IMPLICIT RACIAL BIAS ACROSS THE LAW

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Federal Indian Law

Implicit Bias against Native Peoples as Sovereigns

Susan K. Serrano and Breann Swann Nu'uhiwa

In the midst of a contentious political debate about Native Hawaiian sovereignty, former Hawai'i governor Linda Lingle implored the U.S. Senate to reject the "Akaka Bill," proposed legislation designed to restore a small measure of self-governance to the Native Hawaiian people. In short, the bill would facilitate the formal recognition of Native Hawaiians as a self-governing Native community, bringing their political and legal status roughly on par with that of other Native peoples in the United States.[1] Lingle based her opposition, in part, on the unfounded assumption that a Native Hawaiian government with self-governing powers similar to those possessed by Native American and Native Alaskan governments would exercise those powers "in a way that is inconsistent with State criminal statutes otherwise applicable to all citizens, and inconsistent with virtually every conceivable state law that serves to protect the public." She also maintained that restoring Native Hawaiian self-governance would require the state to develop a plan to "enforce its interests against

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[1] The United States maintains government-to-government relationships with more than five hundred Native American and Alaska Native communities. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 FED. REG. 60,810, 60,814 (Oct. 1, 2010). However, the federal government has neither formally recognized Native Hawaiians as a self-governing Native community on par with federally recognized Native Americans and Alaska Natives nor confirmed a government-to-government relationship with the Native Hawaiian people. The Native Hawaiian Government Reorganization Act (colloquially referred to as the "Akaka Bill" after its chief sponsor, Senator Daniel Akaka) seeks to rectify this political and legal disparity between Native Hawaiians and federally recognized Native Americans and Alaska Natives by (1) reaffirming that the United States has a special political and legal relationship with Native Hawaiians that is generally of the same type and nature as the "relationship the United States has with the several federally recognized Indian tribes" and (2) providing a process for the reorganization of a Native Hawaiian governing entity within the framework of federal law. S.675, 112th Cong. §§ 2(20), 3(14), 4(a)(1)-(2) (2011).

unlawful or irresponsible actions by the [Native Hawaiian] governing entity or its elected leaders or employees."[2] Although the public will probably never know the extent to which Lingle's opposition stymied the bill's progress, her opposition is significant because it highlights a pernicious process that functions to dispossess Native peoples of land, resources, and governing authority.

This process began nearly two centuries ago when European Americans began using U.S. law and legal discourse to justify the appropriation of Native lands, resources, and governing authority. To legitimize the dispossession, European Americans stereotyped Native peoples as a foreign race of savages who lacked the requisite knowledge and industry to exercise full sovereignty. Reinforced by literature and media, the image of Native peoples as "nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state,"[3] came to dominate. Within a few generations, this negative stereotype became an unquestioned assumption that formed the basis of contemporary implicit bias against Native peoples.

Implicit bias is a pervasive phenomenon characterized by the automatic activation of stereotypes or attitudes about other social groups. Without conscious direction, the human mind draws on cognitive filters – constructed in part by accumulated knowledge, experiences, and cultural influences – to organize people into social categories such as race and to attribute characteristics to those categories. These cognitive shortcuts cause the mind to make assumptions about other people, distort judgment and memory, and trigger discriminatory behaviors, even when one consciously rejects negative stereotypes and discrimination.[4] Accordingly, although contemporary discourse openly denounces stereotyping of Native peoples, empirical studies show that modern-day implicit bias corresponds with the age-old negative stereotype.

What the studies do not explain, but we aim to demonstrate in this chapter, is that implicit bias against Native peoples advances the continuing dispossession of Native land, resources, and governing authority in much the same way that explicit bias advanced the initial dispossession. We begin by describing the dominant stereotype

[2] Letter from Linda Lingle, former governor of the State of Hawai'i, to U.S. Senator (Mar. 23, 2010) (on file with authors).

[3] Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

[4] *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951, 961 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345 (2007); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063 (2006); Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. SOC. SCI. 427, 438 (2007).

of Native peoples and how it was used to assert privilege over and aggression against Native peoples. We then consider specific assumptions underlying the dominant stereotype and explore how those assumptions, manifesting as implicit bias, undergird modern barriers to Native self-governance, such as legislation, case law, and administrative action limiting Native peoples' governing power. In conclusion, we propose that eliminating implicit bias against Native peoples as sovereigns is an integral element of a larger, ongoing project to repatriate Native land, resources, and governing authority to their rightful possessors, and we suggest potential ways to facilitate elimination of the bias.

I. CREATING THE DOMINANT STEREOTYPE OF NATIVE PEOPLES

Kevin Gover, director of the National Museum of the American Indian, described modern negative portrayals of Native peoples as "a continuation of a process that began a long time ago to define [Native peoples] in a very limited way, as less than human, in order to rationalize the dispossession."[5] In other words, contemporary portrayals perpetuate the negative stereotype of Native peoples created in the eighteenth and nineteenth centuries to justify the appropriation of Native territory and political power. That original stereotype was produced by racializing Native peoples to diminish their political identities, attributing negative characteristics to them in their group capacity, and conjuring legitimacy for the negative attributions by injecting them into law and legal discourse.

A. *Transforming Native Peoples into a Race*

At the time of its creation, the newly formed U.S. government possessed inferior claims to land, resources, and political control within its claimed territory than the Native polities that had been operating in that same territory for millennia. To justify its exercise of dominion, the burgeoning nation needed to recast the pivotal *legal-political* question – whether one sovereign may unilaterally dispossess another sovereign of its territory and political power – as a *racial* question about the competing rights of the European Americans who controlled the colonizing government and the Native peoples who controlled the preexisting Native governments.[6] The recasting of this question transformed the image of Native peoples in the collective American consciousness from "potentially equal governments burdened solely by lack of religion and civilization to barbarous natives whose differences were rooted

[5] Courtland Milloy, *It's Time Once Again to Tell Washington's Football Team to Ditch the 'Redskins' Racist Moniker*, WASH. POST, Jan. 4, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/01/04/AR2011010405217.html.

