

Indian Policy and the Imagined Indian Woman

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Twenty-six years after the United States Supreme Court decided *Santa Clara Pueblo v. Martinez*,¹ the case continues to generate cries that the federal government has abandoned Indian women in the name of Indian culture.² This outrage is in part generated by the sense that, as Judith Resnik puts it, that “the case was an ‘easy’ one for the Supreme Court to proclaim its commitment to tribal sovereignty” because it accorded with federal norms about the treatment of women.³ In this essay, I want to disagree and argue that, to the contrary, it was a particularly hard case -- and not because the justices were such committed feminists. Rather, the case was a tough one for the Supreme Court and for non-Indian policymakers because the federal government and the colonial governments before it had always used the needs of Indian women as an excuse for erosion of Indian sovereignty. Indian women, by the common account, needed the federal government to come save them from drudgery, from sexual slavery, from oppression. But, I will suggest, the women whose plight called out for European and American protection were not real women -- instead they were imagined by the colonizers, tailored to their ideas of gender and culture and their needs in justifying the colonial project.⁴ I hope to show that this tradition not only colors discussions of the case and the situation of Indian women generally but may also make it more difficult for tribes to identify and address practices that do need to be changed.

The first imagined Indian woman in Indian policy was the North American continent itself.⁵ As pictured in this 1580 etching, (Fig. 1) she was voluptuous, naked, and reclining, representing both the almost sexual rewards available to those that could conquer her virgin soil and the need for Europeans to come clothe her in their superior civilization.⁶



Fig. 1. Theodore Galle, *Vespucci Discovering America* (1580)

Once the Americans began to assert independent claims to North America, they began to see her as “their” Indian woman, needing defense against the violations of the Europeans. In 1774, on the eve of the American Revolution, Paul Revere published this cartoon of America as an Indian woman defiantly spitting tea back at the British officers seeking to look up her skirt. (Fig. 2.).



Fig. 2. Paul Revere, *The Able Doctor, or America Swallowing the Bitter Draught* (1774)

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This sexualized perception extended from the land to the people themselves. In part the qualities ascribed to Indian people, male and female, were the qualities that European Americans ascribed to their own women. Portrayals of Indian men as feminized or emasculated by their improper lifestyles appeared from the earliest reports through the 1800s.⁷ More significant was the perception that Indians, like women, were creatures of nature rather than reason, like women, subject to wild impulses and passions, and, most importantly, like women, needed European and American men to protect and guide them.⁸ The object of this guidance, as preached by ministers and military leaders alike, was to turn them into “men.”⁹ The absence of women from this last equation is telling. It reveals both that women were invisible to these policymakers and that they were intended to remain invisible. If men assumed their proper role, women would naturally disappear from the political and economic stage, and become the passive helpmeets that God and civilization intended.

Indian women, then as now, were much more than the silent companions of their men. But the reality of Indian women’s lives was invisible to the non-Indians that observed them. James Adair’s 1775 *History of the American Indians*, for example, is one of the most detailed written records of the Southeastern tribes during the eighteenth century.¹⁰ He had lived and traded with the tribes for thirty years and had married a Chickasaw woman.¹¹ Despite this, Adair did not recognize that the tribes he lived among were matrilineal and thus missed the clanship system that was one of the most important elements of their religion and law.¹² In the same way, even when women exercised considerable political power, observers assumed that only men had political authority or property rights.¹³ For example, when a female member of the Sauk tribe protested against the removal proposed by Major General Edmund Gaines, saying that women had a right to know of bargains made regarding the lands the women farmed, he responded that “the president did not send him here to make treaties with the women, nor to hold council with them!”¹⁴

The last story points to another deliberate invisibility at work. While Indian policy from contact through the beginning of this century was dedicated to turning the “Indian people” into farmers, these policymakers missed the fact that there already were many Indian farmers. The problem was that they were all women.¹⁵ For many Indian communities, including the tribes first encountered by non-Indians such as the Cherokee, the Iroquois, and the Algonquian Tidewater Tribes of Virginia, men were responsible for hunting, while women were responsible for farming.¹⁶ While this division of labor could be consistent with domination of women,¹⁷ in most tribes, each sex determined appropriate behavior and controlled the property used within their respective fields of labor, and each activity was recognized as necessary and important for the welfare of the tribe.¹⁸ Women’s responsibility for agriculture was thus an important source of power and prestige.

But when European Americans faced these uncomfortable facts, they molded them to conform to their policy needs. They interpreted the division of labor with European eyes, through which women's work was distasteful and inferior, and hunting was the occupation of the idle rich. The fact that women farmed while men hunted, therefore, was evidence that Indian men were lazy and despised honest work, and Indian women were their abused slaves.¹⁹ Making men take their proper place in the fields was necessary to free women from this unnatural drudgery. In the words of Commissioner of Indian Affairs William Medill, "The most marked change, however, when this transition takes place is in the condition of the females. She who had been the drudge and the slave then begins to assume her true position as an equal; and her labor is transferred from the field to her household—to the care of her family and children."²⁰ In the same way, although rights in land often vested in women and descended through the maternal line, when treaties, statutes, and government officials allotted land to "heads of households" they assumed and sometimes insisted that the heads of household be Indian men.²¹

