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Indian Common Law: The Role of Custom in American Indian Tribal Courts Part II

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(Part II of II)***

V. SUBSTANTIVE INDIAN COMMON LAW	509
A. <i>Land</i>	511
1. Who Owns the Land?	513
2. Neglect and Reversion	517
3. An Example: White Mountain Apaches	519
4. Hopi Land Law Issues	520
5. Future of Indian Land	524
B. <i>Theft</i>	528
C. <i>Repossession</i>	529
D. <i>Inheritance</i>	530
E. <i>Environment</i>	535
F. <i>Family Law</i>	536
1. Marriage	537
2. Divorce	540
3. Child Custody and Adoption	544
4. Intermarriage	545
G. <i>Contracts</i>	547
H. <i>Torts</i>	551
I. <i>Crimes</i>	552
VI. CONFLICTS OF LAW	558
VII. CONCLUSION	562
BIBLIOGRAPHY	564

V. SUBSTANTIVE INDIAN COMMON LAW

We now turn from process to substance in our examination of social norms in tribal law. The constitution of every tribe that we visited, except some Pueblos, follow American models, not Indian tradition. Many tribes have organized their statutes into codes covering such areas as family law, fish and game, traffic, and crimes. In perusing these codes, we found little that is traditional or customary.

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* For Part I of the article, see 46 *Am. J. Comp. L.* 287-37 (1998).

Although tribal constitutions and codes typically recognize custom as a source of law, custom is not apparent on the face of written law.

Some people, including some Indian judges, think that this appearance is reality. They associate "customs" with abandoned practices unsuitable to contemporary life. We heard custom described as "law in reserve" which can be revived if "the new system fails and we need to go back to the old system." —RL. Some tribal judges complained that custom, which is vague and confused, gets dragged into legal disputes as a last-ditch effort to save a hopeless case. There is, however, good reason to penetrate appearances and search for a deeper reality. A long sociological tradition argues that custom, not law, guides repeated interactions in families, neighborhoods, or businesses.¹ Reservation life involves repeated interactions among people, many of whom are relatives. Applied to tribal courts, this sociological tradition predicts that custom will dominate in tribal law.

There is ample reason to believe that informal custom dominates written law in many disputes before tribal courts. The story of how Mrs. Correla became a judge illustrates this point.² She worked for several years as secretary in the Tohono O'odham tribal court where she gleaned some knowledge of law.³ The Tohono O'odham tribal court consists of three judges appointed for two year terms. A judge sometimes resigns before his term expires, perhaps to avoid deciding a case that would offend his relatives. One day the judge quit who was supposed to decide a controversial case involving a stabbing. He said to Mrs. Correla, "You have been around here longer than anyone else. You decide this case." So she did. After she heard the arguments on both sides, she looked at the Tohono O'odham code, but did not find it very helpful. She decided the case according to her own beliefs about right and wrong. Mrs. Correla was subsequently appointed formally to the court and she eventually became its chief judge.

Mrs. Correla's story illustrates the principle that traditional Indians who fill tribal offices impart traditional substance to modern legal forms.⁴ Our interviews revealed that customs are thriving in the practices of courts. We will describe our most important findings about custom in the areas of tribal jurisdiction, which roughly encompasses property, contracts, torts, fish and game, the environment, family law, minor crimes, tribal constitutions, and traffic regulation.

1. This tradition is reviewed and extended in Robert Ellickson (1991).

2. This story is based upon an interview of Mrs. Correla by one of the authors.

3. To our knowledge, no tribal judge at Tohono O'odham has had a law degree.

4. Here is another example: Most of the land at the San Xavier Papago reservation was allotted in conformity with federal and state statutes, but for many years the Papagos were oblivious to this fact and continued to follow tribal law in using the land. See Henry F. Manuel, Juliann Ramon, and Bernard L. Fontana, "Dressing for the Window: Papago Indians and Economic Development," in Stanley (1978) pp. 511-578.

A. *Land*

When Indians were confined to reservations, some tribes occupied their traditional homeland, whereas other tribes were relocated and given reservation land in a place where they had no prior history of occupation and use. To illustrate, the O'odham reservation encompasses much of the desert in southwestern Arizona historically occupied by the tribe. In contrast, only one of the three tribes who occupy the Warm Springs Reservation are indigenous to that place. Similarly, Yaquis emigrated from their homeland in Sonora to a Tucson neighborhood. When their Tucson neighborhood was demolished to build a highway, they were relocated to the Pasqua Reservation on the southwest side of Tucson.

The historical relationship between a tribe and the land on its reservation affects contemporary patterns of ownership. For some tribes like the O'odham and the Pueblos, where the reservation encompassed the tribe's traditional homeland, individuals and groups established customary rights over much of the land through a long history of occupation and use. When tribal governments acquired authority over the reservation, they usually respected such customary rights to land. Perhaps tribal governments have no choice in this matter because they are bound by law to respect customary rights.⁵

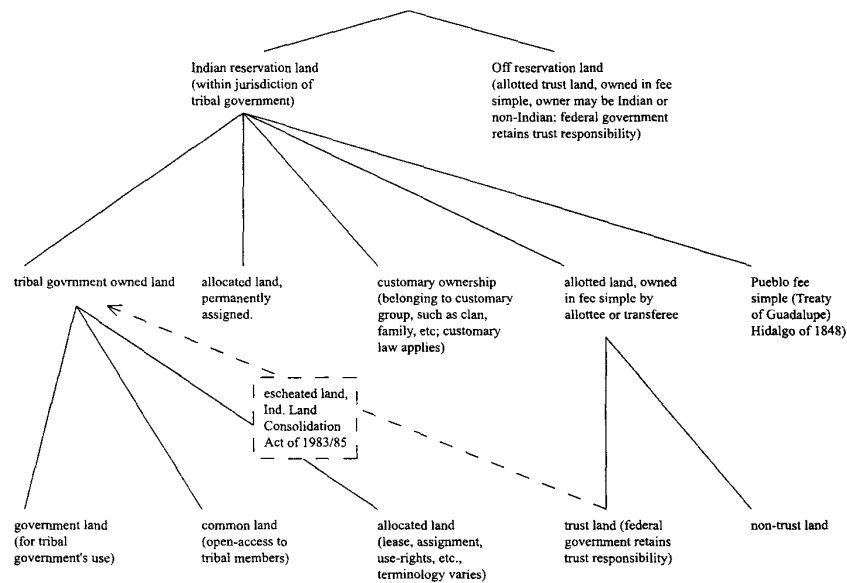
For relocated tribes, however, the tribal government faced a more difficult task: allocating land on the reservation for ownership or use by individuals, families, and groups. After Indians were relocated to a reservation, the tribe formally acquired ownership of the land and it could decide how to allocate the land to individuals and families for occupancy and use, contingent upon the Federal government's approval as trustee.⁶ Where individuals and families lack customary rights over land, the tribal government often leases or assigns tribal lands to members of the tribe. Even tribes that still occupy their traditional homeland often have reservation land that customary law does not allocate, so the tribal government can assign or lease it. Different tribes use different labels. To illustrate, Pojoaque uses "assignment to families" (—FD, EQ), in Nambe the procedure is called "allotment" (—PT), and Santo Domingo refers to "leases" for houses and farms (—RH). The underlying idea is that the tribe owns the land and its members receive it for use on a safe, but not permanent, basis. "I am homeless, but I know that I can live in my house with my family." — QC.

5. We say "perhaps" because this principle is followed in practice by reservation governments, although the principle has not been developed by tribal courts to our knowledge. We searched in vain for cases involving the taking of customary property by the tribal government. See subsequent discussion in this section of text.

6. For some purposes not discussed here, tribal land can be divided into various categories, such as land owned by aboriginal title, land acquired by treaty with the United States, or land granted by the Spanish; see also Figure 3, *infra*.

We have explained that much land on reservations is allocated to individuals or groups by custom or lease. In addition, the federal government has allotted some Indian land to individuals who own it, as mentioned in the preceding discussion of the Allotment Act of 1887 ("Dawes Act"). In terms of the land's legal status, allotment typically ended a regime of customary law and replaced it with freehold ownership. Allotment, however, comes in several types. Depending upon its legal form, allotment might end or retain the federal trust responsibility ("simple freehold" or "trust allotment"). In addition, allotment might preserve tribal jurisdiction or remove the land from the reservation and bring it under the jurisdiction of a town, county, or state ("off" or "on" the reservation). Finally allotment might impose or remove restrictions concerning sale and inheritance ("unrestricted" or "restricted" allotment).

Beside land allocated to individuals or groups by custom, lease, or allotment, some reservation land remains under the direct control of the tribal government. The tribal government uses its land for government buildings, roads, resorts, casinos, parks, grazing, timber, and so forth. In addition, Indians may have customary rights to hunt, gather, or graze on common land administered by the tribal government. Land under the direct control of the tribal government, which we call "tribal government land," resembles the land owned by the government of a town and used for public purposes. The distinction between allocated tribal land and tribal government land rests upon the fundamental distinction between the tribe and its government. Figure 3 outlines the categories of Indian land:



Transfer of land follows rules as complicated as the land's status. Reservation land which is allotted and unrestricted, can be bought and sold like land off the reservation. The federal government, however, may restrict the transfer of allotted land as part of its trust responsibility. Restrictions may preclude sale to non-tribal members, or restrictions may preclude any kind of sale (while allowing leases). Turning to tribal land that is not allotted, the tribal government that assigns or leases land can put restrictions on transferring the lease or assignment. Finally, turning to tribal land allocated by custom, customary law did not contemplate modern markets in land, so customary law does not contain in itself modern rights of sale.

1. Who Owns the Land?

Who are the customary owners of Indian land? Candidates include individuals, families, clans, moieties, societies, bands, and tribes. Only a few good studies address the question of customary ownership among Indians, but they show that any simple answer is misleading.⁷ Customary property norms vary from one Indian group

7. There are some more sources on the property law of specific tribes, but not many. Llewellyn & Hoebel (1941) offer aspects of Cheyenne property and inheritance law. For Hopi, see Ragsdale (1987). For Zuni, we have Smith & Robert's (1954a and 1954b) account. Generally, see Cronon (1983). Simple accounts that rely upon secondary sources and make serious errors include McChesney (1990) and Demsetz (1967). Specifically, these accounts speak of customary ownership as if it applied open-access or collective control by a large group of people. See our discussion on page 512ff.

to another. To illustrate, the agricultural villages of the southwest have ancient property rights in land that we have called "clan ownership." In contrast, the nomads who hunted buffalo on the Great Plains have very different traditions that might be called "band ownership."⁸ These labels are rough because traditional ownership differs from freehold ownership, not just in the identity of owners, but in their powers.⁹

The owners of freehold land enjoy broad rights, traditionally described as "full and absolute dominion." Full and absolute dominion over land encompasses a bundle of rights including the right to occupy, use, develop, bequeath, inherit, sell, give, transform, and exclude others.¹⁰ Legal constraints prevent freehold owners from parceling out their rights and dispersing them in ways that would interfere with markets.¹¹ These restraints preserve unitary ownership and reduce the transaction costs of market exchange. Assigning rights to owners, and prohibiting others from interfering with their exercise, gives owners discretion over the land. Discretion consists in the legal power to act or forbear, without the obligation to do either.¹²

If all these rights belong to one person, the question, "Who owns the land?", has a simple answer. However, the question has no simple answer when applied to aboriginal Indians. Some components of full ownership rights as described above did not vest in anyone. Customary law typically specifies who inherits the land, so that no owner has the right to choose an heir. Similarly, customary law in aboriginal times probably did not contemplate selling land to outsiders, much less "developing" it in the modern way.¹³ These rights were not

8. Some village peoples of the southwest tend to own land in clans, often with matrilineal inheritance. The Pueblos have at least three different major land tenure systems. Dozier (1970), 134 ff., 150 ff., 162 ff. The buffalo hunters of the Great Plains hunted in bands that claimed territory as a whole. See Llewellyn & Hoebel (1941).

9. To illustrate, the owner in fee simple can designate an heir and sell land. Most Indian groups did not originally have markets in land, so the legal power to sell land was undeveloped. That is why "sales" to non-Indians seemed illegal to the tribes. Thus the Cherokee Republic enacted legislation prescribing capital punishment for Cherokees who sold land to outsiders. Similarly, inheritance followed prescribed rules which left owners with little discretion. A Cherokee man would inherit use rights in land from his maternal aunt. These facts about Cherokee law were reported to us by Robert K. Thomas, Professor of Indian Studies at the University of Arizona, based on his reading of 19th century Cherokee court cases.

10. "To own property is to have exclusive control of something — to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it." Grey, T. (1980).

11. Examples are the right of partition and the rule against perpetuities. Complex leasing arrangements and modern land use regulations undermine, but do not destroy, freehold as a system of unitary, absolute ownership.

12. The relationship between property and liberty is an old theme in political philosophy. A thorough bibliography and critical discussion is in Underkuffler (1990).

13. In early 19th century Georgia, the Cherokee tribe forbade the sale of land to outsiders in an attempt to block further intrusion of white settlers, see n. 9, *supra* also. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and Wilkins (1970), 201.

in the bundle. If important ownership rights do not belong to anyone, then no one fully "owns" the land as English speakers understand the term. Besides the gaps in rights, some elements in the bundle of ownership rights were dispersed among different people or groups. Customary law may give a family the right to graze livestock but not to plant crops on a piece of land, or a family may have the right to plant crops but not to build a dwelling. If ownership rights are dispersed among different people, asking the question, "Who owns the land?" is like asking, "Which employee is the corporation?"

Unitary, absolute ownership is possible among individuals whose mutual obligations are minimal. If a stranger asks to buy some of my land, I am free to respond as I please, including a simple "No!" If, however, I am part of a clan and my nephew wants to buy some land, the answer is not simple. "What do I owe my brother (his father)?" "How severe is his need relative to mine?" "Will he help tend my land?" "Can my children live amiably along side his children?" These questions arise because ownership of customary land involves long run relations with many reciprocal obligations. These reciprocal obligations affect customary rights and the equities of land disputes.¹⁴

In effect, federal and state officials treated the tribe or allottee as the absolute, unitary owner, subject to applicable tribal regulations and the federal government's trust responsibility. Federal and state courts, who were very solicitous about questions of Indian land,¹⁵

14. Gluckman summarized this situation succinctly with respect to an African tribe:

"I have argued that Barotse property law defines not so much the rights of persons over things as the obligations owed between persons in respect of things. . . Trials over ownership of land may become inquiries into how the kinsfolk concerned have dealt with one another through long periods. . . whether the junior gave the senior fish from his catchers and money from his earnings. . . whether the senior had contributed. . . to his juniors' payments of cattle for brides. . . the settlement of disputes over ownership may turn on whether the parties have fulfilled all the duties of their station. . ."

—Max Gluckman (1965), quotes from pages 171, 172, and 173.

The point of Gluckman's example is not just a difference in property rights among tribal people, but also a difference in conception of what constitutes a case in law (e.g. the proper scope of a legal dispute).

15. As to the intricate questions arising from the "white" interventions into the tribal land tenure system, see Pevar (1982) 4ff., Canby (1988) 8ff., as to the Pueblos which own their land in fee simple, see Pevar (1982) 251ff.; Deloria & Lytle 72. Still, it is now well established that the United States has a trust relationship with the Pueblos. This means that the federal government has a duty to protect Pueblo lands, and the Pueblo Indians are entitled to the same benefits and services other federally recognized tribes receive, Pevar (1992) 252. In Alaska, however, federal and state courts remain divided on the issues of Alaska native village sovereignty and "Indian country," Thompson, P. (1993). Thompson examines the state and federal court treatment of these issues and concludes that the Alaska Native Villages are sovereign tribes and the lands set aside under the Alaska Native Claims Settlement Act are Indian country in Alaska, essentially of the same legal character as in the other states of the U.S. *Alaska v. Native Village/Venetic*, 101 F.3d 1286 (9th Cir. 1996) held that

took little interest in the customary property law of tribes. As far as we know, no federal or state court has recognized custom or Indian common law as limiting the power of a tribal government or allottee to use the land as it wishes.

Even so, Indian custom affects tribal property law. Jurisdiction over reservation land rests largely with the tribal courts, and they can enforce customary property laws that do not contravene federal law or tribal statutes. Indeed, they may be obligated to do so by tribal constitutions. Presumably, tribal government can only exercise the prerogatives of ownership over reservation land that does not belong to anyone in customary law.¹⁶ On the other hand, customary law may bestow on tribal governments such prerogatives or establish duties.

When Indians are asked, "Who owns the reservation's land?", they frequently reply, "The tribe," which is a sufficient answer for most outsiders. However, this question does not address the deeper question of who gets which tribal land and what they can do with it. This is the crux of the question of land ownership for Indian communities. In our interviews we tried to determine whether customary law, contemporary politics, or something else controls the allocation and use of tribal land. We found ample evidence of the influence of customary law and contemporary politics.¹⁷ Generalizations across tribes are difficult but necessary. Custom appears to dominate when land allocation preceded creation of the reservation, whereas politics appears to dominate where land allocation followed creation of the reservation.

To illustrate, the Pueblo tribes, who have lived a settled life in the same place for centuries, allocated the land among themselves long before establishment of the reservation system. These tribes have various religious beliefs and genealogies that connect family, clan, society, or moiety to the land and explain the pattern of ownership.¹⁸ The Pueblos know who has what customary rights over which

land under the the Alaska Native Claims Settlement Act of 1971 may constitute "Indian Country" within the meaning of 18 U.S.C. § 11551 (a), (b).

