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Resistance, Resilience, and Reconciliation: Reflections on Native American Women and the Law

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RESISTANCE, RESILIENCE, AND RECONCILIATION: REFLECTIONS ON NATIVE AMERICAN WOMEN AND THE LAW

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Rare in the field of American Indian Law is the opportunity for celebration, particularly when it comes to legal and political victories for Native American women.[1] Indians lose the majority of the cases that advance far enough to make it into published court decisions.[2] Tribal communities are inundated with injustices for which remedies are never pursued in any forum whatsoever.[3] Many academic leaders in the field of American Indian law are tribal court judges and with regard to legal

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1. *See generally* Bethany Ruth Berger, *After Pocahontas: Indian Woman and the Law, 1830 to 1934*, 21 AM. INDIAN L. REV. 1 (1997) (explaining how courts, the federal government and tribal governments have denied women land, rights to participate in political processes, control their own reproduction and protect themselves from violence). This article uses the terms "Indian" and "Native American" interchangeably to refer to the indigenous peoples of the Americas. During the allotment periods of the nineteenth and twentieth centuries, "Indian" was universally used. Today, "Indian" and "Native American" are widely used by native peoples.

2. Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 587-92 (2008).

3. *See, e.g.*, Stacy L. Leeds, *A Tribal Court Domestic Violence Case: The Story of an Unknown Victim, and Unreported Decision, and an All Too Common Injustice*, *in* WOMEN AND THE LAW STORIES 453 (Elizabeth M. Schneider & Stephanie M. Wildman eds., 2011).

credentials, are equally or overly qualified in comparison to the state court judges who preside in the adjacent county. However, tribal judges are not looked upon as "real" judges presiding over "real" courts.

These realities can be discouraging, but there is truly remarkable energy of growth and optimism in tribal communities and within the field of Indian law. Much of that energy comes from the key roles Native American women play in both advancing legal arguments and in evolving the law. The number of Native American women law professors exploded in the decades after I began law school in the mid-1990's.[4] Furthermore, the majority of Native American professional degree graduates are women.[5] This translates into more Native American women who hold mainstream positions of power, such as advising the President of the United States,[6] serving key roles in the Department of Justice[7] and the Department of the Interior,[8] sitting as tribal and state judges[9] and as attorneys for tribes,[10] playing leadership roles in our national professional

4. As a law student, I looked to mentors Gloria Valencia-Weber and Christine Zuni-Cruz as two of the few indigenous women law professors. Since then, several other women who are tribal members or descendants from tribal families, including myself, have joined the ranks as full time law faculty, including but not limited to: Sarah Deer, Kristen Carpenter, Angelique EagleWomen, Rebecca Tsosie, Elizabeth Kronk, Wenona Singel, Aliza Organick, Jill Shibles, Mary Jo Brooks, Angela Riley.

5. *Fast Facts: Degrees Conferred by Sex and Race*, NAT'L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/fastfacts/display.asp?id=72 (last visited Apr. 27, 2012).

6. Press Release, Office of the Press Sec'y, President Obama Announces Kimberley Teehee as Senior Policy Advisor for Native American Affairs (June 15, 2009), *available at* http://www.whitehouse.gov/the_press_office/President-Obama-Announces-Kimberly-Teehee-as-Senior-Policy-Advisor-for-Native-American-Affairs.

7. *See, e.g.*, *ASU Appoints Diane Humetewa to Advise President on Indian Affairs*, ARIZONA STATE UNIV. NEWS (March 24, 2011), https://asunews.asu.edu/20110324_Humetewa (noting that Humetewa formerly served as a United States Attorney for the District of Arizona).

8. *Solicitor Hilary Tompkins*, U.S. DEP'T OF THE INTERIOR, http://www.doi/gov/archive/bio/tompkins_bio.html (last visited Feb. 7, 2012).

9. For example, Meredith Drent is currently a Supreme Court Justice for the Osage Nation. *About Us*, OSAGE NATION JUDICIAL BRANCH, http://www.osagetribe.com/judicial/about_us.aspx (last visited Feb. 7, 2012).

10. Diane Hammons is General Counsel to the Cherokee Nation. Travis Snell, *Hammons Becomes First Woman General Counsel*, CHEROKEE PHOENIX, http://www.cherokeephoenix.org/18761/Article.aspx.

associations,[11] and serving as super-delegates[12] and political appointees[13] within mainstream political parties.

It appears as if there is an influx of Native American women finally reaching positions of power where they have the ability to influence the law. However, Native American women have always played an integral role advancing the law in their own ways, often in stories known to few. This essay highlights a few of the Native women who have impacted and shaped the law over time, and whose stories need to be told more often.

A STRUGGLE FOR RECOGNITION: SALLY LADIGA

Native American women are strong, forceful actors in Indian law. They are perseverant, take-charge citizens who refuse to let their individual or tribal rights be trampled. An early example of such a determined woman is that of Sally Ladiga.

Sally Ladiga, a Creek woman, brought suit to quiet title to her family's land that had been purchased by a white man.[14] Federally appointed Indian commissioners, Alabama courts, and the United State Supreme Court tried to settle the question of whether she, a husbandless mother and grandmother, could be considered the head of family for the purposes of land distribution.[15] The question of whether Ladiga was the head of family for purposes of land allocation was an important one, considering Ladiga had a cabin and cultivated field on her land

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11. Jill Shibles served as President of the National American Indian Court Judges Association and as the founding Executive Director of the National Tribal Justice Resource Center. *Jill E. Tompkins*, UNIVERSITY OF COLORADO AT BOULDER, http://lawweb.colorado.edu/profiles/profile.jsp?id=58 (last visited Feb. 7, 2012).

