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The Fate of Native American Diversity of America's Law Schools

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The Fate of Native American Diversity of America's Law Schools[†]

Raymond Cross

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I. INTRODUCTION

America’s law schools should adopt a new diversity initiative that focuses on community development and empowerment within America’s minority communities. Their adoption of this new initiative would help reinvigorate the law schools’ now flagging social justice and public service missions.¹ Further, there is a successful diversity model available that, with some appropriate modifications, can be adopted by the law schools for this purpose. Indeed, this particular diversity model has already helped many impoverished communities throughout America to improve the lives of their residents.

Furthermore, some American law schools, particularly those located within the Indian Country regions of our nation, have already embraced this model as an effective means for revitalizing their social justice missions. Several of these law schools, through their collaborative work with interested governmental agencies and the affected minority communities, have provided useful assistance to those targeted communities in their efforts at community development and self-empowerment. For example, the University of Montana School of Law has, through its past collaborative work with a private foundation and several tribal governments, developed a Model Tribal Uniform Commercial Code that has been adopted by several Indian tribes as their means of achieving greater economic development.²

1. See Anthony V. Alfieri, *Educating Lawyers for Community*, 2012 WIS. L. REV. 115 (2012).

2. See *Exploring Tribal Issues at UM’s Law School, Around the Oval*, THE MONTANAN (Spring 1997), available at <http://www2.umt.edu/montanans97/oval.htm>. The model tribal commercial code grew out of a nationwide legal conference on Indian economic development issues that was hosted by the law school on April 14–16, 1997, in Missoula, Montana. That conference was entitled: *Tribal Nation Building: Building Tribal Legal Infrastructure for Economic Prosperity*. Nationally recognized Indian law experts addressed issues such as tribal sovereignty,

I contend that America's law schools, through their adoption of an appropriately modified version of this community development model, will be better positioned to promote their public service and social justice missions. My goal is to demonstrate two points: first, this available diversity initiative, known popularly as Native American diversity, has succeeded in facilitating the community building efforts of eligible minority communities throughout Indian Country; and second, this diversity initiative has also reinvigorated the social justice and public service missions of those law schools that have chosen to embrace it.

My article is divided into three parts. Part I describes the birth of both Native American diversity and the Indian self-determination movement during the late 1960s. In Part II, I assess whether the community development model of Native American diversity can serve to reinvigorate the social justice and public service missions of America's law schools. In Part III, I offer my proposed synthesis of the emerging community based lawyering model and the Native American lawyering model as the practical basis for the reform of the social justice and public service missions of America's law schools. I conclude my article with a brief assessment of the future role of Native American diversity as a practical means for revitalizing the commitment and practice of social justice within America's law school.

II. THE BIRTH OF NATIVE AMERICAN DIVERSITY AND INDIAN SELF-DETERMINATION DURING THE LATE 1960s

A. Introduction

The current community development model of Native American diversity was born out of the turmoil of the Civil Rights era and the War on Poverty era of the late 1960s. Leading commentators on this era agree that this initiative grew out of President Lyndon B. Johnson's famous War on Poverty. That "war effort" helped spark the growth of both Native American diversity in American law schools and the larger phenomena of the Indian self-determination movement. For example, Ms. Gwendolyn Mink asserts that the War on Poverty's community development programs gave a major boost to the growth of the Indian self-determination

tribal-bank relations and economic development. The conference was co-sponsored by the First Interstate Bank Foundation and the Federal Reserve Bank of San Francisco.

movement.³ Likewise, Christopher Riggs credits the Office of Economic Opportunity (“OEO”), the federal agency that funded the War on Poverty’s efforts in Indian Country, with giving “grants to [Indian] community and [tribal] government organizations to finance anti-poverty programs such as [Indian] education, legal services, job training and health.”⁴ He contends the success of these anti-poverty initiatives soon persuaded the BIA’s Indian policy makers to accept OEO’s programs as the best means of “foster[ing] self-determination because Indians would not be forced out of their homelands due to their dismal economic conditions.”⁵ However, Ms. Alexandra Harmon argues, in a somewhat different vein, that the proponents of Indian self-determination successfully translated the politics of the Civil Rights movement into the language of tribal sovereignty.⁶

However, these commentators generally agree that it was the creation of the Indian Community Action Programs (“ICAPs”) that laid the foundation for the rapid growth of both Native American diversity and Indian self-determination. The ICAPs provided the organizational training ground for the future Indian leaders of the self-determination movement. Through this ICAP mechanism, the Indian leaders were able, for the first time, to gain access to direct funding from the federal government. Therefore, those leaders were able to use their federal funds as the means of realizing their community development and empowerment goals throughout Indian Country.

Perhaps the most astute commentator on the War on Poverty era in Indian Country, Mr. George Pierre Castille, concludes that it was the OEO, through its twin emphasis on community building and empowerment, that provided both the money and the organizational structure necessary for the launch of Native American diversity and the Indian self-determination movement. He describes OEO’s community building initiatives as “mobiliz[ing] local [poverty stricken] communities to solve their own problems.”⁷ Therefore, the ultimate goal of OEO’s anti-poverty efforts was the “empowerment of the actual residents of urban ghetto and of rural poverty pockets, to enable them to act for themselves,

3. See GWENDOLYN MINK & ALICE O’CONNOR, POVERTY IN THE UNITED STATES: AN ENCYCLOPEDIA OF HISTORY, POLITICS AND POLICY 491 (2004).

4. Christopher R. Riggs, *American Indians, Economic Development and Self-Determination in the 1960s*, 69 PAC. HIST. REV. 431, 445 (2000).

5. *Id.* at 447.

6. Alexandra Harmon, *Native American Activism in Cold War America: The Struggle for Sovereignty*, 96 J. OF AM. HIST. 927, 928 (2008).

