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Kristen A. Carpenter

*University of Colorado Law School*

Angela R. Riley

*University of California, Los Angeles*

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# TRIBAL RIGHTS, HUMAN RIGHTS

*Kristen A. Carpenter\* & Angela R. Riley<sup>π</sup>*

2013 MICH. ST. L. REV. 293

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## INTRODUCTION

We appreciate the opportunity to participate in this symposium, convened to examine Professor Wenona Singel's article, *Indian Tribes and Human Rights Accountability*.<sup>1</sup> Amongst her many professional accomplishments, Professor Singel is well known as a scholar in American Indian law,<sup>2</sup> the Chief Justice of an active tribal appellate court,<sup>3</sup> and a Reporter on the American Law Institute's *Restatement of American Indian Law*.<sup>4</sup> Her

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\* Associate Dean for Faculty Development, Associate Professor of Law, and Director of the American Indian Law Program, University of Colorado Law School.

<sup>π</sup> Professor of Law; Director of the American Indian Studies Center; Director, MA/JD Joint Degree Program; Co-Director, Native Nations Law and Policy Center, University of California, Los Angeles. The authors wish to thank Matthew Fletcher, Kate Fort, Jeffrey Same, Wenona Singel, and the *Michigan State Law Review* for the opportunity to participate in this symposium.

1. See Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 SAN DIEGO L. REV. 567 (2012).

2. See Stacy L. Leeds & Elizabeth Mashie Gunsaulis, *Resistance, Resilience, and Reconciliation: Reflections on Native American Women and the Law*, 34 T. JEFFERSON L. REV. 303, 304 n.4 (2012) (recognizing Professor Singel as one of the new generation of indigenous women scholars in legal academia).

3. Professor Singel is the Chief Appellate Justice of the Little Traverse Bay Bands of Odawa Indians. *Court of General Jurisdiction (Tribal Court)*, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, <http://www.ltbodawa-nsn.gov/Tribal%20Court/ContactUs.html> (last visited May 13, 2013). For opinions of the court, see *Appellate Court Filing Process for Appeals*, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, <http://www.ltbodawa-nsn.gov/Tribal%20Court/Court%20Opinions/Appellate%20Court%20Opinions/Appellate.html> (last visited May 13, 2013).

4. Professor Singel is the Co-Reporter on the American Law Institute's *Restatement of American Indian Law*. For information about the project, see *Current Projects: Restatement Third, the Law of American Indians*, AMERICAN LAW INSTITUTE, [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=27](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=27) (last visited May 13, 2013).

influence, therefore, is felt and respected throughout the academy, the practicing bar, and Indian country. At an early stage of her career, Professor Singel is already recognized as a thought-leader, someone who is both brave and careful in her willingness to articulate and address some of the most trenchant challenges in American Indian law.

Professor Singel's newest article is perhaps the most evocative example of her intellectual and community leadership. Her observation that Indian tribes could, on occasion, do better in extending civil and human rights to citizens, employees, and residents in Indian country, is strikingly forthright. And her resulting proposal—advocating for the creation of an intertribal, treaty-based mechanism to adjudicate human rights disputes—is deeply respectful of tribal sovereignty, calling on tribes to take the first steps toward increased accountability and to turn to their own laws and norms as a basis for improving their systems of governance. And, finally, her proposal is notably provocative, having inspired passionate conversations at major gatherings of tribal leaders and scholars across the country,<sup>5</sup> and a lively, focused discussion among Indian law scholars, lawyers, and leaders at the symposium on October 4-5, 2012.<sup>6</sup>

In this spirit, and on the occasion of this symposium, we are prompted first to situate *Indian Tribes and Human Rights Accountability* in the larger body of Professor Singel's scholarship to date, and second to describe the way in which she has inspired us to embark on a new research project of our own.

#### I. PROFESSOR SINGEL'S CONTRIBUTIONS TO LEGAL SCHOLARSHIP

To use Frank Pommersheim's words, Professor Singel does not rely on "received notions" of law.<sup>7</sup> Instead, she boldly identifies legal problems, brings in new conceptual and analytical tools to crack open entrenched thinking, and then proposes innovative solutions. Professor Singel is creative and transformative, a change agent in American Indian law. She is also

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5. Professor Singel was invited to present *Indian Tribes and Human Rights Accountability* to an audience of 800 lawyers, scholars, and tribal leaders at a plenary session of the Federal Bar Association's annual Indian Law Conference on April 8, 2011. In addition, she has presented the work at UCLA Law School, George Mason University, the University of Illinois Law School, the University of Kansas, the Ford School of Public Policy, and other institutions.

6. *Indian Tribes and Human Rights Accountability Symposium—Schedule of Events*, MICH. ST. U.C.L., <http://www.law.msu.edu/tribes-accountability/schedule.html> (last visited May 13, 2013).

