

LIES, DAMN LIES, AND FEDERAL INDIAN LAW: THE ETHICS OF CITING RACIST PRECEDENT IN CONTEMPORARY FEDERAL INDIAN LAW

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ABSTRACT

Federal Indian law is rooted in history. Present day Indian law practitioners routinely cite cases from the 1800s. Most of the jurisprudence dealing with Indians in the 1800s is flagrantly racist and based upon grossly erroneous stereotypes about Indians. Contemporary Indian rights continuously erode because federal Indian law remains stuck in the unjust past. This is problematic because it perpetuates a racist legacy but also because lawyers are bound by ethical rules. Lawyers are forbidden from propagating untruths, acting in a manner that discriminates based on race or ethnicity, and engaging in conduct that is prejudicial to the administration of justice. Accordingly, lawyers' ethical obligations are incompatible with contemporary federal Indian law. This Article offers recommendations on how to purge the racism from federal Indian law.

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I.

INTRODUCTION

In *Dred Scott v. Sandford*, Chief Justice Taney infamously wrote,

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.¹

Although the case was effectively superseded by the passage of the Thirteenth and Fourteenth Amendments,² aspects of the decision remain binding law and

1. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

2. U.S. CONST. amends. XIII, XIV.

have continuing influence.³ However, most lawyers and judges would never dream of citing *Dred Scott*. When Kansas Solicitor General Stephen McAllister cited *Dred Scott* in support of the proposition that the Declaration of Independence is a values statement rather than law, public criticism forced the state Attorney General to quickly withdraw the brief and apologize for the citation.⁴ The case's racist rancor runs roughshod over any precedential value it may carry. *Dred Scott* serves as a reminder of how far the country has come. Indeed, a war was fought, and the Constitution amended, to cure its ill effects.⁵

Unfortunately, change has been far slower to come in the realm of federal Indian⁶ law. As but one example, *Lone Wolf v. Hitchcock*,⁷ the American Indian *Dred Scott*,⁸ not only remains binding law but is cited without generating

3. Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI-KENT L. REV. 49, 73 (2007); Lewis H. LaRue, *The Continuing Presence of Dred Scott*, 42 WASH. & LEE L. REV. 57, 58 (1985); see Cass R. Sunstein, *Constitutional Myth-Making: Lessons from the Dred Scott Case*, OCCASIONAL PAPERS FROM L. SCH. U. CHI., 1996, at 1, 9 (noting the importance of *Dred Scott* as “the birthplace of the idea of ‘substantive due process’”).

4. P.R. Lockhart, *It's 2016 and Kansas Approvingly Cited Dred Scott in an Abortion Case. It Was Not a Good Idea.*, MOTHER JONES (Oct. 20, 2016), <https://www.motherjones.com/politics/2016/10/kansas-retracts-dred-scott-citation-supporting-anti-abortion-law/> [https://perma.cc/MQ9A-MNGB]; Bryan Lowry, *Attorney General Schmidt Apologizes for State's Citation of Dred Scott Case*, WICHITA EAGLE (Oct. 20, 2016, 6:30 AM), <https://www.kansas.com/news/politics-government/article109166717.html> [https://perma.cc/74YQ-GGMD]; Debra Cassens Weiss, *Kansas Attorney General Apologizes for Dred Scott Citation in Abortion Brief*, ABA JOURNAL (Oct. 20, 2016, 8:01 AM), http://www.abajournal.com/news/article/kansas_attorney_general_apologizes_for_dred_scott_citation_in_abortion_brief [https://perma.cc/JJ2Z-JFBZ].

5. Sarah Bell, *Dred Scott v. Sandford* (1857), CIVIL WAR ON THE WESTERN BORDER, <http://www.civilwaronthewesternborder.org/encyclopedia/dred-scott-v-sandford-1857> [https://perma.cc/XA8X-6SJM] (last visited Feb. 15, 2020); *Dred Scott Decision*, THIS DAY IN HIST., <https://www.history.com/this-day-in-history/dred-scott-decision> [https://perma.cc/3YR2-MJ2E] (last visited Feb. 15, 2020); *Dred Scott v. Sandford*, OHIO HIST. CENT., http://www.ohiohistorycentral.org/w/Dred_Scott_v._Sandford, [https://perma.cc/2GP9-ERSS] (last visited Feb. 15, 2020).

6. This Article uses the term “Indian” rather than “Native American” to denote the indigenous peoples of the United States. “Indian” is used because it is the proper legal term (see, e.g., 25 U.S.C. §§ 1-5636 (2012)), and “Indian” is the preferred term of Indians themselves. See, e.g., MISS. BAND CHOCTAW INDIANS, <http://www.choctaw.org/> [https://perma.cc/D88K-8ZAH] (last visited Feb. 15, 2020); POARCH CREEK INDIANS, <http://pci-nsn.gov/westminster/index.html> [https://perma.cc/UY24-D8MJ] (last visited Feb. 26, 2020); SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, <https://www.srpmic-nsn.gov/> [https://perma.cc/5S9D-6Q4G] (last visited Feb. 28, 2020); SOUTHERN UTE INDIAN TRIBE, <https://www.southernute-nsn.gov/> [https://perma.cc/C7DB-XBFS] (last visited Feb. 26, 2020).

7. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

8. *Sioux Nation of Indians v. United States*, 601 F.2d 1157, 1173 (Ct. Cl. 1979), *aff'd*, 448 U.S. 371 (1980) (“The day *Lone Wolf* was handed down, January 5, 1903, might be called one of the blackest days in the history of the American Indian, the Indians’ *Dred Scott* decision.”) (Nichols, J., concurring); Angela R. Riley, *The Apex of Congress’ Plenary Power over Indian Affairs: The Story of Lone Wolf v. Hitchcock*, in INDIAN LAW STORIES 189, 189 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011) (citing Senator Matthew Quay (R. Pennsylvania), U.S. Congressional Record 2028 (1903): “It [*Lone Wolf*] is a very remarkable decision. It is the *Dred Scott* decision No. 2, except that in this case the victim is red instead of black. It practically inculcates

controversy today;⁹ in fact, it was cited during the Supreme Court's most recent term.¹⁰ Jurisprudence loaded with grotesque 19th-century racist stereotypes and factual errors about American Indians remains valid precedent.¹¹ Even a case wherein the Supreme Court explicitly declares a law regulating Indian Affairs unconstitutional but upholds the law because Indians are a dependent, weak, and helpless people continues to be cited in contemporary decisions.¹²

Attorneys in the present day United States routinely use cases based on white supremacy to argue against American Indian rights, and judges unblinkingly cite these opinions in federal Indian law cases.¹³ Furthermore, many of the restrictions placed upon tribes by Congress are rooted in antiquated jurisprudence.¹⁴ Federal Indian law jurisprudence is often nothing more than racism cloaked as law. This begs the question: Is federal Indian law, as it is currently practiced, ethical? Can lawyers comply with their ethical obligations while simultaneously citing overtly racist, factually erroneous cases in the field of federal Indian law? This Article will demonstrate that much of the current practice of federal Indian law is in fact incompatible with modern standards of legal ethics.

the doctrine that the red man has no rights which the white man is bound to respect, and that no treaty or contract made with him is binding. Is that not about it?").

9. *E.g.*, *Thompson v. United States*, No. 3:18-CV-00147-RCJ-WGC, 2018 WL 5833062, at *2 (D. Nev. Nov. 7, 2018) ("Congress has plenary power over the Indian tribes, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903)"); *Pueblo of Jemez v. United States*, 350 F. Supp. 3d 1052, 1102 n.27 (D.N.M. 2018) ("The Supreme Court further stated that Congress' decision to take Tribal property is a political question not subject to judicial review. *See Lone Wolf v. Hitchcock*, 187 U.S. at 565."); *Munoz v. Barona Band of Mission Indians*, No. 17-CV-2092-BAS-AGS, 2018 WL 1245257, at *3 (S.D. Cal. Mar. 8, 2018) (citing to *Lone Wolf* in support of the proposition that Congress has the power to modify or extinguish tribal sovereignty).

10. *McGirt v. Oklahoma*, S. Ct. 2452, 2462 (2020) ("This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. *Lone Wolf v. Hitchcock*, 187 U. S. 553, 566–568 (1903).").

11. *See infra* Parts III–V.

12. *United States v. Kagama*, 118 U.S. 375, 383–84 (1886); *see, e.g.*, *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 909 (9th Cir. 2017), as amended (Aug. 3, 2017) ("But 'Indian tribes are . . . no longer 'possessed of the full attributes of sovereignty.'") (citing *United States v. Wheeler*, 435 U.S. 313, 323) (quoting *Kagama*, 118 U.S. at 381)); *United States v. Lara*, 541 U.S. 193, 206 (2004); *Nevada v. Hicks*, 533 U.S. 353, 363–64 (2001).

13. Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law through the Lens of Lone Wolf*, 38 TULSA L. REV. 5, 5 (2002) ("Most educated Americans have heard of *Dred Scott*. In contrast, only a small segment even of the American legal community is aware of *Lone Wolf*.").

14. *See generally* Adam Creppelle, *Decolonizing Reservation Economies: Returning to Private Enterprise and Trade*, 12 J. BUS. ENTREPRENEURSHIP & L. 413 (2019) [hereinafter Creppelle, *Decolonizing Reservation Economies*]; Adam Creppelle & Walter E. Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country*, 23 WASH. & LEE J. C.R. & SOC. JUST. 315, 318–19 (2017); Lance Morgan, *The Rise of Tribes and the Fall of Federal Indian Law*, 49 ARIZ. ST. L.J. 115, 115 (2017) (acknowledging that one reality of Indian law is "a set of rules established over the last two hundred years by the federal court system and the United States Congress . . . which have combined to place tribes in a tight box of restrictions and limitations").

In Part II, this Article first delves into the development of legal ethics and then explores the contemporary ethical obligations of lawyers and judges relating to truth, equality, and justice. As this Article demonstrates, these obligations are highly salient to federal Indian law jurisprudence. Part III discusses six canonical Indian law cases. Based both in impermissible racial stereotypes and a doctrine of white supremacy, this case law is overtly racist. However, it remains binding law. Part IV discusses two Indian law cases that the United States Solicitor General has admitted are based upon lies and racist stereotypes; nevertheless, the cases remain binding precedent. Part V examines the Supreme Court's scurrilous *Oliphant v. Suquamish Tribe* opinion and unpacks both the deficiencies in its reasoning and the devastating consequences of the decision. Part VI poses the question: Is it ethical to cite cases that are factually wrong and racist? Applying the ethical standards which govern the legal profession to the racist and erroneous opinions still relied upon in federal Indian law, this Article firmly concludes that this practice is unethical. Part VII offers three solutions to help remove the racism from Indian law. The primary recommendations of this Article are to improve education on Indian law and history, to impose consequences for those who violate legal ethical guidelines with their continued reliance on this precedent, and to take congressional action.

II.

LEGAL ETHICS: PAST AND PRESENT

Although the Model Rules of Professional Conduct (MRPC) are relatively new, legal ethics are far from novel. In Part II.A, this Article traces the development of legal ethics from antiquity to the American Bar Association's (ABA's) MRPC. As model rules, the ABA MRPC are not binding on lawyers.¹⁵ However, each state bar association establishes its own ethical guidelines for lawyers licensed to practice within the state,¹⁶ and most state bar associations have adopted the ABA MRPC or rules largely identical to them.¹⁷ It should also be

15. *United States v. Straker*, 258 F. Supp. 3d 151, 156 (D.D.C. 2017) ("However, this ABA Opinion is not binding on this Court, interpreted Model Rule 1.6 (which is different than D.C. Rule 1.6) and is contrary to the controlling ethics opinion from this jurisdiction."); *Melo v. United States*, 825 F. Supp. 2d 457, 463 n.2 (S.D.N.Y. 2011) ("Moreover, an ABA ethics opinion is not binding on this Court."); *Dunlap v. United States*, No. 4:09-CR-00854-RBH-1, 2011 WL 2693915, at *1 n.4 (D.S.C. July 12, 2011) ("First and foremost, ABA opinions are not binding authority on this court."); *In re Meador*, 968 S.W.2d 346, 349 n.1 (Tex. 1998) ("While the [ABA's Committee on Ethics and Professional Responsibility's] opinions are often cited as persuasive authority by state disciplinary bodies, the opinions do not bind those bodies.").

16. *Additional Legal Ethics and Professional Responsibility Resources*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest/ [<https://perma.cc/8JG5-RZUH>] (last visited Feb. 29, 2020); Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct*, 15 GEO. J. LEGAL ETHICS 313, 330 (2002) (noting that there are ethics rules adopted by each jurisdiction, usually based on the ABA Model Rules).

17. See Geri L. Dreiling, *Choosing Up Sides*, ABA J. (May 1, 2007, 9:22 AM),

noted that in addition to rules set by state bar associations, several other rules govern lawyers' conduct.¹⁸ Part II.B then summarizes the key ethical duties for attorneys within the ABA MRPC. Lastly, Part II.C outlines the standards of honesty, justice, and impartiality which the Model Code of Judicial Conduct (MCJC) establishes for the judiciary.

A. *The Development of Legal Ethics*

Legal ethics can be traced as far back as ancient Greece and Rome.¹⁹ Foremost amongst the Roman lawyer's duties was to speak only that which the lawyer believed to be true.²⁰ The fall of the Roman Empire and the onset of the Dark Ages caused the significance of lawyers, as well as legal ethics, to fade.²¹ However, a code of legal ethics began to emerge in England during the 13th century when advocates were required to take an oath swearing, among other things, to be truthful during litigation.²² By 1402, English lawyers were required

http://www.abajournal.com/magazine/article/choosing_up_sides [https://perma.cc/M6SU-NRPN] (“The ABA Model Rules serve as the basis for most state ethics codes that directly govern lawyers.”); Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express ‘Bias,’ Including in Law-related Social Activities*, WASH. POST (Aug. 10 2016, 5:53 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/a-speech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-law-related-social-activities-2/?noredirect=on&utm_term=.45177f4a8900 [https://perma.cc/HD7J-YXYP] (noting that the MRPC is “an influential document that many states have adopted as binding on lawyers in their state”); *Legal Ethics & Professional Responsibility Research: ABA Codes*, NYU LAW, <https://nyulaw.libguides.com/c.php?g=773845&p=5552013> [https://perma.cc/BBT5-QFYF] (last updated Mar. 27, 2018) (“Most states have adopted the Model Rules, though some with modifications. California is currently the only state that has not adopted some version of the Model Rules.”).

18. *E.g.*, 15 U.S.C. § 7245 (2012); 17 C.F.R. § 205.1 (2011); FED. R. CIV. P. 11; FED. R. APP. P. 46.

19. Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1389 n.25 (2004) [hereinafter Andrews, *Standards of Conduct for Lawyers*] (“Roman laws, from the third century, addressed a variety of abuses” within the legal profession); Louise L. Hill, *Solicitation by Lawyers: Piercing the First Amendment Veil*, 42 ME. L. REV. 369, 370 (1990) (“Both lawyers and proscriptions against solicitation have their roots in ancient Greek and Roman law.”); *Professional Responsibility: History*, LAW LIBR.-AM. L. AND LEGAL INFO., <https://law.jrank.org/pages/9481/Professional-Responsibility-History.html> [https://perma.cc/F8LH-VYMN] (last visited Feb. 28, 2020).

20. Andrews, *Standards of Conduct for Lawyers*, *supra* note 19, at 1393; *see also* John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV. 207, 219 (2008) (“Like the lawyer’s duty of candor toward the tribunal, the concept of zeal in the lawyer’s representation of her client has antecedents in early Roman law.”).

21. Andrews, *Standards of Conduct for Lawyers*, *supra* note 19, at 1390 (“After the fall of the Roman empire, the role of lawyers is obscured in the ‘dark ages.’”); *A Brief Guide to the History of Lawyers*, SMOKEBALL (May 8, 2018), <https://www.smokeball.com/blog/brief-guide-to-the-history-of-lawyers/> [https://perma.cc/4YAU-Q526] (“Lawyers in medieval times found themselves struggling to make a living as the legal profession collapsed in the western world.”); *Professional Responsibility: History*, *supra* note 19.

22. Andrews, *Standards of Conduct for Lawyers*, *supra* note 19, at 1393.

to take an oath to “do no falsehood.”²³ French legal ethics were evolving at the same rate as the English, and by 1231, French ecclesiastical lawyers were required to be truthful and maintain the honor of the court during the course of litigation.²⁴ Though honesty before tribunals has remained a hallmark of French and English legal ethics over the centuries, the legal profession in both nations also developed other standards to enhance the profession.²⁵

Lawyers in colonial America were held in ill repute.²⁶ Virginia thought so little of lawyers that it outright prohibited lawyers for periods of time while imposing extreme regulations on lawyers at other times.²⁷ In 1732, Virginia began to follow the practice of other colonies and required lawyers to swear an oath that: “You shall do no falsehood, nor consent to any to be done in the court; and if you do know of any to be done you shall give notice thereof to the justices of the court that it may be reformed...”²⁸ The oath, inspired by the English oath taken for centuries, formalized a duty of honesty in litigation.²⁹ England’s legal influence extended to colonial lawyers’ views of rights; consequently, colonial lawyers were vital to America’s push for independence.³⁰

Legal ethics in the United States began to take their current shape during the 19th century.³¹ In 1881, Thomas Goode Jones first proposed the idea of

23. *Id.* at 1404; Richard Dooling, *First, Tell No Lies: A Hippocratic Oath for Lawyers?*, LINCOLN BAR ASS’N 1, 2 (2018), <https://www.lincolnbarassociation.com/wp-content/uploads/2018/11/Presentation-First-Tell-No-Lies-A-Hippocratic-Oath-For-Lawyers.pdf> [<https://perma.cc/Z5F6-86UN>].

24. Andrews, *Standards of Conduct for Lawyers*, *supra* note 19, at 1410.

25. *Id.* at 1409, 1411; *see generally* John Leubsdorf, *On the History of French Legal Ethics*, 8 U. CHI. L. SCH. ROUNDTABLE 341 (2001).

26. Andrews, *Standards of Conduct for Lawyers*, *supra* note 19, at 1413; Kevin L. Colosimo & Daniel P. Craig, *A Brief History of American Legal Ethics, Colonial America to 1908*, 37 ENERGY & MIN. L. INST. § 1.02 (2017); William T. Ellis & Billie J. Ellis, *Beyond the Model Rules: Aristotle, Lincoln, and the Lawyer’s Aspirational Drive to an Ethical Practice*, 26 T.M. COOLEY L. REV. 591, 592 (2009).

27. Andrews, *Standards of Conduct for Lawyers*, *supra* note 19, at 1414; Anton-Hermann Chroust, *The Legal Profession in Colonial America*, 34 NOTRE DAME L. REV. 44, 45 (1958) (“Virginia displayed a violent and prolonged aversion to the lawyer.”).

28. Chroust, *supra* note 27, at 49; *see also* Andrews, *Standards of Conduct for Lawyers*, *supra* note 19, at 1415 (noting that “do no falsehood” oaths were some of the most common regulations amongst lawyers in the colonial era).

