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ADDRESS AT UNIVERSITY OF KANSAS CONFERENCE ON
TRIBAL LAW AND INSTITUTIONS, FEBRUARY 2, 2008

TRIBAL LAW, TRIBAL CONTEXT, AND THE FEDERAL
COURTS

*Philip P. Frickey**

It is an honor to be asked to speak here today, before such a distinguished gathering of tribal leaders, scholars, lawyers, and law students. It is a bit of a homecoming, actually. I grew up in Kansas and graduated from KU with a degree in political science, in what seems like just a few years ago. It is very nice to be back.

Let me begin by referring to a favorite cartoon that appeared in the *New Yorker* many years ago. It pictures a relatively young man with a drink in his hand, talking to a woman with a look of interest in his eyes. It is obviously at a cocktail party. Apparently in response to a question from her, he says to the woman, "I'm from Cleveland, but I'm not from Cleveland anymore." That ran in the *New Yorker* in the late 1970s or early 1980s, when I was living in Washington, D.C. As what was referred to at the time as a yuppie (young urban professional), I got the joke.

But I might not have understood the joke a decade or so earlier, as a teenager growing up in Oberlin, Kansas, a town in northwest Kansas of about 2300 people in those days (and quite a bit fewer now). As a small-town Kansas kid, to imagine being from Cleveland – a real city, with a major league baseball team with the rich history of great players like Bob Feller, Larry Doby, and one of my then-current favorites, Rocky Colavito – why, to be from Cleveland would have struck me as exotic, something to be proud of, though it would seem pretty foreign as well, and it would have been hard for me to imagine what it would be like living there and, if required to do so, how I would cope with an urban environment. My own view is that the guy in the cartoon is not only from Cleveland, he will always be from Cleveland in an important sense, just like I will always be from Oberlin, though I left there many years ago and these days live in northern California. I think one of the reasons I am interested in federal Indian law is my upbringing in a small community, my sense of how such a place can work. To be sure, there are

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profound differences between a small Kansas community and an Indian tribe, but I want to suggest some similarities — ones that federal Indian law does not appreciate.

In the small town in which I grew up, the law was visible only in the sense that there were police who occasionally gave traffic tickets to us. Hardly anyone was arrested for a misdemeanor, much less a felony. Now, don't for a minute think that there were not bad people doing bad things there; I am sure there were. But these things tended to get worked out through the application of social customs and norms rather than court proceedings. Storekeepers whispered to each other that Mrs. Smith was a shoplifter, look out for her, rather than seek her prosecution. A teen-aged boy who grossly misbehaved would find it strongly suggested to him that the Army is a good place to start. For sure, sometimes people had to go to court — it was the only way to get a divorce, of course, and if all else failed, you could try to collect on a debt that way, and insurance companies occasionally insisted on litigating the allocation of responsibility for an auto accident or some such. But these were, in a sense, a failure of justice — or at least, a failure of private resolution — not a preferred venue in which to seek justice. My sense was that families, intermediary institutions like churches, and community groups like social clubs and business associations did their best to resolve things on an informal basis.

So what does this have to do with anything relevant to this conference? Let me suggest a way. When one thinks abstractly, jurisprudentially, about the nature of law, one imagines the rule of law as an alternative to chaos. In our system, as explained by Henry Hart and Albert Sacks, “[t]he alternative to disintegrating resort to violence is the establishment of regularized and peaceable methods of decision.”¹ More elaborately, as expressed by Lon Fuller, a colleague of Hart and Sacks at the Harvard Law School, under a system of the rule of law, law consists of general, comprehensible rules laid down beforehand that are implemented by public officials in an evenhanded and predictable manner.²

But the law in my little town was not very much a top-down system of rules created by legislatures (the Kansas legislature, the Oberlin city council) and courts (the Kansas Supreme Court), implemented by public officials like the local judge, county attorney, and police who simply follow the rules laid down, with chaotic disintegration into violence as the only alternative. Instead, the rule of law was in the shadow, not the forefront.

To be sure, it provided a layer of protection against abusive exercises of social norms or private power. The boy who was pushed to join the Army rather than face criminal charges could insist on his day in court, and with enough pushback, the system of the rule of law described by Fuller would kick in. But boys like that rarely did.

1. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 4 (10th ed. 1958).

