

A Rite of Passage: Perpetuating the Invisibility of American Indian Lawyers

Roshanna K. Toya

Introduction

My eyes welled up with tears when I had to deliver the news to my three young children: “I’m sorry, guys, Momma didn’t pass the bar exam.” We had all spent the past two months apart because of the rigorous demands of the bar prep course. Once law school was *finally* over, they thought they had their Momma back. But I was again gone every morning before they woke up and would sometimes come home in time to kiss them goodnight and tuck them into bed. In their own nine-, six-, and four-year-old minds, they grappled with understanding the sacrifices that we had to make to get past this artificial finish line after graduating from law school. Maybe they did not quite understand, but they sure did have patience, especially when Momma missed another Little League practice, dance practice, or classroom party. Their eyes similarly welled up with giant tears when they learned the disappointing news. They knew it meant that we would have to do the whole thing all over again and that the sacrifices were not over yet.

I write this essay based on my own experiences and influenced by the stories of many other aspiring American Indian lawyers from throughout the country. I am fortunate to have a bond with many other American Indian lawyers who attended law schools and practice in multiple states throughout the country. We are all connected by Indian Country’s acclaimed Pre-Law Summer Institute (PLSI).¹ Through the ideas and sentiments in this essay I

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1. Pre-Law Summer Institute (PLSI) is an intensive two-month program that prepares American Indian and Alaska Native individuals for the rigors of law school by essentially replicating the first semester of law school. Students come from all over the country to participate in the program, which is based in Albuquerque, New Mexico, on the campus of the University of New Mexico School of Law. The program teaches students the unique

do not purport to speak on behalf of all Indian lawyers, but I am speaking up because journeys like mine are not atypical.

Part I discusses my personal experiences with the Uniform Bar Exam. Part II discusses the broader, pervasive but somehow invisible problem of law schools not adequately preparing American Indian law students to pass the Uniform Bar Exam (UBE) on the first try. Part II includes a discussion of how a lack of data is an age-old problem to tribal people and nations, and how it is becoming more apparent and more pervasive in light of the global pandemic. In Part III I propose solutions and ideas to law schools and law professors for solutions to investigate in furtherance of American Indian self-governance and tribal sovereignty. As a millennial American Indian woman, I find no excuse for the invisibility of American Indians in law schools and the legal field given the commonplace nature of collecting data in this day and age.

I. When Even the Good News Feels Bad

My story is like that of many other Indians who pursue a law degree. I was a nontraditional student, returning to obtain my juris doctor and become an attorney almost ten years after completing my graduate schoolwork and having a career. As a nontraditional student, I had a husband and three children, a job, and a tribal community of which I was an active part. My husband and I had to figure out how to finance my education² when the tribal scholarships³ and funding by organizations such as the American Indian Graduate Center⁴ did not stretch far enough. Also, like many other American Indians pursuing a juris doctor, I made the sacrifices so I could become a better advocate for

methods of law school research, analysis, and writing. PLSI, as Indian attorneys fondly know it, is run by the American Indian Law Center (AILC). PLSI and AILC also strive to promote diversity in judicial clerkships through their Judicial Clerkship Program, and extend support to law school graduates through their own Native American Bar Passage Initiative. See AM. IND. L. CENT., <https://ailc-inc.org>.

2. I write this with sincere gratitude for my husband, Michael Toya, Jr., who by my side lost many hours of sleep during law school to make sure we could feed and support our family by creating innovative and beautiful pieces of Pueblo-inspired artwork to sell at various venues throughout the country. Visit his Instagram page and help support Indian artists: <https://www.instagram.com/toyamichael/?hl=en>. Supporting Indian artists, especially during this global pandemic, is critical, in part because there are few opportunities for Indian art shows, Indian markets, and live viewing of art, which have historically been lifelines for many American Indian artists and families. Without these lifelines for income, American Indian families will continue to suffer the disparities made visible by the pandemic. See Nicholas Kristof, *The Top U.S. Coronavirus Hot Spots Are All Indian Lands*, N.Y. TIMES, May 30, 2020, <https://www.nytimes.com/2020/05/30/opinion/sunday/coronavirus-native-americans.html>.
3. I have deep appreciation for the Pueblo of Isleta for the many years of funding, and the support of my tribal leaders and community to raise up Indian scholars. See <https://www.isletapueblo.com/> for a glimpse of the Pueblo community where I was raised and live today.
4. The American Indian Graduate Center is a nonprofit organization and the largest scholarship provider to Native American graduate students in the United States, <https://www.aigcs.org>.

tribal people, sovereign tribal nations, and the general betterment of Indian people and communities.⁵

I did not grow up knowing any attorneys, much less Indian attorneys, and I was the first in my family to become an attorney. Despite not having a network of attorneys who understood my plight and who I could turn to for help, I was fortunate to be introduced to my Indian law colleagues during PLSI. The program not only provided me with a network for social and professional support, but it also prepared me academically. I have maintained these connections and friendships throughout my career as an Indian attorney; it was overall such a formative experience.

