrowth of the movement to develop protections for the cultural and intellectual property rights of indigenous peoples. The appropriation of the native voice, experience and culture has been such a recurrent theme, that I found it difficult to incorporate specific examples of native clients and communities

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9. I have proposed a course for the upcoming academic year on the Law of Indigenous Peoples, which would concentrate on "insider" law: exploring the law of tribal nations, both written and oral, traditional and non-traditional.

without feeling conflicted. The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples broadly declares "that *all forms of discrimination and exploitation of indigenous peoples, indigenous knowledge and indigenous cultural and intellectual property rights must cease.*"<sup>10</sup>

What is not spoken is often as important as what is spoken. As Loretta Todd, Canadian First Nation film maker states,

For me the definition of appropriation originates in its inversion, cultural autonomy. Cultural autonomy signifies a right to one's origins and histories as told from within the culture and not as mediated from without. Appropriation occurs when someone else speaks for, tells, defines, describes, represents, uses, or recruits the images, stories, experiences, dreams of others for their own. Appropriation also occurs when someone else becomes the expert on your experience.<sup>11</sup>

Cultural autonomy is an important principle for all whose work privileges them to obtain entry into disenfranchised and oppressed communities.

The ethic of non-exploitation which I seek to develop in the clinic regarding the representation of native peoples and communities encompasses, yet goes beyond, the need to carefully preserve client confidences that is a part of our ethical responsibility to our clients. This paper begins a dialogue, not only between me and the outside reader, but continues and deepens the dialogue between me and my community and the communities we work with. The question as to what is the appropriate way to write expands an ongoing dialogue with the community about appropriate disclosure. Later, I hope to build on the feedback.

As a Pueblo person, I cannot think of "Indian law" and lawyering for Indian peoples without thinking of the impact of that law and the impact of lawyering, both negative and positive, on my community, the larger Pueblo and Indian community, our sovereignty, and all the other Indian peoples affected. "Indian law" and lawyering for Indian peoples are not abstract endeavors for those of us affected by both the law and the lawyering.<sup>12</sup> They

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10. The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, June 18, 1993, passed by the plenary of the First Int'l Conf. on the Cultural & Intell. Prop. Rts. of Indigenous Peoples (emphasis added). The Mataatua Declaration takes its name from the nine tribes of Mataatua from the Bay of Plenty Region of Aotearoa, New Zealand who convened the conference. (Declaration on file with the author).

11. Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CAN. J. OF LAW & JURISPRUDENCE 249, 279 (1993).

12. I have tried to identify some of the thoughts associated with each voice I speak from throughout this paper, as a method of explaining how each of these roles influence my work. Perhaps they are so interrelated that it is impossible to separate out one from the other, but I hope

are crucial to strengthening tribal nations and protecting the rights of native peoples to the principles of sovereignty, autonomy and self-determination.

Self-determination is a foundational principle associated with any work undertaken with, for or in native communities. Unless it is understood and incorporated into work with native peoples, work undertaken can very quickly deteriorate into work undertaken without their consent and full participation. Self-determination is "grounded in the idea that all are equally entitled to control their own destinies."<sup>13</sup>

### III. Introduction

Lawyering which respects those who comprise the community as being capable and indispensable to their own representation and which seeks to understand the community yields far different results both for the community and the lawyer.<sup>14</sup> Self-determination is important to lawyering which benefits the community and the people within that community. If the lawyer cannot respect a peoples' culture, which means understanding a peoples' goal toward self determination, then the people will not be well-represented. However, the means by which the end is obtained are all important. Successful community lawyering has just as much to do with process as it does with outcome, and when one values community, process becomes critical. Process is critical because for native peoples community lawyering is about self-determination, both for the community and the individual, about recognizing traditional norms and practices, and about valuing relationships.

This paper looks at lawyering for, and within distinct communities and at the responsibility lawyers have to understand how culture, both their own and their clients', impacts their lawyering. More specifically, I will discuss lawyering for and within distinct native communities and how clinical instructors and students can prepare to enter distinct communities and practice across cultures.

Part IV defines this paper's two most important concepts, community and culture. Culture, specifically the lawyer's responsibility to value and to

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that my attempts serve the purpose of detailing the influence of each. Whether people of color have a distinctive voice has been the subject of heated debates in legal scholarship. See Leslie Espinoza, *Masks and Other Disguises: Exposing Legal Academia*, 103 HARV. L. REV. 1878 (1990); Mari Matsuda, *Affirmative Action and Legal Knowledge*, 11 HARV. WOMEN'S L.J. 1 (1988); cf. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

13. ANAYA, *supra* note 8, at 75, 75-96. Anaya goes on to say "Self-determination gives rise to remedies that tear at the legacies of empire, discrimination, suppression of democratic participation and cultural suffocation." *Id.* at 75.

14. GERALD LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VIEW OF PROGRESSIVE LAWYERING* 11-82 (1992); Oren Lyons, *When You Talk About Representing Tribal Clients, You Are Talking About the Future of Indian Nations*, in *RETHINKING INDIAN LAW* iv (Nat'l Law. Guild, Comm. On Native Am. Struggles, ed. 1982).



understand the importance of culture in representing clients, is considered. Part V examines the community lawyering concept. It provides a full definition of community lawyering and contrasts it with the traditional, regnant form of lawyering and particularly with the more familiar and more closely related client centered form of lawyering. This section analyzes and explains why the community lawyering approach is superior to the client centered lawyering approach and, indeed, is essential to the competent and non-colonial representation of native communities. Part VI concludes with a discussion of how SILC<sup>15</sup> teaches this community lawyering approach to its students and explores the lessons and challenges that have developed through the use of this approach.<sup>16</sup>

#### *IV. Community and Culture as Themes in Lawyering for Distinct Populations*

Community and culture are the two major themes emphasized in lawyering for distinct communities throughout this paper.<sup>17</sup> The relationship between the community, the individual and subgroups and the bearing these relationships have on representation is the theme first examined. Culture, with its subtle and overt influence on all of us, and specifically in relation to its significant role in community, demands separate consideration. Because community and culture are major themes, it is necessary to provide a definition of these terms.

My definition of community cannot be separated from a description of the community which arises from the existence of distinct tribal nations of

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15. The Southwest Indian Law Clinic was established at the University of New Mexico (UNM) in 1993 to provide students with clinical experience in Indian law. The clinic benefitted from the immense resource and potential interaction with the state of New Mexico's twenty-two distinct native nations and from the supportive response to the creation of the clinic from Indian peoples throughout the state. The twenty-two native nations are: Navajo, Jicarilla Apache, Mescalero Apache, and the Pueblos of Isleta, Sandia, Laguna, Acoma, Zuni, Santa Ana, Zia, Jemez, San Felipe, Santo Domingo, Cochiti, Tesuque, Poquaque, Nambe, San Ildefonso, Santa Clara, San Juan, Picuris, and Taos. Native people represent 8.2% of the population of New Mexico and represent the third largest group of people in the state. Indians in New Mexico make up the largest percentage of Indian peoples in any state's population in the nation. HAROLD HODGKINSON, JANICE OUTTZ & ANITA OBARAKPOR, *THE DEMOGRAPHICS OF AMERICAN INDIANS: ONE PERCENT OF THE PEOPLE; FIFTY PERCENT OF THE DIVERSITY* 9, Table 3 (1990).

16. Some explanation appears to be required here as to why there is a lack of personal claim, whether it be to acquired knowledge or work, on my part at various points throughout the article. Passive voice, as it is referred to, arises from my discomfort with claiming credit for many things which I might describe as common or natural knowledge to native people working with their communities or to thoughts or ideas which are the result of practical or common sense approaches to working with the community against oppression as the result of being familiar with oppression. To take personal credit for this seems absolutely inappropriate.

17. Community and culture are used in the singular, although, as my colleague Margaret Montoya points out, we all belong to multiple communities and cultures.

peoples. However, many of the same concepts applicable to lawyering in native communities are applicable to lawyering for other communities. At a minimum, these concepts are certainly worthy of consideration when one undertakes lawyering for distinct communities or lawyering across cultures.

Indian community emanates first from those relations created by blood ties and tradition.<sup>18</sup> Generally, an Indian person's community is the tribe they are born into and tied to by membership and by participation.<sup>19</sup> Thus, community includes a person's nuclear and extended family, and all who are tied by other relationships to the nuclear and extended family, by religious, marital or other societal bonds. Community may also be defined in relation to land. For Indian people, community may be defined as "the people" within certain territorial landmarks, boundaries of the reservation, or specific areas within those landmarks and boundaries. These definitions work for describing tribal land based communities, but not necessarily for describing the urban based Indian community. Thus, community may also include the participatory groups which one is a part of, which expand those which arise from blood, custom or societal obligation, and which arise as a result of some commonly shared bond, whether it is geographic or racial, religious or political identity.

Culture is a complex term. Those who have addressed culture in other contexts, have recognized a difference between culture with a capital "C" and culture with a small "c." Capital "C" Culture is defined as either "the independent and abstract noun which describes a general process of intellectual, spiritual and aesthetic development . . . or the independent and abstract noun which describes the works and practices of intellectual and especially artistic activity" or both.<sup>20</sup> Small "c" culture is defined as "the independent noun, whether used generally or specifically, which indicates a particular way of life, whether of a people, a period, a group, or humanity in general . . . ."<sup>21</sup> It must also be understood that for native peoples, culture is also conceptualized in different terms than that embodied in Western terms. Individualistic, rigid demarcation of cultural categories fail to accommodate native culture, which "cannot be separated from issues of spirituality, political

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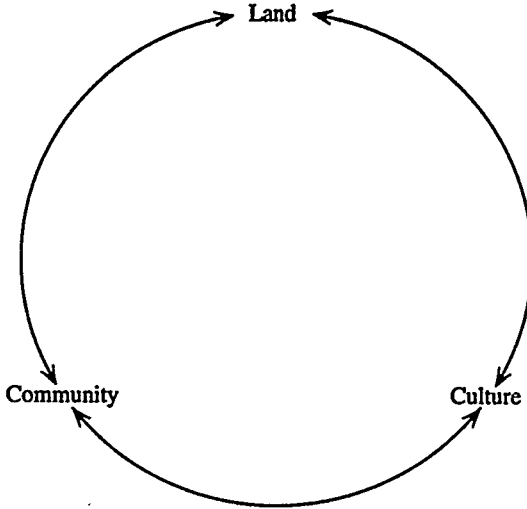
18. I attempt to define Indian community here without reference to anthropological definitions of a "tribe." I seek a working definition to guide myself and others in thinking about community in relation to lawyering with native peoples, which is not overly legalistic or scientific, but which is grounded in practicality. In Indian Law, membership in a tribe is a legal principle and therefore impacts the definition of Indian community, yet participation in the community and recognition by the community are also critical.

