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Respecting the Identity and Dignity of All Indigenous Americans

BILL PIATT

The United States government attempted to eliminate Native Americans through outright physical extermination and later by the eradication of Indian identity through a boarding school system and other “paper genocide” mechanisms. One of those mechanisms is the recognition of some Natives but not the majority, including those whose ancestors were enslaved. The assistance provided to recognized tribes by the government is inadequate to compensate for the historical and continuing suffering these people endure. And yet the problem is compounded for those unrecognized Natives whose ancestors were enslaved and whose tribal identity was erased. They are subjected to a double-barreled discrimination. That is, they suffer the same discrimination and deprivation of resources as their recognized brothers and sisters yet are unable to qualify for government assistance. The system thus pits recognized Indians against unrecognized Indians in a struggle for inadequate resources. This leaves the majority of American Indians striving to survive as they attempt to maintain their Indian identity and dignity. While they continue to preserve the cultural and religious practices of their ancestors, they often find themselves to be the victims of “pretendian” attacks. This Article examines an approach to resolving this conflict, respecting the identity and dignity of all Indigenous Americans.

Respecting the Identity and Dignity of All Indigenous Americans

BILL PIATT*

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INTRODUCTION

No reasonable person would quarrel with the proposition that Indian¹ identity and dignity should be valued and respected. However, the United States government has created a system so complicated and inconsistent for determining who is an Indian that fair-minded people are often confused. Not-so-fair-minded people exploit the divisions the government has created. The bottom line is that while, according to the most recent census figures available, Natives in this country number 5,220,579,² the United States government only recognizes approximately 1,969,167³ of them. In other words, the government recognizes only about one-third of the Native population in this country. The inadequate federal assistance available to recognized tribes and Indians is generally not available to the remaining two-thirds of the Native population as noted in this article.

It is critical to understand, initially, that federally recognized Indians belong to sovereign nations which only obtained recognition after surviving genocidal attempts to exterminate them. The treaties into which they entered required the surrender of lands, and in many instances, the forced repatriation onto remote and nearly uninhabitable areas. These nations, and only these nations, have the right to determine membership in their nations. Nothing in this article intends to

1. As I have previously noted, and as argued in this article, cultural, racial, and ethnic identity are very important concerns. Attaching labels to groups and individuals is often problematic. Without intending offense or a lack of sensitivity, throughout this article I use the terms, "Indian," "Native American," and "Indigenous" interchangeably. Steven L. Pevar, who is the author of one of the leading legal treatises, explains his use of the term, "Indian" as follows:

Considerable thought was given to using Native American rather than Indian in this book. Indian was chosen for several reasons. For one, many Indians use the terms Indian and Native American interchangeably, but there seems to be a preference for the word Indian. For instance, noted Indian author and scholar Vine Deloria, Jr. uses the word Indian in all of his books rather than Native American. In addition, most Indian organizations and groups, including the National Congress of American Indians and the Society of American Indian Government Employees use Indian in their titles. Moreover, virtually all federal Indian laws (such as the Indian Reorganization Act) and federal agencies (such as the Bureau of Indian Affairs) use Indian.

STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 1 (4th ed. 2012) (cited in Bill Piatt et al., *Law Schools Harm Genízaros and other Indigenous People by Misunderstanding ABA Policy*, 49 N.M. L. REV. 236, 236-37 (2019)).

2. Tina Norris et al., *U.S. Census Bureau, The American Indian and Alaska Native Population: 2010* 7 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>. Some of these Indians are of "mixed race." Of course, many Americans from a racial minority background are "mixed race." Former President Barack Obama is one example. The portion of white blood in President Obama, and in the Indians in this census, does not diminish or detract from their respective minority identities. The federally recognized Indians identified in the next footnote also includes many of "mixed race" and "mixed tribal" background. That fact, of course, similarly does not detract from their Indigeneity any more than it detracts from the Indigeneity of the non-federally recognized Indians.

3. U.S. DEP'T OF INTERIOR, 2013 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT 74, 78, 90, (Jan. 16, 2014), <https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc1-024782.pdf>.

disparage the rightful claims to sovereignty these nations continue to exercise. Rather, this article analyzes how the United States government either intentionally, or unintentionally, promotes and foments discord among Indians and non-Indians alike. It maintains a system that has the effect of encouraging Natives to fight with one another for resources and for their very identity as Natives. The resulting chaos undermines the ability of Natives to work toward achieving equality, destroying the dignity of many in the process. This article examines this horrible and growing phenomenon and offers solutions that will enable people of good faith to de-escalate the conflict and work towards justice for all Indigenous Americans.

In sum, as this article examines the policy of the United States toward Native Americans was that of extermination throughout the 1800s and into the early 1900s.⁴ Extermination was pursued physically and through the eradication of the Indian identity of the survivors. Fortunately, the ultimate goal of genocide was not accomplished due to the resiliency of the Native peoples. From the 1900s forward, the policy shifted to the protection of Indian tribes and Indians.⁵ Indigenous populations have rebounded. Unfortunately, this preservation goal has not been completely realized. The resources and policies committed to this protection have not been adequate. And importantly, many Indians and their tribes are ineligible for assistance because the aftereffects of the efforts to eradicate Indians continue.

Still, the United States developed a series of benefits for the tribes and individuals it chooses to recognize. These include educational opportunities, housing, land development, health care, employment, and others.⁶

One author noted that “[v]irtually every federally recognized tribe receives significant financial and technical assistance under one or more of these programs, and some tribes would suffer severe economic hardship without this assistance.”⁷ Moreover, importantly, many Indians and their tribes are ineligible for assistance because the aftereffects of the efforts to eradicate Indians continue. Part I of this article explores how enslavement, the federal government, and “self-eradication” attempted to erase Indian identity. Part II considers the mechanisms of obtaining federal recognition and the benefits that re-

4. Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 715 (1986).

5. *Id.*

6. PEVAR, *supra* note 1, at 35; BILL PIATT & MOISES GONZALES, *SLAVERY IN THE SOUTHWEST, GENIZARO IDENTITY, AND DIGNITY AND THE LAW* 54-60 (2019).

7. PEVAR, *supra* note 1, at 35.

sult from such determinations. Part III examines the failure of the federal recognition program to provide adequate stewardship of Native tribes, Natives it recognizes, and its adverse actions toward non-recognized Indians. Part IV discusses the continued painful attacks launched against unrecognized Indian individuals and Indian tribes by illustrating two examples. Finally, Part V constructs a model for reconciliation of these conflicts.

I. ERADICATION

We begin with an examination of the historical realities of colonization. It is a gross understatement to assert that the lives of Indigenous people, in what is now the United States, have been precarious since the arrival of Europeans. As we will explore, while there is no longer an overt and active campaign to exterminate Natives, at least in a physical sense, nonetheless, there is a continuing pattern of “paper genocide”⁸ undermining, if not eliminating, their identity, cultures, and dignity.

A. Physical Eradication

It is not clear exactly how our Indigenous ancestors arrived on this continent. Early theories involved the migrating of peoples via a land bridge from Asia into what is now Alaska, then down into what is now North America.⁹ The creation stories of various tribes offer and preserve another perspective: Native peoples originated in what is now the Americas. Native creation stories vary from tribe to tribe. For example, the Cherokees believed that the Earth was first created as a floating island above the sea, which was suspended at each of its four corners by cords connected to giant rock known as the sky vault.¹⁰ Similarly, the Iroquois concluded that human beings came from both the sky and the Earth and that their great ruler created the world as a floating island.¹¹ Like these two stories, many tribes held their own beliefs about the origin of life, stemming anywhere from a hollow tree trunk (Kiowa Tribe),¹² to animals dancing and singing life into exist-

8. See, e.g., Cecily Hilleary, *Some Native Americans Fear Blood Quantum is Formula for 'Paper Genocide,'* VOICE OF AMERICA (July 24, 2021, 3:29 AM), https://www.voanews.com/a/usa_some-native-americans-fear-blood-quantum-formula-paper-genocide/6208615.html.

9. SUSAN A. STEBBINS, *NATIVE PEOPLE OF NORTH AMERICA* 39 (2013).

10. *THE PORTABLE NORTH AMERICAN INDIAN READER* 86-88 (Frederick Turner ed., Penguin Books 1977).

11. *Id.* at 36-39.

12. N. SCOTT MOMADAY, *THE WAY TO RAINY MOUNTAIN* 16 (1969).

tence (Miwok).¹³ One common factor that these stories share is that Indigenous people did not migrate to the Americas, but were created here instead.

What is not in dispute is that Indigenous people preceded the arrival of Europeans by tens of thousands of years. Nations and civilizations flourished in the Western Hemisphere. Complex and sophisticated governmental systems, architecture, agriculture, and trade had developed among the estimated 75 to 145 million people in the Americas by the time Christopher Columbus arrived in 1492.¹⁴ One estimate is that the Indigenous population, in what is now the United States and Canada, consisted of between 7.5 million and 18 million people.¹⁵ Another study suggests that the population, in what is now the continental United States, was around 5 million people at the time of Columbus's arrival.¹⁶ There is some evidence that northern Europeans arrived on the eastern seaboard of what is now the United States centuries before Columbus's arrival.¹⁷

The impact of European immigration and conquest upon the Indigenous population was devastating. Active campaigns to kill as many Natives as possible were conducted in some regions by the Spanish, and later by Americans. David E. Stannard's *American Holocaust* details some of these horrific examples. One includes the practice by some Spanish conquistadores of hanging and burning Natives alive in groups of thirteen in order to "honor" Christ and the twelve apostles.¹⁸ Additionally, American soldiers slaughtered Indigenous women and men, cut off their genitals, and proudly wore them on their hats.¹⁹ While these practices were horrific, disease caused an even more catastrophic decline in the Indigenous population. Smallpox alone may have caused the death of 75% of Indians in what is now the United States.²⁰ The ultimate effect was a death toll as high as 100 million people in the Western Hemisphere.²¹ The late Rennard

13. NATIVE AMERICAN ANIMAL STORIES 3-4 (Joseph Bruchac ed., Fulcrum Publishing 1992).

14. DAVID E. STANNARD, *AMERICAN HOLOCAUST: COLUMBUS AND THE CONQUEST OF THE NEW WORLD* 267 (1992).

15. *Id.*

16. SHARON O'BRIEN, *AMERICAN INDIAN TRIBAL GOVERNMENTS* 14 (1989).

17. BILL PLATT, *IMMIGRATION LAW CASES AND MATERIALS* 7 (1994).

18. STANNARD, *supra* note 14, at 268.

19. Genevieve M. Le May, *The Cycles of Violence Against Native Women: An Analysis of Colonialism, Historical Legislation and the Violence Against Women Reauthorization Act of 2013*, 12 PSU MCNAIR SCHOLARS ONLINE J., 2018, at 1, 5. See also, *Massacre of the Cheyenne Indians*, REP. ON THE CONDUCT OF THE WAR, H.R., 38th Cong., 2d Sess. (Washington, Government Printing Office 1865).

20. DONALD R HOPKINS, *PRINCES AND PEASANTS: SMALLPOX IN HISTORY* 204 (1983).

21. STANNARD, *supra* note 14, at 268.

Strickland provided historical examples regarding the role of law in the process of eradicating Natives.²² He detailed horrific massacres, performed unlawfully, even under the laws at the time. Moreover, he explained how the legal system provided a framework for the genocidal activities of federal and state governments of the United States.

Nonetheless, Indian deaths did not exclusively occur because of European conquest and policies. Native tribes engaged in warfare against one another and captured and enslaved their adversaries throughout this time period.²³ However, the utter devastation resulting from disease and warfare by Europeans accounts for the vast majority of this tragedy.

By the best estimates, by the time the United States of America was founded, the Indian population had plummeted from over five million to perhaps less than one million people. If smallpox alone had reduced the Native population by 75%, and additional deaths were attributed to other diseases, starvation, and warfare, then perhaps fewer than one million Natives remained alive at the time of the founding of the new nation. The exact numbers are not easily determined because Indians were not a listed race within the United States Census between 1790 and 1840.²⁴

B. Eradication of Indian Identity by the Federal Government

The physical destruction of Native communities was not the only attempt by the United States government to eradicate Native culture and civilization. Indian boarding schools were established by the federal government throughout the United States under the Civilization Fund Act of 1819.²⁵ These schools operated for more than 150 years. Native children were forced out of their communities and into the schools with the stated purpose of assimilating them into American society.²⁶ As Richard Pratt, the founder of the Carlisle School, infamously stated: “Kill the Indian and save the man.”²⁷ Pratt was not

22. See Strickland, *supra* note 4, at 713.

23. See JAMES F. BROOKS, *CAPTIVES & COUSINS: SLAVERY, KINSHIP, AND COMMUNITY IN THE SOUTHWEST BORDERLANDS* (2002); see ANDRES RESENDEZ, *THE OTHER SLAVERY* (2016); see PIATT & GONZALES, *SLAVERY IN THE SOUTHWEST*, *supra* note 6.

24. CENSUSES OF AMERICAN INDIANS, U.S. CENSUS BUREAU, https://www.census.gov/history/www/genealogy/decennial_census_records/censuses_of_american_indians.html (last visited July 12, 2021).

25. Pub. L. 15-85, 3 Stat. 516b, ch. 85.

26. *US to Investigate ‘Unspoken Traumas’ of Native American Boarding Schools*, *GUARDIAN* (June 22, 2021, 5:56 PM), <https://www.theguardian.com/us-news/2021/jun/22/us-investigation-native-american-boarding-schools>.

