Indian Tribal Courts and Procedural Due Process: A Different Standard

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The legal position of American Indian tribes continues to pose a dilemma for the federal government. The reservations, with a total population of 280,000,\(^1\) are in many ways semi-autonomous governments. Congress and the Executive have never adopted a single, coherent policy sufficiently strong to effect either stable autonomy or assimilation. In the face of this indecision, federal courts have generally avoided reaching decisions with an intrusive effect on Indian autonomy, construing the Constitution and applicable laws to promote as much tribal survival as possible.

Americanization—often termed “civilization”—of the Indian has long been a major theme of the government and reformers,\(^2\) particularly after the tribal Indian had been contained and ceased to be perceived as more than an occasionally dangerous nuisance.\(^3\) Yet the combination of governmental irresolution, Indian inability and unwillingness to assimilate White ways, and the need for some local administration has precluded total dismantling of the tribal structure. Self-government has continued on many reservations. One element of this autonomy is the tribal court, which resolves many of the reservation's day-to-day disputes. Prior to the passage of the 1968 Indian Civil Rights Act,\(^4\) it was generally assumed that no procedural due process constraints applied to these tribal courts.\(^5\) The 1968 Act, however, made most of the language of the Bill of Rights applicable to Indian tribes “exercising powers of self-government.”\(^6\) The issues raised by this Act are similar to those currently presented concerning procedural due process requirements for other non-traditional adjudicatory bodies. The roles of tribal courts in American In-

\(^1\) Commission on the Rights, Liberties, and Responsibilities of the American Indian, The Indian: America's Unfinished Business 218 (1966) [hereinafter cited as The Indian] (figures based on 1960 census).


Dissolving the Indian's disregard for personal property was seen as a fundamental tool for accomplishing this goal—and for acquiring Indian land. Id. at 226.

\(^3\) See Hagan, supra note 2, at 1-26.


\(^5\) See note 10 infra.

dian communities and the validity of their use in a comprehensive scheme of reservation administration are important factors in determining the constitutional parameters within which tribal courts should operate. This task of setting limits is further complicated by an element which is lacking in the context of other such bodies: a concern for the survival of Indian tribal culture.

THE TRIBAL COURTS AND THE 1968 INDIAN CIVIL RIGHTS ACT

Generally, tribes possess, and usually exercise, full sovereign power over internal affairs.7 This power is subject to Congress' plenary power8—if exercised—and to any congressional grants of power to state governments.9 It has been generally held that the Constitution does not regulate the exercise of tribal power.10

Although federal intrusion upon tribal affairs was minimal at first,11

7. See F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1942) [hereinafter cited as COHEN]; Cohen, Indian Rights and the Federal Courts, 24 MINN. L. REV. 145, 147 (1940); Powers of the Indian Tribes, 55 INTERIOR DEC. 14, 57, 64 (1934); cf. Williams v. Lee, 358 U.S. 217, 220 (1959) (exercise of state jurisdiction, without an act of Congress, cannot be permitted to infringe the Indians' right to "make their own laws and be ruled by them."). On the specific powers of Indian tribes, see generally Indian Rights and the Federal Courts, supra, at 147–85; Powers of the Indian Tribes, 55 INTERIOR DEC. 14 (1934).
8. The sources of congressional authority over the Indian tribes are discussed in COHEN, supra note 7, at 89–91; and Rice, The Position of the American Indian in the Law of the United States, 16 J. COMP. LEG. & INT'L L. (3d ser.) 79 (1934). Principal sources are the commerce clause, U.S. Const. art. I, § 8; federal ownership of western lands; and "delegation" of power by the Indians by treaties. COHEN, supra note 7, at 89, 117.
9. Cf., e.g., United States v. Kagama, 118 U.S. 375 (1886); COHEN, supra, at 116–21.

11. During the colonial period, there was little intrusion upon tribal administration of tribal law; at first because the White settlers were outnumbered, later because the frontier made avoidance the easiest response. See WASHBURN, supra note 2, at 42. See generally id. at 27–52; Kawashima, Legal Origins of the Indian Reservation in Massachusetts, 13 AM. J. LEGAL HIST. 42 (1969).

By 1790 only a few tribes had been conquered, see E. SPEIER, A SHORT HISTORY OF THE INDIANS OF THE UNITED STATES 11 (1969); but population pressure and demand for
it has become quite substantial. This intrusion is particularly evident in respect of tribal adjudicatory bodies. There are three types of such bodies: traditional courts, Courts of Indian Offenses, and tribal courts. This note focuses upon tribal courts, the most common adjudicatory body among tribes; the arguments proposed here would apply to the other two types with equal or greater validity.

The structure and functioning of tribal court criminal jurisdiction have been strongly restricted. Tribal court jurisdiction now extends only to offenses committed by an Indian or arising between Indian and Indian on the reservation. Congress has withdrawn the offenses enumerated in


The next four decades witnessed little White involvement in Indian affairs; where the Indian impinged upon White life, the usual response was military violence. See D. Brown, Bury My Heart at Wounded Knee (1971); Washburn, supra note 2, at 67-74. However, the encirclement and subjugation of the Indians in the West made a less savage method of local administration necessary, and what became known as Courts of Indian Offenses were established on most reservations. Hagans, supra note 2, at 25-27.