[6] Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 599 (2009); Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1373–74 (2002).

in nature."[7] Bethany Berger describes this act of racializing Native peoples to diminish their political identities as "the basic racist move at work in Indian law and policy."[8]

Examples of this "basic racist move" appear repeatedly in Supreme Court jurisprudence. For instance, in its 1846 decision, *U.S. v. Rogers*, the Court considered whether a "white man" treated, recognized, and adopted by the Cherokee as a tribal member entitled to all the rights and privileges of membership could be considered a Cherokee under the Intercourse Act of 1834. Denying that Mr. Rogers was a "Cherokee" under the act, the Court averred that, although adoption by the Cherokee might entitle Mr. Rogers to certain privileges in the tribe and make him amenable to their laws and usages, "he is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, . . . of the family of Indians."[9] Similar racializing language appears in other early Supreme Court decisions such as *U.S. v. McKee* (1875) and *Beecher v. Wetherby* (1877).[10]

Treating Native peoples as a race rather than a collection of independent political entities not only allowed the United States to recast difficult questions regarding Native rights to land, resources, and governing authority but it also enabled the fledgling nation to use classic racist discursive strategies[11] to justify its colonial domination. For example, in a 1783 letter to New York State Senator James Duane, George Washington equated Native Americans with "wild beasts" to justify the United States' westward encroachment into Indian territory:

> [P]olicy and economy point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the *Wild Beasts of the Forest* which will return as soon as the pursuit is at an end and fall perhaps on those that are left there; when the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire; *both being beasts of prey tho they differ in shape*.[12]

7 Berger, *supra* note 6, at 600.

8 *Id.* at 599–600.

9 U.S. v. Rogers, 45 U.S. 567, 571, 573 (1846).

10 U.S. v. McKee, 91 U.S. 442 (1875) (referring to "warlike tribes of that race"); Beecher v. Wetherby, 95 U.S. 517 (1877) (describing relationship between United States and Native peoples as relationship between Christian people and "ignorant and dependent race"). *But cf.* Lucas v. U.S., 163 U.S. 612 (1896) (acknowledging that race not necessarily dispositive of tribal membership).

11 According to Albert Memmi, racism in the colonial context involves "the generalized and final assigning of values to real or imaginary differences, to the accuser's benefit and at his victim's expense, in order to justify the former's own privileges or aggression." *See* ALBERT MEMMI, DOMINATED MAN: NOTES TOWARD A PORTRAIT 194 (1968).

12 THE WRITINGS OF GEORGE WASHINGTON 133–40 (John C. Fitzpatrick ed., 1938) (emphasis added).

More than a century later, U.S. Senator Johnson of Indiana used similar racialized rhetoric to legitimize the annexation of the Hawaiian Islands to the United States against the will of the Native Hawaiian people:

> Side by side on their islands were two civilizations, higher and a *lower civilization*. On the side of the higher civilization were ranged intelligence, the progress, the thrift, the aspirations for enlarged liberty and for the legalization of a great destiny for Hawai['']i. On the other side was ranged the monarchy with its narrow, contracted view of human rights, with its *semibarbarous* face turned toward the past, unwilling to greet the dawning sun. . . . From the very nature of things these two civilizations could not exist together forever. One was to survive and the other would have to perish.[13]

Washington contrasted negative images of Native peoples as "Wild Beasts of the Forest," wolves, and "beasts of prey" with positive images of white Americans as "enlightened" and "generous" to justify driving Native peoples out of their ancestral lands by purchase or, if necessary, by force of arms. Similarly, Johnson juxtaposed positive descriptions of white Americans as "intelligent," "progressive," and "thrifty" with a negative depiction of Native Hawaiians as "semibarbarous" to legitimize the destruction of Native Hawaiian self-determination through annexation. In other words, once Native peoples were racialized as "red," American law and politics worked to transform red into the universal symbol of Native peoples' alleged inferiority to rationalize American privilege and aggression.[14]

B. *Targeting Native Societies Rather than Native Individuals*

Importantly, early racism against Native peoples focused primarily on their alleged inferiority as societies rather than as persons. As Berger explains, to justify the assimilation of Native individuals into non-Native society and the subsequent appropriation of Native land and resources, European Americans needed to theorize Native "*societies* as fatally and racially inferior while emphasizing the ability of Indian *individuals* to leave their societies and join non-Indian ones."[15] Specifically, because the United States sought to dissolve Native societies and dispossess them of the land and resources under their stewardship, racist discourse needed to focus on the perceived racial deficiencies of the Native society as a whole and the supposed impacts of those deficiencies on the society's politics, economics, and culture.[16] Thus, although Native individuals did not completely escape the type of racism levied against members of other communities, early U.S. decision-makers focused

[13] 53 Cong. Rec. 1885 (1894) (emphasis added).
[14] Berger, *supra* note 6, at 611, 622–23.
[15] *Id.* at 593 (emphasis added).
[16] *Id.* at 599, 618–19; Goldberg, *supra* note 6, at 1373–74.

on Native peoples' purported racial inferiority as collective entities to assert privilege over and aggression against them in their collective capacities.

C. *Legitimizing the Negative Stereotype through Law and Legal Discourse*

Robert Williams Jr. observed that no self-regarded "civilized" society can engage in the horror of destroying another people for very long without appealing to a revered legal discourse to justify its acts.[17] For that reason, although popular media played a significant role in the initial racialization and denigration of Native peoples in the United States, law and legal discourse were the most forceful tools for forming and advancing the dominant negative stereotype. For instance, the foundational U.S. Supreme Court cases that articulated the federal government's purported right to control Native lands and peoples, described Native peoples as "fierce savages, whose occupation was war" and "remnants of a race once powerful, now weak and diminished in numbers."[18] Enshrining those depictions in hallowed Supreme Court opinions legitimated those ideas for subsequent generations of Americans, who accepted as given the notion that Native peoples comprised a weak and unsophisticated racial group, as well as the attendant belief that the United States had a right and duty to control them. In the present day, those early Supreme Court opinions and their progeny are routinely cited as the defining texts of the Native–federal relationship, with little or no attention paid to the antiquated racist notions that they contain and promote.[19]

II. THE DOMINANT STEREOTYPE AND IMPLICIT BIAS

The dominant image, enshrined in early U.S. law and legal discourse, of "[t]he mythical Indians of stereotype-land," who are "fierce," "dwell in primitive splendor," and live a way of life that is "dreadfully wrong" and "un-American," persists in modern implicit bias against Native peoples.[20] Using various measures, including the Implicit Association Test (IAT),[21] social scientists have documented the existence of implicit bias against Native Americans, Native Hawaiians, and Canadian Aboriginals. The

[17] Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 247 (1989).