16. We say "presumably" because this principle is followed in practice by reservation governments, although the principle has not been developed by tribal courts to our knowledge.

17. Takings provide one test of whether tribal land belongs to the government or is allocated. To illustrate, "If Jemez Pueblo requires land from a family for a public purpose, compensation is paid for the taking". —DY. Hence the tribe must regard this land as allocated.

18. We were told that there is safe land between the Four Sacred Mountains to which the Hopi and the Navajo refer. It is safe from catastrophes such as hurricanes, earth quakes, floods, wildfires, etc., —TH. This is one of the reasons why the peoples living there feel attached to the land and why they believe that it has been given to them. (The last big eruption of a volcano in that area was in 1064 A.D.). Similarly, at White Mountain an Apache leader told us: "Our forefathers must have prayed a lot so that we got this magnificent, safe country."

tribal land, even if it has not been surveyed and the customary rights have not been written down. In contrast, the Yaquis relocated to Pascua in recent decades, so the reservation land was not allocated by customary law. An intermediate case is the White Mountain Apaches. Their reservation encompasses a significant part of their homeland, so many Apache traditions extend to the land. However, the lives of Apaches were not settled until the second half of the nineteenth century, so their customs do not contemplate many of the problems of property forced upon them by reservation living.

2. Neglect and Reversion

What happens when assigned land is neglected or abandoned by its owner? Can the tribal government reclaim the land? As with so much tribal property law, the answer is very complicated. Some tribes reclaim property as soon as "the users move out and the bills are no longer paid." —PBN. Some tribes use a 5- or 10-year rule to check whether the house or farm is still in use and maintained. For example, San Felipe Pueblo uses a 5-year rule: If somebody moves out and leaves his house empty and unused, he can return and reclaim in for 5 years, after which it reverts to the tribe. In Jicarilla Apache, we were told that a committee of the tribal council called the land commission can issue an order in cases of neglect of an "assigned" home. For every year of neglect, one seventh of the assigned property goes back to the tribe. After seven years of neglect, the property is forfeited. If the holder returns and ends the neglect, the forfeited shares return to the holder. —CV. In other tribes, such as Santo Domingo Pueblo and Santa Ana Pueblo, the tribe cannot reclaim property "even if the houses or farms are neglected" which causes big problems. —RH.

In Nambe Pueblo, traditional houses and farms belong to the "allottees," which cannot be taken away from them by the tribe, but government-financed homes follow a different rule. If payments fall far enough in arrears, the housing authority can file a petition to remove possession from the allottee. In Sandia Pueblo, we were told that neglect has never occurred with single houses, but one farm among the 6 or 7 big farms run by particular families was left empty when the farmer died without a male successor. The farm was given to somebody else by the tribal council, but later a male grandchild returned, wanted the farm, and got it.¹⁹

Given these various forms of ownership, phrases like "tribal land" often mislead people. To illustrate, "Hopi tribal land" may refer to land owned by a clan or to land owned by the tribal government.

19. Sandia is matrilineal, like Taos, another Tiwa-speaking pueblo. Perhaps a male successor is being preferred as an exception to the rule, or perhaps this grandchild's mother did not want to take over the farm upon the death of her father.

Clan ownership, which is traditional, involves the exclusive use of land by families and close relatives, whereas government ownership, which is modern, involves the disposition of land by elected officials. Land that belongs to the tribe in customary law does not belong to its government.

Some scholars think that allotment meant privatization, or a change from some form of collective control to individual control.²⁰ This is not generally true. Allotment ended in individual control in the form of freehold, but it did not begin with collective control. As explained, much allotted land was formerly under customary law, which allocated ("assigned") the land to individuals and small groups. Alternatively, customary law gave and still gives relatively free access to a large group of tribal members.²¹ In any case, customary ownership bears little resemblance to government ownership.²² Land in customary ownership is not necessarily controlled by the tribal council or chairman. Furthermore, the rules of customary law are not a form of legislation made by the tribal council and chairman. Rather than being made, customary law evolves. There are no prescribed procedures for making a custom.²³ The distinction between individual and collective control often does not fit the facts of customary law. For example, the Nishga formerly lived in large "houses" that owned exclusive rights to pick berries on particular hills. Use-rights owned by a Nishga house do not resemble individual ownership or government ownership.²⁴

In the next sections, we will try to explain the relationship between customary law and politics in the allocation of land for the White Mountain Apaches and the Hopis. It is difficult for an outsider to be confident in assessing property law and practice, but we present our best understanding derived from our interviews and reading.

20. This is part of McChesney's thesis. Economists have a long history of analyzing the inefficiencies of collective ownership, as compared to the efficiencies of individual ownership. See Demsetz, Eggertsson, Ellickson (1991; 1993), Ostrom. Conversely, Spanish settlers and their governors envied the effectiveness of collective Pueblo agriculture, compared to the poor results achieved by the individual Spanish settlers, so that in times of want, for instance, in the winter, the Spaniards had to requisition from the Natives, Marc Simmons (1992).

21. Lindo (1997) discusses the "escheat" from allotment to tribal ownership under the Indian Land Conservation Act of 1983, 1985.

22. We know of no one who has distinguished between allocated tribal land and open-access tribal land, and then attempted to estimate the proportion of each type that was allotted. We believe that a large proportion of allotted land was formerly allocated tribal land. However, establishing consistent definitions is not easy because the distinction between customary allocation of land to small groups and open access by large groups can become blurred.

23. See the discussion of secondary rules by Hart (1972).

24. These facts were explained to Cooter while visiting the Nishga. A published description of some Nishga ownership law is found in Raunet (1996).

3. An Example: White Mountain Apaches

The White Mountain Apache reservation is sparsely settled, having much more pasture and forest than home sites. Most of the reservation is "tribal land" that has not been allotted or leased to outsiders. Tribal members can apply for an "assignment" or "lease" of any vacant or unused tribal land. Assignments are open-ended, whereas leases run for a specified time, usually twenty-five years. The tribe is reluctant or unwilling to provide any land to non-members. A formal process exists for assignment or lease of land. A five member Tribal Land Board, which meets approximately twice a month, hears applications, investigates sites, and makes recommendations to the tribal council. —GL. The council subsequently assigns or leases the land to families. Since the federal government is trustee, a local BIA official must endorse the decisions of the Tribal Land Board. Assigned or leased land must be surveyed, fenced, or identified by markers and natural landmarks.

Like political bodies everywhere, the tribal council inevitably favors families loyal to the governing faction when distributing benefits, including the allocation of land. Tribal members apparently devote much energy to lobbying the council for land and other benefits, or to electing a council with the preferred loyalties. A separate question concerns the extent to which assignments or leases, once granted, are secure against changes in the council's composition. We are uncertain about law and practice with regard to termination of leases or repossession of assignments. According to one view expressed to us, an assignment or lease may be revoked by the tribal council at any time, and revocation is more likely if no investments are made on the land. If, however, the assignee or lessee improves the land by fencing it or building structures or roads on it, revocation is unlikely. ("Three times they tried to take this land from me, but now I built this house and the corral on it." —RL.) Similarly, assignments are apparently less likely to be revoked the longer the family occupies the land. Absentees usually keep their assigned or leased lands until they die.²⁵ —GL. When a lease expires, or the lessee or assignee dies, or the lessee or assignee abandons the land, it apparently escheats to the tribe, unless the lease is renewed by the tribal council. —GG, PS. We could not determine the extent to which renewal is automatic in practice. Elders may be asked to testify about use and prior occupation to resolve disputed boundaries.

25. A case was described to us in which a piece of land was leased to four sisters who tore down a pre-existing fence but did not reside on the land. Somebody else subsequently tried to settle on the land and claim it. An elderly witnesses testified that the land was assigned to the four sisters and, as a result, the court returned it to them, GL.

We found a similar pattern of leases and assignments on other reservations with a lot of vacant land. For example, in the San Carlos Apache Reservation, land for building a house is leased to the house builder. The lease may cover a period of 25 years. If the house is built and occupied, renewal of the lease is automatic. The house itself is the property of the builder. —VS. On the Gila River Indian Community (Pima and Maricopa), we were told that agricultural leases to families typically run for 25 years, whereas home site leases run 50 years. —AS, PM, RP.

Large blocks of tribal land at White Mountain are used for pasture. The grazing of cattle on tribal land, which is an important source of income on many reservations, has been organized on a cooperative basis by cattle associations. Cattle owners can decide which of several cattle associations to join. The cattle associations pay fees to the tribe for grazing rights. The owners of cattle, in turn, pay the cattle associations a percentage of the sale price of their cows. —GL, PE.

The BIA has financed the construction of many houses at White Mountain and other reservations in recent years. Some reservations, such as Warm Springs, enjoy a dispersed housing stock that is congenial to the residents and in good repair. More typically, however, BIA housing developments concede nothing to traditional patterns of land use. Three bedroom houses (perfect for nuclear families), constructed entirely from non-native materials, are typically clustered together in a grid of small lots to reduce the cost of water and electricity lines. BIA houses utilize various forms of ownership including rental, lease, purchase, and gift. Indians often point to the pattern of construction and ownership as a cause of crime.

4. Hopi Land Law Issues

Most of the twenty Pueblos occupy land granted to them by the Spanish government and subsequently recognized by the Mexican and U.S. governments.²⁶ President Abraham Lincoln, who wanted to reciprocate for the neutrality of the pueblos in the Civil War, renewed the handing over of ceremonial canes to the pueblos as symbols of their sovereignty. Living on grant land apparently means that the tribe owns the land in fee simple, although the BIA sometimes takes the position that sovereignty has been waived by the pueblos. —FK.

As explained, the phrase "tribal ownership" obscures the question of who gets which tribal land and what they can do with it. According to Ragsdale's account of the basic structure of the Hopi property law (at 381 f.), each village has its own land and its own

26. Treaty of Guadalupe Hidalgo, see footnote 35, in Part I of this article, 46 *Am. J. Comp. L.* (1998) *supra*. Laguna, which is a relatively young pueblo, does not occupy grant land.

land law. The relevant authorities are the villages, not the tribal council. —MT. The Hopi Tribal Court has stated unambiguously that questions of property are to be decided by the village authorities according to their traditions and laws, not by the tribal court.²⁷ The tribal government does not own much land or make land law for the villages.

All villages have common land which is under the control of their leaders, called "kikmongwis," translated as "chiefs" by Ragsdale. In addition, much of the village land is allocated to individuals or groups by customary law. We were told that Walpi, Shingopovi, Hopi-Tewa, and Polacca have "clan lands," whereas Kykotsmovi, Bacabi, and Moenkopi do not, and Oraibi even has "allotments in the white man's way." —EN.²⁸ According to Ragsdale, individuals cannot sell or will clan land. We were told that the "traditional villages," which are ruled by the kikmongwis, assign land only to clans and settle land disputes in the "old way," whereas the villages that settle land disputes in the "new way" (non-traditional villages led by the governor and board of directors) assign land to families and households. —WS. Any belief on our part that we thoroughly understood these assertions were dispelled when WS added that the governor consults "the clan owning the land" before assigning it.

There are no one-for-one equivalents between terms in Hopi customary law and terms in American law. In an attempt to overcome this problem, La Farge coined the term "use-ownership" to describe the occupant's status. This oxymoron acknowledges confusion without contributing clarity. Another term that we heard at Acoma is "possessory use." —CS. No English phrase will do justice to the complex rules connecting village, clan, and family with respect to land. Our schematic account merely suggests the lines along which future research can explore the diversity and complexity of reality.

Outsiders who know enough to be puzzled by Hopi customary law discover additional intricacy in its responses to changing circum-

27. In *Fred Johnson v. Fermina Banyacya*, Hopi Tribal Court, Hopi Jurisdiction, Keams Canyon, Arizona, No. CIV-043-84 (1987), Associate Judge Delfred Leslie writes,

"The Hopi villages are empowered to assign farmlands within their boundaries according to custom or village constitution. See Constitution and By-Laws of the Hopi Tribe, Article III, Section 2 and Article VII. This simply preserves to the villages their inherent authority over matters dealing with lands, because historically the Hopi villages have exercised complete control over lands within their boundaries for different uses, including assignment of farmlands."

However, the court will decide where the village has not chosen to exercise its authority, as with livestock in Kykotsmovi. See *In the Matter of Estate of David Sahu*, Hopi Tribal Court, Hopi Jurisdiction, Keams Canyon, Arizona, No. PR-001-88 (1988).

28. We could not find out whether these old allotments still exist. They should not be confused with the assignment of part of the lands to clans, lineages or households, or with the giving in use of part of the clan lands to lineages or households by the senior women of the clans.

stances. The Hopi clans are matriarchal and the husband traditionally works land belonging to his wife's clan. If somebody applies for a lease today, the wife's clan normally handles the procedure. Now, however, Hopi men are marrying outsiders with no rights to Hopi land. These men are, nevertheless, asking the authorities for leases or even assignments of land.²⁹ This has caused the law of the land "to get mixed up." —MT.

The Hopi authorities defer to customary clan boundaries, but not always.³⁰ For example, one Hopi woman complained that the tribal meeting hall was "illegally constructed" on land belonging to her clan, whereas the tribal government took the position that no clan could claim this plot.³¹ An interesting case described to us by Hopi judges concerned special houses on First Mesa that are designed to be used for religious practices. Only particular clan members with responsibilities for the religious practices may live there. In this case, members of a particular clan thought that they had a "better title to the religious practices" than a woman who was living in one of the houses. These clan members sought to evict the woman and occupy the house themselves. After hearing testimony from clan leaders about the meaning of these houses and their occupancy, the tribal court dismissed the claim, basing its decision on the testimony. —RA, DL.

The case of *Ross v. Sulu* provides another example of how the Hopi court deals with disputes about customary land titles.³² The village chiefs traditionally resolve land conflicts, but the tribal court heard this case in 1989. The case was still pending on appeal when we visited the area in 1990. We discussed the case with several Hopis and studied the available documents. The Hopi-Tewa (or Teowa) are a linguistically distinct people who were given land and refuge by the Hopis centuries ago after the unsuccessful Pueblo revolt against the Spanish (1680-1692). The Hopi villages of Walpi and Shingopovi, and the Hopi-Tewa village form the "consolidated villages of First Mesa." The disputed piece of land was long regarded by the Hopi-Tewa as theirs. A Hopi named Patsie Ross and her clan alleged that the disputed piece of land was transferred to them centuries ago or at a subsequent time. She moved a mobile home onto the disputed land and a Tewa chief, Tom Sulu, sought relief from the court for this alleged trespass. The court enjoined Ross from moving

29. We found the terminology confusing at Hopi because leases for a definite period of years are sometimes called "assignments," and open-ended assignments are sometimes called "allotments."

30. See the subsequent discussion of *Ross v. Sulu*, pages 513-15, *infra*.

31. Conversation with FB.

32. The decision of the Tribal Court, by Lawrence Numkena, J. is of Feb. 28, 1989; Ross' appeal to the Appeal Court was still pending when we visited the Hopi courts in 1990.

into the mobile home. She apparently appealed and moved into the mobile home.³³

In hearing the case, Judge Numkena listened to the testimony of Hopi and Tewa elders, and he also examined historical documents on Hopi land law.³⁴ Two documents proved directly relevant. An article by Ragsdale is quoted to the effect that the kikmongwis hold all village land in trust for the Hopi people and have ultimate authority and decision-making power over all traditional clan holdings within the village.³⁵ The most interesting document quoted in one of the briefs is a letter on the Hopi land law by Oliver La Farge to the Hon. John Collier, Commissioner of Indian Affairs, dated March 7, 1940. In his letter, La Farge compares the Hopi villages and the Hopi-Tewa village to the several states within the United States. La Farge goes on to state that political organization in the villages is traditional and remained so after 1934 when modern tribal government arrived on the Hopi reservation.

"This means that heads of certain established groups work with the kikmongwi, so that several men stand behind each other. By using the word kikmongwi instead of chief we brought in the whole tradition so that there could be no doubt in the mind of any Indian." —O.L.F.

La Farge points out that Hopi customary law of "use-ownership" was not repealed by the IRA Constitution that was adopted after 1934. La Farge infers that certain ongoing land disputes between the villages of Kykotsmovi and Shungapovi ought to be settled traditionally, not in the tribal court.

Land use that involves several Hopi villages creates an inter-governmental coordination problem, as illustrated by easements to build power lines. We were told that permission for a power line across land belonging to a traditional village must be obtained from the kikmongwis and the leaders of the affected clans. Furthermore, the tribal council expects to discuss and approve such projects when several villages are affected. In addition, the BIA officials at Keams Canyon usually try to mediate between tribal authorities and the

33. Numkena, J., writes :

The Tribal Court, Feb. 28, 1989, awarded tract of land to Petitioner/Appellee [Sulu] and issued an injunction enjoining Patsie Ross from moving into her mobile home. Ross appealed. And she moved personal belongings into the mobile home (on or about July 16, 1990) and began nightly occupancy of the mobile home. According to witnesses she moved into the mobile home on August 11, 1990, and moved a camper trailer next to the mobile home in violation of the court order. Sulu asks the court to find her in contempt, and Defendant/Appellee moves for an interim order to be permitted to move into the mobile home (on June 2, 1989).

