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American Indian Law Codes: Pragmatic Law and Tribal Identity

The United States has recognized the power of American Indian tribes to make laws at least since 1934. Most tribes, however, did not write down many of their laws until the 1960s. Written laws have subsequently accumulated in well-organized codes, but scholars have not previously researched them. Using written materials and interviews with tribal officials, we describe the scope, motivation, and interpretation of tribal codes. With respect to scope, we found nine main types of codes that cover almost all fields of law over which tribes have jurisdiction. Few tribes have all nine types of codes. Tribes have internal and external motivations for codifying. Internal motivations include preserving culture, maintaining social order, and encouraging economic development. Financial incentives and demands for transparency supply outside motivation. Tribal officials interpret codes pragmatically, which resembles interpretation of codes in continental Europe. Finally, we note that law and justice sometimes require state or federal courts to use a tribal code to decide a case, but they seldom do so, which undermines tribal power and identity.[1]

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1. In addition to scholarly sources, we conducted many interviews with tribal officials and residents. Attributing remarks to identified speakers would have inhibited these conversations, so we follow an anthropological convention of identifying the speaker only by initials.

INTRODUCTION[2]

The subject of this article is American Indian tribal law, which refers to laws made by Indian tribes to govern themselves.[3] It consists of constitutions and referenda enacted by tribal members, legis-

2. We want to thank the following persons and institutions for supporting our field studies: VolkswagenStiftung, Hannover, Germany, included our project in its program "Das Fremde und das Eigene" (The Foreign and the Own). There, our project received the subtitle "Tribal Identity and Foreignness by Tribal Code Law." VolkswagenStiftung contributed the essential part of the financing. Other contributions came from supporters with special interests in our work, outside of the identity issue: The Max-Planck Institute for Intellectual Property, Competition and Tax Law, Munich, is interested in code law on folklore protection and in the interface between intellectual property protection and culture comparison. The Bavarian Academy of Sciences, Munich, offered the financing of library work connected with the history and listing of tribal codes. The Gruter Institute for Law and Behavioral Research, Portola Valley, CA, U.S.A., helped with logistic and methodological advice. The Santa Fe Institute, Santa Fe, NM, U.S.A., assisted by providing us with working facilities during our studies in the Rio Grande Pueblos. The President of the Human Science Center, Munich, Professor Ernst Pöppel, Director, Dr. Eva Ruhnau, and Ms. Petra Carl, M.P.H., supervised progress of our project in cooperation with VolkswagenStiftung.

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3. Cooter & Fikentscher (1998), at 290, 292.

lation made by tribal councils, holdings by tribal courts, and customary law upheld by traditional authorities.[4] In contrast, "Indian law," which is not the subject of this article, refers to federal laws that govern American Indians.[5] Indian law consists of legislation enacted by Congress, regulations created by federal agencies like the Bureau of Indian Affairs, and holdings by federal judges.

Since Felix Cohen published his classic book in 1942, Indian law has been extensively researched by scholars and taught in law schools, but tribal law has received little attention, apparently for two reasons. First, while experts and ethnographers have long recognized that Indians use "customs," "habits," and "religion" to regulate their affairs, they have only recently appreciated that Indians also have law. To illustrate, in 1971 the Restatement (Second) of Conflict of Laws declared that Indian tribal law is non-existent, and mainly characterized Indian tribal norms as "religion."[6] This oversight is not surprising since tribal officials seldom circulate their laws outside the reservation and tribal judges seldom document their decisions in writings that outsiders can access.

A second reason why scholars have failed to examine tribal law is its relative newness as written law. A few tribes in Oklahoma, such as the Cherokees, once had written constitutions, adjudication, and legislation, but these tribal governments were abolished in the process of creating the State of Oklahoma. The federal officials who governed reservations before 1934 enacted some laws that embodied custom or reflected the will of Indians, but Indians did not make these laws. It was not until the Indian Reorganization Act of 1934 that tribes were encouraged to enact written constitutions.[7] Some tribes, such as the Hopi, enacted constitutions immediately, but others did not follow suit for some time, and still others, such as the Navajo, never drafted a constitution. For many tribes, constitutions were the first written laws they made.

Until the 1960s, most tribal councils contented themselves with making occasional decisions and producing few written laws. Since the 1960s, however, laws have accumulated rapidly in well-organized codes. These codes constitute the bulk of written tribal law today. Some tribes also have ordinances created by agencies with authority delegated to them by the tribal council. Although their sources are different, codes and ordinances differ little in practice. In this article

4. Loc. cit., at 329.

5. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 2005 Edition. For details on the editions and reprints, see bibliography of this article.

6. Restatement (Second) of Conflict of Laws volume I, Chapter 1, Introduction, § 2, Comment c, (1971).

7. Indian Reorganization Act (Howard-Wheeler Act), 25 U.S.C.A. § 461 et seq. (1934).

we present the first systematic description and analysis of codified tribal law.[8]

First, we provide an overview of tribal codes. Tribes currently have up to nine types of codes that span the scope of tribal jurisdiction. Much of the text of tribal codes is transplanted from federal law, state law, or the law of another tribe. Often the codes follow a relatively standardized form, but sometimes they reflect legal inventiveness or distinctive drafting styles.

Second, we observe that when tribal officials apply codes, they interpret the law pragmatically. Personal disposition, education, and availability of legal records dictate a pragmatic approach. This style of interpretation resembles the interpretation of codes by judges in continental Europe.

Third, we consider the goals of codification. Internal goals include preserving culture, strengthening tribal identity, achieving social peace and harmony, and promoting economic development. The external goals involve resolving issues with outsiders such as traffic, consumer protection, business, and casinos. Using this distinction, we classify the nine primary types of codes according to their underlying purposes.

In our conclusion we note that law and justice sometime require officials from outside a reservation to decide cases by applying tribal law. Cross-border application of tribal law can be called "tribal conflict of laws." When laws conflict, however, officials of the federal government, states, other tribes, and international organizations seldom use tribal law in resolving the problem. By failing to use tribal law where appropriate and due under the rules of conflict of laws, outsiders undermine the power and identity of the tribes.

I. Overview of Tribal Codes

A. *Accessibility of Codes*

Before providing an overview, we wish to describe the sources of our information. Where can scholars find tribal codes? The most effective way is to visit tribal courts. A scholar who cannot visit tribal courts must use a collection. For many years, no accessible collection of tribal codes existed. The *American Indian Court Judges Association Long-Range Planning Project* conceived of a comprehensive collection of Indian tribal codes in 1978. In response, Professor Ralph W. Johnson, his assistant Ms. Susan Lupton, and the Marian Gould Gallagher Law Library at the University of Washington assembled and published the first edition of "Indian Tribal Law—Codes" in

8. In a separate paper we examined the differences between custom, customary law, and common law as practiced in tribal legal systems. Cooter & Fikentscher at pp. 287-330, 509-580 (1998).

1981.[9] It is a microfiche collection of material obtained from the Bureau of Indian Affairs (BIA), National American Indian Court Judges Association (NAICJA), the University of Washington, and various tribes and private persons. Although imperfect and incomplete—it covers only ninety-four tribes—it still represents one of the best collections of its kind.[10]

The popularity of the first edition prompted a supplement in 1988 that was produced with the help of Richard Davies. The supplement covers some developments between 1981 and 1988. Although it comprises just fifty-six tribes, the new collection encompasses constitutions and constitution-related documents. Both editions come with a detailed foreword by Professor Johnson, an outline of the history of tribal law, extensive bibliographical references, and an analysis of current issues by Richard Davies.[11]

In addition to these microfiche collections, some codes are now available on the internet. The best source is the website of the Tribal Law and Policy Institute, which links to the National Indian Law Library, the National Tribal Justice Resource Center, and the Native American Constitution and Law Digitization Project of the Native American Rights Foundation. The steady accumulation of online materials promises easier access to tribal codes in the future. Currently, however, neither the microfiche nor the online collections are close to complete. To gain access to a complete set of codes for a tribe, one must go to reservations and speak to officials.

In most democracies, the text of laws can be found in a publicly accessible periodical. This is not true in Indian country. A few tribes, such as the Navajo, print edited volumes of their code, and they post in public proposed changes to it.[12] In Pojoaque, a Pueblo[13] without a

9. INDIAN TRIBAL CODES: A MICROFICHE COLLECTION (Ralph W. Johnson ed., 1988) (1981).

10. Professor Ralph W. Johnson offered three qualifications concerning the collection: not all tribes are represented; not all codes in the collection were still current at the time of publication; and the legal documents were photographed in exactly the condition in which they were found, i.e., in varying physical quality. Some codes were freshly printed, some were printed and marked, and others were typed. Of course, the codes documented by Professor Johnson may have changed since then. See also LESTER HARGRETT, A BIBLIOGRAPHY OF THE CONSTITUTIONS AND LAWS OF THE AMERICAN INDIANS (The Lawbook Exchange 2003) (1947).

11. Indian Tribal Codes, supra note 9. A copy of this collection was purchased in 2002 by Cooter and Fikentscher for use in writing this article. The microfiche copy is at Berkeley, and a photocopy was bound and placed in the Library for Anthropology of Law, Munich University. The photocopy was made possible by the kind support of Professor Peter Landau and Dr. Jörg Müller, and through the work of Ms. Susanne Weingärtner.

12. We also heard: "In White Mountain Apache, proposals for amendments or a new code are posted in the tribal office, tribal members suggest changes, and the finalized law is posted again." —DF; similarly RA; JH.

13. The term "Pueblo" refers to small tribes who already lived in villages, especially on the Rio Grande River, when the Spanish arrived. The Spanish called them

constitution but with a number of codes,[14] a binder of basic tribal codified civil and criminal law is available for twenty dollars.[15] But in general, tribes do not have an "Official Gazette" or a similar outlet for publishing the tribal council's enactments. When we visited reservations, we asked officials how they publicize their code laws. We often used this hypothetical: "Assume that a trial begins today in the court building at nine o'clock in the morning. How do the parties find the code law that the judge will apply to the case?" The usual answer was this:

> The judge has the code on his desk. The parties are free to come to court before the trial begins and talk to the tribal advocate (a tribal official knowledgeable in the law). The tribal advocate will identify for each party the relevant code provisions and what they mean, and the parties may check the text of the code in the judge's book.

This passage suggests what our experience generally confirmed: tribes that produce code law collect it in a folder, binder, or portfolio. Tribal councils enact new and amend old legislation regularly,[16] especially when a different political faction wins control of the tribal council.[17] The binders are often "loose-leaf" in order to accommodate changes and additions.[18] Other than the judge's copy, we did not see copies of complete codes available in public places.

The code is easier to obtain than copies of court decisions interpreting it. Trials have no written transcripts, although audiotapes are made for oral arguments in important cases or appeals cases.[19] Judges write their orders, but they seldom write their opinions. Some

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"republics." These towns, with some of their adjacent lands, granted to them by the Spaniards, have been recognized as Indian reservations by the federal government.

14. A draft constitution of 1954 was not signed. We saw five loose-leaf binders of codes. Since the late 1920s, Pojoaque Pueblo has been rebuilding its identity and regaining its original Tewa language.

15. "In Laguna Pueblo there is always some repealing and amending by tribal codes, and the secretary of the court makes codes and their revisions available to tribal members." —PT. In Navajo we heard a laconic remark: "Among the Navajo, the interest in what code law holds is limited. It's the outsiders and their lawyers who want to read it. Tribal members are content when somebody tells them what's in the code."

16. "Whenever the need is felt, an up-date will be proposed to the council." —GL; DO. Of course, a tribe that feels an encompassing code to be desirable such as White Mountain Apache, is confronted with "steady revisions." —DO. A similar reaction ("there is no system, but a constant need to add") we found in Acoma. —AL.

17. "Big changes occur when a new generation comes in and wins the majority of the tribal council." —DF; similarly RA; JH.

18. In Hopi, resolutions of the tribal council aimed at amending the law are being added to the collection of codes by inserting "a new page in the binder."—AG. Up to now, changes have always been additions, not repeals —LH; AG, although the code contains obsolete parts such as prohibiting "illicit cohabitation." —LH; AG.

19. In Pojoaque, "The reasons given by the judge are usually oral, and perhaps two cases a month are written down." —FD.

Hopi tribal officials told us that they learn of Hopi court decisions from the Indian Law Reporter, which collects a small number of cases from reservations throughout the United States.[20]

For this study we obtained copies of tribal codes from libraries, online sources, and directly from tribal officials. We also spent parts of the summers of 2001-2004 visiting twenty-nine reservations, mostly in the American Southwest, and talking to seventy-six tribal officials, legal experts, and experts on tribal law and its application.

B. Form of Codes

Tribal codes are written in English. They vary in length and density. Preambles are apparently regarded as part of the law. Following Anglo-American practice, tribal codes frequently contain introductory chapters consisting of definitions.[21] The codes usually aspire to cover all eventualities, as in the British tradition of lawmaking.[22] Official comments and aids for interpretation are sometimes added to tribal code provisions in brackets, small print, or under headlines and titles indicating that this explanation of law is not law itself.

C. Drafting of Codes

Tribal constitutions generally separate powers into council, administration, and court. The tribal council is an elected legislature that usually reflects the tribe's tensions and disagreements. As in many small American towns, the political factions on Indian reservations are not organized into political parties. Rather, factions tend to organize on the basis of families and dynasties, sometimes with ideo-

20. "Written summaries of the most important decisions of the judges would be desirable to illustrate and accompany the code law but it is not done yet." —AG. "Many tribes regularly report to the Indian Law Reporter —ILR, for example, "San Ildefonso Pueblo and Santa Clara Pueblo do." —PT.

21. The historical background of this desire to frame the language of an Anglo-American legal text as encompassing as possible is Edward Coke's mischief doctrine which in turn is an attempt at equilibrating the powers of parliament and the courts during the early seventeenth century. According to Edward Coke's "mischief theory," the preponderant weight of law-making power rests with judges, and Parliament should limit rule making to curing "mischiefs." Judges who follow this theory should favor a strict interpretation of the words chosen by Parliament in a statute, and Parliament should draft statutes in ordinary language, not technical legal terms. This approach invites lawmakers to stipulate the meaning of the words in each statute, for example by chapters on "definitions," rather than relying upon a body of previous laws to establish the meaning of words. Consequently, Anglo-American lawmakers and contract draftsmen are used to additional chapters on definitions and often create considerably longer texts than Continental Europeans would in writing the same statute or contract. A further discussion is contained infra, note 119.

