Michigan Law Review

Volume 94 | Issue 6

1996

An "Age of [Im]Possibility": Rhetoric, Welfare Reform, and Poverty

Lisa A. Crooms

Howard University School of Law

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Law and Society Commons](#), and the [Social Welfare Law Commons](#)

Recommended Citation

Lisa A. Crooms, *An "Age of [Im]Possibility": Rhetoric, Welfare Reform, and Poverty*, 94 MICH. L. REV. 1953 (1996).

Available at: <https://repository.law.umich.edu/mlr/vol94/iss6/25>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

AN "AGE OF [IM]POSSIBILITY": RHETORIC, WELFARE REFORM, AND POVERTY

Lisa A. Crooms*

THE POVERTY OF WELFARE REFORM. By Joel F. Handler. New Haven: Yale University Press. 1995. Pp. ix, 177. \$12.

LIVING ON THE EDGE: THE REALITIES OF WELFARE IN AMERICA. By Mark Robert Rank. New York: Columbia University Press. 1994. Pp. xii, 266. \$14.

"[P]erhaps most important, we are gaining ground in restoring fundamental values. The crime rate, the welfare and food stamp rolls, the poverty rate and the teen pregnancy rate are all down. And as they go down, prospects for America's future go up. We live in an age of possibility."¹

On January 23, 1996, President Bill Clinton so delivered his fourth State of the Union address. In it, he defined "our first challenge: to cherish our children and strengthen the American family."² Clinton continued: "For too long our welfare system has undermined the values of family and work instead of supporting them . . . I challenge people on welfare to make the most of this opportunity for independence. And I challenge American businesses to give people on welfare the chance."³

Clinton's remarks illustrate how the current bipartisan discourse about welfare reform frames the issue of poverty as one of moral failure and personal irresponsibility fueled by the financial incentives of public assistance.⁴ Those who view poverty in this way believe that the social contract imposes on members of society a duty to "contribute . . . by supporting themselves and their families if they can" (Handler, p. 3), and they see one's ability to fulfill this

* Visiting Associate Professor, Howard University School of Law. B.A. 1984, Howard University; J.D. 1991, University of Michigan. — Ed.

1. President Bill Clinton, State of the Union Address (Jan. 23, 1996), *reprinted in* N.Y. TIMES, Jan. 24, 1996, at A14.

2. *Id.* See generally Alison Mitchell, *Clinton Offers Challenge to Nation, Declaring, 'Era of Big Government Is Over,'* N.Y. TIMES, Jan. 24, 1996, at A1.

3. Clinton, *supra* note 1.

4. See Rank, pp. 71-72 (noting that "many contend that because benefits increase with the size of a household, women on welfare have a financial incentive to bear more children"); see also Michael Wines, 'Not My Job.' 'Not Our Job.' *So Whose Job Is It?*, N.Y. TIMES, Apr. 9, 1995, § 4 (Week in Review), at 1, 3.

duty largely as a matter of individual effort.⁵ For the able-bodied, failure to discharge this duty raises an irrebuttable presumption of personal and civic irresponsibility that strips them of their right to human dignity.⁶

This term of the social contract, the defining conundrum of U.S. social welfare policy, rests between two conflicting sets of principles. On the one hand, individualism, opportunity, and liberty lie at the center of the liberal foundation of U.S. national identity. "Throughout . . . history, Americans have enthusiastically embraced individualism [and the c]losely associated . . . concept of self-reliance."⁷ These ideas are coupled with "the widely shared belief that the United States is a land where opportunities exist for all who are willing to work for them and that individual virtue and talent can overshadow the constraints of class, race or ethnicity" (Rank, p. 200). On the other hand, real need and poverty, most starkly evidenced by the severe maldistribution of wealth, exist in this regime that legally protects the rights of property holders while affording no parallel legal right to fulfillment of one's basic needs.⁸

5. Republicans and Democrats part company at this point. Although both appear interested in implementing an authoritarian agenda that penalizes the poor for their perceived sloth and immorality, they disagree about how best to encourage those on AFDC to make an effort to support their families. This is illustrated by their proposals for moving AFDC recipients from welfare to waged work as well as the assumptions on which those proposals are based. On the one hand, Democrats tend to support education and job-training programs because they believe that the poor are entitled to an equal opportunity to compete in the labor market. By emphasizing government-subsidized, human capital development, the Democrats both acknowledge that many on welfare lack basic skills and create a government obligation to provide recipients with training in order to realize the goal of equal opportunity. On the other hand, Republicans tend to prioritize immediate job placement based on an apparent belief that welfare recipients have all the marketable skills they need to secure employment. Implicit in this approach is the assumption that welfare recipients succumb to the financial incentives of cash benefits and depend on the program because they lack the will to do otherwise. See Handler, pp. 110-38 (discussing the "sharp divisions within Congress, the administration, the states and the public over many of the reform proposals"); see also Rank, pp. 25-35 (discussing various explanations or theories of poverty and welfare reciprocity).

6. Rank's recounting of a story about a member of the Milwaukee County Board of Supervisors illustrates this conclusion. The board member "proposed that the county government begin selling the organs of dead welfare recipients" regardless of consent because "[i]f they can't help society while they're alive, maybe they can help it while they're dead." Rank, p. 2; see also Rank, p. 39 (noting that most Americans view welfare recipients as failing in their civic and social duty, a "highly stigmatized behavior").

7. Rank, p. 200; see also Charles A. Reich, *The Liberty Impact of the New Property*, 31 WM. & MARY L. REV. 295, 295 (1990) (identifying "liberty, democracy, living under law, equality and owning property in an individual way" as "democratic ideals").

8. See, e.g., Louis Henkin, *Economic Rights Under the United States Constitution*, 32 COLUM. J. TRANSNAT'L L. 97 (1994); Wayne McCormack, *Economic Substantive Due Process and the Right of Livelihood*, 82 KY. L.J. 397 (1994); Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265; see also Carrie E. Johnson, *Policy and Prejudice*, 10 BERKELEY WOMEN'S L.J. 134, 136 (1995) ("The argument for limited federal welfare intervention seems to suggest that economic security is not a citizenship right for which the government is responsible, but rather an ideal for which individual citizens must strive."); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94

Within this context, the poor and images of poverty control the behavior of the nonpoor and make them honor the terms of the social contract (Handler, p. 148).

Against this backdrop social welfare policy makers construct proposals purportedly designed to respond to real need and suffering without threatening the fundamental values of work, family, and social order (Handler, p. 2). To them, public assistance must satisfy three requirements: (1) it must not encourage able-bodied workers, particularly those in low-wage jobs, to abandon their employment;⁹ (2) it must not encourage recipients to abandon proper gender roles;¹⁰ and (3) it must not facilitate the anarchy and lawlessness that lie in the wake of the loss of social order (Handler, p. 2).

Whether these requirements have anything to do with eradicating poverty depends entirely on one's views about poverty and its causes.¹¹ For those who see poverty as a question of moral failure,

YALE L.J. 1 (1984) (describing a social vision which compels, *inter alia*, alleviating misery through "adequate and not merely minimal allotments of food, clothing, medical care, shelter"); Bob Herbert, *Asleep at the Revolution*, N.Y. TIMES, Nov. 6, 1995, at A17 (characterizing federal moves to cut social welfare programs as "abandoning its responsibility to provide even the most minimal level of assistance to Americans left without any other resources").

9. According to some commentators, social welfare policy mainly functions to maintain labor discipline among low-waged workers. See, e.g., FRANCES A. FOX PIVEN & RICHARD CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 365-97 (updated ed. 1993). As Jack Rothman recently noted, welfare grants remain at low levels in order to "pressure people to drop out of the program and [to] join the ranks of cheap labor . . . who can . . . be hired dirt-cheap to work for the big winners in business and industry." Jack Rothman, *Tinkering Won't Work on Welfare*, L.A. TIMES, Jan. 18, 1996, at B9; see also PIVEN & CLOWARD, *supra*, at 372 (noting that "[b]y 1990, the maximum benefit was less than half the poverty level in a majority of the states, and less than a third of that level in a quarter of the states").

10. I refer to the gender roles that govern family formation and the division of labor in traditional, two-parent families. Women who accept this role must limit their childbearing to the confines of the traditional two-parent family. Men in turn must assume primary responsibility for the financial support of their domestic, familial dependents.

Since the inception of the Aid to Families with Dependent Children (AFDC) program, the policymakers have worked to avoid the immorality commonly associated with single motherhood. As Handler notes, the Aid to Dependent Children (ADC) program, which preceded AFDC, came into being at "the moment of the full flowering of the patriarchal domestic code." Predictably, many who "feared that aid to single mothers . . . would weaken the responsibility of fathers and encourage single parenthood" opposed it. Handler, p. 24. The eventual compromise program provided aid to "children of worthy character, suffering from temporary misfortune, and children of reasonably efficient and deserving mothers." Handler, p. 24 (footnotes omitted). It purportedly aimed to permit these mothers to focus on their primary, domestic caretaking responsibilities, undistracted by waged work. The limits on the pool of eligible recipients, however, undermined its ability to remedy poverty. The restrictions denied benefits to all poor families except those headed by morally "fit and proper" single mothers. Handler, p. 24. The resultant recipient population was virtually all white and widowed. See Handler, p. 25. See generally Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 24-51 (1995) (discussing the stigmatization of single parenthood).

11. Many scholars have discussed the impact of different perspectives in various contexts. For example, Vincene Verdun notes that both the proponents and opponents of reparations for black people "approach the issue . . . from two distinct perspectives that are based on

placing such requirements on welfare recipients seems completely warranted.¹² For those who see it as a combination of structural flaws and individual behavior, focusing on moral failure misses the point.¹³ This essay considers two books about the current social welfare policy discourse which adopt the latter view of poverty and criticize the former. Joel F. Handler¹⁴ and Mark Robert Rank¹⁵ pose similar questions in order to expose the illusory "logic" of the current welfare reform rhetoric. They ask, "Why [is] there so much anger [against welfare recipients] with so little evidence to justify it?"¹⁶ "Why does society cling to the basic assumptions that underlie welfare policy when it is so clear that they do not comport with reality? . . . What is this incessant need to blame the victim?" (Handler, p. 8).

Both books address these questions, but they do so from different perspectives. Handler criticizes the current Democratic and Republican proposals to reform the welfare system. He argues that these proposals affirm "majoritarian values through the creation of deviants" and hold "[t]he poor . . . hostage to make sure that the rest of us behave" (Handler, p. 9). Rank functions as ethnographer, providing a true sense of welfare recipients and proving that they are "not that different from you or me — no better, no worse."¹⁷

differences in the beliefs imbedded in the perception of each group." Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 610 (1993); see also KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 158-91 (1984) (discussing the different belief structures or "world views" of opponents and proponents of full reproductive freedom for women); Kim Lane Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2083-84 (1989) (describing the "perceptual fault lines [or] different descriptions of events that grow from different experiences and different resonances" at work in legal storytelling); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 410-11 (1987) (telling a story about how a difference in perceptions between herself and her sister led one to see a road as black while the other saw it as purple).

12. Such individuals explain poverty and welfare dependency as a function of individual attitudes, motivation, or culture. Rank, pp. 25-29.

13. Rank recognizes four structural theories of poverty: (1) Marxism; (2) dual labor-market theory; (3) functionalism; and (4) the "Big Brother" theory. See Rank, pp. 30-34.

14. Richard C. Maxwell Professor of Law at the University of California at Los Angeles School of Law.

15. Associate Professor in the George Warren Brown School of Social Work at Washington University, St. Louis.

16. Rank, p. 1. Rank begins his book with the following story about his conversation with an individual irritated by an editorial Rank wrote about the myths of welfare reform:

How in the world could I write such nonsense when everyone knew that most welfare recipients were black, on the dole for years at a time, living the good life, and so on. "But how," I asked, "do you know that?" "Just look around!" he replied. He had no need for the data I used to argue my points; for him it was obvious that people on welfare were good-for-nothing parasites.

Rank, p. 1.

17. Rank, p. 4. According to Rank, this is "[p]erhaps the most salient theme to emerge from [his] study." Rank, p. 172. For other ethnographic studies of poor populations, see JONATHAN KOZOL, *AMAZING GRACE: THE LIVES OF CHILDREN AND THE CONSCIENCE OF A*

He sets his sights on the much-maligned welfare queen, determined to challenge her primacy in mainstream social welfare policy discourse.¹⁸ Read together, these authors provide an interlocking explanation and critique of the current mainstream social welfare policy proposals.¹⁹

The remainder of this essay is divided into five parts. Part I considers the marriage of morality and law within the context of social welfare policy, in general, and the Aid to Families with Dependent Children (AFDC) program, in particular. Part II discusses Handler's views of the welfare reform "Consensus" and "the culture of poverty" thesis it embraces as evidenced by the assumptions on which the Consensus is based. Part III focuses on the Consensus' "work versus welfare" paradigm and seeks to expose the myths on which this paradigm relies. These myths include not only that welfare recipients do not work for wages but also that if welfare recipients are forced to work for wages, then their economic well-being will be enhanced significantly as illustrated by "successful" welfare-to-work programs as implemented by states such as California. Part IV analyzes both the Consensus' desire to modify the behavior of welfare recipients and Rank's claims that such a desire is unwarranted because, contrary to popular belief, the poor are no different from the non-poor. Finally, it concludes with some thoughts about the stigma of negritude and its impact on the apparent "logic" of the Consensus, its assumptions and its proposed welfare reforms.

