

1-1-2006

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Recommended Citation

Wenona T. Singel, Cultural Sovereignty and Transplanted Law: Tensions in Indigenous Self-Rule, 15 Kan. J.L. & Pub. Pol'y 357 (2005-2006).

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CULTURAL SOVEREIGNTY AND TRANSPLANTED LAW: TENSIONS IN INDIGENOUS SELF-RULE

*Wenona T. Singel**

Two forces that have a tremendous impact on tribal legal systems are in direct conflict with each other. This essay describes what these forces are, explains why they are in conflict, and discusses what can be done to minimize this conflict.

The first force is the concept of cultural sovereignty.¹ This concept refers to an indigenous counterforce to the dominant society's narrative of the meaning of tribal people's collective existence.² An important part of the dominant narrative is the story that the federal courts have developed to describe tribal people's histories and the nature of their communities and political institutions.³ This narrative weaves references to dependency,

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1. Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191 (2001); Rebecca Tsosie, *Engaging the Spirit of Racial Healing with Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21, 43 (2005); ROBERT ALLEN WARRIOR, TRIBAL SECRETS: RECOVERING AMERICAN INDIAN INTELLECTUAL TRADITIONS 87-98 (1995) (describing the process of developing "intellectual sovereignty"); VINE DELORIA, JR. & CLIFFORD M. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 245 (1984) (proposing methods for linking tribal assertions of political power to tribal culture and tradition); Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2004) (discussing cultural sovereignty as a process of developing an internal meaning for sovereignty, and building upon this theory to propose a form of experiential sovereignty that links cultural with legal sovereignty).

2. See Coffey & Tsosie, *supra* note 1, at 198.

3. See Jo Carrillo, *Disabling Certitudes: An Introduction to the Role of Mythologies of Conquest in Law*, 12 U. FLA. J.L. & PUB. POL'Y 13, 14 (2000) ("U.S. colonization by Europeans depended upon a mythology of conquest. Colonization was as much a matter of narrative as of might and commerce."); Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 224 (2000) ("For Native Americans, the Western legal infrastructure is the narrative of 'white law'—a system

weakness, incompetence and inferiority into the retelling of the disputes that give rise to federal Indian law.⁴ The repetition of these references also serves to validate the fundamental principles of federal Indian law, including the discovery doctrine,⁵ the plenary power doctrine,⁶ the trust relationship,⁷ and the doctrine of implicit divestiture.⁸

Cultural sovereignty refers to tribes' efforts to represent their histories and existence using their own terms, and it acknowledges that each Indian nation has its own vision of self-determination as shaped by each tribe's culture, history, territory, traditions, and practices.⁹

Cultural sovereignty plays another role. It refers to efforts to dismantle the tangible effects of five centuries of European colonization. As a result of repeated attempts to eliminate or assimilate tribes through paternalistic policies intended to assist tribal governments,¹⁰ traditional forms of tribal political authority have been weakened, and many elements of tribal legal systems have been shaped to imitate Anglo, non-Indian norms.¹¹ Thus, the structure of tribal courts, legislative bodies, tribal codes and tribal case law often have been molded to fit non-Indian models.¹²

The project to promote cultural sovereignty includes efforts to develop tribal legal systems in a way that reflects tribal histories, cultures, and

devoid of indigenous values, concepts, and lifeways. Native peoples remain outside of most formal legal systems in the United States and continue to be surrounded by dehumanizing images of the Indian, supporting the myth that Native peoples are inhuman, timeless, and essentialized.") (footnote omitted).

4. *E.g.*, *United States v. Kagama*, 118 U.S. 375, 384 (1883) ("weakness and helplessness"); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) ("domestic dependent nations"); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 567 (1903) ("These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights.") (emphasis in original).

5. *See Johnson v. M'Intosh*, 21 U.S. 543, 573 (1823).

6. *See Kagama*, 118 U.S. at 384 ("From [the tribes'] very weakness and helplessness . . . there arises the duty of protection, and with it the power."); *United States v. Lara*, 541 U.S. 193, 200 (2004); *Lone Wolf*, 187 U.S. at 567.

7. *See Cherokee Nation*, 30 U.S. at 10 (discussing the guardian-ward relationship); *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

8. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *United States v. Wheeler*, 435 U.S. 313 (1978); *Montana v. United States*, 450 U.S. 544 (1981).

9. *See Coffey & Tsosie*, *supra* note 1, at 209.

10. VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 8-12, 99-103, 126-130 (1983); Warren H. Cohen & Philip J. Mause, Note, *The Indian: The Forgotten American*, 81 HARV. L. REV. 1818, 1842-43 (1968).

11. *See* FRANK POMMERSHEIM, *BRAID OF FEATHERS: AMERICAN INDIAN LAW AND CONTEMPORARY TRIBAL LIFE* 61-62, 65 (1995); ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 312 (2003); Carole E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1004 (1997).

12. *See* Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Toward Indians*, 66 WASH. L. REV. 643, 707-08 (1991); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 742 (1989).

community norms. This process is referred to by some as cultural revitalization or indigenization.¹³

Meanwhile, in spite of the important and effective efforts of many to promote cultural sovereignty in tribal communities, Indian nations continue to incorporate non-Indian law at a dramatic and, in some cases, accelerating rate.¹⁴ I refer to this incorporated non-Indian law in tribal legal systems as transplanted law. Today, tribes continue to adopt transplanted law through voluntary acts, although the degree of voluntariness can vary greatly from case to case.

There are many examples of transplanted law in tribal legal systems. Non-Indian models and norms have been voluntarily incorporated into tribal constitutions,¹⁵ in the content of tribal codes,¹⁶ and even in the body of tribal court opinions.¹⁷ The commercial law that has been and is currently being adopted by Indian tribes provides an illustration. This commercial law is perhaps best exemplified by the secured transactions codes that many Indian nations are adopting as tribal law.¹⁸

Generally, a secured transactions code is a statute that governs the creation, attachment and perfection of a security interest in goods.¹⁹ A security interest is an interest in goods that a creditor takes when a debtor pledges the goods as collateral.²⁰ The Uniform Commercial Code's Article 9 is a model

13. See Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L.J. 889, 889 (2003); Robert B. Porter, *Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples*, 5 YALE HUM. RTS. & DEV. L.J. 123 (2002); Angela R. Riley, "Straight Stealing": *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 131 (2005).

14. Elmer R. Rusco, *Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions*, 14 AM. INDIAN L. REV. 269, 270-274 (1989); Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. REV. 597, 642-646 (2004) (describing the enactment by several tribes of commercial codes modeled after the UCC); Richard J. Annon, Jr. & Ladine Oravetz, *Tribal Economic Development: What Challenges Lie Ahead for Tribal Nations as They Continue to Strive for Economic Diversity?*, 11 KAN. J.L. & PUB. POL'Y 441, 451 (2002).

15. Goldberg, *supra* note 13, at 891.

16. See Resnik, *supra* note 12, at 713.

17. See Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 523-24 (2000).

18. E.g., Blackfeet Commercial Code – Secured Transactions (1999), available at <http://www.tribalresourcecenter.org/ccfolder/blkftt31commercial.htm> (last visited Mar. 8, 2006); Secured Transactions Ordinance of the Bay Mills Indian Community (2000), available at <http://www.tribalresourcecenter.org/ccfolder/bmsecured.htm> (last visited Mar. 8, 2006). See generally Sue Woodrow, *Secured Transactions Codes: An Important Tool for Tribal Economic and Housing Development* (2004), available at http://minneapolisfed.org/community/pubs/secured_transactions.pdf (last visited Mar. 8, 2006); Susan Woodrow & Fred Miller, *Lending in Indian Country: The Story of the Model Secured Transactions Law*, 15 BUS. LAW TODAY, Nov.-Dec. 2005, at 39.

19. E.g., U.C.C. § 9-109(a) (2000) (defining scope of the UCC secured transactions code).

20. See U.C.C. § 9-102(73) (2000) (defining "security agreement").

secured transactions code, and all states have adopted some form of it, often with minor variations to suit each state's needs and concerns.²¹

In the past five years, many tribes have developed a growing interest in enacting a form of secured transactions code as tribal law. This is because tribes have developed a growing recognition of the fact that secured transactions codes are often critical tools for promoting economic growth in Indian country.²² Without a secured transactions code enacted as tribal law, lenders remain wary of extending credit in Indian country because they cannot predict whether or how any security interest they may take in goods will be recognized or enforced under tribal law.²³ This problem is exacerbated because Article 9 includes a choice of law provision providing that the secured transactions law that governs the perfection of any security interest is generally the law of the location of the debtor.²⁴ Under this choice of law rule, if the debtor is an individual or entity or Indian nation located in Indian country, then the law that governs the making and enforcement of security interests is always the tribe with jurisdiction over the Indian country in question. The result is that under the law of nearly every state, whenever a debtor is located in an area of Indian country where the relevant tribe with jurisdiction lacks a secured transactions code on the books, there is no definite set of rules that will govern the making and enforcement of a security interest. The uncertainty that results from this phenomenon creates a disincentive for lender investment in Indian country generally, and the effects of this disincentive are felt by individuals, by small and large businesses, and by tribal governments.

