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**“I WAS SO MUCH OLDER THEN/I’M YOUNGER THAN THAT
NOW”*:
VALEDICTORY NOTES AND COLLAGE**

VALEDICTORY NOTES AND COLLAGE

FRANK POMMERSHEIM[†]

Teacher, Scholar, Tribal Justice, Colleague. These are the seasons turning and braiding across my years and decades in the field, the factory, and the monastery of my work and vocation. The toil of craft and building community. Yet there is also something valedictory and elegiac that guides this pen and spills this ink in the desire to provide both a professional and personal sense of my thirty-five years of service at the University of South Dakota School of Law (hereinafter USD).¹

I. PROLOGUE

I joined the law school faculty in 1984. It followed ten years of working on the Rosebud Sioux Reservation² and a year as a Bush Leadership Fellow³ at Harvard University’s Kennedy School of Government. I was initially hired as an Associate Professor, but I had no idea what an associate professor was. I had no understanding of academic rank, much less any conception of the promotion and tenure process.⁴

All I knew was that I would be teaching Federal Indian law and Indian Jurisdiction. There was no discussion of what other classes I would teach. When I showed up for work that fall, I was told that I would also be teaching legal writing and appellate advocacy. I was shocked. Yes, I could write, but I had never taught writing of any kind. Welcome to the world of a ‘junior’ faculty member in 1984.

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* BOB DYLAN, *My Back Pages* on ANOTHER SIDE OF BOB DYLAN (Columbia Records, 1964). And in true Bob-spirit, please note that the language in this essay will be some mix of the expository, the lyrical, the spiritual, and the vernacular.

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1. Compositional note. Even after 35 years, all my scholarship and judicial opinions are written by hand on yellow legal pads. This piece is no exception. No computer exists in my office.

2. I taught for seven years at Sinte Gleska College (now Sinte Gleska University) and served for three years as the Director of Dakota Plains Legal Services.

3. The Bush Foundation is a non-profit institution located in Minneapolis, Minnesota. One of its many programs is the Bush Leadership Program, which provides mid-career opportunities for individuals who have an outstanding employment record in the arena of public service.

4. The University of South Dakota School of Law Rules on Promotion and Tenure contain a detailed description of this complicated and arduous process. UNIV. OF SOUTH DAKOTA SCHOOL OF LAW, UNIVERSITY OF SOUTH DAKOTA SCHOOL OF LAW POLICY MANUAL, § IV.B.1 at 11-18 (2014), <https://www.usd.edu/-/media/files/law/lawschoolpolicymanual.ashx?la=en>.

The law school would also pay me. The salary was quite penurious (which I didn't know at the time) by national law school standards, but it was considerably more than I ever made on the reservation and it was a boon to support a growing family, which included my wife Anne (Dunham) and our two children, Nicholas and Kate, and eventually a third with the name Hannah.

People at the Law School were helpful and kind. I found my way, fell into a rhythm, and established a career; a generous (even if underpaid) and hospitable workplace of thirty-five years. Yet it was in the broader context, both locally and nationally, of the field of Indian law that I found my true vocation and calling, and a life's work in teaching, scholarship, and service.

The means of exposition to describe this journey include both a conventional narrative and a series of (personal) vignettes inserted throughout the essay to provide the collage effect of the non-linear and subjective components complementing the linear and objective. Remember, it's notes and collage, not endless detail and battalions of footnotes. The goal is to describe this long and essential experience with verisimilitude and insight, but if necessary, to yield to Bob's long ago call that "nothing is revealed."⁵

II. TEACHING for Mike Roche⁶

A. THE BEGINNING: A CLEAN SLATE

When I first came to the Law School, I had no philosophy or model for what constituted "proper" or adequate law school teaching. And no one supplied any. You just prepared, went to class, and watched what happened. It was quite an anxiety-producing situation. The one thing that I did bring from my experience of teaching at Sinte Gleska College on the Rosebud Sioux Reservation was a core understanding of the importance of engagement. Students at Sinte Gleska College wanted to learn the subject matter, but they also wanted to learn how it related to their own lives and the lives of their (tribal) communities. It was *this* connection that most fruitfully engaged students and triggered their commitment to hard and reflective work.

Yet I wondered whether this form of engagement was an appropriate model for law school teaching. The law—at least as I imagined it then—was quite formal and objective. It was self-disclosing and without distortion. To describe and teach law any other way was likely, I thought, to draw criticism and rebuke. Therefore,

5. BOB DYLAN, *Ballad of Frankie Lee and Judas Priest*, on JOHN WESLEY HARDING (Columbia Records 1967).

6. Mike Roche is a long-time Professor of Criminal Justice at the University of South Dakota and the winner of numerous teaching awards. Professor Roche has always supported my attempts 'to push the envelope' of heart and mind within the classrooms of the law school. Our regular lunches at Burger King are legendary (in our minds!) for their pedagogic insight. Not only was Mike a teaching mentor, but also the closest of friends and 'brother' on the frontlines of family and matters of parenthood, as well as matters of the spirit and shooting hoops.

my initial approach was quite guarded and bounded by self-censorship. I just went through the casebook or text one case or section at a time. I felt quite awkward and assumed my students found me wooden and dull.

B. TEACHING 'PACKAGE'

In my early years on the faculty, I taught an odd assortment of courses. The only constant was Indian law. I also taught Legal Writing, Appellate Advocacy, Municipal Corporations (!), Indian Jurisdiction, and Education and the Law. It was beginning to wear me down. Then fortuity and mighty luck intervened. Professor Chris Hutton (yes, the one and only; yes, the legend!) informed me that she was planning on going on leave for the year to work in a Federal Court project in Charlottesville, Virginia. She asked whether I would be interested in teaching Criminal Law and Criminal Procedure during her leave of absence.

I readily agreed. Professor Hutton told me that Dean Walt Reed had already approved the change, but Professor Hutton never did take that leave because she became pregnant with her first daughter, Molly. It looked like I would be cast back on happenstance and trolling the dregs of the curriculum. I was not enthused.

Dean Reed saved the day and agreed to the sectioning of Criminal Law and Criminal Procedure. The rest is history. Professor Hutton and I have taught Criminal Law and Criminal Procedure for more than 25 years. More than a quarter of a century. Hard to believe but delightfully true. We talked endlessly about students and what we were trying to do in the classroom. How to read cases, how to read critically, how to develop craft, how to keep justice in view. It made all the difference.

Students (and the 70% of the active Bar that we have taught) often talk of us as one. Many former students will come up to us at the law school functions or the State Bar Convention and say, "Ah, Professors Hutton and Pommersheim—my two favorite law school teachers!" There is no need for flattery. It sounds like fond recall. It sounds genuine. It has always been one of my highest privileges at the law school to teach and work so closely with Chris for so many years.

So it came to be. Indian Law, Criminal Law, and Criminal Procedure. Federal Jurisdiction and the Rights of Indigenous Peoples were added several years later. I had the 'package' I was meant to have.

C. FINDING TEACHING RHYTHM

Over time, I began to find my own personal style of comfort and pedagogy. This new approach eventually became identifiable to me as having three essential components, namely: (1) intellectual mastery of subject matter, (2) love of subject matter, and (3) the ability to engage students. A braid that weaves together mind, body, and (creative) spirit.

Intellectual mastery of subject matter is a necessary, but not sufficient, condition for excellence in teaching. We must *know* what we teach. In the law,

this often involves many complex historical, doctrinal, and analytical parts. Unlike other fields, the law is also constantly developing and changing. Therefore, there is an ongoing obligation to understand and to integrate the constant flow of change, however large or small. Such minds and intellects never rest; they are always sharp and alert.

Love of subject matter is also necessary in order to achieve excellence in teaching. The love I have in mind is not sappy or faux, but rather a love that demonstrates care and respect for the subject matter. In the context of the law, its dignity and yes, its cruelty as well. What it has done and what it has not done and what it yet might do.

Engagement and creative spirit are the final, and perhaps, most necessary ingredients for excellence in teaching. Teaching requires the ability to engage students. Without such engagement, teaching may well be competent, but essential learning will be minimal. We need to bridge the gap and create the synapse. Hence, the need for creativity, the creative spirit. We have to push out, to take risks, and to cross over. You are the teacher, not the student, but you can get to the edge by showing vulnerability, by sharing and reciting poetry and/or by using self-deprecating humor. Obviously, there are many other ways. These are the ones that I have most often used.

As part of this process of engagement, we also need to show that we have concern for the well being of our students. Indeed, that we have affection for them. Affection does not mean hanging out with students; it does not mean deference or the absence of rigor; and it certainly does not mean easy grading. Students need to know that we are in their corner and that we want them to succeed. They also need to know that we are not condescending or sentimentalizing them. Law is a difficult and demanding profession. Students need encouragement as they begin to travel that long road.

Any of this effort can become mechanical or artificial. Thus, there is the need for the requisite energy and animation day in and day out, regardless of the lack of direct institutional supervision or support. Teaching is an art and vocation that is critical to preparing lawyers who are adept at their craft and deeply committed to the principles of justice and fair play.

