1997

Of Cold Steel and Blueprints: Musings of an Old Country Lawyer on Crime, Jurisprudence, and the Tribal Attorney's Role in Developing Tribal Sovereignty

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> Far best is he who knows all things himself;
> Good, he that hearkens when men counsel right;
> But he who neither knows, nor lays to heart
> Another's wisdom, is a useless wight.[1]

I. Introduction

Three decades ago, a new generation of Indian lawyers began to emerge from the law schools of this country. This "first generation"[2] of Indian lawyers has exerted a tremendous impact upon tribal government, federal Indian law, and those who are coming after us.[3] We were generally young, smart, brash, irreverent, and unwilling to take "no" for an answer from the federal bureaucracy. Some had never met an attorney prior to entering law school. Those lucky enough to have someone in their family who had attended a college or university could generally look to a World War II Veteran father or uncle who had used their GI benefits to be the first in our family, and often the first in our Tribes, to obtain a bachelor's degree at an institution of higher learning. These men, and their warrior parents and grandparents were our role models and inspiration. Kirke Kickingbird captured the feelings of many of us as we began our law school and legal careers:

> Our great grandfathers and sometimes our grandfathers as young teenagers, had fought the last of the Indian wars at the close of the American frontier. We understood battle and the warrior tradition. Many of us came from the nobility and aristocracy of our people, and like the southern aristocrats after the Civil War, we knew the bitter taste of defeat. We did not have the good fortune to encounter genteel poverty. (Look at the last three U.S. Census' economic statistics on American Indian income.) We encountered crushing poverty. And if it was not our immediate personal experience, it was the experience of our families, our relatives, and our tribes.
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> We understood the power of the law and its use as a defensive and offensive weapon. Our contribution to the War on Poverty would be a legal battle. We felt like bronze age warriors given the gift of a Damascus steel blade. No enemy could stand before us. We shared Deloria's cynical humor when he twisted the Civil Rights Movement's anthem, "We shall overcome," into "We shall overrun." And when our friends took the anthem too literally, as at Wounded Knee, lawyers were needed more than ever.[4]

As we embarked upon our careers, and gained experience as attorneys, we often faced

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the dichotomy which existed between our roles as attorneys, and our station as very young — and, thus, often almost irrelevant — members of our tribal communities. As attorneys we were expected to be knowledgeable, competent practitioners of the legal arts and had been taught in law school that we should always have a ready and correct answer. As young tribal members, we generally did not have the life experience or cultural knowledge required for our elders to even bother to ask us the relevant question until after they had already made a decision.[5]

Many of us soon came to realize that we were that blade of Damascus steel, and that to be effective and fulfill the promise we held as the new generation of briefcase warriors,[6] we were obliged to place the handle of the sword and control over our actions into the hands of our people. Walking then, with one foot in both worlds, we balanced our duty as attorneys to represent our clients using our independent professional judgement[7] with our responsibility to defer on cultural and policy issues to the judgment of our elders. We became the instruments of tribal policy makers. In time, many assumed leadership roles, laying the foundation for new or long suppressed directions in tribal policy as we conveyed to our peoples the knowledge we had gained as attorneys. In effect, we have become teachers, students, leaders, and warriors, and some of us are now approaching the status of elders within our Tribes.

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Is this, then, the sine qua non of the tribal attorney? Perhaps. It is certainly an honorable thing to bring to the Indian community knowledge of their legal rights, and to be an advocate for the Indian people in tribal, federal, and state courts. Yet, willingly or unwillingly, knowingly or unknowingly, tribal attorneys build and shape the contextual arena within which the next generation of battles will be fought in the continuing struggle for tribal sovereignty. The role of a tribal attorney is, and ought to be, both an advocate for, and architect of, the sovereignty of the Tribes.[8]

The role as advocate is well-known. Training is completed; skills are honed to a razor-edge; for days before the battle preparations are made. Willingly the advocate steps into the maw of controversy ready and able to defend and promote the interests of the client. Bruised and battered, the advocate returns with their shield or upon it. Yet a true warrior does not rush thoughtlessly into battle. A true warrior promotes, protects, and defends the interest of their people.[9]

One must understand, however, that to prevail in court or in the halls of Congress is not always to promote the overall interest of Indian people in tribal sovereignty, and can sometimes be directly adverse to it.[10] It is incumbent upon Tribal attorneys to consider not only the merits of the arguments which could be made in a particular case, but also their long term affect upon the sovereignty of the Tribe should they prevail upon those arguments. Ideally, Tribal attorneys

should adopt those positions which will both prevail in the case at issue, yet maintain and enhance the sovereignty of the Tribe in the future. To do so, Tribal attorneys must keep in mind, in both the advice they give to tribal decision makers and the positions they advance in court, their role as developers of Tribal sovereignty.[11] It is then to our role as architects of tribal sovereignty that our attention should now turn.

II. Architects of Tribal Jurisprudence

A. Drawing Fine Lines with Blunt Pencils

Amidst the humdrum variations in tribal representation — throwing out the bingo bandits, political disputes, arguing with the BIA,[12] political disputes, arguing with the IHS,[13] political disputes, litigating jurisdictional issues with the State, political disputes — it is easy to miss the opportunity to make a worthwhile contribution to tribal sovereignty, as these opportunities often come in disguise. The Tribal Chairman's nephew started a fist-fight with his cousin at the powwow (again) and was arrested by the tribal police. He has been put in the tribal jail five times in the last six years for the same thing. Everyone wants such conduct stopped. Now what? An old man and his juvenile grandson are arrested for severely beating a young man who entered the old man's Indian house without permission. Several tribal elders come to your office protesting the arrest on the grounds that the old man must be out of jail for a tribal ceremony next Friday since he is the only one authorized to conduct a portion of that ceremony. The old man cannot or will not make bail. Now what? A young woman runs off with her sister's husband, and the wife and her relatives start tracking them. His relatives respond in kind. There are three requests for emergency protective orders, a divorce case, six criminal cases of assault and battery, eight criminal cases for malicious mischief or destruction of private property, and close to twenty (at last count) civil actions for damages filed in the tribal court all arising out of this incident, and the parties show no signs of eschewing similar behavior in the future. Now what?[14]

It would seem that our training as attorneys, and our role as advocates, would compel us to file appropriate criminal or juvenile charges and prosecute the assailant(s) in each case, leaving the "victims" to pursue their private legal remedies for the wrongs done to them. These examples illustrate some of the significant deficiencies in an Americanized justice system. First, how is wrongful and disruptive conduct to be deterred when the perpetrator is willing to accept the statutory penalty proscribed for such conduct — can moral thoughts and conduct be legislated?[15] Second, the Americanized justice system has extreme difficultly dealing with — or even formally acknowledging — concepts of community or group needs, rights, or responsibilities which are affected by its processes. In addition, the American system of justice often requires a plethora of lawsuits to resolve a single incident. Finally, the adversarial system is directed only at conduct,[16] generally leaving the underlying causes of personal conflict unresolved, and often contributing to long term continuation of personal controversies via its winner-loser approach to justice. It is, of course, obvious that we should also question whether our use of the adversarial system of "justice" within our communities is beneficial,

or whether it is destructive of the unique cultural and philosophical attitudes and beliefs that define the very essence of our peoples.[17] When these problems become apparent, Grandma is likely to ask "Why do we have a criminal code anyway?"

Sometimes the simple questions are the most difficult.

The simple answer to Grandma's question, of course, is that that is the way the white people do it.[18] That is the way we are trained in law school, and most of us have not thought much past the basic reasons given in the law school textbooks for the criminal justice system.[19] A more thoughtful answer might be that the Secretary of the Interior, when he drew the first rules for the original Courts of Indian Offenses, included a criminal code in his regulations,[20] and the Tribe was required to have a similar structure before the Secretary would recognize the Tribal Court and close his Court of Indian Offenses for the Tribe.[21] If we aspire to the development of an Indian tribal law which is truly in our own image, the best answer may be "because the Duke of Normandy invaded medieval England and won the day at the battle of Hastings in 1066."[22] To fully understand *why* we were trained as we were in law school, and perhaps more importantly the assumptions behind such training, we must delve into the cultural assumptions, customs, traditions, and history of the Americans underlying the creation of their system. In order for Tribal Attorneys to adequately assist the Tribes in the development of their own tribal jurisprudence which is consistent with the cultural assumptions and history of the Tribe, we must recognize and attempt to understand the basic assumptions of the American legal system and the reasons for its existence.

The problem, of course, is where to start.

The search for the source of the criminal justice system amongst the antiquities of Western Civilization is perhaps fruitless, as the available translations and scholarly literature has already been filtered through culturally biased eyes. However, a short synopsis of the reported aspects of the laws of ancient civilizations of the "western" world will be useful in understanding the later development of the American system of justice. Given the pervasive influence of the Judeo-Christian ethic upon those who would become the Americans, it may be well to begin our inquiry at the place from which their religion has its source — Babylon.

B. Once upon a time on a Continent far, far away . . . .[23]

> [T]he law's future is bounded by law's past. The future law is the law that we will come to see. Because our sight is limited by what we are able to pick out based on our past sightings, future law will necessarily have to do with us — our needs, our goals, our plans, our visions — all of which are limited, even nearsighted.[24]

While the Babylonian and Assyrian peoples apparently had recognizable legal "codes" since the beginnings of their civilization,[25] practically all we know of that which could later be classified as "criminal" comes directly from the code which King Hammurabi received from his god.[26] Amongst the penalties recognized by the Code of Hammurabi are

death,[27] mutilation,[28] and scourging.[29] Other known forms of penalties imposed by the Code of Hammurabi for various forms of conduct include banishment, restitution (both simple and in some cases up to thirty times the damages found), voidance of claims at law for attempting self-help justice, and simple compensation.[30] While the King and other high officials probably acted as judges on occasion, and professional judges were known from antiquity,[31] it seems that there was no clear conception of a "criminal offense" against the state which could be distinguished from providing an avenue of formalized retaliation or restitution for the victim, for the victim of wrongful conduct could effectively pardon the perpetrator even though the Code of Hammurabi required the death penalty.[32]

It may be fairly argued, however, that the vaunted Code of Hammurabi is not a code at all, at least in the sense in which the word "code" is now understood by lawyers as a legislative act, but is rather a compendium of "dooms" or "judgments" which Hammurabi had made.[33] In order to consider this possibility seriously, one need only remove the section numbers inserted by the translators and hear the words of Hammurabi himself from the stele:

> [The Gods establish a high rank for Babylon] . . . and Bel call me by name, Hammurabi, the high prince, god-fearing, to exemplify justice in the land, to banish the proud and oppressor, that the great should not despoil the weak, to rise like the sun over the black-headed race (mankind) and illumine the land, to give health to all flesh. Hammurabi the (good) shepherd, the choice of Bel, am I . . . [there follows a long list of his achievements] . . . When Marduk [God who rules mankind] brought me to direct all people and commissioned me to give judgment, I laid down justice and right in the provinces, I made all flesh to prosper. Then if a man has accused another of laying a *nertu* (death spell) upon him, but has not proved it, he shall be put to death; if a . . . slave has said to his master, "You are not my master," he shall be brought to account as his slave, and his master shall cut off his ear. The judgments of righteousness which Hammurabi, the powerful king, settled, and caused the land to receive a sure polity and a gracious rule . . . The oppressed who has a suit to prosecute may come before my image, that of a righteous king, and read my inscription and understand my precious words and may my stele elucidate his case. Let him see the law he seeks . . . .[34]

It does not appear that there is any clear distinction between wrongs that are "criminal" and wrongs that are "tortious," although there clearly exists a recognizable system for the resolution of disputes[35] and the imposition of permissible, ritualized, or common sanctions for those who wrong another.[36]

Abram, later to be named Abraham as the founder of the Jewish people and the Judaic religion, was a native of Ur[37] within the territory governed by Babylon.[38] Abraham's grandson, Jacob, returned to Haran in

Mesopotamia[39] to find a wife, and there married Leah and Rachel from whom descended the twelve tribes of Israel.[40] Moses, of course, received a written code directly from his God in the form of the Ten Commandments,[41] and a series of "judgements"[42] which echoed many of the provisions of Hammurabi's Code of judgments.[43] Likewise, the Jewish people received judges who were to judge the people[44] and who attained some of the "Kingly" traits of a Mesopotamian ruler.[45] Of course David, Israel's great King, personally implemented judgement and justice among his people,[46] as did Jehoshaphat and other Jewish Kings both personally and via regularly appointed judicial officers.[47] Yet, even as late as the Roman period, there appears to be no clearly defined concept of crime in the sense of an offense against the state for which the state may demand punishment.[48]

In the early Greco-Roman world, kings are seen as the possessors of *Themistes*, or divinely dictated judgements given by god to the kings for their use upon need.[49] After the development of regular "judicial" officers, they are seen not necessarily as the successors of the prerogative of the king in the sense of individual divine inspiration for each sentence, but as the oligarchy which claims to monopolize the knowledge of the laws.[50] Of course the publication of Roman law in the Twelve Tables, and other writings, in some ways broke the monopoly of knowledge as the Code of Hammurabi had done for the Babylonians but not the monopoly of authority. We do know somewhat of the procedure of suits in the Roman period through the Legis Actio Sacramenti, the font of the later Roman Law of Actions.[51]

The subject of litigation is supposed to be in Court. If it is moveable, it is actually there. If it is immoveable, a fragment or sample of it is brought in its place; land, for instance, is represented by a clod, a house by a single brick. In the example selected by Gaius, the suit is for a slave. The proceeding begins by the plaintiff's advancing with a rod, which, as Gaius expressly tells, symbolised [sic] a spear. He lays hold of the slave and asserts a right to him with the words, "*Hunc ego hominen ex Jure Quiritium meum esse dico secundum suam causam sicut dixi;*" and then saying, "*Ecce tibi Vindictam imposui,*" he touches him with the spear. The defendant goes through the same series of acts and gestures. On this the Praetor intervenes, and bids the litigants relax their hold, "*Mittite ambo hominem.*" They obey, and the plaintiff demands from the defendant the reason of his interference, "*Postulo anne dicas qua ex causa vindicaveris,*" a question which is replied to by a fresh assertion of right, "*Jus peregi sicut vindictam imposui.*" On this, the first claimant offers to stake a sum of money, called a Sacramentum, on the justice of his own case, "*Quando tu injuia provocasti, D aeris Sacramento te provoco,*" and the defendant, in the phrase "*Similiter ego te,*" accepts the wager. The subsequent proceedings were no longer of a formal kind, but it is to be observed that the Praetor took security for the Sacramentum, which

always went into the coffers of the State.