27. Strickland, *supra* note 4, at 729 n.33. See Becky Little, *How Boarding Schools Tried to ‘Kill the Indian’ Through Assimilation*, *HISTORY*, <https://www.history.com/news/how-boarding-schools-tried-to-kill-the-indian-through-assimilation> (Nov. 1, 2018).

referring to the physical killing of the Indian; rather, Pratt sought to kill the Indian identity of the individual removed from his tribe and entrusted to his care. The horrors of this attempted eradication of Indian identity were underlined by Secretary of the Interior, Debra (“Deb”) Haaland,²⁸ the first Native American to hold that position. In an opinion piece published in the *Washington Post* on June 11, 2021, Haaland noted:

Many Americans may be alarmed to learn that the United States has a history of taking Native children from their families in an effort to eradicate our culture and erase us as a people. It is a history that we must learn from if our country is to heal from this tragic era.²⁹

Haaland, citing statistics from the National Native American Boarding School Healing Coalition, indicated that by 1926, more than 80% of Indigenous school-age children attended boarding schools run by the federal government or by religious organizations.³⁰ Many unexplained graves of Indian children have recently been discovered at the sites of Indian schools in Canada.³¹ Secretary Haaland has ordered an investigation to determine if a similar situation exists in the United States.³²

There is no doubt that these efforts to force assimilation had a devastating impact on the identity of Natives. For example, many of those who survived the boarding school process chose to no longer identify as Indian. These survivors, along with their descendants who did not know of their Indian identity, would not appear on Census rolls, yet they were just as genetically “Indian” as those who continued to identify as such. These descendants could not share in the kinship and culture of their tribes because they were forcibly removed from them, and in many instances, their emotional attachment to tribal identity was destroyed. Their descendants who might later learn of their Indian identity through DNA testing, historical records, and the

28. *GUARDIAN*, *supra* note 27.

29. Deb Haaland, *Opinion: My Grandparents Were Stolen from Their Families as Children. We Must Learn About This History*, *WASH. POST* (JUNE 11, 2021, 9:00 AM), <https://washingtonpost.com/opinions/2021/06/11/deb-haaland-Indigenous-boarding-schools/>. See Memorandum from Deb Haaland, Secretary of U.S. Dep’t of Interior, to the Dep’t of Interior (June 22, 2021), <https://www.doi.gov/sites/doi.gov/files/secint-memo-esb46-01914-federal-indian-boarding-school-truth-initiative-2021-06-22-final508-1.pdf> [hereinafter Haaland Memorandum] (requesting the Department of Interior to investigate the deaths and lasting consequences of residential Indian boarding schools in the U.S.).

30. *GUARDIAN*, *supra* note 27.

31. Dan Bilefsky & Ian Austen, *Hundreds More Unmarked Graves Found at Former Residential School in Canada*, *N.Y. TIMES* (July 30, 2021), <https://www.nytimes.com/2021/06/24/world/canada/Indigenous-children-graves-saskatchewan-canada.html>.

32. See Haaland Memorandum, *supra* note 29.

other means discussed below, certainly are Indigenous even though they no longer maintain the political affiliation with a sovereign Indian nation. Many of the survivors of these efforts are not recognized as being Indians by the U.S. government because they cannot demonstrate affiliation with a recognized tribe, explained below, thereby furthering the goal of Indian eradication.

Another mechanism of Indian eradication employed by the federal government is the requirement of a “blood quantum” of “Indian blood” in the recognition process.³³ That is, the government requires an individual demonstrate that the person possesses some fraction, at least one-sixteenth, of “Indian blood.”³⁴ Some have suggested that this mechanism was designed to extinguish Indian identity, regardless of active membership in a tribe, when successive generations of intermarriage “diluted” the blood.³⁵ Not every tribe maintains a “blood quantum” requirement for tribal membership. Recently, the Cherokee Nation agreed to remove the requirement because it led to the exclusion of descendants of enslaved African Americans, held by Cherokees, who were eventually accepted as tribal members.³⁶ By comparison, “one-drop” of “[B]lack blood” was considered sufficient to categorize a person as Black for purposes of Jim Crow laws.³⁷

C. Self-Eradication

The assimilation forced by the boarding schools and the horrors experienced by Indian parents as their children were removed from

33. See Kat Chow, *So What Exactly Is ‘Blood Quantum’?*, NPR (Feb. 9, 2018, 6:00 AM), <https://www.npr.org/sections/codeswitch/2018/02/09/583987261/so-what-exactly-is-blood-quantum#:~:text=OF%20your%20tribe.,Blood%20quantum%20was%20initially%20a%20system%20that%20the%20federal%20government,part%20of%20their%20citizenship%20requirements> (explaining how blood quantum was initially a system the U.S. federal government placed onto Indian tribes in an effort to limit their citizenship”).

34. See *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005) (discussing how courts have “judicially explicated” the term “Indian,” and the generally accepted conjunctive test for “Indian status” considers (1) the degree of Indian blood; and (2) the tribal or government recognition as an Indian).

35. See e.g., KIM TALLBEAR, *NATIVE AMERICAN DNA: TRIBAL BELONGING AND THE FALSE PROMISE OF GENETIC SCIENCE* 45 (2013).

36. Allison Herrera, *Cherokee Nation Supreme Court Rules Citizenship not Determined ‘By Blood,’* THE WORLD (Mar. 4, 2021, 4:15 PM), <https://www.pri.org/stories/2021-03-04/cherokee-nation-supreme-court-rules-citizenship-not-determined-blood>.

37. F. James Davis, *Who is Black? One Nation’s Definition*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/jefferson/mixed/onedrop.html> (last visited Sep. 29, 2021). See *Plessy v. Ferguson*, 163 U.S. 538, 552 (1896) (including a discussion of the *any ascertainable* Negro blood standard which was the *one drop rule* in effect in many states at the time). See also, *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that Virginia’s anti-miscegenation statute violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *Id.* “Colored persons,” according to the Virginia statute, were those in whom there was “ascertainabl[y] any Negro blood.” *Id.* at 4 n.4. By contrast, a person with one-sixteenth or less of Indian blood, and no other nonwhite blood, would be considered white. *Id.*)

them prompted many Indians to hide or even deny their identity. The bitter sting of discrimination aimed at Indians undoubtedly caused many to claim an identity other than Indian to minimize that discrimination. Some denied Indian identity by claiming to be Spanish or Mexican. Fair-skinned Natives claimed to be white. The trauma of discrimination was internalized by many, so their children were never told who they really were.³⁸

D. Eradication of Indian Identity Through Slavery

Europeans did not invent slavery. It has existed since recorded history.³⁹ Egyptian slavery of the Jews forms the basis of the book of Exodus in the Old Testament.⁴⁰ The New Testament contains the urging of slaves and slave masters to respect one another.⁴¹ Slavery was an important feature of ancient Roman and Greek societies.⁴² Natives had captured and traded slaves for thousands of years on what is now the North American continent.⁴³ Yet, Native slavery usually involved incorporating captives into the tribe. While their original tribal identity and membership would be lost, their indigeneity was not; the captives were still Indian, and become members of the tribe of their Indian captors.⁴⁴ European slavery, on the other hand, extinguished Native identity because enslaved Indians could not identify their tribal origins, particularly, if their enslavement occurred when they were young or if the enslaved Natives became part of non-Indian households. Today, Indigenous people who are not members of a federally recognized tribe are generally not considered to be Indians by the United States government.⁴⁵ Recognition as an “Indian” by the federal government depends upon the political reality of enrollment of an individual in a federally recognized sovereign Indian nation.⁴⁶

European slavery began with the Spanish. The Spanish arrived in the “New World,” or what is now known as North America, South America, and the Caribbean, beginning in 1492, seeking to enrich and

38. Carol Morello, *Native American Roots, Once Hidden, Now Embraced*, WASH. POST (Apr. 7, 2001), <https://www.washingtonpost.com/archive/politics/2001/04/07/native-american-roots-once-hidden-now-embraced/8897fa1e-762e-4151-85f3-7b377a96d9ae/>.

39. CHERYL TAYLOR PAGE & BILL PIATT, *Human Trafficking* 5 (2016).

40. See *Exodus*.

41. *Colossians* 3:22, 4:1.

42. *Slavery in Ancient Greece*, Crystalinks, <http://www.crystalinks.com/greekslavery.html> (last visited July 21, 2021).

43. BROOKS, *supra* note 23, at 33.

44. *Id.* at 6, 18.

45. See discussion *infra* Part II.

46. *Id.*

expand the Spanish colonial empire.⁴⁷ They also sought to propagate the Catholic faith. The Spanish then headed north, arriving at what is now New Mexico, in 1540. They moved eastward, and on to what is now Kansas, in a futile attempt to locate the Cities of Gold.⁴⁸ The Cities, according to legend, were established by Spanish bishops fleeing with their gold to the New World to escape the Muslim invasion of Spain.⁴⁹ The fall of Merida, Spain in 1150 C.E. prompted the legend.⁵⁰ One can imagine the Spanish conquistadores asking Natives where the cities of gold could be found, and having the Natives point ahead urging the Spanish to keep searching for the nonexistent legendary cities.

After realizing the legendary cities did not exist, the Spanish returned to what is now New Mexico to establish settlements. The Spanish needed a labor force to build and maintain these settlements, thus, the Spanish enslaved the Natives. Additionally, the Spanish purchased other Indians from various tribes that enslaved other Indians.⁵¹ Slave markets in Taos Pueblo and Pecos, in what is now New Mexico,⁵² provided ample opportunities for the Spanish to purchase Indian captives. The Spanish distributed these enslaved Indians to the colonials and the Roman Catholic Church (“the Church”) through a system of “encomienda.”⁵³ These slaves became known as “Genízaros,” taken from the Turkish word *yeniceri* or *janissary*. *Yeniceris* were Christian captives of the Turkish Empire, forcibly abducted as children. After being trained as soldiers, they were required to defend the Ottoman Empire.⁵⁴

In addition to providing slave labor to the Spanish colonizers and the Church, Genízaros were used for military purposes by their Spanish slave masters. Spanish settlements came under repeated attacks by Indians in the surrounding plains. To protect their communities, the Spanish began to afford some limited autonomy to Genízaros by al-

47. PIATT & GONZALES, *supra* note 6, at 14-20.

48. *Id.* 18.

49. *Id.* at 17.

50. *Id.* at 17-18. Ironically, one of the Indian gaming casinos in New Mexico is named, “Cities of Gold,” https://www.reservations.com/hotel/cities-of-gold-casino?rmcid=tophotels&utm_source=googleads&gclid=CJ0KCOjw9O6HBhCrARIsADx5qCREvOcxD98ysd_y_y2WYnYs8Ou5DKjmX31SBeij0oSQs1gk1g2wJ0aArxiEALw_wcB (last visited July 23, 2021).

51. PIATT & GONZALES, *supra* note 6, at 18.

52. Taos Lightnin’, UNITARIAN CONGREGATION OF TAOS, <https://uutaos.org/wp-content/uploads/2014/03/Slave-Trade-in-NM.pdf> (last visited July 22, 2021); see Marc Simmons, *Slavery Thrived in Colonial New Mexico*, SANTA FE ALWAYS ONLINE, <https://www.sfaol.com/history/slavery.html> (last visited July 23, 2021).

53. WARREN A. BECK, *NEW MEXICO A HISTORY OF FOUR CENTURIES* 65 (1982).

54. See *infra* note 72; see Malcolm Ebright, *Genízaros*, N.M. STATE REC. CTR. ARCHIVES, <http://newmexicohistory.org/people/genizaros> (last visited Oct. 29, 2018).

lowing them to live in defensive outposts to protect against invading Indians.⁵⁵

The first recorded Genízaro settlement was located in the Barrio de Analco, in my hometown of Santa Fe. Early records indicate that by 1750, Genízaros were functioning as a semi-autonomous defensive perimeter south of the Santa Fe River, protecting the Spanish colonists. Besides their defense of Santa Fe, the colonial governor of New Mexico sent Genízaro warriors from Analco to defend the perimeters of the Spanish colonial settlements in what is now northern New Mexico. Genízaros demonstrated their skill as mounted soldiers, which added to their value as protectors of the Spanish colonial interests.⁵⁶

Besides their value as warriors, Genízaros also provided their talent in constructing the Spanish settlement within Santa Fe. Genízaros built the San Miguel Chapel in 1610, which still remains as the oldest church in the United States.⁵⁷ However, the Analco settlement was met with tragedy. In August of 1680, a coalition of Indians led by a Native medicine man named Popé rebelled against the Spanish rule and against the imposition of the Catholic faith, in particular. The Genízaro *barrio* was wiped out by the rebels during the early fighting.⁵⁸ Many Spanish settlers were killed, along with over twenty Franciscan friars.⁵⁹ A monument to those friars, the Cross of the Martyrs, overlooks Santa Fe. A statue of Popé, who led the first revolution against European colonizers, is one of the two New Mexico statutes in place in the United States House of Representative.⁶⁰

The Spanish fled south in 1680 to the area of what is now El Paso, Texas.⁶¹ They did not give up on their colonial and conversion mission. They returned to Santa Fe in 1692, along with their Indian allies who had fled with them, and a wooden statue of Our Lady known as “La Conquistadora.”⁶² Their bloodless “reconquest” of Santa Fe, and

55. NACIÓN GENÍZARA: ETHNOGENESIS, PLACE, AND IDENTITY IN NEW MEXICO (Moises Gonzales & Enrique R. Lamadrid eds., 2019) 27-35 [hereinafter NACIÓN GENÍZARA].

56. *Id.* at 19.

