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Indian Common Law:¹
The Role of Custom in American Indian Tribal
Courts²
(Part I of II)

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ABSTRACT: Many American Indian Reservations have had modern tribal courts for at least 60 years. Have the distinctive social norms of Indians worked their way into judge-made law, or are tribal courts much like state courts? Is there Indian common law? To answer these questions, we interviewed tribal judges on reservations throughout the West. We found distinctively Indian social norms, both substantial and procedural, pervading tribal courts. Many of these norms are specific to particular tribes and some are shared by many tribes. Indian common laws (in the plural) are tribe-specific, so there is a comparative law of Indian common law. Applying the rules of conflict of laws requires knowledge of Indian common laws.

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1. For their ethnographic fieldwork in tribal laws, the authors received the Max-Planck Research Prize in Bonn in 1994. This award was the second time a lawyer received the prize and the first time it was awarded for anthropology of law.

2. *Emic* (insiders') use clearly prefers "Indian". The term "Native American" is *etic*, that is, outsiders' usage. Thus, the people whom we interviewed referred to themselves as "Indians" in almost every case, and only occasionally used the phrase "Native Americans." Our paper respects their practice. For the distinction between *emic* and *etic*, see Headland et al. (1990).

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Our field research consisted of interviews with tribal judges as well as other Indian officials. The reservations that we visited once or more were Flathead, Blackfoot, Gila River Indian Community (Pima-Maricopa), Hopi, Navajo, Nishga, Nez Percé, Pascua Yaqui, San Carlos Apache, San Xavier District and the main reservation of Tohono O'odham, Warm Springs, White Mountain Apache, Jicarilla Apache, the Yavapai-Apache Community, Kaibab Paiute, Moapa Paiute, Las Vegas Paiute and the Pueblos of Acoma, Isleta, Jemez, Laguna, Picuris, San Ildefonso, San Juan, Santa Ana, Santa Clara, Santo Domingo, Tesuque, Taos, Zia, Pojoaque, Nambe, Cochiti, San Felipe, Sandia and Zuni.

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"The greatest challenge faced by the modern tribal court system is in the harmonizing of past Indian customs and traditions with the dictates of contemporary jurisprudence."

— Vine Deloria, Jr., and Clifford M. Lytle.³

INTRODUCTION

A way of life expresses itself in norms sustained by institutions. Scholars have long studied the distinctive norms of American Indians, but no one has studied systematically whether or how tribal courts sustain these norms. Have custom and tradition worked their way into judge-made law on reservations and created distinctively Indian common law? This article provides an answer based upon interviews with judges on Indian reservations throughout the western United States.

The study of American Indian norms can be divided into three phases. Before contact with Europeans or the acquisition of writing, some tribes reflected upon their own norms and collected them.⁴ After contact, Europeans and Americans recorded their observations of Indian norms,⁵ and some tribes reformed their own governments by adopting written constitutions.⁶ In the late 19th century, the modern discipline of anthropology emerged and Indian studies became more systematic. Thus, the study of Indian norms took place in three stages: 1) reported "ways" before contact with Europeans; 2) written accounts after contact; and 3) anthropological studies beginning in the late 19th century.

The third stage culminated in the publication of Llewellyn and Hoebel's *The Cheyenne Way* (1941) which helped establish legal anthropology as a distinct sub-discipline. By the end of the 19th century, all tribes were confined to reservations or had lost their lands through allotment. In the 1930's, only a few Cheyennes remained who could recall their former life as a free people. Llewellyn and Hoebel used historical records and the recollections of elderly Indians

3. Deloria & Lytle (1983), page 120.

4. The larger alliances and confederations among tribes prior to contact presumably required a legal foundation. The best known example is the Iroquois, whose form of government may have influenced the American constitution. See Fenton (1968).

5. For the argument that the idea of federation passed from the Iroquois League to the USA and then to Switzerland, see Vanoni (1998).

6. Strickland (1975).

to reconstruct Cheyenne law as it existed during the 1860's and 1870's.

Llewellyn and Hoebel's book is the most thorough, penetrating, and lively study in Indian legal anthropology. Other scholars produced a modest number of useful accounts of the legal customs of various tribes, which we describe briefly. Two short articles written in the 1930's concern what the authors describe as the "common law" of the Hopi and Navajos.⁷ Four monographs written in the 1940's or early 1950's describe the customary law of four additional tribes.⁸ Property and inheritance rules for the Hopi are the subject of several studies over a period of years.⁹ In the 1940's and 1950's, the last Indians died who could recall life before confinement to reservations, so retrospectives like Llewellyn and Hoebel's became impossible. From the 1950's to the present, the amount of scholarship on Indian legal norms failed to increase and may have diminished.¹⁰

After Indians were forced onto reservations in the 19th century, their affairs were administered by federal officials and, to a limited extent, by local Indians. In the 1930's, however, many reservations adopted Western-style democratic government with an elected legislature and modern courts. As the memory of an older freedom faded, tribal government experienced a renaissance. The rebirth of tribal self-government enlarged the scope for making Indian norms into laws. Did the tribes draw upon their moral and legal heritage to make distinctively Indian laws, or did they simply adopt state and federal law? Scholars have neglected this question almost entirely.

7. See Colton (1934) on the Hopi and Van Valkenburgh (1936-1938) on the Navajo. A proposal to use the term "Indian common law": Zion (1988).

8. See Richardson (1940) on the Kiowa, Hoebel (1940) on the Comanches, Noon (1949) on the Grand River Iroquois, and the more substantial and systematic study by Smith & Roberts (1954a and 1954b) on Zuni law. Note that Smith and Roberts state in the introduction at page 3 that there is "no major specialized study of the law-ways of any Southwestern Indian tribe" and then list the relevant studies that they could find. Out of the 97 cases reported by Smith and Roberts, 25 are taken out of earlier works on Zuni (by Bunzel, Cushing, Curtis, Ealy, Kirk, Kroeber, E.C. Parsons, Scott, Stevensen and others). 21 cases are reported by informants but date back to the years 1933 and before. 51 cases concern contemporary problems.

9. For research on land, ownership, and inheritance among the Hopi, see Beaglehole (1935), Page (1954), Cox (1967), Ellis (1974), and Kennard (1979).

10. Father Haile (1954) gave a useful analysis of Navajo property concepts. Reina's (1967) study of ritual laws refers to a pueblo in Guatemala. Only chapter 3 of Bruce A. Cox's insightful doctoral dissertation on Hopi law and conflict resolution was published. See Cox, (1967, 1968). Dan Vicente (1972) contributed a book on Navajo legal education. Navajo public law was treated by Mary Shepardson (1963, 1970). Gary Witherspoon (1975) gave a useful account of Navajo kinship and marriage law. John W. Ragsdale (1987) discusses questions of Hopi law; he quotes literary sources but does not indicate whether he did additional field work. E. Adamson Hoebel reported on Keresan witchcraft (1952) and Keresan law (1968 and 1969). Hoebel (1969 at page 100) stated, "The most distinctive feature of Pueblo law, among tribal systems, is that there is no private law." This claim was contradicted by the wealth of private law rules we discovered in all the Pueblos we visited, including the Keresan Pueblos.

To illustrate, Llewellyn and Hoebel drew no connections between the Cheyenne's historical and contemporary law. Llewellyn and Hoebel did not investigate whether the Cheyenne Way influenced modern Cheyenne legislation and court decisions. This omission was not limited to Llewellyn and Hoebel alone. Sources concerning actual practice in tribal courts are scarce.¹¹ Some tribal constitutions and codes are published,¹² and one reservation published the decisions of its highest court.¹³ However, our review disclosed little writing in law journals concerning the content of tribal codes and constitutions, the procedures of tribal courts; or the distinctively Indian characteristics of criminal, civil, or administrative law on reservations.¹⁴

What explains this gap in scholarship? In form, tribal governments often look much like local governments anywhere in America. Perhaps scholars assume from appearances that Indian laws are not distinct enough to warrant separate study. State and federal law pre-empts much tribal law.¹⁵ Perhaps scholars assumed that the tribes lack the power to make distinctive laws. Or perhaps legal scholars were deterred from field research by the cool reception given them on some reservations.¹⁶ For whatever reason, scholars have neglected the study of tribal courts.

While scholars neglected *tribal law*, another kind of Indian legal scholarship flourished. Under United States law, Indian tribes are "sovereign," which conveys unique powers upon them. However, the tribes are also legally "dependent," which exposes them to intrusions

11. See Pevar (1992), 129ff.; Canby (1988), 181; Wilkinson (1987); Clinton, Newton & Price (1991); Getches, Wilkinson, & Williams (1993); and Deloria & Lytle (1983). It is worth noting that Linda Fritz's 167 page bibliography of "native law" contains three entries under the heading "Customary Law."

12. Fay (1970a, 1970b), R. Johnson (1981). Some examples: Navajo Tribal Code (1978). Jicarilla Apache Tribal Code (1987), Pueblo of Isleta Tribal Constitution (1947, revised 1991). Constitution and Bylaws of the Pueblo of Santa Clara New Mexico (1935). Also see The National Indian Law Library Tribal Code Project of the Native American Rights Fund.

13. Navajo Law Reporter (1969 through 1987).

14. "To date, no developed literature exists concerning the legal codes of U.S. tribes. . ." — B. G. Miller, "Contemporary Tribal Codes and Gender Issues," 18 American Indian Culture and Research Journal 43-74 (1994) at page 68. One of the few articles actually concerned with what tribal courts do is Tso (1989). Also see Pommersheim (1988), Brakel (1978), and National American Indian Court Judges Association Long Range Planning Project (1978). Fredric Brandfon (1991) calls for tribal courts to review legislation by tribal councils in light of Indian traditions.

15. Floyd Kezele, who was judge at Acoma, reported to us that an attorney recently argued before the Acoma Tribal Court that the Indian Civil Rights Act of 1968 "did away" with all Indian common law. The Indian Civil Rights Act is discussed at page 308 in this article. Nothing in the Act can be construed to this effect. Judge Kezele told us that he thinks that the Indian common law of crimes and some civil wrongs have been pre-empted on those reservations located in the so-called "P.L. 280" states. "P.L. 280" is discussed on page 521f.

16. Partly under the influence of Vine Deloria's (1969) attack on anthropologists, some reservations now require researchers to apply to a tribal board for permission to enter the reservation and conduct research. These boards, which have little to lose from denying an application, proceed cautiously and slowly. For a reply to Deloria, see the introduction to Hunn (1990).

by federal authorities.¹⁷ The paradox of being sovereign and dependent raises vexing legal questions about the scope of tribal power relative to federal and state governments. These questions became more urgent after the Second World War as budgets for Indian programs increased, land values rose, and Indians asserted their legal rights more aggressively. Legal scholarship responded with a flow of articles and books on Indian jurisdiction and policy,¹⁸ as well as research and meditations on cultural conflicts and the law.¹⁹ Thus, while Indian legal scholarship such as Llewellyn and Hoebel's atrophied, the study of federal *Indian law* and tribal jurisdiction in particular matured and flourished.

Litigation of tribal jurisdiction turns upon the interpretation of treaties, acts of Congress, and decisions of federal courts, all of which were imposed upon the tribes. This litigation usually requires limited knowledge of Indian society, just as litigation in international public law requires limited knowledge of the countries who are parties to the disputes. In contrast, litigating the laws that Indians make for themselves in tribal councils and tribal courts requires detailed knowledge of Indian society. Like Llewellyn and Hoebel, we study law made by Indians (called "tribal law"), rather than law made for Indians (called "Indian law"), but unlike these scholars, we study tribal law as it is, not as it was.²⁰

Philosophers agree that a tree exists in the forest when no one is looking at it. We began our study with the belief that Indian common law exists when no scholar notices it. To test this belief, we conducted more than 120 interviews with tribal officials on 37 reservations in the West.²¹ We sought answers to four questions:

- (1) Is there Indian common law? Specifically, does custom work its way into judge-made law on reservations?
- (2) Is Indian common law specific to each tribe or generic to many tribes?

17. The legal basis of sovereign dependency is explained on page 511f.

18. See Cohen (1982). Subsequently, surveys of jurisdictional Indian law were written by Pevar (1983, 1992) and Canby (1981, 1988). Also see National American Indian Court Judges Association (1974); Falkowski (1992). A study in greater depth is by Deloria & Lytle (1983). For cases and materials, see Getches, Wilkinson & Williams (1993), and Clinton, Newton & Price (1991). For relevant articles, see student note in Laurence (1988), Resnik (1989). For policy studies Rosen (1976), Taylor (1983), Prucha (1985).

19. Weber (1982), Wilkins (1991), Wilkinson (1987), Williams (1986, 1989, 1990).

20. Some scholars use the phrase "Indian law" for the law imposed upon the tribes, and "tribal law" to refer to the laws made by Indians. For example, Canby defines "American Indian Law" as that body of law dealing with the status of the Indian tribes and their relationship to the federal government, with all the consequences for the tribes, their members, the states, their citizens, and the federal government itself. In contrast, Canby defines "American Tribal Law" as the constitutional, statutory, and customary laws of the various tribes. Canby (1981, 1988), page 1 and 3.

21. The reservations that we visited once or more, and the names of judges and tribal officials, are listed in the acknowledgments.

(3) How does Indian common law develop? Is the process different in tribal courts than in American state courts?

(4) Should public policy encourage or discourage the development of distinctively Indian common law?

The Anglo-American legal tradition identifies the common law as a body of substantive rules and a process.²² The substantive rules come from judges selectively enforcing social norms, and the common law process comes from judges systematically refining precedent. Mark Twain quipped that reports of his death were greatly exaggerated. Similarly, Tom Tso, whom we interviewed in 1990 when he was Chief Judge of the Navajo Reservation, thinks that reports of the death of Navajo common law are greatly exaggerated. He used Navajo social norms daily to decide cases. Our field research concludes that all tribal courts selectively enforce social norms and few tribal courts systematically refine precedent. These conclusions coincide with the conclusions of legal anthropologists about the general character of dispute resolution in tribes.²³

Unlike other minority groups in America, many Indian tribes have their own lands and governments. The U.S. Constitution recognizes tribal sovereignty.²⁴ In recent years, Indian and non-Indian officials have stressed that sovereignty should be a fact, not just a slogan. If tribes exercise sovereignty, they would presumably absorb social norms into tribal laws. Thus our research reports on progress towards the realizing Indian legal sovereignty.

