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INDIAN LAW AND THE MINER'S CANARY: THE SIGNS OF POISON GAS

The Fiftieth Cleveland-Marshall Lecture*

RENNARD STRICKLAND**

My title "Indian Law and the Miner's Canary" comes from an oft quoted statement of Felix Cohen, the Blackstone of contemporary American Indian law and the father of the *Handbook of Federal Indian Law*. My Indian law students swear that I make them memorize the quote and that I have them recite it as a choral reading. That isn't quite true, but it isn't a bad idea. Perhaps next year. Soon after the Second World War, Cohen, looking back on the Nazi holocaust in the context of American society, wrote: "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians . . . reflect the rise and fall in our democratic faith."¹

* This essay is based on the Fiftieth Cleveland-Marshall Lecture and is essentially reprinted as delivered at Cleveland State University on April 17, 1991.

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¹ Felix S. Cohen, *The Erosion of Indian Rights, 1950-53: A Case Study in Bureaucracy*, 62 YALE L. J. 349, 390 (1953); FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* at v (Rennard Strickland ed., 1982).

In this fiftieth Cleveland-Marshall lecture I want us to look at some present day examples of Cohen's contention that our treatment of Indians — Indian law itself — acts as a barometer, a miner's canary for society. I want to do this by first looking in detail at the Wisconsin Indian Fishing Rights question and then very briefly at several recent Supreme Court cases in the field of Indian Law particularly the *Smith*² and *Duro*³ cases. I believe they do not bode well for any of us. Indeed, I considered changing the title to "Pardon Me, My Canary Died," but I am not quite ready to make that declaration.

One of the last series of public addresses that I delivered was the Langston Hughes at the University of Kansas in 1985. They bore the title "Genocide-at-Law" and argued that "[i]n the nineteenth century, law was the principal tool of genocidal extermination."⁴ I then contended that "in the twentieth century, law had become the major weapon in the preservation and extension of Native American culture and economy."⁵

At the conclusion of the Langston Hughes Lectures I raised the question of the future role of law and its relationships not only to Indian values but also, indeed, to the shared inherited traditions of Western civilization as well. The Langston Hughes Lectures concluded:

I would love to close on an optimistic note, but I am not sure that is possible. We are clearly in a cataclysmic phase in the saga of American civilization. There is little in the progressive tradition of the last 200 years as relevant for the next 200 years as the experience of the American Indian tribes, whose material culture was annihilated, who were subjected to the most vicious forms of legalized genocide, but who turned inward and fostered the spirit of their native tradition.

We stand, I think at a crucial juncture in the history of this nation, even of civilization. The stakes are high, unbelievably high — perhaps even the survival of the best of our inherited tradition⁶

Six years later, we begin the Cleveland-Marshall Lecture at the point at which the Langston Hughes Lectures closed, looking at developments in this cataclysmic phase not only of Indian law but, indeed, of western civilization. Fears barely hinted at in 1985 have become a nightmarish reality. In the field of Indian law, we are witnessing the collapse of twentieth century law as the weapon of preservation and a return to the nineteenth century use of law as the weapon of genocidal homogenization. If, as Cohen argued, treatment of the Indian serves as the Miner's Canary,

² Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

³ Duro v. Reina, 495 U.S. 676 (1990).

⁴ Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 715 (1986).

⁵ *Id.*

⁶ Rennard Strickland, Langston Hughes Lectures Address, The University of Kansas (1985).

this collapse is significant far beyond the Indian community. As the American Jewish Congress, joined by such ideologically divergent groups as the Episcopal Church, the Baptist Joint Committee on Public Affairs, and the Evangelical Churchmen's Association along with almost eighty other organizations recently concluded with reference to an Indian case known as *Smith II*:⁷ "The implications for this gutting of the Free Exercise Clause are far reaching for both institutions and individuals."⁸

Let us begin with a look at the Native American Community at the beginning of the 1990's. Were I selecting my title now, rather than last fall, I would probably choose something like "Dances With Lawyers: Native Americans, the Supreme Court, and the Modern Medicine Men." For surely, the Kevin Costner film *Dances With Wolves* has stirred, once again, an awareness of what history calls "the plight of the American Indian."⁹

Interest in things Indian seems to run in cycles. Vine Deloria, Jr., the Sioux scholar, lawyer, and philosopher, has suggested that this surfaces every twenty years or so. He is right, at least as far as the filmmakers and book publishers are concerned. Looking back twenty years to 1971, for example, the Hollywood films *Soldier Blue* and *Little Big Man* were recasting the Vietnam War in terms of the Plains Indian experiences of the nineteenth century. Two breakthrough books by Native Americans also appeared at about that time: Scott Momaday's Pulitzer Prize winning novel *House Made of Dawn* and Vine Deloria, Jr.'s own *Custer Died for Your Sins*. Twenty years later, in 1991, *Dances with Wolves* is winning motion picture awards including the "Best Picture" Oscar and producing long lines at the box office; ABC has mounted *Son of the Morning Star*, a miniseries about Custer, the Battle of Little Big Horn and the Plains' Wars. And at the local bookstores there are, once again, two important works by Native Americans. The novel is James Welch's *The Indian Lawyer*; the non-fiction study is one by a law professor — Robert A. Williams' *The American Indian in Western Legal Thought: The Discourses of Conquest*.

Welch's 1990 novel *The Indian Lawyer*, provides a good starting point for this lecture. Welch, a Blackfoot-Gros Ventre, also pictures the Indian in the canary role. His novel, *The Indian Lawyer*, is about the casting of Native American issues in a western legal mold. In truth, *The Indian Lawyer* is about an even larger question: the casting of the fate not just of the Native American, but of all mankind into formalistic and legalistic equations. Early in Welch's novel, Yellow Calf, the Stanford educated, Montana born Indian lawyer, is asked "What do you believe in?"¹⁰

⁷ *Employment Div. v. Smith*, 494 U.S. 872 (1990).

⁸ Report on the Decision of the United States Supreme Court in *Employment Division v. Smith* 19, American Jewish Congress, Commission on Law and Social Action (April 17, 1990).

⁹ *Dances With Wolves*, (Orion Pictures, 1990).

¹⁰ JAMES WELCH, *THE INDIAN LAWYER* 51 (1990).

Sylvester Yellow Calf answers, "Well, certainly Indian issues, water rights, mineral rights on reservations, alcoholism, family issues."

"What else?"

"The environment, wilderness, preservation. . . ."

"Okay, what else?"

"Generally, the problems . . . people face in gaining a voice. . . ."¹¹

Yellow Calf's political advisor says to him:

"[The State] is becoming one big reservation and all the people in it are the Indians. They make noises about self-determination, but we know who, up to this point, determines what's good . . . not the Indians, not the people . . . , but the special interests, the giants, and their backers . . ."

