

TRIBAL LEGAL DEVELOPMENT CLINIC:

UCLA School of Law

LAUREN VAN SCHILFGAARDE* & PATRICIA SEKAQUAPTEWA**

Tribes possess inherent sovereignty, which includes the authority to self-govern through distinct tribal legal systems.¹ They are extra-constitutional, in which the U.S. Constitution's provisions, including the Bill of Rights, have no force over tribes.² Yet the federal government can

This article is part of the special section, "Legal History in the Making: Innovative Experiential Learning Programs in California Law Schools," in *California Legal History*, vol. 17, 2022 (see editor's introduction on page 3).

* Lauren van Schilfgaarde is the San Manuel Band of Mission Indians Director of the Tribal Legal Development Clinic at the UCLA School of Law.

** Patricia Sekaquaptewa, former instructor at the Tribal Legal Development Clinic, is Affiliated Assistant Professor in the Department of Native Studies and Rural Development at the University of Alaska, Fairbanks, and Associate Justice of the Hopi Appellate Court in Arizona.

¹ See *Worcester v. Georgia*, 31 U.S. (6. Pet.) 515, 559 (1832) (recognizing tribes as "distinct, independent political communities") and *United States v. Wheeler*, 435 U.S. 313, 323–324 (1978) (upholding tribal powers of self-governance as the exercise of inherent sovereign powers, as opposed to delegated powers).

² Jordan Gross, *Incorporation By Any Other Name? Comparing Congress' Federalization of Tribal Court Criminal Procedure with the Supreme Court's Regulation of State Courts*, 109 KENTUCKY L.J. 299, 301 (2021), https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1201&context=faculty_lawreviews.

exert plenary authority over tribes, which has produced a variety of both harmful and supportive policies toward tribal self-government.³ Federal Indian law, the body of federal law regarding tribal-U.S. relations, is a core component of U.S. law and as old as the country itself. Yet, federal Indian law is a marginalized, if not completely neglected component of legal education.⁴ Tribal law, the bodies of law developed by any of the 574 federally recognized tribes, fares even worse.⁵

As tribes resiliently continue to self-govern, including through efforts aimed at the forced assimilation and destruction of tribes, their legal needs have grown exponentially. But because the legal academy has failed to sufficiently recognize and incorporate both federal Indian law and tribal law into the mainstream curriculum, there is a dearth of legal competency to serve these needs. The complexity and growing proliferation of Indian law cases across tribal, state, and federal dockets demand an elevated competency threshold for the entirety of the legal profession.⁶ Legal curriculum regarding Indian law can and must include exposure to actual tribes, their legal systems, and the diverse ways in which tribes interact with the law. The experiential education model offers a unique opportunity to facilitate these competency obligations to and about tribes and federal Indian law, while also enhancing law students' lawyering and comparative analytical skills.

The UCLA School of Law's Tribal Legal Development Clinic is designed to introduce students to the complexities of tribal law, federal Indian law, and the considerations of group, government, and cross-cultural representation. The Tribal Legal Development Clinic connects law students with tribal governments and organizations to engage in non-litigation, legal

³ See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01 (Nell Jessup Newton, et al., eds., 2012).

⁴ Gloria Valencia-Weber, *Indian Law on State Bar Exams: A Situational Report*, THE FEDERAL LAWYER 26 (March/April 2007), <https://www.fedbar.org/wp-content/uploads/2007/03/focuson-valenciaweber-0307-pdf-1.pdf>.

⁵ Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555 (2021), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2021/03/Reese-73-Stan.-L.-Rev.-555.pdf>.

