Jason Zenor
Assistant Professor
School of Communication, Media and the Arts
SUNY-Oswego
315-312-3527
jason.zenor@oswego.edu

Title- The Other Americans: Tribal Nations and Free Speech
2014 AEJMC Law & Policy Division
Teaching Competition

THE OTHER AMERICANS: TRIBAL NATIONS AND FREE SPEECH

RATIONALE

When students take a law course, they often just want to be told what the law is and memorize it for the test and try to avoid breaking it in their future careers. It takes some work on the part of the professor to try to get students to think about the bigger picture. What is the meaning of the law? Why was it adopted? What were the policy issues? What were the political, social and philosophical values behind its origins?

Furthermore, students often believe 'the law is the law' and it is the same for everyone. If the news (or their Facebook feed) reports that a judge has held that a person can be punished for tweeting about a police investigation, then no one anywhere can tweet about police investigations. They do not realize that it is only one trial judge in one jurisdiction and that the case will be appealed. For the students, the judge has spoken and that is that.

So in our law courses we try to teach them about how law is based in culture and how it affects disparate groups differently. We talk about how in the past the law was applied differently to women, the LGBT community, African American community, suspected communists, etc. We also spend time discussing how the many jurisdictions interpret and apply the law differently, even after the U.S. Supreme Court has spoken on the issue (because it inevitably creates more issues). Moreover, in a single semester we rarely have the chance to speak about international law and how principles of free speech and free press are perceived differently. But, arguably, students may not care about other nations as they just need to know the American law for the class and their job.

Well, I find this to be disconcerting. So I have tried to develop a way to incorporate the ideas of policy, diversity and thinking beyond U.S. law, but at the same time I want it to be accessible. Then I had an epiphany, as I realized that we have a 'foreign' nations right in our backyards. Nations that is susceptible to American jurisprudence yet at the same time is are sovereign and have their own tradition and laws. These are nations whose legal structure has been heavily influenced by American political, social and cultural beliefs. These nations of course are the 566 federally recognized American Indian Tribes.

IMPLEMENTATION

I teach courses in both Media Law and Federal Indian Law and Policy, so it was an easy for me to fit cases that have derived from tribal nations. Serendipitously, I disocvered several cases and issues that involve both Federal Indian and media law. Below is as short [non-exhaustive] survey of cases and issues that can be applied in a media law course:

First Amendment: I discuss the Indian Civil Rights Act of 1968 (ICRA) which created a 'Bill of Rights' for the tribal members who live on reservations. In doing so, we have to discuss the sovereignty of the tribal nations and how they are not bound by the U.S. Constitution, yet are controlled by the plenary powers of Congress. I discuss some of the following cases specifically.

Employment Division, Department of Human Resources of Oregon vs. Smith, 494 U.S. 872 (1990): A state government can deny unemployment benefits to tribal members who were fired for drug use, even though it was for religious purposes. This can move into a discussion about freedom of thought and religious practice and how western cultures view expression differently. (Similarly, *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), examines how the two cultures have disparate views on how land and building are play a role in religious expression).

Bowen v. Roy, 476 U.S. 693 (1986): the U.S. Supreme Court failed to recognize that the use of social security numbers violated the tribal member's right to free exercise. This case ties into the O'Brien test and how facially neutral and generally applicable statutes do not violate fundamental rights.

Gilbert v. Flandreau Santee Sioux Tribe (S.D. 2007): A tribal member who worked for a casino owned by the tribal nation was fired for complaining about a member of the tribal council. The tribal member was denied unemployment benefits from the state. This tribal case parallels many of the employee speech cases that have recently benne decided by the U.S. Supreme Court, such as Garcetti v. Ceballos (2006).

Free Press: ICRA does include the freedom of the press, but many reservation newspapers are run by tribal government. So, they often shut down dissenting newspapers (reservations are one of the few areas where newspapers are thriving), punish journalists and use prior restraint. Not all tribes have abuse this power (as some have supported the press) but many have wielded this sword against the press. [See http://www.rcfp.org/category/tags/indian-reservations and http://www.nieman.harvard.edu/reports/article/100616/Freedom-of-the-Press-in-Indian-Country.aspx].

Moreover several cases concerning libel by reservation media has turned on the issue of whether the court applies U.S. Constitutional law or tribal customs (which often has very different outcomes). (See Patrick M. Garry et. al., *Tribal Incorporation of First Amendment Norms: A Case Study of the Indian Tribes of South Dakota,* 53 S.D. L. REV. 335, 354 (2008)).

Trademark and Right to Publicity: The Crazy Horse Malt Liquor Case: A New York brewery created a malt liquor called Crazy Horse (with a logo of a generic Indian headdress). Several Sioux tribes of South Dakota sued the liquor manufacturer. The claim was that the image of Crazy Horse (a sacred leader of the tribes) belonged to his descendants. Of course, Crazy Horse had been dead for over 100 years and there was not a tribal Right to Publicity statute. Nevertheless, the court decided to apply the seven generations rule which is the standard on the reservations. Since Crazy Horse's great grandchildren were still alive, control of the image belong to them. This case illustrates right to publicity law and how it is descendible, but it also speaks to the cultural differences of collectivism and connection to ancestry.

Copyright: The class can discuss rain dances, songs and other tribal works of art and who they belong to copyright purposes. Under international copyright law the works of art belong to the creator. But, with tribal art, it often belongs to the tribe. But, under copyright law, government created works are not copyrightable. So, the discussion can move to issues about issues of ownership between collectivist and individualist societies (it also sheds light on some of the issues that American companies have with piracy in East Asia nations that are collectivists). There are also issues concerning non-Indians using tribal trademarks and copyrights such as school mascots, selling 'Indian' crafts and art collectors.

LEARNING OUTCOMES

Through the implementation of this teaching exercise, students are able to:

1) Describe and analyze how tribal nations apply communication law and policy;
2) Describe and analyze how a sovereign nation within the U.S. borders is able to define and apply the principles of free speech and free press differently than the states;
3) Analyze how political, social, and cultural differences play a significant role in how legal principles are defined and applied.