This Article is divided into six parts. Part I, entitled "Sovereignty," briefly explains the extent to which Indian tribes possess the legal power to govern themselves. Part II explains our methods of research, which we used to test the hypotheses formulated in Part III. Our findings concerning procedural and substantive tribal law are reported in Part IV and Part V, respectively, and concerning conflicts of law in Part VI.

22. Eisenberg (1988), Cardozo (1921), Llewellyn (1951), Goodhart (1959), Levi (1949). For a discussion of common law theorists prior to 1975, see Fikentscher (1975).

23. For descriptions of these processes by anthropologists, see Bohannan (1957), Gluckman (1955), Pospíšil (1978), Nader (1990), Josselin de Jong (1969); cf. Pannenberg (1983).

24. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) enunciating a principle of "discovery" as an alleged European doctrine; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); *United States v. Kagama*, 118 U.S. 375 (1886); *Williams v. Lee*, 358 U.S. 217 (1959); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1977); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) U.S. v. Wheeler, 435 U.S. 313, 327 (1978); *Montana v. U.S.*, 450 U.S. 544 (1981); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149, 102 S.Ct. 834 (1982), dissent of Justice Stevens, joined by Chief Justice Burger and Justice Rehnquist, in S. Ct. at 918-920.

I. SOVEREIGNTY: THE RIGHT OF TRIBES TO THEIR OWN LAW

The Declaration of Independence begins with the words, "We, the People", but this phrase did not include most Indians living within the new nation's boundaries. They were members of sovereign nations that had been, or soon would be, conquered in war or otherwise forced to submit to the authority of the United States. The United States Constitution acknowledges the distinct legal status of persisting Indian tribes. The Commerce Clause (Art. I, section 8, clause 3) provides that Congress shall have the power, not only to regulate commerce with foreign nations, and among the several states, but also with Indian tribes. Furthermore, Art. II, section 2, clause 2, empowers the President to make treaties, including treaties with Indian tribes, with the consent of the Senate. (In 1871 Congress withdrew this power from the President.²⁵) Only sovereign nations can make treaties, so this section of the Constitution implicitly acknowledges tribal sovereignty.

In addition to the Constitution, international law governs relations between the tribes and the United States. International law acknowledges the authority of conquerors and imposes obligations on them. The character of the obligations depends partly upon the nature of the conquest. The term *debellatio* refers to a conquered people who dissolved, leaving no one to assert their rights as a people. *Occupatio bellica* refers to a conquered people who persist, leaving the defeated nation as a legal subject. Germany after 1945 provides an example of the latter situation. Under rules of international public law, the victor has obligations to the defeated, such as the obligation to recognize its delegates, negotiate a peace treaty, and possibly acknowledge the existence of a state with some residual powers. Upon conquest, some Indian tribes dissolved and others persisted. In principle, the American government's power over the persisting tribes is rooted in, and limited by, *occupatio bellica*.²⁶

Occupatio bellica received a distinctly American interpretation along lines initially laid down by Chief Justice Marshall and expressed in the famous oxymoron, "domestic dependent nation."²⁷ In

25. 16 Stat. 544, 566, codified as 25 U.S.C. 71.

26. Cf. Verdross & Simma (1984) 391. Examples for *debellatio* include the Northern Kingdom of Israel (*Bible*, "2 Kings", Chapter 17); an intended and publicly proclaimed *debellatio* was the conquest of Kuwait by Iraq on Aug. 2, 1990. Examples for *occupatio bellica* include France in 1940 and Japan after World War II.

27. Chief Justice Marshall, in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); see the discussion in Canby 14 ff., 66 ff. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) on "discovery" giving title to discoverers; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) on Cherokees having a "state"; *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832) on tribes having no ability to deal with foreign powers but being "distinct, independent political communities, retaining their original natural rights" in matters of local government; *Menominee Tribe v. U.S.*, 391 U.S. 404 (1968); *Antoine v. Washington*, 420 U.S. 194 (1975). For details see Pevar (1983), 41 ff.; Canby (1988), 66 ff.; Deloria, Jr. (1969) and (1974); Josephy (1971); Quinn (1990). This principle of "dependent sovereignty" is opposed to the theory of the "three sover-

Worcester v. Georgia, Justice Marshall pronounced that the tribes in Georgia are "distinct political communities, having territorial boundaries, within which their authority is exclusive."²⁸ So the tribes are nations. However, Marshall held that the exclusive authority of tribal nations is limited. The tribes retain "their original natural rights" in matters of local government, but the United States has exclusive power to deal with foreign states.²⁹ So the tribes are dependent in foreign affairs.

Marshall's formula for allocating power survived in spite of persistent attempts by states to extend their jurisdiction over tribes. The formula solidified into the principle that states may legislate, adjudicate, or administer Indian affairs only to the extent that Congress empowers them to do so. Furthermore, Congress may not assign all of its powers over the tribes to the states. The relevant statutes and cases —called "Indian law"— have been studied intensively by others.³⁰ We distinguish three phases in the development of Indian law and describe some of its contours.

eighties" because it (correctly) keeps Indian sovereignty out of the U.S. federal system (cf. Resnick (1995); O'Connor (1997)). For chronology of cases see Holt & Forrester (1990).

28. 31 U.S. (6 Pet.) 515 (1832), at 561.

29. 31 U.S. (6 Pet.) 515, at 519. See also *U.S. v. Kagama*, 118 U.S. 375, 381-383 (1886) on quasi-sovereignty and semi-independence; *Talton v. Mayes*, 163 U.S. 376 (1896) on tribal governmental powers; *Menominee Tribe v. U.S.*, 391 U.S. 404 (1968); *Antoine v. Washington*, 420 U.S. 194 (1975). For details see Pevar (1992), 37 ff.; Canby (1988), 14 ff., 66 ff.; Deloria (1969) and (1974); Josephy (1971); Green & Work. This allocation of power made practical sense at the time. The appetite of non-Indians for Indian land threatened to provoke new Indian wars. To avoid conflict, the frontier states were denied power over the tribes, and the federal government regulated commerce with them. See Canby (1988), 10; Cornell & Kalt (1991).

30. See the authorities cited in note 18, *supra*; also Pommersheim (1995); Reno (1995); Wallace (1995); Feldman & Withey (1995). Felix Cohen, *op.cit.*, identifies constitutional powers that, apart from U.S. Constitution, article I, § 8, cl. 3, deal with the management of Indian tribes, including the Treaty Clause, the Property Clause, the Necessary and Proper Clause, and the Supremacy Clause. However, none of these clauses gives direct power over Indian tribes, Cohen, at 207-211. By comparison, the Articles of Confederation specifically gave Congress "the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians not members of any of the states, provided that the legislative right of any state within its limits be not infringed or violated," Articles of Confederation, Article IX, which leaves no room for the application of the X Amendment. However, the attempted compromise caused many problems between Congress and the states, and ultimately for the tribes. This ungovernable situation led to the Constitution's terse and concise grant of power: Robert N. Clinton, "Isolated In Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government," (1981); Lester J. Marston & David A. Fink, "The Indian Commerce Clause," (1986) for the historical background, and details. Justice Thurgood Marshall wrote, "[t]he source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172n. 7 (1973).

The Supremacy Clause in Article 6 of the Constitution says that a federal treaty with an Indian tribe is the supreme law of the land. Moreover, a legislative ratification by Congress of an agreement between the federal executive branch and an Indian tribe is a law of the United States made pursuant to the Constitution and, therefore,

A. *Three Phases*

Before contact with Europeans, few tribes in North America created empires or subordinated others.³¹ Most tribes, consequently, enjoyed independence and autonomy. The advance of the frontier

like treaties, is made binding upon the affected stated by the Supremacy Clause notwithstanding that an affected state is not a party to the agreement, Knickerbocker, Anne E., *American Jurisprudence*, Second Edition, Volume 41 (1995) Current Through April 1997 Cumulative Supplement, §§34-57, §55. Cases dealing with the supremacy clause are *Stephens v. Cherokee Nation*, *Wiggan v. Conolly*, 163 U.S. 56, 41 L.Ed. 69, 16 S. Ct. 914; 174 U.S. 445, 43 L. Ed. 1041, 19 S. Ct. 722; *Blackfeather v. United States*, *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 47 L.Ed. 183, 23 S.Ct. 115; 190 U.S. 368, 47 L. Ed. 1099, 23 S. Ct. 772; *Sac & Fox Indians v. Sac & Fox Indians*, 220 U.S. 481, 55 L.Ed. 552, 31 S. Ct. 473; *Eastern Cherokees v. United States*, 225 U.S. 572, 56 L. Ed. 1212, 32 S. Ct. 707; *Lane v. Morrison*, 246 U.S. 214, 62 L. Ed. 674, 38 S. Ct. 252; *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 20 L. Ed. 2d 697, 88 S. Ct. 1705 (hunting and fishing rights upheld); *Antoine v. Washington*, 420 U.S. 194, 43 L. Ed. 129, 95 S. Ct. 944; *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 61 L. Ed. 823, 99 S. Ct. 3055, 9 ELR 20517, on remand (CA9 Wash) 605 F.2d 492, appeal after remand (CA9 Wash) 641 F.2d 1311, 8 Fed. Rules Evid. Serv. 382 and on remand 92 Wash. 2d 939, 603 P.2d 819 and modified on other grounds 444 U.S. 816, 62 L. Ed. 2d 24, 100 S. Ct. 34; *United States v. Dion*, 476 U.S. 734, 90 L. Ed. 767, 196 S. Ct. 2216, 16 ELR 20676; *Utah Mining & Mfg. Co. v. Dickert & Myers Sulphur Co.*, 6 Utah 183, 21 P 1002.

Therefore, state jurisdiction or regulatory authority over activities on Indian tribal lands is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state's interests at stake are sufficient to justify the assertion of state authority. Where a detailed federal regulatory scheme exists and where its general thrust will be impaired by incompatible state action, that state action, without more, may be ruled preempted by federal law, *Knickerbocker*, loc. cit., §48; Cases dealing with the preemption issue are *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 76 L. Ed. 2d 611, 103 S. Ct. 2378; *Mattz v. Superior Court*, 46 Cal. 3d 355, 250 Cal. Rptr. 278, 758 P.2d 606, reh. den. (Cal) 1988 Cal LEXIS 1572, and cert. den. 489 U.S. 1078, 103 L. Ed. 2d 834, 109 S. Ct. 1529; *People ex rel. Department of Transportation v. Naegele Outdoor Advertising Co.*, 38 Cal. 3d 509, 213 Cal. Rptr. 247, 698 P.2d 150, cert. den. 475 U.S. 1045, 89 L. Ed. 2d 570, 106 S. Ct. 1260: responsibility of enforcement of the Highway Beautification Act(23 USCA §§ 131 et seq.) on Indian reservations is reserved to federal employees, and state's regulatory authority over outdoor advertising on Indian tribal lands is preempted by the operation of federal law; *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 90 L. Ed. 2d 881, 106 S.Ct. 2305, later proceeding (ND) 419 N.W.2d 920; *California v. Cabazon Band of of Mission Indians*, 480 U.S. 202, 94 L. Ed. 2d 244, 107 S. Ct. 1083; *White Mountain Apache Tribe v. Williams*, (CA9 Ariz), 798 F.2d 1205, 810 F.2d 844, cert. den. 479 U.S. 1060, 93 L. Ed. 2d 990, 107 S. Ct. 940, reh. den. 480 U.S. 941, 94 L. Ed. 2d 783, 107 S. Ct. 1594.

From this, a theory of "multiple sovereignties" has been developed, *Resnick* (1995), *O'Connor* (1997), note 27, *supra*; see also *Monette* (1994); however, tribes, states, and federal government are not parts of a tripartite system of sovereignties since the tribes are outside of the federal system that only connects states and the federation; see for this *R.M. Hills, Jr.* (1998); by ratifying the Constitution, states accepted the notion of sole Congressional authority over Indian affairs. Hence, tribes rather enjoy a "dependent sovereignty" of their own that is non-federal but quasi-inter-national; see notes 26f., *supra*, and accompanying text.

31. In North America the tribes often engaged in warfare and extracted tribute from each other, and some tribes were apparently coerced to join confederations. The best known example is the Iroquois confederation, which apparently exterminated some tribes and incorporated others. See *Morgan* (1851); *Warren* (1984), 146 ff.; *Murdock* (1934), 291-323. However, most anthropologists deny that there were kingdoms or empires of the type that feudalism makes possible. Tribal hunters had limited use

brought violence, warfare, and relocation on an unprecedented scale. Conquest and submission to American authority resulted in the confinement of many tribes to reservations, where they were legally and economically dependent upon the federal government. In the 1930's, reservation governments were reformed and the tribes began to elect their own officials. The new tribal governments recovered some sovereignty while remaining dependent. These facts suggest dividing legal relations between the American government and the tribes into three historical phases: (i) independence and autonomy; (ii) conquest and submission; and (iii) modern tribal government with dependent sovereignty.³²

Many tribal histories roughly fit these three phases, but no tribe fits perfectly and some tribes do not fit at all. To illustrate a tribe that fits well, various Apache bands hunted and farmed in the White Mountains of Arizona, and raided the farms and towns to the south that belonged to Papagos and Mexicans. In the second half of the 19th century, they were subjugated by the U.S. Army and confined to reservations at San Carlos and White Mountain. In the 20th century, the Apaches adopted a democratically elected government. Thus the history of the White Mountain Apaches approximates the three phases. The same could be said of other western tribes that we studied, including the Navajo.³³

The Pueblo tribes fit the pattern more roughly. They were subjugated by the Spanish, rebelled in 1680, and most were re-conquered before American authority extended into the area.³⁴ Instead of receiving land grants from the U.S. government, the Pueblos acquired their lands from the Spanish, and the U.S. subsequently recognized these titles in fee simple.³⁵ The Pueblos already had well-organized village governments and a long history of responding to outside au-

for slaves and lack the administrative apparatus for colonialism. See Eggan (1950); Llewellyn & Hoebel (1941).

