Course structure: The course will be built around lectures, discussions and running case-based problems, with integrated participatory exercises appropriate to each unit of the course.

Need for this course

A course on the legal systems of indigenous North American communities and the legal environment in which Native communities live is critical at this point in time for at least three reasons:

First, the legal systems of Native Americans are important subjects of study in their own right as, in the words of former Supreme Court Justice Sandra O’Connor, the third sovereign (along with state and Federal governments) that comprise the legal system of the United States. Vibrant Native governments operate throughout the United States territory beyond the reach (and restrictions) of the U.S. Constitution (although not of the Congress, which may regulate, and, arguably, abolish, American Indian governments). It is impossible to fully understand United States legal systems without understanding the law of its “third sovereign,” not least because both state and Federal systems have grown out of, in contrast to, and along with, indigenous legal systems.

Further, no community in the United States lives in more constant contact with (in some specified locations state and) Federal law which forms the environment in which Native
legal systems persist. It is no coincidence that so many conflicts between settlers and indigenous communities arose out of, or at least took as their justification, disputes over legal jurisdiction or that many of the earliest— and more effective, at least for a time—colonialists’ efforts to suppress American Indian culture was to outlaw Native legal systems.

Second, the history and growth of indigenous communities is an excellent case study of the ways in which indigenous communities have resisted and absorbed the effects of colonialism, violence and cultural genocide, subverting the very institutions and roles designed to lead to their demise to sustain cultural practices including, legal practices in which Native communities thrive (or at least persist) on their own terms.

Finally, the study of Native legal systems is an outstanding opportunity to take a comparative perspective on other domestic, foreign and international legal systems, forcing students to confront the meaning of law, its role in constructing cultures, and the limits of legal process, while fostering exploration of the “adjacent possible” in legal systems, as have indeed many state and Federal processes which have adopted or adapted native legal traditions into their own legal systems—most prominently as “alternative” dispute resolution or restorative justice. In studying American Indian law, students will develop an understanding of how the interactions of institutions, roles and stories with rules, norms and customs contribute to the creation of legal systems around the world today. At the very least, students will acquire the vocabulary and skills to observe, understand and approach any legal system—no matter how familiar or exotic.

**Learning objectives:**
Students will engage Native American legal systems, Federal law (and in limited circumstances and communities, state law) affecting Native governance and the lives of American Indians, as well as the recorded experience of indigenous communities. Students will also engage with current American Indian controversies and proposals, and develop critical skills in assessing policy proposals and rhetoric. Students will, through practical exercises, understand how the institutions and roles of some extraordinarily diverse Native American legal systems operate today, and, in the process, students will learn advocacy skills and systemic approaches applicable to many policy areas and legal systems.

**Materials:** Required Texts:


Turtle Talk blog

Supplementary materials will be made available on Latte.

**Methods:** The course will be taught through a mix of lecture, discussion, student presentations and participatory exercises. Participatory exercises may be organized around a single, semester-long cumulative problem set-- incorporating materials for presenting claims to a Tribal government agency followed by a hearing before a Tribal court and advocacy letter to the U.N. Special Rapporteur on the Rights of Indigenous Peoples and preparation of testimony on a Tribal jurisdiction policy proposal to Congress or through the UNDRIP’s consultation process or might involve several stand-alone exercises.
Fit within Brandeis' curriculum: At the first two Brandeis Indigenous Peoples’ Day teach-ins, students and faculty alike complained of a dearth of courses relating to Native American issues at Brandeis. This is particularly true of courses on the context of Native American communities today, as opposed to those focusing on the history of the indigenous peoples in what is now the United States. A course on Native American legal systems would appropriately supplement Heller’s course on Indigenous Peoples and Development, particularly because the rule of law, protection of (private or collective) property rights and a culturally appropriate legal system have been identified, most recently by Harvard’s Project on American Indian Economic Development (HPAIED) as the three pillars of economic development in Indian Country. This proposed course also adds to the Legal Studies Department’s comparative law and law and society offerings.

Course Progression: The general progression of the course would include:

January 15-17, 2019

Class #1 – Introduction to Tribal Legal Studies and Tribal Governance

Richland & Deer, chapter 1 “What is law?”

chapter 3 “Tribal law in customs and traditions”

Fletcher, chapter 1

Class #2 – Tribal Justice Systems

Richland & Deer, chapter 4, “Forms and trends of traditional Tribal governments

chapter 7, “Tribal justice systems today”

chapter 8, “Examples of Tribal court systems”

Fletcher, chapter 2


Assignment due at beginning of class: Write a letter to the Senate Committee on Indian Affairs generally describing the strengths and weaknesses of tribal justice systems.