29. Andrews, *Standards of Conduct for Lawyers*, *supra* note 19, at 1422 (“Litigation candor and fairness obligations were expressed in the ‘do no falsehood’ oath, the procedural rules and misconduct statutes.”).

30. Colosimo & Craig, *supra* note 26, at 7 (“The American Revolution succeeded in great part due to the rise of a professionally trained class of lawyers . . .”); Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 13 (1934); Edmund Burke, Speech on Conciliation with the Colonies, (Mar. 22, 1775), in THE ESSENTIAL BILL OF RIGHTS: ORIGINAL ARGUMENTS AND FUNDAMENTAL DOCUMENTS 170, 173 (Gordon Lloyd & Margie Lloyd eds., 1998).

31. Carol Rice Andrews, *Ethical Limits on Civil Litigation Advocacy: A Historical Perspective*, 63 CASE W. RES. L. REV. 381, 401 (2012) [hereinafter Andrews, *Ethical Limits*]; Andrews, *Standards of Conduct for Lawyers*, *supra* note 19, at 1423–24 (noting that nineteenth century legal educators and reformers “began a new era in American legal ethics”); Walter B. Jones,

formulating a Code of Legal Ethics to elevate the standards of professionalism in the field of law.³² During a discussion of the proposed Code, an Alabama senator stated, “We are not adopting rules for our guidance here merely because certain practices have become obsolete in the land; we are adopting what we consider a sound code of morals for the practice of the law.”³³ Jones’s efforts resulted in the Alabama State Bar Association adopting the first ever Code of Legal Ethics in the United States in 1887.³⁴ Several states soon followed Alabama’s lead.³⁵

Inspired by Alabama’s Code of Legal Ethics, the ABA adopted the Canons of Professional Ethics in 1908.³⁶ The Canons regulated many aspects of a lawyer’s conduct; however, the Canons emphasized that nothing is more harmful to the reputation of the legal profession than “the false claim.”³⁷ Accordingly, the Canons demanded candor and fairness from attorneys.³⁸ Misquoting the law and misrepresenting facts were shunned under the Canons.³⁹ Nevertheless, the Canons did not cure the public’s distrust of lawyers⁴⁰ as Justice Harlan Stone claimed in 1934 that socio-industrial changes in the twentieth century had “tainted it [the legal profession] with the morals and manners of the market place in its most anti-social manifestations.”⁴¹ He called for lawyers to make a “moral readjustment.”⁴² Several other commentators raised similar ethical concerns regarding the adequacy of the Canons.⁴³

Canons of Professional Ethics, Their Genesis and History, 7 NOTRE DAME L. REV. 483, 494 (1932) (noting the influence of Judge Sharswood’s nineteenth century essay on Alabama’s adoption of the first Code of Legal Ethics); Louis Parley, *A Brief History of Legal Ethics*, 33 FAM. L.Q. 637, 637–39 (1999).

32. John A. Eidsmoe, *Warrior, Statesman, Jurist for the South: The Life, Legacy, and Law of Thomas Goode Jones*, 5 JONES L. REV. 51, 145 (2001); Jones, *Canons of Professional Ethics*, *supra* note 31, at 483–84.

33. Jones, *supra* note 31, at 489.

34. *Id.* at 493; *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 454 n.11 (1978); *Gaylard v. Homemakers of Montgomery, Inc.*, 675 So. 2d 363, 369 (Ala. 1996).

35. Eidsmoe, *supra* note 32, at 146.

36. MODEL CODE OF PRO. RESP. Preface (AM. BAR ASS’N 1980) (noting that the original Canons of Professional Ethics “were based principally on the Code of Ethics adopted by the Alabama State Bar Association in 1887”); Andrews, *Ethical Limits*, *supra* note 31, at 420; Jones, *supra* note 31, at 494–96.

37. CANONS OF PROF’L ETHICS Canon 15 (AM. BAR ASS’N 1908).

38. *Id.* at Canon 22.

39. *Id.*

40. Stone, *supra* note 30, at 3 (asserting that contemporary “lay dissatisfaction with lawyers” went beyond the typical “chronic distrust of the lawyer class”).

41. *Id.* at 6–7.

42. *Id.* at 10.

43. Melissa Mortazavi, *The Cost of Avoidance: Pluralism, Neutrality, and the Foundations of Modern Legal Ethics*, 42 FLA. ST. U. L. REV. 151, 157 (2014) (“Critiques of the Canons were strong and mounting by the 1960s.”).

Lewis F. Powell, Jr., who would later serve on the Supreme Court of the United States, answered Justice Stone's call for reform.⁴⁴ Powell was elected ABA President in 1964 and pushed for a complete reform of legal ethics.⁴⁵ He claimed, "The Canons of Ethics, adopted in 1908, had well served their purpose for more than half a century. But the need for reevaluation and revision was overdue."⁴⁶ The goal of the overhaul was not to toss out the 1908 Canons; rather, the purpose was to transmute their essence into a contemporary form.⁴⁷ In their 1908 manifestation, Powell asserted that the Canons were unenforceable.⁴⁸ Thus, the ABA's House of Delegates created a Special Committee to recommend revisions to the then-current Canons.⁴⁹ Nearly five years after the creation of the Committee, the ABA House of Delegates adopted the Model Code of Professional Responsibility (MCPR) in 1969.⁵⁰

The MCPR was successful in that it was adopted by the majority of state and federal jurisdictions soon after its enactment.⁵¹ Nevertheless, the ABA created a committee, the Commission on Evaluation of Professional Standards, to further study legal ethics in 1977. The committee concluded that mere reforms would not suffice to properly govern the ethical situations faced by lawyers.⁵² The committee composed the Model Rules of Professional Conduct (MRPC), which the ABA adopted in 1983.⁵³ The MRPC have since been amended over a dozen times;⁵⁴ however, the essence remains unchanged.

44. *Lewis F. Powell, Jr.*, OYEZ, https://www.oyez.org/justices/lewis_f_powell_jr [https://perma.cc/TQX6-7Q6T] (last visited Feb. 27, 2020).

45. *Id.*

46. Lewis F. Powell, Jr., Supreme Court Justice, Evaluation of Ethical Standards, Address at ABA House of Delegates (Aug. 12, 1969), in WASH. & LEE U. SCH. L. SCHOLARLY COMMONS 1, <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1007&context=powellspeeches> [https://perma.cc/P2GA-M27S].

47. *Id.* at 4–5.

48. *Id.* at 5.

49. MODEL CODE OF PRO. RESP., *supra* note 36.

50. *Id.*; *The History of the Rules of Disciplinary Procedure in Washington: Selected Historical Highlights*, AM. BAR ASS'N 2, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/38th_conf_session15_history_of_the_wa_rules_of_disciplinary_procedure.pdf [https://perma.cc/89T3-TUNK] (last visited Feb. 24, 2020).

51. MODEL RULES OF PRO. CONDUCT Preface (AM. BAR ASS'N 2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble/ ("The Model Code was adopted by the House of Delegates on August 12, 1969, and subsequently by the vast majority of state and federal jurisdictions.").

52. *Id.*

53. *Id.*

54. *Id.* ("Between 1983 and 2002, the House amended the Rules and Comments on fourteen different occasions.").

B. The MRPC and the Truth

The Preamble of the MRPC begins by stating lawyers have a “special responsibility for the quality of justice.”⁵⁵ It notes that lawyers engage in adversarial dealings on behalf of their clients; nonetheless, a lawyer is required to be honest in dealings with others.⁵⁶ The MRPC suggest a lawyer should be more than honest. The MRPC encourage lawyers to elevate the justice system—to reform the law, be aware of and address deficiencies in law, and promote the equitable administration of the law.⁵⁷ Hence, the MRPC state that lawyers should aspire “to improve the law.”⁵⁸ The MRPC “provide a framework” rather than a definitive list of moral and ethical guidelines.⁵⁹

Though the MRPC are considered largely amoral in their design,⁶⁰ honesty and truth-seeking make appearances throughout the MRPC. Indeed, finding the truth is a paramount objective of the American legal system.⁶¹ Lawyers are to zealously represent their clients;⁶² nonetheless, a lawyer must ground her client’s case in both fact and law.⁶³ Lawyers are expressly prohibited from engaging in false or deceptive behavior⁶⁴ and cannot counsel a client to engage in fraudulent behavior.⁶⁵ Thus, lawyers must correct incorrect information when lawyers become aware of information’s falsehood.⁶⁶ A lawyer may be held responsible for a false statement by mere affirmation of the false statement or incorporating the false statement into her argument if the lawyer knows the statement is factually incorrect.⁶⁷ Even an omission can violate a lawyer’s duty to the truth.⁶⁸

55. MODEL RULES OF PRO. CONDUCT Preamble & Scope ¶ 1 (AM. BAR ASS’N 2020) [hereinafter MRPC, P&S], https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/ [<https://perma.cc/3BBZ-MXTN>].

56. *Id.* at ¶ 2.

57. *Id.* at ¶ 6.

58. *Id.* at ¶ 7.

59. *Id.* at ¶ 16.

60. Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 473 (2005).

61. *See, e.g.,* Polk Cty. v. Dodson, 454 U.S. 312, 318 (1981) (“[Our] system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.”); Mackey v. Montrym, 443 U.S. 1, 13 (1979) (“[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error . . .”); Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629, 1634 (2002) (noting that the “purpose of any justice system” is the securing of certain values, including truth).

62. MRPC, P&S, *supra* note 55, at ¶ 9.

63. MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS’N 2020).

64. *Id.* at r. 8.4(c), r. 4.1.

65. *Id.* at r. 1.2(d).

66. *Id.* at r. 3.3, r. 3.3 cmt. 2 (“[T]he lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.”).

67. *Id.* at r. 4.1 cmt. 1.

68. *Id.*

Lawyers are barred from engaging “in conduct that is prejudicial to the administration of justice;”⁶⁹ consequently, lawyers also cannot behave in a manner that discriminates on the basis of race, sex, or national origin.⁷⁰ The comments to the MRPC note that discrimination “undermine[s] confidence in the legal profession and the legal system.”⁷¹ Lawyers are expressly authorized to consider moral, social, and political factors when advising clients.⁷² Comments in the MRPC acknowledge that “moral and ethical considerations” are highly relevant to the application of the law.⁷³ Lawyers can seek to overturn existing law provided there is a “good faith argument” to overturn it.⁷⁴ Therefore, provided they have a reasonable basis for their argument, lawyers are empowered to affirmatively work towards overturning unethical precedent. Additionally, the comments note that lawyers who are public officials and trustees are held to heightened ethical standards.⁷⁵

C. *Judicial Ethics*

Like attorneys, judges are also bound by ethical standards.⁷⁶ The ABA Model Code of Judicial Conduct (MCJC) recognizes that a fair and impartial judiciary is essential to the United States justice system.⁷⁷ Accordingly, judges are obligated to “strive to maintain and enhance confidence in the legal system.”⁷⁸ Judges must apply the law impartially and must avoid even the appearance of impropriety.⁷⁹ Any judicial conduct that undermines the impartiality of a court subverts public confidence in the legal system.⁸⁰

In the course of judicial duties, judges are strictly prohibited from using words that intimate prejudice based upon race, gender, religion, or national origin.⁸¹ Judges are similarly forbidden from harassing others based upon the noted characteristics, and harassment includes the use of words that demonstrate antipathy toward a person on such bases.⁸² Likewise, judges must prohibit lawyers

69. *Id.* at r. 8.4(d).

70. *Id.* at r. 8.4(g).

71. *Id.* at r. 8.4 cmt. 3.

72. *Id.* at r. 2.1.

73. *Id.* at r. 2.1 cmt. 2 (“It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.”).

74. *Id.* at r. 3.1.

75. *Id.* at r. 8.4 cmt. 7.

76. *See* MODEL CODE OF JUD. CONDUCT (AM. BAR ASS’N 2011).

77. *Id.* at Preamble ¶ 1.

78. *Id.*

79. *Id.* at Canon 1–2.

80. *Id.* at r. 1.2 cmt. 3.

81. *Id.* at r. 2.3(B).

82. *Id.* at r. 2.3 cmt. 3 (“Harassment . . . is verbal or physical conduct that denigrates or shows

from exhibiting prejudice or bias based upon race, gender, or national origin in proceedings before the court.⁸³ Examples of proscribed prejudicial manifestations include suggestions of connections between race, nationality, and crime and other negative stereotyping.⁸⁴ Judges may, however, refer to these factors when they are relevant to the proceeding before the court.⁸⁵

With these standards of legal ethics in mind, this Article next turns to the foundations of federal Indian law. As the next Part will demonstrate, federal Indian law, from its beginnings, has been rife with bias, inaccuracies, and rationalizations based in white supremacy. This raises serious legal ethical problems.

III.

LEGAL ETHICS AND FEDERAL INDIAN LAW JURISPRUDENCE—THERE MAY BE A PROBLEM

Federal Indian law is a nonsensically complicated area of the law.⁸⁶ As this Part will demonstrate, a major reason for the complexity is that Indian tribes lack full territorial sovereignty. The reason for this lack of full territorial sovereignty goes back to racist jurisprudence from nearly two hundred years ago. This jurisprudence remains the cornerstone of contemporary federal Indian law.

Modern notions of civil rights and racial equality are thoroughly incompatible with the openly anti-Indian verbiage employed by courts over a century ago. Nonetheless, present day Indian rights are consistently diminished because long ago, white men in robes believed Indians were “savages,”⁸⁷ “heathens,”⁸⁸ and an “unfortunate race.”⁸⁹ Significantly, though the ABA had not devised its ethical rules when these cases were decided, the judges and attorneys participating in the

hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.”).

83. *Id.* at r. 2.3(C).

84. *Id.* at r. 2.3 cmt. 2.

85. *Id.* at r. 2.3(D).

86. *See, e.g.,* United States v. Lara, 541 U.S. 193, 219 (2004) (Thomas, J., concurring) (“Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases.”); Adam Creppelle, *Concealed Carry to Reduce Sexual Violence Against American Indian Women*, 26 KAN. J.L. & PUB. POL’Y 236, 239 (2017) (“Indian country criminal jurisdiction is a bewildering mess.”); Morgan, *supra* note 14, at 118–19 (“Federal Indian law is complicated.”).

87. Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543, 590 (1823) (“But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest.”).

88. *Id.* at 577 (“[N]otwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.”).

89. United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846) (stating that the federal government “has exercised its power over this unfortunate race in the spirit of humanity and justice”).

cases would have been bound by the long-established ethical duty of truth;⁹⁰ hence, these opinions likely would have been unethical by legal standards of the time. This section briefly summarizes six influential federal Indian law opinions that remain binding law in the United States.

A. *Johnson v. M'Intosh: Problematic Perpetuation of Doctrine of Discovery*

Though no Indian was a party to the case, *Johnson v. M'Intosh* is the foundation of federal Indian law.⁹¹ The case was a land dispute. Thomas Johnson, a member of the Wabash Company, had directly purchased the land from the Piankeshaw and Illinois Indians.⁹² Johnson had since died, and his heirs claimed title to the land based on his original purchase. William M'Intosh received a land grant from the federal government that overlapped Johnson's land.⁹³ Although the parties stipulated that their land claims were overlapping, the district court records demonstrate that in fact the land tracts at issue did not intersect.⁹⁴ This apparent lack of a genuine controversy did not prevent the Supreme Court from hearing the case for the purpose of deciding whether the Indians have ownership rights to their land.⁹⁵

Justice Marshall began his opinion by noting the case should be resolved by not only "those principles of abstract justice" but additionally "those principles also which our own government has adopted in the particular case, and given us as the rule for our decision."⁹⁶ He then went on to discuss the Doctrine of Discovery which gave the "discovering" European nation the exclusive right to acquire land from a country's indigenous people.⁹⁷ European nations were

90. See *supra* Part II.

91. *Johnson*, 21 U.S. at 543; ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 51 (2005) ("The Supreme Court's unanimous decision in *Johnson v. McIntosh*, written by Marshall in 1823, is, without question, the most important Indian rights opinion ever issued by any court of law in the United States.").

92. *Johnson*, 21 U.S. at 571–72; see also Eric Kades, *The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands*, 148 U. PENN. L. REV. 1065, 1083 (2000).

93. *Johnson v. M'Intosh: The Power to Grant Land*, CONSTITUTIONAL LAW REPORTER, <https://constitutionallawreporter.com/2015/09/01/historicaljohnson-v-mintosh-the-power-to-grant-land/> [<https://perma.cc/YU9N-QZL5>] (last visited June 15, 2019) ("William M'Intosh . . . had obtained the same land from the federal government.").

94. Kades, *supra* note 92, at 1092; Dennis J. Whittlesey & Patrick Sullivan, *The Foundation of Indian Law in the United States*, INDIAN GAMING LAW, Autumn 2016, at 8, 9. *But see* MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 27 (2016) (noting that while historians disputed M'Intosh's claim to the land, others had come to the conclusion "that there was enough overlap in the claims").

95. *Johnson*, 21 U.S. at 572 ("The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.").

96. *Id.*

97. *Id.* at 573 ("The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it."); see generally ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS

justified in applying the Doctrine of Discovery because “the character and religion” of the Indians contrasted with “the superior genius of Europe.”⁹⁸ And if that was not justification enough, Justice Marshall noted that European nations believed that they “made ample compensation to the inhabitants of the new [world], by bestowing on them civilization and Christianity.”⁹⁹ Indian inferiority meant that it was necessary to impair their rights;¹⁰⁰ thus, the sole land right of the “heathens” was occupancy.¹⁰¹ Justice Marshall concluded that the United States, as successor to Great Britain, unequivocally acquired title to all lands within its borders through its treaty with Great Britain.¹⁰² Therefore, Justice Marshall ruled American Indians lacked absolute title and thus could not freely alienate their land.¹⁰³

In addition to the Doctrine of Discovery, Justice Marshall offered additional analysis on why Indians should not be allowed to own their land. He did not decide whether, on abstract principles, “agriculturists, merchants, and manufacturers” might have a right to expel “hunters” from their land.¹⁰⁴ However, Justice Marshall’s acknowledgment of this argument reflects a view that the Indians were stuck in the hunter-gatherer state of society; as Justice Marshall claimed, “[t]o leave them in possession of their country, was to leave the country a wilderness.”¹⁰⁵ This, of course, was false, and Justice Marshall knew it. Justice Marshall was an educated Virginian, so he certainly would have known the Indians in the area were adroit farmers.¹⁰⁶

JEFFERSON, LEWIS AND CLARK, AND MANIFEST DESTINY 1 (2006) (“The Doctrine provided, under established international law, that newly arrived Europeans immediately and automatically acquired property rights in native lands and gained governmental, political, and commercial rights over the inhabitants without the knowledge nor the consent of the indigenous peoples.”).

98. *Johnson*, 21 U.S. at 573.

99. *Id.*

100. *Id.* at 574.

101. *Id.* at 576–77.

102. *Id.* at 584–85.

103. *Id.* at 588, 593 (“All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.”).

104. *Id.* at 588.

105. *Id.* at 590.