Such was the necessary preface of every ancient Roman suit. It is impossible, I think, to refuse assent to the suggestion of those who see in it a dramatization of the Origin of Justice. Two armed men are wrangling about some disputed property. The Praetor, *vir pietate gravis*, happens to be going by, and interposes to stop the contest. The disputants state their case to him, and agree that he shall arbitrate between them, it being arranged that the loser, besides resigning the subject of the quarrel, shall pay a sum of money to the umpire as remuneration for his trouble and loss of time. This interpretation would be less plausible than it is, were it not that, by a surprising coincidence, the ceremony described by Gaius as the imperative course of proceeding in a Legis Actio is substantially the same with one of the two subjects which the God Hephaestus is described by Homer as moulding [sic] into the First Compartment of the Shield of Achilles. In the Homeric trial-scene, the dispute, as if expressly intended to bring out the characteristics of primitive society, is not about property but about the composition for a homicide.[52]

Thus, early Roman law did not view wrongs between people as wrongs against the state, but as controversies which the state should resolve. Maine explains that the earliest conception, in the Roman Republic, of *crimin* or Crime was that of:

> an act involving such high issues that the State, instead of leaving its cognisance to the civil tribunal or the religious court, directed a special law or *privilegium* against the perpetrator. Every indictment therefore took the form of a bill of pains and penalties, and the trial of a *criminal* was a proceeding wholly extraordinary, wholly irregular, wholly independent of settled rules and fixed conditions. Consequently, both for the reason that the tribunal dispensing justice was the sovereign state itself and also for the reason that no classification of the acts prescribed or forbidden was possible, there was not at this epoch any *Law* of crimes, any criminal jurisprudence.[53]

By the time Caesar had begun the Roman invasion of Gaul, including Normandy and Brittany,[54] the Romans had begun the development of the concept of the "crime against the people" in the Lex Calpurnia de Repetundis which established a permanent commission to deal with claims to recover money improperly taken from provencials by a Governor-General.[55] During the decay of the Republic, these permanent commissions multiplied as each new set of "crimes" gave rise to a new permanent commission to try and punish violators of the legislation establishing the commission and prohibiting certain conduct — legislation often used to fulfill political ends.[56] The decline of the Roman Republic and the rise of the Roman Emperors meant that the appoint-

ment of judges and trial of cases became centralized in the Emperor and his council.[57] As Rome secured its grasp on Gaul and portions of Britain,[58] the Emperors again become the font of all "justice," and in awful majesty could decree whether a man lived or died. Augustus Caesar (63 B.C.-A.D. 14) was deified shortly after his death, and later Caesars were deified during their lives, again intertwining the notion of the god-king doing justice for his people.[59]

The conversion of Emperor Constantine (A.D. 275-337) to Christianity in about A.D. 312 set the stage for the rise of the Church as a major power in the western world.[60] While the Roman Empire proper collapsed in the west in A.D. 476,[61] its vertically integrated power structure and the rise of the Church as a political and religious power remained thoroughly ingrained in the culture and tradition of the region.[62] In A.D. 800, Pope Leo III crowned Charlemagne as Emperor of the Romans, thereby re-establishing the Holy Roman Empire which would exist in various forms until 1806.[63] Charlemagne firmly established the feudal tenure system, including its ruthlessly vertical power structure.[64] Shortly after Charlemagne's death in A.D. 814,[65] the Norsemen (Normans) invaded France, and by the 900s had colonized that area of France now known as Normandy. By A.D. 911, the Normans had adopted French custom, become Christians, and their chief had entered into the feudal service of the Frankish king, Charles the Simple.[66] Maine would describe this stage in the development of the power structure of the time as it relates to the development of the criminal law thusly:

> [T]he development of the criminal law was universally hastened by two causes, the memory of the Roman Empire and the influence of the Church. On the one hand traditions of the majesty of the Caesars, perpetuated by the temporary ascendency of the House of Charlemagne, were surrounding Sovereigns with a prestige which a mere barbarous chieftain could never otherwise have acquired and were communicating to the pettiest feudal potentate the character of guardian of society and representative of the State. On the other hand, the Church, in its anxiety to put a curb on sanguinary ferocity, sought about for authority to punish the graver misdeeds, and found it in those passages of Scripture which speak with approval of the powers of punishment committed to the civil magistrate. The New Testament was appealed to as proving that secular rules exist for the terror of evil-doers; the Old Testament, as laying down that "whoso sheddeth man's blood, by man shall his blood be shed." There can be no doubt, I imagine, that modern ideas on the subject of crime as based upon two assumptions contended for by the church in the Dark Ages — first, that each feudal ruler, in his degree, might be assimilated to the Roman Magistrates spoken of by Saint Paul; and, next, that the offences which he was to chastise were those selected for prohibition in the Mosaic Commandments, or rather such of

them as the Church did not reserve to her own cognisance.[67]

On the other hand, the people whom the Caesars invaded in France and Britain came in part from Celtic stock, having spread from Austria throughout France, Portugal, Spain, and Britain.[68] The populations of Celts who inhabited Ireland, Scotland, Wales, southwest England, and Brittany in what is now France were the only Celtic peoples who retained their own culture relatively intact in the face of the Roman onslaught.[69] Other than the research of archeologists and reports of the Greeks and Romans,[70] however, little is known of their society as they had no early system of writing.[71] What we do know comes mainly from extrapolation from the conflict between the "old" customs of England and the rules imposed by William the Conqueror.

The stage was set for the Norman invasion of Britain.

III. An Island for the Duke

Duke William of Normandy, as successor to his Norman forebears, owed feudal service to the King of France. Obviously, an exposition of the feudal system is beyond the scope of this work. However, William and his Barons brought the feudal system in its full glory with them as they conquered England, and a few words will shed at least some light on the subject of this survey.

One of the dominant notions of the day was that of service. Land was not simply an estate. It was inextricably intertwined with the idea that one owed service (military assistance, labor, money, personal services, etc.) to the superior through whom one possessed the land:[72]

> The public organization of England, for example, was derived from the fact that all the land in the country was held by a certain number of tenants-in-chief, including ecclesiastical incorporations and boroughs, from the king, while all the rest of the population consisted either of under-tenants or of persons settled on the land of some tenant and amenable to jurisdiction through the latter. In other West-European countries the distribution of the people was more intricate and confused because there had been no wholesale conquest capable of reducing conditions to uniformity, but the fundamental facts were the same. Every West-European country was arranged on the basis of feudal land-tenure.
>
> The acts constituting the feudal contract were called homagium and investitures. The tenant had to appear in person before the lord surrounded by his court, to kneel before him and to put his folded bands into the hand of the lord, saying: "I swear to be faithful and attached to you as a man should be to his lord." He added sometimes: "I will do so as long as I am your man and as I hold your land" (Saxon Lehnrecht, ch. 3). To this act of homage corresponded the "investiture" by the lord, who delivered to his vassal a flag, a staff, a charter or some other symbol of the property conceded. There were

> many variations according to localities and, of course, the ceremony differed in the case of a person of base status. Yet even a villein received his yardland or ox-gang from the steward of a lord after swearing an oath of fealty and in the form of an "admittance" by the staff, of which a record was kept in the rolls of the manorial court: hence the copyhold tenure of English law.[73]

Another important consideration within this long tradition of vertical allegiance culminating in the person of an all-powerful King,[74] owed fealty by all, was the concept of the "King's peace." Originally, the "King's peace" attached only to the King's house, and his attendants, servants, and other persons upon whom he bestowed his special protection.[75] After the Norman conquest, it appears that the King's peace[76] expanded until it became a normal and general safeguard of the public order.[77] This change is important because a violation of the "King's peace" meant that one had been disloyal in the worst feudal sense — it was felony, high treason, a direct affront to the majesty and person of the King thus requiring all his loyal subjects to rise in righteous wrath to protect him. Even as late as 1769, Blackstone would describe in terms of homage and fealty, the rationale for the crime of treason (and other felonies) as a violation of the true and faithful allegiance owed to a person's sovereign liege lord, the King.[78]

The doing of homage[79] between lord and vassal[80] created a mutual "contractual" and "legal" bond of trust in the highest degree between lord and man so that the lord owed the man protection in the estate held by the man "of" the lord and in his person, as the man owed the lord service and reverence.[81] It is from this reverence owed by the man to the lord, and the jurisdiction the lord obtained over the man to enforce it,[82] which gave rise to that distinctly feudal crime — felony:[83]

> [Felony] covered only the specifically feudal crimes, those crimes which were breaches of the feudal nexus and which would work a forfeiture or escheat of the fief, or, as the case might be, of the lordship; for the lord might be guilty of felony against his man just as the man might be guilty of felony against his lord. A mere common crime, however wicked and base, mere wilful homicide, or theft, is not a felony; there must be some breach of that faith and trust which ought to exist between lord and man. Now it would seem that for a while the word was used here as well as elsewhere in this restricted sense; in the Leges Henrici *felonia* is one among many crimes. A little later it seems to cover every crime of any considerable gravity, and seems to have no reference whatever to the feudal bond, save in one respect, namely, that the felon's land escheats to his lord; nay, a charge of *felonia* has become an indispensable part of every charge of every crime that is to be punished by death or mutilation. The details of this process are obscure. Possibly the lords saw no harm in a change which brought them abundant

> escheats . . . . All the hatred and contempt which are behind the word felon are enlisted against the criminal, murderer, robber, thief, without reference to any breach of the bond of homage and fealty.[84]

Yet there remained a substratum of that autonomous legal custom of the Celts over which these feudal precepts of the Normans were laid and intertwined. Early Anglo-Saxon law and custom was that of the feud, to be compromised through the payment of compensation denoted as the *wergild*, literally a "man's price" or "man-payment" while lesser injuries than death had been the subject of elaborate tariffs[85] describing the amounts to be paid to the injured party or his heir for offenses committed against him.[86] These customs[87] have been described as follows:

> Of the more ancient system we shall say but little. On the eve of the Norman Conquest what we may call the criminal law of England (but it was also the law of 'torts' or civil wrongs) contained four elements which deserve attention; its past history had in the main consisted of the varying relations between them. We have to speak of outlawry, of the blood-feud, of the tariffs of wer and bot and wite, of punishment, of punishment in life and limb. As regards the malefactor, the community may assume one of four attitudes: it may make war upon him, it may leave him exposed to the vengeance of those whom he has wronged, it may suffer him to make atonement, it may inflict on him a determinate punishment, death, mutilation, or the like.[88]

[T]he defendant and his relatives literally bet the defendant's life on the jury verdict if they refused to compensate the victim

The slow but steady amalgamation of the old with the new resulted in four different, yet related, forms of action designed to remedy wrongs done: the appeal of felony, the writ of trespass, the indictment of felony, and the indictment of trespass.[89] The appeal of felony, still extant in Blackstone's day,[90] was not an appeal to a higher court but rather an original action through which a private citizen obtained redress upon the wrongdoer by a private prosecution for a felony. As in the writ of trespass,[91] in which the victim requested damages, an appeal of felony could neither be dismissed nor pardoned by the King, but only by the victim or the victim's heir entitled to bring the appeal.[92] Further, an appeal of felony could be brought after a defendant had been acquitted, or found guilty and pardoned (not punished), at the suit of the King upon indictment, but no indictment could be brought by the King after an acquittal upon an appeal of felony.[93] The private victim-prosecutor ran some risk in that the defendant could demand trial by battle,[94] and the victim-prosecutor could be killed. Further, if the action were lost, the prosecutor would be fined in a small amount by the king. They were attractive, however, in that so long as such

actions could be settled out of court, the defendant and his relatives literally bet the defendant's life on the jury verdict if they refused to compensate the victim.[95]

In contrast to the appeal of felony and the writ of trespass, indictments of felony and indictments of trespass were actions controlled by the King's officers. In both these actions, the victim had no say in whether the defendant was prosecuted to judgment or thereafter pardoned.[96] Successful prosecutions resulted, absent a pardon, in the execution of the wrongdoer. The wrongdoer's goods were forfeited to the king upon conviction,[97] and upon entry of judgment the rent and profits of his lands belonged to the king for one year (including whatever the king could make from wasting the land), and the lands thereafter escheated to the wrongdoer's lord.[98] Pardons, however, had value both in money and favors owed, and when an appeal of felony was settled out of court, the king lost both revenues and personal obligations important for his crown.[99] The ability of the victim-prosecutor to negotiate a solution to the problem acceptable to him was finally outlawed by statute,[100] and the appeal of felony slowly fell into disuse as its benefits in obtaining just compensation disappeared and its possible adverse consequences remained. It slowly became dormant, and was replaced by the indictment of trespass controlled by the King's officers.[101] Thereafter the only remedy left to the victim was the writ of trespass for compensatory damages.[102]

[O]ne's station in life depended upon how close one came to the ruling Monarch in title and position within this pyramidal society

IV. The Alien Invasion

A. Nina, Pinta, Sancta Maria, & One That Fell Off the Edge

By the time the English began their invasion of our lands in what is now called the United States, several prominent features of their society could be discerned from their customs and traditions. On the religious front, the invaders were, in the main, participants in various Christian[103] sects whose roots lay in the Roman-Jewish-Babylonian empires.[104] While disputes remained as to the precise domains of church and secular law, the separation of the Church of England from the Catholic Church of Rome prevented, at least after the reign of Henry the Eighth, the continued interference of the Church of Rome in the government of England.[105] Thus, instead of the church being a competitor for power within the English system, England had once again returned to the ethic of the god-King,[106] a convergence of religious and secular rule in one human person,[107] in the tradition of Hammurabi and the Ceasars.

In the secular arena, English society appears to have been ranked according to a rather severe class pyramid with the Monarch at its feudal apex. Not only was all land in private ownership held, ultimately, "of the King,"[108] the holding of such lands was intertwined with one's rank and status.[109] Ultimately, from the most lordly Baron to the lowliest villain,[110] every person owed personal allegiance, obedience, and deference to the

King and his liege lord, and, in turn, expected to receive such allegiance, obedience, and deference from his tenants and villains as well as others of lesser rank whom he deemed his inferiors. Thus, one's station in life depended upon how close one came to the ruling Monarch in title and position within this pyramidal society, resulting in a social system where personal honor and importance depended almost exclusively upon class, rank, and wealth. It would not, perhaps, be an exaggeration to suggest that their social development had regressed to the point that — at least prior to their contact with Indian people — they could not conceive of a system of social control, i.e., a government, which was not based upon rank, wealth, and force.[111]

Within this structure, the old remedies of the victim for wrongs done were slowly being consumed by the King's courts. The appeal of felony, while still technically available, had fallen into disuse. The ancient remedies of victims to demand compensation for the offense against them in preference to the King's ability to prosecute and receive the profits of the prosecution had been outlawed. The King was in the final process of consolidating his hold upon the system of justice generally by reducing the jurisdictional authorities of the nobles, and of solidifying his grip upon the revenues available from the punishment of "crimes" by limiting the rights of victims to the writ of trespass.[112] In short, the idea of the crime against the Crown had begun to take shape.