12. Kalyn Free served as a Super Delegate on the Democratic National Committee from 2005-2008. *Kalyn Free, President and Founder*, INDIGENOUS DEMOCRATIC NETWORK, http://www.indnslist.org/node/5?q=node/22 (last visited Feb. 7, 2012).

13. Victoria Sutton served in President George H.W. Bush's administration as Assistant Director in the White House Science Office and in the Environmental Protection Agency. *Professor Vickie Sutton*, TEXAS TECH UNIVERSITY SCHOOL OF LAW, http://www.law.ttu.edu/faculty/bios/sutton/ (last visited Feb. 7, 2012).

14. *Rowland v. Ladiga* (*Ladiga I*), 9 Port. 488 (Ala. 1839).

15. *See generally Ladiga I*, 9 Port. 488; *Ladiga v. Rowland* (*Ladiga II*), 43 U.S. (2 How.) 581 (1844); *Rowland v. Ladiga's Heirs* (*Ladiga III*), 21 Ala. 9 (1852).

before the Treaty of New Echota was enacted.[16] The treaty intended to allot 320 acres to each head of family for residence and cultivation.[17] When Ladiga's living situation was assessed by a locating agent, influenced by white settlers in the region,[18] she was not found to be the head of the family for the purpose of allocation, despite having raised several children and two grandchildren.[19] A white man entered Ladiga's land and took over her cabin and field, displacing Ladiga and forcing her to leave her home to reside elsewhere with family.[20]

Despite repeated applications to locating agents to be recognized as the head of family and return to her land, Ladiga was time after time denied head of family status.[21] Armed troops eventually forced Ladiga to emigrate to Arkansas,[22] though she never made it there.[23] It is most likely she died along the Trail of Tears.[24]

Ladiga's heirs continued to fight for their land, pushing the United States Supreme Court to ultimately declare it would "shock the common sense of all mankind" to doubt a grandmother and grandchildren compose a family.[25] The United States Supreme Court further determined Ladiga insisted on her rights under the treaty, rather than sleeping on them after she left the land, as the defendants claimed.[26] Upon further review, the Alabama Supreme Court agreed with the United States Supreme Court, holding that to consider Ladiga's departure from her land as voluntary abandonment would be "to allow

16. Berger, *supra* note 1, at 12.

17. *Id.* The Dawes Act originally allotted land only to men; married women were not to receive land. Dawes General Allotment Act, ch. 119, 24 Stat. 388 (1887). After some outcry, this law was changed, so that each adult, regardless of family status, received eighty acres of land. Act of February 28, 1891, ch. 383, §1, 26 Stat. 794. Treaty allotments could disburse more than the Dawes Act's 80 acres, as seen in the Treaty of New Echota, which was to give 320 acres to each head of family. Treaty With The Cherokee, 7 Stat. 478 (1835).

18. *Ladiga III*, 21 Ala. at 12.

19. *Ladiga II*, 43 U.S. at 585.

20. *See generally Ladiga I*, 9 Port. 488; *Ladiga II*, 43 U.S. (2 How.) 581; *Ladiga III*, 21 Ala. 9.

21. *Ladiga III*, 21 Ala. at 15.

22. *Ladiga II*, 43 U.S. at 585.

23. *Ladiga III*, 21 Ala. at 12.

24. *Id.*

25. *Ladiga II*, 43 U.S. at 590.

26. *Id.*

lawless force to defeat individual rights."[27] Alas, even Ladiga's heirs could not benefit from the victory, since they could not prove their relation to Sally Ladiga after her death.[28]

A STRUGGLE FOR ANCESTRY: LYDA AND HELENA CONLEY

Another story involves two Wyandotte sisters, Lyda and Helena Conley.[29] They were born in the late 1800's and lived in what is now Kansas City, Kansas.[30] In their lifetimes, the Conley sisters witnessed the federal government's attempt to break up their tribe's social structure and land base via the federal allotment and assimilation policies of the late nineteenth and early twentieth centuries.[31]

The federal allotment policy removed lands from communal tribal ownership and then allocated the land into individual ownership.[32] The Dawes Act allowed the United States to hold the land "in trust" for Indian allottees' sole use and benefit, but exempt from conveyance or contract.[33] After twenty-five years, or longer at the President's discretion, a fee patent would be issued to allottees.

The Indian Reorganization Act (IRA) of 1934 changed the Dawes Act by removing the twenty-five year term for trust land and prohibited Indians from transferring Indian land or shares in tribal corporations other than to the tribe itself without the express approval of the Secretary of the Interior.[34] Such land was now to be held in trust by the federal government, and now sits in trust indefinitely.

Despite treaty provisions protecting the land,[35] the federal

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27. *Ladiga III*, 21 Ala. at 15.

28. Jacqueline Agtuca et al., *Beloved Women: Life Givers, Caretakers, Teachers of Future Generations in* SHARING OUR STORIES OF SURVIVAL: NATIVE WOMEN SURVIVING VIOLENCE 1, 16 (Sarah Deer et al., eds., 2007)

29. Kim Dayton, *Trespassers, Beware!: Lyda Burton Conley and the Battle for Huron Place Cemetery*, 8 YALE J.L. & FEMINISM 1, 1 (1996).

30. *Id.* at 13, 15-16.

31. *Id.* at 9-12.

32. Dawes General Allotment Act § 5, 24 Stat. 388 (1887).

33. *Id.*

34. VINE DELORIA JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 14 (2007).

35. Treaty with the Wyandot, 10 Stat. 1159 (1855).

government announced its intention to allow for the sale of the community's cemetery lands to a local developer.[36] Two facts facilitated the federal government's choice to sell Wyandotte tribal land. First, the tribal community in Kansas City was diminished in size. Second, the tribal land was located in what is now downtown Kansas City, and there was a push to free the land of Indian control so it could be better used for the development of the emerging downtown.[37] This is an early recount of urban sprawl.