19. Matters become complicated when a person comes from parents who come from two separate tribes, or when one parent is non-Indian, which is why I include "participation" in the community as a component where one has a choice of being involved in more than one "community." The extent to which one chooses to or actually participates in these communities is a factor to consider in identifying our own or our client's community.

20. Coombe, *supra* note 11, at 256 (citing RAYMOND WILLIAMS, *KEYWORDS: A VOCABULARY OF CULTURE AND SOCIETY* 90-91 (1983)).

21. *Id.* at 256.

determination, and aboriginal title to traditional lands."<sup>22</sup> It is important to underscore the interrelationship of culture, community and land; they are not compartmentalized for native peoples, but are interconnected.<sup>23</sup> (see graph A)



GRAPH A

The recognition of the right to one's culture, or cultural rights, as a basic human right,<sup>24</sup> is a critical matter to native peoples, particularly because destructive or assimilative practices aimed at indigenous culture have been the norm applied to eradicate or absorb native peoples historically. The recognition that culture is a pronounced, valued and integral component of lawyering on behalf of native individuals and communities is of no small significance to native peoples.

I use culture (the small c term) broadly to include all that gives us a cultural identity: language, race, ethnicity, religion, land, world-view, foods, and music, for example. Culture and hence, cultural identity, impacts lawyering. For example, the culture of our client influences how our client speaks to us; the culture of the lawyer also influences how the lawyer speaks, what the lawyer hears and how she listens.

Initially, I saw the opportunity to teach students with a specific interest in Indian Law in a clinical setting as an opportunity to improve the overall delivery of legal services to Indian peoples. I would say now that I also see

22. *Id.* at 272.

23. "Culture, ordinarily, is an outgrowth of a collectivity, and, to that extent, affirmation of a cultural practice is an affirmation of the associated group." ANAYA, *supra* note 8, at 101.

24. *Id.* at 98-104.

an opportunity to expose students to the receipt of legal services from the various perspectives of native clients with the hope of influencing students' awareness of how their own consideration of culture and community directly impacts the quality of the legal service delivered to native peoples. The first time I heard a student say she, for the first time ever, "saw" her own culture and considered how her own culture and background impacted her and therefore, her lawyering, as a result of her clinical experience in SILC, I felt everything up to that point and still feel that everything beyond it, has been worth it.

Perhaps because of my own native background, when I look at communities, I cannot separate them from the cultural markers which make them distinct communities. A discussion of community lawyering which does not include cultural considerations is incomplete because of this impact of culture on all aspects of the attorney-client relationship. Cultural influences are not always so apparent, nor easily understood, which is precisely why it is important not to lose sight of the tremendous influence culture can have on clients from distinct communities.

It is important from another perspective, however. Many lawyers cross cultural boundaries in their work, and are astute about this fact; fewer, however, seem to grapple with their need to understand the influence of the client's culture on the client and the legal issue or problem faced. Even less recognizable is the influence the lawyer's own culture has on the lawyer him/herself, his/her lawyering style, approach and problem-solving technique and their impact on the client. In crossing cultural boundaries, one is most acutely aware of the culture entered; equally important however is the awareness that one is viewing the "entered" culture from one's own particular cultural perspective. Keeping in mind that crossing cultural boundaries is a two-way process is critical; it requires the lawyer to consider his or her own cultural view as well as the cultural view of the client.

Language, cultural values and world view are important elements in representing clients. When one must translate any of these for oneself in working with a client, the task of lawyering becomes twice as challenging. If one must translate an understanding of the client for oneself, one usually must also translate the client for others in the course of representation. Lawyers are engaged in this translation in the normal course of representation of clients from distinct communities; it is the conscious and studied approach that should inform community lawyering. Typical law school training does not emphasize the skills required to engage in this type of lawyering and does not prepare students to factor this into their lawyering. Cases are rarely discussed in terms of the crossing of cultural boundaries for all involved, including the judge, the lawyers, and the clients. The underlying message, whether it is implied or transmitted out of ignorance, is that culture is not a critical element; all that need be drawn from cases is an understanding of the

law. In a multi-cultural society however, the "acultural"<sup>25</sup> teaching of law and of lawyering skills serves neither the practicing lawyer nor the client well. What should be taught is how race and culture can impact clients, how law is cultured by the dominant societal view, and the necessity of both cross-cultural communication skills and a vocabulary for understanding culture and community.

For example, a lawyer representing a client with a difference in language faces multiple issues. From the initial interview to trial or other resolution of the matter, each of the basic lawyering skills must be modified to accommodate the difference in language. From the competency of the interpreter, the interjection of a third party into an interview, the language skill of the attorney who does not make use of an interpreter, the questioning, the language itself, to the politics surrounding the use of a language other than english, language difference can greatly challenge the lawyering skills of the average attorney and raise issues of the competent representation of the client by the lawyer.

Even if lawyer and client speak the same language, whether it is english or another language, differences in cultural values and world-view can affect the quality of understanding. This is where self-awareness of one's own cultural trappings, coupled with an awareness of the differences in cultural values and world-view of the client can help an attorney.

In seeking to address the relationship between culture and lawyering, there are many challenging issues encountered both in the classroom and the real world. The most difficult of these include issues of self-identity, cross-cultural communication and understanding, cognizance of place, outside/insider issues, and assuming responsibility for understanding the impact of lawyering choices on the client, the community or both.

It is much more meaningful to discuss issues of community and culture in concrete, rather than abstract terms. The following sections are intended to provide more of an idea of how considerations of community and culture operate in the real world of lawyering for specific native communities. It is also intended to show some of the difficulties that arise in seeking to introduce considerations of community and culture in a profession long cast in terms of individuality and an acultural approach to the law.

A distinction is made between "traditional" lawyering and "client-centered" lawyering (to a lesser degree), on one hand and "community" lawyering on the other, by considering the emphasis placed on understanding and valuing culture and community as factors in lawyering. A professional should not only consider, but be judged by a failure to take culture and community into consideration in representing clients.

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25. This is a "created" word used to refer to teaching of law without reference to any culture at all, although law is cultured and culture does impact law.

The emphasis on a client's community and culture as important factors in lawyering, distinguishes community lawyering from the "traditional" lawyering approach that "both parties are best served by the professional's assuming broad control over solutions to the problems brought by the client."<sup>26</sup> Where the professional has no knowledge of the influence of community or culture on his/her client, his or her assumption of "broad control over solutions" could yield less than satisfactory results at the least and potentially disastrous results at most. Another tenet of traditional lawyering — the lawyer's autonomy, is challenged when community and culture are taken into consideration: Legal "professionals, in contrast to members of other occupations, claim and are often accorded complete autonomy in their work. Since they are presumed to be the only judges of how good their work is, no layman or other outsider can make any judgment of what they can do."<sup>27</sup>

"Community" lawyering is closer to "client-centered" lawyering, which emanates from a belief in the autonomy, intelligence, dignity and basic morality of the individual client.<sup>28</sup> "Community" lawyering, however, shifts and broadens the lawyer's view of the "nonlegal"<sup>29</sup> influences recognized in client-centered lawyering as affecting the client. It broadens it to specifically include community and culture as overarching, significant and centrally relevant factors which must always be considered. Community lawyering shifts the lawyer's view of nonlegal influences from an individualistic view of the client and her concerns to a view of the client as a part of a larger community. The community lawyer seeks to consider the community and the culture of the client as informing the consequences of legal action taken, the re/presentation of the client, and the relationship between the attorney and the client. In community lawyering, community and culture are always relevant to the lawyering. (See graph B)<sup>30</sup>

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26. DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 7 (1974).

27. *Id.* at 8.

28. DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 18 (1991).

29. Binder, Bergman, and Price specifically include economic, social, psychological, moral, political, and religious consequences as the nonlegal concerns of clients. *Id.* at 8-9.

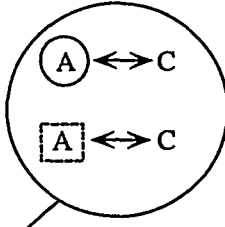
30. The graph illustrates the differences between three models of lawyering: community lawyering, traditional lawyering and client-centered lawyering. In the community lawyering diagram, (I) the attorney(s) and client are placed within the larger circle which depicts the client's community and culture, because the attorneys consider the client's community and culture in their lawyering of the client. The solid line around the outsider lawyer indicates the cultural boundaries the outsider attorney must cross to communicate with the client. The attorney must also be aware that all the client communicates filters through his/her cultural boundary. The broken line around the insider attorney, illustrates the lawyer who comes from the community, who already possess knowledge of the community and culture, but whose education and membership in the legal profession places some boundaries between her and the client which must be crossed. The client-centered diagram(III) shows the lines of communication going both toward the client from the lawyer and from the client to the lawyer, illustrating the lawyer's consideration of the client's goals, input and concerns. However, there is no emphasis on the routine and wider consideration

Three Lawyering Models

I. Community Lawyering

⊙ A = "Outsider" Attorney

⊡ A = "Insider" (Member) Attorney



Client's Community/Culture

II. Traditional Lawyering



III. Client-Centered Lawyering



GRAPH B

*V. Community Lawyering*

From its very beginning, the Southwest Indian Law Clinic (SILC) was funded by the New Mexico state legislature in 1993 to provide students with clinical experience in the field of Indian Law. Initial input was obtained from Indian peoples, nations and non-governmental organizations throughout the state regarding the structure, policy and formation of the clinic.<sup>31</sup> SILC was developed as a community lawyering clinic.<sup>32</sup> The clinic's work has not deviated from the initial community lawyering approach. In 1996, UNM community law clinic faculty sought to develop a statement on community lawyering in order to provide a common understanding and a sufficiently

of the client's culture or community, nor is there routine consideration of the cultural boundaries attorney and client cross. The diagram of the traditional lawyering model(II) depicts the lawyer directing the relationship with the client receiving the benefit of the lawyer's expertise. There is no routine consideration of the client's potential for assisting in the representation, nor of the significance of the client's community or culture on the representation.

31. Visiting Professor Barbara Creel and Professor Gloria Valencia-Weber rotate into the SILC; both possess backgrounds in Indian Law. Professor Creel teaches in the general community clinic and the law practice clinic, as well. This paper is one of two papers which were written to describe the work in the SILC. The second paper, written by Professor Creel, applies the concept "First, do not harm" taken from medical ethics to the practice of law in diverse communities.