22. Cf., WOLFGANG FIKENTSCHER, METHODEN DES RECHTS vol. 2 (Amerikanischer Rechtskreis) 111-133, 262-271 (1975), vol. 3 (Mitteleuropäischer Rechtskreis) 378 (1976), vol. 4. (Dogmatischer Teil) 141 (1977); idem, What are Law Schools For? (Aug. 1996) (unpublished paper delivered at the Academics' Forum, International Bar Association, 26th Biennial Conference, available from IBA as BP100).

logical and philosophical disagreements about modernization and economic development. Politics often create the impetus for codifying law.

Most tribal governments have a member of the council who also serves as the chairman or governor. In this respect, tribal councils resemble a parliament with a member acting as the prime minister. The tribal chairman, however, is usually elected directly by the tribal members. Administration in every large tribe includes at least one attorney who is usually an outsider with a law degree. The tribal attorney and his assistants see themselves as technical experts who implement decisions made by others.

As in U.S. courts and other countries, tribal judges make laws by deciding important cases. The decisions of judges have the widest effect when they are written down and easily accessible. Access to past cases is easiest in the larger tribes where the courts have more resources and keep better records. Some large tribes build common law on precedents,[23] as in English common law. Many smaller tribes rely on loosely structured case-by-case practice.[24] In all jurisdictions, the statutes enacted by the tribal council are more accessible and more recited than case law decided by judges.

A tribal code, or "code law," is a systematic body of legislation. We will describe the typical form of codification, which involves the tribal council, administrators, and judges, each participating in different ways. Codification may proceed by collecting and organizing the council's past legislation, or by enacting a whole new body of laws where the tribe did not yet have statutes. We did not encounter a "law reform committee" charged with regularly revising codes. Codifying a new body of law often begins with a request from the tribal council for the tribal attorney to prepare a draft. Rather than starting from scratch, the tribal attorney usually adapts a statute that already exists in another jurisdiction. The model may be the law of another Indian tribe or a statute of the state where the reservation is located. The tribal attorney may enlist the help of off-reservation lawyers. (During our fieldwork in the Rio Grande Pueblos, in the office of a Santa Fe attorney, we rediscovered a remarkable and forgotten example of help from an off-reservation lawyer—texts of laws drafted for three tribes by Karl N. Llewellyn, one of the most distinguished American legal scholars of the twentieth century.[25]) After

23. For examples of how tribes use precedent, see II. below.

24. See Cooter & Fikentscher (1998), at 326-330.

25. Karl N. Llewellyn did fieldwork among the Rio Grande Pueblos in the 1940s. He drafted at least three codes for three different Pueblos, which we now possess. One code was accepted and enacted by a tribe; two were rejected and not enacted. One code focuses on sanctions by tribal courts, the two others concern constitutional, organizational, and family law matters. These texts predate Llewellyn's great works on legal realism, which obviously grew out of his legal ethnology to a much greater extent than is generally assumed. For historical details on Llewellyn's fieldwork, see Wolfgang

the tribal attorney prepares a draft, officials, including judges, usually discuss it.[26] A revised draft eventually goes to the tribal council, which decides its fate, possibly after holding hearings.

D. Scope of Tribal Law

The tribes occupy the peculiar legal status of "dependent sovereigns." As such, they have powers that the fifty states lack, including the power to determine membership ("enrollment") and residency. Legal history, however, stresses their dependency more than their sovereignty. The U.S. Constitution reserves powers for the states, whereas the constitutional principle of plenary power allows Congress to pre-empt tribal law on any issue simply by enacting a statute.[27] Congress has pre-empted the tribes with respect to major crimes but not minor offenses. However, Congress has not significantly impaired tribal control over civil cases (e.g., property, contracts, accidents and other torts, family matters, and inheritance).[28] The tribes can determine their own legal procedures within limits. With respect to public law, the tribes have to follow applicable federal statutes,[29] including the Indian Civil Rights Act of 1968.

Fikentscher, Die Erforschung des lebenden Rechts in einer multikulturellen Gesellschaft: Karl N. Llewellyns Cheyenne- und Pueblo-Studien, in U. Drobnig/M. Rehbinder (eds.), Rechtsrealismus, multikulturelle Gesellschaft und Handelsrecht: Karl N. Llewellyn und seine Bedeutung heute 45-70 (1994). On Llewellyn, see, e. g., Charles D. Breitel, Llewellyn: Realist and Rationalist, 18 Rutgers L. Rev. 745 (1963-64); William Twining, Karl Llewellyn and the Realist Movement (1973); William Twining, Law and Anthropology: A Case-Study in Interdisciplinary Collaboration, 7 Law & Soc. Rev. 561 (1973); Wolfgang Fikentscher, Methoden des Rechts vol. 2 (Anglo-Amerikanischer Rechtskreis) 284-289 (1975), vol. 5 (Nachträge – Register) 190 (1977) (containing a list of Llewellyn's most influential works).

26. "In Laguna Pueblo, if somebody wants a rule enacted or amended, the concerned person or group may file suggestions but should give the tribe ninety days notice to react." —FC.

27. Note, however, that Babbitt v. Youpee, 117 S.Ct. 727 (1997) imposes some constitutional constraints on the plenary power of Congress.

28. Major Crimes Act, 18 U.S.C. § 1153 (1885). The Major Crimes Act of 1885 pre-empts tribal law with respect to prosecuting its members for major crimes listed in the statute, but leaves the tribe with concurrent jurisdiction over other crimes. The U.S. Attorney will prosecute (or not) for murder, and the tribe will prosecute for, say, unlawful discharge of a firearm. There is no double jeopardy problem with the two prosecutions because the federal government and the tribal government are separate sovereigns. See U.S. v. Wheeler, 435 U.S. 313, 98 S. Ct. 1079 (1978). On the issue of "dependent sovereignty" in general, see Cooter & Fikentscher, supra at 295-299. In defense of tribal sovereignty, see Frank Pommersheim, The Reservation as Place, 34 S.D. L. Rev. 246-251 (1989); Philip P. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 Harvard L. Rev. 381-440 (1993). On the growing awareness of tribal sovereignty from the side of the states and its impact on legal matters, see, e.g., Joy Blane & Marcy L. Kahn, The First New York Listening Conference for Court Officials and Tribal Representatives, NYSBA Journal, Nov./Dec. 2006, at 11-19. We thank Phil Frickey for help on this point.

29. For details, see Cooter & Fikentscher (1998), at 297-309; CANBY (2004), 235 f., 250-254.

How much of their powers over civil matters and minor crimes have the tribes chosen to exercise? Some tribes, like the White Mountain Apache, aim for a complete code that covers all subjects within their power.[30] In these tribes, the whole body of regulations is called "The Code" and is subdivided in many chapters. Others, especially smaller tribes, limit their codes to particular subjects such as the "family code" or the "motor vehicles code."[31] Finally, there are some tribes with council and courts that have not organized their law into any code.[32] A tribe may have regulatory jurisdiction but not statutes, in which case the tribal court must decide cases by applying customary law and tribal common law. Custom and tribal commonlaw are especially important for issues involving land ownership by families.

E. Nine Fields of Tribal Code Law

Although the titles of tribal codes vary—the "family code" in one tribe is named "domestic relations code" in another—we have identified nine fields of law into which the substance of most tribal codes naturally falls. We review these fields in this subsection.

1. Membership

Tribal members have rights, such as the right to vote in tribal elections, reside on the reservation, receive treatment from the Indian Health Service, and share in casino royalties. Consequently, every tribe needs law to define the requirements for tribal membership. To qualify as a tribe recognized by the federal government, membership requirements must be clear and unequivocal, although not necessarily contained in a formal code.[33] Otherwise, the tribe is

30. Another example of the intention to achieve relative completeness is the Navajo Nation whose Navajo Nation Code (NNC) is an impressive system filling several binders. The NNC started, according to our materials, in the 1960's as Navajo Tribal Code (NTC). The 3rd edition of the NTC of 1969, published in June 1978, has a foreword, written by Peter MacDonald, in which he warns against the assumption that codification in Navajo encompasses all tribal law. He says that there has been unwritten Navajo law for centuries and that it retains its validity.

31. Crow Creek Sioux Tribal Code (1973). The code contains chapters on courts (including judges and jurisdiction), civil procedure, evidence, damages, obligations imposed by law (sic!), contracts, replevin, penal code, and hunting and fishing. The Law and Order Code of the Maricopa Ak-Chin Indians Community, revised in 1975, has chapters on court and police, criminal procedure, crimes and punishment, civil actions, health and sanitation, livestock, game and fish, motor vehicles, and land use. The structure of these codes shows a growth step-by-step when the need is felt.

32. Cochiti Pueblo is an example of a tribe with unwritten membership rules and no membership code. "We want to keep our law open to development. If you put down law on paper, it petrifies . . ." —RP.

33. On the details and requirements as well as the limits of this freedom of the tribes to legislate and apply tribal law, including establishing membership rules, see CANBY (2004), Chapters VII-IX. See also State v. Sebastian, 243 Conn. 115 (1997), cert. denied 118 S. Ct. 856 (1998); and the White Mountain Apache Enrollment Code.

free to define membership requirements as it wishes. Congress and federal courts have not interfered with the membership rules set by the tribes.[34]

Membership rules vary substantially from one tribe to another.[35] When the tribes entered treaties with the federal government, implementing the land provisions often required tribes to identify their members. Allotting land to tribal members presupposed a roll that named the members. In most tribes, biological descent from the original roll determines who is a contemporary member. Each tribe sets its own rules for determining the lines of biological descent that separates members from non-members. For example, a person may belong to a tribe by virtue of his or her father having been a member. Or membership may require a "blood quantum" such as one-eighth of one's ancestors being on the original tribal role. When politically influential Indians find that intermarriage has caused their children to fall below the blood quantum required for membership, they try to relax the membership rules by reducing the requirements.

Since legal membership depends on biological descent, it correlates imperfectly with social integration into a tribe as determined by language, residence, employment, religious observance, culture, and social interaction. Misalignment of legal membership and social integration produces sharp injustices. For example, some people who live on the White River Apache Reservation and speak Apache are not tribal members, and some people are tribal members who live in Los Angeles, cannot speak Apache, and never visit the reservation.

These injustices were present from the beginning. The original membership rolls omitted some people who were socially integrated into the tribe and included some people who were not. In some circumstances, the legal rules of descent aggravated injustice by focusing on the wrong determinant of membership. For example, Hopis trace descent through the mother for purposes of determining clan membership, whereas the law traces descent through the father for purposes of determining membership in the tribe. Consequently, the Hopis have tribal members without a clan (the person's father is a tribal member and the person's mother is not a Hopi Indian), and

34. Santa Clara Pueblo v. Martinez, 436 U. S. 49, 98 S.Ct. 1670 (1978). In this case, a Native American woman felt discriminated against by membership rules of a Pueblo code on tribal membership. Santa Clara Pueblo's family system is patrilineal. The U.S. Supreme Court decided that habeas corpus is the only legal mechanism for judicial review under the Indian Civil Rights Act of 1968. Beyond that, federal protection against gender discrimination is barred by the principle of sovereign immunity which the tribe is able to invoke. See also Carla Christofferson, Tribal Court's Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act, 101 YALE LAW REV. 169, 169-185 (1991); Cooter & Fikentscher (1998), at 305; Cohen (2006), 13-18.

35. For example, patrilineal tribes have membership rules different from matrilineal tribes. See Christofferson, preceding note.

members of Hopi clans who are not tribal members (the person's mother is a clan member and the person's father is not a tribal member). This problem gets worse with time—more tribal members are not socially integrated, and more socially integrated people are not members.

As an alternative to the current rules, a tribe might try to develop a functional rule of membership related to social integration, such as the rule that membership lapses when someone fails to reside on the reservation for two consecutive years, and lapsed membership can be restored by two years of continuous residence. We are not aware of any tribe that has attempted to develop functional standards related to social integration for determining membership.

Whereas a tribe can set the rules to determine who is a member of it, the federal government determines whether or not to recognize a group of people as an Indian tribe. As with membership, federal recognition aligns imperfectly with how Indians view themselves. To illustrate, the Lumbee of North Carolina are not recognized as a tribe by the federal government, but they think of themselves as a distinct Indian people. They exercise significant social, economic, and political influence in Robeson County, North Carolina, where other people also view them as a distinct Indian people. Conversely, many Alaskan tribes qualify for federal recognition,[36] but only specialists can distinguish them from their neighbors.

Recognition and membership rules affect the function and identity of a tribe, and vice versa. Some tribes that dissipated were able to re-constitute themselves after receiving federal recognition and formalizing their membership rules. Profitable casinos helped. For other tribes, failure to achieve federal recognition and legal definition of membership has hastened their social disintegration.[37]

2. Family Law

Since families are universal, so is family law.[38] Family law imposes positive obligations on family members, such as the duty to care for dependent children, and negative obligations, such as the duty of husbands not to abuse their wives. While families are universal, the rules and practices surrounding the family vary across cul-

36. On the rules of BIA recognition of tribes, see LaPier v. McCormick, 986 F.2d 303, 305 (9th Cir. 1993); CANBY (2004), 3-10.

37. The Ramapo Indians of New Jersey, who repeatedly tried to achieve federal recognition without success, provide an example of this phenomenon. The Coquille Indians of Oregon were "terminated" as a tribe in 1953 but regained recognition in 1989. IRMGARD & WOLFGANG FIKENTSCHER, Geschichten der Coquille, in DAS MENSCHENBILD IM WELTWEITEN WANDEL DER GRUNDRECHTE, FESTSCHRIFT HEINRICH SCHOLLER 311-316 (B. Schünemann, J. P. Müller & L. Philipps eds., 2002). For a thorough discussion of the issue, see generally CANBY (2004), at 58-61.

38. See DONALD E. BROWN, HUMAN UNIVERSALS (1991).

tures. Indian kinship is different from European kinship, often bewilderingly so.[39] Many tribes have family norms and childrearing practices that differ from their European-American counterparts.

Identifying distinctively Indian family norms is easy where clans or lineages persist and elusive where clans have disappeared and lineages have fallen into disregard.[40] To illustrate, European languages refer to the biological mother as "mother," and her biological sisters are called "aunts." Among Europeans, a child's bond is expected to be stronger with its mother than with its aunt. The difference in names helps the child and the adults to feel appropriately towards each other. In contrast, a Cherokee child traditionally refers to its biological mother and her biological sisters by the same term: they are all "mothers." The Cherokees use the same word for "biological mother" and "biological maternal aunt" because the child is supposed to feel the same way towards them, and they are supposed to feel the same way towards the child.[41] (This was even true when the child was older than one of its mothers.)