The Dawes Act, Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified at 25 U.S.C. § 331 (1970)), providing for allotment of Indian lands to individuals, was designed to end tribal insularity and independence, and the Courts of Indian Offenses thereafter began to decline in importance. Hagans, supra note 2, at 141. However, allotment was a failure (primarily because the Indians were not experienced in the ways of private property), and in 1932 Congress passed the Wheeler-Howard (Indian Reorganization) Act, Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-79 (1970)), designed to help what was left of the Indian tribes to survive. See Cohen, supra note 7, at 84-85. It was under part of this act, 25 U.S.C. § 476 (1970), that the tribes established some fifty-three tribal courts. See Kerr, supra note 10, at 322.

12. The traditional courts exist only on a few Pueblo reservations in the Southwest. The Pueblo tribes are semi-religious, almost theocratic in government. Their laws are largely unwritten custom. Offenses are usually adjudged by decision of the tribal governor, in concert with the tribal council. No jury privilege is allowed. See Kerr, supra note 10, at 321-22; Constitutional Status, supra note 10, at 1357-58.

13. Courts of Indian Offenses are the remnants of the system of local administration of reservations developed in the latter half of the nineteenth century. These courts are governed by the Department of the Interior, see 25 C.F.R. §§ 11.1-37 (1973), pursuant to its general authority under 25 U.S.C. § 2 (1970). The judges are appointed by the Bureau of Indian Affairs with the approval of the tribal council, 25 C.F.R. § 11.3(b), for a four-year term. Id. § 11.3(c). Any member of the tribe may be appointed so long as he or she has not been convicted of a felony. Id. § 11.3(d). The courts apply federal law, rulings of the Department of the Interior, tribal ordinances and customs not inconsistent with federal law, id. § 11.23(a), and the Code of Indian Tribal Offenses. Id. §§ 11.38-87. There are only twelve of these courts left. Kerr, supra note 10, at 321. See also note 44 infra & text accompanying.


15. The Courts of Indian Offenses are created by the Bureau of Indian Affairs, see note 13 supra, and as an explicit agency of the federal government are clearly subject to constitutional restraints. See generally notes 31-54 infra & text accompanying.

16. This note will deal only with criminal due process. The severity of the criminal sanction, see note 50 infra & text accompanying, makes the procedures for applying it the benchmark for due process.

17. 18 U.S.C. §§ 1152, 1153 (1970). At least one tribal judge has begun to assert
the Major Crimes Act from tribal court jurisdiction, vesting jurisdiction over these offenses in the federal courts. At times, Congress has also permitted states to assume full criminal and civil jurisdiction over the reservations. What remains to the Indians has, in another context, been termed "residual jurisdiction" by the Supreme Court.

The tribal courts apply tribal laws and customs. Before the Act, professional counsel was proscribed, perhaps to assure some equality with the usually untrained prosecutor. The accused may be expected to speak on his or her own behalf. Silence may be considered evidence of guilt. Appeal is usually to the tribal council, although appeal to a panel of tribal judges is used in some tribes.

Some of this procedure may have been changed by the 1968 Indian Civil Rights Act, which applied most of the language of the Bill of
Rights and the equal protection clause of the fourteenth amendment to the tribes. This Act also made federal habeas corpus a means of challenging convictions rendered in tribal courts.\textsuperscript{24}

The legislative history of the Act provides little guidance for ascertaining its intended effect.\textsuperscript{25} No trend of interpretation has appeared in the reported cases dealing with the Act.\textsuperscript{26} Several commentators have concluded that Congress probably did not intend to enact the entire case law of the Bill of Rights, and that the federal courts should avoid construing the law in such a way as to force Americanization upon the tribes.\textsuperscript{27} These writers advocate continuing the judiciary's treatment of the tribes as sui generis, because construing the Act to apply pro tanto the Constitution with its judicial gloss would go far toward destroying the Indian tribal cultures.\textsuperscript{28} This would, in one writer's view, ignore Congress' 'strong pre-existing legislative policy' in favor of tribal autonomy.\textsuperscript{29}

\begin{itemize}
  \item (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;
  \item (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
  \item (9) pass any bill of attainder or ex post facto law; or
  \item (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.
\end{itemize}


25. But see notes 27-30 infra & text accompanying.

26. Two of the reported cases touched remotely upon tribal administration of criminal justice. United States v. Kills Plenty, 466 F.2d 240 (8th Cir. 1972) (collateral estoppel; question of identity between federal and tribal governments not reached); Loncaisson v. Leekity, 334 F. Supp. 370 (D.N.M. 1971) (25 U.S.C. §§ 1302(2) & (8) limit tribal action to the same extent that the fourth and fifth amendments limit federal action, and give rise to an action for damages).


There does not seem to be strong tendency to use the Indian Civil Rights Act, 25 U.S.C. §§ 1301-03 (1970), to intrude upon tribal affairs. See McCurdy v. Steele, \textit{supra}, at 633-34 (the Act's civil rights guarantees 'should, where possible, be harmonized with tribal . . . autonomy;' and the constitutional import of the language "may be modified" by the need for tribal autonomy); but cf. Loncaisson v. Leekity, \textit{supra}; Lefthand v. Crow Tribal Council, \textit{supra}, at 730 (dictum).

27. E.g., Coulter, \textit{supra} note 22; Kerr, \textit{supra} note 10; \textit{Constitutional Status, supra} note 10.

28. Coulter, \textit{supra} note 22, at 75; \textit{Constitutional Status, supra} note 10, at 1355.

29. \textit{Constitutional Status, supra} note 10, at 1344-45, 1354. However, the same writer also seems to recognize the ambivalence of Congress' attitude. \textit{Id.} at 1344-45 n.8.
Moreover, these authors say, the tribes lack the resources to meet contemporary standards of procedural due process and could be forced to give up their courts entirely.  