Though PLSI was such an empowering first step in my law school journey, when it was over, and my colleagues and I moved on to our respective law schools throughout the country, my feeling of uncertainty quickly resurfaced. I was unsure of my place in a bigger law school class, and unsure about my ability to succeed academically. My fears were part of the normal anxieties new students face—especially students of color—about perhaps whether they belong in law school, but my worries were also bigger than that.⁶

During my first year of law school, New Mexico joined many other states in switching to administering the UBE in place of the state-authored bar exam. That fall (September 2016) I learned that not one American Indian law school graduate—out of fourteen who sat in New Mexico—had passed the exam.⁷ Though the pass rate for all bar takers in the state and throughout the country that year was remarkably low,⁸ it was the pass rate and fate for American Indian law graduates that really created a pit in my stomach.

5. *The Pursuit of Inclusion: An In-Depth Exploration of the Experiences and Perspectives of Native American Attorneys in the Legal Profession*, NAT'L NATIVE AM. BAR ASS'N 22 (2015), https://www.nativeamericanbar.org/wp-content/uploads/2014/01/2015-02-11-final-NNABA_report_pp6.pdf.
6. For more details on other worries and experiences of young American Indian attorneys in the law schools and the legal profession, see *The Pursuit of Inclusion: Experiences of Young American Indian Attorneys*, NAT'L NATIVE AM. BAR ASS'N (2015), https://www.nativeamericanbar.org/wp-content/uploads/2014/01/2015-02-03-final-NNABA_ipage_generation_2.pdf.
7. Chris Quintana, *New Bar Exam Takes Toll On UNM Law Grads*, ABQ. J. (Sept. 25, 2016), <https://www.abqjournal.com/852513/new-bar-exam-takes-toll-on-unm-law-grads.html>. Thankfully we saw higher pass rates over the years that followed through increased and intentional efforts to support and prepare law students for this new style of bar exam. Jessica Dyer, *UNM: 91 Percent of Law Students Pass Bar Exam On First Try*, ABQ. J. (Sept. 20, 2017), <https://www.abqjournal.com/1066565/unm-91-percent-of-law-students-pass-bar-exam-on-first-try.html>.
8. Several local and national affinity bar associations called for bar examiners to “consider the impact on minority applicants in deciding whether to adopt the Uniform Bar Examination (“UBE”) in their jurisdiction.” AM. BAR ASS'N, RESOLUTION & REPORT 117, at 1 (2015), <https://www.nativeamericanbar.org/wp-content/uploads/2014/01/ABA-Resolution-No.-117.pdf>. See also N.Y. STATE BAR ASS'N, TASK FORCE N.Y. BAR EXAMINATION, REPORT OF THE N.Y. BAR ASS'N, at app. C (2020), <https://nysba.org/app/uploads/2020/03/Report-of-the-Task-Force-on-the-New-York-Bar-Examination.pdf> (reproducing how the Dean of New York Law School encouraged the Task Force to continue studying how the UBE truly impacts law graduates of color); Robert R. Kuehn & David R. Moss, *A Study of the Relationship between Law School Coursework and Bar Exam Outcomes*, 68 J. LEGAL EDUC. 623 (2019) (examining a decline in

Anxiously, I went through my first semester of law school repeatedly asking, “In light of the recent bar pass rates, what should I be doing *now* to ensure I pass?” The answer I and my colleagues in other states always heard was similar: “*Don’t worry*, it is still a long way off,” or “You have enough to worry about to just get through law school, *don’t worry*,” or, “*Don’t worry*, bar prep will give you everything you need to know.”

So during my third year of law school I followed the same path as those before me. I took a bar strategies class; I began to practice the Multi-State Performance Tests with the encouragement of my clinical law professor; I applied for and received scholarships so I would not have to work while studying; I paid for a bar prep program and followed it meticulously. I devoted time away from my family, from work, and from my community to study. I needed to pass.