32. A good discussion of the cycles in law is in O'Brien (1991). Recent cycles in policy are reviewed in Stuart (1991), pages 93 and 102. Special mention should be made of the Indian Self-determination and Education Assistance Act of January 4, 1975, Publ. L. 93-638, 88 Stat. 2203, 2203-72209-10, 2212-13, as amended at 25 U.S.C.A. SS450a-450n (1994); concerning Pub. L. 93-638, see Getches et al., (1993), at 652; Iadarola (1979a,b); Johnson & Knowlton (1995).

33. Spicer (1962), 21ff.; 343ff; 371ff.

34. Spicer (1962), 152ff. The Hopi were never conquered, Mays (1985), 21f.

35. Recognition was stipulated in the Mexican peace treaty of Guadeloupe Hidalgo of July 4, 1848. The Pueblos of New Mexico accordingly own most of their land, rather than having the United States hold legal title for them, Canby (1988), 272; cf., Simmons (1977), 132 f. President Abraham Lincoln renewed and confirmed this distinctive form of ownership by issuing to each Pueblo a ceremonial cane similar to the ones that the Pueblos had received from the Spanish. At inauguration rites for newly elected or appointed Pueblo governors, both canes are presented to the public to recall the Pueblos' titles in their territories as not having been derived from the United States.—CS.

thorities before they were brought into the American reservation system.³⁶

Unlike the White Mountain Apaches and the Pueblos, the three phases do not fit the Yaquis. In the early decades of this century, they migrated to Tucson to escape an extermination campaign conducted in their Sonoran homeland by the Mexican government and settlers.³⁷ After extensive negotiations, the U.S. government recognized in 1978 the large Yaqui community on the southwestern boundary of Tucson as an Indian reservation.³⁸ Thus, the Yaquis were never conquered by outsiders, never lived under officials of the federal government, and actively campaigned for federal recognition as a tribe and creation of a reservation.

B. Three Courts

The three historical phases outlined above roughly correspond to the historical and legal bases of contemporary Indian courts. A few courts existed before contact, some were imposed after conquest, and others were created during the rebirth of sovereignty in this century. We will briefly describe each type of court.

Anthropologists stress that dispute resolution in a tribe usually aims to repair relationships, rather than decide the rights of the parties.³⁹ Repairing relationships is best accomplished, not by a court, but by the mediation of a chief, an elder, a clan-mother, a medicine man, a religious leader, or a respected relative. Informal means of resolving disputes and repairing relationships developed before contact with Europeans and persist today in many tribes. When successful, these informal processes resolve disputes through mediation before they reach tribal courts.⁴⁰ To promote harmony and reduce reliance on courts, the Navajo government is trying to organize "Peacemakers Courts", and other tribes may follow their lead.⁴¹

Besides informal dispute resolution, some tribes still have formal courts with a long history, possibly pre-dating the conquest. Examples include the "Peacemakers Courts" of the Iroquois and the Pueblo religious courts.⁴² Federal, state, and most tribal authorities do not

36. In his report of 1598 to the King of Spain, the conquistador Juan Onate called the pueblos "republics"; as for the pueblo governments that vary from pueblo to pueblo see Ortiz, A. (1969); Dozier (1970/1983), 133 ff., 151 f. 166/167; Lange (1959/1990); Simmons (1977), 45ff.; Sando (1976/1982; 1982; 1992); Fikentscher (1995b), 223, 272-85.

37. Spicer (1962), 46ff., 61ff., 334ff.

38. Spicer (1988), page 310, note 7.

39. Nader (1990); Bohannon (1957); Pospišil (1978, 1971).

40. Deloria & Lytle (1983), 112.

41. We were told that peacemakers are not merely envisioned, but actively working in some places on the main Navajo reservation and in the district of Rama. We could not find any documents on the peacemakers and we did not attempt field research on their activities.

42. Cushing, who was the first American to live among the Zuni, describes the operation of such a court. It is not certain whether such courts still exist.

recognize the jurisdiction of these courts. Consequently, these courts cannot legally exercise coercive powers.⁴³

Some Pueblos have public courts developed in response to Spanish and Mexican administrators. Pueblos call these courts "traditional," but, to avoid confusion with traditional religious courts, we call them "traditional secular courts". Traditional secular courts meet in public under the direction of secular officials. The composition of traditional secular courts varies from one Pueblo to another. In some Pueblos the court consists of the governor and the two lieutenant governors, often assisted by tribal counsel or a tribal attorney.⁴⁴ Other Pueblos hire judges who have no other tribal office.⁴⁵

Now we turn from the traditional courts to the second type of court, which developed after Indians were confined to reservations and their affairs were brought under federal administration.⁴⁶ "Indian agents" were assigned by the Bureau of Indian Affairs (BIA) to most reservations.⁴⁷ The Indian agents, who had wide discretionary powers under the federal government, recruited Indians as judges for so-called "Courts of Indian Offenses." In 1883, these courts were made a regular part of the Bureau of Indian Affairs. Since they operated under the Code of Federal Regulations, the Courts of Indian Offenses became known as "CFR courts." The Indian agent usually dominated the CFR courts by his power to appoint judges and prescribe rules.⁴⁸

Some CFR courts remain today, but most of them were replaced by courts with newer origins. To understand the newer courts, one must consider how American-style democracy came to the reservations. Reservations in the 19th century were governed by an uneasy and unequal interchange between the Indian agent and traditional Indian leaders. The Indian agent responded to Washington officials, who demanded peace and compliance with administrative orders. Af-

43. Attempting research on such courts would be an impropriety in our opinion. One sanction of a traditional religious tribunal may be exclusion from the kiva for revealing ceremonial secrets to outsiders. Because the traditional religious courts serve as mediators and adjudicators in ceremonial matters, the judges of the traditional secular or modern Pueblo courts can concentrate on secular issues. Fikentscher's guess is that historically the religious traditional courts were three kinds: Disciplinary courts of the societies (described for instance of the "Delight Makers", Bandelier (1890)), disciplinary courts of each moiety, and a court consisting of the two moiety heads who decided ceremonial matters of the whole tribe.

44. Santa Ana, Sandia, Zia, Cochiti, San Felipe, Santo Domingo, and Jemez. Of Zia Pueblo it is said that "they are thinking about hiring a judge," by which they mean establishing an IRA court.

45. See note 52, *infra*.

46. Warfare between the tribes and the U.S. diminished so far by 1849 that the BIA was removed from the Department of War. It might have been relocated in the State Department, which generally deals with other nations, but instead it was transferred to the newly created Interior Department, which suggests that these nations were more dependent than sovereign.

47. Not all reservations were placed in charge of an Indian agent, e.g., Acoma. See, however, Canby (1988), 18.

48. Deloria & Lytle (1983), 114; Canby (1988), 18, 61.

ter satisfying these constraints, traditional Indian leaders had some scope to exercise their authority. This situation fundamentally changed with passage of the Indian Reorganization Act (IRA) in 1934 and the accompanying shift in Indian policy. After 1934, many tribes adopted constitutions providing for an elected council and chairman, and an appointed judiciary. Tribes that did not formally adopt such constitutions tended to acquire similar institutions by other means.⁴⁹ The IRA shifted power from outside officials to the tribes, and redistributed power within the reservations. Specifically, the IRA took power away from the Indian agent and traditional Indian leaders, and gave it to elected Indian officials.

Some reservations welcomed these changes and others resisted. To illustrate, the Navajos developed a system of "chapter houses" that brought a high level of community participation in ward politics to the reservation. In contrast, modernization fragmented the Hopis and triggered bitter disputes about whether customary authorities should yield power to elected officials. Some Hopis still speak of the elected tribal government as a foreign imposition.⁵⁰ Other tribes like the White Mountain Apaches accepted American-style democracy reluctantly, but without fragmenting into modern ("friendly") and traditional ("hostile") factions.⁵¹ The Pueblos responded by adding additional institutions of government to the ones that already existed. Instead of fragmenting socially, the Pueblos fragmented institutionally, so they now have multiple courts.⁵² Although responses

49. For example, the Navajos never adopted such a constitution, yet their government is much the same as that of neighboring tribes like the Papagos or Apaches who did.

50. This is approximately true of the "traditionalist" villages — Hotevilla, Baccabi, Shingopovi, and Walpi. We were told that the traditional villages, which enjoy much autonomy, do not cooperate with the tribal government in the way the Hopi Constitution and tribal statutory law envisions, but rather on the basis of personal contacts between the Tribal Chairman and the traditional village leaders. The label "traditional" is potentially misleading here. For a fascinating account of how a professional anthropologist was duped by Hopi factionalism, see Geertz (1987). See also Danaqumtewa, Basmettler & Schmid (1991).

51. These remarks are based upon conversations with Robert K. Thomas, Ben Chavis, and our own observations at White Mountain.

52. It seems to us that in 1992 the Pueblos had the following five courts. (1) IRA courts (Hopi, Laguna, Zuni, San Juan, Santa Clara, Isleta); (2) modern non-IRA courts (Acoma, Pojoaque, Tesuque, San Ildefonso); (3) traditional secular courts with the governor, lieutenant-governor, or similar appointed official serving as judge (Jemez, Zia, Cochiti, San Felipe, Santa Ana, Santo Domingo, Sandia); (4) courts of type (2) or (3) but with an outsider "hired" as judge (type 2 are Picuris and Tesuque, and type 3 is Nambe); (5) multi-court systems such as that at Taos, where the Tribal Council delegates land, cattle, and other "traditional" matters to the War Chiefs and all the other matters, including domestic affairs, to the Governor, who in turn delegates the daily court business (but not domestic affairs) to the English speaking Pueblo Court.

This description is our best guess about a situation in flux. A second visit in 1995/96 to a number of pueblos re-confirmed the above picture — a situation in flux — with a tendency in favor of returning to traditional secular courts (type 3) and a pronounced interest in a multi-court system (type 5), with occasional reference to the Taos Pueblo court system. In Sandia Pueblo, the parties appear to be able to choose

differed from one reservation to another, modernization in the 1930's brought the form of government that prevails on most Indian reservations today.⁵³

After 1934, most tribes abolished the CFR courts and established new courts, which we call "IRA courts." The IRA court must obey the tribal constitution and apply laws enacted by the tribal council. Most tribal constitutions stipulate that the elected tribal chairman appoints judges to the IRA court, subject to confirmation by the council. As time passed, the remaining CFR courts came to resemble the IRA courts in these respects.⁵⁴ IRA courts, or courts just like them, are the only formal courts on most reservations today.⁵⁵

We have shown that the three kinds of tribal courts (traditional, CFR, and IRA) correspond to three phases of Indian political history (independence, conquest, and modernization).⁵⁶

C. *Cycles of Ideology*

Federal policy towards Indians vacillates between the objectives of assimilation and autonomy. When the former predominates, federal officials seek to dissolve the reservations and integrate Indians into the surrounding society. When the latter predominates, many officials foster cultural identity and promote self-determination on reservations. The tension between assimilation and autonomy has been present from the beginning of Indian policy, but we will only

between tribal arbitration (by the tribal council, elders, etc.) and the traditional secular tribal court, represented by the Lieutenant Governor. He may decide according to traditional tribal law or New Mexico state law, whatever the parties prefer. This somehow resembles the Taos model. Mixed systems such as this are flexible enough to respond to multi-cultural exigencies. Our impression is that the Draft Tribal Justice Act backfired, contributing to the mutual estrangement between Native and "Anglo" law: Indian justice goes underground wherever it is forbidden.

53. Some Indian tribes and Pueblos persist with traditional government. See A. Ortiz (1969a), Dozier (1983), Lange (1990), Simmons (1977), Fikentscher (1995a, 1995b), at 267-85.

54. Referring to CFR courts, Deloria & Lytle (1983), 115 quote Kerr (1969), at 321 as follows:

"With the authorization of the IRA corporate form of tribal government, all but a few tribes assumed judicial functions as a manifestation of self-government and rid themselves of this hated institution."

55. In Laguna Pueblo it appeared to us that plaintiffs can choose between the traditional secular court and the IRA court in bringing a dispute. Taos has a four-court system that consists of an English-speaking Pueblo court, the Governor's Court, the War Chiefs' Court, and the Tribal Council, see note 52, *supra*.

56. Note that the three phases demarcate other significant features of tribal history, such as the development of U.S. citizenship for Indians. Indians were originally regarded as citizens of their own sovereign nations. They remained as such after conquest, except individuals and some groups became citizens by various means including the allotment process. Finally, in 1924, all Indians were unilaterally declared U.S. citizens (8 U.S.C.A. 1401 (a)(2)). However, this left open the issue of double citizenship (U.S.A. and tribe).

describe the shifts that shaped tribal government over the last hundred years.⁵⁷

Dissolution and absorption were the objectives in 1887 when Congress passed the Allotment Act ("Dawes Act").⁵⁸ Before allotment, federal law regarded reservation land as the property of the tribe. After allotment, federal law considered the land as the property of individuals. (In a subsequent section we correct some misconceptions about the difference between tribal ownership and individual ownership.)⁵⁹ Allotment transferred vast tracts of land to non-Indians,⁶⁰ reduced the reach of Indian customary law, diminished the power of tribal government, and created a complicated legal patchwork. "With all this imposed slash and burn, cultural and institutional loss was inevitable."⁶¹

One irony of the allotment era was the dissolution of democratic governments created by the "Five Civilized Tribes" in Oklahoma. To illustrate by one of these tribes, Andrew Jackson's administration removed the Cherokees from their mountain homeland in the southeast to Oklahoma. The removal to Oklahoma is known by the infamous title, the "Trail of Tears," because many of the young and old died from exposure and hardship.⁶² Left to their own in the Oklahoma Territory for several decades, the Cherokees restructured their government as a democracy, complete with a constitution, president, legislature, and supreme court. Although it mirrored the standard American form, the Cherokee government was dissolved by Congress.

Since 1790, Congress has used the phrase "Indian country" to refer to land subject to tribal and federal law, as opposed to state law.⁶³ "Indian country" includes all land within the limits of any Indian res-

57. See the text accompanying footnote 27ff. *supra*, referring to Chief Justice Marshall's decisions. With the passage of the Major Crimes Act, 23 Stat. 362, 385 (1885), Congress established federal jurisdiction over seven crimes (including murder) committed by Indians against other Indians and non-Indians alike; for the legislative history see Canby (1988), 105.