Such an approach—especially in my Indian law class—was refined to include components of theory and practice. The ‘theory’ component included matters of policy, history, and culture. That is, the broad thick picture of ‘other’ stuff that both directly and indirectly provides a broader canvas and context in which to understand and to evaluate the law.

Yet law students—especially in a place like South Dakota—will soon enough *practice* law and they need to know, for example, how to handle an Indian Child Welfare Act case in state court, defend a criminal case in tribal court, and make treaty arguments in federal court.⁷ In each of these examples, it means knowing

7. It is also true that South Dakota is the only state in the country where Indian Law is a mandatory essay question on the State Bar Examination. Paul Spruhan, *Indian Law on State Bar Exams*

how to represent *either* side, not just the "Indian" side, whatever that is. I firmly believe that the most fair and just decisions in Indian law (or any area of the law for that matter) occur, when there are well-informed, thoughtful, and respectful attorneys on both sides. Respect, reason, and informed argument are central ingredients to fruitfully resolving disputes.

D. TEACHING PHILOSOPHY

I always inform my students that my own teaching goals are threefold. They include developing the craft of lawyering within them, shaping their character, and advancing their commitment to justice and fair play. This may appear arrogant on my part, but I don't mean it in that way.

I want my students to understand that the practice of law involves more than the possession of a set of legal skills; it involves the ability to make and to shape legal materials into something that speaks with logic and clarity. Something that is a product of devoted labor and care. Something that attracts engaged attention. Something that reflects dedication to craft.

I also want my students to have backbone and character. Both Indian law and criminal law (and criminal procedure) often require that lawyers be willing to represent 'unpopular' clients and difficult causes. The result in many cases is not dictated by the simple application of a rule of law to particular facts, but more often by the willingness to forcefully argue that a particular rule applies, despite it being espoused by people and organizations outside mainstream legal thought and categories.

Of course, it is true that character has little or nothing to do with law study or law practice *per se*, but more to do with moral engagement and virtue. Many would therefore argue that concern for (developing) character is outside the purview of law school teaching. I disagree with that assessment. Law is not robotic or self-executing. It is practiced by individuals and therefore their moral courage is a necessary part of the mix in their brief writing and oral argument. Such is my notion of a holistic approach to the practice of law.

These two elements of craft and character are the bookends for the pursuit of justice. Express commitment to justice is a quintessential human good that is at the core of any authentic practice of law. For example, my colleague, Professor Chris Hutton, and I spend most of our first class in both criminal law and criminal procedure seeking to develop a working, operational definition of justice. The most common synthesis or exposition is that justice is the ongoing conversation between truth and fairness, which needs to be leavened with compassion and humility. Regular injection of justice concerns in discussions of assigned cases keeps our eyes on the prize. I think that this kind of conversation makes an impression on students and many comment on the exercise in their course

evaluations. For a few, it even appears on their graduation announcements several years later.

Armed Bodyguards in Florence, Italy

In 2003, I was invited to make a presentation and receive an award for my work in the field of Indian law at the International Union of Anthropological and Ethnological Sciences Conference in Florence, Italy. My youngest daughter Hannah, age 15 at the time, accompanied me. Upon arrival, I was informed by Prof. Alex Martire, the main organizer of the conference, that since I had been invited largely for my scholarship and work as a tribal court judge, I (and my daughter) would have armed bodyguards accompany us at all times because there had been a recent rash of judicial assassinations in Italy.

Armed bodyguards! This fact inspired no fear in Hannah or me, but rather engendered a surreal sense of strangeness. Everywhere we went our armed bodyguards, Alessandro and Mario, had to check it out first. For example, when we returned to our hotel at the end of each day, Hannah and I would have to wait in the lobby, while our bodyguards went up to our room on the fourth floor to inspect and 'clear' it before they returned to the lobby and escorted us to our room.

We were not permitted to sit at outdoor caf  s where we might become victims of assassins rolling past the caf   on their Vespas. Needless to say, this all seemed rather extravagant to Hannah and me. Yet we did not 'complain', but simply accepted the gift of armed hospitality without qualm.

It was only on the last evening before leaving Florence to return home to South Dakota that Hannah and I got a little queasy. We were at a small restaurant with a number of people from the conference and other members of the public. There was an abundance of wine consumed with the meal. Someone suggested that Hannah and I have our pictures taken with our bodyguards. It sounded fine. We had many wonderful prior conversations with Alessandro and Mario about Italy and the United States and greatly enjoyed their company.

A few pictures were taken, but then Alessandro and Mario pulled out their firearms and started waving them around to apparently achieve some Western cowboy effect. People began

to gasp. Soon enough, cooler heads prevailed. Guns were holstered. Hugs were exchanged. It all ended well. Not a single shot was fired.

E. THE PRAXIS OF MUSIC, POETRY, AND BOB DYLAN

At a certain point, having developed a confident comfort level with students, I wanted to push outside the confines of the law *per se* to employ and to reference materials beyond the narrow canon of law teaching materials. To make the 'study' of law richer and thicker with unexpected resonances. For example, Bob Dylan appears front and center in many, many criminal law hypotheticals involving burglary, larceny, embezzlement, and theft involving that one-of-a-kind vintage Bob Dylan t-shirt or rare Bob Dylan bootleg CD. Students are often delighted to engage and even to push further into such realms as the difference between objective, market value and subjective, personal value, and the difference between custody and possession for determining the distinction between larceny and embezzlement.

Over the years, the Bob Dylan thing has taken on a life of its own. I'm often identified with Bob Dylan by my students, which apparently flows from my own classroom observations that Bob and I went to different schools together or directing students to the (nonexistent) Bob Dylan/Frank Pommersheim.com website.

Bob has even made it in recent years as a 'bonus' question on my Indian law final exam. Name the one Bob Dylan song that directly refers to South Dakota. The answer is "The Ballad of Hollis Brown" from *The Times They Are A Changin'* LP (1963).⁸ Sad to say, not a single student got it right. It hurt.

My secretary (now Registrar) Teresa Carlisle even organized a Bob Dylan Day in my honor. The attractive announcement, which included a picture of Bob and I, stated:

November 4, 2014, All Day at the Law School.

Let's have some fun and surprise Professor Pommersheim!

Bob Dylan Day.

Dress up as: Bob Dylan (any era); a person from one of his songs; representation of one of his songs; or anything 1960s.

The whole event caught me off guard. An infectious spirit held sway.

Even before Bob Dylan came front and center, even before the advent of CDs, I developed a cassette (!) of criminal law songs. The cassette contained the following songs: "Equal Rights" (Peter Tosh), "Long Black Veil" (Joan Baez), "Jailhouse Rock" (Elvis Presley), "Peggy's Kitchen Wall" (Bruce Cockburn),

8. BOB DYLAN, *Ballad of Hollis Brown*, on *THE TIMES THEY ARE A CHANGIN'* (Columbia Records 1963).

"Take the Money and Run" (Steve Miller Band), "Illegal Smile" (John Prine), "Graffiti Limbo" (Michelle Shocked), "Framed" (Los Lobos), "I Shot the Sheriff" (Bob Marley & the Wailers), "Johnny 99" (Bruce Springsteen), "San Quentin" (Johnny Cash), "Stolen Land" (Bruce Cockburn), "The Law is for Protection of the People" (Kris Kristofferson), "Harriet Tubman" (Holly Near/Ronnie Gilbert), "Pretty Boy Floyd" (Bob Dylan), "Sister Rosa" (Neville Brothers), "Jesus Christ" (U2), "Johnny Too Bad" (Slickers), "Lawyers, Guns & Money" (Warren Zevon), "I Fought the Law (and the Law Won)" (The Clash), "Preach What You Live, Live What You Preach" (Sir Douglas Quintet), "People Who Died" (Jim Carroll Band), and "Tennessee Plates" (John Hiatt).⁹ The cassette was placed on 'reserve' in the USD law library. Remember those days! Now that cassette is part of history and part of the Law School's archives.