"This country is turning in a bad direction, Sylvester. Those people you want to appeal to . . . they are on the outside looking in."¹²

In a way, it seems to me, that most of us — Indian and non-Indian alike — are on the outside looking in. In the spring of 1991 when the Heard Museum in Phoenix, Arizona mounted a national touring show of twentieth century American Indian painting and sculpture it chose *Shared Visions* as the title. The museum selected this title because the experience of the Native American in the eighteenth and nineteenth century has direct relevance to the experience of the world at large as we move from the twentieth to the twenty-first century.¹³

As the nineteenth century drew to a close and the twentieth century unfolded, the Native American was the subject of much artistic interest including one of Frazer's monumental sculptures, called *The End of the Trail*. In truth, far from being a people on the road to disappearance, the contemporary Native American is not at the "end of the trail" but one of the fastest growing groups in the United States. Against monumental odds, Indian people and Indian culture survived the nineteenth century's historic genocidal thrusts. As we move to the twenty-first century, the Indian is very much alive: a surprise to many who believe in the myth of the end of the trail and the passing of the "Noble Red Man."

The preliminary 1990 Bureau of the Census Report shows that there are more than two million Native Americans living in the United States.¹⁴ Approximately half of this number, according to the Bureau of Indian Affairs (BIA), live on or near Indian Reservations, Trust Land, or Native Villages. The other half are urban Indians many of whom live in major cities such as Los Angeles, Chicago, Dallas, and even here in Cleveland.¹⁵ Approximately ninety percent of the BIA reservation Indian population

¹¹ *Id.*

¹² *Id.* at 53-54.

¹³ *Shared Visions: Native American Painting and Sculpture*. (Phoenix: The Heard Museum, 1991).

¹⁴ Dirk Johnson, *Census Finds Many Claiming New Identity: Indians*, N.Y. TIMES, March 5, 1991, at A1, A16.

¹⁵ *Id.*

is concentrated in eleven states.¹⁶ The largest concentrations by state are in Oklahoma, New Mexico, Arizona, and California. Ohio, by contrast, had one-tenth of 1% of the total U.S. Indian population or 12,239 in the 1980 census.¹⁷ On the 1990 census, the Ohio number has risen to 20,358 or a 66.3% increase in the number of self-declared Native Americans.¹⁸

Statistics hide the vast diversity of life and lifestyles of the Native American. At law or in life, there is no such thing as *the typical Indian*. The contemporary American Indian is as varied as the Kansas Kickapoo, the Florida Seminole, the New York Mohawk, the Dakotas' Sioux, the New Mexico Santa Clara, the Arizona Navajo, and the Oklahoma Cherokee, not to mention the Alaskan Village native. The Bureau of the Census found American Indians living on 278 reservations and Alaskan Natives living in 487 villages.¹⁹ Some groups and reservations are large. The Navajos are approaching 250,000; the Cherokees more than 125,000.²⁰ Together, the Cherokee and the Navajo constitute almost a fifth of the American Indian population.²¹ And yet 35% of all reservations and villages have fewer than 100 persons in residence.²²

The most encouraging aspect of the census figures is that this Indian population is young — quite young in comparison to the rest of the population. Almost a third of the Indian population is under fifteen years of age while only about a fifth of the non-Indian population is under fifteen.²³ At the other end of the age scale, only 7.6% of the Indian population is over sixty years, while 15.8% of the general population is sixty or older.²⁴ The median age for all Indians is twenty-three.²⁵

And yet despite this encouraging news, the evidence of the "plight" of the American Indian remains appalling. The red man continues to be the most poverty stricken and economically deprived segment of our population, a people whose "plight" dwarfs the situation of any other American, even those in the worst big city ghettos. The statistics are long, cold, and hard. They are overpowering. Gathered together, the facts establish that "the first American has become the last American . . . with the opportunity for employment, education, decent income, and the chance for a full and rewarding life."²⁶

Whatever index is chosen to measure Indian conditions, the statistics are tragic evidence of our failure. The income level, health conditions,

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ PRESIDENTIAL COMMISSION ON INDIAN RESERVATION ECONOMIES, REPORT AND RECOMMENDATION TO THE PRESIDENT OF THE UNITED STATES 83 (1984) [hereinafter PRESIDENTIAL REPORT].

²⁰ SOVEREIGNTY SYMPOSIUM IV at 24 (1991) [hereinafter SYMPOSIUM].

²¹ *Id.*

²² *Id.*

²³ PRESIDENTIAL REPORT, *supra* note 19, at 81.

²⁴ *Id.* at 81-82.

²⁵ *Id.*

²⁶ Kennedy, *The American Indian: An American Tragedy*, THE WASHINGTON REPORT, March 7, 1968.

housing standards, unemployment rate, educational level, and statistics of crime and juvenile delinquency all establish, as the Presidential Commission concluded, "American Indians . . . suffer . . . indignities that few groups in America suffer in equal measure."²⁷ An Indian born in the twentieth century will live a life not significantly longer in span than his ancestor of 500 years ago.²⁸ Although the last decade has brought considerable improvement, the Indian is still left out of many of the advances of modern medicine. The United States population as a whole will live one-third longer than the American Indian.²⁹

The Indian health level is the lowest and the disease rate the highest of all major population groups in the United States.³⁰ The incidence of tuberculosis is over 400% higher than the national average.³¹ Similar statistics show that the incidence of strep infection is 1,000% higher, meningitis is 2,000% higher, and dysentery is 10,000% higher. Death rates from disease are equally shocking when Indian and non-Indian populations are compared.³² Influenza and pneumonia are 300% greater killers among Indians.³³ Disease such as hepatitis are at epidemic proportions with an 800% higher chance of death.³⁴ And the suicide rate for Indian youths ranges in many reservation areas from 1,000 to 10,000 times higher than for non-Indian youths; adult Indian suicide has also become an epidemic.³⁵ Mixed-bloods, like myself, too often come to believe that we are exempt from these common fates because of our light skin, education or standard of living: until it comes home, as it did in our family, when two summers ago my brother took his own life.

On many reservations, several generations of Indians are housed in two or three-room shacks or hogans which contain no plumbing or bathing facilities. Between 50,000 and 57,000 Indian homes are considered substandard.³⁶ Most of these cannot be repaired. These dwellings are not only inadequate in size but unsanitary. For example, over 88% of the homes of the Sioux in the Pine Ridge area have been classified as substandard dwellings.³⁷

²⁷ Richard Nixon, *A Better Day for the American Indian*, Omaha, Nebraska (Sept. 27, 1968) advance speech text.

²⁸ Strickland, *supra* note 4, at 717. See generally, RUSSELL THORNTON, *THE AMERICAN INDIAN HOLOCAUST AND SURVIVAL* (1990).

²⁹ CHARLES WILKERSON, *FEDERAL INDIAN LAW* 10 (1979).

³⁰ Strickland, *supra* note 4, at 717.

³¹ FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON INDIAN HEALTH, Task Force Six, 41-55 (1976).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Indian Housing Act of 1988: Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance, and Urban Affairs*, 100th Cong., 2nd Sess., 29 (1988) (statement of Wayne Chico, National American Indian Housing Council).

³⁷ Thomas B. Williams and Robert D. Leatherman, *INDIAN HOUSING IN THE UNITED STATES* 31-32 (1975).