34. An article by E. Beaglehole (1935) is referred to as a "misleading law review article" by the defendant's counsel.

35. Ragsdale (1987).

power company. Of course, the clans and villages want compensation, which involves investigating and documenting claims that often overlap, and appraising land for which no market exists. In general, Pueblo peoples are uneasy about such easements, which give outsiders some claims on reservation land and which seem like a desecration to some people. (The Hopi village of Walpi remains without electricity because it refuses to connect to the grid.)

It is useful to compare these descriptions of Hopi to the reports we were given at other Pueblos. We were told that in Acoma the tribal council assigns land to families based upon advice given by one of fourteen clans. As long as the family stays, the assignment remains valid. If a change in occupancy is contemplated by a family, the clans have to be informed. —FK. It is apparently possible for families to "assign" land to other tribal members without council approval, but never to non-members.³⁶ Before such a "sale," the land must be surveyed, everyone in the family must agree, and the sale must be done in a realty office. —CS. In other Pueblos we were told that the council assigns land to families.³⁷ In Jemez Pueblo we were told that the moieties influence the assignment more than the clans.³⁸ The accounts of revocation of assignments, which we do not repeat here, were similarly complex.³⁹

5. Future of Indian Land

Earlier we contrasted reservations encompassing a tribe's traditional homeland, where customary law allocates much of the land to individuals and families, with reservations of relocated tribes where tribal government allocates much of the land. The allocation of tribal land is a source of intense politics and bitter dispute on some reserva-

36. The same rule was attributed to Isleta by WBJ. However, WBJ and CP assert that land and houses at Santa Ana "I" cannot be sold or given by assignees to anyone, even members. In the more recently established settlement of Santa Ana "II", the rules are less strict (note 39, *infra*).

37. StB speaking of San Juan, DY speaking of Jemez, and PBN, speaking of San Ildefonso. Tesuque Pueblo assigns only for the assignee's lifetime, after which the family must renew the application, PS.

38. "As to land, the moieties are more important than the clans. Moieties are strong, there is much unwritten law within the moieties", —DY speaking of Jemez Pueblo.

39. In San Juan, "a house may stand empty but land must be worked to avoid revocation after five years", —StB "Tesuque Pueblo does not apply revocation by the tribe because the assignment is for a lifetime". —PS. At Jemez, revocation is "not a problem because few go and the property is kept in order". —DY San Ildefonso terminates an assignment if the assignees move away and neglects the place ("the bills are not paid") or if there is no surviving family. "I have seen three or four such cases in thirteen years". —PBN. Santa Ana Pueblo has an older village ("Santa Ana I") with family-assigned, unalienable, and non-revocable assignments of houses used for ceremonial purposes. Similar, but not identical assignment rules, apply to Santa Ana II, which is the newer settlement on the banks of the Rio Grande that includes land bought from Spanish settlers. CP Kaibab Paiute enforces revocation without fixed periods of neglect. —CB; etc.

tions. Some allocations are so vague and uncertain that no one will risk investing in improvements. We found many examples of uncertain property rights inhibiting economic development.⁴⁰ Usually the tribal council must decide whether to permit a business to acquire land and begin operating on a reservation. Business on the reservation, especially if run by outsiders, can have difficulty obtaining land or permits. Some tribes do not permit business by outsiders on the reservation (e.g., Sandia Pueblo, which is near Albuquerque). In San Felipe Pueblo, everything depends on what the kind of business it is. Under certain conditions, in Santo Domingo Pueblo an outsider may get a permission from the tribal council. —RH.

Uncertainty and restrictions on transfer block loans for improvements of property. To illustrate, in Jicarilla Apache land is assigned to members, but banks are reluctant to take an assignment as security on a loan. Banks, consequently, advise Indians not to build a house but, instead, to buy a trailer or mobile home. Beside banks, there is a tribally owned Credit Commission that offers low interest rates. These movables can secure a loan. If the loan is not repaid, the bank repossesses the trailer or mobile home in order to sell or rent it to other tenants. Thus a bank may become an outsider "living" on tribal land and subject to tribal law. The shortage of housing, partly caused by the lack of mortgages, prompts the federal HUD Program to build public housing for the reservation. Public housing on the reservation suffers from the same notorious defects as public housing elsewhere. Both trailers and unimaginative HUD settlements can spoil the appearance of a magnificent landscape.

While uncertainty inhibits development, clarity and security promotes investment in improving the land. Clarity and security depend upon relationships between politicians, courts, laws, and customs. Our observations suggest that customary land rights increase security of title by circumscribing political interference with property by tribal governments. With the passage of time, social norms and laws regulating property on the reservation should become more clear and secure, thus removing an obstacle to investment.

What is the future of Indian land and land law? The population on the larger reservation is growing rapidly, while improved roads and communications increase access. Population growth and urbanization put pressure on the tribes to develop law and administration to oversee development. Some reservations, such as Warm Springs, have sophisticated officials who attempt to plan development and land use. We were told that the Hopi town of Moenkopi has a complete zoning system and comprehensive plan (but "there is not

40. For example, an Apache who wanted to start a business in White River would be fearful that the tribal council might not grant permission, or that the council might interfere if the business became profitable.

enough money to go on with it." —EN). Other reservations, such as San Xavier, are being overwhelmed by haphazard and intrusive developments.⁴¹

Even so, the larger reservations seem empty and unspoiled relative to neighboring land occupied by non-Indians.⁴² As America gets more crowded, the relatively undeveloped reservation land draws envious stares from outsiders. Land is what Indians have that outsiders want the most. Three hundred years of history have been marred by theft, embezzlement, and unfair acquisition of Indian lands. Much allotted land on some reservations has been sold to non-Indians who own it in freehold.⁴³ Other allotted land whose sale is prohibited has been leased to non-Indians. Such sales and leases, which are bitterly resented by tribal members, are directly encouraged by some BIA officials and indirectly encouraged through federal inheritance rules.⁴⁴

The old tradition of unfair transfers persists to this day. A review of the provisions of the Alaskan Claims Settlement Act by the Native American Rights Fund concluded that "The effect on the Native land base and tribal existence could rival the disaster of the allotment era."⁴⁵ In the Mexican state of Sonora, the forcible occupation of Tohono O'odham houses by Mexican homesteaders has drawn international attention. We will give a detailed example of an aborted lease to show how contemporary theft of Indian land proceeds.

Only a few strands of barb wire separate the San Xavier District of the Tohono O'odham reservation from the southern edge of the city of Tucson. While Tucson rapidly paves its open land, most of the San Xavier reservation is not being used commercially, even for farming. The reservation represents an obvious opportunity for real estate de-

41. Here we refer to "Mission View Estates," which is a trailer park that desecrates the desert and brings more non-Indians onto the reservation than there are Indians in San Xavier village. The Indians, who express hatred and bitterness towards "Mission View Estates," could easily block its expansion or eliminate it altogether through zoning and land use ordinances.

42. This is particularly true of the Rio Grande Valley with its sixteen Pueblos. When driving through northern New Mexico, it is easy to tell where you are: If the land is unoccupied, you are on Pueblo lands. The reason is that Pueblo law follows the European principle of the "closed village," according to which you may not settle between the towns; see discussion in Fikentscher (1997c), 98-102.

43. This is apparently true of large tracts on the Flathead Reservation.

44. San Xavier's allotted land cannot be sold, but the inheritance rules applied by federal authorities follow the American pattern, not the Tohomo O'odham pattern. Consequently, as owners die intestate, the land is divided among close kin. In this way, San Xavier's allotted land has been broken into minute parcels often owned by people who live off the reservation. These are the people who lease the land to developers for a trailer park.

45. See NARF Legal Review, "Highlights of Indian Legislation in the 99th Congress: 1991 Legislation," vol. 12, No. 1, Winter 1987, pages 1-3. A Congressional amendment has somewhat ameliorated the effects of the original Act. See "Alaska Native Claims Settlement Act Amendments: How the Debate Ended," Indian Report, Friends Committee on National Legislation, 1-29 Spring 1988, page 5.

velopers. Santa Cruz Properties, Inc., a California land development company, has proposed a 99 year lease to develop almost one third of the reservation and locate over 100,000 non-Indian residents there. The Bureau of Indian Affairs urged the tribal government at San Xavier to accept this proposal. Most of the land has been allotted to individuals, but a substantial block belongs to the tribal government. The San Xavier District Council agreed to lease the tribal government land to Santa Cruz Properties, and recommended that individual allottees add their property by signing the lease.

In the end, the development project came to nothing. To make a long story short,⁴⁶ tribal officials favoring the development lost an election and their successors repudiated the initial agreement with Santa Cruz Properties. In addition, some allottees never signed the lease and others who signed it changed their minds and attempted to withdraw their allotments. The developer could not proceed under these circumstances.

These were bold acts by a people intimidated by outsiders for decades. The San Xavier community has endured years of worry and tension over this project, and Santa Cruz Properties, having spent several million dollars on plans and politics, apparently will come away with nothing. The failure of the project drags in its wake charges of bribery and breach of duty directed at everyone concerned—the developer, the tribal government, the BIA, and individual allottees. The proposed lease to Santa Cruz Properties looks like a modern version of an old story, specifically, government sponsored theft of Indian land and the planned destruction of an Indian community.⁴⁷ Instead of the cavalry, the path is cleared for a modern developer by well-paid experts such as lawyers, city planners, and professors. (A University of Arizona anthropologist wrote the “human impact” study for Santa Cruz Properties to justify this project.) In order to survive as a community, the San Xavier Papagos need distance from the disintegrating influences of Tucson. Instead of inviting Tucson onto the reservation, they need a buffer between themselves and the city. The draft of the proposed lease is full of holes and the water rights alone might be worth more than the total price offered by the developer.

Many tribes have responded to outside intrusions by raising political, cultural, and physical boundaries in order to create enclaves. Some tribal governments are buying back allotted land, so that the tribe controls all land inside the reservation. For example,

46. The story, which is not entirely finished, has been reported in detail in the *Papago Runner*, which is the tribe's newspaper, over more than five years.

47. A similar, troubled story can be told about Tesuque Pueblo in recent years, JMcC. Land is the tribe's greatest resource. So-called development can easily result in non-desirous land uses. The most extreme cases of which have been called “environmental racism;” see also footnote 56, *infra*.

the Warm Springs tribe has an informal right to make the first bid on allotted land when it is offered for sale, and the tribe has been steadily shrinking the amount of allotted land on its reservation. Some Pueblos have adopted harsher measures. Santa Ana Pueblo ("Santa Ana I", not the more recent settlement down at the Rio Grande) is closed to outsiders all year round except for a feast day in August, and a member who marries a non-member, whether male or female, has to move out. In general, access to reservations by outsiders will probably diminish in future years.

B. Theft

A tribe with distinctive forms of property will have distinctive forms of theft. To illustrate, consider a Navajo judge's distinction between borrowing and stealing:

If A borrows the car of his brother B without B's knowledge or permission, a white policeman would say, it's stolen. But A would say, "It's my brother's", and a Navajo judge would accept this defense." Similarly, giving the use of a chattel to someone without asking a price is regarded by Navajos as like borrowing among the family, so no compensation should be given in case of loss or damage. —WT.

We were unable to survey tribal rules of theft in a systematic way. Instead of a review, we will discuss a significant and unusual case we encountered. Although this case began in 1857, a contemporary Acoma court official knew its details. According to CS, the mission church in Acoma houses a famous painting of San Jose, the patron saint of the pueblo, which was used for healing ceremonies. In the 19th century, the pueblo of Laguna borrowed the picture for a ceremony, and when the ceremony was over, the picture was not returned. Laguna claimed that possession amounted to ownership in the circumstances. To make matters worse for Acoma, the documents of title for the painting, which originated from the King of Spain and his Viceroy, were stolen from Acoma and the thieves demanded six hundred dollars for their return. Acoma asked the New Mexico courts to order the painting and documents returned. The case reached the Supreme Court of New Mexico during the January term of 1867. The Supreme Court upheld the trial court's decision that the property must be returned and ransom could not be extracted from the true owners.⁴⁸ This one of the few cases that we

48. Justice Benedict, writing for the court, concluded with these remarks:

"Having closed our review of the merits of the case, we may be indulged in reflecting, that of the highly interesting cases we have had to consider and determine during the present session, this is the second in which this pueblo has been the party complainant. The first keenly touched the religious affections of these children of the Rock of Acoma. They had been deprived by a neighboring pueblo of the ancient likeness in full painting of their patron or guardian saint, San Jose. However much the philoso-

encountered where a state court applied the common law of an Indian tribe. Later we discuss the importance of the principle that state courts can apply Indian common law. (VI., at 549ff.).

C. *Repossession*

Indians often borrow from lenders off the reservation and secure the loan with moveable property such as cars, trucks, tractors, or mobile homes that is kept on the reservation. When the debtor defaults, the creditor faces the problem of repossessing property on the reservation. Such situations cause friction between reservation officials and off-reservation businesses. To illustrate by a recent case from Pojoaque Pueblo, the bank that financed the purchase of a car by a tribal resident retained a car key. Alleging default on the loan, the bank drove the car off the reservation and repossessed it. The debtor sued in the Pojoaque tribal court, claiming that repossession on tribal land is illegal. The court ordered the bank to return the car and pay the buyer \$ 600 for damages.

As illustrated by this case, tribal code or customary law often forbids repossession on the reservation without consent of the debtor. For example, San Felipe Pueblo requires all "bill carriers," "repossession claimants," and "vendors" from outside to first "talk to the governor" before trying to collect from tribal members. Disregarding this rule means committing trespass. However, "we don't want to have a sanctuary here, we only want to protect helpless citizens who might be taken advantage of by foreign creditors." —DS. In Jicarilla Apache, the chief judge explained that the tribal court has developed some rules for repossession:

- (1) Self-help of the seller is not permitted.
- (2) To repossess, a tribal court order is necessary.

pher or more enlightened Christian may smile at the simple faith of this people in their supposed immediate and entire guardian of the pueblo, to them it was a pillar of fire by night and a pillar of cloud by day, the withdrawal of whose light and shade crushed the hopes of these sons of Montezuma, and left them victims to doubt, to gloom, and to fear.

The cherished object of the veneration of their long line of ancestry, this court permanently restores, and by this decree confirms to them, and throws around them the shield of the law's protection in their enjoyment of their religious love, piety and confidence. In this case, the title that Spain had given this people, confirming to them the possession and ownership of their lands, and the rock upon which they have so long lived, was found in the hands of one professing to be of a better-instructed and more civilized race, and turned by him into the means of extortion and money-gathering from the unoffending inhabitants. It is gratifying to us to be the judicial agents through which an object of their faith and devotion, as well as the ancient manuscripts, that is the written evidence that established their ancient rights in their soil and their rock, are more safely restored and conferred to their possession and keeping."

(3) The court will try to make the employer of the buyer pay and deduct the money from the buyer's salary on a reasonable installment basis.

(4) The purchaser cannot legally waive her or his rights to go to court in case of repossession.

(5) If repossession concerns a car, and the car is neither paid nor insured, the tribal court will impound it.

(6) Jicarilla law does not follow *Jim v. C.I.T.* (See n. 122, *infra*) in these cases, but will assume jurisdiction and decide under the *lex fori* rule (see VI. *infra*).

These rules from Jicarilla illustrate a preference that tribal officials stated explicitly at Santo Domingo Pueblo. The tribe will "defend its territory" against repossession attempts, but it will also exert pressure on tribal members to pay their debts owed to outsiders. The policy of tribal courts towards repossession is protection combined with admonishment. Our impression is that outside creditors fare badly in the disputes with debtors in tribal courts. We return to this topic in the section on contracts.

D. Inheritance

Anthropologists have found that inheritance among tribal people typically follows, not the will of the decedent, but patterns prescribed by custom ("matrilineal" or "patrilineal," primogeniture or ultimogeniture, etc.). The customary patterns of inheritance have disappeared from some reservations and remain strong on others. Among Indians, customary inheritance law often conflicts with two alternative principles. On every reservation that we visited, officials report that most people die intestate. An Indian who dies intestate presents officials with a choice between applying tribal customs or state intestacy laws. Alternatively, an Indian may make an oral or written will, which presents officials with a choice between enforcing the will or following custom. An Indian official who decides among custom, wills, and state inheritance laws faces another obstacle with respect to land: the trust responsibility of the federal government requires the Bureau of Indian Affairs to assure legality of the inheritance.

Teaching materials used by the National Indian Justice Center in training sessions for tribal judges suggest how to reconcile custom and statute for inheritance:

Many tribal courts, however, have attempted to follow tribal customary probate law within the framework of the tribal probate codes. Many tribal probate codes provide enough flexibility for the tribal customs. Some tribal codes have attempted to codify tribal customary probate procedures such as the following:

"INDIAN CUSTOM: DISTRIBUTION OF INDIAN FINERY AND ARTIFACTS."

"Notwithstanding the provisions of this code relating to descent and distribution, the surviving spouse or any other surviving next of kin may distribute any Indian artifacts and finery belonging to the decedent in accordance with the customs of the confederated tribes prior to the initiation of administration of the estate."

In this example, the family of the deceased can follow custom in distributing small items belonging to the deceased without raising issues concerning the tribal code or the federal trust responsibility.