106. Crepelle & Block, *supra* note 14, at 336; Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters’ Last Stand: American Indian Women’s Resistance to Domestication and the Denial of Their Property Rights*, 77 N.C. L. REV. 637, 640 (1999) (“Chief Justice Marshall ignored the fact that for centuries, many tribes had indeed engaged in settled agriculture”); Mary Kathryn Nagle, *Standing Bear v. Crook: The Case for Equality Under Waaxe’s Law*, 45 CREIGHTON L. REV. 455, 465 (2012) (noting Justice Marshall’s assertion that Indians were not farmers in *Johnson v. M’Intosh* “is ironic, since the very first English settlers to arrive on the continent relied on Native American harvests to survive—and would have starved to death but for their ability to eat the crops grown by Native Americans.”); see also Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 607 (2009).

Justice Marshall further contended that the indigenous occupants of the Americas were warlike.¹⁰⁷ According to Marshall, the Indians “were fierce savages,” and moreover, because they “were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence,” coexistence with the civilized whites would be impossible.¹⁰⁸ Justice Marshall said that conflicts between the civilized and the savages were inevitable; hence, whites residing in proximity with Indians were under “the perpetual hazard of being massacred.”¹⁰⁹ However, he conceded whites were at times the antagonists.¹¹⁰ The reality is that Indians in what would be become the eastern United States often welcomed Europeans.¹¹¹

Factual errors and flagrant racism have not stopped *Johnson v. M’Intosh* from becoming one of the most influential cases in Supreme Court history.¹¹² The case remains binding law,¹¹³ and all land tenure in the United States can be traced directly to it.¹¹⁴ Moreover, the current trust status of Indian land is a direct consequence of *Johnson v. M’Intosh*.¹¹⁵ Trust land, in particular the bureaucracy that encumbers it, is a major reason that American Indians are the poorest people in the United States.¹¹⁶ Even the unapologetically ethnocentric Doctrine of

107. *Johnson*, 21 U.S. at 586 (“The ceded territory was occupied by numerous and warlike tribes of Indians[.]”).

108. *Id.* at 590.

109. *Id.*

110. *Id.* (“Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued.”).

111. *E.g.*, ROBERT M. UTLEY & WILCOMB E. WASHBURN, *INDIAN WARS* 15 (2002) (“Powhatan’s Indians not only permitted the settlement to survive, but actually helped the English during the first desperate winters.”); Joseph Perillo, *Exchange, Contract and Law in the Stone Age*, 31, 36–37 *ARIZ. L. REV.* 17 (1989).

112. William D. Wallace, *M’Intosh to Mabo: Sovereignty, Challenges to Sovereignty and Reassertion of Sovereign Interests*, 5 *CHI.-KENT J. INT’L & COMP. L.* (2005) (surveying multiple settler-states that have followed a similar framework to *Johnson v. M’Intosh* for the foundations of their land tenure systems); Blake A. Watson, *The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand*, 34 *SEATTLE U. L. REV.* 507, 508–09 (2011).

113. *E.g.*, *Oneida Indian Nation v. Phillips*, 360 F. Supp. 3d 122 (N.D.N.Y. 2018); *Pueblo of Jemez v. United States*, 350 F. Supp. 3d 1052 (D.N.M. 2018); *People ex rel. Becerra v. Huber*, 244 Cal. Rptr. 3d 79 (Cal. Ct. App. 2019).

114. Kenneth H. Bobroff, *Indian Law in Property: Johnson v. M’Intosh and Beyond*, 37 *TULSA L. REV.* 521, 521 (2001) (“*Johnson v. M’Intosh*, is at the root of title for most real property in the United States.”); Kades, *supra* note 92, at 1096 (“Marshall, then, created a rather strange two-tiered land tenure system: Indian title of occupancy applied before American purchase or conquest, and the common law of the several states applied after.”); see Carol M. Rose, *Left Brain, Right Brain and History in the New Law and Economics of Property*, 79 *OR. L. REV.* 479, 485 (2000).

115. Mickale Carter, *Regulatory Jurisdiction on Indian Reservations in Montana*, 5 *PUB. LAND L. REV.* 147, 149, 151 (1984); Crepelle, *Decolonizing Reservation Economies*, *supra* note 14, at 424–26; BrieAnn West, *Mediating Our Future: The Role of the Land Buy-Back Program in Rebuilding Confidence and Strengthening Trust Between Tribal Nations and the United States Government*, 35 *J. NAT’L ASS’N ADMIN. L. JUDGES* 481, 502–03 (2015).

116. Crepelle, *Decolonizing Reservation Economies*, *supra* note 14, at 443–44; Morgan,

Discovery, which was adopted in *M'Intosh*, was cited explicitly by the Supreme Court as recently as 2005 to rule against an Indian tribe.¹¹⁷

B. *Cherokee Cases: Diminished Sovereignty and Creation of the "Trust" Relationship*

The first of the two "Cherokee cases" occurred in 1831. The Cherokee Nation sought to assert its sovereignty as a shield against state encroachment, however, before the rights of the Cherokee Nation could be decided, the Cherokee had to establish that the Court had jurisdiction to hear the suit.¹¹⁸ The Cherokee Nation contended that it constituted a foreign state entitled to original jurisdiction before the Supreme Court.¹¹⁹ In support of its position, the Cherokee asserted they had numerous treaties with the United States denominating the Cherokee a nation; the Cherokee have been self-governing since time immemorial; and the Cherokee were "aliens," not American citizens, so they must be foreign.¹²⁰ Justice Marshall described this argument as "imposing."¹²¹ In contrast, Georgia made no argument.¹²²

Justice Marshall concluded the Cherokee were not a foreign state. Instead, Marshall decreed the Cherokee to be "domestic dependent nations... Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."¹²³ Justice Marshall justified this nomenclature because the Cherokee "look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father."¹²⁴ Moreover, Justice Marshall claimed the Founding Fathers may have intentionally excluded tribes in Article III because their understanding was that, rather than appeal to the courts, the Indian's "appeal was to the tomahawk, or to the government."¹²⁵ Justice Marshall concluded by pointing out the Commerce Clause of the Constitution distinguishes "tribes" from both "states" and "foreign nations" and there would have been no reason for this distinction had tribes been classed as foreign nations or states.¹²⁶ Thus, the Cherokee lacked standing to seek redress for their rights.

supra note 14, at 119; Jessica A. Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487, 490–91 (2017).

117. *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 203 n.1 (2005).

118. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831).

119. *Id.* at 15–16.

120. *Id.* at 16.

121. *Id.*

122. *Id.* at 14.

123. *Id.* at 17.

124. *Id.*

125. *Id.* at 18.

126. *Id.* at 18–20.

The Cherokee's fortunes changed a year later. White missionaries entered the Cherokee Nation to help it resist Georgia's hostilities.¹²⁷ Georgia, however, had enacted a law forbidding white people from residing within the Cherokee Nation without a license from the state.¹²⁸ Georgia arrested the unlicensed missionaries within the Cherokee Nation.¹²⁹ All but two, Samuel Worcester and Elizur Butler, accepted the state's offer of pardons.¹³⁰ Now Georgia's transgressions against the Cherokee could be legally challenged because Worcester and Butler were white men—the Court had jurisdiction.¹³¹ Many believed that Justice Marshall's true sympathies lay with the Cherokee Nation, and now provided with the chance to hear the matter on the merits, he ruled in favor of the tribe.¹³² Justice Marshall declared:

The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.¹³³

Though the Cherokee prevailed in the Court, the reality was very different. President Jackson allegedly said, “John Marshall has made his decision, now let him enforce it.”¹³⁴ Likewise, Georgia disregarded the Court's decision and kept Worcester and Butler in jail.¹³⁵ The Cherokee's hope of resistance was effectively over after the case.¹³⁶ A political faction within the Cherokee Nation signed the Treaty of New Echota on behalf of the entire Nation that sealed the tribe's

127. See, e.g., Elizabeth Wrozek, *Marker Monday: Dr. Elizur & Esther Butler: Missionaries to the Cherokees* GA. HISTORICAL SOC'Y, <https://georgiahistory.com/marker-monday-dr-elizur-esther-butler-missionaries-to-the-choerokees/> [<https://perma.cc/866R-B4SX>] (last visited July 3, 2020) (“Dr. Butler and Mr. Worcester were both missionaries working under the American Board of Commissioners for Foreign Missions who also provided legal and political advice to the Cherokee Nation in the 1820s and 30s as Georgia waged a campaign for the removal of all Native Americans from within the State's claimed borders.”).

128. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542 (1832).

129. Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 519–20 (1969).

130. *Id.* at 520 (“Nine of them accepted pardons, but Worcester and Elizur Butler rejected offers of freedom in order to get the Cherokees their second day in Court.”).

131. Rennard Strickland, *The Tribal Struggle for Indian Sovereignty: The Story of the Cherokee Cases*, in INDIAN LAW STORIES, *supra* note 8, at 61, 72–74.

132. *Id.* at 70; Burke, *The Cherokee Cases*, *supra* note 129, at 510.

133. *Worcester*, 31 U.S. at 561.

134. Burke, *The Cherokee Cases*, *supra* note 129, at 524–25.

135. Strickland, *The Tribal Struggle*, *supra* note 131, at 76.

136. *Id.* at 77 (In a letter, Samuel Worcester said, “There was no longer any hope, by our perseverance of securing the rights of the Cherokees, or preserving the faith of our country.”).

removal.¹³⁷ Many members of the Cherokee Nation were forced to march to Oklahoma; approximately one in four migrants died along the way.¹³⁸

The Cherokee cases remain foundational to contemporary Indian law.¹³⁹ Tribes continue to occupy the *sui generis* status of “domestic dependent nations.”¹⁴⁰ The modern-day trust relationship between tribes and the federal government¹⁴¹ is just a less paternalistic way of stating the relationship between tribes and the federal government is like “that of a ward to his guardian.”¹⁴² And though *Worcester* is widely regarded as a win for tribal sovereignty,¹⁴³ it was not. *Worcester* more accurately stands for the proposition that states have no authority in Indian country while the federal government has control over Indian country.¹⁴⁴

137. *Id.* at 77–78.

138. *A Trail of 4,000 Tears*, NAT’L HIST. EDUC. CLEARINGHOUSE, <http://teachinghistory.org/history-content/ask-a-historian/25652> [<https://perma.cc/FWE2-GZXR>] (last visited May 23, 2020); *The Trail of Tears*, PBS, <https://www.pbs.org/wgbh/aia/part4/4h1567.html> [<https://perma.cc/H3SJ-J6VL>] (last visited May 23, 2020) (“Over 4,000 out of 15,000 of the Cherokees died.”); *The Trail of Tears—The Indian Removals*, U.S. HIST., <http://www.ushistory.org/us/24f.asp> [<https://perma.cc/PQ5A-WM94>] (last visited May 23, 2020).

139. Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 628 (2006); *1831: Supreme Court Rules Indian Nations Not Subject to State Law*, NATIVE VOICES, <https://www.nlm.nih.gov/nativevoices/timeline/278.html> [<https://perma.cc/C9T5-9DFR>] (last visited May 23, 2020).

140. *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014).

141. *See, e.g.*, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); EXECUTIVE OFFICE OF THE PRESIDENT, 2016 WHITE HOUSE TRIBAL NATIONS CONFERENCE PROGRESS REPORT: A RENEWED ERA OF FEDERAL-TRIBAL RELATIONS (Jan. 2017).

142. Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at Its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope*, 18 N. ILL. U. L. REV. 115, 115–16 (1997); Heather Whitney-Williams & Hillary M. Hoffmann, *Fracking in Indian Country: The Federal Trust Relationship, Tribal Sovereignty, and the Beneficial Use of Produced Water*, 32 YALE J. ON REG. 451, 471–74 (2015); Mary Christina Wood, *Indian Trust Responsibility: Protecting Tribal Lands and Resources through Claims of Injunctive Relief against Federal Agencies*, 39 TULSA L. REV. 355, 358 (2003) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)).

143. *E.g.*, Sarah Deer & Mary Kathryn Nagle, *Return to Worcester: Dollar General and the Restoration of Tribal Jurisdiction to Protect Native Women and Children*, 41 HARV. J. L. & GENDER 179, 182 (2018).

144. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (“The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.”); Alison Burton, *What About the Children? Extending Tribal Criminal Jurisdiction to Crimes Against Children*, 52 HARV. C.R.-C.L. L. REV. 193, 198 (2017) (noting that the Court in *Worcester* “went on to hold that tribal sovereignty only has force against state governments and that tribes are subject to federal laws”); Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, n.55 (1998) (“Although *Worcester* is cited as a victory for tribal jurisdiction, the primary issue in *Worcester* was federalism, not tribal sovereignty.”).

C. U.S. v. Rogers: *Outright Racism and Discrimination*

The facts of *U.S. v. Rogers*¹⁴⁵ are simple. William Rogers was a white man who chose to move into the Cherokee Territory in 1836.¹⁴⁶ He married a Cherokee woman, had several children with her, and lived with her until she passed in 1843.¹⁴⁷ Jacob Nicholson was also a white man who had married a Cherokee and resided in the Cherokee Territory.¹⁴⁸ Rogers was indicted for the murder of Nicholson in 1845.¹⁴⁹ Rogers argued the United States had no jurisdiction over the case because both he and the victim were citizens of the Cherokee Nation—meaning they were Indians—at the time the crime was allegedly committed.¹⁵⁰ The district court certified this question to the Supreme Court.¹⁵¹ The Supreme Court answered the question during its next term in an opinion delivered by Chief Justice Taney.

After setting forth the facts, Justice Taney immediately derided Indian rights. Justice Taney noted the scene of the alleged murder was within the Cherokee Territory, but made clear his belief that the Cherokee occupy the land through an act of benevolence by the United States.¹⁵² Justice Taney noted the Americas were treated as “vacant and unoccupied” by the Europeans, “and the Indians continually held to be, and treated as, subject to their dominion and control.”¹⁵³ Justice Taney then stated it is not worth considering whether the Doctrine of Discovery is just and equitable since it has been applied for so many years.¹⁵⁴ Besides, Justice Taney claimed:

from the very moment the general government came into existence to this time, it has exercised its power over *this unfortunate race* in the spirit of humanity and justice, and has endeavoured by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices.¹⁵⁵

145. *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846).

146. *United States v. Rogers*, 27 F. Cas. 886 (C.C.D. Ark. 1845) (No. 16, 187), *certified question answered*, 45 U.S. (4 How.) 567 (1846).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *United States v. Rogers*, 45 U.S. (4 How.) 567, 571–72 (1846).

153. *Id.* at 572.

154. *Id.* (“It would be useless at this day to inquire whether the principle thus adopted is just or not; or to speak of the manner in which the power claimed was in many instances exercised.”).

155. *Id.* (emphasis added).

Justice Taney asserted such a question falls under the authority of the legislative and executive branches, and that it is appropriate for the Court to defer to their judgment.¹⁵⁶

Justice Taney concluded that Mr. Rogers could not be an Indian.¹⁵⁷ According to Justice Taney, the exception created for crimes committed by one “Indian” against another “Indian” in “[a]n act to regulate trade and intercourse with the Indian tribes, and to preserve the peace of the frontiers” applies only to people of the Indian race.¹⁵⁸ Mr. Roger’s citizenship in the Cherokee Nation carried no weight with Justice Taney.¹⁵⁹ Justice Taney reasoned Congress could not have meant to include the adopted white citizens of a tribe within the definition of Indian because the white men who become Indians by adoption “will generally be found the most mischievous and dangerous inhabitants of the Indian country.”¹⁶⁰

While classifications based upon a person being “Indian” are constitutionally permissible under a rational basis review standard when the classification is tied to tribal citizenship,¹⁶¹ “Indian” can also be a racial classification when unmoored from tribal citizenship.¹⁶² *Rogers* is overtly racist. It makes race—membership in the “unfortunate race”—an explicit requirement to be an “Indian;” moreover, it conceives Congress’s unbridled plenary power over Indians based upon their racial inferiority.¹⁶³ Nevertheless, the case remains binding law.

More remarkably, Justice Taney’s racialized test of whether one is an Indian remains the test applied in state and federal courts to determine whether an individual qualifies as an Indian.¹⁶⁴ The case is typically cited without any reference to its racist origin, but in a 2015 concurring opinion, Judge Kozinski noted the oddity of relying on *Rogers* as the guide star for Indian status in the

156. *Id.*

157. *Id.* at 572–73.

158. *Id.* (“[T]he exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally . . .”).

159. *Id.* (“He may by such adoption become entitled to certain privileges in the tribe, and make himself amenable to their laws and usages. Yet he is not an Indian.”).

160. *Id.* at 573.

161. *See, e.g.,* *Morton v. Mancari*, 417 U.S. 535, 553–55 (1974).

162. Adam Crepelle, *White Tape and Indian Wards: Removing the Federal Bureaucracy to Empower Tribal Economies and Self-Government*, 54 U. MICH. J.L. REFORM (forthcoming 2021).

163. WILLIAMS, *supra* note 91, at 72–73 (“*Rogers* adumbrates the basic contours of what will come to be known in the nineteenth-century Supreme Court’s Indian law as the congressional plenary power doctrine.”); *see also* *United States v. Zepeda*, 792 F.3d 1103, 1116 (9th Cir. 2015) (Kozinski, J., concurring); Rachel San Kronowitz, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 524 (1987).

164. *E.g.,* *Martin v. United States*, No. CR-12-206(1)(DWF/LIB), 2017 WL 976928, at *6 (D. Minn. Mar. 13, 2017); *State v. George*, 422 P.3d 1142, 1143–44 (Idaho 2018); *State v. LaPier*, 790 P.2d 983, 986 (Mont. 1990); *State v. Nobles*, 818 S.E.2d 129, 135–36 (N.C. Ct. App. 2019), *aff’d*, 838 S.E.2d 373 (N.C. 2020); *State v. Reber*, 171 P.3d 406, 410 (Utah 2007).

twenty-first century.¹⁶⁵ Judge Kozinski also noted the unfairness of using Indian blood to gauge whether a criminal statute applies, and thereby factoring into criminal sentences.¹⁶⁶ Indeed, studies have shown that Indians routinely receive harsher sentences than non-Indians for committing the same exact crimes.¹⁶⁷ This effect, largely due to the fact that Indians are uniquely subject to federal jurisdiction, results in Indians receiving disproportionately harsh punishments solely because they are Indians.

D. *Ex parte Crow Dog and Kagama: Imposing “Justice”*

Crow Dog was convicted for the murder of Spotted Tail on the Great Sioux Reservation.¹⁶⁸ The case was resolved pursuant to Sioux custom—the families of the murderer and the victim met to work out compensation for the death.¹⁶⁹ After the families deliberated, Crow Dog’s family paid Spotted Tail’s family eight horses, \$600, and one blanket.¹⁷⁰ There was nothing extraordinary about this for the Sioux; however, many Americans were outraged.¹⁷¹ Spotted Tail had been

165. *Zepeda*, 792 F.3d at 1118 (Kozinski, J., concurring) (“Reliance on pre-civil war precedent laden with dubious racial undertones seems an odd course for our circuit law to have followed . . .”).