When it was finally my turn to sit for the exam, there were at least ten American Indian students, some first-time takers and multiple retakers, who sat for the exam. Only two passed. When I sat for the bar exam a second time, I had a group of about seven Indian friends who also sat for the exam as retakers. That time again, many did not pass.

After the pass list was released in April 2020—right after the worldwide pandemic’s onset of quarantine safer-at-home and shelter-at-home orders—although I had great news to take home to my husband and children, I felt a great sense of sorrow. Many of my friends would have to again endure the stress of preparing as retakers. Our friendship and support for one another was so genuine and so strong that my feelings of joy were tempered by sadness. I knew the pain it would bring not only to my friends, but to their families too. Many of my friends were also parents, or caring for their own parents, had minimal-paying jobs they had to endure until they could become officially licensed, and still had tribal communities in which they participated.

As I move on in my career and wait for my friends to join the ranks of licensed attorneys in their respective states, the idea of Indians as invisible attorneys is ever more real.

II. We Cannot be Seen if We Are Not Counted

After a recent study was published by The Center for Women in Law and The NALP Foundation, called *Women of Color: A Study of Law School Experiences* (June 15, 2020), Indian law scholars were quick to notice and point out that the study lacked data related to American Indian law students. The study organizations were immediately contacted by “[Indian] women law professors and lawyers, [Indian] men law professors and lawyers, and allies who teach in the field of Indian law” to discuss concerns about the study.⁹ The study

bar examination passage rates within the past decade and how law school coursework, GPA, or LSAT scores may have an impact on passage rates).

9. Angelique W. EagleWoman & Wambdi A. Was'teWinyan, *Native Women Law Students Excluded from So-Called “Women of Color in Law School” Study*, INDIAN COUNTRY TODAY (June 26, 2020),

organizers defended the study as “completed,” because “the responses received by Native women surveyed was included in aggregate numbers.” The remedy proposed was to include “language on the statistically low number of [Indian] women law student responses as justification for the exclusion.”¹⁰ The aftermath of the study’s publication is only the most recent example of Indian attorneys expressing the sense of being “invisible lawyers.”

In 2015, an article published by the American Bar Association provided another example of advocates bringing attention to the experiences of American attorneys who feel invisible, excluded, and marginalized. The article was appropriately titled “The invisible lawyer? New study looks at challenges of Native American attorneys.”¹¹ This article pointed to a study that was conducted and released in 2015 by the National Native American Bar Association. The study indicates that Indian attorneys reported their feeling of exclusion persisted *even when* they were working with racial or ethnic minority attorneys and/or working with groups that focused on diversity and inclusion in the profession.¹² Other similar articles published that year echoed that sentiment.¹³

The sentiment of being invisible as an Indian law student, law professor, or attorney has persisted for many years. There are a number of law school graduates throughout the country who put their lives and tribal communities on hold to complete the prestigious accomplishment of obtaining a law degree, yet the world may never know them as attorneys because in part they are impacted by the disproportionate rate of Indians who struggle to pass the licensing exam. My intent here is to call to the attention of law schools and law professors everywhere: Continued low rates of bar passage for American Indian students will perpetuate the problem of Indian attorneys becoming increasingly invisible.

A. The Problem of Missing Data

Indian attorneys become transmuted into invisibility every time there is a complete lack of data about our experiences. Data regarding our presence in the legal field, data regarding bar pass rates, data that shows we even exist as Indian law students, lawyers, or law professors is lacking. Although my

<https://indiancountrytoday.com/opinion/native-women-law-students-excluded-from-so-called-women-of-color-in-law-schools-study?redir=1>.

10. *Id.*

11. Marilyn Cavicchia, *The Invisible Lawyer? New Study Looks at Challenges of Native American Attorneys*, 39(6) BAR LEADER (2015), https://www.americanbar.org/groups/bar_services/publications/bar_leader/2014-15/july-august/.

12. *Pursuit of Inclusion*, *supra* note 5, at 37.