The problem, of course, is that Indian Nations never had a King.

B. Of Colonists, Pioneers, and Felons Transported

When we study the lives of the great pioneers of Australia and America we see that they were almost all born criminals, pirates, or assassins, whose excessive fondness for action, strife, carnage, and novelty, which would have been an immense danger for their country, found a useful outlet in the midst of tribes of savages.[113]

While the American legend states that the early colonists were pious Christians intent on seeking religious freedom in a new land, that legend usually fails to recall that many of the early invaders were *de jure* outlaws in England.[114] Blackstone reports that transportation to America for a term from seven years to life was a standard punishment for perjury, subornation of perjury,[115] and most felonies other than high treason, upon claiming the benefit of clergy to avoid execution.[116] Mr. Justice Story described the attitude of the early "colonists" and their reasons for invading Indian Country as follows:

> It is difficult to perceive, why their [Indian Nations] title was not, in this respect, as well founded as the title of any other nation, to the soil within its own boundaries. . . . especially as to countries in the possession of native inhabitants and tribes at the time of the discovery, it seems difficult to perceive, what ground of right any discovery could confer. It would seem strange to us, if, in the present times, the natives of the South Sea Islands, or of Cochin China, should, by making a voyage to, and a discovery of, the

> United States, on that account set up a right to the soil within our boundaries.
>
> The truth is, that the European nations paid not the slightest regard to the rights of the native tribes. They treated them as mere barbarians and heathens, whom, if they were not at liberty to extirpate, they were entitled to deem mere temporary occupants of the soil. They might convert them to Christianity; and, if they refused conversion, they might drive them from the soil, as unworthy to inhabit it. They affected to be governed by the desire to promote the cause of Christianity, and were aided in this ostensible object by the whole influence of the Papal power. But their real object was, to extend their own power, and increase their own wealth, by acquiring the treasures, as well as the territory, of the New World. Avarice and ambition were at the bottom of all their original enterprises.[117]

As suggested by Lombroso and Justice Story, it was perhaps more politic for the King to send the dissenters and the criminals from his kingdom in England to the colonies in America under the charge of his loyal, greedy vassals (some of whom would be Barons and Lords, and thus tenants-in-chief of the King within the English system) than to deal with them at home.[118] It is reasonably certain that the King considered such a course of action more profitable to the Crown.

Whether their cause in coming to the Indian Country was to avoid the lawful religion of England, to avoid execution as a criminal, or simply to pirate their fortune, it is clear that the "adventurers" and "pioneers" who began the English invasion did so within the forms of their own customs and traditions.[119] It would seem to be beyond cavil to deduce that English people would bring English ways with them as they moved to colonize a foreign land. In this regard, a review of the form of some of the early Charters issued for the establishment of colonies will be illustrative of the feudal roots of the English colonies in America, and the transfer of the English custom and tradition to those colonies.[120]

The thirteen colonies which would form the original United States of America were governed, at least by the time of the revolution, under either a Provincial, Proprietary, or Corporate Charter form of government.[121] The Provincial form of government was directly and wholly under the pleasure and authority of the King, and existed at the time of the Revolution in New Hampshire, New York, Virginia, North Carolina, South Carolina, and Georgia although some of these had earlier been governed as Proprietorships or in the form of Corporate Charters.[122] Proprietary colonies (Maryland (Lord Baltimore) and Pennsylvania and Delaware (William Penn) at the time of the Revolution) were those conveyed and granted by letters patent from the King to one or more persons personally, which patents — in accordance with the feudal practice — conveyed both rights to the soil and jurisdiction to govern the territory and the persons therein.[123] Charter governments (Massachusetts, Rhode Island, and Connecticut at the time of the Revolution) were similar to

the Proprietary colonies in that the soil and governmental authority were conveyed by grant, deed, or letter patent, but the soil and government were conveyed to a body corporate and politic which would function according to the constitution of such body set out in the charter.[124]

The charters issued to these entities contained several clauses which reflect the basic assumptions regarding the conjunction of land tenure, government, and the feudal structure of their society. First, the grants regularly reserved unto the King or Prince granting the property the services due to a feudal lord in the form of annual rentals payable in money, furs, or the produce of the lands.[125] It should be noted, however, that the grant of these lands to be held "as of our Mannor of East Greenewich, in free and Common Soccage"[126] — as well as the attitudes of the populace — effectively prevented the creation of the feudal tenure system in the colonies from the original grantee to others lower in the chain of title.[127] Further, these grants and charters required the oath of allegiance (homage) due the King to be taken before an authorized officer of the Colony.[128] Many of these grants contained provisions for the King, upon finding that a subject had engaged in thief or piracy of the King's subjects or the subjects of some other King or Prince then in amity with England and had not made restitution within the time set by the King, to declare that the subject was out of the allegiance and protection of the King and that the aggrieved party then would be entitled to make war upon the former subject.[129]

There were regularly two provisions in these Charters which reinforced the habit and custom of the English people by which they brought their common law with them to the colonies and expected to be treated by their government according to their rights as English people. First, as the Charters conveyed the rights of government to the Proprietary or the governing corporate body, it did so respecting the custom of the free inhabitants (generally meaning the landowners) to elect a body who would actually pass the laws subject to Executive approval, as well as the jury trial for their enforcement, and required that all such laws be not inconsistent with the laws of England.[130] Further, these Charters provided that the colonist and their children were to be treated as freeborn English subjects to the same intents and purposes as if they had been born in England.[131]

V. Putting Locks On Our Barkhouses Crime Comes to the Indian Country

It is impossible for us to suppose these creatures to be men; because allowing them to be men, a suspicion would follow that we ourselves are not Christians.[132]

If our people were astonished at the technological development of the colonists, it is also true that the ethical and political development of the early colonists were so backward and barbaric that they could not even recognize the forms of government in use by the Indian Tribes with which they came into contact.[133] The European experience, for over a thousand years prior to our discovery of the lost Genoese sailor upon our shores, contained no examples of egalitarian democracy. "Liberty" was thought of not as freedom from rulers and the hierarchical feudal power structure,[134] but rather as a national liberty from control by

another nation, or the liberty received by a slave who had advanced to the status of a subject.[135] The impact of our political institutions upon the Europeans post contact was profound,[136] resulting in a rapid diminishment of the authority generally accepted by the colonists in their sovereign lord, the King,[137] and eventually leading to their revolution.[138]

Many of the prominent thinkers and figures of the colonies during and after their revolution, including Benjamin Franklin, Thomas Paine, Charles Thomson (the perpetual Secretary of the Congress), George Washington, and Thomas Jefferson, were familiar with Indian political processes.[139] During the revolutionary period, and for some years thereafter during the period of the Articles of Confederation,[140] they even attempted to emulate the League of the Six Nations (Iroquois) Confederacy with one of their own.[141] However, custom, tradition, and culture die hard. No matter how much the Americans had come to detest the King, the now independent thirteen American colonies could not make a system of governance work without the hierarchical power of coercion in their society. Justice Story described their inability to operate within a system devoid of coercion and rank as follows:

> It was remarked, by an eminent statesman, that by this political compact the Continental Congress have exclusive power for the following purposes, without being able to execute one of them: — They may make and conclude treaties; but can only recommend the observance of them. They may appoint ambassadors; but they cannot defray even the expenses of their tables. They may borrow money in their own name, on the faith of the Union; but they cannot pay a dollar. They may coin money; but they cannot import an ounce of bullion. They may make war, and determine what number of troops are necessary; but they cannot raise a single soldier. In short, they may declare every thing, but they can do nothing. And, strong as this description may seem, it was literally true; for Congress had little more than the power of recommending their measures to the good will of the States.
>
> The leading defects of the Confederation were the following: In the first place , there was an utter want of all coercive authority in the Continental Congress to carry into effect any of their constitutional measures . . . there was no power in the Continental Congress to punish individuals for any breaches of their enactments. . . .[142]

These and other "subordinate" defects, according to Justice Story, were enough to "establish its utter unfitness as a frame of government, for a free, enterprising, and industrious people,"[143] even though similar systems had existed among many of the eastern Nations of Indians, including the Iroquois, Cherokee, and Creeks for hundreds of years.[144] Simply put, the Americans had simply not advanced socially and culturally to the point where they could make such a system work. They could com-

mand, but could not consistently lead their people. They could obey for fear of punishment, but could not agreeably abide by the decisions of their chosen leaders without unwarrantable dissent. They could enumerate their "rights" against their superior(s), but could not assume responsibility to their fellows to act consistently with the standards of their society. They could divide into "mine" and "thine", but would attribute honor and prestige within their society to the accumulation of wealth and exercise of power, not the uses to which it was put.[145]

Regardless of their best theoretical precepts, and adamant detestation of the British King and English system of royalty and nobility, they could not easily throw off the shackles of class, rank, and privilege, the products of a thousand years of European custom and tradition. They have substituted "Mr. President" for "Your Majesty," and "Senator X" for "Your Lordship," but review of the records of their government and news stories of today clearly show that their leadership expects the deference "due" their exalted rank.[146] Even their daily forms of address— Sir,[147] Mister,[148] Mistress (Mrs.),[149]—are based upon the titles of rank, not the relationship of equals as relatives or families within a society. The theory, "We hold these truths to be self-evident: that all men are created equal,"[150] in practice means only that all those persons who rank as our equals and are of the same class are created equally. Consciously or unconsciously, Americans tend to classify persons as their superiors, their equals, or their inferiors — thus the "upper," "middle," and "lower" classes of American society and the atrocious history of discrimination not only against racial groups, but against "others" perceived as inferior — Jews, Irish, and many other later immigrant groups.[151] Simply stated, those who are different are threatening, because in a system inherently rank and power conscious, the "different," whether it be, race, culture, or whatsoever, must be suppressed as inferior by those having the power to do so lest the different be found to be superior.

Thus, the short lived experiment of a federal government without coercive power was abandoned, less than ten years after it was instituted, and a federal government was substituted in its place which is again based on the power of the executive to compel compliance with governmental dictates through the use of force.[152] Like the government under the Articles of Confederation,[153] and the colonies before that,[154] the new federal government was slow to attempt to extend the reach of its criminal law into the Indian Country. Section 1 of the Trade and Intercourse Act,[155] drew a boundary line between the United States and the Indian Tribes on its frontier according to its treaty commitments,[156] and provided that if any Indian crossed said boundary into the United States and there stole horses or other property or committed any "murder, violence, or outrage, upon any such citizen or inhabitant," the United States would apply to the Tribe for satisfaction if the violator was not apprehended within American territory.[157] In 1817, Congress extended the criminal law into the Indian Country subject to the proviso that such extension did not extend to the commission of any offence by one Indian against

another, nor would that extension be construed as affecting any treaty in force between the United States and any Tribe.[158] These provisions were later continued into sections 2145 and 2146 of the Revised Statutes (with an additional exception as to those Indians who already had been punished by the local laws of their Tribe.)[159]

Although Georgia claimed criminal jurisdiction even over Indians in the Indian country within the boundaries of Georgia,[160] the United States Supreme Court, in 1832, decided that state criminal law did not apply within the confines of the Indian Country — even concerning the conduct of white persons.[161] Some years later in a case where Crow Dog killed American favorite Spotted Tail within their reservation, both being Indians, the Court held that the laws of the United States did not apply.[162] This result was followed by the imposition by Congress of the Major Crimes Act.[163] In this statute, Congress granted jurisdiction to their federal courts over several felony offenses (as defined by American law) committed by Indians in the Indian Country regardless of the exceptions previously contained in federal law.[164] In the classic anti-constitutional case of United States v. Kagama,[165] the Court held that although the Constitution contained no authority for Congress to extend the jurisdiction of the United States over the conduct of Indians within the Indian Country,[166] the statute would be enforced because:

> [t]he power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.[167]

Kagama is patently wrong not only in deciding that Congress could exercise a power which was neither conveyed to it by the Constitution nor necessary and proper for the exercise of such power, but also in its announcement that such authority never has existed anywhere else,[168] and had never been denied.[169]

Thus did European-American criminal law, with all its cultural baggage of rank, power, and coercive authority over the "subjects," come to the Indian Country. I have previously mentioned the creation of anglicized tribal court systems,[170] and will not document their development here. Suffice it to say that the "criminal law system" had become so widespread within the Indian Country that by 1968 Congress felt compelled to adopt the Indian Civil Rights Act[171] to guarantee certain of the American's constitutional protections to tribal members,[172] including many of their rights in criminal cases.[173] In criminal cases, at least, the Indian Civil Rights Act requires that Tribal Courts accord most of the same procedural protections for defendants that are provided in federal and state courts.[174] The Court also has determined that both the Tribe and the

United States may try and convict Indians within the Indian Country for offenses committed therein, as they are separate sovereigns and may independently exercise their authority for the prevention or punishment of offenses.[175] We are in danger of seeing the "rights" based mentality of the Americans — a mentality which is directly attributable to their cultural and social history described above — replace our conception of responsibility to our families, our clans, our relatives, and our people as the guiding principle of society.

IV. Sharpened Pencils of Damascus Steel

More Questions Than Answers

They are strangers to the common law.

They derive their jurisprudence from an entirely different source.176

Justice Yazzie,[177] Professor Pommersheim,[178] and others have begun to describe the analytical framework and practical application of tribal court jurisprudence. Issues regarding the "fit" of tribal courts within the structure of the society of the United States and its Constitutional system have also been addressed by the federal courts,[179] and, of late, by the academy.[180] There seems to be a consensus, perhaps unstated, building amongst the commentators and the Court that Indian Tribes who expand the reach of their anglicized political and legal systems, as they strive for self-governance within our occupied territories, will run directly into the Tribe's lack of rank within the hierarchical power system which is America. There is, perhaps, no other way to analytically explain the Court's decisions in cases such as *Ohliphant*[181] and *Strate,*[182] unless one attributes them to covert or subliminal racism.

As Indian people, we are not heirs . . . of the Empires of Europe, nor the feudal systems of their "middle-ages", nor the English common law with all its attendant cultural baggage

Indian Tribes and Indian people will never give up their right to remain a separate people and control their own territories and destiny as a people.[183] As Indian people, we are not heirs (a feudal word/idea again!) of the Empires of Europe, nor the feudal systems of their "middle-ages," nor the English common law with all its attendant cultural baggage. Neither are we utopian in outlook or expectation — we would be the first to say that our societies have significant problems from both obvious and non-obvious sources, and remedies which are adequate to the problems are neither obvious nor readily available within the context of the American legal system. Perhaps, then, we should hesitate to adopt the structure and processes of a system which is not only foreign to the culture and traditions of Indian peoples, but bedeviled with problems of its own which are apparently unsolvable even by those to whom it belongs.