As another example, a Navajo clan is a descent group with membership traced through the female line. A child, consequently, belongs to a different clan than its biological father. A Navajo acquaintance once remarked to us, "Although he's not my relative, I like my father." Similarly, a Navajo child is close kin to his biological mother's brother. In Navajo, the oldest living brother of the mother is also called "little father." He is the one who should assist his biological sister in bringing up her children.[42] A Navajo child, however, is not kin to his biological father's brother.

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39. It cannot be denied that cases of physical fights, beatings, and ensuing estrangements are to be found in many tribes. There are a number of reasons for this. One is discrimination of Native Americans by outsiders, for instance employers, off reservation; second is the daily sudden change from one cultural world into a very different one, when dad comes home from work; third alcohol; and a fourth is misplaced criticism. See, e.g., Pueblo of Laguna Law and Order Code of 1984, Chapter 5: Domestic Relations, 39 f.(1984); WOLFGANG FIKENTSCHER, Domestic Violence under Indian Pueblo Law, in GEWALT IN DER KLEINGRUPPE UND DAS RECHT, FESTSCHRIFT FÜR MARTIN USTERI, SCHRIFTEN ZUR RECHTSPSYCHOLOGIE 45-73 (1997);WOLFGANG FIKENTSCHER, Rechtsanthropologie – am Beispiel einer Feldstudie zu rechtlichen Reaktionen auf Gewalt in der Familie bei Pueblo-Indianern-, JURA – JURISTISCHE AUSBILDUNG 182-189 (1998).

40. On the different family systems, see, e. g., NORBERT BISCHOF, DAS RÄTSEL OEDIPUS: DIE BIOLOGISCHEN WURZELN DES URKONFLIKTES VON INTIMITÄT UND AUTONOMIE (1985); ROBIN J. FOX, KINSHIP AND MARRIAGE (Cambridge Univ. Press 1983) (1967); Leslie White, The Definition and Prohibition of Incest, 50 American Anthropologist 416, 416-435 (1948). Many Indian tribes live by the Crow System, modified one way or the other. The Omaha System and the Iroquois System are less frequently used.

41. The Cherokee pattern that merges aunts and mothers closely resembles the Iroquois pattern, which is one piece of evidence that these tribes share common ancestors.

42. Navajo follow a "modified Crow System of descent." See Bischof, supra note 40.

Clans are relatively large. They may trace their descent to an animal, mountain, cloud, etc. ("stipulated ancestor"). Lineages, in contrast, are relatively small. They trace descent from an historical person ("demonstrated ancestor"). Relationships within a lineage may also play a role in applying family law among Navajos. If the parents of a traditional Navajo abandoned the child, someone in its maternal lineage would be most likely to assume responsibility, such as the child's biological mother's brother ("little father" in Navajo, "maternal uncle" in English). It is less likely that someone in its father's clan would assume responsibility, such as its biological father's brother ("paternal uncle" in English).

The degree to which clans and lineages persist differs markedly across reservations. Clans are extinct in some tribes and apparently declining in others, and the same may be said of lineages.[43] The life of a clan or lineage is complex, but a simple measure indicates the extent of decline. Marriage within the same clan or lineage is traditionally regarded as incest, so decline is marked by failure to observe these prohibitions. With or without clans or lineages, however, most reservation children grow up under the eyes of relatives in small, intimate communities.[44]

Family law is mostly left to the tribes,[45] although tribal law must harmonize with federal legislation, including the Indian Child Welfare Act,[46] Headstart, and other education-oriented legislation.[47] Given the historical importance of clans on all reservations and their continuing importance on some reservations, one might think that

43. Where clan membership is still observed, such as in the Navajo culture, marriage of two clan members is incest. If a young man starts "talking clans" to a young lady, this might be indicative of trying to make approaches. It is actually a good test of whether clans still exist among Indian people by whether or not a marriage between two members of the same clan, as determined by traditional rules of descent, is regarded as incestuous. On the reservations that we visited, we often heard older people complain that young people pay no attention to clan when marrying. Marriage within a lineage is most certainly incestuous: in traditional societies, cross-cousin marriage may be a morally preferred choice. A cross-cousin is the cousin who descends from ego's uncle or aunt if between that uncle or aunt and ego's parent as brother or sister of that uncle or aunt there exists a difference in sex. The historical reason for a moral preference of cross-cousin marriage is locality in connection with peace keeping: a paternal society that "marries out" its daughters into a neighboring village enhances its chances for peace keeping with that village when its young men prefer young girls from that neighboring village. There is no incest because the daughters to be "married out" hereby quit the patriline. In maternal societies, the reverse applies, so that, again, marriage within the lineage does not occur.

44. This does not exclude help from tribal leaders or other respected personalities of the tribe. See Cooter & Fikentscher (1998), at 557 (discussing education in a Southwestern tribe).

45. CANBY, 185-226; a chapter on domestic relations or family relations is one of the most frequently found in Indian codes. Of course, the contents vary according to whether descent is traced through the mother, father, or both.

46. Indian Child Welfare Act of 1978, 25 U.S.C.A. §§ 1901 et seq. (1978).

47. See 20 U.S.C.A. §§ 236-44 (1950) (repealed 1994); 25 U.S.C.A. §§ 452-54 (1934) (amended 1936).

the rules in family law codes would refer to clans. This is not the case. The tribes follow a common practice of modern law throughout the world, which seldom mentions clans, even in places like Africa and Papua New Guinea where they remain powerful. Officials mostly accommodate cultural distinctiveness through the application of family law, not the drafting of it. Thus tribal courts often have a specialist in tradition. The court assigns cases to this specialist that involve "traditional families," whereas the court assigns cases involving "modern families" to other judges. When deciding the rights and wrongs of disputes within traditional Indian families, the specialist applies tribal custom, including rules about clans and lineages.

3. Substance Abuse

On many reservations, alcoholism is a long-standing issue, and drug use and trafficking are increasingly common. Tribal members view alcoholism and drug abuse as a cause of automobile fatalities, neglect of children, violence, and wasted lives.[48] The pervasiveness of these problems perplexes residents and preoccupies officials. Many reservations have codes on "substance abuse" that define illegal substances, prohibit possession, use, and trafficking, and sometimes regulate treatment and rehabilitation.[49] Some reservations, including the largest one by population and land area (Navajo), prohibit the sale or possession of alcohol. Other reservations stop short of a ban but severely limit the number of places where alcohol can be bought or sold. Wherever laws prohibit or sharply restrict the sale of alcohol, "bootlegging" (illegal alcohol sale) is common. All reservations must conform to federal laws prohibiting the use of listed drugs. However, the Native American Church, which is active on some reservations, uses peyote in ceremonies that mix Christian and aboriginal beliefs.[50]

In response to alcoholism and drug abuse, the tribes have tried a variety of remedies, from jailing drunks to using aboriginal ceremonies and teaching the "old ways." It is difficult for an outsider to understand the effects of these laws and policies. We are unable to say anything about their relative success or failure. On one reservation, we attended a four day-and-night initiation dance. Alcohol was, of course, forbidden, and nobody could be seen drinking. The last night involved the most impressive dances. Early the next morning, Fikentscher visited the dancing ground to count empty beer cans or

48. Cf. S. Kershaw, Dizzying Rise and Abrupt Fall for a Reservation Drug Dealer, N.Y. Times (Internet edition), February 2006.

49. Santa Clara Pueblo has a rehabilitation center. Isleta Pueblo bought a building complex on a sizeable lot and started a center there, administered by AA.

50. The conflict between freedom of religion and prohibitions against drugs has resulted in important legal disputes involving the Native American Church. See Native Am. Church of N. Am. v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959).

bottles, and he could not find a single one. He remarked on this surprising fact to a tribal member who smiled and replied, "Before you arrived, somebody must have picked them all up. They bring five cents apiece."

4. Land

The federal government holds most land in Indian country and its subdivisions in trust for the tribes.[51] Although the trust principle fits oddly with history,[52] it is entrenched through fundamental Supreme Court decisions originating with Justice Marshall.[53] It even applies to tribes whose ownership of land was established in Spanish and Mexican law and recognized by the United State after acquiring the respective territory in 1848.[54] As trustee, the federal government must consent to the disposition of Indian land by an individual or tribe, including its sale.[55] While tribes cannot sell land without the consent of the federal trustee, they can buy it. Having bought it, they can add it to the reservation if the federal government will extend trust responsibility to the acquired land.[56]

51. See CANBY (2004), at 367-391; Cooter & Fikentscher (1998), at 511-528. On the legal subdivisions of Indian land, see in particular CANBY, at 343-366. A system of use rights concerning Indian land is developed and illustrated by examples in Cooter & Fikentscher at 513 ff. Non-Indians own land in fee simple that is in "Indian country" (e.g. on the reservation) and not under federal trusteeship.

52. The trustee is the federal government, and the beneficiary is the tribe in question. It seems, however, that the donor must also be the tribe, which is peculiar since the tribes seem not to have consented to giving their land to the creation of a trust during the formative period of the United States nor thereafter (with few exceptions). Indeed, the trust is a concept from early English law that is foreign to any known Indian tribal law. To use a term from acculturation theory, Justice Marshall "imposed" the principle of trust upon the Indians for their intended benefit. Cf., W. Fikentscher (1995; 2004), at 478.

53. See Johnson v. McIntosh, 21 U.S. (Wheat) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U. S. (6 Pet.) 515, 559 (1832); Cooter & Fikentscher (1998), 295.

54. In the Treaty of Guadeloupe Hidalgo (1848), which ended the U.S.-Mexican war, it was stipulated that the property rights of former Mexican citizens would remain untouched. Spain, and, after its secession from Spain, Mexico, had granted civil law property rights to the Pueblos in New Mexico and Arizona. Thus, the still existing nineteen Pueblos in what is today New Mexico, and the Hopi Nation in Arizona, enjoy full property (fee simple) with regard to their land. However, these tribes agreed to the essentials of the trust status of the other U.S. reservations. They were included in federal subsidy programs. Neither the Pueblos nor their citizens are legally able to transfer property in land. In this respect they share the fate of the other U.S. reservations, to their advantages and disadvantages.

55. This seems to have been one of the foremost legal-political aims of John Marshall, and the use of the trust concept to this end ought to be interpreted against the background of this intent. See Worcester, 31 U.S. (6 Pet.) 515.

56. See U.S. v. Sandoval, 231 U. S. 28. The right to acquire such land is sometimes provided for in tribal code law. See, e.g., LAW AND ORDER CODE OF THE CHEYENNE RIVER SIOUX TRIBE, CONSTITUTION, ART. VIII § 12 (1935). Cf., CANBY (2004), at 367 ff.

In the past, the federal government "allotted" much Indian land, which in its simplest form means that the land was removed from the federal trust and converted to the usual form of land ownership in the United States—fee simple. An owner in fee simple can sell his land to anyone, including non-Indians. Allotment was part of a federal policy intended to gradually dissolve reservations and place Indians on the same legal foundation as other ethnic groups.[57] For the present, allotment has ceased, which protects the tribes against non-Indians "checker-boarding" the reservation. Without this prohibition, Indians would lose control over their reservations. Further allotment of reservation land would provoke lawsuits against the federal government for failure to perform its duties as trustee. The current political climate precludes any further allotment of Indian land.

Some tribes, such as the Pueblos, have lived for centuries in the place now recognized as their reservation. Clans, lineages, families, and individuals on these reservations claim almost all of the land in customary law. Relatively little land belongs to the tribe as a whole through its government, or at least the clans, lineages, and families contest claims by the tribal government to own much land. Other tribes, however, were relocated from their ancestral homes to new lands. When a tribe relocated, the clans, lineages, and families did not have customary claims to the new land. Many tribes are in-between these poles, with some reservation land in customary ownership and other land unclaimed in custom.

Tribes have responded to this difficult history by developing land codes. Property codes regulate the use of land such as building a house, farming, grazing cattle, lumbering, hunting, etc. For reservation land that is not allotted or owned in custom by clans and families, the tribal government asserts ownership. It can distribute rights of use to tribal government land, but it cannot allocate land to its members in fee simple without federal approval.[58] Tribal governments have procedures for distributing the rights to use tribal land to families and individuals. The nature and terminology of the use rights vary: lease, rent, grant, license, or simply "use right."[59] Regulations address the establishment, content, violation, and termination of use rights.[60] The tribal government may grant or recognize use rights that are part of custom. In this way, custom, which is

57. See Allotment Act of 1887 (Dawes Act), 18 U. S. C. § 1151. For further details, see, e.g., STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES: THE BASIC ACLU GUIDE TO TRIBAL INDIAN RIGHTS 19 ff (1992); CANBY (2004), at 20-23, 384-388; Cooter & Fikentscher (1998), at 303f, 512-517, 528.

58. A use right may take various forms. See, e. g., Cooter & Fikentscher (1998), at 513.

59. For details, also concerning the content of use rights, see id. at 511 ff, 513-518, 522.

60. For an example from the White Mountain Apache Tribe, see id. at 519f.

mostly unwritten and easily contested, secures a more certain legal status.

Since land is the most valuable asset of many Indian tribes, disputes over it are certain to persist. Families and clans living on the reservation will continue to demand that the tribal government recognize their customary rights; families will continue to jostle over priority to receive use rights over tribal land; and developers will continue to try to induce tribes to sign long term leases for outsiders to occupy and use reservation land.

Population growth and the scarcity of mortgages aggravate a housing shortage on many reservations. Mortgages are inevitably scarce because of the trust status of tribal land. When an Indian defaults on debts, the trust status prevents the creditor from seizing Indian land from the debtor and selling it to satisfy the debt. Indian land, consequently, cannot serve as collateral for a loan. This fact prevents a market in mortgages from developing to financing the construction of houses and the founding of businesses.[61] The federal government has responded by supplying houses through the Department of Housing and Urban Development (HUD).[62] HUD houses are not designed for, or allocated to, extended families, lineages, or clans. Also, HUD houses usually clustered on small lots. Some Indians, consequently, see HUD houses as causing social disruption and promoting violence.[63]

5. Environment, Grazing, Landmark Protection, Hunting and Fishing

Whether they lived in compact villages like the Hopi or dispersed households like the Navajo, low population densities before the arrival of Europeans left much Indian land open. The advancing frontier, however, confined most tribes to land that was poorly suited for European settlement. Indian populations were compressed onto reservations, but the reservations in the West were often large enough in relation to the Indian population for the land to remain relatively undeveloped. Since the trust relationship between the federal government and the tribes inhibited economic development, much Indian land remains in a more natural state than privately owned western lands that are not on Indian reservations.[64]

61. Unlike a house, a mobile home is transferable property. More Indians live in mobile homes than would be the case if they could borrow to build a house as easily as they can borrow to buy a mobile home.