Increasingly, with time and age, I find myself affectionately regarded by students as some kind of a cultural ambassador of that long-ago era of anti-war activity and sex, drugs, and rock-n-roll. What I lived in real time is now history for students. *Tempus fugit*.¹⁰

Poetry—especially an (ongoing) set of Buddha poems that I have written and read in class—often engages students beyond the daily law school grind. With rare exception, the poems I read have nothing to do with law directly and maybe for that very reason students are attracted to their varied sentiments and internal compression. Let me give several examples:

9. PETER TOSH, *Equal Rights*, on EQUAL RIGHTS (CBS 1977); JOAN BAEZ, *Long Black Veil*, on JOAN BAEZ/5 (Vanguard 1964 reissue 2002); ELVIS PRESLEY, *Jailhouse Rock*, on JAILHOUSE ROCK (RCA Victor 1957); BRUCE COCKBURN, *Peggy's Kitchen Wall*, on STEALING FIRE (UK Spindrift Records 1984); STEVE MILLER BAND, *Take the Money and Run*, on FLY LIKE AN EAGLE (Capitol 1976); JOHN PRINE, *Illegal Smile*, on JOHN PRINE (Atlantic 1971); MICHELLE SHOCKED, *Graffiti Limbo*, on SHORT SHARP SHOCKED (Mercury 1988); LOS LOBOS, *Framed*, on LA BAMBA (original motion picture soundtrack) (Slash Records 1987); BOB MARLEY & THE WAILERS, *I Shot the Sheriff*, on BURNIN' (Island 1973); BRUCE SPRINGSTEEN, *Johnny 99*, on NEBRASKA (Columbia Records 1982); JOHNNY CASH, *San Quentin*, on JOHNNY CASH AT SAN QUENTIN (Columbia Records 1969); BRUCE COCKBURN, *Stolen Land*, on LIVE (True North Records 1990); KRIS KRISTOFFERSON, *The Law is for Protection of the People*, on KRISTOFFERSON (Monument 1970); HOLLY NEAR & RONNIE GILBERT, *Harriet Tubman*, on SINGER IN THE STORM (Chameleon Records 1990); BOB DYLAN, *Pretty Boy Floyd*, on FOLKWAYS: A VISION SHARED – A TRIBUTE TO WOODY GUTHRIE & LEADBELLY (CBS Records 1988); NEVILLE BROTHERS, *Sister Rosa*, on YELLOW MOON (A&M Records 1989); U2, *Jesus Christ*, on A VISION SHARED – A TRIBUTE TO WOODY GUTHRIE & LEADBELLY (CBS Records 1988); SLICKERS, *Johnny Too Bad*, on THE HARDER THEY COME (soundtrack) (Island 1972); WARREN ZEVON, *Lawyers, Guns & Money*, on EXCITABLE BOY (Asylum 1978); THE CLASH, *I Fought the Law (and the Law Won)*, on THE CLASH (U.S. Version) (Epic 1979); SIR DOUGLAS QUINTET, *Preach What You Live, Live What You Preach*, on THE RETURN OF DOUG SALDANA (Philips Records 1971); JIM CARROLL, *People Who Died*, on CATHOLIC BOYS (Atco 1980); JOHN HIATT, *Tennessee Plates*, on SLOW TURNING (A&M 1988).

10. Latin. Time flies.

Buddha's Epistle for Arbor Day

Plant now
avoid

the scythe
of regret

Later

Buddha Walks the Streets of Ferguson¹¹

History
grabs the noose

in a disruption
of questions

Justice
hangs

in the balance

Buddha Visits the Rosebud Sioux Reservation¹²

Tunkasila

The people
suffer

but reach out
to you

Distant stars
the red road

Poetry often finds the illuminating metaphor and image beyond the four corners of the legal text. Student evaluations often praise these efforts as both

11. FRANK POMMERSHEIM, LOCAL MEMORY AND KARMA (THE BUDDHA CORRESPONDENCE, VOL. 2) (Rose Hill Books 2015).

12. FRANK POMMERSHEIM, SMALL IS BEAUTIFUL (THE BUDDHA CORRESPONDENCE) (Rose Hill Books 2011).

engaging and provocative, even liberating. Student reaction both in the moment and more reflectively on student evaluations encouraged me greatly.

Poetry has also caught a spark outside the classroom. At the suggestion of law school librarian, Sarah Kammer, there is now an annual Legal Haiku Lollapalooza Contest. Law students compose haiku poems based on cases that they have read in any of their courses. Student participation has been enthusiastic and creative. There are prizes. I judge the anonymous submissions.

I want to provide a final observation about spontaneity and improvisation. After many (many!) years, I am confident enough in the classroom to (occasionally) improvise, to tease out student observation, and to follow my own unexpected thoughts. Often (though not always) the results are insightful and engaging to students. I regularly tell students that I look forward to coming to class to find out what I think. They often look amazed and nonplussed, but I think they feel the positive current of the unexpected and unchastened.

F. THE WORD 'FUCK'

Yes, I do want to provide a pedagogical shout out to the word 'fuck.' Seriously. I believe that the word has distinct yet manifold meanings. For example, according to Google dictionary, it can be used "in various phrases to express anger, annoyance, contempt, impatience, or surprise, or simply for emphasis."¹³

From a law teaching perspective, the word provides a wide range of meaning and depth of feeling rarely found anywhere in *Black's Law Dictionary*.¹⁴ For me, its resonance emanates not from its use as a noun or verb about sex, but rather in the adjective form that intensifies what it describes and modifies. Its intensity and slight inappropriateness gets students' attention, which is an important element of engagement.

Of course, the use of the word has its risks as being mere show, a wan nod to fleeting youth, or seeking to curry student favor. But it's a risk I'm willing to take. A student recently asked me, "Professor Pommersheim, if I use the word 'fuck' on my final exam do I get extra credit?" I smiled and said, "No, but if you use the word correctly and with the right emphasis, it will certainly bring a smile to my face!"

The law is all about language, meaning, and interpretation. Yet too often the language of law is deadeningly formal and painfully abstract. The word 'fuck' endeavors to bring the law down (however fleetingly) a notch and insert it back into a more understandable language of reality. You know, kudos to the vernacular, particularly at its edges.

13. Definition of "fuck." GOOGLE DICTIONARY, (last visited Oct. 30, 2018), https://www.google.com/search?rlz=1C1GGRV_enUS759US759&ei=vbHYW6XoPOiP5wLDyozoBQ&q=fuck&oq=fuck&gs_l=psy-ab.3...3620.3998..4252...0.0..0.120.463.0j4False2..0False1..gws-wizFalse...0j0i71j0i131j0i67.0j9lZptGeH4. See also Christopher M. Fairman, *Fuck*, 28 Cardozo L. Rev. 1711, 1772 (2006) ("*Fuck* must be set free.").

14. BLACK'S LAW DICTIONARY (10th ed. 2014).

All of these things – none of which were really planned – found a place in my daily pedagogy. They all helped the seeds of engagement to take root and to bloom. They became necessary ingredients in the artisanal produce of craft and care. Without engagement, there is only the fall back of ordinary competence.

When you push the envelope and then open it, the contents may surprise you.

G. INDIAN LAW FIELD TRIP

The practice component also needs to have a 'contact' component. For example, early in my career there was a shocking recognition that very few of my students had even visited or spent time on any of the nine reservations in South Dakota.¹⁵ After living and working on the Rosebud Sioux Reservation for ten years, I had just assumed that all South Dakota students had visited and/or possessed some knowledge about South Dakota Reservations. This turned out not to be the case. It wasn't even close. Negative stereotypes predominated. Reservations were violent places full of poverty and alcoholism. Apartheid was the image that came to mind.

I decided to do something about this *de facto*, if not *de jure*, apartheid. Not only to talk about it in class, but also to go there. The result was the beginning of the annual two-day Indian Law field trip to the Rosebud Sioux Reservation, which has now gone on for more than thirty years.

Students are well received and treated with respect. They have the opportunity to see a tribal court in session, even assist in initial criminal court appearances, and share a meal in the courtroom. They have an opportunity to meet Tribal judges, Tribal officials, and ordinary Tribal citizens. They experience Lakota generosity and the institutional quest for fairness and justice. They see a beautiful landscape as the Little White River dips around the Grass Mountain Community down below Crazy Horse Canyon. They gamble at the Tribal Casino. These diverse and manifold interactions often break down the artificial barrier between different peoples and their institutions. Student evaluations and repeated conversations with students over the years highlight the power, often described as transformative, of the Indian Law field trip experience.

Buddha and the Indian Law Field Trip

On the Indian Law Field Trip in 2016, two students, Brandi Gant and Anna Limoges, who were riding in a vehicle behind the lead vehicle which I was driving on our way from Vermillion to Rosebud, composed a Buddha poem about my alleged driving deficiencies. It read:

15. The nine reservations are: Cheyenne River Sioux Indian Reservation, Crow Creek Indian Reservation, Flandreau Santee Sioux Indian Reservation, Lower Brule Indian Reservation, Pine Ridge Indian Reservation, Rosebud Sioux Indian Reservation, Sisseton-Wahpeton Oyate Indian Reservation, Standing Rock Indian Reservation, and Yankton Sioux Indian Reservation.

*The rebellious driver
No lines does he follow
Laughter
Death*

They texted it to Bo Bearshield, one of the students who was riding with me (I don't text!). Bo read it to me. I chuckled.

When we arrived in Winner, South Dakota, on the edge of the Reservation and were eating at the local Subway, I stood up and spontaneously announced to all that Bo was going to read a new Buddha poem. He appeared quite surprised, but got up and read it with much exuberance. Laughter and applause followed. Non-law student customers were nonplussed.

We then got back in our vehicles and continued on our way to Rosebud. The story and poem eventually made its way onto the Turtle Talk website. Such is the lore and laughter of Buddha on the Indian Law Field Trip.

H. INDIAN LAW SYMPOSIUM

Early on in my career at the Law School, I wanted to organize and put on an Indian Law Symposium to present Indian law and Indian policy issues to the larger Law School and University communities. This seemed to me to be an important necessity given the almost complete absence of such forums throughout public education and the entire public sphere in South Dakota. I found (and continue to find) strong support for this endeavor from the administrative leadership of both the Law School and the larger University community.