7. See Frank Pommersheim, Professor, Univ. S.D. Sch. of Law, Practitioners Perspective and Human Rights, Presentation at the Michigan State Law Review Symposium: Indian Tribes and Human Rights Accountability (Oct. 4, 2012) (recording on file with Michigan State Law Review).

an intellectual leader who motivates fellow scholars in the field to advance new ground.

The power of Professor Singel's scholarship is in its breadth of coverage, depth of analysis, and intellectual honesty. In each article, she identifies a problem in American Indian law and then employs a theoretical framework—including new institutional economics, property and equity, and law and development—to suggest that conventional legal responses have failed to address the problem at hand. Having opened the door through her theory work, Professor Singel then argues quite powerfully in a number of contexts, including labor law, commercial law, and land claims, for tribal law solutions to tribal law problems.<sup>8</sup> Consider several examples.

Professor Singel is a well-known expert in American Indian labor relations, an area characterized by polarized viewpoints between tribal sovereignty advocates and labor advocates.<sup>9</sup> Professor Singel bridges these positions through two works, *Labor Relations and Tribal Self-Governance (Labor Relations)*,<sup>10</sup> and *The Institutional Economics of Tribal Labor Relations (Institutional Economics)*.<sup>11</sup> First, in *Labor Relations* she critiques the *San Manuel Indian Bingo & Casino* decision in which the National Labor Relations Board (NLRB) asserted that the National Labor Relations Act (NLRA) implicitly subjects federally recognized tribes to the jurisdiction of the NLRB.<sup>12</sup> As Professor Singel notes, this decision departs from the well-established and general rule requiring Congress to be explicit when it abrogates tribal sovereignty, substituting instead a “confusing and subjective test” in which implicit divestitures will sometimes be held to abrogate sovereignty.<sup>13</sup>

*San Manuel* is problematic, Professor Singel argues, because of its departure from precedent and lack of respect for the law-making institutions of tribes, which often have their own means for recognizing employee rights.<sup>14</sup> Just as unfortunate, Professor Singel notes, *San Manuel* has also led to revealing problems as tribes respond to its holding.<sup>15</sup> It has inspired tribes to adopt “right-to-work” laws “to minimize the threat of unionization” and NLRB interference.<sup>16</sup> Professor Singel comments that while this strategy

8. See *infra* notes 10-11, 29-30, 37 and accompanying text.

9. See, e.g., KAIGHN SMITH, JR., *LABOR AND EMPLOYMENT LAW IN INDIAN COUNTRY* 53, 63, 165 (2011) (citing Professor Singel's works).

10. Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. REV. 691 (2004).

11. Wenona T. Singel, *The Institutional Economics of Tribal Labor Relations*, 2008 MICH. ST. L. REV. 487.

12. *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, 1055, 1059-60 (2004).

13. Singel, *supra* note 10, at 691.

14. *Id.* at 697.

15. See, e.g., *id.* at 727.

16. *Id.* at 727-28.

“allows tribes to exercise some degree of self-governance over labor relations,” it is “at bottom a reactive and insufficient approach that will thwart the ability of tribes to develop more progressive and comprehensive labor policies that satisfy the specific needs of tribal communities.”<sup>17</sup>

Because tribes are so vulnerable to the heavy hand of federal interference, the divestiture of tribal sovereignty forces them into a defensive posture. “Once confronted with the threat of NLRA enforcement,” Professor Singel writes, “tribes are forced to divert their attention away from the pursuit of a vision for community labor relations that may in fact embrace unions and promote organizing activity” as part of a comprehensive tribal law approach to employee rights.<sup>18</sup> It is here that Professor Singel’s voice speaks so thoughtfully: tribal sovereignty is important not only as a formal, dignitary, and remedial matter, but also because it allows tribes to engage in legal and institutional development according to norms that may differ from, and ultimately empower, citizens in their communities.<sup>19</sup>

Professor Singel’s subsequent piece, *Institutional Economics*, extends her thinking about labor law, but shifts the focus specifically to tribal labor law.<sup>20</sup> As foreshadowed in *Labor Relations*, however, Professor Singel’s thinking here transcends both doctrinal methodology and the usual pro-tribe/pro-labor positions. While tribal sovereignty proponents do indeed argue for tribal solutions, Professor Singel concedes that this is a difficult proposition to realize on the ground in Indian country.<sup>21</sup> As a means of explaining why, Professor Singel turns to law and economics theory, arguing that “microeconomics sheds light on the dynamics of the choices that employees and union organizers make as they decide how to proceed to protect labor interests in Indian country.”<sup>22</sup>

More specifically, Professor Singel brings the insights of “path dependence” to explain resistance to innovation and provides a detailed subset of new institutional economics-based arguments for and against federal and tribal labor law.<sup>23</sup> If tribes seek to exercise sovereignty over labor matters, Professor Singel argues that they could apply a number of insights from

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17. *Id.*

18. *Id.* at 728.

