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Foreword

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FOREWORD

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Last year marked the 150-year anniversary of the U.S.-Dakota War of 1862, which is one of the most tragic events in Minnesota history. During this six-week war that began on August 18, 1862, between 500 and 1000 U.S. and Dakota citizens were killed. Following the conclusion of the war, the United States abrogated all of its treaties with the Dakota, and nearly all Dakota men, women, and children were removed from their homeland and eventually divided into communities in Canada, North Dakota, South Dakota, Montana, and Nebraska.

In an attempt to educate the public about these events, the Indian Law Program at William Mitchell College of Law, with financial support from the Minnesota Historical Society, held an all-day symposium at the College on October 26, 2012.[1] The conference, which discussed legal issues arising out of the U.S.-Dakota War, was attended by almost 200 attorneys, historians, and students. The *William Mitchell Law Review* collected articles by some of the symposium presenters, and those articles are included in this issue.

In *"I Could Not Afford to Hang Men for Votes." Lincoln the Lawyer, Humanitarian Concerns, and the Dakota Pardons*, Professor Paul Finkelman examines the legal proceedings that led to the largest mass execution in U.S. history.[2] On December 26, 1862, thirty-eight Dakota men were hanged from a single gallows in Mankato,

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1. *U.S.-Dakota War Symposium—October 26, 2012*, WILLIAM MITCHELL C. L., http://web.wmitchell.edu/indian-law/us-dakota-war-symposium-2 (last visited Nov. 26, 2012).

2. Paul Finkelman, *"I Could Not Afford to Hang Men for Votes." Lincoln the Lawyer, Humanitarian Concerns, and the Dakota Pardons*, 39 WM. MITCHELL L. REV. 405 (2013).

Minnesota, before a crowd of soldiers and civilian spectators. Prior scholarship has discussed whether it was legal to try these men by military commission and has emphasized the lack of due process provided to the defendants, who were not appointed counsel and were tried and convicted in proceedings that lasted only five to ten minutes each.[3] Professor Finkelman summarizes this scholarship in a clear and concise way that will make it accessible to a larger audience. He also adds significantly to the discussion by focusing on President Abraham Lincoln's involvement in these proceedings.

Using primary sources, Professor Finkelman discusses the process that Lincoln used in deciding to authorize the executions of only a fraction of the 303 Dakota men that the military commission had condemned to death. As a Lincoln scholar, Professor Finkelman also helps the reader understand the enormous pressures that the President was facing when deciding the fate of the condemned Dakota. The Civil War was raging, the President's political support was waning, and he was preparing to issue the Emancipation Proclamation. Professor Finkelman explains how Lincoln's decision to ignore the calls for extermination by prominent Minnesotans, and instead confirm only a small portion of the death sentences issued by the Dakota commission, had significant political ramifications for him in his run for reelection. Nevertheless, the decision was consistent with Lincoln's humanity and his contemporaneous practice of pardoning soldiers condemned to death during the Civil War.

Dr. Waziyatawin has written a thought-provoking piece entitled *Colonial Calibrations: The Expendability of Minnesota's Original People*.[4] In this article, Dr. Waziyatawin looks at the events surrounding the U.S.-Dakota War of 1862 through the framework of the United Nations Convention on the Prevention and Punishment of Crimes of Genocide and the more recent United Nations Declaration of the Rights of Indigenous Peoples. She argues that until the U.S. government offers redress for the genocidal policies it pursued in the past, Dakota people remain expendable in the eyes of Americans who benefit from the government's dispossession.

3. *See, e.g.*, Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13 (1990); Maeve Herbert, *Explaining the Sioux Military Commission of 1862*, 40 COLUM. HUM. RTS. L. REV. 743, 780 (2009); *see also* JOHN ISCH, THE DAKOTA TRIALS (2012) (containing the unedited transcripts of the military commission trials).

4. Waziyatawin, *Colonial Calibrations: The Expendability of Minnesota's Original People*, 39 WM. MITCHELL L. REV. 450 (2013).

Next, Professor Angelique EagleWoman continues the dialogue begun by Dr. Waziyatawin in her piece, *Wintertime for the Sisseton-Wahpeton Oyate: Over One Hundred Fifty Years of Human Rights Violations by the United States and the Need for a Reconciliation Involving International Indigenous Human Rights Norms*.[5] After discussing the U.S.-Dakota War of 1862, Professor EagleWoman goes on to explain the events that have shaped her tribe—the Sisseton-Wahpeton Oyate Nation—over the past 150 years. She argues that the Sisseton-Wahpeton have effectively remained refugees for all these years and that "poverty and hunger have been constant factors"[6] in the lives of tribal members since being dispossessed of their homelands in Minnesota. Professor EagleWoman offers concrete actions that could be taken by the U.S. government to right some of these wrongs, including recognizing the true and original boundaries of the Sisseton-Wahpeton's 1867 Lake Traverse Reservation.

