

Article

Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples

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This Article argues that the meaningful revitalization of Indigenous nations depends upon engaging in a process of indigenization, the active pursuit of a distinct developmental path, culture, and identity. Significant barriers to indigenization include not only political, economic, and social obstacles, but also psychological reliance upon the colonizing nation, the inability to recall the memory of the colonization process upon one's nation, and the pursuit of remedies to colonization that have the practical effect of promoting rather than alleviating its impact. In light of these barriers, the Article critically examines the extent to which indigenization may be assisted or undermined by efforts to develop international treaty law governing the rights of Indigenous peoples.

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Now is both an exciting and frightening time for the Indigenous nations located within the United States. For perhaps the first time since the European colonization of our lands began, a few of our nations have developed the economic and political resources necessary to once again become free and self-sufficient. Unfortunately, significant barriers remain in the path to the meaningful redevelopment of our nations. Many of these barriers are obvious, such as the naturally limiting consequences of having weak and ineffective governments, underdeveloped and inadequate economies, and pervasive and debilitating social dysfunction. Other barriers, however, are less obvious and include such equally crippling maladies as continued psychological reliance upon the colonizing nation, the inability to recall the memory of the colonization process upon one's nation, and the pursuit of remedies to colonization that have the practical effect of promoting rather than alleviating colonization's impact.

Historically, Indigenous peoples within the United States have been subjected to a variety of American governmental policies designed to radically transform our societies at both the individual and collective levels.¹ As evidenced by the forced removal policy of the early nineteenth century, the land allotment policy of the late nineteenth century, and the sovereignty termination policy of the mid-twentieth century, Indigenous peoples have long been a primary focus of America's social engineering agenda. Even in the present day, America's colonizing practices have continued, more intensely in some cases due to internal as well as external developmental impetus. Against this backdrop, one of the primary purposes of this article is to re-orient policy analysis relating to Indigenous peoples away from this colonial legacy and to urge policymakers both within and outside of the Indigenous nations to envision and carry out a post-colonial methodology in the course of their policy development and research activities.

In approaching this objective, I will avoid defining what "proper" policy outcomes for any particular Indigenous nation might be. Instead, this Article sets forth a comprehensive developmental theory that could serve as the basis for any Indigenous nation's (re)development efforts. Naturally, such a "unified" theory is fraught with peril especially given that there are nearly 600 Indigenous nations within the United States. "Incorrect" outcomes could easily outnumber "correct" ones. What is most important is not the developmental "answer", but instead the investigation into the common problems afflicting these nations and a remedial model to resolve them. Ultimately, it is best left to the policymakers working with particular Indigenous nations to develop the case specific policy proposals needed to resolve particular colonization-rooted maladies.²

1. See ROBERT N. CLINTON, NELL JESSUP NEWTON & MONROE PRICE, *AMERICAN INDIAN LAW: CASES AND MATERIALS* 137-64 (3d ed. 1991); *see generally* FREDERICK E. HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920* (1984); FRANCIS PAUL PRUCHA, *INDIAN POLICY IN THE UNITED STATES* (1981).

2. My approach here is known as a "thin" theory by philosophers, i.e. a theory providing "the bare framework for conceptualizing choice and agency but leaving the specific content of

Exploring the roots of the problems affecting Indigenous societies first requires an investigation into the impact of European colonization on Indigenous lands and peoples. Colonialism is "the process by which a people exploit and/or annex the lands and resources of another people—who are usually of a different race or ethnicity—without their consent and unilaterally expand political power over them."³ Because of the pervasiveness of the forced transformation of Indigenous societies associated with American colonialism, it is my view that colonialism is the source of *all* problems afflicting the Indigenous nations in the United States, and thus, solutions to its crippling aftereffects must be addressed at the deepest levels so that these societies might one day be revitalized. For an Indigenous nation that is developing a particular policy agenda, engaging in such a historical inquiry is a critical first step towards achieving a meaningful outcome. Ultimately, my argument in this article is that the preservation of Indigenous peoples in the United States as distinct members of humankind is conditioned upon their resumption of important responsibilities currently in the hands of the colonizing American government. Achieving this devolution is simply not possible without fully appreciating the extent to which one has been transformed by and incorporated within the colonizing state.

Devolution, revitalization, or as I refer to it—"indigenization"—will not take place in a vacuum. For many years, particularly during the last decade, there has emerged a global effort to mitigate the effects of the colonialism that has long impacted Indigenous societies through the development of international law governing the rights of Indigenous peoples.⁴ So successful have these efforts been that some experts now indicate that the legal protection afforded Indigenous peoples' rights has approached the level of customary international law.⁵ Obviously, this is a critical development for the future of all Indigenous societies and the states that surround them. It is equally critical, then, to assess the extent to which emergent international law governing the rights of Indigenous peoples will affect indigenization efforts in the future.

The threshold purpose of this Article is to stimulate critical thinking about the future of the Indigenous nations in the United States and to promote the development of strategies by those engaged in research and policy development that will ensure their survival and redevelopment. In doing so, what follows is a reflection of my experiences as a citizen of an Indigenous nation who was raised in our territory, who later served as its chief legal officer, and who continues to be concerned about our national future. Having been engaged directly in the challenge of developing policy

choices to be filled in by individuals" or peoples. Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, in *THE RIGHTS OF MINORITY CULTURES* 93, 98 (Will Kymlicka ed., 1995).

3. Robert B. Porter, *Legalizing, Decolonizing, and Modernizing New York State's Indian Law*, 63 ALB. L. REV. 125, 128 n. 18 (1999).

4. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 45-47 (1996).

5. See *id.* at 49-58.

for an Indigenous nation—and making some mistakes in the process—I know that it is vitally important to have an understanding of the roots of the problems being addressed as well as the ways in which current remedial efforts may play out against contemporary global legal and political developments.

Part I will set forth the argument that the meaningful revitalization of the Indigenous nations depends upon engaging in a process of indigenization. Part II will identify the most significant barriers towards accomplishing that objective. Part III will assess the extent to which indigenization efforts may be assisted or undermined by the efforts to develop international treaty law governing the rights of Indigenous peoples. Part IV will put forward a few observations as to how indigenization might be achieved in practice.

I. "INDIGENIZATION": THE OBJECT OF MEANINGFUL INDIGENOUS REVITALIZATION

It seems to be a truism that the survival of Indigenous peoples within the United States depends upon the preservation of societies that are distinct from American society. This axiom is deeply rooted in the legal and political traditions of my people, the *Haudenosaunee*.⁶ One of the first *Haudenosaunee* treaties entered into with Dutch colonists in the late 17th century was the *Guswentah*, or "Two Row Wampum," which was memorialized by a belt of wampum beads. This belt contains two parallel rows of purple wampum beads, which reflect power, against a backdrop of white wampum beads, which reflect peace. The two parallel rows of purple beads represent the normative relationship that was agreed upon by the *Haudenosaunee* and the colonists—two vessels, each under its own power and control would travel together through time. As described by Mohawk scholar Taiaiake Alfred, the *Guswentah* symbolizes a "respectful (coequal) friendship and alliance" with "any interference with the other partner's autonomy, freedom, or powers . . . expressly forbidden."⁷

Despite its clarity, the history of the Indigenous-Immigrant relationship on the North American continent has not been in accord with the requirements of the *Guswentah*. For much of the period following its adoption, the paths of the Indigenous and the Immigrant peoples maintained a relative parallelism. Following the American Revolutionary War, however, the United States abandoned the commitment made by its

6. *Haudenosaunee* means "people of the Long House" and are otherwise known as the Six Nations Iroquois Confederacy. Haudenosaunee Homepage at http://sixnations.buffnet/Culture/?article+who_we_are (last visited Nov. 29, 2001); see generally *A Basic Call To Consciousness: The Hau De No Sau Nee Address to the Western World*, in BASIC CALL TO CONSCIOUSNESS 66 (Akwasasne Notes ed., 2d ed. 1982); LEWIS HENRY MORGAN, LEAGUE OF THE IROQUOIS 51 (1962). My nation, the Seneca Nation, is historically one of the six nations of the Confederacy, but it established its own constitutional republic in 1848. SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 104 (1989).

7. TAIAlAKE ALFRED, PEACE, POWER, RIGHTEOUSNESS: AN INDIGENOUS MANIFESTO 52 (1999).

colonial predecessors not to interfere in internal Indigenous affairs. Because of its expansionist desires, the United States and its citizenry aggressively and unilaterally began to assert control over Indigenous peoples and lands. These actions constituted a gross violation of the *Guswentah* in a manner sufficient to permanently transform the underlying social and legal relationship between the Americans and the *Haudenosaunee*.

The significance of this colonial aggression can best be symbolized as a convergence of the *Guswentah's* two parallel rows of purple wampum. If one envisions the *Guswentah* as a set of parallel *time* lines, each purple row reflects the historic developmental paths of the Indigenous and Immigrant peoples since first contact. In the beginning, the lines are parallel, reflecting the distinctness of our two societies as we meet for the first time and agree upon how best to coexist in the same territory. But the impact of Euro-American colonization on Indigenous societies has precipitated a tremendous convergence of these historical developmental paths. Settlement, trade, disease, and warfare all took a toll in reducing the ability of the Indigenous nations to sustain a distinct existence. To be sure, the path of Immigrant development converged slightly toward the path of Indigenous development shortly after first contact, reflecting some degree of influence of Indigenous society on Immigrant society. But eventually, as the Immigrant society gained strength, the path of Immigrant development was restored to a parallel course where it has stayed pretty much for the last 200 years. The immovability of the Immigrant developmental path reflects the lack of Indigenous influence on Immigrant society.⁸

During the same period, the convergence of the Indigenous developmental path towards the Immigrant developmental path has been much more dramatic. This convergence reflects the assimilating influence of Immigrant society on Indigenous society. In extreme cases, the developmental paths of some Indigenous peoples have converged completely with the Immigrant developmental path, thus reflecting their complete assimilation into the Immigrant society and their extinction.⁹ But as we conceive of the Indigenous nations that have survived to the present

8. This is not to say, however, that the Immigrant developmental path has remained static. In a spatial sense, this path would have moved as the result of the influence of non-European Immigrant forces on American society, e.g. African and Asian Immigrants. In a few cases, there is also the possibility that such forces had an effect on Indigenous societies, e.g. the African-American slaves of the Five "Civilized" Tribes. The point here is simply that Indigenous peoples have not had a material influence on the Immigrant developmental path for a very long time.

9. At the time of first contact with European Immigrants, it is estimated that there were about seven million Indigenous peoples in North America. See RUSSELL THORNTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1492*, at 32 (1987). Today, there remain only 556 Indigenous nations that are recognized by the United States, Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 65 Fed. Reg. 13,298 (Mar. 13, 2000), with dozens more not so recognized, U.S. Federally Non-Recognized Indian Tribes—Index by State, at <http://indy4.fdl.cc.mn.us/~isk/maps/tribesnonrec> (unofficial list compiled by Prof. Troy Johnson, Cal. State Long Beach).

day, in varying degrees it can be said that the two paths have not yet completely converged. It is conceivable that for a few Indigenous nations there has been an established a new, albeit narrower, parallelism of developmental paths. But given the breadth and intensity of colonization's impact on Indigenous societies, I am skeptical that this has widely occurred. It is most likely that the overall path of Indigenous development is on a collision course with the path of Immigrant development.

Against the backdrop of this "converging" *Guswentah* and what it symbolizes for the future of Indigenous peoples, there are but three developmental choices that an Indigenous nation can make. First, it can choose to take no action and allow the inertia of colonialism to eventually precipitate the convergence of the Indigenous and Immigrant developmental paths. This choice would reflect the elimination of any meaningful distinction between Indigenous and Immigrant societies, or, in other words, the complete assimilation of the Indigenous people into American society. I will refer to this path as the "Path of Indigenous Extinction." Second, it can choose to take some action to halt the convergence of the developmental paths and to restore some measure of parallelism, i.e., distinctness, as a people separate and apart from the American people. I will refer to this path as the "Path of Pragmatic Indigenization." Third, it can choose to take action to not just halt the convergence of the Indigenous and Immigrant developmental paths, but to actually try to widen the gap that exists between the two paths and reestablish a new parallel relationship at some greater measure of distinctness. I will refer to this path as the "Path of Enhanced Indigenization."

Given these options, an Indigenous nation must make a threshold determination as to whether it will proceed down the Path of Extinction or pursue some variation of the Path of Indigenization. As a modern policy dilemma, suggesting that this is a "choice" sounds rather ridiculous. Why would any society deliberately seek its own extinction? Given that the Indigenous nations in the United States have been colonized by a society that has pursued this policy for over 200 years, this is far from a ridiculous question. Yet when one considers that many Indigenous people, including many of the Indigenous leadership, may not even comprehend the magnitude of colonization's impact, the prospect that Indigenous peoples may choose extinction looms large.

Colonization has not just been an external force. It has also generated an internal dimension by creating an entire class of Indigenous people who have been trained to collaborate with the colonizing nation.¹⁰ As the

10. Howard Adams identifies this problem as "neocolonialism":

The change from colonialism to neocolonialism is a change only in how the state controls the colonized people. Colonialism is a system in which the colonized people have no control over their lives—economically, socially, politically or culturally. The power to make decisions in these important areas of daily life are almost totally in the hands of others, either the state or corporations and businesses. Neocolonialism involves the use of Natives to maintain that control. The state is willing to share

United States began to overwhelm the Indigenous nations militarily and to confiscate Indigenous lands, it created a new "Indian Problem."¹¹ What should the United States do with these people who were once free and self-sufficient but who have now been subjugated and made unable to care for themselves? While a few American policymakers supported the continued massacre of Indigenous peoples, the policy that prevailed was the one designed to ensure the eventual extinction of Indigenous peoples through their gradual assimilation into American society.¹² Thus, by the late nineteenth century, it was widely accepted by Americans that the United States should develop policies designed to "kill the Indian and save the man."¹³

Once implemented, this policy had generated considerable "success" in the twentieth century. From the boarding and missionary schools that were established, a new class of "civilized" Indians emerged to help carry out America's Indian assimilation agenda. These people and their like-minded descendants are the seed and motivating force behind many actions now being taken to further the assimilation of their own people into American society, and they continue to the extent that they live in and influence Indigenous communities. Thus, given that Indigenous collaborators are too often the ones making official decisions on behalf of their people, it is far from ridiculous to suggest that some Indigenous nations might actually choose to erode their distinctness and promote the Path of Extinction.

To be sure, there is a multitude of forces both within American and Indigenous societies that conspire to promote the Path of Indigenous Extinction. Few but the most rabid Indian-haters consciously believe that Indigenous peoples should be made extinct. But the conceptual problem is compounded by the fact that America is an extremely diverse nation in which it is entirely possible to maintain a considerable measure of autonomy and distinctness as a separate people and still remain within the legal and political framework of American society. The Amish in Lancaster County, the Chinese in San Francisco's Chinatown, and the Hasidim in New York are all but a few examples of the distinct peoples who have maintained considerable autonomy and distinctness as peoples but who have done so as Americans living in America and not as separate sovereigns.

Of course, these peoples too, have struggled mightily against the forces of assimilation that threaten all small and distinct communities in America

some of the wealth of a racist system with a few Natives in return for a more effective method of controlling the vast majority.

HOWARD ADAMS, *A TORTURED PEOPLE: THE POLITICS OF COLONIZATION* 56 (1995).

11. See, e.g., NEW YORK LEGISLATURE, REPORT OF THE SPECIAL COMMITTEE TO INVESTIGATE THE INDIAN PROBLEM OF THE STATE OF NEW YORK, Assembly Rep. No. 51 (1889).