I. MORALITY, LAW, AND WELFARE

Social welfare policy arises at the intersection of morality with law and policy — the point at which both Handler and Rank center

NATION (1995); ELLIOT LIEBOW, TALLY'S CORNER: A STUDY OF NEGRO STREETCORNER MEN (1967).

18. Rank asserts that "the common stereotypes surrounding welfare" support the belief that "most recipients are minorit[y women who are] on welfare . . . for long periods of time [who] have more children to get higher welfare payments." Rank, p. 142; *see also* Rank, p. 2 (describing the stereotypical welfare recipient as a "good-for-nothing freeloader who drives a Cadillac, uses Food Stamps to buy sirloin steak, or watches soap operas all day").

19. They define the mainstream according to their shared view of the debate about welfare reform — that is, as occurring in the largely partisan and ideological universe occupied by liberal Democrats and conservative Republicans. I concur with this definition because it excludes radical outliers. *Cf.* MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* 79-123 (1989) (discussing the debate about welfare in terms that include radicals); Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. MIAMI L. REV. 999, 1020-25 (1994) (discussing poverty lawyers and their lawyering in terms of liberal legalists, radicals, and critics); Lisa A. Crooms, *Stepping into the Projects: Lawmaking, Storytelling and Practicing the Politics of Identification*, 1 MICH. J. RACE & L. 1 (1996) (defining the mainstream in terms that, while not synonymous with white, recognize the central role of the ideology of white supremacy to the mainstream's principles).

their analyses of the current mainstream welfare-reform debate.²⁰ Focusing on the AFDC²¹ program, Handler characterizes the mainstream's proposals to reform the program as a series of "right-flanking" moves by political liberals and conservatives at both the national and the state level out of which emerged bipartisan consensus.²² Both authors recognize the public ambivalence towards AFDC, an ambivalence that reflects the perceived immorality of AFDC recipients and their apparent unwillingness to abide by the social norms of mainstream life (Handler, pp. 90-94). This ambivalence leads to policy initiatives designed to make individuals more responsible but that pay little attention to the structural forces that prevent the poor from escaping poverty.²³

Handler predicts that the current round of reforms, the latest installment in an ongoing struggle, will meet a fate no different from that of its misguided and ill-conceived predecessors (Handler, p. 112). The mainstream's discourse reiterates the same themes, issues, and choices raised over the centuries as societies have considered their obligations to care for those members unable to provide for their own needs.²⁴ In most instances the resolution of this issue becomes inextricably linked to morality as societies seek to uphold the obligation of each man to support himself and his family. This

20. As Handler notes, "although contemporary welfare policies are often described in so-called objective terms — labor markets, wage rates, incentives, demographics — they are heavily laden with moral judgments." Handler, p. 30.

21. 42 U.S.C. §§ 601-687 (1988). AFDC is "a \$23 billion federal-state program supporting 14.5 million people, 9.5 million of them children. It is supplemented by food stamps, public housing, child care and nutrition programs." *Washington Can't Wash Its Hands of Welfare*, USA TODAY, Aug. 1, 1995, at 10A.

22. See Handler, p. 3. Despite the intense bi-partisanship on the surface of the mainstream's discourse, members of both parties have recognized the consensus to which Handler refers. See Pamela M. Prah, *Clinton Vetoes Welfare Package; Lawmakers Look to 1996 to Try Again*, Daily Labor Report (BNA) 7 (Jan. 11, 1996) (reporting Republican criticism of Clinton as "a typical Democrat, a very liberal protector of the nation's failed welfare system"); *Welfare Farewell*, THE NATION, 809, 811-12 (1995) (detailing current partisan wrangling over congressional welfare reform proposals). For example, President Clinton recently acknowledged the Consensus when he stated, "Congress and I are near agreement on sweeping welfare reform. We agree on time limits, tough work requirements and the toughest possible child-support enforcement." Clinton, *supra* note 1. Michigan Governor John Engler, one of the most visible Republicans at the forefront of welfare reform, now supports Clinton's proposals to provide to "poor people services like child care and transportation while requiring them to work." Jason DeParle, *Aid from an Enemy of the Welfare State*, N.Y. TIMES, Jan. 28, 1996, § 4 (Week in Review), at 4. To many, the Consensus is lamentable. Handler, for one, decries the dawn of the "new" Democrat. Handler, pp. 37-38; see, e.g., Dirk Johnson, *With Popular Issues, Clinton Strikes Chord*, N.Y. TIMES, Jan. 25, 1996, at A18 (quoting Michael Bellows, a social worker from Chicago, expressing his concern that "Clinton no longer represents true Democratic ideology . . . [b]ut for liberals like me, he's all we've got").

23. See, e.g., Rothman, *supra* note 9.

24. Handler marks the passage of England's Statute of Labourers in 1349 as the beginning of social security. See Handler, chapter 1. Rank marks it with the Elizabethan Poor Law of 1601 which was the start of outdoor, that is, not institutionalized, relief. See Rank, chapter 2.

link has grown especially strong in the United States, where "the notion that there are no socioeconomic systemic flaws that produce poverty" is "[f]undamental to our cultural order."²⁵ Indeed, the "enthusiastic[] celebrat[ion of] . . . the Horatio Algers, the Abraham Lincolns, or the Clarence Thomases of this country" seems crucial to maintaining our collective faith in "the American dream . . . of opportunity" (Rank, pp. 200-01). In this context "individual flaws merely produce the appearance of system failure," and people become scapegoats for conditions and circumstances largely beyond their control.²⁶ Those who do not succeed are thought to deserve the punitive measures designed to make them conform (Rank, p. 171). Their apparent immorality permits policy makers to propose draconian and arguably illegal measures in the name of reforming their "deviant" and intolerable ways. Handler observes, however, that despite these efforts to reform welfare, "for the vast majority of [AFDC recipients] life will go on much as before, unless dramatic changes take place in America's labor markets and the larger environment."²⁷

II. HANDLER'S CONSENSUS AND THE "CULTURE OF POVERTY"

Handler's work confronts four "key assumptions" about the nature of poverty and its cures: (1) welfare dependency is a moral issue; (2) welfare destroys the work ethic; (3) welfare should modify individual behavior to comport with mainstream norms; and (4) reform efforts should be directed at adults (Handler, p. 4). For Handler, these assumptions best capture the apparent "logic" of the Consensus position as well as its false dichotomy between work and welfare.²⁸ The Consensus not only frames the issue as one of welfare versus work but also diagnoses a "culture of poverty" that drives the poor.²⁹

25. Larry Catá Backer, *Welfare Reform at the Limit: The Futility of "Ending Welfare as We Know It,"* 30 HARV. C.R.-C.L. L. REV. 339, 341 (1995); see also Rank, p. 200.

26. Backer, *supra* note 25, at 341.

27. Handler, p. 112; see also Rothman, *supra* note 9.

28. Chapter 3 of Handler's book specifically addresses the problems associated with the false dichotomy between welfare and work.

29. Oscar Lewis developed the culture-of-poverty thesis in a series of works based on the experiences of poor Puerto Ricans. This thesis carried with it radical implications because Lewis called for efforts to organize poor Latinos to overcome the mindset that they developed as a coping mechanism for seemingly inevitable poverty. See, e.g., KATZ, *supra* note 19, at 16-19. In the 1960s, social conservatives misappropriated Lewis's explanation of poverty and adapted it to their agenda. Lewis's theory allowed them to blame the poor for their pathology of poverty. See *id.* at 19-35; cf. Rank, p. 175. Lewis apparently appreciated the potential for such misappropriation. He warned "that my findings might be misinterpreted or used to justify prejudices and negative stereotypes . . . which, unfortunately, are still held by some Americans." KATZ, *supra* note 19, at 19 (quoting OSCAR LEWIS, *LAVIDA: A PUERTO RICAN FAMILY IN THE CULTURE OF POVERTY — SAN JUAN AND NEW YORK* xiii (1966)).

The culture-of-poverty theory, which preoccupies the current mainstream discourse, views the black ghetto underclass as the metaphor for all the problems of welfare. Specifically, the image of the black single mother living in a devastated inner-city community figures prominently in the mainstream welfare reform discourse.³⁰ As Rank comments, "Welfare dependency is viewed as part of a cultural process in which children learn from their parents and from their surrounding environment that relying on welfare, bearing children out of wedlock, dropping out of school, and so on, are acceptable behaviors" (Rank, p. 175). Relying heavily on this theory, the Consensus appears to blame the mere receipt of AFDC benefits for crime, juvenile delinquency, substance abuse, AIDS, and the other social ills most common to underclass communities.³¹ Such imagery makes the explicit identification of the race of the poor unnecessary; poverty in its most heinous form is presumptively black (Handler, pp. 3-4).

Both Handler and Rank criticize the bipartisan Consensus for its failure to frame the issue correctly. As Handler sees it, the problems of underclass communities follow from poverty rather than welfare. In his view, the eradication of poverty requires more than human capital development and equal opportunity; an explanation of poverty must go beyond individual irresponsibility and moral failure.³² Rather, that explanation requires an understanding of what Rank calls "structural vulnerability" (Rank, p. 180). Structural vulnerability measures the structural impact of both human capital deficiencies and irrational market barriers, such as discrimination on the basis of gender, on the class mobility of the least advantaged members of society.³³ It seeks to avoid the problems associated with other theories that ignore "the important influence of larger factors that lie beyond people's immediate control[, without] suggest[ing] that individual characteristics are irrelevant" (Rank, p. 171). As Rank explains, individual characteristics are "simply best understood within a wider context" (Rank, p. 171).

30. Handler, pp. 35-36; *see also* Rank, pp. 27-30 (discussing the cultural explanations of poverty embraced by Daniel Patrick Moynihan and William Julius Wilson in which inner-city black communities are central).

31. Handler, p. 3; *see generally* Rank, pp. 58-61 (describing the physical consequences of poverty such as disease, crime, and acute health problems).

32. As Ruth Margaret Buchanan observes, the "debate over whether poor people are lazy and immoral or merely lack social opportunities is an example of how complex social dilemmas are misleadingly reduced to a simple question of structural versus individual responsibility." Buchanan, *supra* note 19, at 1008. In chapter 3, Handler argues that the problem is not one of welfare versus work but one of poverty which persists even for those who work. He concludes that the focus on welfare is misguided and that instead we must explore what prevents some workers from earning a living wage. Handler, pp. 39-44.

33. Rank, pp. 176-85. Like Rank's structural vulnerability theory, Handler's analysis of poverty identifies both structural problems and human capital deficiencies as significant. Handler, pp. 35-39.

Handler views poverty and welfare dependency as outcomes of the deterioration of family income between 1973 and 1990 (Handler, pp. 34-35). He explains how this deterioration has led to an increase in the numbers of both multiple job holders and working household members, all of whom strive to support a family.³⁴ He describes how it has affected family structure by increasing the number of households headed by women who hold the primary responsibility for the financial support of their families.³⁵ Consequently, more women have entered the labor market, which is hampered by irrational barriers such as gender discrimination.³⁶ Indeed, "[m]ost women are . . . still segregated in low-paying, traditionally female jobs in clerical, sales and service occupations."³⁷ As such, factors beyond their control severely limit their earning potential. That is, "low wages are linked to the skills and jobs that women usually hold."³⁸ Although low income does not determine family behavior, poverty has proven the "most powerful predictor of . . . harmful behavioral consequences" (Handler, p. 36). This explains why female-headed families disproportionately fill the ranks of the poor and play a crucial role in the rhetoric of welfare reform.

III. WORK VERSUS WELFARE

Handler concerns himself primarily with the link between waged work and welfare in the current mainstream social welfare discourse. He concludes that neither mandatory waged work proposals nor time-limited benefits will succeed for the simple reason that they fail to address the causes of poverty. According to Handler, this society can remedy poverty only by creating jobs that

34. Handler, p. 35; *see also* Rank, pp. 43-44 (describing the conditions that lead married couples to welfare); FAMILIES & WORK INST., WOMEN: THE NEW PROVIDERS 31 (1995) (observing that, although "the notion persists that women's wages are only supplementary and provide discretionary income . . . the economic viability of many households is dependent on women's earnings").

35. Handler, p. 35; *see also* Rank, pp. 42-43, 79 (discussing the effects of poverty on family structures and the strains poverty puts on marriages, many of which dissolve).

36. *See* Handler, p. 35; Rank, pp. 42-43; Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659, 1659 (1991) (discussing sex discrimination in employment and gender-based wage differentials as "one aspect of the systemic subordination of women and people of color to whites and men, particularly white men, under rules, practices and standards made by white men and preserving their power"). *See generally* Barbara Crossette, *U.N. Documents Inequities for Women as World Forum Nears*, N.Y. TIMES, Aug. 18, 1995, at A3 (noting that despite the halving of "gender gaps in human capabilities" over the last 20 years, "women overwhelmingly still lack access to economic and political opportunities"); Rothman, *supra* note 9 (discussing poverty in the context of factors such as discrimination).