Ironically, Indian tribes still possess vast resources capable of substantial economic development. The 1980 census reports that 408,000 Indian persons were living below the poverty level.³⁸ This is more than 25% of all American Indians, as compared with 12.4% of the non-Indian population.³⁹ The unemployment rate on reservations is 25.6% and the median Indian's income is 16% lower than the national average.⁴⁰ The full 1990 figures have not yet been released but the preliminary data suggests it will be of an even greater magnitude.⁴¹

Compare this vast poverty with the great richness of undeveloped Indian resources. In his eloquent essay, *Shall the Islands Be Preserved?*, Professor Charles Wilkerson inventories some of these tribal assets:

The stakes are much higher than is commonly realized. The reservation system comprises some fifty-two million acres — about 2 1/2% of the entire surface area of the United States. Add to that the forty million acres which will be transferred to Alaska natives . . . as well as unresolved land claims in many states The tribes have large mineral holdings: 10% of the nation's coal, 10% of the oil, and a minimum of 16% of the uranium. In addition to valuable recreation land, Indians own 1 1/2% of the country's commercial timber and 5% of the grazing land. And reservation Indians have first call on the water in many rivers in the parched western half of the country.⁴²

The tremendous potential for the development of Indian natural resources has only recently been fully appreciated. In a report to the Senate Committee on Energy and Natural Resources (then Interior and Insular Affairs), the General Accounting Office (GAO) stated that the estimate on oil reserves on 40 reservations in 17 states was approximately 4.2 billion barrels with gas resources at about 17.5 trillion cubic feet.⁴³ There was also an estimation of approximately 100-200 billion tons of identified coal reserves located on 33 reservations in 11 States.⁴⁴

[A] report by the Federal Trade Commission [shows] that Indian lands have the potential of containing more than one-tenth of the United States currently minable coal reserves Aside from the major Indian energy resources, there [is] a variety of other minerals of considerable value on Indian lands.⁴⁵

³⁸ PRESIDENTIAL REPORT, *supra* note 19, at 83.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See generally, Johnson, *supra* note 14.

⁴² Charles Wilkerson, *Shall the Islands be Preserved?*, 16 AM. WEST, 32-34 (May-June 1979).

⁴³ WILKERSON, *supra* note 29, at 16 (citing 1 Am. Indian Policy Review Comm'n, Final Report, 338-39 (1977)).

⁴⁴ *Id.*

⁴⁵ *Id.* at 16-17.

Felix Cohen, in one of his essays, posthumously collected and published in *The Legal Conscience*, recites the following parable:

A certain rich man was enjoying a banquet. As he sat at the groaning table he could see outside the window, at the door of his home, an old woman, half starved, weeping. His heart was touched with pity. He called a servant to him and said: "That old woman out there is breaking my heart. Go out and chase her away."

Something of the same attitude [Cohen continues] has characterized our attitude towards the Indians on our national doorstep [W]e have often disposed of them spiritually by denying their existence as a people, or by taking refuge in the Myth of the Vanishing Indian, or by blaming our grandfathers for the wrongs that we commit. In this way we have often assured ourselves that our national sins were of purely anti-quarian significance.⁴⁶

Dances With Wolves has once again proven the power of film to energize, to create public awareness. As a student of the history of cinema, there is a film which I wish I could compel theater owners to show as a required double feature with *Dances With Wolves*. The movie, which I suspect most of you have never heard of, is a short film called *Return of the Country*.⁴⁷ It was produced and directed at the American Film Institute by the full-blood Creek-Seminole Indian filmmaker Bob Hicks and stars the Seminole elder Woodrow Hainey. In it the tables are turned. There is a Native American President and a Director of the Bureau of Caucasian Affairs. Little white children are sent off to boarding school to remove them from the evil influence of their parents and home community. As one Indian, speaking at the Palm Springs Film Festival, put it: "The Moccasin is on the other foot."⁴⁸

Today, as we talk about Indian law, I encourage you to imagine yourself as a member of Hick's white minority in *Return of the Country*. Think of yourself as a person — or non-person — whose fate rests with the Bureau of Caucasian Affairs. You are in the hands of folks anxious to help you blend into the Indian mainstream and forget your old white ways.

One of my own great cinematic fantasies — and this tells you the sickness of my imaginary life — is to have Mr. Justice Scalia in a kind of reenactment of Martin Scorsese's 1983 film *King of Comedy*.⁴⁹ You may remember that this is a black comedy starring Jerry Lewis and Robert DeNiro. Scalia would not only have to view *Dances With Wolves* and Bob Hick's *Return of the Country*⁵⁰ but also the Chippewa author Gerald Vizenor's ironic film *Harold of Orange*⁵¹ which draws upon the traditional Indian Trickster mythology to explore the self-indulgent, ethnocentric

⁴⁶ FELIX S. COHEN, *The Legal Conscience* 264 (1960).

⁴⁷ *Return of the Country* (American Film Institute, 1982).

⁴⁸ Nick Ramus, Panelist, Palm Springs International Film Festival, January 10, 1991. See generally, A TRIBUTE TO NATIVE AMERICANS IN FILM (1991).

⁴⁹ *King of Comedy* (RCA/Columbia, 1982).

⁵⁰ See *supra* note 47.

⁵¹ *Harold of Orange* (Film In the Cities Production, 1985).

rationalization process of mainstream elites. Some cynics might suggest that the Vizenor film unfolds like a recent Supreme Court Decision.

As my first example of the presence of poisonous gas I would like for us to look at the treatment of Indians in and by the State of Wisconsin. Let us go back, back before there was a Wisconsin. Every year, for tens of thousands of years, the lakes of northern Wisconsin have slowly shed their winter covering of ice. As spring drives out the bitter cold, the walleye and muskellunge which live in those lakes celebrate this thawing by moving out of the depths and spawning in the clear, gravel-bottomed shallows. For hundreds of years people in boats, using spears, have taken some of those fish back to their families — a satisfying confirmation that another winter has passed. For these native people, the Chippewa, time is cyclical: the seasons pass and return, the fish spawn and then return. For centuries, the people themselves returned each spring to harvest fish — the seasons, the fish, and the people bound together in a continuing cycle dictated by nature.

Prevented by the State of Wisconsin from harvesting their fish for almost eighty years, the cycle has finally returned for the Chippewa; 150-year-old promises made in exchange for title to land are once again being kept. After years of enforced absence, the Chippewa again gather when the ice breaks up to fish from boats with spears.

But the soft, cyclical, pace of nature has been replaced by another, discordant way of measuring time. The peaceful harvest of fish by the Chippewa is threatened by non-Indians who barrage the peaceful fishers with rocks and insults, and who use large motorboats trailing anchors to capsize the boats of the fishers. Because of this, the State of Wisconsin has pressured the Chippewa to give up their ancient rights to fish off of their reservation, and has pressed them to do so immediately. This pressure has sometimes been applied indirectly, sometimes directly, but always upon the Chippewa. All because a small group creates disturbances in opposition to the Chippewa's federally recognized legal rights.