32. The recent history of community lawyering clinics at UNM begins with the Institute for Access to Justice (IAJ) Clinic, which provided students exposure to underrepresented clients at specific community sites.

broad description of the type of lawyering and teaching we are engaged in our community lawyering clinics.<sup>33</sup>

A discussion of the term "community lawyering" is necessary to shed light on what is encompassed in its use in this paper. Focusing on the term is particularly important because the term has no exact definition and can be used in different ways. The following preliminary statement on community lawyering was arrived at by the group of clinical faculty.

Community lawyering is a broad term. It describes a way of lawyering that includes much of traditional lawyering.<sup>34</sup> Generally, community lawyering is a method of providing legal service, advice, and representation which approaches case work or legal issues with appropriate consideration and an understanding of community values, concerns, ideas or beliefs and their impact on the treatment of the client, the treatment of the legal issues, and the final legal solution crafted. Community lawyering seeks to approach individual clients and communities with an understanding of the community the client comes from and ever mindful of the impact of legal work on the community. Community lawyering is working with communities and the individuals which comprise communities, not independent of them.

Community lawyers do more than represent individual clients. They represent clients in definable communities. They learn about the cultures, values, beliefs of the people in the community. They see problems of individual clients in the context of the

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33. In 1994, the Semester in Practice clinic format continued the work of the IAJ and provided students with a semester devoted to "community focused" clinical work and a course in legal ethics. SILC was one of the community lawyering clinics offered under the semester in practice format. The community lawyering clinics differ from the general law practice clinic, in that specific communities are served with an eye toward understanding those communities. UNM Clinical faculty who had participated in SIP developed the statement on community lawyering in the fall of 1996. They included Professors Alfred Mathewson and Scott Taylor, who taught in the Economic Justice clinic, Professor Margaret Montoya, who teaches in the general community lawyering clinic, Barbara Creel and the author, both of whom teach in the Southwest Indian Law Clinic. All of the above clinics are community lawyering clinics. The statement also addressed community; scope of work; methods, legal practices, and problem solving; teaching community lawyering in a clinic; and community responsiveness. The author's own position and statements on community lawyering should not be attributed to the position of the group as a whole, or to any of them individually.

34. The term traditional lawyering is used generally here and does not refer to the traditional approach to lawyering referred to earlier in the paper. Rather, it refers to the community lawyering that traditional lawyers have been engaged in. As explained by Alfred Mathewson, "the work of some very traditional lawyers may be described as community lawyering. I have found that transactional lawyering very closely resembles what I think of as community lawyering in general. I distinguish though the teaching of community lawyering skills from its practice."



community. Individuals in communities may face all sorts of problems, but lawyers engaged in community lawyering go beyond individual cases to develop and implement community-wide solutions that will benefit others in the community who may face similar problems. Community lawyers grapple with the tension between "zealous representation"<sup>35</sup> of individual clients and community concerns. Community lawyers are also aware of the impact that their work may have on the community. Consequently, community lawyers seek to help the community take advantage of the legal system in light of the culture, values, and beliefs of the people in the community."

Many of the challenging questions which present themselves in community lawyering stem from the relationship of the individual (as client or as lawyer) to the community. Many clinics and private practitioners represent individuals from distinct communities, such as tribal rural communities or urban neighborhoods; some also represent the community as a community or groups from within the community. Whether representation is undertaken of individuals, of the community as a whole, or of a specific group within the community, a number of questions arise regarding the relationship of the individual to the community. All I address in the sections on representing individual clients from distinct communities, communities, and groups from within communities, comes from my experience in private practice and in working with tribes. The "communities" I have experience with are tribal. While tribal communities are unique and distinct in relation to other communities, primarily because of the blood relationships which distinguish tribal communities, as well as their unique legal and political status;<sup>36</sup> the same types of issues regarding representation of individuals and communities arise when lawyering for/with/in other distinct communities. Clinics across the country draw their clients from distinct communities, typically communities of color, with distinct characteristics. While I write this section with specific reference to tribes, it is important to emphasize that similar issues may arise

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35. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1983).

36. "The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence . . . The relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else.' The federal-tribal relationship is premised upon broad but not unlimited federal constitutional power over Indian affairs, often described as 'plenary'. The relationship is also distinguished by special trust obligations requiring the United States to adhere strictly to fiduciary standards in its dealings with Indians. The inherent tension between broad federal authority and special federal trust obligations has produced a unique body of law." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 207 (1982 ed.) (citing *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831)). "In dealing with Indians, the federal government is dealing with members or descendants of political entities, that is, Indian tribes, not with persons of a particular race." *Id.* at 19 (citing *United States v. Antelope*, 430 U.S. 641, 645-46 (1977) and *Morton v. Mancari*, 417 U.S. 535 (1974); other citations omitted).

when lawyering for any community. It is also important to emphasize that the knowledge comes not only from the experience of lawyering for native peoples but also from existing as a native person.

The relationship of the individual to the community is worthy of special consideration simply because so much emphasis in both American society and in law, is placed on individuality, and on individual rights and freedoms. Unfortunately, the impact and interrelationship that exists between clients and their communities have not been sufficiently emphasized.<sup>37</sup>

The purpose of this section is to continue to challenge lawyers to see their clients as part of a larger whole and in so doing, to better understand and realistically view the community's impact on the representation of clients, and to improve the quality and change the character of the provision of representation in/to/with these communities.

#### *A. Individual Representation and Community*

As lawyers venture into communities to serve clients, or as clients venture out of their communities to seek assistance, it can be frustrating, if not outright disrespectful to consider the client and the client's options without considering the individual client in the context of the client's community and the client's relationship to that community. Whether working directly with particular communities or with members of particular communities who find their way to clinics or law practices on their own, it is important to be aware of the dynamics of the client's community and its interrelationship with the individual client and their impact on the legal decisions. 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. One example is instructive.

An attorney "inherited" a case from a previous attorney involving a child. The attorney was upset because the case had not been filed in the tribal court of the client's tribe. The attorney felt that filing the case in tribal court promoted tribal sovereignty over tribal children and would have avoided issues which had to be addressed in relation to the state court proceeding. The case could have been filed in tribal court, but the client and the child, although members, were not residents of the reservation. The previous attorney had a choice of forum and filed the case in state

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37. See Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyers' Ethics in Tribal Peacemaking*, 27 U. TOL. L. REV. 821 (1996), which discusses how communal values can be used in dispute resolution. She addresses the ethical obligations of a lawyer and how the apparent gap between the individualistic values of lawyers' ethics and communal values evidenced by tribal peacemaking can be bridged. Elder and environmental law are areas of practice she cites as fostering a move by scholars and legal practitioners to redefine professional responsibility to include valuing the community.

court based on the client's off-reservation residency. The reasons behind the choice were not documented in the file. I had a discussion of the choice of forum with the second attorney. The client had not been a resident of her tribal community for many years, the client was seeking custody of a child under tremendously difficult circumstances involving the child's parents, and the tribal forum was a traditional court, meaning the client would be required to engage in some degree of self-advocacy, ranging from full advocacy by the client, herself, to active assistance, if the attorney was given permission to appear in the traditional court. The community was very small. I asked the attorney to consider the client's long absence from the community, the grievous facts, the client's privacy desires, and the small size of the community. The outside forum gave the client an anonymity she would not have otherwise. Clearly, the reasons for making the choice of forum decision could have been better documented by the previous attorney, but in the absence of their documentation, it was important to me to point out to the attorney, for future reference, the importance of considering and discussing these considerations with the client, documenting the discussion in the file, and framing an otherwise "legal" matter in terms of the client's relationship to the community and defining potential issues which should be discussed with a client when making such a decision.

The community lawyering approach trains an attorney to consider a client in relation to and as a part of her larger community, rather than as an individual. Nevertheless, a client may embrace a community or reject it. Rejection of the community as the forum for the legal issue, was a significant choice on the part of the client. This choice was treated as less significant by the first attorney involved in this case, than by the second. The first attorney was employing a client centered approach, that is the client's choice between two forums was sought and accepted but neither her reasons or the community's interests in the matter were documented or explored any further. The second attorney was seeking to employ the community lawyering approach. This attorney saw the client as a part of a community and her preference of a forum as detrimental to the community. However, the second attorney failed to consider the individual client in relation to her community. The community lawyer must consider the client and the community together, not simply the client as an individual and not simply the community itself. When the client is viewed in relation to the community, her reasons for not wanting to utilize the community forum are critical. In this case, the impact of the client's choice on the community could be explained to the client by the lawyer, but the impact of the choice on the client could only be explained by the client. Where an issue like choice of forum can have such a significant

one's "place" in relation to the community. Unless you are a member of the community, you are an outsider and no amount of information you obtain or time spent in the community will change that. This awareness of outsider status can help the quest for information by preparing one to approach communities with a sense of humility, politeness, persistence, and awareness of the need to actively involve the client and others supportive of the client (including family and service providers) in both obtaining information and in suggesting the approach and the sources of information.

Crossing tribal boundaries in our work makes us acutely aware of how much we learn by respecting differences and working with them; we pursue different methods of obtaining information as the cultural, political and governmental structure of native communities dictates.

An attorney, bothered that a tribal court would not treat a court order involving a client like a public document and release it to her on behalf of her client, sent out a letter to the court questioning why the court would not release the public court order to her. The judge reminded the attorney that tribal courts are different from state courts and warned against expecting tribal courts to do things in the same manner as state courts. The judge did release the order to the client, but only after ascertaining her approval because it involved a family matter. It provided a tremendous learning opportunity to the attorney, underscored a basic principle and reminded the attorney how easy it is to take the wrong approach, even when trying to integrate community and culture into lawyering.

It is also important to be respectful of the information obtained and how it should be used. In her article on native claims to cultural appropriation, Rosemary Coombe, uses the words of the late Barbara Owl to illustrate how "for native peoples . . . spirituality is not a thing that can be reified or abstracted from real human communities integrally balanced in a relationship with the earth." Ms. Owl's words also resonate with the need for respect in using information obtained whether it be in a client's case, in other cases, or generally.