37. WOMEN'S BUREAU, U.S. DEPT. OF LABOR, WORKING WOMEN COUNT!: A REPORT TO THE NATION 23 (1994).

38. *Id.*

pay living wages.³⁹ Until it does so, public assistance will remain a necessity.⁴⁰

As Handler notes, to assume that AFDC recipients do not work for wages presupposes that AFDC pays recipients enough to meet their basic needs. This, however, ignores the fact that the program exists to reduce the misery associated with poverty rather than to remedy it.⁴¹ As Rank observes:

[p]erhaps most apparent when one listens to welfare recipients describe their daily lives and routines is the constant economic struggle that they face. This includes difficulties paying monthly bills, not having enough food, worrying about health care costs, and so on. The amount of income received each month is simply insufficient to cover all these necessary expenses.⁴²

This struggle presents a significant dilemma for AFDC recipients. On the one hand, if they work and report their income, their AFDC checks will shrink. Reporting thus defeats the purpose of working — that is, to increase the amount of money with which to meet the family's basic needs.⁴³ As Kelly McGrath explained,

There's people that [work] and get paid cash and don't report it. And they probably don't report that their family members are helping 'em. They wouldn't say, "Yeah my mom gave me a hundred dollars last month." I mean they just wouldn't do that because it's hard enough

39. Any program to move people off of public assistance must create jobs. Unfortunately, those with only a high school diploma face dim prospects. According to a recent study by the MacArthur Foundation, an estimated 140,000 jobs will be available in the Chicago area in the next ten years. One-half of those jobs will require a high school education but will not pay a living wage. See Thomas Geoghegan, *The State of the Worker*, N.Y. TIMES, Jan. 25, 1996, at A21.

40. Although Handler makes some passing comments about the possibility of reconceptualizing work to include domestic caretaking, he apparently rejects this idea. See Handler, pp. 32-33. At least one of Rank's interviewees appeared to support the idea of domestic caretaking as an economically valuable activity when she noted:

I mean if you got a family, what're you talkin' about lazy?! A woman is on [welfare] because she's got some children. And if she's at home and she's doin' for her family, how the hell is she lazy? ... [T]o me that's not laziness. If she's doing a good job at that ... that's not laziness!

Rank, pp. 122-23.

41. Susan Mayer & Christopher Jencks, *War on Poverty: No Apologies, Please*, N.Y. TIMES, Nov. 9, 1995, at A29.

42. Rank, p. 51; see also Kathryn Edin & Christopher Jencks, *Reforming Welfare*, in RE-THINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS 204 (Christopher Jencks ed., 1992).

The story of Mary Summers, a fifty-one-year-old divorced mother of two teenage daughters, makes these difficulties all too real. Summers

receives \$544 a month from AFDC and \$106 a month [in] Food Stamps. After paying \$280 for rent (which includes heat and electricity), she and her [two] daughters are left with \$370 a month (including Food Stamps) to live on. This comes to approximately \$12 a day, or \$4 per family member.

Rank, p. 52. Summers does not receive AFDC because she prefers welfare to wages; rather, "she ha[s] been unable to find work for two years." Rank, p. 52; see also Rank, pp. 54-56 (describing how recipients make ends meet).

43. Edin & Jencks, *supra* note 42, at 204.

to survive on the aid. When you get extra, you don't want 'em to take it away from you. And that's what they do.⁴⁴

On the other hand, if they work and do not report their income, they increase their ability to make ends meet, albeit at a level below the poverty line. Therefore, "[t]he only way most welfare recipients can make ends meet . . . is to supplement their welfare checks without telling the department."⁴⁵ That is, they must "lie and cheat in order to survive."⁴⁶

Moreover, most of the poor occupy the position esteemed by the mainstream — that is, they work and do not receive AFDC. What the mainstream does not see, at least in the context of welfare reform, is that millions of working people cannot lift themselves out of poverty. As Handler notes, in 1993, the 13.6 million welfare recipients accounted for only about one-third of those living in poverty (Handler, p. 34). Thus, even if the coming reforms achieve their stated objectives and move all AFDC recipients from welfare to work, there is little likelihood that these workers will earn enough to meet their basic needs. As Handler notes, "the real earnings of the less-skilled, less-educated workers have declined substantially since 1973," and the numbers of working poor people have increased in step (Handler, pp. 39-40). He asks, "if the problem is welfare and the vast majority of the poor are working and not on welfare, then what is the problem of work?" (Handler, p. 39). Forced off welfare and into the low-waged jobs for which they qualify, AFDC recipients will confront that "problem of work." Clearly, "requiring welfare recipients to work . . . does little to improve their economic well-being," and the mainstream's reform proposals do little to address the phenomenon (Handler, p. 88).

Finally, as Handler observes, the mainstream political rhetoric seems inconsistent: it advocates both cutting costs as well as the need to provide AFDC recipients with the resources necessary to put them on the path to economic independence.⁴⁷ Rather than address the real financial requirements of the capital-intensive programs needed to remedy the varied and interlocking causes of poverty, Handler contends that the Consensus exaggerates the

44. Rank, p. 119. Ironically, the mainstream fails to recognize that this activity comports with family values. Recipients who rely on relatives often come from close families that "take care of each other if anybody has a problem." Rank, pp. 70-71.

45. Edin & Jencks, *supra* note 42, at 204; *see also* Rank, pp. 169-70 (noting that in spite of the impact of low-waged work on the level of family income, "many on welfare work or eventually will find work").

46. Edin & Jencks, *supra* note 42, at 205.

47. *See* DeParle, *supra* note 22 (noting that "[w]ork programs almost always cost more than sending checks," and that "the financing of the Republicans' . . . bill is sufficiently short that fewer than 15 states will meet their employment goals"); Rothman, *supra* note 9 (characterizing work programs as "invariably more expensive than simply providing welfare payments" and "counter to the . . . aim of creating cheap labor").

moderate success of state demonstration projects and wishes to limit the role of the federal government to encourage more state experimentation.⁴⁸

To underscore this claim, Handler lays out the Consensus' views about the success of California's Greater Avenues to Independence, or "GAIN," program:

[T]he basic idea [behind GAIN] is that all eligible recipients are to participate in programs until they become employed or are off AFDC. Mothers whose children are three years or older are eligible. . . . Recipients undergo orientation and appraisal before they are slotted. Those with work experience, for example, go immediately into job search. Others might go to remedial education. Employment plans are developed for those unable to find jobs, and work-for-relief is provided for those who complete the plan but fail to find a job within ninety days. Work-for-relief can last up to a year, and then the process begins again.⁴⁹

The localized administration of GAIN leads to uneven results across counties. As Handler notes, "because GAIN depends on an extensive network of county services and counties vary in the availability of these services and the willingness and ability of the services to cooperate with welfare departments, there is wide variation in the operation of the program" (Handler, p. 67). Handler concludes that misconceptions about the performance of the GAIN program in one California county guide much of the rhetoric about the potential of mandatory work programs.

To prove his point, Handler analyzed Manpower Development Research Corporation (MDRC) data regarding the program's performance in Riverside, Alameda, and Los Angeles counties. Riverside County, with both rural and urban areas, had a high percentage of AFDC recipients who were minorities without basic education (Handler, p. 68). The Riverside program stressed employment and an inexpensive job search based on a philosophy that "a low-paying entry-level job was better than no job at all and could lead to a better job" (Handler, p. 68). In Alameda County a large proportion of long-term AFDC recipients were African-American inner-city residents, many of whom also lacked a basic education. Alameda's program, however, emphasized "basic education and train-

48. As of August 1995, the Clinton administration had "approved 36 demonstrations in 32 states . . . 23 states require work, 17 limit benefits, 27 have increased earned income AFDC recipients can keep, 14 have strengthened child-support enforcement and 25 stress parental responsibility." *Washington, supra* note 21; see also 42 U.S.C. § 1315(a) (1988) (permitting the Secretary of Health and Human Services to waive certain requirements and thus to allow states to experiment with novel welfare programs); *Beno v. Shalala*, 30 F.3d 1057 (9th Cir. 1994) (holding that § 1315(a) waivers for welfare experiments are subject to judicial review).

49. Handler, pp. 65-66; see also Ann VanDePol & Katherine E. Meiss, *California's GAIN: Greater Avenues or a Narrow Path? The Politics and Policies of Welfare Reform and AFDC Work Programs in the 1980s*, 3 BERKELEY WOMEN'S L.J. 49, 69 (1987).

ing to prepare recipients for higher-paying jobs" (Handler, p. 68). Finally, Los Angeles County held one-third of California's welfare recipients, including a large inner-city, long-term AFDC population. It also contained both the highest percentages of non-English speakers and minorities and the lowest percentage of recipients with recent work experience. Its program enrolled only those "in need of basic education" (Handler, p. 68).

Having discussed the demographics of the three counties as well as the differences between their GAIN programs, Handler compares the performance of the Riverside County program with that of the programs in Alameda and Los Angeles counties. He then examines the performance of Riverside County in terms of its effect on the earnings of program participants. In so doing, Handler exposes the error of relying on the Riverside County experience as "the standard-bearer or model . . . for proposed [national] changes" (Handler, p. 67).

As the MDRC data demonstrate, the Riverside County program outperformed the Alameda and Los Angeles County programs in terms of net cost,⁵⁰ benefit-cost ratios⁵¹ and earnings effect.⁵² But, as MDRC cautioned, the different results across counties suggest that different counties must implement different combinations of strategies. Many social welfare policy pundits, however, appear unwilling to heed MDRC's advice. Instead, they talk as if "the Riverside program could be replicated elsewhere" (Handler, p. 75). They ignore the fact that Florida tried unsuccessfully to implement the Riverside approach statewide in 1987.⁵³ Without an appreciation for the importance of local particularities to program success, federal welfare reform will fail much as Florida did in 1987.

Even if other states and counties could replicate the Riverside County program, the MDRC notes that GAIN "was only moderately successful in moving people off welfare and out of poverty by the end of three years" (Handler, p. 75). As for the earnings effect,

50. The five-year average net cost was less than \$2000 per recipient in Riverside and more than \$5500 in both Alameda and Los Angeles counties. The difference reflected, in large part, the relatively large numbers of long-term recipients in Alameda and Los Angeles counties engaged in education and job-training programs. See Handler, p. 70.

51. While Riverside County experienced a gain of \$2.84 for each \$1 invested, both Alameda and Los Angeles counties experienced losses. See Handler, p. 70.

52. The MDRC data indicate that five of the six counties that participated in the GAIN program experienced an average income effect of \$923 per experimental subject over a five-year period. Riverside County recipients gained the most — \$1900 — while Los Angeles County recipients suffered an average net loss of \$1561 over the same period. See Handler, p. 73.

53. This is not meant to suggest that particular jurisdictions cannot replicate the Riverside program. Indeed, it appears that in another county with demographics similar to those of Riverside County, the program might enjoy the same moderate success.

Riverside County participants increased their income by an average of \$3113 for three years, or approximately \$1037 each year (Handler, p. 69). Thus, their earnings increased an average of \$84 per month, or less than \$20 per week.⁵⁴ Handler interprets the small earnings effect as evidence of the control group's work activities (Handler, p. 70). This conclusion, however, follows only if the control group's reported income included employment income — a highly unlikely condition. Indeed, the Edin and Jencks study on which Handler relies argues that neither the earned income of AFDC recipients nor their employment factor into mainstream social welfare discourse because the vast majority of recipients do not report their additional income.⁵⁵ This flaw, however, does not prove fatal to Handler's analysis. The point remains: the hype about programs such as the Riverside County program finds little support in their actual performance.⁵⁶ Ironically, as Handler notes, the real experiences under GAIN, excluding Riverside County, resemble those under the current federal JOBS program that the Consensus has declared an abysmal failure.⁵⁷

IV. BEHAVIOR MODIFICATION, SAMENESS/DIFFERENCE, AND POWER

In the context of measures designed to modify the behavior of individual AFDC recipients, the Consensus focuses again on state experiments, but its more conservative members do so in order to justify the federal conditions they wish to place on block grants to the states.⁵⁸ Their commitment to such an authoritarian agenda betrays their pledge to end big government and highlights their intention that the federal government control the social behavior of AFDC recipients.

54. See Handler, p. 69. After the reduction in AFDC benefits resulting from recipients' increased earnings, the earnings effect of the program decreases to an average of \$52 per month. See Handler, pp. 69-70.

55. See *supra* notes 43-46 and accompanying text.

56. See Handler, pp. 67-85; see also VanDePol & Meiss, *supra* note 49, at 80-82 (criticizing GAIN as doing little more than pushing AFDC recipients into low-wage jobs and as not increasing their financial resources for their families' basic needs).

57. See Handler, p. 76; see also Mayer & Jencks, *supra* note 41, at A29 (noting that "[m]illions of Americans, including a majority of legislators," believe that social programs do not work).

