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SMALL SCHOOL.
BIG VALUE.

TRIBAL LAW AND BEST PRACTICES IN LEGAL EDUCATION: CREATING A NEW PATH FOR THE STUDY OF TRIBAL LAW

*Aliza G. Organick**

“This is a wonderful time to be a law teacher. For the first time in a long time, there is a lot of excitement and energy about the directions we might take in our curriculums and in our individual courses. There may not have been another time in history when there was more hope for the future of legal education.”¹

In August 2004, I began my career as a tenure-track professor in Washburn University School of Law’s (Washburn) clinical program.² I came to Washburn with the intention of starting a new clinical section that focused on practicing law in tribal courts in Kansas.³ Prior to joining the faculty at Washburn, I taught in the clinical program at the University of New Mexico School of Law (UNM) in the school’s Southwest Indian Law Clinic (SILC).⁴ As a result of my experience in the SILC, I began to develop an understanding of the unique challenges that accompany supervising law students in tribal court settings. Of course, the supervision of law students in any setting is rarely easy, but the unique nature of practicing law in a tribal court setting

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1. Symposium, *The Opportunity for Legal Education*, 59 MERCER L. REV. 859, 859 (2008).

2. The clinical program at Washburn has been in existence for nearly 40 years and has taken a number of forms since its inception. Currently, there are five clinical sections, which provide live-client representation in Kansas state and municipal courts, as well as the Prairie Band Potawatomi and Kickapoo Nation of Kansas tribal courts.

3. Aliza G. Organick, *Creating a Tribal Law Practice Clinic in Kansas: Carving the Peg to Fit the Hole*, 82 N.D. L. REV. 849, 849 (2006).

4. I taught in the SILC as an Assistant Visiting Professor on two separate occasions: first from 2000-01, and then again in 2003-04. I also taught in the SILC during Summer 2007.

brings its own set of challenges. I was fortunate during my time at UNM to get encouragement and guidance from Professor Christine Zuni Cruz, the creator and director of the SILC.⁵ Professor Zuni Cruz also shared her invaluable insights into the practice of law in tribal court setting. It was invaluable that she could reinforce these insights with a view from the tribal court bench, where she has served as both a trial and appellate court judge.⁶

My goal was threefold in creating what came to be known as the Tribal Court Practice Clinic (TCPC). First, I planned to develop clinical educational objectives that incorporated essential lawyering skills such as client interviewing and counseling, motion drafting, and hearing and trial preparation.⁷ I also wanted to prepare law students for the unique challenges of practicing in tribal communities, which often incorporate an indigenous legal framework into their tribal court structures and proceeding. Finally, I wanted to provide students with a framework for understanding the role that culture so often plays in the practice of law. To accomplish this I introduced students to a variety of culturally distinct legal settings, even though those settings might have been outside their normal comfort zone. In short, I wanted to engage law students in a culturally sensitive practice of law.

The first semester I taught at Washburn, it became clear that establishing a tribal court practice was going to be more of a challenge than I had anticipated.⁸ I knew that it would be necessary to design a curriculum that differed from the one that I had designed at UNM. Still, I greatly underestimated the amount of time I would need to spend explaining basic federal Indian law and tribal court structure to students. Although my first clinic students in the Fall 2004 were eager to begin working with clients and to learn the necessary lawyering skills, only one student had prior exposure to federal Indian law.⁹ None of my students had any exposure to tribal courts or any experience working with tribal nations or tribal citizens. Unlike my previous teaching experience in the SILC, which at that time required Federal Indian Law as a clinic requirement,¹⁰ Washburn clinic students who were

5. See University of New Mexico School of Law, Professor Christine Zuni Cruz, <http://lawschool.unm.edu/faculty/zuni-cruz/index.php> (last visited Nov. 11, 2009).

6. *Id.*

7. See Margaret Martin Barry et al., *Justice Education and the Evaluation Process: Crossing Borders*, 28 WASH. U. J.L. & POL'Y 195, 209 (2008) (identifying the following as core skills taught in the clinic setting: "[l]egal writing; plain, clear verbal communication; research; fact-gathering and investigation; . . . *cross-cultural competency*; empathy; listening; case management . . . ; case organization; interviewing; counseling; negotiation" (emphasis added)).

8. See Organick, *supra* note 3, at 849-50.

9. For several years, Washburn has offered a seminar course in Native American Law. It is offered every two or three semesters.

10. The SILC now allows students to qualify for enrollment in this section if they have completed any of the other Indian law courses, including law of Indigenous Peoples. University of New Mexico School of Law, Southwest Indian Law Clinic - Course Description, <http://lawschool.unm.edu/curriculum/clinics/descriptions/silc.php> (last visited Oct. 19, 2009).

assigned to my section had no such requirement or background.¹¹ As a result, it was necessary to build the basic essentials of Federal Indian Law and tribal court structure into an already crammed clinic syllabus.

Until the TCPC became more established and tribal court practice more accepted as a regular part of the clinical experience at Washburn, the concept of practicing in culturally distinct tribal communities in Kansas was a new experience for students. I introduced this added cultural element at the same time I introduced the students to important core clinic skills. My challenge was to create an environment that provided students with an opportunity to build those skills, along with a basic understanding of the tribal court systems created under federal Indian policy. Early in my experience with the TCPC, I did not foresee the challenges involved in creating a new pedagogical framework in an environment that welcomed outreach to tribal communities but was not designed to support that framework.

In Part I of this article, I explore the importance of introducing law students to tribal law and the culture of other local legal systems early and often. I assert that when the legal academy ignores the role that culture plays in the formation and understanding of our own legal system and the legal systems of other communities,¹² we are ignoring the most basic and core aspects of society. By disregarding the role culture plays in legal systems, we are doing a disservice not only to our students, but also ultimately to the legal community and our clients. By failing to give our full attention to this critical aspect of our student's education, we are also failing to adhere to principles espoused in the *Best Practices of Legal Education*, which is to adequately prepare our students for the practice of law.¹³

The importance of teaching how culture impacts legal practice has gained momentum in some law school settings, such as clinical programs. For many programs, the role culture plays in student interaction with clients is integral to the clinical experience.¹⁴ But the value of teaching culture goes beyond clinical education or boutique seminar courses. We live in a multicultural society, which affects the lawyer-client relationship. A lawyer-client relationship cannot be truly effective if the lawyer does not or cannot give value to the cultural background of the client.¹⁵ Being an effective advocate is

11. Washburn requires only Professional Responsibility as a prerequisite for clinic enrollment.

12. Leonard Hammer, *The Human Right to Culture and Migrant Workers in Israel*, 11 MSU-DCL J. INT'L L. 427, 431 (2002).

13. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION, 88-89 (Clinical Legal Education Association, 2007).

14. See, e.g., Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 379 (2005). In her article, Professor Weng, who teaches in a clinical setting, posits that the key to developing multicultural competence lies in the ability of the lawyer to become keenly aware of his own culture and the "cultural forces" that affect him in order to more accurately understand his interactions with clients. *Id.* at 369.

15. See *id.* at 392 (explaining that "lawyers treat clients in culturally insensitive ways due to

challenging at the best of times, however, when cultural differences are thrown into the mix and we do not give the lawyer the proper tools to negotiate those differences, we are doing both the lawyer and the client a disservice.

Using tribal courts as a means to teach culture in the classroom is valuable on a number of levels. Tribal courts are, as my colleague Professor Tonya Kowalski asserts, one prong of our three-part federal system and should be incorporated into the law school curriculum on a regular basis.¹⁶ Additionally, the study of tribal court systems cannot be done without first exploring how modern tribal courts came into existence. This necessarily requires law students to consider their own legal system and its culture.¹⁷ This includes the historical and cultural context of tribal-state relationships and tribal-federal relationships. The individual lawyer must develop an increased self-awareness in order to become a multicultural lawyer.¹⁸ Similarly, law schools must increase their institutional awareness in order to provide a more meaningful legal education for future lawyers.

There are a number of challenges when teaching about other cultures and other legal systems.¹⁹ Educators must recognize that students come from a variety of backgrounds and have different learning experiences.²⁰ In addition, designing effective teaching techniques requires the law professor to have some knowledge and experience in the subject matter.²¹ This is one of the core tenets of *Best Practices*, which requires law professors to understand their subjects "extremely well."²² It is equally important to know something about the students' cultural backgrounds to more effectively communicate important information.²³ This is true for the individual professor and the institution.

By ignoring culture and the study of other legal systems, not only do we undermine the role culture plays in all legal systems, we ignore a valuable

'unconscious or aversive racism.'").