58. Hunn (1990), 279f.

59. "Customary ownership" should not be confused with "group ownership." See section entitled on land in Part II.

60. For statistics see O'Brien (1991), 78ff.

61. Pommersheim (1989), at 258. Allotment also weakened the power of Indian customary law by replacing traditional ownership with a form of freehold ownership. Allotment diminished the power of tribal government by eliminating or reducing the regulatory power of tribal government over Indian lands. Allotment often proceeded piecemeal, so that adjoining properties have different legal status. Legal confusion was aggravated by clouded titles resulting from unconscionable contracts. For more discussion, see the section on land in Part II. Allotment created complicated situations with regard to inheritance. The Indian Land Consolidation Act of 1983 tried to remedy the "quagmire" *Lindo* (1997), 25 U.S.C. § 2206 (Supp. I 1983) (codified as amended at 25 U.S.C. § 2206 (1994)). However, in *Hodel v. Irving*, 481 U.S. 704 (1987) and *Youpee v. Babbitt*, 117 S. Ct. 727 (1997), the U.S. Supreme Court held essential parts of the (amended) Indian Land Consolidation Act unconstitutional, see for details *Lindo* (1997) who offers proposals for a solution.

62. Thornton (1990), 63ff., 73.

63. 1 Stat. 137; Pevar (1992), 12ff.

ervations, all "dependent sovereign" Indian communities like the Pueblos, and all allotments to which Indian titles have not been extinguished.⁶⁴ Although greatly reduced in size, "Indian country" survived allotment. Most tribes persisted as sovereign polities and distinctive cultures apart from the American mainstream. The policy of termination and absorption was repudiated officially in 1934 by passage of the Indian Reorganization Act (IRA). As explained, the IRA recreated the institutional forms of American democracy on the reservation. Elected Indian officials displaced traditional Indian officials and federal administrators.

Some Marxists believed that communism would eliminate social conflict and "end history". Similarly, some proponents of American democracy thought that it would eliminate conflicts in Indian policy and end its dismal history. Events proved otherwise. The arrival of democracy on reservations did not end the swings in Indian policy. The stress on sovereignty ended in the 1950's and the BIA returned to the objective of assimilation. In the 1950's and 1960's, some tribes were terminated and their official existence as sovereign peoples ended.⁶⁵ *Occupatio bellica* gave way to *debellatio*. In addition, Congress curtailed the authority of some tribal governments by enacting a complex of laws in 1953 which became known as "Public Law 280."⁶⁶ The Indian Civil Rights Act of 1967 further limited tribal governments. Later we explain some features of these two complex laws.

In the 1970's and 1980's, the goals of termination and absorption reversed and policy swung back to emphasize sovereignty. The swing in policy reflected and promoted the ascent of Indians in the federal administration of Indian programs. Indians acquired high offices in the BIA, and the federal government began to contract with Indian organizations to supply more services to reservations.⁶⁷ Now Indian political entrepreneurs compete vigorously with each other to imple-

64. 18 U.S.C. Sec. 1151. Pevar (1992), 17ff. explains: "Finally, section 1151 includes as Indian country all "trust" and all "restricted" allotments of land, whether or not these allotments are inside the boundaries of an Indian reservation. (Trust allotment is federal land which has been set aside for the exclusive use of an Indian, who is called the "allottee." A restricted allotment is land for which federal approval must be obtained before it can be sold, leased or mortgaged, whether the land is owned by the federal government or not. These terms are further discussed in Chapter 10). Even a "non-trust" allotment outside the reservation is considered Indian country so long as the allottee retains ownership. (A non-trust allotment is land which the federal government has given to an Indian with full rights of ownership, as opposed to a trust allotment, ownership of which is retained by the United States). . . ."

65. Major examples are the Menominee (Wisconsin) and the Klamath (Oregon).

66. The "mandatory states" are Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. The legislation stipulates some exceptions to the preemption by these states, such as Red Lake Reservation in Minnesota and Warm Springs Reservation in Oregon.

67. See Stuart (1991). In several conversations on reservations, officials remarked upon the increasing practice of governments to contract with Indians for the provision of reservation services.

ment Indian policy. In our opinion, the transfer of offices and contracts from non-Indians to Indians impacted reservations more than changes in formal law. Whether increased control by Indians over federal Indian policy will result in greater sovereignty for the tribes remains to be seen.

D. Tribal Jurisdiction

How much scope exists for Indians to make law? We will describe the pattern of jurisdiction that evolved through Congressional enactment and interpretation of federal laws by the courts and BIA officials, beginning with criminal law. An Indian tribe cannot exercise criminal jurisdiction over non-Indians on reservations, unless Congress has expressly given this power.⁶⁸ Likewise, states cannot regulate criminal conduct of Indians on reservations, unless Congress has expressly given this power.⁶⁹ Thus when crimes occur on reservations, non-Indians are typically subject to state or federal courts, and Indians are typically subject to tribal or federal courts. If an Indian defendant is charged with certain major felonies, however, the federal courts have jurisdiction on reservations.⁷⁰ In sum, the tribes have broad jurisdiction to maintain peace and order on the reservation, including the prosecution of many crimes in which the injurer and victim are Indians.⁷¹

In civil matters, an Indian tribe has the inherent right to exercise jurisdiction over wrongs occurring within the territory it controls.⁷² Like criminal matters, this right extends to disputes between members of the tribe. Unlike criminal matters, this right also extends to non-Indians whose activities affect a substantial tribal interest.⁷³ Thus, the tribal courts usually resolve civil disputes on reservations.

68. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

69. Pevar (1992) 112; Scoles & Hay (1982) 376ff., 381 note 32.

70. Jurisdiction is obtained by the federal Major Crimes Act, see note 57, *supra*.

71. The situation is more complicated than these remarks suggest since jurisdiction can depend upon whether the Indians involved in the crime are enrolled members of the tribe where the crime occurred, enrolled members of another tribe, or Indians not enrolled in any tribe. See Deloria & Newton (1991).

72. Pevar (1992), 154ff.

73. Pevar (1992), 156; *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 f. (1980). *St. Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) (rules that habeas corpus is the only mechanism for judicial review provided by the Indian Civil Rights Act). A recent article described the judicial history as follows: In the years surrounding the passage of the ICRA, the Supreme Court struggled with the limits of tribal sovereignty. One attempt to define the scope of this sovereignty is the preemptive test, which was set out in *Williams v. Lee* [358 U.S. 217 (1959)]. In that case, the Supreme Court held a state law inapplicable if it infringed on a tribe's right to make its own laws and to be governed by them. The *Williams* court favored protecting tribal autonomy, but the 1978 Supreme Court limited tribal autonomy by holding in *Oliphant v. Suquamish Indian Tribe* [435 U.S. 191 (1978)] that Indian tribes did not have criminal authority over non-Indians on the reservation except as permitted by Congress. Three months later, the Court switched sides again in *Santa Clara Pueblo v. Martinez* [436 U.S. 49 (1978)]. By denying federal protection against

Tribal governments can tax and regulate on reservations as provided in tribal constitutions. However, the Secretary of the Interior retains veto power over all decisions affecting the federal government's trust responsibility for reservation lands. According to the officials with whom we talked, federal authorities now use this power to interfere with tribal government less than in the past.

Drawing conclusions from generalizations about the jurisdiction of tribal courts demands caution.⁷⁴ Large, irregular curtailments of tribal jurisdiction have occurred, notably those created by "Public Law 280" in 1953.⁷⁵ In this complex legislation, Congress empowered six states to enforce state criminal laws in Indian country situated within their borders.⁷⁶ Thus state authority replaced tribal authority over crimes in the six "P.L. 280 states," which are also called the six "mandatory states." Congress also authorized all other states (the "optional states") to acquire criminal jurisdiction over Indian country at their option. These states exercised their option piecemeal.⁷⁷ (By chance, the tribal judges whom we interviewed mostly preside over courts in optional states.⁷⁸) The Indian Civil Rights Act of 1968 re-

gender discrimination to an Indian woman, the Court refused to encroach upon the sovereignty of a tribe; Christofferson, "Tribal courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act," 101 Yale L. R. 169-85 (1991), at 171-72.

74. Practitioners of tribal law, including tribal judges, frequently refer to the charts on page 170 and 171 of Canby (1988) as a quick guide to jurisdiction.

75. Apparently the section of P.L. 280 on civil jurisdiction was rushed through at the last minute and its drafting was poor. See Pevar (1992), 142ff.; Deloria & Lytle (1983), 203; but see Scoles & Hay (1982), 379, note 2. Canby notes that this grant of civil jurisdiction "was added to Public Law 280 as an afterthought, and there is consequently little legislative history concerning it;" Canby (1988), 180; Deloria & Lytle 177. This section of P.L. 280 apparently conferred upon the option states the power to adjudicate civil actions against Indians that arise in Indian country, but the precise meaning of the section was unclear; Canby (1988), 181. Whether the statute allowed states to pre-empt the civil jurisdiction of tribes was disputed until the Supreme Court resolved the matter in *Bryan v. Itasca Country*, 426 U.S. 373 (1976); Canby (1988), 165; Pevar (1983), 144. In a unanimous decision Bryan held that, appearances to the contrary, section 1360 (a) did not confer upon states regulatory control over Indian reservations in civil matters. It is now settled that Publ. L. 280 did not authorize a state to impose its civil laws in Indian country. On the situation under P.O. 280 in California, see Goldberg-Ambrose (1997).

76. Originally they were five states: California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska was added in 1958. See Canby (1988), 159, and Canby (1988), 161. At the same time, any federal criminal law formerly applicable was declared inapplicable. 67 Stat. 588; 18 U.S.C. 1162, 28 U.S.C. 1360. For the "optional states," see the next footnote.

77. Florida opted to pre-empt all Indian criminal and civil jurisdiction, West's Fla. Stat. Ann. §285.16 (© West Group 1997) (1975). Some other option states imposed part of their jurisdiction. For Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington, see Pevar (1988), 105ff. The U.S. Supreme Court subsequently struck down pre-emption of tribal civil law by the states under P.L. 280. See the preceding footnote.

78. One reservation in our survey — Warm Springs — is in Oregon, which is a P.L. 280 state. However, this reservation was exempted by name in the Congressional legislation. The other reservations in our survey are outside the P.L. 280 states, the exceptions mentioned in the text.

moved the option of states unilaterally to acquire criminal jurisdiction over the tribes and no pre-emptions occurred subsequently.⁷⁹

In spite of P.L. 280, substantial powers remain with the tribes. Civil law remains open to tribal jurisdiction in all states.⁸⁰ The trust status of Indian property, the right to tax business and property on reservations, and the general regulatory power over Indians in Indian country remain outside of the scope of P.L. 280.⁸¹ In criminal law, tribes pre-empted under P.L. 280 may exercise authority in those areas from which P.L. 280 excludes state jurisdiction, notably the regulation of hunting and fishing guaranteed by treaty or statute. In family law, federal statutes give the tribes the power to pre-empt state law.⁸²

In addition to pre-emptions under federal law, states have acquired a variety of powers over tribes by agreement or other means. Roads, power lines, and aqueducts often cross reservations, thus requiring cooperation between tribal governments and state governments. Similarly, pollution does not respect jurisdictional boundaries. The extent to which these interdependencies enable state or local government to acquire jurisdiction depends upon prior agreements with the tribe and the tribal interests affected by the activity.⁸³ The tribe and state may share concurrent jurisdiction, the tribe may cede jurisdiction to the state, or each one may exercise independent jurisdiction within its territory. For example, Arizona acquired extensive control over air and water on reservations within the state,⁸⁴ and Arizona extended its criminal and civil jurisdiction over the trust land of a specific tribe that we visited.⁸⁵

The U.S. Constitution regulates federal and state behavior towards tribes, but the tribes, being sovereign, are not bound by it. Consequently, the tribes are free to include or omit human rights in

79. P.L. 280 exemplified a policy of termination and absorption whose momentum was exhausted by the time of passage of the Indian Civil Rights Act. In fact, the Indian Civil Rights Act provided that henceforth states could not opt to pre-empt tribal jurisdiction as provided in P.L. 280 without the consent of the affected tribe. Unilateral extension of state criminal and civil law by states to Indian country is no longer permitted. Section 403(b) of Publ. L. 90-284, Title IV, April 2, II, 1968, 82 Stat. 79. As that consent is not forthcoming, it is not to be expected that additional accessions will occur in the future.

80. *Bryan v. Itasca County*, 426 U.S. 373 (1976), at 388, a case involving a Minnesota law attempting to assess a state and local property tax against personal property owned by an Indian in Indian country; the tax was held as not authorized under P.L. 280; similarly, in *California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083 (1987), a Riverside County gambling ordinance was held "civil and regulatory" (and not "criminal and prohibitory") and thus not applicable to a high-stake bingo place on a reservation.

81. 28 U.S.C.A. 1162 (b); 28 U.S.C.A. 1360 (b).

82. See section on Family Law in the next installment of this article.

83. *Pevar* (1992), 154, 158, 160; *Canby* (1988), 145 ff.; *Williams v. Lee*, 358 U.S. 217 (1959).

84. *Ariz. Rev. Stat. Ann.* 36-1801, 36-1865 (1974).

85. *The Pascua Yaqui*: 1300 f(c) of Title 25, Act of Aug. 15, 1953, (67 Stat 588), as amended by Act of April 11, 1968 (82 Stat. 79). *Ariz. Rev. Stat. Ann.*

their own constitutions, and tribal members cannot sue tribal governments for violating the U.S. Bill of Rights. In the 1960's, some Indians complained bitterly that tribal constitutions did not extend human rights far enough and that tribal courts did not provide adequate remedies for violations of human rights by tribal governments. Complaints of misconduct and abuse by tribal officials eventually moved Congress to act.