We found that tribes differ widely in their inheritance practices and rules. On some reservations, probate and inheritance of real property is handled by BIA officials, who apply state law. This is apparently the case at the Gila River Indian Community (Pima-Maricopa). At Warm Springs, the tribal member (EP) who is responsible for the BIA's probate division asserted that state law is applied exclusively. In his opinion, the tribe has no surviving inheritance law distinct from Oregon state inheritance law. In the San Carlos Apache Reservation, we were told that the reservation lacks its own code of inheritance and probate and thus uses Arizona state law "as a guideline."

At the other extreme are the traditional Pueblos. In general, intestate inheritance differs widely in the Pueblos, although outsiders have difficulty reaching confident judgments about legal details.⁴⁹ Hopi inheritance law provides an example. Ragsdale says that upon the death of the household's "senior woman" the right to use the land will go to other females of the household, and if there is no female to inherit the usufruct rights, then the land will revert to the clan

49. The following are examples of assertions made to us:

For intestate inheritance, much depends on patri-, matri-, bi- or ambilinearity. The Pueblos of Taos, Pojoaque, Sandia, Santo Domingo, San Felipe and Nambe were described to us as matrilineal, Pojoaque progressing on the way to ambilinearity. A widely used rule seems to be that the spouse inherits all, and upon his or her death all the children inherit, with equal shares (established for Nambe Pueblo and San Felipe Pueblo). But there are different rules for houses and farms.

All Pueblos we visited say they respect the will of the deceased, whether oral or written (which is advised). Apparently every proof in probate is admitted, such as witnesses who live in the house or are neighbors (Isleta, Santa Clara, San Ildefonso, Santa Ana, San Juan; Cochiti Pueblo requires the presence of the extended family). But land, houses, and personal property cannot be "assigned to outsiders." A young child that is taken out of the Pueblo by the surviving non-member parent who remarries outside has no title in land, JS. The distribution of the intestate's estate follows various patterns. Acoma allegedly follows matrilineal ultimogeniture because "the youngest daughter lives longest." In the Tewa speaking Pueblos, "the family" are the heirs, and in San Ildefonso Pueblo the oldest child "will make a decision" about distributing the intestate's estate. If no family survives, the property goes back to the tribe. In Tesuque Pueblo, if the family quarrels, the council may say: "Nobody gets the land or house" and reclaim them "for the tribe," with only the personal property going to the heirs. The same assertion was made about Santa Ana, a Keresan speaking Pueblo. Jemez, the only Towa speaking Pueblo left, follows this order: written or oral will, the surviving parent, the oldest child, the tribe.

(Ragsdale, at 384.) This view coincides with what a Hopi judge told us. According to him, the general rule of Hopi common law is that the house goes to the household's oldest daughter. If no daughter is in the house to inherit, the house goes to the clan, where the senior woman will decide who should inherit it, possibly after consulting the elders and the kikmongwi (village head).

An interaction between custom and code prevails on the Navajo Reservation. The Navajo Tribal Code recognizes wills to the extent that custom recognizes them, or when properly witnessed. The code reads

A will shall be deemed to be valid. . . if the will was made in accordance with a proved Tribal custom or made in writing and signed by the decedent in the presence of two witnesses who also sign the will. Title 8, No. 3, Navajo Nation Code.

The Navajo custom with respect to wills is stated by the tribal court as follows:

It is an established custom, recognized in case law, that a Navajo may orally state who shall have his property after his death when all of his immediate family are present and agree that such a division will be honored after his death. We know of no other custom in this respect. We hold, therefore, that unless all of the members of his immediate family are present and agree, a Navajo cannot make an oral will. Since the wife and children were not present when the deceased made the alleged oral will to the petitioner, we hold it was invalid. *In the Matter of the Estate of Joe Thomas*, 5 Navajo Rptr. 232 (1987).

Notice the court refers to the "immediate family." The Navajo courts no longer require the presence of the *extended* family, which, due to modern mobility, may live scattered about.

Tribes differ widely concerning oral wills. In Jicarilla Apache, we were told that oral wills are not recognized. To be recognized, a will must be written on paper and witnessed by two persons who are not related to any beneficiary. (This statement much simplifies reality.⁵⁰) —CV. In San Felipe Pueblo, we were told that oral wills are permitted, provide they are witnessed, and the witnesses are usually

50. We were told that restrictions apply to wills. For example, the married testator can only will away his strictly personal belongings, his prenuptial property, and one half of the communal property. Furthermore, the rule against oral wills has an exception. We were told that an oral will is permitted if the testator makes a "death bed utterance," because a dying person can see things clearer. However, witnesses have to be present, and the beneficiary cannot be the only witness. On the whole, wills among Jicarilla Apache are not frequent. Maybe this is an effect of the traditional taboos and fears surrounding death prevalent among many Athabascans. Under the old traditions, a person's home and all material possessions would be burned, so the utility of a will was rendered moot. This shifts the weight all the more on the rules of intestate inheritance.

members of the family.—DS. In Pojoaque, very few wills occur, but oral wills are recognized, even without a formalized body of witnesses (extended or nuclear family, household, etc.). —FD. In Cochiti Pueblo, the extended family has to be witness of an oral will. —Anonymous. Santo Domingo Pueblo honors the oral tradition, both in contracting and in willing. —RH. “The oral tradition is strong, people have the law in them, they know how to live it.” —BSt. Matrilineal intestate succession according to the tribal law of inheritance seems to prevail in Sandia Pueblo, where a judge knew no cases of oral wills. —QC.

The inheritance process was described to us in some detail at the White Mountain Apache reservation, although our understanding remains imperfect. The tribal court, not the BIA, apparently handles probate and appoints an administrator. Most dispositions of the deceased's chattels are made by families without legal dispute. These dispositions presumably follow customary patterns. (As always, customary law prevails the most where the stakes are not large enough for anyone to invoke statutory law.) To illustrate, many rodeos and powwows include a “give-away” of goods by the surviving members of the family in memory of a recently deceased person. In times past, the goods given away actually belonged to the deceased person, but now the relatives of the deceased usually buy goods for the occasion such as candy, blankets, or even horses.

There is no will in the great majority of deaths at White Mountain. (White Mountain Apache thus resembles Jicarilla Apache, (see *supra* at note 50). Although we heard contradictory testimony about family and clan patterns of inheritance and descent,⁵¹ it seems that intestate property goes to the mother's family, or rather, it stays with the mother's family. —ML. The matrilineal pattern of inheritance creates a problem when an Apache girl marries a boy from a patrilineal tribe. The fear is that after her death the boy's family might assert a claim over her land on the Apache reservation. We were told that Apache families are encouraged to avoid such conflicts by asking

51. Some said descent is matrilineal, some said patrilineal, and some said bilineal. Four clans (Bear, Eagle, Roadrunner, and Butterfly) were described to us, but we have little sense of how they function.

Every legal system that permits willing away property must provide for rules against unreasonable wills: At least the nuclear family should not be overlooked by the testator. In all Pueblos we were told that there is recourse to the tribal council when a will neglects this economic necessity and familiar decency. The tribal council may declare unreasonable stipulations of the will invalid. Nambe Pueblo has a code that provides for this remedy. The heirs have to go to court, asking for a reduction of what was willed away. The court will invalidate (1) all unreasonable clauses, for example those which take away from the heirs their economic basis of sustenance, and (2) all illegal provisions, for example concerning tribal land (which cannot be given to outsiders). “Courts can thus change a will”—PT.

the girl to go and live with her husband's people and join the patrilineal system.

If there is a will at White Mountain, the administrator is asked to carry it out, unless it contravenes tribal law. If the will contravenes tribal law, especially with regard to assignments or leases of land, the tribal council may set it aside or adapt it to accord with tribal law. In doing so, the tribal council will respect the testator's wishes as much as possible. To illustrate, consider the case of an Apache father who willed his leased land to his deaf daughter. In a matrilineal society, land passes from mother to daughter. Thus the father in this case was attempting to avoid the customary prescription, bypass his wife, and give the land to their daughter. The tribal council did not regard this will as binding because it violated customary law, but the council took the document as advisory and decided that there was good reason to bypass the wife and grant the lease to the daughter. —GG.

We found a special legal institution at San Felipe Pueblo that serves the economic purpose of a will without being a will. When a person becomes very old, he or she may call together the family and declare that she no longer wants to own anything, which implies that her life is ending. In Pueblo property law, this declaration transfers everything to the family, including land, house, and chattels. Since the elderly person owns nothing, her family takes care of her. ("Therefore, such a declaration is dangerous because the person owns nothing anymore, but it is used by others." —ET.) This declaration fits with the view that people take their belongings into themselves as part of their personality. Just as people internalize their belongings in their life, so they externalize their belongings at death.⁵² This legal institution combines aspects of transfer of property *inter vivos* and the oral will. Perhaps it could be called an *inter vivos will* by declaration of civil death.⁵³ In any case, it illustrates the ingenuity

52. "Because everything we own, house, land, car, etc., is in a way part of our self, and we are in these things." — ET. Therefore it makes sense, for example, to bring the cars to church for a blessing. People are in those things. "We live in house, drive in cars, etc. We don't regard houses as a matter, houses are parts of ourselves, and we say, we don't own anything." —ET.

53. A "civil death," which arose historically from the vows of a monk or nun or as a punishment for wrongdoing, implied that the person ceases to be a legal person and loses the rights of a person. The old legal adage "*mobilia ossibus inhaerent*" (chattels dwell within the bones, that is, their legal treatment follows the law applicable to the person who owns them) shows that the "identity" of a person and certain kinds of property is also recognized in traditional European law.

We asked whether the declaration is a transfer of property now, or a promise to cede the property in the future, and whether this distinction is made in legal practice. We were told that the promisor loses possession and the mental side of property right away and has, therefore, no rights in property anymore. It is a transfer of all property *uno actu*, not a promise to transfer single pieces of property.

of tribal people in inventing legal institutions that elude familiar legal categories and terms.

E. Environment

Indians sometime describe themselves as the "keepers of the land," possessing special knowledge and obligations towards nature on "this island called North America." Here are some examples that we encountered of how these sentiments affect behavior. A San Carlos road building crew was brought to a halt by a bird's nest in a tree standing in the road's path. Construction did not resume until a non-Indian cut the branch and carried the nest to another tree. Similarly, a hawk's nest temporarily halted a Nishga logging crew that had contracted to clear-cut a slope in British Columbia. The crew reluctantly cut down the tree when the boss said that no one would receive any pay for their work unless the slope was completely cleared. The White Mountain Apaches built a ski resort on the second highest mountain on the reservation, instead of the highest mountain which was better for skiing, because of the latter's spiritual significance.⁵⁴ A bear "went crazy" and began killing livestock in a remote area of the Navajo reservation. Navajos are reluctant to kill a bear for religious reasons, so after spiritual means failed to deter it, they hired a non-Indian to kill it.⁵⁵

These examples make us suspect that distinctly Indian practices towards nature work their way into law. We were unable to pursue this point very far, but we can offer some examples and suggestions for future research. Several reservations have tribal companies for logging and road construction. We would like to investigate their practices and rules. We would also like to investigate the mining contracts of several reservations, and the protests surrounding them, notably at Hopi and Navajo. We were told that Santa Clara Pueblo fines outsiders who are caught dumping waste on tribal land,⁵⁶ and that Santa Ana Pueblo has received legal help from the BIA to solve the problem of pollution of its main arroyo by a chemical plant.

54. Ben Chavis pointed out to us that the highest mountain also contains nesting sites of the spotted owl. The Apaches consider owls to cause bad luck, and the federal government protects the spotted owl as an endangered species. For environmental issues on reservations, see, e.g., Haner (1994).

55. We heard much the same story at Zuni:

"Zuni won't kill a bear, a porcupine, a badger, or a mountain lion, because they are our relatives. Not even Zuni police would do it. If necessary, they get a white from Gallup to do it." — anonymous Zuni.

Indians do not think that many of their obligations towards nature fall upon non-Indians.

56. New Mexico police bring the perpetrators before the Santa Clara court. A much broader issue concerns undesirous land use in Indian country, for example the dumping of toxic, nuclear, or otherwise hazardous waste: see Sitkowski (1995); Collins & Hall (1994); see n. 47 *supra*.

Hunting and fishing are important sources of sustenance and income, as well as a spiritual link with the past. The tribes have the right to regulate hunting and fishing on their reservations, and many Indians have special hunting and fishing rights off the reservations by virtue of historical treaties. Modern conditions, especially the confinement of Indians to reservations and the rapid growth in the non-Indian population, demand far more restraint in hunting and fishing than in times past. Most tribes have responded by enacting a code and creating a fish and game department to administer it. These codes and their actual administration are a promising place to look for distinctively Indian laws and practices concerning the environment.

For example, we were told that the Blackfoot Indian fish and game code requires members to make use of the entire animal after killing it. Wasting any part of an animal, as trophy hunters do, is a crime on the Blackfoot reservation. Perhaps tribal law or its administration in practice distinguishes between hunting for sustenance, sport, or religious purposes. Finding distinctively Indian law and practices, however, may require ingenuity. We interviewed the head of the Department of Fish and Game at the White Mountain Apache Reservation, who is a tribal member, a biologist, and a vigorous administrator. The Department looks like any well-organized state office that one might encounter off the reservation. Our interview did not reveal anything distinctively Indian about its practices.⁵⁷ Similarly, we were told that hunting seasons used to be determined by the moieties in the Pueblos, but now some Pueblos follow New Mexico's definition of hunting seasons.

F. Family Law

Indian families differ markedly from non-Indian families. We expected the law to reflect this difference and we were not disappointed. We will discuss marital law, beginning with the making of a marriage, and then consider some of its possible consequences. Everywhere the tribal judges and advocates gave us thoughtful, circumspect answers that were grounded in their experience, but the reported rules may seem confusing and inconsistent to the reader. The reader should bear in mind that practices differ from place to place even among neighboring peoples like the Pueblos, and in any one place people dispute and disagree about law. To illustrate, Pueblo tradition and religion typically resist divorce, yet different Pueblos

57. According to him, hunters on the reservation are severely restricted in the number of animals they can take. Tribal members pay a low fee for hunting permits on the reservation, whereas non-members pay far more. The tribe enjoys substantial revenues from fees paid by outsiders to hunt exotic species like elk or buffalo. The tribe has recently given a member permission to trap wild horses, which have multiplied enough to create a nuisance.

and different legal authorities in the same Pueblo apply this principle differently.

1. Marriage

Custom and law in America traditionally distinguished sharply between being married and unmarried, with marital status determined by whether or not a person passed through a marriage ceremony. If a couple flouted custom by cohabiting without a ceremony, the protection of marriage could be extended to the women or her children by ascribing a common law marriage. In recent years, however, changes in behavior have eroded the traditional dichotomy. Many couples form long-run relationships, cohabit, and feel that they owe some of the obligations of marriage to each other, but they reject enough of the obligations of marriage to prevent them from marrying. Because of these near-marriages, the fit has worsened between social practice and the married-unmarried dichotomy. Perhaps Americans will eventually adopt a three-way distinction: single, unmarried partners, or married.

Similarly, the married-unmarried dichotomy fits poorly when applied to Indian tribes. Many tribes mark various stages in life with traditional ceremonies, such as the elaborate and lengthy Apache "sunrise ceremony" for girls attaining puberty. Some Pueblos such as the Hopis have important traditional ceremonies for marriage,⁵⁸ but most of the tribes that we visited do not. Even tribes like the Hopis have many couples who consider themselves married for most purposes, even though they have not passed through the marriage ceremony. Many Indians consider people married when a man and woman begin living together publicly as a couple. Thus a couple may be considered married in a matrilineal society when the man goes to live with the woman's family, or vice versa in a patrilineal society.⁵⁹

Marriage has significant legal consequences for duties owed to children, rights to inherit property, and rights to receive welfare

58. After describing such a ceremony, PtS hastened to point out that Hopis have a distinctive understanding of the meaning of marriages and its obligations. The significance of the ceremony is lost without an understanding of Hopi marriage. For a general anthropological account of kinship, marriage and gender, see Kottak, (1994), 199-238; Harris (1995), 119ff., 190ff.

59. The polar categories of "matrilocal" and "patrilocal," or "matrilineal" and "patrilineal" may confuse, rather than clarify, the conditions of Indian life. Indeed, many Indians whom we interviewed had difficulty applying these terms to their own tribes, or the terms were applied in contradictory ways by different people. To illustrate, White Mountain Apaches variously described themselves as keeping names and residences according to the wife's family or clan, the husband's family or clan, or personal preference. Contrary to some written authorities, in this context we heard Keresan speakers describe their Pueblos as matrilineal, Tewa speakers describe their Pueblos as bilineal, (Pojaque, Tesuque) or as patrilineal (Santa Clara, San Ildefonso), and Taos (Northern Tiwa) as well as Sandia (Southern Tiwa) their Pueblos as matrilineal. For details, see Eggan (1950, 1994); cf. note 49, *supra*.

assistance (Aid For Dependent Children or "AFDC"). Consequently, legal officials want definite criteria for determining marital status. The absence or disuse of a marriage ceremony creates a problem for judges who must apply such laws. An Acoma judge told us:

There was a couple in Acoma whose marriage was a common law marriage, if any. The partner who claimed to be married said that her mother and sisters had blessed the union with prayers. It turned out that these prayers were spoken in English. Still the marriage was held valid. In Zuni, prayers held in Zuni would be required. The Zuni common law marriage is different. —FK.⁶⁰

Published Navajo court records have many cases that address the question of marital status. A Navajo judge summarized these cases by asserting that a "Navajo common law marriage" must meet three criteria: consent, cohabitation, and publicity.