We have many particular things which we hold internal to our cultures. These things are spiritual in nature. . . . They are ours and they are not for sale. Because of this, I suppose it's accurate to say that such matters are our "secrets," the things that bind us together in our identities as distinct peoples. It's not that we never make outsiders aware of our secrets, but we — not they — decide what, how much, and to what purpose this knowledge is to be put. That's absolutely essential to our cultural integrity, and thus

to our survival as peoples. . . . Respect for and balance between all things, that's our most fundamental spiritual concept.<sup>41</sup>

In addition to knowing one's place, the second guideline we follow is to ensure the principles of autonomy and self-determination on the part of the tribal nations we work with are respected. This is incorporated into the manner in which community project and site work were designed when the clinic was established. Each project and site has a designated contact associated with the community or with the non-governmental organizations we work with. We could not do the work we do without these people; they are navigators and cultural translators. They insure that the principles of autonomy and self-determination are enacted and embedded in our work within tribal nations. A deliberate choice was made, when establishing the clinic to adhere to the principle of self-determination, which means we do not determine the legal needs of the community, but instead allow the community to prioritize its legal needs. The project and site contacts, with their knowledge, established relationships, and frequently, tribal membership in the community, assist us in our work in communities.

A community will have a greater or lesser degree of influence on an individual depending on the individual, the community, the individual's relationship to the community, as well as the legal issue presented. Nevertheless, failure to consider the possible influences of community on the client, or the client's relationship to the community, robs a client of an important relationship which can be significant to their legal representation. To not consider the community as a whole in work undertaken on behalf of individuals in communities and to not consider the entire community in work undertaken on behalf of a community is to misunderstand the special privilege we are allowed when our profession gains us entrance to these communities. If one is not sensitive to the outer "community" boundaries of clients, one is probably not sensitive to the more subtle cultural and personal boundaries that surround our clients.

The corollary to the point raised above is the extent to which a community client is considered in the context of his/her individuality. Just as it is important to carefully consider and explore with clients the community context in which their legal issue may be situated, it is also important to consider a client's relationship to the community, how a client is situated in the community or how a client may wish to operate within the context of the community. This raises three issues. One is the need to be aware of stereotypes and overgeneralizations, which arise either as a result of general information about a community or as a result of specific information acquired about a community in the course of work within or with particular communities. One attorney assumed a client was familiar with traditional

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41. Coombe, *supra* note 11, at 279 (citation omitted).

effect on a community and a client, a lawyer should consider both the impact on the client and the impact on the community. The community lawyering approach moves beyond the client centered approach by placing importance on the reasons behind the client's choice which impact the community and by considering the impact on the community (beyond the individual client) as well as knowledge of the community.

Knowledge<sup>38</sup> of communities is an essential element needed in community lawyering. Knowledge of communities may come from the cumulative experience of work with individual clients or with the community, it may come from advance "reconnaissance"<sup>39</sup> or linkages with critical resources in the community, or it may come from information gathering done at the time representation is undertaken.<sup>40</sup> Information which helps to answer questions about a client's community will have a bearing on how well that client is served, whether that information ultimately impacts the legal issue or not. Uninformed lawyering in distinct communities about the community itself can be just as disastrous as lawyering without properly researching the law or investigating the facts. The damage to the client, or the community, or both can be irreparable.

Several examples come to mind, but I will use one which I believe illustrates how knowledge of community standards and even knowledge of a community's physical features can help to understand client decision making and improve the understanding and therefore the representation of the client.

I received a call from an attorney, who was quite perplexed by resistance she received from a client, a friend of the attorney, after having given what she thought was great advice (for its simplicity) to a legal issue he had confronted. She thought I could shed some light on his unexplained reaction to the advice. The attorney had suggested that her client engage in a legal fiction regarding his residence in the community. The client had informed her that he owned a home within the community, and the attorney suggested he claim that home as his legal residence. However, the client rejected the advice outright, leaving the attorney without an explanation and feeling quite uneasy. Because

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38. Encompassed in "knowledge" and "information" are such things as: history, culture, politics and political process, law (all with caveats, especially for outsiders), government structure and protocol. Obtaining this knowledge is a part of the work students must do in relation to their project work. Students may also be required to present this information to the class as they discuss their project work.

39. I refer to information obtained prior to the representation of a particular client through prior experience, corroborated research and study, and personal contact in the community or "tested and tried" information which is more fully developed and reliable.

40. See LÓPEZ, *supra* note 14, at 167-273, for a description of an in-depth study of a community undertaken in the representation of a client.

I was familiar with the community she asked me to suggest why the advice would be so soundly rejected. I gave her two related possibilities: one, there is a high premium placed on accountability within the community. To say you live in the community, when in fact you don't, would be known to all within the community to be untrue, and would be shameful to the individual who could, and undoubtedly would be called on by the small community to account for the "legal fiction," once they became aware of it. Secondly, there are many "homes" in the community which are old and uninhabitable. It was possible that her client owned one of these homes, which would make it more of an untruth, than a legal fiction, to say his legal residence was in that home. She reported later that the "possibilities" proved to be correct.

Knowledge of the community a client comes from is important, both as a bridge to relate to and understand the client as well as to inform a lawyer of relevant issues likely to be involved in client decision making and useful in assisting the client with legal solutions. The community lawyering approach situates and considers the client both within the context of the community and as an individual. In the example above, knowledge of the community's physical features and of the community's values help explain the client's reaction. Perhaps this information would be obtained from the client himself, under a client-centered approach to lawyering. Under a community lawyering approach, however, which situates the client in the context of his/her community, it is expected that proposed solutions and their impact on the client, as an individual and in relation to community will be queried into. Should the client not volunteer this information, the community lawyer would be expected to independently raise and explore solutions in the community context with the client. In addition, it is expected that the community lawyer would be concerned with community values and become acquainted with the community's physical features as a result of visiting and spending time in the community. The difference between the community lawyering approach and client-centered approach is primarily one of challenging the individualistic approach embedded in client-centered lawyering. The premise of community lawyering is that cultural influences and the client's position in relation to the community must be understood by the lawyer as impacting the client and that the lawyer has a responsibility for recognizing this.

The process of gathering information itself can be a challenge where one is approaching the community for the first time. The lawyer's approach can affect the kind of information obtained, the amount, its usefulness or accuracy, future relationships and even, whether the lawyer comes away with the particular information sought. There are two basic guidelines which show their worth, time and again, amid the diversity of indigenous communities we work with. The first and most important is that of always being aware of

indigenous dispute resolution simply because the client was from a particular tribe. When the attorney discovered the client had no knowledge of the process, the attorney immediately recognized that he was operating on an unchecked assumption and saw it as a valuable lesson regarding his underlying generalizations both about the client and the process. When stereotypes or overfamiliarization with both problems and people from a community begin to drive the lawyering of individuals, there is significant danger in the failure to see viable solutions that may be available or problems with the "standard" approach and its applicability to an individual's unique circumstance. An example of this is contained in the description of a lawyer in a progressive non-profit office in Gerald Lopez' *Rebellious Lawyering*.<sup>42</sup> Boz, a housing attorney in Lopez' scenario, was seen as not expecting "more than a beaten down, resourceless, uncooperative client. The repertoire of formal strategies Boz seems willing to explore was as stingy and inflexible as her attitude toward clients. She handled her load 'case by case' in the most mechanical sense."<sup>43</sup> This can occur when lawyers do not see their clients in context — but only in relation to their legal problems, and when they see them individually, without the context of community.

Mechanical approaches to legal problems can arise where the client or the legal problem are stereotyped. Boz' perception of her clients as "beaten down, resourceless, and uncooperative" is a stereotype of the person who cannot afford to pay for legal assistance and who utilizes free legal services. When one approaches work with clients with an understanding of the history of the community, the surrounding circumstances of the community's (and the individuals who comprise the community) struggle to survive, and with an awareness of the world-view of the client and the client's community, as is required in effective community lawyering, the individual is put in context. Client-centered lawyering is also individual-centered lawyering. An individual seen as beaten down, resourceless, and uncooperative is better understood in the context of the community. The oppression exerted on the community impacts the individual. An individual seen in the context of community is never resourceless — whether community is seen as including immediate and extended family or the community beyond family relations. The assessment of uncooperative behavior can be tied to one's own values, norms and expectations. A client's values, norms and expectations may not be the same as her lawyer's. Clearly, an understanding of these things, in short, a community lawyering approach, would help Boz in her stereotyped view of her clients. When one can see the client in the broader context of the community, solutions that may not have been obvious when the client was considered only in an individual context may also become clearer. For example, where domestic violence has been put in cultural context in native

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42. LÓPEZ, *supra* note 14, at 102-16.

43. *Id.* at 110.



communities, the approach to the problem at both an individual and a community level has changed.<sup>44</sup>

The second is the more complicated tension between an individual and a community. There are a number of situations that can bring a client in conflict with the community, that can bring a client to seek a solution which places greater emphasis on the individual rather than the community, or instances where the interrelationship between the client and the community is such that any position the client takes will impact them both. Choosing what to do in the face of this tension is related to the goal of the work in the community or with the individual. For the students and lawyers engaged in community lawyering, it requires some analysis and knowledge, as well as an ability to articulate what the practitioner is seeking to accomplish in working with individual members of distinct communities or with the community. Different decisions will be made, different options will be explored in the face of this tension depending on how a lawyer views not only the community, but how the lawyer views his/her client's relationship to the community, and perhaps even his/her own relationship to the community. The conscious undertaking of lawyering within distinct communities requires that consideration of the goals of the work and the complicated relationship between individuals and distinct communities be considered carefully, preferably before such work is undertaken. The goals will ultimately inform the lawyer of his/her position in the matter.

One illustration of the above is currently surrounded in some controversy. Individual clients residing on Pueblo reservations have sought divorces from state courts for years in situations where both husband and wife reside on the reservation. Attorneys serving Pueblo clients have accepted these clients and obtained divorces in state court. The Pueblos currently do not provide an action for divorce within their tribal court systems; the greatest relief individuals can obtain is a legal separation. The approach SILC has taken in handling these cases is based on two premises. One, that clients obtain the greatest relief possible, a legal separation, from the tribal forum and two, that the only relief sought from the state court be the dissolution of marriage itself. The clinic also seeks to file not only a divorce petition, but a petition to domesticate the tribal court's legal separation decree, thus affirming the tribe's exclusive jurisdiction over all other matters related to the separation including child custody and support, alimony, division of personal and real property. The practice of filing a petition to domesticate tribal court domestic

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44. See Gloria Valencia-Weber & Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. 69, 128-29 (1995).

relations orders was brought to the clinic from my private practice in other family law cases and applied to the divorce cases we accept in SILC to reinforce state recognition of tribal court orders. This approach allows the individual to obtain the narrowest legal relief from state court, with the greatest respect being accorded to exclusive tribal jurisdiction. At a recent continuing legal education seminar, however, the practice of seeking divorces from state court by individuals residing on Pueblo reservations was challenged as contrary to tribal sovereignty and as outside the state's jurisdiction. It was asserted that the state lacks jurisdiction over domestic relations and other matters involving tribal residents. From the individual Pueblo perspective, however, the unfortunate reality of divorce leaves seeking dissolution of state-licensed marriages in state court as the only recourse to severing a legally recognized status which otherwise affects both parties' and their ability to remarry, their tax status and their debt obligations. The Pueblo stance on not providing for divorce is deeply imbedded in religion, yet the need for individual relief cannot be ignored. It presents a classic conflict of community and individual interests, which is further complicated by jurisdictional and sovereignty concerns. Because the Pueblos do not exercise jurisdiction over divorce, individual members are left with no alternative but to seek a divorce in state court. Use of the state court by tribal residents is a controversial example of a clash between those who assert sovereignty as the tribe's position against the individual. This example clearly illustrates all of the concerns discussed above, including the difficulties that arise when the protection of tribal sovereignty collides with the complexities of culture of both the individual and the community in the context of reality.