Such an approach, however, is inadequate in several respects. It fails to consider fully the effect of a changed due process standard upon the individual. Moreover, treating tribal court action as sui generis for constitutional purposes does not encourage the federal courts to evaluate procedural due process standards under the more fruitful rubric of the applicability of the Constitution to entities other than those formally designated as "government."

**Tribal Courts as Instrumentalities of the Federal Government**

There are a number of formulae for considering the applicability of the Constitution to nongovernmental entities. One of these is the "public function" doctrine,\(^{31}\) which makes a body occupying a rôle normally performed by the state or federal government\(^ {32}\) subject to the same constitutional restraints as the government would be.\(^ {33}\) The tradition of constitutional tribal immunity\(^ {34}\) is no bar to the application of this doctrine. If constitutionally protected rights such as property rights may be limited, then tribal rights—inherent but subject to Congress’ plenary power—may be.\(^ {35}\)

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30. E.g., id. at 1365–69.
33. The foundation case is Marsh v. Alabama, 326 U.S. 501 (1946) (company town). Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), extended Marsh to include a shopping center serving as the functional equivalent of the central business district of a town. This development was limited by Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), to picketing related to a use of the property. See also Evans v. Newton, 382 U.S. 296, 299 (1966) (semble):

Conduct that is formally "private" may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action.

Marsh may be limited to situations in which the free exercise of private rights would result in effective denial of the constitutional rights of others. See Tanner, 407 U.S. at 562; cf. Logan Valley, 391 U.S. at 320 n.9; Marsh, 326 U.S. at 505. But see Logan Valley, 391 U.S. at 319; Marsh, 326 U.S. at 502–03; cf. Evans v. Newton, 382 U.S. at 299. The analysis here is consistent with such a reading, because any failure to observe constitutionally required procedures in an adjudicatory hearing is an absolute denial. There is no alternate method of asserting those rights.

34. See note 10 supra.
The public function doctrine, however, is too blunt an instrument for
general use. The classification of a particular function as governmental
or nongovernmental is conclusory, somewhat reminiscent of the govern-
mental/proprietary dichotomy that once ruled the liability of municipali-
ties in tort law. Moreover, in the case of the tribes the doctrine could
be destructive, since tribes would have to conform to a non-Indian model
of government. This overly sweeping effect, coupled with traditional
protection of tribal autonomy by the courts, should prevent the invocation
of the public function cases.

A second approach to the applicability of the Constitution to non-
governmental entities is to consider the degree to which a normally im-
mune activity or institution has become a part of a state process. This
approach is illustrated by the Texas primary cases, which denied the
power of political parties to exclude non-Whites from voting in primary
elections. These holdings are based on the principle that where private
activity has become an "integral part" of a state function, whether
through state control or by the activity's effect upon a state process,
the private activity is "subject to the constitutional limitations placed up-
on state action." Applying this approach, the inherent power and non-
governmental status of the tribes would be irrelevant, since the issue is
whether an exercise of power by a group not normally subject to consti-
tutional restraints has become assimilated into a governmental function,
thereby making certain constitutional restraints applicable.

1971).
(1944); Nixon v. Condon, 286 U.S. 73 (1932). See also Nixon v. Herndon, 273 U.S.
40. Id. at 664.
42. Id.
43. A caveat should be added here. The authority of the Texas Primary cases, note 38
supra, is limitable in three ways. First, these cases concerned the scope of the fifteenth
amendment, but see United States v. Classic, 313 U.S. 299 (1941). They might be inap-
posite for less sensitive areas of the Constitution. Second, they deal with classifications by
race for clearly invidious purposes. Third, these cases present a sequence of actions appar-
etly designed to evade the mandates of the fifteenth amendment and the rulings of the
Supreme Court, something the Court is not likely to permit. Cf. Child Labor Tax Case
(1918). Nonetheless these cases remain the leading authority on a problem distinct from
the issues posed in the more recent "state action" cases. The discussion in this note is of
the integration of an institution formally immune to the Constitution with one not im-
mune. In the later state action cases, the issue is tacit state approval of private dis-
crimination, see, e.g., Reitman v. Mulkey, 387 U.S. 369 (1967); cf. Burton v. Wilming-
ton Parking Auth., 365 U.S. 715 (1961); or perhaps allocation of a scarce resource to
Tribal courts have become a substantially controlled, small part of the administration of law and order on the reservation. There are three elements of federal control. First, as described above, Congress has substantially limited the jurisdiction of the tribal courts. Second, federal control is exerted by the 1968 Act, which, *inter alia*, sets procedural limits on the tribes’ adjudicatory processes. These limits, designed to assure Congress’ conception of a fair trial, may be compared to the limits placed by the Texas legislature upon party primaries to ensure “fair methods and a fair expression by [party] members of their preferences.” These limits were sufficient for the United States Supreme Court to find the political party an agent of the state.

Finally, the federal government approves the laws enforced by the tribal courts, since the Secretary of the Interior must approve a tribe’s initial constitution and laws and “may” approve amendments thereto. Thus tribal laws bear the influence of federal officials, as authorized by Congress. Under such substantial federal control, the scope of authority and power of the tribal courts has been so limited and defined that, without regard to the public function doctrine, by a process of functional delegation they have become instrumentalities of the federal government. Therefore, the procedural requirements for a fair trial should be determined.