19. *See id.* at 714-17.

20. Singel, *supra* note 11, at 498-503.

21. *See id.* at 500-03.

22. *Id.* at 488.

23. *Id.* at 491. The pro-tribal labor law efficiency arguments are: fairness, working conditions, cultural match, and efficiency of tribal court adjudication. *Id.* at 498-99. The anti-tribal labor law efficiency arguments are underdeveloped tribal law and perceived unfairness. *Id.* at 500. The pro-federal labor law efficiency arguments are: perceived fairness, stability, and predictability. *Id.* at 498. The anti-federal labor law efficiency arguments are: modern decline of labor unions, the archaic, inefficient quality of the NLRB, and the poorly-suited nature of the NLRB to Indian country regulation. *Id.* at 495-97.

new institutional economics, especially the creation of organizations and support of individuals with an interest in the new regime.<sup>24</sup> Specifically, she suggests that tribes consider the development of programs specifically targeted toward employment, including fostering the formation of employee rights organizations or developing laws that recognize the claims, redress, and protection of employees with grievances.<sup>25</sup> Other suggestions focus on educating others, particularly non-Indian employees, about tribal legal institutions, tribal cultural and political values, and encouraging involvement in tribal civic and community life.<sup>26</sup> At the same time, she contends tribal advocates should develop the efficiencies associated with tribal jurisdiction, such that tribal courts truly become the fair, nimble, low-cost, close-to-home institutions that they have the potential to be.<sup>27</sup>

As one of very few legal scholars to bring law and economics to bear on tribal labor law (or even Indian law generally),<sup>28</sup> Professor Singel's inquiry is the first into these very fruitful and important ways of bridging sovereignty and labor concerns. Her capacity to incorporate these new insights into economic matters is also illustrated in her article, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*.<sup>29</sup> Here, Professor Singel evaluates the situation of tribal governments, whose interest in fostering economic development has led to the rapid adoption of commercial law.<sup>30</sup> As Professor Singel demonstrates, some of this law reform has proven dysfunctional for reasons both mechanical (tribes adopted Article 9 on Secured Transactions without the many other articles cross-referenced in Article 9) and/or cultural (the norms embedded in the Uniform Commercial Code (UCC) did not necessarily reflect tribal conceptions of property rights).<sup>31</sup>

In an attempt to gain a deeper understanding of how and why tribes' new UCCs were so fraught with difficulty, Professor Singel turns to comparative law's literature on "Law and Development."<sup>32</sup> As she explains, in the 1970s many U.S. policymakers proposed the export of U.S. legal institutions and rules as a step toward investment and infrastructure development

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24. *Id.* at 501-02.

25. *Id.* at 501.

26. *Id.* at 501-02.

27. *Id.* at 502.

28. *Cf.* Gavin Clarkson, *Wall Street Indians: Information Asymmetry and Barriers to Tribal Capital Market Access*, 12 LEWIS & CLARK L. REV. 943 (2008); Ezra Rosser, *This Land Is My Land, This Land Is Your Land: Markets and Institutions for Economic Development on Native American Land*, 47 ARIZ. L. REV. 245 (2005).

29. *See generally* Wenona T. Singel, *Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule*, 15 KAN. J.L. & PUB. POL'Y 357 (2006).

30. *Id.* at 359-62.

31. *Id.* at 361-62.

32. *Id.* at 363-67.

in the developing world, including Asia, Latin America, and Africa.<sup>33</sup> Yet, even these original proponents later realized that they could not successfully impose U.S. models on nations whose infrastructure and cultural norms differed so substantially from that of the United States.<sup>34</sup> While noting contextual limitations of her comparison, Professor Singel insightfully draws a parallel between the limits of “transplanted law” in both contexts.<sup>35</sup> She then suggests employing a new model, one of “cultural sovereignty,” to ensure that tribes take a deliberate and integrated approach to lawmaking and reform, including economic development.<sup>36</sup>

In her related work, which shifts specifically to tribal property interests, Professor Singel addresses the confounding problem of Indian land claims in the contemporary era. In *Power, Authority, and Tribal Property*, Professor Singel and her co-author Professor Matthew Fletcher examine theories of equity to respond to the Supreme Court’s devastating opinion in *City of Sherrill v. Oneida Indian Nation*, limiting the extent to which Indian nations can use their purchasing power to regain political sovereignty over reservation lands lost during the process of conquest.<sup>37</sup> Professors Singel and Fletcher note that the rules of equity fundamentally address fairness concerns.<sup>38</sup> Equitable principles such as unclean hands and relative harm would seemingly prohibit courts from applying laches to bar Indian claims.<sup>39</sup> To ignore these concerns in the American Indian context, they contend, seems to defy the very principles that animate concepts of equity law.<sup>40</sup>

But even this powerful critique, Professors Singel and Fletcher argue, is not the only way to conceive of the inequitable use of equity in *Sherrill*, a case that uniformly silenced the harms suffered by the American Indians who were “[o]utnumbered, outgunned, and out-brutalized” and therefore forced to recede in the histories giving rise to contemporary claims.<sup>41</sup> Singel and Fletcher contend that, in *Sherrill*, as with Anishinaabe claims in Michigan and other Indian land-related cases across the country, seeing the equities on the non-Indian side often legitimates land dispossession through

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33. See *id.* at 365.

