40 Years of the Indian Civil Rights Act: Indigenous Women’s Reflections

Gloria Valencia-Weber, Rina Swentzell, and Eva Petoskey

Gloria Valencia-Weber

First, I want to thank the people at Michigan State University Law School for planning this conference. The Indian Civil Rights Act (ICRA) as the core statute and then Santa Clara Pueblo v. Martinez as the foundational case that continues with power in Indian life on the ground are very important. And I want to thank everyone. I know Matthew Fletcher and Wenona Singel led, but you had some great staff people and I thank you all. I especially want to thank the panelists for their perspectives. I come from Mexican indigenous people, Yaquis who crossed over into territorial Arizona, and Indianness does not end with formal borders. We always speak about all our relations, and I am especially pleased to be here with my relations and particularly my sisters that include not only Rina Swentzell, but it is always gratifying for a law professor to see several of her former students on the program. I also want to acknowledge my appreciation for Professor MacKinnon. One of the highlights of my career as a law student was to hear her speak at the Harvard Law School. I think all women who have faced less than friendly work environments owe a great deal to the development of the doctrine of the hostile work environment and what complications arise for all women in the workplace, and they have not all gone away, as we know.

I approach this discussion by noting that Martinez raises two critical oppositional principles: the collective political right versus the individual rights norm. Individual rights are the keystone in the Constitution of the United States. However, tribal rights for collective political entities are also affirmed in the Constitution in the provisions that establish relationships with the tribal nations. This political, nation-to-nation relationship was explicitly acknowledged and reaffirmed in Morton vs. Man cari. The most important right that tribal people claim for themselves is that as sovereigns. We have to remember that tribes were first sovereigns within the United States. And, as the noted scholar Charles Wilkinson reminds us, the tribal sovereigns
were pre-constitutional, post-constitutional, and, in the international law context of indigenous law, extra-constitutional.5

As an Indian law teacher who also teaches constitutional law, I'm quite aware of the different pushes and pulls of those two doctrines. It's very hard for some students to understand why this political sovereignty right exists and how it functions as the guiding principle of Martinez. Many a student comes into law seeing that Indians are just another minority group, an aggregate collection of individuals. Why not apply the universal norms of equal protection and due process, and transfer them from the constitutional law doctrines over into the Indian law area? Yet they ignore or are unaware throughout their law education that Indian law is, as we call it in law, sui generis, a unique form of historical and legal relationship-based law. The fact remains that within the borders of the United States, the tribes are unique, culturally based governments—the only legal theocracies—and that has always guided my own perspective of what every question starts with: the sovereignty foundation.

From the law professor perspective, I'm working on the Martinez case for a book and some other writings. I enjoy looking at the Library of Congress archives of our justices to see how they reasoned, not only in Martinez but in other cases. You have to recognize that Martinez is one of the most cited cases. It has endless numbers of articles written about it. If you look just in the federal courts from the Supreme Court down to bankruptcy court, almost 350 citations to Martinez and to ICRA appear, and the number is growing.6

On the ground, life is different from legal study. I'm very aware of this as I engage in this long-term study with Santa Clara Pueblo tribal member and scholar Rina Swentzell or: this matter. I am writing a law chapter using the Library of Congress, the justices' archives, but am very aware all the time that life on the ground in Indian country where I live and have lived most of my life is quite different. The ICRA is one of a number of Indian statutes, but one that nonetheless has complete and pervasive impact, much the way Lawrence Baca described it when it is invoked for a variety of reasons, some not so honorable.7 The underlying question very much is as my former student Casey Douma states it in the federal bar article in the conference materials.8 He raises the question: "Can tribal law and can tribal courts provide justice to the persons who are within the authority exercised by that tribe?" Let us remember that the act is about "persons" within the authority of that tribe. In the legislative history, as described in Donald Burnett's great article in the Harvard Journal on Legislation, there was much active discussion on this point.9 As truncated and spread-out as those hearings were, there was one continuing discussion: Should the ICRA protect the rights of "Indians," "members," or "persons?" The final statutory term "persons" is significant in how life on the ground is lived among Indians and non-Indians and how government authority is exercised under the ICRA.10 Issues of equality, equal protection, and due process raise the question in Martinez as well as now: Who defines these terms and how do we go about determining that equality exists?
Indigenous Women's Reflections

Of the 565 tribes that are federally recognized, each has a unique culture and perspective, but there are some commonalities. The story on the ground in Santa Clara Pueblo is that before and after the case there had always been a core of people who, by their own designation, called themselves progressives, who felt that true equality and treatment of female members should exist. They are the same people who presented a proposal in the last two years to the Pueblo council to change that ordinance. I will leave it to Rina to address this.