The first Indian Law Symposium was held in 1990. Its title was *Tribal-State Relations: Hope for the Future*.¹⁶ The Indian Law Symposium became a biennial event and has now run for 30 years.¹⁷ I believe it is the longest running biennial

16. Frank Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239 (1991).

17. The symposium titles are: *Tribal-State Relations: Hope for the Future* (1990); *Tribal Constitutions: Past, Present and Future* (1992); *Enhancing Cultural Preservation through Tribal Code Development* (1994); *Tribal Courts: Leaders along the Trail of Indian Sovereignty* (1996); *Indian Nations on the Eve of the 21st Century: Sovereignty, Self-Government, Water Rights, Land Rights* (1998); *Practicing Indian Law: Who? What? Where?* (2000); *Indian Law, Culture and the Environment: A New Dialogue for a New Century* (2002); *Economic Development for the 21st Century in Indian Country* (2004); *Brightening the Outlook of Indian Youth (Lakota Teca Tawowyanke Azanzanya Pi)* (2006); *Tribal Sovereignty – From Myth to Reality* (2008); *Twenty year Anniversary of Employment Division v. Smith: Reassessing the Free Exercise Clause and the Intersection between Religion and the Law* (2010) (Held jointly with Law Review and National NALSA Moot Court Competition); *Tribal-State Relations: A Symposium* (2012); *Public Safety in Indian Country: Tribal, Federal and State Responses* (2014); *ICWA:*

Indian Law Symposium in the country. This is little known but not insignificant. It is imbedded in the reputation of the Law School within the national Indian Law world.

Each symposium also commissioned a piece by a Native artist. In the year 2014, at the suggestion of then Associate Dean Angela Ericson, all of the symposium art works were framed and are now permanently displayed in the Courtroom of the Law School. The presence of these Native artworks (and the accompanying Symposia titles) is not only a respectful tribute to the individual artists, but more broadly creates a Native and tribal presence within a state public space. A civic space, which all too often, however advertently or inadvertently, denies the historical and contemporary presence of Native people and tribal-state issues within the political and cultural life of the state of South Dakota. The Symposia artwork quietly and respectfully rebukes the common mantra of "out of sight, out of mind."¹⁸ This is a unique accomplishment, where native art both welcomes and validates.

The flag of the Rosebud Sioux Tribe also hangs in the courtroom. It was a gift from the Tribe to the Law School when the USD courtroom was used for oral argument before the Rosebud Sioux Supreme Court in the case of the *Estate of Tasunka Witko (aka Crazy Horse) v. Heilman Brewing Company*¹⁹ back in 1996.²⁰ Walk around the USD campus and other Universities in the state, as well as the public spaces in the state of South Dakota. I don't think you will find any similar artistic, political, and cultural display. "How many times can a man turn his head /and pretend he just doesn't see?/ The answer my friend/ is blowin' in the wind."²¹

I. POURING IT ALL OUT

In recent years, I have come to want even more from my students. I wanted them to 'pour it all out.' I wanted them to have even more of sense of the depth and texture of Native life because it would make them better citizens and better lawyers. With this objective in mind, I began to have students write personal book

Old and New Challenges (2016); *The Challenges of Culture, Governance, and Respect in Indian Country* (2018).

As the symposia titles indicate, there has been a wide swath of important issues discussed, ranging from tribal constitutions to land into trust processes, that have likely been discussed nowhere else. Audiences often include groups outside the Law School and University such as high school students and tribal, state, and federal officials.

18. There are also several star quilts prominently displayed elsewhere in the Law School. They are gifts from Native graduates. They also evoke Native beauty and presence.

19. *In re Estate of Tasunka Witko, a.k.a Crazy Horse v. The G. Heilman Brewing Co.*, 23 Indian L. Rep. 6104-13, No. Civ. 93-204 (Rbd. Sx. Sup. Ct., May 1, 1996). See also FRANK POMMERSHEIM, *TRIBAL JUSTICE: 25 YEARS AS A TRIBAL APPELLATE JUSTICE* 30-54 (Carolina Academic Press 2015) and the USD Law School LibGuide found at <http://libguides.law.usd.edu/c.php?g=744258> (containing the texts of more than 125 of my tribal court appellate opinions).

20. *Id.*

21. BOB DYLAN, *Blowin' in the Wind*, on *THE FREEWHEELIN' BOB DYLAN* (Columbia Records 1963).

reviews. The book choices were Sherman Alexie's *The Absolutely True Diary of a Part-Time Indian* or *You Don't Have to Say You Love Me: A Memoir* and Louise Erdrich's *The Round House* or *LaRose*.²² The assignment read as follows:

Pick your book. Write a three-page "book review." Summarize the plot and the main characters. What did you learn? How is it relevant (or not) to our Indian Law class? You do not have to "like" the book, but you do have to engage it.

Write well, speak your mind, "pour your heart out."

I was overwhelmed by the response and level of engagement. The book reviews were written and then read anonymously by me. Many of my students—both native and non-native—went deep into their personal histories of poverty, alcohol abuse, stereotypes, and racism. Students were often hard on themselves. Here are some examples of what they said:

1. Below is a scatter-brained review of Louise Erdrich's novel, *The Round House*.²³ Because of my desire to speak my mind and pour my heart out, some sentences are not grammatically pleasing. However, they illustrate my sincere reaction to the novel and its characters, who have visited me in my dreams, following me, sharing in their story. For the sake of expressing my true thoughts and reactions, I apologize for the lack of formality this "book review" has. . . . And by the final pages of the book, I felt a rock build up in my stomach as I was forced to relive the pain experienced through losing a friend in your youth. It brought me back to my own sorrow I so deeply felt in ninth grade with the death of a friend. Oh, how Louise Erdrich compelled me to feel the pain of others. Oh, how I reminded myself that it is both a blessing and a curse to feel everything so very deeply Thank you for this assignment. It brought a "realness" to what we study, and it brought out more emotion in me than any textbook ever could. (Exam #109).

2. My most recent reading of this novel [Sherman Alexie's *The Absolutely True Diary of a Part-Time Indian*]²⁴ has left me broken. Although I had accepted many of the conditions described in the

22. SHERMAN ALEXIE, *THE ABSOLUTELY TRUE DIARY OF A PART-TIME INDIAN* (Little, Brown and Co., 1st ed. 2007); SHERMAN ALEXIE, *YOU DON'T HAVE TO SAY YOU LOVE ME: A MEMOIR* (Little, Brown and Co., 2017); LOUISE ERDRICH, *THE ROUND HOUSE* (Harper 2012); LOUISE ERDRICH, *LAROSE* (Harper 2016).

23. See ERDRICH, *THE ROUND HOUSE*, *supra* note 22 (explaining this particular student's response to the book).

24. See ALEXIE, *THE ABSOLUTELY TRUE DIARY OF A PART-TIME INDIAN*, *supra* note 22 (explaining this particular student's response to the book).

novel and was devastated by them, I now recognize that many of the tragedies may have been induced by Supreme Court decisions. Alexie's modern illustration of these court decisions leaves me terrified, and makes me wonder how each new decision may impact the lives of so many people. But, like Arnold in the novel, I must find hope for the future and remain steadfast in my attempts to help protect individual's rights wherever I can. (Exam #307).

3. ***What I learned?*** Arnold [main character in Sherman Alexie's *The Absolutely True Diary of a Part-Time Indian*]²⁵ put my own adolescence into perspective. For example, I also commuted 20 miles to school every day. But I always left home with a stomach full of food and either my parents car filled with gas ready to take me or my own vehicle that my parents were able to provide for me. I learned that I too was a part of many tribes, even though I am not Indian. The tribe of basketball players and small-town kids for example. I learned that whatever struggles I thought I had faced growing up, that they fail in comparison to those faced by those who live on the reservation.

How is it relevant (or not) to our Indian Law class?

"What greater grief and loss than one's native land?"

– Euripides

Arnold made me consider the racism that always appears to be the backdrop of so many cases we read in class. Frankly, I think Arnold does a better job discussing racism and its effect on Indian culture than Justice Marshall in the Marshall Trilogy. (Exam #222).

Many students noted on their student evaluations submitted at the end of the course how much they appreciated the assignment (no bluebooking!) and the push to "pour it all out"; to bring themselves (not always in the most favorable light) forward with more of a sense of respect and reciprocity. These results reminded me of the writer Tim O'Brien's²⁶ observation that the power of the best literature is not only that it tells the author's story, but in some uncanny way leaves room for the reader's 'story' as well.

25. *Id.*

26. TIM O'BRIEN, *THE THINGS THEY CARRIED* (1990).

This is a poem I wrote to capture what I was thinking about and what I meant by 'pouring it all out':

Buddha Sends a Hunter-Gatherer Poem to Prof. Pomm's Indian Law Class

Cut complicity

gather reason
seek balance

show respect
find spirit

pour it
all out

I had the poem made into a bookmark with a star quilt on it and gave one to each of the students in the class at the conclusion of the semester.

Research Assistant Wears Professor Pommersheim 'Costume' for Halloween

In recent years, under the leadership of Professor Wendy Hess, Professor and Director of the Fundamental Legal Skills program, the celebration and status of Halloween within the Law School has risen dramatically. There is now an annual Halloween theme in which faculty and students pick a relevant character and dress accordingly. People then parade into Room 101 after ten o'clock classes. Everyone is introduced. There is much cheering and good fun. I am a non-participant. I am too shy and repressed to participate.

