

## Indigenous Litigiousness

### *The Oven Bird's Song and the Miner's Canary*

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The oven bird's song, as captured in Robert Frost's evocative poem, speaks to the marking of time and the inevitable changes wrought by the passing of the seasons. The bird's clear sweet song reminds us that youth and adulthood is followed by old age and death, and that the world cannot remain the same. David Engel refers to the song in the title of his essay to evoke the ways in which the people of Sander County voiced opposition to personal injury litigation.<sup>1</sup> Their collective concerns are interpreted – as is the oven bird's song – as a lament; a lament to the lessening in their minds of a traditional way of living and being.

In this chapter I turn to another bird: the “miner's canary,” which refers to canaries being used by coal miners in Britain as an early warning system and an essential element in keeping miners safe from harm. The bird was taken in a cage with the men down to the bottom of the shaft. When the delicate bird showed signs of distress it meant that fresh air had turned sour and the miners needed to quickly get out of the deep underground tunnels, or succumb to carbon monoxide poisoning.<sup>2</sup> I like to think of the oven bird and the miner's canary singing to each other across time and space in ways that both resonate and contradict. Their commonality lies in the sense that both evoke the marking of time, transition, and change, as well as impending threat.<sup>3</sup>

<sup>1</sup> David M. Engel, “David Engel and the oven bird's song” in Simon Halliday and Patrick Schmidt (eds.), *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge University Press, 2009), pp. 83–93.

<sup>2</sup> In Britain, canaries were used extensively throughout the nineteenth and twentieth centuries. They were finally phased out in 1986 and replaced with new monitoring technologies for carbon monoxide, which is odorless, colorless, and hard for humans to detect.

[http://news.bbc.co.uk/onthisday/hi/dates/stories/december/30/newsid\\_2547000/2547587.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/december/30/newsid_2547000/2547587.stm).

<sup>3</sup> Why birds are used as vehicles of social commentary is an interesting question. Perhaps it is because birds, particularly small birds, often go unnoticed and are part of the unseen

From spring to winter, from fresh to poisonous air, the birds symbolize shifting conditions, nostalgia, melancholy, and ultimately a deep sense of loss.

In David Engel's chapter, personal injury litigation becomes the legal front through which Sander County locals voiced their dismay at the increasing encroachment by industry and "foreigners" into their established set of social, political, and economic relations.<sup>4</sup> Opposition to personal injury lawsuits became the official mechanism through which to sort the "insiders" who belonged and shared the town's cultural values (including notions of injury) from "outsiders" who didn't understand how the system worked. As Engel compellingly argued, opposition to personal injury lawsuits operated to galvanize thinly veiled articulations of social anxiety and racialized fear that informed the local blaming of outsiders for the inevitable altering of the rural small-town community.

In this chapter I explore both similarities and differences between the ways in which "outsiders" brought personal injury lawsuits in Sander County and lawsuits in Santa Barbara County (in the latter case a Native American tribe). However, whereas Engel was interested in the category of litigation (personal injury, contract) and the differences this made to people's understanding of the legal system's appropriateness to address grievances, I am interested in the very fact that Native Americans – in this case the Santa Ynez Band of Chumash Indians – are bringing lawsuits at all. So it is not the type of legal action that is of central importance in my narrative, but rather that more and more Indians are using the formal legal system to resolve a variety of historical and contemporary disputes and grievances.

In the following, I discuss Indian gaming, which informs the background to the lawsuits being brought by the Santa Ynez Band of Chumash Indians, and describe more fully the reference to the miner's canary. I then explore the similarities and differences between the "outsider" politics of Sander County and the "outsider" politics of Santa Barbara County as each is refracted through people's use of formal and informal legal processes. The similarities and differences of these two case studies – separated by approximately forty years – provide a way to think about comparable forms of legal consciousness

landscape. At the same time, their capacity to watch us go about our business is immense, precisely because we generally ignore them. They sit on the tree branch outside our living room, watching, chirping, waiting, and ultimately moving on with little notice from most of us. Their taken-for-granted presence and assumed innocence is exactly what Alfred Hitchcock played to in his film *The Birds* (1963), which released frenzied swooping, murdering flocks onto the heads of schoolchildren.

<sup>4</sup> David M. Engel, "The oven bird's song: insiders, outsiders, and personal injuries in an American community," *Law & Society Review*, 18(4) (1984), 551–82.

as well as emerging legal subjectivities in contexts of rapid change and the diminishing of a romanticized American past that never existed.