13. See, e.g., Mary Smith, *Native American Attorneys Systematically Excluded in the Legal Profession*, 40(4) AM. BAR ASS'N HUMAN RIGHTS 14-17 (May 2015), <https://www.jstor.org/stable/26408477>; Dwanna L. Robertson, *Invisibility in the Color-Blind Era: Examining Legitimized Racism against Indigenous Peoples*, 39(2) AM. INDIAN Q. 113 (Spring 2015), <https://www.jstor.org/stable/10.5250/amerindiquar.39.2.0113?seq=1>.

experiences with bar passage and the struggles for many of my colleagues to pass the bar exam provide primarily anecdotal evidence, the fact is, there is a problem. However, the problem is never fully actualized because there is not enough data collected to demonstrate where the problem lies. Law schools rarely collect data on American Indians, or people of color in general, regarding bar passage. A separate and further compounding problem, however, is that bar examinees are asked to self-identify a racial classification on their bar exam application to be counted as American Indians.¹⁴ Being American Indian, as any Indian knows, is such a political classification that it is never as simple as checking a box to identify as such.¹⁵

As Indian lawyers and law students pointed out on one session of *The Jabot*, a podcast produced by Above the Law, there are many implications for American Indians when there is a lack of data about our existence in the legal profession.¹⁶ The implications for American Indians being invisible, especially as law students, translates into the inability of nonprofit funders like the American Indian Graduate Center to justify budgets big enough to continue funding Indian legal scholars. If students cannot get help with funding, they are less likely to attend law school. They are certainly less likely to graduate and pass the bar. But if Indians do not attend law school, it threatens the self-determination of tribal nations, because there will be decreasing numbers of Indian advocates trained to fight for tribal rights, tribal self-governance, and tribal sovereignty. It is imperative that our representation and perspectives in diversity studies be included, otherwise we are at risk for being aggregated out of existence.

B. Further Implications as a Result of COVID-19

I recognize that given all of the tragedy occurring on American Indian reservations across the country,¹⁷ it seems odd to be talking about the impact of the bar exam on Indian law students. That is exactly why this is important. To prevent future calamities, we need to be able to exercise our self-governance and we need lawyers to protect tribal nations and people. It is important to

14. Self-identification creates many other complications about who is Indian. For a brief and concise explanation of the loaded problem of identifying as Indian, see Mary Smith, *The Pursuit of Inclusion, An In-Depth Exploration of the Experiences and Perspectives of Native American Attorneys in the Legal Profession: Executive Summary*, NAT'L NATIVE AM. BAR ASSOC. (2015), https://www.nativeamericanbar.org/wp-content/uploads/2014/01/2015-02-11-NNABA_execSummary_6.pdf.
15. A seminal Indian law case known for stating that being Indian is not a racial classification but a political classification is *Morton v. Mancari*, 417 U.S. 535, 553 (1974).
16. The Jabot, *Erasure of Native Voices in Law School Experience Study*, ABOVE THE LAW (July 21, 2020), <https://www.amazon.com/Erasure-Native-Voices-School-Experience/dp/Bo8K6H7YPR> (discussing the study on women of color in law school with Dean Angelique EagleWoman, Thomasina Real Bird, Paulene Abeyta, Christina McDonough and Aidan Graybill).
17. Kate Conger, Robert Gebeloff & Richard A. Oppel, Jr., *Native Americans Feel Devastated by the Virus Yet Overlooked in the Data*, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/us/native-americans-coronavirus-data.html?searchResultPosition=1>.

consider these issues in light of the worldwide pandemic—law schools are shifting to online platforms, bar exams are pushed back or canceled until a date uncertain, and important experiential learning opportunities for students are compromised. The disparities among the oppressed, marginalized, and invisible people are growing larger.

On the tribal reservations, learning from home, participating in courses through a variety of online learning platforms, and following along in an online bar course can be impractical if not impossible when the internet connection is slow or does not exist. “In comparison to the rest of the country, where 92 percent of Americans have access to broadband services, only 65 percent of Indian Country has access to wireless services.”¹⁸ Some additional concerns for tribal communities during the pandemic are whether students—either in grade school or pursuing advanced degrees—will get left behind because of the digital divide.¹⁹

Productivity and engagement in a classroom or bar prep are negatively impacted, and law professors must take into consideration that tribal students who live in rural areas will be disparately impacted by a fully online curriculum requiring video, synchronous lectures, or other high-bandwidth streaming. Left unaddressed, the achievement gap, unfortunately, will continue to grow. Law schools must ask and pay attention to students whose virtual connection and infrastructure are less than ideal. These students deserve as much of a chance as any to succeed—and more, given their backgrounds and goals.