In 2015, the main theme was Star Wars,²⁷ but unbeknownst to me there was a sub-theme of a few students dressing up like faculty members, often with great verisimilitude and sensitivity to their sartorial tics and quirks. So quite unawares, I looked at people gathering in the hall to enter Room 101. What? There was someone who looked just like me!

But what does that mean exactly? It means that someone is wearing blue jeans, a dress shirt and tie, a vest, a pair of Sperry

27. STAR WARS (Lucasfilm Ltd. 1977).

top-siders, wire rim glasses, and a Davidson basketball cap.²⁸ But who was "me" exactly?²⁹ It was my terrific research assistant, Alexis Yackley.³⁰ She was even holding and waving a copy of Braid of Feathers.³¹ We walked into Room 101 together, even said a few words. I don't remember what I said, but I do remember Alexis using the word 'fuck.' My heart leapt, but no transcript or video record exists to confirm or deny. It doesn't even matter for such is the nature of sweet labor and imitation that both honors and pokes fun at the same time.

Whenever I think of it, I just smile and then smile again. And yes, there is a delightful photograph of the two of us in 'costume' sitting on my research table in the law library.

J. WINDS OF PEDAGOGICAL CHANGE

In the midst of writing these descriptions and enthused reflections on teaching, the ground beneath my pedagogical feet began to dramatically shift. All that I held dear as a teacher—especially love of subject matter and greater engagement with students—appeared to be rapidly receding. It was no more than some artifact to be swept aside in favor of a new wave of robotic assessment and top down identification of new measurable learning objectives.

The source of this clamorous change was the new American Bar Association (ABA) Standards governing any accredited Program of Legal Education.³² The Standards—at least as they are being implemented here at the USD School of Law—impose or are in the process of imposing a new regime which includes substantial changes in the preparation of syllabi and identifying and measuring the achievement of course objectives.

Legal education is at a crossroads. There is growing dissatisfaction within the ABA accreditation bureaucracy about what takes place within the classroom and how that process is assessed. Prior to the current 'reform' movement, a law school teacher, for better or worse, was completely on their own, free from any institutional constraints or national standards. You prepared a syllabus—sometimes no more than a paragraph or two—and you were off and running. Likely the syllabus also identified the required text or casebook and the means of assessment, usually one three-hour final examination.

28. My Daughter Hannah is a 2008 graduate and of course, so is Steph Curry of the Golden State Warriors and NBA fame.

29. Not in any deep existential sense, but only in a mundane Halloween costume sense.

30. Alexis Yackley's married name is now Alexis Warner.

31. FRANK POMMERSHEIM, BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE (U.Cal. Press, 1st ed., 1995).

32. See, e.g., ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 302 (AM. BAR ASS'N 2018-2019) (discussing learning outcomes); *Id.* § 308 (discussing academic standards); *Id.* § 314 (discussing assessment of student learning); *Id.* § 315 (discussing evaluation of program of legal education, learning outcomes, and assessment methods).

In recent years, such an unstructured, bare bones approach has fallen out of favor with the local and national powers that be. For example, a syllabus—pursuant to new ABA Standards³³—must now include a basic statement of substantive learning objectives, as well as the description of the experiential component of the class and the chosen method of testing. Much of this is no more than educational common sense and I agree with it. Yet I am put off by its top down approach, which I believe to be largely arbitrary and rule bound with too much concern for the part and not enough for the whole. Law is, lest we forget, a humanity historically more concerned with craft, values, and the pursuit of justice than assessing learning objectives in the jargon-drenched language from the field of education.

Such assessment is also not self-executing and is not without substantial cost. It is labor intensive because it requires extensive institutional collaboration and evaluation. It requires precious administrative time, which a small law school like ours does not have. It also requires exorbitant recordkeeping and monitoring. Yes, I'm old, and quite hostile to the increasing bureaucratization and denaturing of legal education. Much of legal education is bending away from me, and it pains me greatly.

Molly Worthen's recent op-ed column in the *New York Times* captures it well:

All professors could benefit from serious conversations about what is and is not working in their classes. But instead they end up preoccupied with feeding the bureaucratic beast. "It's a bit like the old Soviet Union. You speak two languages," said Frank Furedi, an emeritus professor of sociology at the University of Kent in Britain, which has a booming assessment culture. "You do a performance for the sake of the auditors, but in reality, you carry on."

Yet bureaucratic jargon subtly shapes the expectations of students and teachers alike. On the first day of class, my colleagues and I – especially in the humanities, where professors are perpetually anxious about falling enrollment – find ourselves rattling off the skills our courses offer ("Critical thinking! Clear writing!"), hyping our products like Apple Store clerks.³⁴

In addition to the new assessment regime, online legal education is growing rapidly. The ABA now permits up to fifteen hours of online legal education.³⁵ In addition, three hybrid online education programs have been granted provisional authorization by the ABA.³⁶ I'm a staunch opponent. Online legal education is

33. See *id.* § 310 (discussing determination of credit hours for coursework).

34. Molly Worthen, *The Misguided Drive to Measure 'Learning Outcomes'*, N.Y. TIMES, Feb. 23, 2018, at SR1, <https://nyti.ms/2sRSoam>.

35. See ABA Standards, *supra* note 32, at § 306 (discussing distance education).

36. See Shalina Chatlani, *Another law school launches hybrid online degrees*, EDUCATIONDIVE (Feb. 15, 2018), <https://www.educationdive.com/news/another-law-school-launches-hybrid-online->

too mechanical with too little regard for engagement and community. To date, no reliable studies confirm the rigor or competence of online legal education. It is mainly growing because it is a new and easy way to generate revenue. It is always important to remember the potential distortions engendered by concern for revenue. It is the (capitalist) wave of the future, but it is a wave I choose not to ride.

Resistance can still play a small role. In recent years, both Professor Hutton and I have prohibited the use of computers in our classes. Why? You cannot see and engage students when their heads are down and their computer screens are up. Students need to engage and to take notes and not mindlessly transcribe and 'record' what you say. In addition, computers divert student attention from class discussion to emails, texts, and the other temptations of disappearing down the rabbit hole of the Internet. Students generally have no ethical sense that such 'multi-tasking' is disrespectful to the teacher. I believe that it is both disrespectful and a hindrance to real learning. I inform my students of this rationale for the no computer rule.

Professor Hutton and I expected significant student blowback against the 'no computer' rule. There was none. Many students approved, even applauded it. We took heart, but we are not overly optimistic about reversing the powerful technological trends and encroaching robotics already at work in legal education.

Yes, I know, I'm relentlessly old school. I am a neo-Luddite and proud of it. So old school so as to have a growing preference to teach outside the confines of the new order of the law school. I now teach frequently (in addition to, not instead of) outside the law school in the OLLI (Osher Lifelong Learning Initiative) program in Sioux Falls and Vermillion. People sign up for your classes.³⁷ They want to learn. They are ready to listen and to engage. They come without computers. There is a vibrant conversation. It rekindles old joy.

In the end, my concern is not about the reform project *per se*, but more with the importance of local discussion about it and the balance of the new bureaucratic regime within the fabric of traditional craft and practice. In other words, my goal is to hold fast and not go gentle into the encroaching maze of rule upon rule, learning objective upon learning objective, and assessment upon assessment.

III. SCHOLARSHIP³⁸

The object in the discussion of my scholarship is not so much about plumbing doctrinal details, but rather to indicate my motivation and subjective intent. What

degree/517246/ (discussing Mitchell Hamline School of Law, Syracuse School of Law, and Southwestern School of Law, who have all implemented, or secured a waiver, for a hybrid online law degree program).

37. For example, I have taught classes entitled: The Great Sioux Nation, South Dakota, and the Black Hills; Tribal-State Relations at Statehood in 1889 and in 2014; Black Hills and the Sioux Nation: History and Current Challenges; Doctrine of Discovery; *The Buddha Correspondence* (poetry reading); Treaties: Past, Present and Future; Tribal Sovereignty with Particular Focus on the Dakota Access Pipeline Controversy; The Camden 28; and Rights of Indigenous Peoples Under International Law.

38. A complete compendium of my scholarship may be found at https://works.bepress.com/frank_pommersheim/.

was I thinking about, what did I hope to accomplish? How successful was it? Nor is this section in any way meant to be exhaustive in its review. No, far from it, remember that it's just 'notes' and collage. Fragments that hopefully add up to illuminate the whole 'scholarship' enterprise.

At the very beginning of my law school 'career,' the word scholarship intimidated me. High learning, endless in-depth research, and hundreds of footnotes all seemed quite beyond my mundane capabilities. There was, of course, no mentoring or guidance so I just jumped (or was I pushed?) in. I decided that I would avoid the overly theoretical and doctrinal and attempt to be more 'practical' and concrete. By practical, I meant that my work would be useful in addressing and understanding local reservation issues and problems in some basic way, so that people back at Rosebud (and elsewhere) could read and understand what I was saying and find it helpful.