[18] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); U.S. v. Kagama, 118 U.S. 375 (1886).

[19] *See* Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 196 (2001) (describing and challenging the tendency to adhere automatically to the Marshall Trilogy and its limited notion of Native sovereignty).

[20] VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 2, 4, 13 (1988).

[21] The IAT requires the test taker to rapidly categorize various concepts in order to measure how strongly associated two types of concepts are. The more associated the concepts, the faster the test taker should be able to respond, and vice versa. *See FAQs*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/demo/background/faqs.html#faq7 (last visited Sep. 3, 2011).

empirical studies collectively show that today's implicit views of Native peoples reflect at least three of the specific racist assumptions underlying the dominant stereotype – that Native peoples are foreign, savage, and ignorant. These lasting racist assumptions fuel the notion that Native peoples are unable to govern and justify continuing acts of deprivation and dispossession against them.

A. *Foreignness*

1. Foreignness in Implicit Bias Studies: Native Peoples as Less "American"

As counterintuitive as it may seem, a groundbreaking empirical study on implicit bias showed that Native Americans are viewed as less American – more foreign to the United States – than white Americans. The study, conducted by Brian Nosek and his colleagues, used IATs and measures of participants' self-reported (explicit) beliefs to examine the extent to which "American identity was implicitly and explicitly associated with Native Americans and White Americans."[22] In the IAT portion, participants were asked to quickly pair Native American and white American faces with the attribute "American," as represented either by natural scenes from the American landscape that are easily associated with Native Americans or names of cities or states that have Native American origin. Participants more quickly associated those American landmarks, cities, and states with the faces of white Americans. This was true for all ethnic groups, except Native Americans and Native Alaskans, who more easily associated Native American with "American." At the same time, participants' self-reported responses reflected the view that Native Americans were more "American" than whites. The study thus revealed a dramatic dissociation between explicit and implicit responses: non-Native Americans explicitly identify Native Americans as American, but *implicitly* identify them as *more foreign* than whites.

These striking findings suggest that the historical assertion that whites are more "American" than Native people is now a deeply ingrained implicitly held view. In addition, unlike explicit reasoning, implicit views cannot be consciously controlled: "implicit measures often document stronger biases than explicit measures because the motivation to avoid these biases . . . produces more egalitarian explicit responses, but is relatively ineffective at changing implicit responses."[23] Thus, according to the study's authors, the dissociation between explicit and implicit responses might

[22] Thierry Devos, Brian A. Nosek, & Mahzarin R. Banaji, Aliens in Their Own Land? Implicit and Explicit Ascriptions of National Identity to Native Americans and White Americans (2007) (unpublished manuscript) (on file with authors). *See also* Brian Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCH. 1, 2, 20 (2007) (summarizing data from more than 2.5 million IATs and self-reports and finding, among other things, that participants more easily associated European American than Native American faces with "American").

[23] Devos et al., *supra* note 22, at 11.

reflect people's "intentional reasoning" that Native Americans *should* be considered more American (or at least as American) because they are the original inhabitants of what is now America, and in light of egalitarian principles. However, the study revealed that everyday images of prominent (white) Americans and people's daily experiences reinforce strong implicit associations between America and white *that cannot be consciously altered*.[24]

2. Foreignness in Law and Legal Discourse: Casting Native Peoples as an Unentitled Other

The widely held view of America as "white" has deep historical roots. The federal government acted early and often to equate the term "Americans" with whites, thereby relegating indigenous Americans to the margins of society, along with non-white immigrant communities. In *Dred Scott v. Sandford*, the U.S. Supreme Court described the tribes comprising the "Indian race" as vastly foreign to America:

> These Indian Governments were regarded and treated as foreign Governments, as much so as if an ocean had separated the red man from the white . . . and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. . . . But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.[25]

Similarly, in *Elk v. Wilkins*, the Supreme Court opined that "[t]he Indian tribes . . . were not, strictly speaking, foreign states; but they were alien nations."[26]

By labeling Native peoples as foreign communities, the federal government established white Americans as the proper inhabitants of the United States, with all other "foreign" peoples, including Native peoples, purportedly existing within the United States at white Americans' sufferance.[27] This initial relegation of Native peoples to the periphery of U.S. life and political structure privileged the claims of white Americans, acting through the federal government, to Native land, resources, and political power. Over time, the federal government firmly entrenched this

[24] *Id.* at 11–12 (describing "prominent Americans" as "U.S. presidents, most political and social leaders, celebrities, and a majority of the population").

[25] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

[26] Elk v. Wilkins, 112 U.S. 94, 100 (1884).

[27] This notion was articulated clearly by Thomas Jefferson, who declared that Native peoples "must see we have only to shut our hand to crush them, and that all our liberalities to them proceed from motives of pure humanity only." 10 THE WRITINGS OF THOMAS JEFFERSON 369–71 (Andrew A. Lipscomb ed., 1904).

hierarchy by developing and applying legal principles such as federal plenary power over Native peoples, the related trust responsibility of the federal government to act for and on behalf of Native peoples, and the doctrine of discovery, all of which purport to place supreme power in the hands of the federal government and legitimate the continuing wrongful deprivation of Native lands, resources, and governing authority.