12. BERNARD W. SHEEHAN, *SEEDS OF EXTINCTION: JEFFERSONIAN PHILANTHROPY AND THE AMERICAN INDIAN* (1973).

13. This "motto" is attributed to U.S. Colonel Richard Henry Pratt, the founder and president of the Carlisle Indian Industrial School. Peter Nabokov, *Facing the Indian Future*, in *NATIVE AMERICAN TESTIMONY* 405 (Peter Nabokov ed., 1991).

regardless of ethnic origin. But they have survived to the present not as citizens of their own nations surrounded by America, but as Immigrant peoples who have abandoned their primary loyalty to their mother country to come to America to live as American citizens. Americans of Immigrant descent accept this approach to diversity and so too have many of the Indigenous peoples who have sufficiently assimilated this worldview. To them, Indigenous people can survive just fine as Americans living apart from one another and scattered throughout America. But Indigenous people who accept this developmental paradigm—who I believe are the “Native American” elites who most often are the official spokespersons for Indigenous peoples—have the effect of promoting the further assimilation of Indigenous peoples into American society. In accepting this worldview, they are, in effect, promoting the Path of Indigenous Extinction.

This reality is profoundly disturbing. It seems an inescapable conclusion that the survival of Indigenous peoples is predicated upon embracing Indigenization and pursuing a distinct developmental path at *some* level. Given the extraordinary forces of assimilation that have been unleashed against our societies, and the observable impact that those forces have had to date, the cost of not making this choice will be nothing less than the complete absorption of Indigenous peoples into American society in the long run. In the absence of making a deliberate choice and taking concerted action to ensure that Indigenous peoples remain a distinct component of humankind, it is historical fact and not hyperbole that Indigenous peoples eventually will cease to exist.¹⁴

My argument here is predicated upon the debatable assumption that there is something intrinsically different, and maybe even superior, about “traditional” Indigenous culture and identity, primarily because of its connotation with community-oriented values.¹⁵ Of course all cultures change, and even in the absence of colonialism Indigenous societies would have undergone at least some degree of cultural transformation. Interactions amongst Indigenous peoples often occurred to the same degree of intensity as that associated with Euro-American colonization. War and conquest—Indigenous-style—precipitated considerable cultural transformation and, in some cases, complete transformation through annihilation and absorption. Against this backdrop, it could be argued that Euro-American colonization of Indigenous peoples simply precipitated the development of new but value-neutral conceptions of Indigenousness that otherwise might not have materialized in its absence. If culture is fluid, then, just because a particular Indigenous people might have assimilated with their colonizers to some extent and may no longer be recognized by their ancestors from seven generations ago does not mean that they are no

14. See THORNTON, *supra* note 9, at 32 (discussing estimates of American Indian depopulation since 1492).

15. Such an argument dovetails with the political philosophy known as communitarianism. See generally MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT* (1996); WILL KYMLICKA, *LIBERALISM, COMMUNITY, AND CULTURE* (1989).

longer "Indigenous" peoples.¹⁶

The problem with this post-modern critique of what is fundamentally my essentialist argument is that it fails to account fully for the fragile state of modern Indigenous existence. Colonization has induced considerable changes in Indigenous identity and culture that cannot be denied. While originally Indigenous peoples in the United States were colonized the old fashioned way with guns and brute force, later efforts focused on the more efficient process of eliminating traditional Indigenous identity as the means of eliminating Indigenous people. Colonel Richard Henry Pratt, head of the infamous Carlisle Indian School, and others like him who spent their days "killing the Indian and saving the man" were engaging in an especially effective form of social engineering. Instead of just trying to "sand down the rough edges" of what it meant to be "Indigenous," America's social engineers embraced an atomic bomb approach that sought nothing less than its complete eradication.¹⁷

Against this history, it just is not good enough to define "Indigeness" solely on the basis of some relativistic definition currently in vogue. Without some intrinsic meaning, the concept of "Indigeness" loses *all* meaning. While I would not defend the position that Indigenization efforts must seek to replicate a conception of Indigenous identity that existed at the time of first contact, I would argue that there is *something* intrinsically unique about being "Indigenous" that must be sustained into the future. This intrinsic uniqueness is far more than being able to claim that one descended from some Indian that lived hundreds of years ago. It is possessing a bundle of attributes—such as language and culture—that must be preserved, strengthened, and regenerated in order to maintain a collective existence as a separate and distinct people.¹⁸ The absence of such attributes is a hallmark characteristic of an assimilated and extinct people.

This consequence is the reason that it is so important to focus on maintaining some conception of Indigenous culture and identity from a policy perspective. In the absence of deliberate dedication to such an effort, history tells us that colonization-inspired assimilation and extinction

16. Speaking about the phenomenon generally, Waldron refers to this vision of the self as "cosmopolitanism":

The cosmopolitan may live all his life in one city and maintain the same citizenship throughout. But he refuses to think of himself as *defined* by his location or his ancestry or his citizenship or his language. . . . He is a creature of modernity, conscious of living in a mixed-up world and having a mixed-up self.

Waldron, *supra* note 2, at 95.

17. See generally AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880-1900 (Francis Paul Prucha ed., 1973).

18. See DAVID MAYBURY-LEWIS, INDIGENOUS PEOPLES, ETHNIC GROUPS, AND THE STATE 8 (1997) ("Indigenous peoples maintain their own languages, which normally differ from those spoken by the mainstream populations, and their own cultures which invariably differ from the mainstream. They are conscious of their separate identities and normally struggle to retain these.").

of Indigenous peoples is guaranteed.¹⁹ With such an effort, there remains some chance that Indigenous peoples will survive.

What colonization has done, then, is to ravage Indigenous societies and induce a state of affairs in which it actually has become necessary to advocate that survival should be chosen over extinction. Unfortunately, the barriers to pursuing the Path of Indigenization are considerable and have precipitated a state of affairs in which arguing for survival, rather than simply having an instinct for it, has become our only hope.

II. THE BARRIERS TO INDIGENIZATION

At the time of first contact, it was obvious who were the Indigenous peoples and who were the Immigrant peoples. In almost every conceivable way, Indigenous and Immigrant peoples were different. Indigenous and Immigrant peoples looked differently, dressed differently, and talked differently. They governed themselves differently, provided for themselves differently, and defended their way of life differently. They also worshiped differently, viewed themselves in relation to one another differently, and understood their relation to the natural world differently. So great were the differences between Indigenous and Immigrant peoples that each had a difficult time even perceiving of the other as human beings.²⁰

To a definitive extent, then, these differences contributed to ensuring the separateness of the Indigenous and Immigrant peoples and made the development of such agreements like the *Guswentah* a necessity. Other factors, such as geography, also played an important role in keeping these societies distinct. But the bundle of attributes that contributed to the distinctness of Indigenous and Immigrant societies played a critical role in defining the separation between the two peoples.

By definition, then, Indigenous populations cannot remain distinct from the Immigrant population unless they possess certain attributes that serve to define their distinctness from the Immigrant society that surrounds them. As has been discussed, colonialism has had the effect of promoting the assimilation of Indigenous peoples into the Immigrant society and has thus eroded, either in whole or in part, many of the attributes that contribute to this distinctness.

Thus, as any Indigenous nation embarks upon a Path of Indigenization, it must confront the reality that colonization has imposed considerable barriers that prevent it from doing so. These barriers break down into two primary categories: psychological barriers and physical

19. See Waldron, *supra* note 2, at 99 ("[W]e know that a world in which deracinated cosmopolitanism flourishes is not a safe place for minority communities. Our experience has been that they wither and die in the harsh glare of modern life, and that the custodians of these dying traditions live out their lives in misery and demoralization.").

20. Compare JOE KANE, SAVAGES 18 (1995) (describing how the Huaorani people of the Ecuadorean Orient refer to non-Huaorani as *cowode*, or "cannibals") with Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 590 (1823) (describing Indigenous people as "fierce savages").

barriers. Psychological barriers are those that lie within the mind and spirit of Indigenous peoples. Physical barriers are those that relate to the physical and institutional framework shaping and supporting Indigenous societies. Despite the apparent independence of these barriers, they do at some level occupy the same space and are thus interdependent and mutually reinforcing. The blending and interaction of these psychological and physical barriers is what I call the barrier of "auto-colonization."

Auto-colonization is the process by which Indigenous peoples, because of their inability to possess, retain, or maintain memories of the colonization process, actually seek resolutions of their colonization-induced problems in a way that promotes the colonizing nation's agenda rather than remedies its aftereffects. Against the backdrop of the converging *Guswentah*, auto-colonization is thus the effect of intensifying, rather than reducing or eliminating completely, the convergence of the Indigenous and Immigrant paths of development as the result of one's own actions.

A. Psychological Barriers

To properly remedy the aftereffects of colonization, Indigenous nations must confront and redress at least two different psychological barriers: psychological dependency and colonization amnesia.

1. Psychological Dependency

A significant barrier to achieving a Path of Indigenization is the belief that Indigenous nations cannot be free from the controlling influence of the colonizing nation. While Indigenous leaders quite frequently express and defend the sovereignty of their nations, the reality is that these same leaders and many of their own people have accepted the proposition that their nation is subject to the overriding authority of the United States and dependent upon its largess. This dependence is not simply a dependence associated with receiving financial benefits from the colonial government or assistance in administering Indigenous lands and resources. It is a psychology of dependence that reflects a genuine and, in some cases, complete abandonment of the belief in inherent Indigenous freedom in favor of reliance on the colonizing state.²¹

The primary cause of this psychology of dependence for Indigenous peoples in America is the so-called "trust responsibility" that has been assumed by the United States. In the modern era, whenever there is a problem confronting an Indigenous nation, it seems that there is always an appeal by Indigenous leaders to the United States to exercise its "sacred"

21. Alfred refers to this symptom as the "colonial mentality . . . a mental state that blocks recognition of the existence or viability of traditional perspectives" that "prevents people from seeing beyond the conditions created by the white society to serve its own interests." ALFRED, *supra* note 7, at 70.

trust responsibility to provide assistance and protection. The origins of this doctrine, however, indicate that it is primarily a tool for promoting the weakness of Indigenous nations and ensuring their dependence on the United States government.

The roots of the Trust Responsibility lay in the treaties entered into by Indigenous nations with the United States. While these treaties were primarily vehicles for defining the terms of peace between the Indigenous and Immigrant peoples, they often included a promise by the United States to provide "protection" to the Indigenous nation. Providing "protection," however, very much served American interests. Accepting American "protection" meant that Indigenous nations agreed not to defend themselves against other colonial powers and, as a result, ensured that they would be too weak to ever again threaten the United States. Viewed this way, American "protection" of Indigenous nations justified a role for the United States to control their external relations.

Early in American legal history, the U.S. Supreme Court began to expand the definition of "protection" to justify greater power over Indigenous nations, and to develop the notion that being a "protected" nation really meant being a subservient one. Thus, in *Cherokee Nation v. Georgia*,²² the Court concluded that Indigenous nations would no longer be recognized as foreign nations but instead would be called "domestic, dependent nations." It said that Indigenous people were in a "state of pupillage" and that the relationship with the United States resembled that of "a ward to his guardian." In *U.S. v. Kagama*,²³ the Court upheld the power of the United States to control criminal activity within Indian territory because the "weakness and helplessness" of the Indigenous people established "the duty of protection, and with it the power." And in *U.S. v. Sandoval*,²⁴ the Court again affirmed federal power over Indigenous lands—this time, liquor regulation—because the United States "as a superior and civilized nation [has] the power and duty of exercising a fostering care and protection over all dependent Indian communities within its borders."

Interpreting "protection" in this way obviously justified the unilateral assertion of American power over the internal affairs of the Indigenous nations. In so doing, the United States violated the terms of the treaties and assumed for itself illegal and illegitimate power over Indigenous nations and peoples. Rather than reflecting mutually agreed-upon terms by which the United States might assist Indigenous peoples, the Supreme Court cases that establish and refine the Trust Responsibility are the equivalent of colonial edicts, rationalizing and sustaining the authority of the United States to take whatever action it wants on behalf of Indigenous peoples on the grounds that it knows best.

History reveals that the Trust Responsibility foremost serves America's colonizing agenda. For example, federal Indian control laws require BIA

22. 30 U.S. (5 Pet.) 1, 17 (1831).

23. 118 U.S. 375, 384 (1886).

24. 231 U.S. 28, 46 (1913).

(Bureau of Indian Affairs) approval before Indigenous nations can even take routine governmental action.²⁵ And it is well known that the United States abuses its position of trust to quench its insatiable appetite for Indigenous people, lands, and resources.²⁶ While Indigenous people can always use help from being exploited, the United States has a crippling conflict of interest that precludes it from being a reliable "guardian." When push comes to shove, the United States has always safeguarded the interests of its people at the expense of Indigenous peoples.

Against this backdrop, many Indigenous people in the United States have evolved a psychology of dependence that itself enhances the direct destructive impact of the Trust Responsibility. Rather than providing strength in the long-term, holding the belief that the United States has a "sacred" responsibility to protect one's people and lands has the narcotic effect of eliminating any instinct to take action to protect oneself. This crippling belief has become so ingrained over the generations that it is now the case that many Indigenous people cannot imagine taking any action that would be contrary to the desires of the United States. The implication of this state of affairs is disastrous to any long-term Indigenization effort. Because the United States itself is so often the threat to Indigenous interests, the willingness to blindly accept the application of American policies and laws ensures that American, rather than Indigenous, interests will prevail in the long run. Therefore, because American interests foremost favor assimilation of Indigenous peoples, acceptance of a dependent relationship upon the United States ensures that Indigenous nations will be unable to defend themselves from being pushed further down the Path of Extinction.

2. Colonization Amnesia

Another critical psychological barrier to restoring a Path of Indigenization is the phenomenon by which any and all memory of the Euro-American colonization has been erased from the individual and collective memory of Indigenous peoples. While perhaps hard to believe, there appears to be very little understanding amongst Indigenous peoples today of how colonialism has generated the radical transformation of Indigenous life over the past 200 years. While this problem is especially acute amongst younger Indigenous people, this colonization amnesia affects many older Indigenous people as well.

The main reason why there is so little conscious understanding of how

25. See, e.g., 25 U.S.C. § 81 (2001) (requiring approval of the Secretary of the Interior for certain contracts involving Indians).

26. See, e.g., *Pueblo of Sandia v. Babbitt*, No. CIV.A.94-2624 1996 WL 808067, at 8 (D.D.C. 1996) (stating, in a case involving the Pueblos' effort to obtain from the Secretary of the Interior a correct survey of its original grant of property, that "[i]f the Secretary of the Interior's failure to order a new survey is let stand, the *government* would benefit from a *government* error in a *government* survey—surely—a violation of a trustee's responsibility toward its beneficiary." (emphasis added)).

colonialism has affected the Indigenous nations is due to the suppression of the traumatic experiences associated with colonization. In historical hindsight, it is hard to imagine the brutality and inhumanity reflected by the actions taken by Europeans and Americans to colonize Indigenous peoples and lands. These Immigrants killed millions of Indigenous peoples with their diseases, unleashed decades of warfare, coerced the abandonment of property and lands, and forcefully relocated thousands of people to bounded territories often quite far from their homeland. There are many peoples in the world who know what this treatment is like. But most people in the United States—because they are the descendants of immigrants and not immigrants themselves—cannot fully appreciate the anguish of being forced to abandon your homeland, being forcefully marched to a strange new land while you watch your loved ones die, and being abandoned there to fend for yourself. Because of the horror associated with colonization, it is easy to see how the memory of this holocaust could be suppressed and denied to future generations.²⁷

A tragically poignant example of how this colonization amnesia is impressed upon Indigenous people is reflected by the experience of the Indigenous people who were taken from their families and sent to boarding schools.²⁸ At very young ages, Indigenous children were forced to leave their families, travel to strange institutions far from home, and adopt a new way of life. This forced and radical acculturation was accomplished in several ways. Physically, their appearance was transformed by cutting their hair and taking away their traditional clothes in favor of dresses and suits. Psychologically, they were subjected to numerous brainwashing techniques. They were forced by threat of violence to stop speaking their native languages and to start speaking English. They were forced to read the Bible and go to church, and they were not allowed to see their families, visit their homelands, or partake in traditional ceremonies. The philosophy of the government agents and missionaries who ran those institutions, which were in effect “detention centers,” is best summed up by Colonel Pratt, who said that, “[i]n Indian civilization [efforts], I am a Baptist, because I believe in immersing the Indians in our civilization and when we get them under, holding them there until they are thoroughly soaked.”²⁹ It is not surprising that the survivors of this “soaking” would have little interest in conveying to their children the horror of their experience.