In my third article, *Reservation as Place: A South Dakota Essay*, I pushed the envelope as far as I could at that time.³⁹ Most of the existing scholarship and current journalism portrayed reservations very negatively as places riddled with crime, poverty, and alcohol abuse. Given the hardship and despair so often described, why would anybody live there? Why would anybody care? My own experience of living and working on the Rosebud Sioux Reservation for ten years was quite positive and enriching. I wanted to describe that powerful experience without denying the real problems that existed there.

The piece was very well received in the context of both conventional scholarship and human inquiry. I received my first letters (e-mail did not exist at that time!) of praise and endorsement of my work.⁴⁰ I didn't expect that anyone would actually read my scholarship, so I was stunned and greatly pleased. The article continues to be cited quite often.⁴¹

I then began to write about tribal courts.⁴² I had developed a wide range of experience by serving on a number of tribal (appellate) courts both in and out of

39. Frank Pommersheim, *Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 246 (1989).

40. Including, for example, letters from well-known English Professor, Charles Woodard, at South Dakota State University and Robert Frieberg, the then President of the South Dakota Bar Association.

41. The article has been cited approximately 100 times since its publication in 1989 in a variety of different works, such as: Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 440 (1993); William Bradford, *Beyond Reparations: Justice as Indigenism*, HUM. RTS. REV., Apr.-June 2005, at 5, 11; CLIMATE CHANGE AND INDIGENOUS PEOPLES: THE SEARCH FOR LEGAL REMEDIES 11 (Randall Abate & Elizabeth Ann Kronk eds., 2013), and many more.

42. See, e.g., Frank Pommersheim, *The Contextual Legitimacy of Adjudication in Tribal Courts and the Role of the Tribal Bar as an Interpretive Community: An Essay*, 18 N.M.L. REV. 49 (1988); Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 329 (1989); Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411 (1992); Frank Pommersheim, *Tribal Courts: Providers of Justice and Protectors of Sovereignty*, 79 JUDICATURE 110, 110 (1995); Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot from the Field*, 21 VT. L. REV. 7, 7 (1996); Frank Pommersheim, *What Must be Done to Achieve the Vision of the Twenty-First Century Tribal Judiciary*, 7 KAN. J. L. & PUB. POL'Y, no. 1, at 8 (1997); Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313, 313 (1997); Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 439

South Dakota.⁴³ This very real 'practical' experience prompted me to write about tribal courts in order to make them more understandable, more human, and more appreciated yet burdened with substantial funding and infrastructure issues. At that time, there was very little scholarship about tribal courts, and I wanted to address some of the gaps and shortcomings in the scholarly literature. Tribal courts were arguably the least important and least known branch of tribal government, but that was rapidly changing, largely due to two Supreme Court decisions, namely *Santa Clara Pueblo v. Martinez*⁴⁴ and *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*.⁴⁵

Santa Clara Pueblo held that the Indian Civil Rights Act of 1968 (ICRA)⁴⁶ did not create an implied federal cause of action against tribes for alleged violations of ICRA and thus such action would now have to be litigated in tribal court instead of the more familiar and more preferred federal courts.⁴⁷ This was a titanic shift of the judicial focus in the context of civil rights claims against the tribes. It was also true that tribal courts would not just be the *only* forum, but they would also be the *final* forum for such litigation. No right of federal appeal exists.

National Farmers Union held that any challenge by non-Indians to tribal court civil jurisdiction over them would require the exhaustion of tribal court remedies before seeking any review in the federal court.⁴⁸ This holding was largely based on an evolving federal judicial respect for tribal courts. This evolving respect would need to be validated and vindicated. Scholarship could play a role.

My tribal courts' scholarship—at least in retrospect—had several goals in mind. One was to identify their growing promise as the crucible in which much of contemporary tribal sovereignty would be addressed and adjudicated. Another was to identify the issues challenging tribal courts, and also to determine their relationship to and their 'fit' within the system of federal courts.

These and other law review articles gathered positive response from many other Indian law scholars and practitioners. I was encouraged to write a book. It seemed a steep challenge, but one I wanted to embrace.⁴⁹ I had already written

(1999); Frank Pommersheim, "Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community, 71 U. COLO. L. REV. 123, 123 (2000).

43. It is almost impossible for me to imagine that when I was named to the Rosebud Sioux Supreme Court in 1987 that I would still be serving on it thirty-one years later and that I also would serve on six additional tribal appellate courts: namely the Cheyenne River Sioux Tribal Court of Appeals, the Flandreau Santee Sioux Tribal Court of Appeals in South Dakota, the Saginaw Chippewa Tribal Court of Appeals in Michigan, the Mississippi Band of Choctaw Supreme Court, the Grand Portage Chippewa Tribal Court of Appeals, and Lower Sioux Tribal Court of Appeals in Minnesota.

44. 436 U.S. 49, 49 (1978).

45. 471 U.S. 845, 845 (1985).

46. 25 U.S.C. §§ 1301–1304 (2017).

47. Unless the case involved some kind of detention making it amenable to habeas relief, at 25 U.S.C. § 1303 (2017). Habeas is the only express federal remedy articulated in ICRA.

48. *National Farmers Union*, 471 U.S. at 845.

49. I want to acknowledge and thank the Indian law teaching and scholarly community for all its positive response to, and support of, my scholarship and judicial opinions. Without such encouragement, I likely would have faltered and lost my way.

two books,⁵⁰ but they were directed more to a local, general Reservation audience. They were published by Sinte Gleska College and were not subject to any pre-publication scholarly review.

My Dad and Writing

When I wrote my first book on tribal government back in 1976, I was on leave from Sinte Gleska College⁵¹ and living in Eugene, Oregon, as my wife, Anne Dunham, pursued her Masters of Library Science at the University of Oregon. Whenever I spoke to my dad on the phone back in New York, he would always ask me what I was doing. I would say, "Dad, I'm writing a book." Silence usually greeted that statement. The conversation would soon come to an end.

When my dad and mom visited us in Eugene, Oregon, in the spring, I had just received a copy of the manuscript for Broken Ground and Flowing Waters. It was about 280 pages in length. I showed it to my dad, and he held it in his hands. It was almost like he was caressing it. Writing was no longer an abstraction beyond the scope of his working class, immigrant experience, but a real material object that might have been honed on a lathe in a machine shop from his youth.

Dad grew ever more fond of my writing, but always with a caveat that it was too difficult for him to understand. By the time Broken Landscape⁵² was published in 2009, he would always purchase numerous extra copies of my books, have me sign them, and then proudly distribute them to friends and family.

It was a strange and yet most revealing and touching experience. The thing—writing—that was most important to me was beyond my father's comprehension until the abstraction of writing a book became the concrete reality of a physical manuscript. Law itself is not unlike this in its sometimes disturbing disjunction between the abstract and the concrete, between the mind and the hand, and between the value and the rule. And yes, the child is always the father of the man.

50. FRANK POMMERSHEIM, *BROKEN GROUND AND FLOWING WATERS* (Sinte Gleska College Press 1977); FRANK POMMERSHEIM & ANITA REMEROSKI, *RESERVATION STREET LAW* (Sinte Gleska College Press 1979). These books also remain in print and are still used in various high school and college classes at Rosebud and elsewhere.

51. Now Sinte Gleska University.

52. FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* (Oxford Univ. Press 2009).

I wrote *Braid of Feathers (American Indian Land and Contemporary Tribal Life)*.⁵³ The book's central focus was to describe the field of Indian law from an inside-out Reservation perspective, rather than the more common outside-in top down approach that focused on the federal dominance in the field of Indian law. The book was accepted for publication by several publishers after the necessary scholarly review. I chose publication with the University of California Press. *Braid of Feathers* was published in 1995 and remains in print today. It has been a required text in many undergraduate, graduate, and law school classes.⁵⁴

I know that this is what scholars do. They write books. Yet it remains intoxicating when it is what *you* have accomplished. To write a book and hold it in your very own hands wrapped in an attractive dust jacket is a most sublime feeling. Believe me, I never quite envisioned any of this as a likely possibility for me.

Several years later, I decided to write a book that was the complement of *Braid of Feathers* in that it had an outside-in top-down perspective with a focus on the relationship of tribes and individual Indians to the U.S. Constitution.⁵⁵ The result was *Broken Landscape: Indians, Indian Tribes and the Constitution*.⁵⁶ It was published by Oxford University Press in 2009 and also remains in print. It even found its way as a required text in a class at Harvard Law School.

There is also an empirical strand in my scholarly resume that seeks to fill some significant gaps in the literature, particularly as they pertain to Indian country and South Dakota. People would often ask me or simply assert one way or the other about 'discrimination' in the sentencing of Native defendants, especially in the state of South Dakota criminal justice system. With interested colleagues, I undertook two (one involving Native men, one involving women) such studies. These studies⁵⁷ were the first of their kind in South Dakota and Indian country. They are often cited and even sparked some follow up studies by others.⁵⁸ The conversation continues.