44. See notes 11–22 supra & text accompanying. An indirect indication of the continuing importance of this residual jurisdiction is that the Bureau of Indian Affairs has provided for Courts of Indian Offenses where usual law enforcement by the tribes has broken down. 25 C.F.R. § 11.1 (1973). See also note 13 supra.


48. Id. at 654, quoting Bell v. Hill, 123 Tex. 531, 534, 74 S.W.2d 113, 120 (1934).


50. In practice, the Secretary usually does in fact pass upon the tribal laws, since the Bureau of Indian Affairs made this part of tribal constitutions. *Constitutional Status*, supra note 10, at 1350 n.33.

51. Also of relevance in evaluating the degree of assimilation of tribal courts with the federal government are the collateral consequences, such as loss of voting rights, of conviction of a crime anywhere. See *Sibron v. New York*, 392 U.S. 40, 53–58 (1968) (collateral consequences sufficient to keep appellant’s release from jail from mooting appeal of criminal conviction); *President’s Comm’n on Law Enforcement and Administration, Task Force Report: Corrections* 27–37, 88–92 (1967); Note, *Civil Disabilities of Felons*, 53 Va. L. Rev. 403 (1967). In light of such disabilities, discussion of due process in terms of tribal autonomy, without more, is specious. Reference to tribal autonomy should not exclude concern for the individual.

52. See notes 31–35 supra & text accompanying.
mined by reference to the Constitution, not Congress' enactments or a tribe's beliefs.\(^{53}\)

**DUE PROCESS AND THE TRIBAL COURTS**

If the tribal courts are instrumentalities of the federal government, two questions arise. First, does Congress have the constitutional power to use tribal courts as part of its scheme of law enforcement on the reservation? Second, if it does, may these courts deviate from the procedures a federal court must follow in trying a criminal case? Congress has power to use the federal district courts, and perhaps the state courts, to carry out law enforcement on the reservations.\(^{54}\) It did not, however, choose to

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53. There is also a question whether a tribal court, as an instrumentality of the federal government, may enforce laws which would be invalid if enacted by Congress. Under Shelley v. Kraemer, 334 U.S. 1 (1948) (made applicable to the federal government by Hurd v. Hodge, 334 U.S. 24 (1948)), a court may not aid private action which would be invalid if performed by the state. However, the logic of this decision, especially in light of subsequent cases, seems to rest on more than simple enforcement. In *Shelley, supra*, the state common law was the basis of the racially restrictive covenant declared unenforceable. 334 U.S. at 19-20. Later cases have looked for at least as much state involvement. Compare *Evans v. Abney*, 396 U.S. 435 (1970), with *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). In the instance of tribal courts, federal involvement with the substantive tribal law consists solely in the Secretary of the Interior's approval. This alone should not be enough to make tribal law unenforceable, although Congress could not have passed a similar law. But cf. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

54. Under its plenary power over tribal affairs, *see note 8 supra*, Congress could have enacted its own code for tribal affairs, as it has for tribes without judicial institutions. *See note 13 supra*. Congress perhaps could also have vested jurisdiction over cases arising under the tribal laws and customs in the federal district courts. This "protective jurisdiction" over a class of cases that does not arise under federal substantive law could be justified here because: (a) Congress has legislated extensively in the area of tribal affairs and could vest jurisdiction to protect its legislative program; and (b) Congress' plenary power over Indian affairs eliminates any danger of intrusion upon reserved state powers. *Cf. Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 469-84 (1956) (dissenting opinion of Frankfurter, J.); *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 382 (plurality opinion). *See also Greenebaum & Wirtz, Separation of Powers: The Phenomenon of Legislative Courts*, 42 IND. L.J. 153, 189-90 (1967) [hereinafter cited as *Greenebaum & Wirtz*]; *Mishkin, The Federal "Question" in District Courts*, 53 COLUM. L. REV. 157 (1953).

Congress may permit states to exercise jurisdiction over cases arising under federal civil law. *E.g., Testa v. Katt*, 330 U.S. 386 (1947); *Mondou v. New York*, N.H. & H. R. Co., 223 U.S. 1 (1912); *cf. Palmore v. United States*, 411 U.S. 389 (1973) (dictum). *See THE FEDERALIST No. 82, at 555 (J. Cooke ed. 1961) (A. Hamilton). It has never been held that state courts may be given jurisdiction over federal criminal cases, although scholars have argued that they should. *See F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT* 293 (1928); *C. Warren, Federal Criminal Law and the State Courts*, 38 HARV. L. REV. 545 (1925) (the latter article does not cite any cases of a state court enforcing a federal statute involving imprisonment. The argument presented there is based upon cases involving penal fines, like those provided for by the statute in *Testa, supra*). Even assuming complete federal power to delegate general criminal jurisdiction over federal law to the states (an assumption supported by the supremacy clause, U.S. CONST. art. VI), there would seem to be no reason to extend this to the tribal courts. Power to delegate jurisdiction to the states would grow out of
use these forums; rather, it made a non-article III court—a tribal court—its instrumentality for this purpose. The Constitution limits Congress' power to use non-article III courts to achieve its goals. These limits are particularly strict in criminal trials. As discussed above, an instrumentality of the government cannot escape the constitutional restraints that apply to the government itself. Therefore, if Congress could not have created a non-article III court to hear matters now tried by tribal courts, it cannot allow them, its instrumentalities, to try them.