166. *Id.* at 1116 (“Damien Zepeda will go to prison for over 90 years because he has ‘Indian blood,’ while an identically situated tribe member with different racial characteristics would have had his indictment dismissed. It’s the most basic tenet of equal protection law that a statute which treats two identically situated individuals differently based solely on an unadorned racial characteristic must be subject to strict scrutiny.”).

167. INDIAN LAW & ORDER COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 119 (2013), https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf [<https://perma.cc/CA7Y-VUB9>] (noting that “[f]ederal sentencing guidelines systematically subject offenders in Indian country to longer sentences than are typical when the same crimes are committed under State jurisdiction.”); BJ Jones & Christopher J. Ironroad, *Addressing Sentencing Disparities for Tribal Citizens in the Dakotas: A Tribal Sovereignty Approach*, 89 N.D. L. REV. 53 (2013); Emily Tredeau, *Tribal Control in Federal Sentencing*, 99 CALIF. L. REV. 1409, 1416–17 (2011) (describing that Indians are much more likely than non-Indians to be prosecuted in federal court, and are therefore likely to receive harsher sentences).

168. *Ex parte Crow Dog*, 109 U.S. 556, 557 (1883); see SIDNEY L. HARRING, *CROW DOG’S CASE 1* (1994) (“Early on the afternoon of August 5, 1881, on a dusty road just outside the Rosebud Indian Agency on the Great Sioux Reservation in Dakota Territory, Kan-gi-shun-ca (Crow Dog) shot to death Sin-ta-ga-le-Scka (spotted Tail), a Brule Sioux chief.”).

169. Adam Creppelle, *Tribal Lending and Tribal Sovereignty*, 66 DRAKE L. REV. 1, 27 (2018) [hereinafter Creppelle, *Tribal Lending*]; B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 468 (1998); Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 801 (2006).

170. INDIAN LAW & ORDER COMM’N, *supra* note 167, at 117; Sidney L. Haring, *Crow Dog’s Case: A Chapter in the Legal History of Tribal Sovereignty*, 14 AM. INDIAN L. REV. 191, 199 (1989); *Developments in the Law — Indian Law: Chapter Three: ICRA Reconsidered: New Interpretations of Familiar Rights*, 129 HARV. L. REV. 1709, 1712 (2016).

171. Creppelle, *Tribal Lending*, *supra* note 169, at 27 (“Americans of the era were dissatisfied with the punishment.”); Anthony G. Gulig & Sidney L. Haring, “*An Indian Cannot Get a Morsel of Pork . . .*” *A Retrospective on Crow Dog, Lone Wolf, Blackbird, Tribal Sovereignty, Indian Land*,

avored by the federal government for his cooperation with whites, and now, in their eyes, Crow Dog walked free for his murder.¹⁷² Accordingly, the United States government stepped in to prosecute Crow Dog and convicted him of murder.¹⁷³

Crow Dog challenged the conviction through a writ of habeas corpus before the United States Supreme Court, asserting the federal government had no jurisdiction over the case because the murder was committed by one Indian against another on an Indian reservation.¹⁷⁴ This argument had never been made in a case involving two Indians by blood,¹⁷⁵ and the issue was significant enough to warrant a special appropriation from Congress to pay Crow Dog's legal expenses.¹⁷⁶ The United States argued it had jurisdiction over Crow Dog because the Indian-on-Indian crime in Indian country exception relied upon by Crow Dog had been superseded by both a treaty with the Sioux and a statute.¹⁷⁷

The Court disagreed.¹⁷⁸ To reach its conclusion, the Court relied on the verbiage of the statute and treaty.¹⁷⁹ The context of the statute was also key to the Court's decision, as it reasoned the law's purpose was to civilize the savages.¹⁸⁰ Indeed, the Court noted that Indians are "aliens" separated by race and tradition, so prosecuting them under United States law would not be fair.¹⁸¹ After all:

[The United States] tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures

and Writing Indian Legal History, 38 TULSA L. REV. 87, 89 (2002); Daniel L. Rotenberg, *American Indian Tribal Death—A Centennial Remembrance*, 41 U. MIAMI L. REV. 409, 413 (1986) ("Influential Americans were not happy with the result.").

172. *Keeble v. United States*, 412 U.S. 205, 210 (1973); *Ex parte Crow Dog*, ENCYCLOPEDIA.COM <https://www.encyclopedia.com/history/united-states-and-canada/us-history/ex-parte-crow-dog> [<https://perma.cc/Q8SL-69JA>] (last updated Feb. 1, 2020); Washburn, *Federal Criminal Law*, supra note 169 at 801 (indicating that Spotted Tail had been viewed by the United States Attorney as a "friendly" Indian who had been made a tribal chief by the United States Army, whereas Crow Dog was viewed as "hostile").

173. *Crow Dog*, 109 U.S. at 557.

174. *Id.*

175. See discussion of *United States v. Rogers* supra Part III.C.

176. *Crow Dog*, 109 U.S. at 562.

177. *Id.*

178. *Id.* at 567 (finding that although Congress could extend jurisdiction to Indians in Indian country, "it is quite clear from the context" that the provision was not intended to "cover the present case of an alleged wrong committed by one Indian upon the person of another of the same tribe").

179. *Id.* at 567–68.

180. *Id.* at 568–70.

181. *Id.* at 571.

the red man's revenge by the maxims of the white man's morality.¹⁸²

As a result of Crow Dog's inability to understand the "white man's morality," the Court determined the federal courts lacked jurisdiction over him.¹⁸³

Crow Dog remains one of the most influential cases in the history of federal Indian law.¹⁸⁴ For nearly a decade, the Bureau of Indian Affairs (BIA) had sought to extend federal criminal law over reservation Indians.¹⁸⁵ *Crow Dog* provided the BIA with proof that federal law was needed to tame reservation Indians.¹⁸⁶ The lack of federal law, argued the BIA, meant that only tribal law governed reservation Indians, and revenge was their only rule.¹⁸⁷ The argument worked. Congress responded to the *Crow Dog* decision by passing the Major Crimes Act (MCA), which extended the application of federal laws to certain offenses committed by one Indian against another while in Indian Country.¹⁸⁸

However, the BIA's argument was specious. Revenge was not the Sioux's resolution to murder. Although some tribes did have blood feuds,¹⁸⁹ Sioux justice focused on restoring harmony to the community.¹⁹⁰ The Sioux were a migratory

182. *Id.*

183. *Id.* at 571–72.

184. HARRING, *supra* note 168, at 191; *see* Washburn, *supra* note 169, at 803 (discussing the backlash to *Crow Dog*, prompting the Major Crimes Act).

185. *See, e.g.*, Washburn, *supra* note 169, at 798–99 ("In 1874, a bill was introduced in Congress that attempted to extend federal jurisdiction to Indians who committed serious crimes against other Indians."); David J. Wishart, *Ex parte Crow Dog*, ENCYCLOPEDIA OF THE GREAT PLAINS, <http://plainshumanities.unl.edu/encyclopedia/doc/egp.law.016> [<https://perma.cc/C53S-3X6F>] (last visited on July 4, 2020) ("Yet *Ex parte Crow Dog* was tainted by racism. Its concluding language referred to Native Americans living a 'savage life' and having a 'savage nature,' and it described Native American law as the 'red man's revenge.' This played into the hands of the Interior Department and the BIA, which had since the late 1870s urged Congress to pass a statute extending federal law to Indian-on-Indian crimes within Indian Country.")

186. Washburn, *Federal Criminal Law*, *supra* note 169, at 803; HARRING, *supra* note 168, at 230.

187. *Keeble v. United States*, 412 U.S. 205, 210–11 (1973); Washburn, *Federal Criminal Law*, *supra* note 169, at 803.

188. Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2012)); *Keeble*, 412 U.S. at 209 ("The Major Crimes Act was passed by Congress in direct response to the decision of this Court in *Ex parte Crow Dog*"); Sidney L. Haring, *The Distorted History that Gave Rise to the "So Called" Plenary Power Doctrine: The Story of United States v. Kagama*, in INDIAN LAW STORIES, *supra* note 8, at 150; Adam Crepelle, *Concealed Carry to Reduce Sexual Assault Against American Indian Women*, 26 KAN. J.L. & PUB. POL'Y 236, 241 (2017) ("Congress responded to the perceived light punishment by passing the Major Crimes Act of 1885, granting the federal government jurisdiction over certain felonies involving only Indians in Indian country.")

189. *E.g.*, UTLEY & WASHBURN, *supra* note 111, at 27; Daniel K. Richter, *War and Culture: The Iroquois Experience*, 40 WM. & MARY Q. 528, 532 n.17 (1983); *Native American Law: Blood Revenge*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/history/news-wires-white-papers-and-books/native-american-law-blood-revenge> [<https://perma.cc/D4EH-R9SE>] (last updated Apr. 3, 2020).

190. HARRING, *supra* note 168, at 236.

people who depended largely upon hunting for their sustenance; therefore, the level of planning required for these coordinated efforts made it essential that intertribal disputes be settled amicably.¹⁹¹ Hence, *lex talionis*¹⁹² was not the Sioux way. Dean Kevin Washburn has noted the peculiarity of Congress's relying on *Crow Dog* to pass the MCA because the "merciless Indian Savages"¹⁹³ sought restorative justice while the civilized "white man's morality"¹⁹⁴ required *Crow Dog* be hanged.¹⁹⁵

Regardless of the MCA's flawed inspiration, Kagama was indicted under the MCA for murdering another Indian on the Hoopa Valley Reservation a year later.¹⁹⁶ Kagama's defense was not that he did not commit the crime; instead, he argued the United States had no constitutional authority to pass the MCA.¹⁹⁷ The United States argued the Commerce Clause provided the authority for the law.¹⁹⁸ The Supreme Court described the government's Commerce Clause argument as a "very strained construction of this clause."¹⁹⁹ The Court was unable to identify any other constitutional provision that could justify the MCA.²⁰⁰

Sans explicit constitutional authority, the Court nonetheless affirmed the MCA because:

These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights... From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power...²⁰¹

191. *Id.* ("For the hunt and the perpetual migration to succeed, all people had to work together, and to conform to one system of rules.")

192. Latin for "law of retaliation," *lex talionis* defined as "the principle or law of retaliation that a punishment inflicted should correspond in degree and kind to the offense of the wrongdoer, as an eye for an eye, a tooth for a tooth; retributive justice. *Lex talionis*, *Dictionary.com*, <https://www.dictionary.com/browse/lex-talionis> [<https://perma.cc/2KDG-BPS7>] (last visited July 27, 2020).

193. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

194. *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883).

195. Washburn, *Federal Criminal Law*, *supra* note 169, at 805.

196. *United States v. Kagama*, 118 U.S. 375, 376 (1886).

197. *Id.*

198. *Id.* at 378 ("[The Commerce Clause] is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes.")

199. *Id.*

200. *Id.* at 379 ("While we are not able to see, in either of these clauses of the Constitution and its amendments, any delegation of power to enact a code of criminal law for the punishment of the worst class of crimes known to civilized life when committed by Indians . . .").

201. *Id.* at 383–84.

Following *Kagama*, the Court has repeatedly affirmed Congress's plenary power over Indians.²⁰² Curiously, nearly a century after *Kagama*, the Court began claiming the Commerce Clause does provide Congress with the plenary authority to enact laws relating to Indians.²⁰³ This is patently untrue; in fact, several scholars have called out the Supreme Court for its lack of clarity on the source of a plenary power and its revisionist construction of the Commerce Clause.²⁰⁴ Justice Thomas has, too.²⁰⁵ The Supreme Court's reliance on the Commerce Clause as a basis for Congress's plenary power over Indians is a procrustean effort to justify precedent oozing with white supremacist ideology.²⁰⁶

IV.

LIES AND RACISM ADMITTED, BUT THAT DOES NOT AFFECT PRECEDENT

The cases discussed in Part III live on. Their influence goes beyond shaping foundational principles of federal Indian law; indeed, the cases are regularly cited without any apparent misgivings. As of December 2020, *Johnson v. M'Intosh* has been cited in 355 cases.²⁰⁷ *Cherokee Nation* has been cited in 680 cases.²⁰⁸ *Worcester* has been cited in 914 cases, including by the Supreme Court in 2020 to oust state authority from Indian land.²⁰⁹ *U.S. v. Rogers*, despite being an unabashedly racist opinion authored by an infamously racist judge,²¹⁰ has been

202. *E.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *Winton v. Amos*, 255 U.S. 373, 391 (1921); *Tiger v. Western Investment Co.*, 221 U.S. 286, 316 (1911); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

203. *E.g.*, *United States v. Lara*, 541 U.S. 193, 200 (2004); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973).

204. *E.g.*, Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1015 (2015); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 35 (1996); Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PENN. L. REV. 195, 196 (1984).

205. *United States v. Bryant*, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring) (“Over a century later, *Kagama* endures as the foundation of this [plenary power] doctrine, and the Court has searched in vain for any valid constitutional justification for this unfettered power.”); *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 659 (2013) (Thomas, J., concurring); *Lara*, 541 U.S. at 215 (Thomas, J., concurring) (“I cannot agree with the Court . . . that the Constitution grants to Congress plenary power to calibrate the ‘metes and bounds of tribal sovereignty.’”).

206. *Bryant*, 136 S. Ct. at 1968–69 (Thomas, J., concurring); FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 46 (2009); WILLIAMS, *supra* note 91, at 72; Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 163 (2002).

207. Westlaw citing references (Dec. 27, 2020). *Most recent case citation*, *United States v. Abouseiman*, 976 F.3d 1146, 1156 (10th Cir. 2020).

208. Westlaw citing references (Dec. 27, 2020). *Most recent case citation*, *Mitchell v. Bailey*, No. 19-51123, 2020 WL 7329219, at *4 (5th Cir. Dec. 14, 2020).

209. Westlaw citing references (Dec. 27, 2020). *Most recent case citation*, *Chatman v. Ferrell*, No. CV-17-03826-PHX-DLR, 2020 WL 7643212, at *1 (D. Ariz. Dec. 23, 2020); *see also* *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2477 (2020).

210. David Welsh, *Racism and the Law: Slavery, Integration, and Modern Resegregation in*

cited in 108 cases and as recently as 2018 for the definition of who is an Indian.²¹¹ *Crow Dog* has been cited in opinions 293 times.²¹² Amazingly, *Crow Dog*—in spite of its unapologetically white supremacist language—can be favorably interpreted by those advocating for tribes as an affirmation of tribal sovereignty and self-governance.²¹³ In fact, *Crow Dog* was cited by the majority in *McGirt v. Oklahoma* to support tribes' right to self-govern.²¹⁴ The Court in *Kagama* openly admitted there was no explicit constitutional authority for the MCA, but upheld the law based primarily upon its belief that the Indian race was too weakened to self-govern.²¹⁵ Nevertheless, *Kagama* has been cited in cases 579 times.²¹⁶ The MCA—the very act that the Court could find no constitutional authority to justify—also remains a part of the United States Code.²¹⁷

More remarkably, cases wherein the United States has admitted lying and basing its arguments on odious racial tropes remain binding law as well. In *U.S. v. Sandoval*, the Court held the United States could assert plenary power over the Pueblos.²¹⁸ The key issue in the case was whether the people of the pueblos qualify as Indians, and the Court remarked:

The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs

America, 2 UTAH L. REV. 479, 481–82 (2009); Jack E. Nelson, *Setting the Record Straight on Taney*, CAP. GAZETTE (Mar. 7, 2017, 12:28 AM), <https://www.capitalgazette.com/opinion/columns/ph-acc-column-nelson-0307-20170303-story.html> [<https://perma.cc/73CN-QWWG>]; Roger B. Taney, *Slavery's Great Chief Justice*, HARV. U. PRESS BLOG (Aug. 18, 2017), https://harvardpress.typepad.com/hup_publicity/2017/08/roger-taney-slaverys-great-chief-justice-paul-finkelman.html [<https://perma.cc/QA9F-MBGF>].

211. Westlaw citing references (Dec. 27, 2020); *United States v. Flores*, No. 1:18-CR-00102-MR, 2018 WL 6528475, at *2 (W.D.N.C. Dec. 12, 2018).

212. Westlaw citing references (Dec. 27, 2020). *Most recent case citation*, *Cheyenne & Arapaho Tribes v. United States*, No. 20-143, 2020 WL 7251080 (Fed. Cl. Dec. 9, 2020); *see also* *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2477 (2020).

213. Richmond L. Clow, *A Dream Deferred: Crow Dog's Territorial Trials and the Push for Statehood*, 37 S.D. HIST. 46, 73 (2007) (“At the national level, *Ex parte Crow Dog* stood as a strong statement of tribal sovereignty.”); Keith M. Werhan, *The Sovereignty of Indian Tribes: A Reaffirmation and Strengthening in the 1970's*, 54 NOTRE DAME L. REV. 5, 11 (1978).

214. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2477 (2020).

215. *United States v. Kagama*, 118 U.S. 375, 380, 383–84 (1886).

216. Westlaw citing references (Dec. 23, 2020). *Most recent case citation*, *Holtz v. Oneida Airport Hotel Corp.*, No. 20-C-1360, 2020 WL 5770363, at *2 (E.D. Wis. Sept. 28, 2020).

217. 18 U.S.C. § 1153 (2012).

218. *United States v. Sandoval*, 231 U.S. 28, 48–49 (1913).

inherited from their ancestors, they are essentially a simple, uninformed and inferior people.²¹⁹

Thus, the people of the pueblos are Indians because “like reservation Indians in general; that, although industrially superior, they [Pueblo Indians] are intellectually and morally inferior to many of them.”²²⁰ Making this degrading description all the more astonishing, 30 years prior, the Court endorsed the exact opposite view of the Pueblo Indians’ personal characteristics:

They are as intelligent as most nations or people deprived of means or facilities for education. Their names, their customs, their habits, are similar to those of the people in whose midst they reside, or in the midst of whom their pueblos are situated. The criminal records of the courts of the Territory scarcely contain the name of a pueblo Indian. In short, they are a peaceable, industrious, intelligent, honest, and virtuous people. They are Indians only in feature, complexion, and a few of their habits; in all other respects superior to all but a few of the civilized Indian tribes of the country, and the equal of the most civilized thereof.²²¹

This has not prevented *Sandoval* from becoming one of the canonical Indian law cases and remaining binding law, cited by the Supreme Court as recently as 2020.²²²

In *Tee-Hit-Ton Indians v. United States*,²²³ the Court held the Tee-Hit-Ton did not have a takings claim against the United States for the federally authorized plunder of the tribe’s timber because:

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors’ will that deprived them of their land.²²⁴

The Doctrine of Discovery was at the heart of the Court’s reasoning.²²⁵ Hence, the Court concluded the Indians necessarily lost their land as a result of “the drive

219. *Id.* at 39.

220. *Id.* at 41.

221. *United States v. Joseph*, 94 U.S. 614, 616–17 (1877) (favorably quoting the opinion of the Supreme Court of the Territory of New Mexico).

222. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2467 n.6 (2020); *Bruette v. Sec’y of Interior*, No. 17-C-286, 2017 WL 4180158, *6 (E.D. Wis. Sept. 20, 2017), *appeal dismissed sub nom. Bruette v. Zinke*, 727 F. App’x 878 (7th Cir. 2018), *cert. denied*, 139 S. Ct. 645 (2018).

223. 348 U.S. 272 (1955).

224. *Id.* at 289–90.

225. *Id.* at 279 (“This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained.”).

of civilization.”²²⁶ According to the Court, the Indians have been given “generous provision” in the recovery of wrongs committed against them, but the recovery is “a matter of grace, not because of legal liability.”²²⁷

This was false. Less than 10 years earlier, the Chief Justice, in a plurality opinion joined by three justices, declared, “In our opinion, taking original Indian title without compensation and without consent does not satisfy the ‘high standards for fair dealing’ required of the United States in controlling Indian affairs. The Indians have more than a merely moral claim for compensation.”²²⁸ The opinion even stated, “It was usual policy not to coerce the surrender of lands without consent and without compensation,” and “[s]omething more than sovereign grace prompted the obvious regard given to original Indian title.”²²⁹ Notably, *Tee-Hit-Ton* was decided within a year of the Court’s unanimous decision in *Brown v. Board of Education*—the monumental victory for racial equality under the law.²³⁰ *Tee-Hit-Ton* has been cited in 129 court cases, most recently in September of 2020.²³¹

Sandoval and *Tee-Hit-Ton*’s precedential status is even more troublesome than the cases discussed in Part III. The Acting Solicitor General of the United States admitted both cases are grounded in lies and racial stereotypes. The Solicitor General’s Office should know because it was the office that supplied the winning argument in both cases.²³² In 2011, Neal Katyal, the Acting Solicitor General, stated, “For our office, these cases serve as a reminder that there are limits to the extent of our advocacy for the government and that we must never cross the line into prejudice and racism.”²³³ This admission has not diminished the precedential value of these cases.

V.

OLIPHANT AND “COMMON NOTIONS OF THE DAY”

In the 1970s, federal Indian law and policy underwent a drastic change. President Richard Nixon delivered a special message on Indian Affairs to Congress in 1970, noting the horrendous socioeconomic conditions American

226. *Id.* at 281.

227. *Id.* at 281–82.

228. *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 47 (1946) (plurality opinion) (internal citations omitted).

229. *Id.* at 48.

230. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). However, another factor that could have contributed to the court’s shift was the death of Justice Jackson, creating a different court in this short period.

231. Westlaw citing references (Dec. 27, 2020). *Most recent case citation*, *Pueblo of Jemez v. United States*, No. CV 12-0800 JBVJFR, 2020 WL 5238734, at *73 (D.N.M. Sept. 2, 2020).

232. Neal Katyal, Acting Solicitor Gen., Address to the 36th Annual Federal Bar Association Indian Law Conference, *in* Stipulation of Dismissal with Prejudice at Ex. 1, Cal. Indian Law Ass’n v. Dep’t of Justice, No. 15-cv-00539 (D.D.C. Nov. 20, 2015), ECF No. 18-1 (April 8, 2011).

233. *Id.* at Ex. 1 1, 9 ¶¶ 12–15.

Indians found themselves in and acknowledging that United States Indian policies were a major reason for their impoverished condition.²³⁴ President Nixon said the United States policy of tribal termination was wrong and recommended the United States adopt the Indian policy of tribal self-determination.²³⁵ Congress followed Nixon's lead in 1975, passing the Indian Self-Determination and Education Assistance Act.²³⁶ Every president and Congress since has followed the self-determination policy.²³⁷

The Supreme Court, as touched upon *supra*, has not embraced tribal self-determination. The Supreme Court's continued reliance on racist jurisprudence in the field of federal Indian law has earned the ire of scholars.²³⁸ International human rights bodies have also critiqued federal Indian law. For example, the Inter-American Commission on Human Rights recommended that the United States "[r]eview its laws, procedures and practices to ensure that the property rights of indigenous persons are determined in accordance with the rights established in the American Declaration..."²³⁹ Similarly, the United Nations Committee on the Elimination of Racial Discrimination has described the Supreme Court's Indian law jurisprudence as "out of step with contemporary legal developments in

234. Special Message on Indian Affairs, 213 PUB. PAPERS 564, 565: Richard Nixon (July 8, 1970), http://www.ncai.org/attachments/Consultation_IJaOfGZqlYSuxpPUqoSSWIaNTkEJEPXxKLzLcaOikifwWhGOLSA_12%20Nixon%20Self%20Determination%20Policy.pdf [<https://perma.cc/Q9R3-XGE4>].

235. *Id.*

236. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 450 (2012)).

237. *See, e.g.*, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000), <https://www.govinfo.gov/content/pkg/FR-2000-11-09/pdf/00-29003.pdf> [<https://perma.cc/A7AU-VHSR>]; Memorandum on Government-to-Government Relationship With Tribal Governments, 2 PUB. PAPERS 2177 (Sep. 23, 2004), <https://www.govinfo.gov/content/pkg/PPP-2004-book2/pdf/PPP-2004-book2-doc-pg2177.pdf> [<https://perma.cc/K2P2-GBJE>]; Presidential Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1 PUB. PAPERS 662-63 (June 14, 1991), <https://www.govinfo.gov/content/pkg/PPP-1991-book1/pdf/PPP-1991-book1-doc-pg662.pdf> [<https://perma.cc/K63R-8ART>]; Presidential Statement on Signing the Indian Self-Determination Assistance Act Amendments of 1988, 2 PUB. PAPERS 1284-85 (Oct. 5, 1988), https://www.govinfo.gov/app/collection/ppp/president-40_Reagan,%20Ronald%20W./1988/02%21A%21July%20%2C%201988%20to%20January%2019%201989 [<https://perma.cc/HS5S-PP77>]; EXECUTIVE OFFICE OF THE PRESIDENT, *supra* note 141; Alysa Landry, *Jimmy Carter: Signed ICWA into Law*, INDIAN COUNTRY TODAY (Sept. 12, 2017), <https://newsmaven.io/indiancountrytoday/archive/jimmy-carter-signed-icwa-into-law-GtsQUN5tRkGIiNzMVHJP8g/> [<https://perma.cc/Q2CZ-8BVG>].

238. *E.g.*, INDIAN LAW STORIES, *supra* note 8, at 2; WILLIAMS, *supra* note 91; Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law's* *Brown v. Board of Education*, 38 TULSA L. REV. 73, 75 (2002).

239. *Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, ¶ 173 (Dec. 7, 2002) [<https://perma.cc/RYL7-R9CQJ>].

indigenous rights.”²⁴⁰ *Oliphant v. Suquamish Tribe*²⁴¹ is a prime example of the Supreme Court’s use of racism in the modern era of federal Indian law.²⁴²

The facts of the case are not complicated. Mark Oliphant assaulted a tribal officer on the Port Madison Reservation.²⁴³ The other perpetrator, Daniel Belgarde, was racing on a reservation roadway and crashed into a tribal police vehicle.²⁴⁴ When charges were brought in tribal court, the two non-Indian petitioners argued the Suquamish Tribal Court lacked jurisdiction over non-Indians.²⁴⁵ The federal district court rejected their argument, and the appellate court affirmed the district court. The appellate court reasoned, “[s]urely the power to preserve order on the reservation, when necessary by punishing those who violate tribal law, is a sine qua non of the sovereignty that the Suquamish originally possessed.”²⁴⁶ Indeed, the court of appeals noted it was essential to public safety that the tribe provide law enforcement on the reservation because the non-Indian governments had refused to provide police.²⁴⁷

Nevertheless, the Supreme Court agreed with Oliphant and Belgarde, holding Indian tribes lack criminal jurisdiction over non-Indians.²⁴⁸ The Court stated, “While Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians, we now make express our implicit conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.”²⁴⁹ To reach this conclusion, the Court’s reasoning at times was deceptive, relied on inaccuracies, and introduced a new point of view.

240. U.N. Comm. On the Elimination of Racial Discrimination, 59th Sess., 1475th mtg. at ¶ 33, U.N. Doc. CERD/C/SR.1475 (Aug. 22, 2001).

241. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

242. *E.g.*, WILLIAMS, *supra* note 91, at 100–01; Deer & Nagle, *supra* note 143, at 238 (“For Native women and children—and the Tribal Nations that seek to exercise their inherent right to protect them—*Oliphant* and its racist reasoning is our *Plessy v. Ferguson*.”); *see generally* M. Brent Leonhard, *Closing a Gap in Indian Country Justice: Oliphant, Lara, and DOJ’s Proposed Fix*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 117, 122–46 (2012).

243. *Oliphant*, 435 U.S. at 194.

244. *Id.*

245. *Id.*

246. *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976).

247. *Id.* at 1013 (“When the Suquamish Indian Tribe planned its annual Chief Seattle Days celebration, the Tribe knew that thousands of people would be congregating in a small area near the tribal traditional encampment grounds for the celebration. A request was made of the local county to provide law enforcement assistance. One deputy was available for approximately one 8-hour period during the entire weekend. The tribe also requested law enforcement assistance from the Bureau of Indian Affairs, Western Washington Agency. They were told that they would have to provide their own law enforcement out of tribal funds and with tribal personnel.”).

248. *Oliphant*, 435 U.S. at 212.

249. *Id.* at 204.

A. Deceptive Reasoning

The *Oliphant* opinion is untenable when read straight through. For example, the Court incongruously relies on the inapplicable Treaty of Dancing Rabbit Creek, made with the Choctaw in 1830, to determine the rights at issue which were guaranteed to the Suquamish in the 1855 Treaty of Point Elliot.²⁵⁰ The treaty with the Choctaw was made during the Removal Era, whereas the Treaty of Point Elliott was made decades later in an entirely different historical context.²⁵¹ Given the evolution of congressional policies, there is little logic or utility in using one such treaty to interpret the other. There was evidence that the Choctaw had been divested of criminal jurisdiction over non-Indians.²⁵² In comparison, the Suquamish never relinquished criminal jurisdiction in its treaty; in fact, the Court admitted the Suquamish did not accept a treaty that would have surrendered the tribe's criminal jurisdiction over non-Indians.²⁵³ The United States entered into over 350 treaties with tribes, and the Treaty of Dancing Rabbit Creek is the only one that arguably supported the Court's position.²⁵⁴ Nowhere in *Oliphant* does the Court explain why or how the 1830 Treaty of Dancing Rabbit Creek is relevant to the Suquamish or the 1855 Treaty of Point Elliott.

The Court only cited one case, *Ex parte Kenyon*, to support its conclusion that tribes lack criminal jurisdiction over non-Indians.²⁵⁵ However, a closer look at *Kenyon* reveals that the district court's pronouncement was mere dicta.²⁵⁶ Whatever limited force a single district court's century-old dicta might possess dissipates entirely with a perusal of footnote 10. The footnote cedes that the author of the *Kenyon* opinion, Judge Isaac Parker, was not a good judge in the eyes of the Court.²⁵⁷ The Court acknowledged that Judge Parker's thoughts about the Indians

250. *Id.* at 197–99. Note that though *Oliphant* does not explicitly name the Treaty of Dancing Rabbit Creek, this was the only treaty the Choctaw signed in 1830. See CHOCTAW NATION, *Government Treaties*, <https://www.choctawnation.com/history-culture/history/government-treaties> [<https://perma.cc/XL3L-NCM4>] (last visited July 27, 2020).

251. FLETCHER, *supra* note 94, at 351; Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609, 617–18 (1979).

252. *Oliphant*, 435 U.S. at 199.

253. *Id.* at 206–07 n.16.

254. See Barsh & Henderson, *supra* note 251, at 617 (“The 1830 Choctaw treaty is, however, the only treaty to use this specific language—one out of 366.”).

255. *Oliphant*, 435 U.S. at 199 (“At least one court has previously considered the power of Indian courts to try non-Indians and it also held against jurisdiction.”); see *Ex parte Kenyon*, 14 F. Cas. 353 (C.C.W.D. Ark. 1878).

256. Geoffrey C. Heisey, *Oliphant and Tribal Criminal Jurisdiction over Non-Indians: Asserting Congress's Plenary Power to Restore Territorial Jurisdiction*, 73 IND. L.J. 1051, 1065 (1998); Leonhard, *supra* note 242, at 136–37; Carol A. Mitchell, *Oliphant v. Schlie: Tribal Criminal Jurisdiction of Non-Indians*, 38 MONT. L. REV. 339, 343 (1977).

257. *Oliphant*, 435 U.S. at 200 n.10 (“Judge Parker's views of the law were not always upheld by this Court.”).

may not be “in accord with current thinking on the subject.”²⁵⁸ However, the Court attempted to establish Judge Parker’s credibility by claiming that the Indians liked him.²⁵⁹ The Court dubiously claimed to be able to glean the Indians’ feelings about Judge Parker from a sentence in the book, *He Hanged Them High*, stating “[t]he principal chief of the Choctaws, Pleasant Porter, came forward and placed a wreath of wild flowers on the grave.”²⁶⁰ The dubiousness of relying on this source to discern Judge Parker’s views of Indians is evinced by the fact that Pleasant Porter was not a Choctaw Chief—he was a Chief of the Creek Nation.²⁶¹ Furthermore, Chief Porter’s placing flowers on Judge Parker’s grave could have meant any number of things, including exuberance that Parker was no longer a judge.²⁶² Following Justice Rehnquist’s questionable reasoning, the fate of tribal court jurisdiction may have been different had an Indian desecrated the grave of Judge Parker.

The Court’s citation of *Crow Dog* for the proposition that non-Indians cannot understand tribal law is the apex of its deception.²⁶³ The Court block quotes a segment of the racialized text in *Crow Dog*, quoted in full *supra*, but the Court conveniently removes the white supremacist language:

[L]aw, by argument and inference only, . . . over aliens and strangers; over the members of a community separated by race [and] tradition, . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code . . .; which judges them by a standard made by others and not for them . . . It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different

258. *Id.*; see The City Wire staff, *Another View of the ‘Hanging Judge’ Heritage*, TALK BUSINESS & POLITICS, (Apr. 19, 2015), <https://talkbusiness.net/2015/04/another-view-of-the-hanging-judge-heritage/> [<https://perma.cc/8JU7-Q9CM>] (“Though Judge Parker was quite enlightened for his era when it came to Indians—he was opposed to genocide—in today’s terms he was not exactly a ‘friend to the Indians.’ Parker was an advocate for expediting assimilation, which in essence is ethnocide, not exactly a ‘friendly’ approach to interacting with other cultures.”).

259. *Oliphant*, 435 U.S. at 200 n.10 (“Nothing in these long forgotten disputes detracts from the universal esteem in which the Indian tribes which were subject to the jurisdiction of his court held Judge Parker.”).

260. *Id.*

261. See Dianna Everett, *Porter, Pleasant (1840–1907)*, THE ENCYCLOPEDIA OF OKLA. HIST. AND CULTURE, <https://www.okhistory.org/publications/enc/entry.php?entry=PO032> [<https://perma.cc/747E-YPW5>] (describing Porter as “the Creek Nation’s last elected principal chief”); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2495 (2020) (Roberts, J., dissenting) (“Particularly probative is the understanding of Pleasant Porter, the principal Chief of the Creek Nation.”).

262. Barsh & Henderson, *supra* note 251, at 630 (“It is, moreover, tempting to wonder whether Chief Porter’s gesture was one of personal favor, diplomacy, or of gratitude for the decision to remove Judge Parker from the bench.”).

263. *Oliphant*, 435 U.S. at 210–11.

race, according to the law of a social state of which they have an imperfect conception...²⁶⁴

Excising the white supremacist language from the citation to *Crow Dog* in this context is wholly disingenuous.

B. Suppressing the Truth

The *Oliphant* opinion contains statements that range from misrepresentation to outright falsehoods. The *Oliphant* Court claims the Solicitor of the Department of the Interior reaffirmed Judge Parker's decision in *Ex parte Kenyon* that tribes lack criminal jurisdiction over non-Indians.²⁶⁵ Similarly, the Court cited a 1960 Senate Report that concluded tribal courts have no inherent authority to criminally prosecute non-Indians.²⁶⁶ In footnotes, however, the Court reveals the truth. Per the Court's comment on the Solicitor endorsing Judge Parker, footnote 11 states, "[t]he 1970 opinion of the Solicitor was withdrawn in 1974 but has not been replaced. No reason was given for the withdrawal."²⁶⁷ Footnote 15 unveils that a 1977 congressional Policy Review Report reached the exact opposite conclusion of the 1960 Senate Report; that is, "[t]here is an established legal basis for tribes to exercise jurisdiction over non-Indians."²⁶⁸ The reason for the difference between the earlier and later opinions cited by the Court may be that in 1970, the United States was still in the tribal termination era.²⁶⁹ By 1974, the legislative and executive branches of the United States had begun embracing tribal self-determination—a position that has yet to take hold at the Supreme Court.²⁷⁰

The *Oliphant* Court also asserted, "[t]he effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians, however, is a relatively new phenomenon. And where the effort has been made in the past, it has been held that

264. *Id.*

265. *Id.* at 200–01.

266. *Id.* at 204–05.

267. *Id.* at 201 n.11.

268. *Id.* at 205 n.15.

269. See Indian Relocation Act of 1956, Pub. L. No. 84-959, 70 Stat. 986; Clayton R. Koppes, *From New Deal to Termination: Liberalism and Indian Policy, 1993–1953*, 46 PAC. HIST. REV. 543, 561 (1977); Alys Landry, *Harry S. Truman: Beginning of Indian Termination Era*, INDIAN COUNTRY TODAY (Aug. 16, 2016), https://newsmaven.io/indiancountrytoday/archive/harry-s-truman-beginning-of-indian-termination-era-Ma3YnfYy_U-AFyBGsUxzCw [<https://perma.cc/ZZZZ-4WDP>]. Public Law 83-280 was passed in 1953. It transferred federal criminal jurisdiction over Indian reservations in six states to the states themselves without providing any federal funds, making it an unfunded mandate. See Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, AM. INDIAN DEVELOPMENT ASSOCIATES, <http://www.aidainc.net/publications/pl280.htm> [<https://perma.cc/C6XG-4DHJ>] (last visited May 23, 2020). That is, Public Law 83-280 was designed to reduce federal expenditures.

270. See Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 5301–5423 (2012)); Special Message on Indian Affairs, *supra* note 234.

the jurisdiction did not exist.”²⁷¹ The Court claimed few tribes had formal dispute resolution systems until the middle of the 20th century; indeed, the Court quoted an 1834 report stating “the Indian tribes are without laws, and the chiefs without much authority to exercise any restraint.”²⁷² This is patently false.