58. See Handler, pp. 133-35. Both Democrats and Republicans have opposed the strings attached to block grants under the House of Representative's Personal Responsibility Act. Democrats, who oppose block grants, tend to favor increased state and local control through a streamlined version of the current Department of Health and Human Services waiver process. Republicans, especially at the state and local level, support block grants "with virtually no strings attached." See, e.g., DeParle, *supra* note 22; see also Herbert, *supra* note 8, at A17 ("The fundamental principle that our national Government is the protector of last resort is what is at stake as we give . . . block grants to the states and tell them to go ahead and do whatever they want." (quoting Marian Wright Edelman)).

The experiences of the Wisconsin welfare recipients interviewed for Rank's book, from applying for welfare to leaving the rolls, provides additional evidence that the Consensus' current reform proposals are misguided and sure to fail. Rank makes clear that the Consensus' prototype does not represent the entire recipient population but only a small percentage of it.⁵⁹ Accordingly, he views the potential damage from the current reforms as associated with their overbreadth. The Consensus tailored its current reforms after this prototype, which represents very few actual welfare recipients. In Rank's opinion the Consensus should not treat the rest of them like the black, inner-city single mothers with whom it appears most concerned.

Rank's strategy focuses on the "sameness" of the poor. He seems to believe that this approach de-emphasizes the alleged deviance and difference of the poor and underscores the structural vulnerability their poverty represents (Rank, pp. 180-81). He encourages his readers to empathize with public assistance recipients, in the hope that such empathy will reveal the arbitrariness of this perceived difference.

Unfortunately, Rank's chosen paradigm impairs his ability to evaluate the potential injury of the proposed reforms in a way that strengthens the universality of his structural vulnerability theory. His focus on difference and sameness obscures the questions of power raised by issues of poverty.⁶⁰ Conceding, as Rank does, that poverty is largely a structural phenomenon requires an analysis beyond the sameness of the poor and Rank's audience.

Professor Catharine MacKinnon's dominance approach may provide a better paradigm for this project. In her essay *Difference and Dominance: On Sex Discrimination*,⁶¹ Professor MacKinnon criticizes mainstream feminists who embrace the sameness-difference paradigm to analyze questions of sex equality. According to

59. See Rank, p. 49; see also Handler, p. 34.

60. Professor Patricia Williams similarly criticizes the politics of the recent Million Man March held in Washington D.C. She viewed the event as a time for Black men to insist, "We exist!" "We are different!" and "We are good!" Patricia J. Williams, *The Million Man Atonement: Different Drummer Please, Marchers!*, 261 THE NATION, 493, 494 (1995). She contends that such expressions incorrectly frame the issue and fail to recognize the problems of stereotypes that seem to make "atonement" the private domain of Black men. See *id.* Williams envisions a realigned and inclusive day of atonement in which

Bob Packwood could join, marching side by side with Ben Chavis, both apologizing up a storm[.] Where Rush Limbaugh and Mark Fuhrman could weep for their sins with Marion Barry; where Pat Buchanan and Louis Farrakhan could jump up shouting with the ecumenical power of divine redemption. In which Clinton came down from his mount and atoned for Lani Guinier, while Jesse Helms climbed up out of his burrow and let Clinton appoint her to the Justice Department. In which Charles Murray and Dinesh D'Souza confronted the Black Child Within and had transformational experiences.

Id.

61. CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32 (1987).

MacKinnon, "[a]pproaching sex discrimination . . . as if sex questions are difference questions and equality questions are sameness questions . . . provides two ways . . . to hold women to a male standard and call that sex equality."⁶² She argues that such an approach leads to the perception that "demands for [sex] equality [ask] to have it both ways: the same when we are the same, different when we are different."⁶³ In employment, for example, many feminists advocate a gender and sex neutrality that entitles those women who can conform to the male norm of full-time employment to equality of opportunity.⁶⁴ Accordingly, they de-emphasize those things that make women different from men such as child bearing and child rearing because these differences may justify differential treatment.⁶⁵ Other feminists, however, focus on those sex and gender differences and seek to have them accommodated in the workplace through measures such as maternity leave and pregnancy benefits.⁶⁶

MacKinnon advocates "an alternative approach" in which "[sex] equality . . . is a question of the distribution of power" and "[g]ender is . . . a question of power, specifically of male supremacy and female subordination."⁶⁷ Rather than avoid confronting the presumed legitimacy of the status quo, as the sameness/difference approach does, MacKinnon's "dominance approach . . . is critical of reality."⁶⁸ Therefore, it criticizes feminists on both sides of the sameness-difference divide. To those obsessed with sameness, MacKinnon says we must abandon gender neutrality because it "has mostly gotten men the benefit of those few things women have historically had."⁶⁹ She asks "[w]hy should you have to be the same as a man to get what a man gets simply because he is one?"⁷⁰ She warns those who celebrate difference not to "affirm[] what we have been, which necessarily is what we have been permitted, as if it is women's, ours, possessive."⁷¹ To MacKinnon, these feminists make "it seem as though [female] attributes, with their consequences, re-

62. *Id.* at 34. MacKinnon notes that questions of sameness and difference, in this context, carry with them a male referent. This establishes maleness as the norm and fails to appreciate that women are as different from men as men are different from women. *See id.* at 37.

63. *Id.* at 39.

64. *See id.* at 37; *see also* Abrams, *supra* note 36, at 1220-26.

65. *See* MacKinnon, *supra* note 61, at 34-36.

66. *See id.* at 34-36, 242 n.18.

67. *Id.* at 40.

68. *Id.*

69. *Id.* at 35. For example, the law of custody and divorce has been transformed by gender neutrality so that "men [have] an equal chance at custody of children and at alimony." *Id.*

70. *Id.* at 37.

71. *Id.* at 39.

ally are somehow ours, rather than what male supremacy has attributed to us for its own use."⁷²

Rank's sameness-difference paradigm suffers from flaws similar to those of the feminist sameness-difference paradigm. By focusing on sameness to dispel myths of difference, Rank obscures the nature of the entitlement at issue. Will the problems commonly thought to be associated with welfare dependency be remedied if all AFDC recipients work for wages? In Rank's own estimation the answer is "no": the structural vulnerability of the recipient population will place them in the same position occupied by the working poor who do not rely on AFDC. The work experiences of his interviewees support this conclusion.⁷³

Rather than be viewed as an issue of sameness or difference, poverty may more appropriately be conceptualized as an issue of power and its distribution. As such, we should assess any proposed remedy based on its impact on the power disparity between the poor and the wealthy.⁷⁴ MacKinnon's "dominance approach," with its focus on power disparities and abuses, may help clarify a more promising poverty policy than one based on similarities between the poor and the nonpoor. Also, a power-based analysis may prove more compatible with Rank's theory of structural vulnerability than one based on the sameness-difference paradigm, as Rank's theory

72. *Id.* Although MacKinnon's approach may prove better suited to Rank's articulated task, I want to make clear that I have reservations about her approach, all of which stem from the limited nature of her analysis as it relates to discrimination suffered by black women and her overly optimistic view of the law's treatment of race. First, MacKinnon has been criticized, and rightfully so, for her tendency to resort to essentialism. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). Second, MacKinnon claims that courts during the sixties implicitly applied a dominance model to questions of racial justice. She bases this claim on *Loving v. Virginia*, 388 U.S. 1 (1967), in which the Supreme Court struck down Virginia's anti-miscegenation statute as a violation of the Fourteenth Amendment. See MACKINNON, *supra* note 61, at 42 n.35. MacKinnon reads that decision as "based on the realization that the condition of Blacks . . . was not fundamentally a matter of rational or irrational differentiation on the basis of race but was fundamentally a matter of white supremacy, under which racial differences became invidious as a consequence." *Id.* at 42. Although *Loving* characterized the Virginia statute as "designed to maintain White supremacy," the Court had a limited vision of both this supremacy and its manifestations. See *Loving*, 388 U.S. at 11. It embraced race neutrality as the proper remedy and failed to recognize the institutionalized and systemic nature of white supremacy and its accompanying oppression. See Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 173-75 (1994). Finally, MacKinnon claims that the abolition of slavery meant that "no amount of group difference mattered anymore." MACKINNON, *supra* note 61, at 44. Such a conclusion seems ahistorical, and ignores the significance of cases such as *Plessy v. Ferguson*, 163 U.S. 537 (1898), as well as the black codes or Jim Crow laws that included the very statute struck down in *Loving*. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 169 (1987) (discussing the Supreme Court's apparent unwillingness to consider constitutional challenges to state anti-miscegenation statutes before its decision in *Loving*).

73. See Rank, pp. 114-25.

74. Such an approach has the potential to build alliances based on a shared interest of poor and non-poor to redistribute power more equitably.

treats poverty as the result of a convergence of different institutionalized oppressions.⁷⁵

Rank's sameness-difference analysis allows for highly punitive measures for recipients who resemble the discourse's prototype. Indeed, he seems to concede that vindictive proposals may be justified for the small percentage of the recipient population that is poor, black, single, urban-dwelling, and female.⁷⁶ According to Rank,

[t]hose who posit cultural reasons for welfare dependency . . . are generally referring to severely depressed inner-city areas. . . . Had I focused exclusively upon the inner city, it is certainly possible that I might have found more evidence of the importance of cultural factors. Regardless, . . . those living in major metropolitan inner-city areas constitute a very small percentage of the overall poverty population. *They are simply not representative of most people who are poor and on welfare.* [Rank, p. 175; emphasis added]

Therefore, Rank apparently sees the injury flowing from the mainstream's current reforms as caused by the overinclusiveness of the punitive measures rather than from the socially constructed meaning of the debate. He decries the apparent willingness of the general public to assume that the discourse's prototype represents all welfare recipients.

Finally, he introduces the voices of AFDC recipients in terms that segregate them from the mainstream. As Rank notes, no one believes the current AFDC program works: "Conservatives worry that it erodes the work ethic, retards productivity, and rewards the lazy. Liberals view [it] as incomplete, inadequate, and punitive. Poor people, who rely on it, find it degrading, demoralizing, and mean."⁷⁷ In Rank's world, the poor are neither liberal nor conservative, and neither liberals nor conservatives are poor. Rank draws unnecessary distinctions between the poor and the nonpoor in a way that duplicates the historic need for line drawing in social welfare policy.⁷⁸ Moreover, his data do not support this division: the recipients he interviewed spanned the ideological spectrum. While Chester Peterson echoes the views of the Consensus and believes that AFDC encourages welfare mothers to bear children (Rank, pp. 142-43), Denise Turner believes that mothers who

75. Recognizing the multiplicity of factors at work requires a multi-axes analysis such as that advocated by scholars under the rubric of intersectional analysis. See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

76. See Rank, p. 4.

77. Rank, p. 12 (quoting MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* ix (1986)).

78. See Rank, pp. 13-25; see also Handler, pp. 10-31 (reviewing the historical development of welfare policy).

choose to stay at home and care for their children deserve assistance (Rank, pp. 122-23).

Unfortunately, Rank's effort to dispel the myths underlying the current debate falls prey to one of liberalism's contributions to the debate's moral tone. That is, it adopts the idea of individual responsibility that, in turn, supports the notion that a welfare recipient might deserve the punitive measures proposed by social welfare policymakers under some circumstances.

V. SOME CONCLUDING THOUGHTS ABOUT THE SIGNIFICANCE OF THE STIGMA OF NEGRITUDE

The significance of race and its accompanying social constructs may help to answer Handler's and Rank's questions.⁷⁹ The apparent logic of the rhetoric employed in the mainstream's discourse may be, in large part, a function of race and the role it played in the War on Poverty. More specifically, the post-1964 policy of the Johnson administration sought to respond to the demands of the movements for civil rights and black liberation.⁸⁰ The War on Poverty shifted from the primarily white, rural, and passive poverty that caught the attention of the Kennedy administration to the primarily black, urban, and aggressive poverty represented by urban rebellions such as the Watts uprisings in 1965.⁸¹ Poverty became a black issue in the context of a civil-rights agenda conceptualized in largely middle-class terms and a black liberation agenda firmly committed to the perpetuation of the patriarchy.⁸² The country's discomfort with racial issues, many of which remain unresolved, helped to create the "us-versus-them" paradigm in which "us" denotes normalcy while "them" indicates deviance. Blackness became a proxy for poverty and justified the stigma that attached to those who needed public assistance. The explicit link between blackness and social welfare policy means that the stigma historically associated with

79. See *supra* note 16 and accompanying text.

80. See, e.g., Johnson, *supra* note 8, at 140 (characterizing the War on Poverty as an attempt "to overcome the racial barriers of the New Deal legacy" in which "[f]ederal policies to aid the poor quickly became linked to the civil rights movement as civil rights organizations endorsed and undertook welfare programs that targeted African-American poor").

81. See, e.g., Buchanan, *supra* note 19, at 1017 (noting that "growing civil unrest and riots [in northern cities] announced the growing problems of poverty among African-Americans who had moved from the South but had been unable to find well-paying jobs").