7. George Pierre Castille, *Therapeutic Experience of ‘Maximum Feasible Participation’*, 46 AM. STUD. 77, 80 (2005).

rather [than] to remain passive recipients of local government and private charity largesse.”⁸

Castille also asserts that the Indian leadership of the new ICAPs was practicably “interchangeable with the established tribal leadership.”⁹ Castille implicitly credits the OEO with jump starting the growth of Native American diversity in the American legal system through its funding of the famous public interest law firm known as the Native American Rights Fund (“NARF”). OEO implicitly, if not expressly, intended this legal organization to act, through litigation when necessary, to help the Indian people assert their rights of inherent sovereignty and self-determination. Today, NARF still specializes in the promotion and protection of American Indians’ distinctive legal rights. He also points out that OEO also sponsored the growth of another radical legal innovation through its funding of many Indian legal services programs such as the highly successful California Indian Legal Services (“CILS”) program.¹⁰ But, Castille does criticize OEO for its occasional heavy-handed efforts to influence the Indian communities’ goals and objectives. On balance, however, he concludes that its anti-poverty programs in Indian Country had a “therapeutic” effect in the development of a radical “new approach to tribal self-governance.”¹¹ He contends that OEO accomplished this feat by “allow[ing] Indians to redefine their relationship with the Federal Government.”¹²

In the next section of my article, I briefly describe how and why Indian self-determination eventually triumphed as the contemporary legal and political basis for a radically different type of federal Indian policy.

B. The Triumph of Indian Self-Determination

It was a far thinking Interior Secretary, Stewart Udall, who really grasped the possibility of transforming the OEO’s limited community building initiatives in Indian Country into a new and comprehensive federal Indian policy. He foresaw the demise of the federal government’s increasingly controversial War on Poverty programs. For that reason, he sought to formulate a new and politically defensible concept of an Indian self-determination policy. His new Indian policy would also incorporate

8. *Id.*

9. *Id.* at 81.

10. *See id.*

11. *Id.* at 82.

12. *Id.*

many of the OEO's Indian community development and empowerment initiatives.¹³

But his most difficult challenge was in crafting a compelling historical narrative that would justify his radically new Indian self-determination initiative. He did so by, as Castille puts it, "experiment[ing] with contracting with [Indian] tribes to perform services under the authority of the 'Buy Indian' act, which had existed since 1910."¹⁴ Despite the relatively thin legal basis for his new Indian policy, he nonetheless proclaimed his support for the idea of Indian self-determination. Therefore, he "pressed the case for a new direction in Indian policy with [President] LBJ."¹⁵ Fortunately, President Lyndon Johnson was interested in Udall's new policy idea. However, while Johnson readily endorsed Udall's idea that the Indian people should work to improve their tribal communities, he did not grasp the full importance of Udall's policy initiative.¹⁶ But Johnson did present Udall's Indian self-determination in his last major message to Congress on Indian issues. In that message, he not only endorsed the idea of self-determination as the basis for a new Indian policy, he also committed to the goal of the "maximum feasible participation" of the Indian people in the administration of those federal programs that were intended for their benefit.¹⁷

Far more important to the future success of Udall's Indian self-determination initiative was the fulsome legislative support that Johnson's Republican successor as President, Richard M. Nixon, gave to that initiative. Indeed, Nixon adopted Indian self-determination as his legislative center piece for his "New Federalism" policy. In his version of "New Indian Federalism," Nixon endorsed the idea that the Indian people should assume the administration of those Indian benefit programs that were presently operated by the BIA or Indian Health Service ("IHS").¹⁸

Nixon, therefore, implored the Congress to enact his version of the Indian self-determination initiative as the legislative basis for devolving the administration of these Indian benefit programs into the

13. Castille, *supra* note 7, at 81.

14. *Id.*

15. *Id.*

16. *Id.* (providing an example of when Johnson endorsed Udall's idea).

17. President Johnson presented the case for Indian self-determination in his "Special Presidential Message to Congress on the Problems of the American Indian: The 'Forgotten American.'" *Id.* In his message, he praises OEO's "new concept of community developmet—a concept based on self-help—[that has] work[ed] successfully among [the] Indians." *Id.* He also proposed in his message a new goal of Indian self-determination that "promotes partnership self-help" with the Indians. *Id.*

18. *See id.* at 83.

hands of the Indian people themselves. He apparently assumed, much like the OEO policy makers had before him, that the Indian people, themselves, were best positioned to administer these programs in accord with their interests and priorities. Ironically, Nixon, as the man who had ended the War on Poverty, nonetheless spearheaded the effort to enact Indian self-determination. Indeed, he revived OEO's old community building mantra of "maximum Indian participation" as his lead rhetorical flourish in his famous 1970 Indian Self-Determination Message to Congress.¹⁹

In the next section of my article, I briefly describe how the OEO, through its cooperative venture with a leading Indian Country law school, helped jump start the phenomena of Native American diversity in America's law schools.

C. The Rise of Native American Diversity in America's Law Schools

Native American diversity in America's legal profession and law schools, symbolized in its most important product, the Indian lawyer,²⁰ emerged as an important by-product of the War on Poverty initiatives during the late 1960s. More specifically, Native American diversity is the direct result of concerted action, beginning in 1967, between the OEO and a leading Indian Country law school, the University of New Mexico

19. Castille, *supra* note 7, at 83. Nixon's Indian message "contained an extensive set of legislative proposals to implement the new [Indian self-determination] approach." *Id.* Castille describes the Nixon sponsored self-determination policy as a "long step in the right direction." *Id.* at 85. His only regret is that "[t]he role of the OEO" has never been recognized in this historical process. *Id.*

20. Professor Louise Barnett describes James Welch's *Indian Lawyer* as "his fourth and penultimate novel." She describes the troubled life of a highly successful "Indian lawyer," Sylvester Yellow Calf, as follows:

This time, rather than writing about the Blackfeet territory of northern Montana where his previous three novels take place, Welch immerses a Blackfeet Indian in the mainstream professional world of Helena, the state capitol. Sylvester Yellow Calf is a former high school basketball star who has left behind the usual reservation poverty and dysfunctionality by getting an education and becoming a valued member of a prestigious law firm. At the novel's beginning he has a white establishment girlfriend, Shelly Hatton, and an enthusiastic mentor in an elderly lawyer, Buster Harrington. He is poised to a named partner and to run for Congress.