The Tenth Amendment of the U.S. constitution reserves powers for the states in order to protect them against a tyrannical majority in Congress. As Indians, the tribes probably have more to fear from a majority in Congress than the states. As sovereigns, the tribes allegedly have more independence than the states. However, the "plenary power" asserted by Congress allows a majority of its members to impose laws on the tribes without restriction. Congress exercised this power when it enacted the Indian Civil Rights Act in 1967, whose stated purpose is

"to ensure that the American Indian is afforded the broad Constitutional rights secured to other Americans [to] protect individual Indians from arbitrary and unjust actions of tribal governments".⁸⁶

This Act extended most, but not all, provisions of the Bill of Rights to Indians, thus limiting tribal sovereignty.⁸⁷

86. 25 U.S.C. 1301-41. The quote is from S. Rep. No. 841, 90th Cong., 1st Sess. (1967), 6; Brewer (1995), at 469. See, however, note 30 *supra*, where we agree that Art. IX of the Confederation gave Congress the "sole and exclusive right and power" to regulate Indian affairs, so that there can be no room left for the states invocation of the 10th Amendment. The language of the 10th Amendment which speaks of the states or "the people," reinforces this point. Indians were and are not "people" in the sense of the Declaration of Independence and the Constitution, see page 295, *supra*, at I. Hence, the 10th Amendment does not refer to them.

87. 83 Indian Civil Rights Act of 1968, 25 U.S.C.A. 1301. 1302 provides, under the title "Constitutional rights":

No Indian tribe in exercising powers of self-government shall

- (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
- (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
- (3) subject any person for the same offense to be put twice in jeopardy;
- (4) compel any person in any criminal case to be a witness against himself;
- (5) take any private property for a public use without just compensation;
- (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;
- (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of \$5,000, or both;
- (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
- (9) pass any bill of attainder or ex post facto law; or

To conclude with a rough generalization, the jurisdiction of tribal governments on reservations includes civil law, family law, taxes, regulations, and minor crimes committed by Indians. Pre-emptions of tribal jurisdiction include major crimes on all reservations and all crimes on some reservations. In addition, the exercise of tribal jurisdiction must be consistent with the federal government's trust responsibility and with the Indian Civil Rights Act. Tribal jurisdiction apparently has scope to apply and develop Indian norms in the legal process, civil law, family law, regulations, and some crimes. This paper surveys legal process, property and land, inheritance, environment, contracts, torts, crimes, family law, and conflict of laws. We omit four important topics which demand separate study: gaming or gambling,⁸⁸ domestic violence, child abuse and child welfare,⁸⁹ protection and repatriation of cultural and religious objects,⁹⁰ and the protection of graves and repatriation of human remains.⁹¹

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

This is not the complete list of rights contained in the Bill of Rights. Clause (1) permits the establishment of a preferred tribal religion (which is important, for example, for the 20 pueblos of New Mexico and Arizona where government and religion are closely connected). Clause (6) requires that a tribal member hire a counsel of defense "at his own expense." Congress did not want to burden the tribes with expenses for supplying counsel to indigents. (But this has led to an unwarranted discrimination against defendants who are Indians. —StB.) The right to jury in Clause (10) is impractical in small pueblos. —FK. Some years ago, Picuris Pueblo had a population of about 200 (Mays (1985), 46). Today it may be 350.

88. In 1995-96, Wolfgang Fikentscher studied the gaming law situation in some Rio Grande Pueblos (Isleta, San Felipe, San Juan). In spite of rich details offered, most of all in Isleta Pueblo, more research will be necessary before this field of law can be covered in another paper. See, e.g., Brewer (1995).

89. Here are some articles which cover this important topic and provide bibliographies: Valencia-Weber & Zuni (1995); Zion & Zion (1993); San Juan County (1993); Duran, Duran, Woodis & Woodis (no year); Fikentscher (1997a, 1998). On child welfare and the Indian Child Welfare Act, see Jones (1995), and Canby (1988), 173.

90. This topic includes rights of property in images and designs, protection of ceremonials, dances, music, stories, and designs from misuse, and the recovery by the tribes of objects in museums and private collections. To illustrate, Pojoaque Pueblo protected its tribal emblem as a trademark. A grievance widely shared by many Indian people is the commercial appropriation of Indian names, images, designs, patterns, stories, and religious or ceremonial practices; Newton (1995); the article deals with the Crazy Horse case in which a malt liquor was marketed under the name of a revered Lakota figure known as Tasunke Witko, or Crazy Horse; see Harshell Brewing Co. v. The Rosebud Tribal Court et al., 1998 U.S. App. Lexis 405 (8th Cir. 1998). Similar situations concern the use of trademarks that include Native American "nick-names" such as Redskins, Braves, etc.; see Kelber (1994); Guest (1996); and Loving (1992). On intellectual property rights for plant genetic resources developed by indigenous peoples, see Hannig (1996). On the Indian Arts and Crafts Board, established as an independent federal agency located in the U.S. Department of the Interior, see Publ. Law 74-355 (1935), as amended by Publ. Law 101-644 of Nov. 29, 1990.

91. See, e.g., Native American Graves Protection and Repatriation Act; Echo-Hawk (1986); Harding (1997); Roberts (1997); Ochoa & Newman (1997).

II. FIELDWORK ACCOUNT: RESEARCH METHODS

In addition to library research, we visited thirty-seven western reservations in the summer of 1990, winter, spring and summer of 1992, winter and spring of 1995-96, and spring of 1998, where we conducted more than one hundred and twenty open-ended interviews with legal officials, and examined tribal court records.⁹² Many reservations, particularly the Rio Grande Pueblos, were visited more than once. All together, in the Rio Grande Pueblos, fifty-seven interviews were held, five in 1990, thirty-three in 1991-92, and nineteen in 1995-96. Indian friends, especially Ben Chavis and Robert K. Thomas, arranged some interviews for us. Sometimes we simply showed up at the tribal courthouse and asked whether the judges would talk with us.

Tribal judges typically received us with hospitality and welcomed the opportunity to exchange ideas. Communication was usu-

92. The reservations are listed in the acknowledgments. To our knowledge, the only previous survey of this kind was done by the National American Indian Court Judges Association (1978). Consultants were hired to visit 23 reservations and provide basic facts about the operation of the tribal courts. We summarize some of the main conclusions as follows:

variety of courts: "Data from the BIA as of March, 1977 indicated that there are 16 traditional courts and 32 Courts of Indian Offenses (CFR courts), with the remainder (71) being tribal courts and conservation (hunting and fishing) courts." p. 42

cultural distinctiveness: "As stated before, tribal law and order codes are similar if not identical to the Code of Indian tribal Offenses (CFR code) which was published by the Bureau of Indian Affairs soon after passage and implementation of the Indian Reorganization Act. This code has been revised only once since then. Of the twenty-three reservations surveyed, nineteen have law and order codes patterned to some degree after the CFR code. Some tribes have expanded on the code by adding additional chapters and provisions to meet their particular needs. The CFR code is very Anglo oriented, makes no provision for inclusion of tribal culture, and is outdated in that it includes many offenses which are no longer crimes in most jurisdictions or which are unenforceable." p. 38. . . "Except in some of the Pueblos, tradition plays a small part in modern-day Indian courts. In other tribes the use of tradition in courts tends to be in the civil, domestic relations, and hunting and fishing cases. Remarkably, no tribe among those [23] surveyed reported that it incorporates any traditional substantive law in criminal proceedings in the tribal court." p. 43.

reception of tribal courts: "tribal courts were originally alien institutions imposed on tribes by the government. Even today they are seen by some as arms of a conquering nation." p. 39 independent judiciary: "A lack of independence of the judiciary seems to be a serious problem with many tribes. . ."p. 40

proceedings: "Court proceedings observed indicate that generally courtroom operations are smooth, efficient, and rapid. . . Indian courts have been compared by several people to non-Indian rural judicial systems. Common characteristics of these two systems are: (1) close acquaintance between the judge and the parties ; (2) smaller volume of cases; (3) lack of resources because of low population and tax base; and (4) space and separation." p. 61

caseload: "All reservations reported that adult and juvenile alcoholism is the major cause of crime and cases before Indian courts. As reported earlier in this chapter, alcohol accounts for perhaps 90 percent of all cases in Indian courts. . ."p. 78

recommendation: The first principle commended as a guide for the future is "The use of tradition and custom should govern whenever it is applicable in the Indian judicial system in tribal member controversies." p. 105. Yet the concrete recommendations discuss codification and process, but say nothing about the development of Indian common law.

ally easy and productive. Most tribal judges recognize that disseminating knowledge about indigenous Indian law increases its effectiveness and vitality, thus strengthening Indian cultures. Researchers without personal ties, however, cannot be certain of their welcome on reservations. Conducting interviews on Pueblo law often requires careful preparation, several recommendations by insiders, and much patience. Some tribes have legal mechanisms to fend off outsiders, including legal scholars.⁹³ Some tribal courts are politicized, which makes judges cautious and eager to project a politically approved image of the tribe. The chief judge on one reservation forbade us to talk with any tribal judges,⁹⁴ and one other judge refused to see us. Our questions about property law once provoked the suspicion that we were real estate developers.⁹⁵ In most tribal courts, however, we felt welcome and we made friends. When asked what *we* could do *for them*, one Indian judge replied: "Remember us and come again."

Legal anthropologists know that different societies use legal terms differently.⁹⁶ The differences provoke some of anthropology's deepest musings,⁹⁷ concerning, for example, whether the laws of one society can be compared with another.⁹⁸ The fact that our interviews were conducted in English raises questions about barriers to communication. On all of the reservations that we visited, some people can speak Indian languages, but Indian languages do not dominate private or public life. Except for some Pueblos, a minority of the Indians on every reservation that we visited speak an Indian language in

93. We witnessed a French television crew on the Hopi reservation trying to record curing rituals. Many Indians are tired of such activities. Indian intellectuals have criticized anthropologists. See note 16 *supra*. Note the joke that the typical Navajo family consists of husband, wife, children, grandparents, uncle or two, and an anthropologist. Some tribes have created government boards to license researchers who want to conduct studies on the reservation. These boards risk something from licensing researchers and lose nothing from stalling applications.

94. The reservation in question is Tohono O'odham. The Chief Judges prevented us from interviewing anyone without first going through a cumbersome application process to do research on the reservation. The tribal council instituted the process by legislation. Some Pueblos require permission from the tribal council to interview officials. This was granted to us in all cases with one exception.

95. Specifically, at the White Mountain Apache Reservation.

96. Bischof (1985), 54 ff., referring to concepts such as "father," "son," and so forth.

97. See discussions by Chagnon (1982), pages 281-318; Gluckman (1955); Pospišil (1971); Muller (1962).

98. Bohannan (1957) and Zake (1962) hold the view that law in different societies is incomparable or nearly so. See the discussion in Pospišil (1978), 10f. Other theorists provide a single criteria for defining law and making comparisons, such as Barkun (1964) (manipulable symbol of social structure), Radcliffe-Brown (1952) and Davis et al. (1962) (social control through political organization). In contrast, Fikentscher (1979, page 167; 1988, page 25; 1991, page 320; 1995b, at 28) advocates a three-criteria definition for purposes of comparison: Law exists when there is (i) a human authority established that may impose (ii) sanctions in pursuit of (iii) an ought. Pospišil (1974) uses four criteria: authority, obligatio, intent of general application, and sanction; see for this discussion Pospišil (1978), pp. 8-13, Fikentscher (1988), 3ff.

the home.⁹⁹ Some reservations require fluency in the local Indian language as a prerequisite for becoming a judge, while other reservations have no such prerequisite and some of their judges can only speak English.¹⁰⁰ Far more trials are conducted in English in the tribal courts than in an Indian language.¹⁰¹ To our knowledge, tribal courts keep written records exclusively in English,¹⁰² so we were able to read all trial transcripts that were shown to us. The quality of transcripts varies from one court to another. The Navajo Supreme Court publishes its major cases.¹⁰³ The Hopi tribal court has neat hanging files of its cases. In most of the other courts, we saw a few written cases and, in some courts, the only case records are a heap of cassettes containing tape recordings of trials.

Since tribal courts hear and record most cases in English, officials must formulate legal concepts in English. Tribal judges have already struggled with the problem of translation, which reduces misunderstandings when communicating with outsiders. Nevertheless, several judges asserted that English is inadequate for discussing some Indian legal concepts.¹⁰⁴ In our interviews, we were sometimes brought short by statements suggesting a chasm between legal cultures, such as the following:¹⁰⁵

"Whites fear the law. Indians *live* it." —FK

99. We know of no survey evidence confirming this fact, but it is our impression, as well as the impression of the researchers with whom we have talked. Many Pueblo Indians are trilingual (English, Spanish, tribal language), with the tribal language preferred in the home.

100. For example, the Navajo reservation requires its judges to speak Navajo, whereas the three judges on another major reservation that we visited only speak English.

101. Many reservations have one judge who specializes in cases involving traditional disputants that may be conducted in an Indian language. Often the other judges are not proficient in a native language. To illustrate an exception to this pattern, Taos Pueblo has four courts, one of which uses English while the other three use Northern Tiwa.

102. Trials conducted in an Indian language must be translated into English when a written transcript is required. This fact is not surprising since most Indian children are not taught to write in Indian languages at school.

103. Cases involving children are not open for study by scholars on any reservation that we visited.

104. This fact has prompted a Hopi scholar, Emory Sekaquaptewa of the University of Arizona, who has degrees in law and anthropology, to devote himself to constructing a dictionary suitable for Hopi courts.

105. We sometimes use coded letters to protect the identity of Indian officials whom we quote. Here are some more quotations that suggest a chasm between legal cultures:

"Indian people have the law in them, they know how to live it." —BSt

"We apply law holistically." —WT

"Better a blue nose than black eyes." —RP, SE (a person who cannot be trusted has "black eyes")

"Having courts is not the Hopi way." —EN

"In tort law, pain and suffering are not compensated. It's give and take of life. You live with it." —BR

"Don't think this is traditional Indian law, it's law we are developing to meet our daily needs." —CV

"In a culture in which so much rests on oral tradition, a given word weighs much more than in a culture that writes."

—Anonymous

"We say we don't own anything." —ET

Everywhere the tribal judges and advocates gave us thoughtful, circumspect answers that were grounded in their experience. The facts, however, may seem confusing and inconsistent to the reader. The reader should bear in mind that on Indian reservations, as everywhere, people dispute and disagree about law. The range of dispute is especially broad in so far as law resides in oral traditions. With these caveats in mind, we will report the facts to you as they were reported to us by tribal judges and advocates.