An honest answer to Grandma's question, then, would be, "I don't know why we adopt a criminal code as a separate system." There is no good reason for distinguishing between wrongs done on the basis of crime and tort when the structure of our society is such that our leaders are not political heirs of liege Lords and Kings who can command obedience from their subjects. There is no good reason for such distinction when we do not view wrongs

and misbehavior as violations of the faith and allegiance owed a superior, because there are only relatives with whom we should have good relations, not superiors to be obeyed and inferiors to obey. There is no good reason for this distinction when wrongful conduct is considered to be an illness or other personality deficit, and not an intentional, willful breach of the laws of God and a man — and particularly where we do not believe that our job is to act as executioners for our Creator. It makes no rational sense to preclude the victim (and the families of the parties) from formal and active participation in the process of correcting wrongs done or obtaining relief for them. It makes no sense to focus only on controlling the act, and not to attempt to solve the underlying problem. It makes no sense to require multiple processes to address a single wrong. In fine, there is no good reason for this distinction when the exercise of the coercive power of the criminal justice system, with its win-lose mentality of rights instead of responsibilities, is destructive of the fabric of our societies and without other redeeming characteristics. The words of Joseph Brant ring down through two hundred years of occupation and assimilation:

> I was, sir, born of Indian parents, and lived while a child, among those you are pleased to call savages; I was afterwards sent to live among the white people, and educated at one of your schools; since which period, I have been honoured, much beyond my deserts, by an acquaintance with a number of principal characters both in Europe and America. After all this experience, and after every exertion to divest myself of prejudice, I am obliged to give my opinion in favour of my own people. . . . I will not enlarge on an idea so singular in civilized life, and perhaps disagreeable to you; and will only observe, that among us, we have no law but that written on the heart of every rational creature by the immediate finger of the great Spirit of the universe himself. We have no prisons — we have no pompous parade of courts; and yet judges are as highly esteemed among us, as they are among you, and their decisions as highly revered; property, to say the least, is as well guarded, and crimes are as impartially punished. We have among us no splendid villains, above the controul of that law, which influences our decisions; in a word, we have no robbery under the colour of law — daring wickedness here is never suffered to triumph over helpless innocence — the estates of widows and orphans are never devoured by enterprising sharpers. Our sachems, and our warriors, eat their own bread, and not the bread of wretchedness. No person, among us, desires any other reward for performing a brave and worthy action, than the consciousness of serving his nation. Our wise men are called fathers — they are truly deserving the character; they are always accessible — I will not say to the meanest of our people — for we have none mean, but such as render themselves so by their vices.
>
> . . . .
>
> The palaces and prisons among you, form a most dreadful contrast. Go

to the former places, and you will see, perhaps, a deformed piece of earth swelled with pride, and assuming airs, that become none but the Spirit above. Go to one of your prisons — here description utterly fails! — certainly the sight of an Indian torture, is not half so painful to a well informed mind. Kill them [the prisoners], if you please — kill them, too, by torture; but let the torture last no longer than a day . . . . Those you call savages, relent — the most furious of our tormentors exhausts his rage in a few hours, and dispatches the unhappy victim with a sudden stroke.

But for what are many of your prisoners confined? For debt! [For being Poor!] Astonishing! And will you ever again call the Indian nations cruel? — Liberty, to a rational creature, as much exceeds property, as the light of the sun does that of the most twinkling star: but you put them on a level, to the everlasting disgrace of civilization . . . . And I seriously declare, that I had rather die by the most severe tortures ever inflicted by any savage nation on the continent, than languish in one of your prisons for a single year. Great Maker of the world! And do you call yourselves christians? . . . . Does then the religion of him whom you call your Saviour, inspire this conduct, and lead to this practice? Surely no. It was a sentence that once struck my mind with some force, that "a bruised reed he never broke." Cease then, while these practices continue among you, to call yourselves christians, lest you publish to the world your hypocrisy. Cease to call other nations savage, when you are tenfold more the children of cruelty, than they.[184]

Simply stated, it makes no sense to adopt power, rank, and wealth as the measure of individual honor and attainment, and disregard our traditional standards of fairness, generosity, humble attitudes, and respectable actions in life. What then is to be done? In the context of the criminal justice system, we should rethink the methodology of social control and rectifying wrongs within our society, searching for traditionally appropriate methods of response which are workable in today's environment.

We, as Tribal Attorneys, must look to the past to see where five hundred years of occupation has brought destruction and decay, while helping to design and construct Indian people's vision for their future.[185] We need not fear this vision quest. Work in this arena has already commenced, with such works as Professors Gloria Valencia-Weber[186] and Christine Zuni's work on Indian women in Tribal societies,[187] as well as the works of Alex Tallchief Skibine,[188] Robert Porter,[189] Richard Monette,[190] Justice Yazzie, Professor Pommersheim, and others.[191] Generally, we must pursue basic and fundamental questions regarding the very nature of American society as it has been foisted upon Indian people, and refuse to accept that which is fundamentally adverse to our culture and society, instead rebuilding those institutions and processes by which the Creator made each of our Tribes unique as a people.

If the hypotheses considered in these musings have a glimmer of validity, it may be possible to explain the cyclical and schizophrenic nature of federal Indian policy in alternatively providing support for self-government by Indian Nations and then (when Indian Nations do begin to achieve governmental and economic successes) demanding that Indians individually assimilate into the American mainstream, all the while refusing admittance therein at any level above that of the lowliest villain to Indians,[192] other people of color, and others seen as "inferiors," in terms of the feudal cultural traditions of American society.[193] It may, perhaps, be possible to thereby explain the American tendency to decry genocide and demand self-governance for peoples in other places in the world whilst at the same time denying true self-governance in the Marshallian sense[194] to Indian Tribes, and forging federal Indian policies which are genocidal in nature.[195] I also suspect that further research in this arena may provide a paradigm for the explanation of other aspects of American culture and tradition (that which they call law) rooted in the hierarchical feudal system, not only as it applies to Indians, but also as it applies to the very nature of Anglo-American jurisprudential thought. Prime candidates for future research in this area seem to include fields such as criminal law, property[196] juvenile law, and other areas which delve deeply into concepts regarding governmental structures, social control methodologies, and dispute resolution systems. In short, while Americans have learned many of the concepts of individual liberty and democratic principals inherent in the nature of egalitarian Indian societies, they have failed to fully "lay to heart another's wisdom" and in their continuing destructive interference with Indian society are destroying an important well of wisdom from which they might draw much sustaining strength, and an alternative view of society, social processes, and human kind's place on this earth.

As a single example, American politicians claim to be "servants of the people." Yet, which Governor, Mayor, or Alderman is expected to take a shovel and dig the grave of their constituents who pass away? Which legislator would expect to be called upon to cut wood or cook? Which Attorney General or District Attorney is expected to build fire upon which to cook? Which Justice or Judge expects to be called upon to wait tables and serve the family and friends of the deceased? And which of them would expect to be placed under the charge of the janitor from the head-start who will be in overall charge of the funeral? Yet even in Tribes larger than most rural towns, such expectations are routine regarding many events of importance to the community and its people. Clearly a significant difference exists in the Indian and non-Indian communities with regard to the expectations of the people and leaders relative to political leadership. These differences, and the expectations and assumptions underlying them, have not been adequately explained. I propose that it is critical to understand these differences, and the fundamental societal cultures, traditions, and assumptions which give rise to them, if the avowed American dream of creating a classless, color-blind society — of the people, by the people, for the people — is to have any hope of success. It is imperative, then, that strong, traditional, Indian Tribal governments not only exist, but flourish within the United

States as autonomous entities if the United States is to fulfill the goals its forefathers expressed only two hundred years ago.

As Tribal Attorneys, then, we must protect and, where necessary, begin the process of recovering, our own tribal identities, governmental structures, social control methodologies, and dispute resolution systems. We must teach the non-Indian world the underlying rationale for our methodology in terms they can understand, while always being cognizant that they will, perhaps, eventually learn something — even as their founding fathers did. Most of all, when called upon to assist in the development of modern tribal government and its policies, we must hesitate to act like lawyers and instead listen to the people who sing the songs of tens of thousands of years of freedom. Only then can we use the skills we learned in law school as true architects and advocates of Tribal Sovereignty. These are the challenges those of us who are almost done must leave for those who are just beginning. Stand up. There is much to be done.

Notes

1. Aristotle, *Nicomachean Ethics Book* 1:4 (W. D. Ross trans.) (visited Oct. 8, 1991) <http://gopher.vt.edu:10010/02/39/15>.

2. By describing those of us who graduated from law schools during the period from the late 1960's through the late 1970's as the "first generation" of Indian attorneys, I do not in any way downplay the part played by those who came before, both Indian and non-Indian, in the field of Indian law. Many of those have contributed as mentors, advocates, and role models in ways which it may not be possible to ever adequately acknowledge. However, the period from the late 60's through the late 70's marked perhaps the first time that Indians from the Indian communities of this country graduated from law schools in sufficient numbers to have a real impact on the future of tribal governments and federal Indian law.

3. A good many of this first "generation," and the two "generations" which have come after, are alumni of the Pre-Law Summer Institute directed by P. Sam Deloria and operated by the American Indian Law Center at the University of New Mexico School of Law. Perhaps the most productive and effective federally sponsored "Indian education" program of all time, a roll call of its alumni include many elected tribal officials and judicial officers, high ranking federal officials, and Indian law practitioners.

4. Kirke Kickingbird, *Introduction* to the NATIVE AMERICAN BAR ASSOCIATION'S 1997 MEMBERSHIP DIRECTORY, 1-2.

5. Some years ago at a tribal ceremony, one of the elders addressed a group of us — mostly men in our 40's — as follows: "You young boys are coming to a hard time in your lives, you're getting to the place where you're the oldest of the young ones and the youngest of the old folks. You're going to have to be responsible for this pretty soon. It will be hard for you."

6. For some thoughts on the teaching of Indian law and Indian law students, *see* G. William Rice, *There and Back Again — An Indian Hobbit's Holiday: Indians Teaching Indian Law*, 26 N.M. L. REV. 169 (1996).

7. *See* MODEL CODE OF PROFESSIONAL RESPONSIBLITY Canon 5 (1997-1998).

8. I use the term "sovereignty" here to denote that most important attribute of Indian Tribes, their inherent authority to make and enforce *their own* laws. *See* Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515, 562 (1832); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982).

9. The role of an "advocate" is not really that of the "gunslinger" or even the "Perry Mason" of popular fiction: "Lawyers, as officers of the court, should be problem-solvers, harmonizers, and peacemakers — the healers, not the promoters, of conflict. In the words of Abraham Lincoln: 'As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough.'" Chief Justice Warren E. Burger, *Remark The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 953 (1995).

10. *See* Fletcher v. United States, 116 F.3d 1315 (10th Cir. 1997) In this case, the Osage Tribal Council, in order to avoid a challenge to its governmental authority by recognized Indians of Osage blood who were attempting to extend the voting franchise to all Osage Indians (not just those who had inherited a portion of a share in the Osage mineral estate), argued that Congress had abolished the authority of the Osage people to establish their own form of government — the Tenth Circuit agreed. In response to *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), Congress began to consider a series of bills, one of which would become the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166-68 (1994) and 25 U.S.C. §§ 2701-2721 (1994). Many Tribes supported the Act, including the new provisions requiring the Tribes to negotiate a compact with their local state in order for the Tribe to operate a Class III gaming operation even though *Cabazon* had expressly ruled that the states had no authority in the matter. Of course, with the decision in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996), the Court's decision in effect allowed recalcitrant states to protect their own gaming revenues by simply refusing to negotiate a compact with the Tribe, and Congress currently shows no signs of adopting a legislative solution. *See, e.g.*, Alex Tallchief Skibine, *Gaming on Indian Reservations: Defining the Trustee's Duty in the Wake of Seminole Tribe v. Florida*, 29 ARIZ. ST. L.J. 121 (1997); Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. (1997). Some Tribes had apparently forgotten the still true maxim that "the people of the states where they are found are often their deadliest enemies." United States v. Kagama, 118 U.S. 375 (1886). For further thoughts on the *Seminole* case, *see* Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213 (1996); Jason Kalish, Note, *Do the States Have an Ace in the Hole or Should the Indians Call Their Bluff? Tribes Caught in the Power Struggle Between the Federal Government and the States*, 8 ARIZ. L. REV. 1345 (1996).

11. This is not to imply that one should hesitate to claim or defend on grounds which implicate tribal sovereignty. One should always, however, consider carefully whether it is better to live with the Bingo Bandits a little longer, or admit a position that one of the attributes of tribal sovereignty has been permanently diminished or abridged in order to throw them out prior to the expiration of their contract — even where there is no doubt they have done wrong.

12. The Bureau of Indian Affairs, Department of the Interior.

13. Indian Health Service, Department of Health and Human Services.

14. Each of these anecdotal "straw men" have been related to me in various forms by Tribal judges and prosecutors from the Tribes in Oklahoma.

15. "Those [who] governed by the force of punishments, wanted to accomplish that by punishments, which it is not in their power to produce, that is, to give habits of morality. By punishments a subject is very justly cut off from society, who having lost the purity of his manners, violates the laws; but if all the world was to lose their moral habits, would these reestablish them? Punishments may be justly inflicted to put a stop to many of the consequences of the general evil, but it will not remove the evil itself." BARON DE MONTESQUIEU, I THE SPIRIT OF THE LAWS, Printed for G. and A. Ewing, in Dame-street, and G. Faulkner in Essex-street 373 (1751), (*reprinted* in The Legal Classics Library, 1984).

16. Early examples of this rule can be found in CHRISTOPHER SAINT GERMAIN, DOCTOR AND STUDENT (Second Dialogue) 179 (1530), *reprinted* in 1787 (William Muchall, ed.).

17. *See* Hon. Robert Yazzie, *"Hozho Nabasdlii" — We Are Now In Good Relations: Navajo Restorative Justice*, 9 ST. THOMAS L. REV. 117 (1996); Hon. Robert Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994).

18. *See* 18 U.S.C. §§ 1-6005 (1994); Okla. Stat. title 21 §§ 1-1981 (1996).

19. The rationale for the distinction between "criminal" law and "tort" law is generally given in terms of purpose — i.e., the purposes of criminal law is seen as either to assert the moral condemnation of the community. *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW AND CONT. PROB. 401 (1958), to affect retribution (an eye for an eye); H. L. A. Hart, *Murder and the Principles of Punishment: England and the United States*, 52 NW. U. L. REV. 433 (1957); P. Brett, AN INQUIRY INTO CRIMINAL GUILT 51 (1963); It is also seen as a utilitarian methodology to achieve prevention, deterrence, treatment and the like. *See* GEORGE E. DIX AND M. MICHAEL

SHARLOT, CRIMINAL LAW (4th ed. 1996). It is obvious that none of these rationales are sufficient to adequately explain why Anglo-American jurisprudence has created a distinction between the law of crime and the law of torts.