16. Tonya Kowalski, *The Forgotten Sovereigns*, 37 FLA. ST. U. L. REV. (forthcoming 2010).

17. See *infra* Part.III.

18. See Weng, *supra* note 14, at 389 (citations omitted).

19. See Samrieng Mekkiengkrai, *Effective Techniques for Teaching About Other Cultures and Legal Systems*, IALS CONFERENCE: EFFECTIVE TEACHING TECHNIQUES ABOUT OTHER CULTURES AND LEGAL SYSTEMS, MONTREAL, CANADA, MAY 30, 2008, 197, <http://www.ialsnet.org/meetings/assembly/MasterBookletMontreal.pdf> (describing teaching techniques, including: sharing knowledge about other cultures and legal systems, encouraging outside learning experiences, including attending cultural events, visiting foreign courts, the use of video and practical demonstrations, proactive learning, and group discussions).

20. *Id.*

21. *Id.*

22. STUCKEY ET AL., *supra* note 13, at 105. Chapter Four of *Best Practices* discusses the delivery of instruction. In addition to underscoring the principle that teachers should know their subjects extremely well, the comment explores the importance of developing techniques that help students understand fundamental concepts and, further, helps them develop analytical thinking.

23. Mekkiengkrai, *supra* note 19, at 197.

teaching tool.²⁴ Teaching in a comparative context and including the culture of other legal systems in the standard law school curriculum allows students to better understand their own legal system.²⁵ Incorporating the study of tribal law provides students an opportunity to do a well-reasoned and thoughtful comparative analysis of legal systems right on their doorstep. We do not need to travel far from home to learn the legal rules, culture, and practices of other sovereigns.

The opportunity for significant re-evaluation is perfectly ripe. We are in an era when law schools are examining ways to overhaul the legal educational system. Many law schools are currently considering how to redesign their curriculum to better prepare their students for the practice of law in accordance with *Best Practice* principles.²⁶ For example, *Best Practice* principles include, in part, institutional goal setting and organizing more effective programs of instruction.²⁷ As Susan Bryant underscored in her article *Five Habits: Building Cross-Cultural Competencies in Lawyers*, practicing law is frequently a cross-cultural experience, and as such, it makes sense that we must build a set of skills that allow us to communicate both accurately and effectively.²⁸

Despite its importance in a number of legal contexts, from international law to dispute resolution, culture receives little attention in the law school curriculum. It is not surprising, then, that the skill set required to teach culture has also been underdeveloped. Interestingly, medical schools have a more established history of underscoring the importance of skills training in this area. Recognizing that developing cultural competence in health care affects the quality of medical treatment, the Liaison Committee on Medical Education (LCME), introduced a set of standards for medical school faculty and medical students in 2000.²⁹ The LCME institutional requirements establish several important curriculum objectives. These include developing a curriculum that has “the institutional support of the leadership, faculty, and students;” the commitment of institutional and community resources; the inclusion of

24. See generally Ronald A. Brand, *Effective Teaching Techniques About Other Cultures and Legal Systems*, IALS CONFERENCE: EFFECTIVE TEACHING TECHNIQUES ABOUT OTHER CULTURES AND LEGAL SYSTEMS, MONTREAL, CANADA, MAY 30, 2008, 209, <http://www.ialsnet.org/meetings/assembly/MasterBookletMontreal.pdf> (discussing the teaching techniques and the value of comparative education).

25. See *id.* at 211-12.

26. See Harriet N. Katz, *Evaluating the Skills Curriculum: Challenges and Opportunities for Law Schools*, 59 MERCER L. REV. 909, 909 (2008).

27. See generally STUCKEY ET AL., *supra* note 13 (creating a model for preparing law students for practice and discussing the importance of: goal setting, the organization and delivery of instruction, providing opportunities for both experiential and non-experiential teaching methods, and the process to assess and evaluate both student learning and institutional effectiveness).

28. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 38 (2001).

29. See The Association of American Medical Colleges, *Cultural Competence Education 1* (2005), <http://www.aamc.org/meded/tacct/culturalcomped.pdf> (last visited Nov. 16, 2009).

community leaders in order to provide feedback on curriculum design; and a “clearly defined evaluation process” that includes outcome assessments.³⁰ The LCME firmly stated that cultural competences “cannot be an add-on to the present medical school curriculum.”³¹ Medical students themselves are asking that cultural competence be included in their training.³² We certainly have much to learn from our professional counterparts.

Part II will identify key components of *Best Practices* that establish a framework for teaching culture in general and for teaching it alongside tribal law in particular. This section pays particular attention to establishing an institutional affirmation of the importance that culture plays in legal education; setting institutional goals for a program of instruction that includes teaching culture across the curriculum beginning in the first year of law school and throughout the entire course of legal study; and establishing an environment that supports faculty development for delivering instruction in teaching culture as part of course curriculum.

Finally, Part III identifies a few teaching techniques they may be helpful to those interested in trying cultural education. These suggestions are tailored to the type of course being taught. I discuss whether particular techniques could be included in the doctrinal, survey/seminar, or clinical courses. Part III also provides examples from my own teaching manual, which I use to illustrate how we can customize existing exercises and ideas to integrate them into the curriculum.

I. SHEDDING LIGHT ON THE CHALLENGES

*“No one lights a lamp in order to hide it behind the door: the purpose of lights is to create more light, to open people’s eyes, to reveal the marvels around.”*³³

As legal educators, we have an opportunity to reconsider how our past pedagogical approach has failed to fill the gap in legal education left by the continued marginalization of courses such as federal Indian law in law schools. This marginalization exists despite the fact that a number of law schools offer Indian law in their curriculums because these courses are often offered sporadically, or just to provide “contrastive enrichment to the mainstream curriculum.”³⁴ In addition, few law schools have full-time tenure-track faculty

30. *Id.* at 2.

31. *Id.*

32. Kristen C. Ochoa, et al., *Negotiating Care: The Teaching and Practice of Cultural Competence in Medical School: A Student Perspective*, MEDICAL EDUCATOR ONLINE (2003), <http://www.med-ed-online.org/l0000001.htm> (last visited Oct. 21, 2009).

33. PAULO COELHO, *THE WITCH OF PORTOBELLO I* (Margaret Jull Costa trans., HarperCollins Publishers 2007).

34. See Gloria Valencia-Weber & Sherri Nicole Thomas, *When the State Bar Exam Embraces Indian Law: Teaching Experiences and Observations*, 82 N.D. L. REV. 741, 746

teaching these courses.³⁵ This marginalization extends even further when it comes to the study of tribal courts and indigenous legal systems. While there are a few law schools that specialize in the study of tribal courts, the legal academy largely ignores tribal legal systems and the internal law of tribes. When it does so, the academy closes off opportunities to broaden and enrich legal education. Not only is this a detriment to our law students, it puts potential clients at risk as the continued economic development of tribal lands makes it increasingly likely that graduates will find themselves representing clients in a tribal court setting.³⁶ It also has a negative impact on the development of crucial lawyering skills, such as problem solving in a cultural context. This further marginalizes the study of Indian law.³⁷ Tribal law has even less of a foothold in legal education than Indian law and, therefore, the effect of its marginalization is even more pronounced. It is important for future practitioners to understand the culture of tribal communities in order to effectively advocate on behalf of tribes and their citizens.³⁸

A. Importance of Culture

*“Modern Western lawyers have largely managed to banish religion, culture and tradition from the tree of law. Such intellectual pruning, declaring that this or that is ‘extra-legal’ labels the bountiful fruits of South Asia and other laws . . . as cultural poison, which progressive lawyers want to consign to the dustbin of history.”*³⁹

The importance of teaching law students the role culture plays in the clinical setting should be obvious. Teaching law students about the impact of culture on legal systems is one of the benefits of the hundreds of study abroad courses offered by U.S. law schools.⁴⁰ However, the value of teaching culture in the doctrinal or seminar settings here at home is less obvious to many. In addition to American law students going abroad to study other legal systems,

(2006).

35. *Id.*

36. Charles R. Calleros, *In the Spirit of Regina Austin’s Contextual Analysis: Exploring Racial Context in Legal Method, Writing Assignments and Scholarship*, 34 J. MARSHALL L. REV. 281, 284 (2000).

37. *See, e.g.*, James M. Grijalva, COMPARED WHEN? TEACHING INDIAN LAW IN THE STANDARD CURRICULUM, 82 N.D. L. REV. 697, 707 (2006).

38. *See, e.g.*, Duane Champagne, *Justice, Culture, and Law in Indian Country: Teaching Law Students*, 82 N.D. L. REV. 915, 915-16 (2006).

39. Chuma Himonga, *The Role of Culture in Teaching About Other Cultures and Legal Systems*, IALS CONFERENCE: EFFECTIVE TEACHING TECHNIQUES ABOUT OTHER CULTURES AND LEGAL SYSTEMS, MONTREAL, CANADA, MAY 30, 2008, 184, <http://www.ialsnet.org/meetings/assembly/MasterBookletMontreal.pdf> (quoting Werner Menski, “On the Law of Laws,” Inaugural Lecture, Oct. 19, 2005, 1).