57. SAN MIGUEL CHAPEL, <https://www.sanmiguelchapel.org> (last visited Nov. 29, 2021).

58. PLATT & GONZALES, *supra* note 6, at 27-29; Ebright, *supra* note 54.

59. History of the Archdiocese of Santa Fe, ARCHDIOCESE OF SANTA FE, <https://archdiocesof.org/asf-history> (last visited Oct. 1, 2021). See generally Michael P. Gueno, *Among the Pueblos: The Religious Lives of the Franciscan Missionaries, Pueblo Revolutionaries, and the Colony of Nuevo Mexico, 1539-1722* (2010) (Ph.D. dissertation, Florida State University) (exploring the presence of religion within daily life through the history of the Pueblo and Spanish colonists of New Mexico from pre-European settlement to the Pueblo Revolt of 1680).

60. Po'pay Statute, ARCHITECT OF THE CAPITOL, <https://www.aoc.gov/explore-capitol-campus/art/popay> (last visited July 21, 2021).

61. W.H. Timmons, *El Paso del Norte*, TEX. STATE HIST. ASSOC. HANDBOOK OF TEX. (Jan. 1, 1995), <https://www.tshaonline.org/handbook/entries/el-paso-del-norte>.

62. “La Conquistadora” means “the conquering woman” in Spanish. Since 1997 though the Church has referred to her as, “Our Lady of Peace.” History of La Conquistadora, SANTA FE:

what is now New Mexico, is celebrated each year as a fulfillment of a promise made by the Spanish “Conquistadores” to “La Conquistadora” that a celebration would be held each year in her honor if the reconquest could be peaceful.⁶³ Although the celebration continues today, controversy over its origins has led to its modification to account for Native sensibilities.⁶⁴ This modification seeks to correct the historical inaccuracy that the reconquest was “bloodless.” After the initial Spanish entry was peaceful, a series of reprisals, including hangings, were carried out against those who continued to resist Spanish rule.⁶⁵ Following their return, the Spanish created additional defensive Genízaro settlements. Genízaros were awarded land grants in Belen, Abiquiu, Ranchos de Taos, Carnué, and Las Huertas-Placitas.⁶⁶

Today, the Genízaro communities still exist. In the mountain pass east of Albuquerque, where the original Route 66, now Interstate 40, traverses, the village and people of Carnué continue to maintain a sophisticated governance structure based upon the land grant awarded by Spain, and carried forward through Mexican governance, into the present recognition by the United States and New Mexico.⁶⁷ The same is true of the Pueblo de Abiquiu, north of Santa Fe. Other Genízaro outposts remain as communities in New Mexico. The remaining Genízaro population is widely distributed throughout New Mexico, Colorado, and the Southwest.⁶⁸ Another non-federally recognized Indigenous pueblo in New Mexico is Tortugas Pueblo near Las Cruces.⁶⁹ This tribe includes the descendants of some of the Indians who fled during the 1680 rebellion.⁷⁰

The contributions of Genízaros, and their identity as Indigenous people is explained in a resolution adopted by the legislature of the State of New Mexico:

NEW MEXICAN, https://www.santafenewmexican.com/news/local_news/history-of-la-conquistadora/article_ca342910-fe14-5b69-a766-8cb9000ac3d8.html (last visited Jan. 21, 2022).

63. Bill Piatt, *Entrada: Slavery, Religion and Reconciliation*, 13 INTERCULTURAL HUM. RTS. L. REV. 1 (2018).

64. FIESTA DE SANTA FE, <https://www.santafefiesta.org> (last visited Jan. 21, 2022).

65. SANTA FE NEW MEXICAN, *supra* note 62.

66. NACIÓN GENÍZARA *supra* note 55. The locations of the Genízaro land grants are located on an unpaginated map within the source.

67. CAÑÓN DE CARNUÉ, <https://www.canondecarnuelandgrant.org> (last visited Mar. 9, 2022).

68. *E.g.*, NACIÓN GENÍZARA, *supra* note 55.

69. Welcome to Tortugas Pueblo, TORTUGAS PUEBLO, <https://tortugas pueblo.com/about> (last visited Jan. 21, 2022).

70. Diana Alba Soular, *Local Tribe's History Rooted in Spanish Conquest*, LAS CRUCES SUN NEWS (Mar. 26, 2016, 8:03 PM), <https://www.lcsun-news.com/story/news/local/2016/03/26/local-tribes-history-rooted-spanish-conquest/82176602/>.

A MEMORIAL RECOGNIZING THE ROLE OF GENIZAROS IN NEW MEXICO HISTORY AND THEIR LEGACY.

WHEREAS, indigenous captivity and servitude were common in frontier society that became New Mexico; and

WHEREAS, various indigenous peoples, including Apache, Dine (Navajo), Pawnee, Ute and Comanche, were captured; and

WHEREAS, indigenous people became part of New Mexican communities and households through capture in war, kidnapping, trade fairs, punishment for crimes, adoption, abandonment and the sale of children; and

WHEREAS, baptismal records reveal that at least four thousand six hundred one captive indigenous persons were baptized between the years 1700 and 1880, becoming part of Spanish, Mexican and territorial households; and

WHEREAS, numerous primary source records document the captivity, presence and experience of indigenous people displaced in this way, including marriage records, court cases, wills and censuses; and

WHEREAS, the experiences of captives, while varied, included being raised and serving within households, and sometimes remaining in a captor's home for a lifetime; and

WHEREAS, the practice of taking Indian captives lasted through the Mexican and into the American period in New Mexico; and

WHEREAS, there were many terms to describe Indian captivity and servitude in New Mexico, including "cautivos," "criados," "coyotes," and "famulos" but the most common used prior to 1821 and into the Spanish colonial period was the term "genizaro"; and

WHEREAS, the term "genizaro" derives from the Turkish word "yeniceri" or "janissary," terms used to describe Christian captives who, as children, had been forcibly abducted, traded and trained as the nucleus of the Ottoman empire's standing army; and

WHEREAS, genizaro families could be found in various communities throughout the colony, including the major villages of Albuquerque, Santa Cruz de la Canada, Santa Fe and El Paso del Norte; and

WHEREAS, in the mid-eighteenth century, many genizaros were again relocated strategically at the edges of Hispanic communities, thus providing both an initial line of defense against raiders and the foundation for communities such as Abiquiu, Belen, Carnuel, Las Trampas, Ojo Caliente, Ranchos de Taos, San Miguel del Vado and Tome; and

WHEREAS, by 1776, genizaros comprised at least one-third of the entire population of the province; and

WHEREAS, genizaros and their descendants have participated in all aspects of the social, political, military and economic life of New Mexico during the Spanish, Mexican and American periods; and

WHEREAS, eventually the migration patterns of cautivos and genizaros paralleled that of all New Mexicans with communities extending southward to El Paso del Norte (Ciudad Juarez) and northern Chihuahua, Mexico, as well as northward in Colorado and beyond; and

WHEREAS, the direct result of the Indian slave trade was the emergence of generations of racial and cultural mixtures often referred to in the colonial period with terms such as coyotes, colores quebrados, lobos and mestizos; and

WHEREAS, many New Mexicans can trace their ancestry to these [I]ndigenous peoples;

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE STATE OF NEW MEXICO that the important role of genizaros and their descendants have had in the social, economic, political and cultural milieu of New Mexico and the United States be recognized; and

BE IT FURTHER RESOLVED that the house of representatives recognize the existence and importance of this [I]ndigenous group and the presence and importance of its descendants today; and

BE IT FURTHER RESOLVED that a copy of this memorial be transmitted to the office of the state historian."⁷¹

The enslaved Genízaro, many of whom were captured as children, had their tribal identity stolen from them because they were re-named by their Spanish colonial masters, and by the Church, without inclusion of a tribal identity.⁷² A Genízaro would appear on many early census rolls as "Indian servant," or *criada* (servant).⁷³ Thus, the descendants of the Genízaros, through no fault of their own or their ancestors, cannot identify with a specific tribal affiliation. Despite this, descendants of the enslaved Genízaro identify as Indigenous because of their significant Native DNA and their maintenance of tribal identities, governance, and practices for centuries. Further, Genízaro Natives have received state recognition and would be recognized under

71. H.R. Mem'l 40, 48th Leg. 1st Sess. (N.M. 2007); S. Mem'l 59, 48th Leg. 1st Sess. (N.M. 2007).

72. See Piatt & Gonzales, *supra* note 6, at 20-27.

73. FRAY ANGELICO CHAVEZ, 9 SMITHSONIAN, INSTITUTION HANDBOOK OF NORTH AMERICAN INDIANS (1979).

the United Nations Declaration on the Rights of Indigenous People (“UNDRIP”).⁷⁴ However, Genízaros are not recognized by the United States federal government. *Slavery in the Southwest* summarizes the importance of self-identification as a fundamental criterion for protection under the United Nations Declaration on the Rights of Indigenous People:

But who exactly is protected by this declaration? Importantly, the Declaration does not define ‘[I]ndigenous peoples.’ That is because the Declaration adopts the International Labour Organization’s (ILO) ‘Convention Concerning [I]ndigenous and Tribal Peoples in Independent Countries (No. 169).’ That Convention recognizes that ‘self-identification as [I]ndigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.’ So, initially, it is important to note that Genizaros or other non-tribal Indians have the right under the authority of the United Nations Declaration to determine their own identity as ‘[I]ndigenous or tribal,’ without requiring the approval of the United States government, nor those of the states.⁷⁵

Yet Genízaros continue to maintain their Indigenous identity whether or not the federal government recognizes it. A *New York Times* article notes a renewed interest in this Indigenous identity.⁷⁶ Sophisticated DNA studies by Miguel Torres continue to demonstrate the scientific basis for the Indian identity of Genízaros.⁷⁷ Religious and cultural practices, practiced for centuries, continue among these people. A growing body of scholarship supports and advances the knowledge of Genízaro history and identity.⁷⁸ A photo exhibit by Russel Albert Daniels regarding the Genízaro Pueblo of Abiquiú is on display at the Smithsonian National Museum of the American Indian in Washington, D.C.⁷⁹ Native filmmaker, Gary Medina Cook, is creating a documentary entitled *The Genízaro Experience* at the at the

74. G.A. Res. 61/295, United Nations Declaration on the Human Rights of Indigenous Peoples (Sept. 13, 2007).

75. PIATT & GONZALES, *supra* note 6, at 145 (footnote omitted).

76. Simon Romero, *Indian Slavery Once Thrived in New Mexico. Latinos Are Finding Family Ties to It*, N.Y. TIMES (Jan. 28, 2018), <https://www.nytimes.com/2018/01/28/us/indian-slaves-genizaros.html>.

77. NACIÓN GENÍZARA, *supra* note 55, at 305-25.

78. Some of these, from most recent, include: PIATT & GONZALES, *supra* note 6; NACIÓN GENÍZARA, *supra* note 55; Piatt et al., *supra* note 1; Piatt, *supra* note 58, at 1; Gonzales, *supra* note 63; See BERNARDO GALLEGOS, POSTCOLONIAL INDIGENOUS PERFORMANCES: COYOTE MUSINGS ON GENÍZAROS, HYBRIDITY, EDUCATION, AND SLAVERY (2017); Ebricht, *supra* note 54; See ESTEVAN RAEL-GALVEZ, IDENTIFYING CAPTIVITY AND CAPTURING IDENTITY: NARRATIVES OF AMERICAN INDIAN SLAVERY. COLORADO AND NEW MEXICO, 1776-1934 (2002).

79. Russel Albert Daniels, *The Genízaro Pueblo of Abiquiú*, AMER. INDIAN MAG., <https://www.americanindianmagazine.org/story/genizaro-pueblo-abiquiu> (last visited July 23, 2021).

time of this writing.⁸⁰ Contemporary music by Felix Peralta incorporates traditional songs dating back centuries, that preserves and communicates the Genízaro experience.⁸¹ Further, director of the Abiquiu Library and Cultural Center, Isabel Trujillo, expanded upon the collection of documents and experiences of the Pueblo de Abiquiu.⁸²

Annual feasts and religious celebrations are held in Genízaro communities throughout New Mexico.⁸³ Traditional dances, such as the *Matachines*, are performed commemorating the mixture of Native and Catholic religious history.⁸⁴ In Carnué, New Mexico, members gather to pray, celebrate, and witness the dancing at the end of the summer. Moises Gonzales, a Genízaro scholar and historian, is one of the *danzantes* (dancers) during these events.⁸⁵ His passion and commitment to his people is infectious. The steep canyon walls east of Albuquerque, part of the land grant, form the backdrop for the dancing and celebrations. A procession of community members follow the dancers to the village church, tucked away in the Sangre de Cristo mountains. Once at the church, *danzantes* move in the traditional centuries old *Matachines* dance to the rhythm of a violin and guitar.⁸⁶ A

80. Gary Medina Cook, *The Genízaro Experience Trailer*, YOUTUBE (Dec. 6, 2021), <https://youtu.be/b4y7OU74eJs>.

81. Felix Gato Peralta, *Comanche Highway*, BANDCAMP, <https://felixgatoperalta.bandcamp.com/track/comanche-highway> (last visited July 23, 2021). The lyrics are as follows:

Comanche highway passing thru the canyon
Comanche spirit Mother Earth and companion
Captured by the unknown,
Now I'm a landless [Genízaro]
Blood & Pain Terrorize the
Desert land
Servants sold I just can't understand
Like a pelt of Buffalo I'm a landless Genízaro
Once a warrior on the eastern
plains I ride
Enslaved by the Spaniard [c]lan, learned to love Jesus Christ
Our religion was the Buffalo I'm a landless [Genízaro]
Comanchera[,]Coyote de Apache
Two religions fightin['] within me
Like a pelt of Buffalo I'm a landless [Genízaro]

Id.