The Supreme Court's *Rice v. Cayetano* decision in 2000 illustrates the detriment that can flow to a Native community when it is improperly characterized as foreign alongside immigrant communities. In *Rice*, the Court invalidated a requirement that individuals be Native Hawaiian to vote for the trustees of the Office of Hawaiian Affairs, a semi-autonomous organization created by the state constitution to manage certain funds and benefits for Native Hawaiians. In doing so, the Court asserted that, when considering the rights of Native Hawaiians, it must recount the immigration story of "many different races and cultures" to Hawai'i and how those groups faced and overcame discrimination. The Court implicitly assumed that Native Hawaiians are similarly situated to "Chinese, Portuguese, Japanese, and Filipinos," who also had their "own history in Hawai['']i," their "own struggles with societal and official discrimination," their "own successes," and their "own role in creating the present society of the islands."[28] By characterizing Native Hawaiians as simply another racial group alongside immigrant groups and by omitting white Americans from the list of immigrants to Hawai'i, the Court effectively erased the unique status of Native Hawaiians, the harms of U.S. colonization, and the present-day need to rectify those harms. Working from this incorrect characterization of Native Hawaiians, the Court deemed the Native Hawaiian voting system an illegal "racial preference" for Hawaiians and "reverse racial discrimination" against the white American, Freddy Rice.[29]

B. *Violence*

1. Violence in Implicit Bias Studies: Native "Aggressiveness" in the Criminal Law Context

A study by Justin Levinson found that it was easier for participants to correctly remember and falsely remember the aggressiveness of Native Hawaiians as compared to that of whites depending on the factual situations. College students at the University of Hawai'i read two legal stories, with the primary independent variable being the protagonist's race. The first story, *The Confrontation*, involved a fistfight,

[28] Rice v. Cayetano, 528 U.S. 495, 506 (2000).

[29] Eric K. Yamamoto & Catherine Corpus Betts, *Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of Rice v. Cayetano*, in RACE LAW STORIES 563 (Rachel F. Moran & Devon W. Carbado eds., 2008). Harold "Freddy" Rice is a descendant of white American Christian missionaries who built a ranching empire on Hawai'i Island. *Id.* at 545.

in which the criminal defendant was either William (Caucasian), Tyronne (African American), or Kawika (Native Hawaiian).[30] After reading the stories, participants received a "distraction task" and answered questions about the stories.

Participants exhibited systematic errors in their memories of *The Confrontation* – they had an easier time correctly recalling the aggressive actions of Tyronne and Kawika, compared to William. For example, "[p]articipants who read about Tyronne or Kawika were significantly more likely to recall correctly [facts that would tend to indicate that the defendant initiated the fight] than participants who read about William." Moreover, participants who read about Tyronne or Kawika were "significantly more likely to *misremember* [certain facts] in a manner that would be detrimental to the actor in a legal proceeding."[31]

These findings are significant. They suggest that historic characterizations of Native Hawaiians as aggressive, discussed in the next section, now persist as implicit memory biases. They also show that judges' and juries' recollections of legal stories can be systematically shaped by the race of the legal actors, which has significant consequences for Native Hawaiians who are grossly overrepresented in Hawai'i's criminal justice system.[32]

2. Violence in Law and Legal Discourse: Rationalizing External Intrusion into Native Justice Administration

Explicit characterizations of Native peoples as groups of violent savages appear throughout early U.S. law and legal discourse. In the 1823 *Johnson v. McIntosh* decision, one of the first Supreme Court cases to address Native legal issues, Chief Justice Marshall proclaimed that "the tribes of Indians inhabiting this country were fierce savages, whose occupation was war."[33] Similarly, mid-nineteenth-century discourse in the territorial assembly of South Dakota depicted Native peoples as "revengeful and murderous" savages, "implacable enemies, hell hounds, and wild, turbulent, and hostile people."[34] Explicit characterizations of Native peoples as violent savages remained present in the law throughout the nineteenth century, with the Supreme Court in *Ex Parte Crow Dog* asserting in 1883 that Native peoples lived a "free though savage life."[35]

[30] *See* Levinson, *supra* note 4, at 347, 349. The second story involved an employee, with the protagonist as Brenda (Caucasian), Keisha (African American), or Ka'olu (Hawaiian). *Id.* at 394.

[31] *Id.* at 398–99 (emphasis added). On the other hand, individuals who read about Kawika were more likely to exhibit false memories of mitigating factors compared to those who read about William or Tyronne. *Id.* at 401. This finding might relate to the "complex and unique relationship between localism in the community (among Native Hawaiian and non-Hawaiian people alike) and positive and negative stereotypes," including those involving aggression and mitigation. *Id.* at 402.

[32] *See* OFFICE OF HAWAIIAN AFFAIRS, THE DISPARATE TREATMENT OF NATIVE HAWAIIANS IN THE CRIMINAL JUSTICE SYSTEM, EXECUTIVE SUMMARY (2010), *available at* http://www.oha.org/images/stories/files/pdf/reports/es_final_web.pdf.

[33] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

[34] Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1029 (D.S.D. 2004).

[35] Ex parte Kan-Gi-Shun-Ca (Crow Dog), 109 U.S. 556, 571 (1883).

The alleged savagery of Native peoples was often used to justify the United States' unilateral exercise of power over them. Elsewhere in *Johnson v. McIntosh*, Chief Justice Marshall declared that "the character and religion of [America's] inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy."[36] That claimed ascendancy provided justification for the imperial powers to deny Native peoples their rights and to freely appropriate Native land and resources. Subsequently, it legitimized the United States' relegation of Native peoples to domestic dependent nation status and the usurpation of Native sovereignty. As James Lobsenz asserts, "The 'quasi-sovereign' or 'dependent' status of the Indian tribe is inextricably linked to past concepts of the Indian as an uncivilized savage who was to be gradually elevated to the level of a civilized human being."[37]

The characterization of Native peoples as violent savages also extended to Native Hawaiians. American missionaries described Native Hawaiians as "having an appearance of half-human and half-beast . . . form[ing] a link in creation . . . connecting man with the brute" to rationalize the missionaries' aggressive proselytization of the Native community.[38] U.S. Senators, while pushing for economic control over Hawai'i, bristled at the thought of incorporating into the U.S. polity "a country of dusky ex-cannibals" and "a half-civilized people" who were "prone to insurrections" and who once "ate our missionaries."[39] Believing themselves to be from a "higher civilization" destined to bring "salvation," progress, and liberty, and labeling Native Hawaiians as savage brutes in need of direction, American missionaries and members of Congress justified the mass confiscation of Hawaiian land, the near decimation of the Hawaiian language, and the destruction of Hawaiian culture and self-governance.

Subsumed within the racist assumption that Native peoples are violent is a related notion that Native peoples are not prone to peace, rationality, or the fair resolution of disputes. From the nineteenth century to the present, this assumption has undermined Native efforts to administer justice and has supported the unwarranted intrusion of external governments into internal Native community matters. For example, in 1885, Congress passed the Major Crimes Act, which gave the federal government jurisdiction over certain serious crimes committed in Native territory. More than a century later, in 2010, the Tribal Law and Order Act reaffirmed that Native governments have limited sentencing authority and offered an opportunity to enlarge that authority only to those Native governments that are willing to adhere to certain standards and practices mandated by the federal government. Although these acts were passed more than a century apart, they are based on the same

[36] *McIntosh*, 21 U.S. at 543.