The phrase "common law marriage" causes uneasiness among some Indians. Often, "tribal marriage" is preferred.

"If you talk of a common law marriage in English or American common law, it's almost a denigration. Not so in Acoma." —FK.

A Hopi judge avoids the term "common law marriage," and, instead, says "traditional marriage" or "customary marriage." The Rio Grande Pueblos use similar terminology.

In Pojoaque, we were told that a "tribal marriage," is part of Indian culture and should not be confused with the "common law marriage" which is an "Anglo word, an Anglo concept."—FD. In Nambe, we were told that "tribal marriage" and "tribal divorce" are recognized, but the common law marriage in the Anglo sense is not recognized. —PT.

Many Indians belong to churches that prescribe marriage ceremonies. To illustrate, the Tohono O'odham are mostly devout Catholics, but they have resisted church weddings and the sacrament of marriage. An anthropologist who married into the tribe explained this reluctance, paradoxically, by religious devotion. According to his account, O'odham expect to go through several marriages before settling into a permanent union. Being devout Catholics, they fear the harm that might result from the priest making their first marriage indissoluble.⁶¹ They fear the priest's displeasure over the absence of a marriage less than the consequences of a divorce after a church

60. We were told that the Zuni Tribal Council, which is the reservation's appeals court, tends to follow the customs and traditions of the Zuni nation in family disputes—SQ.

61. This fact was explained in detail to us by Robert K. Thomas, who was Professor of Indian Studies at the University of Arizona until his death in 1992. Professor Thomas was a Cherokee who married a Tohono O'odham. He has dictated a narrative concerning the early years of his marriage which Professor Cooter possesses.

marriage. Catholic officials, however, continue applying pressure for the Tohono O'odham to marry in church.

Aside from Catholic priests, some Pueblos urge church marriages. At San Felipe Pueblo we were told that the *fiscales* (church officials) will try to convince those who want to live together to marry. The marriage will be held at a favorable time of the year, when "the flavor is there" as it is said in the local tradition. Only after marriage in church is the couple regarded as married. —ET. The facts are allegedly similar at Sandia Pueblo, where customs are old and strict. At Santo Domingo Pueblo we were told that authorities "probably" do not recognize tribal marriage because they will urge the partners to comply with the rules of good Catholic custom. —RH.

Tribal government officials also advise Indians to regularize marriage by having a ceremony. Navajo authorities would like a clearer criterion for marriage. The Navajo code of 1980 covered the formalities of tribal marriage. To achieve greater legal clarity, it discourages common law marriages and encourages people to have weddings before civil or religious authorities. Indeed, some Navajos say that the statute forbids courts from recognizing common law marriage. A similar policy was reported in Acoma, where the tribe has tried to discourage common law marriage.

Different criteria for marriage can be used for different legal purposes. To illustrate, we were told that, because Apaches cherish personal freedom, so the Jicarilla Tribal Council regards a couple that lives together without formal marriage as "unmarried," but the Jicarilla court applies marriage rules to the couple for the benefit of their children. —CV. Perhaps the American debate over unwed couples could benefit from such a perspective, which regards people as married for some purposes and unmarried for other purposes. The criterion is whether third party interests rely upon married status. Business law follows a similar criterion for the existence of a partnership or corporation.

Tribal courts will not enforce some important Indian customs regarding marriage. Traditional rules in tribes commend marriages between specified clans. In addition, traditional rules forbid marriage between people who belong to the same clan as a form of incest ("clan exogamy"). Clan-based restrictions on marriage have declined in influence or disappeared on most reservations. We heard of these rules being enforced informally in some case,⁶² but we encountered no litigation over clan incest.

Similarly, many tribes traditionally allowed a man to have more than one wife. In some circumstances, a man was encouraged or required to marry sisters ("sororal polygyny"). To illustrate, some

62. "The mother of a baby conceived through clan incest will be ridiculed among many Navajos." —WT.

tribes encouraged a man to marry his wife's sister after her husband dies.⁶³ In other tribes, sisters could demand that a man who married one of them should marry the others so they could continue living together.⁶⁴ We know of no case, however, where a tribal court recognized a polygynous marriage, and we know of a case in which the Navajo court refused to recognize such a marriage.⁶⁵ The distinctive Indian tradition of sororal polygyny may yet influence courts in subtler ways that we could not detect.⁶⁶

2. Divorce

Having discussed marriage, we now consider divorce. Tribal law regulates divorce through customary law and family law codes, which differs widely in the tribes that we visited. We can only identify a few patterns in this complexity.

In the tribes that we visited, customary law for dividing property on divorce often conflicts with modern concepts of equality, as illustrated by Navajo common law. According to Navajo court records, custom prescribes that the husband comes to live with his wife's family. Similarly, custom prescribes that a wife divorces the husband by leaving his belongings at the hogan's door. Thus the man leaves the marriage with what he originally brought to it, usually not much more than his clothes and ceremonial paraphernalia. Similarly, a man divorces a woman by packing up his personal effects— but nothing more— and leaving the house. One Navajo quoted a saying about the man's position in divorce: "The stone rolls out."⁶⁷

Similarly, we were told in Zuni that if the wife in a traditional marriage regards it as a failure, she

... packs his bag and sets it before the door. He may question this declaration of divorce by going to the tribal court, and

63. Hunn (1990) 204f ("levirate"). He also says that "sister" was used to refer to a sororal co-wife, and "enemy" to a co-wife who was not a sister.

64. A Cherokee man, RT, offered this explanation for why his grandfather was married to two sisters. Curiously, while sororal polygyny was favored among many American Indian tribes, other parts of the world allow polygyny but frown on the sororal form.

65. In the Matter of the Estate of: William Al Tsosie, 5 Nav.R. 261 (1984-1987), the defendant was married to two wives, so the first marriage was held valid and never divorced, though "completely separated," while the second marriage was deemed invalid for this reason.

66. For example, special rules of propriety may still apply to the husband and his wife's sister, who are possible mates. On a related but distinct point, many tribes accord a maternal aunt the status of "mother" with respect to her nephew or niece (in the Iroquois, Crow and Omaha kinship systems).

67. Quoted in David C. Johnson v. Hattie Johnson, 3 Nav. R. 9 (1980) No.A-CV-02-79, Court of Appeals, April 11, 1980.

from there to the Tribal Council, but the latter takes the traditional view which favors the woman. —SQ.⁶⁸

This customary division of property at divorce accords with the matrilineal, matrilocal conception of marriage⁶⁹ that a Navajo expressed to us:

In Navajo, a boy always marries into the girl's clan. I was raised by my mother and her elder brothers. My father, as much as I like him, is not my family. I'm a traditionalist."—WT.

A legal advocate at the San Carlos Apache reservation summarized child custody practices by saying, "The father is not family." —VS. We presume a similar view would prevail in most matriarchal tribes.

Tension between traditional matriarchy and modern equality can create confusion in the courts over the allocation of property and children at divorce. Some Navajo judges apparently interpret custom to mean that everything accumulated in a marriage, such as a car, furniture, mobile home, or house remains with the wife after divorce. For example, the Navajo appeals court upheld a lower court judgment that awarded an automobile to the wife on divorce by virtue of customary law. It rejected the husband's claim that custom discriminated on the basis of gender.⁷⁰ In another case, however, the court

68. As mentioned before (see *supra* n. 60), we were told that the Zuni Tribal Council, which is the reservation's appeals court, tends to follow the customs and traditions of the Zuni nation in family disputes, SQ.

69. In much of North America and elsewhere, tribal people associate hunting with males and agriculture with females. Thinking along these lines, the following functional explanation of matrilineal and patrilineal patterns in the southwest was offered to us:

Some Navajos believe that they were patrilineal in their "hunting time," that ended around 1600 A.D. When they acquired sheep and became pastoralists, the land grew more important, so they believe they became matrilineal. . . The Papagos who hunted in the desert were patrilineal, but they settled partly in the Santa Cruz River valley, there they became matrilineal.—WT.

70. Here is the crucial part of the decision:

This is a case in which a man and a woman, living in a common law relationship, have a dispute over the right to property and contributions in acquiring the property. The trial court rules in favor of the woman and held that she would keep a 1978 Ford Thunderbird car finding "that the tradition of the Navajo people dictates that a male give up certain property rights upon the dissolution of a 'common law' relationship."

On appeal the man raises the question, "May the court deny appellant his property rights solely on the basis of gender?" and he argues that the custom found by the trial court conflicts with the Equal Rights provision of the Navajo Bill of Rights. That right very simply states that "Equality of rights under the law shall not be abridged or denied by the Navajo Nation on account of sex."

The Chief Justice is unable to properly evaluate the file and matters in this case as he is required to do because of the inadequate and conclusory brief filed by the man and the lack of argument on the important question by the woman.

This case simply is not ripe for a review and the Court of Appeals will not consider the important matter of the Equal Rights provisions. . . .; —Paul Ration v. Mat-

awarded railroad retirement benefits solely to the divorcing husband, and further asserted that community property is statutorily established as the rule on the Navajo reservation.⁷¹ In yet another case, the divorcing husband apparently did not contest the wife's right to property, except for some Native American Church religious paraphernalia. In this case, the appeals court let the lower court's division of property stand without pronouncing an overall principle.⁷² The Navajo courts have found traditional grounds for ordering divorced fathers to make child support payments, although some Navajos deny that such obligations exist in Navajo tradition.⁷³

tie Robertson, 4 Nav. R. 15 (1983) [No. A-CV-20-82, Court of Appeals of the Navajo Nation, January 24, 1983; Judge Nelson J. McCabe.

71. "Community property law is based on the idea that a marriage is a community to which each spouse contributes by building it up, and to which each spouse has an equal right when it dissolves. . . Under Navajo law all property acquired by a spouse during the marriage is community property, *except* for property which is a separate gift or inheritance and *except* for the earnings of a wife while she lives separate and apart. 9 NTC Sec. 205. There is another statute which gives definitions of what is separate and non-community property. That part of the statute which deals with the husband tells us that all property owned by him before the marriage or property he obtains by gift or inheritance is his separate property and it is not to be counted as a part of the property of the community. 9 NTC Sec. 202(a)." —Kenneth Willie vs. Ada Willia, 4 Nav. R. 31 (1983) [No. CV-28-80, Court of Appeals of the Navajo Nation, May 2, 1983].

72. For example, in David Joe v. Winona Joe, 1 Nav. R. 320 (of Nov. 9, 1978) Native American Church paraphernalia had to be divided between husband and wife, but she apparently got the rest of the property. About the contested religious objects, the court wrote:

Plaintiff-Appellant first contends that the award of certain medicineman paraphernalia to Defendant was improper because he and not Defendant-Appellee is the medicineman. Yet, conflicting affidavits in file indicate that certain items were given and distributed to the children of the parties by Plaintiff-Appellant and that these items are being used by other individuals. Because of the unique nature of medicineman paraphernalia, some items can be used only by specific individuals who have acquired them in specific ways, and other items can be used by any member of the Native American Church. Some items may be handed down only by ritual and ceremony, and other items may be given from individual to individual. This court believes that these issues have been considered by the Shiprock District Court and that the District Court was in the best position to review the evidence and testimony and to award the paraphernalia accordingly. For these reasons, this Court is reluctant to disturb the ruling of the District Court. . . ."

73. This issue was raised in a case where the court's judgment read that the defendant-husband should "pay in the amount of \$50.00 child support to plaintiff." He claimed this was an order for a one-shot payment, whereas she claimed it was an order for a monthly payment. She prevailed, and the court remarked on custom as follows:

It is plain under the customary law of the Navajo People that a father of a child owes that child, or at least its mother, the duty of support. It is said that if a man has a child by a woman and fails to pay the money to support it, "He has stolen the child." In other words, the man who receives the benefit and joy of having a child is a thief if he does not share in the worldly burdens of taking care of it. This Navajo custom lays the ground rule of support, and the conclusion [in this case is] to be drawn from the principle . . .

— Allten Tom v. Irene B. Tom also known as Irene Johnson, 4 Navajo Law Reporter 12 (1983) [No. A-CV-26-82, Court of Appeals of the Navajo Nation] at page 13.

We believe that similar results would prevail on other reservations with matriarchal customs. For example, at the San Carlos Apache Reservation we were told about a case in which a divorcing husband prevented his wife from obtaining all of the property that they accumulated in the marriage, as prescribed in customary law, by burning it. The court found that, while the husband had the right to destroy his wife's property in case of her death, this right did not extend to divorce. He was punished. —VS. Similarly, in Hopi we were told that the old custom was "the wife owns all." —AP. The Hopi official said that the courts tried introducing aspects of communal property, but more recently "we returned to custom and the courts will no longer look for community property." —EN.⁷⁴ Another Hopi judge said that in disputes over child custody the rule is that children go to the mother's family, but this custom will be bent in the best interests of the child. —MT.

In Acoma, we were told about a distinctive process for settling divorce disputes. When a boy and a girl want to marry, her parents ask his parents to find a couple of sponsors. The sponsors try to foster stability in the marriage and reconcile disagreements between the couple. If reconciliation fails and the couple wants to divorce, a family gathering may be held at which the sponsors and others try to work out a plan for the affected people and property. Negotiations may take place all night, with an Acoma judge attending and approving the final plan. —CS, FK. A similar role for marital sponsors was described to us at Hopi.⁷⁵ The Pueblos, which differ so much in most divorce practices,⁷⁶ generally appear to restrain divorces by encouraging or requiring consultation procedures.⁷⁷

74. We heard the same report about property and custody after divorce at Hopi from more than one person. — DL, FK, SC. However, a judge who reported these facts, having left Hopi a few years ago, warned us that the situation is fluid and his information might not reflect current practice.

75. "In Hopi, 'divorces' are decided by the tribal authorities in the Hopi way. If no reconciliation is possible, the sponsors may separate the couple. Then the families of both partners may object. It is recognized by the Hopi courts that the relatives have an interest in sustaining or separating the marriage." —EL.

76. Here are some relevant comments by officials whom we interviewed.

San Juan Pueblo and Santa Clara Pueblo recognize both tribal divorce and separation (a legally recognized status of living separately), as well as divorces obtained outside the reservation. — StB, PT.

San Ildefonso Pueblo also recognizes tribal divorce and separation, and it recognizes divorces obtained outside the reservation after a tribal court hearing. — PBN.

Taos Pueblo and Tesuque Pueblo grant separations but not divorces. Jemez Pueblo refuses to grant tribal divorce or separation, and the tribal court does not recognize outside divorce. — DY. The same holds true for Santo Domingo Pueblo. —BSt, RH.

Santa Clara Pueblo did not have tribal divorce until an enactment by the tribal council in 1968.

77. In Santa Ana Pueblo, a family council must be convened and consulted before a divorce may go through. — CP. Acoma has a similar and apparently even more

3. Child Custody and Adoption

With child custody as with property, tribal court practices combine tradition and innovation. In White Mountain, the juvenile judge said that she based custody decisions on the family's adherence to tradition. The "strict traditional" rule assigns the child to the custody of its biological mother, or, if she will not take custody, to the maternal grandparents. In contrast, this judge disfavors the grant of custody to grandparents in "neo-traditional" and "modern" families. The Navajo courts allegedly follow a standard based upon the "best interests of the child," whose form puts fathers and mothers on an equal basis, but whose substance favors mothers in custody cases.⁷⁸ Some tribes occasionally divide custody between mothers and fathers.⁷⁹ In general, cultural prescriptions for custody and the perceived best interests of the child interact in complicated ways when the tribal courts decide custody cases.⁸⁰

Adoption and foster care for Indian children is an important area where federal statute gives priority to tribal law over state law.⁸¹ Specifically, the Indian Child Welfare Act of 1978 provides, with some qualifications, that the law of the child's tribe will apply in state

elaborate consulting procedure. — CS. Marriage sponsors try to reconcile the quarrel-
ing partners in San Felipe Pueblo. —DS.

78. "It may well be that the father's relationship to a young child is . . . [better and he has] equal or superior ability to care for the child would require a trial court to award him custody. The proper analysis of the Navajo Equal Rights guarantee is that there can be no legal result on account of a persons sex, no presumption . . . which has the effect of favoring one sex or the other. For this reason, there can be no presumption that a young child should be in the care of the mother. . . . It is the relationship that is important, not a mere rule-of-thumb, and the child's age is important only in consideration of its relationship to the parents. "Sandra Help v. Fred Silvers also known as Fred Silver Fox," 4 Navajo Law Reporter 46 (1983). [No. A-CV-01-82, May 6, 1983], at page 48.

Similarly, we were told that Tesuque Pueblo asks for the "child's best interest," which may result in the court giving custody to a relative other than the parents. — PS. However, these pronouncements of sexual equality did not resonate with most of what tribal judges said to us about family law.

79. We were told of a case in San Carlos where the mother took the child during the school year and the father took custody during vacations.

80. To illustrate, consider these remarks from various officials in the Pueblos:

"In Jemez Pueblo, clans and moieties are equally important, but in custody cases families are more important than either, with the child going to the mother's family if possible." — DY.