Unfortunately, even though the boarding schools have largely been eliminated, this “soaking” of Indigenous children in the way of life of the Immigrant nation has continued. Every day, Indigenous children are sent, usually with parental consent, to the Immigrant nation’s public school

27. EDUARDO DURAN & BONNIE DURAN, *NATIVE AMERICAN POSTCOLONIAL PSYCHOLOGY* 27-28 (Richard D. Mann ed., 1995).

28. See generally DAVID ADAMS, *EDUCATION FOR EXTINCTION* (1995) (providing a comprehensive study of the policy and practice of employing boarding schools for Indigenous youth from 1880 to 1930).

29. Frederick J. Stefon, *Richard Henry Pratt and His Indians*, 15 J. ETHNIC STUD. 87 (1987).

system to be “educated.” There they learn how to read and write the English language, how America became such a great nation, how to count money, and how to recite the pledge of allegiance to the American flag. They do not, as a general matter, learn their own Indigenous language, explore the history of their own Indigenous nation, or pay allegiance to their own Indigenous political and social traditions. In hauntingly similar ways, then, the “civilization” process by which Indigenous children were stripped of their cultural, linguistic, spiritual, and political foundation as Indigenous people over a hundred years ago has continued to the present. The only difference today is that missionaries with the support of the army no longer have the primary responsibility for the “education” of Indigenous children, although the effect is the same. As time has moved forward, the general population of Indigenous people has become more and more ignorant of the circumstances surrounding the history of colonization.

Within an Indigenous society, having little or no knowledge of the colonization process has the disastrous effect of ensuring that every succeeding generation is equally if not more ignorant of the manner in which colonization has affected them. Ignorance in this regard is not simply the potentially embarrassing consequence of being unaware of historical events. For Indigenous peoples, being ignorant of colonization has the consequence of jeopardizing survival. If an Indigenous person is unaware of how colonialism has impacted the lives of his or her parents, grandparents, or great-grandparents, then that person will surely be unaware of colonialism’s continuing impact on him- or herself. Because colonialism is so critical to the dysfunction that now exists at both a personal and collective level within Indigenous societies, Indigenous peoples will not have a sufficient understanding of the nature or the magnitude of the problems that now confront them. Thus, in the end, failing to understand colonialism’s impact will ensure that the action necessary to remedy its destructive and corrosive effects will not be taken.

Within the framework of the converging *Guswentah*, the effect of colonization amnesia on the possibility of pursuing a Path of Indigenous development is significant. Not knowing that you are a colonized people is the equivalent of not knowing that you are on a converging path of development that is on a collision course with the path of Immigrant development. And if you are unaware that this is happening, you will naturally not think to take corrective action. In short, no decision can be made to precipitate a divergence towards a Path of Indigenization because doing so would not appear rational. Inevitably, failure to take corrective action will ensure a continued journey down the Path of Extinction.

B. Physical Barriers

In comparison to the psychological barriers, those barriers that relate to the physical parameters and institutional framework of Indigenous societies are easier barriers to identify. These barriers are numerous and

affect every aspect of Indigenous society. Because they are relatively easy to identify, they are usually the focus of efforts taken by Indigenous nations to improve their condition. To the extent that there is interest in remedying the impact of these barriers from outside the Indigenous nation, they also become the focus of the colonizing nation and the scholarly and professional communities. While I believe that numerous physical barriers can be identified, I will focus on only a few to demonstrate the broader problem associated with fixating on them: (i) the erosion of communal bonds; (ii) linguistic, cultural, and spiritual extinction; (iii) governmental and legal ineffectiveness; (iv) economic underdevelopment; and (v) social dysfunction.

1. Erosion of Communal Bonds

One barrier to pursuing the Path of Indigenization is the erosion of the communal bonds among Indigenous peoples. One of the lasting vestiges of colonialism for most Indigenous nations in the United States is the imposition of a blood quantum system to define citizenship within the nation.³⁰ Historically, Indigenous nations were rather flexible with regard to membership criteria, and outsiders, both citizens of other Indigenous nations and even Immigrant captives, could easily be adopted into the nation. But the United States sought to transform the mechanism by which Indigenous peoples maintained their connection with one another, primarily for reasons related to the allotment of reservation land in the late nineteenth and early twentieth centuries. This process involved the compilation of written lists (called rolls) of individual Indians in the nation or tribe which were then used to allocate the tribal land. These rolls often incorporated the idea of a "degree of Indian blood," and this system was cemented for many nations pursuant to the governments later established for them by the United States. As a result, there has been established within almost all Indian nations a conception that one's "Indianness" is defined by one's degree of Indian blood.

Being a citizen of an Indigenous nation is obviously far more than simply a matter of blood quantum or genetics. But it appears that Indigenous people in nations with a blood quantum system of enrollment have fully internalized this colonial intrusion into how they define their connections to one another, such that they think it odd that connectedness could be defined in any other way, say by patrilineal or matrilineal descendants, or defined citizenship criteria. This is especially problematic since a primary reason why the United States imposed the blood quantum system in the first place was to establish a mechanism by which Indigenous peoples could "breed themselves out of existence."

30. See L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 722-23 (2001) ("As a consequence [of Federal government involvement], despite the sovereign power of tribes to establish their own membership criteria, virtually all tribes now base membership essentially on race.").

Encouraging Indigenous people to intermarry and have children with Immigrant peoples was an explicit policy preference adopted by the United States during the nineteenth century to further its assimilation agenda. Thomas Jefferson, in a speech to a delegation of Indigenous people, explained the architectural foundation of this policy. "[Y]ou will unite yourselves with us, join in our great councils and form one people with us, and we shall all be Americans; you will mix with us by marriage, your blood will run in our veins, and will spread with us over this great island."³¹

To facilitate interracial breeding, in the late nineteenth century the United States opened up Indigenous lands for settlement by Immigrants. It was anticipated that as Indigenous and Immigrant peoples began to live together, they would eventually intermarry. With the natural result being reproduction, it was anticipated that the number of Indigenous people satisfying the blood quantum would begin to decrease with the first interracial offspring. Eventually, it was assumed, Indigenous peoples, and thus, their nations, would cease to exist when the citizens of those nations had children that fell below the one-quarter blood quantum.³²

With haunting results, it appears that the architects of this assimilation policy have succeeded in their social engineering effort. While there are no hard statistics publicly available relating to the extent to which a particular Indigenous nation is comprised of "mixed-bloods," it is possible to extrapolate demonstrative conclusions from existing census data. Accordingly to the 1990 census, Indigenous peoples marry other Indigenous people only twenty-six percent of the time and intermarry with Whites approximately seventy-one percent of the time.³³ In contrast, the next highest rates of intermarriage with Whites for other American "minority" groups are Asian-Americans, who intermarry with Whites only twenty-nine percent of the time, and African-Americans, who intermarry with Whites only six percent of the time.³⁴ While these statistics do not reveal the extent to which Indian-White married couples have children, or the extent to which Indians have children with Whites out of wedlock, the trend appears to be that the number of persons living in America of mixed-Indigenous descent will increase over time.

Acceptance of the colonizing nation's definition of lineage means that intermarriage between Indigenous and non-Indigenous peoples will continue to be a considerable barrier for any Indigenous nation seeking to pursue the Path of Indigenization. For the United States, physical distinctness has been, and will continue be, a critical measure by which the Immigrant society has distinguished Indigenous peoples from citizens of

31. Thomas Jefferson, *To Captain Hendrick, the Delawares, Mohiccons, and Munries*, in *THE COMPLETE JEFFERSON: CONTAINING HIS MAJOR WRITINGS, PUBLISHED AND UNPUBLISHED, EXCEPT HIS LETTERS* 502, 503 (Saul K. Padover ed., 1943).

32. See PRUCHA, *AMERICANIZING THE AMERICAN INDIANS*, *supra* note 1.

33. See U.S. Bureau of the Census, *Race of Couples 1990*, Table 2, available at <http://www.census.gov/population/socdemo/race/interractab2.txt>.

34. *Id.*

its own society.³⁵ While it is likely that other factors will continue to be relied upon as the basis for continued recognition of Indigenous nationhood,³⁶ it is entirely possible that the Immigrant society could simply decide one day that it no longer wishes to recognize Indigenous nations as distinct and separate sovereigns simply because Indigenous peoples have come to "look like" the Immigrant peoples.³⁷

2. Linguistic, Cultural, and Spiritual Extinction

Another barrier to pursuing a Path of Indigenization is the loss of Indigenous language, culture, and spirituality. While each of these factors can be thought of as distinct, they are naturally interrelated and can be dealt with as such for purposes of discussion.

Of the 554 Indigenous nations recognized by the United States only about 230, or forty-two percent, still have their own language.³⁸ Of that number only about twenty percent teach their language to their children. What this means is that within a generation, as the language-speaking elders die, there will only be about fifty Indigenous nations left that will have their aboriginal language and any practical hope that they will be able to speak it into the future. With this much loss, "nearly 80 percent of the extant native languages of North America . . . [are] facing effective extinction within a single lifetime, or in most cases, much sooner."³⁹ Not surprisingly, use of the English language by Indigenous peoples in the United States has increased significantly.⁴⁰

Like blood dilution, the destruction of Indigenous languages was also part of the colonizing nation's efforts to exterminate Indigenous peoples. As part of its Assimilation Policy of the late nineteenth century, the United

35. The United States currently maintains standards for recognizing an Indigenous people as "a distinct [Indian] community" on the basis of such factors as "significant rates of marriage within the group, and/or, as may be culturally required, patterned out-marriages with other Indian populations." Mandatory Criteria for Federal Acknowledgment, 25 C.F.R. § 83.7(b)(1)(i). The regulation further provides that "sufficient evidence of community" can be demonstrated if "[a]t least 50 percent of the marriages in the group is between members of the group." *Id.* § 83.7(b)(2)(ii).

36. See generally 25 C.F.R. § 83.7 (Identifying such other recognition factors as historical recognition, history of self-governance, decedency, and exclusivity from other groups).

37. See Steve Dunleavy, *It's Unfair to Make Trump the Odds-Man Out in Deal*, N.Y. POST, Oct. 25, 2001, available at <http://www.nypost.com/commentary/32557.htm> (last visited Dec. 13, 2001) ("Everybody knows how brutally the Indians were treated in this country, but this whole charade is going to become the longest-standing canard in gambling history. Monticello Raceway is not an Indian reservation. Nor was Kutsher's, last I checked. But it looks as if they will be classified as such. Some of these Indians' eyes are as blue as mine are bloodshot. . . . [W]hen Donald doesn't get a bite at the gambling apple, I will be checking every tribe in the Catskills very closely.").

38. See Ives Goddard, *Introduction*, 17 HANDBOOK OF NORTH AMERICAN INDIANS 1, 3 (William C. Sturdevant ed., 1996).

39. *Id.*

40. See JAMES S. OLSON & RAYMOND WILSON, *NATIVE AMERICANS IN THE TWENTIETH CENTURY* 210 (1984) ("English continues to gain ground as the primary language of most Native Americans. Indeed, in 1978, 65 percent of Native Americans spoke English as their primary language.").

States established boarding schools by which it forced Indian children to learn to speak English, among other things. Physical punishments were routinely administered when Indigenous children rebelled against this indoctrination and attempted to speak in their own language.

Coinciding with the loss of language has been a loss of Indigenous culture and spirituality. This has happened in two ways, through both the outright extinction of unique Indigenous cultural practices and the displacement of these practices through the adoption of pan-Indigenous cultural practices. Much of what is unique about Indigenous peoples is rooted in culture and spirituality. Unfortunately, Immigrant peoples have long been threatened by this uniqueness and have taken aggressive efforts to eliminate it.

When they were able to do so, the Immigrant nation sought to prohibit cultural practices, such as living together outside of Christian marriage and certain religious rituals and dances.⁴¹ These practices were frequently outlawed with criminal punishments inflicted on those who sought nothing other than to live and worship as was natural for them. In addition, Christian missionaries financed in significant part by the United States were instrumental in destroying Indigenous religions by converting Indigenous people to Christianity. Loss of language and loss of culture and spirituality often coincided at the missionary-run boarding schools where Indigenous children were forced to read the Bible and to conform to "Christian" behaviors and ethics.

Even in those instances in which the colonizing nation did not affirmatively seek the destruction of Indigenous cultural and religious practices, there have emerged in response to colonialism pan-Indigenous movements that have had the same effect of destroying traditional Indigenous culture and spirituality. Perhaps the most well known of such pan-Indigenous spiritual movements has been that of the Native American Church.⁴² Most known for its sacramental use of peyote, the NAC is an Indigenous religion that is rooted in Indigenous cosmology but also draws upon the spiritual tenets of Christianity.⁴³ Its adherents can be found in many different Indigenous nations. Another example of such a pan-Indigenous movement is the pow-wow. Usually a large, festive occasion originally characterized as more religious than social, the pow-wow has emerged as one of the most significant cultural, social, spiritual, and economic practices within Indigenous nations today.⁴⁴ So popular have pow-wows become that even Indigenous nations for whom the pow-wow

41. See generally Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773 (1997) (describing claims brought by the government against Indigenous Americans for practicing traditional religious and cultural practices).

42. See generally Jay Fikes, *A Brief History of the Native American Church*, in ONE NATION UNDER GOD: THE TRIUMPH OF THE NATIVE AMERICAN CHURCH (Huston Smith & Reuben Snake eds., 1996).

43. See OMER C. STEWART, PEYOTE RELIGION: A HISTORY 157, 222-26 (1987).

44. See generally JULIA C. WHITE, THE POW-WOW TRAIL (1996).

is a "foreign" ceremony have begun to conduct them.⁴⁵

It is hard to imagine factors more significant to the Indigenization of the Indigenous nations than having a distinct language, culture, and religion. Language may be the most powerful force that some Indigenous peoples have to ensure their distinctness in the world. Being able to "think", as well as speak, one's own language preserves avenues for distinctness that cannot otherwise be matched. Having a vibrant language allows an understanding of the unique cultural and spiritual foundations of a people that cannot be accommodated by the English language.

Without language or a distinct culture and religion, it becomes exponentially easier to continue down the Path of Extinction. Speaking the colonizing nation's language and absorbing and replicating its culture and spirituality further erode the justification by the Immigrant society for recognizing Indigenous peoples as distinct.