But the Conley sisters did not stand by passively and watch this happen. The events that followed the settlers' attempt to take family land and overrun ancestral burial grounds are legendary stories that few people have ever heard, even within the Native American community. The Conley sisters started by posting signs to keep trespassers off the land. Eventually the conflict escalated to standoffs involving these two strong Indian women armed with guns.[38] The controversy advanced to local municipal courts, followed by several trips to the local jailhouse, and eventually a case before the U.S. Supreme Court.[39] Lyda and Helena stood together with the help of other tribal women, including some of their cousins. They absolutely refused to allow their ancestors' graves to be destroyed and their lands to be relinquished from Wyandotte control—it was a battle that went on at least forty years. The women built a wooden shack and resided over some of the graves to prevent the loss of Wyandotte land.[40] When federal or local officials removed the structure, the women would rebuild and continue to live there.[41] When one woman refused to pay a ten-dollar fine for trespassing on her own peoples' land and was taken to jail, other women stepped up and took over the protective vigil.[42]

They did not mince words in their communications that the lands would not be dispossessed in their lifetime. One of the sisters stated: "We had two large American flags in the shack and in the event of troops putting an appearance, we had

36. Dayton, *supra* note 29, at 18.
37. *Id.* at 12.
38. *Id.* at 19.
39. Conley v. Ballinger, 216 U.S. 84 (1910).
40. Dayton, *supra* note 29, at 19.
41. *Id.* at 26.
42. *Id.* at 27.

decided to wrap the fold of the flag around [us], and tell boys in blue to shoot—for they would have to do that before they could disturb those graves."[43]

That story in and of itself would be a remarkable story of civil disobedience, but the sisters realized that they would need all the ammunition they could find. Sister Lyda knew the power of a shotgun, but she also knew the power of education. She went to law school and was admitted to the Missouri State Bar in 1902.[44] Lyda was known in the Kansas City area as an advocate for many pro bono clients and as a champion for justice.[45]

Lyda's story is remarkable even if told separately from her story of civil disobedience. As a Native American woman attorney in the early 1900's, she was one of a handful of woman attorneys in the United States, and likely the only American Indian woman attorney at the time. Although many famous contemporary women attorneys, such as Justice O'Connor[46] and Justice Ginsburg,[47] encountered difficulty securing profitable employment early in their careers, Conley actually made a very decent living practicing law at the turn of the century.

She certainly serves as an inspiration to Wyandotte tribal leaders and women attorneys today, such as Jan English[48] and Holly Zane.[49] She is seen as an inspiration, but curiously she is not idolized as a single individual hero for her successes; she is

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43. *Id.* at 13 (quoting I.T. Martin, *Living in a City of the Dead*, KAN. MAG., 1909).

44. *Id.* at 1.

45. *Id.* at 2.

46. Justice O'Connor frequently recounts the difficulty she experienced in entering the workforce after law school. *See, e.g.*, Linda Myers, *Three Days with Retired Justice Sandra Day O'Connor*, CORNELL CHRONICLE ONLINE (Oct. 25, 2007), http://www.news.cornell.edu/stories/Oct07/OConnor.sidebar.lm.html ("'I graduated first in my class at Stanford Law School. I wanted to work at work worth doing, but as a woman I couldn't get an interview, much less a job.'" (quoting Justice Sandra Day O'Connor)).

47. Justice Ginsburg also had great difficulty securing gainful employment after graduating at the top of her law school class with impeccable credentials. Malvina Halberstam, *Ruth Bader Ginsberg*, JEWISH WOMEN: A COMPREHENSIVE HISTORICAL ENCYCLOPEDIA, http://jwa.org/encyclopedia/article/ginsburg-ruth-bader (last visited May 2, 2012).

48. Janith English is the Chief of the Wyandot Nation of Kansas. Dayton, *supra* note 29, at 30.

49. Holly Zane is the attorney who drafted the Wyandot Nation's Constitution. *Id.*

seen as part of a collective force.

Lyda Conley filed the lawsuit that initiated the formal legal challenges to protect the lands where the cemetery was located.[50] The case eventually was heard on appeal to the U.S. Supreme Court in *Conley v. Ballinger*.[51] When someone asks who was the first Native American woman attorney to argue before the U.S. Supreme Court, the standard answer is Arlinda Locklear.[52] That answer is both true and untrue; Locklear was the first licensed Native American female attorney actually admitted to the Supreme Court bar.[53] However, Lyda Conley was actually the first American Indian woman attorney to argue before the U.S. Supreme Court.[54] When reporters asked her if she was properly admitted to practice law there, she responded:

> "No, but I am willing to take the examination, if I can find anyone who will stand to sponsor me. But you know one can plead his own case in any court, and this I intend to do. No lawyer would plead for the grave of my mother as I could, no lawyer could have the heart interest in the case that I have."[55]

Although Lyda was a trained Kansas attorney admitted to practice in the Missouri state bar, she appeared *pro se* before the Supreme Court.[56] She was perceived, at least until her story was widely disseminated, to be a lay advocate. The U.S. Supreme Court issued a unanimous decision denying Lyda's claim.[57] Despite express treaty language to the contrary that vowed to

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50. *Id.* at 19-20.

51. 216 U.S. 84 (1910).

52. Arlinda Locklear was the first Native American woman attorney to argue before the Supreme Court in the capacity of attorney. *Arlinda F. Locklear '76*, DUKE LAW NEWS (Jan. 21, 2009), http://www.law.duke.edu/news/story?id=4174&u=3.

53. Locklear argued before the Supreme Court in 1984 in the case *Solem v. Bartlett*, a case successfully challenging the State of South Dakota's authority to prosecute a member of the Cheyenne River Sioux Tribe for on-reservation conduct. *See Arlinda F. Locklear '76*, *supra* note 52; Solem v. Bartlett, 465 U.S. 463 (1984).