62. Housing and Urban Development Program, administered by the Bureau of Indian Affairs. See CANBY, at 55.

63. See W. Fikentscher (1997a).

64. This causes an interesting conflict between American and European arguments about the pros and cons of agricultural subsidies, for example, in negotiations in the World Trade Organization (WTO): U.S. subsidies are paid to pull the open space together, European subsidies are paid to keep towns apart and to keep open the

Aboriginal religion gives Indians responsibilities and privileges with respect to the environment. Tribes that still occupy their homeland have made these places sacred in their creation stories and subsequent history or myth. Relocated tribes do not have this connection, but generations of births and deaths make new places sacred. Many ceremonies must be performed in an environmentally "clean place" to sustain proper relationships with the land or the spirits who inhabit it. Respect for the environment is reflected in customary practices that are most common where Indian culture remains intact. The responsibilities and privileges imposed on Indians by religion are normative resources for environmental protection that other cultures lack. By "normative resources" we mean a shared sense of attachment and duty that provides widely accepted reasons among Indians for preserving and protecting the environment.

From their connection with the land, some people conclude that American Indians "lived at one with nature" and are "ideal guardians of the natural environment." Like so many cultural stereotypes, these claims are misleading. Correcting these stereotypes is not easy. Aboriginal religious practice is mostly private and often secret. In discussions with outsiders, Indians do not readily connect environmental practices to religion. Stereotypes aside, the tribes, like everyone else, are in need of laws and administration to protect the environment and to manage the use of natural resources. Tribal regulations deal with wetlands, historical sites (such as Puye Ruins near Santa Clara Pueblo), protected landmarks,[65] guided tours (such as those that take place in the Canyon de Chelly on the Navajo Reservation), use and protection of ground water and of mines,[66] and control of litter, refuse, sewers, and dumpsites.[67]

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green stretches between the villages. However, the WTO representatives have not yet discovered that they are talking about different, even opposite, things when they negotiate agricultural subsidies. U.S. agricultural subsidies are paid to promote urban sprawl, and U.S. proposals to reduce such subsidies would reduce sprawl, open up the space between the towns and tentatively restore "pioneer times." European agricultural subsidies are conceived strictly anti-sprawl, and any reduction of European subsidies would promote sprawl, destroy the greenbelts between the towns, and tentatively change Europe's face into that state of simultaneous land use for all purposes at all places which can be observed between the Rockies and the Atlantic Coast. For details of this illogical reasoning, see WOLFGANG FIKENTSCHER, Landschaft und Landwirtschaft, in: idem, DIE FREIHEIT UND IHR PARADOX: ÜBER IRRTÜMER UNSERER ZEIT 98-102 (1997b).

65. Section 1011B of The Navajo Nation Cultural Resources Protection Act, 19 NAVAJO NATION CODE §§ 1001-1061 (1988), defines as protected landmarks such parts of the land which have "significance to the entire Navajo Nation."

66. Examples: Code of Ordinances of the Salt River Pima-Maricopa Community, TALLAHASSEE, FL., MUNICIPAL CODE CORP., vol. II, ch. 18, art. II, 1350-1357 (ground water) (1981); OGLALA SIOUX TRIBAL CODE, CH. 38 § 85-1 (Mining Code, Pine Ridge Reservation).

67. Examples: LUMMI CODE OF LAWS, vol. I, tit.16, 198 (sewer) (1975), tit. 18 (refuse) (2004); WHITE MOUNTAIN APACHE BUSINESS CODE, ch. 7 (public junk-

Closely connected to the environment are codes that regulate tribal parks, forests, and grazing land. Also, some state parks have been placed under tribal management. When the tribal government or respective law sets user fees, they are usually much higher for outsiders than for tribal members.[68] Similarly, regulations and fees in hunting and fishing codes aim at two different groups of people. The first includes tribal members who mostly hunt and fish for their own consumption. For tribal members, quantity limits are set, hunting and fishing periods fixed, and modest fees assessed. The second group comprises sport hunters and fishermen. Permits sold to these outsiders often fetch substantial prices.[69]

The connection between tribal religion and nature suggests that tribal codes for the environment must be quite different from equivalent state and federal regulations. That proposition, however, is false. Our discussion of family law explained that the cultural distinctiveness of Indian law shows itself much more in the way officials exercise discretion in applying family law to cases than in the written code. The same applies to the codes for land and environment: distinct Indian norms and sensibilities towards the environment express themselves in decisions more than in laws.

The decisions of Indian officials about land use often reflect aboriginal religious concerns. Economic development of sacred sites can desecrate them and make them unsuitable for religious ceremonies. Tribes often oppose or channel development to protect religious sites, which also benefits the environment. For example, the White River Apache and the Tohono O'odham in Arizona have steered tourist developments away from their sacred mountains, which are especially high and beautiful. Six Arizona tribes have also joined a suit against the National Forest Service to prevent skiing developments in the San Francisco Peaks that would interfere with the exercise of their religion.[70] When environmental disputes involve Indian tribes, whether the land at issue is on or off the reservation, aboriginal religion is appropriately a significant element in the debate.

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yards and littering) (1983); ZUNI TRIBE CODE, tit. XIX (waste disposal); SAN ILDEFONSO PUEBLO CODE, tit. XVII, Sec. 55.5.

68. We found this in many tribes, for instance, White Mountain Apache, Jicarilla Apache, and Coquille. For an example of a hunting and fishing code, see Code of Ordinances of the Salt River Pima-Maricopa Community, TALLAHASSEE, FL, MUNICIPAL CODE CORP., vol. II, ch. 18, art. II (1981).

69. According to a forest and hunting official with whom we spoke, "a bear is $10,000."

70. The tribes have had some success in such cases in the 9th Circuit Court of Appeal. See Kathy Helms, Sacred Peaks Case Before Federal Judge, INDEPENDENT (web edition), October 12, 2005, http://www.gallupindependent.com/2005/oct/101205scrdpks.html.

6. Tribal Organization and the Court System

The Indian Reorganization Act of 1934 gave the tribes the right to escape the direct administration of their affairs by outsiders and to organize themselves democratically. Many tribes quickly adapted the American government template for their own use. The tribal council became the legislature, the tribal chairman became the executive who also sits in the council, and the tribal court was given independence (although the tribal council sometimes serves as the court of appeals). Conspicuously absent from tribal constitutions are detailed formulations of individual rights.

Some tribal constitutions stipulate so much organizational detail that a separate code is unnecessary.[71] More often, the constitution or basic laws leave details of tribal organization to a code.[72]

Many tribal codes stipulate the installation, personal composition, jurisdiction, and working procedures of a court or courts.[73] In principle, court procedures often follow federal rules, but in practice they are much less formal. The Navajo and Hopi have their own appeals courts, but most tribes, especially smaller ones, do not. To overcome this problem, some tribes have confederated for purposes of maintaining an appeals court that meets episodically. Thus, Santa Clara Pueblo, San Ildefonso Pueblo, and Zuni Pueblo, among others, belong to the Southwest Intertribal Court of Appeals (SWITCA), located at the Indian Law Center in Albuquerque, New Mexico. In a shared appeals court, the judges mostly work at other jobs and assemble every so often to hear an appeal. Since judges in these courts hear cases from reservations other than their own, they are seldom experts in the applicable law. If the appeal comes from a trial decided under tribal customary law, the court must call witnesses to find out what the custom is.[74] Conversely, if the appeal comes from a trial decided under a written code, the judges have an easier time understanding the applicable law. Shared appeals courts deserve closer study as an expression of a pan-Indian movement.[75]

71. An example is THE HOPI CONSTITUTION (1934). Another way of saying this is that this kind of constitution is formulated evasive enough to open possibilities of future development including partial tacit derogation. An interesting remark was made to us about the relationship between constitutions and codes: "Tribes without a constitution tend to have more codes than tribes who have a constitution." —DC. We did not test the truth of this hypothesis.

72. Examples include Lummi, White Mountain Apache, Jicarilla Apache, Coquille, and Warmsprings.

73. Examples include Laguna Pueblo. The same applies to most other Pueblos.

74. In appeal cases, tapes of proceedings handled in court are stored six years. —DF; RA; JH. In Acoma, tapes are taken to enable parties to go for an appeal, the tribal council being the appeal court. —AL.

75. Examples of Indian federations of different sorts include the old defense alliances such as the League of Iroquois, see LEWIS H. MORGAN, LEAGUE OF THE HO-DE-NO-SAU-NEE OR IROQUOIS (World Publications 1995) (1851), A. C. PARKER, THE CONSTITUTION OF THE FIVE NATIONS OR THE IROQUOIS

By following the 1934 Act's template for democracy, the tribes could begin to fit their own self-government into the American legal and political system. This solution gave more self-government to Indian people than in other countries, notably Canada and Mexico. These gains, however, came at a price. Englishmen needed centuries to abandon the traditional principle of heredity in government and replace it with elections. The House of Lords, which represents the customary principle of government by hereditary officials, gradually ceded power to the House of Commons, which embodies the modern principle of government by elected representatives. In contrast, American Indians had to make the change immediately. Traditional authority in the tribes is based largely on heredity and divination. The Indian Reorganization Act of 1934, however, did not recognize heredity or divination as a source of political legitimacy.

The conflict between traditional and modern principles of government fueled disputes over legitimacy that still fester in many tribes. The Hopi villages divided between "traditional" and "modern," which were also called "hostile" and "friendly," respectively. Customary principles still govern in the Hopi traditional villages and in the Pueblos where aboriginal, Spanish, Mexican, and European-American conceptions of government co-exist in a complex arrangement of offices.[76] The traditional Hopi villages are often at odds with the elected council and chairman of the tribe. The old tension be-

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BOOK OF THE GREAT LAW (Iroqrafts reprint 1967, 1970, 1984, 1991) (1916), and DEAN R. SNOW, THE IROQUOIS (PEOPLES OF AMERICA SERIES) (1996). Other examples are the Otoe bands; the loose alliance between the Blackfoot and Cree; traditional and modern powwow communities combined with fairs, chants, sports, or Miss Indian election events; various Pueblo organization such as the Eight Northern Pueblos Association, see FIKENTSCHER, Domestic Violence . . . (1997a), the five Sandoval Pueblos (organized for purposes such as Headstart, etc.), the loosely structured association of the ten southern Pueblos, the group of the "River Pueblos" who keep their languages secret, the All Indian Pueblo Council who is the survivor and guardian of the memory of the alliance of all Pueblos in the Great Pueblo Revolt of 1680, see JOE S. SANDO, PUEBLO NATIONS: EIGHT CENTURIES OF PUEBLO INDIAN HISTORY (1992); and the Indian Ecumenical Movement. Viewed anthropologically and psychologically, Indian federalism is an identity issue of considerable interest. It would deserve closer attention, closer than can be provided in the present context. First observations in WOLFGANG FIKENTSCHER, ZUR ANTHROPOLOGIE DER KÖRPERSCHAFT - POLIS, GENOSSENSCHAFT, TEWA-PUEBLO - (EIN ELDFORSCHUNGSBERICHT) (1995b).

76. The system of separation of powers in the twenty Pueblos of New Mexico and Arizona is more intricate than the three-powers separation postulated by Richard Hooker and Montesquieu. For a description of Pueblos governments, see ALFONSO ORTIZ, THE TEWA WORLD: TIME, BEING, AND BECOMING IN A PUEBLO SOCIETY (1969); ROBIN FOX, LONDON SCHOOL OF ECONOMICS MONOGRAPHS IN SOCIAL ANTHROPOLOGY: THE KERESAN BRIDGE, No. 35 (1967); JOE S. SANDO, THE PUEBLO INDIANS (1976). In the Pueblos, codification is regarded to be a concession to modern trends, "although the moieties are intact" (a remark that confirms the interior stability of the Pueblos whose structure is based on moieties and—in one case, Santa Ana—on phratries). —PT.

tween "hostile" and "friendly" Hopi factions has weakened but not disappeared, and a similar tension exists on some other reservations.

7. Traffic and some Minor Crimes

As noted, federal law took criminal jurisdiction over fourteen enumerated crimes away from the tribes, but many tribes retain jurisdiction over minor crimes and civil disputes, including road traffic incidents. Highways cross many reservations. Some tribes have relinquished their powers over drivers on these roads to a county or state government. Most large tribes and some small tribes, however, have retained their authority in this respect, so drivers crossing the reservation are subject to tribal regulations and accident law.

Traffic provides a clear example where a code lubricates contact with outsiders in two ways. First, when an outsider has an accident or gets ticketed, a written code helps tribal officials to explain the law to him. Explanation is straightforward because tribal traffic codes are mostly borrowed from state law and they lack culturally distinctive features. Second, when a traffic violation involves a crime, a conflict between federal, state, and tribal jurisdiction may arise. Precise provisions in tribal codes improve the prospects for the tribe's success in its competition for jurisdiction with state and federal authorities. Instead of conflict, traffic control has prompted cooperation between police on the reservation and off of it.[77]

Some small American towns or counties take advantage of outsiders by imposing dubious traffic fines as a source of revenue. We heard no complaints of this kind against tribal authorities.

8. Business

The tribes use business codes to regulate economic activities on the reservation, such as gas stations, quarries, fairs, powwows, peddling, illicit merchandise, and cigarettes.[78] Business codes contain

77. Examples: Code of Ordinances of the Salt River Pima-Maricopa Community, TALLAHASSEE, FL, MUNICIPAL CODE CORP., vol. I, ch. 16, 1097ff (1981); ZUNI TRIBE CODE tit 5, § 5-1-7 (cross-deputizing). On the history of tribal criminal jurisdiction, see CANBY (2004), at 111 ff., 124 ff.; Robert N. Clinton, Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective, 17 ARIZ. L. REV 951 (1975); Ex parte Kan-gi-shun-ca (otherwise known as Crow Dog), 109 U. S. 556, 571, 3 S.Ct. 396 (1883); Major Crimes Act, 18 U.S.C. § 1153 (1885). "Non-major crimes by Indians were within the exclusive jurisdiction of the tribes, and remain so today (assuming . . . that the crime is committed in a state where Public Law 280 does not apply) . . . ," for this, see CANBY (2004), at 232-258. On Public Law 280 of 1953 and its meaning in this context see Cooter & Fikentscher (1998), at 306 f.

