

AMERICAN INDIAN LAW: A DISCOURSE ON CHTHONIC LAW

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ABSTRACT

This discourse on Chthonic Law, a theory propounded by H. Patrick Glenn among others, is the occasion for describing advantages and disadvantages of the introduction of customary American Indian law (Chthonic law) into the courtroom. Remarks on the theory, considerations of its merits and weaknesses and illustrations from American Indian societies lead to the conclusion that Chthonic law should become part of the admissible evidence in American courts. A major criticism of Chthonic Law theory is that it tends to describe a fictionalized version of society. Examples of American Indian violence, use of punishment, and private property law counter the idyllic construction of Chthonic law. Examples of the actual operation of a different legal system do exist, particularly the use of compensation and the justice goal of restoration after offenses. Chthonic law theory, if modified can be of use to American Indian plaintiffs.

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I. INTRODUCTION

Comparative government scholars generated a model of indigenous justice called Chthonic law.¹ This model, describing the general characteristics of indigenous law, was created to facilitate comparisons with other legal systems, and perhaps, to assist empowering legitimization of customary law within both domestic and international courts. Historically, nation state legal systems like the United States typically exclude customary or tribal law from the court room. In addition to Chthonic law, comparative law theorists also identify Talmudic, Civil, Islamic, Common law, Hindu, and Asian as world legal traditions.

It is a cliché that the twenty-first century is one of overlapping magisteria² operating within different legal paradigms. Courts, domestic and international, are constantly faced with situations where they must adjudicate across legal traditions. If Chthonic law is allowed, this could alter domestic arrangements about land, jurisdiction, self-government, and ultimately, sovereignty within many nation states.

II. IMPOSING STATE LAW ON INDIGENOUS SOCIETIES

Colonialism left pockets of indigenous populations within nation states.³ The United States, Australia, New Zealand, Ghana, South Africa

1. This paper is based on a guest lecture given to Professor Gregory Gordon's Comparative Law class at the University of North Dakota School of Law. The editors of the North Dakota Law Review kindly indicated that the lecture might be of interest to a wider audience. My lecture focused on Chthonic law as a constructed model used to consider indigenous legal systems. I asserted that Chthonic law, as described in the literature, is really a variation of the Noble Savage Environmentalist dating back to Montesquieu and Rousseau. Under the prodding of editors, the lecture has been modified a bit and a panoply of citations added to enhance the original presentation. Their labors are appreciated. This essay remains essentially a lecture that is a discourse on aspects of the Chthonic Law theory, its flaws and its applicability today, rather than a standard law article. I hope that it will generate interest in American Indian Law as well as thoughts about legal fictions, inter-cultural law, and model credibility among readers.

2. A magisterium is an authoritative domain of truth. Stephen Jay Gould posited that religion and science, for instance, are non-overlapping magisteria. In this usage, Chthonic societies have magisteria different from nation-state foundational magisteria, and therefore reconciling both magisteria in judicial proceedings is profoundly problematic.

3. Chthonic is an awkward term as are so many theoretical constructs, but it is the term created for comparative law. Chthonic implies primeval, created by the original societies, and

and many others still have separate, identifiable Chthonic, or aboriginal, societies which have legal status within the larger nation states. During the past several decades, indigenous peoples living within nation states have challenged the existing status quo based in part on Chthonic law.⁴

As many former colonies became nation states, indigenous peoples within these emergent nations, like the United States, continuously struggled for self-determination and world recognition within their respective dominant nation states. After indigenous societies were incorporated into the new nation states, their only recourse for recognition of their claims for justice required them to use the courts of their conquerors. Most nation states gradually came to recognize separate existence and rights for indigenous peoples within the general rubric of the principles of national self-determination.

Today, the United Nations provides a forum for indigenous organizations and their advocates.⁵ It offers an arena where surviving indigenous societies can assert their rights even where they are not recognized or are severely compromised by the nation states within which they exist. However, redress still must be obtained through the legal and legislative systems of the nation states.