82. EL PUEBLO DE ABIQUIU LIBRARY & CULTURAL CENTER, <http://abiquiupl.org/index.html> (last visited July 26, 2021).

83. John Burnett, *Descendants of Native American Slaves in New Mexico Emerge from Obscurity*, NPR (Dec. 29, 2016, 4:13 PM), <https://www.npr.org/2016/12/29/505271148/descendants-of-native-american-slaves-in-new-mexico-emerge-from-obscurity>.

84. MATACHINES! (Claude Stephenson ed., 2008); Wu Mingren, *The Controversial Role of La Malinche in the Fall of the Aztec Empire: Traitor or Hero?*, ANCIENT ORIGINS (Feb. 2, 2016), <https://www.ancient-origins.net/history-famous-people/controversial-role-la-malinche-fall-aztec-empire-traitor-or-hero-005284> (July 24, 2019); Adelaida R. Del Castillo, *La Malinche*, ENCYCLOPEDIA, <https://www.encyclopedia.com/social-sciences/encyclopedias-almanacs-transcripts-and-maps/la-malinche> (last visited July 23, 2021).

85. Co-author of SLAVERY IN THE SOUTHWEST: GENÍZARO IDENTITY, DIGNITY AND THE LAW; co-editor, A GENÍZARA: ETHNOGENESIS, PLACE, AND IDENTITY IN NEW MEXICO.

86. This author has observed the *Matachines* as performed in Carnué on several occasions, including 2019 and 2021. Photos and videos, of these dances are on file with the author.

little girl in a white First Communion outfit accompanies the adult dancers. She represents the introduction of Catholicism to the New World, according to at least one interpretation of the dance.

At Abiquiu Pueblo, Indigenous people celebrate the feast of Santo Tomas (St. Thomas), the patron saint of their Pueblo, with dancing and feasts the weekend following Thanksgiving.⁸⁷ I was born in Santa Fe and my maternal Indigenous Hispanic lineage extends back centuries. My Genízaro relatives still live in Abiquiu. Some of my family members have served as leaders of the “Merced del Pueblo de Abiquiu” (Land Grant of the Pueblo of Abiquiu). Some of my ancestors are buried in Abiquiu and it is particularly moving to visit Abiquiu over the years to participate in feasts and engage in book discussions. The world knows Abiquiu as the site of Georgia O’Keefe’s residence and the magnificent natural beauty of the area.⁸⁸ My family, including my family members who were friends and associates of O’Keefe, know the area as the ancestral homeland, calling us back to experience its beauty and to hear the voices of our ancestors. I cannot completely share in this article the experience of walking the paths of my ancestors, visiting their graves, and feeling their presence. It is impossible to re-create the sights and sounds of the celebration. Nobody who spends time in the community of Abiquiu, and in particular, nobody who attends the feast of Santo Tomas can doubt that the people of Abiquiu Pueblo are Indigenous. Until you visit these feasts, my words suffice.⁸⁹

Abiquiú Indian women and girls, some as young as four or five, dance inside and outside the church. As they wear traditional dresses, village members watch, sing, and join in the dances in the crisp New Mexico autumn air. An elder circulates among the crowd offering paper cups and a shot of whiskey to help spectators “keep warm” as a light snow falls and the dancing continues. Occasionally, a shotgun is fired into the air. Then, as the dancing winds down, the crowd moves into the parish hall for a shared feast of traditional dishes of posole, chile, beans, tortillas, pastries, and more shots to “keep warm.” Back outside, dancers from one of the nearby pueblos arrive to offer their dancing to the celebration. Members of that pueblo circulate among the crowd, tossing store-bought candies (a delicacy in rural northern

87. *The Genízaro Pueblo of Abiquiú*, NATIONAL MUSEUM OF THE AMERICAN INDIAN, <https://americanindian.si.edu/developingstories/daniels.html> (last visited Oct. 1, 2021).

88. GEORGIA O’KEEFE MUSEUM, <https://www.okeeffemuseum.org/home-and-studio> (last visited Jan. 22, 2022).

89. The description is from my November 2019 observation. I have photos and videos on file. Dances were not held in 2020 due to the coronavirus (COVID-19) pandemic.

New Mexico) to the crowd. This occurs as the feasting, prayers, and celebration continues.

Members of the Tortugas Pueblo, near Las Cruces, New Mexico, who self-identify as *Los Indigenes de Nuestra Senora de Guadalupe* (The Indigenous People of Our Lady of Guadalupe), conduct an annual feast and celebration in December. Participants gather to pray and embark on a thirteen-mile roundtrip pilgrimage from the church at Tortugas Pueblo to the top of “A” mountain, east of Las Cruces, New Mexico for a mass in honor of Our Lady. I have had the wonderful experience of participating in these pilgrimages, celebrations and feasts in Tortugas.⁹⁰

Although this is only a brief summary of some of the Genízaro feasts and celebrations, no summary would be complete without the mentioning of two other Genízaro religious celebrations. The first of these celebrations is the annual pilgrimage to El Santuario de Chimayo in Chimayo, New Mexico. I have participated in this pilgrimage many times over the last forty-plus years. The church was constructed on the site of an older Indian settlement. It has gained a reputation over the years as a healing place. Indeed, dirt from El Santuario is believed to have miraculous healing powers. Rows of crutches line the room where the dirt is available from the *poza* (hole) in the floor. These crutches, photos, and notes left in the room, attest to the miraculous recovery of those who made the pilgrimage and touched the dirt.⁹¹

The pilgrimage to the Santuario takes place on the days leading up to Good Friday. Mass is celebrated in the early morning hours on that day, which means pilgrims from surrounding areas begin their journeys to be present on Holy Thursday and Good Friday. I have commenced this 28-mile journey from my hometown of Santa Fe on numerous occasions, leaving on Holy Thursday evening to arrive at the Santuario in the *madrugada* (dawn) the next morning. Some pilgrims walk from as far away as Albuquerque, almost 90-miles to the south. A few carry crosses and some even make part of the journey on their knees.

And further north, Genízaro *penitentes* (penitents) commemorate Holy Week in ceremonies which extend back centuries. Charlie Carrillo and Felipe Mirabal note, “[t]he mystery of the *Hermanos*

90. Again, the description is from my personal observations, December 2019. I have photos and some video on file. The pilgrimage was not held in 2020 due to the coronavirus (COVID-19) pandemic.

91. See *Easter Pilgrimage to Chimayó*, THE PLURALISM PROJECT, <https://pluralism.org/easter-pilgrimage-to-chimay%C3%B3> (last visited July 23, 2021).

[(Brothers)] or *Penitentes* that belong to the *Cofradía de Nuestro Padre Jesús Nazareno* [(Brotherhood of Our Father Jesus the Nazarene)] has baffled and fascinated scholars, journalists, Protestant missionaries, and the local Catholic clergy for decades.⁹²

Much has been written on the *penitentes* with often a great deal of misunderstanding on the part of outside observers. Ramon A. Gutierrez offers an important explanation of the complex Genízaro origins of the *Hermanos Penitentes* in *Nación Genízara: Ethnogenesis, Place, and Identity in New Mexico*.⁹³ These dances, feasts, celebrations, and pilgrimages are always moving spiritual events, renewing kinship ties. Genízaros sharing space with other Genízaros in the presence of the Creator. There is no doubt in the mind of any of the Genízaros that they are Indigenous people. They carry on the traditions and rituals of their ancestors, passing along the traditions to their children just as those traditions have been passed along to them by their elders.

Still, Genízaros are not recognized as Indians by the United States government. They are, however, listed in the Smithsonian Museum's Handbook of North American Indians.⁹⁴ As will be seen, the badges of servitude imposed upon their Genízaro ancestors, and now upon them, continue. They are often subjected to mocking and ridicule for the lack of their federal recognition, as described below. Yet the slavery imposed upon their ancestors, and lack of recognition by the United States government has not prevented Genízaros from maintaining their cultural and religious practices as noted in this section and in the discussions to follow. However, with or without federal recognition, their kinship, culture, and identification as Indians will endure, as contemporary Genízaros continue to learn of, and assert their Indigenous identity.⁹⁵ This resurgence in Genízaro practices, customs, and now a growing body of scholarship all means that the eradication of Genízaros and their identity has not, and will not, be accomplished.

92. Charlie M. Carrillo & Felipe R. Mirabal, *The Mystery of the Penitentes*, EL PALACIO <https://www.elpalacio.org/2019/12/the-mystery-of-the-penitentes> (last visited Mar. 9, 2022).

93. *Id.* See NACIÓN GENÍZARA, *supra* note 55, at 80-117.

94. See generally HANDBOOK OF NORTH AMERICAN INDIANS (William C. Sturtevant ed., 1978) (addressing, through a series of fifteen volumes, documenting information about all Indigenous peoples of North America).

95. *E.g.*, NACIÓN GENÍZARA, *supra* note 55; see also, John Burnett, *Descendants of Indian Slaves in New Mexico Emerge from Obscurity*, WFDD (Dec. 30, 2016, 12:25 PM), <https://www.wfdd.org/story/descendants-native-american-slaves-new-mexico-emerge-obscurity>.

E. Eradication of the Indian Identity of Other Tribes

Although other non-federally recognized tribes do not have a similar enslavement background, they share many of the same burdens as Genízaros. Additionally, they share the same commitment to maintain their Indigenous identities and pass their culture to their children, whether or not the federal government recognizes them. A complete discussion of all of these tribes and nations would fill volumes. But it is critical to understand this topic by identifying some of them, without intending to diminish the importance of the many not listed in this brief summary.

The Tap Pilam Coahuiltecan Nation⁹⁶ is an Indigenous group in Texas, and the American Indians in Texas at the Spanish Colonial Missions (“AITSCM”) is the non-profit arm of the Nation.⁹⁷ I serve on the Board of the AITSCM, and more about this Indigenous nation follows later in Section IV of this article. Below, the AITSCM website identifies the work they perform:

[AITSCM] is a nonprofit organization established by the Tap Pilam Coahuiltecan Nation, descendants of the aboriginal people who populated South Texas and Northeast Mexico. The organization works for the preservation and protection of the culture and traditions of the Native American tribes and other [I]ndigenous people who resided in the Spanish colonial missions.⁹⁸

The brutality directed at Natives, in what is now Texas, is chronicled in Professor Milo Colton’s article titled *Texas Indian Holocaust and Survival*.⁹⁹ Professor Colton notes that the genocidal policies of Texas drove many Indians out of the state and many into hiding.¹⁰⁰ In 1965, it became obvious that the Coahuiltecan Texans never died out. They had practiced their ceremonies and exercised their religion for generations. When the Church in San Antonio permitted archeologists to excavate Indian decedents in an Indian cemetery at one of its missions place the remains in a local state university, the Tap Pilam objected, and subsequently in 1999, reached an agreement for the return of the bones of their ancestors.¹⁰¹ Then Archbishop Patrick Flores held a mass and issued an apology for allowing graves at the San

96. See TAP PILAM COAHUILTECAN NATION, <https://tappilam.org> (last visited July 22, 2021).

97. *Who We Are*, AMERICAN INDIANS IN TEXAS AT THE SPANISH COLONIAL MISSIONS, <https://aitscm.org/about> (last visited July 22, 2021).

98. *Id.*

99. See Milo Colton, *Texas Indian Holocaust and Survival*: McAllen Grace Brethren Church v. Salazar, 21 ST. MARY L. REV. ON RACE & SOC. JUST. 51 (2019).

100. *Id.* at 62-77.

101. *Id.* at 78.

Juan Capistrano Mission to be unearthed.¹⁰² The struggles by AITSCM and Tap Pilam against removing Coahuiltecan bones continues as discussed in Part III.

Another Texas tribe, unrecognized by the federal government, is the Lipan Apache Tribe of Texas.¹⁰³ Despite their lack of federal recognition, they have won important civil rights victories, including recognition of the Tribe as Indians for purposes of religious freedom issues afforded by federal statutes to Indians in federal courts.¹⁰⁴ More about the Lipan Apache Tribe follows below.

Other important Indian nations continue their existence as Natives, with all of the characteristics of recognized tribes with one important exception: the United States has failed to completely recognize them. One of these is the Lumbee Nation. A review of their website and an examination of their history demonstrates their continuing Indian identity. They identify their history and culture in this summation:

In southeastern North Carolina, amongst the pines, swamps, and dark waters of the Lumbee River, you will find the heart and homeland of the Lumbee People. The ancestors of the Lumbee came together in the shelter of this land hundreds of years ago—survivors of tribal nations from the Algonquian, Iroquoian, and Siouan language families, including the Hatteras, the Tuscarora, and the Cheraw. The ancestors of the Lumbee were recognized as Indian in 1885 by the State of North Carolina. In 1956, Congress recognized the Lumbee as an Indian tribe while denying the People any federal benefits that are associated with such recognition—an action that the Lumbee continue to fight today.¹⁰⁵

The Lumbees have a proud history of military service on behalf of the United States. In addition to defending this country against foreign enemies, they have also served as a bulwark against the establishment of the Ku Klux Klan in North Carolina, driving out the Klan in a battle that has contributed to the folklore surrounding the Lumbee Nation.¹⁰⁶ Their struggle for federal recognition stretches over eighty years.

Many other Indigenous tribes and nations exist within the United States. Many maintain formal governance structures and have main-

102. *Id.* at 77-78.

