

# Co-Editors' Note

By: Simon Truong and Evette Jahanrigi



**T**o all our readers,

It is our honor to serve as Co-Editors-In-Chief of the Diversity and Social Justice Forum for the 2022-2023 academic year. We are proud to lead and be a part of an organization that is committed to implementing notions of diversity through the inclusion of a broad scope of unique perspectives, ideas, and backgrounds. To put our mission into metaphorical terms, diversity is having a seat at the table, and inclusion is having the opportunity to speak.

On behalf of the Diversity and Social Justice Editorial Board, we invite you to immerse yourself in our annual Publication, Volume VI: Our Voices: Exploring Cultural Roots and Significance.

Throughout time, historical records and scholars have had great power in documenting information and key events in many cultural groups. At times, this can lead to an accurate representation of such groups' culture, but other times, it can lead to the development of misconceptions and prejudices. As such, it is important to recognize and consider how

powerful a written record or a simple description of one's culture can be in shaping its portrayal, outlook, and perceptions.

Our job now is to facilitate and promote awareness about the history and representation of various minority groups.

Our contribution to the mission of promoting such awareness lies within the pages of this publication. Each article represents a ubiquitous form of discrimination aimed at historically marginalized communities, and invites the reader to acknowledge how we as a collective can further mitigate discriminatory thought and practice.

We hope that this publication not only encourages you to challenge your biases, but also inspires you to immerse yourself in intersectional discourse to advocate for the implementation of diversity and inclusion in various legal spaces.

Evette Jahangiri and Simon Truong



**Kenneth Stahl** is Professor of Law and the director of the Environmental, Land Use, and Real Estate Law program at Chapman University Fowler School of Law, where he teaches Property, Land Use Regulation, State & Local Government Law, Election Law, and other courses. He is the author of *Local Citizenship in a Global Age* (Cambridge University Press 2020), which discusses how the nature of citizenship and the relationship between local and national governments have been transformed by globalization. Professor Stahl's scholarly works have been widely published in many journals.

## Introduction

By Professor Kenneth Stahl

Justice is said to be blind, but the process of picking judges is surely not. According to a report by the Center for American Progress, 73% of federal judges are men and 80% are white. Of the 226 federal judges appointed by Donald Trump, 84% were white, and 76% were men.

Ironically, when President Biden promised to elevate the first black woman to the Supreme Court, Ketanji Brown Jackson, many of those who had cheered Trump's virtually all white male judicial nominees were outraged that race or gender could possibly play a role in the choice of the next Supreme Court justice. Several critics complained that by pre-committing to a nominee of a certain race and gender, Biden would therefore not choose the "objectively" best candidate for the job. As anyone who has ever interviewed candidates for a job knows, however, there is hardly ever an objectively best candidate and, even when there is, that is rarely the decisive consideration. Certainly Supreme Court justices have never been selected based on who is the objectively best candidate – they are selected for ideology, partisanship, personal connections, the ease with which they can be confirmed, and other factors. Even those who've raged about Biden's reference to race and gender in the selection of Justice Jackson have themselves championed the use of race and gender to choose judges they perceived as closer to their own ideological predispositions.

The fraudulent notion of "objectivity" is attractive because it allows us to indulge the pretense that justice is blind, that judges resolve cases without regard to their backgrounds, ideologies and personal prejudices. This is a myth, of course. While it is popular in some circles to assert that deciding cases with vast societal impacts is simply a matter of "calling balls and strikes," as Chief Justice Roberts stated during his confirmation hearing, the empirical evidence proves that this is not true. A recent study showed that Republican-appointed judges tend to sentence black defendants to longer prison sentences than

Democratic-appointed judges do, and female defendants to shorter sentences than Democratic-appointed judges do. Another study found that white judges are four times more likely than non-white judges to throw out racial discrimination lawsuits. It seems reasonable to suppose that non-white judges are more likely to have experienced racial discrimination in their own lives than white judges have, and this experience invariably informs their perspective on the validity of racial discrimination claims.

A truly colorblind justice system is a noble and vital aspiration in a liberal democratic society, but we get no closer to that goal by pretending it has already been met when it clearly has not. Stripping away that pretense is among the many valuable contributions of organizations like the Diversity and Social Justice Forum at Chapman University Fowler School of Law. Through its activism, its scholarship, and its promotion of a robust dialogue dedicated to addressing inequality, the Forum is a powerful reminder that "identity politics" are inescapable in our justice system and that there can be no impartial system of justice without recognizing the diversity of backgrounds and perspectives we all bring to the decisions we make. I am proud to celebrate the Forum's work, and invite you to participate in its quest for social justice.