40. *See, e.g.*, Louise Harmon & Eileen Kaufman, *Innocents Abroad: Reflections on Summer Abroad Programs*, 30 T. JEFFERSON L. REV. 69, 74 (2007).

many foreign students are coming to the U.S. to study. Building the concept of culture into legal education early and reinforcing it often is frequently overlooked. It is particularly important as we come to terms with the increased globalization of the legal field and legal education,⁴¹ and as we begin to consider the relatively recently articulated human right to culture that has become a core focus in many human rights instruments.⁴² When we work with students in the human rights seminar settings, it is incumbent upon us to explore whether and how the human right to culture is expressed as both an individual right and a collective or community right.⁴³ As a general matter, students come to law school with built-in or internalized understandings of individual rights. But what happens when they come face-to-face with the notion of collective tribal rights to culture, or with the notion of tribal rights to tribal children? Have we given them the framework to comprehend that an understanding of the human right to culture and the collective right of distinct cultural communities to exist is essential to their understanding of emerging

41. See, e.g., Gloria M. Sanchez, *A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. American Trading Partners*, 34 SAN DIEGO L. REV. 635, 636, 639-42 (1997).

42. See United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 8, 11, 12, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at <http://www.un.org/esa/socdev/unpfii/en/drip.html>. [hereinafter U.N. Declaration]. Article 8 recognizes that: "1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. 2. States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration; (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them." Article 11 further underscores those principles: "1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature. 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs." Article 12 also underscores the right to culture: "1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains. 2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned."

43. Significantly, the U.N. Declaration on the Rights of Indigenous Peoples is perhaps the only human rights instrument that recognizes not only individual human rights but also collective human rights as articulated in Article 1. It says: "indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law." U.N. Declaration, art. 1.

international norms?⁴⁴ Have we provided them with the tools necessary to understand how this may help solve these issues should they arise in their practice?

It is understandable that the legal academy might feel overwhelmed with the changes proposed to legal education by *Best Practices* and the Carnegie report, *Educating Lawyers: Preparation for the Profession of Law*.⁴⁵ After all, we have been challenged to do more, to meet additional expectations in an already demanding environment, and we are now required to meet these challenges with even less money. Nonetheless, when I began studying the changes proposed by *Best Practices*, I was delighted to find that the authors had created a model that provides a structure that is designed to help law professors attain the goals that *Best Practices* has proposed. I was grateful to have more than just a laundry list of expectations and demands. I had a handbook that contained a framework articulating ways that I could become a better law professor. *Best Practices* provides insights into how law students learn and explains that, when we create realistic expectations in a humane environment, our students are open to new ideas and new ways of learning.⁴⁶

As a result of my early failure to understand the complexity of introducing federal Indian law and tribal courts to my clinic students, I was determined to reassess my goals. I spent a great deal of time thinking about how I could better explore the complex subject matter with my students. I also continued to explore more effective ways to introduce students to the practical and cultural considerations necessary for successfully representing clients in a foreign environment. I asked myself whether I could possibly do this alone. That is, what could my institution do to help me? I wondered, were there institutional structures already in place that could work to support my goal? Could I help create a new vision for the institution that would help it approach the subject of culture in a broader and more inclusive fashion, specifically in relation to tribal and Indian law?

The *Best Practices* model provides possible answers to these questions in a more concrete form. I understood intuitively that for my students to feel more comfortable learning about tribal culture they needed to hear about it long before they entered my tribal law practice clinic, or any of the other

44. These principles are emerging in a number of international rights instruments (a right to culture is also espoused in the U.N. Convention on the Rights of the Child and in the Draft Declaration of American States). But U.S. law also recognizes that tribes have a collective interest in the rights to Indian children. The Indian Child Welfare Act, 25 U.S.C.S. § 1901-63 (Lexis Nexis 2009), specifically recognizes tribal interest in children who are members or eligible for membership in tribes.

45. WILLIAM M. SULLIVAN, ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

46. See STUCKEY ET AL., *supra* note 13, at 3 (issuing the call to “reevaluate our assumptions about the roles and methods of law schools and to explore new ways of conceptualizing and delivering learner-centered legal education.”).

seminar classes in which I incorporate tribal law.⁴⁷ I began to think of this process as my “slow-drip theory.” I think that is what law students need: a long, slow, continuous, drop-by-drop introduction to both federal Indian law and tribal law throughout law school for them to feel comfortable with the subject matter. This process needs to begin as early as first-year orientation, in order to de-marginalize⁴⁸ these often alien concepts.

B. Integration of Federal Indian Law

There is a growing body of scholarship devoted to the subject of integrating federal Indian law⁴⁹ into the law school curriculum. A quick browse through Lexis Nexis or Westlaw will bring up articles on incorporating Indian law into commercial law and bankruptcy courses,⁵⁰ civil procedure courses,⁵¹ and first-year legal writing courses.⁵² The topic of federal Indian and tribal law could easily be worked into courses on law and literature,⁵³ and federal courts.⁵⁴ In 2001, UNM Professor Barbara Blumenfeld discussed having a federal Indian law appellate question in first-year legal research and writing advocacy classes.⁵⁵ Similarly, Professor Cynthia Ford wrote about her

47. Over the last several years, I have created three seminar classes at Washburn, Tribal Law Practice Seminar, Law of Indigenous Peoples, and Comparative Law: Understanding Method and Theory. Tribal Law Practice Seminar provides the most straightforward exploration of tribal law issues. While Law of Indigenous Peoples focuses on the international laws affecting indigenous populations worldwide, I tie in concepts of federal Indian law, indigenous tribal court peacemaker and wellness court models that have been used internationally as a framework for problem-solving, as well as concepts of the to collective right to culture recently expressed in modern human rights instruments. Similarly, I structured the comparative law class to include the U.S. Supreme Court cases and asked students to provide an analysis of the case using a problem solving matrix designed to help them examine the subject and location of inquiry, theory of the court, what sources were used in their finding, and what source of law (positive, natural, or socio-legal) were used to determine an outcome.

48. See generally Grijalva, *supra* note 37.

49. I use federal Indian law, Indian law, and American Indian law interchangeably throughout this article. However, I refer to the internal law of tribes as “tribal law.”

50. See, e.g., Jack F. William, *Integrating American Indian Law into the Commercial Law and Bankruptcy Curriculum*, 37 TULSA L. REV. 557 (2001).

51. See, e.g., Cynthia Ford, *Integrating Indian Law into a Traditional Civil Procedure Course*, 46 SYRACUSE L. REV. 1243 (1996).

52. See, e.g. Barbara P. Blumenfeld, *Integrating Indian Law into a First Year Legal Writing Course*, 37 TULSA L. REV. 503 (2001).

53. See, e.g., Amelia V. Katanski, *Writing the Living Law: American Indian Literature as Legal Narrative*, 33 AM. INDIAN L. REV. 53, 53 (2008-09) (discussing “the dynamic role of American Indian literary texts in the production of an indigenous jurisprudence and providing a few examples that explore how literary narratives can make space for, enable, rewrite, and produce law”).

54. See, e.g., B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 459 (1998) (discussing the role of tribal courts as “players” in the federal judicial landscape). This article could also serve as a model for how the curriculum might be structured.

55. Blumenfeld, *supra* note 52, at 503.

experience when she included federal Indian law in her Civil Procedure class in 1996.⁵⁶ Professor Ford made specific suggestions for where, when, and how Indian law can be incorporated in to first-year civil procedure courses.⁵⁷ She then revisited that experience in 2001.⁵⁸ Both articles describe her methodology and pedagogy alongside the challenges and the ultimately positive outcomes of incorporating this topic.⁵⁹ Although neither Professor Blumenfeld nor Professor Ford incorporated tribal law considerations into their learning objectives, the opportunity exists to introduce, at least as a threshold discussion, the concept that our existing legal system impacts specific, culturally distinct groups of tribal people in the United States.

I looked at Washburn's course offerings and made a list of the possible doctrinal and seminar courses where the topic of federal Indian law or tribal law could be introduced.⁶⁰ My goal was to start a conversation with the students and faculty.⁶¹ I then incorporated some exposure to tribal courts into the courses I developed on the Law of Indigenous Peoples and Comparative Law.⁶² When I teach those courses, I begin by asking my students if they know that there is a tribal court system. The answer is invariably, no. I then ask them to consider how they think a tribal court system might look the same or different from the U.S. legal system. Generally, students are open and willing to share what they know, but their answers often reveal a real lack of insight into the topic.