The civilization project was deemed necessary to save Indian women from sexual slavery as well. The very first reports of the people of the Americas dwelled on what they believed to be the inappropriate sexuality of Indian people.²² Indians typically wore far less clothing than their European counterparts, and in some tribes, sex before marriage was not forbidden.²³ Upon marriage, the family of the groom often provided gifts to the family of their bride, a practice that was perceived as a form of prostitution.²⁴ Marriages could also be terminated with little formality, and in many tribes husbands could have more than one wife.²⁵ European and American settlers saw these practices as very nice for the man, but degrading to Indian women.²⁶

The sexuality of Indian women created both an opportunity and a mission for the colonizers. The settlers delighted in imagining themselves as the objects of affection to these half-clothed, lustful women and believed they could use these affections as a way of gaining access to Indian people. Hence the persistent fascination of the Pocahontas story. John Smith may well have invented his story of being saved by Pocahontas, or at least misunderstood (or misrepresented) what was in fact a Pamunkey adoption ritual.²⁷ Even if Smith's account was accurate, Pocahontas would only have been ten or eleven at the time of the incident, not the sexually mature young woman she is usually portrayed as. Although Pocahontas did in fact marry an Englishman, John Rolfe, some years later, the marriage only occurred after the English had kidnapped her and held her for ransom for several months.²⁸ Moreover, despite the veneer of romance given the story, both her father, Chief Powhatan, and the Governor of the Virginia Colony, Thomas Dale, appear to have understood the match as a diplomatic alliance.²⁹ Nevertheless, the fictionalized story of Pocahontas' willing choice of an English soldier over her tribe remains one of the most popular images of Indians in American culture, refiguring American conquest as voluntary, a consensual

seduction rather than a rape.



Fig. 3. Victor Nehlig, *Pocahontas Saving John Smith* (1870)

Once seduced by the attractions of white men and their superior culture, Indian women could be saved, introduced to Christianity, and cleansed of their degrading pasts. Two pictures from the 1830s show the sexual allure and colonial opportunity presented by Indian women. Robert Matthew Sully's 1832 painting shows Pocahontas as she is often imagined, as a voluptuous temptress before her marriage. (Fig. 4.)



Fig. 4. Robert Matthew Sully, *Pocahontas* (1832)

It was Pocahontas' marriage and conversion, however, which best fit the mythology of American nation building. In 1837, the federal government commissioned the below *Baptism of Pocahontas at Jamestown, Virginia, 1613* (Fig. 5), in which she is separated from her naked compatriots, clothed in the pure white robes of civilization, and illuminated by the light of her conversion to Christianity. In 1840, the finished tableau was hung in the Rotunda of the U.S. Capitol where it remains today.³⁰



Fig. 5. John Chapman, *Baptism of Pocahontas at Jamestown, Virginia, 1613* (1836-1840)

Federal policymakers worked hard to save women from their perceived sexual

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exploitation. Several of the “Indian Offenses” proscribed by the Rules for the Courts of Indian Offenses established by the federal government in 1883 have to do with these goals. The only non-criminal duty explicitly given to the Indian judges was the power to solemnize marriage.³¹ Traditional dances were forbidden not only because they were a sustaining part of the culture the U.S. sought to abolish but because they were considered “repugnant to common decency and morality.”³² Polygamy was criminalized, as was paying anything of value to a woman or her relatives to cohabit with her.³³ The only prerequisite for Indian judges was that they not be polygamists.³⁴

The infamous federal boarding schools sought to transform Indian women as well. In 1881, Senator Carl Schurz declared that schools must be established for Indian girls to teach women to “make the atmosphere and form the attraction of the home” and “lift up the Indian women to respect themselves,”³⁵ while Indian commissioner Thomas Morgan declared that “co-education . . . is the surest and perhaps only way in the which the Indian women can be lifted out of that position of servility and degradation which most of them now occupy, on to a plane where their husbands and men generally will treat them with the same gallantry and respect which is accorded to their more favored white sisters.”³⁶ The faces of the girls in the pictures below cast doubt on whether they felt the boarding school experience was lifting them out of servility and degradation.



Fig. 6. Yakima School Girls, Fort Simcoe, Washington; Courtesy of Washington State Historical Society



Fig. 7. Girls Sewing, Albuquerque Boarding School; National Archives and Records Administration (NRG-75-AISP-14)