A third issue and related question arises from consideration of a lawyer's goals in working with individuals from distinct communities; namely, to what extent is the community considered in terms of the individual representation undertaken? Individual clients from distinct communities can become clients without a lawyer consciously seeking to work with them or their communities. On the other hand, work within a particular community on certain legal issues can be sought out. In either case, however, it is critical at some point for the community lawyer to consider the relationship between the individual representation and the community. It is quite possible to arrive on the community "scene" and quickly or even painstakingly assess what the major legal problems are and deliberately chose to represent clients on those specific issues. It is also possible to let the issues surface on their own and address them as they arise in the legal matters which clients bring. It is much more difficult to get to the root of what is causing the problems, or even to look

behind the problems and to begin to evaluate individual representation in relation to its underlying causes. For example, in working with domestic violence victims and offenders, a lawyer may find herself constantly making the same legal request on behalf of individual clients, when seeking a community based solution, such as advocating the establishment of counseling programs specifically tailored to the community and culture of victims and offenders might more effectively reduce and prevent reoccurring instances. The community lawyer is sometimes in the best position to see solutions as a result of work on a number of similar cases in a community. In addition, sometimes representation of a single client may present the opportunity to make an argument which, if successful could have wide impact for other similarly situated individuals. Of course, the decision to make such an argument is not necessarily the attorney's choice. For example, in a case several attorneys are involved in, a possible appeal lies in which a judge's interpretation of the law can be challenged. If the appeal is successful, it would have wide impact, not only on the client's case, but on how others in the client's position would be treated by the court in future cases, to the benefit of those individuals. However, the decision to take the appeal is the client's, and other, perhaps more expedient and less risky options are possible. Furthermore, if the appeal is taken, the client faces the risk, both if she is successful and if she is not, of incurring the judge's ire and subjecting herself to the possible risk of the judge's displeasure if she cannot successfully excuse the judge from hearing her case in the very small community. Yet, searching for and wrestling with underlying causes and problems should be a goal in community lawyering. Undoubtedly, there is value to the community in working on the pressing and common problems presented, but there is also a need for more broadly based advocacy that community lawyers can provide.

### *B. Community Representation*

Clearly, community lawyering can involve not only individual representation but representation of the community itself. Community is defined generally in the UNM community lawyering statement as referring to "[indigenous peoples,] groups, populations, or neighborhoods which are racially, linguistically, ethnically, geographically, politically or socially distinct, as well as assemblages or groups which self-identify as communities."<sup>45</sup> To this general definition I added "indigenous peoples" to include and distinguish native peoples with distinct identity and historical political attributes.<sup>46</sup>

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45. The statement on community reads in full: "Community refers to groups, populations, or neighborhoods which are racially, linguistically, ethnically, geographically, politically or socially distinct, as well as assemblages or groups which self-identify as communities. Clients belong to multiple communities; community lawyering seeks to identify and work with the client's communities that are implicated in the client's legal situation."

46. See ANAYA, *supra* note 8, at 77; Russell L. Barsh, *Indigenous Peoples in the 1990's*:

Of the work that I have engaged in at the community level, success has only been possible due to the strengths of the community itself; the technicalities of the law were only a part of the picture. To see so clearly that the law and the lawyer were secondary, tools in the hands of those represented, helped me to see the role of the lawyer as being side by side the client and sometimes behind the client, and rarely, out in front. Serving as counselor and advisor were as critical as serving as mouthpiece. The lawyering done in private is just as important as the lawyering done in public. These were invaluable lessons not taught in law school. My law school experience was primarily that of learning about individual representation. Group representation was only indirectly addressed by cases involving businesses, corporations or class actions. Federal Indian law cases, while involving tribes as parties, were rarely discussed in terms of the challenges, ethics, or responsibilities of representing a tribe as a client. In practice, I saw that my work as a lawyer in identifying the legal issue, the tribe's legal position, and the law were a part of the representation, but the interaction and the explanation of the legalities to the council, the response of the council, the "big picture" and ultimately the legal approach and argument was most appropriately shaped not by the lawyer, but by the forces that give an Indian nation an identity as separate peoples. These include the viewpoint of the client expressed through the leadership, the consideration of "the people," and the larger context of the legal issue both internal and external to the group. The above is illustrated by the following tribal-state "government to government" disagreement.

In representing a tribe on a request that was denied made to the state for a stoplight at an intersection of two state highways located on the reservation, easements for which had been granted by the tribe to the state, three extralegal factors influenced the outcome: the resolve of the leadership and council, their participation in the negotiations, and the detrimental impact of external commuters on the safety of the tribal population. Each of these, while considered by the attorney, were not considered in quite the same way in the initial analysis of the issue. Were the attorney to have devised the approach, it would not have been the same approach ultimately used and influenced by the council and the leadership. The influence of community, the dynamics put into play when the client is a tribe, the willingness of the attorney to be directed as opposed to being directive, and to respect and understand the decision-making process of the tribe were important to the attorney's ultimate approach to the issue. Considering the community impacts and changes the lawyering

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*From Object to Subject of International Law*, 7 HARV. HUM. RTS. J. 33 (1994).

approach. Perhaps this is the salient and obvious lesson, but it was one which was not entirely understood by the attorney until this experience. In representing a tribe, community is always a factor, but it is not necessarily always taken into consideration by the attorney. The tribe was successful, not entirely for the legal position the attorney initially thought they would succeed on, but due to the approach influenced by considerations of community.

In the practice of Indian Law, community representation entails the representation of Indian nations. Oren Lyons, Faithkeeper of the Turtle Clan of the Onondaga Nation and spokesman for the Six Nations Iroquois Confederacy,<sup>47</sup> in commenting on the attorney/client relationship in an address on the legal representation of Indian nations stated, "When you talk about client relationships, you're talking about the future of nations. It's a great responsibility. I sure would not like to be a lawyer."<sup>48</sup>

This responsibility represents a tremendous challenge to clinical teaching. Community lawyering for Indian nations is discussed primarily in theory in the clinic, because clinic practice does not regularly encompass direct or ongoing representation of Indian nations.<sup>49</sup> However, the theory of community lawyering for Indian nations is a critical part of the classroom component. Teaching from my own experience and using actual cases in which I was involved, rather than imaginary hypotheticals, provides the grounding in reality which assists in contextualizing discussions. In addition, in past semesters, students have heard from a tribal councilmember regarding attorney- tribal council relations, attended council meetings, and engaged in problems in role as counsel for the tribe. In future semesters, students will engage in minor pupilages with attorneys who serve as counsel for tribes. Project work which does provide the clinic with the responsibility of dispensing legal advice directly to tribes under limited representation agreements or which entails working with those who directly represent tribes gives students practical experience.

The questions that arise from community representation include questions of "who" is the client as well as the obligations of a lawyer to the "community" in such representation. These questions are raised not only to obtain answers, but to point out the difficulties that can emerge in considering answers. The questions are raised to provoke thought about the complexities that go beyond the traditional concepts of lawyering for organizations, corporations and state and federal governments that are implicated in

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47. STEVE WALL & HARVEY ARDEN, WISDOMKEEPERS, MEETINGS WITH NATIVE AMERICAN SPIRITUAL ELDERS 64 (1990).

48. Lyons, *supra* note 14, at v.

49. Project work is designed to provide students with the experience of representing tribes. Students may work directly with tribes or with attorneys for a tribe on specific legal issues. Limited case work may also be undertaken for a tribe.

answering any (typically, ethical) question of "group" or "class" representation. The Model Rules of Professional Conduct contain provisions which provide some guidance to attorneys in their representation of "organizations."<sup>50</sup> However, insofar as tribes and other communities or other groups are not corporate organizations, the rules are not directly on point.<sup>51</sup> In representing a community, how does one view obligations to the larger community when dealing with a smaller subset of decisionmakers? As to representation of a tribal nation, former Governor Verna Teller of the Pueblo of Isleta states:

Tribal attorneys represent the tribe. Although this may seem like a very simple statement to most attorneys representing Indian tribes, it is one which is nonetheless important to make . . . . Tribes generally act through their tribal leaders, appointed or elected, and the governing body of the tribe. Generally, this is the Governor, Chairman, or President and the Tribal Council. Although the attorney receives directives from these duly authorized tribal figures, the attorney represents the tribe as a whole and not just the tribal leaders or tribal governing body. This perhaps more than any other single point is worthy of underscoring. The attorney represents the tribe acting through its duly authorized representatives.<sup>52</sup>

In the words of Chief Oren Lyon, it is clear that to native leaders *who* is represented, when representation of Indian nations is undertaken, is much more far-reaching, when situated in a cultural context, than that typically understood by attorneys.

I was asked by Andy Young one time "Well, how many people do you represent?" That's a liberal question; they like numbers. "Well," I said "All I know is that we're mandated as chiefs to look out for the seventh generation to come. How many people are in those generations? That's who we represent. We're not counting the people who sit here today. We're counting the people who are in the future. 'How many?' You tell me."<sup>53</sup>

What if the community is not or has not been formally recognized as a group? In the context of federal Indian Law, I could be referring to

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50. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1994).

51. Tracy N. Zylock, *The Native American Tribe as a Client: An Ethical Analysis*, 10 GEO. J. LEGAL ETHICS 159, 175-76 (1996).

52. Verna J. Williamson (Teller), *Ethical Considerations of Representing Indian Tribes: Tribal Perspective*, (New Mexico Indian Bar Association ed. 1987) (emphasis added) (materials on file with the author).