In response to the threat to economic growth that the absence of tribal secured transactions codes presents, many Indian nations have responded by enacting tribal secured transactions codes as tribal law. In addition, a few law schools have devoted resources to helping tribes develop tribal secured transactions codes,²⁵ and the National Conference of Commissioners on Uniform State Laws (NCCUSL) also became involved in the effort to develop and promote the tribal enactment of this code.²⁶ NCCUSL is a national organization that develops a wide variety of uniform laws for state enactment.²⁷ In particular, NCCUSL monitors state law UCC developments and considers whether developments merit revision of the model form of the UCC. When NCCUSL creates or revises a uniform law, it combines the

21. 9B WILLIAM D. HAWKLAND, HAWKLAND UCC SERIES § 9-301:3 [Rev] (2005).

22. See Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. REV. 597, 641 (2004).

23. See generally Paul E. Frye, *Lender Recourse in Indian Country: A Navajo Case Study*, 21 N.M. L. REV. 275 (1991).

24. See U.C.C. § 9-301(1) (2000).

25. E.g., Fred H. Miller & Duchess Bartmess, *Uniform Laws: Possible Useful Tribal Legislation*, 36 TULSA L.J. 305, 313-24 (2000) (University of Montana School of Law).

26. See Woodrow & Miller, *supra* note 18, at 40.

27. See *id.* at 39.

expertise of academics and practitioners from each of the fifty states and ultimately issues an official form of the model law in question which it then endorses for state adoption. The American Law Institute (ALI) also reviews and decides whether to endorse the model laws that NCCUSL develops. Once the model form is endorsed by NCCUSL and ALI, both organizations then encourage each state legislature to adopt the model law with as few changes as possible. A guiding principle that informs the NCCUSL's development of model codes generally is that uniformity of the law from state to state promotes greater certainty, predictability, and efficiency in the law. In the area of commercial law, this uniformity encourages efficient economic transactions because parties are able to contract with each other without a significant investment of time and resources each time a party engages in commerce in a new state law jurisdiction.

NCCUSL's involvement in the drafting of a model tribal secured transactions code arose from the congruence of a few different developments. First, some tribes and tribal attorneys sought out NCCUSL's leadership to ask for assistance with the incorporation of a version of Article 9 of the UCC as tribal law. Second, the Community Development division of the Federal Reserve Bank became involved in encouraging the development of a model tribal secured transactions code in order to counteract the reluctance of banks to extend credit in Indian country. And third, the leadership of NCCUSL recognized that it had a stake in ensuring that the creation of a model tribal secured transactions code was as effective as possible and as faithful as possible to the state law version of NCCUSL's own Article 9.

As the interest in enacting secured transactions codes in Indian country grew, so too did the number and variety of problems associated with successful tribal incorporation of the code. The first problem occurred at the outset, with tribes' failure to properly integrate the code into tribal law. In many cases, tribes adopted secured transactions codes by simply cutting and pasting either the model Article 9 of the UCC or an enacted state version of Article 9 and incorporating the cut-and-pasted product as tribal law.²⁸ This method of tribal incorporation was the least likely to be successful, since it often failed to take into account previously-enacted tribal laws to ensure that the incorporated code did not conflict with existing tribal law. This method also suffered because the model Article 9 of the UCC and the various state-enacted versions of Article 9 are each laden with cross-references to other bodies of law which the drafters of Article 9 presume to be enacted by each respective jurisdiction. For example, Article 9 refers to other portions of the UCC governing sales and leases, debtor-creditor law, and commercial paper. If none of these other portions of the UCC are enacted as tribal law, then a tribe that adopts a model secured transactions code with references to concepts embedded in these other

28. *E.g.*, Eastern Band of Cherokee Code, ch. 16D-1, available at <http://www.narf.org/nill/Codes/ebcicode/eccodech16dgamingord.htm> (last visited Mar. 8, 2006).

codes will ultimately enact a law that cross-references itself to a series of dead-ends, or non-existent law.²⁹