20. *See* 25 C.F.R. § 11 (1981). The original Court of Indian Offenses was, of course, intended as an instrument for the "civilization" of Indian people through the forced replacement of tribal legal institutions, procedures, and substantive rules by those of the Americans. *See* United States v. Clapox, 35 F. 575 (D.C. Or. 1888); Ex parte Bi-a-lil-le, 12 Ariz. 150, 100 P. 450 (1909).

21. The Secretary persisted in the establishment of the Courts of Indian Offenses without Congressional sanction for almost a century although similar attempts to exert "plenary" administrative power almost invariably failed when challenged in the Courts. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 103, 148 (1942). Of late, however, these administrative "courts" have been acknowledged by the United States Supreme Court and Congress. *See* Williams v. Lee, 358 U.S. 217 (1959); Indian Civil Rights Act, 25 U.S.C. § 1311, (Pub. L. 90-284, Title III, §301, Apr. 11, 1968, 82 Stat. 78.) (Although Congress called for the presentation to it of a model code for the Courts of Indian Offenses, it did not take further action. The Secretary of the Interior did revise the Regulations dealing with the Courts of Indian Offenses. *See* 58 Fed. Reg. 54, 411 (1993); Indian Tribal Justice Support Act, 25 U.S.C.A. § 3602, (Pub. L. 103-176, §3, Dec. 3, 1993, 107 Stat. 2004 (1993)).

22. SIR FREDERICK POLLOCK AND FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 74 (1899); MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND Ch. V (1713).

23. The material which follows is not intended as a definitive discourse upon the development of the criminal law. I do, however, hope to touch upon some of the events which might be considered significant in the rise of the peculiar institutions and conceptualizations of the criminal law of Anglo-American jurisprudence by a person from a civilization having a wholly different perspective upon dispute resolution and the view taken of antisocial actions. *See, e.g.*, Yazzie, *supra* note 17.

24. Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y. UNIV. L. REV. 1467, 1523 (1996).

25. *See* C. H. W. Johns, BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS 39 (1904).

26. *See id.* at 4, 390-395.

27. Imposed for such activities as witchcraft, theft, corruption of justice, rape, neglect of certain official duties, causing a death by assault, allowing seditious assembly, causing death by bad building practices, and certain forms of homicide. *See id.* at 96. Death by drowning, fire, and impalement on a stake is also provided in certain cases. *See id.* at 97.

28. Mutilation was mainly of two types, either an eye-for-eye type of pure retaliation, or a mutilation which was symbolic of the offense itself — such as cutting off the hand for the offense of striking one's father. *See id.* at 97.

29. *See id.*

30. *See id.* at 98-99.

31. *See id.* at 81-82.

32. *See id.* at 116-118. Such systems still exist. The Associated Press reported in August, 1996, that a woman in Saudi Arabia had been condemned to public beheading, the normal form of execution in that country, for killing a man who had tried to "harm" her. According to the report, under Saudi Law, a murder victim's family may demand a death sentence, jail term, damages, or set the perpetrator free. The criminal in such cases may be pardoned only by the victim's family. In the case reported, the woman's family had offered the victim's family one million dollars to spare her to no avail, but a last minute personal appeal by the woman to the father of her victim resulted in his decision (after consultation with other family members) to pardon her. *See Woman Escapes Public Beheading: Saudi's Last-Minute Appeal Wins Freedom*, TULSA WORLD, August 27, 1996, at A6.

33. *See* G. R. DRIVER AND J. C. MILES, THE BABYLONIAN LAWS (Two Vols., 1952, 1955).

34. C. H. W. JOHNS, BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS 390-393 and 44-67 (1904). Johns notes, that although the form of the 282 "sections" of the "code" are rendered "[I]f something happens" [then] "some result shall follow," the term "shall" as used in the code is not imperative but rather the verb is a permissive future form. While admittedly absolutely ignorant of the original text and without the means to translate same, I wonder whether the passages of the code could be rendered in a manner similar to "When a man had accused another of laying a nertu (death spell) upon him, but did not prove it, [I ruled/adjudged/decided] he should be put to death?" Such a rendering certainly seems to be consistent with the comments of Hammurabi in the pro-

logue and epilogue to that part of the stele which constitutes the "code proper," but would have the effect of transmogrifying the "code" to a digest of decisions as opposed to the commands expected from a King. Certainly an implication that "I ruled/adjudged/decided" should provide no more trouble than the failure of the code to provide a penalty for simple murder. *See id.* at 96.

35. For further reading concerning these civilizations, *see*, G. R. DRIVER AND J. C. MILES, THE BABYLONIAN LAWS (Two Vols., 1952, 1955); and J. OATES, BABYLON (1979).

36. *See* COHEN, *supra* note 21, at 44-67.

37. *See* Genesis 11:31, 12:1-5.

38. *See Isaiah* 13:19. King Hammurabi said: "Descendant of kings whom Sin had begotten, I enriched the city of Ur, and humbly adoring, was a source of abundance to E-NER-NU-GAL (the temple of Sin at Ur). C. H. W. Johns, BABYLONIAN AND ASSYRIAN LAWS, CONTRACTS AND LETTERS 391 (1904).

39. *See Genesis* 11:31.

40. *See Genesis* 29, 30.

41. *See Exodus* 20:1-17.

42. *See Exodus* 21-23.

43. *See Leviticus* 18-20.

44. *See Deuteronomy* 16:18-20.

45. *See Judges* 2:16-18.

46. *II Samuel* 8:15.

47. *2 Chronicles* 19:5-7.

48. *Matthew* 26:57-66; *Mark* 14:53-72; 15:1-15.

49. *See* HENRY SUMNER MAINE, ANCIENT LAW 4 (John Murray ed. 1930) (1861).

50. *See id.* at 12.

51. *See id.* at 375.

52. *Id.* at 375-77.

53. *Id.* at 394. The description is that of a Bill of Attainder.

54. *See* JULIUS CAESAR, THE GALLIC WARS 68 (51 B.C.) (John Warrington, trans., Eston Press 1955).

55. *See* MAINE, *supra* note 49, at 404.

56. *See id.* at 381-391.

57. *See id.* at 395, 396. Julius Caesar, while without formal crown, became King and Emperor in all but name in about 49 B.C. He treated the Roman Senate as a mere advisory council, and bequeathed his surname as a title to future Roman dictators. *See* 3 WORLD BOOK ENCYCLOPEDIA 13 (1989).

58. Gaius Julius Caesar Octavianus (Octavian) succeeded Julius Caesar, and became known as Augustus Caesar *the exalted.* He completed the occupation of Gaul (France) begun by his great-uncle, Julius Caesar. *See* 1 WORLD BOOK ENCYCLOPEDIA 893 (1989) (italics in original).

59. *See id.* at 894.

60. *See* 4 WORLD BOOK ENCYCLOPEDIA 991 (1989).

61. *See* 6 WORLD BOOK ENCYCLOPEDIA 261 (1989).

62. *See* PAUL VINOGRADOFF, SOCIAL AND ECONOMIC CONDITIONS OF THE ROMAN EMPIRE IN THE FOURTH CENTURY (1911); 1 CAMBRIDGE MEDIEVAL HISTORY 542-67 (1911) <http://www.ecn.bris.ac.uk/het/vinogradoff/rome4thc> (containing a general survey of the conditions of this era of the Roman world).

63. *See* 3 WORLD BOOK ENCYCLOPEDIA 379 (1989).

64. *See id.*

65. *See id.* at 380.

66. *See* 14 WORLD BOOK ENCYCLOPEDIA 460 (1989).

67. MAINE, *supra* note 49, at 397-98 (1861).

68. *See* 3 WORLD BOOK ENCYCLOPEDIA 342 (1989).

69. *See id.* at 341-42.

70.

> Throughout Gaul only two classes of men are of any real consequence-the Druids and the baronage. The common people are treated as little better than slaves: they never venture to act on their own initiative, and have no voice in public affairs. Most of them, burdened with debt, crushed by heavy taxation, or groaning under the hand of more powerful men, enter the service of the privileged classes, who exercise over them the rights enjoyed by a master over his slaves.
>
> The Druids are a priestly caste. They regulate public and private sacrifices and decide religious questions. The people hold them in great respect, for they are the judges of practically all inter-tribal as well as personal disputes. They decide all criminal cases, including murder, and all disputes relating to boundaries or inheritance, awarding damages and passing sentence. Any individual or tribe refusing to abide by their decision is banned from taking part in public sacrifices-the heaviest of all their punishments. The effect of this excommunication is to set the guilty party on a level with the vilest criminals: he is shunned by

all; his conversation and very presence are avoided for fear of contracting ritual uncleanness; he is barred from all honours and dignities; and he has no redress in the courts.

The Druids hold office under the supreme jurisdiction of an arch-priest who is succeeded on his death by the next senior. If there be several of equal rank, the succession is determined by the votes of their colleagues, or sometimes even by armed force. A chapter is held on a fixed date each year at a sanctuary not far from Chartres *(in finibus Carnutum)*, which is reckoned the centre of Gaul; and litigants from all over the country meet there for final judgment upon their disputes.

The druidical doctrine is commonly supposed to have reached Gaul from its original home in Britain, and it is a fact that to this day men going on for higher studies usually cross to Britain for the purpose.

JULIUS CAESAR, THE GALLIC WARS 153-54 (51 B.C.).

71. *See* 3 WORLD BOOK ENCYCLOPEDIA 342 (1989).

72. *See* PAUL VINOGRADOFF, AGRICULTURAL SERVICES (1900), *reprinted* in 1 THE COLLECTED PAPERS OF PAUL VINOGRADOFF 112 (Legal Classics library, 1995).

73. PAUL VINOGRADOFF, FEUDALISM, in 3 CAMBRIDGE MEDIEVAL HISTORY 458-84 (1924). <http://www.ecn.bris.ac.uk/het/vinogradoff/feudal>.

74. During the adolescence of the Britain of the Normans, the King was an individual person who sat at the top of the pyramid of power and authority. The conception of the King as "State" was fuzzy, at best. *See* Frederic Maitland, *The Crown as Corporation*, 17 L. Q. REV. 131-46 (1901).

75. *See* POLLOCK & MAITLAND, I THE HISTORY OF ENGLISH LAW 45 (1899).

76.

> The greatest of artificial persons, politically speaking, is the State. But it depends on the legal institutions and forms of every commonwealth whether and how far the State or its titular head is officially treated as an artificial person. In England we now say that the Crown is a corporation: it was certainly not so when the king's peace died with him, and 'every man that could forthwith robbed another.'

Frederic Maitland, *The Crown as Corporation*, 17 L. Q. REV. 131-46 (1901),

77. *See* POLLOCK & MAITLAND, I THE HISTORY OF ENGLISH LAW 45 (1899).

78. *See* WILLIAM BLACKSTONE, IV COMMENTARIES ON THE LAWS OF ENGLAND 74 (1769). For an intricate review of the common-law rules regarding felony, attaint, and their corresponding forfeitures; *see* SIR EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, *in* 2 COKE'S FIRST INSTITUTE, L.3, C.13, § 745, L.3, C.8 § 500 et seq. (1817) (containing an intricate review of common-law rules regarding felony, attaint, and their corresponding forfeitures.)

79. Glanville described the doing and effect of homage as follows:

> Homage should be done in the following form: he who is to do homage shall become the man of his lord, swearing to bear him faith of the tenement for which he does his homage, and to preserve his earthly honour in all things, saving the faith owed to the lord king and his heirs. It is evident from this that a vassal may not attack his lord without breaking the faith of his homage, except perhaps in self-defence or when he goes by royal command with the king's army against his lord. The general rule is that he may not, without breach of the faith of homage, do anything which works to the disinheritance or bodily dishonour of his lord. If anyone has done several homages for different fees [lands] to different lords who are attacking each other, and his liege lord commands him to go personally with him against another of his lords, he must obey his command in this matter, but saving to that other lord the service for the fee which he holds of him. [In other words, he would go with the one, and send someone in his place to the armies of the other(s).]
>
> It is clear from what has been said above that if anyone does anything to the disinheritance of his lord and is convicted of it, he and his heirs shall by law lose the fee which he holds of him. The same rule will apply if anyone lays violent

> hands on his lord to hurt him or do him a dreadful injury, and this is lawfully proved against him in the proper court. But I put this question: is anyone bound to defend himself on such charges against his lord in his lord's court; and may his lord distrain him to do so by award of his court without a writ from the lord king or his chief justice? The answer is that anyone may lawfully bring his man to trial and distrain him to come to his court by judgment of his court; and, unless he can clear himself against his lord . . . . the whole of the fee which he holds of that lord shall be at the lord's mercy. I also put this question: may a lord distrain his man to come to his court to answer a complaint by the lord that he is withholding service, or that some of the service is in arrears? The answer is that he may lawfully do so . . . [and] if the tenant is convicted of the charge, he shall by law be disinherited of the whole fee which he holds of that lord.

THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILLE 104-05 (IX, 1.) (C.D.G. Hall, transl. 1965). Homage then, not only created a bond of service and fealty, but also *jurisdiction* of the lord over his men to enforce it.

80. For a detailed treatise on the Doomsday Book created to record for William the Conqueror the lands held by all within his new realm, and describing in detail the related customs of England regarding land tenure and personal rank (status), *see* FREDERICK W. MAITLAND, DOMESDAY BOOK AND BEYOND: THREE ESSAYS IN THE EARLY HISTORY OF ENGLAND (1st ed. 1897).

81. *See* THE TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILLE 107-09 (IX, 3-4.) (C.D.G. Hall, trans. 1965). The term "reverence" might be thought of as personal allegiance. One did not swear to "preserve, protect, and defend" or "pledge allegiance" to the constitution or the country, one swore to bear true faith and allegiance to *the person* of one's Lord.

82. "It was a fundamental principle of the monarchy, that whosoever was subject to the military power of another person, was subject also to his civil jurisdiction." BARON DE MONTESQUIEU, THE SPIRIT OF LAWS II 332 (Legal Classics Library ed. 1984).

83. *See* POLLACK & MAITLAND, I THE HISTORY OF ENGLISH LAW 303 (1899). The concept of treason, for instance, was divided into two parts — High Treason, or treason against the King, and Petit Treasons, which were treason against a person to whom one owed faith and allegiance such as a wife to a husband, a servant to their lord or master, and an ecclesiastic to his lord or religious superior. Both were felony. *See* WILLIAM BLACKSTONE, IV COMMENTARIES ON THE LAWS OF ENGLAND 75 (1769).