53. Lyons, *supra* note 14, at v.

communities which seek federal or state recognition as Indian tribes. However, it is possible that a community might be outside the tribe, such as urban Indians within a city, or even internal to a tribe, such as a smaller community seeking to organize formally as a corporation, or seeking to obtain special recognition within a larger tribal community. It might refer to a group of native people who are or may be potential participants in a class action. In all respects, the questions which arise might include: Are we meeting with, speaking to all the people we should be? Do we know enough about the community to know? Have we considered group and individual ramifications? Has the whole community had an opportunity to consider potential drawbacks? Who is responsible for information dissemination? What if the goal of the representation is not in the "best interest" of the larger community? Who is to say what is in the best interest of the larger community?

Regarding "best interest," Chief Oren Lyons states,

And this is what lawyers must understand: *"For the best interests of the people," lawyers say. "You know, you people are taking a pretty hard position, I don't think you are going to make it. And I think probably it would be better if you did it this way."* Now that's when lawyers have to be very careful. Because they are making a judgment on behalf of the people. The people are very dependent on lawyer's judgments and they have a tendency to give the lawyers a great deal of credit . . . .

*"What is it that you want?" "What is it that you are looking for?" NOT "What I think is best for you." NOT "What I think you are going to do." Rather, "How in the world am I going to defend this position. As far out as it seems, as unwinnable as it seems, how am I going to defend it with the best theories?"* That is what the lawyer has to say . . . . He is going to be asked to do things and he will say *"You can't do this, because it's not going to work that way."* So the question becomes "Who is directing?" If you have a strong government, it will command.

We have recognized for a long time the importance of having counsel. We ask the question of counsel: "What happens if we do it this way? So, they tell us. "What happens if we do it that way?" And they tell us . . . [The Council] doesn't ask the lawyer, "What do you think is best?" It directs.<sup>54</sup>

Are our obligations different if we are part of the community or if we are not? Many native lawyers become counsel for their own tribes. What impact does being lawyer as well as part of the client community have?<sup>55</sup>

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54. *Id.* (italics added). See Zylock, *supra* note 51, at 174-75 for a discussion of the problems that arise when a tribe is divided as to its goals.

55. One of the papers presented at the 1998 2nd Annual Kansas Tribal Law and Governance

The community lawyering approach helps in preparing the lawyer to place the community in context and thereby understand and counsel the community in a much more helpful way. The community lawyering approach in representing tribes requires that the lawyer possess background which assists the lawyer in understanding the community, including knowledge regarding the community's history, law, both the external law impacting the community and internal law, written and oral, modern and traditional. The community lawyer must also possess an understanding or a respect of the community's culture, knowledge of the community's land base, both traditional and present-day, have knowledge and respect for the community's protocols and ethics, as well as an awareness of the lawyer's boundaries, whether as an insider or an outsider and a grasp on the political realities of the community.

### *C. Community Group Representation*

Some of the same questions in representing individuals within the community or the community as a whole, can arise when we undertake representation of a subgroup of the community. Conflict between a subgroup and the larger community which can affect both detrimentally must be handled carefully. Additional issues include questions of conflict resolution. Is a continued relationship between the two considered? If there is no conflict, issues of support and relationships of the subgroup to the general community are important. A community lawyering approach recognizes the relationship between community and subgroups of individuals, and acknowledges the significance of community as an influential factor in a client's legal position.

An example of this type of conflict arose in a political context. A tribal member sought a political position and was challenged based on the tradition of the community. Culture, politics, and tradition were important forces in the dispute. The client succeeded because of community support, traditional leadership consultation and the intense internal interest generated in the matter at issue. A community lawyering approach was critical where issues of traditional law, religion, politics and community produced complex sub-issues, which at times, superseded the pure legal issues. Cultural sensitivity and knowledge of the community on the part of the advocate were critical to create a forceful and compelling case to support the client's position. Also important was the approach, which took into consideration that a

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Conference addressed the topic *Addressing Conflicts of Interest for Tribal Lawyers Representing Their Own Tribes*. Gerald Hill, General Counsel for the Oneida Indian Nation of Wisconsin made the presentation. The Kansas Journal of Law and Public Policy publishes the papers presented at this annual conference.



continuing relationship exists between all parties from a native community.

A legal issue in which an individual member or a sub-group challenges the community as a whole or another subgroup of the community is an immensely challenging undertaking for an attorney. The community lawyering approach, which recognizes the importance of understanding the relationship between the individual or the subgroup and the community, understanding the legal issue from a historical, cultural, social and political perspective as well as from a legal perspective<sup>56</sup> can mean the difference between successful resolution of the issue or disruption of the community and lack of resolution of the issue. The client-centered approach, because it is focused on the client, can lead the lawyer to see the legal issue itself as being the most important and the sole issue, when in fact, the legal issue itself is only part of larger and more complicated community issues which must be factored into the lawyering approach. Additionally, a client may or may not be able to identify all the information required. Nonetheless, it is incumbent on the lawyer to recognize the necessity for such an understanding. Reliance upon the client to provide the lawyer with such information or to know what information the attorney may need is not always possible. Where the intent of representation is to help a client resolve an issue in relation to a community, the community lawyering approach which requires that the lawyer consider the legal issue in the larger context of the individual's or the subgroup's relation to the community is critical. Knowledge and consideration of the attendant issues surrounding the resolution of the issue increases the quality of representation. Attorneys accustomed to the client-centered lawyering approach, which does not discipline the attorney to consider the client and the legal issue in relation to a community, may miss the critical dynamics of community in representing an individual client or a subgroup in a dispute with the larger community.

#### *VI. The Southwest Indian Law Clinic: Teaching Community, Culture, and a Community Lawyering Approach*

As described above, the Southwest Indian Law clinic introduces and exposes students to the practice of Indian law.<sup>57</sup> Before discussing the

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56. I use *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (no authorization under Indian Civil Rights Act to bring equal protection violation action against tribe and its officers in federal courts challenging tribal ordinance denying membership to children of female members married outside tribe, while extending membership to children of male members married outside tribe), to initiate discussion about social, political and cultural issues involved in representing an individual native client against her tribal community. Discussion centers around identifying the social, political and cultural issues presented by the case, and then considering the approaches, strategies, and arguments which a community lawyering approach might identify to help a client. I draw from my experience in private practice in helping individuals and subgroups seek successful resolution of similar issues within the native community.

57. It is one of five clinics currently in operation in the UNM clinical law program. The

current approach to the work in the clinic, it is important to discuss the underlying considerations in developing the clinic and the conceptual paradigms upon which the clinic is based. The first is recognition of the primacy of the native communities in their relationship to and use of the clinic. The second is adherence to the protocol of native communities, which include consultation, respect of internal priorities and decision-making, clarity of motive in establishing relationships, and mutuality and consensus.

#### *A. Primacy and Observation of Protocol*

Tribes were notified of the clinic's funding and approached and consulted about the clinic's development. Discussions were held with both community representatives and individual representatives from within urban and tribal communities. Representation of communities and individuals from tribal communities and representation of Indian people in urban settings were carefully discussed. These discussions and meetings with tribal communities and other leaders were held well before the clinic began its work. The practice of Indian law can involve representing individual native clients, non-native clients with Indian law issues, tribal governments and non-governmental Indian organizations and sub-groups of communities. The clinic has had experience working with all of the above. One presumption that was specifically avoided as contrary to the development of the clinic for native peoples was that those external to a community can determine the needs of the community better than the community itself and those internal to it. In its work with tribes and individuals, the clinic has been sought out as a resource.

In the project and site work with native tribal governments and non-governmental Indian organizations, the clinic set up a process by which internal contacts were identified and remain permanently attached to the work. In addition, the students meet with the contact at the beginning of each semester and work with them and the clinical supervisors throughout the semester. The Southwest Indian Law Clinic provides community project work<sup>58</sup> and intake sites located inside a particular community, instead of

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other four clinics include a general law practice clinic, a prosecution clinic, and two other community lawyering clinics. The clinics each enroll a maximum of eight students. Six credits of clinic are a requirement for graduation. The Southwest Indian Law clinic was brought into existence by student initiative. Students proposed the creation of an Indian law clinic to the law school administration and then obtained funding from the New Mexico state legislature for its operation. The Southwest Indian Law Clinic adds a permanent and much needed experiential component to the Indian law curriculum and to the Indian Law certificate program, however SILC is not a requirement for the certificate. [Note: Since this reprinting, the Southwest Indian Law Clinic was made a requirement of the Indian Law Certificate program.] The clinic is in its sixth year of operation.

58. Projects are undertaken with a variety of tribal communities, non-governmental native organizations and legal advocacy groups engaged in Indian law practice. Some of the projects the clinic has worked on were with the Jicarilla Apache, the Navajo Nation, the Pueblos of Isleta, Laguna, San Felipe, Jemez, Santa Clara, and Taos.

removed and detached from the people invested in the goals of representation.<sup>59</sup>

Lawyering which considers native community and culture leads to additional discovery and insight. Students and supervisors address difficult challenges when exploring culturally based legal theories and defenses raised by representing sub-groups of a culture; representing disenfranchised individuals in a system which is based on different values; and representing clients who are in remote areas or isolated from the general public.

### *B. Teaching Through Casework*

In their work within tribal communities, and with individual clients, supervisors seek to help students consider a client's legal issues in the context of community and culture, where appropriate. After the initial interview of a client and during the staffing of open cases, when the student seeks supervision in discussion of the case approach, supervisors assist the students in exploring and considering how the client's community ties or cultural considerations may impact the understanding or handling of the case. For example, many native clients may have a choice of bringing an action in state or tribal court when concurrent jurisdiction exists in both forums. A client decision may be affected by the client's ties to the community, the matter itself, the relationship of the other parties to the tribal forum, including whether they are also members of the community, and where the parties reside. Tribal courts can possess jurisdiction over matters even when all parties reside off the reservation, if the parties are members of the tribal community. How a client is situated in relation to her community may be important to the client's decision in this matter. In assisting a client in making this decision, the student must have information about the tribal forum and tribal law, as well as the state forum and state law.

In general, community and culture are always considered in representation of a native client, however, they may not always have a direct bearing on the specific legal issue presented by the client. Supervisors, however, strive to help students consider both in relation to the representation of the client herself. Consider again, the choice of forum example, although the client was in the state forum, her argument for custody was supported by the cultural norm of her tribe which favored her as guardian in the absence of the natural parents and which placed great significance on the particular relationship between herself and the child. The impact of culture and community on a native client may not always be obvious. It is for this reason, that SILC seeks to make its students available to co-counsel with students in other clinics who

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59. This semester the clinic has two external sites to serve native clients. One site is at the Albuquerque Indian Center and the other is at the Bernalillo County Detention Center Women's Unit. In past semesters, the clinic has also operated a site at the Albuquerque Shelter from Domestic Violence.

may represent native clients in what might otherwise be considered straightforward legal matters. In this way, cultural and community issues are not missed.