78. Examples: LUMMI CODE OF LAWS tit. 6 (1974). CHAP. 6.9, SEE 6.9.1: ". . . AND OTHER PROCEDURES ESTABLISHED BY THE BUSINESS COUNCIL . . . "; Code of Ordinances of the Salt River Pima-Maricopa Community, TALLAHASSEE, FL., MUNICIPAL CODE CORP., vol. I, ch. 15, at. III, IV, VII, VIII, 1010 ff. (1981); WHITE MOUNTAIN APACHE BUSINESS CODE (1983); LUMMI CODE OF LAWS, tit. 20 (1971), 21 (1972) (alcohol and tobacco trade, respectively).

provisions on licensing a business—whether, how, when, where, and by whom. Besides constraining business through permits and licenses, law facilitates business by enforcing contracts and enabling of the creation of organizations such as partnerships. A few tribes have incorporated the Uniform Commercial Code (UCC) into their business laws by reference, at least with respect to contracts between merchants.[79] To illustrate, the Navajo subject minor businesses to the traditional rules of the Navajo nation and apply the UCC to larger businesses (those with a value of $10,000 or more).[80] Tribal business codes sometimes regulate jurisdiction: which court will decide the case, and which law applies.[81]

In recent years, development economics has stressed that regulatory uncertainty slows business development and contributes to poverty in developing nations.[82] This analysis certainly applies to Indian reservations. Tribal members enjoy justifiable preferences and privileges. When issuing business permits, however, tribal officials often discriminate between political allies and opponents, and between insiders and outsiders.[83] Obtaining land and permits to do business often requires political influence, and the politicians protect their supporters against competition, especially from outsiders who are not tribal members.

9. Casinos

State law regulates casino gambling in the United States. While Nevada specializes in gambling, many states prohibit its most profitable forms. Perceiving a profitable opportunity, some tribes began opening casinos on their reservations in the 1990s. State governments have limited and indirect power to restrict casino gambling on Indian reservations. These powers are ambiguous and complex. After bargaining with political officials in the state or federal government, tribes usually succeed in opening casinos on reservation land.

Within the tribes, Indian members have fought, and continue to fight, bitter battles about casinos. Some tribes, like the Navajos,

79. The relevant part of the Navajo Nation Code (NNC) is called NAVAJO UNIFORM COMMERCIAL CODE (NUCC); also, the LUMMI CODE OF LAWS tit. 26, ch. 26.03 (1985) (amended 1998, 1999, 2002, 2004), adopts the Washington State Uniform Commercial Code as Lummi law.

80. § 1-110 NUCC limits the application of NUCC to transactions worth more than $10,000. Below this amount, Navajo customary law applies, Official Comment to § 1-110. The borderline is strictly numerical, and not oriented at kinds of merchandise.

81. See remarks at the end of the Introduction, supra.

82. See, e. .g., HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000).

83. Efforts are made to prevent, by precise provisions, political influence on business licensing. *C.f.*, WHITE MOUNTAIN APACHE BUSINESS CODE, § 1.1-1.11, and § 2 on peddlers.

have refused to allow casinos on the reservation, while others have found the opportunity too good to pass up. On some reservations, casinos rival federal subsidies as a source of tribal wealth. To illustrate, the Mashantucket Pequot Indians' resort casino in Connecticut allegedly generates annual revenues that exceed $1 billion. High rates of profit on Indian casinos have apparently diminished in recent years as more reservations enter the business and states allow more competition from non-Indians.

Running an Indian casino is a professionalized business dominated by outside corporations that specialize in it. The tribal government usually contracts with such a corporation to manage the casino. The tribe extracts some money from the casino, which the tribe may distribute periodically as a lump sum payment to each tribal member, or the tribal government may use the money for various purposes such as improved infrastructure, student scholarships, or better equipment for the police. Sometimes the casinos commit to "tribal preference" in hiring employees, but sometimes the tribes do not want their members to work in casinos.

A tribe that decides to have a casino often wants a code to regulate its operation, such as Title 34 of the Lummi Code of Laws. The Title begins by stating legislative findings, declaring policy, and offering definitions. It prohibits gambling except as authorized, and retains Bingo as a tribal monopoly. It exempts from regulation traditional Indian gambling games such as Indian Sla-Hal, bone games, and k games. It authorizes and regulates certain card games such as blackjack, poker, baccarat, and other gambling activities. It prescribes times of operation, identification of employees, pull-tabs and punchboards, and disposition of proceeds to the Lummi Indian Tribe, and it prohibits participation by minors.[84]

10. Rarely Covered Areas in Tribal Codes

We finally turn to some issues that are important to many Indians but are not universally codified in their laws. Tribes often express concern about protecting traditional knowledge and artistic expression in arts and crafts. The tribal officials with whom we spoke, and some outside experts, consider the federal legislation on these issues to be inadequate.[85] The tribes are free to enact their

84. For a rather full account of Indian "gaming" law, which is the term preferred over "gambling" by most tribes with casinos, see Paul H. Brietzke & Teresa L. Kline, The Law and Economics of Native American Casinos, 78 NEBRASKA L. REV. 601-685 (1999). See also Sean Brewer, Analysis of the Indian Gaming Regulations Act in the Light of Current Tenth Amendment Jurisprudence, 26 Rutgers Law Journal 469 (1995).

85. See, e.g., Indian Arts and Crafts Board Act, Pub. L. No. 74-355 (1935), amended by Pub. L. No. 101-644 (1990); Native Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001-3013 (1991). W. Fikentscher & Thomas Ramsauer, Traditionswissen – Tummelplatz immaterialgüterrechtlicher Prinzipien, in

own arts and crafts legislation. Some tribal law exists in this area.[86] The potential for tribes to possess intellectual property rights has been discussed but not pursued seriously.[87]

Just as family disputes require tribal judges to consider the importance of clans and lineages, so do legal matters regarding probate and inheritance.[88] Traditional patterns of inheritance persist in some places but not in others. In traditional Hopi villages, land ownership passes through the female line, whereas at Warm Springs the probate officials apply state law as developed by European-Americans. An attempt to develop an inheritance code would produce conflict between traditional and modern members of some tribes, which may explain why we did not encounter written codes reflecting custom and tradition.[89]

An Indian who lives on a reservation, most of which are in rural areas, often shops elsewhere. For example, Jicarilla Apache shop in Espagnola and Farmington, and Navajos shop in Albuquerque and

URHEBERRECHT: GESTERN – HEUTE – MORGEN, FESTSCHRIFT FUR ADOLF DIETZ 25-41 (Peter Ganea, Christopher Heath, Gerhard Schricker, eds.) 2001.

86. Most tribal codes do not address "arts and crafts," let alone the protection of intellectual property or traditional knowledge. This holds true even for tribes that are famous for their works of art, such as jewelry, fetishes, pottery, wood carving, paintings, murals (e.g. Zuni), and often are homeplaces of renowned artists. The place to find the subject matter is, if mentioned at all, the tribal constitution. See, e.g., CONSTITUTION OF THE WHITE MOUNTAIN APACHE TRIBE art. IV, § 1G (1934, 1993) ("to cultivate Indian arts, craft, and cultures"). We raised issues of traditional knowledge and intellectual property protection on several reservations: Hopi, Navajo, Zuni Pueblo, San Ildefonso Pueblo, Acoma Pueblo, Pojoaque Pueblo, Tesuque Pueblo, Moapa Paiute, and others. Usually we heard that codified law for the protection of works of art is in preparation, but that the subject matter is difficult and expert advice short. We heard of pending cases. For details, esp. procedural issues, see Fikentscher & Ramsauer (2001). Protection under local tort law and through local courts in connection with recognition of foreign judgments is sometimes proposed as a means of first resort.

87. See INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, (Silke von Lewinski, ed. 2004); THOMAS RAMSAUER, GEISTIGES EIGENTUM UND KULTURELLE IDENTITÄT: EINE UNTERSUCHUNG ZUM IMMATERIALGÜTERRECHTLICHEN SCHUTZ AUTOCHTHONER SCHÖPFUNGEN (2005); Wolfgang Fikentscher, Geistiges Gemeineigentum – am Beispiel der Afrikanischen Philosophie, In: Perspektiven des Geistigen Eigentums und des Wettbewerbsrechts, Festschrift für Gerhard Schricker zum 70, 3-18 (Ansgar Ohly et al. eds. 2005); idem, The Whole is More Than the Sum of the Parts, Therefore I have Individual Rights: African Philosophy and the Anthropology of Developing Economies and Laws, In: The Shade of New Leaves: Governance in Traditional Authority, A Southern African Perspective, International Conference on Traditional Government and Customary Law 295-328 (Manfred O. Hinz, Helgard K. Patemann eds. 2006); W. Fikentscher, Intellectual Property and Competition – Human Economic Universals (The Gruter Institute Working Papers on Law, Economics, and Evolutionary Biology, Vol. 4: Article 1, 2006), available at http://www.bepress.com/giwp/default/vol4/iss1/art1. note 55.

88. See Cooter & Fikentscher (1998), at 530-535.

89. But see, ZUNI TRIBE CODE, tit. 15 (probate); SAN ILDEFONSO PUEBLO CODE, tit. XI; WHITE MOUNTAIN APACHE PROBATE CODE (1963). On tribal inheritance law with more examples, see generally Cooter & Fikentscher (1998), at 302-309.

Gallup.[90] If the purchase involves credit, a dispute may arise in which the consumer wants protection from creditors and the creditor wants to garnish wages or repossess property. To settle such disputes, tribal courts have developed case law, in some tribes amounting to common (not customary) law, that tries to balance the eagerness of tribal members to borrow money and their reluctance to pay it back.[91] Eventually, tribes may develop a consumer code so that vendors know what to expect from tribal courts when trying to collect debts from Indian customers or to repossess merchandise.[92]

II. How do Tribal Officials Interpret Codes?

In applying a code to a case, do tribal judges typically follow the law's letter or its spirit? This is a question of strict versus liberal interpretation of the law's language. One judge said that interpretation should "make the code work," by which he meant making the code accomplish its intended purposes. (Similarly, an unidentified Justice of the German Supreme Court recently said: "*das Gesetz möchte ich sehen, das mich an einer vernünftigen Entscheidung hindern will.*"—"I would like to see the law that prevents me from making a reasonable decision."[93])

The background and circumstances of most tribal judges necessitate a practical approach to interpretation. Although the situation is changing, few contemporary tribal judges attended law school.[94] Legal education of tribal judges occurs primarily in seminars, workshops, or institutes.[95] We found teaching materials from these activities, including statutes and tribal law cases, on the bookshelves of many tribal officials whom we visited.[96] When interpreting a code, most tribal judges do not have easy access to relevant materials other than these teaching supplements and the code itself. The materials emphasize practical decision-making, not principles of philosophy, religion, or political ideology. In conversation, tribal judges usually describe themselves as practical people. Pragmatic interpretation of

90. For a typical case, see Allen Jim v. CIT Fin. Serv. Corp, 87 N.M. 362 (1975); see generally Cooter & Fikentscher (1998), 558-562.

91. This is one of the main fields of "new law" created by tribal judges in common law manner. See Cooter & Fikentscher (1998), at 329f. For example, the Jicarilla Apache Court under Judge Carey Vicenti seems to have developed consumer protection by (as far as we can see unprinted) case law.

92. See, e.g., SAN ILDEFONSO PUEBLO CODE, tit. XVIII (Consumer Code).

93. Cited by Reinhard Bork, Wider die Rechtswidrigkeit der Wohnungseigentümergemeinschaft, ZIP 2005, 1205.

94. See Cooter & Fikentscher (1998), at 322f.

95. Examples: AILTP/American Indian Resources Institute, Stockton, CA; Center for the Study of American Indian Law and Policy, University of Oklahoma, Norman, OK; Tribal Law and Polica Institute, San Francisco, CA; American Indian Law Clinic, National Indian Law Library, Boulder, CO.

96. Sometimes, they also have law journals, such as the American Indian Law Review, Indian Law Reporter, and Navajo Law Reporter.

code provisions by tribal judges is a consequence of personal disposition, education, and availability of legal resources.

Pragmatism in western jurisprudence commends the practical approach of tribal judges. Coke argued that laws cure mischief, and that "mischief" identifies the purpose of the law and provides the yardstick for its interpretation.[97] Similarly, Rudolph von Ihering taught that the law should be applied to achieve social purposes.[98] "Making the code work" comes close to Coke's "mischief" and Ihering's "purpose" tests.

The pragmatic approach to interpretation holds that a particular law applies when the facts of a case fall under it. This is the approach that Continental Europe embodies in the theory of "subsumption" which means to place something specific (a fact or set of facts) under something general (a concept of law).[99] This is also a familiar view in the common law world as given literary expression by Justice Benjamin Cardozo.[100] Whether or not the facts fall under a law in a tribal code seems obvious to tribal judges in most cases, and they feel obligated to apply the law in these circumstances. "The Code tends to fit the case at hand, and verbal interpretation is enough in most situations."—DO. "It is the law of the code that applies; it should be illustrated by precedents if there are some, or even better by stories; but what applies is the code, not the precedents or stories, which only illustrate how the code has been interpreted up to now."—DC; PT; FD; and RH. But "[i]n harder cases, tribal advocates or other legal experts must remind the judges, who often do not have a formal legal education, about the relevant code provisions."—DO.

What should be done when the facts do not clearly fall under a law? "Making the code work" can involve stretching or shrinking a law so that it encompasses or excludes the facts of a case. In many tribal codes, "marriage" is not defined, but "from the intention of the legislator it is to be taken that only heterosexual marriage is implied." —KE. The Navajo code provides for a fine for the owner when

97. See supra, note 21.

98. See RUDOLF VON IHERING, DER ZWECK IM RECHT vol. 2 (1883).

99. See WOLFGANG FIKENTSCHER, METHODEN DES RECHTS vol. 2 (Amerikanischer Rechtskreis) 240-252 (1975) (on Cardozo), vol. 4 (Dogmatischer Teil) 182f (1977) (on the logic of subsumption); idem What are Law Schools For? (Aug. 1996) (unpublished paper delivered at the Academics' Forum, International Bar Association, 26th Biennial Conference, available from IBA as BP100). Minority opinions include Justice Oliver Wendell Holmes, Jr.,'s theory of norm-free decision according to which every case carries its just settlement within itself; Alf Ross' and other Skandinavian realists' tenet that law is fact; Arthur Kaufmann's and others' idea that the relationship between law and fact is that of an analogy; and Ernst Cohn's and Fritjof Haft's theories that applying the law means using case by case similarity tests; on these ideas, see generally WOLFGANG FIKENTSCHER, METHODEN DES RECHTS vol. 3 (Mitteleuropäischer Rechtskreis) (1976), 736-759.