In addition, I was often queried by people in and out of the profession about various legal rules concerning civil jurisdiction, membership, and criminal law on the nine reservations in South Dakota. This led to the writing and publication of the *South Dakota Tribal Court Handbook*⁵⁹ which provided the relevant civil

53. POMMERSHEIM, BRAID OF FEATHERS, *supra* note 31.

54. *Id.*

55. POMMERSHEIM, BROKEN LANDSCAPE, *supra* note 52.

56. *Id.*

57. Chris Hutton, Frank Pommersheim & Steve Feimer, *I Fought the Law and the Law Won: A Report on Women and Disparate Sentencing in South Dakota*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 177 (1989); Frank Pommersheim & Steve Wise, *Going to the Penitentiary: A Study of Disparate Sentencing in South Dakota*, 16 CRIM. JUST. & BEHAV. 155 (1989); Frank Pommersheim & Steven Feimer, *Marking Time: Does Race Make a Difference? A Study of Disparate Sentencing in South Dakota*, 13 J. CRIME & JUST. 86 (1990).

58. See, e.g., Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 629 (1991) (showing that the work has been cited throughout the country).

59. FRANK POMMERSHEIM, SOUTH DAKOTA TRIBAL COURT HANDBOOK (1986, Rev. eds. 1988, 1992, 2006, 2012 & 2018), <http://ujs.sd.gov/media/docs/IndianLaw%20Handbook.pdf>.

jurisdiction, membership, and criminal law information for each of the nine Reservations in South Dakota. It was the first such publication of its kind to exist anywhere in the country. It filled (and continues to fill) an important gap in the availability of the laws that govern on the nine reservations in South Dakota.

The *Handbook* was originally published in 1986, revised in 1988, then again in 1992, 2006, 2012, and now appears online at the South Dakota Unified Judicial System website in its most recent 2018 edition. It remains an ongoing and valuable source of information and law concerning all nine reservations in South Dakota. The availability of such basic information is often the predicate and foundation for legitimacy within the larger legal and political communities within the state and nation.

The practical work described here serves no theoretical or high scholarly purpose. It seeks rather to enhance the storehouse of useful information about tribal law and tribal courts and the fate of Native prisoners caught in the web of incarceration in the South Dakota State Penitentiary. Think and embrace the local, before going global with one's theories and assessments.

By way of syntheses and summary of prior scholarship, I then wrote a three-article trilogy entitled "South Dakota Law Review Trilogy."⁶⁰ These three pieces sought to examine the difference between the 'offensive' and 'defensive' uses of sovereignty,⁶¹ the role and use of amicus briefs in Supreme Court cases involving non-Indians,⁶² and the long arc of the Crazy Horse Malt Liquor case from a cutting edge jurisdiction case to a cutting edge case about Lakota tradition and custom.⁶³

The most significant of the articles (in my opinion) continues to be the "Crossroads"⁶⁴ piece, particularly as a predictor of the vicissitudes of Supreme Court Indian law jurisprudence. For example, the Court remains relatively hospitable to the 'defensive' use of tribal sovereignty, especially in the context of tribal sovereign immunity.⁶⁵ You, private individual or business, or you, the state, cannot sue the tribe. Tribal sovereignty—qua sovereign immunity—is a 'shield' to protect tribes from offensive onslaughts by others, particularly the state.⁶⁶ For example, in *Michigan v. Bay Mills Indian Community*,⁶⁷ Justice Sotomayor noted:

60. Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48 (2010); Frank Pommersheim, *Amicus Briefs in Indian Law: The Case of Plains Commerce Bank v. Long Family Land & Cattle Co.*, 56 S.D. L. REV. 86 (2011); Frank Pommersheim, *The Crazy Horse Malt Liquor Case: From Tradition to Modernity and Halfway Back*, 57 S.D. L. REV. 42 (2012).

61. Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48 (2010).

62. Frank Pommersheim, *Amicus Briefs in Indian Law: The Case of Plains Commerce Bank v. Long Family Land & Cattle Co.*, 56 S.D. L. REV. 86 (2011).

63. Frank Pommersheim, *The Crazy Horse Malt Liquor Case: From Tradition to Modernity and Halfway Back*, 57 S.D. L. REV. 42 (2012).

64. Pommersheim, *supra* note 61.

65. *Id.* at 54.

66. *Id.* at 50.

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

"If Tribes cannot sue States for commercial activities on tribal lands, the converse should also be true. Any other would fail to respect the dignity of Indian Tribes."⁶⁸

Yet when tribes attempt to use their sovereignty 'offensively' to hold non-Indians and non-Indian businesses civilly accountable for their discrimination in commerce⁶⁹ or torts of sexual assault, the Supreme Court almost uniformly rebuffs all such assertions of tribal civil jurisdiction over non-Indians.⁷⁰ Tribal sovereignty cannot be used as a 'sword.' Tribes are not accorded even minimal respect to protect the "political integrity, economic security, or the health or welfare of the tribe."⁷¹

Such a judicial approach—no more than judicial plenary power – has become increasingly incoherent, characterized by a toxic asymmetry with one set of (broad) jurisdictional rules favoring tribal civil jurisdiction over Indians and another set of narrow, privileged, immunizing rules disfavoring tribal civil jurisdiction over non-Indians. One might call this a kind of new jurisdictional apartheid or a regime of separate but unequal justice and jurisdiction; a new Jim Crow for Indian Tribes.

The thrust of such scholarship is a calling out of injustice and unfairness; an injustice and unfairness that does not even have the imprimatur of congressionally enacted legislation. The conversation and struggle for reform, repair, and respect continues.

I write on; a monk at his desk. The sky above, the mud below.

IV. TRIBAL APPELLATE JUSTICE

Although I have written extensively elsewhere about my work as a longtime Tribal appellate justice,⁷² I want to simply acknowledge in this essay how that work for at least seven different tribes within and without the state of South Dakota

68. *Id.* at 809 (Sotomayor, J. concurring).

69. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327-28 (2008).

70. The progeny of *Montana v. United States*, 450 U.S. 544 (1981) (the seminal case analyzing the parameters of tribal court civil jurisdiction over non-Indians) created much subsequent case law. *See, e.g.*, *State v. A-1 Contractors*, 520 U.S. 438, 442 (1997) (holding state highways running through Reservations are to be considered fee lands for *Montana* analysis purposes); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 410 (1989) (holding non-Indian fee land on the reservation is subject to Tribal zoning if it is completely surrounded by Tribal trust land); *South Dakota v. Bourland*, 508 U.S. 679, 692-94 (1993) (Federal government "taken" lands on reservations are to be considered fee lands for *Montana* analysis purposes); *Nevada v. Hicks*, 533 U.S. 353, 360 (2001) (Stating that *Montana* analysis applies to all land, including trust land, within the reservation); and *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) (Finding no tribal court jurisdiction over discrimination claims involving the sale of fee land by a non-Indian bank). The Supreme Court held against tribal jurisdiction in all of these cases, with the single exception of a Tribe's right to zone non-Indian fee land located on part of the reservation completely surrounded by trust land. *See also* *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 Sup. Ct. 2159 (2016), in which the Court deadlocked in a 4-4 vote challenging the Fifth Circuit decision upholding tribal court civil jurisdiction over a case involving an allegation of sexual battery committed by a non Indian employee against a minor tribal member intern.

71. *Montana*, 450 U.S. at 566.

72. TRIBAL JUSTICE, *supra* note 19. *See also* the USD Law School LibGuide found at <http://libguides.law.usd.edu/c.php?g=744258> (containing the texts of more than 125 of my tribal court appellate opinions).

has enabled me to contribute to and to comment upon the development of an identifiable body of tribal court jurisprudence that forms an important component in understanding tribal justice and its developing contours. This includes, for example, two opinions that went all the way to the United States Supreme Court. One was from the Cheyenne River Sioux Tribal Court of Appeals⁷³ and the other from the Mississippi Band of Choctaw Supreme Court.⁷⁴

It has helped to provide me and USD Law School with a unique vantage point within a national framework of cutting edge tribal legal developments. My work in this area has, in part, allowed USD Law School to achieve a unique position of institutional importance and respect within the national tribal judicial world. This includes, for example, the only LibGuide in the country that highlights the jurisprudence of a single appellate justice and all the opinions that he has written.⁷⁵ This LibGuide is nationally recognized as a valuable legal resource for researching important cases and developments within tribal court jurisprudence.

My tribal court work—whatever its merits—provided me with a wide-ranging opportunity to see and to participate in the actual development of a frontline tribal institution. This on the ground experience was an invaluable window into the struggle to realize tribal sovereignty in the latter part of the twentieth and early part of the twenty-first century. It also gave my Indian law teaching a stronger grounding in the world of Indian law reality.

Armed B.I.A. Sniper on the Courthouse Roof of the Saginaw Chippewa Tribal Courthouse

In 1998, I was named as an Associate Justice on the Saginaw Chippewa Tribal Court of Appeals. The first case that I and my colleagues, Cheryl Fairbanks and Carey Vincenti, heard involved a challenge—in an original action brought before the Court of Appeals—to the improper ‘holdover’ of the current tribal council through two Tribal election cycles, for more than four years.