**Denis Binder** is entering his 50th year of Teaching. His first article, published in the California Law Review in 1971, was “Sex Discrimination in the Airline Industry: Title VII Flying High.” He has published three indices of Environmental Justice Cases, and in 2017 “Some Rough Historical Parallels Between South Africa and the United States.” He consulted with Cesar Chavez and the United Farm Workers in 1991.

Professor Denis Binder is not a Native American, but through an unique sequence of events was the first chair, 1977-78, of the Section of Native American Rights of the Association of American Law Schools



## Chief Red Cloud

By Professor Denis Binder

*“They made us many promises, more than I can remember. But they kept but one. They promised to take our land ... and they took it.”*

— Mahpiya Luta

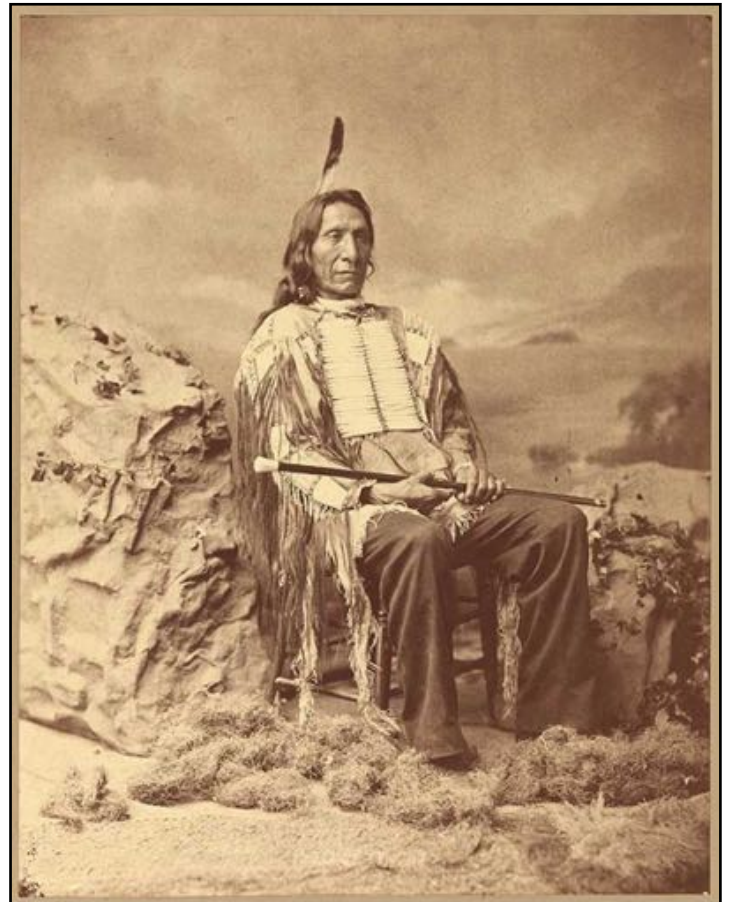
**M**ahpiya Luta, an Oglala Lakota Sioux, known in history as Chief Red Cloud, temporarily won a large reservation for his tribes.

Red Cloud was a warrior and a leader of the Lakota Sioux. He met with five presidents over 30 years advocating Indian rights.

Red Cloud’s War between the Plains Indians and the military from 1866-1868 established his greatness. Gold was found in Montana. The Bozeman Trail (1863-1868) from Fort Laramie to southern Montana ran through Lakota Sioux, Arapahoe and Cheyenne lands. He led a skirmishing war against travelers on the trail, high-lighted in December 1866 by killing all 81 soldiers led by Captain Fetterman.

The United States and the tribes entered into the Second Treaty of Fort Laramie. The government granted roughly them 90,000 square miles of land, the Great Sioux Reservation, including the Black Hills and the Powder River Basin. The Army closed the Trail and abandoned the forts. Red Cloud became a man of peace, living on reservations.

His famous quote is the story of Native Americans.





**Michael Bazylar** is Professor of Law and The 1939 Law Scholar in Holocaust and Human Rights Studies at the Fowler School of Law, Chapman University, California.