Louise Barnett, *The Indian Lawyer*, LITERARY ENCYCLOPEDIA (Feb. 5, 2009), <http://www.litencyc.com/php/sworks.php?rec=true&UID=24943>.

School of Law. Why that law school chose to actively embrace Native American diversity is a story worthy of an extended telling. Unfortunately, I can provide only the shorter version of that important story. In my telling of the story, the OEO and this law school envisioned the recruitment and training of a cadre of Native American law students who would, upon their successful completion of an intensive Indian law summer program, be placed as first year law students in the available American law schools. It was hoped by the program's organizers, but not explicitly required, that these Native American law students would, upon graduation from their respective law schools, commit to work with their respective tribal communities to help them realize their goals of community building and sovereign empowerment.²¹ The success of this Native American diversity initiative was due to the hard work of one man—a revered and honored UNM law professor named Frederick W. Hart. He volunteered to work with OEO to initiate the first Native American diversity program in an American law school. This now famous program has recruited, trained and placed hundreds, if not thousands, of Native American law students into law schools throughout this nation. As envisioned by Hart, many of these newly minted Indian lawyers did

21. Professor Frederick W. Hart, the founder of the PLSI program at the UNM School of Law, described his early concept of the program's goals and objectives in a 1970 law review article:

Although no segment of our society more needs representation within the legal profession than does the American Indian, no group has fewer lawyers. There are well over a half-million Indians. To achieve proportionate representation at the bar, five hundred to a thousand Indians would have to be lawyers; yet there are perhaps not more than two dozen practicing lawyers who identify as Indian in the entire United States. The number who are actively engaged in work affecting Indians is even less.

In the spring of 1967, the University of New Mexico began a program to increase the number of Indian lawyers. Funded primarily by the Office of Economic Opportunity, the program consists of an eight-week pre-law session during the summer, and financial assistance for the student during the academic year There are now fifty Indian law students under the program studying in twenty-six different Universities.

Thomas W. Christopher & Frederick W. Hart, *Indian Law Scholarship Program at the University of New Mexico*, 2 U. TOL. L. REV. 689, 690–91 (1970).

choose to work on behalf of those tribal people who desired to develop and empower their communities.²²

Professor Hart, armed with his initial OEO grant, set about in 1967 to establish what has now become the nationally renowned Pre-Law Summer Institute (“PLSI”). As originally envisioned, this eight week, pre-law program was intended to provide selected and qualified Native American college graduates with those essential study and analytic skills that would enable them to survive in their first year of law school.²³ Additionally, Professor Hart and his law school allies worked to develop

22. Philip S. Deloria, the long-time director of the PLSI program after Hart stepped down, reviewed that program’s success from the modest foundation laid down by Hart in 1967:

The achievement resulting from Professor Hart’s foundation has been remarkable. The overall design of the program has varied little from the original pattern set by Hart over the first three years. At the outset, Hart and [Dean] Christopher conducted a brief survey and could find fewer than 25 Indian lawyers in the nation and about 15 Indian law students. Present estimates of Indian lawyers exceed 1,500; law students about 250. The impact has been impossible to measure because it has been so great. Indian lawyers, summer program alumni, are found throughout Indian affairs: tribal attorneys; tribal chairpersons; tribal chief justices, supreme court justices, tribal court judges (as well as a growing number of state and municipal judges); tribal attorneys general (and one state attorney general); and a United States Attorney (in the Carter Administration). Indian lawyers can be found through the Interior Solicitors Office, the Bureau of Indian Affairs, the House Subcommittee on Native American Affairs and the Senate Select Committee on Indian Affairs staffs. Indian lawyers have their own law firms and serve as executive directors and staff attorneys in many national and regional Indian advocacy organizations. Two Assistant Secretaries for Indian Affairs in the Interior Department have been summer program graduates, Tom Fredericks and Ada Deer, along with at least four Deputy Assistant Secretaries who have been program alumni or who were helped in law school with financial assistance.

Philip S. Deloria, *The American Indian Law Center: An Informal History*, 24 N.M. L. REV. 285, 291–92 (1994).

23. Professor Gloria Valencia-Weber describes the PLSI program as “a ‘boot camp’ experience, where students are introduced to law courses, legal research and writing, and Indian law. It is not a remedial program but one to develop a core understanding of law in some basic courses such as contracts or torts.” Gloria Valencia-Weber & Sherri Nicole Thomas, *When the State Bar Exam Embraces Indian Law: Teaching Experiences and Observations*, 82 N.D. L. REV. 741, 744 (2006).

a specialized Indian law curriculum and clinical programs at their law school. Through the appropriate mix of doctrinal and clinical training in Indian law, Hart developed an Indian law curriculum that would equip the participating law students, both Native and non-Native, with the required knowledge and skills to enable them to become successful Indian lawyers.²⁴ As a practical matter, however, without the on-going financial support of the OEO, and later the BIA, Hart's PLSI program would not likely have succeeded. These two federal agencies also, for some time, provided substantial financial aid to those successful graduates of the PLSI program who were admitted to American law schools. Therefore, the PLSI program may prove to be one of OEO's most substantial legacies since its by-gone War on Poverty.²⁵

Indeed, one historian of the PLSI program contends that it has produced more than 3000 Native American legal professionals and academics. That historian also credits the program with jump starting other law schools' efforts to develop a specialized Indian law curriculum in their respective law schools. She also points out that more than 64 of the ABA's accredited law schools now boast Indian law programs.²⁶

However, OEO's guiding purpose in funding this program was to help promote the social and economic development of tribal communities within Indian Country. Its sponsorship of this Native American diversity initiative at the UNM School of Law was its means of producing those needed Native American lawyers who would hopefully work for their tribal communities in a wide variety of professional roles. In that regard, OEO's diversity initiative was extremely successful. Many PLSI graduates have gone on to serve their tribal communities as tribal leaders, tribal attorneys, tribal judges or as Indian policy makers in federal agencies or in the staffs of the Indian congressional committees. Therefore, from OEO's perspective, the real beneficiaries of its diversity initiative were those tribal communities that were provided with a committed cadre of community oriented lawyers who chose to assist them in their arduous task of re-building their shattered communities and in the re-gaining of their capacity for self-governance.²⁷ The PLSI program's contribution to this

24. Professor Valencia-Weber also describes the story of the PLSI as "inseparable from the history of Indian law at UNM as an institution and its [overall] curriculum." *Id.* at 745. She credits Hart and others at the law school as being the leaders in pushing for the integration of Indian law and clinical practice in the broader curriculum at the law school. *See id.* at 743-44.