⁶ See, e.g., *Oklahoma v. Castro-Huerta*, No. 21-429, slip op. at 12 (June 29, 2022) (Gorsuch, J., dissenting) ("Today the Court rules for Oklahoma . . . without any sense of this history recounted above and unattached to any colorable legal authority. Truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom."), https://www.supremecourt.gov/opinions/21pdf/21-429_8o6a.pdf.

development projects on behalf of the tribal client, using both classroom teaching and experiential learning methods. Law students work with law faculty on campus and travel to tribal communities and reservations. The Clinic engages in policy research and legislative drafting on a broad spectrum of subjects. Clinic clients have come from all parts of Indian country. Though, in part because UCLA is a public university in a state with a shameful history of tribal justice, the Clinic has a special responsibility to tribes in California.⁷ The Tribal Legal Development Clinic has additionally worked with non-federally recognized tribes and nonprofit organizations affiliated with either tribes or tribal issues. This article overviews the history, approach, and impact of the Tribal Legal Development Clinic.

HISTORICAL BACKGROUND

In 1996, California voters approved Proposition 209, which amended the state constitution to effectively ban the consideration of race or ethnicity in admissions decisions to the University of California.⁸ American Indian enrollment in the nine campuses of the University of California plummeted dramatically.⁹ Until 2008, when the UC Board of Admissions and Relations with Schools issued a policy clarification that political membership in a federally recognized tribe could be considered in admissions decisions,¹⁰ the UCLA School of Law and the UCLA American Indian

⁷ See, e.g., BENJAMIN MADLEY, *AN AMERICAN GENOCIDE: THE UNITED STATES AND THE CALIFORNIA INDIAN CATASTROPHE, 1846–1873*, Yale University Press (2017).

⁸ CAL. CONST. art. 1, § 31(a) (“The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”).

⁹ Cruz Reynoso & William C. Kidder, *Tribal Membership and State Law Affirmative Action Bans: Can Membership in a Federally Recognized American Indian Tribe Be a Plus Factor in Admissions at Public Universities in California and Washington?*, 1 CHICANA/O LATINA/O L. REV. 27, 30 (2008) (noting that, between 1995 and 2005, American Indian freshman enrollment at UC Berkeley, UCLA, and UC Davis declined by 74 percent), <https://escholarship.org/uc/item/9461z6cr>.

¹⁰ “Position Statement on Admissions Selection Criterion 13 and Membership in a Federally Recognized American Indian Tribe” (Board of Admissions and Relations with Schools — University of California, February 8, 2013), https://senate.universityof-california.edu/_files/reports/MTB2Sakaki_Tribal_Affiliation_final.pdf.

Studies Center were the only programs within the UC system to recognize tribal membership as an admissions factor.¹¹ Still, the wake of Prop 209 caused robust and complex harms.¹²

In response, Professor Carole E. Goldberg, founder and then director of the UCLA School of Law's Native Nations Law and Policy Center and celebrated legal scholar in federal Indian law,¹³ established the Tribal Legal Development Clinic. Professor Goldberg reflected that, particularly in the wake of Prop 209, it was essential for students to have direct experience working with a tribal community. From the beginning, she hoped the Clinic would help develop skills in two areas that continue to be underrepresented in legal education — cross-cultural representation and legislative drafting. The latter is not really taught in any major law school, and Professor Goldberg was hard pressed to find any published teaching materials on the subject.¹⁴ There is also very little written about representing tribal clients.¹⁵ The Tribal Legal Development Clinic is one of the first law school clinics to center on federal Indian law and tribal law and remains one of the few Indian law clinics in the country.¹⁶

¹¹ Reynoso & Kidder, *supra* note 9 at 32.

¹² Zachary Bleemer, *Affirmative Action, Mismatch, and Economic Mobility After California's Proposition 209*, 137 Q.J. ECON. 115 (2022), <https://zacharybleemer.com/wp-content/uploads/Papers/QJE%20Affirmative%20Action.pdf>.

¹³ See, e.g., Joshua Rich, *Seeds of success: Through her students, law professor sows change in Indian country*, UCLA NEWSROOM (Nov. 18, 2018) (noting she was one of the first female faculty members at the UCLA School of Law in 1972 and her receipt of the 2013 Lawrence R. Baca Lifetime Achieve Award, the highest honor bestowed by the Indian law section of the Federal Bar Association, among her many accolades), <https://newsroom.ucla.edu/stories/seeds-of-success-through-her-students-goldberg-sows-change-in-indian-country>.