34. *Id.* at 364.

35. *Id.* at 367.

36. *Id.* at 357-58, 362-63 (citing Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 209 (2001)).

37. Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21, 21-22 (2005). See generally *id.* (citing *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 (2005)).

38. See *id.* at 36.

39. *Id.* at 48-50.

40. *Id.* at 48-49.

41. See *id.* at 21, 45.



means outside of the rule of law.<sup>42</sup> As the authors write, “*City of Sherrill* and its progeny . . . have performed a service to the people and entities . . . who used physical and political power to dispossess Indian people and communities of their lands.”<sup>43</sup> Retelling stories of Anishinaabe people who lost their land as a result of brutal violence and abuse of legal processes, Professors Singel and Fletcher challenge the notion that justice is achieved when courts apply equity in favor of the current owners or occupiers of Indian lands, to the complete exclusion of the Indian parties.<sup>44</sup>

While *Power, Authority, and Tribal Property* was published in 2006, it has turned out to be prescient in light of subsequent Supreme Court and federal appellate decisions even further denying Indian remedies for historic land loss.<sup>45</sup> Thus, Professor Singel and Fletcher’s challenge to judges and lawmakers to stake out a “middle ground,” one that applies notions of property and equity and maintains a broader commitment to the rule of law, with attention to American Indian experience and history, remains vital today.<sup>46</sup>

Similarly, another co-authored article by Professors Singel and Fletcher makes the contemporary case for the use of historic treaties and treaty jurisprudence in the preservation and restoration of the Great Lakes today. In *Indian Treaties and the Survival of the Great Lakes (Indian Treaties)*, the authors note that Indian treaties recognize certain tribal rights to the Great Lakes for economic, cultural, and political activities, all of which require preservation of the resource.<sup>47</sup> Yet, these treaties, even with their provisions on fishing rights and other tribal interests, have not yet been tested as a legal tool in the struggle to protect and restore the Great Lakes.<sup>48</sup> Treaties and treaty jurisprudence would supplement the conceptual limits of the public trust doctrine in favor of alternative cultural norms and, as a matter of environmental justice, help to ensure Indian tribes have a seat at the table when

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42. *Id.* at 45-47.

43. *Id.* at 45.

44. *See id.*

45. For one such line of cases, see *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 277-78 (2d Cir. 2005) (holding tribe’s possessory claim barred by laches and no basis for constructive possession that could support trespass damages); *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114, 140 (2d Cir. 2010) (holding that *Sherrill* and *Cayuga* barred claims for redress for 250,000 acres of land taken by New York and two counties); *Onondaga Nation v. State*, No. 5:05-cv-0314, 2010 WL 3806492, at \*7 (N.D.N.Y. Sept. 22, 2010) (holding that *Sherrill*, *Cayuga*, and *Oneida* foreclose the Onondaga claim for declaratory judgment recognizing tribal property rights). *But see* *Saginaw Chippewa Indian Tribe v. Granholm*, No. 05-10296-BC, 2008 WL 4808823, at \*22-23 (E.D. Mich. Oct. 22, 2008) (holding *Cayuga* does not bar claims in this case).

46. *See* Singel & Fletcher, *supra* note 37, at 22-23.

47. Wenona T. Singel & Matthew L.M. Fletcher, *Indian Treaties and the Survival of the Great Lakes*, 2006 MICH. ST. L. REV. 1285, 1287.

48. *Id.*

clean-up and access is negotiated.<sup>49</sup> Once again, as in all of Professor Singel's work, *Indian Treaties* identifies a long-standing problem—in this case, pollution and degradation of the Great Lakes.<sup>50</sup> She then evaluates the problem through theory—the property arguments underlying the public trust doctrine.<sup>51</sup> And finally, Professor Singel proposes a new window into solutions—here, the interest convergence suggested by Indian treaty rights and broader community needs in cleaning up the Great Lakes.<sup>52</sup>