Despite their lack of specific or even general knowledge of federal Indian law, the conversation is often invaluable because it allows for discussion about the relevance of federal Indian law to students' legal education.⁶³ It is a

56. See Ford, *supra* note 51, at 1243.

57. *Id.*

58. See Cynthia Ford, *Including Indian Law in a Traditional Civil Procedure Course: A Reprise, Five Years Later*, 37 TULSA L. REV 485 (2001).

59. *Id.* at 485.

60. I found that at least 32 of the current course offerings provide an opportunity to include some mention of the internal law of tribes, tribal courts, or culturally competent lawyering. These courses include the obvious candidates, such as Race and Law, Law of Indigenous Peoples, Law and Human Rights, as well as some others: Oil & Gas, ADR, Comparative Constitutional Law, Client Counseling, Contracts, Conflict of Laws, Debtor/Creditor Relations, Divorce Practice, Employment Law, Family Law, Local Government Law, and Taxation courses. See Washburn University School of Law, Curriculum, <http://washburnlaw.edu/curriculum/> (last visited Nov. 10, 2009).

61. Several faculty members have already incorporated federal Indian law or tribal law into their classes. Professor Bill Rich includes one federal Indian law case into his Constitutional Law course. Professor Nancy Maxwell includes the Indian Child Welfare Act into her Family Law Seminar course. Professor Janet Jackson incorporates an overview of federal Indian Law and the relationship between the federal government and tribes into her Race and the Law Class. Professor Mryl Duncan included the topic of tribal court structure into his Native American Law Course.

62. Syllabi for these courses are on file with the author.

63. See Melissa L. Tatum, *Symposium: Native American Law: Forward*, 37 TULSA L. REV. 481, 481 (2001) ("Despite its growing acceptance . . . Indian law is still often viewed as a niche

relatively straightforward route that takes us from the broad discussion of federal Indian law to the topic of tribal court practice, especially for those clinical students enrolled in the TCPC or criminal law clinic.⁶⁴ Once the students understand the relevance of Indian law, particularly in tribal court settings, they rarely show apprehension about further engaging in key aspects of the topic. It is important to provide this background before students observe court proceedings in a tribal court. Without this preparation, the students would be unable to compare and contrast the proceedings in tribal and state courts. For instance, when tribal prosecutors make their formal appearance on the record in tribal courts in Kansas, they say they are representing “the Nation.” Once back in the classroom, a question about who comprises “the Nation” becomes a rich discussion regarding tribal sovereignty and segues into issues of tribal court jurisdiction⁶⁵ as well as state and federal jurisdiction.

II. USE OF BEST PRACTICES

Integrating an exploration of this topic into my classroom is sometimes met with resistance and resentment. In trying to understand the basis for the resistance, it is critical to acknowledge that these barriers exist.⁶⁶ But that is just the beginning. A framework for change is required, and the good news is that *Best Practices*⁶⁷ provides a model that can help institutions address some of those barriers and begin the process of permanently dismantling them.

From the outset, the authors of *Best Practices* call on the legal academy, the public, the judiciary, and the legal profession as a whole to reassess our traditional roles and methods of teaching law and to find new ways to ensure we are providing a more “learner-centered” legal education.⁶⁸ The authors point to long-established practices in legal education that have ignored core educational objectives resulting in a failure to fully prepare our students for the

field, one that is important only to a small subset of scholars and attorneys. Even as more schools offer a basic course in Indian law, there is an entrenched belief that Indian law is separate and apart, offering nothing to the more generalized study of law. In 1989, Professor Judith Resnik wrote her *Dependent Sovereigns* article, exploring what Indian law has to offer federal courts’ jurisprudence. Eleven years later, Professor Frank Pommersheim wrote his *Open Letter to the Federal Courts’ Teaching and Scholarly Community*, discussing the relevance of Indian law to federal courts’ jurisprudence and inviting even more attention to the field. It is clear from Professor Pommersheim’s article that little progress occurred in those intervening years.” (citations omitted).

65. Kansas is unique in that it has concurrent jurisdiction with Kansas tribes for misdemeanor criminal cases pursuant to 18 U.S.C.S. § 3243 (Lexis Nexis 2009).

66. See Grijalva, *supra* note 37, at 706–08 (2006) (discussing the challenges of integrating Indian law into other courses and describing both actual and perceived barriers that are not necessarily unique to Indian law, including: lack of introduction to the topic early in law school experience, lack of familiarity on the part of law professors, lack of time to cover the material, and students’ emotional reaction to the material).

67. STUCKEY ET. AL, *supra* note 13.

68. *Id.* at 3.

practice of law.⁶⁹ The overarching motive for the creation of the *Best Practices* project was to “help evaluate the quality of [a law] school’s program of instruction and provide guidance for improving it.”⁷⁰ With this goal in mind, *Best Practices* establishes its guidelines for goal setting, organization, delivery of instruction, goals for both experiential and non-experiential teaching methods, and provides models for assessing student learning and institutional effectiveness.⁷¹ *Best Practices* defines key components for law school instruction from the first through third year of study.⁷²

Best Practices acknowledges what I learned the hard way as a new teacher; because of “notable gaps” from the beginning of their law school experience, students are not given the “broader intellectual and social context” for the law they are studying.⁷³ The result is a devaluing of some of the essential skills and responsibilities of lawyers, such as “honor, integrity, and fair play,” as well as the ability to purposely and sensitively to respond to issues of culture.⁷⁴

Best Practices provides a useful model that is designed to help law professors and institutions overcome the challenge of creating a more culturally competent legal education system. In doing so, *Best Practices* explains the importance of creating more culturally competent lawyers.⁷⁵ The *Best Practices* model begins with the straightforward goal that schools should create a mission statement that reflects the values the institution holds dear.⁷⁶ With that in mind, it seems clear that in attempting to concretely visualize a culturally competent institution, the mission statement should include not only such relevant values as honor, justice, and integrity, but should also include creating culturally sensitive lawyers as principal goals from the outset. Aside from this, the institution should go even further by embedding those goals in the very ethos of the institution and should incorporate these values in some form throughout the curriculum. This foundation can serve as the broader context called for in *Best Practices* and as the means around which further culturally competent curricula can be structured.⁷⁷ It is particularly important to begin building on these broader concepts during law students’ “sacred first year”⁷⁸ when the all-important imprinting begins and then to continue these

69. *Id.* at 3. The authors divide curriculum development into four key stages: identify educational objectives, provide learning opportunities that are designed to meet these objectives, organize learning experiences effectively, and design a means for evaluating the effectiveness of those learning experiences. *Id.*

70. *Id.* at 11.

71. *See generally id.*

72. *Id.* at 275–81.

73. *Id.* at 22.

74. *Id.* at 22, 87–88.

75. *See id.* at 88–89.

76. *Id.* at 39.

77. *Id.* at 93.

78. *See* Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education*

skills in the school's "curriculum map."⁷⁹

Using these pieces of the *Best Practices* framework one can see the importance of including the concept of culture into the curriculum map early and often so that students become familiar and comfortable discussing the potential impact cultural influences play in their developing lawyering skills.⁸⁰ Introducing an appreciation for the role culture plays in understanding their own legal system is enhanced by encouraging law students to make that connection early in their learning and development.⁸¹

Scholars have commented that federal Indian law and tribal court structure and practice are "overlooked" in core law school curriculum and results in a void in a critical component of legal education.⁸² Professor Gloria Valencia-Weber and Sherri Nicole Thomas wrote an article discussing the New Mexico State Bar's inclusion of Indian law on its bar examination in 2002. They noted the increasing frequency with which New Mexico practitioners found themselves face-to-face with an Indian law issue without the sufficient knowledge to handle that issue on their own.⁸³ As a result, the New Mexico Native American Bar Association, along with support from UNM alumni and a number of Indian law practitioners in the state, began to advocate for the inclusion of Indian law on the state's bar exam.⁸⁴

In response to the inclusion of Indian law on the bar exam, law students enrollment increased by two fold in the basic Indian law course at UNM in the fall semester immediately preceding the first bar exam with the potential for an Indian law essay question.⁸⁵ What was most surprising, however, was what the article described as an additional and disturbing response by some law students who now felt compelled to take the Indian law course.⁸⁶ Unfortunately, as described by Thomas, herself a tribal citizen and tutor for the course, some students chose to participate in "creating an environment . . . with hints of hostility and animosity."⁸⁷ Thomas reports that this led to an environment where even once inquisitive and formally respectful student/peers

in a Culture of Competition and Conformity, 60 VAND. L. REV. 515, 517-18 (2007).

79. STUCKEY, *supra* note 13, at 93 (focusing on creating consistency and congruency throughout the entire three years of instruction, building progressively from year to year and introducing the concept of creating a more integrated institution that does not separate theory and doctrine from more practice-oriented courses in the curriculum).