"Santa Clara Pueblo follows the patrilineal clan structure within the framework of CFR, Indian Child Welfare Act, and the Indian Civil Rights Act." — PT. (Note that most authorities deny the existence of clans in Tewa speaking Pueblos.)

"San Juan Pueblo applies the matrilineal pattern in child custody cases after a divorce. Children would rather follow a female." — StB.

For Santa Clara, the order of responsibility for children is: Mother's family, extended family, family that can support the child. — PBN.

In Taos Pueblo, children go "to the mother's side, but every elder is responsible for a child that needs custody." — CZ.

"In Santa Ana, mother's older sister takes care of orphans." — CP.

81. See Canby (1988), at page 173.

court proceedings.⁸² Thus, tribal law trumps state law when they conflict over adoption of Indian children. Enactment of the federal law was prompted by the concern of Indians that their children were too often placed for adoption in non-Indian homes by aggressive social workers. Our inquiries suggest that the federal legislation has largely ended this practice.⁸³

Implementation of Indian jurisdiction over adoption of Indian children differs from place to place. We were told that if the state of Arizona obtains custody over a Hopi child, notice is sent to the Hopi court. The court subsequently notifies the twelve villages and they decide whether one of them wants to assume responsibility for the child and find foster parents. The child is either turned over to Hopi village authorities or the tribe does not assert claims over the child. The Hopi court has no say in the matter. —DL.

4. Intermarriage

Members of a tribe enjoy significant rights and benefits, such as the right to live on the reservation, hold office and vote in tribal elections, hunt and fish at privileged times and places, send children to reservation schools, and use the Indian Health Service. Members of clans often enjoy customary rights to use land, perform certain religious ceremonies, and control sacred objects. Membership in the tribe and clan are transmitted to children through marriage according to customs and legislation. Erosion of traditional patterns of marriage affect these rights. The material consequences of intermarriage often depend upon informal practices. We will recount some of the practices described to us.

The Jicarilla Apache nation apparently allows non-Indian outsiders to marry into the tribe without an agreement, permission, or introduction to the Tribal Council. This practice seems consistent with the Apache ideal of personal freedom. Non-members, however, do not enjoy many of the benefits of tribal membership, such as a share of income from tribal enterprises (mines, farms, resorts, casino, etc.). Operating a business on the reservation requires outsiders to be partners with a member of the tribe and receive permission from the tribal council.

Compared to the Jicarilla Apache, the Pueblos tend to be more restrictive about intermarriage. If a member of Sandia Pueblo marries an outsider, both partners are introduced to the tribal council "at the wedding," who gives them the necessary instructions. The

82. 25 U.S.C. 1901 ff.; 25 U.S.C. 1915.

83. These impressions are not a substitute for a quantitative study. Alcohol and drug abuse on some reservations result in abandonment or neglect of Indian children at such rates that the children must be placed for adoption outside the tribe. Furthermore, Mormons still vigorously recruit Indian families voluntarily to place their children in non-Indian Mormon homes for education and religious training.

outside partner has to give his or her (oral) consent.⁸⁴ San Juan Pueblo prefers the consent to be given in writing. If the outside partner later violates this agreement, the couple must leave the pueblo. Some pueblos require the outside partner to offer his or her communal services upon request. For example, in San Juan Pueblo husbands marrying into the tribe may be asked to serve as parking police at ceremonials. Sandia Pueblo does not apply this communal service rule. —QC.

Pojoaque Pueblo requires outsiders who want to live on the reservation as married partners or simply as "outsiders" to get a permission to do so from the tribal council. The examination of worthiness is strict. If there is evidence that the outside marriage partner is a drug addict, she or he is not permitted to live with the tribal member on the reservation. In Santo Domingo Pueblo, living on the reservation requires a permit of the tribal council, and after some years of marriage an "adoption" into the tribe is possible. —RH. The same rules seem to apply to Santa Ana Pueblo.

Instead of an individual examination and agreement, Nambe Pueblo regulates intermarriage of residents through the "Non-Indian Female Membership Code" and the "Non-Indian Male Membership Code." These codes stipulate the rights and duties of outsiders who marry into the tribe and become "limited members." Children from these marriages receive limited membership. Since the outsider who marries into the tribe and requests to live in Nambe Pueblo submits to these provisions of the code, no individual agreement with the tribal council is required as in San Juan Pueblo and Sandia Pueblo.

In other tribes, such as Santa Clara Pueblo, no intermediate position exists in law between full membership and non-membership. —PT.⁸⁵ In Sandia Pueblo, non-member Indians who are married to members apparently fall under the full scope of Sandia membership law.

In San Felipe Pueblo, an outsider who becomes the wife of a tribal member can reside on the reservation, but may be excluded from some of its activities. We heard of a case where a "Spanish" woman married into the tribe. She was permitted to live in the Pueblo, but was not admitted to ceremonial dances. The children of this couple, however, "speak the language" (Keresan), and they are admitted to the ceremonies. The situation is different for non-Indian husbands. If a woman in San Felipe Pueblo marries a white, "Spanish", or black person, she must go. The couple may not live in this small, traditional and closely knit Pueblo society. If the husband is an Indian, for example from a neighboring pueblo, he must file a petition to stay. He "must prove that he got out of his place," which means that he has

84. The consent must cover the instructions in their entirety.

85. Also see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

severed tribal, religious, clan, moiety, and other ties that might keep him from being a dedicated member of San Felipe society. Still, he is admitted only on a five-years probation period, after which he may file a petition to become a tribal member.

G. *Contracts*

Some legal anthropologists have alleged that contract law differs systematically in commercial societies and tribal people. Tribal people who lived outside of a cash economy engaged in barter. In a barter economy, exchange occurs without a common currency to denominate values. Contract law in a barter economy must look to the possession of objects and not the value of promises. In his account of Barotse law (an African tribe), Gluckman asserts that contract law arising from barter focuses upon objects rather than values.⁸⁶ The usual remedy for breach of contract among the Barotse is, consequently, specific performance, not damages.

Furthermore, qualitative differences in handicraft products cause imperfections in the substitutes available for a lost good. This fact influences the allocation of contractual risks. For example, Gluckman found that if a buyer advances payment on a unique good that gets destroyed accidentally after delivery, the buyer can recover his advanced payment, but the buyer cannot demand a substitute good or the cost of buying a substitute good.⁸⁷ The buyer presumably bears the onus of finding and paying for a substitute good because perfect substitutes do not exist for the kinds of handicraft items at issue.

Tribal people tend to form long-run relationships with trading partnerships. Long run relationships build trust and reliance among the parties. Gluckman found that the seller of a good bears liability for defects or deficiencies that become apparent after the buyer obtains the good and uses it.⁸⁸ This rule gives the buyer more reason to trust the seller's representations.

In contrast, the "bargain theory of contract," which figures prominently in Anglo-American law, commends enforcing promises given as part of a bargain.⁸⁹ In the classical formation, three elements identify bargain promises: offer, acceptance, and consideration. "Offer" and "acceptance" have their ordinary meaning, and "consideration" means an inducement given to elicit the offer. For example, if I offer to give you a car in exchange for your promise to make payments of \$1,000 per month for 12 months, and you accept my offer, then your promise induced my offer. In the bargain theory, the usual rem-

86. Gluckman (1965), 182.

87. Gluckman (1965), 180.

88. Gluckman (1965), 180; the buyer may reclaim the price.

89. Eisenberg (1988).

edy for breach of contract is "expectation sum which equal the expected value of performance of the contract.

Do old traditions of barter and long-run exchange influenced contracts in tribal courts in America? In White Mountain, we heard an account of Apache contract law that reminded us of the Barotse. Here, and in other tribes (Jicarilla Apache, Acoma, all Rio Grande Pueblos), we were told that contracts are valid traditionally by mutual consent. Neither writing, nor consideration, nor witnesses is required.⁹⁰ Trust and reliance are the foundations of contractual exchange. —CV (Jicarilla Apache). This would apply, for example, to a loan, or the sale of a horse. In former times, a breach of a contractual promise would lead to "revenge, but today the court would order the return of the money or the horse." —GG. These claims suggest that consideration is unnecessary for a contract, and specific performance is the preferred remedy. Similarly, the Pueblos apparently regard agreement (offer and acceptance) as sufficient for a contract, even without consideration.⁹¹ Furthermore, we heard comments suggesting that customary law among tribes affords few defenses or

90. The question whether consideration is necessary for a valid contract was denied in all tribes where we asked it: White Mountain, StB; Kaibob Paiute, CB; Jicarilla Apache, CV; Acoma, FK; Tesuque, PS: "A given promise must be kept, among living persons, and in case of a will. This is our law. Of course, often it is a matter of proof"; Pojoaque, FD; San Felipe, ET. "In a culture in which so much rests on oral tradition, a given word weighs much more than in a culture that writes. Therefore, an oral pledge is valid, even without consideration" — Anonymous; Santo Domingo, BSt, RH ("no consideration case known"); Sandia, QC ("no cases known"); when we asked whether "a handshake" is enough to form a binding agreement, the answers pointed to a change in practice: in former times, a handshake agreement was regarded binding, but now there is less trust and reliance. "There are very little gentlemen's agreements any more, today it is better to make a promise by deed, the Anglo Way"—Nambe, PT. Nambe law was described to us as having come under the influence of outsider views because of frequent intermarriages with them. This, it was said, subjects traditional law to changes because the outsiders bring their own Anglo-American law with them and insist on its application. This, in turn, caused the traditional handshake agreement, the validity of a mere promise, slowly to become obsolete. "There is an increase of mainstream law by intermarriage", PT. "Twenty years ago, a handshake was firm proof of a verbal agreement. Now no longer. We use other proofs, too", StB. Still, our impression is that in Indian tribal law in general, while the practice of the "handshake agreement" is decreasing, consideration is not necessary. The use of paper is for proof.

91. This conclusion was supported by remarks made by PT (Santa Clara, also for Nambe), StB (San Juan), CP (Santa Ana). The most general statement on legal promises that we heard among the Pueblos was made in Tesuque Pueblo:

"Our tradition is to honor a promise, whether it is a contract or an oral will. But there must be proof." —PS.

We heard contradictory testimony about the need for writing as evidence in land contracts.

"Twenty years ago, a handshake was proof of a land contract. This is no longer so. We admit all kinds of proof for the agreement. A handshake is neither required nor enough." —StB.

We were told that a writing is unnecessary for land contracts in Santa Clara, whereas Santa Ana law strongly prefers written proof.

excuses for nonperformance of a promise.⁹² We need more detailed evidence before concluding that Gluckman's observations about African tribal contract law extend to the Apaches or other Indians.

Chief Judge Carey Vicenti of Jicarilla Apache added that even more important than the principle of reliance on a given word is the question whether in case of breach of contract the sanction is damages (as in Anglo-American law), or specific performance. Judge Vicenti thinks that specific performance is the appropriate answer "because our tradition is not money-oriented." Repairing the relationship between the partners is the primary legal goal.

These remarks suggest a similarity between Indian and Continental European law, as opposed to Anglo-American law. Contract law specifies the kinds of promises that the law will enforce and the legal remedy for breaking an enforceable promise. As explained, the usual formation of Anglo-American law requires "consideration" to make a promise binding. In continental law, however, consideration is unnecessary to make a contract,⁹³ and the usual remedy is often said to be specific performance. (Differences between continental and Anglo-American law of contracts probably exist more at the level of traditional theory than practice).

Earlier we discussed the problem of off-reservation creditors repossessing property from on-reservation debtors. Many contract disputes that end up in tribal courts are brought by off-reservation creditors who lent money to Indians for the purchase of goods. We already explained that creditors who try to repossess the property on the reservation in disregard of the tribal court commit trespass under tribal law. —DY. To obtain proper title, the creditors must pursue the debtors in tribal court. Our impression is that creditors sometimes fare badly in these disputes (see pages 520f., *supra*).

History provides reasons, as illustrated by the Navajo trading posts. Navajos, whose reservation still seems large and empty, depended historically upon trading posts for the purchase and sale of market goods. The trading posts, which were owned by non-Indians who spoke Navajo and sometimes married into the tribe, kept accounts for their customers who bought on credit. Transportation costs and other barriers to competition enabled the trading posts to extract monopoly profits, not only through high prices but also through the manipulation of credit. Navajos who were innumerate or illiterate were vulnerable where the creditor kept the only records of

92. Asked whether the promisor should be excused from a promise extracted from him after the promisee induced the promisor to get drunk, the judge at Santa Clara Pueblo answered:

"It is a general Indian rule that you have to keep your body clean. Thus, intoxication is no defense under contract or tort law." —PT.

93. On the binding force of a promise, without consideration, see Fikentscher (1997b), Nos. 67, 781, 1402, *supra* nn. 89-90.

the debtor's account. This system began to erode as Navajos got cars, and it broke down entirely in the 1960's when national chain stores with relatively uniform prices located on the reservation or near to it. (When asked what caused the greatest economic change on the reservation in recent decades, one astute Navajo replied, "K-Mart.") This history does not favor outside creditors in legal disputes.

In towns around the Navajo reservation, such as Albuquerque, Gallup, Farmington, Holbrook, Flagstaff, and Espanola, some merchants specialize in credit transactions with Indians. Sellers of durable consumer goods such as furniture, dish washers, laundry machines, and refrigerators typically extend credit to the buyer. Merchants have a long history of finding legal forms for these contracts that strengthen their ability to repossess items from defaulting debtors and to circumvent usury laws that impose ceilings on interest rates. A popular contemporary form for such contracts is "rent-to-own," whereby the consumer makes rental payments that can be applied to the purchase of the item. Rent-to-own construes the agreement so that the seller retains the full power of ownership until the buyer has paid the full price. In conversations with us, Indians expressed resentment towards this contracts and hostility towards a "guild of merchants" that "lives from the Indians."

The Jicarilla Apache Court sometimes reinterprets these agreements in order to lower the contract price. When the court perceives a rent-to-own contract as unjust, the court reinterprets the contract as a sale and a loan, not as a rental agreement. The buyer gets a price adjustment from the court. The seller has a right to the market price of the commodity and the market interest rate, but not late fees or excessive interest disguised as "rent." "Don't think this is traditional Indian law, it's law we are developing to meet our daily needs; it's not custom, but a new law of contracts." —CV.⁹⁴ If the buyer cannot make the periodic payments imposed by the court, the judge tries to obtain cooperation from the defendant's employer or a bank to refinance the loan from wage deductions.⁹⁵

94. The judge told us these contracts meet the form of a rental agreement in common law, but the court should follow the economic purpose and not the legal type used by the seller. The economic purpose is sale and not a lease because the seller does not want to recover the good in the future, but rather the seller wants to trade the good for the most money possible. "Anglo-American law, in interpreting contracts, talks of the 'four corners of the contract' as interpretive guidelines. But we go beyond this looking at economic situation and intended purpose." —CV.

95. In terms of modern German law, the Jicarilla Apache case law on rent-to-own furniture contracts would technically be called a validity-saving reduction of the contract (*geltungserhaltende Reduktion*) because of its unconscionability, as an exception to the principle of total invalidity in case of partial invalidity (§ 139 German Civil Code), for reasons of consumer protection. Compared to German law, the Jicarilla Apache Court in heeding the economic intentions of the parties avoids the dubious interpretation of financed leasing contracts as rental agreements (cf. Fikentscher 1997b, No. 83). The interpretation which is based on "economic purposes" and leaves

One reason why tribal courts can deal sharply with off-reservation creditors is that tribal and state courts do not owe each other "full faith and credit." (See our subsequent discussion of conflict of laws beginning at page 549.⁹⁶) Navajo courts assume jurisdiction for deciding whether a contract for sale of a house trailer or similar merchandise can be held to comply with Navajo commercial law. We heard similar stories on other reservations.⁹⁷

A case from the Flathead Tribal Court contains an interesting twist in which the court used custom against the Indian debtor. In this case, a borrower who defaulted on a loan sought to recover sacred jewelry that he had offered as collateral. The court held that "using a ceremonial or sacred object for the purpose of collateralizing a loan is not sanctioned by the cultural traditions of the Tribes." The court concluded, however, that pawning such an object indicates that it has lost its religious significance to him, so he could not plead religion as an excuse for escaping the contract.⁹⁸

H. Torts

In *Crime and Custom in Savage Society* (1926), Malinowski reported that much tribal law consists, not in criminal law, but in civil law, and many disputes concern claims for compensation. Perhaps compensation is necessary from time to time to restore balance and harmony in a life among kin. Our research only provided a few hints about this hypotheses, which needs testing in Indian courts. We interviewed a Navajo who said that when someone harmed another in

behind the "four-corners" theory follows principles developed in the 1860's by Rudolph von Ihering, a theory that became dominant in Continental European law, and in particular for the interpretation of the German Civil Code of 1900.