Even as we are gathered today, the Chippewa are preparing for yet another spring. Just as spring rekindles life, the Chippewa rekindle the hope that their neighbors will come to respect the reality of their sovereignty, their culture and their rights. Because this is the most violent and explosive example of 1991 Indian white confrontation, I want to look at the Wisconsin/Chippewa fishing dispute in some detail as a prime example of the miner's canary.

The area comprising the present State of Wisconsin became part of the United States with the establishment of the Northwest Territory in 1787; Wisconsin was established as a separate territory in 1836 and became a state in 1848. Although the United States signed its first treaty with the Chippewa in 1785,⁵² it did not seek significant land cessions from the

⁵² *Treaties and Agreements of the Chippewa Indians*, INST. FOR DEV. INDIAN LAW, at 3 (1973) [hereinafter *Treaties*]; see also, KAPPLER, *INDIAN TREATIES, 1778-1883* (1979). For a discussion of the clearly established legal import of treaties and the law regarding Indian hunting and fishing rights, see FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW*, 441-67 (1982), and CANBY, *AMERICAN INDIAN LAW IN A NUTSHELL*, 295-312 (1988).

Wisconsin Chippewa until 1837 when treaty commissioners, particularly Governor Henry Dodge of Wisconsin Territory, told the Chippewa that the U.S. desired the timber from their lands. Dodge told the Chippewa that under the proposed treaty they would be able to continue to cut timber, hunt, fish and live in the ceded lands so long as they did not molest white settlers. With that understanding several chiefs signed the treaty, which they believed to be simply an agreement of friendship, and gave their permission for non-Indians to cut timber.⁵³

In 1842 the Chippewa, along with several other bands, ceded almost all of their remaining territory.⁵⁴ Although the settlement of the ceded lands was peaceful, with almost no conflict between the Chippewa and the white settlers,⁵⁵ in 1847 the U.S. Government began a plan of resettlement of the Chippewa west of the Mississippi river. Pursuant to that policy, President Filmore, in 1850, signed a removal order which sought to expel the Chippewa, sending them to lands reserved in the West.⁵⁶

The territory which was ceded by the Chippewa became a major part of the new state of Wisconsin and in February, 1854, the Wisconsin legislature petitioned the President and Congress to create reservations for the Chippewa and to rescind the Removal Order of 1850. With the treaty of September 30, 1854, the Lake Superior Chippewa ceded the remainder of their land and agreed to reside upon the reservations set forth,⁵⁷ which are substantially the reservations occupied today by the Lac de Flambeau, the Lac Courte Oreilles and other bands of Chippewa. On their small reservations, the Chippewa were free to hunt and fish as they wished. However, when they attempted to exercise the off-reservation fishing, hunting, and timber rights reserved by them in the 1837 and 1842 treaties, they were harassed by the State of Wisconsin which began to strictly enforce state game laws against the Chippewa in 1908.⁵⁸

⁵³ This description of the Chippewas' understanding of the treaty of 1837 is taken from the findings of the District Court in *United States v. Bouchard*, 464 F. Supp. 1316, 1322-33 (W.D. Wis. 1978), and the U.S. Court of Appeals in *Lac Courte Oreilles Band, Etc. v. Voigt* (LCO I), 700 F.2d 341, 346-47 (7th Cir. 1983). The courts, in interpreting the 1837 treaty, obtained evidence as to what the Chippewa thought the treaty meant and the court's findings are now the legal facts.

⁵⁴ Treaty with the Chippewas, 7 Stat. 591, 591 (1842); see also, *Treaties supra* note 52, at 73-75.

⁵⁵ The LaPointe subagent, in 1847, examined the two reported acts of violence visited upon whites by Chippewa. In one the Chippewa was determined to be acting in self-defense, in the other the white was found solely to be in the wrong. The Commissioner of Indian Affairs wrote in his annual report that the Chippewa were extraordinarily peaceful and all conflicts had been traced "to the influence of the white man." Two years later the Commissioner noted an increase in conflict, but acknowledged that the sale of whiskey by whites to the Native Americans caused most of the problem. *Lac Courte Oreilles, Band, Etc. v. Voigt*, 700 F.2d at 345-46.

⁵⁶ Executive Order of Feb. 6, 1850 (unpublished — available through the National Archives).

⁵⁷ Treaty with the Chippewas, 10 Stat. 1109 (1854); see also, *Treaties, supra* note 52 at 78-82.

⁵⁸ Symposium, *supra* note 20, at 33.

In 1974 Frederick and Michael Tribble, two members of the Lac Courte Oreilles band, were arrested for spearfishing in the ceded territory. Following their prosecution, the Lac Courte Oreilles band⁵⁹ turned to the courts for a declaratory judgment that the Chippewa were able to hunt and fish in the ceded territory under the treaties of 1837 and 1842.⁶⁰ After the initial rejection of their arguments in the district court, the Chippewa appealed to the Seventh Circuit Court of Appeals, where the sanctity of the treaties was reaffirmed. In its *Voigt* opinion,⁶¹ the Seventh Circuit looked back to the understanding of the Chippewa at the time of the signing and found that the Chippewa had refused to sign any treaty which did not reserve to them rights to gather food and hunt in the ceded territory. The court, therefore, held that the treaties reserved usufructuary rights throughout the ceded territory and that the U.S. could not abrogate those off-reservation treaty rights.

The United States had gained immense wealth through the Chippewa treaties, which inured to the new state of Wisconsin. This wealth included: 100 billion board-feet of timber; 150 billion tons of iron ore; 13 billion pounds of copper; and 19 million acres of land.⁶²

⁵⁹ The Lac Courte Oreilles Band of Chippewa were the original plaintiffs; they were joined by the Red Cliff Band of Lake Superior Chippewa Indians, the Sokaogon Community/Mole Lake Band of Wisconsin, the St. Croix Chippewa Indians of Wisconsin, the Bad River Band of the Lake Superior Chippewa Indians, and the Lac Du Flambeau Band of Lake Superior Chippewa Indians. The court found that all plaintiff groups were successors to the Chippewa who signed the treaties of 1837 and 1842. *Lac Courte Oreilles v. State of Wisconsin (LCO IV)*, 707 F. Supp. 1034, 1036 (W.D. Wis. 1989).

⁶⁰ The appeals court stressed that the off-reservation usufructuary rights that it recognized were limited to exercise upon land which had not passed into private hands, doing so by "finding" that the Chippewa understood this to be so in 1938. *Lac Courte Oreilles, Band, Etc. v. Voight*, 700 F.2d at 341 n.14 (7th Cir. 1983). Judge Doyle felt that the appeals court did not have the jurisdiction to make this finding of fact and in a later ruling held that the Chippewa could, in fact, exercise their usufructuary rights on private lands if public lands were insufficient to support a moderate living. *Lac Courte Oreilles v. State of Wisconsin*, 653 F. Supp. 1420, 1432 (W.D. Wis. 1987). Despite this ruling the Chippewa have not expressed a desire to exercise their treaty-reserved rights on private land, without permission of the landowner. SYMPOSIUM, *supra* note 20, at 33 n.8.