**WHAT TYPE OF COURT?**

There are two types of federal courts: article III courts, and non-article III, or "legislative," courts. The chief differences between these types of courts relate to the judges and jurisdiction. Article III courts are presided over by judges with life tenure and undiminishing salary, while the judges of non-article III courts have such tenure and salary guarantees as Congress wishes. Article III courts exercise only "the judicial Power of the United States," while non-article III courts' functions are whatever Congress establishes, including rendering advisory opinions and proposals for legislative action. The judicial independence fostered by the tenure and salary requirements of article III protects both reserved state powers and individual rights against encroachment by the national government. Since federal power over the Indian tribes is plenary, the concern for federalism is not a bar to use of non-article III courts. Protection of the individual, however, remains a problem.

Possible justifications for using tribal courts in reservation administration may be found in those used to support the use of non-article III courts in the territories. Despite the language of early cases which seemed to defer completely to Congress' will, it is now settled that the territorial legislative courts were justified by practical necessity and their temporary status. In 1962, in *Glidden Co. v. Zdanok*, the United...
States Supreme Court reserved the question whether these reasons would today justify the use of non-article III courts in the territories, probably because the territories no longer seem to be nascent states. However, a tribe's future is completely unsure, and it would be foolish for mechanical reasoning to force Congress to bear the burden of tenured judges who may later become useless. If a tribe should resist Americanization and choose to become a permanently separate entity, the justification of temporary status would not suffice, but a practical need for a flexible system of local courts may still exist. The requirements of courts of petty jurisdiction may change; for example, legalization or toleration of some widespread offenses could reduce the number of judges necessary to operate the courts.

Although the Supreme Court has indicated with respect to court-martial that it will not readily permit the use of non-article III courts to handle criminal cases, a recent case suggests that Congress may nonetheless continue to rely on tribal courts. In *Palmore v. United States*, the Supreme Court sustained a criminal conviction rendered by a non-article III municipal court in the District of Columbia. The Court relied on the historical use of state courts to enforce federal criminal laws, the need to relieve article III courts in the District of Columbia of the burdens of trials under laws of local application, and the local impact of the laws. These factors would seem to justify use of non-article III courts to administer laws of local origin and application on the reservation. Prejudice resulting from the lack of judicial independence at a particular trial is better dealt with by a habeas corpus proceeding than by an overly

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64. *Id.* at 548 n.19 (plurality opinion per Harlan, J.).

The other four participating justices, two concurring in the result and two dissenting, did not address this question; perhaps Justice Douglas' inartful dissent, *Id.* at 589, indicates that he would never allow use of non-article III courts for criminal trials.

65. *See* U.S. Const. art. III, § 1. It has been suggested that the now large federal judiciary makes invalid one of the arguments against imposing the requirements of article III on the territorial courts—that when the territory became a state Congress would have to continue with unnecessary judges. *Note, Legislative and Constitutional Courts: What Lurks Ahead for Bifurcation*, 71 Yale L.J. 979, 982 (1962). A tribal court judge, however, might find the shift from a court of very limited jurisdiction to one of genuine federal jurisdiction somewhat difficult.


68. *Id.* at 402; *see* note 54 *supra*.

69. *Id.* at 408-09.

70. *Id.* at 407-09.
intrusive and possibly costly blanket rule. Thus, article III need not be a bar to Congress’ use of tribal courts.

A SEPARATE DUE PROCESS

The question is now whether, and to what extent, the tribal courts—as instrumentalities of the federal government—may develop a separate procedure in the trial of criminal cases. This question must be considered in light of the trend toward a single standard of due process. This trend is most clearly illustrated by the requirements placed upon the states. Where once fourteenth amendment procedural due process was only partially a function of the Bill of Rights, the modern approach is toward a uniform standard for both state and federal governments. A similar unifying trend is apparent for military tribunals, administrative agencies, and juvenile courts. The bases of this trend seem to be fuller perceptions of the integrated character of the nation, and disbelief that deviations from procedural due process standards would achieve their purported goals. More fundamentally, this trend reflects a belief that, regardless of the stated goals or exigencies of a particular process, the

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72. It has been suggested that the analysis is the same whether under the Constitution or the 1968 Indian Civil Rights Act, 25 U.S.C. §§ 1301–03 (1970). See Constitutional Status, supra note 10, at 1343. As has already been seen, however, the statutory approach does not confront the question of article III’s applicability; neither does it force consideration of tribal court procedures within the courts’ general jurisprudence.


74. The result in Apodaca v. Oregon, 406 U.S. 404 (1972), that states need not require criminal conviction by a unanimous verdict, while federal courts must retain the unanimous verdict, does not affect the analysis here. All the justices save Mr. Justice Powell would, it appears, impose the same standard upon state and federal courts alike. Justice Powell, whose vote was decisive, would impose different standards because of historical considerations. Id. at 370. See also note 99 infra.


76. See, e.g., Morrissey v. Brewer, 408 U.S. 471 (1972). Although Morrissey recognized that different circumstances may require different standards of due process, id. at 481, the dominant factor was that a parolee was threatened with loss of liberty. See id. at 481–82.


loss of liberty, the stigma and the collateral consequences\textsuperscript{60} attendant upon a criminal conviction are substantially the same regardless of the forum or location in which they are imposed.\textsuperscript{61} The requirements of procedural due process reflect a balance between the individual's desire to avoid unjustified imposition of these consequences and society's need to protect itself against crime. This balance determines the possibility of a wrong verdict,\textsuperscript{82} and the courts seem increasingly to believe that the individual's interest in preventing such verdicts outweighs the reasons adduced for a specific deviation from the norm set forth in the Bill of Rights.