96. An interesting contract case involving this issue is *Allen Jim v. CIT Financial Services Corp.*, 87 N.M. 362 (of April 11, 1975). A New Mexico financing corporation sought self-help repossession against a member of the Navajo tribe who had bought a truck with the help of CIT but then failed to pay the monthly installments. The New Mexico Supreme Court held that any right to self-help repossession depended on the proper application of conflict rules and on the applicable substantive contract law, which could have been Navajo or New Mexican. Thus the state court acknowledged that tribes may have their own contract law. Both the District Court and Court of Appeals had decided in favor the plaintiff, CIT, apparently overlooking the conflicts of law situation. The sales contract did not indicate whether the parties wanted the contract to be entered into under Navajo or New Mexican law. Therefore the case was remanded to the District Court for further investigation. The New Mexico Supreme Court says by way of dictum that the laws of the Navajo Tribe, and decisions based upon them, are entitled to full faith and credit in the courts of New Mexico because the Navajo Nation is a "territory" within the meaning of a federal statute, 28 U.S.C.A. 1738. Upon remand, the case was settled between the parties.

97. For example, in the Gila River reservation we were told about a case in which car dealers had applied unconscionable methods in talking people into the purchase of cars. When the buyers did not pay, the vendors complained to the court and found no relief. "Pushing too much means no contract", RP.

98. *Martin Papin, Jr. vs. Doug Allard*, Tribal Court of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Pablo, Montana, Cause No. CV-238-90.

the old days, people would shun the injurer. The injurer's relatives would try to end the bad feeling by compensating the victim. Two Navajos independently asserted that when harm was done, people feel a deep need for compensation, and from this fact they concluded that criminal and civil sanctions were not sharply distinguished in tradition. —NM, TH. Unfortunately, the Navajo court records do not contain any tort cases that relate to such traditions. Indeed, perusing the Navajo court records does not suggest that tort compensation occupies a central place in legal disputes.

A more specific hypothesis, not considered by Malinowski, is that tribal tort law focuses upon causation more than intent. Thus a Pueblo tribal member said, "There's much less psychology in Indian law. He did it. That's enough." —JS. This hypothesis predicts that tribal tort rules look more like strict liability than negligence. Our research did not provide evidence on this hypothesis.

Indian tribes are often responsible for regulating traffic on the reservation, including automobile accidents, which are the largest single source of tort claims in America.⁹⁹ Tribal traffic codes, however, look about the same on the reservation as off it. Distinctively Indian attitudes towards automobile accidents, if they exist, do not show up in tribal traffic codes. However, we suspect that an analysis of Indian juries would reveal distinctive attitudes based in custom and tradition. For example, the people of White Mountain say that they have their own ideas about what constitutes negligence. To illustrate, stray animals are considered a threat and a nuisance at White Mountain, but the owners of horses and cows that stray onto roads and collide with vehicles are not held liable for negligence. —RL. One Pueblo told us that that pain and suffering are not compensated in tribal law. ("You live with it". —BR.)

I. Crimes

Tribal members have long run relationships ordered through kinship. A crime ruptures the fabric of these relationships, and punishment helps repair the tear. Legal philosophers distinguish various purposes of punishment such as deterrence, retribution, rehabilitation, condemnation, and reconciliation.¹⁰⁰ Punishment in tribal societies often stresses reconciliation as the main purpose.¹⁰¹ Our attempt to identify customary elements in criminal law focused upon punishment, especially as a means of reconciliation.

We found many examples, which we described in the section entitled "Procedure in Trials." These examples were abstracted in the

99. Kakalik and Pace (1986), Table 2.4 page 14.

100. For example, see H.L.A. Hart (1961).

101. For example, see Bohannon's account of "repairing the Tar," "Bohannon (1989), chapters 9 and 10, at 162ff.

four step procedure described to us by judges at Laguna and Acoma, which bears repeating.¹⁰² First, the person who commits a tort that is also a crime must admit what he has done and promise not to do it again. Second, he must apologize to the victim. Third, he must pay damages to the victim, usually as compensation but sometimes as punishment. Fourth, the injurer must "make it up" to the community ("communal work"). The use of these four steps varies depending upon the court and the judge. Moreover, unlike some tribal judges, a judge at Jicarilla Apache does not require apology to the community. But a judge at Sandia Pueblo distinguishes wrong "to the tribe", which requires apology to the community, from wrong to a person.

Some tribes use jail as one among several forms of punishment; for example, Pojoaque Pueblo implements a continuum of penalties including jail, damages, and/or fines. Pojoaque is a small pueblo with income derived primarily from its casino. Tribal courts distinctly prefer alternatives to incarceration, such as compensation.¹⁰³ There are two reasons for avoiding incarceration as punishment. First, reintegrating the wrongdoers into the tribal community is the first aim, whereas jail separates the wrongdoer from the community. Second, jails are expensive. Several reservations that we visited have costly new jails, which prompt caustic remarks by local Indians about tribal priorities. Mescalero Apache, Jicarilla Apache, and Laguna Pueblo are said to have jails, but most tribes have no jail, so they have to rent jail space from counties or states. In 1996, the Los Alamos, NM, jail cost \$ 110 a day per person to rent, the Keams Canyon jail (on Hopi territory) \$ 30 a day.

The contemporary American criminal justice system relies almost entirely upon three forms of punishment: probation, fines, and incarceration.¹⁰⁴ Each of these forms of punishment can be ordered by severity. For example, a fine of \$1,000 is more severe than a fine of \$500, and a sentence of 3 years is more severe than a sentence of 2 years. The ability to order punishments by severity permits them to be graded, compared, and calibrated. The bureaucratic state can thus monitor disparities in punishment and try to reduce them. Reducing disparity reduces injustice to individuals or groups.

This gain, however, is achieved at a price. In the past when social relations were more personal and the state was less bureaucratic, a variety of punishments were employed by law. Greater variety enables tailoring the punishment to the crime, which may help to recon-

102. FK and FC. See pages 539ff.

103. In Acoma, we were told:

"We hardly put ever someone in jail for a long period if short-term jail sentence will do. We prefer asking the offender to compensate." —CS.

Besides being non-traditional, jail is expensive.

104. A very small number of criminals receive other punishments such as community service and execution.

cile the parties. For example, we already mentioned a case in which the defendant was required to hug his mother with all the family present.¹⁰⁵ Historically, "tailored punishments" were used allegedly to promote reconciliation, by substituting state vengeance for private vengeance. American state and local government in the 18th century, like Indian tribes in the distant past, used punishments that included shaming, ridiculing, shunning, banishing, beating, whipping, and mutilating.

We predicted that the tribes, being more personal than bureaucratic, would use a greater variety of punishments than the larger society. We found one striking example of such a traditional Indian punishment. A traditional Indian raised among kin can hardly imagine life without them, and in the past prospects for survival were small for an Indian without the help of kin. Consequently, banishment is a very serious punishment. Sometimes a modern Indian community will exclude a criminal without any official action being taken. For example, a Chippewa raped a young woman from his tribe in the Detroit Indian Center.¹⁰⁶ Criminal charges were not brought, but, as the story circulated among local Indians, they refused to have anything to do with the offender. Eventually he just disappeared.

Besides informal exclusion, tribes have the legal power to exclude, presumably rooted in the inherent right of a tribe to maintain law and order in its own society as well as the territorial reach of sovereignty.¹⁰⁷ The terminology varies. "Exclusion" seems to be the general expression, covering "banishment" for a prescribed number of years, and "disenrollment" or "cancellation of membership" for life. The latter is a strict, rare punishment. —FD, CV, KM. Permission to return may require a hearing, as apparently required in Sandia Pueblo, or it can be automatic after the period of banishment expires. An excluded member who returns to the tribe without permission, is liable of trespass and will be tried accordingly, as reported in describing a case in Cochiti Pueblo.¹⁰⁸

At Zuni we were told about a contemporary case that involved the banishment of a teacher. He was banished for taking masks and other religious paraphernalia from the places where they are kept and using them for commercial purposes. Being a tribal member, he was presumed to know the religious significance of these objects — MZ. We were told that Hopi custom defines grounds and procedures for banishment. The perpetrator is first warned that if he continues

105. See Part I of this article, 46 *Am. J. Comp. L.* (1998) page 540 *supra*.

106. Cooter, who knew the offender (V.N.), observed these events in the early 1970s.

107. *U.S. vs. Wheeler*, 435 U.S. 313, 322-23; see Pevar 83 ff.

108. From the right to exclude somebody, a lesser power can be derived: the court can order that somebody has to behave in a certain manner, for example be home in his house at 9 p.m. —CV. This is a far reaching *argumentum de maiore ad minus*.

to behave "ka-Hopi" (in an "un-Hopi way"), banishment might be pronounced. These procedures were apparently at issue in a 19th century legal case.¹⁰⁹ Once pronounced, banishment may last for a fixed period, an indefinite period (until the banished individual successfully applies for return), or forever. In San Felipe Pueblo we heard the story of a young man who resisted authority and followed no tradition. The tribal council summoned him and threatened to banish him for life, but he did not believe it at first. When the tribal council made him understand that they were serious, he abruptly "turned his life around" and became a very reasonable member of the tribe. At Jicarilla Apache, X was three times convicted of drunken driving and his driver's license was canceled. He persisted to drive drunk and he got six months in jail. Finally, when he was convicted again, he was excluded from the tribe; his wife remained on the reservation.

So far we have discussed tribes excluding their own members from the reservation. Tribes also exercise the powers to exclude against non-members. In Hopi we were told that unemployed strangers who have no business on the reservation are ordered to leave. The practice was illustrated by a recent case in which Hopi police picked up a suspected drug user at 4:30 in the morning, took him to jail, then released him on the condition that he leave the reservation. Missionaries, who sometimes divide Indians against each other on sectarian lines, are occasionally excluded from the reservations.¹¹⁰ For example, we were told that Navajo authorities recently expelled a Pentecostal preacher because he induced people to burn ceremonial paraphernalia ("objects for devil worship"). —WT. Similarly, a teacher who dug up a skeleton and a necklace from a Navajo burial ground was ordered to leave the reservation within twenty-four hours —WT, SP. (We also noted sentiment on some reservations to exclude all non-members from residing there and to regulate entry, not as punishment, but to preserve the tribe's coherence.¹¹¹)

109. *Marsh vs. Brooks*, 49 U.S. 223 (1850).

110. In general, missionaries who wish to establish themselves on a reservation face the difficulty of acquiring use of a building. Tribal governments often create obstacles to missionaries who want to acquire reservation land and build a church. In spite of these obstacles, missionaries work actively on most reservations.

111. The *River Indian News*, 2 August, 1990, page 8, carried a story under the heading: "Non-members: Stay away!" According to the report, in 1965 the village council passed an ordinance prohibiting non-members from owning or renting property in the village, and from staying in the village longer than twenty-four hours without permission. In 1982 some white couples sued the village over alleged violations of their civil rights when told they could not rent homes there. A U.S. District court judge ruled in favor of the village, and in August 1990 the 9th U.S. Circuit Court of Appeals upheld the judge's ruling, which stopped the civil rights suit. During the hearing, the appeals court reinstated an earlier suit by the village seeking to enforce its own ban on whites, which had been thrown out by the District Court. Lawyers for the village say the ban is not racially motivated or designed to infringe on a person's civil rights, but rather concerns the right of the tribe to make and enforce laws essen-

As discussed earlier, the jurisdiction of the tribes over non-members who commit crimes on the reservation is limited and uncertain. A much debated case, *Duro v. Reina*, 821 F. 2d 1358 (9th Cir. 1987), strengthened the right of non-member Indians accused of committing crimes on the reservation to be prosecuted under federal or state law, not tribal law.¹¹² Some tribes reacted to *Duro* by relying more upon the power of exclusion and less upon other punishments. We were told that Acoma developed a "waiver system" for cases where a non-member violates tribal law. The suspects are given seventy-two hours to decide whether they want to waive their right to be prosecuted under federal or state law. If they do not waive this right, they are asked to leave the reservation. If they waive the right, then they are deemed to have submitted to tribal jurisdiction. Laguna created a similar waiver system —FC.¹¹³

Exclusion is a significant tool for regulating religious activity on reservations. By federal statute, tribal members are free to exercise their preferred religion (Indian Civil Rights Act of 1968, 25 U.S.C.A. 1302 (1)). Religion fragments some tribes, where missionaries have carried sectarian antagonism onto the reservation. Tribal government sometimes inhibits aggressive missionary activities. To illustrate, in the 1930's and 1940's, Zia Pueblo was plagued by a group of "holy rollers" who belonged to an evangelical sect. The story, which includes both tragic and comic features, ended with an exclusion of the evangelical group from Zia Pueblo.¹¹⁴ In general, tribal governments can control religious activities by establishing a preferred tribal religion (see page____) excluding particular missionaries from the reservation or refusing to allocate land for a church.

Another kind of traditional punishment concerns alcohol and drug abusers. Shaming is used, especially to deter drunkenness.¹¹⁵ We have observed that the Hopis shamed offenders by publishing

tial to its political, economic and social security. A response by the justice department and subsequent action by the court is expected to take months or years.

112. The *Duro* decision lost its importance when Congress responded to it by enacting a statute (November 1990) that restores to the tribes jurisdiction in criminal matters over non-member Indians; Department of Defense Appropriations Act, 1991, Pub. L. No. 101-511, s 8077(b)-(d), 104 Stat 1856, 1872-93 (1990).

113. We are uncertain of the extent to which this waiver system was actually implemented at Acoma or Laguna. After *Duro* was repealed by statute (see preceding footnote), the waiver system was apparently discontinued. In its place, some tribes such as Jemez Pueblo offered instead a "residence agreement" to nonmembers residing on the reservation. In these agreements, the privilege of residing as a non-member on the reservation is granted in exchange for the declaration to abide by all tribal customary unwritten law and to engage in community services such as patrolling and traffic regulation during feasts and ceremonies. Tesuque follows the Jemez model in a less formal way. Even if no written agreement is actually signed, it is implied, and resident nonmembers are asked to assist as feast day police etc.

114. See Fikentscher (1994, with references).

115. On shaming by apologies, see notes 105ff. and accompanying text.

lists of convictions in the local newspaper.¹¹⁶ In Pima-Maricopa, substance abusers may be required to go through a special rehabilitation program. The program uses ceremonial objects, such as a small altar ornamented with a blanket, candles, and eagle feathers, to create a special atmosphere in which people speak out about their problems. Sweat lodges, prayers, and expressive art are also used. The desert tribes, who have a long tradition of running to improve body and mind, also sponsor "Sobriety Runs" to inspire resistance to debilitating substances -WJ.

In Laguna and San Domingo we were told the court may require a person convicted of a crime to apologize to the public and the tribe, whereas we were told that Nambe does not have this practice, although the offender in domestic violence cases may be required to apologize to the victim. - PT. In cases of domestic violence, Santo Domingo Pueblo may require an apology to the tribe and the victim, as well as paying a fine or being sentenced to communal work (but not jail). -RH. The courts in the Northern Six Pueblos may sentence the guilty party in domestic violence cases to participate in treatment by the "Peace Keepers," who try to explain the causes and remedy such behavior by psychological and social methods (see Fikentscher 1997a, 1998). These programs might run for two hours a week for six months, and the sentenced party who fails to participate must spend the time in jail.

We have been discussing distinctive punishment. Another question concerns Indian views about what constitutes crime. Many crimes in the past were allegedly perpetrated by witches through magic. "Witchcraft," as Indians use the term, means magical practices intended to harm people. Many tribes still conduct aboriginal religious ceremonies that include magical practices intended to benefit people. The benefits usually concern health, so Indians refer to beneficial magic as "medicine." Although skeptics regard both witchcraft and "medicine" as superstition, when viewed functionally anthropologists have found that magic typically promotes order and morality in tribes. This finding should surprise no one since the greatest experts at magic are tribal elders, who, like old people everywhere, tend to be conservative. Conservative people uphold order and conventional morality. Modern campaigns against superstition have been more successful in eliminating public ceremonies that protect against witchcraft than in eliminating secret ceremonies that make witchcraft.¹¹⁷ Furthermore, the strain of reservation life cre-

116. This practice ceased. Unfortunately, the newspaper, which was published in Kykotsmóvi, is defunct.

117. See Malinowski (1926); Bohannon (1957) and Fikentscher (1995b), 230-34, 277-80, quoting some authorities.

ates bad feeling among kin, which prompts witchcraft. Consequently, accusations of witchcraft abound on reservations today.

In the past, witchcraft was sometimes punished severely.¹¹⁸ It would be surprising if the frequent accusations of witchcraft on reservations did not spill over into criminal cases. For example, suppose that a person accused of assault also tried to harm the victim by witchcraft. Can this fact be used to show that harm was premeditated? Is a crime worse for having been accompanied by witchcraft? We were unable to discover cases in tribal courts involving witchcraft, possibly because tribal courts refuse to allow any such testimony, or possibly because Indian officials are understandably reluctant to discuss the issue with us. However, medicine men are frequently hired to influence courts by means of magic. Indeed, we know of some medicine men who specialize in "fixing" traffic citations.

Everywhere we visited, Indian common law is more persistent in deed than in word. A judge at Warm Springs illustrated this fact with a family law case. A husband came home to find his wife naked in bed and her lover hiding behind the couch. He beat up the lover and was tried for assault and battery. The jury found him innocent and the foreman said that the defendant should have beaten up his wife as well. The judge let the jury verdict stand. A judge on the White Mountain Apache reservation told us that in the old days a cuckolded husband was entitled to cut off the nose of an adulterous wife and beat up her lover on the spot. However, the same judge said that his court would not allow such assaults to go unpunished today. Even so, the Apaches joke about the possessiveness of men towards women, and we suspect this attitude influences judges and juries.