The Americas’ indigenous people had justice systems long before European arrival.²⁷³ Though the Indian societies were not literate,²⁷⁴ they had well-established laws.²⁷⁵ Tribal laws may have been unrecognizable to Europeans because traditional tribal laws were usually focused on restoring harmony to the community rather than retribution.²⁷⁶ Moreover, Indian tribes had long prosecuted non-Indians who perpetrated crimes on Indian land.²⁷⁷ Early treaties between the United States and tribes explicitly authorize tribal criminal jurisdiction over non-Indians.²⁷⁸ The United States knew tribes were criminally prosecuting whites in the early and mid-1800s; in fact, on at least one occasion the United States even turned over a white fugitive to an Indian tribe for criminal prosecution.²⁷⁹ By writing that tribes’ assertion of criminal jurisdiction over non-Indians is “a

271. *Oliphant*, 435 U.S. at 196–97.

272. *Id.* at 197.

273. Crepelle, *Tribal Lending*, *supra* note 169, at 26. See generally RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE* (2009); K. N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941).

274. See Lyle Campbell & William O. Bright, *North American Indian Languages*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/North-American-Indian-languages> [<https://perma.cc/9TBV-Z5TC>] (last visited July 27, 2020) (“No native writing system was known among North American Indians at the time of first European contact, unlike the Maya, Aztecs, Mixtecs, and Zapotecs of Mesoamerica who had native writing systems. Nevertheless, a number of writing systems for different North American Indian languages were developed as a result of the stimulus from European writing, some invented and introduced by white missionaries, teachers, and linguists.”); Steve Russell, *Early Indigenous Peoples and Written Language*, INDIAN COUNTRY TODAY, https://indiancountrytoday.com/archive/early-indigenous-peoples-and-written-language-UJ-6AxiE4kmg_ImKwfVLKg [<https://perma.cc/6W9X-7HZU>] (explaining that tribes would have had physical devices that served as memory cues, perhaps close to writing in the modern sense).

275. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542–43 (1831); Crepelle, *Decolonizing Reservation Economies*, *supra* note 14, at 415; Matthew L.M. Fletcher, *A Perfect Copy: Indian Culture and Tribal Law*, 2 *YELLOW MED. REV.* 95, 100 (2007).

276. MAHA JWEIED, U.S. DEP’T OF JUSTICE & U.S. DEP’T OF THE INTERIOR, *NATIVE AMERICAN TRADITIONAL JUSTICE PRACTICES*, at I (2014), <https://www.justice.gov/sites/default/files/atj/legacy/2014/10/09/expert-working-group-report-native-american-traditional-justice-practices.pdf> [<https://perma.cc/H2YT-YU2W>]; Justice Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations*, 11 *WYO. L. REV.* 351, 354 (2011); Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, 79 *JUDICATURE* 126, 131–33 (1995).

277. G.D. Crawford, *Looking Again at Tribal Jurisdiction: “Unwarranted Intrusions on Their Personal Liberty,”* 76 *MARQ. L. REV.* 401, 420 (1993); Deer & Nagle, *supra* note 143, at 202.

278. *E.g.*, Treaty with the Cherokees, U.S.-Cherokee Nation, July 2, 1791, art. VIII, 7 Stat. 39; Treaty with the Creeks, U.S.-Creek Nation, Aug. 7, 1790, art. IX, 7 Stat. 35; Treaty with the Chickasaw, U.S.-Chickasaw Nation, Jan. 10, 1786, art. IV, 7 Stat. 24.

279. FLETCHER, *supra* note 94, at 349; Paul Spruhan, “Indians, in a Jurisdictional Sense”: *Tribal Citizenship and Other Forms of Non-Indian Consent to Tribal Criminal Jurisdiction*, 1 *AM. INDIAN L.J.* 79 (2012).

relatively new phenomenon,” Justice Rehnquist either disregarded the truth or did not care enough about the truth to do cursory research into the matter.²⁸⁰

C. An Antiquated Lens

The *Oliphant* Court reached its decision by adopting a new method of interpretation in Indian law:

“Indian law” draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.²⁸¹

Justice Rehnquist was never known as a friend of Indian country,²⁸² but his recommended Indian law lens is startling. Justice Rehnquist overtly demanded that the racism that permeated Indian policy long ago be injected into present day federal Indian law cases—that tribes remain shackled by the anti-Indian ideals of the past.

As a result, Justice Rehnquist expressed a desire for contemporary lawyers to see federal Indian law through the eyes of those who had clearly expressed anti-Indian sentiments. For example, President George Washington wrote in 1783:

[W]hen the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey tho’ they differ in shape. In a word there is nothing to be obtained by an Indian War but the Soil they live on and this can be had by purchase at less expence, and without that bloodshed . . .²⁸³

280. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 (1978); Barsh & Henderson, *supra* note 251, at 610 (“A close examination of the Court’s opinion reveals a carelessness with history, logic, precedent, and statutory construction that is not ordinarily acceptable from so august a tribunal.”).

281. *Oliphant*, 435 U.S. at 206.

282. WILLIAMS, *supra* note 91, at 115–16; Carole Goldberg, *President Nixon’s Indian Law Legacy: A Counterstory*, 63 UCLA L. REV. 1506, 1527 (2016) (“And we also know that Justice Rehnquist, later Chief Justice Rehnquist, went on to write more anti-tribal Supreme Court opinions than any other jurist of his era.”); Matthew L.M. Fletcher, *The Supreme Court’s Indian Problem*, MICH. ST. C. L. LEGAL STUD. RES. PAPER SERIES, no. 05-10, at 15–16, https://sct.narf.org/articles/supreme_court_indian_problem_fletcher_2007.pdf [<https://perma.cc/9BP7-SX2C>] (last visited July 27, 2020).

283. Letter from George Washington, President, to James Duane (Sept. 7, 1783), <https://founders.archives.gov/documents/Washington/99-01-02-11798> [<https://perma.cc/NLV3-TZRP>].

Not only does President Washington characterize Indians as “beasts of prey,”²⁸⁴ he also recommends entreating with Indians because they are doomed by the expansion of civilization. According to President Washington, the United States will not have to keep its promises with the Indians because they will disappear anyway, a common belief during his day.²⁸⁵ Justice Rehnquist wants lawyers and judges to impute President Washington’s vanishing Indian view into contemporary Indian law cases.

But the Indians were not vanishing fast enough to keep pace with white demands for Indian lands. Accordingly, President Thomas Jefferson devised a policy of removing Indians from the Eastern United States.²⁸⁶ Presidents following Jefferson supported Indian Removal;²⁸⁷ however, no President believed in the policy as forcefully as Andrew Jackson. Elected in 1828, President Jackson actively worked to ensure the passage of the Indian Removal Act of 1830 which empowered the president to negotiate the removal of tribes from the Eastern United States.²⁸⁸

When President Jackson addressed Congress in 1833, he advocated for Indian removal stating:

284. *Id.*

285. See Kathryn E. Fort, *The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court*, 57 ST. LOUIS U. L.J. 297 (2013); Sarah E. Baires, *White Settlers Buried the Truth about the Midwest’s Mysterious Mound Cities*, SMITHSONIAN MAG. (Feb. 23, 2018), <https://www.smithsonianmag.com/history/white-settlers-buried-truth-about-midwests-mysterious-mound-cities-180968246/> [<https://perma.cc/A3ZY-GXMA>]; Marina N. Bolotnikova, *Native Modern*, HARV. MAG. (Jan–Feb. 2019), <https://harvardmagazine.com/2019/01/philip-deloria> [<https://perma.cc/ZFA3-LMSX>].

286. Alysa Landry, *Thomas Jefferson: Architect of Indian Removal Policy*, INDIAN COUNTRY TODAY (Jan. 19, 2016), <https://newsmaven.io/indiancountrytoday/archive/thomas-jefferson-architect-of-indian-removal-policy-kV7p2W8yLUeb47XLS5kJmg/> [<https://perma.cc/8EV8-BAD5>]; *Indian Removal*, DIGITAL HIST., http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=2&psid=3545 [<https://perma.cc/3WKR-9F3D>] (last visited May 23, 2020); *Indian Treaties and the Removal Act of 1830*, DEP’T OF ST. OFF. OF THE HISTORIAN [hereinafter OFF. OF THE HISTORIAN], <https://history.state.gov/milestones/1830-1860/indian-treaties> [<https://perma.cc/7ETD-QUQD>] (last visited May 23, 2020).

287. Burke, *The Cherokee Cases*, *supra* note 129, at 506 (“[Jackson’s supporters] insisted that every President since Jefferson had approved of Indian removal.”); OFF. OF THE HISTORIAN, *supra* note 286 (noting President James Monroe supported Indian Removal); Dennis Wagner, *1816 James Madison—The Indian Removal Era Begins*, ST. OF THE UNION HIST. (Jan. 12, 2017), <http://www.stateoftheunionhistory.com/2017/01/1816-james-madison-indian-removal-era.html> [<https://perma.cc/A7PY-4JRT>]; *The Presidency of John Quincy Adams*, DIGITAL HIST., http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtid=2&psid=3543 [<https://perma.cc/5KME-3EUT>] (last visited May 23, 2020).

288. Indian Removal Act of 1830, ch. 148, 4 Stat. 411; *Andrew Jackson—Key Events*, UVA MILLER CTR., <https://millercenter.org/president/andrew-jackson/key-events> [<https://perma.cc/AYX7-W7DA>] (last visited May 23, 2020); *Indian Removal*, TEACH U.S. HIST., <http://www.teachushistory.org/indian-removal> [<https://perma.cc/3T9T-XBER>] (last visited May 23, 2020). *Presidency*, ANDREW JACKSON’S HERMITAGE: HOME OF THE PEOPLE’S PRESIDENT, <https://thehermitage.com/learn/andrew-jackson/president/presidency/> [<https://perma.cc/WX3B-BR6B>] (last visited May 23, 2020).

[The Indian tribes] have neither the intelligence, the industry, the moral habits, nor the desire of improvement which are essential to any favorable change in their condition. Established in the midst of another and a superior race, and without appreciating the causes of their inferiority or seeking to control them, they must necessarily yield to the force of circumstances and ere long disappear.²⁸⁹

Though this passage is steeped in white racial superiority over Indians, this is the frame that Justice Rehnquist mandated the legal community use when reading Indian law. In fact, Justice Rehnquist referenced and quoted multiple documents from the 1830s in *Oliphant* in his analysis of the viability of tribal jurisdiction over non-Indians.²⁹⁰ In doing so, Justice Rehnquist commanded lawyers to infuse the mindset of Indian Removal—America’s ethnic cleansing—into modern Indian law construction.²⁹¹ Relying on such precedent is unjust and perpetuates the harm caused by past racist policies.

Death marches were just the beginning as reservation life proved bitterly hard. The sacred treaty promises made by the United States to tribes included rations, healthcare, housing, and more, but these treaty guarantees proved to be empty words.²⁹² The United States so abysmally dishonored its pledge to provide reservations with rations that starvation was commonplace on reservations.²⁹³

289. President Andrew Jackson, Fifth Annual Message (Dec. 3, 1833), in AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/fifth-annual-message-2> [<https://perma.cc/99EC-ZNFA>].

290. *E.g.*, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 (1978).

291. *E.g.*, Christopher Haveman, *Creek Indian Removal*, ENCYCLOPEDIA OF ALA., <http://www.encyclopediaofalabama.org/article/h-2013> [<https://perma.cc/2NPK-S44E>] (last updated Jan 13, 2017); *1831: The Removal Act Affects Choctaw First*, NATIVE VOICES, <https://www.nlm.nih.gov/nativevoices/timeline/279.html> [<https://perma.cc/X7PY-Q3X6>] (last visited May 23, 2020); *Removal*, THE CHICKASAW NATION, <https://www.chickasaw.net/Our-Nation/History/Removal.aspx> [<https://perma.cc/VME6-LBD5>] (last visited May 23, 2020); *Trail of Death*, CITIZEN POTAWATOMI NATION, <https://www.potawatomi.org/culture/trail-of-death/> [<https://perma.cc/VUQ2-97YA>] (last visited May 23, 2020); DeNeen Brown, *Trump called Andrew Jackson ‘a swashbuckler.’ The Cherokees called him ‘Indian killer.’*, WASH. POST, May 3, 2017, <https://www.washingtonpost.com/news/retropolis/wp/2017/05/03/trump-called-andrew-jackson-a-swashbuckler-the-choctaw-called-him-indian-killer/> [<https://perma.cc/59X9-CA99>]; David Truer, *This Land is Not Your Land: The Ethnic Cleansing of Native Americans*, FOREIGN AFFAIRS (July/Aug. 2020), <https://www.foreignaffairs.com/print/node/1126055> [<https://perma.cc/VC8T-8X7D>].

292. See Crepelle, *Decolonizing Reservation Economies*, *supra* note 14; Crepelle & Block, *supra* note 14, at 319; Kori Schake, *Lessons from the Indian Wars*, HOOVER INSTIT. POL’Y REV. (Feb. 1, 2013), <https://www.hoover.org/research/lessons-indian-wars> [<https://perma.cc/M8Y3-G8FV>].

293. Sarah K. Elliott, *How American Indian Reservations Came to Be*, PBS, <http://www.pbs.org/wgbh/roadshow/stories/articles/2015/5/25/how-american-indian-reservations-came-be> [<https://perma.cc/QJ4E-U35T>] (last updated Oct. 18, 2016); William Least Heat-Moon, *A Stark Reminder of How the U.S. Forced American Indians into a New Way of Life*, SMITHSONIAN MAG. (Nov. 2013), <https://www.smithsonianmag.com/history/a-stark-reminder-of-how-the-us-forced-american-indians-into-a-new-way-of-life-3954109/> [<https://perma.cc/2S9U-68VC>]; *Indian*

Reservation conditions were so dire that Indian women were forced to trade sex for food and clothing, and sex trafficking remains a problem for Native women to this day.²⁹⁴

It was against this backdrop that President James Buchanan announced in 1860: “Utah is now comparatively peaceful and quiet, and the military force has been withdrawn, except that portion of it necessary to keep the Indians in check and to protect the emigrant trains on their way to our Pacific possessions.”²⁹⁵ Ironically, *Oliphant* cites an 1863 Treaty with the Utah-Tabeguache Band as support for the proposition that tribes should not have criminal jurisdiction over non-Indians.²⁹⁶ When viewed through the prism that “Indians must be kept in check,” Justice Rehnquist’s belief that tribes should not have jurisdiction over non-Indians makes sense.

Indians persisted despite the hardships of reservation life; thus, the United States’ “Indian problem” remained.²⁹⁷ The government had two options: civilization of the Indians or genocide. The United States chose civilization because it was cheaper than physical genocide.²⁹⁸ Indian kids were stolen from their parents by the federal government and sent to far off boarding schools—far off because the boarding school conditions were so egregious that the United States knew many children would attempt to run away, and distance made

Reservations, HISTORY.COM, <https://www.history.com/topics/native-american-history/indian-reservations> [https://perma.cc/2CLY-67AF] (last updated Mar. 18, 2019).

294. Deer & Nagle, *supra* note 143, at 193; Gabrielle Mandeville, *Sex Trafficking on Indian Reservations*, 51 TULSA L. REV. 181, 184–85 (2015); Mary Annette Pember, *Native Girls Are Being Exploited and Destroyed at an Alarming Rate*, INDIAN COUNTRY TODAY (May 16, 2012), <https://newsmaven.io/indiancountrytoday/archive/native-girls-are-being-exploited-and-destroyed-at-an-alarming-rate-4r1HLmef-EWEoSpGM9DXyA/> [https://perma.cc/T259-CNYC].

295. President James Buchanan, State of the Union 1860 (Dec. 3, 1860), in AM. HISTORY FROM REVOLUTION TO RECONSTRUCTION AND BEYOND, <http://www.let.rug.nl/usa/presidents/james-buchanan/state-of-the-union-1860.php> [https://perma.cc/KT94-8ZZU].

296. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 n.8 (1978).

297. *The Federal Government and “the Indian Problem,”* FACES OF AMERICA WITH HENRY LOUIS GATES, JR., <https://www.pbs.org/wnet/facesofamerica/video/the-policy-of-termination/103/> [https://perma.cc/29R4-2QJP] (last visited May 31, 2020); *The “Indian Problem,”* SMITHSONIAN INSIDER (May 26, 2016), <https://insider.si.edu/2016/05/the-indian-problem/> [https://perma.cc/LS65-U3J4]; *Trail of Tears*, HISTORY.COM, <https://www.history.com/topics/native-american-history/trail-of-tears> [https://perma.cc/8NNB-E99E] (last updated Feb. 21, 2020).

298. ANDREA SMITH, SECRETARIAT OF THE UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, INDIGENOUS PEOPLES AND BOARDING SCHOOLS: A COMPARATIVE STUDY 5, http://www.un.org/esa/socdev/unpfi/documents/IPS_Boarding_Schools.pdf [https://perma.cc/9TB3-TS92] (providing the United States calculations of the costs of killing Indians versus educating them); *see also* Charla Bear, *American Indian Boarding Schools Haunt Many*, NPR (May 12, 2008, 12:01 AM), <https://www.npr.org/templates/story/story.php?storyId=16516865> [https://perma.cc/5FYC-LC24]; Becky Little, *How Boarding Schools Tried to ‘Kill the Indian’ Through Assimilation*, HISTORY.COM, <https://www.history.com/news/how-boarding-schools-tried-to-kill-the-indian-through-assimilation> [https://perma.cc/9EQ3-LW4H] (last updated Nov. 1, 2018).

returning home more difficult.²⁹⁹ Boarding schools went to great lengths to exterminate all vestiges of Indian culture, including banning indigenous languages and imposing Christianity on Indians.³⁰⁰ The stated purpose of boarding schools was “that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.”³⁰¹

This was a relatively mild Indian policy as many during the late 1800s believed “the only good Indian is a dead one.”³⁰² General Philip Sheridan is widely credited for the saying, but he denied coining the phrase.³⁰³ Nevertheless, the statement’s sentiment was common during the era, and none other than President Theodore Roosevelt held the same belief—or at least almost: “I don’t go so far as to think that the only good Indians are dead Indians, but I believe nine out of every 10 are, and I shouldn’t like to inquire too closely into the case of the 10th.”³⁰⁴ This history paints a gruesome picture of Indian law. By invoking this historical period, Justice Rehnquist’s *Oliphant* opinion becomes even more sinister. Justice Rehnquist effectively dismisses the violence he knew his decision in *Oliphant* would usher onto tribes, or at least disclaims any responsibility for that outcome.³⁰⁵ In doing so, he adds to the ignoble tradition of devaluing Indian life. After all, if the only good Indians are dead Indians, why should tribes be allowed to protect their citizens from non-Indian assailants?

VI.

IS IT ETHICAL TO CITE FACTUALLY WRONG AND RACIST CASES?

Lawyers and judges who cite the aforementioned cases are violating the ABA’s MRPC. Legal arguments against Indian land rights or against tribal sovereignty will inevitably find their roots in *Johnson v. M’Intosh* or *Kagama*. This presents lawyers with a conundrum. *M’Intosh* and *Kagama* are well over a

299. SMITH, *supra* note 298, at 4 (noting Richard Pratt advocated for boarding schools being placed far from children’s homes to prevent running away); Bear, *supra* note 298; *American Indian Boarding Schools*, 17 POVERTY & RACE 17, 18 (2008), <https://www.prrac.org/newsletters/novdec2008.pdf> [<https://perma.cc/6KQN-WGJW>].