¹⁴ *But see* JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES, 3D ED. (Rowman & Littlefield, 2015) (which now serves as the primary textbook of the Tribal Legal Development Clinic).

¹⁵ Since then, some notable exceptions now include Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437 (2002) and Kristen A. Carpenter & Eli Wald, *Lawyering for Groups: The Case of American Indian Tribal Attorneys*, 81 FORDHAM L. REV. 3085 (2013), <https://scholar.law.colorado.edu/articles/95>.

¹⁶ A list (though not exhaustive) of notable Indian law clinics includes the Tribal Justice Clinic at the University of Arizona James E. Rogers College of Law, the Indian Legal Clinic at Arizona State University Sandra Day O'Connor College of Law, the American Indian Law Clinic at the University of Colorado Law School, the Tribal Judicial Support Clinic at Kansas University School of Law, the Indian Law Clinic at Michigan

In 2001, Professor Goldberg recruited Pat Sekaquaptewa (Hopi) and her Hopi Tribal Court Project from the University of California Berkeley School of Law. Professor Sekaquaptewa, a 1995 Berkeley Law graduate, started the Hopi Appellate Court Clerkship in 1993 following a summer visit home from law school — and a summer clerkship with the Hopi Tribal Courts — to the Hopi Reservation in Arizona. Like many tribes, the Hopi Courts lacked the personnel and the legal resources to consistently manage appeals from the Hopi Trial Court. At the end of the summer, Hopi Appellate Court Chief Justice Emory Sekaquaptewa (her uncle), suggested that she return to Berkeley Law and recruit her fellow students to assist in resolving the backlog of appeals. According to Professor Sekaquaptewa,

After spending the summer with those files, I realized the significance and magnitude of the many questions of first impression bearing on the shaping of the Hopi tribal government. I also recognized a need to find a way to balance the recognition of, and the integration of, custom and tradition with contemporary Hopi and Tewa peoples' growing expectations of individual rights and other western norms and values.

After six years of running the clerkship at Berkeley Law, Professor Sekaquaptewa moved the project to the UCLA School of Law and incorporated it within the broader Tribal Legal Development Clinic. The Tribal Legal Development Clinic has since oscillated between incorporating tribal appellate clerking within its docket and offering a Tribal Appellate Court Clinic as a stand-alone course.

The Tribal Legal Development Clinic is housed within the UCLA School of Law's experiential program, which features a comprehensive selection of clinics, practicums, simulation courses, and externships. Since the foundational work of Professor Goldberg and Professor Sekaquaptewa, the Tribal Legal Development Clinic has functioned under the leadership of an array of instrumental adjunct faculty, including Clifford Lyle

State University College of Law, the Indian Child Welfare Clinic at the University of Minnesota Law School, the Margery Hunter Brown Indian Law Clinic at the University of Montana Alexander Blewett III School of Law, the Southwest Indian Law Clinic at the University of New Mexico School of Law, the Tribal Environmental Law Project at the University of North Dakota School of Law, and the Tribal Court Clinic: Criminal Defense and Family Advocacy at the University of Washington School of Law.



CLINIC STUDENTS SERVED AS JUDICIAL CLERKS AT THE HO-CHUNK NATION SUPREME COURT, BLACK RIVER FALLS, WISC., 2019 (L.-R.): BEN RATHELON (THEN LL.M.); SIMONE CHUNG (THEN 2L); ASSOCIATE JUSTICE DAVID J. W. KLAUSER, CHIEF JUSTICE TODD R. MATHA, AND ASSOCIATE JUSTICE TRICIA A. ZUNKER (UCLA LAW 2006); LAUREN VAN SCHILFGAARDE, SAN MANUEL BAND OF MISSION INDIANS DIRECTOR, TRIBAL LEGAL DEVELOPMENT CLINIC, UCLA SCHOOL OF LAW; HOLLIE CHE (THEN 2L); ALEX BOOKOUT (THEN 3L).

Photo courtesy UCLA Tribal Legal Development Clinic.