⁶¹ *Lac Courte Oreilles v. Voigt*, 700 F.2d 341 (7th Cir. 1983). This is most popularly known as the *Voigt* decision, but is also referred to as *LCO I*. A subsequent clarification (*Lac Courte Oreilles v. State of Wis.*, 760 F.2d 177 (7th Cir. 1985)) is known as *LCO II*. Judge Doyle's decision upon remand, in which he set for the tribes' right to exercise the treaties free from state interference (except for conservation), is known as *LCO III* (653 F. Supp. 1420 (W.D. Wis. 1987)). Judge Crabb's first decision in the case, which established the legal standards for the permissible bounds of state regulation, is known as *LCO IV* (668 F. Supp. 1233 (W.D. Wis. 1987)). Her second opinion, *LCO V*, held that the tribes' modest living standard reserved in *LCO III* could not be met from the presently available harvest within the ceded territory (686 F. Supp. 226 (W.D. Wis. 1988)). The most recent Crabb decision, setting forth the tribes' walleye and muskellunge fishing rights, is known as *LCO VI* (707 F. Supp. 1034 (W.D. Wis. 1989)).

⁶² SYMPOSIUM, *supra* note 20, at 34.

In return the Chippewa received a few thousand dollars, a declining amount of food and a small amount of equipment. Of their original landholdings they retained only a few thousand acres of reservation and their hunting, fishing and gathering rights in the ceded territory.⁶³ It is ironic that, despite the immensity of the bounty received by the United States, the resources granted by the Chippewa were squandered.

The vast pine forests, which held the potential for a sustained yield and healthy economy, were cut. The massive scope of Wisconsin timber frauds shocked congressional investigators and federal inspectors.⁶⁴ The same strip-and-run techniques ravaged Wisconsin's mineral deposits for the benefit of steel companies, with little or no long-term benefit to Wisconsin. Largely unchecked angling exploitation of the walleye population led to the severe decline in the quality of fishing. Where the Wisconsin lakes once produced stringers of walleye,⁶⁵ 92.6% of today's fishermen report catching no walleye at all. Of the few successful anglers, 73.2% catch only one or two walleye,⁶⁶ even with today's improved gear and technique.

The economic distress of northern Wisconsin provides a fertile bed for the exploitation of fear and frustration. The leadership vacuum created by state inaction has been filled by groups with initials such as PARR, ERFE, and STA.⁶⁷ All of these groups focus their attention on the exercise of treaty rights, but use racist literature, hate-group organizing techniques and propaganda to convince non-Indians that their livelihood is threatened by Chippewa treaties. Their openly-distributed literature uses outright falsehoods ("Indian households receive free food, homes, medical care and \$20,000 per year in cash . . . Indians are allowed to kill hundreds

⁶³ David Wrone, *Economic Impact of the 1837 and 1842 Chippewa Treaties* 5 (1989) (unpublished manuscript, University of Wisconsin at Stevens Point).

⁶⁴ *Id.* at 6 (quoting *Report of the Public Lands Commission*, 58th Cong., 3rd Sess. 65-75 (1960)).

⁶⁵ Since the Wisconsin Department of Natural Resource (WDNR) has no reliable historic population estimates, this information is necessarily narrative. However, interviews with long-time residents universally supports the conclusion that fishing has declined in the last few decades.

⁶⁶ Undated WDNR Memorandum provided to authors. This table indicates that based upon a WDNR creel survey, 92.6% of the anglers on any given day catch no walleye. Of the remaining 7.4% of the anglers, 51.4% report that they caught one walleye, while another 21.8% caught two. Three walleye were caught by another 12.2%, while 5.1% caught four, and another 8% caught the bag limit of five walleye.

⁶⁷ Some of the more active groups in organizing anti-treaty and anti-Chippewa sentiment are Protect America's Rights and Resources (PARR), Stop Treaty Abuse (STA), and the now-inactive Equal Rights For Everyone (ERFE).

⁶⁸ These two blatant fabrications are contained in a brochure entitled *Wisconsin's Treaty Problems: What Are The Issues?* which is produced and distributed in mass by the Stop Treaty Abuse organization. This slick, authoritative-appearing brochure contains few statements of truth, but provides the doctrine underlying their organization. It's impact can be seen on the boat landings where many protesters' signs refer to the "\$20,000 per year handout," and the "Free Everything" that the Chippewa supposedly garner from the taxpayers. Of course, the true facts are that the Chippewa suffer from extreme poverty and receive

of eagles per year for sale in Europe”),⁶⁸ racial stereotypes and predictions of economic ruin to arouse anti-Chippewa activity. Dean Crist of the Stop Treaty Abuse group said:

You know, I was listening to [Ku Klux Klan leader] David Duke speak the other day, and he was good, very good What he was saying was the same stuff we have been saying. It was like he might have been reading it from S.T.A. literature.⁶⁹

The activities of these groups have been widely condemned by religious leaders,⁷⁰ chambers of commerce,⁷¹ and town governments. Even though STA founder Dean Crist openly admits that his organization’s goals are those of the Ku Klux Klan, Wisconsin continues to lend legitimacy to their activities. Governor Thompson told PARR, “I believe spearing is wrong, regardless of what treaties, negotiations for federal courts may say [sic].”⁷² The Governor has repeatedly stated that he sees no sign of racism in the protests in northern Wisconsin. The presence of hundreds of signs with threats of violence such as “Spear a pregnant squaw, save two walleye” suggest otherwise.⁷³ The stated goal of these groups is abrogation of federal treaties and the Wisconsin state government’s refusal to disclaim this policy feeds their efforts.

little public assistance; there are no federal payments for being an Indian. Their economic distress is one thing that they have in common with their non-Indian neighbors. For example, per capita income in the town of Lac de Flambeau totaled \$7,266, about 29% below the state average and 14% below the Vilas County average. WISCONSIN STATE JOURNAL, Feb. 4, 1990 at 14a (citing 1985 statistics). Indians do receive some health care through the federal Indian Health Service.

⁶⁸ WISCONSIN STATE JOURNAL, Jan. 14, 1990.

⁷⁰ The Lutheran Human Relations Association of America has been one of the most outspoken of the critics, producing a newspaper supplement which condemns the Citizens for Equal Rights Alliance, an umbrella group centered in Montana which works with anti-treaty organizations in 23 states, including many admitted white-supremacist groups and several of the Wisconsin anti-treaty organizations. The anti-treaty organizations have also been condemned by the Rev. William C. Diocese. The Wisconsin Conference of Churches, which is associated with more than 3,000 churches statewide, is a member of Honor Our Neighbor’s Origins and Resources (HONOR), a treaty support group which has condemned the goals and tactics of anti-treaty organizations. WISCONSIN STATE JOURNAL, April 8, 1990 at 3g.