84. *See id.* at 304.

85. POLLOCK & MAITLAND, I THE HISTORY OF ENGLISH LAW 47 (1899).

86. *See generally, id.* at 46-51, 476-78.

87. The "crime-tort" law of early England is explained in Chapter 8 of POLLOCK & MAITLAND, II THE HISTORY OF ENGLISH LAW (1899).

88. POLLOCK & MAITLAND, II THE HISTORY OF ENGLISH LAW 449 (1899).

89. *See* David J. Seipp, *Symposium: The Distinction Between Crime and Tort in the Early Common Law*, 76 B. U. L. REV. 59, 60 (1996). The Writ of Trespass against the King's peace became the tort action. Victims generally used it for receiving compensation, although the King imposed a fine upon conviction pursuant to such Writs for the breach of his peace. The Indictment of Trespass became, in effect, the misdemeanor.

90. *See* WILLIAM BLACKSTONE, IV COMMENTARIES ON THE LAWS OF ENGLAND 308 (1769).

91. The writ of trespass was an action for compensatory damages in the King's courts. It could be brought instead of the Appeal of Felony for felonies other than homicide, but could also be brought for offenses which did not arise to the level of felony. The form of the Writ was that the defendant had caused damages to the victim "with force and arms against the king's peace." The courts treated these "violations of the king's peace" seriously, and could arrest or outlaw (as they did in criminal cases) defendants who failed to appear in response to the writ. Seipp, *supra* note 89, at 69-70. Montesquieu reports a case in France where a Judge demanded satisfaction (a legal duel) when his order to appear was not obeyed. "I sent for thee, and thou didst not think it worth thy while to come; I demand therefore satisfaction for this contempt." MONTESQUIEU, *supra* note 82, at 235.

92. Only the Appellant could discharge an appeal of felony. *See* WILLIAM BLACKSTONE, IV COMMENTARIES ON THE LAW OF ENGLAND 311-12 (1769).

93. *See id.*

94. Montesquieu described the rules of judicial combat as follows:

> When there happened to be several accusers, they were obliged to agree among themselves that the action might be carried on by a single prosecutor; and if they could not agree, the person before whom the action was brought appointed one of them to prosecute the quarrel.
>
> When a gentleman challenged a villain [villein] he was obliged to present himself on foot with buckler and baton, but if he came on horseback, and armed like a gentleman, they took his horse and his arms from him; and stripping him to his shirt, they obliged him to fight in that condition with the villain.
>
> Before the combat the magistrates ordered three banns to be published. By the first the relations of the parties were commanded to retire; by the second the people were warned to be silent; and the third prohibited the giving any assistance to either of the parties, under severe penalties; nay, even on pain of death, if by this assistance one of the combatants should happen to be vanquished.
>
> The officer belonging to the civil magistrate guarded the list or inclosure where the battle was fought; and in case either of the parties declared himself desirous of peace, they took particular notice of the actual state in which things stood at that very moment, to the end that they might be restored to the same situation in case they did not come to an accommodation.
>
> When the pledges were received either for a crime or for false judgment, the parties could not make up the matter without the consent of the lord; and when one of the parties was overcome, there could be no accommodation without the permission of the count, which had some analogy to our letters of grace.

MONTESQUIEU, *supra* note 82, at 241-42.

95. On the other hand, the victim would generally be willing to accept a lesser amount in settlement of the appeal of felony than they might if proceeding pursuant to a writ of trespass, since if the appeal of felony went to trial and the defendant was convicted and sentenced, the victim got nothing. *See* David D. Friedman, *Making Sense of English Law Enforcement in the Eighteenth Century*, 2 U. CHI. L. SCH. ROUNDTABLE 475, 486-92 (1995). Thus there was great pressure upon the perpetrator (and his family) not to appear "judgment proof," and pressure upon both victim and perpetrator to reach an amicable settlement.

96. *See* Seipp, *supra* note 89, at 72-76.

97. *See id.* Some effects of these rules would seem strange to American society today. Not only were the defendant's goods forfeited by the verdict, thus removing any possibility of the victim receiving compensation even if the defendant was later pardoned, but so was the victim's stolen property, and the object used to commit the offense. In today's terms, if a man robbed a bank, stole a getaway car, and ran over a pedestrian during the getaway, the bank's money, the car, and all the perpetrator's worldly goods were forfeited to the King. The perpetrator's land was in the King's hands for a year and a day, and was then forfeited to the Lord of the fief. Neither the bank nor the car owner obtained a return of their stolen property, and the perpetrator had no property left from which the pedestrian could obtain compensation for injuries. *See id.*

98. *See id.* These penalties — execution and forfeiture of goods and lands along with corruption of the blood — were common to most felonious offenses. *See* COKE, *supra* note 78, at L.3, C.13, § 745. Forfeiture of goods occurred upon a finding of a guilty verdict, forfeiture of lands and corruption of the blood occurred only upon entry of the judgement and sentence. *See id.*

99. *See* Friedman, *supra* note 95, at 495-97. Although the felon's goods, and one year's rent from the convicted felon's lands belonged to the King upon conviction and entry of judgment and sentence, a larger amount might be paid by the felon or his friends and family in order to secure a pardon thereby saving his life and, perhaps, recovering the family's lands. *See* Seipp, *supra* note 89, at 73. Pardons also had political value in that the perpetrator and their family "owed" both the King who granted the pardon and the liege Lord who interceded on their behalf, and in many cases surely felt a true sense of life-long obligation for the assistance rendered and the pardon given.

100. *See* Friedman, *supra* note 95, at 505. This is the origin of the offense of compounding a crime. Obviously,

if the victim to a "crime" could prevent its prosecution, the Crown and Lords of the realm lost revenues in that they lost the ability to obtain the escheat of goods and forfeiture of lands to which they would be entitled upon conviction and sentencing, respectively. *See* COKE, *supra* note 78, at L.3, C.13, § 745. Certainly the King and members of the House of Lords would have had no animosity toward preventing a diminution of revenues to which they felt themselves entitled.

101. *See id.*; *see also* Seipp, *supra* note 89, at 73; and WILLIAM BLACKSTONE, IV COMMENTARIES ON THE LAWS OF ENGLAND 308-12 (1769).

102. For an in depth look at a 20th Century return of a form of victim compensation incorporated into the criminal process, *see* Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 U.C.L.A. L. REV. 52 (1982). Of course, concepts such as that of punitive damages in tort actions also are a form of punishment incorporated into "civil" cases.

103.

> The impact of Martin Luther's concept of the individual and his power achieved by allowing God's grace to work through his own conscience, cannot be overemphasized. That concept denied the rationale of the Roman Catholic Church for monopolizing the legal power structure and tying secular law to theological doctrine. Think of this bit of Teutonic efficiency in contemporary terms: Why pay the Vatican cable company to view God's will when each individual can receive it direct from God Himself by tuning in his own conscience?
>
> Religion aside, monarchs liked Luther's concept because it gave them a reason to dispute the power of the Church and freed them to create positivist laws. Common wisdom appears to be that rulers and their laws suddenly had no moral restraints; however, this is not the case. Law did become secular and positive. However, the laws presupposed a respect for the individual conscience, contracts, and property rights. This presupposition incorporated four centuries of Roman Catholic teachings, which served as the moral compass guiding both individual and ruler as they sanctified and spiritualized agreements under amoral positive law. To break one's word wasn't just to break it with one's fellow human, it was to break it with God and risk eternal damnation."

Dan Gifford, *The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason*, 62 TENN. L. REV. 759, 807 (1995); *see also* WILLIAM BLACKSTONE, IV COMMENTARIES ON THE LAW OF ENGLAND 102-118 (1769).

104. *See* Gifford, *supra* note 103, at 808.

105. *See* WILLIAM BLACKSTONE, IV COMMENTARIES ON THE LAW OF ENGLAND 102-118 (1769) defining the criminal offense of Praemunire, the introducing of a foreign power (the Pope) into England in derogation of the authority of the King. *See id.* at 114.

106.

> Government by kings was first introduced into the world by the Heathens, from whom the children of Israel copied the custom. It was the most prosperous invention the Devil ever set on foot for the promotion of idolatry. The Heathens paid divine honors to their deceased kings, and the Christian world hath improved on the plan by doing the same to their living ones.

THOMAS PAYNE, COMMON SENSE (n.p. 1776).

107. Perhaps no British monarch after the Conqueror claimed divine status, although certain political theories certainly claimed (as did Hammurabi and the Caesars) that they ruled by divine right. Even the clerics were required to acknowledge the supremacy of the King over the Church. *See* CHRISTIE & MARTIN, JURISPRUDENCE 392 (1995).

108.

> The grand and fundamental maxim of all feodal tenure is this; that all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown. The grantor was called the proprietor, or lord; being he who retained the dominion or ultimate property of the feud or fee: and the grantee, who had only the use and possession, according to the terms of the grant, was stiled the feudatory or vasal . . . .
>
> Besides an oath of fealty, or profession of faith to the lord, which was the parent of our oath of allegiance, the vasal or tenant upon investiture did usually homage to his lord; openly and

> humbly kneeling, being ungirt, uncovered, and holding up his hands together between those of the lord, who sate [sic] before him; and there professing that "he did become his *man*, from " [sic] that day forth, of life and limb and earthly honour:" and then he received a kiss from his lord. Which ceremony was denominated homagium, or *manhood*, by the feudists, from the stated form of words, *devenio vester homo.*

WILLIAM BLACKSTONE, II COMMENTARIES ON THE LAWS OF ENGLAND 53, 54 (1769).

109. *See* WILLIAM BLACKSTONE, I COMMENTARIES ON THE LAW OF ENGLAND 151-53 (1769).

110.

> The majority of the peasants are villains, and the legal conception of villainage has its roots not in the connexion of the villain with the soil, but in his personal dependence on the lord.
>
> . . .
>
> As to the general aspect of villainage in the legal theory of English feudalism there can be no doubt. The 'Dialogus de Scaccario' gives it in a few words: the lords are owners not only of the chattels but of the bodies of their ascripticii, they may transfer them wherever they please, 'and sell or otherwise alienate them if they like.' Glanville and Bracton, Fleta and Britton follow in substance the same doctrine, although they use different terms. They appropriate the Roman view that there is no difference of quality between serfs and serfs: all are in the same abject state. Legal theory keeps a very firm grasp of the distinction between status and tenure, between a villain and a free man holding in villainage, but it does not admit of any distinction of status among serfs: servus, villanus, and nativus are equivalent terms as to personal condition, although this last is primarily meant to indicate something else besides condition, namely, the fact that a person has come to it by birth. The close connexion between the terms is well illustrated by the early use of nativa, nieve, 'as a feminine to villanus.'
>
> These notions are by no means abstractions bereft of practical import. Quite in keeping with them, manorial lords could remove peasants from their holdings at their will and pleasure. An appeal to the courts was of no avail: the lord in reply had only to oppose his right over the plaintiff's person, and to refuse to go into the subject-matter of the case. Nor could the villain have any help as to the amount and the nature of his services; the King's Courts will not examine any complaint in this respect, and may sometimes go so far as to explain that it is no business of theirs to interfere between the lord and his man. In fact any attempt on the part of the dependant to assert civil rights as to his master will be met and defeated by the 'exceptio villenagii.' The state refuses to regulate the position of this class on the land, and therefore there can be no question about any legal 'ascription' to the soil. Even as to his person, the villain was liable to be punished and put into prison by the lord, if the punishment inflicted did not amount to loss of life or injury to his body. The extant Plea Rolls and other judicial records are full of allusions to all these rights of the lord and disabilities of the villain, and it must be taken into account that only an infinitely small part of the actual cases can have left any trace in such records, as it was almost hopeless to bring them to the notice of the Royal Courts.

PAUL VINOGRADOFF, VILLAINAGE IN ENGLAND: ESSAYS IN ENGLISH MEDIAEVAL HISTORY 1 (1892).

111.

> Liberty itself has appeared insupportable to those nations who have not been accustomed to enjoy it. Thus a pure air is sometimes disagreeable to those who have lived in a fenny country.
>
> Balbi, a Venetian, being a Pegu, was introduced to the king. When the monarch was informed that they had no king at Venice, he burst into such a fit of laughter, that he was scarce-able to speak to his courtiers. What legislator could propose a popular government to a people like this?

BARON DE MONTESQUIEU, I THE SPIRIT OF LAWS 362 (1751).

112. One author has suggested that the development of the distinction between the civil and criminal law can be

attributed to the choice of remedies made available to the victim through the various processes of the King's courts. *See* Seipp, *supra* note 89, at 83.

113. *See* CESARE LOMBROSO, CRIME: ITS CAUSES AND REMEDIES 449 (Henry P. Horton trans, 1911).

114. *See, e.g.*, WILLIAM BLACKSTONE, IV COMMENTARIES ON THE LAWS OF ENGLAND Chapters IV and VIII (1761).

115. *See id.* at 137-38.

116. *See id.* at 137-38 (perjury and subordination of perjury), 363-67 (as condition of pleading the benefit of clergy for most felonies including petite treason), 370 (as specified penalty for certain statutory offenses), 394 (condition of pardons).

117. MR. JUSTICE JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 13-14 (1840).

> Brothers; — We never made any agreement with the King, nor with any other Nation that we would give to either the exclusive right of purchasing our lands. And we declare to you that we consider ourselves free to make any bargain or cession of lands, whenever & to whomsoever we please, if the white people as you say, made a treaty that none of them but the King should purchase of us, and that he has given that right to the United States, it is an affair which concerns you & him & not us. We have never parted with such a power..

2 THE CORRESPONDENCE OF LIEUT. GOVERNOR JOHN GRAVES SIMCOE 17-19, (E.A. Cruitshark, ed., 5 vols., Toronto Ontario Historical Society, 1923-31), *reprinted in* THE WORLD TURNED UPSIDE DOWN - INDIAN VOICES FROM EARLY AMERICA 182 (Colin G. Galloway, ed., 1994).

118. *See* Seipp, *supra* note 89.

119. Blackstone took the position that most of England's American colonies were not subject to English custom and tradition:

> [I]f an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them.. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.
>
> Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties. And therefore the common law of England, as such, has no allowance or authority there; . . .