As nation states, like the United States, have matured, their legal systems responded to cases brought by the indigenous peoples, but only within their national legal systems. Indigenous peoples have argued that Chthonic law must be considered to achieve real justice. The Catch 22 is that Chthonic peoples have had to turn to nation state courts to gain redress for losses incurred by being colonized.⁶ Indigenous peoples and their issues are stipulated as domestic law by international agreement.

founded on religious worldviews; therefore, it is ancient and precedes the legal systems created by nation states or post-tribal societies. Chthonic peoples have been incorporated into the nation states that were constructed from European empires in the Americas, Asia, and Africa. Some nation states, like China, also have significant indigenous or Chthonic populations. Chthonic societies are those based on worldviews functionally conceived of as indigenous polities that existed prior to being absorbed within nation states. Examples include American Indians, Ainu, tribal societies within various African states, the Maori, Native Hawaiians, and Aborigines within Australia. To a large degree, Chthonic law is synonymous with customary law, traditional law, and indigenous law. The terms are used interchangeably in this essay.

4. A representative study of assertions of indigenous societies is James (Sa ke'j) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (2008).

5. See *infra* note 7.

6. H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 58 (3d ed. 2007). The Chthonic population of the world is estimated at about 260 million (4-5% of world population). *Id.* at 2. Roughly 80% are in Asia, 7% in South America, 6% in North America, 4% in Africa, 3% in Australia/Oceania, and .01% in northern Europe (Saami people). *Id.* The designation of Chthonic, natives/aborigines/indigenous in common usage, is arbitrary. People of European descent have been present in many areas of the world for several hundred years. Japan has been

A. CHTHONIC LAW FORUMS

After decades of effort seeking a public platform to feature Chthonic claims, the United Nations has declared that Chthonic peoples exist and have rights. According to Article 26 of the United Nations Declaration of the Rights of Indigenous Peoples, “[i]ndigenous peoples have the Right to own, use, develop and control the lands, territories, and resources that they possess by reason of traditional ownership or other traditional occupation or use as well as those they have otherwise acquired.”⁷ For instance, indigenous plaintiffs claim that their oral histories could help define traditional ownership and rights of usage.

Significantly, many nation states that incorporate indigenous peoples had already created a legal status for them as distinct political-legal entities and often as distinct racial or ethnic groups within the sovereign jurisdiction of the nation states. Generally, these states have trended toward recognition of distinct rights for “their” Chthonic peoples. However, they have not necessarily embraced Chthonic Law as admissible in their courts. In effect, indigenous peoples have to conform to state law and legislation to describe themselves and their legal traditions without the benefit of being able to draw on centuries of Chthonic Law.

The United States Code of Federal Regulations (hereinafter “C.F.R. 25”) describes its relationship with American Indians.⁸ Canada’s 1982 Constitution Act reaffirmed aboriginal and treaty rights for Indians, Inuits, and Metis, and designated them as aboriginal peoples.⁹ Australia and New Zealand have acknowledged that the Chthonic peoples within their boundaries have rights and separate status.¹⁰

The rub is in the details. How is justice determined for peoples who had or have a different paradigm from the nation state about such things as sovereignty, land use, payment, obligations, responses to criminal behavior, or commerce? What about the interaction on the same soil between citizens of the Chthonic peoples and those of the nation state? Whose law should be used and how should those two systems be reconciled?

“colonized” for millennia, but the Ainu minority is Chthonic and China has many distinct minorities/indigenous peoples.

7. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, art. 26(2) (Sept. 13, 2007).

8. “The term ‘Indian tribe’ means any Indian tribe, band, nation or other organized group or community of Indians (including any Alaska Native village or regional or village corporation) which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians.” 25 U.S.C. § 2403(3) (2006).

9. Canada Act, 1982, c. 11 (U.K.) (Can.).

10. Australia and New Zealand have extensive legislative, judicial, and executive histories of the acceptance of unique indigenous status for the Aborigines and Maori respectively.

