

# Introduction: Why Indian Tribes and Indian Law Matter



If history is simply the propaganda of the victors, as suggested by the influential writer Simone Weil, then much dominant legal history concerning Native Americans and Indian tribes is inherently suspect. This history is not necessarily false or erroneous; rather, it is simply something worthy of close scrutiny, intense reflection, and energetic dialogue. Although much has been written about Indian history and law, little of what has been written concerning Indian law carefully scrutinizes the assumptions that support the historical and contemporary ratification of federal dominance and the parallel limits on tribal sovereignty and self-government. In addition, almost none of what has been written reflects the indigenous, localized tribal perspective.

Indeed, most Indian law<sup>1</sup> writing focuses on the pervasive role of Congress and the Supreme Court and their enduring dominance, whether for good or ill. In general, federal hegemony in Indian law and Indian affairs is extensive, but if we do not acknowledge the counterweight of tribal sovereignty and authority, the federal presence seems more dominant than it really is. Most scholarship in this area tends to relegate, even if inadvertently, important tribal institutions like tribal courts to a continuing role of passivity and marginality, dependent on federal jurisprudential largesse. If tribal courts are not seen as a vital force in the development of Indian law, their important and instructive struggles

will remain largely unknown—consigned to the corridors of (dominant) legal history. This concedes far too much power to the laws and courts of the conqueror.

Much of what is happening in tribal law and tribal courts is exciting and important, and these events provide an enviable window through which to observe the development of several themes significant at both the tribal and national—the indigenous and dominant—levels of American and global society. These themes include (1) an examination of the dominant society's historical, legal, and cultural commitment to diversity and pluralism; (2) an analytical perspective from a unique minority viewpoint that does *not* seek assimilation or greater access to the dominant society but seeks rather to preserve a historically based “measured separatism”; (3) a view of the dominant society's rule of law in an indigenous, colonized, and developing society; (4) an opportunity to observe the development of the foundational concept of tribal sovereignty at the local, reservation level; and (5) a chance to ascertain the relationship of law—both federal and tribal—to the quality of contemporary tribal life as one critical element of the braid of feathers that makes up tribal culture and society.

The view of this book, then, is more of an inside-out view from the grassroots, reservation level rather than the traditional top-down view that permeates most Indian law writing. According to this inside-out view, a pivotal ingredient in realizing tribal sovereignty within such a national pluralistic republic as the United States is the understanding and implementation of the indigenous vision that develops in its localized institutional settings. For example, in this view we should examine tribal court jurisprudence with reference to the tribal perception of its struggle to render justice and fair play within Indian country. This analysis does not ignore federal constraints but seeks rather to place them in a more limited (albeit forceful) context that achieves a better balance and equilibrium from which to view emerging tribal court development. Without this angle of vision, the field of Indian law becomes relentlessly monolithic and self-referential. If tribal courts exist only to mimic the majoritarian legal system, the work of colonization and assimilation is complete. Thus, one im-

portant goal of tribal court jurisprudence is to produce a creative body of law that synthesizes the best of the dominant legal system with the legal imperatives of tribal history and culture, while at the same time avoiding dominant pressures that would render such a synthesis irrelevant or contrary to the national interest. In addition, emerging tribal court jurisprudence provides a valuable perspective on the meaning and use of language, the importance of narrative and story, and the meaning of justice from the indigenous point of view.

The reservation perspective also allows ample opportunity to elucidate the theme of “difference” that is inherent in any consideration of Indian law matters, as well as directing our attention to the *values* that tribal legal systems seek to actualize as significant aspects of contemporary tribal life. On the relatively rare occasions when commentators examine tribal courts and judicial systems, they limit their examination to a comparison with state and federal systems, focusing narrowly on resources and procedural competence without any understanding of or reference to the values these systems are trying to realize. This view, which lacks any sense of culture or context, deprives tribal courts of their legitimate aspirations toward relative independence and cultural integrity. More explicit concerns include how much power tribal courts have or ought to have and what federal limitations, constitutional or otherwise, constrain the judicial authority of tribal courts.

Indian tribes and their institutions also play a significant role in the life of the West and are key players within the region both politically and economically. The West has always been a source of valuable national assets such as land, water, timber, coal, and uranium. A good deal of these resources in the West are owned and controlled by Indian tribes, and therefore much of the future vitality of Indian tribes is bound up with their role in the region and the outlook for the region as a whole. These tribal and regional concerns in turn raise hard questions about economic development, the integrity of the landscape, and cultural continuity. How tribes decide to deal with local development and regional issues will powerfully determine the future identity not only of the tribes but of the entire region as well.