⁷¹ Eleven northern chambers of commerce, including the Minocqua Chamber of Commerce, issued a joint statement which condemned the goals of the anti-treaty organizations (without referring directly to the organizations) and stated that “continued interference with the exercise of Treaty Rights threatens the social and economic balance of Northern Wisconsin.” SYMPOSIUM, *supra* note 20, at 37 n.17.

⁷² Although these were the words of candidate Thompson, Governor Thompson continues to resist full implementation of the federal-court-mandated rights. See SYMPOSIUM, *supra* note 20, at 37 n.18.

⁷³ The implication being that if the protester could kill a pregnant Indian, he would also kill the baby in the womb — thus saving *two* walleye. Photographs of hundreds of protesters carrying these (and worse) signs have been published in the newspapers and on television.

The Chippewa have been made a scapegoat for these thorny problems; thus their efforts to play a positive role in addressing the need for development for Indians and non-Indians and to address the crisis of economic stagnation are stymied. It is unfair to expect the Chippewa to volunteer their cultural extinction in order to appease hate-groups.

In fact, some state agencies have gone further — they have acted in ways which have heightened the pre-existing problems. The primary example of this is the way in which the Wisconsin Department of Natural Resources (WDNR) seems to manipulate fish population data and the resulting non-Indian bag limits (which inflames non-Indian residents) so as to shift the blame for inconsistent fisheries management from the WDNR to the Chippewas.

We have an ongoing strategy by the state and the WDNR to adopt the most laissez-faire of management strategies for those lakes not speared and the most conservative of conservation strategies for lakes which are speared by the Chippewa — thus creating the impression that it is the Chippewa who are bringing forth the new restrictions on angling. The only way to make sense of this inconsistent policy is to conclude that non-Indian anglers' bag limits are being manipulated by the WDNR in order to prompt those anglers to pressure the Chippewa into reducing their harvest. Non-Indians are thus used as pawns and the public is deceived. Resulting public outrage, which should be focused on the WDNR policy makers, is diverted to the Chippewa.⁷⁴ George Langley, owner of the Eagle Sport Shop in Eagle River and head of the 24-member Eagle River Guide Association summed it up:

They [the WDNR] were implying that the reason for the decline in the walleye fishery was spearing; when the reduced limits were imposed, not a word was said about the DNR's management over the years What does that say to you? It says, "Those damn Indians are killing all the fish, so we're going to take some away from you."⁷⁵

The 3% of the annual walleye catch that make up the Chippewa harvest is subject to more WDNR attention and observation, monitoring, press coverage, and political manipulation than the entire other 97%.

The Chippewa have a long history of sharing resources with non-Indians; their traditional culture reinforces a cooperative policy. To this day, the Lac du Flambeau Chippewa heavily stock their reservation lakes,

⁷⁴ The WDNR responds to this by saying that the district court ordered them to restrict anglers to the "safe harvest" level on lakes speared by Chippewa. This is disingenuous at best, since the state created this plan and presented it to the court as the only way to preserve the fish — the WDNR also sets the "safe harvest" level which is the key to manipulation of the bag limits and makes the decisions as to when, and how, the bag limits must be reduced to stay within the "safe harvest" level that it has created.

⁷⁵ WISCONSIN STATE JOURNAL, Mar. 4, 1990 at 15a.

which are then primarily fished by non-Indians, who have always been welcome. The Chippewa fishers fish conservatively, staying well below even the WDNR's ultra-conservative "safe harvest" allowances.

The 1989 angling harvest in the ceded territory was estimated at 672,000 walleye, while the Chippewa harvest was 16,053, less than 3% of the angling harvest.⁷⁶ The 1989 angling harvest of muskellunge in the ceded territory was estimated at 16,201 while the Chippewa harvest was 118, less than 1% of the angling harvest.⁷⁷ This record of Chippewa hunting and fishing demonstrates that their harvest is lawful, peaceful and extremely conservative.

For the 1990 season, the Chippewa tribes announced that they would fish in only 178 lakes out of the 2,359 lakes they are entitled to fish (only 682 are known to contain walleye).⁷⁸ Within that limited number of lakes, they voluntarily restricted themselves to between 54 and 59% of their entitlement,⁷⁹ which would allow anglers a bag limit of at least three walleye. All of these voluntary actions document the Chippewa good faith. The relatively insignificant Chippewa harvest figures do not call for the extreme WDNR reaction which has so angered non-Indian sportsmen.

All of these statistics demonstrate that the problems in Wisconsin are not due to the Chippewa. Their legal, cultural and historically rooted ethics and practices have not endangered this resource in the slightest. Judged by the hard facts and the specific record, the Chippewa are the most law-abiding and conservative group of hunters and fishers in northern Wisconsin.

The motives underlying the policies of the State of Wisconsin are often difficult to discern. At times the actions of the various state leaders⁸⁰ seem contradictory and aimless. At other times the policies seem coordinated to inflame non-Indian emotions and douse Chippewa efforts towards self-determination and resource co-management. Many observers feel that this apparent aimlessness may in fact be a coordinated strategy to inflame non-Indian sentiment to the point that the Chippewa are forced to give up their rights to influence the timber, mineral, and industrial devel-

⁷⁶ The harvest figures were taken from state-wide graphs provided by the Great Lakes Indian Fish and Wildlife Commission (1989) for only ceded territory.

⁷⁷ *Id.*

⁷⁸ In her opinion in *LCO IV*, Judge Crabb found that 861 lakes contain walleye. *LCO IV*, 707 F. Supp. 1034 at 1040 (W.D. Wis. 1989). Subsequent research by a joint WDNR/GLIFWC team has determined that only 682 lakes contain a measurable population of walleye. See cases and discussion, *supra* note 61.

⁷⁹ WISCONSIN STATE JOURNAL, Mar. 16, 1990.

⁸⁰ Although this report has focused upon the executive branch it cannot be forgotten that the state legislature has shown little respect for either the Chippewa or the rule of law. The state assembly passed a resolution asking for federal intervention to resolve the "problem," and for *changing the treaties* if negotiations do not work. The legislators make the same mistake of analysis as the administration when they shift the focus from economic stagnation and racism to the Chippewa.

opment of northern Wisconsin. In contrast, Chippewa motives and policies are clear. The Chippewa are determined not to give away the ancient rights they retained 150 years ago, nor does it seem that they wish to sell them. The Chippewa continue to win in federal court, continue to prudently exercise their rights and continue to build support among non-Indian citizens and neighboring Indian tribes. All of the state's various attempts at de-facto abrogation have failed.

In the meantime, there have been physical attacks on peaceful Chippewa. These attacks have included rock throwings, a bomb placed on a boat landing, and several Chippewa boats capsized by high-speed motorboats trailing anchors. Luck, alone, has prevented serious injury or death. However, one cannot expect this luck to continue forever and the ramifications are grave when law abiding citizens are maimed or killed by racist mobs.