#### INDIAN GAMING

Native Americans accessing the formal legal system is a relatively new phenomenon, brought about almost entirely by the introduction of the Indian Gaming Regulatory Act (IGRA) in 1988. At the time the act was passed, a few tribes had casinos on their reservations. The Seminole Tribe of Florida was the first to open a high-stakes bingo parlor in 1981, and other tribes quickly followed suit. While the Seminole casino operation was enormously successful,<sup>5</sup> most Indian operations were far less so because of reservations' isolation from urban communities and a sustainable clientele. Moreover, each state had specific laws relating to Indian gaming within its state borders.<sup>6</sup> These state laws were aggressively defended against the Bureau of Indian Affairs (BIA), which, as a federal agency, has historically governed all matters pertaining to Native Americans. Many states challenged the federal oversight of Indian gaming because they wanted to either block Indians establishing high-stakes gaming (which competed with state lotteries and horse-racing) or illegally demand revenue-sharing from tribes when their casinos were successful.<sup>7</sup>

IGRA was introduced in response to the confusion about federal and state jurisdictional control over reservation casinos. IGRA's goals were to regulate Indian gaming operations and to provide tribes some federal protection from state governments. IGRA was also introduced to try and encourage economic growth and financial independence for Indian communities on reservations, many of whom were living in abject poverty. As stated in the case *Rincon Band v. Schwarzenegger* (2010), "Congress enacted IGRA to provide a legal framework within which tribes could engage in gaming – an enterprise that holds out the hope of providing tribes with the economic prosperity that has so

<sup>5</sup> Jessica Cattelino, *High Stakes: Florida Seminole Gaming and Sovereignty* (Duke University Press, 2008).

<sup>6</sup> Kathryn R. L. Rand and Steven Andrew Light, *Indian Gaming Law and Policy*, 2nd ed (Carolina Academic Press, 2014).

<sup>7</sup> The Cabazon Band of Mission Indians sued the state of California, claiming it had no right to shut down its gambling operations and seize cash and goods held by the tribe. In 1986, in *California v. Cabazon Band*, the Supreme Court held that Indian reservations are governed exclusively by Congress and the federal government and upheld the principle of tribal sovereignty against state encroachments on native lands. See Ralph A. Rossum, *The Supreme Court and Tribal Gaming: California v Cabazon Band of Mission Indians* (University Press of Kansas, 2011).

long eluded their grasp – while settling boundaries to restrain the aggression by powerful states.”<sup>8</sup> To facilitate federal oversight of Indian gaming, the National Indian Gaming Commission (NIGC) was also established by Congress in 1988. Over the years it has become a powerful presence in Washington DC, providing a national platform to represent and lobby for a wide diversity of issues and concerns raised by tribes with gaming operations across the entire United States.<sup>9</sup>

There are 566 federally recognized tribes in the United States, of which 486 tribes are involved in some form of gaming on their reservations. However, not all of these involve high-stakes gaming and many of these casino operations are not financially successful. The 2008 economic recession has taken a toll, and in certain areas the proliferation of casinos has saturated the market. That being said, in 2013 gross gaming revenues reached \$28.5 billion. Much of this revenue has been diversified into a range of businesses, resorts, health clinics, educational facilities, housing, infrastructure, and the building of cultural centers and museums. Many tribes “realize that the success of gaming is not an end in itself. Rather, it is a bridge to help regain what was once ours long ago – true self-respect, self-determination and economic self-sufficiency.”<sup>10</sup> NIGC’s Former Associate Commissioner Daniel notes that “Indian gaming is an American success story for addressing the social and economic needs of Indian country.”<sup>11</sup>

One success story has been unfolding over the past two decades in Santa Barbara County with respect to the Santa Ynez Band of Chumash Indians. While other bands of Chumash exist in Southern California, together numbering around 5,000 people, only the Santa Ynez band received federal recognition in 1901 and were granted a small reservation landholding close to the Santa Ynez Mission for their population of less than 200 members. At that time, the Chumash had experienced centuries of colonial oppression by the Spanish, Mexican, and then Californian governments, and their populations had been decimated in the process.<sup>12</sup> The social and economic marginalization of the tribe continued throughout the twentieth century,

<sup>8</sup> *Rincon Band v. Schwarzenegger* (2010) at pp. 5887–8, <http://cdn.ca9.uscourts.gov/datastore/opinions/2010/04/20/08-55809.pdf>.

<sup>9</sup> Indian gaming has a very rich history and a large body of literature has developed around the issue which is beyond the scope of this chapter. See Eve Darian-Smith, *New Capitalists: Law, Politics and Identity Surrounding Casino Gaming on Native American Land* (Wadsworth, 2004); Cattelino, *High Stakes*; Paul H. Gelles, *Chumash Renaissance: Indian Casinos, Education, and Cultural Politics in Rural California*. CreateSpace Independent Publishing Platform, 2013).

<sup>10</sup> [www.santaynezchumash.org/gaming\\_history.html](http://www.santaynezchumash.org/gaming_history.html).

<sup>11</sup> [www.nigc.gov/images/uploads/Fact%20Sheet%20August%202015.pdf](http://www.nigc.gov/images/uploads/Fact%20Sheet%20August%202015.pdf).