54. Dayton, *supra* note 29, at 25.

55. *Id.* at 24 (quoting I.T. Martin, *Living in a City of the Dead*, KAN. MAG., 1909, at 52).

56. Lyda was unable to find a qualified attorney to sponsor her admission to practice before the Supreme Court by vouching for her character and moral fitness. She was never admitted to practice before the Supreme Court, so she argued on her own behalf, as she was a named plaintiff in the suit. *Id.* at 24-25.

57. Conley v. Ballinger, 216 U.S. 84, 91 (1910).

permanently reserve "the portion now enclosed and used as a public burying-ground . . . for that purpose,"[58] the Court ruled that the United States had no legal obligation to protect the Native American cemetery and that Lyda lacked standing to bring the challenge.[59]

Justice Oliver Wendell Holmes, Jr. wrote the decision for the Court, and in his opinion he reiterated, "If the treaty created any rights at all, they were tribal rights, not individual ones."[60] Therefore, there was nothing akin to a federal trust responsibility to tribes. In Lyda's case, the United States was empowered on the heels of cases such as *Ex Parte Crow Dog*,[61] *U.S. v. Kagama*,[62] and *Lone Wolf v. Hitchcock*[63] by the doctrine of plenary power,[64] giving the United States the right to dispose of tribal lands as the United States saw fit, even over the objection of the tribes.[65] The Court stated that any legal obligation that might exist was "only by honor but not by law."[66]

Three Supreme Court cases formed the foundation of

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58. Treaty with the Wyandot, 10 Stat. 1159 (1855).

59. *Conley*, 216 U.S. at 90.

60. *Id.*

61. 109 U.S. 556 (1883) (deciding the federal government did not have jurisdiction over an Indian who killed another Indian and was punished by his tribe for the crime, prompting Congress to pass the Major Crimes Act, found at 18 U.S.C. § 1153, ordering federal jurisdiction over Indians who commit felonies in Indian Country).

62. 118 U.S. 375 (1886) (finding an Indian who killed another Indian fell under the jurisdiction of the federal government because the United States claimed ownership of the territory, making Indians "wards" of the federal government and giving Congress the power to regulate activity within Indian Country).

63. 187 U.S. 553 (1903) (allocating plenary authority over Indian affairs to Congress, including the power to break Indian treaties at its discretion and to dispose of treaty-protected Indian land at will).

64. "Plenary power" is the absolute, unquestionable power of a governing body over certain subject matter. With regards to issues in Native American law, the United States federal government has plenary power over Indians and Indian Affairs, which means it has the power to make any laws it deems necessary and proper related to such issues. *The Plenary Power Cases*, ARIZONA STATE UNIVERSITY, http://outreach.asu.edu/tglf/book/case-law/plenary-power-cases (last visited Apr. 25, 2012). Since the doctrine of plenary power is not found in the United States Constitution, there is no source for the federal government's claim over Indians in Indian Country except for the claim itself. *Id.*

65. *Lone Wolf*, 187 U.S. at 553.

66. Conley v. Ballinger, 216 U.S. 84, 90 (1910).

federal Indian law. Two of the three Marshall Trilogy[67] cases tell a story of tribes ultimately winning in the federal courts, but facing a practical reality of tribal termination.

The second in the Marshall Trilogy, *Cherokee Nation v. Georgia*, is the story of a conflict between Cherokee Nation and the state government of Georgia.[68] Georgia passed a series of laws attempting to annihilate the Cherokee Nation's laws by establishing that Georgia state law was to apply to everything and everyone inside Cherokee Nation lands that fell within

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67. The "Marshall Trilogy" includes *Johnson v. M'Intosh*, 21 U.S. 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), and *Worcester v. Georgia*, 31 U.S. 515 (1832). The first in this trilogy of cases, all authored by Chief Justice John Marshall, is the story of one of the most basic of all property rights for Native Americans—the right to sell and otherwise transfer property. In *Johnson v. M'Intosh*, Johnson was a white settler who purchased land from Piankeshaw tribes in 1773 and 1775. STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 179. M'Intosh had purchased property from the federal government which he claimed to be the same as that belonging to Johnson and, subsequently, his heirs (though the parties, likely working together, stated as fact that their claims competed for the same property, facts the court accepted as true without question). Eric Kades, *The Dark Side of Efficiency: Johnson v. M'intosh and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1092 (2000) ("Mapping the United Companies' claims alongside McIntosh's purchases, as enumerated in the district court records, shows that the litigants' land claims did not overlap."). When Johnson's heirs brought suit seeking M'Intosh's ejectment based on the theory their claim was superior by virtue of the purchase date, the United States District Court for the District of Illinois dismissed the heirs' claim. *Id.* at 1093. Upon appeal to the United States Supreme Court, Johnson's heirs lost again with Marshall's affirmation of the dismissal. *Johnson*, 21 U.S. at 604. Marshall, writing for a unanimous court, declared Indian tribes do not have the right to convey land to anyone other than the federal government. *Id.* at 603. Quoting the discovery doctrine, Marshall determined European settlers gained title to all lands they conquered and, therefore, the right to extinguish any rights of title, including the right to "grant the soil" of indigenous peoples. *Id.* When the United States declared independence from Great Britain, the federal government took with it all those rights to take from Indians any rights to grant and convey title to land. *Id.* The result was a system by which Native Americans could only grant land to the federal government, which could then convey land to individual citizens without any input from the original Indian owners or competition among potential buyers. *Johnson* perpetuated the difficulty of proving and enforcing Native American rights against white settlers and the federal government. Though now widely criticized by legal scholars and generally met with disapproval, *Johnson* is still cited by lower courts as good law and legal authority several times each year. Tribes and individual Indians continue to fight for their rights as property owners today.