I cannot think of the Fishing Rights Controversy without recalling a particularly meaningful insight from Joseph Conrad's *The Heart of Darkness*:

The conquest of the earth, which mostly means the taking it away from those who have a different complexion or slightly flatter noses than ourselves, is not a pretty thing when you look into it too much. What redeems it is the idea only. An idea at the back of it; not a sentimental pretence but an idea; and an unselfish belief in the idea — something you can set up, and bow down before, and offer a sacrifice to⁸¹

What does this have to do with Indian law? I believe that in the field of Indian affairs a fetish has been created — a fetish of law. Law has been made into that which Conrad says we “bow down before and offer a sacrifice to.” We have somehow come to believe that if it is *THE LAW* then it is inevitable, preordained. Somehow we have allowed ourselves to equate “it is the law” with “it is right.” We have seemingly forgotten Plato's old question, “Let me ask you Stranger, are the authors of your laws men or gods?” We have made the idea of law itself into the god — the god by which we justify taking away from those who are different from ourselves.

Robert Williams' in *The American Indian in Western Legal Thought*⁸² takes us step by step down the intellectual primrose path that has brought the jurisprudence of American native people to the point at which, if you look at the Supreme Court decisions of recent years, tragically rests.⁸³ In the American historical experience, law is the rationalization that has

⁸¹ Joseph Conrad, *The Heart of Darkness*, in *YOUTH AND TWO OTHER STORIES* 50-51 (1925). I want to thank Rob Williams for initially drawing this to my attention.

⁸² ROBERT WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* (1989).

⁸³ See generally, WILLIAMS, *supra* note 82.

made it possible to strip away hundreds of millions of acres of aboriginal land. In so many ways, it is law that has kept the Indian on the outside.

Law is central to the discourse of American Indian policy. Indeed, law has been thought of as both the arrow and the shield of the Native American. Literature is filled with statements that no people are as dominated by the apparatus of law as is the Native American. Law reaches down into the smallest details of the daily decision making of Indian people. It was Alexis de Tocqueville who asserted that no people had been destroyed with greater respect for the law of nations than the Indians of the Americas. My students and audiences often hear me recite these words of de Tocqueville:

The Spaniards pursued the Indians with bloodhounds, like wild beasts; they sacked the New World like a city taken by storm, with no discernment or compassion; but destruction must cease at last and frenzy has a limit The conduct of the Americans of the United States towards the aborigines is characterized, on the other hand, by a singular attachment to the formalities of law

The Spaniards were unable to exterminate the Indian race by those unparalleled atrocities which brand them with indelible shame, nor did they succeed even in wholly depriving it of its rights; but the Americans of the United States accomplished this twofold purpose with singular felicity, tranquilly; legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world. It is impossible to destroy men with more respect for the laws of humanity.⁸⁴

Before we look at the Supreme Court decision in *Smith*⁸⁵ and several other recent cases, I'd like to briefly review with you some of the generally accepted concepts of American Indian law. What is this thing called Indian Law?

Before preparing this lecture, I turned to my class in Indian Land Titles — many of them had also been subjected to my first semester course in American Indian Law and Policy. I asked them what they thought I should tell the audience at the Cleveland-Marshall lectures.

A young man raised his hand. He was a Chickasaw and asked, "Are you *really* going to Cleveland?"

I said, "Yes, I am going to Cleveland to deliver a very distinguished lectureship." He seemed unimpressed but continued.

"Ask them," he said, "about having a baseball team called the Cleveland Indians."

⁸⁴ ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 354-55 (H. Reeve trans. 1945).

⁸⁵ See *supra* note 7.

I wasn't sure what my response to him should be, after all Indian mascot names promote controversy. One of the few issues of agreement in the Indian legal community is that relegation of Native Americans to mascot status is neither ennobling nor enlightening. The University of Oklahoma has, after much Native protest, ceased to use a pep figure called "Little Red." Ironically, the last "Little Red," Kirke Kickingbird, is now a professor of Indian law at Oklahoma City University. So, like 'ole Brer Rabbit, I just lay low.

"Tell them," the Chickasaw continued, "if they call themselves Indians, why the hell can't they win." So I come with a special plea from some Oklahoma Indian law students. First, they want a new name for the Cleveland Indians. If that's not possible, they want them to win. Even though this is the very first day of the new season, my vote is that the former may be easier than the latter.

In any event, there were other suggestions of principles of Indian law that I needed to share with you. Among the concepts they suggested I stress was the over-arching principle that Indian law is constitutionally set forth in the Indian Commerce Clause.⁸⁶ That clause defines Indian law as a governmental sovereignty issue resting in a basic government to government relationship between the tribes and the federal government in which the states play primarily a secondary role. Furthermore, there is a "trust" relationship between the tribes and the federal government. Rights of Indian tribes are not special privileges granted to tribes but are retained by the tribes in their sovereign status. To diminish those rights requires clear and specific actions which will not be implied. This creates a quasi-inverse "preemptive" doctrine in Indian law. Furthermore, Indian law tends to be tribe specific and temporal in that the date of emergence of a right or an agreement has great significance. I often tell my students that Indian law and Indian history are the opposite sides of the same coin.

The term "Indian law" itself has several meanings. When we speak of Indian law we are really talking about two very different — and yet clearly related — fields of law. The two branches of Indian law are: first, the traditional legal system of Native peoples. What the Cheyenne informant, with whom I identify, a fellow named "High Forehead", called the way Indians made people behave before the Blue Coats came on the Prairie and built guardhouses. What used to be called, in an age less sensitive to ethnocentric and phalocentric language, "the law of primitive man."⁸⁷ Later, in my faculty seminar, we will talk about this branch of Indian law with emphasis of "the Cherokee way." Karl Lewellyn and E. Adamson Hoebel have written of this in their classic jurisprudential study *The Cheyenne Way*.⁸⁸ On the two-hundredth anniversary of the U.S. Con-

⁸⁶ U.S. CONST. art. I, § 8, cl. 3.

⁸⁷ E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN* 4 (1954).

⁸⁸ KARL LEWELLYN, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

stitution, the Congress, by joint resolution, acknowledged the debt of the so-called "Founding Fathers" to the Iroquois and their "Founding Mothers." As we know, the Great League with its "Beloved Woman" provided an example to Benjamin Franklin and others who helped create America's basic constitutionalism.

Contrary to the writings, diaries and letters of early European soldiers and settlers Native Americans before Columbus were not "lawless." When the white traveller found wampum belts, a woman's court, wolf-skin head-dresses, and the raven-winged Cherokee justice instead of the familiar blackrobes, leather volumes and powdered wigs, he equated an absence of recognizable legal trappings with a lack of law. Indian law, primarily, is the traditional body of the Law of Native peoples.

A second branch of Indian law deals with what most people mean when they speak of Indian law. That is, the governmental relationship between Indian tribes and other governmental units such as the federal government of the United States or the fifty separate state governments. They also include the non-traditional relationships of individual Indian people with their own tribal government or other governmental units. In our law schools we most often teach our courses in "Federal Indian Law" with emphasis on jurisdictional issues.

These two systems of Indian law often overlap. For example, in application of the Indian Child Welfare Act⁸⁹ courts may look back to the traditional legal system of tribal peoples for enforcement of a federally mandated right which supersedes state domestic or family policy. In the range of courts to which Indian people are subjected, tribal tribunals or special Indian CFR courts often draw upon these old ways of Indian justice in determining standards of legally enforceable conduct.