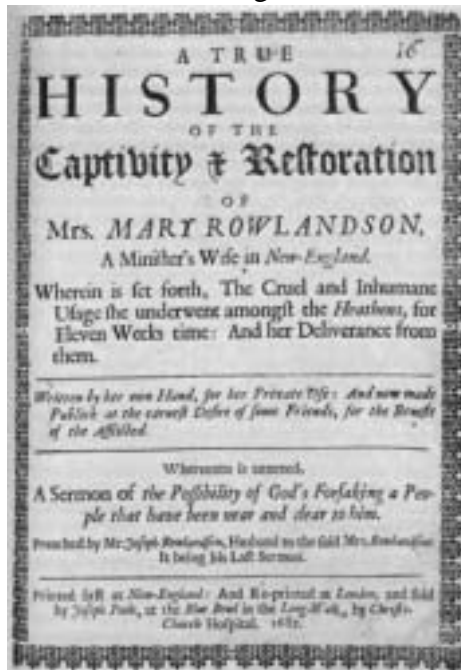
The perception of Indian women as wanton concubines was likely as great a distortion as that of them as oppressed slaves. Many tribes prohibited adultery,³⁷ and the relative ease of obtaining a divorce likely made it uncommon. Indeed, the punishment for adultery among tribes as different as the Creek,³⁸ Sioux³⁹ and Navajo⁴⁰ -- cutting off the offender's nose -- is one of the more serious abuses of women of which there are credible reports. The presence of multiple wives, rather than creating a harem in which the lucky man could luxuriate, might in fact increase the power of women in the household, particularly as sisters would often marry the same man.⁴¹ In Navajo households, for example, it appears that husbands, living as they did with the families of their wives, were subject to much teasing as lazy in-laws.⁴² Given that in many tribes, couples would move in with the bride's family after marriage, the "bride-price" paid by the husband's family, rather than a means of purchasing women and their sexual favors, can more appropriately be seen as contributions to the support of the new family, a practice not unlike the dowry that European American families provided along with their newly married daughters.⁴³

In addition, the sexual transgressions the colonizers condemned were often the result of federal actions rather than the opposite. While prostitution did exist among Indian tribes,⁴⁴ it vastly increased as brothels sprang up around federal army bases.⁴⁵ Abortion surely increased as the hardships of colonization made women worry about the future of their children. A military doctor remarked at the high rate of abortion among the Navajos imprisoned at Fort Sumter,⁴⁶ not recognizing that the women, starving and forced away from their ancestral homelands, did not wish to bring children into the world that the gods deserted.⁴⁷ More generally, the dislocation and disruption of traditional mores caused by federal policies likely resulted in more sexual license than it curbed. The 1928 Meriam Report, for example, noted that among "the younger educated Indians, no longer influenced by the old tribal domestic life and

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morals, the fluidity of Indian custom and divorce may become simply an opportunity for license.”⁴⁸

In addition to the slave and prostitute, there was another imagined “Indian” woman that motivated policymakers -- the white female captive. One of the most powerful images in the campaign against the Indian was that of the delicate white woman at the mercy of the sexually rapacious savage. Captivity narratives, in which white women recounted tales of kidnapping and rape at the hands of Indian men, were best-sellers from colonial times throughout the nineteenth century.⁴⁹ (Figs. 8 & 9.) These stories not only confirmed Anglo beliefs in the brutality and wildness of Indians, but also reinforced the image of white women as frail and sexually pure.⁵⁰



Figs. 8 & 9. Captivity Frontispieces: Mrs. Mary Rowlandson (1682), Mrs. Caroline Harris (1838)

In reality, Indian women often had more to fear from white men than white women did from Indians. Treatment of white captives varied both among tribes and within tribes as needs varied, and there are credible reports of torture and mistreatment at Indian hands.⁵¹ But there are more reports remarking on the complete absence of sexual impropriety or coercion by Indians toward their female captives and willing marriages of white women to the tribes that had adopted them.⁵² While colonial treaties with Indian tribes often included demands for return of white captives, many of those “rescued” refused to leave their new Indian families.⁵³ Such reports cast doubt on the premise of American superiority behind the colonial project⁵⁴ and might even be

modified for their popular audience. Mary Jemison, for example, who happily remained with the Senecas after her capture at age 15, wrote of the pleasure of a woman's life among them and the kindness and consideration of the Seneca man to whom she was married for 50 years.⁵⁵ But in reprints of her memoir, material was added to make her husband into a brutal killer.⁵⁶ In the same period, the colonists were capturing and enslaving whole Indian villages without any intention of incorporating them into their communities.⁵⁷

Again and again, however, non-Indians rode to the rescue of women that existed only in their imaginations. While Julia Martinez was a real woman who sought to change the membership ordinance that excluded her children before her lawyers ever got involved, I want to argue that similar factors may be at work in reactions to the Martinez case.

First, as discussed above, the position of the Martinezes has been understood largely according to Western priorities. The Martinez children participated fully in the religious and cultural life of the Santa Clara Pueblo,⁵⁸ which perhaps even more than for most tribes, has long been the most important kind of membership in a Pueblo community. Both Julia Martinez and her Navajo husband Myles remained affiliated with the Santa Clara Pueblo until their deaths in 2000 and 2001, respectively, and several of their children still live there.⁵⁹ While today increased tribal revenue with the advent of casino gaming may exacerbate the differences between those formally enrolled and those not,⁶⁰ the most severe hardship faced by the Martinez children came, not at the hands of the tribal government, but from the Indian Health Service, which denied the children medical care for lack of tribal enrollment.⁶¹ This problem, however, was resolved in 1968, long before the case was filed, when the Bureau of Indian Affairs gave the Martinezes Indian census numbers.⁶² But the indicia of membership that were familiar and valued in Anglo-American society, voting and citizenship rights in the government established at federal urging in 1935, were far more visible and important to the non-Pueblo judges.