80. Barry et al., *supra* note 7, at 223 (discussing the "cultural divide" between the lawyer and the potential client and articulating the need for lawyers to "develop cultural awareness" with the client groups they represent; using the term "culture" broadly to include "ethnic, racial, economic, educational, cognitive, and experiential differences").

81. See Teresa Kissane Brostoff, *Using Culture in the Classroom: Enhancing Learning for International Law Students*, 15 MICH. ST. J. INT'L L. 557, 563-64 (2007).

82. Valencia-Weber & Thomas, *supra* note 34.

83. *Id.* at 749.

84. *Id.* at 750.

85. *Id.* at 755.

86. *Id.* at 766-67.

87. *Id.* at 767.

became “distrustful inquisitors.”⁸⁸

It is hard to say what happened to those formerly inquisitive and respectful students, but it seems that in the process of “mainstreaming” the Indian law course, students may not have not been prepared to deal with the often complicated and “emotional content”⁸⁹ of the course. This highlights the critical need to expose students to concepts of culture and critical legal analysis that contain cultural components early and often in law school.⁹⁰ By doing so, we would de-marginalize not only Indian law and tribal court structure and practice, but other subject areas fraught with complex legal and emotional content and for which no tools have been provided to help students contextualize that experience.

Apart from the challenges described by those involved in the process of mainstreaming or integrating Indian law into the core law school curriculum over the last thirty years or so,⁹¹ the inclusion of the law of Indigenous peoples or tribal law into the core curriculum faces even greater hurdles. As discussed previously, law schools offer Indian law as a course option relatively infrequently and this undermines its value as a necessary component of their legal education. It has been thirteen years since Justice Sandra Day O’Connor addressed the Ninth Annual Indian Sovereignty Symposium in Tulsa, Oklahoma, and described the federal government, the states, and Indian tribes as the three sovereign entities recognized in the United States.⁹² Despite this, little has been done to incorporate the legal traditions of indigenous peoples and their tribal court systems into legal education.

Still, there are some notable exceptions. For example, Professor Zuni Cruz at UNM offers a course on the Law of Indigenous Peoples;⁹³ the University of Arizona James A. Rogers School of Law offers courses tribal law and Law of Indigenous Peoples from an international law perspective,⁹⁴ and

88. *Id.* at 766.

89. Grijalva, *supra* note 37, at 710 (citation omitted).

90. *See id.* at 701.

91. *See generally* Valencia-Weber & Thomas, *supra* note 34; Grijalva, *supra* note 37.

92. Sandra Day O’Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L. REV. 1, 1 (1997).

93. UNM has been incorporating Indian Law into the curriculum for a number of years and has one of the most comprehensive Indian law programs in the country. UNM offers an Indian Law Certificate, which is available to students who have completed twenty-one credit hours in Indian law or Indigenous law related curriculum. This curriculum includes course work in tribal Courts, tribal-state relations, and clinical practice in the Southwest Indian Law Clinic. *See* University of New Mexico School of Law, Indian Law Program - About Indian Law, <http://lawschool.unm.edu/indian/index.php> (last visited Nov. 6, 2009).

94. The Indigenous Peoples Law and Policy Program at the University of Arizona has several full-time faculty members including S. James Anaya, James J. Lenoir Professor of Human Rights Law and Policy; Robert A. Williams, Jr, E. Thomas Sullivan Professor of Law and American Indian Studies; Melissa L. Tatum, Research Professor of Law and Associate Director of the Indigenous Peoples Law and Policy Program; and Robert A. Hershey, Director, Indigenous Peoples Law Clinic. The program is also recognized as one of the world’s leading academic

the University of Tulsa College of Law offers a Tribal Governments course in addition to other specialized Indian law courses.⁹⁵ By and large, only those law schools with a dedicated focus and specialization in Indian law offer additional related courses in tribal courts, tribal government, or Indigenous peoples law or tribal law clinics.⁹⁶ It is remarkable that with more than 560 sovereign Indian nations⁹⁷ in the United States and more than 350 tribal justice systems⁹⁸ operating in a number of states, law schools continue to neglect such rich and diverse indigenous legal systems in their curriculum.

III. SHAPE SHIFTING: DEVELOPING EFFECTIVE TEACHING TECHNIQUES FROM EXISTING METHODOLOGY

With such a lack of institutional commitment and a relative lack of scholarship in methodology, it is easy to understand why curriculum design in this area is challenging. Thoughtful curriculum design for studying modern tribal court systems should include at least some understanding of tribal cultures and governments.⁹⁹ Students must also understand the relationship between each tribe and the federal government. To teach students how to competently navigate any legal system, they must learn about the culture of that system.¹⁰⁰

Meaningful curriculum design also requires that students understand how important it is to develop connections within each tribal community.¹⁰¹ By

centers for the study of Indigenous peoples' cultures, histories, languages, laws, and human rights. Its core curriculum supports research, training, and advocacy in Indian law and international law of indigenous peoples, the Indigenous Peoples Law. Its clinical studies and direct advocacy program provides students and practitioners legal assistance to local and international indigenous communities. The University of Arizona James E. Rogers College of Law, Indigenous Peoples Law & Policy Program, <http://www.law.arizona.edu/Depts/iplp/> (last visited Nov. 6, 2009).

95. The University of Tulsa College of Law (Tulsa) offers a certificate program in Indian law. The school provides specialized courses in Federal Indian Law, Tribal Government, Native American Natural Resources Law, Indian Gaming Law, Native American and Indigenous Rights, and the American Indian Law Seminar. Tulsa also offers the first master's program in American Indian and Indigenous Law at any American Bar Association (ABA) approved law school.

96. This list is by no means meant to be exhaustive and leaves out a number of Indian Law programs such as those being offered at the University of Colorado School of Law, Lewis and Clark Law School, the University of Washington School of Law, and Michigan State University College of Law, to name a few.

97. Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 73 Fed. Reg. 66, 18553 (April 4, 2008).

98. See National American Indian Court Judges Association, Testimony on Fiscal Year 2001 Interior Appropriations, http://www.naicja.org/legislation/house_testimony.asp (last visited Oct. 22, 2009).

99. Champagne, *supra* note 38, at 921.

100. See *id.* at 921-23.

101. See *id.* at 921-22 (focusing on modern tribal court justice systems and the way they incorporate multiple legal traditions, but are at the same time, "supported by their own culture and traditions").

increasing students' understanding of each tribe's unique cultural history, they will develop a better understanding of the goals and visions of tribal leaders and individual tribal members.¹⁰² Exploring another legal system also asks students to evaluate the formal structures of their own legal system. This provides insight into their cultural lens, which may not be sufficient. To be more effective advocates for their clients, they must leave the comfort zone of their own experience and be open to another world view.¹⁰³ For the most part, students are willing to do so; they just do not know how, and law schools do not do a good job of teaching them to be more culturally conversant. In the clinical setting, we strive to expose students to the importance of recognizing how and why cultural proficiency is so important to their representation of clients from the initial client interview, to client counseling, case development, and ultimately a positive resolution of their cases.

As a general matter, most clinicians incorporate some form of role-play or simulated learning exercise as part of their classroom component.¹⁰⁴ Clinicians commonly share exercises created by other clinicians or have worked together to recreate new ones using the bones of more established simulated exercises. These exercises become part of the clinician's repertoire, and as a relatively new clinician, I made special efforts to seek them out at clinical conferences and to brainstorm new exercises with colleagues. The following examples reflect the idea that new exercises and simulations do not require the professor to reinvent the wheel, but rather to customize learning exercises so that there is a shift in focus to creating an exercise that incorporates an element of cultural awareness.

A. Playing with Blocks

In Fall 2005, Washburn hosted the Midwest Clinic Conference. The conference included a panel on teaching cultural competency in the clinic setting, which included two clinicians and a professor of social work. The goal for that session was to ensure that there was a multidisciplinary component, recognizing that law professors had much to learn about how to teach cultural competency.¹⁰⁵ This was my first introduction to the "blocks exercise,"¹⁰⁶ which was demonstrated by Professor Bridgette Carr.¹⁰⁷ Professor Carr's

102. *Id.*

103. *See*, Bryant, *supra* note 28, at 59-60.

104. *See* Paul Bergman, Avrom Sherr & Roger Burrige, *Learning From Experience: Nonlegally-Specific Role Plays*, 37 J. LEGAL EDUC. 535, 535 (1987).

105. Most of the literature describing curriculum design for teaching cultural competency comes from the health care professions and teaching.

106. Bergman et al., *supra* note 104, at 548-49. In the article the exercise is called the "Block Party;" the authors of the article posit that role playing and simulated learning techniques are widely used, and that law students benefit from "nonlegally-specific" exercises that help them to see how everyday social exchanges are relevant to their lawyering skills. *Id.* at 553.