Sometimes it is easier to define by negation. We should remember that Indian law is not racial law. We could have an old-style *Dragnet* lineup on this platform and ask a hundred people to pick out the quote "Indians." If you had at one end Nellie Armstrong, the daughter of a Black Freedman father who had been a slave of the Creeks and of a full-blood Creek mother, you might make the same mistake as a dozen silk-stocking blue-chip law firms did when they advised their clients to build a multi-million dollar shopping center and luxury apartment complex on her allotted Indian land which she inherited from her Creek mother without following the federally mandated procedures for the sale of tribal lands.⁹⁰ Well, they were wrong. And it was very costly to them and their malpractice carriers. At the other extreme, you would be wrong when you picked out Angela Martinez, daughter of a full-blood Santa Claran mother and a full-blood Navajo father because the Supreme Court in the *Martinez*⁹¹ case allowed the Pueblo to exclude the Martinez children from aspects of their Pueblo heritage because their father was non-Santa Claran when they would have included them had their mother been the non-Santa Claran.

⁸⁹ 25 U.S.C. §§ 1901-1923 (1988).

⁹⁰ *Armstrong v. Maple Leaf Apartments, Ltd.*, 622 F.2d 466 (10th Cir. 1979).

⁹¹ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

In Indian law, we are dealing with legal and not racial categories. On the Quapaw rolls we have a group of ten families who are known as the "white Quapaws" because the tribe, in order to save their land-base at the turn of the century, allowed them to become tribal members. We have full-blooded Seminoles who speak no English whom the federal government will not allow the tribe to enroll because Congress closed their rolls in 1906 and these full-bloods, as a measure of political and social protest, refused to sign-up or enroll with the federal government. Again, legal, not racial, questions control. The demographer Russell Thornton has prepared an insightful analysis of these complexities in his analysis of how this plays out in the population of the Cherokees.

Indeed, one of the central membership questions of Indian law over the last decade and a half has been the "recognition" by the federal government of Indian tribes who are not "federally recognized." The Lumbees of the Carolinas have been struggling with this issue for generations. Other groups such as the Porch Band of Creeks in Florida and Alabama have been added to this listing. At this moment, back in my home state of Oklahoma, the Cherokees are in court determining whether or not a group known as the Kee Too Wahs constitute a separate federally recognized tribe.

A crucial point to remember is that Indian law is not the law of social welfare or poverty assistance but is rooted in pre-contact sovereignty, historically negotiated treaty and legally enforceable property rights. Much of Indian law is based upon traditional trust doctrine as set forth by John Marshall in his famous trilogy which climaxed in the Cherokee cases.⁹² In truth, we are dealing, as Justice Hugo Black noted in his dissent in the *New York Power* case,⁹³ with national honor, with what the Northwest Ordinance called "utmost good faith." "Great Nations," Black reminded us, "like great men keep their word."⁹⁴

I want to briefly draw your attention to a series of key Indian law cases from recent terms of the Supreme Court. They are: *Lyng v. Northwest Indian Cemetery*;⁹⁵ *Brendale v. Confederated Tribes of Yakima*;⁹⁶ *Employment Division v. Smith*;⁹⁷ *Duro v. Reina*;⁹⁸ and *Oklahoma Tax Commission v. Citizen Band Potawatomi*.⁹⁹

⁹² *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

⁹³ *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960) (Black, J. dissenting).

⁹⁴ *Id.* at 142.

⁹⁵ *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

⁹⁶ *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).

⁹⁷ *Employment Div. v. Smith*, 494 U.S. 872 (1990).

⁹⁸ *Duro v. Reina*, 495 U.S. 696 (1990).

⁹⁹ *Oklahoma Tax Comm'n v. Citizen Band Potawatomi*, 111 S. Ct. 905 (1991).

These cases tell us something, I think, even more about the Court than they tell us about Indian law. *Duro v. Reina* is about criminal jurisdiction over non-member Indians. The Court dismissed a whole body of history of tribal courts with a sentence and a half which says of Indian law that it was usually handled "by social and religious pressure" not law.¹⁰⁰ Looking for those powdered wigs again. This is the opposite of what the court did in *Bowers v. Hardwick*¹⁰¹, when a whole body of ecclesiastical court law was arbitrarily incorporated into the common law tradition. In *Brendale*, a zoning case, Justice O'Connor draws a line with regard to the power to zone in those areas where, among other things, Indians gather herbal medicines but not where twentieth century stores are being operated. *Smith* and *Lyng* gutted concepts of religious freedom and the First Amendment "Establishment Clause" while acknowledging the impact on the Native American Church and the traditional forest sanctuary of an Indian religion. It is in *Smith* that Mr. Justice Scalia turns the question of freedom of religion over to the political process even acknowledging in this immortal — or is it immoral phrase — "it may be fairly said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred . . ." ¹⁰² Not only did my canary die, but so did the Bill of Rights.

Was I wrong in the 1985 Langston Hughes Lectures when I said that our consensus of shared values — our tradition inherited from both Native and Western sources — was at stake. I think not. The present court has an idealized way of looking back to an imagined golden moment. In the published nineteenth century Rules for Indian Courts, the Sun Dance and "heathenish practices" were simply outlawed. We have now achieved that same result judicially.¹⁰³ Diversity, it seems, in *Smith* as in *Bowers* is not constitutionally protected. Once again we must go back to the nineteenth century Indian reservation or to whatever other closet is close at hand.

In this brief time I have tried to cover too much but it was my only chance at you, my only time at bat in this land of the Cleveland Indian. Today, we have in our audience Indian people from Cleveland and particularly from the Cleveland Indian Center. I thank the law school for inviting them and I thank them for honoring us with their presence. I hope, today, you have learned a little something about the principles of the field we call Indian law. I have tried to present the Native American as a living, twentieth century soul with great needs, unparalleled opportunities and unequalled adversity, and I have further suggested that

¹⁰⁰ *Duro*, 495 U.S. 696 (1990).

¹⁰¹ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹⁰² *Smith*, 494 U.S. at 890.

¹⁰³ FRANCIS PAUL PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 187-88 (1975).

the collective fate of all of us is interwoven. The experience of the Native American suggests that we must constantly check for poisonous gas in our democratic Republic.

Just as the Chippewas each spring return to the waters, each summer at the time of the harvesting of the green-corn or the new corn, my father's people, the Cherokee, go back into the hills, rekindle the eternal or Kee-Too-Wah flame and read the law from the ancient shell-sewn wampum belts. One of the seven belts is the "hand in hand" wampum, showing figures joining together, "hand in hand." As I close this Fiftieth Cleveland-Marshall Lecture I hope you will remember that image of people joined hand in hand. We will all make it only if we remember, as Sylvester Yellow Calf in *The Indian Lawyer* reminds us, "The State is one big reservation and all the people in it are the Indians."¹⁰⁴

¹⁰⁴ WELCH, *supra* note 10, at 53-54.