25. Professor Valencia-Weber describes the PLSI program as the "most successful program in the history of Indian education." *Id.* at 745.

26. *Id.* at 745-46.

27. *See id.* at 745.

larger task of community building and empowerment has also been reflected in its graduates who have made substantial contributions to the development of federal Indian law as a meaningful tool for the assertion of Indian rights. For example, the American Indian Law Center (“ALIC”) at the UNM School of Law recently hosted a gathering of *First Thirteen*, referring to those thirteen Native American lawyers who have had the privilege of arguing important Indian law cases before the United States Supreme Court.²⁸ Many, if not most, of these Indian lawyers are either graduates of the PLSI program or have otherwise benefitted from the targeted Indian scholarship funding and specialized Indian law curriculum that has become increasingly available in America’s law schools.²⁹

In the next section of my article, I briefly summarize how the impact of the twin phenomena of Native American diversity and Indian self-determination re-shaped the landscape, not just of Indian Country, but of American legal education as well.

D. Summary

The fabled War on Poverty did much to promote the rise of Native American diversity and Indian self-determination during the late 1960s. Of course, none of OEO’s Indian policy makers or the emerging Indian leaders could have foreseen how these twin phenomena would, within a few decades, have transformed not only Indian Country, but American legal education as well. In the next part of my article, I discuss how the community development and empowerment based norms of Native American diversity may serve, with some appropriate modifications, to reinvigorate the flagging social justice and public service missions of America’s law schools.

28. Diane J. Schmidt, *The First 13 Brings Together Indian Law Pioneers*, NAVAJO TIMES (Apr. 5, 2012), <http://navajotimes.com/politics.2012.0412.040512law.php>. Reporter Diane J. Schmidt asserts that you “could hear the snap, crackle and pop of intellectual athletics when a different kind of all-star team—“The First Thirteen”—assembled at the University of New Mexico Law School on March 16.” *Id.* Ms. Schmidt notes that “seven of the attorneys attended that [PLSI] summer program before going on to law schools around the country.” *Id.* The focus of that gathering was to bring these Indian lawyers together “to talk about their personal experiences and how arguing before the Supreme Court changed their lives and careers.” *Id.* As a score card of these lawyers success before the Court, Schmidt notes that there were “six wins, between 1980 and 1985, followed by six losses and two ties.” *Id.*

29. *See id.*

III. WHY THE COMMUNITY DEVELOPMENT FOCUSED MODEL OF NATIVE AMERICAN DIVERSITY CAN HELP AMERICA'S LAW SCHOOLS RE-INVIGORATE THEIR SOCIAL JUSTICE AND PUBLIC SERVICE MISSIONS

Today, all diversity initiatives in America's law schools are under intense public and judicial scrutiny. Race-based diversity initiatives in America's law schools have survived their most recent challenge before the United States Supreme Court in *Fisher v. University of Texas*.³⁰ Some critics of diversity seem to view it as representing a zero sum contest between an ostensibly more qualified non-minority candidate and an arguably less qualified minority candidate. Consequently, some legal challenges to race-based diversity initiatives have asserted that there may be significant differences between the standardized test scores that a non-minority candidate for admission has achieved on a given test as compared to the test score that a minority candidate has achieved on that same admissions test. Based on this asserted significant difference in test scores between those achieved by the minority candidate and those achieved by the non-minority candidate, critics may argue the non-minority candidate is clearly the more qualified candidate for admission to a college or law school.³¹

In the recently decided *Fisher v. University of Texas*³² case, the plaintiff asserted that the non-minority candidate for admission was more qualified than the competing minority candidates for admission, but, due to her non-minority status, she was denied admission to that particular school. While race-based diversity initiatives have survived their most

30. 133 S. Ct. 2411 (2013).

31. *See id.* Adam Liptak reports that this “new case, *Fisher v. University of Texas*, No. 11-345, was brought by Abigail Fisher, a white student who says the University of Texas denied her admission because of her race.” *Id.* He also reports that Lee Bollinger, the president of Columbia University, had worried that an adverse decision in this matter will “undo several decades of effort within higher education to build a more integrated and just and educationally enriched environment.”

32. Reporter Lyle Denniston asserted that the U.S. Supreme Court returns, for the “first time in nine years to the ongoing controversy over the use of race in public admissions.” *See* Lyle Denniston, *Affirmative Action Review Due Next Term (Updated)*, SCOTUSBLOG, (Feb. 21, 2012, 4:38PM), <http://www.scotusblog.com/2012/02/affirmative-action-review-next-term/>. The diversity plan at issue seeks to “achieve that goal among the major fields of study, and at the classroom level.” *Id.* This expansive application by the University of Texas of what is called the *Grutter* principle is the “key issue in the case taken to the Court by Abigail Fisher.” *Id.* Ms. Fisher, who is white, asserts that “minority students with lower grade averages than hers got in under the plan.” *Id.* That plan was “upheld in [the] U.S. District Court, and then on appeal by the Fifth Circuit.” *Id.*

recent judicial challenge, commentators nevertheless suggest that America's law schools, in the long term, should look to an alternative diversity model that uses non-race-based criteria in its structure and application. For that reason, I recommend that law schools should consider the adoption of a community development focused model as a potential non-race-based diversity alternative.