[37] James E. Lobsenz, *"Dependent Indian Communities": A Search for a Twentieth Century Definition*, 24 ARIZ. L. REV. 1, 2 (1982).

[38] LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 139 (1992).

[39] *See* STATE HISTORICAL SOCIETY OF NORTH DAKOTA, NORTH DAKOTA HISTORY 9 (1989) (quoting Senator William Roach of North Dakota).

implicit assumption that Native peoples are not sufficiently peaceful, rational, and fair to competently administer justice without strict external constraints. Williams explains that many federal attempts to disempower Native justice systems flow from this idea that Native governments are incapable of protecting the rights of those who come under their jurisdiction. In support of his assertion, he cites congressional and judicial characterizations of Native courts as "Kangaroo Courts" that act with "no pretense of due process or judicial integrity."[40]

In the Native Hawaiian context, explicit allegations of savagery played a major role in the initial appropriation of Native Hawaiian lands, resources, and self-governing authority by American missionaries and Congress. In the present day, certain opponents of Native Hawaiian self-governance base their opposition, in part, on the related implicit notion that Native Hawaiians are unfettered by the same notions of peace, rationality, and fairness that bind non-Natives. As evidenced by former Governor Lingle's baseless prediction that Native Hawaiian self-governing powers would be exercised in an "unlawful," "irresponsible" manner "inconsistent with virtually every conceivable state law that serves to protect the public," described earlier, such implicit assumptions undergird the continuing deprivation of Native Hawaiian self-governance by the state and federal governments.

C. *Ignorance*

1. Ignorance in Implicit Bias Studies: Native Peoples as "Nonacademic" and in Need of "Benevolent" Assistance

Two empirical studies show that long-held racist assumptions about the ignorance of Native peoples manifest today as implicit bias and stereotypes. A study by Amanda Burke that linked negative implicit attitudes about Native American *mascots* with race-based social behaviors toward Native American *people* found that Native Americans are viewed as preferring stereotypical, nonacademic tasks. In the first part of the study, Caucasian college students at Oklahoma State University completed various tasks including an IAT that measured the strength of the association between Native American mascots (Redskins, Braves, Indians, Warriors, Chiefs, Fighting Sioux) and Caucasian mascots (Celtics, Vikings, Pirates, Rebels, Mountaineers, and Fighting Irish), and six positive traits (successful, responsible, smart, healthy, clean, educated) and six negative traits (worthless, lazy, dirty, fat, freeloader, poor).[41] The results showed that people hold implicit negative stereotypes of Native mascots.

[40] Williams, *supra* note 17, at 271, 274.

[41] Amanda L. Burke, Behavioral Correlates of Implicit Evaluation and Stereotyping of Native American Mascots 1, 7, 28–29, 35, 38–39, 41, 48 (July 2009) (unpublished Ph.D. dissertation, Oklahoma State University) (on file with authors). A companion study included a self-report questionnaire and an IAT that measured the strength of association of Native Americans (Cherokee, Navajo, Sioux, Apache, Comanche, Iroquois) and European Americans (English, Irish, German, French, Scottish, Dutch),

In the next part of the study, participants were told that they would be interacting with a Native American partner – Joe Tallchief or Joanna Tallchief – on academic (e.g., mathematics, verbal ability) and nonacademic (e.g., general cultural knowledge and environmental issues) tasks. Participants were told to choose tasks for themselves and for their partners that would give the partnership the best combined score and then rate "how well they expected themselves and their partners to perform on each of the tasks." Individuals who showed greater implicit bias on the mascot IAT were significantly more likely to perceive their Native American partner as enjoying "stereotype-consistent" nonacademic tasks. "In other words, greater implicit stereotype bias toward *symbolic representations* of Native people (i.e., Native mascots) was related to the expectation that a Native *person* would be more likely to enjoy tasks of a non-academic nature." Thus, the study concluded that "Native American mascots are not merely insignificant representations of Native Americans." Instead, they may perpetuate the stereotype that Native Americans are less interested in academics, resulting in severe consequences at school, at the workplace, and within society's institutions.[42]

In another study, Cherie Werhun and April Penner found that negative stereotypes about Aboriginal Canadians as uneducated, lazy, and incompetent can influence benevolent prejudicial behavior toward them.[43] Non-Aboriginal college students at the University of Winnipeg were told that the campus newspaper was conducting research on the qualities associated with success at the newspaper. Participants were assigned to the role of "editor" and viewed photographs representing either Aboriginal stereotype images (images associated with the negative stereotype of Aboriginal Canadians) or neutral images.[44] The stereotype images included a homeless person, a close-up shot of a guitar and tattooed hand, a metal fence through which a prison tower and yard were visible, and a prison shank and a bottle of moonshine. The neutral images included a hockey player and the northern lights over a city, a field of sunflowers, and a snowman.

and positive (successful, responsible, intelligent, healthy, clean, and educated) and negative (worthless, lazy, dirty, fat, freeloader, and poor) attributes. The results showed implicit bias against Native Americans. *Id.* at 36, 48.

[42] *Id.* at 28, 48–49, 55–56. *See also* Scott Freng, The Role of Chief Wahoo in Implicit Stereotype Activation (2001) (unpublished Ph.D dissertation, University of Nebraska) (on file with authors); Chu Kim-Prieto et al., *Effect of Exposure to an American Indian Mascot on the Tendency to Stereotype a Different Minority Group*, 40 J. APPLIED SOC. PSYCH. 534 (2010) (finding that participants primed with a Native American sports mascot increased their stereotyping of a different ethnic minority group).

[43] Cherie D. Werhun & April J. Penner, *The Effects of Stereotyping and Implicit Theory on Benevolent Prejudice Toward Aboriginal Canadians*, 40 J. APPLIED SOC. PSYCHOL. 899 (2010). Although this study was conducted in Canada, it is relevant to this discussion in light of Native Americans' and First Nations' shared histories and somewhat similar experiences in their respective countries.