III. HYPOTHESES

In the introduction we mentioned four questions that guided our research on tribal law:

- (1) Does custom work its way into judge-made law on reservations?
- (2) Is Indian common law specific to each tribe or generic to many tribes?
- (3) Is the process for developing Indian common law different in tribal courts than in American state courts?
- (4) Should public policy encourage or discourage the development of distinctively Indian common law?

In this section we refine these four questions into hypotheses.

Conquest and confinement to reservations ended most aboriginal political institutions, but customs and traditions survived. Imbedded in customs and traditions are concepts of justice and fairness relevant to legal disputes. Our first hypothesis is that Indian judges inevitably draw upon their own sense of justice and fairness in deciding cases and interpreting legislation.

The extent to which judges explicitly rely upon custom should vary systematically with the three types of courts that we distinguished above. Custom and tradition should prevail in traditional

"The principle of 'not guilty unless proven guilty' does not work in a community where everybody knows everybody. It leads the defendants to make up stories." —JS

"Our goal is to re-integrate the offender into society, not to lock him up." —FC, WBJ,PT,PSW (all to this effect).

"It is our law that a promise should be kept, both among living persons, and in making a will." —PS

"Bad law always forces people to go into subterfuges." —CV

"Concepts are instruments of suppression." —CV

"The juvenile system is not only about justice, it's also about education." —CV

"Call a duck a duck, and a plane a plane, also in law." —CV

"Keep customs oral. As soon as a custom is written down, it petrifies, and no longer develops; it dies and is no longer a living thing." — Anonymous.

courts, such as the Peacemakers Court of the Iroquois, other traditional tribal courts, and the traditional secular courts of the Pueblos.¹⁰⁶ Similarly, custom and tradition should play a central role in informal dispute resolution, such as peacemaking, mediating, and settlement negotiations. Our observations, however, concern CFR or IRA courts. In these courts we anticipate heavy reliance by judges upon the sense of justice, which customs and norms shape, and modest reliance upon explicit social norms.

Turning to the second question, we hypothesize that Indian common law can be distinguished according to whether it is unique to a tribe, characteristic of groups of tribes, or common to all Indians. We will discuss briefly the causes of different levels of generality in Indian common law. Earlier we divided Indian history into three phases—autonomy and independence, conquest and submission, sovereignty and dependence. In thinking about tradition, Indians often try to reach back to the first phase for guidance. Most traditional Indians believe that their tribe originally had its law or “Way.” A tribe’s way of life is the sum of its customs and traditions, which are often imbedded in stories beginning with the creation of the world. The customs and traditions provide an encompassing guide to living backed by sacred sanction. The Way of the tribe should shape the tribal judge’s sense of justice.

Although each tribe had its own “way,” anthropologists group tribes into cultural areas in which the tribes share many attributes, such as the Great Plains, the Eastern Woodlands, the Northwest Coast, and the Pueblos of the southwest. In addition, the tribes can be divided into language groups that sometimes indicate common ancestry or cultural similarity. Law should follow culture. Consequently, we expect to find some common law specific to each tribe, and some common law shared by cultural groups.

Anthropologists have identified general differences in dispute resolution between tribes and industrial societies. Tribal people live their lives among kin, so a dispute indicates a rupture in these relationships. Dispute resolution in the tribe typically aims to repair relationships. To repair relationships, adjudicators examine the character of the parties and the history of their interaction, not just the particular event in the legal complaint. Compared to other American courts, we expect tribal courts to attend to relationships more than rules. In this respect, we anticipate similarities in the common law of all tribes.

Another reason suggests similarities among all tribes. Conquest subjugated all the tribes to similar forces. Thus the Bureau of Indian Affairs, like all bureaucracies, strives for uniformity in its practices.

106. Some Pueblos with traditional secular courts have neither constitutions nor codes, such as Picuris, Santa Ana, and Jemez. It is difficult to imagine what law they could apply except customary law.

Different tribes may have adopted similar legal strategies to respond to similar external pressures.

Now we turn to the third question, which concerns the process by which tribal judges make law. Common law evolves in American state courts through reasoned elaboration of rules in formal proceedings. As noted, anthropological studies of dispute resolution in tribes typically observe less reliance on rules and more reliance on informal proceedings. America's aboriginal tribes did not possess writing or a professional bar. Most modern tribal courts keep few written records and conduct many trials without lawyers. We hypothesize that the common law process in tribal courts focuses more on relationships and less on rules in resolving disputes.

When making Indian common law, tribal judges confront a central problem in legal anthropology: How to distinguish customary obligations that are enforceable at law (which can be called "common law") from customary obligations that are not enforceable at law (which can be called "mere customs")? Put succinctly, the problem is to distinguish "law from custom."¹⁰⁷ If a custom is law, then legal officials are obligated to enforce it, whereas if custom is not law, then legal officials require an independent justification for enforcing it. Thus disagreements about how to solve this problem involve values and policies, not mere linguistic convention for defining words.¹⁰⁸ Distinguishing law from custom inevitably involves our fourth question – whether public policy should encourage the development of Indian common law.

Some theorists identify law with a formal apparatus of making rules and enforcing them, which implies that stateless societies lack law.¹⁰⁹ For example, H.L.A. Hart defines law as the conjunction of "primary rules" for regulating behavior and "secondary rules" for creating, modifying, or extinguishing primary rules. Custom lacks secondary rules, so it is not recognized as law under this definition. At the opposite extreme, some theorists identify law with rules of social organization.¹¹⁰ Pospíšil goes so far as to argue that each distinct unit of social organization, including the family, has its own law.¹¹¹

107. The anthropological literature on the relationship between law and custom encompasses a range of opinions. An early, insightful discussion in Malinowski (1926), 20, on the Trobrianders. For general accounts of customary law in tribal societies, see Twining (1964); Josselin de Jong (1948); Pospíšil (1980).

108. "Law" and "custom" are what philosophers call "contestable concepts." See Gallie (1955-56). Fikentscher (1977, 1979, 1980, 1988, 1995b) calls the best approach to such legal debates "synepeics," which is a Greek word translatable as "consequential thinking" or "reasoning from effects." In other words, the answer to the debate is to be found in practical consequences of law. In his view, the causes of the "effects" are modes of thought which determine the cultures, Fikentscher (1995b), 19, 21, 130ff.

109. See Radin (1938); also Hartland (1924), Rivers (1924), Hobhouse (1906), and Meggitt (1962). For an account of these theories, see Pospíšil (1978) 8ff.

110. Radcliffe-Brown (1952) 212; Davis (1962), 41.

111. Pospíšil (1971) on the multiplicity of cultures. See also Malinowski (1926), 20, and Carter (1907), 362. "Strict law" has been contrasted with "definite social and

These theories are not so useful to tribal judges who must decide which customs to enforce. A more useful approach comes from the study of enduring relationships by social scientists. In economic jargon, an "efficient" rule enables people to accomplish their ends as fully as possible given the constraints on their resources, whereas an "inefficient" rule frustrates people unnecessarily. Theory and research have identified specific features of the interaction that cause efficient rules to emerge, and also deficiencies in the interaction that cause inefficient rules to emerge.¹¹² Theory and empirical research suggest that people in enduring relationships tend to create efficient rules for interacting that allow them to accomplish their ends. Consequently, many customs (but not all) tend towards efficiency. In addition to efficiency, when the same activity has been repeated for years without objection or apparent harm, people often feel that they have a right to go on doing it. Consequently, many customs (but not all) tend towards fairness. Our final hypothesis asserts that aligning law with custom in tribal courts promotes efficiency and fairness.¹¹³

Efficiency and fairness concern the treatment of individuals, whereas culture belongs to a society. Like some other ethnic groups in America, Indian cultures are in peril. Unlike other ethnic groups who emigrated to America, however, Indians have no homeland abroad where their original culture will persist. Consequently, the assimilation of Indians in America extinguishes cultures. Enforcing Indian customs in tribal courts can contribute to the survival of Indian cultures. This reason for promoting Indian common law stands apart from efficiency and fairness.

IV. PROCEDURE IN TRIBAL LAW

Now we turn to the results of our field research, beginning with legal procedure and proceeding to substantive law.

personal pressures" that are not law (Llewellyn & Hoebel (1941), 213ff., for the Cheyenne). Pospíšil (1980) asserts that law is what binds, in contrast to morals which recommend. Each social unit has what it thinks is a "must" (law) and what it thinks is "desirable" (custom). Bodenheimer (1974), 375, asserts "...there is every reason for ascribing legal character to a custom as long as its practice is accompanied by an intent to create relations which are definite, circumscribed, and important enough to produce obligatory rights and duties." For Indian customary law, to the same effect Zion (1988), at 123.

112. Cooter (1996, 1997a).

113. We also recognize that custom can be unfair and inefficient. For example, customary racial discrimination can be unfair, and customary dumping of refuse in rivers can be inefficient. A thorough statement of the general conditions under which we predict that customs will be efficient and fair goes beyond this article. See e.g., Nader & Sursock (1986). A more thorough account of the structure of human interaction under which customs will evolve towards efficiency is in Hirshleifer & Coll (1988), Cooter (1996), and Cooter (1996, 1997a).

A. Independent versus Amalgamated Judiciary

The American constitution creates separate offices for judges and insulates them from politics. In contrast, aboriginal tribes in America apparently amalgamated judicial activities with other activities. Do modern tribal courts conform to the old principle of amalgamation or the new principle of independence?

The answer is complicated. Formal independence requires separating the judiciary from the legislature, executive, and electorate. At the level of the appeals courts, tribes differ with respect to the separation of judges from politics. The Navajo and Hopi reservations have independent courts of appeal, thus following the principle of separation of powers. In contrast, the tribal council acts as appeals court at Acoma, Taos, and some other reservations, thus following the principle of amalgamation. In Warm Springs, the voters directly elect a large appeals court consisting of people without training in law or experience with courts. Some tribes have joined together to share an appeals court.¹¹⁴ Other reservations have no appeals court.¹¹⁵

Compared to appeals courts, tribal constitutions prescribe relatively uniform organization for trial courts. Except for some of Pueblos, government on each of the reservations that we visited divides power among a court (judiciary), an elected council (legislature), and an elected chairman or governor (executive). On most of the reservations that we visited, "trial judge" is a distinct job performed by someone with no other tribal office.¹¹⁶ Different reservations use different methods for selecting and replacing judges. To illustrate, the Navajo tribal council, elected by the Navajo people, appoints the seventeen Navajo judges, including the three Navajo Supreme Court judges. After a two year probation period, Navajo judges may be appointed permanently to serve until the age of seventy. This method of selection insulates the Navajo judiciary from politics. Similarly, in many Pueblos, the tribal council elects the judge or judges, who are sometimes hired from outside the tribe.¹¹⁷

114. For example, the Southwestern Intertribal Court of Appeals encompasses the Gila River Indian Community, Isleta, Laguna, Mescalero Apache, Mohave, Nambe, Pascua Yaqui, San Juan, Santa Ana, Santa Clara, Southern Ute, Tohono O'odham, Zuni, and Cocopah. It serves as the court of last resort for some tribes such as Southern Ute, and an intermediate court of appeals for others such as San Juan Pueblo (the tribal council being the court of last resort). Furthermore, intertribal appellate courts may be invited to send judges to IRA tribes, such as Pascua Yaqui, and to give advisory opinions.

115. An appellate court is lacking at White Mountain Apache, San Carlos Apache, and Zuni. Pima-Maricopa, Pascua Yaqui, and Tohono O'odham cooperate together in forming an appeals court of special judges from time to time.

116. Some small reservations appoint an outsider as judge to hear cases regularly or from time to time as they accumulate. Also, the Pueblos have several different courts as explained on page 301-302. Otherwise, trial judge is a full time position.

117. Current examples are Picuris, Nambe, Tesuque, see note 52, *supra*.

Separation of powers at the level of the trial court achieves formal independence for judges. In reality, however, the influence of the tribal council and chairman upon judges varies from one tribe to another, and from one historical period to another. Effective independence requires that politicians do not influence the decisions of judges. To achieve effective independence, the income and power of judges must not depend upon the evaluation of their decisions by politicians. Alternatively, the judiciary and politics intertwine when politicians can dismiss or promote judges in response to their decisions in cases. The extent to which officials tribal politicians can influence judges depends in part upon formal laws for removing judges, and in part upon informal traditions and personalities.

To illustrate, the Navajo Supreme Court showed its political independence during a series of recent cases triggered by crimes allegedly committed by the former chairman.¹¹⁸ In the San Carlos Apache Reservation, any judge can be dismissed for just cause by a two-thirds vote of the council. We were told, however, that judges at San Carlos are not usually dismissed when a new group assumes elected office. Some judges, such as the Chief Judge at Hopi, remain in office for many years as politicians come and go. On most reservations, however, the council can impeach or dismiss judges, and politicians sometimes use this power to force judges to resign. For example, elections in recent years at the White Mountain Apache Reservation have been bitter and many officials, including judges, have been replaced after a new chairman assumed office. Similarly, the chief judge at Warm Springs told us that he brooks no intrusion of the council into the activities of his court, but he was subsequently compelled by the council to resign.

To remain in office, tribal judges on many reservations must balance a diverse set of interests. Judges cannot appear partisan in adjudication, but neither can they appear unresponsive to the electorate or disloyal to the council and chairman. Three U.S. Senate and House bills contemplate creating incentives for tribes to increase the independence of judges. The bills offer more money for tribal courts on reservations whose constitutions separate powers and protect judicial independence much as in the federal constitution.¹¹⁹ For tribes that follow the traditional practice of amalgamation, such an offer poses a

118. The former Chairman, Peter McDonald, has been accused, tried, and convicted of financial wrongdoing. His indictment and conviction in turn raised constitutional issues concerning the election and disqualification of a chairman. As the dispute unfolded, it was covered from time to time by national newspapers such as the *New York Times*. For example, see *New York Times*, February 12, 1989, Section 4, page 7.