The several dominant nation states involved have decided that their courts will determine the rules for indigenous peoples and state relations.¹¹ Indigenous peoples have come to the courts of their conquerors for redress, but they have insisted, with some success, that their traditions, histories, and legal traditions be included in considerations of the relationships. However, in order to be acceptable to nation state courts, the principles of law for Chthonic peoples must be understood by the arbiters.

Construction of the Chthonic law model is the result of efforts to comprehend indigenous worldviews, and therefore, indigenous laws. As Professor H. Patrick Glenn points out in his tour de force, *Legal Traditions of the World*, Chthonic law emanates from the indigenous cultures of the world from a people that “live in or in close harmony with the earth.”¹² Christine Zuni Cruz quotes from Glenn in describing Chthonic peoples “who live ecological laws . . . by living in close harmony with the earth.”¹³ Several scholars have examined Chthonic law among indigenous peoples in Africa, Asia, and the Americas and some even harken back to when Europeans practiced Chthonic law.¹⁴

In the model utilized by H. Patrick Glenn, Chthonic law describes the worldview of indigenous peoples. He indicates that this worldview includes a sense of rootedness in nature, tradition, and a commitment to maintaining balance and harmony.¹⁵ Chthonic law orders societies that are peaceful, harmonious, and non-violent. Disputes do occur, but they are handled through the application of consensus decision making that applies traditional rules.

For example, although disputes concerning land use and land ownership occur in indigenous societies, these disputes are easily resolved because of the symbiotic relationship that exists between the two concepts. Land is held in common and used according to need in these societies so there is no argument about ownership, and arrangements for use can be modified according to societal needs. Glenn asserts that Chthonic people

11. STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* (4th ed. 2012); THOMAS ISAAC, *ABORIGINAL LAW: COMMENTARY AND ANALYSIS* (2012).

12. GLENN, *supra* note 6, at 60.

13. *Id.* at 330.

14. *See, e.g.*, T. W. BENNETT, *A SOURCEBOOK OF AFRICAN CUSTOMARY LAW FOR SOUTHERN AFRICA* (1991).

15. Variations on the concept of peace and harmony in Chthonic societies are ubiquitous and include Voltaire, Montesquieu, Locke, and Marx. Pat Sekaquaptewa, *Key Concepts in Finding, Definition and Consideration of Custom Law in Tribal Lawmaking*, 32:2 AM. INDIAN L. REV. 390; SHARON RIDGEWAY & PETER J. JACQUES, *THE POWER OF THE TALKING STICK*. (2014) (demonstrates scholarship that assumes the Balance and Harmony model). SHEPHARD KRECH III, *THE ECOLOGICAL INDIAN: MYTH AND HISTORY* (2000) (provides a convincing anecdote to the model).

accept the world of harmony and conform to decisions based on this worldview.¹⁶ As an oral law, discussions among humans lead to justice.¹⁷

American Indians¹⁸ have insisted their traditional legal systems were diametrically opposite many of the western legal traditions. Failure to recognize this truth, Indians contend, prevents just adjudication of their claims in nation state courts. American Indian justice focused on restoration of a society—not on punishment. Their emphasis was collective, not an individual versus the state model of justice. Consensus derived from tradition was the indigenous norm.¹⁹

Most students of North American indigenous societies echo the constructed view of Chthonic law as one of harmony and balance: a justice system without coercion and punishment. This view of Chthonic law is not only trumpeted by scholars, but by most other American Indians as well. A common elaboration of this Chthonic model voiced by Indians and non-Indians even describes American Indians as the first ecologists.

There are several problems with this theory of Chthonic law being accepted by courts as if it really existed from time immemorial the way some would have it. The theory assumes that Chthonic peoples did not have human foibles involving conflict and punishment, nor was there internal violence within nations. Chthonic peoples are pictured as having a single immutable worldview that did not change until the arrival of the Europeans. Further, the model crystallizes all Chthonic societies into a single worldview whether they are African, Asian, Oceanic, Australian, South American, or North American.