107. Professor Bridgette Carr is a clinician and currently teaches in the Human Trafficking Clinic at the University of Michigan School of Law. University of Michigan Law School, Law

demonstration consisted of using two sets of children's blocks of varying colors and sizes and two volunteers. She began the exercise at "phase two" of the original¹⁰⁸ version of this exercise, with volunteers seated at tables facing away from each other. The first participant "builder" began to create a structure from the blocks provided and to describe her "structure" to the second participant. The second participant was told to build her structure based only on the description given by the builder. What the participants did not know was that the set of blocks provided to each of them varied slightly.¹⁰⁹ The purpose of this exercise, articulated by its creators, was to convey to law students "how events get distorted even through innocent telling."¹¹⁰

During our demonstration at the conference, the viewers could see that participant number two, even though listening carefully to the directions given by our "builder," could not create the same structure as participant number one not only because language distorts, but also because the participants did not have the exact same set of blocks. The underlying idea is that when it comes to developing a skill set for asking questions in preparation for a client interview or preparing direct or cross examination, our clients may not have the same set of blocks as we do and vice versa.

I have used this exercise in one form or another in both the clinical setting and in seminar classes that I have created.¹¹¹ When I use this exercise in my clinic class, I first ask the students to consider the blocks as a metaphor for language. Keeping the language metaphor in mind, I ask the students to consider whether or not we all have the same "set of blocks" available to us. Do they have the same "set of blocks" as their clients,¹¹² and how important is it to recognize this? I also ask the students to consider how they should prepare to interview a client whose first language is not English or who does

School Faculty & Staff- Bridgette Carr, http://cgi2.www.law.umich.edu/_FacultyBioPage/faculty_biopagenew.asp?ID=427 (last visited Nov. 6, 2009).

108. Bergman et al., *supra* note 104, at 549.

109. In the original version, there are three phases to the exercise. The first phase allows the participants to watch as the first participants builds their structure and then copies it with no verbal instruction. This first phase illustrates how we learn using visual cues. The second phase is as described, but no information was given as to any manipulation of the blocks sizes or colors. The third phase of the original exercise involves an additional participant who is allowed to ask questions of the builder as she is building the structure to ask for clarifying details but who also is not allowed to see the actual "building" going on. *Id.*

110. *Id.*

111. I have developed courses in Tribal Court Practice Seminar, Law of Indigenous Peoples, and Comparative Law: Understanding Method and Theory. I have used the block exercise in each course to illustrate the use of language, culture, and context to students. I have also used the exercise when guest lecturing in the Alternative Dispute Resolution course to highlight possible miscommunication or undercommunication issues that could arise in that context and then underscore language and cultural considerations.

112. This is particularly effective in teaching interviewing skills in the clinical setting, but also asks student to consider the role that culture plays in subtle language differences and how that might impact their fact gathering.

not share the student's cultural background.

Next, I ask my students to reflect on whether such familiar concepts as family structure have the same meaning across cultures. I ask them whether legal systems are generally the same or whether they fundamentally differ. I ask them whether they believe that the words for maternal and paternal grandmother or grandfather are the same or different in other languages. For instance, in the Navajo language the word for grandmother on the mother's side, *amá sání*, is different than the word for grandmother on the father's side, *análi*.¹¹³ The students will often make the connection when I ask them if they use "grandma" or "nana" interchangeably or whether they use those terms to refer to a grandparent on either their mother or father's side of the family. I ask them to consider other possible ways that confusion could develop if we do not use the culturally appropriate words or connections with our clients. I point out how important this is when interviewing or preparing their clients for trial (or for other court appearances). These topics usually generate a thoughtful discussion and the students usually begin to make these connections from their own life experiences.

Students are less likely to resist incorporating this consideration into their preparation for client interviews or trial when the block exercise is layered with the cultural context. Initially, students talk to me about being overwhelmed by all of these considerations and often ask, "how will I ever find the time to know everything about a possible cultural issue and at the same time prepare my case?" I explain that it is not important that we learn absolutely everything about the culture of a particular client, but that we know enough to ask the important questions.

For example, if the student is working on a family law case in a tribal court and a question arises about which family members could potentially support the client with transportation, babysitting, etc., the student does not need to fully understand possible complex clan structure; but the student does need to ask whether his or her client follows traditional tribal customs, whether the client wants to follow that structure or whether she wants to deviate from it. The student may need to inquire whether the same consideration should be given for care by one grandparent over another because tribal custom provides a hierarchy. By demonstrating that good lawyering requires them to broaden the context of their inquiry when working with clients to include a cultural context, most students seem willing make those adjustments.

B. Everything Old is New Again: Customizing Materials

Video and film are excellent tools with which to illustrate legal points. This technique has long been used in the law school classroom where it has

113. GARTH A. WILSON, CONVERSATIONAL NAVAJO DICTIONARY: ENGLISH TO NAVAJO, CONVERSATIONAL NAVAJO PUBLICATIONS 70 (1989)

often proven effective.¹¹⁴ For instance, in one of our first large group clinic classes on client interviewing we show six minutes from the film *Philadelphia*.¹¹⁵ This clinic class is the first substantive class following clinic orientation and is effective in opening up a preliminary dialogue with the law students about the dos and don'ts of their first live client interview.

Because this technique was successful in helping students to develop their general client interviewing skills, I hoped to find something similarly effective that could be used to illustrate effective and culturally competent interviewing techniques. I was aware that other disciplines, such as social work,¹¹⁶ medicine,¹¹⁷ and psychology,¹¹⁸ have an established history of incorporated developing cultural competency skills into their course curriculum. Professor Mark Kaufman, in the Department of Social Work at Washburn University,¹¹⁹ offered me a video the department uses in their courses.¹²⁰ This video contains a simulated interview between a social work therapist and a male African American patient. The actors, although not professional, created an effective and realistic simulated therapy session. In the video, the therapist asks a series of pertinent therapeutic questions which the client attempts to answer. A believable tension is created between the social work therapist and the patient when it becomes clear that the therapist is not relating well to his patient's cultural background. Rather than overcoming this miscommunication, the patient demonstrates an increased reluctance to answer follow up questions, only compounding the miscommunication.

When watching the video, the law students could sense the discomfort between the therapist and the client, and made tentative suggestions about what went wrong in that interview. But when asked how this might relate to their interviewing experience, they were not able to switch the hypothetical scenario

114. See, e.g., Philip N. Meyer & Stephen L. Cusick, *Using Non-Fictional Films as Visual Texts in the First-Year Criminal Law Course*, 28 VT. L. REV. 895 (2004) (discussing the use of non-fiction films in authors first-year criminal law courses).

115. PHILADELPHIA (TriStar Pictures 1993).

116. See e.g., DOMAN LUM, *CULTURALLY COMPETENT PRACTICE: A FRAMEWORK FOR UNDERSTANDING DIVERSE GROUPS AND JUSTICE ISSUES* (3d ed. 2006).

117. See, e.g., H. Jack Geiger, *Racial Stereotyping and Medicine: The Need for Cultural Competence*, 164 CAN. MED. ASS'N J. 1699 (2001) (discussing the importance of cultural competence in the medical profession).

118. Stanley Sue, *In Search of Cultural Competence in Psychotherapy and Counseling*, 53 AM. PSYCHOLOGIST 440 (1998), available at <http://data.psych.udel.edu/abelcher/Shared%20Documents/6%20General%20Diversity%20Issues%20%2815%29/Sue.pdf> (discussing the impact of cultural competence in psychotherapy and counseling).

119. Professor Kaufman is an Associate Professor at Washburn University. In addition to being a Licensed Specialist Clinical Social Worker (LSCSW) and a Licensed Clinical Marriage and Family Therapist (LCMFT), he is also an attorney licensed to practice law in Missouri. Washburn University, Faculty & Staff- Mark Kaufman, <http://www.washburn.edu/main/sas/social-work/faculty-and-staff/kaufman-mark.html> (last visited Nov. 6, 2009).

120. *The Cross Cultural Therapeutic Alliance: The African American Client* (Menninger Video 1994) (on file with author).

from the social worker-patient relationship to the lawyer-client relationship. The students were not able to relate the social work therapist's role to their own as the lawyer-interviewer and fact gatherer, nor were they able to see how the role of culture might complicate their own client interviewing and their case theory and development.

My colleague, Professor Lynette Petty,¹²¹ and I considered making our own video to customize our approach so that it mirrored a clinic student's interview and case scenario. We wanted to create a vignette that law students could relate to, so we decided to make a video that depicted a law student interviewing a new client in a clinic setting. There is a history of the use of film and video use in law school classes.¹²² We wanted to create a script for the video that was based on an actual clinic experience in which a cultural issue arose in a clinic case. The idea was to illustrate an issue that affected the student attorney's ability to effectively communicate with the client and show how that communication breakdown affected the case outcome in some way. Professor Petty chose a scenario based on a case involving a Mexican immigrant family. I wanted to make sure to create a video vignette that involved Native American clients.