Cultural autonomy is the rationale usually advanced for adopting a different approach to tribal practices.\textsuperscript{83} This rationale may be too far-reaching. A separate doctrine of law based upon race\textsuperscript{84} could, if uncontrolled, become a dangerous tool, potentially destructive to a national constitution.\textsuperscript{85} The unique position of the tribes, however, could prevent the application of such a doctrine to other groups. The tribes' special status is indicated by such factors as the complex relationship between the federal government and the tribes, and the tribes' marginal and isolated economic system.\textsuperscript{86} In addition, the tribes cannot be said to be clearly part of the national society, neither having been assimilated nor having been permitted to make fully independent decisions about their future.\textsuperscript{87}

\textsuperscript{80} See note 51 supra.

\textsuperscript{81} One of the Court's concerns in \textit{In re Gault}, 387 U.S. 1 (1967), was the fact that the juvenile proceeding often resulted in more severe punishment for the child than for an adult committing the same offense. \textit{Id.} at 29. Cf. \textit{id.} at 14-31.


\textsuperscript{83} See, e.g., Coulter, supra note 22; Kerr, supra note 10; \textit{Constitutional Status}, supra note 10.

Cultural differences and autonomy appear to have been one justification for the separate standard for military tribunals. See the discussion in \textit{Military Justice}, supra note 78, at 1401-02, dismissing the theory as no longer fitting the facts. Such a justification may have had more validity when military service was mostly a matter of personal choice. Cf. Sherman, supra note 75, at 6.

\textsuperscript{84} See notes 13-21 supra & text accompanying.

\textsuperscript{85} See generally Marin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 347-48 (1816) ("the . . . necessity of uniformity of decisions") (emphasis in original).

\textsuperscript{86} See \textit{The INDIAN}, supra note 1, at 62-66.

This sort of argument has not been well-received of late, cf. Argersinger v. Hamlin, 407 U.S. 25, 37 n.7 (1972), perhaps because the solicitousness of the second school desegregation case, \textit{Brown v. Board of Education}, 349 U.S. 294 (1955), was the excuse for so much delay. Cf. G. GUNThER & N. DOWLING, CASES & MATERIALS ON \textit{Constitutional Law} 1429-36 (8th ed. 1970). However, the suggestion here is not that practical difficulties would justify different procedures, but that the exceedingly marginal economy of the reservations, see \textit{The INDIAN}, supra note 1, at 62-66, may indicate a qualitative difference between the Indian tribes and other groups that might seek special status.

\textsuperscript{87} The argument is that, given a true choice, a tribe may or may not choose to follow the American scheme. Some freedom of experimentation during the period of
These factors make cultural differences and self-determination both believable and limitable, so that allowing the tribes to develop a separate law will not necessarily imply a retreat from the concept of a national constitution.

In criminal due process, the goal of cultural autonomy could be pursued in two ways. One approach would be to argue that because of their different cultures, tribes should be permitted to choose a balance between protection of the individual and societal needs different from the one reflected in the Bill of Rights and the rest of the Constitution. Procedural rules often embody a society's most deeply held values. If the federal-state standard of procedural due process is to be imposed upon the tribal courts, the development of their own culture may well be impeded.

Two factors, however, militate for stronger constitutional restraints upon the tribal courts. First, as instrumentalities of the federal government, the tribes should not be permitted to function in ways not open to the government itself. Second, the effects of a criminal conviction upon an individual—loss of liberty, substantial social disabilities and stigma—call for adequate procedural safeguards. Even if no social effects of a conviction existed within a particular tribal society, disabilities imposed by other governments would still affect any Indian who left the society.

This is similar in theory to the rationale of fourteenth amendment due process as applied to the states prior to the 1950's. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 174 (1967) (Harlan, J., dissenting); see also Roth v. United States, 354 U.S. 476, 505 (concurring opinion). The recent trend in this area may reflect a conception that the states are functionally too interwoven and too settled in form to allow deviations based upon supposed local differences to remain. If so, it need not apply here. However, to the degree that this development of what Justice Powell calls "prophylactic rules," Argersinger v. Hamlin, 407 U.S. 25, 50 (1972) (concurring opinion), rests upon distaste for the burdens of supervising state adjective law, cf. authorities cited note 99 infra, it would apply equally here.

88. This approach could take two forms: a bald decision to change the balance for ideological reasons, or a change because the tribes cannot survive with the luxury of the protections of the Bill of Rights.

89. Thus, for example, a decision about the admissibility of a certain kind of evidence, obtained, for example, in a manner likely to intrude upon what is called individual privacy, is in part a decision about the relative weights to be given to individual privacy and to society's need to ferret out criminals. It is also a decision about what sorts of factors may justify letting a possibly guilty person go free.

90. A contrary result would permit Congress to circumvent the mandate of the Constitution whenever it proved convenient to do so.