3. Governmental and Legal Ineffectiveness

The ineffectiveness of Indigenous governments is another barrier to pursuing a Path of Indigenization.⁴⁶ Government is both the mechanism for defining the relationships between peoples within and outside of a society as well as the process by which a people arrive at collective decisions. Currently, Indigenous governments are afflicted with a variety of maladies that inhibit their effectiveness and, in many cases, make them completely dysfunctional. As a result, Indigenous governments may prevent some Indigenous nations from being able to arrive at and execute the decisions necessary in pursuing a Path of Indigenization.

Colonialism has disrupted Indigenous governments and made them dysfunctional through historic efforts to displace them with constitutional and corporate governing structures copied from American society. Traditional Indigenous governments were extremely decentralized and many democratic. Following the establishment of the reservations in the nineteenth century, the United States soon realized that it was very difficult to understand how these governments worked and how to control them. As a solution, Bureau of Indian Affairs (BIA) officials would simply designate certain especially compliant tribal members to serve as a "council" and to act as the official representatives of the Indigenous people. Not surprisingly, these council members were not the traditional leaders, and their investiture created a schism in many Indigenous nations that is still being felt today.⁴⁷ By 1934, the United States formalized its control

45. See, e.g., The Grand River Pow-Wow of the Six Nations Iroquois, available at <http://www.grpowwow.com> (listing pow-wow schedule). The pow-wow is not part of traditional Iroquois culture.

46. See generally Robert B. Porter, *Strengthening Tribal Sovereignty Through Government Reform: What Are the Issues?*, 7 KAN. J.L. & PUB. POL'Y 72 (1997) (describing problems in tribal governance).

47. See *id.* at 87-90 (relating difficulties that arise when there are competing traditional and appointed governments).

over Indigenous governments and cemented this elected council system through forced constitutionalism pursuant to the Indian Reorganization Act ("IRA").⁴⁸ In 1971, American efforts to undermine traditional Indigenous governance took on a new form when Alaska Native governments were partially displaced through the establishment of member-owned State Corporations under the Alaska Native Claims Settlement Act.⁴⁹ As a result of these tactical efforts to disrupt Indigenous governance, there remain only a handful of traditional Indigenous governments today. The governments of most Indigenous nations are simply crude copies of the colonizing nation's governmental and business organizations.

Colonialism has also had a less direct, but equally effective, influence on disrupting traditional governance by inducing deliberative or revolutionary adaptation to American forms of government. Many Indigenous nations, including the Cherokees and other members of the Five Tribes, consciously adapted their forms of government to conform to the structure of the American form of government. They did so in response to increasing pressure on their lands and way of life and because of their belief that adapting certain behavioral patterns of the Immigrants—including governance—might induce respect and deference to Indigenous lands and way of life. Nonetheless, these efforts were usually influenced in some way by American conceptions of governance.

In actual operation, this colonization-induced dysfunction afflicts Indigenous governmental operations in a variety of ways.⁵⁰ Many are afflicted with poor administration that, for the most part, arises as the result of having insufficient experience in managing their own affairs. Only in the last 30 years have Indigenous governments taken on—at the urging of the United States—many of the governmental functions carried out by the federal and state governments. In addition, most Indigenous governments are underfunded, which prevents them from carrying out their responsibilities effectively. Dependence upon the United States for approval of laws passed by the Indigenous government is another source of dysfunction. And finally, most Indigenous nations are afflicted with some degree of infighting which often has a debilitating effect of inhibiting governmental effectiveness. On the whole, the process of colonization has resulted in the establishment of governments within Indigenous nations that "ill suit" them and thus are unable to be utilized for collective advantage.

Indigenous nations interested in pursuing a Path of Indigenization will be unable to do so if they do not have governments that are functional and widely perceived by their own people as legitimate. The ability to arrive at

48. Indian Reorganization Act, ch. 576, §§ 1-19, 48 Stat. 984, 984-88 (1934) (codified as amended at 25 U.S.C. §§ 461-79 (1994)).

49. Alaska Native Claims Settlement Act, Pub. L. No. 92-203, § 1, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-29(e)(1994)).

50. See Porter, *supra* note 46, at 90-93 (discussing several impacts of government dysfunction on tribal sovereignty).

the collective decision is the very first step towards pursuing any developmental path. But if there is no mechanism in place to determine whether the people are interested in pursuing a greater level of Indigenization, then the Path of Extinction will continue as the default position. Moreover, even if such a decision can be made, the Indigenous government must be strong enough to generate sufficient collective effort on the part of the people to force a divergence in the Indigenous developmental path and to reassume a new level of parallelism with the Immigrant developmental path. As it now stands, however, too many Indigenous governments stand as barriers and not as facilitators towards the Path of Indigenization.

4. Economic Underdevelopment

Economic underdevelopment presents a considerable barrier to pursuing a Path of Indigenization. While a handful of Indigenous nations are self-sufficient, most do not have an economy strong enough to sustain and provide for the basic needs of their people. This inability is driven by such factors as an insufficient land base, an inopportune geographic location, a lack of natural resources, an absence of qualified labor, and a lack of investment capital. In addition, the problem of dysfunctional government dovetails with economic underdevelopment as there is no coordination of existing resources and personnel towards economically viable opportunities.⁵¹

The chronic state of economic underdevelopment within Indigenous nations is yet another manifestation of colonialism. In fundamental ways, this condition is directly related to the existing Indigenous land base. Most Indigenous nations have land that is either too small, too remote, too dry, or too lacking in natural resources to be put to any significant and productive use. Moreover, even to the extent that an Indigenous nation's lands are adequate for development, the BIA must play a role in the development process. This added layer of bureaucratic interference is in some cases sufficient to scuttle proposed development activity.

The transmutation of the landmass has had a correlating effect in transforming Indigenous economies. Both American colonization policies and the flow of free trade have forced Indigenous communities to abandon subsistence-oriented economic systems. Traditional economies were structured so that the basic needs of all of the people in the society were satisfied on the basis of what was naturally provided. While this system did not necessarily preclude the acquisition of excess wealth, it did ensure a sufficiently even distribution of resources to sustain all members of the society. As colonization occurred, however, the American economic

51. See generally Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, in WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 1, 23-34 (1992) (arguing stable governments are one element needed to promote economic development).

system—capitalism—has increasingly taken hold within the Indigenous nations. This has resulted in the generation of a few enterprising Indigenous individuals—and a few Indigenous nations—who have been able to accumulate considerable wealth while the basic needs of others—both individuals and nations—go largely unmet.⁵²

The inability to develop self-sustaining economies is a considerable barrier to pursuing a Path of Indigenization. This inability ensures that Indigenous nations will remain dependent upon the United States for providing basic needs. For most Indigenous nations, structural deficiencies such as this will ensure long term underdevelopment. It is little surprise, then, that most Indigenous nations during the last few years have not been beneficiaries of America's longest economic expansion. The handful of nations that have generated revenue through gaming have not done so because they have created their own wealth, as would be the case with manufacturing. Instead, they have only exploited the happenstance of their location in gaming states and their proximity to non-Indian gamblers as a means of siphoning off wealth that was generated elsewhere. While the gaming phenomenon is not by any means irrelevant as a development tool, it fails to address the problem that most nations face. This seemingly perpetual state of economic underdevelopment and dependence makes any move towards greater Indigenization fraught with difficulty.

5. Social Dysfunction

Another major barrier to resuming the Path of Indigenization is the myriad of socially dysfunctional behavior that exists within most Indigenous societies. These behaviors include alcohol and drug abuse, domestic violence, child abuse and neglect, welfare dependency, depression and other mental illnesses, sexual violence, infant mortality, and suicide. Moreover, Indigenous communities suffer some of the highest crime rates in the United States with Indigenous people being among the most over-represented populations in the American criminal justice system.

Why Indigenous communities have such extremely high levels of social dysfunction is the subject of considerable inquiry. It has been suggested that "the vulnerability of American Indians is a product of several factors: geographic isolation of reservations, limited economic opportunities on reservations, low levels of human capital, growth in the

52. See, e.g., Fred Dickey, *Inside Story California's Big Gamble; If Voters Say Yes to Vegas-Style Casinos on Indian Land, Gamblers Won't Be the Only Winners and Losers; Everyone Will Feel the Change*, L.A. TIMES, Jan. 9, 2000 (Magazine), at 14 ("Here, hard by the Fields Road exit from Interstate 10, is the Morongo Band of Mission Indians. On their land also live a few members of the Los Coyotes Band, whose own reservation lies a couple of hours away. Both have roots in the Cahuilla people; they are first cousins, anthropologically speaking. The big difference is that the Morongos have a huge casino and the Los Coyotes don't, because their reservation is too remote. The Morongos are rich. The Los Coyotes are poor. Together, they are a living history exhibit of Indian gaming.").

number of single parent (female-headed) families, lack of adequate support programs, and reductions in public assistance."⁵³

Whatever the particular cause might be, it is hard to imagine that any one Indigenous person's dysfunctional behavior is not related to the fact that Indigenous peoples have been the object of hundreds of years of mistreatment at the hands of the colonizing peoples. So extensive has this mistreatment been that Russel Barsh has called colonialism "the abuse of an entire civilization for generations."⁵⁴ Thus, for example, given that the purpose of the criminal justice system is to conform behavior, is it any surprise that Indigenous people—who have long resisted absorption into American society—are so over-represented in America's jails? And given the perpetual state of economic and political powerlessness that has gripped too many Indigenous nations, is it any surprise that many Indigenous people—particularly the young—look to substance abuse or even suicide as a way to numb their intergenerationally accumulated pain? Given the magnitude of the problems, it would take an act of extreme formalism to divorce the causes of social dysfunction in Indigenous communities from the impacts of several hundred years of transformative colonizing activities.

Social dysfunction in Indigenous communities prevents the pursuit of a Path of Indigenization because it denies the individual and collective ability to envision and create a positive future. Charting a new future course is dependent upon having strong and healthy individuals and communities. Unfortunately, the level of socially dysfunctional behavior that now exists within most Indigenous communities has reached crippling proportions. Failing to redress this myriad of social problems will prevent any indigenization movement from succeeding and thus facilitate the continued move down the Path of Extinction.

C. Auto-colonization

Against the backdrop of these psychological and physical barriers, the most formidable obstacle to the resumption of a Path of Indigenization is auto-colonization. This phenomenon can best be seen through the ways in which Indigenous nations have sought to address the physical barriers to Indigenization discussed above.

1. Diminishment of Lineage

With respect to the problem of diminishing lineage, the increasing trend is for Indigenous nations to perpetuate the reliance upon blood

53. Shanta Pandey et al., Implementation of the Temporary Assistance for Needy Families (TANF) on American Indian Reservations: Early Evidence From Arizona 6 (Oct. 26, 1999) (working paper) (on file with author).

54. Russel L. Barsh, *The Challenge of Indigenous Self-Determination*, 26 U. MICH. J. L. REFORM 277, 285 (1993).

quantum as the determinant of tribal membership. Within some nations, efforts have been taken recently to lower the blood quantum requirement necessary to be recognized as a tribal member. This, of course, has the practical effect of increasing the number of tribal members which, presumably, is done for purposes of shoring up the size of the Indigenous community.

The problem with this course of action, however, is that continued reliance on blood quantum continues to ignore other, perhaps more significant criteria of Indigenousness, such as language, culture, residence in an Indigenous community, and allegiance to the political community. Responding to the problem by diluting the blood quantum requirements completely disregards the fact that the United States imposed the blood quantum enrollment as a means of ensuring the eventual demise of Indigenous societies. While it may be the case that Indigenous nations have the inherent sovereign right to determine who their members are under any terms and conditions they see fit, it is also the case that the United States has the sovereign right to not recognize an Indigenous nation that is no longer, by any measure including blood, distinct from American society at large. Thus, perpetuating the legitimacy of the blood quantum standard is self-inflicted colonization.

2. Linguistic, cultural, and spiritual extinction

Within a few Indigenous nations, efforts are being taken to ensure the survival of the people by protecting and strengthening the language, culture, and religion. This primarily occurs through the re-assumption of control over the education of Indigenous children, either by the establishment of tribal elementary and secondary schools or the regulation of public schools located within the Indigenous territory. Most Indigenous nations, however, continue to rely upon the Immigrant nation's educational infrastructure to educate their children. In many ways, this is a reflection of the lack of resources that are available to give life to the desire of Indigenous peoples to reassume control over the educational process. But in other respects, this willingness to abandon education to the control of the colonizing nation is a simple reflection of how colonized people are perpetuating the colonization upon themselves.

For example, many Indigenous people—especially Indigenous elites—have incorporated the colonizing nation's definition of "success" and thus encourage their children to pursue educational paths that might lead to "success" as defined by Immigrant, rather than Indigenous, standards. Defining success this way means that Indigenous children are encouraged to assimilate into and succeed in the Immigrant society. But the flip side of defining success this way is that Indigenous children are discouraged from directing their talents and energies towards serving the needs of their own Indigenous nations. Even for those that ultimately do not leave Indigenous communities, the effect of this educational choice is that Indigenous peoples are not receiving the education necessary to ensure that they will

one day assume the responsibilities of promoting distinct Indigenous societies. This is not to say that there are not occupations and professions within the Immigrant society that cannot be utilized to the betterment of Indigenous societies. But "success" for Indigenous people must be redefined in terms that require a contribution to one's Indigenous nation. Any other definition fundamentally serves the interests of the colonizing nation and is thus auto-colonization.

3. Governmental and Legal Ineffectiveness

Some efforts currently are being taken by Indigenous nations to revitalize their governmental and legal systems. Most of these initiatives in recent years have occurred in the area of tribal court development.⁵⁵ Unfortunately, this development has had the effect of more fully incorporating the Immigrant society's justice values into Indigenous communities instead of revitalizing Indigenous conceptions of justice.

Colonization has so succeeded in transforming Indigenous conceptions of justice that most Indigenous leaders have a difficult time conceiving of dispute resolution in a manner other than the adversarial system common in the United States. In recent years, with the rise of casino gaming enterprises, Indigenous nations have moved to develop and strengthen tribal court systems. The Indigenous governments created by the United States under the IRA, for example, generally did not contain independent judiciaries, so nations operating such structures have had the opportunity to build their formal dispute resolution systems from scratch.

The way in which development has occurred thus far clearly reveals how auto-colonization takes place. Indigenous nations, driven by their leadership, invariably hire consultants—themselves usually American trained lawyers—who proceed to draft codes and procedures to establish and define the operation of the tribal court. Judges—usually lawyers and often Indigenous people—are appointed to serve on the court to decide disputes in a manner befitting any state or federal court. Rarely is there any thought given to the traditional ways in which the community may have historically resolved disputes. And even rarer still are those instances in which those processes are revitalized through modern institutions. The net effect of this development is to introduce into the community a form of dispute resolution that is premised upon the promotion of adversarial behavior between the disputants. Doing so has the long term effect of disrupting community relations and, through the application of substantive law "borrowed" from the Indigenous society, transforming the justice values of the Indigenous society.⁵⁶

55. HARV. KENNEDY SCHOOL OF GOV'T, HONORING NATIONS: TRIBAL SUCCESS STORIES 6-7, 30-31 (1999).

56. See generally Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997).

4. Economic Underdevelopment

Perhaps the aspect of Indigenous dysfunction that has received the most attention in recent years from both Indigenous people and Immigrants is economic development. The central focus of these economic development efforts is to find ways in which to generate more income for Indigenous societies at both the individual and collective levels. During the last 20 years, the most significant economic development within Indigenous nations in the United States has been casino gaming.⁵⁷

The widely shared perception in Indigenous communities is that pursuing casino gaming brings the potential for generating significant sums of money. The reality is that only a handful of Indigenous nations have become wildly successful at gaming. The rest of the over 300 Indigenous nations in the United States who own and/or operate some kind of gaming business generate modest sums that are used to fund tribal government operations.⁵⁸

As gaming has emerged as an economic stimulus, the American economic philosophy—that money buys happiness—appears to be widely accepted in Indigenous communities. It does not appear that Indigenous nations have given serious thought to the long-term impact of aggressively inserting themselves into the Immigrant society's economic system. For a people evolving away from a subsistence foundation, bringing a casino into the community injects capitalistic influence in a way that may not have previously been felt. To be sure, some Indigenous nations have been so economically underdeveloped that the transformative impact of a casino—as well as the jurisdictional concessions that must be given to the states—can hardly be thought do any more harm. But the gaming phenomenon demonstrates just how deeply the Immigrant nation's economic values have been assimilated by Indigenous peoples. This aggressive pursuit of excess wealth reflects an incorporation of the values underlying the colonizing nation's economic system. Acting on the basis of such values is auto-colonizing behavior.