In the next section of my article, I will demonstrate the striking differences between my proposed community development focused model of diversity, on the one hand, and race-based diversity, on the other hand.

A. How My Proposed Community Development Model of Diversity Differs From Race-Based Diversity

My proposed community development model of diversity recognizes that any qualified and committed candidate, whether minority or non-minority, who evidences a commitment to ultimately work as a community based lawyer would be eligible to participate in this program. Of course, suitably qualified candidates may be required to demonstrate their personal knowledge base or experiential connection with those particular social justice communities that are the focus of a given law school's program. In that regard, Native American diversity initiatives typically assess and evaluate the relative strength and intensity of a given candidate's commitment to the targeted tribal communities that are of special concern in a given law school's diversity program. A prospective candidate's personal or historic connection to a given tribal community may be one factor in deciding whether that candidate may participate in a given diversity based program.³³ Therefore, a law school that may choose to adopt my proposed community development initiative would be able to shape that program around its particular social justice and public service missions.

Furthermore, my proposed community development focused model for diversity has already been subjected to searching judicial scrutiny before the United States Supreme Court. The Court's unanimous opinion in *Morton v. Mancari*³⁴ resoundingly approved the legal and practical principles that underlay this diversity model. For example, the

33. The recently adopted Native American diversity program, the American Indian Legal Leaders Project ("AILLP"), provides that a "candidate must evidence, in his law school application of accompanying personal essays, strong ties to Indian Country." *American Indian Legal Leaders Project*, Part II.A.2 (on file with author).

34. 417 U.S. 535, 541 (1974) (explaining that Congress has, in the past, allowed laws to be passed favoring Indian self-regulation).

Court's *Mancari* decision implicitly, if not expressly, approved the OEO's cooperative Native American diversity initiative of the UNM School of Law that I will discuss in the next section of my article. Therefore, a leading race law scholar has characterized the *Mancari* decision as authorizing the federal government, and likely the state governments as well, to undertake a wide variety of development initiatives within the tribal communities throughout the nation.³⁵

In the next section of my article, I assess how and why my recommended community development alternative may serve, given its appropriate adaptation, as a non-race-based, alternative diversity based means whereby America's law schools can reinvigorate their social justice and public service missions.

B. How and Why Native American Diversity and Indian Self-Determination Survived Judicial Scrutiny in Morton v. Mancari

The OEO inspired initiatives of Indian self-determination, as well as its step child, Native American diversity, came under searching judicial scrutiny in *Morton v. Mancari*.³⁶ In *Mancari*, some disgruntled non-Indian job seekers sued the federal government alleging that the BIA's Indian hiring and promotion preferences violated the equal employment opportunity provisions of a recently enacted federal anti-discrimination statute, as well as the equal protection principles of the United States Constitution. These non-Indian plaintiffs alleged that their statutory and constitutional rights were violated because the BIA awarded the available job positions to ostensibly less qualified Indian candidates. Furthermore, these non-Indian litigants prevailed at the federal district court level when that court held that the 1972 Equal Employment Opportunity Act ("EEOA") had impliedly repealed the BIA's Indian preference policy.³⁷ However, that court declined to decide whether that preference policy also violated the equal protection principles of the Fifth Amendment and Fourteenth Amendments.³⁸

35. See generally Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958 (2011).

36. See 417 U.S. 554.

37. Professor Rolnick describes *Mancari* as "a challenge by white (and other non-Indian) applicants to a hiring preference for Indians within the Bureau of Indian Affairs (BIA)." Rolnick, *supra* note 35, at 970. She contends these plaintiffs challenged that preference as "an invidious racial classification that violated the civil rights statutes and the equal protection goals in the Fifth and Fourteenth Amendments." *Id.* at 971.

38. *Id.*

1. *The Analysis of Morton v. Mancari*

Professor Addie Rolnick, a noted race law scholar, emphasized that the federal government had argued at the lower court level in *Mancari* that the court should uphold the BIA's Indian preference policy even if that policy was, as the plaintiffs' claimed, a race-based employment preference.³⁹ Given that this Indian employment preference served important governmental objectives, the government contended that it should be upheld despite the plaintiffs' claims that it violated their statutory rights or otherwise deprived them of the equal protection of the law. However, after the federal government's initial legal argument was rejected by the lower court, the government fundamentally altered its legal strategy at the oral argument level before the United States Supreme Court. There, it asserted that the BIA's Indian employment preference was not a race-based preference at all. It was, instead, a rational and appropriate means whereby the federal government could help promote its much larger program of Indian self-determination.⁴⁰ As such, that BIA employment preference was not based on the racial status or identity of those Indian job candidates. Instead, it was based on those candidates' political status or identity as members of various federally recognized Indian tribes. Furthermore, the government also argued the lower court's holding that the preference had been implicitly repealed was not only inconsistent with the governing judicial canons of Indian statutory interpretation, but it also threatened to undermine the success of the entire Indian self-determination project.⁴¹

Professor Rolnick concludes that in *Mancari*, the Court, in its unanimous opinion in this matter, wholly bought the federal government's argument on this point. Therefore, the Court took special pains to explain why the principle of strict judicial scrutiny did not apply to the federal government's Indian self-determination programs and policies. For example, it recites how the Indian conquest era, in conjunction with the federal government's wrong-headed Indian policies of the time, had ultimately rendered the Indian people completely dependent upon the federal government. Professor Rolnick also recounts how the Court seized on a few old Indian employment preferences as evidencing the government's long-standing commitment to the fostering of the Indians' advancement toward civilization. For example, the Court looked back to those ancient Indian trade and commerce statutes that had once mandated

39. *See id.* at 972.

40. *See id.* at 972–73.

41. *See id.*

the preferential hiring of Indian interpreters and guides as aides to the federal expeditions in the American west.