68. *Cherokee Nation*, 30 U.S. 1.

Georgia's state borders.[69] The legislation went so far as to parcel out particular areas of the Cherokee Nation to individual Georgia counties.[70] Georgia further declared all Cherokee laws null and void, prohibiting the application of such laws in state courts and outlawing Cherokee courts.[71]

The Cherokee Nation fought against Georgia's laws by bringing suit in the United States Supreme Court, asking the Court to settle the matter of whether Georgia laws applied to the Cherokee Nation. The Court ruled that it lacked jurisdiction to hear the case and could not resolve it. The Court declared that Indian nations were both "foreign nations" and people within U.S. boundaries.[72] This meant the Cherokee, though sometimes viewed as an independent nation, were also dependent people of the nation that encompassed them. The Court asserted that "foreign nations," as used in the Constitution, could not include "Indian nations" that fell within the broader United States borders.[73] Because the Constitution only authorizes the Supreme Court to hear cases brought by "foreign nations," and it determined Indian nations were not "foreign nations," the Court was not authorized to hear the case and dismissed it.[74]

Justice Marshall called Indian nations not "foreign nations" as compared to the United States, but "domestic dependent nations,"[75] existing as wards under the federal government's guardianship.[76] This determination of domestic, ward-like status did not intend to help the Cherokee Nation, but was an obvious effort by the Court to escape jurisdiction and avoid a definitive ruling on the difficult dealings between states and tribal governments.[77] The doctrines of "domestic dependent nations" and Indian nations as "wards" and the federal government as the "guardian" have become the cornerstone of federal Indian law

69. *Id.* at 7-9.
70. *Id.* at 7-8.
71. WALTER R. ECHOHAWK, IN THE COURTS OF CONQUEROR: THE TEN WORST INDIAN LAW CASES EVER DECIDED 96 (2010).
72. *Cherokee Nation*, 30 U.S. at 16-18.
73. ECHOHAWK, *supra* note 71, at 50.
74. *Id.*
75. *Cherokee Nation*, 30 U.S. at 17.
76. *Id.*
77. ECHOHAWK, *supra* note 71, at 106.

since 1831.[78]

In 1830, Georgia passed a law requiring its white citizens to obtain a state license before residing inside the Cherokee Nation.[79] A group of missionaries living inside the Cherokee Nation, Samuel Worcester included, refused to obtain the mandatory license.[80] The missionaries were known supporters of Cherokee resistance to Georgia's efforts to remove Cherokee citizens and eliminate Cherokee presence in Georgia, in an effort to take for Georgia and her citizens the lands rightfully belonging to the Indians. Worcester was indicted by a Georgia state court, brought to trial, and convicted. Worcester appealed to the United States Supreme Court, claiming that Georgia lacked authority to convict him.[81]

On review of Worcester's case in *Worcester v. Georgia*, the Supreme Court ruled the Cherokee Nation was a separate political entity that could not be regulated by the state.[82] Georgia's law requiring Worcester to obtain a license to live within the Cherokee Nation was unconstitutional and the missionary's conviction was overturned. The Court pointed to evidence proving that the Native American communities were considered "separate nations" dating back to the time of early colonial America:

> The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is by our constitution and laws, vested in the government of the United States . . . . The acts of the legislature of Georgia interfere forcibly with the relations established between the

78. *Id.*

79. *See* Worcester v. Georgia, 31 U.S. 515, 521 (1832) ("[It] shall not be lawful for any person or persons, under colour or pretence of authority from said Cherokee tribe, or as headmen, chiefs or warriors of said tribe, to cause or procure by any means the assembling of any council or other pretended legislative body of the said Indians or others living among them, for the purpose of legislating (or for any other purpose whatever).").

80. *Id.*

81. *See generally id.*

82. *Id.* at 595.

> United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, is committed exclusively to the government of the union.[83]

The Court also noted current "treaties and laws of the United States contemplate the Indian Territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union."[84] Therefore, only the federal government can negotiate the terms of Indian lands and the use of those lands. States lack constitutional power to deal with such "nations." Georgia was not constitutionally permitted to either pass a law regulating residence within the Cherokee Nation or convict a citizen for activity within it.[85]

What happened at Wyandotte was the complete opposite of what students of Federal Indian Law learn from the famed Cherokee Nation cases[86] of the Marshall Trilogy.[87] In the Cherokee Nation context, the tribe won its legal battles against the state of Georgia's encroachment on tribal sovereignty and lands in the court system, only to lose the overall struggle and be removed from their lands in the southeastern United States for relocation in Indian Territory in the 1830's.[88]

In contrast, the *Conley* case was lost in the U.S. Supreme Court as a matter of law, but over the years the Wyandotte women ultimately prevailed in protecting the lands, as the cemetery remains protected to this day.[89] While Lyda Conley was on the train to Washington D.C. to argue the case, other

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83. *Id.* at 520.

84. *Id.* at 519.

85. Though *Worcester* triumphed as the most favorable to tribal government rights of the Marshall Trilogy, its effectiveness was null, as President Andrew Jackson effected Cherokee removal. Removal under the Treaty of New Echota, signed in December of 1935, effectively eliminated the Cherokee presence and power in Georgia by relocating all Indians to "Indian Country" and giving Georgia the tribal land anyway. *See* ECHOHAWK, *supra* note 71, at 112.

86. *See generally Worcester*, 31 U.S. 515; Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

87. *See supra* note 67 (explaining the Marshal Trilogy includes *Johnson v. M'Intosh*, 21 U.S. 543 (1823), Cherokee Nation v. Georgia, 30 U.S. 1 (1831), and Worscester v. Georgia, 31 U.S. 515 (1832)).