5. Social dysfunction

The magnitude of socially dysfunctional behavior within Indigenous societies has precipitated considerable efforts by both Indigenous and Immigrant governments to formulate viable solutions. During the last 25 years, these efforts have been spearheaded by the United States as a result

57. See generally W. DALE MASON, *INDIAN GAMING: TRIBAL SOVEREIGNTY AND AMERICAN POLITICS* (2000) (examining the political implications of Indian gaming).

58. See Montie R. Deer, Chairman of the National Indian Gaming Commission, *Everything You Always Wanted To Know About Indian Gaming but Were Afraid To Ask* (Apr. 10, 2001) (presentation outline) (indicating that the top eleven percent of all tribal gaming facilities generated sixty-one percent of all tribal gaming revenue with the bottom thirty percent of all tribal gaming facilities generating only one percent of all tribal gaming revenue).

of the Indian Self-Determination and Education Assistance Act of 1975.⁵⁹ Billions of dollars have been appropriated under this Act for a wide variety of programs designed for Indigenous individuals and communities and administered by federal, state, and tribal governments. These programs have focused heavily on such areas as health care, housing and community infrastructure, employment training, education, law enforcement, and welfare. As the name of the Act suggests, the general purpose of this funding has been to assist in the self-determination of the Indigenous nations. While the United States has been aggressively involved in these efforts and has been the primary financier, it has done so because of the obvious damage that it has inflicted on Indigenous societies as the result of its historic colonizing activities.

An important component in this effort to revitalize the Indigenous nations has been the extent to which the Act encourages them to assume the responsibility for governmental functions otherwise administered by the federal and, in some cases, state governments. This "devolution" has in fact occurred with hundreds of Indigenous nations assuming responsibility for the administration of governmental services such as health care, law enforcement, education, and social services. Nations that have accepted this federal assistance have developed their own bureaucracies to administer the programs and deliver the services. Nonetheless, even though there has been an assumption of administrative responsibility by the Indigenous governments, the federal government remains intimately involved by insuring that the Indigenous nations maintain compliance with the funding contracts.

It is clear that the efforts associated with the Self-Determination Act taken during the last 25 years have occurred because of a genuine desire by the United States to improve the quality of life of Indigenous peoples and strengthen the governing capacity of Indigenous nations. The problem, however, is that the Act has created financial incentives for Indigenous nations to comply with a redevelopment agenda that is genuinely American, rather than Indigenous, in nature. In short, the "solutions" embraced by Indigenous nations receiving funds under the Act are predicated upon Euro-American rather than Indigenous cultural values. As a result, the Act as implemented by Indigenous governments is a form of auto-colonization rather than an instrument of culturally affirming revitalization.

For example, the problem of having an insufficiently skilled labor pool has been sought to be redressed by promoting the education of Indigenous youth in American educational institutions. To the extent this has been "successful," however, many Indigenous youth have been trained for jobs that do not exist within Indigenous communities. This ordinarily means that they must take jobs away from their communities in order to match their skills. This, of course, has the long term effect of promoting societal

59. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450-58 (1999)).

weakness as the strongest, most capable members of the society get siphoned off to live the American dream.

Moreover, even in those instances in which attention is given to addressing local concerns in a meaningful way, the colonialist agenda continues to be perpetrated. A good example of this is the effort taken by the United States to assist Indigenous nations in taking over primary responsibility for environmental protection of their lands. The Environmental Protection Agency has developed a program whereby Indigenous nations can assume the responsibility for environmental regulation currently exercised by states. This program is known as the "Tribes as States" program.⁶⁰ In short, Indigenous nations are granted the funding necessary to develop their own bureaucracies and take over the federal and state environmental responsibility. This is, as the name suggests, *de jure* auto-colonization.

Despite these structural problems, in recent years there have been efforts to take these federal resources and re-channel them towards projects that affirm Indigenous rather than American values. In significant part, this is due to the establishment of the Self-Governance program in the late 1980s which allows for the Indigenous nations to receive federal funding but with fewer strings attached.⁶¹ In lieu of federal determination of funding priorities, the relevant Indigenous nation and the federal government negotiate a funding compact that allows for the establishment and carrying out of an Indigenous agenda. This has allowed for the development of innovative solutions to particular community problems. One example is the Navajo Peacemaking Division, which seeks to incorporate traditional teachings and healing processes in the course of handling disputes rather than leave such disputes to the adversarial process that had been imposed on the Navajo Nation by the United States.⁶² Nonetheless, despite successes of this type, the development inertia weighs decidedly in favor of assimilating solutions from American society. As the Indigenous nations in the United States follow the advice of the Immigrant nation – and accepts the financial incentives that accompany this advice – they run the risk of promoting further auto-colonization.

Viewed together, the barriers that lie in the Path of Indigenization are formidable and do not lend themselves to easy resolution. Conceptually, it might appear relatively easy to address the physical, as opposed to the psychological, barriers to Indigenization. These barriers, rooted as they are in a lack of resources or an inadequacy of existing institutions, seem

60. See Safe Drinking Water Act, 42 U.S.C. § 300j-11; Clean Water Act, 33 U.S.C. § 1377; see also Richard A. Monette, *Treating Tribes as States Under Federal Statutes in the Environmental Area: Where Laws of Nature and Natural Law Collide*, 21 VT. L. REV. 111, 114 (1996).

61. Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 209, 102 Stat. 2285, 2296-98 (codified as amended at 25 U.S.C. § 450f); Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, §§ 201-408, 108 Stat. 4270, 4270-78 (codified as amended at 25 U.S.C. §§ 450-58hh).

62. See generally James Zion, *The Navajo Peacemaker Court: Deference to the Old and Accommodation to the New*, 11 AM. INDIAN L. REV. 89 (1983) (discussing the origins and purposes of the Navajo Peacemaker Court).

manageable by comparison because positive outcomes may merely be a factor of devoting additional resources to augment the change. Such is not the case when dealing with psychological barriers, whose resolution requires the healing of the minds and souls of the Indigenous peoples that have survived generations of colonization-inflicted damage.

The perceived ease in dealing with the physical barriers has no doubt contributed to the increased scholarly attention being given to exploring the ways in which law affects Indigenous societies. Some of this attention has focused on Indigenous nation law and governance, although most has focused on the manner in which American law deals with Indigenous peoples. The justification for such a focus is rooted in the notion that by changing the law and legal institutions affecting Indigenous peoples—both within and outside of their societies—conditions can be created in which they can revitalize and thereby pursue greater self-determination. This same sentiment has also contributed to recent scholarly and advocacy efforts to explore the role that international law might play in this process.

III. THE IMPACT OF EMERGENT INTERNATIONAL LAW GOVERNING THE RIGHTS OF INDIGENOUS PEOPLES

To the extent that Indigenous peoples within the United States are able to avoid auto-colonization and pursue a path of Indigenization, they will do so in a world that has become increasingly receptive to such an objective. Primarily, this is due to the political and legal developments since World War II that have had the effect of extinguishing state colonialism and encouraging both the greater interdependence of states and the protection of individual human rights.⁶³ While a strong argument can be made that colonialism still exists—particularly given the considerable influence over the rest of the world exercised by the historic colonial powers⁶⁴—such influence has not been sustained on the basis of formal colonial relationships that are structured to neutralize the self-determination of peoples in former colonies. One important side effect of these global developments has been that Indigenous peoples have been able to gain an audience on the world stage and push for the development of international law protecting their rights.

63. See *e.g.*, Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1961) ("Immediate steps shall be taken, in . . . Non-Self-Governing Territories . . . to transfer all powers to the peoples of those territories.").

64. See, *e.g.*, U.N. CHARTER art. 23, para. 1 (providing for five permanent members of the Security Council—China, France, the U.S.S.R. (now Russia), Great Britain, and the U.S.); *id.* art. 27, para. 3 (providing that permanent members have veto over Security Council decisions); *id.* art. 86, para. 1 (providing for the five permanent members of the Security Council as members of the Trusteeship Council).

A. Towards the Declaration on the Rights of Indigenous Peoples

Longstanding mistreatment by states has moved many Indigenous peoples and their advocates within the United States and throughout the globe to promote the development of international law governing the rights of Indigenous peoples.⁶⁵ They argue that since the United States—as well as other states with Indigenous populations—cannot be trusted to act honorably and lawfully in their dealings with the Indigenous nations, it is important to put pressure on these states in the international arena as a means of ensuring fair dealing and, ultimately, survival.

The efforts of these advocates have primarily focused on the United Nations and the development of a multilateral treaty defining the rights of Indigenous peoples.⁶⁶ The movement was spawned in the 1970s as the result of a intensified scholarly study of the rights of Indigenous peoples and the holding of international conferences such as the 1977 NGO Conference on Discrimination against Indigenous Populations in the Americas.⁶⁷ In response to advocacy from Indigenous groups, in 1982 the United Nations Economic and Social Council established a working group to develop a universal declaration on the rights of Indigenous populations.⁶⁸ This working group, which included experts and Indigenous peoples, eventually developed the Draft Declaration on the Rights of Indigenous Peoples in 1993.⁶⁹ In 1994, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities adopted the Draft Declaration as promulgated and sent it to the United Nations Commission on Human Rights for further consideration.⁷⁰ In 2000, the United Nations established a permanent committee on Indigenous peoples.⁷¹

Because of this movement, advocacy before the Human Rights Commission has intensified. Attention has also increased as states have become more focused on the Draft Declaration and its perceived threat to state territorial integrity.⁷² There is some uniform sense of urgency in moving the Draft Declaration forward as the General Assembly has called for its adoption prior to the end of the International Decade of the World's

65. For a description of the legal problems initially faced by the Indigenous Peoples movement, see Citizen Band Potawatomi Attorney Robert T. Coulter, *International Norms and Indigenous Peoples: The Contest Over Group Rights*, 94 AM. SOC'Y INT'L L. PROC. 314, 314-15 (2000).

66. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 98-104 (1998).

67. ANAYA, *supra* note 4, at 46.

68. Wiessner, *supra* note 66, at 101.

69. *Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations*, U.N. ESCOR, 45th Sess., at 50-52, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993).

70. U.N. ESCOR, 45th Sess., 35th mtg. at 2, U.N. Doc. E/CN.4/Sub.2/1993/SR.35 (1994).

71. *Resolutions and Decisions Adopted by the Economic and Social Council at its Substantive Session of 2000*, U.N. Doc. E/2000/INF/2/Add. 2 (2000).

72. See, e.g., Julian Burger, *The United Nations Draft Declaration on the Rights of Indigenous Peoples*, 9 ST. THOMAS L. REV. 209, 210 (1996).

Indigenous People in 2004.⁷³

The Declaration on the Rights of Indigenous Peoples, if adopted, will not be the first instrument in international law of relevance to Indigenous societies. Foremost, of course, is the United Nations Charter which emphasizes human rights and the right to self-determination possessed by all peoples.⁷⁴ These rights were set forth and codified under the 1948 Universal Declaration of Human Rights⁷⁵ and the 1966 Covenants on Economic, Social and Cultural Rights⁷⁶ and Civil and Political Rights.⁷⁷ In addition, there have been other international law instruments that have been developed over the years that have generally implicated the rights of Indigenous peoples, such as those prohibiting racial discrimination, genocide, and torture, and affirming rights of religious freedom and cultural heritage.⁷⁸

The problem with all of these instruments, however, is that there is no "specific protection of the distinctive cultural and group identity of indigenous peoples as well as the spatial and political dimension of that identity, their way of life."⁷⁹ One notable exception is Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries adopted by the International Labor Organization in 1989, which affirms the fundamental right of Indigenous peoples to make their own life and development choices.⁸⁰ As a general matter, however, existing international treaty law fails adequately to address the rights and status of Indigenous peoples.

Perhaps the most glaring deficiency in the existing international legal regime is the inadequacy in expressly recognizing and declaring that Indigenous peoples possess a right to self-determination. For example, while the United Nations Charter is explicit in its recognition of the right of all "peoples" to the right of self-determination, this protection does not extend to Indigenous peoples because they are only recognized as a "people" and not as "peoples."⁸¹ This seemingly semantic distinction—the so-called battle of the "s"—has been resisted by state participants in the process because of the potential significance of extending to Indigenous peoples the same rights as states, rights which would include the right of secession.⁸² This, not surprisingly, is not an outcome that has been readily embraced. Against the backdrop of the breakup of the Soviet Union and (re)emergence of new states in Eastern Europe, both Indigenous peoples

73. *Id.* at 211.

74. U.N. CHARTER, *supra* note 64, art. 1(2), (3), arts. 55, 56, 73.

75. G.A. Res. 217A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (III) (1948).

76. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Jan. 3, 1976, 999 U.N.T.S. 3, *reprinted in* 6 I.L.M. 360.

77. International Covenant on Civil and Political Rights, *opened for signature* Mar. 23, 1976, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368.

78. Wiessner, *supra* note 66, at 98.

79. *Id.* at 99.

80. Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (1989).

81. ANAYA, *supra* note 4, at 48-49.

82. Wiessner, *supra* note 66, at 116-20.

and states perceive this issue as critical.⁸³

Despite the challenges presented, the movement towards adoption of the Draft Declaration has continued. This movement has been so successful that some experts have concluded that the norms protecting the rights of Indigenous peoples have reached the status of customary international law.⁸⁴ Whether this is true or not, it appears that in the very near future, it is likely that there will be an international declaration on the rights of Indigenous peoples—either by the United Nations or the Organization of American States—that potentially will effect the lives of Indigenous peoples in the United States.

B. The Contours of the Draft Declaration

Not surprisingly, the Draft Declaration strongly supports the continued viability of Indigenous societies by acknowledging the inherent rights of Indigenous peoples to choose their own fate. It does so against the backdrop of these peoples having long been deprived of self-determination⁸⁵ because of discrimination directed against them, including the infliction of genocidal acts.⁸⁶ The most direct statement of this acknowledgment lies in Article 3, which provides that “Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and

83. A Report from the Working Group on the Draft Declaration highlights the concern of the state governments and the underlying tension associated with the battle of the “s”:

There is no consensus on the term “indigenous peoples” at the Working Group on the Draft Declaration (WGDD). Some states can accept the use of the term “indigenous peoples”. Some states can accept the use of the term “indigenous peoples” pending consideration of the issue in the context of discussions on the right of self-determination. Other states cannot accept the use of the term “indigenous peoples”, in part because of the implications this term may have in international law including with respect to self-determination and individual and collective rights. Some delegations have suggested other terms in the Declaration, such as “indigenous individuals”, “persons belonging to an indigenous group”, “indigenous populations” “individuals in community with others” or “persons belonging to indigenous peoples”. In addition, the terms used in individual articles may vary depending on the context. Some delegations have suggested that if the term “indigenous peoples” is used, we should also refer to Article 1.3 of ILO 169. Hence, the bracketed use of the term “indigenous peoples” in the draft Declaration is without prejudice to an eventual agreement on terminology.