Professor Singel has a number of other publications that we could discuss.<sup>53</sup> But having drawn out many of what we see as the specific and general strengths of her work, we now move on to her current piece, *Indian Tribes and Human Rights Accountability*, which is also the subject of this symposium.<sup>54</sup> In this piece, Professor Singel argues that tribal governments should be externally accountable to a system of human rights law that ensures individual citizens and community members are fairly and humanely treated under the law.<sup>55</sup> Consistent with her previous work, Professor Singel draws from theory, this time political theory, to argue that while tribes retain certain sovereign prerogatives of noninterference from other governments, they are also bound by contemporary norms that call for accountability to tribal members.<sup>56</sup> In this regard, she argues that tribal governments, like all governments, should be held to meaningful standards with respect to their treatment of individual community members in citizenship, employment, social welfare, economic development, and other matters.<sup>57</sup>

Also consistent with her previous work, Professor Singel insists that the development of tribal human rights systems should empower and emanate from tribal communities themselves. To advance these norms, she calls for a consent-based system grounded in tribal law, both procedural and substantive. She points, for example, to existing models of intertribal confederacies and coalitions, in which tribes have historically joined voluntarily for the resolution of common conflicts. She also suggests indigenous traditions standards, such as the Seven Grandfather Teachings of the Anishinaabe, that provide a basis for the development of a human rights system that could be used by tribes sharing cultural norms.<sup>58</sup>

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49. See *id.* at 1293-95.

50. *Id.* at 1286.

51. *Id.* at 1287-91.

52. *Id.* at 1291-93.

53. See, e.g., *FACING THE FUTURE: THE INDIAN CHILD WELFARE ACT AT 30* (Matthew L.M. Fletcher, Wenona T. Singel & Kathryn E. Fort eds., 2009).

54. See Singel, *supra* note 1, at 570 (arguing for the creation of an intertribal human rights regime to address human rights violations among tribe members).

55. *Id.* at 570, 591-93.

56. *Id.* at 570-83.

57. *Id.* at 584-85.

58. *Id.* at 568-85; 591-93; 617-22.

In this respect, Professor Singel masterfully stakes out a mediated position to those who call for, respectively, increased federal court intervention into internal tribal affairs, or even other external methods of accountability that have been proposed, such as the creation of an intertribal court system or direct accountability for the United States under international law for wrongs committed by tribal governments. In contrast to these proposals, Professor Singel draws on earlier works in which she has turned to tribal law and indigenous justice systems to advocate, instead, for the creation of an intertribal treaty-based institution recognizing and enforcing tribal human rights obligations.<sup>59</sup>

To be sure, there are legitimate concerns associated with a project so potentially transformative as Professor Singel's. At the symposium, commentators noted that, on a pragmatic level, tribal leaders may fear the proposal's effect on tribal sovereignty,<sup>60</sup> lack the time and resources to devote attention to this long-term project versus other tribal needs,<sup>61</sup> or feel that their tribal laws and institutions already respect individual rights.<sup>62</sup> These comments engendered useful conversations, notably including tribal leader Eva Petoskey's commentary about human rights violations that she has experienced in tribal communities and her sense that reform of the kind Professor Singel suggests could begin in conversations among Odawa citizens and leaders.<sup>63</sup> Professor Singel embraced these comments and addressed the need to bridge the theoretical and practical appeal of her proposal through thoughtful community discussions and governance.<sup>64</sup>

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59. *Id.* at 611-12.

60. John E. Echohawk, Exec. Dir., Native Am. Rights Fund, Practitioners Perspective and Human Rights, Presentation at the Michigan State Law Review Symposium: Indian Tribes and Human Rights Accountability (Oct. 4, 2012) (recording on file with Michigan State Law Review).

61. Stacy Leeds, Dean, Univ. of Ark. Sch. of Law, Accountability, Tribal Law, and Human Rights, Presentation at the Michigan State Law Review Symposium: Indian Tribes and Human Rights Accountability (Oct. 4, 2012) (recording on file with Michigan State Law Review).

62. Trent Crable, Assoc. Gen. Counsel, Lower Elwha Klallam Tribe, Practitioners Perspective and Human Rights, Presentation at the Michigan State Law Review Symposium: Indian Tribes and Human Rights Accountability (Oct. 4, 2012) (recording on file with Michigan State Law Review).

63. Eva Petoskey, Dir., Anishnaabek Healing Circle at Inter-Tribal Council of Mich., Human Rights and Reparative Justice, Presentation at the Michigan State Law Review Symposium: Indian Tribes and Human Rights Accountability (Oct. 5, 2012) (recording on file with Michigan State Law Review).

64. Wenona T. Singel, Professor, Mich. State Univ. Coll. of Law, Closing Remarks at the Michigan State Law Review Symposium: Indian Tribes and Human Rights Accountability (Oct. 5, 2012) (recording on file with Michigan State Law Review).