Another similarity is the reaction of non-Indians to the case. There is some evidence that the case got to the Supreme Court only because it involved protection of women. Several previous cases had challenged membership ordinances that relied on percentage of Indian blood.⁶³ If the equal protection provisions of the Indian Civil Rights Act (ICRA) were enforced in the same way as those in the U.S. Constitution, these ordinances would be far more offensive, since racial classifications⁶⁴ are entitled to strict scrutiny, while gender-based ones receive only heightened scrutiny.⁶⁵ But the circuit courts, even the Tenth Circuit that struck down the Santa Clara Pueblo ordinance, had little trouble upholding these membership requirements. Before the passage of the ICRA, moreover, the New York state courts had, with little hand-wringing, repeatedly upheld Iroquois laws providing that children could only inherit tribal membership through their mothers.⁶⁶ In fact, it appears that among Indian

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Reorganization Act membership laws, ordinances that exclude the children of male tribal members with non-members, while admitting all children of female members, are more common than those like the Santa Clara ordinance.⁶⁷ None of these ordinances, however, generates publicity or concern similar to that attending the Santa Clara Pueblo law.⁶⁸ It takes a case that calls upon the courts in their role as protectors of Indian women to do that.

Another reason the Martinez question case may have been, and remains, particularly troubling is because it clashed with another imagined Indian woman that had begun to dominate the public imagination -- the Indian woman that was always powerful and equal, whose suffering is only at the hands of Euro-American oppressors. The current Pocahontas, as incarnated by Walt Disney, may stand for this Indian woman. Wasp-waisted and mini-skirted, this Pocahontas shares the exoticized sexuality of earlier images, but she is also a woman of power and independence, mistress of the natural world.

This imagined Indian woman is a necessary correction to past images of Indian women as exploited drudges and does much to help non-tribal people come to terms with the unfamiliar power women had in tribal communities. But this modern imagined Indian woman also poses risks to tribes. No culture is perfect. Some tribal practices regarding women were troubling by any standard, and even where tribal traditions promoted gender equality, modern iterations of them may not. Accepting without question that practices dubbed “traditional” promote gender equality may make it harder for tribal communities to move beyond this imagined Indian woman to address problems within their own communities. In her detailed examination of the Peacemaker Courts of the Navajo Nation, for example, Donna Coker found that the emphasis on the traditional practice of “talking through” problems to repair relationships led some Peacemakers to favor maintenance even of abusive relationships or to encourage women to see the abuse as mutual even when one spouse was being seriously injured and the other simply resented a perceived lack of respect.⁶⁹ One Peacemaker, moreover, used her understanding of the Navajo Changing Woman story to say that domestic violence occurred because women assumed men’s roles by going out to work and neglecting their duties at home.⁷⁰ While these practices were neither universal nor necessary results of Navajo tradition,⁷¹ uncritical assumptions that because a practice has been labeled traditional it necessarily promotes gender equality may have allowed them to persist.

Recent experiments by the Canadian government with “sentencing circles” intended to incorporate First Nations justice practices into sentencing of their members have also been critiqued for casting the victim and as responsible for assault or domestic abuse and seeking to repair relationships in which women are in danger.⁷² These experiments are particularly problematic because, unlike Navajo peacemaker courts, they are initiated and controlled by outsiders to the community, members of the

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Canadian government, based on a vague and inaccurate idea of traditional Inuit justice.⁷³ But the circles have been relatively immune from critique because

[B]y labeling them in some way as belonging within Inuit culture, there appears to be reluctance on the part of non-Inuit working within the justice system or within government to scrutinize these alternatives. This results in a "hands-off" approach. Ironically, these alternatives are identified and perceived to be mechanisms of self government and therefore beyond the scrutiny of other levels of government or the judiciary.⁷⁴

The fear within tribal communities of federal deprivation of sovereignty may also stymie internal critique.⁷⁵ Outsider pressure thus may hinder the tribal process of ensuring that ideals of equal respect for the sexes are reflected in tribal practices. There is some evidence that the attack on the Santa Clara Pueblo's right to enact the law only strengthened the resolve of the community to justify and cling to it. Paul Tafoya was Governor of Santa Clara Pueblo at the time of the trial and testified that the ordinance was "the only way we can protect and preserve our culture."⁷⁶ Since then, he has become a leader in the movement to change the ordinance, arguing in 1997, "[i]t has caused suffering everywhere. This is not the Indian way of doing things."⁷⁷ But twenty-five years later, the membership ordinance remains.

The persistence of the Santa Clara Pueblo ordinance can be contrasted with that of another Pueblo people, the Hopi Tribe in neighboring Arizona. The Indian Reorganization Act Era Constitution of the Hopi Tribe provided that children of Hopi mothers were eligible for automatic enrollment, while those whose mothers were not Hopi had to seek approval for membership from the tribal council.⁷⁸ In 1993, however, the tribe amended the constitution to provide that all those with one-quarter Hopi or Tewa ancestry were eligible for membership.⁷⁹ While one might try to explain the difference as evidence of the greater power of Hopi men to amend a law that disadvantaged their offspring, the amendment, along with the broader constitutional reform of which it was part, was the initiative of a Hopi woman.⁸⁰ The current effort to change the Santa Clara Pueblo law, moreover, is led by Santa Clara men as much as it is by women.⁸¹ The more plausible explanation for the difference between the two tribes is that the process of defending the Santa Clara ordinance and the continuous scrutiny it has received since the 1970s have identified support for the law with support for sovereignty, making the law more resistant to change from within.