88. Indian Removal Act, ch. 148, 21 Stat. 411 (1830).

89. Dayton, *supra* note 29, at 30.

Wyandotte women stayed behind to protect the land.[90] It was a daily struggle that spanned decades waiting for a resolution.

Losing in the courts simply redirected Lyda's efforts to Congress, where she successfully lobbied Senator Charles Curtis to sponsor legislation to stop the previously authorized sale of the tribal land.[91] She and her sister went to jail a few times and continued to fight for years against other attempts by local threats and individual trespassers.[92]

Upon hearing this story, the American legal profession is apt to crown Lyda as the hero, a tireless advocate before the Supreme Court and effective lobbyist. The Wyandotte community today, however, classifies the success as a truly collective effort of sisters and tribal women. When researching the matter, Holly Zane, a Wyandotte attorney, told me that it was important for people to understand that Lyda was not a solitary figure. It was the women as a group who made this possible; it was the collective efforts of the sisters.

What the people remember about the Conley sisters is something that will resonate with all of us as we think of the grandmotherly figures in our own communities. The sisters were sweet and kind to everyone except those people who threatened their tribal cemetery. Holly Zane also recounted a story about a young boy Helena Conley caught climbing the cemetery fence during the vigils. Upon gruffly confronting the boy, Helena learned that he climbed the fence to visit his little brother's grave. Helena brought the boy into the shack next to the graves where the sisters lived and comforted and consoled him. The story of the boy reminded me of the unique role that Native American women can play in a community—as mother, grandmother, sister, a legal warrior, a gun-toting revolutionary, and sometimes just as the person who cooks the food, passes out candy, or hugs a child. We can be all of those things and in our communities, all of these roles can be equally valued, equally necessary, never minimized.

The Conley sisters' story demonstrates how Native women uniquely advanced the law. It represents the first Supreme

90. *Id.* at 26.
91. *Id.* at 26-27.
92. *Id.* at 27.

Court case ever argued advocating the protection of a Native American sacred site, and it led to the first protective federal legislation for Native American burial places. The Native American Graves Protection and Repatriation Act now provides comprehensive protection against seizure of certain Indian land and sacred objects, a milestone accomplished long after the deaths of the Conley sisters and their cohorts.[93] The act, passed in 1990, established Native American rights to cultural items and lands, citing the importance of lineal descendants' claims to the artifacts and lands of ancestors, the original owners, or of the tribal interest in those ancestral items in the event lineal descendants are uncertain.[94]

The Conley sisters proved that persevering women could prevail, even against the force of the federal government. These women, bolstered by the support of their ancestors and the strength of tribal bonds, fought for the cemetery land to be saved. And saved it was.

A STRUGGLE FOR FARMLAND: MARY AND CARRIE DANN

A similar story of Native women advancing and shaping the law is better known within the Native community because of its modern day connection: the story of the Dann sisters, the Shoshone women who became international human rights icons for their resistance to federal control over their family's tribal lands.[95]

Mary and Carrie Dann began raising livestock in Nevada in the 1940s. Their fight to keep their farmland and defend their property began in the 1970s.[96] The Dann sisters resisted armed raids of their lands and federal confiscation of their livestock

93. Native American Graves Protection and Repatriation Act (NAGPRA), Pub. L. No. 101-601, 104. Stat. 3048 (1990).

94. *Id.*

95. *See* United States v. Dann, 470 U.S. 39 (1984); *see generally* Allison M. Dussias, *Squaw Drudges, Farm Wives, and the Dann Sisters' Last Stand: American Indian Women's Resistance to Domestication and the Denial of their Property Rights*, 77 N.C. L. REV. 637 (1999); Meghan Theresa McCauley, *Empowering Change: Building the Case for International Indigenous Land Rights in the United States*, 41 ARIZ. ST. L.J. 1167 (2009); Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753 (1992).

96. Dussias, *supra* note 95.

time and time again.[97] Their nonviolent resistance to protect their farmland was akin to the Conleys' struggle to preserve an ancestral graveyard. The Dann sisters' story is one of a thirty-year struggle with the United States over land rights.[98] Told in their own words:

> For more than thirty years, we have been engaged in a battle to protect our homelands, which the Western Shoshones have occupied for at least 10,000 years. The United States government has been trying to take Western Shoshone lands away from us, though they cannot produce a single document to back up their claim that our lands were taken by gradual encroachment and are now public lands. On the other hand, we have the Treaty of Ruby Valley, which granted access and rights of passage to settlers but never relinquished Western Shoshone title to the land. If they took our land by encroachment, where are all those people who encroached?[99]

Like the Conleys, they bravely took on armed officials. They noted:

> In order to try to break our spirit, the Bureau of Land Management[100] has fined us thousands of dollars for refusing to pay grazing fees. This has always been about the land, our right to continue to use and occupy our lands for the benefit of our families and future generations. It has been about money, or grazing or overgrazing. Then fully armed [Bureau of Land Management] agents stormed onto our homelands in armored convoys with helicopters overhead to raid our lands and confiscate our horses and cattle.[101]

In 1974, the federal government filed a trespass action against the Dann sisters, alleging violation of the Taylor Grazing Act[102] by grazing their livestock without a federal permit on land

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97. *See generally Dann*, 470 U.S. 39; Dussias, *supra* note 95.

98. *Dann*, 470 U.S. 39; Dussias, *supra* note 95.

99. WILMA MANKILLER, EVERY DAY IS A GOOD DAY: REFLECTIONS OF CONTEMPORARY INDIGENOUS WOMEN 88 (2004).

100. The Bureau of Land Management is the agency within the Department of the Interior responsible for administering and managing federal lands. *See About the BLM*, BUREAU OF LAND MANAGEMENT, http://www.blm.gov/wo/st/en/prog/more/lands.html (last visited April 26, 2012).