100. See BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

cattle are allowed to stray on the road "at night." We asked: "Is an afternoon with bad visibility 'night'?"[101] A tribal permit may allow its holder to collect wood from a tribal forest. Is a tree-lined road a "forest"?[102] A strict interpretation may frustrate the law's purpose, and a liberal interpretation may cause practice to drift away from plain meaning.[103]

To distinguish between liberal and strict interpretation, we often posed this hypothetical in conversations with tribal officials: "Assume that a tribal environmental code prohibits anyone from dumping 'poisonous waste' on any part of the reservation. If an outsider dumps trash containing mostly plastic in a ditch, could the tribe prosecute him under this code provision?" All judges except one answered that they would fine the defendant and require him to remove the trash. One judge said, "The plastic didn't belong there in the first place, that's the meaning of the code. And we would redraft the code." "The purpose of that code is to keep the reservation clean from trash, so it should be enforced in this case."—DO.[104] Plastic is not poison, but there is an analogy between them.[105]

A legal principle in Germany and elsewhere holds that analogy is not admissible if it works against a defendant in a criminal case. This principle implies that the defendant could not be fined under criminal law, although he might be required to remove the trash under civil law. This concern did not trouble most tribal judges when they responded to our hypothetical. One judge, however, dissented from the others and said that "poisonous" cannot be read to include plastic, especially in a criminal case, so the rule does not apply.

We asked the judges who had decided against the defendant in this hypothetical case whether they would call their interpretation "liberal." The answer was usually: "It's a liberal interpretation starting from the meaning of the code." We asked all judges the abstract

101. A Navajo tribal court judge answered "No, it is not night. The owner of the cattle may rely on the clock and should not be exposed to the risk of misjudging visibility."

102. We were told that Laguna Pueblo law defines all three terms describing collecting activities and species of collectible wood and time frame.

103. The Latin terminology distinguished *lex lata* from *lege ferenda,* the law as it stands and the law as it should be.

104. Similar opinions were expressed by DF, RA, and JH (all for WMAT), FC (for Laguna Pueblo); DC (for Burns Paiute, Warmsprings, and Coquille), FD (for Pojoaque Pueblo); KE (for Grande Ronde, where five tribes and twenty-six bands live; confirmed by DC).

105. In German jurisprudence, the analogy from "poisonous waste" to "plastic" would be called a Gesetzesanalogie (analogy of statute) because the conclusion is drawn from one single situation to another comparable-single situation, without resorting to a general principle of law. Alternatively, Rechtsanalogie (analogy of law) is a generalization of a single provision of the law with the aim of establishing a general principle. An Indian judge in this way applied analogy of law by suggesting that "poison" should mean something that "did not belong there in the first place." The queried principle is "[s]omething not belonging there has to be removed."

question, "Do you favor wide or liberal or open interpretation of tribal codes, or narrow or strict or literal interpretation?"[106] Answers were often equivocal at first. We were told in Navajo that neither approach dominates the other: "It depends on the field of law, and the case." —AS.; similarly, TJH; LJ. Without exception, however, Indian judges would not side with the strict approach as a pervasive principle. Usually, after more discussion, the judges expressed qualified support for liberal interpretation,[107] especially in the Pueblos.[108]

Support for liberal interpretation in the tribes is not necessarily confined to judicial statements. Section 7.3 of the White Mountain Apache Business Code expressly provides for liberal interpretation in cases involving private junkyards. —DF; RA; JH. It reads: "Liberal Construction: This chapter is to be liberally construed so as to effect its objects and to promote justice."[109] Judges agreed that this section expresses a general principle applicable to the entire Code.

An example of liberal interpretation in action concerns a Burns Paiute reservation law that forbids "possessing" alcohol. Tribal members drove off the reservation to town, bought alcohol, drank it, and returned home. Tribal police waited for them at the reservation boundaries. Upon entering the reservation, police arrested them for "possessing" alcohol in their bodies, which was called "possession by consumption." The tribal court developed a rule based on this concept. But a new judge overruled the traditional interpretation, partly for a practical reason—it prevented tribal members who wanted to drink from sleeping it off at home. —DC.

In the Navajo reservation, where tribal judges develop Indian common law in ways resembling the American states, judges were reluctant to endorse a philosophy of strict interpretation of code. —AS; TJH; LJ. In *The Matter of the Admission to the Navajo Nation Bar Association of XY*, S. Ct. of the Navajo Nation, A-CV-11-84 (1984) of October 4, 1984, a liberal interpretation of the concept of sovereign immunity under Rule 23 of the Navajo Court Rules led to the dismissal of a claim to reopen a rehearing based on newly discovered evidence. However, a leading case on interpretation in Navajo, *Navajo Communications Co. v. Navajo Tax Commission*, A-CV-26-89, al-

106. As a model for strict interpretation we referred to the classical British approach: statutes have to be interpreted strictly and literally, because parliament has the opportunity to say exactly what it wants, and what is not covered by the words of the act is left to judge-made common law. See supra, note 21.

107. Compare In the Matter of the Admission to the Navajo Nation Bar Association of XY, A-CV-11-84 (1984) and Navajo Communications Co. v. Navajo Tax Commission, A-CV-26-89 (1989).

108. In Acoma, for example, express preference was given to liberal interpretation, which has to consider "all the relevant circumstances." —AL. In Pojoaque, liberal interpretation is an accepted rule, even beyond the verbal language of the code, tribal custom being the guiding line. —FD.

109. White Mountain Apache Business Code . . . , Chapter Seven: Regulation of Private Junkyards . . . , Section 7.3.

lowed strict interpretation to protect the powers of the tribal government. In 1970, Navajo Communications Co. (NCC) bought a telephone system from the BIA. In 1978, the Navajo Tax Commission asked NCC to pay the business activity tax to the tribe. NCC alleged that in 1970, the Navajo Nation waived its power to tax with regard to NCC. Upon appeal, the Navajo Supreme Court, quoting *Merrion v. Jicarilla Apache Tribe*, 455 U. S. 130 (1982), decided that such contractual waivers in tax matters have to be construed narrowly and under a strict standard of interpretation, absent legislation or proof of express intent to waive. The language of the waiver must contain a "precise, clear, and unmistakable surrender of the Nation's taxing power." NCC had failed to prove any of these reasons not to pay the tax.

The issue of strict versus liberal interpretation relates to the question of judicial activism: while applying codes to novel disputes, do tribal judges make new law? The answer follows immediately from the way tribal judges support their decisions. As explained, the practice among tribal judges is to subsume the facts of a case under a law based on the code's language. Subsequent tribal court cases quote the appropriate code provision again, but not the earlier case. The practice of citing the code directly rather than citing precedent is defended as a matter of principle. When asked whether they should follow precedents from earlier cases in interpreting the code, tribal judges usually answered: "The code is what applies again, not the earlier cases. So it is the code and its relevant section that will be quoted as the reason for the decision." This practice limits the scope for judges to make law. In this respect, the reasoning of Indian courts resemble Continental European application of codes, and tribal practice differs from code application in common law countries such as Great Britain and the United States.

The character of tribal court records often demands citation to the code instead of cases as a practical necessity. When we met tribal officials, we tried to collect a few court cases that applied code law to settle a dispute. Tribal judges and advocates easily provided examples from memory, but written cases were hard to obtain. Most tribal court cases are recorded on tapes and never transcribed, and the recordings may be in disarray. So judges and counsel often refer to earlier cases from memory, but they seldom retrieve a transcript or audiotape for use in court. "Written summaries of the most important decisions of the judges would be desirable to illustrate and accompany the code law but it is not done yet." —AG. Although many tribal courts are too small to generate a rich variety of cases, no tribal judge whom we interviewed considered a decision in one reservation as precedent applicable in another reservation. The combination of

few prior cases and the inaccessibility of transcripts leave a judge little choice but to rely on the language of the code instead of precedent.

Despite their reliance on the code, judges agreed that discussing prior decisions in court is desirable. "Discussions may arise in court whether the earlier cases should serve as precedents or not." —AG; similarly DC; PT; FD; RH. Past cases are illustrative or persuasive, but not binding. The judge may explain to the parties why their case is the same or different from a prior case. If a judge wants to depart from interpretation in prior cases, tribal judges told us that the judge should name the prior case and give reasons for departing from past interpretation. The judge should not quote the code and at the same time change its interpretation without giving an explanation.

When we asked whether case law has developed or may develop from code law, many tribal judges answered that there are still too few cases to have a clear picture. Only a few experts pointed to a tradition in tribal courts resembling common law. Case law appeared to develop from the codes in Navajo (—RH), Santa Clara Pueblo (—RT), and San Ildefonso Pueblo (—RT). Past decisions help to interpret the code in future cases on these reservations, but the practice has not evolved into binding precedents. Navajo, which is the largest reservation, has the most cases and the most written decisions of any tribe. Some Navajos think their tribe might someday follow the U.S. practice of developing binding case law within the code law, but this seems a distant possibility.

Professor Kevin Gover, the former chief official of the BIA, summarized the situation as follows: (1) Most tribes follow the practice of taking their codes as their law in the continental way. (2) Code provisions in a few tribes give the code exclusive status as law and prohibit treating precedents as law. (3) A few tribes, such as the Navajo, conform more closely to the U.S. and British method of interpreting code through precedents set in cases.

Does tribal code conflict with customary law? If so, which one prevails? In conversation, tribal officials disagreed about the extent of conflict. A member of a tribal council active in code making said: "I never saw a real conflict between customary and code law." —GL. By contrast, the conflict between Navajo customary and code law was obvious in a 1977 case, and the court decided that customary law prevailed and set the code aside.[110] The Navajo judiciary apparently feels that it has the power to review the acts of the tribal council for their conformity with traditional law. —AS; similarly TJH and LJ.

While custom sometimes conflicts with code law, more often custom influences the code's interpretation, especially when the code is ambiguous. A doubtful code provision should be interpreted according

110. See Halona v. MacDonald, Nav. Rep. (1977).

to custom. —AL. Interpretation should illuminate the code "in the light of custom." —JD.[111] In Acoma, the tribal sheriffs are asked to help interpret code law in conformity with custom and traditions. —AL. "Statutes are regarded as open enough to reconcile their words with tribal tradition." —MKB. "Liberal, not strict, construction is the rule whereby custom prevails in language." —FC.

These remarks suggest that the typical order of authority for tribal judges is custom first, code second, and federal law third. The ordering required by law, however, is disputed. Some judges think that law requires the opposite ordering—first federal Indian law, then tribal code, and finally custom.

Besides custom, tribal judges acknowledge that the tribal constitution plays a role in the interpretation of codes. A few judges even drew our attention to international instruments as a means of interpretation, such as resolutions of the United Nations and their international agencies (for example ILO and ECOSOC) dealing with indigenous nations.

III. Rationale for Codification

Why do tribes codify? Codes apparently have two broad purposes: meeting a tribe's internal needs and addressing issues with outsiders.[112] Code law differs according to whether it primarily addresses inside issues, outside issues, or both. Family and membership laws especially serve the internal purpose of preserving culture and strengthening identity. Substance abuse laws especially serve the internal purpose of promoting social harmony. Traffic, business, and casino laws are particularly needed for the external purpose of promoting business with outsiders. Tribal organization and courts are necessary for tribal government to pursue any purpose, internal or external. Laws that regulate land, the environment, and landmarks protect the reservation's beauty, environment, and history against dangers from economic development by insiders and outsiders. The following table summarizes our categorization of the purposes of tribal codes, which we discuss in more detail below.

Primarily Internal	Primarily External	Internal and External
family law	traffic	tribal organization and courts
membership	business	land
substance abuse	casinos minor crimes	environment, grazing, hunting, landmarks

111. "In Navajo, law is roughly 70% tradition and 30% code." —AS; TJH; LJ. "In essence, Navajo customary law is equity. We use it to mitigate Navajo statutory law." —LF; MKB. For a comparison: "In Zuni Pueblo, at least 50% of the law may be regarded 'statutory'." —GG-I.

112. For a reinterpretation of the distinction between "emic" and "etic," see W. FIKENTSCHER (1995; 2004), 130 ff.

A. *Inside Issues: Cultural Preservation, Identity, and Social Harmony*

Confinement to reservations brought new challenges for Indian tribes involving social order and welfare. "Customary law often does not address modern problems involving education, employment, health services, housing, environmental degradation, narcotics, missionaries, or consumer fraud. Codes may answer to daily needs—tradition does not cover everything." —PT.

Like most people, Indians disagree over politics, especially when the tribe allocates political power, money, or land among families. Submitting disagreements to a law-making process helps to resolve the worst political tensions and to provide a written record of the resulting bargains or victories. In the best circumstances, drafting a code involves struggling with political disagreements and resolving them. Thus one judge claimed that public debate in the tribe over a draft domestic violence code caused a drop in the frequency of such violence. The judge described how the process of making a code caused people to behave as if it were in force even before it was enacted.[113] (These facts recall the German proverb: "A good question is half the answer.")

Beyond resolving disagreements, codification can contribute to identity. Disparate bands or tribes were brought together to form many reservations. They do not easily see themselves as one people. Through shared government, they ideally come to see themselves as a nation. In this way, codification builds Indian nations out of families, lineages, clans, and bands. Besides helping to sustain a way of life, codification reminds tribal members of who they are or directs their attention to who they are becoming.

In recent decades, some reservations have suffered a massive loss of language, crafts, and artesian skills, as well as changes in religion, dress, and leisure activities. Most older Indians want young Indians to keep more of their traditions. Can law help? We often heard Indians say that drafting codes assists in preserving traditions by writing them down. However, we have already explained that we found little in written codes that reflected traditional or cultural practices among the tribes. Rather, we found cultural distinctiveness in decisions made by tribal officials when they apply the code. By drafting codes, tribal officials take legal jurisdiction away from the

113. "During the preparation phase, village meetings were held in order to mobilize interest for the upcoming code. Outside experts were invited to these meetings to talk about the importance of the code in general and its central problems in particular. The judge who was the main drafter was present and tried to learn the opinions and points of conflict in order to enrich his or her factual knowledge. Debates were going on in the village. Then, this careful and circumspect preparation of the code had an unexpected side effect: "People behaved, even before the draft was presented to the tribal council to decide, as if the code were already in force." —PT.

county or state and extend their reach over members. Codes in modern areas such as business law, consumer protection, traffic law, environmental protection, hazardous waste, and casinos, give tribal officials and judges more law to interpret and apply. The application can bring custom and tradition to bear when appropriate.[114]

Codification, however, can also undermine tradition in the following way: common law raises custom directly to the level of law; code law, however, supersedes common law.[115] Thus codification reduces the scope for judges to raise custom directly to the level of law.