The lesson from all of this is that while non-Indians are particularly moved to save Indian women from their oppression, they are also particularly blind to the actual causes of that oppression. These two characteristics are a dangerous combination, resulting in actions that, even when well-meaning, may only increase the difficulty of

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women's lives. There is no easy way out of this dilemma. Culture cannot be a shield for a thorough examination of the way tribal practices affect women. But neither will outside courts and legislators provide adequate fora for voicing and addressing these practices. Indeed, the Santa Clara Pueblo experience suggests that appeal to outside authorities may shut this discussion down, by casting protests against discrimination as attacks on sovereignty, rather than demands for equal participation within the sovereign community. The result is to discourage both the demands and receptivity to them. Meaningful change must occur instead through the hard work of ensuring that tribal communities have the power and resources to hear and respond to demands for reform, and that members of those communities have the ability and willingness to articulate their demands. Ensuring security for tribal sovereignty, rather than threatening its erosion, may be more productive in enabling women to improve their own lives.

Notes

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1. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).
2. One of the most recent entries to this body of work is Madhavi Sunder's *Piercing the Veil*, which declares the decision a case in which "U.S. law defers to traditionalists within a culture over the claims of reformers." 112 YALE L.J. 1399, 1429 (2003). While this fine article importantly discusses the historical contingency of religious norms for treatment of women in order to dismantle the supposed dichotomy between cultural rights and women's rights, it does not apply these insights to the tribal context and so ignores the processes through which oppression of Indian women is created and is overcome.
3. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 727 (1989).
4. The experience of Indian women thus amply affirms Angela Harris' insight that in insisting on the separation of oppression because of sex and oppression because of race, theorists essentialize each and deny the reality of both. See Angel Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).
5. See Rebecca Blevins Faery, *Cartographies of Desire: Captivity, Race, and Sex in the Shaping of an American Nation* 88 (1999).
6. See, e.g., *id.* at 89, 102.
7. For example, a report from 1504 or 1505 of Vespucci's encounters with the Indian people stated that Indian women were so lustful they caused their men to insert a thorn into their penises to enlarge them, which ultimately resulted in the unfortunate organ breaking off. See ROBERT F. BERKHOFER, JR., *THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT* 8 (1979).

The French Comte de Buffon wrote in the late 1700s that Indian men were small and weak and had “no hair, no beard, no ardor for the female.” *Id.* at 42. Jonathan Elliot, in his 1830 guidebook for tourists to the United States Capitol, faulted two sculptures for their portrayal of Indian men with defined muscles, stating that “[i]t is found, upon a close and accurate examination, that the body of a male Indian is almost as smooth, and devoid of every appearance of muscle, as that of the most delicate white female.” SUSAN SCHECKEL, *THE INSISTENCE OF THE INDIAN: RACE AND NATIONALISM IN NINETEENTH-CENTURY AMERICAN CULTURE* 138 (1998).

8. See JAMES AXTELL, *THE EUROPEAN AND THE INDIAN: ESSAYS IN THE ETHNOHISTORY OF COLONIAL NORTH AMERICA* 45 (1985) (describing the sense that “natives were the children of the human race, their passions still largely unrestrained by reason”). These perceived limitations of Indian people were repeatedly used to justify federal power over them. See, e.g., *United States v. Sandoval*, 231 U.S. 28, 40-41 (1913) (justifying federal power over the Pueblos because “they are essentially a simple, uninformed and inferior people. . . [T]hey are dependent upon the fostering care and protection of the government, like reservation Indians in general . . . and they are easy victims to the evils and debasing influence of intoxicants.”); *United States v. Rogers*, 45 U.S. 567, 573 (1846) (stating that with respect to Indian people the federal government had “endeavored by every means in its power to enlighten their minds and increase their comforts and to save them if possible from the consequences of their own vices”). These justifications find a ready parallel in those used to justify different legal treatment of women. See, e.g., *Mueller v. Oregon*, 208 U.S. 412, 421 (1908) (upholding legislation limiting hours women could work in part, because “woman has always been dependent on man. . . As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved”); *In re Goodell*, 39 Wisc. 232, 245-46 (1875) (upholding exclusion of women from practice of law because female “subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife” and because “[i]t would be revolting to all female sense of the innocence and sanctity of their sex” to face the “nastiness” of the courts).

9. See AXTELL *supra* note 8, at 44 (quoting 1609 sermon by William Crashaw); see also Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, reprinted in *AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN” 1880-1900* 261 (Francis P. Prucha ed., 1973) (describing the goal of boarding schools for Indian students to “kill the Indian in him and save the man”).

10. Theda Perdue, *Cherokee Women: Gender and Culture Change 1700-1835* 4 (1999).

11. *Id.*

12. *Id.*

13. See Rayna Green, *Women in American Indian Society* 33-35 (1992).

14. Lucy Eldersveld Murphy, *Autonomy and the Economic Roles of Women of the Fox-Wisconsin River Region, 1763-1832*, in *NEGOTIATORS OF CHANGE: HISTORICAL PERSPECTIVES ON NATIVE AMERICAN WOMEN* 73 (Nancy Shoemaker ed., 1995). In what was perhaps a suggestion of his view of the proper (sexual) role of women, Gaines then told the woman that the Sauk “young men must leave the fort, but she might remain if she wished!” *Id.* at 74.

15. Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters’ Last Stand: American Indian Women’s Resistance to Domestication and the Denial of their Property Rights*, 77 N. C. L. REV. 637, 650 n.63 (1999) (collecting citations regarding farming among women of many tribes).

16. See Dussias, *supra* note 15, at 656-70.

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17. See Richard A. Sattler, *Women's Status Among the Muskogee and Cherokee*, in *WOMEN AND POWER IN NATIVE NORTH AMERICA* 223-224 (Laura F. Klein & Lillian A. Ackerman eds. 1995) (contrasting Muskogee among whom men gained control of produce from their wives' fields with marriage with Cherokee among whom men gained no such control). Sattler notes, however, that while women were the titular owners of both the larger "town fields" and smaller garden plots, men were primarily responsible for working the town fields, *id.* at 223, so that while women did not have control of resources from farming, neither did they have the labor of creating them.
18. PERDUE, *supra* note 10, at 24-25 (agriculture and property rights and autonomy among Cherokees); Dussias, *supra* note 15, at 656-671 (agriculture and property rights among Iroquois, Virginia Algonquin and Illinois tribes). A similar phenomenon appears among some tribes that did not farm, but in which the division of labor was between men who hunted and women who gathered wild foods or who prepared or stored the animals once caught. See generally, e.g., Lillian A. Ackerman, *Gender Status in the Plateau*, in *WOMEN AND POWER IN NATIVE NORTH AMERICA* (prestige as result of ownership of foods gathered among women of the Plateau tribes of Washington, Oregon and Idaho); Laura F. Klein, *Rank and Gender in Tlingit Society*, in *WOMEN AND POWER IN NATIVE NORTH AMERICA* 33-4 (1995) (explaining Tlingit women's role in preparing salmon and blankets).
19. See, e.g., Annual Report of the Comm'r Indian Affairs (1848), H.Exec. Doc. No. 1, 30th Cong., 2d Sess., reprinted in *DOCUMENTS IN UNITED STATES INDIAN POLICY* 77 (Francis P. Prucha ed., 2000) ("[I]f it be necessary to cultivate the earth or to manufacture materials for dress, it has to be done by the women, who are their 'hewers of earth and drawers of water.' Nothing can induce [the Indian man] to labor . . ."); AXTELL, *supra* note 8, at 49-50, 52-53 (restating observations by European males); BERKHOFER, *supra* note 7, at 43 (quoting Comte de Buffon); Carl Schurz, *Present Aspects of the Indian Problem*, 133 N. AM. REV. 1 (1881), reprinted in *AMERICANIZING THE AMERICAN INDIANS* 20 (describing the treatment of Indian women).
20. Annual Report of the Comm'r Indian Affairs (1848), H.Exec. Doc. No. 1, 30th Cong., 2d Sess., reprinted in *DOCUMENTS IN UNITED STATES INDIAN POLICY* at 78.
21. Bethany Ruth Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 AM. INDIAN L. REV. 1, 15-17 (1996). Even after the Dawes Allotment Act was amended to permit married women to receive allotments of land in 1891, federal agents sometimes refused to allot land to women with husbands. See Katherine M.B. Osburn, "Dear Friend and E-Husband": *Marriage, Divorce, and Women's Property Rights on the Southern Ute Reservation, 1887-1930*, in *NEGOTIATORS OF CHANGE: HISTORICAL PERSPECTIVES ON NATIVE AMERICAN WOMEN*, *supra* note 14, at 160.
22. See BERKHOFER, *supra* note 7, at 7-11 (quoting first European impressions of Indians).
23. See, e.g., AXTELL, *supra* note 8, at 55-57.
24. See, e.g., Schurz, *supra* note 19, reprinted in *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 9, at 20 ("The girl, when arrived at maturity, was disposed of like an article of trade"); *Earl v. Godley*, 44 N.W. 254, 262 (1890) ("[A]ny member of the tribe who desired to obtain a wife might purchase one"); ROBERT H. LOWIE, *INDIANS OF THE PLAINS* 80 (1963) (arguing against notion that because of "bride price" Indian women were considered chattel).
25. See, e.g., AXTELL, *supra* note 8, at 56, 77 (discussing polygamy and divorce among northeastern tribes); PERDUE, *supra* note 10, at 44-45 (discussing polygamy and divorce among Cherokee); DAN VICENTI, *THE LAW OF THE PEOPLE: DINÉ BIBEE HAZ'ÁANII, A BICULTURAL APPROACH TO LEGAL EDUCATION FOR NAVAJO STUDENTS* 279, 351 (1972) (discussing polygamy and divorce among Navajo);