C. "I Have Blankets"

I based the script I developed¹²³ on a bankruptcy case that came to the clinic program at UNM in 2003.¹²⁴ The clients came to the Economic Development Clinic section, which at that time was supervised by Professor Nathalie Martin.¹²⁵ Professor Martin approached me about the case, involving a Navajo couple that had asked the clinic to assist them with completing

121. Professor Petty's clinic section focuses primarily on child-in-need of care (CINC) cases. In her section, students often encounter communication issues with clients whose first language is not English. Professor Petty created a vignette that focused on interviewing the mother of child who was the subject of a CINC petition, and who did not understand the ramifications of not sending her child to school, and the frustration of the clinic student who was unable to get important information across to the mother.

122. Over the years, a number of creative law professors have made use of film and television in order to teach problem solving, practical skills, develop professional skills, as well as challenging the traditional roles of lawyers in our society. See Pearl Goldman, *Legal Education and Technology II: An Annotated Bibliography*, 100 LAW LIBR. J. 415, 436-38 (2008) (listing a number of scholarly articles that explore the use of film and television clips in doctrinal and seminar courses, such as: criminal law, evidence, negotiation and mediation, and contracts).

123. Scripts and copy of the recording are on file with the author.

124. See Nathalie Martin, *Poverty, Culture and the Bankruptcy Code: Narratives from the Money Law Clinic*, 12 CLINICAL L. REV. 203, 221 (2005) (verifying that Professor Martin was working with Professor Organick during a Navajo bankruptcy filing).

125. In addition to the doctrinal courses she teaches at UNM, Professor Nathalie Martin has taught in the Economic Development Clinic (Business and Tax) on several occasions. University of New Mexico School of Law, Faculty- Professor Nathalie Martin, <http://lawschool.unm.edu/faculty/martin/index.php> (last visited Nov. 4, 2009).

bankruptcy forms in advance of an upcoming hearing.¹²⁶ At that meeting, the students, along with Professor Martin and I, helped the clients complete a list of debts and assets for one of the bankruptcy schedules.¹²⁷ As the students asked the clients about their list of assets, the clients repeatedly explained they had Pendleton blankets and gave the quantity.¹²⁸ The students and Professor Martin explained that the clients could move the blankets into the household goods column but what they were working on at the moment was listing the couple's assets. When asked again to list their assets, the couple reiterated the blankets. Professor Martin described her frustration with the couple, believing that they were not being forthcoming about their assets. She did not understand the importance of the blankets to her clients. To the Navajo couple, the blankets were extremely valuable as they are often given as payment to a medicine man or as important gifts or items for exchange.¹²⁹

This experience provided a profound learning experience for the clinic and the professors. The intrinsic value of the blankets was of more importance to the Navajo couple than any of the interviewers could comprehend, viewing them through a utilitarian Western lens. I ultimately titled the recording *I Have Blankets*. For my clinic students at Washburn, I wanted to try to recapture how well-meaning and hard-working students (and their supervisors) can miss potentially important and culturally relevant moments if they have not had the benefit of at least some basic cultural competency training.

In working toward developing quality teaching materials, we should not overlook the time saving value in reshaping already existing ideas and methodology to fit our particular needs. Revamping existing ideas allows us to use a proven methodology and provides a framework for creating our own materials. This can cut the time it would take to invent something from scratch. It also allows more time to custom fit the project to our needs.

The creation of *I Have Blankets*, from drafting the script to taping the interviews with the student actors, took a total of approximately eight hours.¹³⁰ Though additional administrative time was involved in recruiting law student "actors," it was relatively minimal. We filmed the video in our clinic interview rooms on a Saturday morning with the help of our classroom teaching

126. See Nathalie Martin, *supra* note 124, at 220-21.

127. *Id.*

128. *Id.*

129. *Id.*

130. Drafting the script took only a couple of hours because the "script" was readily available inside my head—it came from personal experience. I spent an additional couple of hours reviewing the script with my fellow clinicians and then following up on revisions. It was important to ensure the salient points were neither too subtle nor too obvious for the students. As soon as the final script was completed, a series of discussion questions were generated to help facilitate their thinking. These questions were essentially done side-by-side with the review question. The actual taping took place on a Saturday morning. The technology technician completed the editing and polishing of the final product but this did not take any additional time on the professor's part.

technology specialist. Over the course of a Saturday morning, we created a customized video to which our law students could relate.¹³¹

Using film or video to highlight a particular concept in the classroom is enormously helpful. It is critical to do so in tandem with a class that introduces students to the role that culture plays in their work as lawyers. In my view, it must be done in conjunction with an introductory class on developing cross-cultural competency. If the goal is to help students identify barriers that impede their ability to be effective lawyers,¹³² then it is also necessary to provide room for reflection.¹³³ The reflective learning process is a core tenet of clinical education.¹³⁴ When we ask students to engage in learning to be a lawyer from an entirely new frame of reference and to consider the cultural component in their work and possibly with their clients, we are asking a lot. We are not, however, asking more than they are capable of.

To overcome some of the challenges of introducing these new concepts of teaching culture and the requirement of new lawyering skill sets, I use everything in my arsenal to help get the point across. Although this class has taken a number of different forms over the years, one of the constants is that I do not show *I Have Blankets* on its own. I show the video in combination with pertinent readings. The first article I have students read is written from the perspective of a clinical psychologist.¹³⁵ The article, *Cross-Cultural Considerations in Custody and Parenting Plans*, provides a multidisciplinary view of the role culture plays when experts are asked to assist the court in making important custody determinations. The article refers to a number of actual scenarios describing issues that arose in that clinical setting when children from a variety of cultural backgrounds were the subject of custody and parenting plan disputes.¹³⁶ Dr. Samuel Roll highlights important cross-cultural considerations that are necessary in assisting the court to determine the best interest of the child when dealing with custody or parenting plans.¹³⁷ The scenarios in the article are varied, but they include two that address Native American children.¹³⁸ While I address questions about developing a culturally sensitive custody and parenting plan generally, using the scenarios about native

131. Professor Petty and I were helped greatly by our Classroom Teaching Technology Librarian, Glen McBeth. Mr. McBeth set up all of the recording equipment, and assisted with the lighting and camera direction. He also did all of the editing and post-production work on the final product.

132. See Bryant, *supra* note 28, at 50-52 (discussing the cognitive goals of cross-cultural theory).

133. See *id.* at 56-57.

134. Christine Zuni Cruz, *Toward a Pedagogy and Ethic of Law/Lawyering for Indigenous Peoples*, 82 N.D. L. REV. 863, 863 (2006).

135. Samuel Roll, *Cross-Cultural Considerations in Custody and Parenting Plans*, 7 CHILD & ADOLESCENT PSYCHIATRIC CLINICS OF N. AM. 445 (1998).

136. *Id.*

137. *Id.*

138. *Id.* at 446-47, 451-52.

children provides an opportunity to ask them whether these same considerations might emerge in a tribal court setting.

The second reading is a law review article that discusses the over-representation of the Native Alaskan population in the Alaska criminal justice system and how that system is incompatible with traditional culture.¹³⁹ This article is from the perspective of a former Alaska public defender who chronicles her journey as a new lawyer in rural Alaska and the cultural issues that emerge as she represents her native clients.¹⁴⁰ The author describes the structural aspects of the criminal justice system as well as the cultural norms in the Native Alaskan community that conflict with the adversarial legal system and how these norms affect all areas of the system, from bail to sentencing.¹⁴¹ I use this article to allow students to explore whether they can achieve social justice when a legal system is not equipped to grant a culturally-sensitive remedy. This can easily be expanded to discussions with native clients and other ethnic minority groups and the legal system.

I ask students to respond to questions about the readings online in advance of the class.¹⁴² Their answers are provided solely to the professors and are not posted to an online bulletin board. After reviewing student responses, I develop a new set of classroom questions so that important viewpoints and questions can be shared in the class in a way that is anonymous and non-judgmental.¹⁴³

D. Seminar Classes

Teaching in the comparative context requires us to teach our students about other legal systems.¹⁴⁴ In doing so, we must provide some cultural translation in the process.¹⁴⁵ This cultural translation must include an understanding of the entire cultural context of a given society to better

139. Rachel King, *Bush Justice: The Intersection of Alaska Natives and the Criminal Justice System in Rural Alaska*, 77 OR. L. REV. 1, 2-3 (1998).

140. *See id.* at 4.

141. *Id.*

142. Specifically, I ask students to think about Dr. Roll's article and to consider whether the lawyer has any obligation to develop a culturally sensitive custody or parenting plan. I ask them to think about the lawyer's role if his/her client is strongly opposed to the plan, and the possible benefits of creating such a plan to the legal system. In regards to the second article I ask students whether it is our obligation to develop a legal system that is more sensitive to cultural diversity.