A second problem that tribes have encountered with the enactment of secured transactions codes is their inability to provide the necessary administrative support for successful implementation and enforcement of the code. In some cases, a tribe commits the necessary resources for drafting, reviewing and enacting the code, but once the code is adopted as tribal law, the law languishes on the books without any additional work to ensure that the code is effectively implemented. In some cases, this is the result of inadequate planning. In others, it may be the result of insufficient financial resources for the development of the administrative processes and the training of support staff the code requires. Tribes also encounter a third problem, that of inexperience with secured transactions codes; consequently, the code is rarely applied or enforced because the community lacks experience with the code's meaning and application. In this case, the code may be regarded as tribal law, but, as members of the community disregard the law and adopt practices that conflict with it as they engage in commercial transactions, the validity of the code may be diminished. Finally, a fourth problem that the adoption of secured transactions codes may trigger is the introduction of new meanings, norms and values regarding relationships between individuals that may not comport with and may even directly conflict with the meanings, norms and values that are integral to the community's identity and the cohesiveness of its members' relationships.

Among the various difficulties associated with the enactment of secured transactions codes as tribal law, the potential for conflict with cultural sovereignty is especially worthy of attention. As mentioned earlier, the project to promote cultural sovereignty includes efforts to develop tribal legal systems in a way that reflects tribal histories, cultures and community norms. In contrast to the goals of cultural sovereignty, transplanted law represents a further step toward modeling tribal legal systems after Anglo legal systems. Transplanted law also represents a failure to organically develop tribal legal systems to fit the unique cultures, communities, territories, and traditions of indigenous peoples. In the case of a secured transactions code modeled after Article 9 of the UCC, the code challenges the development of cultural sovereignty to the extent that it displaces or modifies tribal norms and values that relate to the ownership of property and the relationship between debtors and creditors.

Given the continued and growing practice of tribal incorporation of transplanted, non-Indian law, it seems appropriate that we monitor and evaluate this process to identify three things: tribal practices and methods of incorporating transplanted law, the effects of tribal incorporation of transplanted law, and the methods that are available for evaluating the process

29. See generally Woodrow & Miller, *supra* note 18.

of the adoption, incorporation, and enforcement of transplanted law. By examining these processes and analytical tools, we can better predict the effects of transplanted law, we can identify the risks and potential dangers of transplanted law, and we can identify mechanisms that may help resolve problems that arise with the incorporation of transplanted law.

Comparative law scholarship offers a rich body of research examining these challenges. However, before launching into a discussion of what comparative law has to offer to the analysis of transplanted law in tribal legal systems, a brief history of comparative law is necessary to help underscore the significance that this area of scholarship has for tribal legal studies.

This history can be thought of as the Rise and Fall and Rise Again of Law and Development Studies. By tracing this history, the connections between comparative law's development studies and tribal legal studies begin to appear in relief. Generally, Law and Development Studies is concerned with the connection between a developing country's legal institutions and the social, economic and political changes that it experiences.³⁰ The Law and Development movement gained significant momentum during the 1960s.³¹ The United States then had a tremendous faith in the benefits of exporting American legal institutions to developing countries.³² Law and development scholars theorized that developing countries were on an inevitable path of modernization that would slowly bring them more in line with the American model of the liberal democratic state.³³ As proponents of this theory expounded upon the processes of "modernization theory," institutions such as the Ford Foundation and the International Legal Center partnered with the United States Agency for International Development (USAID) to fund projects that exported American legal institutions for incorporation by developing countries.³⁴

Once the movement gained increasing momentum, an analogue also took

30. David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1073-74 (1974).

31. David F. Greenberg, *Law and Development in Light of Dependency Theory*, in 3 RESEARCH IN LAW AND SOCIOLOGY 129, 130 (1980); Trubek & Galanter, *supra* note 30, at 1065.

32. David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 11 (1972).

33. *Id.* at 10; Wallace Mendelson, *Law and the Development of Nations*, 32 J. OF POL. 223, 223 (1970) (identifying a universal process of development following the three stages of unification, industrialization and social welfare).

34. John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 AM. J. COMPAR. L. 457, 457 (1977); David F. Greenberg, *Law and Development in Light of Dependency Theory*, in 3 RESEARCH IN LAW AND SOCIOLOGY, 130-131 (1980). The paradox of the twin beliefs that development was an inevitable, universal process but that developing nations required the intervention and development assistance of western nations was observed by David Trubek. Trubek, *supra* note 32, at 16-18.

root in Indian law: the Indian Civil Rights Act of 1968.³⁵ Just as the American legal establishment had engaged in exporting laws embodying the liberal democratic ideal to developing countries, so too did the Indian Civil Rights Act represent Congress's attempt to impose liberal democratic ideals on Indian nations. The Act imposed a series of protections for individual rights in Indian country that closely follow the protections embodied in the Bill of Rights. Since tribes are not restricted by the Bill of Rights, the Act represented an exercise of Congress's plenary power in Indian affairs that attempted to transplant a series of analogous rights into Indian Country. As a result, Indian nations may not violate certain rights of individuals in Indian country, such as the rights of freedom of speech, due process, and protection from unlawful searches and seizures.