## II. TRIBAL RIGHTS, HUMAN RIGHTS: A RESEARCH AGENDA

Our engagement with Professor Singel's proposal, particularly its resonance with current debates in international human rights law and American Indian tribal law, has inspired us to examine in more detail a specific question raised by her work: that is, Professor Singel's normative suggestion that indigenous peoples should embrace the concept of "human rights accountability" and should effectuate it through their own laws, both procedural and substantive.<sup>65</sup>

As we prepared our response to Professor Singel's article, we began to look closely at the numerous ways in which indigenous peoples themselves are interacting with, defining, and, in some cases, embracing and concomitantly shaping the body of law we refer to as "indigenous peoples' human rights." The result has been an exciting development in our scholarship toward the research and drafting of a forthcoming work, *The Jurisgenerative Moment in Indigenous Human Rights*, which we briefly sketch out in this symposium Article.<sup>66</sup>

In our forthcoming article, taking an approach that is largely descriptive rather than empirical or normative, we consider the ways in which American Indian tribes now find themselves as empowered architects of a multifaceted "human rights culture."<sup>67</sup> Indeed, we contend we are witnessing a demonstrable, transformative moment in which human rights manifest in multiple sources of law, institutions, and discussions with relevance to Indian country.<sup>68</sup> Just as newly adopted instruments such as the United Nations Declaration on the Rights of Indigenous Peoples strengthen indigenous claims against nation-states for the protection of land, resources, religion, and dignity, so too does the human rights culture inspire indigenous communities to look inward and begin to uncover, revitalize, and apply their own conceptions of justice and freedom to contemporary problems.

This inquiry has taken us down several fascinating and yet-unexplored paths. First, we are in the process of examining the role of indigenous conceptions of justice, both as they relate to tribal legal systems and also as they have increasingly been incorporated into international human rights law and in the drafting of the U.N. Declaration on the Rights of Indigenous Peoples in particular.<sup>69</sup> Foundational to this research is the question of how

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65. Singel, *supra* note 1, at 608.

66. Kristen A. Carpenter & Angela R. Riley, *The Jurisgenerative Moment in Indigenous Human Rights*, 102 CALIF. L. REV. (forthcoming 2014).

67. See Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2049 (2003).

68. See generally Rebecca Tsosie, *Reconceptualizing Tribal Rights: Can Self-Determination Be Actualized Within the U.S. Constitutional Structure?*, 15 LEWIS & CLARK L. REV. 923 (2011).

69. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

indigenous cosmologies inform substantive norms and conceptions of rights and responsibilities in tribal communities. Thus, indigenous peoples' notions of justice serve as the core foundation for this project.

We are also exploring multiple additional avenues of intersection within indigenous human rights, with a particular focus on the ways in which tribes are using the somewhat nascent body of international indigenous human rights law to inform their own internal lawmaking and adjudicatory systems. We have uncovered numerous examples to demonstrate the phenomenon, including tribal constitutions and codes manifesting human rights language,<sup>70</sup> tribal court opinions relying on international law,<sup>71</sup> and the creation of human rights bodies within tribal communities that are designed to specifically deal with indigenous peoples' human rights concerns.<sup>72</sup> Just as strikingly, we have discovered that these interactions with indigenous human rights are surfacing again in the international human rights cases themselves. These cases increasingly reflect tribal conceptions of dignity and justice and reaffirm the rights of indigenous peoples "to have rights"<sup>73</sup> under international law.<sup>74</sup>

70. See, e.g., LITTLE TRAVERSE BAY BANDS OF ODAWA CONST. art. VI ("We, the Little Traverse Bay Bands of Odawa Indians, speak through this document to assert that we are a distinct nation of Anishinaabek of North America that possess the right to: self-determination; freely determine our political status; freely pursue our economic, social, religious and cultural development, and determine our membership, without external interference. These same rights and principles the Little Traverse Bay Bands of Odawa Indians acknowledge to be inherent among other peoples, nations and governments throughout the world. We recognize their sovereignty and pledge to maintain relations with those peoples, nations and governments who acknowledge those same fundamental human rights and principles, and who recognize the sovereignty of the Little Traverse Bay Bands of Odawa Indians."); NORTHERN ARAPAHO CODE, 7 N.A.C. 401 (describing grounds for an order terminating peacemaking process as "[c]onduct by the Peacemaker in the peacemaking process which is degrading, inhuman, dangerous, assaultive or otherwise violative of basic human rights").

71. E. Band of Cherokee Indians v. Torres, 2005 WL 6437828, at \*7 (E. Cherokee Sup. Ct. Apr. 12, 2005) (citing International Convention on the Elimination of All Forms of Racial Discrimination and other international decisions and instruments in support of Eastern Cherokee tribal court jurisdiction over crime committed by citizen of Mexico); *In re Custody of T.M.*, 3 Am. Tribal Law 485, 487 (Navajo 2001) (citing the Convention on the Rights of the Child in support of child's right to be heard in a custody case); *Selana v. Hualapai Tribe*, Appellate Court Case No.: 2008-AP-005 (Hualapai Court of Appeals 2008) (considering international norms on treatment of minor witnesses).