82. Black liberation forces, as represented by nationalist organizations such as the Nation of Islam, as well as the traditional, old-line civil rights organizations continue to advocate patriarchal ideals. Last year's Million Man March in Washington, D.C. provides the most recent and most visible example of such ideals in action. See Donna Franklin, *Black Herstory*, N.Y. TIMES, Oct. 18, 1995, at A23. See generally Darryl Pinckney, *Slouching Toward Washington*, N.Y. REV. BOOKS, Dec. 21, 1995, at 73-82 (discussing both the Million Man March and the history of the Nation of Islam).

public assistance is heightened by the stigma of blackness in the context of white supremacy.⁸³

Perhaps both Handler and Rank made conscious decisions not to consider race as a more significant factor in explaining why the myths of welfare dependency and poverty underlying the mainstream discourse persist despite data to the contrary. The imagery of the poor renders them presumptively black, and the relative invisibility of white poverty enhances this image. Unfortunately, both authors avoid directly confronting these thornier issues. For example, they do not consider the question of whether the decisional rights held by women on AFDC in the area of reproduction should be infringed because of their poverty.⁸⁴ Yet, this is where white supremacy and the stigma of negritude merge with patriarchy and the stigma of single motherhood to enhance the perceived immorality of the discourse's prototype — the poor, black, inner-city single mother. Perhaps this is where not only the answers to the questions raised by both Handler and Rank lie but also where we must begin in order to realize a true "age of possibility."

83. Handler's earlier observations support this. He said that: "Throughout our social history, racial discrimination and nativism have served to affirm dominant values, status, and power by defining people of color and immigrants as deviant and degraded." Joel F. Handler, *"Constructing the Political Spectacle": The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 935 (1990).

84. Rank clearly considered this type of imagery. He identifies the view of women on AFDC as "breeding factories" as one of the myths he sets out to debunk. See Rank, p. 3. Still, he apparently does not consider race as significant to the imagery. Handler expresses more discomfort than Rank with the punitive measures advocated by the mainstream. He notes, "[s]ome reforms could be helpful; most are regulatory and punitive." Handler, p. 133. He endorses increased child support enforcement, but remains apprehensive about denying benefits to mothers under 18 years old and about family caps. See Handler, pp. 133-34. It appears from Handler's views about the potential of increased child support enforcement that he assumes that noncustodial parents of children on welfare can pay child support but choose not to do so. He ignores the likelihood that these parents are also poor and that their inability to pay child support results from the decreased wages that Handler himself discussed in chapter 3. See Handler, pp. 32-55.

CONTEXT AND LEGITIMACY IN FEDERAL INDIAN LAW

*Philip P. Frickey**

BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE. By *Frank Pommersheim*. Los Angeles: University of California Press. 1995. Pp. x, 267. \$30.

Federal Indian law is perhaps the least respected and most misunderstood area of public law. Although the field produces a steady diet of cases for the Supreme Court, the Justices have little love for the topic.¹ The work of Indian-law scholars and practitioners seems isolated from the more general span of public law scholarship and practice. Indeed, the mere mention of the field is a conversation stopper for public law generalists of either the academy or the practicing bar.

There are probably many reasons why federal Indian law is out of the mainstream. Some of them involve fairly typical problems of public law: unclear — indeed, largely nonexistent — constitutional text,² murky doctrines of case law,³ the hydraulic pressure upon doctrine of evolving social circumstances, and so on. In addition, there may be some sense on the part of the dominant community that the issues involved in federal Indian law are relatively unimportant in the great scheme of things.

Other factors that contribute to the marginalization of the field are, however, more unusual. Issues concerning the rights of Native Americans are quite different from those involving other minority groups defined by race or ethnicity. Indians had sovereignty, land, and other group rights before their contact with colonizing Europe-

* Faegre & Benson Professor of Law, University of Minnesota. B.A. 1975, University of Kansas; J.D. 1978, University of Michigan. — Ed. Jim Chen, Daniel Farber, Neil Fulton, Jeffrey Rutherford, Gerald Torres, and Laura Walvoord provided helpful comments on an earlier draft of this review essay.

For purposes of full disclosure, I should mention that Frank Pommersheim and I have had many discussions about federal Indian law and once considered combining our efforts to produce a book in the field.

1. See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 382-83 (1993).

2. The Constitution mentions Indians only three times: once to grant Congress the authority to regulate commerce "with the Indian tribes," U.S. CONST. art. I, § 8, cl. 3, and twice to exclude "Indians not taxed" from the apportionment formula for the House of Representatives, U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

3. For a brief description of the doctrines the courts have applied to federal Indian law, see Frickey, *supra* note 1, at 418 n.158.

ans, and they continue to have sovereignty, land, and other group rights today. The wrongs colonization perpetrated were group wrongs rather than individuated injuries. The status of Indian tribes today, which involves collective land ownership, self-government, some aspects of territorial sovereignty, and government-to-government relations with the United States, is unlike anything else in domestic American public law.

Indeed, a fundamental reason for the inscrutability of federal Indian law is that analogies to other areas of public law turn out to be false. Mainstream public law attempts to protect politically powerless members of minority groups from being treated differently from similarly situated persons who are in the majority.⁴ These individualistic and integrationist qualities spring from American domestic norms of equal protection associated with *Brown v. Board of Education*.⁵ In contrast, federal Indian law seeks to protect Indians as groups — as peoples, not as people⁶ — from forced assimilation and destruction of their separate status. These collectivist and separatist qualities spring, remarkably, from international law notions of sovereignty, which were incorporated into American domestic law in the early nineteenth century by the Marshall Court.⁷ Surely this head-spinning contrast between the familiar equal-protection narrative and the unfamiliar Indian law one is a major reason why federal Indian law is sealed off from the public law mainstream.⁸

This exclusive focus on law is, however, highly deceiving. For I think it is the *context* of federal Indian law, even more than its murky doctrines and qualities, that leads to its marginalization. It is plain to anyone who will look that federal Indian law is the law governing the colonization and displacement of the indigenous peoples of this continent by Europeans. The justifications for those colonial acts — acknowledged by our Supreme Court to turn on Christianizing the heathen and confiscating natural resources to use them more efficiently⁹ — now seem hollow. The cross-continental march of European-Americans, the brutality of the Indian wars and

4. See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

5. 347 U.S. 483 (1954).

6. This phrase is borrowed from the evocative title of David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759 (1991).

7. See Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. (forthcoming 1996).

8. Of course, both fields have been forced to deal with racism, and the "sameness" required by the one and the "difference" protected by the other have sometimes met with massive resistance. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 11 (1958); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse-Wisconsin, Inc.*, 843 F. Supp. 1284, 1286 (W.D. Wis. 1994).

9. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542-43 (1832); 31 U.S. (6 Pet.) at 579 (McLean, J., concurring); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572-73, 590 (1823).

their aftermaths, and the removal westward and ultimate isolation of Indians on reservations is a story painful to contemplate in a society supposedly premised upon a Constitution that protects against governmental abuse and embodies a social contract based on consent. The unattractiveness of this narrative, its tension with our dominant American narrative of faith in the rule of law, and the difficulty in knowing how to fuse these narratives into lessons of contemporary significance all contribute to the marginal status of federal Indian law.¹⁰

Turning to the current context, contemporary federal Indian law, "on the ground," happens far away from the District of Columbia, on isolated lands called Indian reservations. The people it primarily affects have a third layer of citizenship — membership in the tribe as well as citizenship in the United States and in the state in which they reside — and may consider tribal membership the most significant of the three. They may also adhere to some traditional beliefs and ways of life inconsistent with western, capitalist values. Indeed, it is no small irony that Native Americans are essentially foreigners in their own country,¹¹ both culturally and legally.¹²

Traditional public law scholarship has its difficulties in coming to grips with such far-flung and foreign factors. Frank Pommersheim has sought to identify these deficiencies and to begin to remedy them in his new book, *Braid of Feathers: American Indian Law and Contemporary Tribal Life*. Pommersheim brings a wealth of experience to the task. He spent over ten years living and working on the Rosebud Sioux Reservation in South Dakota. Now a law professor at the University of South Dakota, Pommersheim sits as an appellate judge for both the Rosebud Sioux Tribe and the Cheyenne River Sioux Tribe.

Pommersheim approaches the subject as much with his heart as his head. He acknowledges that his experiences in Indian country have been highly rewarding, both personally and professionally (p. 6). Indeed, he speaks frankly of his friendship toward and obligations to "people and communities who have done so much, with

10. Consider a historian's perspective on why Indian-white history "occupies a backwater status" in that profession:

The majority of American historians seem to regard the whole issue as an endless tale of woe and atrocity committed mostly against Indians, a litany many find redundant, tiresome, and depressing. More pointedly, the Indian experience is viewed, and so treated, as a curious, even quaint sideshow within the larger panorama of Anglo-American performance and achievement in North America.

Calvin Martin, *An Introduction Aboard the Fidèle*, in *THE AMERICAN INDIAN AND THE PROBLEM OF HISTORY* 3, 9 (Calvin Martin ed., 1987).

11. The point is made well by the title of Robert N. Clinton's excellent article defending tribal sovereignty, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 *STAN. L. REV.* 979 (1981).

12. Oddly, the field of public law most similar to federal Indian law is immigration law. See Frickey, *supra* note 7.

lasting good humor, to highlight the issues and enhance the choices in my own life and those of my family" (p. 13). He recognizes that his view "is not detached nor neutral but engaged and committed" (p. 5), a product of his experiences "in the particular western landscape of Indian country in South Dakota" (p. 6).

This abandonment of any pretense of objective, neutral analysis, however, does not undermine his contribution. Indeed, it seems to me that it greatly enhances it, for it replaces the typical, and misleading, "view from nowhere"¹³ with the actual context of relevance. For as Pommersheim notes, most federal Indian law scholarship focuses almost exclusively on "the pervasive role of Congress and the Supreme Court" (p. 1), failing to acknowledge "the counterweight of tribal sovereignty and authority" (p. 1) and "the understanding and implementation of the indigenous vision that develops in its localized institutional settings" (p. 2).

This, then, is a self-proclaimed "inside-out view from the grass-roots, reservation level rather than the traditional top-down view that permeates most Indian law writing" (p. 2). What Pommersheim seeks for tribes is legitimacy in law running in both directions. Tribal governmental institutions, particularly tribal courts, must have "tribal authenticity," and this "'inside-out' authenticity, in turn, must meet the potential constraints of [federal] judicial and congressional review that is necessary to achieve a complementary 'top-down' authenticity" (p. 134). "In many ways," Pommersheim says, "tribal courts are ideally situated to serve as a bridge between local tribal culture and the dominant legal system" (p. 194). Bi-directional connectedness and legitimacy, in turn, could lead to a "true tribal-federal (judicial) dialogue on tribal sovereignty" that seeks "justice [as] a product of conversation rather than unilateral declaration."¹⁴ Ultimately, this institutional dialogue is the vehicle by which Pommersheim hopes to achieve what he sees as "the two most important — indeed, complementary — projects in the field of federal Indian law . . . the decolonization of

13. See THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986).

14. P. 193. It is for these reasons that Pommersheim focuses on tribal courts rather than other tribal institutions, such as tribal councils. The linkage between tribal sovereignty and tribal courts, on the one hand, and federal courts and the broader national government, on the other, is by no means obvious, however. As I understand it, and as I shall explain in the remainder of this review, Pommersheim's argument is that tribal courts are the tribal institutions best situated to perform a translational role, articulating the nature of tribal sovereignty and other interests so that non-Indian authorities can understand them; a justificatory role, articulating tribal sovereignty and interests in ways that provide persuasive reasons why non-Indian authorities should not interfere with them; and a legitimating role, upholding important, shared national values through appropriate judicial processes so that federal courts will not second-guess tribal court adjudicative results and will trust tribal courts to review the actions of tribal councils and executive officials. Each of these tasks is part of the tribal-federal judicial dialogue in the pursuit of justice that Pommersheim seeks to foster.

federal Indian law and the simultaneous construction of an indigenous version of tribal sovereignty and self-rule.”¹⁵

Heady stuff, this. Openly utopian and yet concretely contextual, Pommersheim asks us to imagine a decolonized federal Indian law and a flourishing tribal life, all with the support of the dominant society. True to his “inside-out” approach, he first considers the reservation context, places the reservation within its broader context in the western United States, and then uses these contextual understandings as the bases for crafting the legal context to achieve the two goals he identifies. I will consider each in turn.

I. A CONTEXT FOR CARING

Pommersheim is explicit in his rationale for examining the context of federal Indian law:

I seek to develop a sense of context — cultural, spiritual, and physical — to help explain why Indian people are committed to reservation life and why non-Indians need to honor and respect that commitment. For it is this commitment to the reservation as place that undergirds all the central legal struggles in Indian country about land, water, natural resources, and jurisdiction. Unless we understand this context, there is little chance that we can forge a commitment to eradicate the stigma of invidious difference while at the same time preserving an enduring pride of difference. Without the human and cultural specifics, the field of Indian law is hopelessly abstract and disconnected from the reality and aspiration of contemporary tribal life. The thick description of the reservation as place provides a context for caring as well as a firm grounding for understanding the pain and promise of law in contemporary Indian life. [p. 8]

In my judgment, the major contribution of this book lies in the identification and substantial satisfaction of these aspirations.