The material well-being of tribes—in other words, their economic sovereignty—will in turn have a direct bearing on their political and legal sovereignty. If tribes remain materially impoverished, especially within a national capitalist-welfare state, their political sovereignty and aspirations will be continually undermined. In this republic, political and economic well-being often go hand in hand. The democratic ideals of freedom and liberty flourish best within an economic framework of growth, progress, and stability. Such economic well-being need not be limited, however, to individual accumulation that is antithetical to group or collective tribal well-being. This interweaving of economic and political concerns raises serious questions for tribes in the context of their commitment to cultural fidelity and continuity with the past.

The regional landscape of the West also provides a valuable locus for an examination of tribes' interactions with their most immediate physical neighbors, the state and local governments. Despite the pervasive role of the federal government in Indian law and affairs, the most prominent day-to-day reality in the life of many tribes is the quotidian presence of and interaction with non-Indians and the states. It is here that tribes often confront the reality of racial animus and the fiercest competition for resources and jurisdiction. Thoughtful consideration of the issues of economic development, tribal-state relations, and regional identity provides a valuable complement to the federal-tribal perspective that so often holds sway in Indian law writing.

The ability of tribes to realize important cultural and economic values is severely tested at the state and local level. Nevertheless, there are many examples of, and opportunities for, cooperative and creative ventures that can advance mutual self-interests, particularly in light of the historical, political, and economic dominance of the entire region by outside interests. In many cases the state and regional issues have too often been eclipsed by the federal presence in Indian affairs and its determinative role throughout the West. But that presence too must yield if there is to be hope for the future in Indian country and throughout the region.

In much of the analysis presented here, I attempt to identify several angles of vision—including those of the reservation and

the region—that help to reveal the situation confronting Indian tribes as they continue their quest to define and to effectuate a meaningful agenda of sovereignty in the latter part of the twentieth century. These angles of vision suggest that there may be greater possibilities for self-determination than conventional top-down, federally saturated views usually permit. In addition, such views minimize (without ignoring) dependence in favor of an optimal explanation identifying the widest possible area of self-defining autonomy. Possibilities for change are, in part, a function of perceptions about social and cultural reality; the analysis here seeks to enhance social and cultural perceptions that make potential liberating change more likely than not.

The inside-out view is grounded, in part, in a commitment to dialogue and praxis as critical elements for developing a strategy of change. This means encouraging talk within and across tribal (and nontribal) communities about what is desirable and what is possible. It means using the gifts of culture and education and the tools of analysis and action both to describe and to transform the inimical pressures of oppressive historical and contemporary circumstance in order to advance a flourishing tribal way of life.

All of this, of course, poses trenchant questions for the dominant society, particularly regarding its legacy of prejudice and exploitation as well as its ideals of freedom and democratic pluralism. The point, as suggested by Vine Deloria, Jr., a leading Sioux intellectual, is not to excoriate the “white man” once again to come to his senses but to look to a more humane and morally coherent era that is based in the core values of respect and dignity:

The lesson which seems so hard to learn is that of dignity and respect. Some of the voices contained herein may appear to be complaining about the loss of land, the loss of a way of life, or the continuing propensity of the white man to change the terms of the debate to favor himself. But deep down these are cries about dignity, complaints about the lack of respect. “It is not necessary,” Sitting Bull said, “that eagles should be crows.”<sup>2</sup>

Inevitably, I have a personal point of view. It is neither detached nor neutral but engaged and committed. I lived and worked on the Rosebud Sioux Reservation in South Dakota for

ten years and continue to serve on the appellate courts of both the Rosebud Sioux Tribe and the Cheyenne River Sioux Tribe. It was and continues to be an important personal and professional experience for me and my family. It was and continues to be an opportunity to see (dominant) injustice up close, as well as to experience the richness and reverence of Lakota culture. This experience has also deepened my awareness of many of the problems addressed in this book and sharpened my understanding of their etiology; perhaps more important, it has helped me identify possibilities for effective change.

My point of view is also grounded in the particular western landscape of Indian country in South Dakota and the specifics of a treaty-based indigenous jurisprudence. This reality is not necessarily identical with the rest of Indian country, which often varies dramatically as it runs from east to west across this country. Yet despite this diversity, the central unity of Indian country is the essential commitment to survive and to flourish within a tribal context. Within this larger unity, I believe, the analytical and narrative motifs of this book will be equally resonant and familiar even to distant friends. Ultimately, of course, readers must evaluate for themselves the validity and worth of these claims and assessments.