91. See, e.g., In re Winship, 397 U.S. 358 (1970). See also discussion notes 83-84 supra & text accompanying.

92. It may be suggested that tribe members remain with the tribe by choice. This cannot justify any deviation from the balance. See Shapiro v. Thompson, 394 U.S. 618 (1969); Edwards v. California, 314 U.S. 160 (1941). It might seem that the argument in the text proves too much, since the Constitution reflects many balances between the individual and society, and thus any change would have to fall. However, where the
However, an apparent change in the balance between individual and society may simply be a change in the conception of criminal adjudication. It has been suggested, for example, that tribal law is rehabilitative in approach, seeking to reintegrate the individual into society. This rationale is the basis for the separate standards of due process in juvenile court proceedings. The continuing validity of this juvenile court doctrine, at least as it concerns factfinding, is unclear. Liberty is the paramount consideration. To force a person to be "rehabilitated" is to deprive him or her of freedom. One may or may not have a right to remain an unrehabilitated felon, but in any case, one has the right not to be subjected to the rehabilitative process unless one really needs such "help."

A second, more narrow response to the cultural autonomy rationale would be to argue that one or another specific procedure, inconsistent with a particular tribal goal, may be dispensed with so long as the overall balance between the individual and society is unchanged. This approach has a greater chance of success. It is similar to that which once prevailed in the United States Supreme Court when considering state court procedures, and its apparent demise with regard to states need not compel its rejection here. Under this approach, any tribal practice plainly in conflict with the 1968 Indian Civil Rights Act would have to fall before Congress' superior power. If no inconsistency is found, the effect of tribes are not agents of the federal government, there is more leeway for them to pursue their own goals.

Morrissey explicitly distinguishes the factfinding and the discretionary roles, 408 U.S. at 479-80, as does Gault, 387 U.S. at 26-27 (dictum).
97. Cf., e.g., In re Gault, 387 U.S. 1 (1967). It may be, of course, that the tribes have wide latitude to shape members' behavior. They might, for example, be able to require substantial amounts of community service as a condition of using public goods (e.g., water), and perhaps even to exact criminal penalties for disobedience of such a rule. But the tribal courts cannot, as agencies of the federal government, apply such penalties unless they are shown to be justified.
99. Such a flexible approach would also comport with the traditional judicial attitude of nonintrusiveness.

However, nondoctrinal considerations of the burden of the federal judiciary may prevent or limit development of the separate doctrine of due process discussed in this paper. See generally H. Friendly, Federal Jurisdiction: A General View (1972); Hart, Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84 (1960); Study Group in the Caseload of the Supreme Court, Report, 57 F.R.D. 573 (1973).
100. See note 8 supra. For example, absolute denial of a jury of six in criminal cases would violate 25 U.S.C. § 1302(10) (1970).
the deviation from the federal standard upon the individual's protection would then be evaluated.  

Evaluation of such a deviation involves consideration of two factors. First is the need for the deviation. For example, the 1968 Act requires a jury trial, but does not specify whether the verdict must be unanimous. Since the tribal courts function as instrumentalities of the federal government, the rule that states need not require a unanimous jury verdict in all criminal trials would not automatically apply. To evaluate the need for a nonfederal standard, the tribe's reason for adopting a nonunanimous verdict should be considered. Since the reason would stem from a governmental philosophy with which the federal courts are not likely to have had much experience, the burden should be on the tribe to present a careful statement of the deviation's importance to the system it is supposed to further, and the reasons the normal federal practice would be dysfunctional. Any clear inconsistency between the proposed change and the tribe's general system would have to meet a heavy burden of

101. These two steps are not one since the general guarantees of the Indian Civil Rights Act, 25 U.S.C. § 1302 (1970) do not determine their form. Compare Duncan v. Louisiana, 391 U.S. 145 (1968) (jury trial mandatory on states for sentences greater than six months) with Apodaca v. Oregon, 406 U.S. 404 (1972) (jury verdict need not be unanimous) and Williams v. Florida, 399 U.S. 78 (1970) (jury need not consist of twelve persons). In considering the effect of a deviation upon the individual's protection it must be remembered that the issue is the degree to which an instrumentality of the government may deviate from standards that a conventional federal court must follow. Furthermore, the method of analysis set out in Duncan v. Louisiana, 391 U.S. 145 (1969)—determining what is "fundamental to the American scheme of justice," id. at 149, by reference to history, id. at 149-54, and the dominant practice among the states, id. at 149-51 n.14, 154—is useful only because it shows the judgment of these authorities as to the fundamentality of a particular practice. Indeed, the Court seemed to retreat from the history/consensus approach in determining what it called the "features" of a jury trial. Williams v. Florida, 399 U.S. 78, 99 (1970). It engaged rather in a kind of functional analysis of the purposes and requirements of a jury. Id. at 99-103. See also Apodaca v. Oregon, 406 U.S. 404, 415 (1972) (dissenting opinion).

102. Since the only purpose of allowing departures is to avoid unnecessary intrusion upon tribal choice, a merely arbitrary change, or one based upon pecuniary cost, would be unjustified. But cf. note 86 supra & text accompanying, suggesting that lack of economic development could be a basis for limiting the approach set out in this note to tribal courts. The point is that, while pecuniary need could not justify a separate doctrine, lack of economic integration with the American economic system is an indicator of a genuinely different society, perhaps not totally tied to the Anglo-American tradition.


105. This assumes a substantive analysis would be made. Mr. Justice Powell, in his decisive concurrence in Apodaca v. Oregon, id. at 366, stated that unanimity in federal criminal trials is "mandated by history." Id. at 370. Whether that mandate would extend to federal instrumentalities is unclear. See also note 74 supra.

justification.  