<sup>12</sup> See Gelles, *Chumash Resistance*; Darian-Smith, *New Capitalists*.

and it was not until the 1960s that the reservation had running water; electricity came many years later.

Faced with extreme economic disadvantage, in 1994 the Santa Ynez Band of Chumash Indians opened up a modest bingo parlor. Encouraged by other tribes entering the casino business, the Chumash began planning for a more fancy and lucrative full-scale casino and resort. In 2003 the tribe opened up a 190,000-square-foot gaming facility; a year later a 106-room luxury hotel. The tribe's current plan is to place into federal trust lands it purchased in 2010 adjacent to its reservation. The primary purpose for the purchase was to build homes for tribal members, since only 17 percent of the tribal members can currently be accommodated on their reservation lands. According to the tribe's website, the effort to provide new housing is regarded as a creating "a meaningful opportunity for tribal members and their families to be part of a tribal community revitalization effort that rebuilds tribal culture, customs and traditions."<sup>13</sup>

Casino operations on reservations represent the most important challenge to the enduring legal discrimination against Indian peoples by both federal and state governments. In a sense, the future of Indian legal sovereignty, which determines the extent to which a tribe is allowed to control what goes on within its bounded territory, is being shaped by the gaming industry. And nowhere is this more evident than in the state of California, where more Native Americans live than in any other state in the country.<sup>14</sup> In a very real sense, what unfolds in California points to the future of Native Americans and their legal sovereignty across the whole of the United States. This future is not clear – many Native Americans are anxious that the good times won't last, given a general decline in the economy coupled with a glut of gambling venues. These contemporary economic worries are compounded by native people's memories of centuries of racism and discrimination. "Owing to the historic distrust between Native Americans and the people who displaced them, there's a sense they must be alert to the prospect that their 'rights' to open casinos could be snatched back or curtailed."<sup>15</sup>

California (and more generally the American West) also performs a highly symbolic role in the popular US imagination. Philip Burnham, a scholar and

<sup>13</sup> [www.chumashfacts.com/](http://www.chumashfacts.com/). Also see Gelles, *Chumash Resistance*.

<sup>14</sup> California's relatively large native population is the direct result of the prevailing ideology of manifest destiny in the nineteenth century, which justified the deliberate dismantling of tribes and their members driven westward across the American continent throughout the nineteenth century. See Dee Brown, *Bury My Heart at Wounded Knee: An Indian History of the American West* (with foreword by Hampton Sides) (Picador, 2007); Theda Perdue and Michael Green, *The Cherokee Nation and the Trail of Tears*, reprinted edition (Penguin, 2008).

<sup>15</sup> Steve Friess, "Indian tribes look beyond casinos for income," *New York Times*, October 23, 2015.

journalist who has lived and taught for several years on the Rosebud Sioux Reservation in South Dakota, sums up the significance of the West in thinking about the future of Native Americans:

Since the creation of the reservations in the mid-nineteenth century, the West is where the vast majority of Indian trust land resides. Land is seminal to our understanding of Indian history, and in recognition of the claims that remain to be settled in US courts, of the future of Indian Country as well . . . The native has literally “returned.”<sup>16</sup>

This sense of native peoples “returning” to take a rightful place in the cultural, political, and economic institutions of their historical oppressors is a theme picked up by James Clifford in the opening passage of his 2013 book *Returns: Becoming Indigenous in the Twenty-First Century*. Clifford writes: “Indigenous people have emerged from history’s blind spot. No longer pathetic victims or noble messengers from lost worlds, they are visible actors in local, national, and global arenas.”<sup>17</sup>

Building on this theme, the overarching question in this chapter is: How is mainstream American society responding to the use of formal law by “outsiders” to redress wrongs and fight enduring discrimination? Specifically, how is the sense of Native Americans returning to take a place at the table of national politics heightening non-Indian cultural and social anxieties and forging new forms of contestation? In the context of Santa Barbara County, I am interested in thinking about the backlash against the Santa Ynez Band of Chumash Indians, who are often derogatively labeled “rich Indians” and who have been engaged in years of lawsuits and litigation with local activist groups. What does this backlash, as articulated by an upsurge in litigiousness involving native peoples, suggest more generally about the future of American society and its fraught postcolonial relations with its Indian populations?

#### THE MINER’S CANARY

The phrase “miner’s canary” is relatively common in referring to a person or thing serving as an early warning of a coming crisis.<sup>18</sup> In the United States it is

<sup>16</sup> Philip Burnham, “The return of the native: the politics of identity in American Indian fiction of the West” in Michael Kowalewski (ed.), *Reading the West: New Essays on the Literature of the American West* (Cambridge University Press, 1996), pp. 199–212, see pp. 202–3.

