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Afterthoughts from a "Buzz Killer"

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AFTERTHOUGHTS FROM A "BUZZ KILLER"

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When my husband is in the middle of telling a funny story, sometimes I interrupt him because he misstates some inconsequential fact. For example, he might be launching into the crazy story about his Aunt Jean's will, saying, "Two years ago, when Aunt Jean died . . . ," and I cut in, "It was three and a half years ago, not two." And then we have a little argument about whether I am right or not, while the person to whom my husband was talking shifts uncomfortably and glances at her watch. My husband accuses me of being a "buzz killer" when I do this. I am almost always right, and he would agree, about the inconsequential detail; but, he will always wonder, was it worth killing the buzz just to insert the annoying reality check?

I really do not want to kill the buzz from the wonderful conference that NCAI and Phil Frickey organized. As a whole-hearted supporter of the push to encourage Indian law scholars to engage in grounded research, maybe I should just slam my laptop shut right now. But as my husband will tell you, it is very difficult for me to remain quiet. Therefore, I will try to be very brief. My two concerns are first, that we should not be overly focused on the judiciary as a potential audience for our work. And second, that we maintain a healthy skepticism towards empiricism, even as we simultaneously embrace its importance.

Some Thoughts About Audience

We should be careful not to misunderstand what Phil Frickey and others are saying as,"We need to be better at telling judges how to rule in Indian law cases." If we aim our grounded scholarship solely at the courts, we are likely frequently to be disappointed, at least in the short run.[1] In addition, we run the risk of distorting our research agendas in order to try to fit them into litigation time frames or amicus brief strategies. This is not to say, however, that we should act as if our only audience is other academics, and that we are oblivious

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1. *See Conference Transcript: The New Realism: The Next Generation of Scholarship in Federal Indian Law*, 32 AM. INDIAN L. REV. 1, 5-6 (2007-2008) [hereinafter *New Realism Transcript*] (transcript of a meeting of the National Congress of American Indians at Berkeley, Cal., Nov. 17, 2006).

to the consequences of our scholarship in the real world.[2] Rather, I think we should write for a broad audience, composed of anyone who might benefit from real stories and data about law and life in Indian country. We are writing, to return to the definition of scholarship that Frickey quotes, "to make claims about the world as trustworthy as possible."[3] Our valid, trustworthy claims about the world of American Indian nations may have no resonance whatsoever in the world of federal judges. That makes our scholarship no less valuable, but it may well make it a source of frustration if we are looking solely to the standard of whether courts are citing to or influenced by our work. Of course, if courts do find our work helpful, that is a good and encouraging thing. It just should not, in my view, be the primary goal of Indian legal scholarship.

There is another reason why our aim at a judicial audience should, at most, be indirect and long-term. As Ronald Coase warned long ago, we must be mindful of the feedback effects of legal rules. Coase was no Indian law scholar, and his incisive critique of the Pigouvian approach to externalities might seem to have little relevance to our field. But perhaps, as at least one commentator suggests, we should rescue Coase's broad insights from their capture by law and economics scholars.[4] In particular, Indian law scholars should heed Coase's observation that if adjustments to a legal regime do not consider impacts on the entire system, the adjustment may result in feedback effects that are undesirable.[5] I suspect that American Indian nation leaders are acutely aware of the problem of feedback effects, even if it is also likely that they do not use such vocabulary for it. While in Coase's example, the potentially undesirable feedback effect of the railroad liability rule was the

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2. I think the risk of this is quite small among our colleagues. Most American Indian law scholars travel frequently between the worlds of practice and scholarship, and increasing numbers are from or have close ties to tribal communities. Still, sometimes it is easy to get distracted, in which case I recommend reading, or re-reading, Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741 (1997) (recounting the author's tale of recovery from being a blood-sucking academic). Professor Williams closes with this blunt injunction: "Get off your butt, go out and make a difference in the world. Or, think independently, act for others. Whatever, you were taught your responsibilities, you know what it is you have to do." *Id.* at 765.

3. *New Realism Transcript*, *supra* note 1, at 148.

4. *See* Pierre Schlag, *An Appreciative Comment on Coase's* The Problem of Social Cost: *A View from the Left*, 1986 WIS. L. REV. 919.

5. *See* R. H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1, 32-34 (1960). As Coase stated, "But the problem is to devise practical arrangements which will correct defects in one part of the system without causing more serious harm in other parts." *Id.* at 34.

under-production of rail service,[6] in the politically charged and plenary power-ridden world of Indian law, the feedback effect is often a congressional nip-and-tuck of judicially recognized tribal powers.[7] I do not want to overstate this version of the feedback effect, given that in recent years it has been the Court, and not Congress, that has done the nipping and tucking.[8] But the point is that even if we could get the Court to do better, we have to remain ever aware of the broader context. Information about the effects of legal rules on Indian nations, the values served or suppressed by those rules, and the legal, political and social contexts in which those values are formed (and contested) must be interrogated irrespective of pending litigation. The feedback loop further suggests that our audience should be broad. It should include people working within and for Indian nations, the general public, legislators, and yes, even courts;[9] but not just courts, and certainly not only the Supreme Court.[10]

Some Thoughts About Empiricism

In his introductory remarks, Phil Frickey cautioned us that doing shoddy empirical work is worse than doing none at all.[11] This is important advice. I would also add that it is important not to do technically proficient empirical work that is theoretically and politically naïve. The concrete nature of some forms of empirical research can be entrancing and misleading. We might take, for example, the outcomes of regression analysis as fixed truths rather than situated and tentative points of information. As critical theorists have cautioned, we should maintain a sense of the structure while examining the

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6. *See id.* at 32-34.