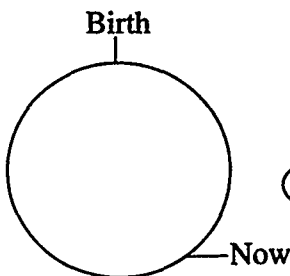
### C. Classroom Component

General issues raised in working with native communities and clients and the significance of culture are also discussed in the classroom component of the clinic. In the best of circumstances, these issues also arise in the clinical work undertaken by students, though this is not always the case. Attention is focused on culture in the initial weeks of clinic. As a way of introducing ourselves to one another and to begin the discussion on culture the first class exercise engaged in is the "culture chart" exercise.<sup>60</sup> I have taken the American Corrections Association culture chart exercise and tailored it as follows. I depict the chart in circular form, showing "birth" and "now" (see graph C). I then ask the students to write about the cultural influences in their lives which give them the cultural identity they possess and ask them to come prepared to introduce themselves at our next meeting using their cultural chart. The exercise itself generally takes the entire eighty-minute class and sometimes goes over into the next class. After students have introduced themselves using their cultural chart, we then engage in a discussion regarding

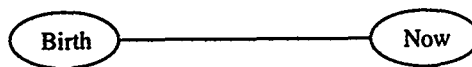
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60. AM. CORRECTIONS ASS'N & POLICE EXECUTIVE RES. FORUM, TRAINING IN CULTURAL DIFFERENCES FOR LAW ENFORCEMENT/JUVENILE JUSTICE PRACTITIONERS, DRAFT 6-8 at Handout 1 (1992). The cultural chart exercise used in the ACA materials illustrates a person's life with a linear graph depicting "birth" (see graph C) at the beginning of the line and "now" at the end of the line. Before the exercise, the group leader talks briefly about culture and its definition (every idea, person, event, thing that has influenced you) and what these influences include (nationality, family, generation). The leader then hands out the graph, and an envelope with small colored pieces of paper in different shapes. The exercise is done in about six to seven minutes during which time the participants write out the most important cultural influences in their lives from birth until now. Each influence is written on the small colored pieces of paper and then taped to the chart and explained orally to the group as a way of introducing themselves. The group leader explains her's first, to serve as an example for the participants.

### Cultural Chart



A. SILC Adaptation



B. ACA Chart

GRAPH C

what is encompassed in the term "culture," what they learned about culture and themselves through the exercise and how culture can impact lawyering. This exercise serves as the foundation for all further discussions about culture and is used to emphasize the personal and pervasive nature of culture. On occasion, I have switched the order and discussed culture first and then engaged in the cultural chart exercise. Generally, no two students describe themselves in the same manner, although several generally use the same influences (family, friends, language). My experience in any two given semesters has never been the same. I find it is effective as a method of making students aware of their own cultural lens and in showing that it is not only the client who possesses a cultural identity, the lawyer possesses one, as well. After having used the cultural chart exercise for several semesters, I have found it helpful to tell students that the exercise is not an exercise in providing detailed (or sketchy) educational or employment history and that they should not feel compelled to disclose anything which would make them feel uncomfortable.

Other classes on culture during the initial weeks are spent on topics such as: interviewing the native client, the intersection of language and culture, and techniques in using interpreters. We also address the impact of culture and race in advocacy, cross-cultural communication, and socio-political considerations in representing native clients. As mentioned previously, the majority of examples used in the class are based on cases in which I was involved in private practice and in the clinic. I find that this provides me with the ability to discuss real world realities as well as to explore the possibilities of previously unconsidered options. The influences of culture on native peoples are often so subtle and invisible that they can go unrecognized; therefore it is important to focus on the influences in the classroom to help students be more consciously aware of them in practice.

It also is important to teach about the differences between native principles and precepts of law and the anglo-american system, for several reasons. One, since we practice in tribal court systems it is important to be aware of these principles and of traditional law. There is a marked difference between traditional native concepts of justice and those of the Anglo-American adversarial system.<sup>61</sup>

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61. See Christine P. Zuni, *Strengthening What Remains*, 7 Kan. J.L. & PUB. POL'Y 77, at 28 Appendix A (1997). Appendix A contrasts the anglo-american adversarial system of justice with indigenous concepts of justice.

*Anglo-American  
Adversarial*

One party against another; One party prevails.

*Indigenous  
Non-Adversarial*

All come together to work out an answer.

Traditional indigenous systems emphasize accountability, truth, restoration, forgiveness and integration of the offender back into the community. The adversarial system emphasizes individual rights, including the right of the accused to remain silent and the placement of the burden of proof on the accusers, punishment and removal of the offender from the community by

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*Argue*

Points of law, points of fact argued against one another. Points of disagreement are focused. Only those with standing may participate.

*Rights of Individuals*

Paramount; Much care is taken to protect individual rights.

*Vindication of Society*

In criminal matters emphasis is on vindicating the matter for society, emphasis on victim or reintegrating accused.

*Punishment/Imprisonment**Rights of Accused*

Right to remain silent. Ability to deny accusation with burden of proof to be borne by accusers.

*Fine to State**Separation of Church and State*

Law is secular matter. Law is separate from religion.

*English Language*

Many words cannot be translated into native language, because there is no equivalent thought.

*Emphasis on Written Record*

Law is written and must constantly be updated.

*Separate Judicial Body**Right to Appeal**Talk*

Everyone talks, events are related from each point of view. Non-parties may speak.

*Rights of Community*

Paramount; Emphasis in indigenous communities is on the community rather than on the self or individual.

*Restoration of Peace*

In community and resolution of underlying problem — goal of indigenous justice.

*Forgiveness/Reintegration*

No imprisonment (Banishment, shame, ridicule).

*Obligation of Accused*

Obligated to speak. Honesty in all parties. Seeking truth. All speak. Through rendition of facts, the evidence speaks for itself. No burden or reversal of burden.

*Restitution to Victim Harmed**Law Is Part of Whole*

Spiritual matters are not separated out from the secular.

*Native Language*

Many words cannot be translated to English, because there is no equivalent thought. Language carries our world view.

*Oral*

Indigenous societies are oral societies. Words are alive. Law (custom) is passed orally.

*Traditional, Customary Leaders Participate**No Right to Appeal*

Final resolution of matter is sought.

imprisonment. These differences are taught in the clinic's classroom component to help students understand the differences between the systems as they may impact clients appearing in "modern" tribal, state and federal courts. They also inform our work with tribal code development, which also involves working with concepts of traditional law and methods of dispute resolution, tribal court development, and the use of traditional law in legal arguments before tribal forums. It is important for practitioners who practice in tribal forums to be equally versed in federal Indian law and understand principles of traditional law.<sup>62</sup> Some of the issues raised in the classroom component regarding traditional law include how to use and research traditional law, as well as the responsibility practitioners have to raise it in tribal forums. Furthermore, methods of indigenous dispute resolution are important in the community as alternatives to litigation for our clients. We consequently address indigenous methods of dispute resolution, in addition to other methods of alternative dispute resolution.

Second, it is important to be aware of the impact these concepts can have as a socializing influence on native clients. There is a general tendency of native criminal defendants to plead guilty,<sup>63</sup> so it is important to stress the importance of thoroughly counseling clients as to the exactitude of pleading in criminal cases in the anglo-american adversary system, including the requirement of proof of elements, the state's burden of proof, standard of proof (beyond a reasonable doubt) and the underlying theme (innocent until proven guilty), which all run counter to traditional concepts of law within which native clients may be socialized. In the tribal courts I served as judge, it was not unusual for our statistics to show percentages in the high nineties for disposition of criminal cases by entry of a guilty plea. In our practice, in the metropolitan court system in Albuquerque, the majority of clients we counsel initially seek to enter guilty pleas. My theory regarding this tendency is based in part on the socialization of native people to truth and accountability, but also to the opposite premises of indigenous and anglo justice systems. Whether this theory plays a role for all native clients or not, what I do believe is important is that the anglo-american adversarial approach

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62. See generally *id.* When establishing the clinic, a critical part of my planning and design was to consider how we would approach traditional law and set up a framework for the clinic's future work with tribes in this area. I purposely adopted an approach to tribal court and code work which would build on traditional law. I chose the Saddle Lake Justice materials as SILC's model for incorporating traditional law into the development of tribal law and legal systems. The Saddle Lake Model is introduced to tribes seeking to develop codes based on traditional law when the clinic is asked to assist in code or court development. Tribes and students have been enthusiastic in their response to the model. See Saddle Lake First Nations, Tribal Justice Centre, Alberta, Canada, Saddle Lake Justice Manual (on file with author).

63. James Dumont, *Justice and Native Peoples*, in NATIVE AMERICANS, CRIME, AND JUSTICE 32, at tbl. 4.3 (1996) (aboriginal responses to the law include pleading guilty on the basis of honesty or non-confrontational acquiescence).

to criminal matters must be clearly explained to native clients, so that they understand the elements of a crime which must be proven and the burden of proof, prior to determining the plea they will enter. The adversarial system runs counter to indigenous approaches to resolving disputes and places a high value on protecting the individual from the excesses of the state, which is directly counter to the mutually beneficial relationship between the individual and the community.<sup>64</sup>

#### *D. Community Level Input*

Culture is also emphasized at the urging of the indigenous peoples involved with the work of the clinic. They believe that it is important to their representation. It must also be emphasized because it is so lacking in the general treatment of the law. Law, to reiterate, is cultured. Perhaps it is this recognition on the part of the indigenous community contacts which causes them to specifically request that we address culture in our work with the students they will work with, and who will, in turn, work with the people. The clinic strives to maintain communication with the project contacts, apart from the communication that results from the work undertaken in the clinic. This communication keeps the clinic and those it works with in tune with one another.

#### *E. Lessons*

Some of the lessons learned in striving to develop a community lawyering clinic include the importance of 1.) providing a variety of work experience and keeping the workload manageable; 2.) acknowledging the imperfection of using grading as a gauge of performance; and 3.) recognizing the limitations of time, space and commitment. Some of the difficulties encountered include: 1.) the dismissal of culture and community as factors in representing clients both by students and others; 2.) the resulting tension that emphasis on community and culture can have for both native and non-native students; and 3.) the challenges that factoring community and culture into lawyering have on students learning basic practice skills.