2. LON FULLER, *THE MORALITY OF LAW* 39, 46-81 (rev. ed. 1969).

I do not stop here to assess whether this was a good system or a bad system. It was what it was, and it was surely commonplace in small communities in the United States. Over the years, courts and legislatures have changed this somewhat. Now you don't see lay judges as magistrates, for example; you have to be a lawyer. But most of this system of social norms and customs remains somewhat intact, I think. And law reform has never concerned itself much with this. After all, if you don't like that environment, you can move somewhere else. If the county sheriff is abusive, elect somebody else. Complain to the local newspaper. Your obvious choices are exit, voice, or loyalty. And it is conclusively presumed that you have the capacity to exercise those choices. The great law reform driven by courts in my lifetime was that of the Warren Court, the Supreme Court while Earl Warren was Chief Justice, from the early 1950s until the end of the 1960s. Racial issues were the driving force not only in such obvious areas as school segregation, but in the reform of criminal justice (you can't beat a confession out of a defendant, a practice that was widespread but was imposed in a racially discriminatory manner; the death penalty had incredible racism built into its imposition, and thus came under attack; and so on). When this had much to do with the context of a small town, it was a small town in the South with an oppressed minority community in it, not a rural farm town in Kansas. Indeed, I'd be hard pressed to identify one major Supreme Court case that most law students read while in law school that was driven by a sense that small-town justice (outside the context of racism) was fundamentally inferior to justice commonly meted out in a large city.

But there is a set of Supreme Court cases that voice concerns about justice in small communities – opinions few law students read, and few law professors know anything about. In a 1978 case, the U.S. Supreme Court stated concerns about justice in a small community in which “[o]ffenses by one [community] member against another were usually handled by social and religious pressure and not by formal judicial processes.”³ The Court in this 1978 case went on to quote a very old Report of a committee of the U.S. House of Representatives characterizing such communities as having a ““want of fixed law [and] of competent tribunals of justice.””⁴ The Court noted that juries in criminal cases would be drawn from the small community, implying that outsiders who end up being haled into that court might suffer injustice as a result. Returning to this theme in a 1990 case, the Court added that in addition to outsiders not being represented on juries in the small communities, they would have no capacity to vote for local government officials — the Court emphasized that outsiders had not given “the consent of the governed” in this context.⁵ Even more recently, in a 2001 case, Justice Souter, in a concurring opinion, went on at some length about the suspect quality of justice in the courts of these small communities, at least when outsiders are involved, asserting that as a practical

3. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 197 (1978).

4. *Id.* at 202.

5. *Duro v. Reina*, 495 U.S. 676, 694 (1990).

matter the governing legal values of these small communities are “still frequently unwritten, being based . . . ‘on the values, mores, and norms of [the community] and expressed in its customs, traditions, and practices.’”⁶

Of course, the small communities that received this intrusive criticism are not rural Kansas towns, but Indian tribes. On the one hand, as I suggested earlier, I think one could evaluate rural justice as well as often being “handled by social and religious pressure and not by formal judicial processes,” and as a practical matter turning on “customs, traditions, and practices” driven by the uncodified “values, mores, and norms” of the rural communities in question. To say that Indian tribes are “want of fixed law” is thus odd in at least two ways: tribes usually have tribal codes these days that govern criminal cases and sometimes civil cases as well, and in any event, if the focus is on social customs and norms, justice in small non-Indian towns surely is driven by similar factors as well. Nobody says there is a want of fixed law there, and surely that is not just because there are more law books on the shelf – the Kansas code and the municipal ordinances – books that probably gather more dust than practical usage.

To be sure, I don’t want to exaggerate the similarities between rural justice and tribal justice. We can imagine some reasons why the courts of the United States would presume rural justice to be adequate, but would be less certain about tribal justice.

Institutionally, as a formal matter, rural justice includes the possibility of trial by jury of peers (though perhaps the last people you’d like on the jury would be people who knew the victim, and in a small town, virtually everybody knows everybody else). In addition, there is the full applicability (on the books, if not in practice) of federal constitutional norms such as due process, protection against unreasonable searches and seizures, and the like, as well as the availability of appellate review. Now, as most of you know, tribal justice today generally includes much the same stuff – but under a different institutional structure. The appeal is to a tribal appellate court, not a state or federal appellate tribunal. The tribal courts are compelled by the federal Indian Civil Rights Act of 1968 to accord parties in tribal courts essentially all of the important federal constitutional rights (with the exception of free counsel for indigent criminal defendants – though some tribes do that anyway, as a matter of good practice). But as a general matter, there is no non-Indian tribunal for civil parties to go if they think these federal rights have been violated in tribal court. To be sure, someone incarcerated in tribal jail may seek a writ of habeas corpus from a federal district court, but that is probably located many miles away.⁷

But is that all that is at work to explain a selective suspicion of tribal justice? Are these just problems of institutional design? I don’t really think so. I do think there is a general distrust of tribal communities as being

6. *Nevada v. Hicks*, 533 U.S. 353, 384 (2001) (Souter, J., concurring).

7. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (finding no implied civil cause of action for enforcement of the statute).

potentially unfair to nonmembers who end up in their courts, and that distrust transcends institutional issues. And it has something to do with the impression that tribes have a “want of fixed law,” and that tribal institutions are just plain unreliable. The first of these is just mistaken, and in any event nobody much worries about this problem of social customs and norms, rather than written law, carrying a heavy practical load in rural justice situations. On that score, I fear that ethnocentrism, distrust, and just plain lack of good information are all at work. But, on the second – the reliability of tribal institutions – it is not so easy to make a confident assertion.

I say this not because I generally distrust tribal institutions. In my experience, tribal institutions can work well. But that is just in my experience, and to be candid, my experience is quite limited. I get to sit in a nice office on a pretty campus and look out my window at San Francisco Bay and type on my computer. To the extent that I can claim expertise in federal Indian law, it is an expertise about the law in the books and about the behavior of the federal judiciary, not about the law in practice. I do not have significant on-the-ground experience with tribal institutions – few law professors do. And consider the experience of the federal judiciary – the only instances of tribal governance that federal judges are likely to ponder are ones brought to them in cases in which someone is complaining about a lack of tribal justice. The judges have no way to have a broader, more balanced view of tribal institutions.

Why is that so? Not to put too fine a point on it: I think there has been a failure of scholarship in federal Indian law. Virtually all the writing by law professors and, so far as I can tell, mostly by other academics as well, that might have relevance to tribal institutions and law has involved abstract discussions of judicial decisions, the refinement of adversarial arguments about the meaning of tribal sovereignty, the trust relationship between the federal government and tribes, and so on. Now, there is nothing wrong with this, it is all well and good and contributes to a better understanding of ideas in the area. But the work has not grappled with the law on the ground in Indian country, as mediated through tribal institutions. There is a virtual void of information on this score in the scholarly literature. Is it any wonder that federal judges do not stop to second-guess their instinctive suspicions about such matters?

There is a small but, I hope, emerging movement toward a greater legal realism in federal Indian law – a movement away from doctrinal work and toward more empirical, more grounded, more experiential examinations of tribal law and tribal institutions. I am proud that, a little over a year ago, we held what I hope will eventually be viewed as a ground-breaking conference at Berkeley on what we called the new legal realism in federal Indian law. This conference at KU is a great place to make the pitch for this kind of work. Professor Leeds and the KU law school are one of the few sponsors of conferences who focus on tribal institutions, not on law professors as talking heads on various panels opining abstractly about this and that and the next thing that often misses the point. Federal Indian law needs a much better, more grounded understanding of tribal law and institutions. Otherwise federal

Indian law just consists of the federal judiciary engaged in guesswork prone to dissolve into suspicion.

I suppose fears about local customs and norms never really took root about rural justice because the elders of the current broader legal community grew up watching the Andy Griffith Show. Sheriff Andy Taylor hardly ever arrested anybody, and when he did, it was usually just Otis, the town drunk, and only so he would have a safe place to sleep it off. By the way, that seems to me to be the application of local customs, norms, and traditions, but nobody ever objected to the “want of fixed laws” in Mayberry, North Carolina. Too bad there was never a television show about a tribal chief of police exercising a similar kindness and wisdom. Without such learning by cultural osmosis by way of cathode ray tube, it is time to try to get a realistic handle on tribal law and tribal institutions.

But a realistic response to my call for this sort of grounded, empirical work might be that it is too late. The federal judiciary has perhaps already cut most of the legs out from under tribal institutions with respect to all but the regulation of the tribe’s own members. One answer is that is not quite correct: tribal courts may still – according to the law in the books – claim significant civil jurisdiction over nonmembers in certain circumstances. But I have to confess that is now in peril as well. Let’s take a look at a pending case, which I think exemplifies this disconnect in federal Indian law between the law in the books and the law on the ground.