119. House of Representatives Bill 4004, "Indian Tribal Justice Act"; Senate Bill 1752 "Indian Tribal Courts Act"; and Senate Bill 667 "Tribal Judicial Enhancement Act"). A survey on the issues involved: *Judicature*, *The Journal of the American Judicature Society* (ed.). *Indian Tribal Courts and Justice*, A Symposium, vol. 79 (1995) No. 3, 109-60.

familiar tradeoff between tribal autonomy and federal funding. Tribal politicians want federal money, but they also want to be sovereign.¹²⁰ We cannot predict which of these contradictory tendencies will prevail in the future.

Before leaving the topic of judicial independence, we want to say something more about the character of tribal politics. To most Americans, the legitimacy of elections and the right of the majority to govern seem self-evident. In contrast, tribal elections often cause enduring bitterness and rancor. To understand why, one must understand Indian political history. The role of leaders in aboriginal government has been described as assisting people to reach a consensus.¹²¹ A consensus is reached when everyone sufficiently agrees with a proposal so that no one objects in public. If someone persists in public dissent, preserving a consensus requires either abandoning the proposal or having the dissenter withdraw from the group. The abrupt change from consensus methods to majority rule among the tribes in the 1930's caused much of the bitterness in tribal politics.

A critique of majority rule based on modern political theory explains why a small community might prefer government by consensus. Under majority rule, the majority can make decisions without taking into account the minority's strength of feeling. In the jargon of political theory, a majority vote reflects the ordering of preferences by individuals, but not their intensity.¹²² In contrast, rule by consensus requires the group to continue its discussions until everyone remaining in it accepts the decision. In the jargon of political theory, rule by consensus has high transaction costs and risks fragmentation or paralysis. A large nation adopts majority rule to reduce transaction costs and avoid political paralysis.¹²³ A small, intimate community, however, might prefer to retain rule by consensus in order to reflect more fully the intensity of peoples' feelings. However, majority rule avoids paralysis caused by the absence of a consensus in a large, heterogeneous group.

Being accustomed to majority rule, Americans have difficulty appreciating consensus politics. In an aboriginal band where people in-

120. "... Traditional religion and customs are widely believed to be the real solution to many of the pressing social problems plaguing Indian communities today. Within a decade, it will be necessary to be a traditional religious leader to be elected to office in many tribes. . . ."—Deloria (1992), page 19.

121. Pospisil (1978); Kottak (1987), 195-214; Kottak (1994), 123-36; Fikentscher (1995b), 275, 470.

122. The relationship between preferences, intensities, and voting rules has been studied by political theorists who adopt an economic approach. For a good summary discussion, see Mueller (1989).

123. The only institution of modern western government that formally operates by consensus is the jury. However, Japanese say that their government proceeds by consensus, Poland cherishes memories of its traditional "liberum veto" system, and some business of the United Nations is conducted by a consensus technique under the direction of the Secretary General (so-called "consensus resolutions" under Art. 10 of the U.N. charter.)

teracted face-to-face each day, political leadership often depended upon personal prestige more than formal office.¹²⁴ To illustrate, a Sioux man could decide on his own initiative to form a war party against a neighboring tribe, and each young man would then decide whether to join by gauging the leader's prestige and spiritual power.¹²⁵ Besides informal leaders, some tribes had formal offices such as the "council of forty-four" among the Cheyenne.¹²⁶ The Pueblos even have hierarchical offices with clearly prescribed duties and terms.¹²⁷ Most offices in the tribes, however, were filled by hereditary chiefs. Principles of inheritance might make several different males eligible to inherit the office of a particular chief.¹²⁸ Selection among several eligible heirs might occur through divination or acclamation.

Some tribal mechanisms for maintaining balance and harmony in government were ingenious and utterly unfamiliar to Americans. To illustrate, some Pueblos maintain a system of parallel sub-units called "moieties" by anthropologists.¹²⁹ The two moieties of a Pueblo form a dual organization, often represented by two kivas (winter-summer; north-south; redeye-blackeye; Turquoise-Squash; Badger-Tree; etc.), each of which has its own officers. The head officers in the dual organizations may take turns governing. For example, the officers of the "winter people" may govern in the cold months, and the officers of the "summer people" may govern in the warm months. This device creates a succession of alternating governments. The checks and balances in the moiety system apparently stabilize politics and may reduce conflicts. In modern times, the moiety heads share power with elected or appointed officials, with details varying from Pueblo to Pueblo.¹³⁰

When tribal government was reorganized and modernized in the 1930's, the older principles of government were not allowed to compromise democracy. For example, tribal constitutions did not allow a "House of Lords" for hereditary chiefs. Instead, all key offices were

124. Max Weber referred to such leadership as "charismatic."

125. These remarks are based on unpublished accounts of Sioux warfare collected by Robert K. Thomas on Pine Ridge Reservation in 1956. Also see Fredrick Gearing, *Priests and Warriors* (1962).

126. Llewellyn & Hoebel (1941), 67ff.

127. Parsons (1925); Eggan (1950); Dozier (1970); Fox (1967, 1972); Lange (1959); Ortiz (1965, 1969); Fikentscher (1995a, 1995b), 272ff.

128. To our knowledge, all tribes with hereditary chiefs reserve the positions for men. However, the relationship between gender and power among the tribes was (and is) very complicated. Many tribes were organized into matriarchal clans headed by women. In addition, a few examples exist of councils of women exercising political power, notably among the Iroquois. These councils are exceptions, not the rule.

129. Ortiz, A. (1969); Dozier (1970/1983), 133ff., 151f., 166/167; Lange (1959/1990); Simmons (1977), 45ff.; Sando (1976/1982; 1982; 1992); Fikentscher (1995a).

130. In Fikentscher's view (1993 at 462; 1995a; 1995b, at 272-85), the moiety structure is an alternative to a traditional social order based on kinship metaphors, but rather resembles the corporate unit invented in Ancient Greece and among some Germanic tribes (especially the Franks).

filled by elections. Nor did tribal constitutions require a consensus for legislation or executive action. Instead, tribal constitutions permit the majority to rule. Few tribes have formalized institutional protection of such traditional minorities. Majority rule can neglect and alienate groups within the tribe. For example, modernist elites may attract the most votes and disregard legitimate interests of a tradition-minded minority (Deloria & Lytle (1983), 2-24; Comment (1972), 973; Churchill (1992), 9).

Modern tribal government broke completely with the older principles of heredity and consensus, and established the new principles of election and majority rule. With hundreds of years of experience in dealing with powerful outsiders and divergent political interests among themselves, the Pueblos sometimes added modern tribal government to traditional government, and the two regimes co-exist in a system of parallel authority. In most other tribes which lacked the experience and tradition of the Pueblos, however, modern government pre-empted traditional government, and the latter disappeared.

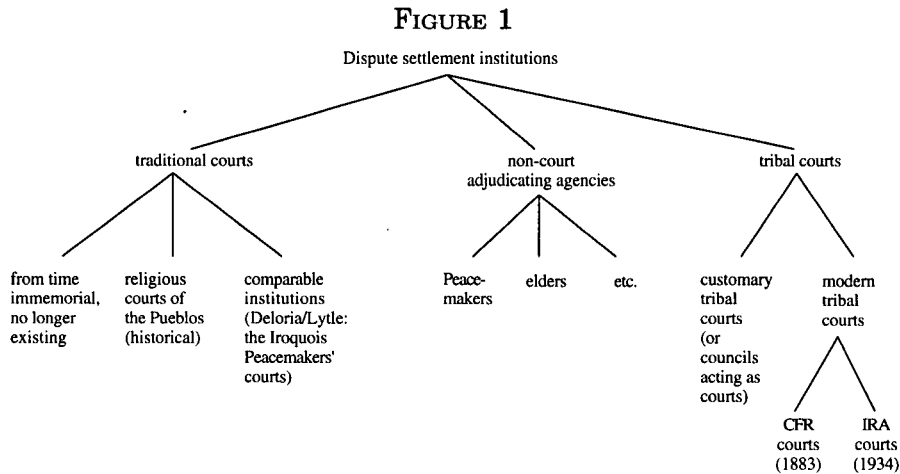
A sharp break with traditional political principles destabilizes government by creating confusion about legitimacy and authority. Little wonder that traditional Indians doubt the legitimacy and authority of tribal government on some reservations today. In a society based upon consensus, withdrawal and non-participation express dissent, not apathy or passivity. Low voter turn-out in tribal elections sometimes expresses disapproval rather than indifference. To illustrate, the Hopi tribal government has been crippled in recent years because many of the villages refuse to send representatives to the council, which deprives the council of the quorum it needs to enact laws.¹³¹ Hereditary chiefs seldom compete for elected office. On some reservations, the tribal chairman is chosen from a small, unrepresentative faction of the tribe. To illustrate, the overwhelming majority of the Tohono O'odham are Catholics, but the recent tribal chairman was Protestant. Similarly, the recent tribal chairman of the Hopis was a Mormon, although Mormons are a small minority of Hopis.¹³² Some Indians told us that traditional Indians prefer to elect assimilated Indians to tribal office so that they can work better with whites and provide a buffer against the surrounding society.

The different types of Indian institutions for resolving disputes are confusing. To help the reader, Figure 1 depicts the types that we

131. The Hopis are considering dissolution of the tribal government. In its place, they would have the villages deal directly with outside authorities. See "BIA to Hopis: Change of gov't may cause void," 105 Independent, March 9, pages 1-2 (1992), (Gallup, New Mexico, newspaper).

132. Indians converted by proselytizing Christians often enjoy exceptional economic success and closer integration into the larger society. This connection between the "Protestant ethic" and the success of Indian "capitalists" has not escaped the notice of scholars. For example, see Pozas (1962).

have distinguished (cf. similar distinctions in Deloria & Lytle (1983), 112):



B. *Qualifications of Judges*

Do tribal judges have the knowledge and inclination to apply tradition to cases? Once again, the situation varies from one reservation to another. Navajo law stipulates that a tribal judge must be fluent in Navajo, knowledgeable in Navajo customs, have at least two years of experience in a law-related area, and be over 30 years of age.¹³³ In contrast, some reservations have no law stipulating qualifications for judges based upon age, experience, or ability to speak an Indian language. We estimate that at least half of the judges whom we interviewed were not fluent in a native language spoken on the reservation where they preside.

Some tribal judges and almost all jurors have no formal training in law. People without legal education who must make legal decisions inevitably draw upon their own sense of justice, which in turn draws upon custom and tradition. For example, we were told that Navajo jurors in wrongful death cases award damages in light of the specifics of Navajo culture, such as as marital practices and family structure.¹³⁴ Similarly, we were told that judges on the Blackfeet tribal court take specific cultural considerations into account when awarding damages.¹³⁵

133. Campbell, Murray, "Taking the Law into Their Own Hands," *The Globe and Mail*, Window Rock, AZ, Sept. 13, 1991, 1, 11.

134. "Children are highly valued by Navajo families. Parents depend upon their children. They are resourceful in terms of future financial support and education. Youth should have full life to gain money, property, and good life." *Ella Louise Bryant, et al., v. Mary I. Bryant, Personal Representative of the Estate of Allison Bryant, deceased*, 3 *Navajo Law Reporter* 194 (1981), at 212.

135. *Fitzgerald v. Fitzgerald*, 1 *Tribal Court Law Reports* A-1(1979).

Some of the judges were deeply rooted in the culture of the tribe where they presided in court, whereas others were outsiders. The outsiders might be Indians from other tribes, Indians returning to their own reservation after a long absence, or non-Indians. Outsiders have the advantage of not being implicated in political factions and family feuds that affect reservation politics. For example, one of the three non-Indian judges whom we met said that he was hired to restore integrity and prestige to a court previously compromised by political infighting. He predicted, accurately as it turned out, that he would finish the process and be replaced with a tribal member.¹³⁶

C. Procedural Provisions for Custom in Law

Tribal law everywhere distinguishes between custom as law and custom as fact. Custom as law draws its contents and strength from custom as fact. Tribal law, which cannot be identified with custom, draws much of its authority from custom. Many tribal constitutions or codes, therefore, recognize the authority of custom and some assign an explicit role to it. To illustrate, Art. VIII, Sec. 2 of the Constitution of the Pascua Yaqui Tribe of 1987 says:

"The jurisdiction of the courts shall extend to all cases in law and equity arising under this constitution and the laws, traditions, customs or enactments of the Pascua Yaqui Tribe. . ."

Thus the Pascua Yaqui constitution recognizes custom as a source of law, without providing any details about when or how to enforce it. Title 7, Article 204 of the Navajo Tribal Code not only recognizes custom as a source of law, but provides the courts with a process for its authoritative determination:

Law applicable (a): In all cases the Courts of the Navajo Nation shall apply any laws of the United States that may be applicable and any laws or customs of the Navajo Nation not prohibited by applicable federal laws. (b) Where any doubts arise as to the customs and usages of the Navajo Nation the court may request the advice of counselors familiar with these customs and usages. (c) Any matters not covered by the traditional customs and usages or laws or regulations of the Navajo Nation or by applicable federal laws and regulations, may be decided by the Courts of the Navajo Nation according to the laws of the state in which the matter in dispute may lie."

Some judges whom we interviewed, notably Chief Judge Don Costello at Warm Springs, actively seek counsel on custom as authorized in the tribal constitution. Even where explicit constitutional au-

136. The individual in question, who was Chief Judge of a large western reservation, resigned under pressure while we were revising this article.

thorization is lacking, assembling elders to discuss custom or tradition is common practice in the Pueblos. Many courts assign cases involving custom to a particularly expert judge. The judicial expert on custom is typically an older person who grew up on the reservation and speaks its language or languages. This was the approach at the Flathead and White Mountain Apache reservations.¹³⁷ However, the most traditional members of the tribe, including the elders who are most immersed in the old way of life, often seem to avoid connection with tribal government and do not participate in court deliberations. One person observed wryly that much unwritten law "eludes the organizers of modern tribal life."—ES.