103. LIPAN APACHE TRIBE OF TEXAS, <https://www.lipanapache.org> (last visited July 22, 2021).

104. McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 468 (5th Cir. 2014).

105. LUMBEE TRIBE OF NORTH CAROLINA, <https://www.lumbee Tribe.com> (last visited July 22, 2021).

106. Malvina Reynolds, *The Battle of Maxton Field*, W. KY. UNIV., <https://people.wku.edu/charles.smith/MALVINA/mr011.htm> (last visited July 22, 2021).

tained cultural identity and kinship as Natives. Many of their members demonstrate high percentages of Indigenous DNA, and in many instances, they even carry a higher level of Indigenous DNA than members of recognized tribes. Consider for a moment that generally, a person must be able to demonstrate some pre-determined fraction (usually at least one-sixteenth) of “Indian blood” and demonstrate membership in a recognized tribe to be considered Indian under many federal statutes.¹⁰⁷ That means that recognized tribal members might carry only slightly more than 6% “Indian blood.” Yet DNA testing by Miguel Torrez consistently reveals a much greater percentage than 6% of “Indian blood” among Genízaros in northern New Mexico, averaging 30%,¹⁰⁸ or close to five times the minimum required under most federal “blood quantum” statutes.¹⁰⁹ On a personal level, my own percentage of “Indian blood,” and that of my immediate relatives is much higher than one-sixteenth. And as mentioned in Part I, the Cherokee Nation has removed the requirement of any percentage of “Indian blood” for membership.¹¹⁰

II. RESURGENCE AND RECOGNITION OF NATIVE POPULATIONS

A. Resurgence

The number of American Indians in the United States has risen dramatically in the last few decades.¹¹¹ Some of this can be attributed to predictable population growth.¹¹² Some is the result of renewed interest in Native identity made possible by DNA testing.¹¹³ Some have found newly discovered links to their ancestors.¹¹⁴ Undoubtedly, some have decided to self-identify as Native with little or no basis for it to gain perceived affirmative action advantages in college admission, employment opportunities, healthcare, political career advancement, and the like. Some of the increase may be attributed to the United States Census now allowing people to self-identify as Indians rather than re-

107. See PIATT & GONZALES, *supra* note 6 (citing *United States v. Diaz*, 679 F. 3d 1183, 1187 (10th Cir. 2012)).

108. See NACIÓN GENÍZARA, *supra* note 55, at 320 50, (displaying the genealogical chart within chapter thirteen (*Genízaro Identity and DNA: The Helix of our Native American Genetic History*)).

109. *United States v. Bruce*, 394 F.3d 1215, 1223 (9th Cir. 2005).

110. Allison Herrera, *Cherokee Nation Supreme Court Rules Citizenship Not Determined ‘By Blood,’* THE WORLD (Mar. 4, 2021, 4:15 PM), <https://www.pri.org/stories/2021-03-04/ Cherokee-nation-supreme-court-rules-citizenship-not-determined-blood>.

111. U.S. DEP’T OF THE INTERIOR, *supra* note 3.

112. *Id.*; see *infra* Part I.B.

113. Romero, *supra* note 76; see also NACIÓN GENÍZARA, *supra* note 55 (discussing the Torres study).

114. *Id.*

lying on door-to-door headcounts or tribal rolls.¹¹⁵ Whatever the reasons, the Indian population has rebounded back to pre-colonization levels.¹¹⁶

B. *Mechanics and Benefits of Federal Recognition*

After years of warfare against Indians, and even genocidal attempts at extermination, why did the federal government ultimately create and maintain a system of recognizing tribes? An overly simplified and optimistic view is that the eventual realization that Indians should not be exterminated led to the conclusion that the federal government had a trust obligation to them.¹¹⁷ Perhaps there was also some element of maintenance of control and eventual assimilation involved in the identification and cataloging of tribes and their members.¹¹⁸ As Natives were herded onto reservations, the federal government recognized their tribes and undertook a trustee relationship with them and their lands in a sovereign-to-sovereign relationship.¹¹⁹

The Bureau of Indian Affairs (“BIA”) within the United States Department of the Interior (“DOI”) was designated to supervise this process.¹²⁰ Complicated mechanisms were put in place to recognize “new” tribes. The current BIA regulations are set out within its Procedures for Federal Acknowledgement of Indian Tribes.¹²¹ Section 83.11 of the Procedures provides guidance regarding “the criteria for acknowledgment as a federally recognized Indian tribe,” providing seven major areas to which a successful tribal applicant must conform.¹²²

The first of these criteria requires that “[t]he petition[ing] [tribe] has been identified as an American Indian entity on a substantially continuous basis since 1900 [and that] [e]vidence that the group’s character as an Indian entity has from time to time been denied will not be considered to be conclusive evidence that this criterion has not

115. *2020 Census Includes Tribal Affiliations*, NAT’L INDIAN COUNCIL ON AGING (Jan. 27, 2020), <https://www.nicoa.org/2020-census-includes-tribal-affiliations>.

116. *Demographics*, NAT’L CONG. AMER. INDIANS, <https://www.ncai.org/about-tribes/demographics> (last visited July 22, 2021).

117. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176 (2011).

118. See Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 877 (2016); see Robert J. Miller, *Consultation or Consent: The United States Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37, 47 (2015); see Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 681-82 (2016) (Feb. 13, 2015).

119. PIVAR, *supra* note 1, at 29-44.

120. Indian Reorganization Act of 1934, 25 U.S.C. § 2701 *et seq.* (2018).

121. 25 C.F.R. § 83.

122. *Id.* § 83.11.

been met.”¹²³ The regulation goes on to identify the types of evidence for determining the group’s Indian identity.¹²⁴ These are actually quite broad; it includes identification of a number of bases and importantly, including “[i]dentification as an Indian entity by the petitioner itself.”¹²⁵ Genízaros, Coahuiltecos, and the other groups mentioned can easily satisfy this requirement. Self-identification is an accepted criteria for inclusion in the United States Census.¹²⁶ It is also a defining criterion for Indigenous recognition under the United Nations Declaration on the Rights of Indigenous People.¹²⁷

The next requirements, two through four, also do not pose insurmountable burdens on the tribes we have discussed. The second requirement is that “[t]he petitioner comprises a distinct community and demonstrates that it existed as a community from 1900 until the present.”¹²⁸ Again, the regulation would make it relatively easy for Genízaros, Coahuiltecos, and others, identified above, to meet this criterion. The third requirement requires that “the petitioner has maintained political influence or authority over its members as an autonomous entity from 1900 until the present.”¹²⁹ This too could be easily met by the groups identified. The fourth requirement calls for petitioning entities to produce a governing document containing membership criteria.¹³⁰ If there is no governing document, the tribe must provide a written statement which describes “its membership cri-

123. *Id.* § 83.11(a). The provision reads as follows:

(a) Indian entity identification. The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group’s character as an Indian entity has from time to time been denied will not be considered to be conclusive evidence that this criterion has not been met. Evidence to be relied upon in determining a group’s Indian identity may include one or a combination of the following, as well as other evidence of identification.

- (1) Identification as an Indian entity by Federal authorities.
- (2) Relationships with State governments based on identification of the group as Indian.
- (3) Dealings with a county, parish, or other local government in a relationship based on the group’s Indian identity.
- (4) Identification as an Indian entity by anthropologists, historians, and/or other scholars.
- (5) Identification as an Indian entity in newspapers and books.
- (6) Identification as an Indian entity in relationships with Indian tribes or with national, regional, or state Indian organizations.
- (7) Identification as an Indian entity by the petitioner itself.

124. *Id.*

125. *Id.* § 83.11 (a)(7) (emphasis added).

126. *About the Topic of Race*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/population/race/about.html> (last visited Mar. 10, 2022).

127. Self-identification as “Indian” is also the standard in the United Nations Declaration on the Rights of Indigenous Peoples. G.A. Res. 61/295, art. 33, United Nations Declaration on the Human Rights of Indigenous Peoples (Sept. 13, 2007).

128. *Id.* § 83.11(b) (2022).

129. *Id.* § 83.11(c).

130. *Id.* § 83.11(d).

teria and current governing procedures.”¹³¹ Again, this would probably not be an insurmountable problem.

However, the fifth requirement, entitled “Descent,” is a formidable obstacle.¹³² Tribes are required to show “the petitioner’s membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes that combined and function as a single autonomous political entity.”¹³³ For Genízaros who were stolen away from their tribes, many as children, it is difficult to prove the specific descent from an identifiable historical tribe. There are some complicated methods for proving descent outlined in the regulation, but the minimal records of the slaves captured and traded, such as those which appear in census data or in baptismal records, rarely contain the tribal identification of the captive. Still, there is some hope of meeting this requirement, such as a provision that would allow the petitioner to show “other records or evidence” of this descent from historical Indian tribe. In this regard, sophisticated DNA testing and based upon family affiliation, such as the work Miguel Torres has undertaken,¹³⁴ might be of assistance.

The sixth requirement requires the tribe to show that its membership “is composed principally of persons who are not members of any federally recognized Indian tribe.”¹³⁵ And finally, the applicant must show that “[n]either the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the federal relationship.”¹³⁶

These requirements are difficult and result in low success rates for tribes seeking formal recognition through the BIA.¹³⁷ In fact, these requirements may take up to thirty years or more to complete.¹³⁸ It

131. *Id.*

132. *Id.* § 83.11(e).

133. *Id.*

134. Miguel Torres et al., *El Pueblo de Abiquiu and its Genizaro Identity*, 58 N.M. GENEALOGIST 8 (2019).

135. 25 C.F.R. § 83.11(f).

136. *Id.* § 83.11(g).

137. Emily Ann Haozous et al., *Blood Politics, Ethnic Identity, and Racial Misclassification among American Indians and Alaska Natives*, J. ENV'T & PUB. HEALTH, 2014, at 1. Between 1978 to 2012, 352 groups sought recognition. *Id.* at 3. Eighty-seven of these were able to satisfy all the submission requirements. *Id.* Seventeen were ultimately recognized by the Department of Interior. Another nineteen were resolved by merger with other tribes or by congressional action. *Id.* Of the eighty-seven with submitted and completed applications thirty-three were denied recognition and as of 2014, eighteen groups were still bogged down in the quagmire of seeking federal recognition. *Id.* The BIA maintains a website providing a detailed listing of the status of recognition petitions, and outlining the process for new petitions. See *Office of Federal Acknowledgment (OFA)*, U.S. DEP'T OF THE INTERIOR, <https://www.bia.gov/as-ia/ofa> (last visited Mar. 10, 2022) [hereinafter *OFA*].

138. *Id.*

requires the expenditure of substantial time and resources, and the location of obscure records. It occasionally provokes opposition from federally recognized tribes who may be justifiably concerned that federal recognition of other tribes might decrease the share of government resources and services available to them. And, for those tribes which operate casinos, the recognition of a new tribe creates the very real prospect of economic competition.¹³⁹

However, the administrative process established by the BIA is not the only method of obtaining federal recognition. Congress reserves the right to recognize new tribes by direct Congressional action.¹⁴⁰ Of course, the likelihood that a group of Indians could obtain a majority vote of both houses of the Congress and then the signature of a president appears to be quite difficult. These actions may even provoke political opposition from existing recognized tribes.¹⁴¹

Nonetheless, there are many tribes who have found success in obtaining recognition by the BIA. As a result of these processes, there are currently 574 federally recognized tribes in this country. There are 229 tribes located in Alaska, and the remaining 345 are scattered throughout thirty-four other states.¹⁴²

These federally recognized tribes have the power to determine who is a member of the tribe.¹⁴³ However, a tribal determination that a person is or is not a member of the tribe is not always binding upon the United States.¹⁴⁴ Thus, someone could be considered an Indian for federal purposes but still not be considered a tribal member by a tribe. Conversely, someone could be considered to be an Indian by a tribe and not considered to be an Indian under state law.¹⁴⁵ These inconsistent legal approaches leave great confusion as tribes and individuals seek the benefits afforded to federally recognized tribes.

Regarding Indian benefits under federal law, the issue of who is an Indian becomes more difficult. The United States government has

139. Bruce Henderson, *Largest Tribe in East Called NC Home for Centuries. Feds Say it's Not Indian Enough.*, THE CHARLOTTE OBSERVER <https://www.charlotteobserver.com/news/local/article224518065.htm> (Mar. 11, 2019).

140. For example, the United States Senate voted to officially recognize the Little Shell Tribe of Chippewa Indians in Montana on December 20, 2020. See S. REP. NO. 116-190 (2020). "Congress, and not the Department of the Interior, has the final word as to whether a tribe should be federally recognized and whether a non-recognized tribe may nevertheless receive certain federal benefits." Pevar, *supra* note 1, at 274.

141. Henderson, *supra* note 139.

142. *Tribal Nations & The United States: An Introduction*, NAT'L CONG. AMER. INDIANS, <https://www.ncai.org/about-tribes> (last visited Jan. 22, 2022) (discussing the 229 in Alaska and the 345 in 35 other states); *Demographics*, *supra* note 116.

143. Piatt et al., *supra* note 1, at 46.

144. *United States v. Bruce*, 394 F.3d 1215, 1223-24 (9th Cir. 2005).