We explained that codification increases the scope for judges and other officials to make law by interpretation, and codification reduces their power to make common law directly. The relationship between custom and code—whether allies or enemies—is ambiguous. This fact may explain the ambivalence of "traditionalists" on some reservations towards law made by the tribal council. On the Hopi reservation, for example, the traditional villages select representatives to send to the tribal council by using their own methods based on tradition, not elections. Sometimes the representatives of the traditional villages participate in the council's lawmaking, and sometimes they refuse to participate, which signals disapproval and may prevent the council from achieving the quorum necessary to enact new laws.

A minority of Indians apparently regard codes as an uncongenial imposition: "Indians don't like codes," a Navajo said, and "in case of conflict between custom and code law they just disregard the code when this seems appropriate." American court cases are cited as X v. Y. A pejorative nickname in Navajo for this confrontational approach to disputes is "versus-law." Navajo judges sometimes direct disputants in a case to peacekeepers. The peacekeepers are mediators institutionalized by the Navajo government. A Navajo said, "Harmony is not restored in versus-law. Therefore, the Navajo peacekeepers should be more trained in Navajo law." —LF. "When people come to court in disharmony, it is for the judge to bring them back to harmony"—a phrase coined by Tom Tso,[116] and quoted to us by LF. This philosophy extends to interpreting codes. "In case of a conflict between traditional law and statutory law, we do not right away declare the statute void, rather we interpret it. In doing so, restoring harmony is most important." —LF.

114. Cf., Eddie Lopez v. Martha Benecke, Case No. 01-2616-CV, of June 25, 2001, amended August 14, 2001, p. 4 (dictum). But for use in the tribes, "state law is mostly unfit." —AS; TJH.

115. This is clearly seen in the preamble to the LUMMI CODE OF LAWS, vol. II, Chap. 26.03 (1975) (commercial code); the adoption of the UCC by the Lummi Tribe preempts tribal common law related to commercial practices.

116. Former Chief Judge, Navajo Supreme Court.

If a narrow majority passed a code after a hard political fight, its authority may suffer. In the most dramatic cases of disrespect for tribal codes, citizens regard the current tribal council's enactments as expiring after the next election, unless the new council supports them. On one reservation, a former member of the tribal council showed us plastic bags full of tribal council documents that the incumbent removed when she was turned out of office. Newly elected officials arrived in offices without records of past government actions.

B. Outside Issues of Economic Development

Traditional Indians feel that they do not need codified law and would prefer living under customary law and Indian common law. Even traditional Indians, however, see codes as necessary for dealing with outsiders. We heard the remark: "We can settle traditional issues our way, for example, by talking. But if the issue is pressed on us from outside, we should have a code." In other words, the traditional ways work for us, but the white man uses written law in his own disputes, so that is how we must deal with him.[117] Codes are useful in the many cases involving state and federal jurisdictions or other tribes. Whether or not codes originated from internal needs or external pressures, tribal governments now accept them as the basis for doing their daily business.

In the twentieth century, tribal government dominated the economies of most reservations, driving economic development and employing more people than any other organization, especially before the arrival of casinos. Tribal government, however, often impedes private business. Most businesses require land, buildings, licenses, and permits. Obtaining leases, licenses, and permits can involve a political struggle in the tribal council. The confused state of property law on reservations inhibits investments in land by outsiders, and weak enforcement of creditors' rights inhibits lending by outsiders to Indians, including lending for business development. When tribal law is unclear, tribal economies suffer. Code law can reduce political interference and rationalize procedures, so entrepreneurs have more freedom to contract and grow successful businesses. "To be able to rely on a tribal code adds to clarity of issues and results, and brings procedural advantages." —DF; similarly RA; JH. "Problems arise less in contracts, where individuals can regulate themselves, than in the matters of trust land issues or mortgages, where regulation by code is needed to protect the parties involved." —PT.

Some Indian judges and lawyers say that, instead of rationalizing procedures, codification reduces flexibility—it "petrifies" the

117. In talking to Indians, we were often confronted with this widespread conception of a division between a world of correct, if contested, customs and traditions, and a world of panicking, conquest, strife, and disharmony.

law.[118] Indians debate whether law should consist of vague unwritten principles or precisely codified rules. These debates echo disputes in western legal philosophy with ancient origins.[119] To attract business, however, the tribes need reliable laws that outsiders can understand. Familiar traffic laws and impartial traffic authorities, for example, increase tourism. Codes increase legal certainty and predictability in dealing with tourists, visitors, casinos, peddlers, investors, developers, prospectors, and outsiders who move onto the reservation or marry into it. Beyond the *fact* of lawfulness, codification projects its image. We heard the remark: "It's better to show them something in print. Proving one's law to the whites is important." —PT.

The same is true for attracting grants of money. With few exceptions, tribal government depends on federal money, mostly provided by the BIA. Federal programs subsidize pre-school (Headstart), housing (HUD), health services (Indian Health Service), administrative assistance, and improvement of the legal system.

Subsidies are often tied to requirements for reorganization, record keeping, or performance. The federal government may fund tribal courts conditional on their adopting basic federal rules of procedure, or the state may provide funds to build a road conditional on its meeting state specifications. In any case, obtaining grants requires tribes to have reliable rules that the granting organization—whether federal, state, or private—can understand. When we asked tribal officials why they codified, some said, "We are pressed to do so." Mostly the pressure works, but sometimes it fails. The Native American Justice Improvement Act promised money to tribes that followed the American practice of separating powers into three branches—legislature, administration, and judiciary. This separation of powers, however, did not fit Indian customary law and several Pueblos refused the money in order to retain their traditional eight-fold or nine-fold division of powers.

Besides receiving grants, tribes sometimes partner with outside government and administration to perform a common task. "When-

118. See supra, note 32.

119. See preceding note. Plato (427-347 B.C.E.), the Greek philosopher, warned against dressing ideas, including laws, into written language. The philosophical attitude behind this harsh critique of writers and interpreters of texts may be the Gnostic conviction of a close relation between thinker and object of thinking that cannot be fixed in letters. See Platon (1990), Werke in acht Bänden, Gunther Eigler (ed.), vol. 5, bearbeitet von Dietrich Kurz, griechischer Text von Leon Robie, Auguste Diez, und Joseph Souilhé, deutsche Übersetzung von Friedrich Schleiermacher und Dietrich Kurz, Darmstadt 1990: Wissenschaftliche Buchgesellschaft (Sonderausgabe), Briefe, 7th letter, 366 et seq., Nos. 341-344c. The jurist Friedrich Carl von Savigny (1779-1861) opposed the creation of a German Civil Code when it was proposed to replace Roman judge-made law ("usus modernus"). See Friedrich Carl von Savigny, Of the Vocation of Our Age for Legislation and Jurisprudence (Abraham Hayward trans., Amo Press 1831) (1814).

ever Indians live close to white areas, streets touching both Indian and white country, you have to have tribal codes, or else the tribes lose jurisdiction. Otherwise codes are not really necessary." —FK. Thus roads often run through land belonging to both tribes and states, where traffic accidents and offenses spill-over from one jurisdiction to another. Effective law enforcement requires "cross-deputizing": a state police officer is deputized to act as a tribal policeman, and vice-versa.[120] The policeman's job is much easer when he or she can study the traffic code of the state and the reservation, and when the codes are similar or identical.

Similar consideration arises when a case proceeds from the police to the courts. Coordinating law enforcement requires courts in different jurisdictions to give full faith and credit to each others' judgments. To give full faith and credit to the judgments of another court, a court often needs a minimal understanding of the underlying law. A code promotes this understanding by providing an organized description of the foreign jurisdiction's law. Appreciation of tribal law also helps outside courts to resist their urge to usurp tribal authority. At White Mountain Apache, a judge told us that the tribe needs a code to prevent erosion of its jurisdiction by unfavorable U.S. Supreme Court cases that have curtailed tribal sovereignty.

CONCLUSION

The code movement took hold on Indian reservations in the 1960s and continues today. Resolving internal issues and dealing with outsiders provide the strongest impetus for codification. Once created, codes become part of the tribe's living law that is internalized, applied, amended, enlarged, and disputed. Tribal judges are generally knowledgeable about their tribe's code and other tribal officials use it in their daily work. While typical, this picture is not universal. Sometimes tribal members favor custom over code law, regard the tribal council as temporarily imposing the will of the faction that won the last election, or regard the council's enactments as useless politicking.

When officials interpret law, they mostly aim to "make the code work," which requires harmonizing it with morality and custom. To do so, most judges interpret the code liberally according to its spirit, rather than interpreting it strictly according to its letter. The code is applied by direct interpretation of its language without theorizing or relying on precedents set in earlier cases. Earlier cases are discussed from memory and used to persuade. By quoting the code and applying it directly, rather than quoting precedent, tribal judges follow the

120. The practice of cross-deputizing is sometimes reflected in tribal codes. See Zuni Tribe Code tit. 5 § 5-1-7. See also supra note 77.

Continental approach, not the British or American practice. Tribal common law, which develops from customary law in some tribes, apparently does not develop from interpreting codes, except possibly on a few reservations.

The German civil code was enacted in Japan. A version of the French and Spanish civil codes was enacted in Chile. Similarly, tribal codes are mostly borrowed from a state or another tribe. Borrowing text, however, should not be confused with transplanting law, which involves institutions and culture. The officials in each reservation are imbedded in a distinct culture with its own history. Distinctive moral sensibilities and customary law lead to distinctive applications of codes. The outcomes in tribal courts differ from those reached in state courts and from one tribe to another, even when the words of the applicable law are the same.

People who share government must submit their disagreements to a political process and accept its outcome. This process helps people see themselves as a single nation. In this sense, disagreement and compromise in a tribal council forges tribal identity. In addition to this internal process, law-making causes outsiders to identify other people as distinct. An auto mechanic from Taos Pueblo tribe in New Mexico tells his Chicano employer in Espagnola, "I'm Taos, our law requires me to observe the feast day, and the tribe expects me to serve with the police tomorrow." The employer should conclude that the mechanic is a good Taos citizen, not an unreliable worker. Similarly, the neighbors of the White Mountain Apache tribe who drive across the reservation must take notice of an Indian nation within the State of Arizona with its own law that binds them. Having one's own law contributes to a distinctive identity in one's own eyes and in the eyes of others.

Distinct legal systems cause conflicts of jurisdiction and law. Jurisdiction concerns the appropriate court to decide a dispute, and conflict of laws concerns the law that a jurisdiction should apply to a case. To deal with conflicts, courts around the world have developed principles of mutual respect. These principles are easier to apply when a judge can read the code of another jurisdiction.

Mutual respect of courts arises in several ways. If tribal law applies to a case that is brought to state or federal court, and if information about tribal law is hard to get or inconclusive, the court should declare itself *forum non conveniens* and send the case to the appropriate tribal court to decide. Conversely, if tribal law applies to a case that is brought to state or federal court, and if information about tribal law is easy to obtain, the state or federal court should decide the case using tribal law. Alternatively, if a tribal court awards a judgment to the plaintiff, and the defendant's assets are off the reservation, a state or federal courts should enforce the tribal court's

judgment according to the principles of comity or full faith and credit. These things often do not happen.[121]

Some Indian elders say that everything that has been told to outsiders for 400 years has been turned against the Indians, leading to loss of land and their way of life. Codification involves overcoming the feeling that disseminating information about the tribe diminishes its power. Indian nations gain self-confidence by building up tribal law to meet the changing times and by making it known to others, provided that outsiders defer in appropriate circumstances.[122] In her seminal book *Harmony Ideology*,[123] Laura Nader reports that the Zapotek Indians of Mexico pretend to live in peace and harmony so that outsiders have no excuse to intervene. Just as the Zapotek organize their self-government to keep the Mexican government away, so some American Indians see tribal codes as a good method for keeping American government at a distance. There is, however, a difference: the Zapotek's "harmony ideology" is a covert, subversive strategy against outside interference, whereas tribal codification is an open, public strategy.

When cultures collide, the possible outcomes can be arranged on a continuum. At one pole, the cultures may live side by side, coexisting without affecting each other's internal character ("co-existence").[124] Or people may internalize two cultures while maintaining their psychological separation from each other ("biculturalism").[125] If

121. Hence, Judge Henderson's proposal of "judicial comity" in his concurring opinion to Mexican v. Circle Bear, 370 N.W.2d at 737, 737-741, 742-744 (S.D. 1985); Robert Laurence, The Enforcement of Judgments Across Indian Reservation Boundaries: Full Faith and Credit, Comity, and the Indian Civil Rights Act, 69 ORE. L. REV. 589, 589-687 (1990); Robert Laurence, Full Faith and Credit in Tribal Courts: An Essay on Tribal Sovereignty, Cross-Boundary Reciprocity, and the Unlikely Case of Eberhard v. Eberhard, 28 N.M. L. REV. 19, 19-57 (1998).

122. In Navajo country, we once were told: "During the last ten years, we developed our Navajo common law. Now we can look at human rights much better than before." The speaker could have also mentioned that Navajo Code law was strongly developed during the same period.

123. LAURA NADER, HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEK MOUNTAIN COMMUNITY (2000). 136 idem, Choices in Legal Procedure: Shia Moslem and Mexican Zapotek, 67 AMER. ANTHROPOLOGIST 394, 394-399 (1965).

124. For more on the study on biculturality and acculturation concepts, with examples, see W. FIKENTSCHER Modes of Thought (1995, 2004) at 476-493; Migration, Akkulturation und Bikulturalität aus rechtsanthropologischer Sicht, in FESTSCHRIFT FÜR WALTER ODERSKY ZUM 65, 4-31 (R. Böttcher, G. Hueck, B. Jähnke et al. eds., 1996). The seminal text is still Robert Redfield, Ralph Linton, and Melville J. Herkovits, Outline for the Study of Acculturation, 41 AMER. JOURNAL OF SOCIOLOGY 366, 366-370 (1935-1936). See also Robert Redfield, Ralph Linton, and Melville J. Herkovits, Memorandum on the Study of Acculturation, 38 AMER. ANTHROPOLOGIST 149, 149-152 (1936) (originating in an invitation by the American Anthropological Association to the three authors to draft a conceptual guideline on acculturation, assimilation, and imposition).

125. See W. FIKENTSCHER (1995; 2004), at 483-492. Thus a Hopi legal official is educated in Hopi culture and "Washington, D.C. culture."

one or both cultures take on characteristics of the other, the result is "acculturation."[126] The process of acculturation can occur while the cultures remain distinct ("partial assimilation"), or one culture may absorb the other ("complete assimilation"). The continuum runs from coexistence to biculturalism to acculturation to complete assimilation.