<sup>17</sup> James Clifford, *Returns: Becoming Indigenous in the Twenty-First Century* (Harvard University Press, 2013), p. 13.

<sup>18</sup> See, e.g., Lani Guinier and Gerald Torres, *The Miner’s Canary* (Harvard University Press, 2002).

most famously linked to Felix S. Cohen, who used the phrase in 1949 with reference to American Indians.<sup>19</sup> In a passage that reads with as much relevance today as it did more than sixty years ago, Cohen wrote:

It is a pity that so many Americans today think of the Indian as a romantic or comic figure in American history without contemporary significance. In fact, the Indian plays much the same role in our society that the Jews played in Germany. Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall of our democratic faith.<sup>20</sup>

Felix Cohen is a fascinating and inspirational figure on many fronts, and is widely known for his early foray into what we would recognize today as sociolegal scholarship. Before joining the Department of the Interior under Franklin Roosevelt's New Deal, Cohen was considered a leading force in the Legal Realism movement.<sup>21</sup> He railed against a science of law that did not ground analysis in criticism or context, writing in a much cited article in the *Columbia Law Review* that even "the most intelligent judges in America can deal with a concrete practical problem of procedural law and corporate responsibility without any appreciation of the economic, social, and ethical issues which it involves."<sup>22</sup> Building upon his belief that law must be

<sup>19</sup> There are apparently nearly 50,000 references on the internet to Cohen's use of the term "miner's canary". For a fascinating discussion of this phrase, see "Getting a bead on Felix Cohen's miner's canary," *Indian Country Today Media Network.com*, June 9, 2006, <https://indiancountrymedianetwork.com/news/getting-a-bead-on-felix-cohens-miners-canary/>.

<sup>20</sup> Cohen concluded with the following: "If we fight for civil liberties for our side, we show that we believe not in civil liberties but in our side. But when those of us who never were Indians and never expect to be Indians fight for the cause of Indian self-government, we are fighting for something that is not limited by the accidents of race and creed and birth; we are fighting for what Las Casas and Vitorio and Pope Paul III called the integrity or salvation of our own souls." Felix S. Cohen, "Indian self-government," *The American Indian*, 5(2) (1949); see reprint in *The Legal Conscience: Selected Papers of Felix S. Cohen*, ed. Lucy Kramer Cohen S. (Yale University Press, 1960), pp. 305–14.

<sup>21</sup> On legal realism see Thom Brooks, "David Ingersoll, behavioralism and the modern revival of legal realism" *Beijing Law Review*, 6(3) (2015), 190–2, and for discussions of the New Legal Realism movement see Howard Erlanger et al., "Is it time for a new legal realism?" *Wisconsin Law Review*, 2005(2) (2005), 335–63; Stewart Macaulay, "The new versus the old legal realism: 'things ain't what they used to be'," *Wisconsin Law Review*, 2005(2) (2005), 365–403; and Mark Suchman and Elizabeth Mertz, "Toward a new legal empiricism: empirical legal studies and new legal realism," *Annual Review of Law and Social Science*, 6(1) (2010), 555–79.

<sup>22</sup> Felix Cohen, "Transcendental nonsense and the functional approach," *Columbia Law Review*, 35(6) (1935), 809–49 at 812.

understood in its wider social contexts, Cohen turned to the issue of Native Americans and is widely considered to have established Indian law in his path-breaking 1941 work *The Handbook of Federal Indian Law*. Throughout his later career he was a vocal champion of Indian land rights and sovereignty in the face of the Bureau of Indian Affairs' efforts to undermine tribal self-government. Despite his great efforts, the BIA eventually pushed into law the Indian Termination Act (1953), which resulted in the widespread disbandment and dispossession of many Indian tribes across the country.

Cohen's insistence that prevailing attitudes toward Native Americans are emblematic of more general attitudes about cultural and racial difference in American society is as pertinent now as it was back in the 1940s and 1950s.<sup>23</sup> The treatment of Native Americans in law and governmental policy over many decades can be used to historically chart the ebbs and flows of racism, intolerance, and capitalist greed that have periodically washed across the political and cultural landscape of American society. Of course, racism, intolerance, and greed have always been intertwined forces sustaining the United States' belief in manifest destiny and its own inherent exceptionalism. But I am interested in the conditions of its periodic upswing – how and why people change their attitudes over time from less tolerant to more tolerant, and back again.