145. PIATT & GONZALES, *supra* note 6, at 46.

adopted differing definitions of who is an Indian in statutes regarding Indian benefits.¹⁴⁶ The Constitution of the United States mentions “Indian” three times,¹⁴⁷ but “Indian” is not defined in the Constitution. The Declaration of Independence refers to the “merciless Indian savages”¹⁴⁸ that the British were inciting to harass the colonists. Of course, the Declaration of Independence did not attempt to define “Indian.” In fact, there are at least thirty-three differing definitions of “Indian” in federal statutes.¹⁴⁹ And in some statutes Congress has created programs to assist Indians without providing a definition of who qualifies.¹⁵⁰ Federal agencies administering these programs make the determination under varying, and sometimes conflicting, requirements.¹⁵¹

Despite the confusion over exactly who qualifies under the various programs, there are significant benefits for federally recognized tribes and individual Indians.¹⁵² Federally recognized tribes operate as sovereigns.¹⁵³ Tribes can create their own judicial and law enforcement systems.¹⁵⁴ Importantly, the Indian Child Welfare Act¹⁵⁵ allows tribes to adjudicate child custody proceedings in their own courts. State courts have no jurisdiction over the custody of Indian children living on a reservation.¹⁵⁶ Extensive procedural and substantive rights apply in custody issues of Indian children living off the reservation. This statute provides an important mechanism to counter the efforts akin to Indian boarding schools, discussed in Part I, which sought to eliminate tribal influence over Native children, ultimately resulting in the dilution and extinguishment of Indian tribes by eradicating Indian identity within Indian children.¹⁵⁷

146. *Id.* at 46 n.7, 47.

147. U.S. CONST. art. I, §§ 2, 8; U.S. CONST. amend. XIV, § 2.

148. See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

149. Brooke Jarvis, *Who Decides Who Counts as Native American?*, N.Y. TIMES MAG. (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/magazine/who-decides-who-counts-as-native-american.html?smid=url-share>.

150. PEVAR, *supra* note 1, at 18.

151. PIATT & GONZALES, *supra* note 6, at 47.

152. U.S. DEP'T OF INTERIOR, BUREAU OF INDIAN AFFAIRS, BUDGET JUSTIFICATIONS & PERFORMANCE INFORMATION FISCAL YEAR 2022 (2021).

153. *E.g.*, *McGirt v. Oklahoma*, 591 U.S. ___, 140 S. Ct. 2452 (2020).

154. Indian Self-Determination and Education Assistance Act of 1975, 28 U.S.C. § 5301 (2018).

155. 25 U.S.C. § 1901 (2018).

156. *Id.* § 1911(a).

157. I had the opportunity to assist a tribe in the Midwest in the early 1980s in creating its juvenile court system. Native children were no longer subjected to the ongoing practice whereby well-intentioned social workers, with approval of local state judges, would remove children from impoverished Native families and place them in white homes with the ultimate goal of having them adopted into a “better” environment.

Tribes can operate casinos and other gambling establishments even though state laws prohibit non-Indians from engaging these endeavors.¹⁵⁸ In 2009, more than 400 casinos, producing over \$26 billion in annual revenues were operated by 230 tribes in twenty-eight states. Twenty-nine of these casinos are located in my home state of New Mexico.¹⁵⁹ An entrepreneurial spirit, coupled with federal recognition of their tribes, has enabled tribes to reap economic reward as they create impressive resort and recreation areas to accompany the casinos.¹⁶⁰

Individual Indians in federally recognized tribes are eligible for affirmative action programs in federal hiring.¹⁶¹ Federal courts have upheld the constitutionality of these preferences because in carrying out its trust responsibilities, the federal government may treat Indians and Indian tribes differently from other individuals and groups without creating an unlawful suspect classification.¹⁶² In upholding Indian hiring preferences, the Supreme Court noted that the power to create this preference “turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a guardian-ward status, to legislate on behalf of federally recognized Indian tribes.”¹⁶³ Federal regulations grant recognized Indians the right to use eagle and other feathers for religious purposes.¹⁶⁴ Non-Indians are forbidden by various laws, including the Bald and Golden Eagle Protection Act,¹⁶⁵ from this use. Recently though, a federal court decision recognized the rights of Lipan Apaches, a non-federally recognized tribe, to the exercise of these same rights.¹⁶⁶ Other statutes grant federally recognized Indians the right to hunt and fish in locations and under circumstances unavailable to non-federally recognized Indians, among other benefits.¹⁶⁷

158. Indian Gaming Regulatory Act, 25 U.S.C. § 2701.

159. *List of New Mexico Indian Casinos*, 500 NATIONS, https://www.500nations.com/New_Mexico_Casinos_List.asp (last visited July 26, 2021).

160. *See, e.g., Sandia Resort & Casino*, <https://www.sandiacasino.com/> (last visited July 23, 2021). The Sandia Resort & Casino is located just north of Albuquerque, New Mexico.

161. Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(i) (1982).

162. Courts have not always been adequately respectful of Indian sovereignty. *See, e.g., Steele*, *supra* note 118; *see Lawrence Baca, 40 Years of U.S. Supreme Court Indian Law Cases: The Justices and How They Voted*, 62 FED. LAW. 18 (2015).

163. *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) (internal quotations omitted).

164. Permits for Indian Religious Purposes 39 Fed. Reg. 1183, 1184 (1974). *See* 50 C.F.R. § 22.22 (a)(5) (2022) (providing the requirements concerning permits for the use of bald or eagles for Indian religious purposes).

165. 15 U.S.C. 668(a).

166. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th Cir. 2014).

167. *PIATT & GONZALEZ, supra* note 6, at 83.

These efforts to improve the lives of Indians through federal recognition, whatever the motivation, may be insufficient, but are nonetheless consequential for addressing the longstanding mistreatment by the United States of its Indigenous peoples. Nothing in this article should be construed as an attempt to impede these efforts on behalf of sovereign Indian nations or their members.¹⁶⁸

III. NON-RECOGNITION LEADS TO MARGINALIZATION

If the purpose of recognition was to afford stewardship, and in some small manner, make up for the history of mistreatment of Natives, the recognition process has failed. While tribal communities are able to exercise some degree of governance and economic development, Indians, particularly those on reservations, face unacceptable levels of substance addiction, malnutrition, disease, and other ailments.¹⁶⁹ Being recognized by the federal government is not an effective manner of alleviating these continuing effects of oppression.

Moreover, the failure of the federal government to recognize all Indigenous people creates confusion among the otherwise well-intentioned people who are charged with administering and enforcing the laws affording benefits to Indians. These laws seek to partially address past discrimination but are thwarted when administrators do not understand who is an Indian. One example is the law school admission issue, to be discussed in subpart B of this section, below. There is also a great possibility that the confusion as to who qualifies as an “Indian” can be used to actually impose a compounded discrimination and oppression. That is, all Indians, recognized and otherwise, have suffered from past discrimination directed against them and their ancestors. Unrecognized Indians then suffer a double oppression by being excluded from the minimal efforts being made to address the past iniquities, such as the protection of Indian burial sites, also discussed in subpart B. Consider the Indian burial and the law school admissions issues, as they both illustrate the marginalization resulting from non-recognition.

168. My interest in maintaining and expanding the opportunities for federally recognized Indians is personal as well as academic. I am the proud grandfather of a member of the Choctaw Nation.

169. *Profile: American Indian/Alaska Native*, OFF. MINORITY HEALTH, U.S. DEPT OF HEALTH & HUM. SERVS., <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=62> (Jan. 11, 2022).

A. *The Second Battle of the Alamo*

The Alamo is the first of five missions founded by the Church in what is now the San Antonio area.¹⁷⁰ These missions have been designated as a world heritage site under the auspices of the United Nations.¹⁷¹ The missions were founded by the Franciscan religious order, which is the same order that accompanied the Spanish into what is now New Mexico to convert the Natives there. The presence of the Franciscans helped implement the Genízaro system in New Mexico¹⁷² and establish the mission system in what is now Texas.

At each of the five missions, Natives were brought to live, work, die, and be buried. They were not enslaved like the Genízaros in New Mexico, but they were separated from their original tribal identities in the process of religious conversion.¹⁷³ Moreover, like the Genízaros, they acquired a military role in the defense of the Spanish settlements from attacks by Indians from the surrounding plains. For example, the northernmost mission, San Antonio de Valero, was established in its present location in 1727, and is known now as the Alamo. On June 30, 1745, mission Natives defended the Presidio de Bejar, known now as the City of San Antonio, from attacks by the Apaches. The mission Natives, consisting of members of the Coahuiltecan Nation, preserved the Presidio from destruction by some 300 Apache attackers.¹⁷⁴ The descendants of the original Coahuiltecan Nation in the San Antonio area did not disappear. They live now as the Tap Pilam Coahuiltecan Nation, and its non-profit arm, the American Indians of Texas at the Spanish Colonial Missions.¹⁷⁵

These Indians have not forgotten their ancestors who are buried at these missions. Each year, the members of the Nation gather at the Alamo at daybreak on a Saturday in September. Historically, they would enter the Alamo to pray for their ancestors, especially those who are buried at the Alamo. Then, those who can, leave on a Spiritual Run to all of the five missions, a twelve-to-thirteen-mile journey, singing along the way with sage blessings and prayers at each stop.

However, that situation changed in 2019. In that year, an effort was launched by a consortium of developers, the State of Texas, and

170. Spanish Missions, EXPLOROS, <https://www.exploros.com/summary/Spanish-Missions> (last visited Oct. 1, 2021).

171. *San Antonio Missions*, UNITED NATIONS EDUC. SCI. & CULTURAL ORG., <https://whc.unesco.org/en/list/1466/> (last visited July 23, 2021).

172. PIATT & GONZALES, *supra* note 6 at 18.

173. RAMON VASQUEZ Y SANCHEZ, *THE HISTORIC MISSION TRAIL* (2003) (on file with author).

174. *Id.*

175. *Who We Are*, *supra* note 97.

the City of San Antonio to “reimagine” the Alamo. Already the most visited tourist site in Texas, the Alamo Trust sought to renovate the Alamo into an even larger attraction.¹⁷⁶ More than \$450 million was raised for these efforts. In the view of critics, these renovation efforts were intended to create a Disneyland-like attraction, demeaning the religious and historical significance of the site and ignoring the graves of Indians and non-Indians alike.¹⁷⁷ To the Coahuiltecs, these renovation efforts represented something worse. The planned excavation and construction would destroy the graves of their ancestors buried there. And they, Coahuiltecs, objected; their attorney cited a federal law which protects against the destruction of native graves.¹⁷⁸ At a minimum, the statute requires consultation with the Native descendants of the Indian ancestors who are buried at a particular site. Attorneys for the Coahuiltecs filed lawsuits, which are still pending as of this writing.

The struggle based by the Coahuiltecs evoked similar painful memories of earlier battles the Nation had to endure. They recall their struggle when the Catholic Church approved an archaeological dig that removed the bones of their ancestors from the Mission San Juan Capistrano, discussed above.¹⁷⁹ As one author put it:

Indians believe that when you disturb a person’s remains, you interfere with their existence in the afterworld. Archaeologists, however, justify their work by saying that is the only way to learn about a lost culture. Central to this thinking is the presumption that a culture is lost, and there are no ancestors.¹⁸⁰

The response of the Alamo Trust to the objections of the proposed grave disturbances was cynical and vicious.¹⁸¹ The Trust determined that because the Coahuiltecs were not a federally recognized tribe, the Trust did not need to consult with them. Moreover, the commission then contracted with some federally recognized tribes, none

176. *Reimagining the Alamo*, SAN ANTONIO EXPRESS-NEWS (Mar. 23, 2021), <https://www.expressnews.com/projects/2020/timeline-alamo-plaza-renovation>.

177. Bill Piatt, *Remember the Alamo-It’s Also a Cemetery*, MY SAN ANTONIO (Sept. 17, 2019), <https://www.mysanantonio.com/opinion/commentary/article/Remember-the-Alamo-it-s-also-a-cemetery-14447307.php>.

178. Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.* (2018).

179. Colton, *supra* note 99, at 79; John Moritz, *Remember the Alamo: Native American Group Says Up to 1,300 Buried at Historic Texas Shrine*, CORPUS CHRISTI CALLER TIMES (Dec. 18, 2019, 12:16 PM), <https://www.caller.com/story/news/local/texas/state-bureau/2019/12/18/texas-alamo-history-predates-battle-texas-independence/2668319001>.

180. Colton, *supra* note 99, at 78; John Davidson, *Coahuiltecs*, SAN ANTONIO EXPRESS-NEWS, Apr. 1, 2001, at 5H.

181. Scott Huddleston, *Alamo’s Buried Past*, SAN ANTONIO EXPRESS NEWS, <https://www.expressnews.com/news/local/article/Legal-battle-looming-over-Alamo-cemetery-in-14287737.php> (last visited July 23, 2021).

of which had ancestors buried at the Alamo, to help approve and speed up the process.¹⁸² Then, when I attended the Coahuiltecan gathering in September 2019, at the Alamo to conduct their annual prayers and Spirit Run, we were met with armed Alamo police officers preventing the Indians from entering the Alamo. At the same time, tourists present were allowed to enter.¹⁸³ Nonetheless, Coahuiltecan prayed for the ancestors outside the Alamo and then went on the Spiritual Run to the remaining missions.¹⁸⁴

In 2020, when I was there once again for the annual prayers and Spirit Run, the Alamo Trust changed its visitor scheme, and we were informed that a limited number of visitors would be allowed to sign up to enter the Alamo. A handful of Indians were allowed to register and were then let inside the Alamo along with tourists. When they entered, the Coahuiltecan began to pray. They were ordered by an armed guard to refrain from prayer, but they ignored the order. After praying, they rejoined the rest of the group outside to begin the Spiritual Run.

In 2021, the Lipan Apaches, another non-federally recognized tribe, joined forces with the Coahuiltecan.¹⁸⁵ The attorneys for the Lipans supported the efforts at prayer and respect for Indian graves, and pressed for the respect of the Coahuiltecan ancestors.¹⁸⁶ This is particularly significant, given that the Lipans and Coahuiltecan had traditionally been hostile to one another.¹⁸⁷ The Alamo Trust has not succeeded in dampening the efforts to protect the graves. It has, however, succeeded in bringing old enemies together to resist their efforts as the litigation continues at the time of writing this article.¹⁸⁸

182. *Id.*

183. See *Tip Pilam Coahuiltecan Nation v. Alamo Trust, Inc.*, 489 F. Supp. 3d 611, 617 (W.D. Tex. 2020).

184. I witnessed these events and participated in the prayers and run in 2019 and 2020. I was honored in 2019 by being asked to carry the Eagle Staff on the last leg of the run. I have photos on file of the event.