By its very nature, federal Indian law is the law of colonial power — case law from what John Marshall once revealingly called “the Courts of the conqueror,”¹⁶ statutes from the centralized legislature of the colonial government, and so on. It is law made by others and imposed upon indigenous peoples. It is both unsurprising and disturbing, then, that, as Vine Deloria once wrote, “what is missing in federal Indian law are the Indians.”¹⁷

15. P. 193. One problem inherent in this project is that federal law will necessarily structure this institutional relationship, and federal lawmakers will have the usual presumptions that federal law is nationwide and uniform. Indian tribes and their members have great diversity across this country, and yet it seems inevitable that tribal institutions and tribal law will have to bend in somewhat similar ways to fit such a national, federal framework. Whether these centripetal and centrifugal forces can be adequately harnessed by working institutions is, thus, a major question.

16. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823).

17. Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 205 (1989).

Law created by judges and legislators this far removed from its context is not likely to be functional, attractive, or legitimate in the eyes of those it most directly affects. Similarly, the legal scholars' penchant for analysis generated within the four walls of their offices, grudgingly supplemented by occasional forays into the law library, cannot possibly produce a fully useful examination of law in this context. To be sure, high-level theory, as well as the careful parsing of precedent and other basic legal-process skills, have their role in federal Indian law, as in all other law. The problem remains, however, that under legal-process assumptions "[l]aw is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living."¹⁸ It is self-evident that law cannot perform this function without an appreciation of the social setting in question and the values and aspirations of the people the legal regime most directly affects. More specifically, Native Americans, who are full-fledged citizens of the United States, and Indian tribes, which are bona fide sovereigns under domestic American law, deserve equal concern and respect in the process by which our national government, through law, carries out its responsibility of "establishing, maintaining and perfecting the conditions necessary for community life to perform its role in the complete development of [people]." ¹⁹

The centerpiece of Pommersheim's contextual presentation is Chapter One, which is a slightly modified version of a law review article he published some years ago.²⁰ The title, *The Reservation as Place*, bespeaks the sort of dignity he seeks to bestow upon locales often viewed "as islands of poverty and despair torn from the continent of national progress" (p. 11). Pommersheim attempts to convey the

[h]idden . . . notion of the reservation as place: a physical, human, legal, and spiritual reality that embodies the history, dreams, and aspirations of Indian people, their communities, and their tribes. It is a place that marks the endurance of Indian communities against the onslaught of a marauding European society; it is also a place that holds the promise of fulfillment. [p. 11]

He writes "from two overarching assumptions. One is that, despite grinding poverty and widespread despair, there is nevertheless a flame of hope and a broadening range of choices in almost all aspects of reservation life" (p. 13). The other "is that, whatever the

18. HENRY M. HART, JR. & ALBERT A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 148 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

19. *Id.* at 102 (quoting Joseph M. Snee, *Leviathan at the Bar of Justice*, in *GOVERNMENT UNDER LAW* 91, 96 (Arthur Sutherland ed., 1968)).

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

conditions, tribal members have been committed to remaining indelibly Indian, proudly defining themselves as a people apart and resisting full incorporation into the dominant society around them" (p. 13).

In my judgment, this essay largely succeeds in making the reader not only understand, but also empathize with, Indians' reasons for having a fundamental and spiritual attachment to the reservation. At the same time, it does not romanticize the reservation as some idyllic setting²¹ or engage in a self-satisfied jeremiad excoriating non-Indians.²² Achieving the former without pandering along the lines of the latter is no mean feat.

Pommersheim begins with a short explanation of the centrality of land to Indian people: "Land is basic to Indian people; they are part of it and it is part of them; it is their Mother" (p. 13). The land is simultaneously the source of cultural connectedness, "of spiritual origins and sustaining myth," (p. 14) and "a homeland where generations and generations of relatives have lived out their lives and destiny" (p. 14). He then turns to the legal genesis of reservations as the result of a bargained-for exchange. Usually through a treaty with the federal government, the tribe ceded away some aboriginal lands and agreed to cease hostilities with non-Indians in exchange for a guaranteed homeland of vital cultural significance over which the tribe would exercise significant sovereignty. He then addresses attacks upon this "measured separatism,"²³ focusing on the allotment of reservation lands to individual tribal members and the opening of remaining reservation lands to non-Indian homesteaders (pp. 19-21). He also considers the assimilative efforts of Christian missionaries, Bureau of Indian Affairs agents, and teachers in Indian country to destroy tribal culture, religion, and language. Particularizing this inquiry, he reviews the South Dakota experience,

21. See p. 34 (noting the "rupture in the relationship of the people to the land" and complaining about "disturbing utopian visions that endlessly romanticize the people and the land"). The current legal analogue to this problem of romanticism might be found in cases suggesting that tribes have more sovereignty in situations in which they are engaged in traditional ways. See, e.g., *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 441-44 (1989) (holding that tribe may zone land owned by non-Indians only in portion of the reservation traditionally closed to the public, where few non-Indian lands are located and the area approximates a pristine region retaining uniquely Indian character); *Rice v. Rehner*, 463 U.S. 713, 733 (1983) (implying that tribal sovereignty is greatest where there has been "a tradition of tribal self-government" on the subject of dispute); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 156-57 (1980) (stating that tribal interest in raising revenue by marketing goods to non-Indians is "strongest when the revenues are derived from value generated on the reservation").

22. See p. 5 (stating that the point is "not to excoriate the 'white man'" but rather "to look to a more humane and morally coherent era that is based in the core values of respect and dignity"); p. 21 ("The point is not to assign blame — an essentially fruitless exercise — but rather to comprehend more deeply the forces at work on the reservation.").

23. P. 16 (using a term from CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW* 4 (1986)).

where all reservations suffered through allotment and other Indian lands were lost to Missouri River water projects.

Pommersheim concludes with a consideration of the reservation within the broader context of the American West. He argues that "[d]espite the pervasive conflict between tribes and the state and federal governments, and between Indians and non-Indians, other more unitive factors point to similarities in situation that are often not perceived and occasionally even ignored" (p. 27). Indians and non-Indians alike in the West share space, aridity, a love of their land, and a complicated relationship with the federal government. Tribes are often criticized as being too dependent on federal largesse. Pommersheim correctly points out, however, that their non-Indian neighbors are similarly dependent on the federal government and survive through farm subsidies and below-market access to grazing, water, and other public goods.²⁴ He suggests that the future for both sides is inextricably linked, and if each would "recognize the permanence and legitimacy of the other" (p. 30) and engage in dialogue, much common ground could be identified and usefully exploited. In particular, both sides might be able to develop an overlapping sense of place.²⁵

For me, this chapter is the cornerstone of the book. It speaks to me in a multitude of ways, providing factual information, cultural perspective, and normative insight. It goes a long way toward filling the yawning chasm between federal Indian law in the books and federal Indian law on the ground. Moreover, I take some solace from it. The chapter ends on a note of hope,²⁶ a commodity all too scarce in federal Indian law.

24. Yet the Westerners' fierce sense of independence and their resentment of the federal government make all this a strange mix, aptly summed up in the injunction to "[g]et out, and give us more money." P. 28 (quoting WALLACE STEGNER, *THE AMERICAN WEST AS LIVING SPACE* 15 (1987)).

25. Thus, Pommersheim's defense of tribal sovereignty builds on legal themes — preexisting rights (to sovereignty and land), unconsented deprivations of these rights (unilateral colonization and displacement of indigenous peoples, forced assimilation), and bilateral legal acknowledgment of those rights (in treaties) — and on cultural themes — the importance of the land and self-determination to Indian culture. For these reasons, in this context there is an intimate connection between sovereignty and individual and group rights. In this instance, at least, sovereignty is more than simply the rights or authority of a government.

26. Consider its final paragraph:

The breath of despair once so prevalent in Indian country seems to be yielding to the air of hope. The answers to these troubling questions about the land and its economic, cultural, and spiritual roles do not readily reveal themselves, but the questions are increasingly recognized and energetically posed. Nor are these questions confined to Indians and reservations. They also pierce with unerring aim the larger society's assumptions about cultural diversity and the use and exploitation of the earth to sustain economic prodigality and waste. The questions inevitably challenge all of us — Indian and non-Indian, tribes and states alike — to summon the honor and wisdom of ourselves, our communities, and our traditions and to apply them to these relentless and provocative issues.

P. 36.

With all that said, the chapter may not work for everyone. I have assigned the underlying law review article to my students in federal Indian law for several years running. Many students find the article worthwhile, but some have difficulty internalizing the material. For them, it may seem too sentimental, too much a matter of airy hopefulness about an environment and the people who populate it.²⁷ The hopefulness of the essay may also strike some persons as a dated indicium of a short period in South Dakota's recent history when non-Indians seemed especially receptive to conversations with Indians.²⁸ Nonetheless, the impetus to care about the context of federal Indian law, along with significant perspectives on that context, strike me as an invaluable contribution to the field.

II. CONTEXTUAL LEGITIMACY FOR TRIBAL LAW AND TRIBAL COURTS

As I understand it, one of Pommersheim's most basic goals is to persuade the broader non-Indian legal community to care enough

In a later chapter, Pommersheim proposes that tribes and states should attempt to abjure litigation and engage in dialogue to reach accords on fundamental issues. See pp. 153-61.

27. To be sure, these reactions may be a product of when the students read the essay. My students and I discuss it at the beginning of the course, as a way to introduce the reservation context and the importance of federal law to it. At that point, the students may be unable to synthesize legal doctrine and context sufficiently to profit optimally from the reading. Nonetheless, it seems important to begin the course with an exposure to this context that is so foreign to many students, and I know of no other writing that works as well as this essay.

Rereading the essay at the end of the course may be necessary for a fuller appreciation of it. Indeed, when I asked a policy question in my most recent federal Indian law examination, several students not only mentioned this article, but also commented on how the analysis in it had informed their perspectives.

A more fundamental problem may be that students expect doctrinal analysis when, in fact, Pommersheim is attempting to provide the context for his basically non-doctrinal, post-modern approach to federal Indian law. See *infra* text accompanying notes 47-61. Essentially, the "reservation as place" is a relational and constitutive concept — focusing on the deep relationships of Indians to the land and to each other and how that is constitutive of individual, collective, and geographical identity — more than a traditional legal concept, based on the law of property, that divorces "things" from the people who "own" them. I am grateful to Jeff Rutherford, my former student, for this insight. In future classes, I shall attempt to determine whether a more forthright confrontation between post-modern analysis and traditional legal conceptions would be fruitful.

28. *The Reservation as Place* was published in the South Dakota Law Review in 1989. See *supra* note 20. Chapter 5 of the book, entitled *Tribal-State Relations: Hope for the Future?*, originally appeared at 36 S.D. L. REV. 239 (1991). In that period, the state was headlong in its centennial celebration of 1989, which provoked extended discussion of the history and present-day situation of Indians in the state. Governor Mickelson declared 1990 the Year of Reconciliation, a time for attempts at meaningful state-tribal dialogue. See pp. 154, 251 n.89. Contrast a recent comment of the current governor, Bill Janklow, alleging that South Dakota Indian tribes have a "master plan . . . to acquire all of western South Dakota" with proceeds from Indian gaming, which was immediately attacked as exacerbating racial tensions. *Janklow Says Tribes Have "Master Plan" To Buy Western South Dakota*, Associated Press Political Service, Aug. 25, 1995, available in Westlaw, ASSOCPPS File, 1995 WL 6739295.

about the Indian context to provide tribes a breathing space for the construction of institutions, particularly tribal courts, that can develop a truly indigenous law. His message is a timely one, for tribal court jurisdiction may well now be expansive enough to create this opportunity.

Understanding this jurisdictional context requires a brief overview of the nature and limits of tribal sovereignty. One of the most basic premises of federal Indian law is that, prior to contact with Europeans, tribes had sovereignty over their members and their areas.²⁹ The European encounter locked each tribe into an exclusive sovereign-sovereign relationship with the "discovering" European country, such that the tribe could have sovereign relations and engage in land transactions only with that country.³⁰ This category of limitations on tribal sovereignty based on tribes' status as "domestic dependent nations"³¹ was more recently expanded to deny any criminal jurisdiction over non-Indians³² and to restrict civil regulatory control over non-Indians on lands within reservations that they own in fee simple.³³ In addition, of course, tribes have lost authority consensually — through treaty agreements, for example — and nonconsensually, when Congress, through the exercise of its judicially sanctioned "plenary power" over Indian affairs,³⁴ has explicitly preempted tribal power.³⁵ What all this means is that tribes retain sovereignty today so long as the particular exercise of power is not inconsistent with domestic dependent status and has never been ceded or taken away.

That reservoir of sovereignty turns out to be significant.³⁶ For tribal courts, it includes the authority to exercise criminal jurisdic-

29. See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 572-73 (1823).

30. See *Johnson*, 21 U.S. (8 Wheat.) at 573-74.

31. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

32. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). The Court later held that tribes also lack the capacity to exercise criminal jurisdiction over nonmember Indians — that is, Indians who are members of a tribe different from the one attempting to exercise the criminal jurisdiction in question. See *Duro v. Reina*, 495 U.S. 676, 688 (1990). Congress has overturned this result by a statute that purports to recognize the tribe's inherent sovereignty in this situation, rather than to delegate federal authority to the tribes. See 25 U.S.C. § 1301(2) (1994).