Report of the Working Group on the Rights of Indigenous Peoples: Amendments Proposed by Governments For Future Discussion, 6th Sess., Nov. 20-Dec. 1, 2000, available at http://www.unhchr.ch/indigenous/wgdd_6nt.htm.

84. ANAYA, *supra* note 4, at 49-58.

85. Draft Declaration, *supra* note 69, pmbl. (“Concerned, that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests. . .”).

86. *Id.* art. 7 (“Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide. . .”).

cultural development.”

The theme of promoting self-determination is consistent throughout the Declaration and greatly shapes the content of the rights guaranteed. For example, Article 8 provides that “Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.” Moreover, Indigenous peoples have the right “to practise and revitalize their cultural traditions and customs,”⁸⁷ “to maintain and develop their political, economic and social systems”⁸⁸ and “to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters . . . which they have traditionally owned . . .”⁸⁹

Most of the Draft Declaration strongly supports the ability of Indigenous nations to pursue a Path of Indigenization. While the assumption is more implicit than explicit, the Draft Declaration is based upon an assessment that Indigenous societies are fragile and in danger of becoming extinct in the absence of legal protection.⁹⁰ To this extent, the Draft Declaration, if adopted, would serve as a prophylactic measure to prevent states from encroaching upon the special province of Indigenous autonomy. Ideally, the “space” created by this protection could then be utilized to assert and carry out particular expressions of national autonomy.

This is not to say, however, that the Draft Declaration does not also contain limits on rights of Indigenous self-determination. For example, the “right to autonomy or self-government” only extends to “matters relating to their internal and local affairs,”⁹¹ thus compromising the scope of the right of self-determination contained in Article 3.⁹² In addition, the right “to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices” is restricted to being in conformity with “internationally recognized human

87. *Id.* art. 12.

88. *Id.* art. 21.

89. *Id.* art. 25.

90. *See id.* pmbl. (“Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind. . .”).

91. *Id.* art. 31.

92. The actual scope of the right of self-determination contained in the Draft Declaration is controversial. Some view it as equal to the right possessed by states, including the right of secession. *See* Steven M. Tullberg, *Indigenous Peoples, Self-Determination and the Unfounded Fear of Secession*, in 1 INDIGENOUS AFF. 13 (1995) (“Although the vast majority of indigenous peoples are committed to creating a better future for themselves within the existing state framework, that should not blind us to the possibility that a small number of colonized and victimized indigenous peoples might meet the same test for full independence that is applied by international law to all other peoples.”). Others take a narrower view. *See* ANAYA, *supra* note 4, at 80-81 (“[W]hile the substantive elements of self-determination apply broadly to benefit all segments of humanity, self-determination applies more narrowly in its remedial aspect. . . the remedial regime developing in the context of indigenous peoples is not one that favors the formation of new states.”). For a discussion of the controversy, *see* MAIVÂN CLECH LÂM, *AT THE EDGE OF THE STATE: INDIGENOUS PEOPLES AND SELF-DETERMINATION* 51-63 (2000).

rights standards.”⁹³ Even with such limitations, however, the Draft Declaration promotes and preserves the right of Indigenous nations to pursue a Path of Indigenization.

The Draft Declaration also contains several provisions that conflict with the prior provisions sustaining the right of Indigenous peoples to pursue self-determination. Indeed, they appear to embrace just the opposite objective—the absorption of Indigenous peoples into the polity of the state that surrounds them. For example, the Draft Declaration provides that Indigenous children shall have the right “to all levels and forms of education in the State,”⁹⁴ and that Indigenous peoples generally shall “have the right to equal access to all forms of non-indigenous media.”⁹⁵ Moreover, it provides that “Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live,”⁹⁶ and thus that “[e]very Indigenous individual has the right to a nationality.”⁹⁷ Perhaps the clearest expression of this assimilating sentiment is Article 4, which provides that Indigenous peoples have the right “to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”⁹⁸

Viewed on the whole, then, the Draft Declaration is a document that strongly supports the right of Indigenous nations to embrace self-determination. At the same time, however, it carves out and preserves the ability of individual Indigenous people to assimilate into state society. So to what extent does the effort to accommodate the rights of Indigenous individuals neutralize the ability of an Indigenous people to exercise their right of self-determination?

C. The Impact of the Draft Declaration

In assessing the ultimate impact of the Draft Declaration, I will assume that it soon will be in effect, i.e., that it will be adopted by the United Nations General Assembly and ratified by the U.S. Senate. One natural outcome from such an assumption is that the rights provided for under the Draft Declaration could become judicially enforceable in an American court and thus be legally and practically meaningful. Even if this seems overly optimistic, however, given the pace at which the Draft Declaration, and especially the OAS Draft Declaration, are developing, it at least seems true that there will soon be in place some instrument of international law that sets forth aspirational norms regarding how Indigenous peoples should be treated. With this range of potential outcomes at stake, it is important to ask the ultimate question. Will the Draft Declaration on the Rights of Indigenous Peoples—when it becomes just a “Declaration”—actually

93. Draft Declaration, *supra* note 69, art. 33.

94. *Id.* art. 15.

95. *Id.* art. 17.

96. *Id.* art. 32.

97. *Id.* art. 5.

98. *Id.* art. 4.

accomplish its stated purpose of promoting the survival of distinct Indigenous societies?

The major obstacle to answering "yes" to this question results from the Draft Declaration's bipolar nature. It cannot credibly be denied that the Draft Declaration protects to some extent the right of an Indigenous person to assimilate and be absorbed into the lifeblood of the surrounding state. Indeed, the document is often expressly oxymoronic on this point, such as in Article 4, which protects the right of Indigenous peoples to "maintain and strengthen their distinct[ness]" while "retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State." At a basic level, this is confusing. Is the right to preserve or assimilate attributable to the "people" or to the individual? At minimum, the implication of such a provision is that the Draft Declaration preserves for an Indigenous *person* the right to have it both ways, to, if you will, "have your cake and eat it too." When it may be convenient or desirable to do so, he may choose to promote greater group autonomy; when it is not convenient or desirable to do so, he may choose a greater degree of assimilation into the state.

It certainly is possible that this may be the "right" answer—a normative state in which aggregations of particular Indigenous people can have maximum choice over which individual developmental path they wish to pursue. For those who wish to strengthen their collective right of self-determination and thus pursue a Path of Indigenization, the Draft Declaration apparently provides support for such an agenda. For those who wish to assimilate into state society and thus pursue a Path of Extinction, the Draft Declaration apparently provides support for that agenda as well. And for those who wish to pursue a compromised, hybrid path—i.e. to preserve both a degree of autonomy while obtaining some measure of incorporation—the structure of the Draft Declaration would seem to allow for the accomplishment of such an agenda perfectly.

What is problematic about embracing such a bifurcated policy approach is that it assumes a decision making matrix that does not fully factor in the context of colonization. It cannot be forgotten that the backdrop condition for Indigenous peoples is one in which the impact of colonization has precipitated a convergence of the Indigenous and Immigrant developmental paths toward the Path of Extinction. This looms as such a powerful force on the Indigenous nations that any attempt to remedy its aftereffects must completely offset and redirect the tremendous inertia associated with it.

The hybrid developmental approach envisioned by the Draft Declaration is unlikely to do that. Rather than serving to maximize the chance for enhancing collective autonomy, the Draft Declaration puts forth a hybrid approach that, at best, may generate no long-term effect on the Indigenous developmental path. Much like multiplying by zero, the Draft Declaration, as constituted, may have little impact on preventing the convergence of the Indigenous developmental path. To be sure, the ultimate result will be contextual in relation to the Indigenous people

affected. For those peoples who have virtually *no* recognition of collective rights by the state, the Draft Declaration could be an important contribution to shoring up the self-determination of such a people. But eventually, over time, any gains on the collective rights front for a people in such a state could very well be neutralized by the countervailing forces associated with other Indigenous people exercising *their* individual right to assimilate into the surrounding state.

Not only does embracing such an approach threaten to neutralize the Draft Declaration's ultimate effect of safeguarding the Indigenous nations, it could also have the practical effect of denying to those Indigenous people who seek to preserve an autonomous collective existence their right to pursue a Path of Indigenization. This might occur in at least two ways.

The first is the psychological and transformative effect associated with having the Path of Extinction presented in the Draft Declaration as a legitimate developmental option. As the text expressly includes several provisions that acknowledge the right of Indigenous peoples to assimilate into the surrounding state, those provisions dignify that outcome and mask the consequences of pursuing the Path of Extinction. In the absence of these pro-assimilation provisions, the Draft Declaration would encourage but one outcome—the promotion and strengthening of Indigenous nationhood. As it now stands, it embraces assimilation as a “lifestyle choice” driven by individual desire rather than as a potential death knell for the “Indigenous” component of Indigenous societies. This outcome, of course, wholly undermines one of the key justifications for developing the Draft Declaration in the first place, to ensure that Indigenous peoples exist to “contribute to the diversity and richness of civilizations and cultures.”⁹⁹ It also is greatly at odds with recent efforts to move international law relating to Indigenous peoples away from its mid-20th century assimilationist orientation.¹⁰⁰

The second and related assimilating impact is the Draft Declaration's potentially destructive effect of promoting within an Indigenous nation two competing developmental agendas and memorializing them within international treaty law. As was discussed above, colonialism was not a benign event, and many Indigenous peoples today have greatly assimilated the values and behaviors of the colonizing society. The lasting

99. Draft Declaration, *supra* note 69, pmbl.

100. Compare Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, International Labour Conference, 328 U.N.T.S. 247 (entered into force June 2, 1959), with I.L.M. Convention No. 169, *supra* note 80. Convention No. 107 was obviously assimilationist in design. Article 2 provided that “[g]overnments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.” Article 3 provided that “[c]are shall be taken to ensure that such special measures of protection (a) are not used as a means of creating or prolonging a state of segregation, and (b) will be continued only so long as there is need for special protection and only to the extent that such protection is necessary.” See also ANAYA, *supra* note 4, at 44-45 (arguing that the thrust of the Convention does not envision a long-term place for robust cultural and associational patterns of indigenous groups).

effect of this transformation is the creation of culturally plural Indigenous societies¹⁰¹ in which their members are frequently at odds with one another, in some cases so intensely as to precipitate the outbreak of civil war.¹⁰² This diversity, of course, is not necessarily a new phenomenon, as there has always been intermingling with other peoples within Indigenous societies. What is new about this tension is the extent to which it is exacerbated by contemporary pressures, ranging from the pursuit of great wealth through casino development to the increasing debate over who is even a citizen given the declining blood quantum within most tribes.¹⁰³

Against the backdrop of this boiling cauldron of destructive pressures, the Draft Declaration runs the risk of fueling these underlying tensions. By embracing competing developmental paths—autonomy and assimilation—the document does not simply preserve for Indigenous peoples a choice regarding which developmental path to pursue. Instead, the Draft Declaration is all things to all people within the society. It supports the position embraced by individual members of each of the competing factions within any particular Indigenous society that *their* preferred developmental path is the “right” one. This, after all, must be true. Why would international law embrace and promote the pursuit of an incorrect or illegitimate developmental path?

How might this conflict spawn? The ability to disguise one’s arguments for greater assimilation into state society as the promotion of an international Indigenous rights agenda is a blessing that could very well contribute to greater factionalism and division within Indigenous societies. Yes, in rare instances, it may be the case that colonization has precipitated relatively minimal effect on a particular Indigenous society and thus there is little to no risk that a pro-assimilation faction could be empowered. However, in almost all Indigenous societies today there will be individuals who seek greater incorporation into the surrounding state and who eventually will draw upon the rights set forth in the Draft Declaration as support for their agenda. In this sense, the Draft Declaration has the overall potential effect of protecting Indigenous nations from state efforts to weaken them while at the same time enhancing the likelihood that those nations will eventually self-destruct.

D. Reconciling Indigenous Group Rights and Human Rights.

Despite its inherent contradictions, the Draft Declaration reflects an admirable effort to accommodate both the group rights of Indigenous nations and the individual human rights of Indigenous people. To be sure, attempting such reconciliation is an extremely difficult conceptual and practical problem. Indigenous nations, like states, run the risk that in the

101. See Gould, *supra* note 30, at 769 (“The new condition facing tribes is multiracialism.”).

102. See Porter, *supra* note 46, at 274-96 (analyzing the effects on tribal sovereignty when Indians resolve disputes like Americans and discussing the Seneca Civil War).

103. Gould, *supra* note 30, at 764-65.

course of pursuing their developmental agendas, they will—from the perspective of their citizens as well as outside observers—abuse the rights of their own people. For example, “abuses” designed to protect culture could include anything from the shocking—such as in the case of female circumcision—to the sublime—such as in the case of requiring Indigenous children to learn their own language. In either case, it can be alleged that this demand from the collective is abusive action inflicted on Indigenous individuals by the Indigenous state in the furtherance of its self-determination.

If the purpose of human rights law is to protect individuals from abuses by the state, why establish a new paradigm in which Indigenous “states” are protected in their rights of self-determination at the same time that Indigenous individuals residing in such “states” are protected against abuses that might result from the exercise of such collective rights?

The Draft Declaration was structured to address this quandary in Solomonic fashion, incorporating language to protect both group and individual rights. Article 8 clearly highlights this tension as it provides that “Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.” This provision sounds strongly supportive of self-determination. However, preserving an “individual right to maintain and develop their distinct identities and characteristics” could also include the individual choice to take on the identity and characteristics of a state citizen in order to effectuate her full or partial assimilation into state society.

In embracing this quixotic policy approach, the Draft Declaration anticipates a normative state of affairs that is surprisingly analogous to the policy approach for dealing with Indigenous peoples that has long been embraced by the United States. This policy is foremost predicated upon the acknowledgment that Indigenous nations possess a limited form of aboriginal sovereignty and that individual Indigenous people are citizens of the United States. In effect for nearly 200 years, it is worth exploring briefly the foundations of this policy formulation for insight into how Indigenous peoples throughout the world might be treated should the Draft Declaration come into effect.

During the early years of the relationship between the Indigenous and colonizing peoples of America, the colonists acknowledged Indigenous nation sovereignty and utilized it for their own strategic ends. Often denying the legal and political character of the Indigenous nations on the basis of a self-perceived cultural superiority,¹⁰⁴ their behavior belied this

104. Arguing in favor of the Albany Plan of Union in 1754, Benjamin Franklin remarked with respect to the Confederacy established by the *Haudenosaunee*:

It would be a strange thing . . . if Six Nations of ignorant savages should be capable of forming such a union and be able to execute it in such a manner that it has subsisted ages and appears indissoluble, and yet that a like union should be impractical for ten or a dozen English colonies, to whom it is more necessary and must be more advantageous, and who cannot be supposed to want an equal understanding of their interest.

assessment. The most obvious expression of this fact was that they entered into a significant number of treaties and agreements with the Indian nations and acknowledged them as nations under American law.¹⁰⁵

Despite the clarity of this foundational conception, the United States over the years altered its view of Indigenous nation sovereignty. John Marshall himself put forth a much more limited view when he wrote for the Court in *Cherokee Nation v. Georgia* that the Cherokee Nation did not constitute a foreign state capable of maintaining international relations, but was instead a "domestic dependent nation" within the United States.¹⁰⁶ Exploiting the provision contained in nearly all of the early Indian treaties that the Cherokee Nation was under the "protection" of the United States, Marshall concluded that the Indian nations were in a "state of pupillage" and in a relationship to the United States that resembled that of "a ward to his guardian."¹⁰⁷

Even though Marshall later sought to minimize the harshness of this assessment,¹⁰⁸ his formulation—that the Indian nations are, in effect, "sovereign wards"—has "shaped the development of American law dealing with Indigenous peoples to the present day. In 1871, for example, Congress further undermined the conception of the Indian nations as full sovereigns when it unilaterally ended its policy of interacting with them by treaty. In 1886, the Court upheld the authority of Congress to interfere in the internal affairs of the Indian nations despite the lack of constitutional authority to do so.¹⁰⁹ And in 1903, the Court determined that treaties with the Indian nations could be abrogated merely by legislative enactment

The Writings of Benjamin Franklin, vol. III, 42 (Albert H. Smythe ed., 1905-1907)

105. In *Worcester v. Georgia*, Chief Justice John Marshall concluded for the Court, "The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The Constitution, by declaring treaties already made . . . to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation,' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same sense."