185. Elaine Ayala, *Lipan Apaches Become Ally to Tap Pilam*, SAN ANTONIO EXPRESS NEWS (Mar. 25, 2021), https://www.expressnews.com/news/news_columnists/elaine_ayala/article/Ayala-Lipan-Apaches-become-ally-to-Tap-Pilam-in-16051079.php?fbclid=IWAR3TApJ-2DrTnoXGX_9DJewFEdRq9h2A0yMZrIT5DSThU-yxqJrZFmoshe4.

186. See Brief for Yale Law Sch. et al. as Amici Curiae Supporting Plaintiffs-Appellants, *Tip Pilam Coahuiltecan Nation v. Alamo Trust, Inc.*, No. 5:19-CV-1084 (5th Cir. Mar. 15, 2021) (No. 20-50908), 2021 WL 1018441.

187. Ayala, *supra* note 185.

188. Scott Huddleston, *Dispute over Human Remains at the Alamo Could be Headed to the U.S. Supreme Court*, SAN ANTONIO EXPRESS NEWS (2021). <https://www.expressnews.com/news/local/article/Dispute-over-human-remains-at-the-Alamo-could-be-16044456.php> (last visited July 23, 2021).

B. Law School Admission Practices

American law schools seek to admit diverse student bodies in order to create diverse learning environments. Law schools also seek to educate and train attorneys who can represent clients in an increasingly diverse society.¹⁸⁹ While these schools may not enforce rigid racial or ethnic quotas to achieve diversity,¹⁹⁰ they nonetheless can take race and ethnicity into account as one of many factors in a “holistic” admission process.¹⁹¹ There are no law school “identity police” regarding a claim by an applicant of racial or ethnic minority status—except in the case of those who claim to be Indian. This is because, beginning with concerns expressed by the Native American Bar Associations (“NABA”) in 2007, some applicants were claiming to be Native on their law school applications with no basis for it. In 2011, the American Bar Association (“ABA”) published a report noting:

The fraudulent self-identification as Native American on applications for higher education is particularly pervasive among law school applicants. Anecdotally, it is well-documented within the Native American legal community that a large percentage of individuals in law school who identified themselves on their law school application as “Native American”, were not of Native American heritage and have had no affiliation either politically, racially, or culturally within the Native American community. This phenomenon is so pervasive it is commonly understood and referred to within the Native American community as “box-checking.”¹⁹²

As a result, in 2011 the ABA announced: “the [ABA] urges the Law School Admissions Council and ABA-approved law schools to require additional information from individuals who indicate on their applications for testing or admission that they are Native American including [t]ribal citizenship, [t]ribal affiliation or enrollment number, [or] . . . ‘heritage statement.’”¹⁹³ Note that the policy provides that applicants can prove Native identity by a tribal citizenship document *or* the use of a heritage statement.

The difficulty is that, as demonstrated in our article,¹⁹⁴ most law schools surveyed for this article believed they could *only* accept a tribal enrollment card from a federally recognized tribe to satisfy this requirement. Schools continue to ignore the heritage statement possi-

189. PIATT, GONZALES ET AL., *supra* note 1, at 236.

190. See *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

191. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

192. *Resolution*, AM. BAR ASS'N 1, 5 (2011) http://www.americanbar.org/content/dam/aba/directories/policy/annual-2011/2011_am_102.pdf; see PIATT & GONZALES, *supra* note 6, at 5.

193. *Resolution*, *supra* note 192, at 5 (emphasis added).

194. Piatt et al., *supra* note 1.

bility. No other minority group member is required to provide documentation of their minority status. As a result, many applicants who possess Indigenous DNA, are culturally, and even identify as Native, will not be eligible for consideration under law school diversity admission programs. The most learned legal minds, at some of the nation's best law schools, are unwilling to try to understand or follow the ABA policy. There is not a lawful quota or limit to the number of Natives, or of any other racial or ethnic group, who can be admitted to law schools.¹⁹⁵ It is simply not clear that anyone is harmed by the admission of Natives who can “only” prove their identity through heritage statement.

IV. NON-RECOGNITION LEADS TO “PRETENDIAN” SLURS

The Alamo situation and the law school admissions issues are two quick examples of the confusion and injustice which arise when people acting in good faith, or acting with at least some good faith, misunderstand the underlying issues involved with Indian identity. But the confusion is not limited to the misunderstanding or ignorance of people who can become better informed, or even subjected to judicial action that may trigger them to act appropriately.

Undoubtably, there are people who, without any cultural, tribal, DNA, or familial connection, make knowingly false claims of Indian identity. That was the concern which led the ABA to issue its 2011 Resolution offering guidance on how law schools could verify the claim of Indian identity by law school applicants.¹⁹⁶ Some people might make similar claims for economic or political gain. Some might do so for any other number of reasons, perhaps out of some feelings of guilt for the tragedies Natives have endured. In any event, the phenomenon is not new. Historical examples abound of “fake Indians” using that status for undue advantage. For example, one of the most dramatic involves the usurpation of Osage tribal identity, and even murder of Natives, by individuals seeking to steal tribal oil and gas profit allotments.¹⁹⁷ In Canada, the government has encouraged researchers to seek out and disprove falsely claimed Indigenous identity of politicians and celebrities.¹⁹⁸

195. *Bakke*, 438 U.S. at 319; *Grutter*, 539 U.S. at 334.

196. See *Resolution*, *supra* note 192.

197. DAVID GRANN, *KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI* (2017).

198. Colleen Flaherty, *Allegations of 'Playing Indigenous,' INSIDE HIGHER ED.* (June 15, 2020), <https://www.insidehighered.com/news/2021/06/15/allegations-playing-being-Indigenous-queens-u>.

Clearly not all non-federally recognized Indians are “fake Indians.” Their tribal, DNA, familial and cultural connections are as strong or stronger than many who enjoy recognition. Many belong to tribes recognized by state governments. For example, Genízaros are recognized by the New Mexico Legislative Resolutions.¹⁹⁹ Lipan Apaches are recognized by a Texas Senate Resolution.²⁰⁰ The United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”) requires that all signatory governments, including the United States, respect the Indian identity of these people.²⁰¹ It requires those governments to protect those tribes and people from harassment and discrimination. The United States government itself, through its census, counts all self-identifying Indians, not just Indians that are members of federally recognized tribes. Therefore, the census counts all those who identify as Indian. As noted, this self-identification is an element which can satisfy even the formidable Bureau of Indian Affairs (“BIA”) process for federal recognition and is the defining element under the UNDRIP for determining Indigenous status.

However, some have taken it upon themselves to attack non-federally recognized Indians using the slur of “pretendians.” This ugly, hate filled accusation thus far has not received the condemnation that other racial slurs would attract.

One does not have to look very hard to find podcasts, newsletters, and social media posts dedicated to seeking out “pretendians.” The victims of these attacks are typically academics or community leaders. In some instances, they are actually members of federally recognized tribes. The attackers make the argument that the recognized tribes of these individuals should not have afforded them membership. Some include racist attacks alleging that those with African American ancestry, or Hispanic or Chicano ancestry are not Indigenous. This of course, is an attack not only on the individuals, but also on the sovereignty of the tribe that enrolls these Indians as members. Some of these attackers are not themselves members of federally recognized tribes, yet cast themselves in the role of *identity police*. These ugly, gleeful attacks offend both Indian individuals and Indian tribes and continue to cause pain and disruption.

It would only cause additional pain to specifically identify the victims. Identifying the attackers would also cause a hardening on the

199. H.R. Mem'l 40, 48th Leg. 1st Sess. (N.M. 2007); S. Mem'l 59, 48th Leg. 1st Sess. (N.M. 2007).

200. S. 274, 87th Leg., Reg. Sess. (Tex. 2021).

201. G.A. Res. 61/295, United Nations Declaration on the Human Rights of Indigenous Peoples (Sept. 13, 2007).

part of the attackers who might eventually be persuaded to abandon this horrible position. So, these victims are intentionally unnamed. Several quick examples, however, afford some illustration of the damage or attempted damage that is being done.

Patty Mills played professional basketball for the San Antonio Spurs. He was born in Australia, where the first inhabitants of that country are identified as “aboriginal.”²⁰² Patty is the only known Indigenous player in the National Basketball Association.²⁰³ His involvement and concern for Indigenous people worldwide led him to offer assistance and recognition to the American Indians in Texas (“AIT”). On January 19, 2020, the Spurs hosted “Indigenous Night.”²⁰⁴ Members of the AIT danced outside before the game, and on-court during halftime. At halftime the Spurs presented the AIT with a check to assist in their efforts. AIT members watched the game as guests of the Spurs. It was a beautiful, moving event. Within days, hate-filled attacks against the AIT, its dancers, and individual AIT members, were launched on social media. The gist of the complaints were that the AIT members were not members of a federally recognized tribe and were therefore not Indigenous. This is the most polite characterization I can muster: the actual words were vicious, gleeful, hateful attacks to which we choose not to give further dissemination.

In another example, an outspoken Genízaro student at a state university in New Mexico defended himself and his people on a social media platform against a pretendian attack. The student did not direct his defense at any particular individual or individuals. Nonetheless, another student at the same institution felt “offended” by his defense and complained to the chair of the department in which they were both enrolled as PhD students. The chair, in conjunction with several other faculty members, demanded an apology from the Genízaro student. When the Genízaro student responded, offering an apology if the other student was offended by his comments, but explaining that the defense against the pretendian attack was not directed at any individual nor was it intended to offend, the Chair rejected it. The Chair

202. The term “aboriginal” generally refers to “a member of race of people who were the first people to live in a country, before any colonists arrived. *Aboriginal*, CAMBRIDGE ADVANCED LEARNER’S DICTIONARY (4th ed. 2013). When referring to American first peoples as ‘Natives’, ‘Indigenous’ or ‘Indians’, one of the two groups of Indigenous people of Australia are commonly referred to as ‘Aboriginal’. Ronald M. Berndt, *Australian Aboriginal Peoples*, BRITANNICA, <https://www.britannica.com/topic/Australian-Aboriginal> (last visited Jan. 22, 2022).

203. Billy Witz, *Flying 3 Flags and Seeking One Banner*, N.Y. TIMES (June 14, 2014), <https://www.nytimes.com/2014/06/15/sports/basketball/the-diverse-heritage-of-san-antonio-spurs-patty-mills.html>.

204. Sports2Nite TV, *Spurs Host NBA’s First-Ever Indigenous Night*, YOUTUBE (Jan. 21, 2020), <https://youtu.be/fKifVnUFFlw>.

threatened to have the Genízaro student expelled from the PhD program if he did not make an unqualified apology and voluntarily withdraw from the program. The Genízaro student refused any further apology and refused to withdraw. With the assistance of this author, he is pursuing legal remedies. He continued in the PhD program.²⁰⁵

Another broad attempt to identify pretendians involves the publication of names of individuals, where the authors claim without evidence, that the individuals are not Indigenous. An attempt is being made to deny these people continuing employment. As noted, some of the people on the list of pretendians are actually members of federally enrolled tribes. Others belong to tribes recognized under the laws of various states. Podcasts and social media posts attacking pretendians in gleeful and ugly terms include attacks by people who themselves are not members of federally recognized tribes. The number of these attacks seems to be on the increase.

V. TOWARD JUSTICE AND PEACE

We must start constructing the model for reconciling these issues relating to the loss of Indian identity and the mistreatment which results with some important understandings. The United States has not yet met its goal of providing resources and assistance to the sovereign nations it once sought to extinguish. Inadequate health levels, high disease rates, and substandard housing plague recognized Native communities.²⁰⁶ However, the government has provided opportunities and resources which attract some people to falsely claim an Indigenous identity—an identity which is not supported by kinship, culture, family, or DNA.²⁰⁷ Others make the false claims of indigeneity for political or personal advantage. There is no need to name names to cause anybody further embarrassment, yet news stories carry accusations of this type of behavior. And, just as some Indians in the past hid their Indigenous identity because of discrimination and other societal pressures,²⁰⁸ some white people now seem to want to falsely claim an Indigenous identity perhaps based upon a feeling of guilt for their whiteness.

There are others, such as the Genízaros, Coahuiltecan, Lipan Apaches, Abiquiu Pueblo, Tortugas Pueblo and Lumbees, to quickly

205. I represent the student on a pro bono basis. The matters cited are all based on my personal knowledge of the case.

206. Strickland, *supra* note 4, at 717.

207. See, e.g., Piatt et. al, *supra* note 1 (discussing the false claim of Indigenous identity to gain law school admission).

208. Colton, *supra* note 99, at 76.

name a few, who identify as Indigenous with good faith claims to that status.²⁰⁹ Their members have lived under a governance structure (particularly in the land grant communities), and have maintained kinship, cultural, and family ties, in some instances, for centuries. Many of their members carry greater portions of “Indian blood” than some members of recognized tribes.²¹⁰ Still others are on a journey trying to identify ancestral and contemporary connections.²¹¹

So, what is to be done regarding the assertion of Indigenous status by those who are not members of recognized tribes? The absolute worst approach, if we are seeking to live in peace and accommodate conflicting legal, moral, sociological and historical concerns, is to continue to tolerate the gleeful, ugly “pretendian” outings and insults. Those who make an unsubstantiated false claim of indigeneity out of ignorance or guilt can be counseled and educated by employers and community members. Those who make the false claim knowing it to be false can be dealt with in a civil process, which guarantees due process. For example, the employee who has secured a position or awarded a contract based on a false claim can be given the opportunity to explain, and if appropriate, resign from the position or contract. Of course, there is very little civility in the political process so the candidate for public office who falsely asserts a Native background should be prepared for the public shaming which is likely to occur.