WILLIAM BLACKSTONE, I COMMENTARIES ON THE LAWS OF ENGLAND 104-05 (1769) Mr. Justice Story articulated a contrary view:

> There is great reason to doubt the accuracy of this [Blackstone's] statement in a legal view. We have already seen that the European nations, by whom America was colonized, treated the subject in a very different manner. They claimed an absolute dominion over the whole territories afterwards occupied by them, not in virtue of any conquest of, or cession by the Indian natives; but as a right acquired by discovery. Some of them, indeed, obtained a sort of confirmatory grant from the papal authority. — But as between themselves they treated the dominion and title of territory as resulting from priority of discovery; and the European power, which had first discovered the country, and set up mark of possession, was deemed to have gained the right, though it had not yet formed a regular colony there. We have also seen, that the title of the Indians was not treated as a right of propriety and dominion; but as a mere right of occupancy. As infidels, heathens, and savages, they were not allowed to possess the perogatives belonging to absolute, sovereign and independent nations. The territory, over which they wandered, and which they used for their temporary and fugitive purposes, was, in respect to Christians, deemed as if it were inhabited only by brute animals. There is not a single grant from the British crown from the earliest grant of Elizabeth down to the latest of George the Second, that affects to look to any title, except that founded on discovery. Conquest or cession is not once alluded to. And it is impossible, that it should have been any

> conquest of cession from the natives of the territory comprehended in those grants. Even in respect to the territory of New-York and New-Jersey, which alone afford any pretence for a claim by conquest, they were conquered from the Dutch, and not from the natives; and were ceded to England by the treaty of Breda in 1667. But England claimed this very territory, not by right of this conquest, but by the prior right of discovery. The original grant was made to the Duke of York in 1664, founded upon this right, and the subsequent confirmation of his title did not depart from the original foundation.
>
> § 153. The Indians could in no just sense be deemed a conquered people, who had been stripped of their territorial possessions by superior force. They were considered as a people, not having any regular laws, or any organized government; but as mere wandering tribes. They were never reduced into actual obedience, as dependent communities; and no scheme of general legislation over them was ever attempted.

MR. JUSTICE JOSEPH STORY, I COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 135- 36 (1833). This was the view which was taken, almost "tongue-in-cheek," by Mr. Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. 515, 543-44 (1832):

> After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing. Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all thigs, conferred these rights over hunters and fishermen, on agriculturists and manufacturers? But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.
>
> The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any one of them to grasp the whole; and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, 'that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession.' 8 Wheat. 573.

This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on denial of the right of the possessor to sell.

120. For a more thorough exposition of the development of the Colonies prior to the Revolutionary War, *see* STORY, *supra* note 119, at 3-131.

121. *See* STORY, *supra* note 117, at 17.

122. *See id* at 17-18.

123. *See id.* at 18.

124. *See id.* at 18-19.

125.

> TO BEE HOLDEN of us, our heires and Successors, as of our Mannor of East Greenewich, in Free and Common Soccage, and not in Capite nor by Knights Service, YIELDING AND PAYINGE therefore to us, our heires and Successors, onely the Fifth parte of all the Oare of Gold and Silver which from tyme to tyme and at all tymes hereafter shall bee there gotten, had or obteyned, in liew of all Services, Dutyes and Demaunds whatsoever, to bee to vs, our heires or Successors, therefore or thereout rendered, made or paid.

CONNECTICUT COLONY CHARTER OF 1662; <http://www.law.uoknor.edu/hist/colony.html>

> [Y]eilding therefore yerelie to us, our heires and successors, the fifte parte onelie of all the same goulde and silver and the fifteenth parte of all the same copper soe to be gotten or had, as is aforesaid, and without anie other manner of profitt or accompte to be given or yeilded to us, our heires or successors, for or in respecte of the same.

THE FIRST VIRGINIA CHARTER (APRIL 10, 1606); <http://odur.let.rug.nl/~usa/D/1601-1650/virginia/chart01.html>.

> Now these presents witness, that for and in consideration of a competent sum of lawful English money, unto his said Royal Highness in hand paid, and for the better extinguishing all such claims, and demands, as his said Royal Highness may any ways have of or in the premises aforesaid, now called West New Jersey, or any part of them; and for the further and better settling, conveying, assuring, and confirming of the same and of every part thereof, according to the purport and true meaning of these presents, his said Royal Highness, the said James Duke of York, hath granted, bargained, sold, and confirmed, and by these presents, doth grant, bargain, sell, and confirm unto the said William Penn, Gawen Lawry, Nicholas Lucas, John Eldridge, and Edmund Warner . . . . and of their heirs and assigns forever; in trust nevertheless for the said Edward Byllynge, his heirs and assigns forever. .Yielding and paying therefore yearly for the said whole entire premises, unto his Royal Highness, his heirs and assigns, the yearly rent of ten nobles of lawful English money, at or in the Middle Temple Hall London, at or upon the feast day of St. Michael the Arch Angel.

Grant of New Jersey (1680) <http://www.state.nj.us./njfacts/njdoc8.htm>.

> [t]o be holden of us, our heirs and successors, as of the Manor of East Greenwich, in our county of Kent, in free and common soccage,and not in capite, nor by knight service; yielding and paying therefor, to us, our heirs and successors, only the fifth part of all the ore or gold and silver which, from time to time, and at all times hereafter, shall be there gotten, had or obtained, in lieu and satisfaction of all services, duties, fines, forfeitures, made or to be made, claims and demands whatsoever, to be to us, our heirs or successors, therefor or thereout rendered, made or paid . . . ."
>
> CHARTER OF RHODE ISLAND *(1663)*. The price for Maryland was reported to be two Indian arrows annually. *See* STORY, *supra* note 119, at 92.

126. CONNECTICUT COLONY CHARTER, *supra* note 125.

127. Mr. Justice Story reports that:

> In all the colonies, the lands within their limits were by the very terms of their original grants and charters to be holden of the crown in free and common soccage, and not in capite or by knights service. They were all holden either, as of the manor of East Greenwich in Kent, or of the manor of Hampton Court in Middlesex, or of the castle of Windsor in Berkshire. All the slavish and military part of the ancient feudal tenures were thus effectually prevented from taking root in the American soil; and the colonists escaped from the oppressive burdens, which for a long time affected the parent country, and were not abolished until after the restoration of Charles the Second. Our tenures thus acquired a universal simplicity; and it is believed, that none but freehold tenures in soccage ever were in use among us. No traces are to be found of copy hold, or gavel kind, or burgage tenures. In short, for most purposes, our lands may be deemed to be perfectly allodial, or

> held of no superior at all; though many of the distinctions of the feudal law have necessarily insinuated themselves into the modes of acquiring, transferring, and transmitting real estates. One of the most remarkable circumstances in our colonial history is the almost total absence of leasehold estates. The erection of manors with all their attendant privileges, was, indeed, provided for in several of the charters. But it was so little congenial with the feelings, the wants, or the interests of the people, that after their erection they gradually fell into desuetude; and the few remaining in our day are but shadows of the past, the relics of faded grandeur in the last steps of decay, enjoying no privileges, and conferring no power. STORY, *supra* note 119, at 160.

128. [The Governor shall] have full Power and Authoritie to minister and give the Oathe and Oathes of Supremacie and Allegiance, or either of them, to all and everie Person and Persons, which shall at any Tyme or Tymes hereafter goe or passe to the Landes and Premisses hereby mentioned to be graunted to inhabite in the same." CHARTER OF MASSACHUSETTS BAY, <htttp://odur.let.rug.nl/~usa/D/1601-1650/massachusetts/mchart.htm>. "[Governor] to have power and authority to Administer the Oath of Supremacy and obedience to all and every Person and Persons which shall att any tyme or tymes hereafter goe or passe into the said Colony of Connecticutt." CONNECTICUT COLONY CHARTER, *supra* note 125.

129. ". . . [T]hen it shalbe lawfull to us, our heires and successors to put the saide parson or parsons having committed such robberie or spoile and theire procurers, abbettors or comfortors out of our allegeannce and protection. . . ." THE FIRST VIRGINIA CHARTER, *supra* note 125. ". . . [I]f the said person or persons who shall commit any such robbery or spoil shall not make satisfaction, accordingly, within such time, so to be limited, that then we, our heirs and successors, will put such person or persons, out of our allegiance and protection. . . ." CHARTER OF RHODE ISLAND, *supra* note 125.

130.

> ". . .[T]o Erect and make such Judicatories for the heareing and Determining of all Accons, Causes, matters and things happening within the said Colony or Plantacon and which shall bee in dispute and depending there, as they shall thinke fitt and convenient; And alsoe from tyme to tyme to Make, Ordaine and Establish All manner of wholesome and reasonable Lawes, Statutes, Ordinances, Direccons and Instruccons, not contrary to the laws of this Realme of England. . . ."

CONNECTICUT COLONY CHARTER, *supra* note 125.

> . . .[T]o order, direct and authorize the imposing of lawful and reasonable fines, mulcts, imprisonments, and executing other punishments, pecuniary and corporal, upon offenders and delinquents, according to the course of other corporations within this our kingdom of England; and again to alter, revoke, annul or pardon, under their common seal, or otherwise, such fines, mulcts, imprisonments, sentences, judgments and condemnations, as shall be thought fit; and to direct, rule, order and dispose of, all other matters and things, and particularly that which relates to the making of purchases of the native Indians, as to them shall seem meet. . . .

CHARTER OF RHODE ISLAND, *supra* note 125. *See also* THE FIRST VIRGINIA CHARTER, *supra* note 125. (This Charter required the King's personal approval of all legislation.); CHARTER OF MASSACHUSETTS BAY, *supra* note 128.

131.

> . . .[W]e do, for us, our heirs and successors, ordain, declare, and grant unto the said Governor and Company, and their successors, that all and every the subjects of us, our heirs and successors, which are already planted and settled within our said Colony of Providence Plantations, or which shall hereafter go to inhabit within the said Colony, and all and every of their children, which have been born there, or which shall happen hereafter to be born there, or on the sea, going thither, or returning from thence, shall have and enjoy all liberties and immunities of free and natural subjects within any of the dominions of us, our heirs and successors, to all intents, constructions and purposes, whatsoever, as if they, and every of them, were born within the realm of England. . . .

CHARTER OF RHODE ISLAND, *supra* note 129. See also

THE FIRST VIRGINIA CHARTER, *supra* note 125; CONNECTICUT COLONY CHARTER, *supra* note 130. For further information in this regard, *see* Story, *supra* note 117, at 20-22.

132. *See* BARON DE MONTESQUIEU, I THE SPIRIT OF THE LAWS, 295 Printed for G. and A. Ewing, in Dame-street, and G. Faulkner in Essex-street (1751), *reprinted in* The Legal Classics Library, 1984.

133. "For the savage people in many places of America, except the government of small families, the concord whereof dependeth on natural lust, have no government at all, and live at this day in that brutish manner, as I said before." THOMAS HOBBES, LEVIATHAN, Part I, Chapter 13 (n.p. 1651).

134.

> The subjection of them who institute a commonwealth amongst themselves, is no less absolute, than the subjection of servants. And therein they are in equal estate; but the hope of those is greater than the hope of these. For he that subject[s] himself uncompelled, think[s] there is reason he should be better used, than he that doth it upon compulsion; and coming in freely, call[s] himself, though in subjection, a FREEMAN; whereby it appear[s], that liberty is not any exemption from subjection and obedience to the sovereign power, but a state of better hope than theirs, that have been subjected by force and conquest. And this was the reason, that the name that signif[ies] children, in the Latin tongue is liberi, which also signif[ies] freemen. And yet in Rome, nothing at that time was so obnoxious to the power of others, as children in the family of their fathers. For both the state had power over their life without consent of their fathers; and the father might kill his son by his own authority, without any warrant from the state. Freedom therefore in commonwealths is nothing but the honor of equality of favor with other subjects, and servitude the estate of the rest. A freeman therefore may expect employments of honor, rather than a servant. And this is all that can be understood by the liberty of the subject.

THOMAS HOBBES, THE ELEMENTS OF LAW NATURAL AND POLITIC, Part II, Chapter 23 (n.p. 1640); *See also* JOHN STUART MILL, ON LIBERTY, HARVARD CLASSICS VOL. 25 (1909).

135. *See* JACK WEATHERFORD, INDIAN GIVERS 117-31 (1988).

136. *See id.*

> And if *Josephus Acosta's* word may be taken, he tells us, that in many parts of *America* there was no government at all. *There are great and apparent conjectures*, says he, *that these men*, speaking of those of Peru, *for a long time had neither kings nor commonwealths, but lived in troops, as they do this day in* Florida, *the* Cheriquanas [Cherokees], *those of* Brazil, *and many other nations, which have no certain kings, but as occasion is offered, in peace or war, they choose their captains as they please*, l. I. c. 25. If it be said, that every man there was born subject to his father, or the head of his family; that the subjection due from a child to a father took not away his freedom of uniting into what political society he thought fit, has been already proved. But be that as it will, these men, it is evident, were actually free; and whatever superiority some politicians now would place in any of them, they themselves claimed it not, but by consent were all equal, till by the same consent they set rulers over themselves. So that their politic societies all began from a voluntary union, and the mutual agreement of men freely acting in the choice of their governors, and forms of government.

JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 242 (1698). The setting of "rulers over themselves" referred to by Locke was the temporary acquiescence in leadership on a particular hunt or during a particular war. *See id.* at 248.

137.

> THE natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of nature for his rule. The liberty of man, in society, is to be under no other legislative power, but that established, by consent, in the commonwealth; nor under the dominion of any will, or restraint of any law, but what that legislative shall enact, according to the trust put in it. Freedom then is not what Sir

> Robert Filmer tells us, *O.A. 55. a liberty for every one to do what he lists, to live as he pleases, and not to be tied by any laws:* but freedom of men under government is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected I it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man: as freedom of nature is, to be under no other restraint but the law of nature.

Id. at 182. *See also* PAYNE, *supra* note 106.

138. *See, e.g.*, DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS, July 6, 1775, I JOURNAL OF CONGRESS, pp 134-39 (edited 1800). *See also* THE DECLARATION OF RIGHTS OF THE CONTINENTAL CONGRESS, October 14, 1774: THE DECLARATION OF INDEPENDENCE, *reprinted in* the appendix of STORY, *supra* note 117, at 271-79.

139. *See* WEATHERFORD, *supra* note 135, at 142-43. It has been suggested that the first call for unity of the colonies actually came from the Tribes. Addressing the Governors of Pennsylvania, Virginia, and Maryland in 1744, the Tribes said in part:

> We have one Thing further to say, and that is, We heartily recommend Union and a good Agreement between you our Brethren. Never disagree, but preserve a strict Friendship for one another, and thereby you, as well as we, will become the stronger. Our wise Forefathers established Union and Amity between the Five Nations; this has made us formidable; this has given us great Weight and Authority with our neighbouring Nations. We are a powerful Confederacy; and, by your observing the same Methods our wise Forefathers have taken, you will acquire fresh Strength and Power; therefore whatever befalls you, never fall out one with another."

Speech of Canasatego at the Treaty of Lancaster (July 4, 1744), 4 PENNSYLVANIA COLONIAL RECORDS 698-734 *reprinted in* THE WORLD TURNED UPSIDE DOWN - INDIAN VOICES FROM EARLY AMERICA 101 (Colin G. Galloway ed., 1994).