101. MANKILLER, *supra* note 99.

102. Taylor Grazing Act, ch. 865, 48 Stat. 1269 (1934) (codified as amended at 43 U.S.C. § 315 (2006)) (regulating grazing on public lands and requiring a permit for grazing, issued the federal government finds the grazing to be harmless and appropriate).

the government claimed was public land.[103] Until that time, the Danns' possession of the land was unchallenged.[104] The Danns argued they held aboriginal title to the land in question, and thus they could not be guilty of trespass.[105] A federal district court in Nevada held the case was precluded by collateral estoppel in an Indian Claims Commission ruling,[106] which held the United States acquired the land.[107] However, that case's ruling related to a geographical area distinct from the land to which the Dann sisters laid claim.[108]

The Dann sisters appealed. The Ninth Circuit reversed, holding the Dann sisters could assert aboriginal title as a defense to the trespass suit because the issue of extinguishment of title over their land was never litigated in the previous proceeding.[109] The court also found the Dann sisters could assert aboriginal title despite the bar provision of the Indian Claims Commission Act,[110] because the government had not yet made payment on the damage award, further proving the government had not demonstrated a clear intent to extinguish the Indians' claim over that land.[111]

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103. *See* United States v. Dann, 572 F.2d 222, 223 (9th Cir. 1978); United States v. Dann, 706 F.2d 919, 921 (9th Cir. 1983), *rev'd*, 470 U.S. 39 (1985).

104. Dussias, *supra* note 95, at 712 (citing Brief of Respondents, *Dann*, 470 U.S. 39 (1985) (No. 83-1476).

105. *See id.* at 712-13; *Dann*, 572 F.2d at 223.

106. The Indian Claims Commission was a judicial body governing relations between the federal government and Native Americans, principally responsible for settling competing land claims. It completed nearly 550 claims brought by tribal groups for awards of over $818 million in the thirty-two years it existed. *See* U.S. INDIAN CLAIMS COMM'N, FINAL REPORT (1979).

107. The Indian Claims Commission found in the Temoak Band's case that the United States had violated the Western Shoshones' rights and the Treaty of Ruby Valley by taking the land without compensation. The Western Shoshones had aboriginal title to twenty-two million acres of land in Nevada, pushing the Commission to order the federal government to repay the Temoak Band the value of the lands taken. Under the order, the claims to compensation were considered settled. *See generally Dann*, 572 F.2d at 224-225.

108. United States v. Dann, 873 F.2d 1189, 1194 (9th Cir. 1989).

109. United States v. Dann, 706 F.2d 919, 923-24 (9th Cir. 1983), *rev'd*, 470 U.S. 39 (1985).

110. The bar provision required "[t]he payment of any claim . . . shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." 25 U.S.C. § 70u(a) (1976) (repealed 1978).

111. *Dann*, 706 F.2d at 925-28.

The Ninth Circuit remanded the Dann sisters' case to the district court to be considered as an individual claim of title over their land, distinct from earlier proceedings.[112] On remand, the district court found the Danns possessed individual aboriginal title to one individual section of grazing land prior to 1979 and therefore the Danns and their father were entitled to individual aboriginal rights to graze certain types and numbers of livestock, without interference from the Bureau of Land Management.[113] However, because the Danns made a tribal claim, not an individual one, the court refused to rule as to whether those aboriginal rights could be enforced.[114] On appeal, the Ninth Circuit held that the Bureau of Land Management's regulations trumped the Danns' individual aboriginal rights.[115] As far as the federal system was concerned, the Dann sisters were out of luck and out of land.

Some observers of the Dann sisters' struggle in the 1990s viewed the complaint the Dann sisters later filed in the Inter-American Court on Human Rights[116] as a useless and symbolic struggle.[117] The United States responded to the complaint that "'[t]his case is about disputed land ownership and grazing rights, and not about human-rights violations.'"[118] Yet, the United Nations has acknowledged a connection between the denial of land rights and the denial of human rights and the intimate ties between the land and human beings. In March 1998, the Inter-American Commission on Human Rights asked the United States to stay its actions against the Danns pending the

112. United States v. Dann, 763 F.2d 379 (9th Cir. 1985).

113. *Dann*, 873 F.2d at 1193-94.

114. *Id.*

115. *Id.* at 1199-1200; *see also* Dussias, *supra* note 95, at 719.

116. The Inter-American Court on Human Rights is part of the Organization of American States (OAS), functioning as, among other things, a monitoring body over human rights institutions in Member States, of which the United States is one. *What is the IACHR?*, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/en/iachr/mandate/what.asp (last visited April 26, 2012).

117. Dann v. United States, Case 11.140, Inter-Am. Ct. H.R. (ser. L) No. 75/02 (Dec. 27, 2002); *see also* Brian D. Tittemore, *The Dann Litigation and International Human Rights Law: The Proceedings and Decision of the Inter-American Commission on Human Rights*, 31 AM. INDIAN L. REV. 593 (2007).

118. Dianna Hunt, *Property Values: Tribal Land Claim Goes to International Panel*, DALLAS MORNING NEWS, May 11, 1997, at 1A (quoting the U.S. Department of Justice's response to the OAS).

Commission's investigation of the case, but the United States has refused.[119] Even when further favorable rulings from the Inter-American Commission were released in 2001[120] and 2003,[121] most Native Americans had little faith that international law would be a viable source of law to advance legal arguments, because the United States would simply reject the application of international rulings or purported jurisdiction over the United States by international bodies.[122]

Recently, something thought to be highly unlikely just a few years ago occurred when the President of the United States reversed course and signed the United Nations Declaration on Rights of Indigenous Peoples.[123] The Declaration signals not only a change in federal policy, but breathes a renewed sense of optimism in a field of law that sometimes struggles for positive news. Although the work of several decades of international advocacy was critical, the Dann sisters' physical resilience and steadfast faith that justice would prevail, either within or outside the confines of the law, was equally critical.