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832).

106. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

107. *Id.*

108. Marshall sought to soften his conclusion in *Cherokee Nation* when he wrote in *Worcester* that:

the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.

31 U.S. at 560-61

109. See *United States v. Kagama*, 118 U.S. 375, 383 (1886) (upholding the Indian Major Crimes Act because "[i]t seems to us within the competency of Congress . . . [f]rom their very weakness and helplessness . . . there arises the duty of protection, and with it the power").

because Congress possessed "plenary power" over the Indian nations.¹¹⁰

On the basis of these developments, then, the United States acknowledges a limited degree of Indigenous national autonomy, rooted in a sovereignty that predates its formation as a state. It views Indigenous peoples as subservient wards needing special protection of their rights to autonomy, and in so doing spends billions of dollars and sustains a considerable body of law defending and defining the scope of that autonomy and status separate from that possessed by mere ethnic or racial minorities.¹¹¹

At the same time, however, American law also recognizes Indigenous peoples as citizens of the United States. While the effort to promote the assimilation of Indigenous peoples goes back to the founding of the American Republic, it was not until the late 19th century that serious consideration was given to conferring American citizenship upon the Indians. Eventually, the assimilationist policies of the government—manifested by the General Allotment Act—precipitated efforts to confer citizenship on the Indians. Through the land allotment process, military service, and administrative naturalization proceedings, about two-thirds of all Indians were granted American citizenship over a 50 year period. In 1924, the Indian Citizenship Act was passed. It conferred American citizenship upon all Indians regardless of their desire or consent.¹¹²

In sum, then, Indigenous peoples within the United States are recognized as being citizens of their own nations, citizens of the United States, and wards of the American government.¹¹³ Accordingly, Indians are free to vote, hold American political office, and live wherever they want to in the United States. To the extent that they live within an Indigenous territory, they may also be subject to a variety of additional benefits and burdens. Most significantly, they are subject to the authority of both their Indigenous nation government and the Bureau of Indian Affairs, the American government's administrative agency for regulating Indians and Indian territory. Should the burdens of Indigenous citizenship become too great, or the benefits become too attenuated, Indians have the free choice of formally relinquishing their Indigenous citizenship or, in effect, "suspending" their status by simply leaving their Indigenous homeland for life as an American citizen.

This structure allows Indigenous people in the United States

110. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.").

111. See *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974) ("The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature.").

112. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b) 1999).

113. Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 128-39 (1999).

considerable freedom to choose how they wish to interact with and be recognized by their own Indigenous nation as well as by the United States. The Draft Declaration reflects a similar vision. Its provisions supporting both the right of self-determination and the right "to participate fully . . . in the political, economic, social and cultural life of the State" parallel precisely the dichotomy present in American law: Indigenous peoples are both citizens of their own nations and citizens of the United States. Indeed, even the degrading concept of state trusteeship of Indigenous peoples—reflected in such notions as "domestic dependent nationhood" and the "guardian-ward relationship"—is embodied in the Draft Declaration. While there are many provisions that reflect this sentiment,¹¹⁴ the need for the Draft Declaration itself is a reflection of the view that Indigenous peoples cannot sustain themselves without protection from superior powers.

In light of this assessment, one might simply ask, "so what, who cares?" If Indigenous peoples, long victimized and mistreated by colonizing peoples, can find a way to move the international community to the establishment of legal standards that allow them to choose whatever developmental path they want—including assimilation—then why shouldn't they be allowed the right to do so? They, as much as any other peoples in the world, should have the right to live the "good life," however they wish to define it.

This is especially true given the variety of circumstances that Indigenous peoples find themselves in. The situation of Indigenous peoples in the United States is certainly the exception rather than the general rule throughout the world. As a matter of law, the United States recognizes both collective rights of sovereignty and individual rights of citizenship. This is not the case in most nation-states of the world, where either or both categories of rights are denied. An example is Brazil, which denies Indigenous peoples within its borders *both* collective and individual rights.¹¹⁵

Undoubtedly, it is with this reality in mind that the Draft Declaration is formulated. Against the backdrop of the very strongly worded provisions contained within it that support the right of Indigenous societies to preserve and strengthen an existence separate from that of the surrounding state, the provisions protecting the ability of individual Indigenous people to assimilate seem wildly out of place. Sure, it could be the case that the Draft Declaration is designed to accommodate all manifestations of the

114. See, e.g., Draft Declaration, *supra* note 69, art. 6 ("Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence . . ."); *id.* art. 38 ("Indigenous peoples have the right to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration.").

115. See Wiessner, *supra* note 66, at 74-75 ("In Brazil, Indians do not enjoy any 'inherent right' of 'self-government.' They are considered to be 'relatively incapacitated,' legally minor under the guardianship of the Brazilian state, and subject to a special regime of tutelage.").

right to self-determination, including the ability to exercise such right in furtherance of greater assimilation into state society. Given the fact that the Draft Declaration was developed with the significant involvement of Indigenous peoples from throughout the world, it could easily be concluded that these assimilative provisions might even reflect the desire of *some* Indigenous peoples to exercise their collective right of self-determination towards the objective of obtaining individual rights as state citizens.

However, assuming that this motivation is embraced by only a few peoples, the most plausible explanation for the pro-assimilation provisions of the Draft Declaration is the desire to protect the basic human rights of Indigenous peoples from rampant discrimination by states and their citizens.¹¹⁶ Preventing Indigenous peoples from partaking in the basic opportunities available to state citizens generally has helped to ensure that in most states in the world the population of Indigenous peoples constitute the underclass. Allowing individual Indigenous people the choice whether they will or will not assimilate into state society thus makes sense as part of a broader effort incorporated in the Draft Declaration to end discriminatory treatment against Indigenous peoples, wherever it may lie.¹¹⁷

This, it seems to me, is the central core of the problem embodied by the Draft Declaration. In the course of affirming the *collective* right of Indigenous peoples to self-determination, the Draft Declaration also seeks to promote the *human* right to be free from discrimination by the state and its citizens.¹¹⁸ But how can this be? If, as the United Nations Charter suggests, all peoples have the right of self-determination, does this right not include the right to discriminate, i.e. to draw distinctions, against other peoples? The Draft Declaration, then, anticipates a normative condition in which Indigenous peoples are free to take whatever action they so desire in

116. See Draft Declaration, *supra* note 69, art. 1 ("Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.").

117. See *id.* pmbl. ("Reaffirming also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind. . . . Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring an end to all forms of discrimination and oppression wherever they occur"); *id.* art. 2 (Indigenous peoples "[h]ave the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin and identity."); *id.* art. 9 ("Indigenous peoples and individuals have the right to belong to an Indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right."); *id.* art. 16 ("States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society."); *id.* art. 18 ("Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, employment or salary."); *id.* art. 24 (Indigenous peoples shall "also have the right to access, without any discrimination, to all medical institutions, health services and medical care.").

118. See *id.* pmbl. ("Reaffirming also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind").

furtherance of their right of self-determination, and the rest of the states and peoples of the world are denied their right to take any responsive action in return.

Aside from being impractical and beyond the capacity of human beings, such a state of affairs may ultimately be unhelpful for the preservation of distinct Indigenous societies. While it may seem counterintuitive, even bizarre, all peoples, not just Indigenous peoples, require a certain degree of discrimination from others to ensure their survival as a distinct group. "Discrimination" in this sense is not defined as the process by which a state may for illegitimate or immoral purposes single out a person or people for special adverse treatment. Instead, discrimination as used here is of the little "d" variety and refers only to the process by which humans draw distinctions from one another on the basis of real or perceived differences from one's self.¹¹⁹ Yes, it is very difficult to legislate a precise definition here. Drawing distinctions amongst people can easily spin into adverse situations, especially where there is an imbalance of power and impure motives among those drawing the distinction. But at a basic human level, all people discriminate against all other people. Until all peoples of the world are the same—the same color, the same culture, the same identity—this type of discrimination will occur. What kind of action one takes on the basis of such discrimination is an entirely different matter.

Discrimination, then, helps to preserve the distinctness of Indigenous societies because it is an important means of defining and ensuring boundaries with other peoples.¹²⁰ Without discrimination by the surrounding state and its citizens, Indigenous peoples could easily come to be viewed by them as integrated components of state society. Individual Indigenous people could eventually come to be viewed as citizens of the state and Indigenous nations could come to be viewed, if at all, as simply units of local or provincial government under the overriding authority of the state. If there is no basis upon which to distinguish Indigenous people from anyone else in the surrounding state society—on physical, cultural,

119. While not phrased as such, social scientists refer to this type of treatment of individuals in the context of how groups are identified and boundaries between groups are drawn. See generally Linda A. Jackson et al., *Achieving Positive Social Identity: Social Mobility, Social Creativity, and Permeability of Group Boundaries*, 70 J. PERSONALITY & SOC. PSYCHOL. 241 (1996). The accepted social identity theory is that impermeable group boundaries promote movement towards a "negatively distinctive in-group" and that permeable boundaries promote "social mobility strategies" away from such a group. *Id.* at 252. This assertion has been challenged, however, because "an individual may be less, rather than more, motivated to distance him or herself from the in-group (i.e., engage in social mobility strategies) because temporary membership in a negatively distinctive group is less threatening to social identity than permanent membership." *Id.* Regardless of the ultimate effect, the fundamental assumption seems well established that individuals draw distinctions from one another.

120. Such a descriptor is consistent with that used by cultural anthropologists. See FREDRIC BARTH, *ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION OF CULTURAL DIFFERENCE* 15 (1969) ("Entailed in ethnic boundary maintenance are also situations of social contact between persons of different cultures: ethnic groups only persist as significant units if they imply marked difference in behaviour, i.e. persisting cultural differences.").

and political grounds—then the Path of Extinction will have reached its logical conclusion. The argument here is foremost predicated on the numbers. Like a drop of brown paint in a bucket of white, Indigenous societies are too small to be able to sustain themselves in a world in which they are not viewed by others as different peoples and treated accordingly.

In acknowledging the utility of this type of discrimination, I am suggesting that Indigenous nations clearly run the risk of mistreatment by the state and its citizens. Such a risk is an inevitable consequence of sustaining a distinct collective existence. Certainly, where a considerable imbalance of power exists, or where discrimination is driven by an illicit purpose, Indigenous societies run a heightened risk of being completely annihilated by virulent discriminatory state practices. Nevertheless, in instances in which Indigenous nations are not powerless, or where international law may be sufficiently prophylactic, it still will be the case that the surrounding state and its citizens may take adverse action to resist assertions of Indigenous self-determination.

Conflict of this sort with the surrounding state is not just a good thing; it is the life-blood of survival. Without the struggle to survive, no individual or society can regenerate and innovate in ways that will allow for a sustained existence. While this sounds a bit like natural selection, the inescapable fact is that beings completely insulated from natural competitive environments will eventually wither and die. For Indigenous peoples, this reality demands that they not be removed from the real-world conflict in which all peoples struggle against one another to survive. Discrimination proportionate to one's assertion of self-determination ultimately aids such assertion because it forms the barrier against which the force of self-determination is applied.

Indigenous peoples in the United States have historically been singled out for isolation from the general population in the hopes of protecting them. Given the obvious threats to Indigenous existence posed by the Immigrant society, it is easy to see how sound-thinking and good-hearted people could have come up with such a solution. But creating a zoo-like environment for Indigenous peoples, in which there is no discrimination or consequence associated with assertions of sovereignty, is a prescription for a sterile, dependent existence in which these societies will inevitably die off. The problem in the United States is not that the Indigenous nations are too weak (although some clearly are), it is that the American government continues to suppress the inherent authority of these nations to assert their power in a manner that can promote genuine self-sufficiency. Having caused this weakness, the United States then seeks to cure the problem with another form of oppression, the Trust Responsibility. When all is said and done, the Indigenous nations have been left weaker and less able to promote any vision for their future that is in conflict with what America has in store for them.

It need not be this way for Indigenous peoples throughout the world. Given the long history of colonization-induced destruction, most Indigenous societies *are* in need of a kind of temporary "receivership" in

which space, time, and resources are made available to allow for such rejuvenation and redevelopment. However, this should not occur on the basis of a normative vision that anticipates the removal of Indigenous peoples from the natural world. Like any creature damaged by man and not condemned to a zoo, a healing process must occur with the end objective being full integration into the natural—albeit dangerous—real world.

This is the critical role to be played by international law, to create the space necessary for Indigenous revitalization. I am skeptical, though, that the bifurcated policy approach embraced by the Draft Declaration—in which one hand takes away what the other has given—is over time likely to make any significant contribution to promoting a Path of Indigenization. Indeed, I worry that the Draft Declaration in its current form could very well undermine it. Given the choice that the Draft Declaration offers to pursue a greater connectedness with the surrounding state, many Indigenous individuals will jump at the chance to do so given the illusion that is created by the state for a “better life.” Yes, this outcome would surely be consistent with notions of collective and individual self-determination. As is the case with the Indian nations in the United States that have so dramatically sought greater integration with the American economic and political system, however, such efforts may “succeed” in an unintended way. Rather than waking up one morning and realizing that they have re-emerged as a vibrant, newly distinct Indigenous society, it may be the case that there is no way to tell where the Indigenous society ends and the colonizing society begins.

IV. INDIGENIZATION IN PRACTICE

This Article has sought to improve the quality and utility of policy analysis relating to Indigenous nations by putting forth a methodology that refocuses such efforts on the pursuit of Indigenization. In doing so, I have given primary attention to explaining why Indigenization is the most meaningful policy objective and what barriers lie in the path of its pursuit. I have also sought to assess the viability of Indigenization efforts against the backdrop of the emergent international law governing the rights of Indigenous peoples. What I have not done, however, is set forth any ideas for how a particular Indigenous nation might actually go about pursuing a Path of Indigenization. As a general matter, I believe that each nation must determine by itself how Indigenization is best achieved, given its particular situation. In the spirit of encouraging such efforts, however, I offer the following preliminary observations as to how this process might begin to take place.

It is first necessary to put into proper perspective the scope of the Indigenization process that I am recommending. Perhaps the most instinctive reaction to any argument that the Indigenous nations should pursue greater Indigenization is that such an idea is romantic, reactionary,

impractical or, as Jeremy Waldron has suggested, artificial.¹²¹ Thus, one could categorize this call for Indigenization as just another variation of the time honored panacea of trying to solve contemporary problems by simply recreating some vision of the past. Given the destruction and misery that have been inflicted on Indigenous peoples to date, many Indians and non-Indians have long been lured by the possibility of returning to the "perfect" past. To be clear, I do not believe that this is possible. Indigenous peoples living today—while connected to their ancestors in varying ways—obviously are not the same peoples who lived in the "old days." Life has changed greatly for Indigenous peoples, and it will continue to do so, regardless of whether colonization ends or not. It is not reasonable to expect that these ancient ways would be entirely workable in the world that now exists.