300. Sarah Deer, *Relocation Revisited: Sex Trafficking of Native Women in the United States*, 36 WM. MITCHELL L. REV. 621, 631 (2010); Little, *supra* note 298; SMITH, *supra* note 298, at 3–5.

301. “Kill the Indian, and Save the Man”: Capt. Richard H. Pratt on the Education of Native Americans, HIST. MATTERS, <http://historymatters.gmu.edu/d/4929/> [<https://perma.cc/8NKP-S45Y>] (last visited May 31, 2020).

302. *Id.* (“A great general has said that the only good Indian is a dead one . . .”).

303. Mark Jacob, *10 Things You Might Not Know About Racism*, CHI. TRIB. (Jan. 17, 2010), <https://www.chicagotribune.com/news/ct-xpm-2010-01-17-chi-10-things-racism-story.html> [<https://perma.cc/KZ6D-6SMY>]; General Sheridan, TONY HILLERMAN PORTAL, <http://ehillerman.unm.edu/node/1597#sthash.i0zyrHxi.dpbs>. [<https://perma.cc/5CXN-K3GT>] (last visited June 1, 2020); Philip Henry Sheridan, NEW PERSPECTIVES ON THE WEST, https://www.pbs.org/weta/thewest/people/s_z/sheridan.htm [<https://perma.cc/C386-T9BV>] (last visited June 1, 2020).

304. Jacob, *supra* note 303.

305. *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 212 (1978).

century old, making them legally venerable, but ethically suspect. Even at the time they were decided, the Court acknowledged the legal difficulties with the cases. Justice Marshall admitted the Doctrine of Discovery appeared to be an extravagant pretension,³⁰⁶ and the Court in *Kagama* could find no law to support its holding.³⁰⁷ Both cases brazenly use white racial superiority and Indian inferiority as the basis of their holdings.³⁰⁸ Presumably, few lawyers in the contemporary United States would dare to openly argue tribal sovereignty needs to be curtailed because Indians are racially inferior to whites. Indeed, the white supremacist ideology at the core of both cases has been soundly disavowed by the federal government³⁰⁹ and by science.³¹⁰ As a result, *Kagama* and *M'Intosh*'s unapologetically racist reasoning should render them impermissible under the ABA's MRPC.

Lawyers who attack tribal sovereignty using jurisprudence rooted in anti-Indian ideology should face ethical challenges by opposing counsel. For example, in a Fifth Circuit case from 2013, Dollar General obtained a tribal business license to operate a store on trust land within the Mississippi Choctaw Reservation.³¹¹ The tribe placed a tribal youth in an internship with Dollar General, and the youth was allegedly molested by the store's manager while at the store.³¹² The tribe lacked criminal jurisdiction over the non-Indian store manager due to *Oliphant*;³¹³ however, the family was able to file a civil suit in tribal court against the store manager and Dollar General.³¹⁴ The tribal court determined it had jurisdiction

306. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 591 (1823) ("However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear . . .").

307. *United States v. Kagama*, 118 U.S. 375, 384–85 (1886).

308. *See supra* Part III.

309. *E.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Fair Housing Act, 42 U.S.C. §§ 3601–3619 (2019).

310. Elizabeth Kolbert, *There's No Scientific Basis for Race—It's a Made-Up Label*, NAT'L GEOGRAPHIC (Apr. 2018), <https://www.nationalgeographic.com/magazine/2018/04/race-genetics-science-africa/> [<https://perma.cc/JCH5-YYG5>]; Howard Markel, *Column: The False, Racist Theory of Eugenics Once Ruled Science. Let's Never Let that Happen Again*, PBS NEWSHOUR (Feb. 16, 2018, 7:15 PM), <https://www.pbs.org/newshour/nation/column-the-false-racist-theory-of-eugenics-once-ruled-science-lets-never-let-that-happen-again> [<https://perma.cc/72ME-BFEQ>]; Adam Rutherford, *Why Racism Is Not Backed by Science*, GUARDIAN (Mar. 1, 2015, 2:45 AM), <https://www.theguardian.com/science/2015/mar/01/racism-science-human-genomes-darwin> [<https://perma.cc/6KKU-HNG7>]; Vivian Chou, *How Science and Genetics are Reshaping the Race Debate of the 21st Century*, SITN BLOG (Apr. 17, 2017), <http://sitn.hms.harvard.edu/flash/2017/science-genetics-reshaping-race-debate-21st-century/> [<https://perma.cc/62YW-WPKE>]. *But see* CODE SW!TCH, *Is 'Race Science' Making a Comeback*, NPR (July 10, 2019), <https://www.npr.org/sections/codeswitch/2019/07/10/416496218/is-race-science-making-a-comeback> [<https://perma.cc/FCV6-C7EN>].

311. *Dolgenercorp, Inc., v. Mississippi Band of Choctaw Indians*, 732 F.3d 409, 411 (5th Cir. 2013).

312. *Id.*

313. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

314. *Dolgenercorp*, 732 F.3d at 411.

over the claims against both the store manager and Dollar General.³¹⁵ Dollar General and the store challenged the tribe's jurisdiction in federal court.³¹⁶ The store manager succeeded in escaping tribal jurisdiction, but Dollar General was found to be under tribal jurisdiction due to its entering a business agreement with the tribe.³¹⁷ The Fifth Circuit Court of Appeals affirmed tribal court jurisdiction.³¹⁸ Dollar General sought Supreme Court review, which was granted.³¹⁹

The Court ultimately split four-to-four after Justice Scalia's death;³²⁰ consequently, the Fifth Circuit's decision was affirmed.³²¹ However, Dollar General's brief before the Supreme Court was troubling. The brief cites *Oliphant* 30 times for the proposition that tribes should not be able to assert civil jurisdiction over non-Indians who facilitate child sexual abuse on Indian reservations.³²² The brief also relied on tribes' "dependent status" and tribes being "subject to plenary federal control" as reasons that non-Indians should not be bound by tribal courts.³²³ Interestingly, Dollar General cited *In re Mayfield*,³²⁴ a paternalistic 1891 case involving the federal government's ability to place Indians in jail for adultery. Dollar General even quoted an unabashedly racist passage from the decision to argue against tribal jurisdiction over non-Indians: "The policy of Congress has evidently been to vest in the inhabitants of the Indian country such power of self-government *as was thought to be consistent with the safety of the white population* with which they may have come in contact . . ." ³²⁵ Unsurprisingly, *Mayfield* cites *Kagama*, *Rogers*, and *Crow Dog*.³²⁶

While the MRPC obligate lawyers to press for every advantage,³²⁷ relying on a direct statement of 19th century white angst over Indian authority and culture goes too far. Indeed, relying on such a statement seems like the very essence of engaging in conduct that discriminates on the basis of race, ethnicity, and national

315. *Id.*

316. *Id.* at 412.

317. *Id.* at 413.

318. *Id.* at 419.

319. *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016).

320. *Antonin Scalia's Absence Felt as Court Ends Term*, TIME (June 27, 2016), <https://time.com/4384855/antonin-scalia-supreme-court/> [<https://perma.cc/GEZ7-6VKW>].

321. *Dollar General*, 136 S. Ct. 2159.

322. Brief for Petitioner at 2, 3, 8, 10, 14, 15, 16, 17, 19, 22, 23, 24, 25, 29, 30, 31, 33, 34, 36, 37, 38, 42, 55, 58, *Dollar General*, 136 S. Ct. 2159 (2016) (No. 13-1496), <https://www.scotusblog.com/wp-content/uploads/2015/09/13-1496-ts1.pdf>. *Oliphant* is not included in the table of authorities [<https://perma.cc/SR3T-GHZ6>]. The 30 figure comes exclusively from the body of the brief.

323. *Id.* at 20.

324. 141 U.S. 107 (1891).

325. Brief for Petitioner at 35, *Dollar General*, 136 S. Ct. 2159 (No. 13-1496) (emphasis added) (quoting *In re Mayfield*, 141 U.S. at 115–16).

326. *In re Mayfield*, 141 U.S. at 112 (1891).

327. MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2020).

origin; thus, citing this passage seems to violate the MRPC.³²⁸ The quoted *Mayfield* passage is inherently prejudicial to the administration of justice.³²⁹ The Mississippi Band of Choctaw Indians (MBCI) should have exposed the ethical problems raised by Dollar General making a blatantly racist argument.³³⁰

The MBCI also should have called attention to the obviously racist precedent cited within *Mayfield*.³³¹ Likewise, the MBCI should have presented the ethical issues involved with citing *Oliphant*—it is riddled with factual errors and underpinned by odious assumptions about Indians.³³² The MBCI should have asked Dollar General if it believed the depictions of Indians contained in the jurisprudence it relied upon. Assuming Dollar General did not accept the disparaging image of Indians it built its case around, MBCI should have raised ethical questions about Dollar General’s candor towards the Court.³³³ After all, Dollar General had affirmatively incorporated overtly racist ideas about Indians into its brief which contradicts the lawyer’s duty of truthfulness.³³⁴ The MBCI would have even been on strong ethical grounds to argue for an outright reversal of *Oliphant* and expansion of tribal jurisdiction.³³⁵

Reliance on racist Indian law precedent also raises ethical issues for judges. Judicial impartiality is a hallmark of the United States’ legal system; hence, judges must avoid behavior that raises questions about their ability to be unbiased.³³⁶ Therefore, judges are barred from using words that suggest bias against race, religion, or national origin,³³⁷ and judges must impose this linguistic decorum on lawyers presenting before them.³³⁸ There is no way an Indian can view the judge presiding over his case as impartial when the judge will base the Indian’s rights upon precedent rooted in the belief in Indian racial and cultural inferiority.

Present day federal Indian law cannot be squared with the ABA’s MRPC or MCJC. As Indian law currently stands, Justice Marshall’s description of the United States’ courts as the “[c]ourts of the conqueror” remains the greatest truth

328. *Id.* at r. 8.4(g).

329. *Id.* at r. 8.4(d).

330. Mississippi Choctaw did touch upon Dollar General’s use of racist precedent but did not raise ethical challenges to the precedent. See Brief for Respondents at 41, *Dollar General*, 136 S. Ct. 2159 (2016) (No. 13-1496), <https://www.scotusblog.com/wp-content/uploads/2015/10/13-1496bs.pdf> [<https://perma.cc/FF2A-BKE4>] (“Whatever Congress may have intended in the brutal years of Indian removal and westward expansion, the consistent federal policy of the last 80 years has been to recognize and reinforce inherent tribal sovereignty.”).

331. See *supra* Part III.C discussing *Rogers* and *supra* Part III.D discussing *Crow Dog* and *Kagama*.

332. See *supra* Part V.

333. MODEL RULES OF PRO. CONDUCT r. 3.3 (AM. BAR ASS’N 2020).

334. *Id.* at r. 4.1 cmt. 1.

335. *Id.* at r. 3.1.

336. MODEL CODE OF JUD. CONDUCT Canon 1–2 (AM. BAR ASS’N 2011).

337. *Id.* at r. 2.3(B).

338. *Id.* at r. 2.3(C).

in Indian law.³³⁹ Principles of justice are not the determinative factor in contemporary federal Indian law cases; instead, federal Indian law cases often hearken to the Melian Dialogue wherein mighty Athens told Melos, “[R]ight, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.”³⁴⁰ Similarly, Alexis de Tocqueville’s summary of U.S. Indian policy during his voyage to the United States amid Choctaw Removal rings true today: “[t]he dispossession of the Indians often takes place today in a regular and, so to speak, entirely legal manner.”³⁴¹

Sadly, viewing Indians as a conquered people in the contemporary United States explains many of the terrible socioeconomic conditions they find themselves in. Indians have the highest rate of poverty in the United States.³⁴² Indians compose roughly one percent of the population,³⁴³ yet eight of the ten poorest counties in the United States are majority American Indian.³⁴⁴ Nearly half of all houses in Native communities lack access to safe water,³⁴⁵ and Indians suffer violence at a rate twice that of any other single race.³⁴⁶ Due to *Oliphant*, non-Indian criminals are effectively free to commit crimes while on a reservation, and the tribal authorities have virtually no recourse.³⁴⁷

339. *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823).

340. THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR 352 (Robert B. Strassler, ed., Richard Crawley, trans.) (1998).

341. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 527 (Eduardo Nolla, ed., James T. Schleifer, trans., Liberty Fund, Inc. 2010) (1835).

342. U.S. CENSUS BUREAU, PROFILE AMERICA FACTS FOR FEATURES: AMERICAN INDIAN AND ALASKA NATIVE HERITAGE MONTH: NOVEMBER 2015 (2015), <https://www.census.gov/newsroom/facts-for-features/2015/cb15-ff22.html> [<https://perma.cc/R49K-YRVS>].

343. TINA NORRIS, PAULA L. VINES & ELIZABETH M. HOEFFEL, U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, at 4 (2012) <https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf> [<https://perma.cc/AM93-RWCV>].

344. *Unemployment on Indian Reservations At 50 Percent: The Urgent Need to Create Jobs in Indian Country: Hearing Before the S. Comm. On Indian Affairs*, 11th Cong. 2 (2010), <https://www.indian.senate.gov/sites/default/files/upload/files/January2820102.pdf> [<https://perma.cc/BGN2-Y98Z>].

345. DEMOCRATIC STAFF OF THE HOUSE COMM. ON NAT. RES., WATER DELAYED IS WATER DENIED: HOW CONGRESS HAS BLOCKED ACCESS TO WATER FOR NATIVE FAMILIES (2016), https://naturalresources.house.gov/imo/media/doc/House%20Water%20Report_FINAL.pdf [<https://perma.cc/T7CL-GE8E>] (“Over a half million people—nearly 48% of tribal homes—in Native communities across the United States do not have access to reliable water sources, clean drinking water, or basic sanitation.”); see also George McGraw, *For These Americans, Clean Water Is a Luxury*, N.Y. TIMES (Oct. 20, 2016), <https://www.nytimes.com/2016/10/20/opinion/for-these-americans-clean-water-is-a-luxury.html> [<https://perma.cc/6SCK-BX6K>].

346. JENNIFER L. TRUMAN & LYNN LANGTON, U.S. DEP’T OF JUSTICE, CRIMINAL VICTIMIZATION, 2013, at 6 (2014), <https://www.bjs.gov/content/pub/pdf/cv13.pdf> [<https://perma.cc/C6SM-DV5U>].

347. Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away with Almost Anything*, ATLANTIC (Feb. 22, 2013), <https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/> [<https://perma.cc/7XHC-4J6E>] (noting that the result of *Oliphant* was “a jurisdictional tangle that often makes prosecuting crimes committed in Indian Country prohibitively difficult”); Serena Marshall, *Battered Indian Tribal Women Caught in*

VII. POSSIBLE SOLUTIONS

Contemporary federal Indian law is clearly racist and based upon lies. The ABA MRPC forbid such assertions during legal argument; nevertheless, federal Indian law's wrongheaded and racist principles hold strong. What can be done to fix this? This section offers possible solutions.

A. Education Gap

One solution to the racism in federal Indian law is education. Most Americans have very limited knowledge of American Indians. Many Americans buy into the stereotype that all Indians lived in teepees, completely failing to appreciate the tremendous diversity of indigenous cultures.³⁴⁸ Indeed, many Americans are under the impression that American Indians still live in teepees.³⁴⁹ Countless other stereotypes abound.

The core of the problem is that Americans receive virtually no exposure to American Indians throughout their formal education. Americans are well aware of the basics of slavery and Jim Crow. Americans have no appreciation of the discrimination and atrocities endured by Indians. For example, it is doubtful that many Americans are cognizant of the fact that whether an Indian qualified as a person was an unsettled question until 1879.³⁵⁰ Most Americans are likely ignorant of the fact that all Indians were not granted citizenship until 1924.³⁵¹ Most Americans are likely unaware that Indians endured formalized racial segregation in public spaces well into the 1960s.³⁵² When Indians are mentioned

Legal Limbo, ABC NEWS, (May 16, 2012, 10:29 PM) <https://abcnews.go.com/Politics/battered-indian-tribal-women-caught-legal-limbo/story?id=16365091> [<https://perma.cc/TM6P-3C7X>]; *Tribal Justice: Prosecuting Non-Natives for Sexual Assault on Reservations*, PBS NEWSHOUR (Sept. 5, 2015, 1:08 PM), <https://www.pbs.org/newshour/show/tribal-justice-prosecuting-non-natives-sexual-assault-indian-reservations> [<https://perma.cc/ZNJ8-6DXG>].

348. Kevin Gover, *Five Myths about American Indians*, WASH. POST (Nov. 22, 2017), https://www.washingtonpost.com/outlook/five-myths-about-american-indians/2017/11/21/41081cb6-ce4f-11e7-a1a3-0d1e45a6de3d_story.html?utm_term=.f54186c36b99 [<https://perma.cc/R679-J2B5>]; Ruth Nolan, *Tomahawks and Tipis: Native American Representations in Commercial Culture*, KCET (May 1, 2013), <https://www.kcet.org/shows/artbound/tomahawks-and-tipis-native-american-representations-in-commercial-culture> [<https://perma.cc/LK6Z-PXQB>].

349. Helen Oliff, *You Wanted to Know: Do Indians Live in Teepees?*, PARTNERSHIP WITH NATIVE AM. (June 26, 2012), <http://blog.nativepartnership.org/you-wanted-to-know-do-indians-live-in-teepees/> [<https://perma.cc/383V-7NKS>]; Nolan, *supra* note 348.

350. See *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891).

351. Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2000)).

352. Adam Creppelle, *Standing Rock in the Swamp: Oil, the Environment, and the United Houma Nation's Struggle for Federal Recognition*, 64 LOY. L. REV. 141, 162 (2018); see DENISE E. BATES, *THE OTHER MOVEMENT: INDIAN RIGHTS AND CIVIL RIGHTS IN THE DEEP SOUTH* 73–74 (2012)

in a textbook, the reference often only refers to Indians a century ago and may be plagued with oversimplifications and inaccuracies.³⁵³ The black hole of knowledge about Indians enables the colonial, racist schema of federal Indian law to persist.

Adding Indian history to the K-12 curriculum can help fix this. Indian history is American history. Indians played a vital role in the history of the United States including the development of its laws,³⁵⁴ culture,³⁵⁵ and its very survival.³⁵⁶ Though much of the history of United States' Indian relations is shameful,³⁵⁷

(discussing the racial classification struggles presented by the MOWA Choctaw and the Houma during the days of segregation in the South); Cedric Sunray, *Indian Country Influenced by Attitudes from the Old South*, INDIAN COUNTRY TODAY (Feb. 11, 2015), https://newsmaven.io/indiancountrytoday/archive/indian-country-influenced-by-attitudes-from-the-old-south-YaQBh_MoskCwru-cArgoQg/ [<https://perma.cc/M3YS-MJH7>].