TODAY AND TOMORROW: A CONTINUING STRUGGLE

Indian women have continuously worked to advance and evolve the law, and the stories highlighted in this essay are just three of thousands of similar stories. When progressive Indian women contemplated the current condition of United States law, they had little reason to have faith that things would change.

Although separated by time, Sally Ladiga, the Dann sisters, and the Conley sisters have several things in common. They lost their legal battles in the courts of the United States, an

119. *See* Brenda Norrell, *Dann's Take Land Battle to World Court*, INDIAN COUNTRY TODAY, Sept. 14-21, 1998, at A2.

120. Dann v. United States, Preliminary Merits Report, Case 11.140, Inter-Am. C.H.R., Report No. 113/01 (2001) (unreported).

121. Dann v. United States, Final Merits Report, Case 11.140, Inter-Am. C.H.R., Report No. 53/02 (Oct. 10, 2002).

122. Tittemore, *supra* note 117, at 612 (citing 2003 Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.118, doc. 5 rev. 2, ch. III(D), ¶¶ 250-251 (2003)).

123. Krissah Thompson, *U.S. Will Sign U.N. Declaration on Rights of Native People, Obama Tells Tribes*, WASH. POST, Dec. 16, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/12/16/AR2010121603136.html.

occurrence not uncommon in their communities.[124] It was after their lifetimes that the full extent of their advocacy was realized. The injustices that they spent a lifetime fighting against are now nationally and internationally recognized wrongs to which the law has responded and evolved.

The difference, as compared to that at the time of the women before, is there are now armies of Native Women coming forward. And expect this to be the case for the years to come because, at least from anecdotal evidence, American Indian women are graduating at a higher rate than their male colleagues. In the last decade the ratio of Indian women to men in legal academia in tenured and tenure-track positions is about two to one.[125]

These exciting times are to be celebrated, but there is some danger unless the community remains mindful of how much there is at stake, and of the gains that have been made. These victories were not won by individual Indian women. They were won by Indian women collectively, consciously working in teams, as the Wyandotte women of today will remind us.

We must take to heart the lessons from these women, and know that to overcome the challenges that lie ahead for tribal communities we must stand united together as a group. We must support each other and remain fully cognizant of the shoulders we stand on in a long legacy of Native women who have truly shaped and evolved the law. It remains a fair question to ask: why would Native American women, the group that arguably should have the least amount of faith in the rule of law, want to be lawyers or law professors who engage with the United States legal system at all?

The Ladiga, Dann, and Conley stories show us that the law eventually catches up, if we are willing to maintain faith and passion in what looks like a losing fight. We must encourage each other to think like those women that have gone before us. Many have heard conference hallway conversations and listened to legal arguments in cases where Native American attorneys act

124. *See generally* ECHOHAWK, *supra* note 71.

125. *Law School Staff by Gender and Ethnicity*, American Bar Association, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/ls_staff_gender_ethn.authcheckdam.pdf (last visited Apr. 27, 2012).

defeated and say, "The U.S. Supreme Court has said that we don't have jurisdiction over this or that," or "The U.S. Supreme Court has denied our relief so I am not sure what to do next." Let us vow to ask ourselves, "What would Sally, Lyda, Helena, Mary, and Carrie have done in this situation?" As we represent tribal communities, we must be prepared to take those kinds of stands.

Andrew Jackson is purported to have said, upon news of the Cherokee Nation's victory in *Worcester v. Georgia*: "Justice Marshall has made his law, now let him enforce it."[126] The Creek, Wyandotte and Shoshone women of this essay said similar things with their actions. The U.S. Supreme Court made its decisions. So what?

Native American women have to be prepared not only to combat outside pressures that are threats to tribal communities. We must be prepared to take stands against injustices that exist within as well—there are certainly times when truth must be spoken to power in our own tribal communities. When considering what has happened in tribal communities—whether it is publicized challenges of inequity like in the *Santa Clara Pueblo v. Martinez* civil rights case[127] or just in the day-to-day complaints to our tribal governments—we know that it usually is the women who stand up and push forward positive change. Achieving change, however, means making unpopular decisions on a tribal court or supporting unpopular political positions, because our silence will mean that we support the injustice perpetrated by our own tribal governments.

In reality, we need to think about what we can do to stand up for the issues in our own tribal communities. What happens when sitting tribal judges are afraid to put repeat offending non-Indians in jail because the U.S. Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe* tells us that we lack the

126. *Federal Indian Removal Policy*, NATIONAL PARK SERVICE, http://www.nps.gov/trte/historyculture/stories.htm (last visited on April 27, 2012).

127. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (stating the Indian Civil Rights Act of 1968 barred suits against the tribe in federal court, strengthening tribal self-determination as the federal government has virtually no enforcement role over tribal governments, but also failing to push tribes to grant tribal membership to children born to female tribal members who married outside the tribe).

power to do so?[128] How many are willing to go to jail like the Conley sisters and countless others whose stories we do not know yet? Does having these prestigious positions create a situation where we are more likely, or less likely, to be the next Ladiga grandmother or Conley or Dann sister?

Let us be successful and unapologetic in all that we do, regardless of what role we play. But if the role we play is that of a Native American woman in the law, then let us emphasize our role as Native American woman first, and our role in the law second. The law will eventually catch up.

128. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (finding Indian tribal courts do not have inherent criminal jurisdiction over non-Indians who commit crimes on Indian lands unless expressly authorized to exercise such jurisdiction by Congress).