If this idealized model of Chthonic Law is offered by Indian plaintiffs, the opposite of the intended effect can result. It is easily refuted with historical evidence. When the other side introduces evidence of imperfect Chthonic societies, it undermines the legitimacy of indigenous law and its traditional uses in reducing conflict and creating just solutions derived from traditional indigenous worldviews. On the other hand, if objective characteristic of indigenous societies and Chthonic law is introduced, then it can have positive effects for indigenous peoples.

16. See generally GLENN, *supra* note 6.

17. Generalizations about models can be as selective as any summary of what are sometimes complex, nuanced models as any other characterization of positions taken. However, this summary is faithful to the model as presented by Glenn and others.

18. American Indian, Indian, Native American, Indigenous, First Nations, and Natives are each a term applied to the descendants of indigenous North American and South American populations. In United States law, the term used most often is Indian or American Indian.

19. James Zion and Robert Yazzie, *Indigenous Law in North America in the Wake of the Conquest*, 55 B.C. INT'L & COMP. L. REV. 55, 55-84 (1997).

Although Chthonic law theory is really a variation on the Noble Savage stereotype,²⁰ if modified from that presented by Glenn, it can help obtain justice for indigenous peoples. Naturally, the model has been embraced by contemporary indigenous peoples because it places them in a superior moral position to the nation states that rule them and establishes a premise that can sway not only the larger society but its courts as well. Chthonic theory provides a basis for efforts to increase the sovereignty of Chthonic peoples and to improve their collective well-being.²¹ If one accepts the Chthonic model, then efforts like those of the United Nations, on behalf of indigenous peoples, make sense.²² The model may also help nation state jurists to understand indigenous laws as they can be included in decisions based on blending Chthonic law and nation state law systems.

If indigenous peoples want to litigate, they have a basis for arguing that their laws and traditions are co-equal with the laws of nation states and need to be considered in seeking redress. Even if Chthonic peoples must accept the irresistible power of the nation states, they can argue for the admission of Chthonic law in the courts of the conquerors as appropriate means to their ends. Assuming that North American Indians had a similar worldview, there remain key questions of exploring the interworking's of indigenous laws and their applications. For example, how did indigenous law, such as Chthonic law, actually work? Is the idyllic view of this law accurate? If the principles of Chthonic law are accepted, how can culturally ignorant judges respond with the specificity necessary to nation state law? What decisions of Chthonic law can be documented to the satisfaction of principles of nation state evidence requirements? These key questions illustrate how difficult blending differing law traditions can be. The difficulty of answering them should not prevent applying principles and making decisions within nation state legal systems.

The Supreme Court has evolved canons of construction for treaties: "Ambiguities . . . must be resolved in favor of the Indians . . . [treaties] must be interpreted as the Indians would have understood them . . . [and] must be liberally construed in favor of the Indians."²³

20. *Noble Savage Definition*, ENCYCLOPEDIA BRITANNICA.COM, available at <http://www.britannica.com/EBchecked/topic/416988/noble-savage> (last visited June 4, 2013).

21. See H. Patrick Glenn & Raymond D. Austin, *American Indian Customary Law in the Modern Courts of American Indian Nations*, 9:2 WYO. L. REV. 351-373 (2011).

22. The United Nations efforts on behalf of indigenous peoples are discussed above and are embodied in the Declaration of the Rights of Indigenous Peoples. See JACKIE HARTLEY, ET AL., *REALIZING THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: TRIUMPH, HOPE, AND UN RECOGNITION* (2010).

23. STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 35 (1983).

If the understanding of Indians is a key component, then there is at least a narrow opening for the introduction of Chthonic/customary law in American courts. Clearly, law must be derived from evidence in both printed and oral history. In order to gain an understanding of how indigenous justice systems actually worked on a daily basis, one must turn to the historical records. Unfortunately, the recorded functioning of a consensus justice system on a daily basis is tantalizingly sketchy. However, we do know that America Indian societies combined tradition with ever-evolving consensus decisions to deal with issues. Punishment was not a preferred means to deal with offenders.²⁴

We also know land was not considered individual private property, and national boundaries were not as they came to be in western societies before they were imposed on the rest of the world. Tribally known “territories” were only loosely bounded, and use was not exclusive to a particular Indian nation. We also know that extended kinship networks guided by tradition dealt with most issues that would wind up in court today. For instance, division of property, indemnification, and criminal actions did not have to be judged by legal institutions, but rather by kinship groups relying on traditions.²⁵

Much debate surrounds the constructed models of Chthonic or traditional law as described by indigenous and comparative law scholars. Often these scholars sketch a picture of an idealized world that would warm the cockles of Karl Marx’s heart.²⁶ Critics contend that this utopian world never existed and its myths cannot be considered as facts. Some jurists argue that Chthonic law cannot be discovered, and even if it could, it should not be part of modern judicial proceedings.²⁷ They insist that customary law does not meet the rules of evidence necessary to justice.

24. H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* (2d ed., 2004). Nearly any ethnography or study of traditional American Indian societies describes the use of alternatives to punishment. The knowledge of this practice rises to the level of common knowledge. One might also look at JOHN PHILLIP REID, *A LAW OF BLOOD: THE PRIMITIVE LAW OF THE CHEROKEE NATION* (1970).

25. Numerous ethnographies and histories describe many of the American Indian nations. See DAVID E. WILKINS & HEIDI KIIWETINGEPINESIIK STARK, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* (3d. ed., 2011) (offering a general description of tribal governments); CHARLES M. HUDSON, *CONVERSATIONS WITH THE HIGH PRIEST OF COOSA* (2003) (providing an idealized synthesis ethnography for Southeastern U.S. Indians).

26. This characterization is not entirely fair to the well-constructed models and research of many scholars. As with Glenn, only the most naïve do not qualify their statements about societies in peace and harmony with acknowledgement that the traditional did change and that there was conflict. However, there is a decided de-emphasis on conflict and a marked emphasis on idealizing traditional, “Chthonic” societies.

27. JAMES W. ZION, *SEARCHING FOR INDIGENOUS COMMON LAW IN INDIGENOUS LAW AND THE STATE*, 121-148 (1988).

I argue that there is ample evidence for discovering Chthonic law and omitting it from courts is disingenuous. On the other hand, traditional American Indian societies did not live in a world of balance and harmony even if to do so was the goal. Those who see an idealized traditional world hurt their case by leaving themselves open to scholars, like Shepard Kretch, who point out just how violent tribal societies could be. Violence was very common.²⁸ The “harmonious” North American Chthonic world was violent long before the arrival of the Europeans, and it grew more so after their arrival.

War is a feature of many tribal oral histories. The Iroquois Confederation’s origin tradition describes the extreme violence that led the cultural heroes, Hiawatha and Deganawidah, to create the Iroquois League with its rules eliminating intra-confederation warfare.²⁹ Historically, war among Indian nations was just as common and constant as it was between the various countries throughout Europe. American Indian cities and towns were often fortified long before Europeans arrived.³⁰ In fact, being a citizen-soldier, or a warrior in common parlance, was almost a requirement for manhood and was a source of prestige for eons.

Wars were fought for the usual reasons: territory, resources, revenge, and many times, glory. Wars led to exchanges of territory and changes in tribal boundaries. Sometimes, defeated tribes were forced to pay tribute to the victors. Indian tribes had clear protocols for land ownership and control of resources, and they were willing to fight to improve their conditions at the expense of other tribes. Diplomacy was much valued, and alliances between and against other tribes was common. When Europeans arrived, Indian leaders sought to use them as allies against their nation’s enemies.³¹

28. The examples cited concerning violence within American Indian societies are common knowledge among historians and have received emphasis in scholarship since at least the 1970s. *See generally* RICHARD WHITE, *THE MIDDLE GROUND* (1991); DANIEL RICHTER, *FACING EAST FROM INDIAN COUNTRY* (2001); COLIN CALLOWAY, *ONE VAST WINTER COUNT* (2003); SHEPARD KRECH III, *THE ECOLOGICAL INDIAN* (1999); PEKKA HAMALAINEN, *THE COMANCHE EMPIRE* (2008); JOHN REID, *A LAW OF BLOOD* (1970).