After just one decade of earnest promotion of the Law and Development movement, many academics in the United States became disillusioned with the ambitious project of promoting democracy in developing countries through the exportation of U.S. laws.³⁶ This disillusionment coincided with a growing recognition that the transplanting of western laws was not a panacea for the troubles of developing countries.³⁷ It also coincided with the shift in legal scholarship toward critical legal studies and the mounting criticism of U.S. involvement in the Vietnam War that developed through the late 1960s and into the 1970s. During this era, the American populace generally and the legal academy in particular became more conscious of the failings of U.S. legal institutions and the potential for their use in the enforcement of restrictions of freedom, the maintenance of inequality, and the depredation of civil rights rather than the promotion and protection of these rights and values. It was during this time that David Trubek and Marc Galanter published a seminal article in the field of Law and Development titled *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*.³⁸ This article, written by a long-time proponent and activist in the Law and Development movement, represented a turning point. In it, Professors Trubek and Galanter assessed the effects of the project to transplant U.S. laws in developing countries. They concluded that it was ethnocentric and thwarted by a combination of overconfidence in the effectiveness of U.S. laws together with a failure to understand the particular histories, legal systems, and needs of the developing countries.³⁹

Interestingly, there is also an analogue to this shift in the Law and Development movement in the field of Indian law. Just as comparative law

35. 25 U.S.C. § 1301 et seq.

36. Greenberg, *supra* note 31.

37. *Id.* at 133-135. Indeed, the importation of western codes and legal institutions often resulted in increasing inequality and the entrenchment of the power of elite actors within developing countries.

38. Trubek & Galanter, *supra* note 30.

39. *Id.* at 1080-82.

scholars grew increasingly sensitive to the unique histories and legal systems of developing countries, so too did scholars in Indian law focus upon the value of nurturing the revitalization of each tribe's traditional practices and its indigenous concepts of justice.⁴⁰ Scholarship in Indian law began to emphasize how traditional concepts of justice were brought to bear on disputes in the Navajo form of peacemaking and in the Onondaga peacemaking forums. Publications such as *Braid of Feathers* emphasized that tribal law development required an effort to develop tribal legal systems in a way that comported with each tribe's history, community, culture, traditions, ways and practices.

Following the disillusionment in Law and Development that is best represented by *Scholars in Self-Estrangement*, the work of transplanting law into developing countries took a new turn. Ironically, as funding for Law and Development work began to dry up in the United States and fewer and fewer legal academics and foundations remained involved, the demand for transplanted law in developing countries began to grow.⁴¹ Developing countries in Asia, Latin America, and Africa continued to attempt to implement legal reform to address pressing concerns that required immediate solutions. Many of these countries were post-colonial nations beginning to address the need for legal systems that had recently gained independence from colonial control. In addition, the fall of the former Soviet Union and the shift of many countries away from socialist regimes gave rise to a new demand for legal reform that grew from a more broad-based support for transplanted law within developing countries.⁴²

Again, this period of Law and Development studies also has an Indian law analogue. While many scholars and foundations in Indian law focused on the project of formulating indigenous tribal legal systems and revitalizing traditional tribal practices within them, tribal attorneys continued to face a variety of concrete legal problems that required immediate, practical solutions. In many cases, the adoption of codes already enacted in other jurisdictions—whether state, tribal or federal—was often the most convenient and efficient means for developing tribal codes that were promptly needed to address legal questions in the community. Thus, despite the now widespread recognition that tribal legal systems should reflect the unique history, community, territory, culture, values, norms and traditions of each tribal community, tribes continue to transplant non-Indian law at a rapid and growing pace.

Developing countries that continued transplanting law on their own initiative as a response to domestic legal concerns also became increasingly

40. Robert B. Porter, *Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples*, 5 YALE HUM. RTS. & DEV. L.J. 123 (2002); Christine Zuni Cruz, *Four Questions on Critical Race Praxis: Lessons from Two Young Lives in Indian Country*, 73 FORDHAM L. REV. 2133 (2005).