In *Plains Commerce Bank v. Long Family Land & Cattle Co.*, an off-reservation, non-Indian-owned bank allegedly discriminated in the terms of a loan it made to a 51% tribal membership owned family business concerning fee simple land owned by the business on an Indian reservation.⁸ The business sued the bank in tribal court. The tribal court held it had appropriate jurisdiction over the dispute, and at trial the jury returned a damages judgment in favor of the business. The tribal court of appeals affirmed. The bank then filed an action in federal district court, asking the court for a declaratory judgment that the tribal court lacked jurisdiction (which of course would have the effect of voiding the tribal judgment). Both the federal district court and the United States Court of Appeals for the Eighth Circuit denied relief on the ground that the tribal court indeed had jurisdiction.

From these bare bone facts, those of you who know Indian law must be thinking, there is no major dispute here, and all the courts – the tribal and the federal ones – decided the case correctly. For under the prevailing precedents, a tribal court is said to have jurisdiction over a civil case brought against a nonmember defendant for a cause of action arising in Indian country so long as the nonmember defendant had a consensual relationship with the plaintiff members of the tribe.

Now, let me add some facts. First, the claim in the case is not breach of

8. 128 S. Ct. 2709, 2712 (2008) (The Supreme Court has now resolved this case, holding that the tribal court lacked jurisdiction to entertain the cause of action in question.).

contract – which might more easily be seen as a claim arising directly in relation to a consensual relationship – but in tort (the allegation, accepted by the tribal court jury, is that the bank discriminated in lending practices based on race or tribal identity). Second, the tort claim is not founded upon an express provision of the tribal code creating a duty in tort law, but instead upon tribal common law. The tribal courts essentially concluded that “under traditional Lakota notions of justice, fair play, and decency to others, discrimination because of race or tribal affiliation was tortious conduct.”⁹ Third, the jury verdict was for \$750,000 plus interest.

If you believe the law in the books, none of these three additional facts would seem to make any difference. First, it would a strange rule that a consensual relationship impliedly authorized only causes of action that sprang from the contract that forms the basis for the relationship. In any event, the line between contract and tort is famously ambiguous, with bad faith conduct implicating both legal categories, and here the allegation is that a tort occurred right at the heart of this consensual relationship. Second, in the United States, we have a common law system – that is, one in which the customs of the people can be transformed into law when they are accepted by state courts as the common law. Had a state trial court instructed the jury on a common law theory – even one that had not been clearly established in the jurisdiction by appellate cases beforehand – no one could plausibly claim that the theory was unfair because of lack of notice or otherwise; we would assume that the good faith and professionalism of the trial judge, coupled with the adequacy of appellate review, would suffice to harmonize the unwritten and evolving nature of the common law with fundamental fairness. To take a different approach to tribal common law – which of course, like state common law, is no less law simply because it is comes from unwritten practices, so long as it is ultimately articulated by a duly established court – would seem to be questionable on the ground of ethnocentrism. And third, the question of the appropriateness of the finding of a breach of duty and the amount of damages should be for the trial court to review upon a motion to set aside one or both and for the appellate court thereafter. It has nothing to do with jurisdiction.

But what if you don't believe that the law in the books explains everything – or, perhaps even much of anything – about federal Indian law? Consider these facts, which may well seem relevant to many people in the dominant community. First, as already mentioned, the bank is non-Indian, and its place of business is outside Indian country. Second, the land is not Indian trust land, but fee simple land. Third, the ranching operation is mostly owned by tribal members, but the dispute might not seem to implicate any significant tribal governmental interest (other than of course providing a forum for the litigation of claims that arise on the reservation, which does go to the economic security of tribal members and hence, of the tribe). Fourth, the ranching operation is incorporated under state law, not tribal law. Fifth, if one indulges

9. *Commerce Bank v. Long Family Land & Cattle Co.*, 491 F.3d 878, 883 (2007), *rev'd*, 128 S. Ct. 2709 (2008).

in the assumption in the Supreme Court cases that tribes have historically been people with a “want of fixed law” and with “non-law” customs that might not be transparent to nonmembers, then it might look like the tribal courts were just making up this tort theory as they were going along – recall it was not provided in the written tribal code, and is said to follow from traditional tribal notions. Sixth, a \$750,000 verdict from an all-member jury against a bank located in a small town is potentially ruinous.

These facts are going to look suspicious to persons prone to the assumptions about the unreliability of tribal institutions. Of course, we could keep adding facts, and this time add some facts that cut in the opposite direction. We learn, for example, that the bank had the opportunity to request that nonmembers or non-Indians be summoned to serve on the jury, but the bank made no such request.¹⁰ A little Internet surfing reveals that, while the bank started out as a presumably tiny bank in the clearly tiny town of Hoven, SD (in the year 2000, population 511), the bank has acquired or merged with some other banks in recent years and now has six branches (including branches in Aberdeen, Watertown, and Sioux Falls), and appears in addition to have a major credit card operation. Do these facts make any difference?