[44] Priming refers to the effect in which exposure to a stimulus activates "knowledge structures, such as trait concepts and stereotypes" and influences the response to an unrelated task. *See* John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY. & SOC. PSYCHOL. 230, 230 (1996).

The participants then read mock newspaper articles "that were manipulated to induce either an entity or an incremental frame of mind." Entity and incremental theories "are the core assumptions people use to understand, interpret, and predict human behavior." Entity theorists believe human attributes are fixed and emphasize personal traits, whereas incremental theorists contend that human attributes are malleable and focus on "mediating factors specific to the situation."[45]

After completing these tasks, participants edited identical essays that they were told were written by either a Caucasian or an Aboriginal student writer. They were then asked about their willingness to recommend the writer to their publishing team and to help the writer beyond their duties as editor. When negative Aboriginal stereotypes (i.e., "[Aboriginals] are uneducated, lazy, and incompetent") were active by way of the images, participants who were primed with entity theory (that human attributes are fixed) were more willing "to engage in benevolent prejudicial behavior toward an Aboriginal student writer"; in other words, to provide extra help to the subordinate Aboriginal writer. At the same time, those participants were less willing to recommend the Aboriginal writer to their team, as compared with the Caucasian writer. According to the authors, the perspective of intelligence as fixed influenced the stereotypical perception that the Aboriginal writer required extra help and attention.[46] Thus, "a greater willingness to help the Aboriginal writer, compared to the Caucasian writer, within the context of negative stereotypical information about Aboriginal Canadians and despite identical performance information for both writers," suggests the "endorsement of the stereotype of Aboriginal Canadians as incompetent." For the authors, these findings are significant because benevolent prejudice may "undermine the target person's competency[,] strengthen negative stereotypes about the target's group," and have negative social ramifications in organizational contexts.[47]

2. Ignorance in Law and Legal Discourse: Justifying Federal Plenary Power

In the U.S. Supreme Court's 1831 decision in *Cherokee Nation v. Georgia*, Chief Justice Marshall famously described Native peoples as being "in a state of pupilage," and he likened the relationship between Native peoples and the United States to the relationship between a "ward" and its "guardian."[48] Following *Cherokee Nation*, this image of Native peoples as ignorant, and therefore in need of the federal government's teaching and guidance, appeared repeatedly in Supreme Court

[45] Werhun & Penner, *supra* note 43, at 902, 907.

[46] *Id.* at 902–10. In contrast, incremental-primed editors did not express any differences in their willingness to provide extra help or in their team recommendations for either the Aboriginal or Caucasian writers. *Id.* at 908–09. This suggests that the perspective of intelligence as malleable eliminated the Aboriginal stereotype's influence on behavioral intentions toward the writers. *Id.* at 910.

[47] *Id.* at 902–03.

[48] Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

opinions, even opinions that purportedly affirmed tribal sovereignty. For example, the Court's 1883 decision in *Ex Parte Crow Dog*, which is generally lauded as an affirmation of Native sovereignty, characterized Native peoples as "a dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor, and by education, it was hoped might become a self-supporting and self-governed society."[49] Likewise, in its 1913 *U.S. v. Sandoval* decision, the Court described the people of Santa Clara Pueblo as "essentially a simple, uninformed, and inferior people . . . regarded and treated by the United States as requiring special consideration and protection, like other Indian communities."[50]

According to the Court's 1886 *U.S. v. Kagama* decision, Native peoples' alleged state of pupilage required the United States to assume a duty to protect them and a corollary power over them.[51] Contemporary law and legal discourse commonly refer to this duty and power, respectively, as the federal government's trust responsibility and plenary power over Indian affairs.[52] Pursuant to this so-called trust responsibility and plenary power, Congress enacted legislation such as the Dawes General Allotment Act of 1887, which purported to "civilize" Native peoples through the introduction of individual private property ownership, but had the practical effect of dispossessing Native peoples of millions of acres of land. The executive branch established the Indian Police and Courts of Indian Offenses and founded "a series of boarding schools deliberately designed to remove Indian children from tribally based child rearing and socialization and thereby stamp out all tribal influences, including language."[53] This concerted effort to "educate" Native peoples and raise them out of their alleged state of pupilage had extremely deleterious effects on Native culture, political power, and landholding that continue to benefit the federal government and non-Natives to this day.

American and European elite also characterized Native Hawaiians as "babes in character and intellect" to deprive the Native community of its sovereign authority.[54] The *Daily Bulletin*, an English-language newspaper in circulation during the reign of King Kalākaua, claimed that the king and his people were still "wedded by ignorance to superstitious ideas and practices" and thus were inherently unable to govern themselves – "unable to stand side by side, on the same plane with Bulgarian or American, as a free citizen of a free country."[55] The newspaper further alleged that,

[49] Ex parte Kan-Gi-Shun-Ca (Crow Dog), 109 U.S. 556, 571 (1883).

[50] U.S. v. Sandoval, 231 U.S. 28, 40 (1913).

[51] U.S. v. Kagama, 118 U.S. 375 (1886).

[52] CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 86–107, 583–618 (6th ed. 2010).

[53] *Id.* at 35.

[54] *See* NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 130 (2004).

[55] *Id.* at 115.

although exposure to European mores "helped" Native Hawaiians, Native Hawaiians still had "much to learn before . . . [they were] fit to graduate [as] free citizens of a free country."[56] Similarly, American military and plantation owners, while lobbying fervently for annexation, alternatively characterized Native Hawaiians as uncivilized or childlike – in either case, in need of American control.

The implicit assumption that Native peoples are ignorant and require teaching and assistance from others continues to deprive Native communities of independent self-governing authority. As discussed earlier, Congress recently passed the Tribal Law and Order Act, which requires Native governments to mirror certain aspects of the U.S. judicial system in order to exercise expanded sentencing authority. Although the intent of the act is a positive one – to increase Native governing authority and further crime abatement in Indian country – certain incidental effects may be detrimental to Native peoples. Namely, to take advantage of the expanded sentencing authority offered by the act, many Native governments will begin to approximate non-Native justice systems more closely, which will almost certainly diminish the influence of Native values and understandings on the administration of justice in those communities. It may also reinforce the faulty assumptions underlying the act, including the notions that Native governments are more "just" if they more closely resemble western governments and that the federal government's alleged superior understanding of dispute resolution enables it to dictate the overarching terms and conditions of Native justice administration. As such, the Tribal Law and Order Act, like many other contemporary federal government actions, reinforces the implicit assumption that Native peoples are not sufficiently sophisticated and knowledgeable to govern properly without external constraints, effectively fortifying the federal government's purported plenary power over Native peoples.