But there needs to be another discussion regarding Genízaros, Coahuiltecan, and the other tribes discussed above. They carry state recognition of one form or another. They clearly meet the criteria identified in the United Nations Declaration on the Rights of Indigenous People (“UNDRIP”). Genízaros, in particular, cannot demonstrate a particular tribal connection because their ancestors were enslaved and removed from their tribes, all with the sanction of the Spanish, Mexican, and later, the United States government. Their situation is not unlike how our legal system once treated children born out of wedlock in this country. Generally, these children were not entitled to support from their fathers, nor were they able to inherit property from them. They were subject to the disparaging, and now, shocking, label of “illegitimate children.” Even worse, and while I do not intend to offend, these children, these little human beings, were

209. See the websites of these tribes referred to in this article.

210. See *NACIÓN GENÍZARA*, *supra* note 55, at 320.

211. Romero, *supra* note 76.

referred to legally as “bastards.”²¹² Yet, those children were not responsible for that status. They had no choice as to whether their parents would be married when they were born. They were not at fault. Nonetheless, the law denied them the rights afforded to children whose parents were married when those children were born. The legal system allowed, and even encouraged, the public mocking of these “bastards.” The state did not recognize their identity nor their dignity.

Genízaros and other non-federally recognized Indians are being treated as legal “bastards” today. Genízaros did not choose their enslavement, and as a consequence, descendants are not entitled to the benefits the law provides to their “legitimate” brothers and sisters in the recognized tribes. So far, the law has allowed, if not encouraged, others to mock them as “pretendians.”

There is another legal analogy which can be drawn regarding Genízaros and similar tribes. This one has recently produced some hope for those asserting an identity claim. We refer to the concept of gender identity. The Supreme Court recently acknowledged the right of gay and transgender employees to employment protection under the federal law by prohibiting employment discrimination on the basis of sex.²¹³ Here, the employee identified as a man when hired, but was terminated by her employer after she began affirmatively presenting herself as a woman.²¹⁴ The Court recognized that her termination violated the “sex” employment discrimination prohibition under Title VII of the Civil Rights Act of 1964.²¹⁵ By analogy, Genízaros, Coahuiltecas, and others, should have the legal system respect their claim to identity as Natives, particularly when that claim is supported by the elements of family, kinship, culture, and DNA ties.

Another analogy can be drawn to the concept of dignity as applied by the Supreme Court to protect the rights of people in same sex relationships²¹⁶ and marriage.²¹⁷ Same sex couples have the right to that identity and to express it without government interference with that expression. Genízaros, Coahuiltecas, and others, have the right to their Native identity and to the expressions of that identity. The government should recognize these identities and protect their dignity

212. Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, Faculty Scholarship at Penn Law (2015), https://scholarship.law.upenn.edu/faculty_scholarship/1593 (last visited July 25, 2021). R. Thomas Farrar, *Does the Bastard Have a legitimate Complaint?*, 22 U. MIAMI L. REV. 884 (1968).

213. See *Bostock v. Clayton County*, 590 U.S. ___, 140 S. Ct. 1731 (2020).

214. *Id.* at 1738.

215. *Id.* at 1754.

216. See *Lawrence v. Texas*, 539 U.S. 558 (2003); See *United States v. Windsor*, 570 U.S. 744 (2013).

217. See *Obergefell v. Hodges*, 576 U.S. 644 (2015).

by affording them equal treatment as Natives. The government must protect them within the civil justice system from the “pretendian” attacks by recognizing a cause of action against the slurs, just as it protects other minority members from racist slurs.²¹⁸

These approaches would not mean that Genízaros, Coahuiltecos, or others, would necessarily receive all the benefits of federal recognition, such as the right to operate casinos, presently given to federally recognized tribes. There might be some middle-of-the road approach which would afford recognition by the federal government, allowing Genízaros and others to be eligible for affirmative action considerations, respect for religious practices, access to public health and education, and the like. Such an approach might blunt the “pretendian” accusations by giving an official sanction to the Indigeneity of the tribes and their members.

There are some limited purely legal remedies available to non-federally recognized tribes and Indians. Rather than dealing with the BIA process which could take decades, tribes could seek formal recognition through an act of Congress. Regarding more limited issues, such as the right to use religious symbols, individual Indians and tribes could seek judicial determinations, such as in the Lipan eagle feather case. This case is but one example of non-federally recognized Indians being held to be judicially entitled to the same treatment as federally recognized tribes and individuals. State action denying non-federally recognized tribes and Indians the same affirmative action benefits as federally recognized Indians could be challenged under an equal protection analysis. Further, there is no government-to-government sovereignty between state governments and the tribes that allows for this preferential treatment, unlike the sovereign-to-sovereign status for federal affirmative action plans.²¹⁹ Moises Gonzales and I have previously outlined legal remedies which non-federally recognized Indians might pursue in *Slavery in the Southwest: Genízaro Identity, Dignity and the Law*.²²⁰

But there continues to be some serious drawbacks for non-federally recognized Indians who seek recognition in Congress or through the judiciary. One involves the time and resources required to mount

218. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C. R.-C. L. L. REV. 133 (1982). Brief of Plaintiff-Appellants, *McPherson v. Kimberly-Clark Tissue Co.*, No. 00-14282-AA (11th Cir. October 2000), 2000 WL 33994825; Brief & Special Appendix for Plaintiff Appellant, *Miller v. New York State Police*, No. 20-3976-cv, 2021 WL 1327101, *1 (2d Cir. Apr. 5, 2021), 2021 WL 1327101; *Seah v. Schwan Food Co.*, No. 09-3289, 2010 WL 2721859, at *1 (C.D. Ill. July 8, 2010).

219. See *Morton v. Mancari*, 417 U.S. 535 (1974).

220. PIATT & GONZALES, *supra* note 6.

formal legal challenges.²²¹ An even more devastating drawback is that in most instances, formal legal challenges would continue to pit Indian against Indian in a fight for inclusion in programs that have not been adequate thus far for even the relatively few federally recognized Indians.²²² The real problem is the inadequacy of the programs aimed at assisting Indians. Resources will need to be directed in a more meaningful and effective manner and increased to an extent such that sovereign nations are not forced to fight with non-recognized Indians for scraps.

Indians have had a long, slow journey in obtaining recognition of their legal rights, and this recognition struggle mirrors the long slow process Indians have endured. Natives, even those born in this country, did not have the right to recognized citizenship in the United States until 1924.²²³ Natives were not finally granted voting rights until 1965.²²⁴ And although the Emancipation Proclamation was announced on January 1, 1863,²²⁵ and the Thirteenth Amendment to the Constitution of the United States, which outlawed slavery was ratified in 1865,²²⁶ it required a separate act of Congress in 1867²²⁷ to outlaw the peonage system which continued to keep Genízaros in New Mexico in bondage.

So, while Natives can wait while the legal system slowly grinds toward justice for them, there are other, better approaches. In the best of circumstances, sovereign Indian nations can join with their Native brothers, sisters, and cousins to compel federal, state, and the Catholic Church (“the Church”) authorities into a reconciliation process. In

221. *Id.* at n.6, 79-108.

222. *See, e.g.*, the efforts of the Lumbees, whose application for recognition has been opposed by a recognized tribe, discussed in PIATT & GONZALES, *supra* note 6, at 106. Regarding resources, refer again to the Strickland article, *supra* note 4, at 717.

223. *See* Indian Citizenship Act of 1924, Pub. L. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. 1401(b) (2018)). This Act “overturned” *Elk v. Wilkins*, 112 U.S. 94 (1884), where the Court held that an Indian cannot become a United States citizen without the consent and cooperation of the federal government. *See*, Cami Fraser, *Protecting Native Americans: The Tribe As Parents Patriae*, 5 MICH. J. RACE & L. 665, 665 (2000); *see* Bethany Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 CARDOZO L. REV. 1185, 1185 (2016).

224. *Voting Rights for Native Americans*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/elections/right-to-vote/voting-rights-for-native-americans> (last visited Mar. 11, 2022) (“Though the Fifteenth Amendment, passed in 1870, granted all U.S. citizens the right to vote regardless of race, it wasn’t until the Snyder Act that Native Americans could enjoy the rights granted by this amendment. Even with the passing of this citizenship bill[*Snyder Act*], Native Americans were still prevented from participating in elections because the Constitution left it up to the states to decide who has the right to vote. After the passage of the 1924 citizenship bill, it still took over forty years for all fifty states to allow Native Americans to vote.”)

225. Abraham Lincoln, A Proclamation (Jan. 1, 1863), *in* 12 Stat. app. 1268, 1269.

226. U.S. CONST. amend. XIII.

227. Peonage Abolition Act of 1867, ch.187, 14 Stat. 546, 546 (codified at 42 U.S.C. § 1994 (2018)).

fact, the Church has been willing to admit its role in the horrible instances of child abuse that it ignored for years.²²⁸ Pope Francis has apologized for the Church's mistreatment of Natives.²²⁹ The Church may be willing to continue to acknowledge its role in the mistreatment of Indians and participate in discussions with tribes and governments seeking to bring about some healing.

One can also imagine a series of shared cultural events among Natives, followed by informal discussions, perhaps even leading to summits. Then, Natives could involve governmental units in discussions of addressing ongoing inequities directed at all Natives. United Nations reporters might be invited to examine the issues and issue a report along the lines of its efforts in other countries.²³⁰ While there would probably be some initial distrust among all parties, it might be that the mediation services of the United States Department of Justice could assist.

There is no guarantee that any of this would produce any immediate benefits. It will take continuing participation of Natives and elected officials to put any meaningful change into effect. There may be setbacks. There may be distrust. Some may not ideally behave in every circumstance during this process. There may still be some who view justice as a zero-sum game. That is, there would be the concern that if one group of Natives received some benefit, it would only come at the expense of other tribes which had already been recognized. It may take a great deal of time and effort to create winning situations. This may be a long, slow, and non-linear process. Nonetheless, dialogue itself is a desirable achievement.

Regarding the "pretendian" accusations, one strategy is to ignore the malicious accusers. Those accusers might be acting out of jealousy, spite, bigotry, or they might even be doing the bidding of others with more nefarious intentions. Indians who have maintained tribal, familial, and cultural connections know they are not pretending anything. Their identity, their dignity, and their works are not diminished by the cries of wrongdoers. It will be difficult and painful sometimes to follow this "sticks and stones" approach. It is particularly galling for an Indigenous person to be accused of being a "pretendian" by an at-

228. Erik Ortiz, *Pope Apologizes for Priest Sex Abuse Scandal with 'Sorrow and Shame,'* NBS NEWS (Aug. 20, 2018) <https://www.nbcnews.com/news/pope-francis/pope-francis-apologizes-catholic-priest-sex-abuse-scandal-sorrow-shame-n902121>.

229. Nicole Winfield, *Pope Asks Pardon for Church's 'Crimes' Against Indigenous,* AP NEWS (July 9, 2015), <https://apnews.com/article/b57b7c946fe84e4892bf0f4b80b71b83>.

230. PIATT & GONZALES, *supra* note 6, 141-72; 182-83. *See also*, Office of the High Commissioner, *The United Nations Human Rights Treaty System Fact Sheet No. 30* 1, 43 (2012), <https://www.ohchr.org/Documents/Publications/FactSheet30Rev1.pdf>.

tacker who themself is not a member of a federally recognized tribe—a “pot calling the kettle white”—attack. But our energy must not be wasted in responding to unfounded attacks. In many instances, that is exactly what the accusers seek to accomplish: drawing the Indigenous person away from the pursuit of justice for their communities in a pointless exchange with the “pretendian” accusers. Those on the journey to rediscovering their stolen or lost identities need not be intimidated by the vicious attacks launched against others who are further along on the journey. If the attacks rise to the level where a response is required, such as an attempt to have a person fired from employment, Indigenous people can first seek to educate their employers. If that fails, there are legal remedies.

What approach might members of sovereign Indian tribes take in defending their non-federally recognized brothers and sisters from “pretendian” attacks? The long-severed bonds can begin to be restored. Most would agree that the Creator gave life to their Indigenous ancestors and that those ancestors now watch over their living children. Then a next step might occur. Some might come to believe that those children include not only those recognized by the government which sought to extinguish them, but also include those children whom the same government has chosen to ignore. Undoubtedly, the Creator and our revered ancestors do not look on approvingly while pain is inflicted on some of their children by a few ignorant people.

CONCLUSION

Colonization and slavery nearly eliminated the Native population in this country. The ultimate survival of Indigenous people was due to their resilience, and to the eventual realization by the United States government that the physical genocide of its Indigenous people was not the appropriate course. While the system of recognition of sovereign Indian nations has afforded some justice and has resulted in the allocation of some resources to the people the United States had tried to eliminate, the resources thus far have been inadequate.

The problems are exacerbated for those Indians the government has failed to recognize. This failure of the United States government to recognize the Indigenous identity of all its Natives, including those whose ancestors were enslaved, leaves the majority of American Indians striving to maintain their Indian identity and dignity. Many continue to maintain the cultural and religious practices of their ancestors, preserving these traditions and passing them along to the coming generations. Many of them struggle for resources, while de-

fending themselves and their tribes against “pretendian” attacks. The time has come to take the steps outlined in this article, to bring recognition to the identity and dignity of all Indigenous Americans.