The Court also cited the federal government's expansion of its Indian employment preference scheme in its landmark Indian revitalization legislation known as the Indian Reorganization Act ("IRA").⁴² That particular act, which statutorily codified the older Indian preference policies, was regarded by the Court as representing the government's modern strategy whereby qualified Indian employees could be groomed by their governmental mentors to eventually assume the responsibility for the administration of their own internal affairs.⁴³ Not surprisingly, the Court's opinion pointed out that the BIA's refurbished preference policy cited the IRA as its legislative warrant for its contemporary policy.⁴⁴ For that reason, Rolnick concludes that it was no surprise that the Court concluded that the BIA's Indian hiring preference is a politically based, not a racially based, employment preference.

In the next section of my article, I demonstrate how the *Mancari* decision has created a radical disjuncture between the community development focused model of Native American diversity and race-based diversity.

2. *The Impact of Mancari*

Professor Rolnick further argues that *Mancari*'s lasting legal effect is to establish a fundamental doctrinal disjuncture between Native American diversity and race-based diversity. She characterizes Native American diversity as explicitly focused on the broad based promotion of the goals of Indian self-determination. By contrast, she characterizes race-based diversity as focused on the limited remediation of demonstrable instances of individualized harms that directly result from identifiable and particularized instances of race-based discrimination.⁴⁵ Furthermore, she characterizes Native American diversity as aimed at the express promotion of a wide variety of Indian political rights, while race-based diversity is aimed exclusively at the limited remediation of individualized instances

42. Indian Reorganization Act (IRA), 25 U.S.C. § 461 (2012).

43. Rolnick, *supra* note 35, at 991. Rolnick emphasizes how the Court "acknowledged that the Indian employment preference was intended to counter 'overly paternalistic' policies of the past and undo historical dominance of non-Indians in the management of Indian affairs by gradually replacing non-Indian employees with Indian ones." *Id.*

44. *Id.* at 983. Rolnick points out that the IRA encouraged tribal governments to refashion their governments in the image of the U.S. government. *Id.*

45. *Id.* at 991.

of “dignitary and exclusionary harm.”⁴⁶ Therefore, she concludes that *Mancari*’s expansive pro-self-determination holdings provide the proponents of Native American diversity with an effective legal shield from judicial scrutiny as well as a highly adaptable political and moral lever to pressure both federal and state governments to promote diversity initiatives that will arguably further the growth of Indian self-determination and sovereignty.⁴⁷

In the next section of my article, I summarize how the *Mancari* decision has spurred the growth of the community development focused model of Native American diversity as the engine for significant economic and political change with tribal communities throughout America.

C. Summary

The *Mancari* decision helped spur the growth of the twin phenomena of Native American diversity and Indian self-determination. That decision’s major contribution to their growth was the Court’s resounding endorsement of the community development and empowerment focused character of both of these phenomena. Furthermore, as emphasized by Professor Rolnick, the *Mancari* decision established a radical disjuncture between Native American diversity, on the one hand, and race-based diversity, on the other hand. These two diversity doctrines, as she points out, have fundamentally different normative and practical roles in American society. Native American diversity, as a race-neutral principle of government action, can serve as a broad based moral and political lever for the re-building and re-empowerment of America’s tribal communities. By contrast, race-based diversity, as described by Professor Rolnick, is a narrowly focused remedial device that may, in instances of discrete and demonstrable instances of harm that were caused by racial discrimination, authorize limited governmental or judicial action to remedy that harm.

In the next part of my paper, I analyze how the community development and empowerment focus of Native American diversity may be used, in conjunction with the emerging normative concept of community based lawyering, as the basis for the re-invigoration of our law schools’ social justice and public service missions.

46. *Id.*

47. *Id.* at 1005. Rolnick argues that the *Mancari* decision, in conjunction with the Indian self-determination policy, is “supportive of tribal political autonomy and acknowledges tribal nationhood.” *Id.*

IV. HOW MY PROPOSED SYNTHESIS OF COMMUNITY BASED
LAWYERING AND NATIVE AMERICAN DIVERSITY CAN SERVE
AS THE NORMATIVE AND PRACTICAL BASIS OF A NEW
SOCIAL JUSTICE MISSION FOR AMERICA'S LAW SCHOOLS

Community building and empowerment, goals that have long served as the focus of Native American lawyering and diversity programs, are now being promoted as the normative and the practical basis for the reform of legal education. The leading proponent of this approach to legal reform, Professor Anthony V. Alfieri, has also emphasized the need to create a cadre of trained and committed "lawyers for the community."⁴⁸ Therefore, he has called on America's law schools to actively recruit and train this new breed of community based lawyers. His call to action resonates deeply with Professor Hart's very similar call, more than 40 years ago, for a specialized Native American diversity program that would produce a new breed of Native American lawyers who would work within their respective tribal communities. Therefore, Alfieri's legal reform proposal, much like Professor Hart's earlier proposal, envisions the law schools' creation of a cadre of trained and committed community based lawyers who would also work within our nation's minority communities.⁴⁹

Furthermore, Alfieri, as did Professor Hart in 1967, promotes his idea of legal reform as representing the pragmatic response of America's law schools to the growing demand for community based lawyers. Likewise, Professor Hart sought to persuade the OEO, and later the BIA, to support his idea for a Native American lawyer training program given the demand for those new legal professionals who could help the tribal communities take advantage of their new self-determination opportunities.⁵⁰ Professor Alfieri contends, in a similar vein of argument, that America's law schools should now revamp their existing pedagogical and curricular structures so as to meet the new demand for trained and committed community based lawyers.⁵¹

48. See Alfieri, *supra* note 1, at 118. Alfieri argues for a "more normative vision of law school curricular reform," one that focuses on "building and recovering community in the contexts of underserved client populations segregated by concentrated poverty and differences of class, ethnicity, and race." *Id.*

49. See *id.* at 116. Alfieri argues for an emphasis on the "education of lawyers for community." *Id.*

50. Philip S. Deloria, *The American Indian Law Center: An Informal History*, 25 N.M. L. REV. 285, 305-06 (1994).

51. See Alfieri, *supra* note 1, at 118. Alfieri argues for a "more normative view of law school curricular reform" one that focuses on "building and recovering community in the contexts of underserved client populations segregated by concentrated poverty and differences of class, ethnicity, and race." *Id.*

Furthermore, he calls for America's law schools to adapt their existing doctrinal and clinical approaches, much as Professor Hart called on the UNM School of Law to adapt its doctrinal and clinical offerings to meet the new demand for Native American lawyers, so as to respond to the demand for community based lawyers. While his call for sweeping pedagogical and curricular reform has yet to be heeded by most of America's law schools, his proposed community based lawyering model does strikingly resemble Professor Hart's vision of Native American lawyering within America's tribal communities.