Despite the development of tribal gaming that has enriched a number of tribes, Native Americans remain the most socioeconomically marginalized of all ethnic groups in the United States. Historically, they have been disproportionately vulnerable to the shifting tempo of mainstream racism and xenophobia. As a collective people, they have been subject to swings back and forth in social attitudes toward them as reflected in federal governmental policies: The Indian Removal Act (1830) systematically forced native populations off their lands in the hope of breaking up their way of life and eradicating the

<sup>23</sup> Interestingly, some native communities have embraced the idea of being thought of as a miner's canary. In January 2016, a coalition of activist organizations including the Indigenous World Alliance marched on Washington DC to promote the "Clean Up the Mines!" campaign, which focuses attention on the exposure of communities to nuclear radiation resulting from an estimated 15,000 abandoned uranium mines across the United States. "Native American nations of North America are the miners' canaries for the United States trying to awaken the people of the world to the dangers of radioactive pollution," said Charmaine White Face from the South Dakota-based organization Defenders of the Black Hills: see Klee Benally, "We are the miner's canary: indigenous organizations call for clean up of 'homegrown' radioactive pollution crisis," [www.cleanuptheminesthills.org/press-release-we-are-the-miners-canary-indigenous-organizations-call-for-clean-up-of-homegrown-radioactive-pollution-crisis/](http://www.cleanuptheminesthills.org/press-release-we-are-the-miners-canary-indigenous-organizations-call-for-clean-up-of-homegrown-radioactive-pollution-crisis/).



“Indian problem”; the General Allotment (Severalty) Act (1874) sought Indian assimilation by splitting up reservations into individual allotments in order to undermine tribal communities and take their lands; the Indian Reorganization Act (1934) sought to restore to Indians the management of their lands and culture; the Indian Termination Act (1953) again sought to aggressively assimilate natives into the white population; the Indian Civil Rights Act (1968) recognized that the policies of Indian termination were a failure; the Self-Determination and Education Act (1975) granted tribes the right to contract with the BIA directly and manage their own health and education services; and the Indian Gaming Regulatory Act (1988), as discussed earlier, was designed to protect tribes from predatory state governments and encourage tribal economic development.

Across the centuries of federal Indian policies, one can read different sets of mainstream attitudes toward native peoples. However, common to what seem at times contradictory attitudes is that native peoples are consistently treated by the dominant white society as social and cultural “outsiders.” This treatment ranges from Anglo/Americans originally seeing them as a threat to be exterminated during the Indian Wars, to being seen as a hopeless waste of federal funds, to being seen as obstacles to land grabs and exploitation of natural resources, to being seen as culturally resilient and deserving of government support, to being seen in the 1980s as non-threatening but ultimately useless, wretched, and pitiful. Against this turbulent backdrop, how are Native Americans viewed today, and what does that say about our current dominant society? Are they still considered outsiders by mainstream America, and if so what are the current conditions of their alienation? To what degree do Native Americans function as the miner’s canary and point to more generalizable attitudes with respect to a spectrum of cultural, ethnic, and religious minorities?

Taking one step back and putting the US national framework within a global context, to what degree are attitudes toward Native Americans as the nation’s internal “outsiders” informed by the increasing hysteria raised by trans-border threats of external “outsiders”? To ask this differently: In what ways may domestic indigenous politics relate to immigration politics and escalating fears of “illegals” and brown-skinned others who will forever change idealized notions of a traditional, white, and culturally monolithic American society?<sup>24</sup> These are the questions that capture my imagination as we move forward into the middle decades of the twenty-first century.

<sup>24</sup> Jamie Longazel, *Undocumented Fears: Immigration and the Politics of Divide and Conquer in Hazelton, Pennsylvania* (Temple University Press, 2016).

SIMILARITIES AND DIFFERENCES – OUTSIDERS IN SANDER  
AND SANTA BARBARA COUNTIES

The first similarity between Sander County as described by David Engel in “The Oven Bird’s Song” and Santa Barbara County is a sense of a changing demographic within the established rural community. Sander County’s wide-spread opposition to personal injury claims was in part related to the new industries that moved into the region in the 1970s and altered the small farming practices of the region. The new industries were accompanied by union members, southerners, blacks, and Latinos, bringing “to Sander County a social and cultural heterogeneity that it had not known before.”<sup>25</sup> These new faces were considered “alien elements” by the long-term residents.

In contrast to the arrival into Sander County of new ethnic and racial groups, in Santa Barbara County Native Americans did not arrive from somewhere else. Hence they are not “outsiders” in a literal sense but rather social and cultural outsiders, and have recently been able to revitalize their local presence. The Chumash Indians have a very long history with the region, and once numbered in the tens of thousands before being wiped out by disease and encroachments on their lands by Spanish Catholic missionaries and military.<sup>26</sup> The Santa Ynez Band of Chumash Indians was federally recognized in 1901 and granted a small reservation in Santa Barbara County, some forty miles inland from the coastal city of Santa Barbara. As narrated on the Santa Ynez Band of Chumash Indians website:

For many years, few tribal members lived on the Reservation. It was difficult to live a modern existence on the Reservation without running water or electricity. We began a housing program in 1979 and more tribal members moved on to the Reservation – both lower and upper Reservation ... Thanks to the revenue generated from the tribe’s Chumash Casino Resort, our tribal members are on the path to economic self-sufficiency. Some continue to live on the Reservation and others live in homes in surrounding towns. Today there are 249 residents on the Santa Ynez Reservation and 97 homes.