7. *See, e.g.*, the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (2006) (adjusting the state-tribal balance of authority over Indian country gaming following judicial recognition of sole tribal authority in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)).

8. *See* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001).

9. This is entirely consistent with the "New Realism" framing. As Stewart Macaulay observed, one of the things that should distinguish the "new" realism from the old is a much broader sense of what law is as well as a larger audience horizon . *See* Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used to Be,"* 2005 WIS. L. REV. 365, 390-91 (discussing the need for a broad view of law, one not solely focused on the distillation of conflicts in legal opinions).

10. As my comments during the conference indicated, our goals for the moment are frighteningly modest, in that they are merely to win over even one or two of the typically more "liberal" Justices. So, for example, even if we dislodge Justice Souter from his misunderstandings, we are, in all likelihood, still one away from a majority. *See New Realism Transcript*, *supra* note 1, at 98.

11. *See id.* at 6.

individual parts, and should also be mindful that the empiricist, whether quantitative or qualitative, comes to the world as it has been shaped by politics and history.[12] The empiricist is also herself shaped by these forces, as well as her own professional and cultural identity.[13]

On these points, we benefit tremendously from the explosion of law and society work that has occurred since the first bout of legal realism, as well as from the critical assessments that law and society scholars have conducted of this body of work. At another "New Realism," conference, Professor Stewart Macaulay distilled some of the lessons from the past four decades or so of law and society work into some helpful insights. One lesson is that looking at facts matters, even if we simultaneously should be aware of the ways in which "facts" are situated and produced.[14] As Macaulay writes:

> Often, the best we can offer is a provisional and qualified picture of the world as our best guess of what others would find if they looked at what we examined. Yet, this is an advance over supporting one's normative position by anecdotes, urban legends, or statements based on no more than what we want to believe, because too many law professors are expert in finding an example or two of something, and asserting that it is a typical or important enough phenomenon to worry about. Social science teaches that we can and should do better.[15]

Another is that our view of what law is and how it operates should be from "the bottom up."[16] By this, Macaulay means more than that we should study the gaps between official law and "law in action." We should consider the potential feedback effects of filling the gaps — of what full legal enforcement would mean.[17] And we should also study informal understandings and cultures of law.[18] My sense is that these insights will seem quite natural to many American Indian law professors. American Indian law, bound in history, riddled with gaps, and beset, in endless intriguing and under-examined ways, with informal understandings and mechanisms, is primed for the New Realism.

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12. *See* David M. Trubek & John Esser, *"Critical Empiricism" in American Legal Studies: Paradox, Program or Pandora's Box?*, 14 LAW & SOC. INQUIRY 3, 11-12 (1989).

13. *See id.* at 13.

14. *See* Macaulay, *supra* note 8, at 396-98.

15. *Id.* at 397.

16. *Id.* at 390.

17. *See id.* at 390-91 (discussing the likely undesirability of "full enforcement" of the law.)

18. *See id.* at 399-402 (discussing various examples of informal and supra-governmental legal arrangements and mechanisms).

So my concerns are perhaps only that as we embrace the tools of empiricism, that we simultaneously remember the things we already know about our field, many of which are part and parcel of the broader New Realist agenda.

Reviving the Buzz

In this last part, I will try to remind you, and myself, that we (yes, failing to heed my own advice, my audience throughout this short piece has been very narrow,) have the best jobs in the world. We are expected to spend thousands of hours studying, thinking about, and expounding on things that fascinate us, things that we care about. Not only that, it is our responsibility to initiate future lawyers, to inspire them and remind them not just that they have to start thinking "like lawyers," but that they have to keep on thinking like human beings. We get to remind them that they *have to think.* How amazing is that? And that part of thinking includes thinking critically, though not cynically. As professors and scholars of American Indian law, we additionally have the enormous privilege of doing this work in the context of some of the most compelling and fascinating communities in this country. What this amounts to is that whichever methods we choose to engage in to "make claims about the world," that we try to, in the end, say something enlivening, something that matters.

In addition, our fabulous jobs allow us to wear several hats so that we need not cram all of our goals for engagement with the world into our scholarship. If we want to reach out specifically to judges, we can participate in *pro bono* litigation or draft amicus briefs, as many of us do. We can also (and I think we should) arrange for seminars to educate judges both about the basic doctrine of Indian law and the lessons from grounded scholarship. In addition, we can, and again many do, engage in mutual consultation with tribal communities. Our objectives with regard to each of these kinds of activities may often be partially reflected in our scholarly work, but our scholarship can and should also stand apart as a separate, slower, less instrumental enterprise, yet one informed by a critical sense of both ourselves and the world that produced us.

So if I killed the buzz with my cautions about audience and unreflective empiricism, I hope these reminders about our fortunate positions and our corresponding obligations have revived it. If not, feel free to try my husband's approach: roll your eyes, sigh, and keep on with your story.