In the next section of my article, I propose a working synthesis of Alfieri's community based lawyering model and the similarly community based Native American lawyering model.

A. My Proposed Working Synthesis of the Community Based Lawyering Model and the Native American Lawyering Model

Given the striking resemblance between these two lawyering models, I seek to craft a working synthesis of Alfieri's community based lawyering model and Hart's Native American lawyering model. Furthermore, I believe that my proposed synthesis of these two lawyering models can serve as the foundation of a new social justice and public service endeavor within America's law schools.⁵² My proposed synthesis may take on even greater importance in light of the potential demise of race-based diversity as the primary driver of many law schools' existing social justice missions.⁵³

Given the significant normative and practical overlap within these two community lawyering ideas, I believe it is possible to develop a new concept of social justice based on a synthesis of these two models' core goals and commitments.⁵⁴ Here are my three suggestions as to how such a working synthesis of these two models may be accomplished:

52. See *id.* at 122–23. Alfieri's community lawyering model contemplates, as does Native American lawyering, the “small- and large scale transformation of communities through cooperative, grass roots partnerships.” *Id.* Alfieri also sees the “third-level relationships between law and social justice movements” as “connect[ing] small- and large-scale transformation” of communities. *Id.* at 122–23.

53. See Liptak, *supra* note 30.

54. See generally Supriya Routh, *Experiential Learning Through Community Lawyering: A Proposal for Indian Legal Education*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 115 (2011).

a. Restate Alfieri's community based lawyering concept to take cognizance of Native American lawyering's core norms of tribal community building and community based empowerment. The successful re-statement of these two concepts' shared norms and fundamental commitments could then serve as the founding framework of a new social justice and public service orientation for America's law schools.

b. Establish a suitable pre-law summer institute, similar in concept and practice to the PLSI, that would seek to identify, recruit, and train a cadre of qualified minority and non-minority law school candidates who, during their law school careers, would commit to specializing in an appropriately crafted community based lawyering curriculum. This curriculum would help build its participants' lawyering skills and abilities so they can, as newly minted lawyers, later be deployed to empower those eligible minority communities that are located within America's inner cities and rural areas.

c. Strive to articulate a non-race-based justification for the law schools' adoption of this new community based lawyering model that focuses on addressing those particular socio-economic factors that distinguish these specified minority communities from their non-minority counter parts. Such race-neutral considerations may include, for example, those objective and measurable factors such as those particular communities' comparatively high rates of poverty, their high unemployment rates, their significantly disparate health care status, as well as any unique educational achievement factors that may place their school age children at risk of dropping out of school.

In the next section of my article, I demonstrate how my proposed working synthesis of these two community based lawyering models can serve to reinvigorate the social justice and public service missions of America's law schools.

B. How My Proposed Synthesis of These Two Models of Community Based Lawyering Can Re-Invigorate the Social Justice and Public Service Missions of America's Law Schools

My proposed working synthesis of these community lawyering models will help promote Alfieri's call for America's law schools to recruit, educate and ultimately deploy a new breed of community based lawyers who are committed to "economic justice[] and a greater promotion of democratic participation[]."⁵⁵ Indeed, my synthesis will require only relatively minor adjustments in Alfieri's community lawyering syntax and vocabulary. With these minor adjustments, his call for a new cadre of community based lawyers could easily substitute for Professor Hart's earlier call for law schools to recruit and train a cadre of Native American lawyers who would work within America's tribal communities.⁵⁶ However, my proposed synthesis of these two lawyering models must acknowledge those real legal and practical differences between America's tribal communities, on the one hand, and America's similarly impoverished and powerless minority and ethnic communities, on the other hand. However, these two models similar normative and practical lawyering orientations serve to minimize, if not eliminate, any friction that may exist in a working synthesis of these models. For example, Professors Hart and Alfieri may likely agree that Native American lawyers and community based lawyers both need to possess the qualities of mindfulness, a willingness to bear true witness to past and present tragic events within those communities they serve, as well as a capacity to "listen to and communicate with their clients across difference, power, and privilege."⁵⁷

While the differing legal and cultural nomenclatures of Native American lawyering and community based lawyering may need to be smoothed over, perhaps through a re-translation of their differing language and word choices into some common vocabulary. For example, the Native American lawyers' ideas of tribal sovereignty and self-determination could be easily, if not perfectly, re-translated in the community based lawyers' language of community building and empowerment.

For these reasons, I believe that my proposed working synthesis of these two community based models is appropriate as the basis for a new

55. Alfieri, *supra* note 1, at 118.

56. *Id.* at 118–19. Alfieri cites, for example, "growing literature of community development [that] weaves disparate strands of grassroots organizing, legal-political integration, empowerment and mindfulness into a broad framework of lawyering, policymaking and lay advocacy." *Id.* at 119.

57. *Id.* at 121 (internal quotation marks omitted).

social justice undertaking within America's law schools. There is a remarkable degree of normative and cognitive agreement that exists within these two community based lawyering models. For example, Alfieri repeatedly emphasizes the idea of "interpersonal harmony" as being more important than any possible realization of "a single, universal cause" of social justice."⁵⁸ Just so, most Native American lawyers could easily subscribe to that normative idea.⁵⁹ Alfieri also requires his community based lawyers to be willing to engage in a "discourse of reconciliation" that strives to reconcile advocate to client, and the advocate to those who listen to his advocacy, and to those who hear advocacy to the client.⁶⁰ Once again, most Native American lawyers could easily buy into this lawyering norm. Indeed, Native American lawyers, long before Alfieri articulated his community based lawyering ideal, had emphasized the goal of restoring interpersonal harmony within the tribal community as being more important than the achievement of any abstract notion of a just outcome in a given matter.⁶¹

But there are some Native American lawyers who may raise a question regarding Alfieri's thesis about the "sinful and tragic" nature of what he characterizes as sometimes "cruel and exclusive" minority communities. Those lawyers may well argue that it is those tribal communities' prerogative, whether Alfieri agrees or not, to decide who is recognized as a member of their communities.⁶²

In the next section of my article, I demonstrate that Alfieri's community based lawyering model can be reconciled with what he calls the ruling imperatives of the standard lawyering model.