<sup>25</sup> Engel, “The oven bird’s song,” 574, n. 4.

<sup>26</sup> In 1769 a Spanish land expedition, led by Gaspar de Portola, left Baja California and reached the Santa Barbara Channel. In short order, five Spanish missions were established in Chumash territory. The Chumash population was eventually decimated, due largely to the introduction of European diseases. By 1831, the number of mission-registered Chumash numbered only 2,788, down from pre-Spanish population estimates of 22,000. <http://santaynezchumash.org/history.html>.

The second similarity between Sander County and Santa Barbara County is the phrases used by the local rural community to describe “outsiders.” In Sander County, according to David Engel, long-term residents referred to the newcomers, and specifically those that brought personal injury claims, as “very greedy,” “deviant,” “troublemakers,” “looking for the easy buck.” The overwhelming feeling was that litigants were people eager to “cash in” without doing the long hours of hard work that everyone else was obliged to undertake to make ends meet. In other words, the outsiders were considered to be not morally worthy of receiving financial compensation.

In Santa Barbara County, the accusations flung by non-Indian residents at the Chumash Indians are surprisingly similar to those heard decades earlier in Sander County. The Chumash are described at various times as “lawless,” “unsophisticated,” “shifty,” “greedy,” and as trying to take advantage of a system that supposedly grants them “special rights.”<sup>27</sup> There is a general consensus that native peoples are in a profound sense not worthy of making lots of money because they don’t work for it, and that if they do become wealthy they will somehow cease to be authentic Indians. As noted in an interview with Gail Marshall, 3rd District Santa Barbara County Supervisor:

[T]hey have, you know, taken up a really beautiful legacy of basketry and tommel building, and really interesting lifestyles and sort of erased it with one fell swoop. I’m not sure how it’s going to affect their generations to come, but I have a feeling it’s going to be very negative. Because when you get \$300,000 a year for sitting on the couch watching a Lakers game, not working, you model that lifestyle to the next generations. I’m not sure what it’s going to be like. They’ll have money but I wonder what else.<sup>28</sup>

The third similarity between Sander County and Santa Barbara County is the recognition that the local community no longer has control over the terms of engagement with “outsiders.” In Sander County this was expressed by the older members of the town as nostalgia for a past era in which neighbors all knew each other face-to-face. As the township grew in size, locals commented on the growing geographic and social distance between people who were no longer familiar, no longer eating at each other’s tables, no longer minding each other’s kids, no longer growing up together knowing each other’s business and functioning as a tightly knit community. As a result, “the gradual

<sup>27</sup> Jon Goldberg-Hiller and Neal Milner, “Rights as excess: the politics of special rights,” *Law & Social Inquiry*, 28(4) (2006), 1075–118; Jeffrey R. Dudas, “In the name of equal rights: “special” rights and the politics of resentment in post-civil rights America,” *Law & Society Review*, 39(4) (2008), 723–57.

<sup>28</sup> Taped interview; see Darian-Smith, *New Capitalists*, p. 92.

decay of the old social order and the emergence of a plurality of cultures and races in Sander County produced a confusion of norms and of mechanisms for resolving conflict.”<sup>29</sup>

In Santa Barbara County, the old rules of the game have also changed. Much to the dismay of local residents in the valley, the Chumash are accessing formal legal processes to bring their demands to the table. Many of the white locals interpret this as the Chumash thumbing their nose at them and not paying attention to established behavioral norms. The long-term residents are being forced to engage with the tribe and come to terms with the fact that they can no longer “manage” local Indian communities as they have in the past. Moreover, they are being forced to deal with native peoples holding legal rights “that are quite different from those that had long prevailed.”<sup>30</sup> This has caused a media outpouring of nostalgic rhetoric about a pristine natural landscape that will be tainted by Indian housing and development. Just as in Sander County, in Santa Barbara County there is “a confusion of norms and of mechanisms for resolving conflict.”<sup>31</sup>

Yet among Chumash tribal members there is no nostalgia for a romanticized past, nor much confusion over how best to proceed. And this is where my story builds out from David Engel’s tale about Sander County, in that I have been following the emerging legal consciousness of the Chumash “outsider” over a period of some decades. At first in the early 2000s, when the tribe was developing its casino plans, it sought the cooperation and involvement of Santa Barbara County as part of what it called government-to-government relations. Unfortunately, the County refused to acknowledge the Chumash as a sovereign tribe and failed to treat the attempted negotiations with any respect. In 2013 the Board of Supervisors voted by a 3–2 margin “against entering into government-to-government negotiations with the tribe, sending a clear message to the Chumash that the tribe’s status as a sovereign government is meaningless to the county.”<sup>32</sup> As a result, communications have almost entirely broken down and the tribe’s efforts to discuss their plans to build homes on purchased lands adjacent to their reservation have stalled and been rejected.