For Native Hawaiians, the tacit assumption that Native governments cannot function appropriately without external constraints supports limitations on governing authority that are far more restrictive than those affirmed by the Tribal Law and Order Act. For instance, in 2007, the U.S. Department of Justice cited the possibility that a proposed Native Hawaiian governing entity might exercise "sweeping" self-governing powers as a reason to refuse to acknowledge Native Hawaiians as a sovereign, self-governing political entity on par with other Native peoples in the United States.[57] As a result, the federal government currently legislates on behalf of Native Hawaiians regarding important community issues such as education, graves

[56] *Id. See also* CHRISTOPHER MARK MCBRIDE, THE COLONIZER ABROAD: AMERICAN WRITERS ON FOREIGN SOIL, 1846–1912 63 (2004) (highlighting "a widely held imperialist belief [that] the foolish natives, all of whom share indistinguishable names, will waste their newfound political freedom on ill-conceived plans").

[57] Statement of Gregory G. Katsas, Principal Deputy Associate Attorney General, United States Department of Justice, Before the Committee on Indian Affairs, United States Senate: Hearing on S. 310, The Native Hawaiian Government Reorganization Act of 2007, 110th Cong. 2–3, 6 (May 3, 2007).

protection, indigenous language perpetuation, and culture and art development,[58] and does not acknowledge the authority of the Native Hawaiian community to develop its own legal standards to address these and other community issues. This arrangement forces Native Hawaiians into a deeper "state of pupilage" vis-à-vis the federal government than federally recognized Native polities, leaving the Native Hawaiian community vulnerable to political attacks and placing the resolution of many important community issues at the discretion of the federal and state governments.

III. STEPS FORWARD: ADDRESSING BIAS AGAINST NATIVE PEOPLES

On the eve of the 500th anniversary of European arrival in the Americas, the National Conference of Catholic Bishops on Native Americans urged its churches and followers to rethink long-held stereotypes against Native peoples: "All of us need to examine our own perceptions of Native Americans – how much they are shaped by stereotypes, distorted media portrayals or ignorance. We fear that prejudice and insensitivity toward Native peoples is deeply rooted in our culture and our local churches."[59] Although the Conference did not expressly reference implicit stereotypes or bias, it did recognize a salient point: negative perceptions of Native peoples are ubiquitous and deeply rooted in American society.

Social scientists have confirmed that these persistent "historical representations are associated with contemporary outcomes" in subtle and implicit ways.[60] As this chapter contends, the connection between historical characterizations, implicit manifestations, and modern barriers to Native self-governance is real and pervasive. Yet more must be done to empirically examine these associations.

We therefore urge researchers to investigate a broader range of stereotypes about Native peoples and the behavioral consequences of implicit bias against Native communities. Although studies addressing an array of Native stereotypes are needed, studies specifically tailored to the stereotype of Native peoples as "incapable of self-government" would be particularly valuable. In light of this stereotype's deep historical and cultural roots, it would be surprising to find that a study on Native

[58] Native Hawaiian Education Act, 20 U.S.C. § 7201 (2006); Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 (2006); Native American Languages Act, 25 U.S.C. § 2901 (2006); American Indian, Alaska Native, and Native Hawaiian Culture and Art Development Act, 20 U.S.C. § 4401 (2006).

[59] CATHOLIC CHURCH, 1992: *A Time for Remembering, Reconciling, and Recommitting Ourselves as a People*, in 6 PASTORAL LETTERS OF THE UNITED STATES CATHOLIC BISHOPS: 1989–1997, AT 421 (1998). *See also* Kim Chandler Johnson & John Terrence Eck, *Eliminating Indian Stereotypes from American Society: Causes and Legal and Societal Solutions*, 20 AM. INDIAN L. REV. 65, 86–107 (1995–96) (describing educational, legal, and legislative efforts to eliminate negative Native American stereotypes represented by mascots, logos, or nicknames).

[60] Phillip Atiba Goff et al., *Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences*, 94 J. PERSONALITY & SOC. PSYCH. 292, 305 (2008).

people's ability to govern would yield different results than the others described here. Nonetheless, more research must be conducted to empirically confirm this.

At the same time, other efforts are needed to help moderate or eliminate bias against Native peoples. Educating decision-makers, lawyers, and advocates – both Native and non-Native – about the existence of implicit bias is a first step. "Debiasing" strategies – interventions that can attenuate or temporarily halt the impacts of implicit biases – should also be explored. Debiasing techniques include forming new personal connections with members of outgroups and exposure to "counter-stereotypes," among others.[61] Legal scholars have examined how the law can also aid in debiasing and in addressing the societal harms of implicit bias.[62]

With this in mind, we suggest some initial ways to think about or to address bias against Native peoples in a legal and cultural context. These suggestions, painted in broad strokes, are merely introductory steps toward examining the underexplored area of implicit bias and Native peoples. Of course, examining the myriad ways to address bias against Native peoples and to create lasting social change is beyond the scope of this chapter.

Studies show that greater exposure to outgroup members under certain conditions can reduce implicit attitudinal bias or prejudice.[63] In an effort to expose non-Native law students and community members to Native jurists, justice systems, and legal traditions, Native American Law Students Associations partnered with the Navajo Nation to bring sessions of the Navajo Nation Supreme Court and the Navajo Nation Peacemakers Court to law schools across the country.[64] Similarly, Chief Judge Martha Vázquez of the U.S. District Court for the District of New Mexico has been working to develop closer relationships between federal justice systems and Native governments. In December 2005, Judge Vázquez convened a federal criminal trial within the territory of the Navajo Nation, marking the first time that federal court has been held on the Navajo reservation and possibly the first time that a federal trial has ever been conducted in Indian country.[65] The experience exposed the trial participants to the Native community and provided the Native community greater access to the federal justice system, which Judge Vázquez perceived as mutually beneficial. At the 2010 meeting of the Indian Law Section of the Federal Bar Association, Judge Vázquez addressed Native leaders, attorneys, and scholars,

[61] Kang & Banaji, *supra* note 4, at 1105–10; Greenwald & Krieger, *supra* note 4, at 963–64; Levinson, *supra* note 4, at 411–13.