VI. CONFLICTS OF LAW

The existence of different legal systems creates conflicts of law if the case is linked to more than one system. In these cases, tribal law and state law often lead to different results. For example, consumer credit transactions may bring tribal and state law into conflict when an off-reservation merchant seeks to enforce a judgment against an Indian residing on the reservation. The most general principle for resolving these conflicts holds that jurisdiction should be determined before substance.¹¹⁹ By "jurisdiction" we mean which court should

118. Graphic illustrations are provided by Frank Cushing's (1882, 1967) account of Zuni in the late 19th century, and Bandelier (1890). A recent survey on witchcraft literature: Lucy Philip Mair (1972).

119. The determination of both jurisdiction and substance sometimes depends on objective criteria ("nexuses", "connecting points") such as nationality, domicile, *lex rei sitae*, place of the wrong, etc., sometimes on the will of the parties (express or implied), such as the "choice of law" in contract cases. If choice of law applies, the context of jurisdiction and substance is reflected in the aphorism, "Qui eligit judicem, eligit jus." Cramton, Currie & Kay (1993), 7 ff., give a concise survey on the various conflict

decide the case, and by "substance" we mean which law applies to the case. Thus the most general principle for resolving conflict holds that the question of which court has jurisdiction should be decided before the question of which law to apply to the case. The court with jurisdiction should apply the most appropriate law, even if it is foreign.

To illustrate, a disputed contract signed in Michigan between two residents of the Navajo reservation might be adjudicated in a Navajo court using Michigan's contract law. Similarly, a disputed contract signed on the Navajo reservation by two Navajo residents of Michigan might be adjudicated in a Michigan court using Navajo contract law.

Although authority on tribal conflict of law is scant,¹²⁰ we often found in our interviews the firmly rooted conviction that tribal courts apply tribal law, and state courts apply state law.¹²¹ To the extent that state law applies, a state court will hear the case and apply its law. To the extent that tribal law applies, a tribal court will hear the case and apply its law. While state courts have occasionally applied tribal law,¹²² usually tribal law is ignored by state courts. The pre-

of laws theories. This text is mainly concerned with conflicts of substantive laws. For jurisdictional issues, see Wagoner (1985).

120. Scoles & Hay (1992)388-394; 549 n.15, Canby (1988) 173.

121. In international and interlocal private law, this practice is identified by the term "lex fori": The court is applying its own substantive law. "Lex fori" application is regarded to be the most primitive form of conflicts of law resolution. Canby (1988) at 175 says "choice of law" (he uses this term to describe the whole field of conflicts of law) plays no part in two large areas of jurisdictional dispute, specifically criminal law and divorce. Tribal and state courts alike follow the general rule that the forum applies its own substantive law in each of these fields. We are inclined to add that this holds also true for contracts and torts law and for all other areas of the law which are not specifically regulated as to applicable law or jurisdiction or both (such as the Indian Child Welfare Act). The Navajo and Arizona courts follow what may be called the rule of mutual avoidance, however modified by the law of nations rule of comity:

"As far as the Navajo Nation is concerned, the state of Arizona is a foreign government. While the State of Arizona has yet to recognize the Navajo Nation as a separate sovereign, it does grant comity in the enforcement of Navajo decisions and law in a de facto kind of recognition of our sovereignty. . ."

—Ellen K. Hubbard vs. Chinle School District Nos. 24/25, Apache Country, AZ and ARA Food Services, Inc., 3 Nav. R. 167 (1982).

122. We found three cases. The first case dates back to 1857 and deals with Acoma contract law. See the text accompanying supra n. 48. In *Pueblo of Laguna v. Pueblo of Acoma*, 1 New Mexico Reports 220 (Jan. 1857, printed in 1911), the New Mexico Supreme Court ordered the Pueblo of Acoma to return an oil painting on loan from the Pueblo of Laguna, thus applying tribal law of contract.

In the second case, *Allen Jim v. CIT Financial Services Corp.*, 87 N.M. 362 (of April 11, 1975), the New Mexico Supreme Court remanded the matter to the district court in order to ascertain whether the parties, in a financed car purchase, had agreed to contract under New Mexico or under Navajo law (a choice of law problem). Excuses not to pay the installments might have depended on the applicable law. We received the information that the case was amicably settled. (The possible applicability of Navajo law in a New Mexico court may have contributed to this outcome.) See page 521. Sometimes, *Jim v. C.I.T.* is understood to the effect that this landmark case tells that there is full faith and credit to be given to decisions based on tribal code or common law. In our conversations with Indian judges, for example FD and EQ shared this

vailing practice violates the general principle described above: Mistakenly, the choice of jurisdiction between state courts and tribal courts determines the substantive law applied to the case.¹²³ The state courts and tribal courts follow the *lex fori* rule of conflicts of law, which renders unnecessary the study of a foreign law.

The explanation of this fact concerns why tribal courts want jurisdiction. The tribes want jurisdiction in disputes in which at least one party is Indian, but the tribes have little interest in disputes exclusively between non-Indians. Similarly, state courts show little interest in claiming jurisdiction over Indians. So state and tribal courts proceed on a common understanding of non-interference, which safeguards the tribes' authority over Indians and the state's authority over non-Indians.¹²⁴

opinion. This interpretation of *Jim v. C.I.T.* is basically correct, but there is, besides this jurisdictional point, another wisdom in this case: If state courts are to give full faith and credit to tribal court decisions it follows *a maiore ad minus* that tribal law should be applied in state courts under the rules of conflict of law in the first place. Because applying a foreign law under the rules of conflict of law is a lesser inroad to state sovereignty than full faith and credit. Therefore, *Jim v. C.I.T.* in the first line teaches the applicability of the rules of interlocal private law in relation to tribal law, and only in the second line — for example if tribal law cannot be ascertained — that recognition should be given to a tribal decision. However, full faith and credit given to tribal decision works in a specific way which in *Mexican v. Circle Bear*, S.D. 370 N.W. 2nd 737 (1985) correctly was defined as a matter of comity, an international principle of respecting the other state's activities (see also *supra* n. 121). Applied to interlocal dimensions, comity should be qualified and redefined as "judicial comity", a proposal made by Judge Henderson in his concurring opinion to *Mexican v. Circle Bear*. *Mexican* was one of those cases in which, in contrast to *Jim v. C.I.T.*, it would have been extremely difficult and costly (and maybe psychologically impossible) to ascertain the precise contents of Lakota law concerning the correct burial of corpses. Hence, the rule should be: Ascertainable tribal law should be subjected to the rules of interlocal private law, taken from the body of rules of conflict of laws (the rationale in *Jim v. C.I.T.*), not ascertainable tribal law should lead to full faith and credit to be given to tribal decisions under the rules of "judicial" (interlocal) comity (the *Mexican v. Circle Bear* rationale). Of course both rationales should work, on a reciprocal basis, in both ways between tribes and states.

The third case, *Lonewolf v. Lonewolf*, 99 N.M. 300, 657 P.2d 627 (1982), concerns the distribution of property after a divorce granted by a state court. Since tribal land was involved, the court held that tribal land law had to be respected by the state courts. This being an obiter dictum, *Lonewolf* is not a clear-cut conflicts case. The Pueblo judges with whom we discussed these cases expressed discontent with the "lex fori" approach to conflict of laws. Negotiations have begun under the sponsorship of Governor Bruce King between the state of New Mexico and the reservations on its territories for an "accord" on the mutual granting of "full faith and credit". Hopefully, the priority question of interlocal conflicts of law will be addressed, too. The "accord" is intended also to cover taxation conflicts and social welfare issues. The choice of the form of an "accord" underlines the quasi-international public law character of the relations between states and tribes. See text accompanying footnotes 25ff.

123. In German conflicts of law doctrine this easy-going attitude of the courts is called "*Heimwaertsstreben*" (trying to get home).

124. Scoles & Hay (1992) 391, n. 20 and accompanying text, write:

"Normally transitory causes of action, such as contract actions and personal injury claims, against Indians cannot be brought in state court if the cause of action arose in Indian country because affording a non-tribal forum would infringe on the tribe's authority over internal matters. The state courts' juris-

A feature of the U.S. Constitution encourages these practices. The U.S. Constitution requires a state court to give "full faith and credit" to the judgments of another state's court.¹²⁵ In contrast, state courts frequently refuse to give full faith and credit to tribal judgments, and tribal courts reciprocate this refusal.¹²⁶ Thus, the Navajo courts have apparently decided that the "full faith and credit" provision, which applies between state courts, does not apply between a state court and a tribal court, or between the courts of different tribes.¹²⁷ Missing full faith and credit on both sides, the tribal courts apply tribal law but not state law, and the state courts apply state law but not tribal law (in spite of any resulting injustice or inconsistency.)

If a state court wanted to apply tribal common law, it would have difficulty discerning what law to apply. The research and documentation of tribal common law often is too scant. Perhaps more research on Indian common law will lead to greater reciprocity between state and tribal courts. Research and documentation of tribal law could eventually lead to the integration of Indian law into the generally accepted principle for resolving conflicts of law within the United States. Knowledge and respect of tribal law would facilitate at least

diction in such circumstances is restricted and the state court cannot hear the case even if service of process is made on the defendant when outside of Indian country."

Scoles & Hay refer to *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 272 :

"There can be no doubt that to allow the exercise of state jurisdiction . . . would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indian to govern themselves". See also *Gover* (1980); *Canby* (1973); *F. Cohen* (1982), ch. 6B3; *Kennerly v. District Court*, 400 U.S. 423, 91 S.Ct. 480; L.Ed. 2d 507 (1971); *Annis v. Dewey County Bank*, 335 F. Supp. 133 (D.S.D. 1971); *Gourneau v. Smith*, 207 N.W. 2d 256 (N.D. 1973); *Wyoming ex rel. Peterson v. District Court*, 617 P. 2d 1056 (Wyo. 1980).

125. Article IV, Section 1. However, the Full Faith and Credit Act, 28 U.S.C. 1738, does not apply to Indians, because it addresses "territories", and reservations are not "territories". Hence, tribal courts are not "courts within the United States" in the sense of the Act. —CV. This seems to us a convincing answer to a disputed issue.

126. The Navajo Supreme Court has taken judicial notice that Indian nations and tribes were not signatories to the US constitution, and duly noted that the status of decision of Indian courts is generally determined not in relation to full faith and credit, but to the concept of the exclusive jurisdiction of each Indian court over certain matters, sanctioned by federal law and United States Supreme Court decisions. See *Dorothy Maloney v. Rose Russell*, 1 Nav. R. 91 decided July 2, 19741; *Matter of the Guardianship of Catherine Denise Chewiwi*, 1 Nav. R. 120 (Decided January 17, 1977, p 125).

127. *Anderson Petroleum Services v. Chuska Energy and Petroleum Company*, 4 Navajo Reporter (1983) (Window Rock District Court, October 26, 1983, No. WR-CV-72-83). The Navajo court refused to enforce an Oklahoma court order, and cites the *Chewiwi* case (see *id.*) in which Navajo Court of Appeals decided that full faith and credit need not be given to another Indian tribe's court. Some tribes, particularly Pueblos, follow the practice of "comity recognition" of foreign court decisions, usually after a hearing before the tribal court. See also comity recognition granted by Arizona courts to decisions of Navajo Courts as mentioned in *Hubbard v. Chinle*, see *supra* n. 121.

recognition based on the principles of "judicial" comity, such as in *Mexican v. Circle Bear*.¹²⁸ Comity implies that both state and tribal courts can decide *from case to case* whether they will give "full faith and credit."¹²⁹ Whereas legal scholarship has established the field of conflicts of law between nations, or states within a nation, or religious groups within a nation, nevertheless the conflict of law among tribes is relatively unexplored and novel. These distinctive forms of conflict, which are obviously significant among tribal people throughout the world, are also relevant to ethnic conflict in places such as the former Yugoslavia or Soviet Union. As soon as law respects tribal or ethnic identity, the problem of conflicts arises.

VII. CONCLUSION

"Indian law" refers to law made for Indians, mostly by federal authorities, and "tribal law" refers to law made by Indians. Scholars have studied Indian law intensively and neglected modern tribal law. Indian intellectuals often characterize the tribes as struggling to be different. This article surveys the extent to which the law made by modern tribal courts is in fact different. We found that Indian judges inevitably draw upon their own sense of justice and fairness in deciding cases and interpreting legislation, so their decisions reflect custom and tradition. Some customary norms are shared by Indians in general, others are shared by cultural or language groups, and many are specific to particular tribes. Indian common law mostly develops orally through networks among tribal officials and intellectuals. We found little evidence of a formal common law process similar to American state courts in any tribal court, except at Navajo.

We investigated tribal law regulating property, family, torts, and crimes. We found that much "tribal land" is allocated to families and groups by custom or lease. When custom does not control the allocation of property, much effort of people is absorbed in an unproductive contest for political influence. Inheritance of property follows some combination of Indian customary law and state probate laws, with the proportions depending upon the extent of cultural continuity on the reservation. Similarly, family law usually follows a combination of customary law and state law, depending upon how traditional the relevant family and community happen to be. With respect to torts and crimes, we found that tribal courts place more emphasis than non-Indian courts upon reconciliation and repairing relationships. Our observations of environmental law, contracts, and torts, while unsystematic, hinted at intriguing hypotheses, such as protection of

128. *Mexican v. Circle Bear*, 370 N.W.2d 737, 742-744 (S.D. 1985) (Henderson, J., concurring). Whoever enters a foreign law area should carry a due share of the risk in doing so.

129. See also Robert Laurence (1990) and Robert Clinton (1993).

sacred natural objects, the absence of consideration as a requirement in tribal contract, and lack of compensation for pain and suffering in the tort law of some tribes.

Tribal law is distinctly more Indian as applied than written.¹³⁰ A colonial situation can prevent the subordinate people from saying what they do.¹³¹ For many years, tribal officials apologized for distinctively Indian practices, but that phase of history has ended. The denigration of Indian culture probably threatens it less now than its misguided celebration.¹³² Many Americans now regard the cultural identity and distinctiveness of Indians and other groups as contributing to peace and diversity, as well as an entitlement of justice.¹³³ However, the history of displaced speech has made thinking about Indian common law difficult. On some reservations, custom is the "underground" law of the courts, in the sense that it affects many decisions without being explicitly recognized or systematized in writing. On a few reservations such as Navajo, the judges explicitly discuss the common law of the tribe and recognize custom as a source of enforceable rules. We believe that fairness and efficiency favor a closer alignment of law with custom in the tribes.¹³⁴ Tribal judges

130. See *supra*.

131. See Thomas (1967) pages 540f. of Part I.

132. Indian celebrations are rife with by phonies, frauds; also Nader (1990); and Fikentscher (1997a; 1998) on some psychological aspects of subordination. For example, The New York Times reported on April 21, 1992, that a famous letter from Chief Seattle to President Franklin Pierce, which organizers of Earth Day asked religious leaders around the world to read, is almost wholly contrived. The letter is the basis for a more elaborate contrivance, the number five best-seller on the New York Times nonfiction book list, entitled *Brother Eagle, Sister Sky: A Message from Chief Seattle*. See "Chief's 1854 Warning Tied to 1971 Ecological Script," The New York Times, Tuesday, April 21, 1992, page 1. That same day, The San Francisco Examiner reported that "Indian impostors" spoiled the opening of the U.S. pavilion at Expo '92 in Spain. It seems that the U.S. Information Agency canceled the scheduled performance of "Pale Moon" in response to protests by reputable Indian organizers that she is an impostor. (Did any Indian outside of Hollywood ever have such a name?) Her dubious credentials have not prevented her from performing widely or raising money in the name of Indians for the foundation that she runs. See "Culture Clash Mars U.S. Pavilion's Expo '92 Opening," San Francisco Examiner, 21 April, 1992, page A-2. Earlier in the year, the New York Times reported that a best selling book, entitled *The Education of Little Tree*, was written by a non-Indian posing as an Indian. See New York Times, March 16, 1992, Section D, page 8.

There is a strong ideological bias in some modern scholarship about Indians. To illustrate, no less a journal than the Harvard Law Review recently contained an article which reported that Indian societies enjoyed equality between the sexes until they were taught sexism by contact with whites. Such generalizations are 10% true and 90% misleading. In every tribe that we are aware of the hereditary chiefs were males, with two exceptions that this article cites as if they were representative. See Christofferson (1991).

133. Fikentscher (1991).

134. In this respect, our views are similar to those of Deloria and Lytle (1983), circa 248, and Brandfon (1991). In contrast, S.J. Brakel (1978) advocates abandoning the tribal court system.

have the power to work their own social norms into the fabric of tribal law. Now we hope that they will do so more explicitly.¹³⁵

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135. A Hopi scholar offered the opinion that all tribes have extensive customary law, which should be written down and kept separate from the modern tribal codes, so the former might be a source for the latter. The person in question, Emory Sekaquaptewa, has degrees in anthropology and law, and teaches at the University of Arizona. In order to write down Hopi traditional law, he has devoted himself to constructing a Hopi dictionary suitable for courts. With the Hopi as with most other tribes, writing down customary law remains an aspiration, not an accomplishment. As mentioned, other tribes dislike writing down their customary law, because "as soon as a custom is written down, it petrifies, and no longer develops; it dies and is no longer a living thing" (see note 106 supra). But in all tribes, Indian customary law exists and evolves, whether written down or not. It should be called Indian common law (Zion 1988, at 123).

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