While some Indians hope for complete assimilation, many fear it. In the 1990s, many reservations insisted more strongly on traditional ceremonies, excluded non-Indians from observing them, excluded anthropologists from the reservation through bureaucratic rules, applied stricter control on religious activities conducted by outsiders, and disclosed less about tribal affairs. Reluctance to admit outsiders to tribal events is a natural reaction to the historical disappearance of some tribes and the cultural transformation of others. Anthropologists have observed more extreme defense mechanisms against intrusion and imposition in other times and places.[127]

Where does the tribal code movement belong on the continuum of cultural collision? By enacting the laws of outsiders, tribal codes promote acculturation. However, by strengthening a distinctive identity in the eyes of tribal members and outsiders, tribal codes resist assimilation. So codification seems to help to stabilize the cultural collision between Indians and outsiders at a point between acculturation and assimilation. "One vehicle to find a solution to this conflict with outsiders from the Indian side is the creation of codified law, which therefore is partly a fashion, partly a necessity." —JZ.

126. Acculturation can be studied in four ways: sources, causes, degree of personal involvement, and results. See idem, preceding note, at 476-482. This is not done here.

127. In acculturation theory, "reaction" is a psychological cultural defense mechanism against sensed intrusion and imposition. Among the Indians of North America, notably the Lakota (Sioux), during the last decade of the nineteenth century the Ghost Dance is a case of cultural reaction. Wovoka, a Southern Paiute religious leader, is said to be one of its initiators. The movement had disastrous consequences. Polynesian cargo cults after 1945 in recollection of war times cargo transports to Polynesian islands by the U.S. Airforce, and nineteenth century cattle mass slaughtering by the South African Xsosa Nation as animist sacrifices in protest against Dutch and British conquest, are other known examples. On the Ghost Dance, see Z. A. Parker, The Ghost Dance Among the Lakota (description of a Ghost Dance observed in White Clay Creek at Pine Ridge Reservation, Dakota Territory, June 20, 1890), PBS: New Perspectives on the West, Archives of the West, 1887-1914 (2001), http://www.pbs.org/weta/thewest/resources/archives/eight/gddescrp.htm; James Mooney, The Ghost-dance Religion and the Sioux Outbreak of 1890, 14TH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY, Part II (1894).'

Bibliography

Bischof, Norbert (1985), Das Rätsel Ödipus: Die biologischen Wurzeln des Urkonfliktes von Intimität und Autonomie. München, Piper.

Blane & Marcy L. Kahn, The First New York Listening Conference for Court Officials and Tribal Representatives, NYSBA Journal, Nov./Dec. 2006, 11-19.

Breitel, Charles D. (1963), Llewellyn: Realism and Rationalism, 18 Rutgers Law Review, 745.

Brewer, Sean (1995), Analysis of the Indian Gaming Regulations Act in the Light of Current Tenth Amendment Jurisprudence, Rutgers Law Journal, 47:2, 469-494.

Brietzke, Paul H. and Kline, Teresa L. (1999), The Law and Economics of Native American Casinos, 78 Nebraska Law Review, 601-685.

Brown, Donald E. (1991), Human Universals, Philadelphia: Temple University Press.

Canby, William C., Jr. (2003), American Indian Law in a Nutshell. St. Paul, MN: West Publishing Company; 4th ed. 2004 (1st ed. 1981).

Canby, William C., Jr. (1973), Civil Jurisdiction and the Indian Reservation, Utah Law Review, vol. 1973, 206.

Cardozo, Benjamin (1921), The Nature of the Judicial Process, New Haven: Yale University Press.

Clinton, Robert N. (1975), Development of Criminal Jurisdiction Over Indian Lands: The Historical Perspective, 17 Arizona Law Review 951-992.

Clinton, Robert N., Nell Newton & Monroe Price (1990). American Indian Law. Charlottsville, VA: Bobbs-Merrill Co.Inc.

Cohen, Felix S. (1942), Handbook of Federal Indian Law, Washington D. C.: Government Printing Office; an internal government document; in 1945, the Government Printing office edited a "fourth edition" of the original paper; Washington , D.C.: Gov. Pr. Off. 1958, revised and edited by Dept. of Interior with changes in the text in support of the Department's termination policy; Albuquerque, University of New Mexico Press 1971, reprint facsimile edition of Cohen's original text of 1941; New York, AMS Press 1972, foreword by H. L. Ickes, introduction by N. R. Margold; Charlottesville, VA: Michie 1982, reprint; Lawrence, KS, Five Rings Corp. Wheat Law Library 1986 (reprint); New York: William S. Hein & Company 1988 (reprint); Newark, NJ, LexisNexis/Mathew Bender 2005 (Nell Jessup Newton, editor-in-chief, executive editorial board: Robert Anderson,

Carol Goldberg, John LaVelle, Judith V. Royster, Joseph William Singer, Rennard Strickland ("2005 edition," with pocket parts, latest in 2007). For details of the editorial history see Jim Adams, Scholars Rewrite Classic Indian Law Handbook, Indian Country Today, of June 16, 2003, and Editors Report, Felix Cohen's 'Handbook on Federal Indian Law: Essential for all Libraries, Indian Country Today, of August 24, 2006.

Cohen, Felix S. (2006). On the Drafting of Tribal Constitutions, David E. Wilkins, ed: foreword by Lindsay G. Robertson. Norman, Okla: University of Oklahoma Press.

Cooter, Robert and Fikentscher, Wolfgang (1998), Indian Common Law: The Role of Custom in American Indian Tribal Courts, Part I & II, 46 American Journal of Comparative Law, 287-330 and 509-580.

De Soto, Hernando (2000), The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else. New York: Basic Books.

Fikentscher, Irmgard and Fikentscher, Wolfgang (2002), Geschichten der Coquille. In: B. Schünemann, J. P. Müller and L. Philipps (eds.), Das Menschenbild im weltweiten Wandel der Grundrechte, Festschrift Heinrich Scholler, Berlin: Duncker & Humblot, 311-316.

Fikentscher, Wolfgang (1975-77), Methoden des Rechts in vergleichender Darstellung, vols. 1-5 (1975a, 1975b, 1976, 1977a, 1977b). Tübingen: Mohr Siebeck.

Fikentscher, Wolfgang (1994). Die Erforschung des lebenden Rechts in einer multikulturellen Gesellschaft: Karl N. Llewellyns Cheyenne- und Pueblo-Studien, in: U. Drobnig and M. Rehbinder (eds.), Rechtsrealismus, multikulturelle Gesellschaft und Handelsrecht: Karl N. Llewellyn und seine Bedeutung heute, Berlin: Duncker & Humblot, 45-70.

Fikentscher, Wolfgang (1995a), Modes of Thought: A Study in the Anthropology of Law and Religion. Tübingen: Mohr Siebeck; 2nd ed. 2004, with a preface to the 2nd edition.

Fikentscher, Wolfgang (1995b), Zur Anthropologie der Körperschaft - Polis, Genossenschaft, Tewa-Pueblo - (ein Feldforschungsbericht), Bayerische Akademie der Wissenschaften, Philosophisch-Historische Klasse, Sitzungsberichte Heft 2/1995, München (Kommission C.H. Beck).

Fikentscher, Wolfgang (1996), Migration, Akkulturation und Bikulturalität aus rechtsanthropologischer Sicht. In: R. Böttcher, G. Hueck, B. Jähnke et al. (eds.), Festschrift Walter Odersky zum 65. Geburtstag, Berlin and New York: de Gruyter, 4-31.

Fikentscher, Wolfgang (1996), "What are Law Schools For?" International Bar Association, 26th Annual Meeting, Berlin, Paper delivered, Oct. 22, 1996, at the Academic Forum, available from International Bar Association as BP100, 1-14.

Fikentscher, Wolfgang (1997a), Domestic Violence under Indian Pueblo Law. In M. Gruter und M. Rehbinder (eds.), Gewalt in der Kleingruppe und das Recht, Festschrift für Martin Usteri, Schriften zur Rechtspsychologie Bd. 3, Bern: Stämpfli, 45-73.

Fikentscher, Wolfgang (1997b), Landschaft und Landwirtschaft. In: idem, Die Freiheit und ihr Paradox: Über Irrtümer unserer Zeit. Gräfelfing: Frankfurter Allgemeine Zeitung & Dr. Resch, 98-102.

Fikentscher, Wolfgang. Rechtsanthropologie – am Beispiel einer Feldstudie zu rechtlichen Reaktionen auf Gewalt in der Familie bei Pueblo-Indianern-, JURA – Juristische Ausbildung 182-189 (1998).

Fikentscher, Wolfgang (2005), Geistiges Gemeineigentum – am Beispiel der Afrikanischen Philosophie. In: Ansgar Ohly et al. (eds.), Perspektiven des Geistigen Eigentums und des Wettbewerbsrechts, Festschrift für Gerhard Schricker zum 70. Geburtstag, München: C. H. Beck, 3-18.

Fikentscher, Wolfgang (2006), "Intellectual Property and Competition – Human Economic Universals," The Gruter Institute Working Papers on Law, Economics, and Evolutionary Biology: Vol. 4: Article 1 (San Francisco, CA: Bepress), http://www.bepress.com/giwp/default/vol4/iss1/art1.

Fikentscher, Wolfgang (2007), Intellectual Property and Competition - Human Economic Universals or Cultural Specificities?: A Farewell to Neoclassics, International Review of Industrial Property and Copyright Law (IIC) 137 – 165 (2007/2).

Fikentscher, Wolfgang and Ramsauer, Thomas (2001), Traditionswissen – Tummelplatz immaterialgüterrechtlicher Prinzipien. In: Peter Ganea, Christopher Heath, Gerhard Schricker (eds.), Urheberrecht: Gestern – Heute – Morgen, Festschrift Adolf Dietz, München 2001: C.H. Beck, 25-41.

Fox, Robin (1967a), Kinship and Marriage. Middlesex: Penguin.

Fox, Robin (1967b), The Keresan Bridge: A Problem in Pueblo Ethnology. London: London School of Economics Monographs in Social Anthropology, No. 35.

Hargrett, Lester (1947), A Bibliography of the Constitutions and Laws of the American Indians. Cambridge, MA: Harvard University Press.

Headland, Thomas N., Pike, Kenneth L. and Harris, Marvin (eds.) (1990), Emics and Etics: The Insider/Outsider Debate. Frontiers of Anthropology, no. 7. Newbury Park: Sage.

Helms, Kathy and Diné Bureau, "Sacred Peaks Case Before Federal Judge," Independent, web edition, October 12, 2005, http://www.gallupindependent.com/2005/oct/101205scrdpks.html.

Hinz, Manfred O. and Patemann, Helgard K. (eds.) (2005), The Shade of New Leaves: Governance in Traditional Authority, A Southern African Perspective. Münster: LitVerlag, 295-328.

Johnson, Ralph W. and Davies, Richard (1988), Indian Tribal Codes: A Microfiche Collection, Seattle: University of Washington Law Library.

Kershaw, S. (2006), Dizzying Rise and Abrupt Fall for a Reservation Drug Dealer, New York Times: Internet edition, National section, 19 February.

Laurence, Robert (1990), The Enforcement of Judgments Across Indian Reservation Boundaries: Faith and Credit, Comity, and the Indian Civil Rights Act, 69 Oregon Law Review, 589-687.

Laurence, Robert (1998), Full Faith and Credit in Tribal Courts: An Essay on Tribal Sovereignty, Cross-Boundary Reciprocity, and the Unlikely Case of Eberhard v. Eberhard, 28 New Mexico Law Review (28:1), 19-57.

Lewinski, Silke von (ed.) (2004), Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore, Hague, Netherlands: Kluwer Law International.

Morgan, Lewis H. (1851), League of the Ho-de-no-sau-ne, or Iroquois. Rochester: Sage & Borther.

Nader, Laura (1965), Choices in Legal Procedure: Shia Moslem and Mexican Zapotec, 67 American Anthropologist (67:2), 394-399.

Nader, Laura (2000), Harmony Ideology: Justice and Control in a Zapotek Mountain Community, Stanford, CA: Stanford University Press.

Ortiz, Alfonso (1969), The Tewa World: Space, Time, Being, and Becoming in a Pueblo Society. Chicago: Chicago University Press.

Parker, Arthur C. (1968), The Constitution of the Five Nations. In: William N. Fenton (ed.), Parker on the Iroquois. Syracuse: Syracuse University Press.

Pevar, Stephen L. (2002). The Rights of Indians and Tribes: The Authoritative ACLU Guide to Indian and Tribal Rights. Carbondale, IL: Southern Illinois University Press (3rd ed.).

Platon (1990), Werke in acht Bänden, Gunther Eigler (ed.), vol. 5, bearbeitet von Dietrich Kurz, griechischer Text von Leon Robie, Auguste Diez, und Joseph Souilhé, deutsche Übersetzung von Friedrich Schleiermacher und Dietrich Kurz, Darmstadt 1990: Wissenschaftliche Buchgesellschaft (Sonderausgabe), Briefe, 7th letter, 366 et seq., No. 344c.

Public Broadcasting Service (PBS), The Ghost Dance Among the Lakota, New Perspectives on the West, Archives of the West, 1887-1914, http://www.pbs.org/weta/thewest/resources/archives/eight/gddescrp.htm.

Ramsauer, Thomas (2005), Geistiges Eigentum und kulturelle Identität: Eine Untersuchung zum immaterialgüterrechtlichen Schutz autochthoner Schöpfungen, München: C. H. Beck.

Redfield, Robert, Linton, Ralph, and Herkovits, Melville J. (1936), Memorandum on the Study of Acculturation: Outline for the Study of Acculturation, 38 American Anthropologist, 149-152.

Sando, Joe S. (1976), The Pueblo Indians, San Francisco: The Indian Historian Press.

Sando, Joe S. (1992), Pueblo Nations: Eight Centuries of Pueblo Indian History. Santa Fe, NM: Clearlight.

Twining, William (1973). Karl Llewellyn and the Realist Movement, London: Weidenfeld & Nicolson.

Twining, William (1973). Law and Anthropology: A Case-study in Interdisciplinary Collaboration, 7 Law and Society Review, 561-584.

von Lewinski, see Lewinski.

White, Leslie A. (1948), The Definition and Prohibition of Incest, 50 American Anthropologist (50:3), 416-435.

Wilkins, David E. (1997). American Indian Sovereignty and the US Supreme Court. Austin TX: University of Texas Press.

Williams, Robert A., Jr. (1990). The American Indian in Western Legal Thought: The Discourses of Conquest. New York & Oxford: Oxford University Press.