Even if pursuing greater Indigenization is not perceived as reactionary or fanciful, a thoughtful critic could surely conclude nonetheless that Indigenization is an impractical pursuit because it ultimately seeks to counter the tremendous forces of transformative global change that is now a part of the modern world.¹²² Our world today is evolving towards greater, not less, interconnectedness and thus, greater, and not lesser, political, economic, and cultural assimilation. The removal of trade barriers, the expansion of the Internet, and the increased flow of goods, services and ideas that it represents are making it easier, not harder, for cultural and social lines to blur and for peoples to interact. Whatever forces have historically supported the assimilation of Indigenous peoples into state society are—even aside from the underlying colonialist motivations—simply going to intensify in the future. In the face of these forces of change, it is easy to see that Indigenization is at odds with globalization. Given the imbalance of power supporting these forces, a betting person would have to conclude that David had a better chance of beating Goliath than Indigenous peoples do at resisting the future path of

121. Waldron, *supra* note 2, at 109-10 ("In general, there is something artificial about a commitment to *preserve* minority cultures. Cultures live and grow, change and sometimes wither away; they amalgamate with other cultures, or they adapt themselves to geographical or demographic necessity. To *preserve* a culture is often to take a favored "'snapshot'" of it, and insist that this version must persist at all costs, in its defined purity, irrespective of the surrounding social, economic, and political circumstances.").

122. Again, Waldron is helpful here in making this point:

But the *stasis* envisaged by [preserving a culture] is seldom itself a feature of the society in question, or if it is, it is itself a circumstantial feature. A society may have remained static for centuries precisely because it did not come into contact with the influence from which now people are proposing to protect it. If stasis is not an inherent feature, it may be important to consider, as part of *that very culture*, the ability it has to adapt to changes in circumstances. To preserve or protect it, or some favored version of it, artificially, in the face of that change, is precisely to cripple the mechanisms of adaptation and compromise (from warfare to commerce to amalgamation) with which all societies confront the outside world. It is to preserve part of the culture, but now what many would regard as its most fascination feature: its ability to generate a *history*.

Id. at 110.

global economic-social-political-cultural development.

To address this criticism and to offer at least a modicum of optimism, it is not my view that pursuing a Path of Indigenization is a romantic or impractical venture designed to simply unwind the painful past and "go back" to a happier time. Rather, Indigenization is an affirmative remedial process to the ills of colonization that seeks to recreate a new future by drawing upon the wisdom of the past. Critics like Waldron rightly stress that the "most fascinating feature" of a minority culture is not the culture itself, but "its ability to generate a history." Such a critique, however, fails to incorporate the fact that colonization is not just your garden variety type of social change. It is a transformative force of nuclear intensity that strips the colonized people of their ability to generate their own history.

As a conceptual matter, I do not believe that what I am proposing here to promote Indigenous survival is very much different from the process that individuals engage in when dealing with ordinary day-to-day problems. We all seek out information, either from reading the newspapers, surfing the Internet, or consulting with our friends for advice. While deciding whether you should go on a diet because your cholesterol is too high, or whether you are saving enough to be able to buy a new car, or whether you should be worried because your kid has just gotten a nose ring, may be the kinds of mundane dilemmas of life that are not as profound as whether an Indigenous society will survive or not, they are simple examples of how individuals confront problems in their life and try to go about remedying them. I believe that no different a process should be adopted by Indigenous peoples seeking to preserve and improve upon their own lives.

As a practical matter, then, can a Path of Indigenization be pursued? The nature of the colonization process suggests that there are two potential paths towards greater Indigenization. First, the colonizing nation could decide to reverse its colonizing agenda and direct its full power and resources to the preservation of Indigenous societies. As an example of this approach, the United States could build new boarding schools where Indigenous children taken from their parents are forced to learn their language and culture at the whole or partial expense of learning the English language and American culture. Much like the boarding school phenomenon of the nineteenth and early twentieth centuries, after some period of time, these schools would inevitably produce a new and resurgent strain of "Indigenous" person, however that might be defined by the colonizing nation.

Despite the likelihood of such a strategy succeeding, it certainly would not occur, at least not in the near future.¹²³ There would be strong resistance from both within and outside of Indigenous societies to any effort to "undo" the myriad of aftereffects of colonization through the simple process of "reversing" the original destructive process. Moreover,

123. Given the recent efforts to map the human genome, and the desire to harvest the DNA of Indigenous peoples, who is to say what might be cooked up in the social engineering laboratories of the future.

in the case of the United States, perhaps the most significant reason why it would never take such concerted and meaningful action to redevelop strong, viable Indigenous nations is that it is anathema to the American credo to do so. The essence of being American is to possess the capacity to regenerate and grow stronger through the continuous assimilation of anything that can promote growth and strength. Expecting America to reverse its colonizing ways is akin to believing that a fox will stop eating chickens. It is simply against its nature and thus will never happen.

The alternative and potentially viable approach to achieving the Path of Indigenization is for Indigenous peoples themselves to take this action. This is not, foremost, an abstract recommendation for corrective action by Indigenous peoples as “peoples.” Such a recommendation begs the question of how, exactly, such corrective action begins to take place. My recommendation takes the form of a specific call to Indigenous individuals as individuals, on behalf of themselves and their nations, to pursue the Path of Indigenization.¹²⁴ Colonization has had a tremendously destructive effect on Indigenous societies because it has “morphed” Indigenous individuals into members of the colonizing society. Restoring the proper path of Indigenous development thus requires that individual Indigenous peoples be recaptured and refocused so that they can dedicate their life energies towards the survival of their Indigenous societies. Only then can an Indigenous nation—the aggregation of its individuals—be revitalized and be able to achieve its full measure of self-determination.

In short, then, individual Indigenous people are the catalysts necessary to achieving the Path of Indigenization. The starting point in such a process must be an acceptance by Indigenous individuals of a set of principles that can serve as a personal guide that leads towards the Path of Indigenization. Such principles might look like the following:

Indigenization Principles

We must *break* the Path of Extinction by confronting the reality that we are to some, if not a complete, extent colonized and socially engineered beings.

We must *understand* how our nation, tribe, village, clan, family, and self have been transformed by gathering information from all sources about our collective and personal experiences with colonization.

We must *believe* that we can change our present circumstances.

We must *dedicate* our lives towards the pursuit of a distinct Indigenous existence for ourselves, our family, our clan, our village, our tribe, and our nation.

124. See also ALFRED, *supra* note 7, at 80 (“The process of decolonization is personal as well as public.”).

We must *convince* others in our society that pursuing a Path of Indigenization is necessary for us to preserve and strengthen our nationhood.

We must *develop* the unique contours of the Path of Indigenization for our nation.

We must *act* to pursue our own unique Path of Indigenization.

Confronting a problem, gathering information about it, believing that a solution can be devised, dedicating oneself to finding the solution, convincing others to do so as well, developing the solution, and taking action to bring it about is the same, simple process that humans have always engaged in to preserve and improve upon their lives.¹²⁵ No less should be engaged in by Indigenous peoples who seek to preserve and strengthen their own societies.

Outlining a process by which Indigenization might occur reveals that outcomes will be unique for any particular Indigenous society. Perhaps one of the most significant factors in shaping a particular outcome will be the willingness of the heavily colonized Indigenous people—the truly co-opted—to accept the guideline principles set forth above. Even if one can accept that she and her ancestry have long been objects of social engineering, it might be hard for her to move beyond the assorted distractions, distortions, and temptations that are associated with being colonized by and living within the colonizing society.¹²⁶ Taiaiake Alfred explains why this is so:

However wrong, colonialism is a familiar reality that provides a certain security for some people. The final steps to decolonization can be truly frightening as Native people are jarred from that familiar reality and forced into a new one—even if it is of their own making. The post-colonial reality is fearsome in its demands, responsibilities, and burdens. There is no one else to turn to except

125. It might be noticed that these Indigenization principles were inspired by the “12 Steps” plan of Alcoholics Anonymous. See Alcoholics Anonymous Homepage, http://www.alcoholics-anonymous.org/english/E_FactFile/M-24_d6.html (last visited Nov. 29, 2001). Indeed, in both a figurative and sometimes literal sense, the crisis afflicting Indigenous peoples is much like alcoholism. Colonialism, like alcoholism, has the effect of blinding one’s self to reality and inducing a variety of self-destructive behaviors. Finding a remedy to this downward spiral is foremost a matter of personal, as opposed to collective, responsibility.

126. For example, for an individual who has become so acculturated as to blindly accept the superiority of Western medicine, it might be very hard to accept the viability of traditional medicinal plant knowledge. Or, for one who has achieved a significant degree of economic success, it might be hard to accept that happiness can be achieved by embracing elements of a traditional subsistence lifestyle. Or, for one who takes great pride in being an American, it might be very difficult to forgo self-identification as an American citizen in favor of a primary affiliation with one’s own Indigenous nation.

ourselves. There is no one else to blame.¹²⁷

Co-opted Indigenous people will thus temper and restrain any effort taken by the more dedicated adherents to the Path of Indigenization in any particular Indigenous society. In some cases—such as where these individuals control the government and all of the resources within a particular society—they may even be able to prevent any remedial change from occurring. In others, where power and resources are more equally distributed across the society, they may have less ability to stop necessary changes from occurring. So long as reason, rather than violence, is the primary means of advocacy, forward progress should result.

In most cases, this rational interplay of competing perspectives will most likely result in a compromised Path of Indigenization. This path, while not as satisfying to some, eventually has the potential for influencing all aspects of a particular Indigenous society. If, for example, the pursuit of the Path of Indigenization evolves—as it should—into the resumption of control over education and the establishment of a school where language and culture can be taught, there is the strong possibility that action of this sort will spread the philosophy of the Indigenization process across many individuals and families who at the present time may have less of a conscious commitment to it. In this sense, even though the Path of Indigenization might be compromised, it could also be Enhanced.

This approach is not as unfair or deceptive as it might sound. Rather, it reflects the natural process by which individuals in a society exercise influence over each other and their future generations. Unlike the colonial process—where consultation by the colonizer with the colonized is not the norm—the compromised Path of Indigenization encourages the free and fair participation by all of those members of the Indigenous society who are interested in a collective future regardless of the degree to which they themselves might be willing (or even unwilling) promoters of assimilation into the colonizing society.

While the pursuit of Indigenization is fundamentally an internal process, those promoting the Draft Declaration and other emergent law governing the rights of Indigenous peoples can play an important role in this process. As has been discussed above, current developments are at cross purposes. While it may be the case that the end point for any Indigenous society is to exist in accord with some compromised Path of Indigenization, international law applying to Indigenous peoples should not seek this outcome as a policy objective. Colonization, globalization, integration, and assimilation are powerful, unchained forces that will have a transformative effect on Indigenous societies regardless of any effort that might be taken to stop them. In the face of such a formidable obstacle, adherents of international law protections for Indigenous peoples should instead be focused exclusively on the challenge of creating sufficient space for Indigenous societies to pursue self-determination. Instruments such as

127. ALFRED, *supra* note 7, at 80-81.

the Draft Declaration thus should not include provisions designed to promote the assimilation of Indigenous individuals into the surrounding state. Instead, they should unequivocally express support for the collective right of self-determination. In the event that these revitalized Indigenous nations emerge as violators of human rights, such a problem can be addressed in the future. As Indigenous nations come to be acknowledged more like states under international law, it would be both appropriate and fair that they be subject to the same international human rights law and its attendant enforcement mechanisms. Until they are able to reassume a greater measure of self-determination, however, it is premature and impractical to impose such strictures.

CONCLUSION

This article is written at a time when Indigenous peoples in the United States find themselves in the midst of a variety of potentially revitalizing phenomena. Economic prosperity, while still avoiding most Indigenous nations, has found some. Indigenous advocacy efforts, at both domestic, state, and international levels, have intensified. American policies towards Indigenous peoples, at least formally, encourage greater self-determination. And international law is increasingly moving in a direction that favors protection and support for Indigenous peoples' rights. The main problem that remains is to what end these revitalizing phenomena should be directed.

I have argued that Indigenous peoples should be singularly focused on pursuing a Path of Indigenization. Only by self-consciously resisting the accumulated effects of several hundred years of colonization and refocusing development efforts toward new visions of post-colonial Indigenous societies is there a realistic chance that Indigenous peoples will survive. This argument is fundamentally rooted in the assessment that all Indigenous societies can become extinct and that purely external influences will be insufficient to keep this from occurring. While I realize that this gloomy future has long been foretold—by both Indigenous and Immigrant soothsayers—the evidence continues to mount that the “Indigeness” associated with being an Indigenous people is being depleted.

As a result of this assessment, considerable attention has been given in this article to the barriers that lie in the Path of Indigenization. Doing so has been necessary in order to fully appreciate the magnitude of the problems faced by Indigenous peoples in the United States in the struggle for self-determination. To be sure, the problems facing Indigenous peoples in America are not necessarily going to affect Indigenous peoples throughout the world in exactly the same way. But in some respects, the United States—by virtue of the power and assimilating nature of its culture—sets a new standard of virulence that threatens the future of all of the Indigenous societies that lie within it. From the American colonial experience, then, Indigenous peoples throughout the world and the states that surround them can perhaps gain new insight into how best to manage

their relations in the future.

Because of the increased attention being given to Indigenous rights in the international arena, I have also sought in this paper to assess the impact of such developments on Indigenous peoples in the United States. At both an intellectual and practical level, the quandary presented to state regimes by the question of the right of Indigenous self-determination is profound and far-reaching. Unlike the challenge once presented by human rights law, and even the challenge associated with efforts to accommodate minority rights, the claims of Indigenous peoples—the first peoples of the land—raise difficult questions regarding the legal and moral obligations of states to remedy their colonizing practices.

It is for this reason that I am concerned that the efforts to develop international law governing the rights of Indigenous peoples may be a shot too far below the mark to produce any meaningful outcome. The compromised nature of the Draft Declaration on the Rights of Indigenous Peoples—promoting both the collective right of self-determination as well as the human right of assimilation—reveals a flaw in its conceptual underpinnings that is inconsistent with the pursuit of a Path of Indigenization. Pressing a right of individual Indigenous people to assimilate into state society is hardly a right that most states who now deny it will be able to continue indefinitely, given the naturally assimilative effect that globalization will have over time. Promoting a right of self-determination is always going to be resisted by states, however. Success in the development of international law governing the rights of Indigenous peoples will thus depend upon articulating a pure and simple message that supports the collective right of self-determination.

The stakes in this struggle are high. Regardless of how one looks at Indigenous societies, it cannot be denied that Indigenous peoples in the United States—as in the rest of the world—lead a fragile existence. Because of the advanced degree of colonial interference in our individual and collective lives, much of what was once distinctly “Indigenous” has been lost and the tentacles of the American state have enveloped us into its society. Given the magnitude of the transmutation that has occurred during the last 500 years, as well as the likelihood that such changes will continue in the future, it may be the case that efforts to promote the greater Indigenization of the Indigenous nations are but a pipe dream. But to the extent they are not, any chance for survival ultimately will depend upon good and clear thinking by the Indigenous peoples themselves, followed up by concerted action. For those who are involved in such efforts, both Indigenous and non-Indigenous, I urge that this process take place with a meaningful outcome in mind. Failure to do so could have disastrous consequences.