C. Why the Community Based Lawyering and the Native American Lawyer Model Can Be Reconciled With the Imperatives of the Standard Model of Lawyering

Alfieri does worry, unnecessarily so I believe, that his proposed "pedagogy of community and public citizenship" may prove incompatible with today's "standard advocacy of adversarial contest within liberal

58. *Id.* at 126.

59. *Id.*

60. Alfieri, *supra* note 1, at 125 ("[I]t is a form of advocacy that 'reconciles the person whose cause is advocated with the persons who hear advocacy.' Further, 'it reconciles the person whose cause is advocated with the persons who hear advocacy.'").

61. *See id.* at 127.

62. *See id.* at 128.

democratic systems.”⁶³ He particularly regards that standard model’s demand for “fidelity-to-law” as likely antithetical to his new norm of the community based lawyer’s overriding “commitment” to a “theology of hope and of faithful witness” in his work within his chosen community.⁶⁴ However, I believe that his concerns will likely prove unfounded. For example, Native American lawyering has had to confront and overcome similar normative dis-junctures within America’s law schools. Furthermore, given the general success that has been achieved by Native American lawyering, including its norms of tribal sovereignty and self-determination, within traditional law schools, Alfieri’s proposed community based lawyering norms will be likewise welcomed in many, if not most, American law schools. Indeed, many law students consciously chose their law school’s Indian law curriculum because of that curriculum’s enlarged vision of economic and social justice. For that reason, Alfieri’s call for an enlarged normative vision of economic and social justice may well be embraced by many law faculty and law students within America’s law schools. Of course, there will likely always be some tension between those traditional lawyering norms that emphasize individual “rights entitlement” and Alfieri’s broader normative idea that calls for the community based lawyer to prioritize his commitment to “moral discourse and social justice” over individually based rights and entitlements.⁶⁵ Once again, there has been a similar on-going tension between the governing normative precepts of Native American lawyering and the traditional lawyering model’s emphasis on individual rights and entitlements. But Native American diversity and lawyering has flourished in many of America’s law schools despite this tension.

Of course, as Alfieri points out, there may be circumstances when the community based lawyer may have to make a stark choice between those standard lawyering norms of rights entitlement and her commitment to work in the best interest of the particular community she has chosen to represent. At this moral juncture, Alfieri rightfully emphasizes that the lawyer may have to make a choice as to whether or not to encourage “moral dissent [on the part of that community] . . . in spite of the ethical duty to respect the law.”⁶⁶ However, Alfieri does say that such hard choice situations will rarely occur and that the community based lawyer can many times avoid or minimize their occurrence through her engagement in a community based “moral discourse” that helps build civic loyalty within

63. *Id.* at 139–40.

64. *Id.* at 144.

65. *Id.* at 149.

66. Alfieri, *supra* note 1, at 141.

that community. In this regard, that lawyer must emphasize her “caring, faith and conscience over simple loyalty.”⁶⁷

In sum, it is possible, as was largely accomplished within the Native American lawyering context, to reconcile the ruling norms espoused by the standard advocacy model and those new community oriented norms espoused by Alfieri as the basis for his proposed community lawyering idea. Indeed, those law schools that have chosen to embrace Native American diversity have generally succeeded in reconciling that idea’s new norms and commitments with its standard advocacy model’s commitment to individual rights and entitlements. Just so, those law schools that may choose to embrace Alfieri’s community based lawyering idea can likely incorporate its new norms without undue stress. Of course, it would take a traditional law school some time to accept Alfieri’s principles that emphasize a lawyer’s commitment to aiding “impoverished communities through legal rights education, organization, and [social] mobilization.”⁶⁸ Therefore, community based lawyering, just like its community focused counterpart, Native American lawyering, can, if it wishes to do so, make an important social justice focused contribution to American legal education.

In the next section of my article, I summarize how my proposed working synthesis of these two community based lawyering models can help transform the social justice and public service missions of America’s law schools.

D. Summary

My proposed synthesis of those two community based models of diversity—the Native American diversity model and Alfieri’s community lawyering model—provides America’s law schools with both the opportunity and practical means for refurbishing their social justice and public service missions. Of course, not all of America’s law schools, particularly those that remain wedded to what Alfieri calls the standard advocacy model, will be able to accommodate the new norms and lawyering principles of this new community based diversity doctrine. However, those law schools that are willing to accommodate these new community development focused norms and practices may discover what some other law schools have already discovered: community based lawyering provides both the law school and its graduates with a new

67. *Id.* at 149.

68. *Id.* at 155.

appreciation and respect for law's power to transform a community's capacity for self-help and self-empowerment.

V. CONCLUSION

The fate of Native American diversity within America's law schools may be, in conjunction with the emerging concept of community based lawyering, to ultimately transform legal education into a powerful and vibrant means for the transformation of America's minority communities. From its troubled and uncertain origin in the War on Poverty era, Native American diversity has matured into a powerful force for the promotion of Indian self-determination and sovereignty. Whether my proposed synthesis of these two community-based diversity doctrines will realize its full promise will depend on the law schools' willingness to embrace this new diversity doctrine's norms and practices that emphasize an on-going engagement between those law schools and the surrounding minority communities. Just as Native American diversity has helped transform the social justice and public service missions of many Indian Country law schools, my proposed new community based diversity doctrine may help America's law schools do the same.