29. FRANCIS JENNINGS, *THE AMBIGUOUS IROQUOIS EMPIRE: THE COVENANT CHAIN CONFEDERATION OF INDIAN TRIBES WITH ENGLISH COLONIES* (1990). Any work on the origins of the League of Peace or the Iroquois Confederation will describe the oral tradition of the violence and any history of colonial America, New France, and the Huron will detail the violence of Indian wars. Another perspective is BERNARD BAILYN, *THE BARBAROUS YEARS: THE PEOPLING OF BRITISH NORTH AMERICA: THE CONFLICT OF CIVILIZATIONS* (2012); *see also* PEKKA HAMALAINEN, *THE COMANCHE EMPIRE* (2009).

30. Mississippian chiefdoms (900-1700 A.D.) were often fortified, and when Europeans arrived, they found Indian cities and towns surrounded by palisades and observed a near constant warfare between Indian tribes.

31. MICHAEL RHOADES, *LONG KNIVES AND THE LONGHOUSE: ANGLO-IROQUOIS POLITICS AND THE EXPANSION OF COLONIAL VIRGINIA* (2011).

American Indian warfare did not have non-combatants, and because of the weaponry, was graphically brutal. Torture or slavery for prisoners was common. War involves outsiders and does not necessarily mean that domestic Chthonic law was not one of determining balance and harmony in an ideal world. However, there were also domestic, internal disputes that can be documented, and their occurrence seems to be based on universal human nature that deviants exist in each society. Indians are not exceptions to this generalization.³²

III. INTRA-SOCIETAL VIOLENCE AND PUNISHMENT AMONG INDIGENOUS SOCIETIES

Unfortunately, for the confident use of the constructed Chthonic Law model in courts, life was much more complex than the model describes. Not only was war common, but domestic society among American Indian nations was not always peaceful and harmonious. One example of intra-society violence and punishment is the manner in which the indigenous societies dealt with witchcraft. Most American Indian societies accepted the reality of witchcraft and viewed it as a vehicle used by some to focus evil against individual members of society.³³ Although it was generally the responsibility of the bewitched individual to draw on shamans to counter such sorcery, the whole community was often called upon to respond. As a result, witches were often punished with execution decided upon by a consensus of the masses.³⁴

Another example of intra-society violence and punishment within indigenous societies is the manner in which justice was enforced. For example, extended families, or clans in some tribes, were responsible for meting out justice. The clan was responsible for its members and acted to punish, as well as protect and sustain.³⁵ For instance, if a husband beat his wife, his wife's clan or family could punish him if there were no other means of recourse available.

32. GREGORY GAGNON, *CULTURE AND CUSTOMS OF THE SIOUX* (2012). This is one of hundreds of scholarly descriptions of American Indian societies, including the many inter-tribal wars and those involving Europeans and Americans. *See also*, ANTON TREUER, *OJIBWE IN MINNESOTA* (2010) (describing the expansion of Ojibwe into northern Minnesota through warfare that displaced Dakota).

33. *See generally* WHITE, *supra* note 28.

34. One of the many recorded instances of killing witches occurred during the efforts of Tenskwatawa (the Shawnee Prophet) to recruit adherents to his Nativist vision. He simply accused opponents of witchcraft and urged their execution. Navajo retaliations for witchcraft are well documented in numerous ethnographies.

35. *See generally* HUDSON, *supra* note 25.

Deeds that endangered the whole community were often punished by military-police societies.³⁶ These societies, common to most tribes, enforced the understood laws with various punishments including whipping, destroying the offender's property, and other penalties. Such sanctions were imposed by the community council or even by the selected leader.