41. Thomas M. Franck, *The New Development: Can American Law and Legal Institutions Help Developing Countries?*, 1972 WIS. L. REV. 767, 770 (1972).

42. *Id.* at 769.

scrutinized by legal academics and lawyers native to these countries. Their analyses ultimately gave rise to a new era of Law and Development studies. This period of examining and developing transplanted law has significant differences compared to earlier Law and Development work following World War II. This period is marked by a more critical analysis of transplanted law from the perspective of developing countries, in contrast to the earlier ethnocentrism of transplanted law. In addition, during this later period of Law and Development work, countries that sought out transplanted law had more choices available for model codes and legal institutions. Besides the United States, several other countries competed for “exporter” or “donor” status, such as Great Britain, France, Germany, and the Netherlands. The countries that began to grapple with the challenge of incorporating transplanted law also began to grow in number and variety, as many countries admitted to the European Community examined the desirability of adopting the laws of other E.C. members. Overall, the combination of these factors has resulted in a new growth and urgency in scholarship that has examined the phenomenon of transplanted law, and the perspective of “recipient” countries has gained a greater foothold among the research published on the subject.

As described above, the history of Law and Development shares many parallels with the evolution of Indian law scholarship and legal practice over the past several decades. As a result, the lessons of comparative law generated in the Law and Development field have a rich potential for application to tribal legal systems. Both developing countries and Indian nations today must confront the very difficult challenge of reforming their legal systems in a manner that is organic and appropriate to each nation’s specific needs and legal institutions. At the same time, both Indian nations and developing countries must grapple with a practical reality: the borrowing of laws from other jurisdictions is the predominant mode of legal reform, and is often necessary to address immediate legal concerns within each nation. Together, these concerns generate a host of challenges regarding the selection, development, enactment, implementation, and enforcement of transplanted law. It seems appropriate that Indian nations may benefit from some of the scholarship from comparative law generally and Law and Development studies in particular that already examines these phenomena and the challenges accompanying them.

Although Law and Development studies has the potential to provide analytical tools that may benefit Indian nations, there are also several important caveats to the application of this field to Indian nations in the United States. At the outset, it is important to note that comparative law is not wholly applicable to Indian nations, since there are several important differences that distinguish their circumstances from those of developing countries. First and most obvious, Indian tribes are subject to the federal-tribal relationship, and as such, their rights as sovereigns and the challenges they confront are largely defined by the status of tribes within the United States’ federal system of government. Second, Indian tribes exist on a much smaller scale than most

developing countries. The size of their populations, territories and economies are dwarfed by most developing countries. Third, Indian tribes also have less cultural pluralism and more religious, cultural and social homogeneity than other developing countries that have populations of millions, representing a wide variety of cultures, languages, and religious beliefs. Each of these differences are important because they each affect the challenges that Indian nations and developing countries confront when they engage in the incorporation of transplanted law into their domestic legal systems.

Despite the important distinctions noted above, however, there are also important similarities between Indian nations and developing countries. These similarities promise that a substantial benefit may accrue from investigating the lessons of comparative law and attempting to apply them to Indian nations. For example, many of the developing countries that incorporate transplanted law share a history of colonization. For these countries, the impulse and need to borrow law from other jurisdictions must be balanced against a desire to reform each post-colonial country's domestic legal system in a way that promotes each country's desire to pursue self-determination without continued dependence on the control of an external colonizing nation.

In addition, many developing countries which adopt transplanted law from other nations are motivated by a desire to improve weak and dependent national economies. These countries often have very high rates of poverty and low rates of economic growth and employment, and they often have a desire to engage in legal reform with the goal of encouraging economic development. Countries which adopt transplanted law are also often motivated by a desire to improve other social conditions within their territories, such as poor housing, impoverished educational systems, inadequate health care and high crime rates. Such countries also share a common trait in their weak negotiating power with external actors and states. This weakened position diminishes the nation's bargaining position when the country is confronted with external forces that demand or insist on the incorporation of transplanted law.

Finally, an additional concern possessed by many developing countries which borrow transplanted law is their desire to engage in legal reform and development in order to strengthen the rule of law and the legitimacy of legal institutions. For these countries, these critical elements of a national legal system are often weakened by the effects of colonization, poverty, or other factors. Each of these characteristics of countries that engage in the incorporation of transplanted law is shared in different degrees by Indian nations. As a result, tribes share many of the same concerns that animate countries that pursue transplanted law, and the analysis of the successes and shortcomings of transplanted law in these countries is likely to serve useful for tribes as well.