What's important is that Martinez left to the tribe, in the exercise of its authority, community dialogues and process, to resolve how—in the sense of all my relations—we are going to live with each other. The fact that Martinez preserves a collective communal right does not mean that equality of individuals will be overlooked. In mainstream scholarship, Martha Minow, who writes about relations and community, has suggested that when our role in the community is based on relationships, these relationships are the core from which our individual rights, entitlements, and duties arise. What we are entitled to—how we are going to be protected in enjoying the entitlements that arise from those relationships, families, clans, and orders—depends on a Pueblo perspective. In Martinez, specifically, what the western lens looks at is ideas of male dominance and patriarchy. These ideas are the very reasons why Alfonso Ortiz, a professor at the University of Chicago, returned to New Mexico: to write about the Pueblo perspective. In his book, The Tewa World, Ortiz tells us that perspective is not about matriarchy or patriarchy, the narrowing paradigms that western intellectual academic study uses to analyze the Pueblo world. That world is about loyalties, moieties or societies, whether you are part of the winter people who govern and carry out the order of the pueblo in the winter and then hand it to the summer people. It is in those core societies that our relationships, our status, our responsibilities, our protections arise.

And so you have this set of clearly different views. Life on the ground was different even at the time of the case. Through detective work, I got the transcript of the trial and you can now, if you go on our law school Web space, get it through our law library. One would think, reading the law-review articles, that the day after the Supreme Court issued its decision upholding the sovereignty and the sovereign immunity of the tribe, that the moving vans showed up and ejected the Martinezes from the community, threw the kids out of the school, cut off the water, cut off the firewood, and cut off all those amenities. That is not what happened.

We have to step back and ask, "Is this the lens, are these the principles by which we try to understand what was going on internally at Santa Clara Pueblo?" We find that during that time the Martinez family continued to function as community members; they do to this very day. Two weeks ago, we were doing interviews in Santa Clara Pueblo and passed by the Martinez house still used, inhabited by members. Outsiders bring a western cultural perspective that is not invaluable, but it is different. And life on the ground continues that way. On the ground today in tribes
some of his filings. After losing at the Pueblo's court of appeals, he tried to get into federal district court, which dismissed the case. Then he filed a cert petition and the Supreme Court denied review. But you see how he could invoke the rights he claimed and he was fairly treated. However, he had violated the terms of the contract and the tribe had every right to control the activities on tribal land and to deny him further presence on their land. For Tesuque in that area, there are continuing struggles in which non-Indians challenge tribal authority even though there is cross-deputization with the state and county police authorities.

I will finish with tribal sovereignty as a recognized authority to enforce laws. We have a lot of cross-jurisdictional agreements involving tribes and the state in New Mexico of necessity because of the way Indian land weaves in and out. And there again that busy highway that goes by the Santa Fe Opera and the Tesuque Flea Market is a place where cross-deputized Tesuque police officers frequently stop people who are speeding like crazy, or maybe driving under the influence, or engaging in other kinds of offenses that are dangerous to people on the road. Continuously, non-Indians challenge the Tesuque Pueblo officer. Even though the officer shows the cross-deputization document, the non-Indian says, “No, they can't stop me and they shouldn't be able to arrest me or anything else.” It’s what those of us living in New Mexico call “the non-Indian guys who hate getting tickets from Indian police officers.” This goes on in other places. In some instances, cross-deputization occurs with the federal authorities. You cannot have some federal law enforcement activity occur in the hinterlands without the assistance of some tribes. When an offender flees, cooperation is essential. One incident involved violent killings on an interstate amid canyons and mountains; the only people who could help find the suspects were the tribal people and the tribal trackers! So life on the ground is different. Life on the ground involving the ICRA and *Martinez* is about real people living daily lives trying to be productive. This is a concern not only within their tribal community, but shared with the other communities with which they have mutual interests in safe and productive lives.

**Rina Swentzell**

I am a woman from Santa Clara Pueblo. I was forty years old when the US Supreme Court ruled in favor of the tribe during the *Santa Clara v. Martinez* case. The entire Santa Clara community was happy with the decision, as was I. The ruling in favor of tribal sovereignty meant we were a group of people who could make decisions for ourselves. We felt that the ordinance of our constitution, which treated women unfairly, was something the community had to deal with internally.

This remains a complicated issue through today because, as you know, Santa Clara has not dealt with this issue of injustice against its women. But the statement that Lawrence Baca left us with is that the world is complicated. If you decide one way, you have this set of problems; if you go that way, you have a different set of
Indigenous Women's Reflections

Our Place of Vision

There is a place where women gather, a place deep in the maple forest. [And some of you haven’t seen the maples, they are changing now, and I know Rina was commenting how beautiful that is, it’s an orange, beautiful glow that comes in the fall.]

We bring our food, we clang our pots, we gather our voices and speak our truth. We prepare a feast of birth and feast for death. We nurture our spirits with the foods of life. From the fiber of our lives we weave a basket, strong, soft, and pure. Deep in the eye of this basket, at the center of the spokes is where the past, present, and future of our community resides. From the center, our lives unfold. From this place of vision, we nourish our ancestors and our unborn children.

Mitewatch.

NOTES

6. Before presenting this talk, this was the rough count from Westlaw and Lexis. It has now increased.
10. Id. at 602, n. 239.
17. Walton v. Tesuque Pueblo, 443 F. 3d 1274 (10th Cir. 2006).