Marshall, former chairman of the Hoopa Valley Tribe; William Wood, associate professor of law at Southwestern Law School; and James Kawahara of Kawahara Law. In 2019, the San Manuel Band of Mission Indians significantly impacted the trajectory of the Tribal Legal Development Clinic through a five-year \$1.3 million gift that facilitated the hiring of a full-time director. With this gift, the Tribal Legal Development Clinic was transformed from being offered once a year into a full-time clinic, offered both fall and spring semesters, as well as during the summer, in which law clerks are hired full-time. Lauren van Schilfgaarde was hired as the Clinic's first full-time director and served from 2019–2022.

THE CURRICULUM

Like most clinics, the Tribal Legal Development Clinic curriculum is multi-faceted. The seminar portion of the Clinic is designed to impart

substantive law, predominately tribal law and federal Indian law. Students are expected to recognize and understand that there is a third sovereign in the U.S. system — tribal governments with sovereign powers that pre-exist the formation of the United States and that persist today, with over 570 tribes formally recognized by the U.S. government. Students must recognize and understand the legal foundations and limitations of tribal sovereignty under U.S. law, particularly as they inform the subject matter of their project. Today, tribes are engaged in nation-building from the bottom up, in response to a historical federally controlled top-down construction of tribal government and its laws. As a consequence, tribal legal system development can mirror the early states' legal system development but must also respond to contemporary demands. Tribal law can include variations of a tribal constitution, code, case law, resolutions, and unwritten custom and tradition. Crafting substantive tribal law requires keen appreciation for the binding nature of existing tribal law, the historical context of the tribe, the contemporary state and federal legal frameworks impacting the tribe, and the extent to which other tribal, state, federal, and/or international laws are persuasive influences on the tribe. Students must recognize and understand that the foundations of tribal law stem from each tribe's unwritten customs and traditions as modified by their contemporary tribal constitutions, statutes, and common law.

The Clinic additionally strives to teach students how to work with tribes, including the complexity of interactions with tribal leaders, judges, agencies, and communities. The Clinic is designed to build specific legal skills that include legal research, memo drafting, client interviewing, crafting legislation, and clerking on appeals. Particularly with tribes as clients, students must navigate a group as a client. Do they represent the in-house counsel, tribal leadership, the tribal government, or the tribe itself? The student must develop skills in working with these various entities, including soliciting input for the (re)drafting of legislation. Critically, in conducting this work, the Clinic seeks to build the student's professional self-awareness — as a non-tribal member and also as a legal professional working in Native communities that are engaged in nation-building efforts within a different culture, with different world views and languages, and with different colonial histories and experiences. What type of lawyer does the student strive to be? What duties are encompassed in that role? How do they define success?

CLINIC PROJECTS

Over the course of the Clinic's two decades of work, hundreds of tribes and tribal organizations from across the country have worked with the Tribal Legal Development Clinic. Tribes submit requests for assistance on various nation-building projects that, once accepted, are assigned to law students. Clinic projects have included reformed constitutions, new statutes, rules, and protocols, the development of tribal courts and alternative dispute resolution processes, and the development of the tribal common law. The Clinic works closely with tribal attorneys, administrators, and leadership to carry out legal projects. UCLA faculty supervise the work on these projects and provide instruction in tribal law, federal Indian law, and in other areas of law implicated in a specific project.

Many tribes lack law-trained judges, law clerks, or in-house counsel. For tribes that do have staff attorneys, the in-house counsel tends to be under-resourced and over-worked. Few tribes have resources dedicated to drafting law. The Tribal Legal Development Clinic is designed to facilitate the organic nation-building efforts of tribal clients in a productive way that serves both the tribe and the students. The breadth of projects is just shy of remarkable. But so too is the work in which tribes are engaged every day. Lawyering in Indian country has always required malleability and eagerness, and so the Clinic strives to approach potential projects with the same zeal that will be demanded of these future attorneys. Purely as an illustration, and with the confidentiality of Clinic clients in mind, we offer this bullet list of example projects:

Child Welfare

- Establish tribal social services and foster care departments
- Research the interaction of state child welfare laws and the Indian Child Welfare Act
- Draft rules of court regarding Tribal Customary Adoption
- Research the inadvertent impacts of artificial reproductive technology and tribal membership provisions
- Research the impact of federal funding pressures on tribal child welfare laws

Cultural Resource Protection

- Draft cultural resource protection code
- Establish tribal institutional review boards for human subjects and cultural property protections
- Assist in the negotiation and drafting of inter-governmental agreement protecting sacred sites
- Publish *The Need for Confidentiality within Tribal Cultural Resource Protection*¹⁷
- Prepare template comments comparing the National Native American Graves Protection and Repatriation Act with state law
- Research state cultural resource protection laws
- Research the potential for cultural harvesting and access off tribal lands
- Publish, in partnership with the Pueblo Action Alliance, *Sacred Place Protections, Limitations, and Re-Imagination for Chaco Canyon*¹⁸

Economic Development

- Draft tribal trademark code
- Draft tribal corporations code

Environmental Protection

- Draft environmental code
- Research tribal authority to enforce environmental regulations on groundwater
- Draft cultural and endangered species code

Gender-Based Violence

- Draft domestic violence protection orders, stalking, and elder protection codes
- Implement the Violence Against Women Act's special domestic violence criminal jurisdiction into tribal code

Government-to-Government Interaction

- Draft sample consultation protocols
- Research the history of law enforcement relations in Public Law 280 jurisdictions in which there is concurrent state jurisdiction

¹⁷ <https://law.ucla.edu/academics/centers/native-nations-law-policy-center/native-nations-publications>.

¹⁸ https://drive.google.com/file/d/1a7o5rVAI6v0nSiEJKc3prlxxxCD_BrkU/view.

International Law

- Publish, in partnership with the Native American Rights Fund and the University of Colorado Law School, *Project to Implement the United Nations Declaration on the Rights of Indigenous Peoples Tribal Implementation Toolkit*¹⁹
- Compare federal intellectual property protections for traditional knowledge with international protections under the World Intellectual Property Organization

Land Use

- Assist tribes in acquiring a trust-protected land base
- Research options for a tribal land conservancy
- Research comparing traditional land tenure principles with western property concepts and laws
- Research comparing traditional village burial practices with mainstream property rights

Taxation

- Research examining dual taxation in Indian country
- Draft taxation enforcement criteria

Tribal Code

- Integrate custom and tradition, recognition of duties and privileges of traditional authorities, and use of traditional processes in drafting/ revising tribal laws
- Conduct comprehensive review of a tribal code for internal consistency

Tribal Court and Dispute Resolution

- Research to establish tribal courts and subject-matter dockets, including its subject matter and personal jurisdiction, the selection of judges, and other core components
- Research to establish a tribal nonprofit offering alternative dispute resolution services (mediation and arbitration) for family and property disputes
- Research to establish a Family Healing to Wellness Court (a tribal drug court for dependency cases)

Voting

- Research voting protections for Native communities under state law

¹⁹ <https://un-declaration.narf.org/wp-content/uploads/Tribal-Implementation-Toolkit-Digital-Edition.pdf>.

OBSERVED OUTCOMES OF STUDENTS

Law students have stated that it was an eye-opening privilege to be a part of the founding and the development of tribal governments within the Tribal Legal Development Clinic. The experience, they said, helped them to better understand how their own state and federal governments evolved. They also expressed an appreciation for the insights and sensitivities that they developed as part of the cross-cultural experience. After having completed a term within the Tribal Legal Development Clinic, whether a semester or summer clerkship, students have developed or enhanced their professional legal skills. Critically, however, students have also expanded their cross-cultural capacity and appreciation, and thereby dramatically altered their approach to the law and their future clients. A student reflected, “This class demonstrates the best of all the areas it covers: critical race theory, applied legal work, and cross-area legal theory.”²⁰ Former student (now attorney) Simone Chung described her appreciation for the comparative legal perspective in noting:

I’ve never read anything like the court opinions written by the Supreme Court of the Navajo Nation, which explore pre-constitutional law and custom through implicit concepts in the Navajo language. In *Navajo Nation v. Rodriguez*,²¹ the Navajo Nation adopted Miranda rights, not because the U.S. Supreme Court precedent was persuasive, but because the Fundamental Law or Diné dictates that police officers should treat all tribe members with dignity and respect.²²

The Tribal Legal Development Clinic is part of the UCLA School of Law’s Native Nations Law and Policy Center, which aims to prepare the next generation of lawyers serving Indian country. And numerous former students of the Tribal Legal Development Clinic have done just that. After taking the Tribal Legal Development Clinic, former student (now attorney) Ethan Elkind worked with Professor Pat Sekaquaptewa to responded to the observed

²⁰ Anonymous Student Evaluation of the Tribal Legal Development Clinic, Fall 2021 (on file with author).

²¹ 5 AM. TRIBAL LAW 473 (2004).

²² Simone Chung, *First Gen in Focus: Students Share their Stories of Success*, 42 UCLA LAW MAGAZINE 12 (Fall 2019), <https://law.ucla.edu/news/first-gen-focus-students-share-their-stories-success>. Chung, class of 2021, is an associate at Skadden, Los Angeles.

burden that the poor and the elderly were disproportionately expected to inform the Hopi Tribe's customary law within Hopi Tribal Court without any institutional support. Ethan Elkind, with the Hopi judges, designed a formal community-based mediation program to work with Hopi and Tewa families in conflict to transform their disputes into working relationships outside of court. These families were able to talk through their valued customs and ways and how they mattered in their families, internalizing traditional values and ways, instead of being court-ordered to follow them.²³

A small sampling of former students includes:

Adam P. Bailey, partner at Hobbs, Straus, Dean & Walker (Sacramento)

R. Daniel Carter, partner at Conner & Winters, LLP (Tulsa)

Carson R. Cooper, acting general counsel at Seneca Nation of Indians (Buffalo)

Kori Cordero, associate general counsel, Yurok Tribe (Medford-Grants Pass)

Michele Fahley, deputy general counsel of the Pechanga Indian Reservation (Temecula)

Richard J. Frye, associate at Hobbs, Straus, Dean & Walker (Sacramento)

Madeline Soboleff Levy, general counsel for the Central Council of Tlingit & Haida Indian Tribes of Alaska (Juneau)

Caroline P. Mayhew, partner at Hobbs, Straus, Dean & Walker (Washington, D.C.)

Padraic McCoy of Ocotillo Law & Policy (Boulder)

Melody Meyers, Office of the Tribal Attorney, Yurok Tribe (Arcata)

Nicole Sieminski, executive director at the Tulalip Foundation (Marysville)

Christina Snider, tribal affairs secretary, Office of California Governor Gavin Newsom (Sacramento)

Geneva E. B. Thompson, assistant secretary for tribal affairs, California Natural Resources Agency (Sacramento)

Heather Torres, program director, Tribal Law and Policy Institute (Los Angeles)

²³ Elkind, class of 2006, is director of the Climate Program at the Center for Law, Energy and the Environment at UC Berkeley Law and leads the Climate Change and Business Research Initiative on behalf of the UC Berkeley and UCLA Schools of Law.

CONCLUSION

The Tribal Legal Development Clinic is just one example of the possibility of leveraging the needs of Indian country, the needs of legal education, and the ever dynamic and stimulating nature of Indian law. The Clinic seeks to uplift federal Indian law and tribal law as core components of the legal academy and profession. It seeks to meaningfully connect with tribes and the Native community. It seeks to ensure that law students receive substantive training in legislative drafting, client engagement, comparative legal research, and professional responsibility. Yet, with 574 federally recognized tribes, and increasingly hostile attacks on tribal sovereignty, there is simply too much need for just one Clinic. Our hope is that all law schools recognize and incorporate Indian law into all classrooms, as well as stand-alone courses. Tribes have immense wisdom to offer the law, and it is incumbent upon us to ready our capacity to receive it.

★ ★ ★