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64. "The Euro-Western concept of authority stems from a background of belief in the inherent inequality of men and the European system of feudalism. Where individual autonomy was regarded as the key to successful acquisition of private property and for achievement in competitive pursuit, authority was deemed necessary to protect society against rampant self-interest . . . . The sovereign authority vested in a person (e.g., a monarch) or an impersonal entity (a constitution or government) serves to guarantee efficient distribution of wealth, property, and (with enlightenment) the equal benefit of accumulation of wealth and the exercise of power along with the development of more egalitarian and humane political structures . . . . In aboriginal society, self-interest was inextricably intertwined with the tribal interest; that is the general good and the individual good were taken to be virtually identical . . ." *Id.* at 20-21 (citations omitted).



### *1. Lesson One: Workload/Variety of Work Experience*

The blend of individual casework and project work gives students the experience of individual client representation and more broad-based representation which impacts a wider group of people, thus allowing for the consideration of community and culture not only in the individual client context but in the wider group context as well. This experience also provides exposure to the different tasks and skills required by each. Project work can be very time consuming and individual representation can require immediate and concentrated attention. The two have to be balanced. Currently, students handle one project and one site, typically in conjunction with a second student, draw their individual cases from these sites and also perform brief services for clients, short of undertaking full representation of a client. The workload each student handles has been substantially reduced over the semesters, as familiarization with the amount of work that can be accomplished during a semester has increased. The diversity in the type of work students undertake in the Indian law clinic requires collaboration and time management skills and can take more time than a uniform caseload in which only individual clients are served by individual students. Unfortunately, some students have a tendency to compare this difference with what they perceive are lesser demands of other clinics.

### *2. Lesson Two: The Imperfection of Grading as the Method for Rewarding Learning*

Grading of student work in clinics raises independent issues of its own. Perhaps it is more sensitive in a clinic where nearly all students enrolled expect to enter into and are seriously committed to careers in the field of Indian law. They work hard on their assigned matters, and are asked to consider lawyering in a different light. All of these seem to magnify or amplify the otherwise routine exercise of grading a typical law school course or even a "non-specialty" clinic. Perhaps the pressure and innate competitiveness of grading is not conducive to a specialty clinic which strives to expand students' notions about what is encompassed in the practice of law, because grading does not reward nor reflect the real challenge it presents for every student and forces a ranking based on other indicia. Over the semesters the following components have been added to demystify the grading process in SILC. A detailed memo on what is evaluated during the semester and what goes into the grade is handed-out and reviewed during the first week of orientation; students prepare a learning contract in which they assess their skills and write a two part contract identifying what they seek to learn and their plan for the semester; a mid-semester and end of semester self-evaluation meeting between supervisor and student is held. Grades are based on the students' work on cases, projects and at sites. Perhaps my concern is that a grade is a silent representation of many observations of a student's work over

a semester and is neither helpful to me or the student in terms of providing specific feedback about specific accomplishments and challenges which the student faced in any area, especially in terms of community and culture. Ultimately, many things go into the grade, of which the student's skill in factoring in the client's community and culture, is a part. It could be that the next component added to "demystify" the grade will be a written narrative which provides specific feedback in all areas.

### *3. Lesson Three: Working Within Limitations: Time, Space, Commitment*

Some of the lessons learned are in those areas where the vision of SILC exceeds the restrictions of everyday reality. This, of course, does not mean that the vision is unattainable, only that in the course of further developing the clinic, different approaches must be attempted and pursued. In a community lawyering clinic, in which work in or with communities is a major component and internal direction is critical, the significance of project contacts is heightened. Project contacts must be committed in their interest in working with the clinic and the students, and the communication and understanding between the clinic and the contacts must remain clear and straightforward. This places great responsibility on both the project contacts and the clinic. The clinic has met with project contacts as a group and plans to supplement these group meetings with individual meetings to strengthen the communication and relationship.

Furthermore, the fact that the clinic is part of an educational institution places restrictions on the amount and type of work that can be undertaken and limitations on the expectations that can be placed on students. These include restrictions on ability to travel long distances and the amount of time that can be spent in the field, which are both related to student commitments to other courses. Student turnover, at the end of the clinical semester, also places restrictions on the type of work which can be best handled both for the benefit of the educational experience of the student and for the service to the client. Student turnover coupled with supervisor rotation calls for meticulous maintenance of files to maintain the accumulation of a collective knowledge of the communities and the cases, thus placing a high premium on collaborative skills to uphold the service to communities and individual clients from semester to semester. The fact that the clinic has a director serves to provide a certain commitment to the native community and a level of continuity. Having only recently experienced supervisor turnover for the first time in the last year and a half, the clinic will experiment with methods of reducing the negative variabilities in supervisor turnover. This will include experimenting with different teaching loads to allow the director to maintain a presence in the clinic year-round, standardizing certain aspects of the clinical curriculum, establishing standard workloads for students and discussing cases which will be transferred with the incoming supervisor.

Finally, understanding among the supervisors regarding the principles of the clinic must be solidified.

#### *F. Challenges*

The biggest challenge has been to articulate the salient points encompassed in community lawyering for native peoples. This is a work in progress. It is not an attempt to produce a finished analysis, but rather to introduce the idea for a continuing dialogue with my community and outsiders. I fully expect to build on and further elaborate on the themes introduced in the article, and expect others to pick up and join in the dialogue, as well.

Some of the other challenges encountered have been touched on in some respect throughout this paper. The greatest are, not surprisingly, related to the work itself which seeks to raise the level of consciousness of community and culture in lawyering to a scale that neither have previously enjoyed. These include 1.) the dismissal of culture and community from the straightforward and competent practice of law, and everyday work with clients and their cases, except in the most unusual cases, 2.) the skepticism and tension that emphasis on community and culture can produce with respect to the practice of law, especially since law is taught aculturally and with an emphasis on individualism in most law schools, and 3.) student apprehensiveness of the challenges that the awareness of culture and community places on them. For example, a student may believe that the law itself and their own skills, are the only factors in representing clients. A student who focuses exclusively on a client's legal issue and their own skill will not look to see how knowledge of the client's community or the client's culture and their self-awareness of the client's or their own culture, can improve their lawyering. The student may conclude that community and culture ultimately have no bearing on the legal outcome of the case and are therefore, irrelevant. Students also react to group dynamics; if cultural issues and community are taken seriously by the "leaders" of the group or by a majority, a receptive atmosphere is established. On the other hand, some students may be silenced by the group, even when the student makes accurate observations on culture and community, because of their lack of standing in the group. Taking positions or discussing cases in relation to their community and cultural aspects can be extremely challenging for students, individually, as well as in group. These present a special challenge to a supervisor, who must be sensitive to reinforce students positively as they take risks, both within the group and individually. It is helpful not only to use examples from one's own practice, but to draw upon practitioners who model respect for both these principles in the work they do and who can provide examples from their work to illustrate their relevance to practice for students.

Dismissal, skepticism, tension and apprehensiveness from students arise in part because culture and community have not been incorporated into class discussions of law in other law courses, and partly because they raise issues

of self-identity, cognizance of place, insider/outsider status, and cross-cultural competency that either have not been directly confronted by students, and which can be difficult and painful for individuals. Reactions can range from appreciation to disdain, from fresh re/consideration to boredom. Teaching and supervising students to be conscious of culture and community is extremely challenging, not always successful, and therefore in need of constant and consistent review.

Another challenge, which cannot be overemphasized, arises from the fact that issues of culture and community are subtle and can be almost invisible in day to day practice. Ideas which are clear in theory and with use of tailored examples, are not so clearly apparent in practice, particularly when dealing with acculturated and assimilated native clients (and with both non-Indian and Indian students with varying degrees of familiarity with native culture and community) or when a traditional legal approach (that is an approach in which neither culture or community is factored in) can yield a result more easily. If dealing with issues of culture can be said to be more emotionally challenging, then dealing with issues of community influence on individual clients can be said to be more obscure and more easily missed and discarded by students, and therefore harder to teach.

Despite the difficulties, the challenges, and sometimes the lack of appreciation of raising issues of culture and community and their relation to the practice of Indian law, it is well worth the effort when it makes a difference for a student, a client or a community. The practice of Indian law which does not take into consideration culture and community and which does not seriously explore either is colonialistic. In order to move beyond the colonial mentality imbedded in much of Indian law and its practice in general, one has to reconsider not only what is encompassed in the law, but what is not. Considering community and culture expands the notion of what is encompassed in the practice of law, and though hard for the practitioner, is of immense value (as I am convinced from years of practice and feedback) to the native client.

### *VII. Conclusion*

Understanding and respecting differences is important to the practice of law. As native people have entered the legal profession, their influence on the practice of Indian law should be felt. The response of Indian people to their own people in the profession who have the ability to influence the practice of law, not only by native peoples but by others, should not be that contained in Gil Scott Heron's painfully powerful lyrics, "You're . . . my lawyer, yeah, but somehow you forgot about me." Instead it is hoped that they see them traveling that road back in.

ON THE ROAD BACK IN<sup>65</sup>

On the road back in  
Just beyond that shooting star  
that leads us on our quest afar  
Paths of truth shine now as then  
on the road back in

On the road back in  
crystal waters meet pure sky  
all comes clear in the dreaming eye  
Light grows bright and  
darkness ends  
on the road back in

On the road back in  
Dancing with the winds of time  
in perfect harmony and rhyme  
Tears are shed with host of kin  
on the road back in

Is it really there to find?  
Past the burden of the mind  
concealed by heart's reality  
illuminates our totality  
Who are we to question when  
we come, we go, and  
who knows when?  
on the road back in

On the road back in  
Songs begin to turn the key  
unlocks the doors of memory  
wisdom waits  
and fear grows thin  
on the road back in

On the road back in  
breath becomes the stepping stone  
ticket to the great unknown  
moonbeams glow and  
starguides grin  
on the road back in

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65. HAROLD LITTLEBIRD, *THE ROAD BACK IN, THE ROAD BACK IN* (Littlebird Studios, 1987).

On the road back in  
Voice and vision intertwine  
in hopeful prayer for humankind  
like arrows swift  
pierce through the din  
on the road back in

Is it where all paths crisscross?  
where nothing's won  
nothing's lost

Power and knowledge go hand in hand  
illuminous way we understand  
our rainbow wheel caught in spin  
on the road back in

On the road back in  
spirits soar  
our soul set free  
lessons of the great mystery  
full circle now  
and back we swim  
on the road back in  
On the road back in.

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