[62] *See, e.g.*, Kang & Banaji, *supra* note 4; Jolls & Sunstein, *supra* note 4; Krieger & Fiske, *supra* note 4; Kang, *supra* note 4; Levinson, *supra* note 4.

[63] Kang & Banaji, *supra* note 4, at 1101 (listing the "conditions that contribute to a debiasing environment[:] People must be: (1) exposed to disconfirming data; (2) interact with others of equal status; (3) cooperate; (4) engage in non-superficial contact; and (5) receive clear norms in favor of equality.").

[64] *See, e.g.*, Jess McNally, *Supreme Court of the Navajo Nation visits Stanford Law School*, Stanford Report, May 10, 2010, *available at* http://news.stanford.edu/news/2010/may/navajo-supreme-court-051010.html.

[65] Troy A. Eid & Carrie Covington Doyle, *Separate but Unequal: The Federal Criminal Justice System in Indian Country*, 81 U. Colo. L. Rev. 1067, 1105 (2010).

among others, and called for further relationship-building between federal and Native justice systems.

Exposure to individuals in counter-stereotypic roles also has been shown to reduce implicit bias. For example, studies found that viewing images of positively viewed African Americans and negatively viewed white Americans, or imagining a "female leader," temporarily diminished implicit biases.[66] The American Indian College Fund's recent advertising campaign "Have You Ever Seen a Real Indian?" that profiled pictures of successful Native Americans in professions like law, medicine, science, business and the arts to challenge Native American stereotypes may have had this type of debiasing effect.[67]

Importantly, repeated exposure to "countertypical exemplars in positions of authority" can have dramatic bias-reducing effects.[68] In one study, after one year at an all-women's college, female students' implicit stereotypes equating "male" with "leader" were eliminated, whereas female students at a coeducational college developed "stronger implicit stereotypes of male [and] leader." The heightened exposure to countertypical female teachers and administrators at the all-women's school was found to be the cause of the decrease in bias.[69] Thus, in the legal context, efforts to increase the numbers of Native law professors, lawyers, decision-makers, leaders, and other countertypical exemplars in authority positions may help lessen implicit bias against Native peoples.

Exposing participants to a multicultural viewpoint or learning values of diversity can also moderate implicit bias.[70] In this way, incorporating more Native American or Native Hawaiian law courses into the law school curriculum or including federal Indian law or Native Hawaiian law on bar exams in light of the diverse and multicultural values they bring could prove meaningful. At the same time, as others have maintained, such an endeavor can make Native law more visible, promote respect for Native peoples and their sovereign rights, diversify the bar, foster positive relationships and discourse among Natives and non-Natives, and increase access to justice.[71] It may also operate to increase the number of Native attorneys and legal academics, thereby creating more "counterstereotypic" agents.

[66] Kang & Banaji, *supra* note 4, at 1105–07.

[67] *See About Us*, American Indian College Fund, http://www.collegefund.org/content/real_indian (last visited Sept. 5, 2011). *See also generally* Stephanie A. Fryberg et al., *Of Warrior Chiefs and Indian Princesses: The Psychological Consequences of American Indian Mascots*, 30 BASIC & APPLIED SOC. PSYCHOL. 208, 215 (2008) (finding that exposure to the American Indian College Fund's advertising campaign did not depress Native American students' self-concept, whereas exposure to Native American mascot stereotypes did).

[68] Kang & Banaji, *supra* note 4, at 1108.

[69] Lane et al., *supra* note 4, at 428.

[70] Levinson, *supra* note 4, at 415–16.

[71] Gloria Valencia-Weber & Sherri Nicole Thomas, *When the State Bar Exam Embraces Indian Law: Teaching Experiences and Observations*, 82 N.D. L. REV. 741, 751–52 (2006); Gabriel S. Galanda, *Bar None! The Social Impact of Testing Federal Indian Law on State Bar Exams*, FED. LAWYER, Mar.-Apr. 2006, at 30–33; The National Congress of American Indians Resolution #MOH-04-001, at 1 (2004).

These efforts must be closely aligned with the larger, ongoing project of changing the structures that maintain these stereotypes and inhibit genuine justice for Native peoples. As Eric Yamamoto and Ashley Obrey contend, this broader project may involve "scrutiniz[ing] the history of the grievance and decod[ing] stock stories embodying cultural stereotypes that seemingly legitimize the injustice" and "examin[ing] the institutional – the ways that organizational structures can embody discriminatory policies that deny fair access to resources or promote aggression."[72] It may also require governments to recognize the harms done against Native peoples; accept responsibility for the damage and for taking action to repair that damage; work to reconstruct Native governance and new productive relationships between the federal, state, and Native governments; and take reparatory actions that promote reconciliation between the United States and its Native peoples. Although this effort can take many forms, it means the United States must support greater Native political authority, control of lands and resources, and cultural sovereignty to begin repairing the persisting damage of historic injustice.

IV. CONCLUSION

Justin Levinson maintains that "debiasing measures may be highly scientific and sometimes cognitively inaccessible." For this reason, he asserts that reducing or eliminating implicit bias requires both a de-biasing and a "cultural" solution, which "requires recognizing the link between historical and societal discrimination and the continued exhibition of implicit biases." Addressing implicit racial biases thus "requires more than a scientific effort at debiasing through cues and primes. It requires a recognition that their very existence reflects the state of American culture. And this recognition, in turn, calls for steps that will facilitate cultural change" as "part of a larger movement to achieve social equality, healing, and the overcoming of historical injustice."[73]

As such, we contend that attempts to lessen or eliminate implicit bias against Native peoples as sovereigns form an integral element of the larger, ongoing project of repatriating Native lands, resources, and sovereignty to Native peoples. This effort must take into account the deep historical, cultural, social, and psychological roots of the negative stereotypes that serve to legitimize injustices, as well as seek to change the structures (legal, cultural, political, and otherwise) that serve to maintain these stereotypes.

[72] Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States–Native Hawaiian and Japan–Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 33 (2009).

[73] Levinson, *supra* note 4, at 418.