January 22, 2019 is a Brandeis Monday **No class**

January 24, 2019

Class # 3 History of Federal Indian Policy

Richland & Deer chapter 5, “The history of Federal Indian Policy and changes to Tribal governments.”

Fletcher, chapter 2


January 29-31

Class #4 Introduction to Federal Indian law

Richland & Deer chapter 9, “An introduction to balancing Tribal legal heritage and Anglo-American law.”

  *Johnson v M'Intosh* (1823) (available on Latte)

  *Cherokee Nation v Georgia* (1831) (on Latte)

  *Worcester v Georgia* (1832) (on Latte)


Classes # 5 : Tribal criminal jurisdiction

Richland & Deer chapter 11, “Criminal and civil violations in Tribal legal tradition”
chapter 12, “Tribal criminal jurisdiction.”

February 5, 2019
Class # 6 : Tribal Criminal Jurisdiction (continued)
Movie, “Tribal justice” (2017)

February 7
Class # 7: Criminal Law and Procedure
Fletcher, chapter 7
Assignment due at the beginning of class: Draft a short memo to your tribal client explaining written consent by non-Indians to tribal criminal prosecution means, and whether it will pass federal constitutional muster

February 12
Class # 8 Domestic violence and sexual assault in Indian country
Erdrich, The round house (2013) (excerpt on Latte)
Casselman, Injustice in Indian Country: Jurisdiction, American law and sexual violence against Native women (2016)(excerpt on Latte)
The Violence Against Women Act Amendments (VAWA) of 2013(excerpt on Latte)

February 14
Class ## 9-10: Tribal civil jurisdiction

Richland & Deer, chapter 13, “Tribal civil jurisdiction”


Excerpt *Samantha Bee’s Full Frontal* (2016)

**Dollar General v. Mississippi Band of Choctaw Indians** (5th Circuit 2014)

**Dollar General v. Mississippi Band of Choctaw Indians** (2016) Supreme Courts oral arguments

**February 18-22:** Midterm Recess No Class

**Assignment Due February 26:** write the “missing” Supreme Court Decision in *Dollar General* as a Supreme Court Justice of your choice.

**February 26-28 2019**

Tribal Civil Jurisdiction (continued)

In class exercise

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Class # 11: The Indian Civil Rights Act (ICRA) of 1968

Richland & Deer, chapters 19-20

**Santa Clara Pueblo v Martinez** (1978)(on Latte)

**March 5, 2019**

**Assignment due at beginning of class:** Draft a short memo justifying or opposing the banishment of a party who has published several letters to the editor in a local paper, each of which characterized a tribe and its members in increasingly derogatory manner (1-3 pages) defending the legal grounds for the substance of banishment and the process the government took to get there.
Assume that the tribe does not have a written constitution, but has adopted resolutions in the past agreeing to comply with the Indian Civil Rights Act.

March 7-12

Class # 12 and # 13 – Tribal Constitutions, membership and elections

Richland & Deer, chapter 2, “Studying Tribal law and contemporary Tribal legal documents”

Chapter 14, “Tribal kinship and the law”

Fletcher, chapters 3-5.

Fletcher, chapter 4

Fletcher, chapter 5

March 14 2019

Assignment due at beginning of class: Draft an amendment to either an enrollment or disenrollment ordinance or constitutional provision

Class #14 – Civil Rights (continued)

Fletcher, chapter 6

Richland & Deer, chapter 21

March 19

Class 15 (Date tentative) An indigenous perspective on, and tour of, the Brandeis campus with representatives from the Mattakeeset tribe.

Readings on Latte

March 21

Class #15 – Domestic Relations
Assignment due at beginning of class: Draft a marriage equality ordinance for a tribe of your choice.

March 26, 2019

Class #16 The Indian Child Welfare Act (ICWA)

Richland & Deer, chapters 15-17

Adoptive Couple v Baby Girl (2013)(on Latte)

March 28, 2019

Class #17 – Property

Fletcher, chapter 9


*Plains Commerce Bank v Long* (2008)(on Latte)

Assignment due at beginning of class: Draft a short memo to a tribal client on whether the tribe has jurisdiction over tribal member lands outside of recognized reservation boundaries.

April 2, 2019

Class 18 UNDRIP and International Law

The UNDRIP (on Latte)


Chief Ted Moses, “Invoking international law “(on Latte)

Battiste and Henderson, “Protecting Indigenous knowledge and heritage: A global challenge”

Kymlicka, “Theorizing Indigenous rights” (on Latte)
Movie, *Crude* (excerpt)

April 4, 2019

Class #19 – Torts and Contracts

Fletcher, chapter 11

Assignment due at the beginning of class: Write a short memo to a Tribal court judge on the legal authority of the Tribe to use tort remedies against off-reservation doctors or drug companies to address a prescription pain killer problem on the reservation.