72. See NAVAJO NATION CODE ANN. tit. 2, § 921 (2009) (creating the Navajo Human Rights Commission "to operate as a clearinghouse entity to administratively address discriminatory actions against citizens of the Navajo Nation, and to interface with the local, state, and federal governments and with national and international human rights organizations in accordance with its plan of operation and applicable laws and regulations of the Navajo Nation").

73. See generally HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 298 (1951).

74. See, e.g., *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Inter-Am. Ct. H.R., No. 11,577 (Aug. 31, 2001), available at <http://www.escri>

What we observe, then, might be described—in the words of Robert Cover—as a “jurisgenerative” moment in indigenous human rights, wherein tribal people draw from multiple legal sources to create and renew legal meanings that allow them to flourish as vital and separate peoples.<sup>75</sup> In this regard, we argue that tribes are neither resisting international human rights law nor being overpowered by it. Rather, they are embracing and becoming empowered by international law, using their own tribal laws, substantive and procedural, as a means to digest, interpret, and apply the concept of human rights today.<sup>76</sup>

In some ways, this forthcoming project is critique-driven. That is, we desire to engage critics from two opposite perspectives: one contending that international human rights law improperly defers to (or even elevates) collective tribal autonomy over the individual rights of members<sup>77</sup> and the other arguing that if international human rights law does impose liability on tribes,<sup>78</sup> this represents another instance of forced assimilation, requiring

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net.org/sites/default/files/seriec\_79\_ing\_0.pdf (emphasizing indigenous land values and customary land tenure in recognition of property rights).

75. See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 15-16 (1983) (“Thus it is that the very act of constituting tight communities about common ritual and law is jurisgenerative by a process of juridical mitosis. New law is constantly created through the sectarian separation of communities. The ‘Torah’ becomes two, three, many Torahs as surely as there are teachers to teach or students to study. The radical instability of the paideic *nomos* forces intentional communities—communities whose members believe themselves to have common meanings for the normative dimensions of their common lives—to maintain their coherence as paideic entities by expulsion and exile of the potent flowers of normative meaning.”).

76. Cf. *id.* at 16 (“The paideic is an etude on the theme of unity. Its primary psychological motif is attachment. The unity of every paideia is being shattered—shattered, in fact, with its very creation. The imperial is an etude on the theme of diversity. Its primary psychological motif is separation. The diversity of every such world is being consumed from its onset by domination. Thus, as the meaning in a *nomos* disintegrates, we seek to rescue it—to maintain some coherence in the awesome proliferation of meaning lost as it is created—by unleashing upon the fertile but weakly organized jurisgenerative cells an organizing principle itself incapable of producing the normative meaning that is life and growth.”).

77. See Rebecca Gross, *The “I” in Indigenous: Enforcing Individual Rights Guarantees in an Indigenous Group Rights Context*, 23 N.Y. INT’L L. REV. 65, 67-68 (2010); see also Austin Badger, Comment, *Collective v. Individual Human Rights in Membership Governance for Indigenous Peoples*, 26 AM. U. INT’L L. REV. 485, 501-10 (2011) (arguing the UNDRIP fails to set forth a standard of review for tribes’ membership decisions).

78. See, e.g., Clare Boronow, Note, *Closing the Accountability Gap for Indian Tribes: Balancing the Right to Self-Determination with the Right to a Remedy*, 98 VA. L. REV. 1373, 1410-16 (2012) (considering whether, despite lack of formal liability for nonstate actors under classic approaches to international law, tribes may still be accountable to various international human rights laws, through liability devolving from states, a more capacious approach to international legal personality, and/or because they are persons or entities who enjoy certain rights and duties as a matter of customary international law); see also Robert J. Miller, *Inter-Tribal and International Treaties for American Indian Economic Development*, 12 LEWIS & CLARK L. REV. 1103, 1118-19 (2008) (considering whether Indian

tribes to meet foreign standards of Western liberalism that are antithetical to tribal values.<sup>79</sup>

While fully recognizing that several scholars raise legitimate and pressing concerns, we assert that these critiques are overly rigid, suggesting dichotomies and hierarchies<sup>80</sup> where tribes are taking more progressive, integrative approaches.<sup>81</sup> Indeed, from examples we have been able to uncover in support of our thesis, we have formed a different or at least complementary viewpoint. We observe that in some instances, tribes are working to foster individual *and* collective interests, legal rights *and* social relationships, and oral traditions *and* written laws. As a counterpoint to leading critiques, then, *The Jurisgenerative Moment* will demonstrate that indigenous peoples are deeply and consciously involved in architecting a human rights moment that bridges Western and indigenous ideals, mechanisms, and outcomes.<sup>82</sup> Just as tribes deploy human rights law to support claims for natural resources, religious freedoms, and equality against the United States, they are also using the language and instruments of human rights to inspire

tribes might be bound by the General Agreement on Tariffs and Trade, the North American Free Trade Agreement, or the World Trade Organization).