D. Procedure in Trials

As remarked earlier, anthropological studies around the world have found that dispute resolution in tribes aims at repairing relationships. Thus judges at Laguna and Acoma described four steps to resolving a dispute along traditional lines.¹³⁸ First, the person who commits the wrong must admit what he has done and promise not to do it again. Second, he must apologize to the victim. Third, he must pay damages to the victim, usually as compensation but sometimes as punishment.¹³⁹ If the offender does not have enough money to pay damages, either a symbolic payment will do, or, under a new procedure being tried at Laguna, the offender works for the victim or for wages passed to the victim. Fourth, the injurer must "make it up" to the community by service. One judge illustrated the fourth point by explaining that his courtroom was decorated by somebody "who had to make good to us for what he had done." In Tesuque, a delinquent was ordered to repair a "fence that was down." On a Paiute reservation, "washing windows" was the penalty for a light offense.

Repairing a relationship requires going deeper into the dispute than the immediate cause of the disagreement. Anthropologists have found that tribal people frequently treat everything about the relationship between the parties as relevant to a dispute, including the character and feelings of the parties. In contrast, rules of procedure in federal and state courts narrow the dispute to the specific wrongdoing alleged by the plaintiff. These facts raise the question, "To what extent do tribal courts examine the relationship and character of the parties, rather than the specific act in dispute?"

137. Traditional cases tended to be assigned to Judge Dodge at the Flathead Tribal Court and to Judge Garland at White Mountain. Our interviews with them were especially enlightening. In Taos (see note 52, *supra*) ordinary matters may go to the Governor's court and, in special cases, to the War Chiefs' court. On the value of custom for law in general, see Glenn (1997).

138. FK and FC.

139. Standard damages aim at compensation, but punitive damages are not unknown. We were told that Acoma sometimes trebles damages, and that damages in Zuni go up to tenfold—FK.

Within certain limits prescribed by federal law,¹⁴⁰ tribal judges are free in principle, to regulate the conduct of parties, witnesses, and experts in tribal courts. Many tribal judges take the federal rules of procedure as their model, especially in disputes involving large stakes. Given large stakes, the parties usually have counsel provided by lawyers or "legal advocates,"¹⁴¹ who may prefer standard, adversarial procedures. However, we heard many complaints against the claim-isolating procedures of modern courts, which were described as "cultural impositions" that create antagonisms over "non-issues." Some tribal judges whom we surveyed seemed reluctant to follow the federal rules of evidence or Anglo-American common law rules of evidence.

Some judges and some courts explicitly follow alternative procedures in an effort to adapt procedure to local needs. To illustrate, before hearing the case, Judge Frank A. Demolli of Pojoaque Pueblo announces the following rules of Pojoaque Pueblo procedure to the parties:

1. In addition to evidence admitted according to generally accepted rules of evidence, hearsay will be given due consideration.
2. The judge may direct questions to the parties and their witnesses.
3. A party who wants to keep silent may do so. However, there will be no "counsel's privilege."
4. An appeal from the decisions of the Pojoaque Tribal Court goes to the Tribal Council, whose decisions are binding and trigger *res judicata*.

Judge Demolli announces these rules to the parties. We found that outside legal counsel has no difficulties in submitting to these tribal procedural rules, and welcomes the advance information.

In admitting hearsay, Pojoaque law resembles the "Rule of Free Evaluation of Evidence" found in continental law (France, Italy, Germany, etc.) more closely than the common law rule against hearsay.¹⁴² Other variations exist. Jicarilla Apache law takes a "middle ground" between free evaluation of proofs including hearsay, and the Federal Rules of Civil Procedure. Thus, hearsay there has "minimal weight" because evidence must be "reliable and trustworthy." —CV.

140. The limits come from the due process clause of the Indian Civil Rights Act (see note 87, *supra*).

141. Legal advocates have some legal training and are authorized to argue cases in tribal court even though they are not members of the bar. As to the right to counsel, see discussion of Indian Civil Rights Act of 1968 in footnote 87, under (6), *supra*.

142. § 286 German Code of Civil Procedure of 1877: "The Court has to decide on the basis of free evaluation, by taking into consideration the entire contents of the trial and the result of an eventual faking of evidence, whether a factual allegation is to be regarded true or false. In giving the reasons for its decision, the Court has to indicate the reasons that were conducive for that evaluation." —translation by Wolfgang Fikentscher.

By allowing the judge to direct questions to the parties and witnesses, Pojoaque law assigns a more active role to judges resembling the so-called "inquisitorial system" of continental Europe rather than the role of passive umpire assigned to judges in the common law's "adversarial system."¹⁴³

Some tribal judges say that they need freedom from formal procedural rules to make the legal process congenial to Indians. A Hopi legal scholar remarked to us, "We apply law holistically." —ES. Such judges proceed informally in their courts. To illustrate, the court in the Gila River Pima-Maricopa Community handles offenses committed within the family "as informally as possible." In one case, the court required the offender to hug his mother with the entire family present. —RP. An apology to the victim, along with the promise not to repeat the wrong, is commonly required of defendants. —FC.

Tribal judges often try to channel cases outside the courtroom. A Hopi judge told us that a good legal practice is to tell the litigants what his decision may be before the trial ("If you don't find a solution, I will, and it's going to be" —RA), and then recommend an out-of-court settlement based on village traditions. A judge in Zuni told us that if the families of the criminal and the victim in a rape case settle their dispute by mutual agreement (for example, by apology and compensation), then the court might accept the settlement rather than prosecuting the offender. —MZ.

An older way of deciding disputes apparently persists in tribal courts, sometimes resulting in formal rules different from the federal rules of procedure, and sometimes resulting in informality. As explained, tribal judges adapt procedures to make courts more congenial to Indians. In addition, outside counsel and non-members of a tribe may prefer a tribal court proceeding, because it is faster and more flexible than state or federal trials. On the other hand, and different from our experience in Pojoaque, outside attorneys sometimes have little trust in the fairness of a trial conducted on a reservation. Unfamiliarity with tribal law and procedures increases mistrust by outsiders.

E. Common Law Process?

A social norm exists in the practices of people. Anthropologists sometimes describe dispute resolution in tribes as the application of inchoate social norms.¹⁴⁴ An inchoate norm is not fully explicit. Flexibility and responsiveness are advantages of inchoate social norms, which especially appeal to small, intimate communities. In contrast to "social law," Anglo-American "common law" stresses the reasoned elaboration of rules by judges. Reasoned elaboration aspires to a fully

143. See Langbein, "The German Advantage in Civil Procedure," 52 U. of Chicago L. Rev. 823 (1985).

144. Bohannan (1957); Gluckman (1955); Pospišil (1978); Nader (1990).

explicit statement of rules, which exist in the decisions of judges, not just the practices of people. Predictability and boundedness are advantages of common law, which especially appeal to large, diverse societies. To achieve predictability and boundedness, common law rules are promulgated authoritatively. Consequently, changing common law rules requires an official revision. In contrast, social norms are not promulgated, so they can change without an official revision. In deciding how far to formalize law, predictability and boundedness apparently trade-off with flexibility and responsiveness.

Does the development of law in tribal courts correspond more closely to the process of social law or to the process common law? The judges in all the courts that we visited expressed respect for precedent and the desire to follow past practices in current decisions. Lawyers or legal advocates argue the more important cases before the judges. However, the reasoned elaboration of rules requires institutional memory. The tribal courts that we visited sometimes record cases on cassette tapes. The tapes may be poorly organized and difficult to use. Only the most important cases are transcribed. When we asked tribal judges for files from previous cases, many judges did not have any to show us. Most tribal judges cannot consult records of rules and principles articulated in past decisions in their own courts. Some tribal judges apparently read many federal cases and some state cases, but they seldom read cases decided in tribal courts.¹⁴⁵

Courts without adequate written records must rely upon individual memory about past decisions.¹⁴⁶ Face-to-face conversations and telephone calls substitute for retrieving court records when researching a case. All the judges whom we visited have participated in training programs and conferences, which provide an opportunity to exchange experiences and ideas.¹⁴⁷ Some tribal judges remain in office for years, have a good memory for cases, and discuss them over many years. Through the work of such judges, Indian common law evolves orally and informally. Other tribal judges, who change jobs rapidly or remain intellectually isolated, make single decisions rather than lasting rules of law. (An interesting historical question is whether the courts of the "Five Civilized Tribes" in 19th century

145. The Indian Law Reporter, which is a national publication available to many Indian judges, reprints reports of tribal cases submitted to it. We scoured back issues to find cases involving custom and tradition that might indicate the generation of precedent, but found virtually nothing of interest.

146. G. Miller (1993) has argued that Biblical stories were made as vivid as possible in part to overcome limited memory in an oral culture. He believes that the use of such stories must play a prominent role in organizing law and morality in such a society.

147. Many such programs are organized by Joseph Myers of the National Indian Justice Center in Petaluma, California, and recently by the Tribal Law and Policy Institute, San Francisco, CA.

Oklahoma, which apparently kept good written records, had a formal common law process.¹⁴⁸)

There is one notable exception to these generalizations. The Navajos, who have the largest, most populous, and one of the richest reservations in America, also have the best funded tribal court system. The Navajo Supreme Court hears many cases each year argued by lawyers who continually refer back to its past decisions, which are published and stored in an impressive library. The Navajo judges speak about "Navajo common law" and regard themselves as participating in its elaboration and development.

Most tribal courts have some, but not all, of the features necessary for the Anglo-American common law process. Some aspects of the common law processes are at work in all of the tribal courts that we visited, but it seems to us that few— possibly only Navajo — have a formal common law process like those found in state courts. Are these facts to be interpreted as a deficiency in the tribal courts, or as a preference for social law over common law? Most tribal judges would like better funding to improve the quality of legal records. Providing tribal courts with more institutional memory would facilitate the common law processes in the tribes. Many tribal judges, however, might want to stop far short of the Anglo-American common law process. Stopping short represents, according to the preceding analysis, a choice in favor of more flexibility and responsiveness, and less predictability and boundedness.

Thus, in essence, Indian customary law develops into Indian common law, which sometimes resembles the Anglo-American common law process, sometimes not. The latter situations are certainly more frequent. Hence, there is a "folk common law" in most tribes, and it is tribe-specific.

James Zion relates Indian customary law and Indian common law in the following way:

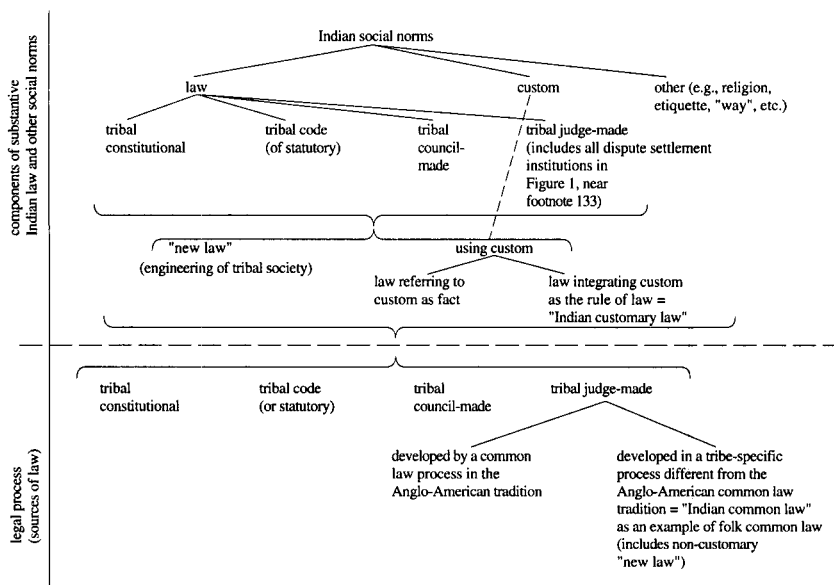
"For the purpose of a rational discussion of Indian customary law, it is best to use the term 'Indian Common Law.' Indian government, law and daily life are founded upon long-standing and strong customs, and since the stated rationale for the English Common Law is that it is a product of custom, that approach maybe used for Indian law as well.

Indians have every right to assert that their law stands on the same footing as the laws of the United States and Canada. It is unfortunate that the term 'custom' implies something that is somehow less or of lower degree than 'law'." Zion (1988), at 123.

148. The microfilm catalog of the Oklahoma Historical Society in Oklahoma City has extensive listing of Cherokee court records. We were unable to go to Oklahoma to examine them. For a discussion, see Strickland (1975), Chapter VIII, 158-67, concerning the Cherokee Supreme Court 1867-1898.

On the whole we agree with this statement by Zion. However, we would add two remarks: (1) Common law is a process-related term referring to a source of law, while customary law concerns a part of substantive law regardless of process; and (2) the common law of an Indian tribe includes tribal legal developments in which tribal judge-made law refers to customs as being part of the law, or as being of a mere factual, not legal nature; or which is not based on custom at all but represents recent tribal judge-made law, for example in cases of consumer protection in "rent-to-own" contracts. Therefore, we prefer a definition of Indian common law that comprises tribal judge-made law, developed either in a common law process according to the Anglo-American tradition, or in a tribe specific legal process different from the Anglo-American model; but in each case including both customs of legal nature and force, judge-made law using customs as mere facts, and judge-made non-customary "new law" answering to contemporary tribal social needs. Figure 2 attempts to illustrate this:

FIGURE 2



The existence of customary law is a fact that influences many cases. For example, social norms influence the way people understand contractual obligations, property rights, and fair punishments for crimes. While social norms influence altitudes in most cases, most customs—whether Indian or Anglo-American—are unsuitable for legal enforcement. For example, most customary promises given in daily life should be enforced informally, not legally. Legal enforce-

ment of daily promises would inject a coercive, bureaucratic element into human relationships. Promises are the source of contracts, but most promises are not contracts. In general, the common law process requires judges to enforce custom selectively.

Moreover, the foundation of any common law system is a vibrant intellectual community of legal experts. An intellectual community that emphasizes oral communication needs frequent face-to-face interaction. Tribal judges especially need conferences, seminars, and telephone calls. In contrast, the Anglo-American common law process relies relatively more on the circulation of written documents. As compared to Anglo-American common law, support of Indian common law requires a different emphasis.

Finally, tribal judges often make law by interpreting statutes. As in Anglo-American law, making law by interpreting statutes differs in important ways from making law by enforcing customs. A discussion of Indian common law must recognize that judge-made law encompasses both sources of law.

Part II of this article will appear in the next issue of the Journal.

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