Second, the effect of the deviation upon the constitutionally prescribed balance between individual and society must be considered. Although the courts are experienced in this area, the fact that a person's liberty is at stake requires that the tribe also show that the deviation does not affect this balance. In justifying a nonunanimous jury verdict, for example, the tribe would have to show that other factors, such as expanded participation on the part of the trial judge, exercised in the accused's favor, counterbalanced any possible prejudice.

Applications of Separate Standards

The examples that follow consider what constitutional problems are raised by a particular deviation from federal standards and how the question might be resolved. Each involves an issue not explicitly treated by the language of the Indian Civil Rights Act. In each it has been assumed that the tribe has made the required showing of need.

Search and Seizure

The fourth amendment exclusionary rule has two purposes: deterrence of illegal police behavior and protection of judicial integrity. The first concerns not the accuracy of the result reached by the trial, but the behavior of the tribal government as a whole. The instrumentality analysis discussed here need not apply to the tribes apart from the tribal courts. Thus, the fourth amendment exclusionary rule should not be invoked unless the constitutionally based fourth amendment exclusionary rule applies to the tribes despite their quasi-sovereign status, as opposed to the tribal courts. Judicial integrity seems at best a tenuous justifica-

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107. For example, tribal governments often function by consensus. Note, The Indian: The Forgotten American, 81 Harv. L. Rev. 1818, 1826 (1968). A tribe that did so would have to justify nonunanimity where a person's liberty was at stake.

108. A tribe trying to avoid application of the fourth amendment rule could argue, for example, that its society did not place much weight on privacy, and that to force exclusion of relevant evidence would add to the difficulty of maintaining their communal atmosphere.


110. Id.

111. If the constitutional search and seizure limitations do not apply to the tribes, the limits would derive from the 1968 Act. 25 U.S.C. § 1302(2) (1970). In this case the exclusionary rule should not be applied. Such an extreme sanction for violation of a statute should derive only from the express mandate of the legislature.

If, however, the fourth amendment were to apply to the tribes, then the exclusionary rule would be necessary to deter wrongful police behavior, unless the tribe could show some other effective means of enforcing the fourth amendment. See Mapp v. Ohio, 367 U.S. 643, 651-53 (1961); cf. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting). If it were decided that the exclusionary rule did apply, the scope of the rule would have to be determined. The law of the fourth amend-
tion as applied to the states.\textsuperscript{112} It alone should not be sufficient to require application of the exclusionary rule to the tribal courts.

\textit{Confessions}\textsuperscript{113}

The rule excluding coerced confessions has three bases: unreliability of coerced confessions,\textsuperscript{114} deterrence of undesirable police practices,\textsuperscript{115} and a privilege not to be a witness against oneself.\textsuperscript{116} The first concern seems conclusive here, since to admit an unreliable confession would increase the danger of convicting an innocent person. Deterrence of tribal police practices does not affect the trial itself, and should be treated as it was in the discussion above of the fourth amendment. The privilege basis, to the extent that it exists,\textsuperscript{117} would have to apply to the tribal courts since it is a privilege that can be asserted only at trial.

\textit{Prior Jeopardy}

The prior jeopardy rule is directed against harassment and the danger that successive prosecutions by the same sovereign will increase the probability of an incorrect verdict.\textsuperscript{118} The tribal government is not the same as the federal government, although its courts have been made the latter's instrumentality. The tribes, like the states, have their own values to reinforce through criminal trials, and likewise, they should be permitted to prosecute under their own laws, notwithstanding a prior federal trial.\textsuperscript{119}

\textit{Assistance of Professional Counsel}\textsuperscript{120}

Although tribe-provided counsel for indigent criminal defendants

\footnotesize{\textsuperscript{112} If applied to the federal courts, it is simply a rule made during the Court's exercise of its supervisory power.

113. Substantive justifications for departure from the rule excluding coerced confessions do not readily come to mind.


Recent cases indicate that reliability may be the dominant purpose of the coerced confession rule. \textit{See}, \textit{e.g.}, Harris v. New York, 401 U.S. 222 (1971).


117. \textit{See} note 115 supra.


will be among the most onerous of requirements because of its cost, the burden will have to be assumed. An attorney is necessary to steer the defendant’s case through trial and appeal under tribal rules, which must include those of the 1968 Indian Civil Rights Act.²¹ It is this need for professional assistance that has led the United States Supreme Court to require counsel for all cases involving the possibility of a prison sentence. Therefore, the tribes undoubtedly will be required to provide professional counsel for those unable to afford it.²²

CONCLUSION

The approach employed here is designed to isolate constitutional issues related solely to procedural due process. It forces consideration of these issues within a general constitutional framework, at the same time presenting a procedure which does not require destruction of tribal culture. The arguments presented relate to the legal determination by a tribal court of whether a person has violated the deep-rooted rules of a tribe. The same arguments need not apply to the formulation of those tribal rules. There may be latitude for a tribe to define the relations between citizen and society, but the decision that a person has violated the basic tenets of that relationship is too fraught with serious consequences to be made any less carefully in a tribal court than in an article III court.

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to pay for someone’s counsel might appear to be giving support to an adversariness that is not within the tribe’s culture, thus subverting it; that it is one thing to permit a person to set him or herself against society, but quite another to support such a move. The failure to provide counsel would raise substantial equal protection problems which are beyond the scope of this note.


These rules also include provisions for federal habeas corpus. Thus, an attorney for a defendant in a tribal court would be conducting the case with regard to appeal in federal court, and thus would have to be able to deal with federal law.