– Contracts

Fletcher, chapter 10

April 9-11

Assignment due at beginning of class: You are the tribe’s attorney general. The tribe is hiring a highly sought-after candidate, who is non-Indian for a position as law clerk to the tribal court. Present him or her with a written employment contract. Include provisions on governing law, dispute resolution, and limited waivers of immunity

Class # 20 Cultural [Re]Appropriation: exploring issues of intellectual property involved in cultural production, reproduction, appropriation, and repatriation, with regard to sacred objects, arts, crafts, and literature.

Rennard Strickland, chapters, Tonto's Revenge (excerpt on Latte)

Indian Arts and Crafts Act materials (on Latte):

Dennis Fox, "Indian Arts and Crafts Act: Point"
Kay Walkingstick, "Indian Arts and Crafts Act: Counterpoint"

Native American Graves Protection and Repatriation Act (NAGPRA)

Indian Arts and Crafts Act: Cause of action for misrepresentation of Indian produced goods


Class # 21: (Date tentative) Tribal cultural heritage and appropriation (cont.) with a visit from indigenous community artists.

Readings on Latte

Tribal Economies

Fletcher, chapter 14

Mowhawk, “Indian economic development: An evolving concept of sovereignty” (excerpt on Latte)

Cornell and Kalt: “Reloading the dice: Improving the chances for economic development on American Indian reservations.”(on Latte).

April 16, 2019

Class # 22: The re-development of Indigenous legal systems

Richland & Deer, chapters 23 and 24.

Fletcher v U.S., (10th Cir. 1997) (on Latte)

Zuni-Cruz, “Tribal law as Indigenous social reality and separate consciousness” (on Latte)

Zion and Yazzie, “Indigenous law in North America in the Wake of Conquest” (on Latte)

Indigenous dispute resolution: Introduction to Peacemaking

Richland & Deer, chapters 25 and 26

“Peacemaking and the Tsuu T’ina Court” (on Latte)
A selection of two of the following
Porter, “Strengthening Tribal sovereignty through Peacemaking” (Latte)
Costello, “Walking together in a good way: Indian Peacemaker courts in Michigan” (on Latte)
Ziwicki, “Circle of Justice is national role model” (on Latte)
Assignment Mock peacemaker court proceedings.
Class #24 Mock Peacemaking session (in class)

April 19-26 Passover Recess No class

April 30, 2019
Class 26 Native American Advocacy

Films: Awake, Trudell or Tentative viewing of film Dawnland with the film's directors.

Wilkinson, Blood Struggle (excerpt on Latte).
Harjo, “In defense of Native sovereignty” (on Latte)
Hobbes, “The Indian problem? We behave too well) (on Latte)
Smith, “Why not a Native American Tribal Lawyering School?” (on Latte)

This is the last class of the semester: Thursday May 2, 2019 is a Brandeis Friday (no class).

Assessment: In addition to class participation, assessment of student learning is based on several short papers arising out of, or in anticipation of, participation in class exercises and a final class presentation (with the possibility of transforming it into a group project depending on student interest and subject-matter compatibility). A take-home final examination might be assigned to assess learning through application of conflicting themes developed during the course or a single, term-long original research project may be assigned, means of performance at each student's choice, for students to explore particular areas of interest. We will discuss and decide upon assessment vehicles at the first meeting.

Other optional source materials


Mark Stevens, "Chief Joseph's Revenge" from The New Yorker, August 8, 1994, pp. 26-33.


Elizabeth Cook-Lynn, "A Centennial Minute from Indian Country; or Lessons in Christianizing the Aboriginal Peoples of America from the Example of Bishop William Hobart Hare," from Why I Can't Read Wallace Stegner and other essays (Madison: University of Wisconsin, 1996), pp. 41-59.


Steven T. Newcomb, Pagans in the Promised Land (Eugene, OR: Indigenous Law Institute, 1995)


Johnson v. McIntosh, 5 L.Ed. 681 (1823)

Cherokee Nation v. Georgia, 8 L.Ed. 25 (1831)

Worcester v. Georgia, 8 L.Ed. 483 (1832)

Louis Filler and Allen Guttmann, selections, 15 pp., from The Removal Of The Cherokee Nation [Boston: Heath (1962)].

Horace Greeley, "Georgia and the Indians," from The American Conflict [Hartford: O. D. Case & Company (1864)].


Wilfred Pelletier, Two Articles (Toronto: Institute for Indian Studies, Rochdale College, [196?]).