I had read the briefs in Chamberlain v. Peters⁷⁶ and was ready to hear the case. The next morning we were informed that the local BIA superintendent wanted to meet with us before we

73. TRIBAL JUSTICE, *supra* note 19 at 61-80. See *Plains Commerce Bank v. Long Family Land & Cattle Co.* 554 U.S. 316 (2008). Note that in this case, Justice Ginsburg in her dissent directly and approvingly quoted (not merely cited) the Cheyenne River Sioux Court of Appeals: “With regards to checks against discrimination the Tribal Court of Appeals observed, ‘there is a direct and laudable convergence of federal, state, and tribal concern.’” *Id.* at 351, n.3. (Ginsburg, J., dissenting). This was an historic first.

74. *Id.* at 81-91. At the Supreme Court—with only eight members sitting—the vote was 4-4 and the result affirmed the Fifth Circuit decision holding in favor of tribal court jurisdiction. See *Dollar General Corp. v. Mississippi Band of Choctaw Indians*, 136 S.Ct. 2159, 2160 (2016).

75. Cheers to Law School librarians Candice Spurlin (retired) and Sarah Kammer for making this a reality, despite the technological illiteracy of its main beneficiary and namesake.

76. *Chamberlain v. Peters*, 27 ILR 6085 (Saginaw Chippewa Ct. App., Jan. 5, 2000).

heard oral argument. This seemed a bit strange and unusual, but we nevertheless agreed to meet.

When we met with the BIA Superintendent, he informed us that we had nothing to worry about. That got my attention because I didn't know that there was anything to possibly worry about. He informed us that there had been numerous threats of violence surrounding this long running election dispute, but he was proactive and had taken precautionary measures, which included placing a BIA sniper on the Courthouse roof (!) and installing a metal detector in the Courthouse.

My colleagues and I just looked at each other and thanked the BIA Superintendent for his thoughtful precautions. We proceeded to hear the case. It proceeded without violence or disturbance of any kind.

I and my colleague Carey Vicenti wrote a lengthy opinion⁷⁷ that required the "holdover" Tribal Council to surrender the reins of power and remove from office. Additional creative details and cultural concerns are discussed in the opinion.⁷⁸ The "holdover" Chamberlain council surrendered office without incident. All of this happened without violence or the discharge of any firearm.

V. COLLEAGUE

I have always tried to be a 'good' colleague within the law school faculty and the South Dakota Bar Association, but it hasn't always been easy. Let me explain. During my early years on the law school faculty, I recall that I said almost nothing at faculty meetings. This was largely the result of feeling too much like a raw outsider. I was coming from ten years of living and working at Rosebud. I had not practiced all that much law. I had never been on a law school faculty before. Senior faculty like Professors Driscoll and Davidson were (however unintentionally) intimidating.

It is also true, at least from my (perhaps narrow) point of view,⁷⁹ that there was very little worth talking about. The history of the Law School has always been one of scarcity. So there was no need to imagine new programs or to take new directions. Class size was steady. Students passed the bar exam at high rates and found jobs. The absence of resources and outside grants kept the door of

77. *Id.* See also TRIBAL JUSTICE, *supra* note 72 at 134-71.

78. *Id.* at 163-66.

79. The recall of other faculty members' may well be different. I am just providing 'my' view and recollection.

expansion and innovation closed tight. A curriculum tweak or two is all that I can remember ever needing faculty input or decision-making. The bureaucracy of the University and the ABA kept their distance.

Res Ipsa Hoops Competition

I have always loved playing hoops—from elementary school to high school to college and beyond—and have played the game all over this land from New York City all the way to the Arctic Circle and the Rosebud Sioux Reservation. Yet by the time I joined the law school faculty in 1984, my competitive days appeared to have come to an end. But with one final gasp, I along with Amy Amundson,⁸⁰ a second year law student and former college hoops player herself, decided to organize a “coed” basketball tournament. Yeah, res ipsa hoops is a totally cool name and I thought of it. It began in 2001 and lasted until 2005.

The rules were basic. Five on five (three men, two women) playing half court (concession to my advancing years!) to 21 points; no referees, self-policing only. Players registered individually. The teams were chosen randomly. All selection and scheduling was done by Amy and myself. Single elimination.

The competition was intense and continued for five years. I was desperate to win a championship, but never did. Even when Amy and I conspired to get ourselves on the same team, we lost anyway. Cosmic justice to be sure!

Despite the losses, it was great fun. I could still (occasionally) summon that smooth jumpshot and behind the back pass. The temperament of participating students and faculty often did not match their more polished demeanor found in the classrooms of the law school. On court demeanor and in-class demeanor were not necessarily the same. It also reminded us of the mind-body gap and need for physical and mental synthesis. There was a wonderful sense of competition and community. People often recall and mention it to me with affection.

Yet make no mistake about it. Those (mostly) halcyon institutional days are now over. In addition to the growing press of assessment and the online expansion of the curriculum, there is a plethora of other institutional issues. These include

80. Amy Amundson, now Amundson-Kimber, class of 2002. No notes or records remain. This is my memory of events.

declining class sizes, apparent reduction in the quantity and quality of applicants, fluctuating bar passage rates, revenue and scholarship issues, student diversity, the continuing dilemma of whether to move the Law School to Sioux Falls, and increasing administrative demands and control of the Law School by both the University's central administration and the ABA.⁸¹ The core of senior faculty⁸² from my era have all retired or are about to do so. It is the changing of the guard at a most critical institutional juncture. The identity and mission, even the existence, of the law school face steep challenges. In the coming years, the need for new faculty commitment, insight, and leadership is going to be greater than ever. This is especially true in light of new leadership in the University's President's office and the incoming Dean of the Law School.

I have always sought to be a voice of reason, thoughtfulness, and maturity in matters of institutional concern and faculty governance. Most often in the context of articulating the necessity to treat each other with respect and essential fairness especially in the matters of promotion and tenure. To control what we control with reason and insight sifted through the craft of our lawyering skills and then to let the chips fall where they may. I think that I have been such a faculty member, but of course, that assessment is not really up to me. But damn! I do know this. I'm the oldest person on the faculty. It is time for new faculty blood to step up. New voices for a new era. Such is the nature of the passage of institutional time.

Reason, collegiality, and the commitment to do the work are the necessary keys to find and to open the right door into the future. Without such effort, lockdown and decline are sure to follow. I have much confidence in the younger cohort of relatively new faculty to meet these challenges. I merely encourage and exhort.

In the context of participation within the State Bar Association, I also mostly felt like an outsider. I wasn't from South Dakota. I didn't go to school here. I didn't know much of the practicing bar. Indian law and tribal court practice were too far out of the mainstream. I am also temperamentally quite shy; a classic introvert.

Nevertheless, over time—with my work on the Indian Law Committee, writing the Indian Law bar exam question, and most importantly now having taught most of the Bar membership—I have come to feel more comfortable within the State Bar. In fact, in 2016, I (along with Freya Manfred) gave the first poetry reading ever at the State Bar Annual Convention.

81. Bart Pfankuch, *University of South Dakota Law School facing challenges but seeing opportunities*, CAPITAL JOURNAL (May 18, 2018), https://www.capjournal.com/news/university-of-south-dakota-law-school-facing-challenges-but-seeing/article_ac522b08-5a61-11e8-a323-3f8f955b6e62.html.

82. Charles Thatcher, Jon Van Patten, David Day, Chris Hutton, and myself.

VI. EPILOGUE

The future beckons, but with no direction home.⁸³ I don't have a plan. I do not own a fishing rod or shotgun for hunting pheasant. No set of golf clubs beckons. No basement workshop calls.

I do find, however, a congenial mind in the 4th century Chinese poet, T'ao Ch'ien. He founded and sparked the tradition of the recluse poet in which an esteemed public servant retires from public service and abandons the city by retiring to the countryside to drink wine and to write poetry:

He entered government service at twenty-nine, and spent most of the next decade in office, which must have involved him in the relentless power struggles of his country's ruthless aristocracy. It is generally agreed that his life and work as a recluse should be read in terms of political protest against an eminently unworthy ruling class. And in spite of its isolated setting, T'ao's poetry is clearly haunted by the country's desperate social situation.⁸⁴

Another possibility involves enrolling at Southeast Technical Institute in Sioux Falls to pursue an A.A. degree in welding. My son Nicholas studied landscaping there. It might be a way to reconnect with my working class roots. A new craft for a new (or is it an old?) day.

But who really knows what is next? I suspect no one, not even Buddha, does, so I'll just take a deep breath and feel gratitude for what has gone before and what shall come later:

But whatever makes living precious
occurs in this one life, and this

life never lasts. It's startling,
sudden as lightning. These hundred

years offer all abundance: Take it!
What more could you make of yourself?⁸⁵

*Mitaku Oyasin*⁸⁶

83. Bob, of course. BOB DYLAN *Like a Rolling Stone, on HIGHWAY 61 REVISITED* (Columbia Records 1965).

84. T'AO CH' IEN, *THE SELECTED POEMS OF T'AO CH' IEN* 9 (David Hinton trans., Copper Canyon Press 1993). Quote taken from the Introduction written by David Hinton.

85. *Id.* at 51. The quoted lines are from the poem 'Drinking Wine'.

86. Lakota phrase meaning "all my relatives." It is often spoken at the conclusion of a speaker's remarks. It is intended to show respect and gratitude to all beings.