In *Rethinking the Effect of the Abrogation of the Dakota Treaties and the Authority for the Removal of the Dakota People from Their Homeland*, Professor Howard Vogel takes a hard look at the actions Congress took after the conclusion of the U.S.-Dakota War of 1862.[7] In 1863, Congress passed legislation that purported to unilaterally abrogate and annul the twelve treaties between the United States and Dakota bands. Through this abrogation, Congress claimed that it was relieved of all of the obligations it undertook in those treaties. Rather than return the parties to the status quo prior to their negotiations, Congress confiscated Dakota lands and forced them to remove westward. Professor Vogel argues that these actions were without legal foundation because they were based on the Doctrine of Christian Discovery, which is without moral or legal justification. He calls upon the courts to purge the Doctrine of Discovery from U.S. law. He also calls upon the American public to engage in "truth-telling" and to take actions that will bring public attention to the injustice of the past and the historical trauma that the Dakota continue to carry with them to this day.

5. Angelique Townsend EagleWoman, *Wintertime for the Sisseton-Wahpeton Oyate: Over One Hundred Fifty Years of Human Rights Violations by the United States and the Need for a Reconciliation Involving International Indigenous Human Rights Norms*, 39 WM. MITCHELL L. REV. 486 (2013).

6. *Id.* at 526.

7. Howard J. Vogel, *Rethinking the Effect of the Abrogation of the Dakota Treaties and the Authority for the Removal of the Dakota People from Their Homeland*, 39 WM. MITCHELL L. REV. 538 (2013).

Lenor Scheffler, an enrolled member of the Lower Sioux Indian Community, a William Mitchell College of Law alumna, and a partner at Best & Flanagan, LLP, has written an article entitled *Reflections of a Contemporary Minnesota Dakota Lawyer: Dakota Identity and Its Impacts in 1862 and 2012*.[8] The article traces the impact that the U.S. government has had on Dakota identity since the 1800s. Treaties with the Minnesota Dakota created a system where, for the first time, (1) the amount of Indian blood a person had was crucial to determining whether they were eligible to receive treaty benefits, and (2) the Secretary of the Interior, not the tribe itself, was arbiter of who was and was not Indian. Following the U.S.-Dakota War of 1862, Congress abrogated these treaties and further divided the Dakota into "loyal Mdewakanton," (who were entitled to remain in Minnesota, given select parcels of land to live on, and received various appropriations) and the remaining Dakota, who were removed from the state. Federal rolls were created that determined who the "loyal Mdewakanton" were.

Today, each federally recognized Dakota tribe in Minnesota is a distinct political community with the power to determine its own membership. Yet the federal rolls described in the preceding paragraph are still important to tribal membership decisions today, even though it is freely acknowledged that many Dakota people were left off the rolls or that blood quantum was incorrectly noted for those on the rolls. Additionally, some Dakota communities have further divided their membership into those that are residents of the reservation (and therefore have the privilege of voting, running for governmental office, or receiving per capita payments) and those that are non-resident members. Attorney Scheffler calls upon all Dakota tribes to take a fresh look at their membership criteria. Traditionally, Dakota knew who their relatives were, and they could rely on their relatives to protect and care for them in times of need. Constitutional reform may be needed to ensure that current membership criteria truly reflect Dakota values rather than Anglo-American beliefs and historic policy goals.

Finally, Professor Sarah Deer and the Honorable John Jacobson have contributed a piece to this issue entitled *Dakota Tribal Courts in Minnesota: Benchmarks of Self-Determination*.[9] This

8. Lenor A. Scheffler, *Reflections of a Contemporary Minnesota Dakota Lawyer: Dakota Identity and Its Impacts in 1862 and 2012*, 39 WM. MITCHELL L. REV. 582 (2013).

9. Sarah Deer & John E. Jacobson, *Dakota Tribal Courts in Minnesota:*

article describes the current governmental institutions of the four federally recognized Dakota communities that exist within the State of Minnesota: the Shakopee Mdewakanton Sioux Community, the Prairie Island Indian Community, the Upper Sioux Indian Community, and the Lower Sioux Indian Community. For each tribe, Professor Deer and Judge Jacobson have described how and when it was formed, the Indian Reorganization Act constitution it adopted, the creation of its tribal court system, the scope of tribal court jurisdiction, and key decisions issued. These Dakota tribal courts are fairly recent in origin, having been created during the 1980s and 1990s during a period of renewal for Minnesota tribes sparked by the acquisition of more economic resources through the advent of Indian gaming. This is the first article written about the governmental institutions of these modern-day Dakota communities in Minnesota, and as a result, it should prove to be a valuable resource for Minnesota practitioners and tribal law scholars.

The sesquicentennial of the U.S.-Dakota War brought renewed awareness to these historic events and their modern-day repercussions for Dakota people. It is our hope that this issue of the *William Mitchell Law Review* continues the public dialogue that occurred throughout the State of Minnesota last year and prompts actions that can foster reconciliation in the future.

Benchmarks of Self-Determination, 39 WM. MITCHELL L. REV. 611 (2013).