140. Proposed in 1777, finally agreed to by the last Colony/State (Maryland) in 1781 and thereafter effective until the adoption of the Constitution of the United States and its implementation. *See* STORY, *supra* note 117, at 28.

141. *See id.* at 133-50. For further information on the confederacy of the Six Nations — which served to govern most of what is now New England for hundreds of years and is still in active use today among the Houdenosaunee- *see* ARTHUR C. PARKER, PARKER ON THE IROQUOIS (1968). For the Articles of Confederation (the "firm league of friendship" of the colonies) *see* STORY, *supra* note 117, at 279.

142. STORY, *supra* note 117, at 29-30.

143. *Id.* at 32.

144. *See* WEATHERFORD, *supra* note 135, at 133-50; *see also* SHARON O'BRIEN, TRIBAL GOVERNMENT (1989); PARKER, *supra* note 141.

145. Benjamin Franklin went so far as to propose that the Executive of the United States, like those with which he was familiar from the Six Nations, receive reimbursement for his expenses but "no salary, stipend fee or reward whatsoever for their services" in order to prevent a post of honor from also being a post of profit. JAMES MADISON, RECORDS OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, 137-41 (GPO 1927). Madison reports that "[n]o debate ensued, and the proposition was postponed for the consideration of the members. It was treated with great respect, but rather for the author of it, than from any apparent conviction of its expediency or practicality." *Id,* at 141.

146. The Associated Press recently reported a story in which it was stated that Jesse Helms, Senator from North Carolina and Chairman of the Senate Committee which is supposed to report to the full Senate as to whether to approve appointments of those nominated by the President for posts as ambassadors to other countries, refused to hold hearings on the appointment of one nominee because the nominee refused to treat him with "due deference." The newspapers, television, and tabloids are full of stories about personal details of the lives of British royalty and others viewed as the "upper" classes — the wealthy, movie stars, business tycoons, and politicians. Few Americans would dream of walking unimpeded into their Senator's or President's office and saying, "Brother, why are you opposing what the people want?" a regular event in the life of any Tribal leader.

147. A title of respect or honor. In olden times a lord, knight, or gentleman. *See* 24 WORLD BOOK ENCYCLOPEDIA DICTIONARY 1950 (1990).

148. A title, originally the abbreviation of Master. *See id.* at 1361.
149. A title for a married woman, used to denote a woman head of household. *See id.* Misses was used for unmarried women. The title Ms. has been invented simply to create a title which does not denote whether the woman is married. *See id.*
150. THE DECLARATION OF INDEPENDENCE *reprinted in* STORY, *supra* note 117, at 275.
151. *See, e.g.*, NORMAN COOMBS, THE BLACK EXPERIENCE IN AMERICA (1972).
152. *See* U. S. CONST., art. II, §§ 2 & 3.
153. During the revolutionary period and until sometime after the adoption of the Constitution, the primary interest of the federal government of the United States was to attract the sympathy and loyalty of the Indian Tribes to their cause — even though they were hesitant to use the Tribes as full allies in their dispute with Great Britain. *See generally* GREGORY SCHAAF, WAMPUM BELTS AND PEACE TREES (1990); BARBARA GRAYMONT, THE IROQUOIS IN THE AMERICAN REVOLUTION (1972); LAWS OF THE COLONIAL AND STATE GOVERNMENTS RELATING TO INDIANS AND INDIAN AFFAIRS FROM 1633 TO 1831 WITH AN APPENDIX CONTAINING THE PROCEEDINGS OF THE CONGRESS OF THE CONFEDERATION (Earl M. Coleman ed. 1979), hereinafter "Coleman." At page 10 of this Appendix, there is an entry dated August 19, 1776 wherein the Congress instructed its Indian Commissioners to "make diligent inquiry into the murder lately committed by Indians in the neighborhood of Pittsburge . . . [and] they demand due punishment on the offender or offenders, which being granted, this Congress will not consider the same as a national act."
154. *See* Coleman, *supra* note 153. While these colonial laws are full of provisions attempting to prevent fraud upon Indians and intrusion into the Indian country, they do contain a few provisions attempting to apply the criminal law of the colonies to Indian under certain circumstances. A non-exclusive list includes: provisions excluding Negroes and Indians from being abroad after dark, *id.* at 53 (Rhode Island, 1696); capital offenses committed by Indians in the "remote parts of the Provence", *id.* at 139 (Pennsylvania, 1744); murders committed by Indians within the colony, *see id.* at 150 (Virginia, 1665); prohibiting Indians from giving testimony except against "negroes, mulattoes, or Indians," *id.* at 153 (Virginia, 1777); punishment for Indians committing offenses within settled part of colony, and providing for joint colonial - tribal resolution of trade disputes between Indians and whites, *id.* at 161 (North Carolina, 1715); and specifically declaring murder to include the killing of a "free Indian" by a white person because "there is reason to believe that several ill-disposed persons have not considered such inhuman actions in a proper light, but being influenced by the ill-grounded prejudices which ignorant minds are apt to conceive against persons differing in colour from themselves" (i.e. not thinking of the danger of involving the province in a bloody and expensive war), *id.* at 185 (Georgia, 1774).
155. An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, Approved, March 30, 1802, *reprinted in* Coleman, *supra* note 153, at Appendix 33.
156. *See id.* at § 1.
157. *See id.* at § 14, Appendix, page 39.
158. An Act to Provide for the Punishment of Crimes and Offences Committed within the Indian Boundaries, Approved March 3, 1817, *reprinted in* Coleman, *supra* note 153, at Appendix 48.
159. These provisions are now contained in 18 U.S.C. § 1152 (1994).
160. State v. George Tassels [Corn Tassel] 1 Dud. 229 (Geo. 1830). This case is described in SIDNEY HARRING, CROW DOG'S CASE 25-56 (1994). Although the United States Supreme Court had issued its Writ of Error on December 12, 1830 to review the case after the Georgia Supreme Court had confirmed Corn Tassels' conviction in the State court for killing another Cherokee within the Cherokee Country, the Georgia legislature meeting in special session voted to defy the Writ. Corn Tassels was hung on December 24, 1830. Three days later the State of Georgia was served with the subpoena for Cherokee Nation v. Georgia, 30 U.S. 1 (1831).
161. *See* Worcester v. State of Georgia, 31 U.S. 515 (1832).
162. *See* Ex parte Crow Dog, 109 U.S. 556 (1883). For a thorough discussion of this case, and the application of Anglo-American criminal law to the Indian Country *see* HARRING, *supra* note 160, at 25-56.
163. Act of March 3, 1885, Ch. 341, 23 Stat. 362 (1885). The current version of this statute may be found at 18 U.S.C. § 1153.
164. 18 U.S.C. § 1152.
165. 118 U.S. 375 (1886).

166.

> The mention of Indians in the constitution which has received most attention is that found in the clause which gives congress 'power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes. While we are not able to see in either of these clauses of the constitution and its amendments any delegation of power to enact a code of criminal law for the punishment of the worst class of crimes known to civilized life when committed by Indians, there is a suggestion in the manner in which the Indian tribes are introduced into that clause which may have a bearing on the subject before us.

Id.

167. *Id.*

168. The Court completely ignored its three year old decision in *Ex parte KAN-GI-SHUN-CA (otherwise known as Crow Dog)*, 109 U.S. 556 (1883), in which the Court stated:

> The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all,—that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs", and further, "by Indians against each other were left to be dealt with by each tribe for itself, according to its local customs.

See also United States v. Joseph, 94 U.S. 614, 617 (1876):

> The tribes for whom the act of 1854 was made were those semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized state or territory, and, in regard to their domestic government, left to their own rules and traditions, in whom we have recognized the capacity to make treaties, and with whom the governments, state and national, deal, with a few exceptions only, in their national or tribal character, and not as individuals.

169. Among the provisions of the Declaration of Independence, through which these same Americans had expressed their reasons for revolt against their King was:

> *He has combined, with others, to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation; . . . For depriving us, in many cases, of the benefits of trial by jury:* [i.e. preventing them from answering charges of wrongdoing according to their own customs and traditions]; *For transporting us beyond seas* [off the reservation] *to be tried for pretended offences; . . . For . . . declaring themselves invested with power to legislate for us, in all cases whatsoever . . . .*

DECLARATION OF INDEPENDENCE (1776) *reprinted in* MR. JUSTICE JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 275 (1840).

170. *See* text at notes 19-23.

171. Codified at 28 U.S.C. § 1302 (1994).

172. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

173. The Supreme Court, based in part upon the fact that the Bill of Rights of the American Constitution does not apply to the Indian Tribes, *Talton v. Mayes*, 163 U.S. 376 (1896), and that the Indian Civil Rights Act, 28 U.S.C. §1302, does not provide for a completely equivalent set of rights in criminal cases in tribal courts, decided that Indian people do not put white people in jail for viola-

tions of Tribal law. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). Although it attempted to extend this ruling to citizens of other Tribes, *Duro v. Reina*, 495 U.S. 676 (1990), Congress acted to reverse that decision. *See* 28 U.S.C. § 1302 (1994).

174. There are some exceptions, no indictment is required, *see Talton v. Mayes*, 163 U.S. 376 (1896), nor are the Tribes required to provide counsel for a defendant who is unable to afford an attorney, although such defendants are entitled to an attorney in the Tribal Court at their own expense. 25 U.S.C. §1302 (1994).

175. *See* United States v. Wheeler, 435 U.S. 313 (1978).

176. Ex Parte Tiger, 47 S.W. 304, 305 (1898).

177. *See* Hon. Robt. Yazzie, *"Hozho Nahasdlu" — We Are Now In Good Relations: Navajo Restorative Justice*, 9 St. Thomas L. Rev. 117 (1996); Hon. Robt. Yazzie, *"Life Comes From It": Navajo Justice Concepts*, 24 N.M. L. REV. 175 (1994).

178. *See* FRANK POMMERSHEIM, BRAID OF FEATHERS (1995); Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot From the Field*, 21 VERMONT L. REV. (1996).

179. *See* Williams v. Lee, 358 U.S. 217 (1959); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); National Farmer's Union v. Crow Tribe of Indians 471 U.S. 845 (1985); Iowa Mut. Ins. Co. v. LaPlante 480 U.S. 9 (1987); Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997).

180. Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313 (1997); Robert Laurence, *The Dominant Society's Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography and the Indian Civil Rights Act*, 30 U. RICH L. REV. 781 (1996).

181. 435 U.S. 191 (1978).

182. 117 S.Ct. 1404 (1997).

183. Congress has recognized this. *See* Indian Self-Determination Act, 25 U.S.C. 450a (1994).

184. Joseph Brant, quoted in Isabel Thompson Kelsay, JOSEPH BRANT (1984) (citing 6 AMERICAN MUSEUM 226-27 *reprinted in* THE WORLD TURNED UPSIDE DOWN - INDIAN VOICES FROM EARLY AMERICA 179-80 (Colin G. Galloway ed. 1994)). Joseph Brant was a Mohawk and prominent leader of Iroquois warriors. He is supposed to have made this reply in 1789 to a question regarding whether he thought Indians living in a "state of nature" were as happy as white people living in "civilization."

185. *See, e.g.*, Ray Halbritter with Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT'L L & BUS 531 (1994).

186. *See* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225 (1994).

187. *See* Gloria Valencia-Weber and Christine P. Zuni, *Domestic Violence and Tribal Protection of Indigenous Women in the United States*, 69 ST. JOHN'S L. REV. 69 (1995). *See, also*, Allison M. Dussias, *Science, Sovereignty, and the Sacred Text: Paleontological Resources and Native American Rights*, 55 MD L. REV. 84 (1996).

188. Alex Tallchief Skibine, *Reconciling Federal and State Power Inside Indian Reservations with The Right of Tribal Self-government and the Process of Self-determination*, 1995 UTAH L. REV. 1105 (1995).

189. *See* Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235 (1997).

190. *See* Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617 (1994).

191. *See* Kirke Kickingbird, *A Tour on the Prairies or Washington Irving and the "Horseless Headman": A Stroll with Congress, the Court and Indian Nations at the Turn of the Century*, 9 ST. THOMAS L. REV. 125 (1996); Vine Deloria, Jr., *Minorities and the Social Contract*, 20 Ga. L. Rev. 917 (1986); James W. Zion and Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55 (1997).

192. *See* Robert A. Williams, Jr., *"The People of the States Where They Are Found Are Often Their Deadliest Enemies": The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981, 985-86 (1996); Rebecca Tsosie, *Negotiating Economic Survival: the Consent Principle and Tribal-state Compacts under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 29 (1997); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 228 (1994); Kirke Kickingbird, *A Tour on the Prairies or Washington Irving and the "Horseless Headman": A Stroll with*

Congress, the Court and Indian Nations at the Turn of the Century, 9 ST. THOMAS L. REV. 125, 125-26 (1996).

193. *See generally* Vine Deloria, Jr., *Minorities and the Social Contract,* 20 GA. L. REV. 917 (1986); NORMAN COOMBS, THE BLACK EXPERIENCE IN AMERICA (1972) (published electronically in 1993) <http://ftp.sunet.se/ftp/pub/etext/wiretap-classic-library/blackexp.txt>.

194.

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.
>
> . . . 'Tributary and feudatory states,' says Vattel, 'do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state.' At the present day, more than one state may be considered as holding its right of self government under the guarantee and protection of one or more allies. The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.

Worcester v. State of Georgia, 31 U.S. 515 (1832).

195. *See* Rennard Strickland, *Genocide-at-Law: An Historic and Contemporary View of the Native American Experience,* 34 KAN. L. REV. 713, 719-21 (1986) (arguing that federal actions dispossessing Indian tribes from their lands during 19th century and attempting to force tribal people to assimilate should be characterized as genocidal in impact); *Conference: Race, Law and Justice: the Rehnquist Court and the American Dilemma,* 45 AM. U.L. REV. 567, 608-11 (1996); Judith V. Royster, *The Legacy of Allotment,* 27 ARIZ. ST. L. J. 1 (1995). *See, e.g., Draft Declaration on the Rights of Indigenous Peoples as Agreed Upon by the Members of the Working Group at its Eleventh Session,* UNESCOR, Comm'n on Hum. Rts., Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, 45th Sess., Ann. 1, Agenda Item 14, UN Doc. E/CN.4/Sub.2/1993/29 (1993); Act of Nov. 4, 1988, Pub. L. 100-606, §2(a), 102 Stat. 3045, as *amended* Sept. 13, 1994, Pub. L. 103-322, Title VI, *by* §60003(a)(13), 108 Stat. 1970.

196. *See* Vine Deloria, Jr., *Minorities and the Social Contract,* 20 GA. L. REV. 917 (1986).