143. Although I introduce these concepts broadly and in a larger group setting in the clinic, I always include articles on the impact of the lack of cross cultural considerations to Native American communities or involving Native American clients to the entire group. I then work in my small group class to further emphasize the importance of these considerations in their work in tribal courts during the semester. This allows for an ongoing discussion that is directly related to their clinical experience and provides additional opportunities for reflection.

144. *See* Edward J. Eberle, *The Method and Role of Comparative Law*, 8 WASH. U. GLOBAL STUD. L. REV. 451, 452 (2009).

145. *Id.* at 459.

understand how those forces shape existing law.¹⁴⁶ This necessarily includes the morals, customs, and belief systems of a society.¹⁴⁷ However, little pedagogy or methodology exists to help comparativists do this part well. Most legal scholars feel relatively comfortable doing a side-by-side comparison of legal systems, but they are unprepared to provide the cultural underpinnings of other legal systems.¹⁴⁸ Of course, when we speak about culture we are talking about entire belief systems, including language, religion, and history.¹⁴⁹ This is no small feat and it is, therefore, not surprising that we tend to avoid teaching culture even in a context where it is clearly essential.

I have taught a class on developing cross-cultural competencies in one form or another since I first began teaching in a clinical setting.¹⁵⁰ In 2004, one of my large group teaching assignments was to teach a class called "Developing Cross-Cultural Competencies." This clinic class had not been taught in the clinical program at Washburn prior to my arrival and I enthusiastically offered to introduce this topic to the large group at Washburn. I had co-taught¹⁵¹ a version of this topic while I was a visiting professor at the University of New Mexico School of Law (UNM) in 2002-03. I used my experience at UNM as a model for the class at Washburn. When I taught this class at UNM, Prof. Sedillo-Lopez and I used the article *The Five Habits: Building Cross-Cultural Competence in Lawyers*¹⁵² as a framework for developing the class. We gave the students a short section from that article, to read before class and asked them to be prepared to discuss "principles" during class.

Professor Sedillo-Lopez and I outlined the Five Habits in class and used the article to encourage students to think about each of the five habits. The article introduces skills that help prepare lawyers for practicing in a cross-cultural context.¹⁵³ It includes ways the lawyer can identify "cultural differences and commonalities;" explores client behavior by considering "alternative explanations" for client actions; helps to identify issues in communication based on cultural disconnect in order to have more effective

146. *See id.* at 452.

147. *Id.*

148. *See id.* at 458 (asserting that comparativists must become immersed in the "political, historical, economic, and linguistic contexts" that shape legal systems, and the need to use a multidisciplinary framework, such as those provided by anthropologists and archeologists in order to get at the "substrata of data" that are inherent in a given culture).

149. *Id.* at 472.

150. From 1996-99, I taught as either an instructor or adjunct in the clinical program at UNM while working on a grant-funded project I co-directed with my colleague, Leslie Mansfield, called the Miners' Legal Resource Center. Students in the clinic represented clients from northern New Mexico, southern Utah and Colorado, as well as a number of clients on the Navajo Reservation in New Mexico and Arizona.

151. I co-taught this class with Antoinette Sedillo-Lopez one semester and with April Land in a subsequent semester.

152. *See* Bryant, *supra* note 28.

153. *Id.* at 40-50.

cross-cultural communication; and encourages the lawyer to reflect on his or her biases and stereotypes that play a role in interfering with effective lawyering.¹⁵⁴ We encouraged the students to share whether and how those some of situations explored in that article might have had some resonance in their clinic experience. Our goal was to encourage students to consider the role that culture might play in the day-to-day interaction they had with their clients and how it would affect their lawyering skills. The classroom discussion went well and I came away from that experience thinking “that wasn’t so hard.” Overall, the students were engaged in the discussion and did not appear to resist the material.

The next semester at UNM, I taught this course with Professor Carol Suzuki. We began the class a bit differently, by using a social science model that conceptualized cultural competency on a continuum. The model illustrates the continuum as a straight line with cultural destruction on one end of the continuum and cultural competence on the opposite end.¹⁵⁵ We asked students to give us their understanding of the competency levels on the continuum and worked with them to understand the essential elements for developing cultural competency as an individual and as an institution. I still use the model, which is effective for drawing out thoughtful insights from students. When this is used in tandem with the readings, it helps provide a framework for further and more in-depth discussion.

E. Barriers to Acceptance

The overall concept of teaching culture in the law school classroom is met with resistance from the institution, professors, and students. The question is, how do we overcome that resistance? Professors Francis Wang and Laura Young, have employed a cross-cultural psychology tool to measure the differences and outcomes of their three-week summer International Business Transactions Course.¹⁵⁶ They have established a model to assess cultural competence similar to one used to describe the five stages of death and dying.¹⁵⁷ They categorize the path to cultural competence as being comprised of two ethnocentric and ethnorelative phases.¹⁵⁸

The first three stages of intercultural sensitivity are ethnocentric, that is, they evolve around a student’s intercultural experience (or lack thereof, as the

154. *Id.*

155. *Id.* The handout we used asks, “Where are you on the Cultural Competency Continuum?”

156. Francis S.L. Wang & Laura W.Y. Young, *Cultural Differences and Legal Perspectives: Measuring Intercultural Interactions and Outcomes at the Summer Law Institute, Kenneth Wang School of Law, Suzhou, China*, IALS CONFERENCE: EFFECTIVE TEACHING TECHNIQUES ABOUT OTHER CULTURES AND LEGAL SYSTEMS, MONTREAL, CANADA, May 30, 2008, 53, 55-56, <http://www.ialsnet.org/meetings/assembly/MasterBookletMontreal.pdf>.

157. *Id.* at 56.

158. *Id.*

case may be).¹⁵⁹ These stages include denial, defense, and minimization.¹⁶⁰ The denial stage is psychological or physical isolation or avoidance of the other culture.¹⁶¹ The defense stage is marked by recognition of cultural differences, but not in a positive way.¹⁶² This phase is marked by the perception that one's culture is the only legitimate one.¹⁶³ The third stage in the ethnocentric phase is minimization.¹⁶⁴ This phase minimizes or "homogenizes" all cultural differences.¹⁶⁵

The ethnorelative phase is concerned with the way a student views their world vis-à-vis other cultures.¹⁶⁶ This stage is also comprised of three stages: acceptance, adaptation, and integration.¹⁶⁷ The acceptance stage demonstrates acceptance of other cultures and a curiosity and respectful attitude toward cultural differences.¹⁶⁸ The second ethnorelative stage is adaptation.¹⁶⁹ The adaptation stage is marked by the ability to appreciate the culture of others.¹⁷⁰ The last stage is integration.¹⁷¹ Integration is noteworthy because in this phase individuals are able to move freely between cultural perspectives.¹⁷² Although the authors recognize their study results are preliminary, Wang and Young believe their research suggests that cultural sensitivity "can be fostered in a simulated real world legal environment where students from different legal and social cultures must work with each other."¹⁷³

Although Professors Wang and Young applied this theory to law students in the context of a summer study abroad law school programs, it is easy to see how it could be used to consider intercultural sensitivity or competence in institutional settings. Using this kind of research is informative to show how students can overcome barriers to developing cross-cultural competencies and it provides a framework for institutions to understand those barriers and work toward overcoming them.

159. *Id.*

160. *Id.* at 56-58.

161. *Id.* at 56. As the authors note, "[t]his is commonly observed with foreign students on University campuses." *Id.* at 57.

162. *Id.*

163. *Id.*

164. *Id.* at 58.

165. *Id.*

166. *Id.* at 58.

167. *Id.* at 58-60. The first part of the authors' two-part theory is that American law students saw themselves more individualistically than their Chinese counterparts, and as a result, American students tended to assume individual had more control when making legal judgments than Chinese students, "who tended to assumed individuals less ability to act on individual free-will." *Id.* at 60.

168. *Id.* at 58.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 61.

IV. CONCLUSION

Teaching culture in the law school classroom is enormously challenging. Teaching culture to law students in a clinical setting poses additional challenges in that we are not solely teaching the theoretical components of cultural competency, we are asking students to put them into practice. Law schools currently do not provide an effective framework for students to do this. By introducing tribal law into the curriculum, law schools begin the process of introducing students to the cultural component of legal theory and practice in culturally distinct communities. Law schools can begin this process by teaching the three-sovereign system endorsed by Justice O'Connor. In addition, law schools should consider ways to provide a cross-cultural practice opportunity such as practice in tribal communities. *Best Practices* provides a framework for developing an overall methodology for creating an institutional model that supports inclusion of this topic across the curriculum. It is up to us, as legal educators, to ensure that this happens.