79. See generally, Elvira Pulitano, *Indigenous Rights and International Law: An Introduction*, in *INDIGENOUS RIGHTS IN THE AGE OF THE UN DECLARATION* 1, 6 (Elvira Pulitano ed., 2012); H. Patrick Glenn, *The Three Ironies of the UN Declaration on the Rights of Indigenous Peoples*, in *REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 171, 171 (Stephen Allen & Alexandra Xanthaki eds., 2011) (arguing that when indigenous peoples “demand recognition for alternative ways of understanding the world,” they do so “ironically enough . . . in the idiom of Western culture theory” (citing Adam Kuper, *The Return of the Native*, 44 *CURRENT ANTHROPOLOGY* 389, 395 (2003))); Natalie Baird, *To Ratify or Not to Ratify? An Assessment of the Case for Ratification of International Human Rights Treaties in the Pacific*, 12 *MELB. J. INT’L L.* 249, 263 (2011) (considering the claim that human rights are perceived as “foreign” in certain Pacific regions); Guillermo de la Pena, *Ethnographies of Indigenous Exclusion in Western Mexico*, 18 *IND. J. GLOBAL LEGAL STUD.* 307, 317-19 (2011) (describing apparent tension between cultural integrity and individual rights in certain Western Mexican communities); see also Austen Parrish, *Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights*, 31 *AM. INDIAN L. REV.* 291, 312 (2007) (suggesting that Western supporters of indigenous human rights may become disenchanted with indigenous groups who insist on the right to group autonomy at the expense of individual rights).

80. See, e.g., Gross, *supra* note 77, at 68 (arguing that “certain fundamental individual rights must supersede the indigenous peoples’ collective right to self-determination”).

81. Cf. Boronow, *supra* note 78, at 1420-25 (suggesting tribes embrace duties as articulated in international human rights instruments, either through self-enforcement or independent tribunals).

82. For one nuanced account of the challenges of reconciling human rights and indigenous traditions in property claims, see, e.g., Joel Wainwright & Joe Bryan, *Cartography, Territory, Property: Postcolonial Reflections on Indigenous Counter-Mapping in Nicaragua and Belize*, 16 *CULTURAL GEOGRAPHIES* 153, 154 (2009) (arguing that assertion of property rights, including through legal and cartographic strategies, in international human rights cases both “confronts a racist and exclusionary colonial past” and “reinforces differences and inequalities in the colonial present”).

internal reflection on tribal governance. In this process, they have actively and thoughtfully integrated international human rights norms *with* tribal law norms, and, in some cases, used the discourse of human rights to uncover and revitalize their own indigenous legal traditions.<sup>83</sup>

*The Jurisgenerative Moment*, then, is a direct outgrowth of the inquiry inspired by Professor Singel's work. And, in many ways, its descriptive approach parallels—and perhaps even supports—her normative proposal for the development of an indigenous, treaty-based dispute resolution mechanism within the United States.

### CONCLUSION

Professor Singel's scholarly career to date, and especially *Indian Tribes and Human Rights Accountability*, has elevated discourse in American Indian law by identifying thorny problems on the ground, embracing legal theory as a conceptual tool, and proposing tribal law solutions to tribal law problems. In this regard, she has pushed others to go further in their work. With respect to human rights, Professor Singel has inspired us to reexamine the ascendant critiques that would dichotomize human rights and tribal rights as incompatible, either because human rights immunize tribes or dominate them. Through the theoretical lens of the "jurisgenerative" legal process,<sup>84</sup> we assert that tribes are now acting as empowered architects in the global human rights culture, working to improve the lives of their members through a vital interpretive process. We look forward to continued dialogue on this project with our valued colleague Professor Singel and others in the field.

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83. Cf. JOHN BORROWS, *RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW* xii (2002) ("[T]he power of Aboriginal law can still be discerned despite the pervasiveness of imported law."); JOHN BORROWS, *CANADA'S INDIGENOUS CONSTITUTION* 23-55 (2010) (describing sources and categories of indigenous law including sacred, natural, deliberative, positivistic, and customary); RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE* xvii (2009) ("There is a unique side to tribal court jurisprudence in the United States . . . [that] involves retrieving ancient tribal values, customs, and norms and using them to solve contemporary legal issues and tribal problems. The modern Navajo Nation courts are adept at this way of problem solving. This method is itself a lesson embedded in the Navajo Creation Scripture and Journey Narratives. These narratives are the Navajo people's oral history beginning with the primeval universe.").

84. Cover, *supra* note 75, at 15-16.