353. E.g., Georgianna Lincoln, *Lack of True American Indian History in Textbooks*, in AUTHENTIC ALASKA: VOICES OF ITS NATIVE WRITERS 91–95 (Susan B. Andrew & John Creed, eds. 1998), http://www.alaskool.org/native_ed/articles/g_lincoln.htm [<https://perma.cc/6KWS-V44B>]; Shannon Speed, “Pro-American” History Textbooks Hurt Native Americans, HUFFINGTON POST, https://www.huffpost.com/entry/proamerican-history-textb_b_6199070 [<https://perma.cc/FR3S-Y4VM>] (last updated Jan. 21, 2015); Lisa Wade, *U.S. Schools Are Teaching Our Children That Native Americans Are History*, PAC. STANDARD, <https://psmag.com/social-justice/u-s-schools-teaching-children-native-americans-history-95324> [<https://perma.cc/2JWL-C3RN>] (last updated June 14, 2017).

354. E.g., H.R. Con. Res. 331, 100th Cong. (1988); *Iroquois and the Founding Fathers*, NAT'L HIST. EDUC. CLEARINGHOUSE, <https://teachinghistory.org/history-content/ask-a-historian/24099> [<https://perma.cc/752V-L74Z>] (last visited June 1, 2020); Amy Sturgis, *Liberty in Perfection: Freedom in Native American Thought*, FEE (Sept. 1, 1999), <https://fee.org/articles/liberty-in-perfection-freedom-in-native-american-thought/> [<https://perma.cc/RD47-MSUB>].

355. E.g., S.J. Res. 14, 111th Cong. (2009); Gregg McVicar, *Rumble On: More Native American Musicians You Should Know*, INDEP. LENS (Jan. 3, 2019), <http://www.pbs.org/independentlens/blog/rumble-on-more-native-american-musicians-you-should-know/> [<https://perma.cc/4ZD5-Z4KM>]; James A. Warren, *Native Americans Invented Our Gun Culture—and Yes, We Stole That, Too*, DAILY BEAST, <https://www.thedailybeast.com/native-americans-invented-our-gun-cultureand-yes-we-stole-that-too> [<https://perma.cc/N43F-P3CE>] (last updated Aug. 28, 2019, 1:43 PM).

356. E.g., Konnie LeMay, *A Brief History of American Indian Military Service*, INDIAN COUNTRY TODAY (May 28, 2012), <https://newsmaven.io/indiancountrytoday/archive/a-brief-history-of-american-indian-military-service-X7hYOzquEUin095S8QpVjw/> [<https://perma.cc/M6KV-5FU9>]; Shondiin Silversmith, *Navajo Code Talkers Created an Unbreakable Code. It Helped Win World War II*, AZCENTRAL (last updated Jan. 31, 2020, 9:59 AM), <https://www.azcentral.com/story/news/local/arizona/2018/07/11/navajo-code-talker-facts-unbreakable-code/460262002/> [<https://perma.cc/JJ7U-L6H6>]; Dave Zuchowski, *Native Americans Played Crucial Role in Settlers' Survival*, PITTSBURGH POST-GAZETTE (Nov. 24, 2010, 6:00 AM), <https://www.post-gazette.com/local/south/2010/11/24/Native-Americans-played-crucial-role-in-settlers-survival/stories/201011240253> [<https://perma.cc/MHF2-DZXT>].

357. See, e.g., *United States v. Sioux Nation of Indians*, 448 U.S. 371, 388 (1980); Remarks on Signing Legislation To Protect Indian Arts and Crafts Through the Improvement of Applicable Criminal Proceedings, and for Other Purposes, 2 PUB. PAPERS 1111 (July 29, 2010), <https://www.govinfo.gov/content/pkg/PPP-2010-book2/pdf/PPP-2010-book2-doc-pg1111.pdf> [<https://perma.cc/QN2Q-2ZLE>]; MERRILL J. MATTES, U.S. NAT'L PARK SERV. REPORT ON HISTORICAL INVESTIGATION OF WOUNDED KNEE BATTLEFIELD SITE, PINE RIDGE INDIAN

Americans are destined to keep perpetuating injustices against Indians if the American citizenry continues to be ignorant of Indian history.

Likewise, law students should receive exposure to basic federal Indian law. Federal Indian law is not just about minority rights; it is about fundamental aspects of the United States constitutional order. Indians are explicitly mentioned in the Constitution,³⁵⁸ and treaties between the tribes and the United States are the “supreme law of the land.”³⁵⁹ Incorporating even a simple seminar on federal Indian law into the law school curriculum will help enlighten and modernize perceptions about Indians and tribal sovereignty; in fact, Canada’s Truth and Reconciliation Commission recommended that Canadian law schools require all students take a course on indigenous peoples.³⁶⁰ Towards this end, the ABA should create an Indian law section. Federal Indian law and Indian rights are undermined when the foremost legal institution in the United States does not create a space for the field.³⁶¹

B. Legal Ethical Regulation

As discussed above, most Indian law jurisprudence violates the MRPC.³⁶² Most state bar associations have adopted the MRPC and have rules prohibiting the use of racist language and untruthful presentations of fact and law. Thus, ethical oversight bodies should censure attorneys and judges who cite Indian law cases without acknowledging their prejudicial elements.

Legal regulatory bodies have taken action to bar racists from practicing law. Most famously, the Illinois Supreme Court denied avowed white supremacist Matthew Hale the privilege of a law license despite his passing the bar exam because his racism evinced a character deficiency.³⁶³ Lawyers have been disciplined for calling people “an illegal alien,”³⁶⁴ and judges have faced

RESERVATION, SOUTH DAKOTA (1952), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1162&context=natlpark> [<https://perma.cc/3F3F-8CLB>].

358. U.S. CONST. art. I, § 2 (“[E]xcluding Indians not taxed”); *id.* § 8, cl. 3 (“To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.”).

359. U.S. CONST. art. VI.

360. TRUTH AND RECONCILIATION COMM’N OF CAN., TRUTH AND RECONCILIATION COMMISSION OF CANADA: CALLS TO ACTION 3 (2015), http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf [<https://perma.cc/TEE2-GAKH>].

361. *Topics and Resources*, AM. BAR ASS’N, <https://www.americanbar.org/topics/> [<https://perma.cc/M7WK-XSAK>] (last visited June 1, 2020).

362. *See supra* Part VI.

363. Carla D. Pratt, *Should Klansmen Be Lawyers? Racism as an Ethical Barrier to the Legal Profession*, 30 FL. ST. U. L. REV. 857, 861–62 (2003).

364. *In re Barker*, 993 N.E.2d 1138, 1139 (Ind. 2013).

suspension for calling people “thugs” and “moolie.”³⁶⁵ However, discipline seems exceedingly rare for lawyers and judges who spew racist remarks.³⁶⁶

Federal Indian law jurisprudence, offered without context, should subject lawyers to ethics charges. Though the lawyer herself may not explicitly describe Indians as “savages,” by relying upon precedent grounded in the belief that Indians are “wards” and “heathens,” the lawyer is engaging in conduct that is prejudicial to the administration of justice as well as presenting untruths to the court. A lawyer’s citation of a federal Indian law case is an incorporation of the racism at the core of the Court’s decision into her argument. This is contrary to the MRPC’s charge that lawyers should strive to improve the justice system;³⁶⁷ in fact, the MRPC permit lawyers in nearly every federal Indian law case to argue that precedent should be discarded due to its white supremacist essence.³⁶⁸ Therefore, legal ethics bodies should sanction lawyers who fail to preface their citations to federal Indian law cases with an acknowledgment that the case is based upon the belief in white superiority over Indians.

Despite ethical bodies’ apparent reluctance to sanction lawyers for citing racist jurisprudence, lawyers should begin challenging precedent while arguing federal Indian law cases.³⁶⁹ The Federal Rules of Civil Procedure authorize lawyers to make creative arguments;³⁷⁰ therefore, lawyers challenging Indian law precedent have no need to fear sanctions as their arguments have a reasonable basis.³⁷¹ The MRPC forbid lawyers from engaging “in conduct that is prejudicial

365. David Ovalle, *Miami Judge Who Called Black Defendant ‘Moolie’ Faces Suspension for Using Slurs*, MIAMI HERALD (May 21, 2018, 7:06 PM), <https://www.miamiherald.com/news/local/crime/article211618154.html> [<https://perma.cc/K5LK-8DB7>].

366. See, e.g., Jessica Schulberg, *Should White Supremacists Be Allowed To Practice Law?*, HUFFINGTON POST (last updated Dec. 26, 2017), https://www.huffpost.com/entry/white-supremacist-nazi-lawyers_n_5a3d8da8e4b0b0e5a7a2232d [<https://perma.cc/4A9T-R2V2>]; Mark Joseph Stern, *No, Aaron Schlossberg Will Not Be Disbarred Over His Racist Rant*, SLATE (May 18, 2018, 3:56 PM), <https://slate.com/news-and-politics/2018/05/aaron-schlossberg-will-not-be-disbarred-over-his-racist-rant.html> [<https://perma.cc/5G4Q-FCPT>].

367. MRPC, P&S, *supra* note 55, at ¶ 7.

368. MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS’N 2020).

369. See WILLIAMS, *supra* note 91, at xxx (“Lawyers representing tribes before the Court can point out in their briefs and also during oral argument that opposing counsels’ precedents and case citations routinely refer to Indians in these negative, stereotyped terms and ask the justices to make them stop.”).

370. FED. R. CIV. P. 11 (the advisory committee’s note to the 1983 amendment notes that “[t]he rule is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories.”).

371. *Altmann v. Homestead Mortg. Income Fund*, 887 F. Supp. 2d 939, 956 (E.D. Cal. 2012) (noting that Rule 11 “is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories” but rather “seeks to strike a balance between the need to curtail abuse of the legal system and the need to encourage creativity and vitality in the law”); *Columbia Gulf Transmission Co. v. United States*, 966 F. Supp. 1453, 1466 (S.D. Miss. 1997) (“The imposition of Rule 11 sanctions should be approached with caution and should not be imposed so as to ‘chill creativity or stifle enthusiasm or advocacy.’”) (internal citation omitted); *Fat T, Inc. v. Aloha Tower Assocs.* Piers 7, 8, & 9, 172 F.R.D. 411, 415 (D. Haw. 1996) (refusing to sanction defendant because to do

to the administration of justice”³⁷² and also bar lawyers from engaging in conduct “the lawyer knows or reasonably should know” discriminates on the basis of race, religion, national origin, or ethnicity.³⁷³ Federal Indian law is built upon discrimination, so tribal advocates have an ethical right to challenge precedent.³⁷⁴

Although lawyers are bound to rely upon binding precedent—even if it is racist³⁷⁵—the MRPC may require lawyers to acknowledge racist Indian law precedent. In fact, a lawyer’s duty of zealous advocacy may obligate tribal advocates to present the pernicious historical context encompassing Indian law precedent to courts.³⁷⁶ Likewise, lawyers advocating against Indian rights should be required to note the precedent’s racist tone as part of their duty to disclose opposing authority.³⁷⁷ One will likely view federal Indian law cases differently if the cases are placed in their historical context; indeed, a case’s holding may no longer seem sound if one discovers the Court reached its conclusion because it viewed Indians as racially or culturally inferior to whites.

Courts are not wholly blind to the problematic nature of federal Indian law precedent. A federal court of appeals has strongly implied that the bigoted reasoning of a century old Indian law case is ripe to be challenged,³⁷⁸ as has Justice Thomas.³⁷⁹ Even if lawyers are leery of directly challenging precedent, lawyers should consider explaining that federal Indian law is ethically troublesome in a footnote, as the lawyers for the Confederated Tribes and Bands of the Yakama Nation recently did in a brief to the Ninth Circuit.³⁸⁰ Contesting precedent is unlikely to bring about sudden results; nonetheless, it will shed light on the inherent flaws in contemporary federal Indian law. This light will help bring federal Indian law, even if slowly, out of its dark past and into the twenty-first century.

so would “chill creativity or stifle enthusiasm or advocacy” by attorneys).

372. MODEL RULES OF PRO. CONDUCT r. 8.4(d) (AM. BAR ASS’N 2020).

373. *Id.* at r. 8.4(g).

374. *Id.* at r. 3.1.

375. *Id.* at r. 1.1 cmt. 2 (“Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems.”).

376. *Id.* at r. 1.3 cmt. 1.

377. *Id.* at r. 3.3(a)(2).

378. *United States v. Doherty*, 126 F.3d 769, 778 n.2 (6th Cir. 1997), *abrogated by* *Texas v. Cobb*, 532 U.S. 162 (2001) (“*Kagama*’s explicit renunciation of any need to rely on the text of the Constitution . . . has been described as an ‘embarrassment of logic,’ and appears no longer to be an accurate statement of the law. More recent cases have stated that federal power in this field rests on the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. Because neither party has raised the issue, we leave to another day the question of whether the newly re-affirmed limitations of the Interstate Commerce Clause also impose limits on federal power under the Indian Commerce Clause.”) (internal citations omitted).

379. *United States v. Bryant*, 136 S. Ct. 1954, 1968–69 (2016) (Thomas, J., concurring).

380. Brief for Plaintiff-Appellant at 6 n.1, *Confederated Tribes and Bands of the Yakama Nation v. Yakima Cnty.*, 963 F.3d 982 (9th Cir. 2020) (No. 19-35199) (“Congress’s claim of such plenary authority is extra-Constitutional and founded in the morally and legally objectionable religious doctrine of Christian discovery, which should be repudiated by modern courts.”).

But it must be noted that not every citation of an antiquated federal Indian law case is an ethical problem; in fact, some of the old and racist cases—even the most bigoted—contain principles that can be used to protect Indian rights.³⁸¹ For example, Justice Gorsuch recently cited *Worcester* and *Crow Dog* to demonstrate the long history of respecting tribal freedom to self-govern.³⁸² These cases are all the more powerful for Indian rights advocates because even when Indian humanity³⁸³ and competency³⁸⁴ were in question, the Supreme Court still managed to affirm tribes' status as sovereigns. The ethical issue arises when the old cases are weaponized to attack tribal sovereignty without indicating the cases were decided on principles long rebuked by the United States. When plainly anti-Indian sentiment permeates a case, referencing the case to diminish tribal sovereignty while failing to mention the opinion makes statements that would violate the contemporary MRPC should constitute a violation of the MRPC.

C. Congressional Action

Congress can solve the problem of racism in Indian law. Congress is said to have “plenary power” over Indian tribes,³⁸⁵ and Congress has issued an apology to Indians for the United States’ “long history of official depredations and ill-conceived policies.”³⁸⁶ Accordingly, Congress can use its power over Indian tribes to help purge the taint of racism in contemporary Indian policy.

Congress has taken steps towards improving Indian policy and respecting Indian rights in recent years. Many laws passed by Congress affirm the trust relationship between the United States and tribes;³⁸⁷ similarly, Congress has also passed laws that enhance tribal sovereignty.³⁸⁸ Furthermore, the United States has

381. Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALB. GOV'T L. REV. 1, 4 (2017).

382. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2477 (2020).

383. *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (C.C.D. Neb. 1879).

384. Janet McDonnell, *Competency Commissions and Indian Land Policy, 1913–1920 in 11 SOUTH DAKOTA HISTORY* 21, <https://www.sdhspress.com/journal/south-dakota-history-11-1/competency-commissions-and-indian-land-policy-1913-1920/vol-11-no-1-competency-commissions-and-indian-land-policy-1913-1920.pdf> [<https://perma.cc/28UQ-FXXJ>].

385. *United States v. Lara*, 541 U.S. 193, 200 (2004); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989).

386. S.J. Res. 14, 111th Cong. (2009); Tanya H. Lee, *7 Apologies Made to American Indians*, INDIAN COUNTRY TODAY (July 1, 2015), <https://newsmaven.io/indiancountrytoday/archive/7-apologies-made-to-american-indians-CzHxzFZyVk6QdDF-Naiyyw/> [<https://perma.cc/2278-9DGL>].

387. However, the “trust” verbiage should be formally jettisoned to place distance between the term’s origin and current relationship between tribes and the United States. “Nation-to-nation” and “government-to-government” are better terms to describe the unique relationship between tribes and the United States.

388. *E.g.*, 25 U.S.C. § 4301(a)(2) (2012); 33 U.S.C. § 1377 (2012); 42 U.S.C. § 7601(d)(1)(A) (2012).

endorsed the United Nations Declaration on the Rights of Indigenous Peoples.³⁸⁹ More must be done because Congress has a trust relationship with tribes, and many members of Congress are lawyers. Trustees and lawyers holding public office are bound by heightened ethical standards.³⁹⁰

An easy place to start would be an express repudiation of *Oliphant*. The Violence Against Women Reauthorization Act of 2013 partially reversed *Oliphant*'s holding,³⁹¹ but the holding was not the only problem with the case. *Oliphant*'s express incorporation of racist and antiquated ideals into present-day federal Indian law must be denounced by Congress. Until Congress rebuts the judiciary's reliance on racist beliefs in federal Indian law, Indian rights will continue to erode. Thus, Congress should act to cleanse federal Indian law of its white supremacist foundations.

VIII. CONCLUSION

Federal Indian law is anomalous in the United States legal system. Rather than moving away from the racism that permeated the Court's early federal Indian law jurisprudence, the contemporary Court clasps racist federal Indian law precedent as tightly as ever. The lawyers and judges who perpetuate racism by citing federal Indian law cases without acknowledging the cases' white supremacist ideology are in violation of legal ethical tenets. They should be sanctioned. To help hasten awareness of the abysmal state of Indian law jurisprudence, adding basic facts about Indians to the American education system would be a major step forward. Congress would also be wise to help root out the racism in federal Indian law by denouncing *Oliphant*. Until the racism is purged from federal Indian law, Indians will remain at the bottom of the United States socioeconomic ladder.

Sentencing a group of people to poverty, high crime, and hopelessness due to white supremacist beliefs from over two centuries ago is the pinnacle of unethical behavior. Yet this is exactly what contemporary federal Indian law does. The continued embrace of antiquated, racist precedent means the United States continues on the path of Indian conquest—one federal Indian law case at a time.

389. U.S. DEP'T. OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: INITIATIVES TO PROMOTE THE GOVERNMENT-TO-GOVERNMENT RELATIONSHIP & IMPROVE THE LIVES OF INDIGENOUS PEOPLES 1 (Jan. 12, 2011), <https://2009-2017.state.gov/documents/organization/154782.pdf> [<https://perma.cc/EW5H-3DUG>]. However, the Declaration is not binding legal authority. See *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 301 F. Supp. 3d 50, 60 (D.D.C. 2018) (“[C]ourts have consistently held that UNDRIP is a non-binding declaration that does not create a federal cause of action.”).

390. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 7 (AM. BAR ASS'N 2020) (“Lawyers holding public office assume legal responsibilities going beyond those of other citizens The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.”).

391. 25 U.S.C.A. § 1304(a)(6) (West 2020).

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This colonial mindset is based upon lies, repudiated ideologies, and it is antithetical to the administration of justice. As the Supreme Court recently stated, “Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.”³⁹² This is true with racist jurisprudence—repeating it long enough and with sufficient vigor is never enough to make it right. Therefore, federal Indian law will remain a violation of the ABA’s MRPC until federal Indian law is cleansed of its rancid foundations.

392. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2482 (2020).