33. See *Montana v. United States*, 450 U.S. 544, 566 (1981).

34. For a helpful overview, see Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).

35. Under the canons of interpretation found in federal Indian law precedents, Congress must act clearly before courts will sanction an invasion of Indian interests. See Frickey, *supra* note 1, at 398-426. A recent example of preemption of tribal power is *South Dakota v. Bourland*, 113 S. Ct. 2309, 2319 (1993) (holding that a federal statute taking Indian lands for public recreation area that remained within reservation divested tribe of authority to regulate nonmembers in that area).

36. In addition to presumptive full legislative sovereignty over its members, tribes have been recognized as retaining certain legislative authority over nonmembers, including, for example, the power to tax nonmembers engaged in consensual economic activity in Indian

tion over members³⁷ and over nonmember Indians,³⁸ and to exclude most nonmembers from the reservation.³⁹ Tribal judicial jurisdiction in civil cases is quite extensive. State courts have no inherent jurisdiction to entertain causes of action against Indians that arise on the reservation.⁴⁰ Because such suits will rarely involve diversity of citizenship, a federal question, or the like, a federal judicial forum ordinarily will not be available, and thus they must almost always be brought in tribal court. Moreover, while tribal courts may not exercise criminal jurisdiction over non-Indians,⁴¹ entertaining a reservation-based civil cause of action against a non-Indian is not foreclosed. The Supreme Court has held that federal courts have federal-question jurisdiction to hear the non-Indian's objection that this tribal-court jurisdiction is inconsistent with domestic dependent status.⁴² Nonetheless, the non-Indian must first exhaust all tribal court remedies, including appellate ones,⁴³ and, if the matter does return to the federal district court, the only issue is whether the tribal court had jurisdiction.⁴⁴

Finally, it remains the case that the Constitution does not constrain the exercise of inherent tribal sovereignty in general or the activities of tribal courts in particular.⁴⁵ Congress applied many constitutional limitations to the tribes, however, by adopting the

country. See *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198-200 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-38 (1982).

37. See *United States v. Wheeler*, 435 U.S. 313, 322 (1978).

38. See *supra* note 32.

39. See *Duro v. Reina*, 495 U.S. 676, 696 (1990) (dictum).

40. See *Williams v. Lee*, 358 U.S. 217, 218-19 (1959). Of course, Congress may change this rule through the exercise of its plenary power, as it did in adopting Act of Apr. 11, 1968, Pub. L. No. 90-284, tit. IV, §§ 401-02, 82 Stat. 73, 78-79 (codified as amended at 25 U.S.C. §§ 1321-1322 (1994)), a statute that authorizes courts in certain states to assume jurisdiction over civil and criminal cases arising in Indian country.

41. See *supra* text accompanying note 32.

42. See *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 853 (1985).

43. See *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16-17 (1987).

44. See *Iowa Mutual*, 480 U.S. at 19. See generally Timothy W. Juranko, *Exhaustion of Tribal Remedies in the Lower Courts After National Farmers Union and Iowa Mutual: Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System*, 78 MINN. L. REV. 259 (1993); Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089 (1995); Alex Tallchief Skibine, *Deference Owed Tribal Courts' Jurisdictional Determinations: Towards Co-Existence, Understanding, and Respect Between Different Cultural and Judicial Norms*, 24 N.M. L. REV. 191 (1994).

45. This understanding is as old as *Talton v. Mayes*, 163 U.S. 376 (1896) (holding that because tribal sovereignty existed prior to the Constitution and is not derived from it, tribal action is not subject to the Constitution). Of course, if the tribe is exercising delegated federal authority rather than inherent tribal sovereignty, a strong argument can be made that the Constitution attaches. Cf. *United States v. Mazurie*, 419 U.S. 544, 553-56 (1975) (upholding federal statute authorizing tribe to regulate liquor in Indian country, including when sold by non-Indians, and conceptualizing the statute as delegating authority to the tribe rather than recognizing the tribe's inherent powers).

Indian Civil Rights Act of 1968 (ICRA).⁴⁶ Consistent with Pommersheim's comparative institutional sensitivity, however, the Supreme Court has interpreted the ICRA narrowly, holding that the statute embodies no implied private right of action for civil relief in federal court.⁴⁷ Thus, ICRA claims are the domain of the tribal courts, which therefore have the opportunity to place an indigenous interpretation on Anglo-American concepts such as due process and equal protection.

After providing an overview of this terrain (pp. 79-98), Pommersheim focuses his attention on a fundamental dilemma. Within this shared federal-tribal judicial domain, tribal courts can function well only if they have legitimacy both in the tribe and in the federal system. Without this dual legitimacy, the tribal courts are doomed to ineffectiveness, for they will be either outsider federal agencies without any tribal support or indigenous actors lacking the federal backing necessary to withstand attack within the broader legal system. Yet there is great tension in this enterprise, for the indigenous qualities that may foster legitimacy within the tribe may undercut the legal-process values necessary for legitimacy within the broader legal community as well as within some segments of the tribal community itself.

Pommersheim sees the issue essentially as an overlapping problem of the construction of legal institutions and law. Tribal courts must have the legitimacy necessary both within the tribe and the federal system to elaborate a body of law that itself will be legitimate from the dual perspectives of the tribe and the federal courts. Thus, in Chapter Three, he considers ways to foster the institutional legitimacy of tribal courts, and, in Chapter Four, he turns to how the jurisprudence of tribal courts might unfold. He speaks, of course, from the practical experience of a sitting tribal appellate judge.⁴⁸

His general prescriptions are, it seems to me, quite appropriate. He is right to suggest that, once tribal courts attain the formal legitimacy necessary under the rule of law — for example, they are duly established by a federally recognized tribe — they should concentrate on developing a contextual legitimacy running simultaneously in two directions (the tribal and the federal) more than on other, more formal institutional matters. To illustrate the problem, consider a fundamental issue of the formal and the functional: the absence of a separation of powers in many tribal constitutions, and the

46. Pub. L. No. 90-284, tit. II, §§ 201-203, 82 Stat. 77 (1968) (codified at 25 U.S.C. §§ 1301-1303 (1994)).

47. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-72 (1978) (finding only remedy enforceable in federal court is habeas corpus).

48. See *supra* text accompanying note 12.

real possibility that the tribal government may refuse to obey a tribal court decision or might even attack the institution of tribal courts itself by seeking to remove the judge or abolish the judiciary. As a formal matter, one might attempt to remedy this situation by seeking an amendment to the tribal constitution. Presented this abstractly, however, why should tribal members support this reform? For what practical and experiential reasons might they wish to invest such faith in often untested tribal courts?⁴⁹ In place of formal reform based on abstract political theory and leaps of faith, Pommersheim seems to suggest that the tribal courts must make their legitimacy the old-fashioned way — they must earn it, through the hard, even courageous work of developing an authentic indigenous jurisprudence that nonetheless accords with the fundamental Anglo-American legal-process values expected by both the federal courts and many tribal members.

More particularly, to foster the contextual legitimacy of tribal courts, Pommersheim proposes that these courts focus on bringing together the practitioners involved with them — attorneys as well as tribal advocates without any formal legal training — “to form a community helping to carry out an important legitimating function” (p. 71). A tribal bar examination, tribal ethics code, and programs of continuing legal education would foster the development of a professional community that both actually serves the tribal and federal communities well and creates the patina of professionalism that will lend confidence to the whole operation. More generally, the tribal bar could become a unique interpretive community that could guide the difficult process of molding tribal-court adjudication to serve the twin functions of tribal and federal legitimacy.

Pommersheim is surely right to seek such a cooperative effort in the construction of contextual legitimacy for tribal courts. After all, as Steven Burton has explained in a work on which Pommersheim relies,⁵⁰ it is the work of the legal interpretive community within its

49. Lest this seem a question with an obvious answer, consider whether Americans today would support the institution of *Marbury v. Madison*-style judicial review if a new Constitution were being drafted and submitted to a plebiscite. The much-debated “counter-majoritarian difficulty” that envelops much public-law scholarship is usually discussed at the level of abstract political and moral philosophy. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962). The people, in place of the scholars, would see the issue much more practically, I would think, and their views will depend upon their own encounters with the judiciary and their practical fears or hopes concerning a political and administrative process unconstrained by constitutional judicial review. The people’s own narrative relationship with the story of *Brown* — or the story of *Roe*, or the story of police practices in their communities, and so on — would surely have more persuasive force than a scholar’s theoretical contributions.

Similarly, when the federal government investigates the operations of tribal courts, it examines the day-to-day successes and failures, not mere abstract principles such as tribal sovereignty or the separation of powers. See p. 132.

50. See p. 223 n.49 (citing STEVEN BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* (1985)).

complex, controversial, but substantially overlapping web of beliefs that specifies the processes and substance of law, as well as its legitimacy, far more than formal deduction from first principles. Moreover, this linkage of education concerning the unique aspects of indigenous law and tribal courts with the role of a professional community is reminiscent of Richard Posner's suggestion concerning the most basic goals of legal education.⁵¹

Pommersheim maintains this antiformalist theme when more directly considering the substance of tribal law. Here he firmly ties himself to the mast of much postmodern legal scholarship. Based on the work of Martha Minow,⁵² he posits a dilemma of difference in this context — when should we view tribal institutions and law as different from their dominant-society counterparts in order to reflect authentic values, and when would we see such visions of differences as stigmatizing and hindering the goals of legitimating them within both the tribe and the dominant society? He posits three tribal-court tools for carving out legitimate differences: language, narrative, and the pursuit of justice (p. 103).

In essence, he posits a hermeneutical tribal approach to deploying and interpreting legal language in a manner that holds some promise of legitimate legal evolution and reform.⁵³ Narratives by tribal courts can educate the dominant society about competing cultural and moral visions, as well as demonstrate concrete reasons why these courts might give little force to some aspects of law imposed upon them from above. Pommersheim illustrates this point of tribal counternarrative by mentioning a tribal appellate opinion he wrote that skeptically viewed a provision of the tribal constitution limiting civil judicial jurisdiction over non-Indians because it

51. As Posner notes:

The most important thing that law school imparts to its students is a feel for the outer bounds of permissible legal argumentation at the time when the education is being imparted. (Later those bounds will change, of course.) What "thinking like a lawyer" means is not the use of special analytic powers but an awareness of approximately how plastic law is at the frontiers — neither infinitely plastic, . . . nor rigid and predetermined, as many laypersons think — and of the permissible "moves" in arguing for, or against, a change in the law. It is neither method nor doctrine, but a repertoire of acceptable arguments and a feel for the degree and character of doctrinal stability, or, more generally, for the contours of a professional culture — a professional culture lovable to some, hateful to others.

RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 100 (1990).

52. See p. 235 n.1 (citing MARTHA MINOW, *MAKING ALL THE DIFFERENCE* (1990)).

53.

Reading has two faces. One is the text or source of law anchored in some time past. The second is the current situation of the reader presently seeking to understand the text and to apply it to the situation at hand. The resulting "reading," whatever it is, meshes two times, two places, and two interpretations. This process is essentially dialectic in nature and entertains (at least theoretically) the possibility of the emergence of a new synthesis that is less lethal or even nonlethal. As the legal reader must respect the text, however oppressive it might be, so too the text must respect the reader's aspiration and otherness. P. 104.

was the result not of indigenous concerns but rather of unilateral intrusion by the Bureau of Indian Affairs (pp. 108-09). Embracing the work of James Boyd White (pp. 112-15), Pommersheim views the pursuit of justice as an act of "translation," the liberating of legal texts from any obsolete associations surrounding their origin and the transformation of meaning in light of current context. These hermeneutical, narrative, and translational moves, Pommersheim suggests, should incorporate the emerging international human rights norms concerning indigenous persons (pp. 123-26) and suggest concrete modifications of federal public law, including the abandonment of the plenary power doctrine,⁵⁴ greater respect and autonomy for tribal sovereignty, and a more coherent set of doctrines (pp. 120-22).

Although much of his analysis has the signature of recent humanistic legal scholarship, he ends this discussion with a nod to institutional imperatives in law that would make any traditional legal-process scholar proud. For Pommersheim, "all significant public values are realized through institutions. Better institutions are essential to better lives" (p. 131). The failure of federal Indian law to pay sufficient attention to this issue has "create[d] a grossly distorted picture of the relationship of law to sovereignty" (p. 131) in the field that unduly values the mere federal endorsement of the concepts of tribal sovereignty and tribal courts without concerning itself with the actual development of flourishing institutions with appropriate procedures.⁵⁵

It is in this discussion, I think, that Pommersheim himself runs into an essentially insoluble dilemma — not one of difference, but of diffusiveness. He talks about the importance of concrete context, but much of the presentation is made secondhand, through postmodern, abstract scholarly moves. This is an inevitable problem in antiformalist legal scholarship, but it is an acute one in this context, where tribal courts and law are especially foreign to readers.