In recent years, the situation has escalated way beyond a refusal to communicate. The County has taken aggressive action – again via the legal system – to challenge the tribe’s historical claim to reservation land that was allocated by the federal government back in 1901. A lawsuit was brought against the tribe, claiming that it did not own reservation land, but this was

<sup>29</sup> Engel, “The oven bird’s song,” 574, n 4.      <sup>30</sup> Ibid, 578, n 4.      <sup>31</sup> Ibid, 574, n 4.

<sup>32</sup> Editorial, “Talking through problems,” *The Lompoc Record* (June 25, 2015).

subsequently thrown out by a US District Court judge on the basis that it had no jurisdiction over a tribal sovereign entity. Vincent Armenta, tribal chairman of the Santa Ynez Band of Chumash Indians, stated: “Unfortunately, we know this will not be the last time these angry anti-tribal individuals will sue the tribe. They simply refuse to live in an evidence-based world, where facts can’t be ignored. Instead, they prefer to make up their own set of facts and ignore the rich historical evidence that proves our tribe’s existence and documents our reservation.”<sup>33</sup> In public statements and across social media, the county and other citizen groups have called the Chumash people “untrustworthy” and “disingenuous.”

Some of the county supervisors have even publicly questioned the existence of tribal governments. But as chairman Armenta responded:

For Supervisor Adam to suggest that the “whole reservation system” should be revisited is laughable. Does he think that the Santa Barbara County Board of Supervisors has the authority to revoke the passage of the Indian Removal Act of 1830? . . . Even more preposterous is Supervisor Adam’s assumption that Native American tribes liked having their land taken away from them and liked being relegated to a small plot of land. Perhaps if the Board of Supervisors could wave a magic wand and “revisit the whole reservation system”, the Chumash people could reclaim the 200-mile stretch of California coastline from Malibu to Paso Robles rather than being relegated to 99 acres in a creek bed.<sup>34</sup>

For the past twelve years the Chumash have engaged in an effort to be legally recognized and exert their legal rights to build on purchased lands, while Santa Barbara County has simply refused to hear their case or brought actions against them for attempting to exert their sovereign rights and status. As noted in an editorial in a local newspaper:

The valley squabble has expanded into county government, with the majority of the supervisors generally taking side with those that oppose the tribe’s plans, now and in the future. Attempts to mitigate the hostilities with actual face-to-face negotiations – or even civil conversation – have failed, miserably. One reason is that both sides are being stubborn about reconciliation. The county apparently feels obligated to stress its own self-importance when it comes to land – use concepts and rules, while tribal officials apparently feel compelled to fall back on the sovereignty angle, refusing to cede any authority to the other sovereign entity. It’s a classic standoff, one that shows no sign

<sup>33</sup> Vincent Armenta, “Relying on history facts to validate tribe,” *The Lompoc Record* (July 16, 2015).

<sup>34</sup> Vincent Armenta, “You can’t rewrite history,” *The Santa Barbara Independent* (February 6, 2015).

of breaking any time soon – and one that is doing very little in the way of good for the general population of the Santa Ynez Valley . . . We also believe the fact that the Chumash have morphed from among the poorest citizens of the Valley to some of the wealthiest, and in a relatively short period of time, simply rubs some neighbors the wrong way.<sup>35</sup>

Finally, in frustration, in June 2015 the Chumash bypassed both Santa Barbara County and state agencies and made a federal appeal to have their right to build houses on adjacent land granted. The House Subcommittee on Indian, Insular and Alaskan Native Affairs heard the case in a public hearing on June 16, 2015. After hearing from both the county and the tribe, Representative Don Young, chairman of the subcommittee, forcefully condemned the actions of Santa Barbara County and charged it to engage in inter-governmental relations with the Chumash. “It’s a pretty damning case, so you had better go back and tell your friends that we will [pass this bill] if they don’t cooperate,” Young told county executive Mona Miyasato.<sup>36</sup> While the federal agency firmly reinforced the sovereignty authority of the tribe, the decision was immediately appealed by the county.

Where this legal battle in Santa Barbara County will end up is not yet clear. It seems that relations between the white wealthy “insiders” and native “outsiders” will probably get worse before they get better. Chumash tribal members relate that they are afraid of going into local shops because they are harassed and bullied. Hate speech and attacks in local media continue. However, what does appear very clear is that the Chumash are now setting the terms of engagement through legal channels and evoking what Jean and John Comaroff have called “lawfare.”<sup>37</sup> Across the United States, more and more tribes who own successful casinos and increasingly diversified commercial interests are asserting greater political and economic clout and engaging in various forms of legal action. In short, by forcefully claiming their legal rights, some tribes are pushing back against long-held stereotypes carried over from a former colonial era that presented them as being legally and politically irrelevant. Contributing to campaign election funds, negotiating tribal land deals, creating new sustainable environmental practices, and providing better health and educational services for their own communities – all of these activities are steadily improving the chances that more and more Native Americans will be able to take a seat at the center of mainstream American society.