- WILLIAM T. HAGAN, *INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL* 133-38 (Univ. of Neb. Press, 1966) (discussing polygamy and divorce among the Kiowa).
26. AXTELL, *supra* note 8, at 56, 77, PERDUE, *supra* note 10, at 44.
27. See FAERY, *supra* note 5, at 113-17; Helen C. Rountree, *Pocahontas: The Hostage Who Became Famous*, in *SIFTERS: NATIVE AMERICAN WOMEN'S LIVES* 17-18 (Theda Perdue ed., 2001).
28. Ralph Hamor, *A True Discourse of the Present State of Virginia, and the Success of the Affairs There till the 18 of June, 1614* 4-11 (1615) (Va. St. Library Publications reprint 1957).
29. The marriage ended a war between the Pamunkey and the colonists, beginning a period of 'friendly commerce and trade.' *Id.* at 11. Some years later, moreover, Hale sent a representative to Powhatan to request the hand of his younger daughter, for a "surer pledge of peace." *Id.* at 37.
30. Susan Sheckel, *The Insistence of the Indian: Race and Nationalism in Nineteenth-Century American Culture* 139-40 (Princeton Univ. Press, 2001).
31. Annual Report of Comm'r of Indian Affairs, Code for Courts of Indian Offenses, H.Exec. Doc. No. 1, 52d Cong., 2d Sess., August 27, 1892, *reprinted in* 3088 U.S. Serial Set (reprinting 1883 code with modifications). See also DOCUMENTS IN UNITED STATES INDIAN POLICY, *supra* note 19, at 185.
32. Report of the Comm'r of Indian Affairs at 11 (Oct. 10, 1883), *reprinted in* 2190 U.S. Serial Set.
33. Annual Report of Comm'r of Indian Affairs, *supra* note 31; see also DOCUMENTS IN UNITED STATES INDIAN POLICY, *supra* note 19, at 185.
34. *Id.*
35. Schurz, *supra* note 19, *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 9, at 20.
36. Thomas J. Morgan, *Supplemental Report on Indian Education*, in AMERICANIZING THE AMERICAN INDIANS, *supra* note 9, at 226.
37. See AXTELL, *supra* note 8, at 56; VICENTI, *supra* note 25, at 307-308; Berger, *supra* note 21, at 25; PERDUE, *supra* note 10, at 56-57. According to Perdue, Cherokee tradition was an exception, as it did not prohibit adultery by married women but forbade adultery by married men.
38. SATTLER, *supra* note 17, at 218.
39. ROYAL B. HASSRICK, *THE SIOUX: LIFE AND CUSTOMS OF A WARRIOR SOCIETY* 48 (1964); see also Pierre Antoine Tabeau, *Narrative of Loisel's Expedition to the Upper Missouri* (Annie Heloise Abel ed. 1939), *reprinted in* WILCOMBE E. WASHBURN, *THE INDIAN AND THE WHITE MAN* 91 (1964) (recounting mutilation as punishment for adultery by Brule Sioux).
40. VICENTI, *supra* note 25, at 351. While the geographic diversity of these tribes should lead to suspicion as to whether these accounts were factual or part of the lore of tribal barbarity, the Vicenti account at least was based on an interview with a Navajo elder in the 1970s who had both heard of the practice from her grandmother and seen a woman whose nose had been cut off.
41. PERDUE, *supra* note 10, at 44; VICENTI, *supra* note 25, at 279; James W. Zion & Elsie B. Zion, *Hozho' Sokee'-- Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L. J. 407, 414 (1993).
42. VICENTI, *supra* note 25, at 232.
43. See, e.g., James F. Brooks, *Captives and Cousins: Slavery, Kinship and Community in the Southwest Borderlands* 243 (2002) (describing role of bride price among Navajo).
44. NEGOTIATORS OF CHANGE *supra* note 14; see, e.g., AXTELL, *supra* note 8, at 278 (quoting reports of the "'trading girls' among the Carolina Indians, whose special haircuts showed that they were 'design'd