I know of no way to solve this difficulty. Enlightening the abstract discussions of dilemmas of difference, narratives, justice as translation, and so on, through the use of examples is, however, surely an ameliorative technique. Pommersheim does attempt to do just that. For example, he refers to those involved in the tribal judicial system as working together in many small ways in the shared enterprise of moving tribal courts toward legitimacy (pp. 59, 127-28). He highlights a field trip his class took to the Rosebud

54. See *supra* text accompanying note 34.

55. Cf. HART & SACKS, *supra* note 18, at 3-6 (conducting a legal-process analysis of the development and operation of a system of institutionalized procedures for settling societal questions).

Sioux Tribal Court, where the chief judge told the students about his efforts to promote the legitimacy of the court by traveling throughout the small communities on the reservation and talking with tribal members about the work of the court. The class also observed the judge handle an intrafamily dispute, in which he followed tribal custom in essentially allowing the parties to speak without interruption and in their native language.⁵⁶ Pommersheim refers to various provisions of tribal law to illustrate jurisdictional issues (pp. 79, 85-87) and law reform (pp. 127-28). He uses several tribal court opinions to exemplify the application of tribal law against the backdrop of federal authority.⁵⁷ He reminds practitioners that tribal courts are the authoritative expositors of tribal law, and thus that state cases are not dispositive and decisions of other tribal courts might be persuasive (pp. 128-29).

Pommersheim does not supplement these firsthand South Dakota experiences with those found in tribal courts elsewhere. That choice is defensible, for a wider sweep might have diluted his focus. Nonetheless, the interested reader would profit from an examination of the literature on other tribal courts.⁵⁸ In particular, if the separation of powers and tribal court independence are major concerns, as Pommersheim (pp. 68, 73-74) and others⁵⁹ have explained, an examination of these subjects both from Pommersheim's South

56. See pp. 69-70; see also pp. 131-32 (noting that the chief judge holds week-long court open house, hosts presentations about the court, and has organized an advisory group concerning tribal court practice that is the precursor to a bar association).

57. See pp. 88-89 (observing that one tribal court adopted "minimum contacts" test of *International Shoe v. Washington*, 326 U.S. 310 (1945), for due process limits on tribal court jurisdiction under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1994)); *supra* text accompanying note 54.

58. See, e.g., Dennis W. Arrow, *Oklahoma's Tribal Courts: A Prologue, The First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead*, 19 OKLA. CITY U. L. REV. 5 (1994); Michael Taylor, *Modern Practice in Indian Courts*, 10 U. PUGET SOUND L. REV. 231 (1987); Tom Tso, *The Process of Decision Making in Tribal Courts*, 31 ARIZ. L. REV. 225 (1989); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994); Jayne Wallingford, *The Role of Tradition in the Navajo Judiciary: Reemergence and Revival*, 19 OKLA. CITY U. L. REV. 141 (1994); Robert Yazzie, "Life Comes From It": *Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994); Frederic Brandfon, Comment, *Traditional and Judicial Review in the American Tribal Court System*, 38 UCLA L. REV. 991 (1991); Daniel L. Lowery, Note, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992*, 18 AM. IND. L. REV. 379 (1993). On the relationship of tribal courts to the larger judicial system, see Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841 (1990); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

59. See, e.g., Brandfon, *supra* note 58, at 1006-09; Valencia-Weber, *supra* note 58, at 238 n.40.

Dakota perspective⁶⁰ and from elsewhere⁶¹ would seem especially useful. Pommersheim acknowledges the importance of the issue and opines that "[m]any tribes are sensitive to this problem and have moved to a policy of de facto, if not de jure, separation of powers" (p. 74). His support for this generalization, however, rests only on his own personal experiences in South Dakota and on conversations with Indian judges there (p. 225 n.71), which may leave some readers unsatisfied concerning the validity of the conclusion locally, not to mention nationally. He does note that the Cheyenne River Sioux Tribe, for which he sits as an appellate judge, recently amended its constitution to incorporate a formal separation of powers (p. 74).

Despite these efforts, and for all of his emphasis upon context, Pommersheim's discussion of tribal courts and law seems more abstract and less intensely human than his discussion of the reservation as place. Of course, it may simply be that talking about law and legal institutions cannot be carried out with the same sense of humanity as talking about a cultural and sovereign homeland for a people. The typical lawyer's joke is premised on precisely this notion of the disjunction between law and the profession of lawyering on the one hand and life and the needs of ordinary people on the other. For Pommersheim, of course, the problem is essentially that he has joined the other side — the perspective of life in general and tribal members in particular — while simultaneously writing descriptively and prescriptively about the law of, and the profession of lawyering in, tribal courts. I was not left disappointed with his discussion so much as left longing for more concrete examples and guidance concerning this challenging and important topic.

60. See *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985) (affirming federal district court's refusal to intervene into Cheyenne River Sioux Tribe election dispute despite allegations that the tribal council had terminated a tribal judge and rescinded the tribal court's order requiring reapportionment of tribal council in accord with results of referendum election); *LeCompte v. Jewett*, 12 ILR 6025, 6027 (Chy. R. Sx. Ct. App. 1985) (adopting *Marbury* approach to judicial review of actions of tribal council and undertaking judicial supervision of tribal elections). Presumably Pommersheim would approve of this scenario: the federal courts stayed their hand, and the tribal court mustered the authority to impose judicial review. See also p. 74 (stating that the recently amended Cheyenne River Sioux Tribe Constitution incorporates formal separation of powers). It would have been interesting to read a discussion by Pommersheim of this or a similar tribal legislative-judicial confrontation.

61. See Valencia-Weber, *supra* note 58, at 238 n.40. Perhaps the most famous tribal appellate court opinion imposing judicial review in the face of the hostility of tribal leaders is *Halona v. MacDonald*, 1 Navajo Rptr. 189 (1978), in which the Navajo Court of Appeals invoked a power of judicial review even though the Navajo have no written constitution. See *id.*

III. CONTEXT, LEGITIMACY, AND THE FUTURE OF FEDERAL INDIAN LAW

Pommersheim is not alone in his suggestion for greater attention to context in federal Indian law.⁶² His major contributions, in my view, are twofold. First, his thick description of the reservation amounts to a translation of that context into words understandable by the larger legal community. Second, his analysis of the comparative institutional competence of tribal courts and federal institutions in accurately assessing this context and working within it to create legal doctrines that are both functional and normatively attractive is a major innovation.

True to his "inside-out" mission, Pommersheim focuses on indirect routes to reform — building the tribal judicial institutions necessary for an indigenous jurisprudence — rather than on direct doctrinal evolution of federal Indian law. To the extent that he discusses those doctrines, his most basic message is that federal Indian law simply should make way for the development of tribal jurisprudence.

A good illustration is his complaint about the plenary power doctrine. Under the case law, congressional power in Indian affairs is essentially limitless.⁶³ This doctrine is subject to a fairly obvious formal critique. It seems hopelessly inconsistent with one of the most basic principles of constitutional interpretation — the *McCulloch*⁶⁴ understanding that Congress possesses only those powers delegated to it in Article I or elsewhere in the Constitution.⁶⁵ Pommersheim alludes to this criticism (pp. 40, 44, 46-50, 120-21) but it seems clear that his major objection is not formal and doctrinal, but rather pragmatic and contextual. For tribes, the problem with plenary power is its "constant destabilizing threat to their very existence and right to self-determination" (p. 122). He urges con-

62. For relatively recent commentary, see Robert N. Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 HAMLINE L. REV. 543 (1985); Deloria, *supra* note 17; Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1207-08, 1219-22 (1990); Carole Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples,"* 39 UCLA L. REV. 169 (1991).

63. See Newton, *supra* note 34.

64. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

65. As explained earlier, the only mention of Indians in Article I provides Congress with the authority to regulate commerce with the tribes. See *supra* note 2. Far from being an express grant of unlimited power, under ordinary textual interpretation this clause creates the negative inference that Congress lacks authority to regulate Indian affairs except when commerce is concerned. Of course, other enumerated powers — the war power, the treaty power, power over federal lands and the admission of new states, and the like — may aggregate into a broad authority for Congress to engage in sovereign relations with tribes beyond the commercial context. Even when aggregated, however, Congress's authority in this area cannot be interpreted easily to be "plenary," if by that term unlimited authority is intended. See, e.g., Frickey, *supra* note 7; Newton, *supra* note 34, at 196.

gressional⁶⁶ or judicial⁶⁷ amelioration of the plenary power doctrine, but acknowledges the unlikelihood of such reforms in the immediate future.⁶⁸ He places his primary hope for reform not on the efforts of non-Indian public officials or scholars,⁶⁹ but on the tribal-federal institutional dialogue he has attempted to foster.⁷⁰

In the last analysis, for Pommersheim, the keys to reform in federal Indian law are translation, education, and a resulting empathy. Tribes are to be the primary actors, and federal and state political and judicial officials are left in a reactive posture — they are to defer rather than intrude, listen rather than command, empathize rather than colonize. He recognizes that “[t]he process of decolonization can *never* lead back to a precolonized society” (p. 99). Rather than “institutionaliz[ing] the false dichotomy of dominant versus indigenous” (p. 195), the reform must “synthesize the best of both worlds while actively seeking to achieve a sovereignty that realizes both the necessary federal deference and the normative space to make authentic and enduring tribal choices” (p. 195). He acknowledges that “[s]uch efforts flow not from mere academic inquiry but from work of the heart and mind” (p. 200). Indeed, he concludes the book as follows:

Inevitably, the feather of Indian law jurisprudence will continue to be a prominent one in the braid of tribal life, complete with the potential to advance and enrich the quality of contemporary indigenous (and majoritarian) life. This potential future is, however, by no means assured, for we must still meet the challenges of history, national diversity, and the ideal of justice. Yet we may be guided by the geography of hope, with its coordinates of commitment, respect, imagination, and engagement. [p. 200]

In a famous and eerily parallel passage, Emily Dickinson once wrote that “‘hope’ is the thing with feathers — That perches in the soul — And sings the tune without the words — And never stops

66. See pp. 189-90 (arguing that Congress should recognize perniciousness of plenary power doctrine and perhaps enact statute recognizing tribal sovereignty); see also pp. 190-91 (proposing a constitutional amendment recognizing permanence of tribes).

67. See pp. 190-93 (asking federal courts to reinvigorate tribal-sovereignty doctrine, perhaps in part by emulating the moral and ethical engagement Chief Justice Marshall demonstrated to some extent in early cases).

68. See p. 190 (concerning congressional action); pp. 144-53, 190-91 (noting that recent trends in Supreme Court have been adverse to tribal interests).

69. See p. 240 n.85 (“I believe most people in the field of Indian law, but particularly at the state and federal level, have little understanding or ‘feel’ for the real threat — used often enough in history . . . — that plenary power holds for Indian people and tribes.”).

70. Pommersheim states:

Reassertion of the sovereignty doctrine can be greatly augmented, in part, if the courts pay close attention to the articulation of tribal sovereignty as it emanates from tribal court jurisprudence. This emerging jurisprudence contributes significantly in advancing the tribal voice as part of the judicial dialogue on the parameters and contemporary meaning of tribal sovereignty.

P. 190.

— At all.”⁷¹ Narratives rooted in original sin, of course, tend to generate this sort of a corresponding incarnation of hope as well as an ethic of conscience and good works. Federal Indian law, grounded as it is in a colonization based on dubious justifications,⁷² qualifies as such a narrative. Pommersheim, who acknowledges the influence of theology (p. 35), including that of the liberation variety (pp. 105-06), sees the hope for this narrative incarnate in tribal courts, whose “words and actions . . . do have their own unique ‘redemptive’ potential.”⁷³

Many readers will doubt whether those institutions, which Pommersheim admits are new and fragile, can withstand this stress.⁷⁴ No reader, however, could possibly doubt his sincerity or his engagement. For if others in the academy and elsewhere lack faith in the assurance of these things hoped for, they must respect Pommersheim’s conviction of things not seen, his courage in subjecting federal Indian law to the mirror of life, dim though the reflection may be.⁷⁵ In the end, no scholar should doubt his significant contribution to a field he rightly criticizes as removed from reality, impoverished of empathy, and lacking in the engagement “‘of our private integrity and our public duty . . . what Pascal called “the grandeur and the misery” of our common humanity.’”⁷⁶

71. Emily Dickinson, Poem No. 254, st. 1.

72. See *supra* text accompanying note 9.

73. P. 106. The relationship of law and religion is, of course, an immense topic well beyond the scope of this essay. Nonetheless, I cannot resist citing a provocative recent essay by Harold Berman on the spiritual qualities of both that seems consistent with Pommersheim’s underlying approach. See Harold J. Berman, *Law and Logos*, 44 DEPAUL L. REV. 143 (1994). One important commentator on law and religion, Milner Ball, has also published extensively on federal Indian law. See, e.g., MILNER S. BALL, *THE WORD AND THE LAW* (1993); Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1; Milner S. Ball, *Introduction to Symposium, Native American Law*, 28 GA. L. REV. 299 (1994); Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280 (1989).

74. See *supra* note 14 (summarizing the formidable tasks Pommersheim places before tribal courts).

75. Cf. *Hebrews* 11:1; 1 *Corinthians* 13:12. Hope that is seen is, after all, a contradiction in terms. Cf. *Romans* 8:24-25.

76. P. 35 (quoting the Christian commentator Jaroslav Pelikan).