My suggestion is that looking from the outside into Indian country is prone to wild shifts in instincts and sympathy depending on which facts are focused upon and which are suppressed. Had this arisen in Oberlin, Kansas (heaven forbid, for my family used to have an interest in a bank there and we would not have liked to be sued), the conclusive assumption would have been that the Kansas district judge, the Kansas Court of Appeals, and the Kansas Supreme Court (if it went that far) would do an adequate job of delivering a just outcome. The United States Supreme Court would certainly take no interest in such a matter. But the Supreme Court just recently granted discretionary review to examine the Eighth Circuit’s denial of intervention into the tribal court dispute in *Plains Commerce Bank*. It is very hard for me to believe that this certiorari grant was driven by a desire to clarify any legal rules. Indeed, based on current federal Indian law, the federal district court and court of appeals seem clearly correct in denying relief. With all respect, my sense is that Supreme Court intervention was caused by suspicion of the tribal institutions and processes at work.

Don’t get me wrong. I am not suggesting that the Justices of the United States Supreme Court are biased in any intentional or malevolent sense of the term. I don’t think they are. I do think they lack any contextual sense of tribal institutions, and they fall victim to some of the same worries that the dominant legal community has articulated in the past, about a want of fixed laws, unwritten and nontransparent customs and practices, and the like.

Now, suppose one of these Justices called me up and said, “OK, loudmouth, I am calling your bluff: give me citations to some things I could read so I can educate myself.” Just what would I cite to him or her that would

10. Long Family Land & Cattle Co., 491 F.3d at 883.

be helpful? I could cite a lot of stuff about the law in the books. I would find it difficult, if not impossible, to find much stuff I could cite about the law in action in Indian country, the law on the ground.

I hope I have made the case that more grounded work would be very helpful to federal Indian law. To be sure, the results of such work must be objective; the scholar needs to take the subject and inquiry where it goes. Not all such work will document facts and reach conclusions that tribes will like, and this kind of work will be intrusive into tribal matters in a way that at least some tribes will find troubling. Nonetheless, I do think, on the whole, that such studies would work to the benefit of the enterprise of tribal self-government because my sense is that much of what would be revealed would generate respect for tribal institutions. But, of course, I do not know that; that is more a matter of faith and intuition. And faith and intuition mean little coming from me; certainly, however, the intuition of federal courts has been negative, so far.

To be sure, it is possible that the federal courts are so far down the road toward undermining tribal sovereignty that scholarly work of this sort can have little impact. In particular, the peculiar way in which the federal courts have defined the concept of the *jurisdiction* of tribal courts and then engage in a review of that jurisdiction may be hard to undo through litigation. But even if that might be the case, there is another forum to consider: Congress. And unlike the courts, Congress can enact legislation abandoning brittle and awkward concepts like jurisdiction (as defined by the courts) and authorize tribal institutions to take on broader roles within newly imagined institutional frameworks. But to do that, the case will have to be made to Congress. And to make that case, one will need a strong contextual argument arising out of work that shows how tribal institutions can operate on the ground.

As a final thought, let's leave all this pragmatic instrumentalism aside. Ultimately, the scholarly enterprise in law cannot simply be bound up with law reform. Whatever the law is at a given time, the goal of the scholarly enterprise must be, at least in part, to transcend doctrinal issues and try to help legal institutions better understand the nature, effects, and limits of law. Legal scholarship is a subpart of scholarship in general, and one goal of scholarship in general is to improve our knowledge about the world. The larger, non-Indian community simply does not know very much about tribal institutions and law. And what they don't know tends not to hurt the larger community, but instead, to hurt tribes.

When someone in the dominant legal community asks me where I am from, and I say Oberlin, Kansas, that no doubt conjures up a variety of images, some positive, some negative, but almost certainly evokes no strong feelings about the system of justice in such rural communities. So, too, would be the case for my cartoon figure who claims to be from Cleveland, though not from Cleveland anymore. But if the response were that the person is from, say, the Cheyenne River Sioux Indian Reservation – the place where the *Plains Commerce Bank* case arose and was litigated – I think more than a few

members of the dominant legal community may well conjure up negative images of the system of justice found there. And that, at least as much as the dry legal rules in books, should be a matter of significant concern for all of us. The people in this room, at least by and large, probably reject those negative images. I think that it is time we did something about documenting who is right, on the whole, and in what varied circumstances – the dominant community, or the rest of us.

Thank you.