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- to get Money by their Natural Parts”); SATTler, *supra* note 17, at 218 (stating that Muskogee women who had committed adultery might be forced into prostitution).
45. See, e.g., LYNN R. BAILEY, BOSQUE REDONDO: THE NAVAJO INTERNMENT AT FORT SUMNER, NEW MEXICO, 1863-1868, at 145 (1998) (describing “hog farms,” as brothels were called, that arose in Fort Sumner).
46. Annual Report of Comm’r of Indian Affairs, H.Exec. Doc. 1, 39th Cong., 2d Sess., Attachment No. 46 at 150 (1866).
47. See Raymond Friday Locke, *The Book of the Navajo* 382 (5th ed. 1992).
48. INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 765-66 (1928). (commonly known as the Meriam Report after its principal investigator, Lewis Meriam).
49. June Namias, *White Captives: Gender and Ethnicity on the American Frontier* 8 (1995).
50. *Id.* at 36-37, 43.
51. See, e.g., *id.* at 42 (describing beating of Rachel Plummer and murder of her baby by Comanches during capture); see also JAMES F. BROOKS, CAPTIVES AND COUSINS: SLAVERY, KINSHIP AND COMMUNITY IN THE SOUTHWEST BORDERLANDS 180-97 (2002) (citing reports of Mexicans unwillingly enslaved by Southwestern tribes).
52. AXTELL *supra* note 8, at 152-53, 181-82, 194; NAMIAS, *supra* note 49, at 47. While Axtell wrote of the experience of the colonists captured by eastern Indian tribes, Sarah Wakefield, recounting her experience as a captive among the Dakotas in 1862 similarly reported that the “Indians were as respectful towards me as any white man would be towards a lady,” and that, “I do not know of but two females that were abused by the Indians. I often asked the prisoners when we met, for we were hearing all kinds of reports, but they all said they were well-treated, that I saw.” SARAH F. WAKEFIELD, SIX WEEKS IN THE SIOUX TEPEES: A NARRATIVE OF INDIAN CAPTIVITY (1864), reprinted in WOMEN’S INDIAN CAPTIVITY NARRATIVES 273, 304 (Kathryn Zabelle Derounian-Stodola ed. 1998).
53. AXTELL, *supra* note 8, at 170-72, 175-77.
54. *Id.* at 169-70.
55. NAMIAS, *supra* note 49, at 98-99.
56. *Id.*
57. *Id.* at 5-7.
58. *Santa Clara Pueblo*, 436 U.S. at 54 n.5.
59. *Obituary of Myles Martinez*, SANTA FE NEW MEXICAN, Oct. 30, 2001, at B2..
60. See generally Rob Carson, Blood won’t always tell: As perks make tribal membership increasingly desirable, some find Indian heritage is not enough to get in, NEWS TRIBUNE (Tacoma, Wa.), Feb. 17, 2002.
61. Brief for Respondent at 3, *Santa Clara Pueblo*, 436 U.S. 49 (1978) (No. 76-682).
62. *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 14-15 (D.N.M. 1975). Today, in response to tribal insistence and over the protests of the Indian Health Service, formal enrollment is not necessary to establish eligibility; instead, IHS defines eligible individuals as persons that are of Indian descent and members of an Indian community. 42 C.F.R. § 136.12(a)(1). While formal enrollment is evidence of such membership, so are active participation in tribal affairs, residence on tax-exempt property, and other factors. 42 C.F.R. § 136.12(a)(2).
63. See, e.g., *Slattery v. Arapahoe Tribal Council*, 453 F.2d 278, 282 (10th Cir. 1971) (upholding one quarter Indian blood requirement); *Daly v. United States*, 483 F.2d 700, 705 (8th Cir. 1973) (upholding

one quarter Indian blood requirement for membership and one half degree for office holding).

64. Authors have persuasively argued that such requirements are not properly perceived as race based, *see, e.g.*, Carole Goldberg, *Descent Into Race*, 49 U.C.L.A. L. REV. 1373 (2002), and the Supreme Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), suggests that such an equal protection argument would have had little success. But this does not explain why the Circuit Courts had so little trouble upholding these membership ordinances well before *Morton v. Mancari* was decided.

65. *See* U.S. v. Virginia, 518 U.S. 515, 533-34, 533 n.6 (1996).

66. *Bennett v. Fink Constr. Co.*, 262 N.Y.S.2d 331 (N.Y. Sup. Ct. 1965); *Woodin v. Seeley*, 252 N.Y.S. 818 (Chautauqua Co. Ct. 1931); *Patterson v. Council of Seneca Nation*, 157 N.E. 734 (N.Y. 1927). Interestingly, an earlier New York decision had invalidated the Tonawanda practice of matrilineal descent in a case involving inheritance rights of the widow of a Tonawanda man. In *Hatch v. Luckman*, the court assumed the familiar mantle of shielding the hapless woman from barbaric tribal practices. 118 N.Y.S. 689 (N.Y. Sup. Ct. 1909), *See* Berger, *supra* note 21, at 20-21.

67. Berger, *supra* note 21, at 51-52.

68. For example, when I show my students a video discussing the membership rules of Seneca Nation, which grant tribal citizenship to children of Seneca women and non-Seneca men but not Seneca men with non-Seneca women, and has even attempted to exclude such non-member couples from the reservation, they typically defend the Seneca's ability to make and enforce the rule, rather than express unease with it, as they do when we discuss Santa Clara Pueblo.

69. Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 92-4 (1999).

70. *Id.* at 65-66.

71. In particular, Philip Bluehouse, a traditional leader and the Director of the Peacemaker Courts, endorsed none of these practices. *See id.* at 91-92.

72. Mary Crnkovich, *The Role of the Victim in the Criminal Justice System – Circle Sentencing in Inuit Communities*, Paper presented at the Canadian Institute for the Administration of Justice Conference (Oct. 11-14, 1995) (unpublished manuscript, available at http://www.casac.ca/issues/mary_crnkovich.htm).

73. *Id.*

74. *Id.*

75. Given the history of using claims of oppression as excuses for the domination of Indian people, Indian women may experience the same “unique ambivalence” with respect to such claims that Harris describes for black women with regard to rape, which was simultaneously used to victimize black women and justify the victimization of black men. *See* Harris, *supra* note 4, at 601.

76. Brief of Amicus Curiae by the National Tribal Chairmen's Association at 3a, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (No. 76-682).

77. Karen Peterson, *Exiles in their Own Land*, SANTA FE NEW MEXICAN, May 11, 1997, at A1.

78. Const. & By-laws of the Hopi Tribe of 1936, art. II, § 1.

79. Const. & By-laws of the Hopi Tribe, art. II, § 2 (adopted 1993).

80. Interview with Pat Sekaquaptewa, Director of the Native Law & Policy Center at UCLA, in Hartford, Conn. (March 12, 2004).

81. *See* Peterson, *supra* note 77.