He is holder of previous fellowships at Harvard Law School, the United States Holocaust Memorial Museum in Washington, D.C. and at Yad Vashem Holocaust Memorial Center in Jerusalem Professor Bazylar is the author of seven books and over two dozen law review articles, book chapters and essays on subjects covering Law and the Holocaust, restitution following genocide and other mass atrocities, public international law, international human rights law, and comparative law.

Over his 30+ years law teaching career, Professor Bazylar has been a visiting professor at various law schools in the United States, Australia, Russia, Belarus and Israel.

His book, *Holocaust, Genocide and the Law: A Quest for Justice in a Post-Holocaust World* (Oxford University Press) is a winner of the 2016 National Jewish Book Award. His writings have been cited by the U. S. Supreme Court, and he has testified in Congress before the House Reform Committee on the subject of Holocaust restitution.

He has also been interviewed by CNN, 60 Minutes, CBS Sunday Morning, Dateline NBC, ABC News, Voice of America, the Australian Broadcasting Company, National Public Radio and the BBC.

He is presently working on his PhD at the Frederich Alexander University at Erlangen-Nuremberg in Germany.

## History and Memory

By Professor Michael Bazylar

*"All wars are fought twice, the first time on the battlefield, the second time in memory."*

— Viet Thanh Nguyen

I am a legal historian focused on the Second World War, and specifically how law and lawyers played a critical role in the effectuating the Nazi project to exterminate Jews. The genocide of the European Jews carries today a special name, the Holocaust.

A major part of my work involves the interplay between history and memory, or how the Holocaust is remembered, both in Nazi Germany and its allied and conquered states across Europe.

Germany, the leading perpetrator nation, has confronted its horrific past. Schoolchildren regularly learn the history of how Germany facilitated the murder of 6 million Jews between 1933-1945. Basic education includes obligatory visits to the concentration camps and death camps. Today, the Federal Republic of Germany mobilizes this memory by creating a national consciousness in contradistinction to the Third German Reich, with a political structure, ethos, and constitution based upon principles of a Western liberal democracy.

Still, these national commemoration efforts undercut substantial erasures. Only in the late 1990's did German companies start publishing investigative

studies showing how they profited from the Holocaust through slave labor, thievery of Jewish assets, and supply of materiel and planning that made the Holocaust possible.

The complicity of other European nations complicates this already fraught issue of commemoration. The German project to exterminate the Jews also depended on a million or more collaborators across Europe, who either went along with or participated in the genocidal murder and theft. Poland has become the particularly heated site of a memory war of how the wartime years should be taught, institutionalized, and memorialized.

Germany's occupation of Poland was brutal; Nazis murdered an estimated 1.9 million non-Polish civilians, of a 35 million population. At the same time, 90% or 3 million Polish Jews, the largest in pre-war Europe, did not survive the war. And while Israel has recognized the selfless acts of almost 7,000 Polish Christians as "Righteous Among Nations," this figure obscures the reality that the Polish majority either ignored or actively assisted in the arrest and murder of the Jewish minority.

It's not hard to see why Polish nationalists want

Poles to have been the untainted victims of Nazism, rather than as participants in a genocidal project. But fully reckoning with the past requires acknowledging its full reality.

Like most naturalized Americans, I am proud and grateful for the opportunities America has given me since I came here as a 11-year-old refugee with my parents from Communist Poland. I see this gratitude keenly echoed in my law students--many of whom arrived fleeing war, poverty, or tyranny, or who carry the trans-generational trauma of their immigrant parents.

But while Americans have dutifully acknowledged the ignobility of other nations (Exhibit 1: the U.S. Holocaust Memorial Museum), we remain reluctant to fully come to terms with our own history of African-American enslavement, a history woven into the fabric of this country's foundations. Like the Germans, we may allow memorial projects to permutate, but grappling with that memory in concrete terms has been less forthcoming. Like the Poles, we honor—rightly—those who fought for emancipation, but we are less eager to talk about how our birth as a nation of slave-owners significantly impact our nation today.

In the second decade of the 21st century, debates rage about what parts of American history should and should not be taught to our children, what statues should be saved and which should be taken down, and how much our history of racism still drives society. The U.S. has not yet fully reckoned with its past, and so is not at peace with its memory ghosts. We wage a new civil war about the topics that animated the last civil war, not on the battlefield, but on the field of memory.