III. Suggestions for Law Schools

Law schools have so much potential to help lessen the impact of disparities and to help Indian attorneys and law students be visible. Although the barriers that American Indians have had to overcome to gain sovereignty, to become educated, and to advocate for themselves are outside the scope of this essay, it is important to recognize that most American Indian law students in your classes are there through significant perseverance, sacrifice, and support on individual, family, community, and political levels.

Especially during this time in our nation’s history, law schools should be asking what accommodations can be made during the pandemic and quarantine orders so students can maintain classroom participation and engagement from home. Similarly, for bar preparation courses, additional support should be built in for individuals in communities lacking reliable internet connectivity. Law schools, and in particular law professors, should be aligning the political agenda of American Indian people with their public service and public advocacy efforts through, for example, petitions collecting signatures, drafting bills, or preparing policy reports and white papers. For

18. Native News Online Staff, *Deb Haaland and Elizabeth Warren Introduce DIGITAL Reservations Act*, NATIVE NEWS ONLINE (July 29, 2020), <https://nativenewsonline.net/currents/deb-haaland-and-elizabeth-warren-introduce-digital-reservations-act>.

19. *Id.*

example, law professors can advocate for their law students and the American Indian communities by supporting congressional Representative Deb Haaland's bill, The DIGITAL Reservations Act.²⁰ American Indians without access to adequate technology and infrastructure are unable to participate in law school, but, more importantly, are unable to participate as readily or as robustly as people with high-speed broadband access.

Further, law schools must create and encourage safe spaces for American Indian students to be recognized, coexist, and have their voices heard. Student organizations are one space. Courses like property, federal jurisdiction, and civil rights are other areas where American Indians can be more visible. Law schools should also assign works written by and reflecting the voices of American Indians, and patiently and intently listen to the voices of students. Reading this essay is a start. Providing resources that Indian students can access to make sure they can be effective law students is another start.

Most importantly, collect data. Rely on the strength of millennials to help collect data and find innovative ways to collect data.²¹ Our world has become accustomed to relying on data to make decisions however, as millennial people of color, we must demand that the data accurately captures and represents the status of affairs. Include Indian student experiences in that data, no matter how small the individual numbers are. Do not aggregate us and do not erase us because there simply are not enough of us, or enough of us responding through traditional methods, to make the numbers statistically significant. The numbers are still significant. Collect data about bar passage rates.²² Though it may be a complex task, as pointed to earlier in this essay, it is a worthwhile and necessary effort if we want to uplift and empower American Indian people and tribal nations.

American Indian students have promise. PLSI is one organization that lives by that vision. But it must continue in law school. Law professors must take personal responsibility for ensuring that all students who make it through law school can pass the bar exam and are set up to succeed thereafter. Students work too hard toward their rite of passage—defeating the bar exam—to then be transmuted into an invisible Indian attorney.

Conclusion

Though I acknowledge my experience does not represent all the voices of American Indian lawyers and law students in the country, I know there are

20. See generally DIGITAL Reservations Act, H.R.7774, 116th Cong. (2020), <https://www.congress.gov/bill/116th-congress/senate-bill/4331/text?r=1&s=1>.

21. Sarah Landrum, *Here's Why Millennials Are the Most Data-driven Generation*, FORBES (Aug. 29, 2017), <https://www.forbes.com/sites/sarahlandrum/2017/08/29/an-inside-look-at-millennials-love-of-data/?sh=5bf978f4271e>.

22. For ideas about how law schools may better understand declines in overall bar exam passage rates, see Kuehn & Moss, *supra* note 8 (examining a decline in bar exam passage rates from within the past decade, and analyzing how law school coursework, GPA, or LSAT scores may have an impact on passage rates).

many other stories just like mine throughout the Indian legal community. There are so many talented American Indian aspiring attorneys with plans to continue to advance their communities. But as long as we remain “invisible” because of false barriers like the bar exam, or are absorbed into the aggregate because our individual numbers are too small, the road to our destination is harder than necessary. There are so many ways to help remove the barrier and lessen the burdens. Money, resources, data, and visibility are some.

Indian people are not like any other racially diverse or oppressed group. “Our voices are not the same as other [people] of color because our identities carry nations with them.”²³ Law schools and the practice of law are lucky to have us. We cannot be overlooked because we are misunderstood. Identify who we are, count us, help to empower us.

23. EagleWoman & Was'teWinyan, *supra* note 9.