<sup>35</sup> Editorial, “Talking to break impasse,” *The Lompoc Record* (July 10, 2015).

<sup>36</sup> Editorial, “Lawmakers slam county for poor dealings with the Chumash Tribe,” *The Lompoc Record* (June 18, 2015).

<sup>37</sup> John L. Comaroff and Jean Comaroff, *Ethnicity, Inc.* (Chicago University Press, 2009).

Notably, tribes are engaged in lawfare in increasingly creative ways. They have created subnational and transnational legal forums that include leveraging UN treaties, participating in pan-indigenous networks, and creating solidarity across national borders, ethnic differences, and socioeconomic classes. For instance, the Cowboy Indian Alliance, which is a coalition of tribal members, ranchers and landowners, came together in April 2014 to march in Washington DC to protest the laying down of the Keystone XL Pipeline. This unlikely alliance reflects a generation of young Indian activists who use new social media to form “networks that are connecting both indigenous and nonindigenous people in truly unprecedented ways.”<sup>38</sup> These coalitions are acutely aware that they may have to use law as a means to resist against government agencies and commercial enterprises taking lands and resources. As John and Jean Comaroff have noted, “the rise of neoliberalism ... has intensified greatly the reliance on legal ways and means.”<sup>39</sup> As a result, we are witnessing “a planetary culture of legality” and “law has become *the* prime space of contestation.”<sup>40</sup> Across the United States, tribes such as the Chumash are demonstrating a newfound capacity to use the formal legal system to negotiate that space to their own advantage.<sup>41</sup>

#### CONCLUDING COMMENTS

Among non-Indian Americans, be these long-term residents of Santa Barbara County or elsewhere, a national anxiety is emerging about Native Americans “returning” to the national polity as fully matured and involved citizens.<sup>42</sup> In a sense the “outsiders” are becoming the “insiders,” and the cultural, social, political, and economic divides between them are not so obvious or differentiated as they were only three decades ago. Mainstream American anxiety about who belongs to what ethnic group often takes the form of a deep lament for a simpler time, when white Americans did not have to think much about native populations and, if they did, the relationship was constructed as one of supposed harmony. This lament conveniently silences or ignores centuries of violence and oppression, as well as genocidal and assimilationist policies that often involved the deliberate dissolution of Indian tribal communities and the removal of Indian children from their families.

<sup>38</sup> Kristin Moe, “Cowboys and Indians Stand Together against Keystone XL,” <http://voices.nationalgeographic.com/2014/05/14/cowboys-and-indians-stand-together-against-keystone-xl/>.

<sup>39</sup> Comaroff and Comaroff, *Ethnicity, Inc.*, 53–54, n 37. <sup>40</sup> *Ibid.*, 54; 80, n 37.

<sup>41</sup> Eve Darian-Smith, “Environmental law and Native American law,” *Annual Review of Law and Social Science*, 6 (2010), 359–86.

<sup>42</sup> Clifford, *Returns*, n 17.

Accompanying this nostalgic romanticism, there is also an emergent sense of anger among residents of Santa Barbara County and elsewhere toward Native Americans, whom many people feel must be stopped at whatever cost from demanding their sovereign rights and legal presence. Often painted as “greedy,” “illegal,” and “dispassionate,” Native Americans are experiencing a national backlash against them by mainstream white society, which remains keen to keep them at arm’s length. But whereas in the colonial era native peoples were relegated to barren reservation lands out of sight and mind, today implementing processes of marginalization is not so straightforward. Racism and racial discrimination are taking more insidious forms, often under cover of the law, as experienced by the protesters against the Dakota Access Pipeline, who have been subject to tear gas, water cannon, and arrest by law enforcement officers. It should never be forgotten that across the mounting legal conflicts and cultural wars between indigenous and non-indigenous communities, Native Americans’ continuing vulnerability to racial discrimination is very real and experienced on a daily basis by rich and poor Indians alike.

In building upon David Engel’s enormously important work of more than thirty years ago, and returning to the title of this chapter, I like to think of the oven bird and the miner’s canary singing to each across time and space in ways that resonate. They both evoke the marking of time, transition, and change, as well as impending threat. From spring to winter, from fresh to poisonous air, the birds symbolize shifting conditions, nostalgia, melancholy, and ultimately a deep sense of loss. In a profound sense, both birds are singing about what Felix Cohen explored back in 1949 when he wrote about “the rise and fall of our democratic faith.”