In order to deal with cases of homicide, most tribal societies followed the tradition of blood revenge.³⁷ According to this tradition, it was the family's responsibility to kill someone from the offender's family in retribution. Most societies mitigated this responsibility with the practice of "covering the dead" through negotiated compensatory payments. The offender's family could offer compensation and the victim's family was encouraged by tradition and community leaders to accept it. Sometimes, adoption of a replacement was the compensation. In the end, the family had the right to respond to homicide with violence, but the community worked to develop an alternative that restored the community.

Most American Indian societies made every effort to mitigate intra-community violence.³⁸ For example, Cherokees maintained sanctuaries for offenders while the families negotiated alternative solutions. Most southeastern tribes declared an annual amnesty for offenders as part of their renewal ceremonies. Those exiled for various offenses could return to the community in good standing. Some, like the Comanches,³⁹ demanded that individuals were responsible for retribution—their legal system has been characterized as "violent individualism."⁴⁰

Another community response to violence was to simply wait until the malefactor was punished by supernatural Beings who were offended by the individual. For instance, a sorcerer could be punished by another sorcerer, or a disrespectful hunter could be punished by the animal's spiritual being. Thunderers and other spiritual Beings were viewed as being responsible for wreaking vengeance on individuals. Indigenous justice combined human and supernatural retribution even as it focused on restoration of community.

Banishment was an infrequent punishment in many American Indian nations.⁴¹ On the surface, this is not much of a sanction. However, the

36. Examples of military societies are the Kit Fox Society of the Lakota, the Dog Soldiers of the Cheyenne, and the Black Mouths of the Hidatsa. Membership was usually sponsored by an established member and some belonged to several of the societies.

37. *See generally* REID, *supra* note 28; HUDSON, *supra* note 25.

38. *See generally* HUDSON, *supra* note 25.

39. *See generally* HAMALAINEN, *supra* note 28.

40. K. N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY*, at ix (1941).

41. Patricia H. Kunesch, *Banishment as Cultural Justice in Contemporary Tribal Systems*, 37 N.M. L. REV. 85 (2007).

worst thing that could happen to an Indian was to be alone. Someone who was abandoned would not have the support of family—a support that was material as well as psychological. Abandonment in indigenous societies could be at least as punitive as solitary confinement in western societies.

The ideal for American Indian societies was for people to live in balance and harmony through following the traditions of the people. Forgiveness, not punishment, was the goal. Decisions were expected to be made with the good of society and restoration in mind, but the ideal was not exclusively present. North American Chthonic society had its violent face, and punishment was not alien.

A. AMERICAN IMPOSED LAW AND PUNISHMENT

After the United States was created, it moved to incorporate American Indians. The United States steadily extended its control of American Indian nations and created federal Indian law. By 1890, all Indians were on reservations subject to the American justice system with its emphasis on adversarial and punitive justice. The current reservation system is the result of a systematic American policy to control Indians while opening the continent to American immigrants. American intrusion into individual Indian lives created a clash between worldviews—between a nation state and Chthonic societies. The same pattern occurred in Canada, particularly after 1867.⁴²

IV. AMERICAN INDIAN CHTHONIC LAW AND CONFLICTS WITH THE UNITED STATES LEGAL SYSTEM

Inter-cultural difficulties concerning criminal justice are common. It is not just a matter of establishing that both societies accept punishment for offenders. Different worldviews pose difficulties. In American Indian law, the most obvious conflict occurred when Americans would not accept the idea of compensation as offered by family members to restore society after a violation of laws. The Sioux Wars of the 1850s began over the issue of

42. American imperialism and relations with American Indian nations is a well-documented narrative. After the American Revolution, the United States either fought or intimidated American Indian tribes, with the result that the United States annexed Indian lands according to American law, and often after punitive wars and invasion. The process left American Indians, collectively, with about 120 million acres by 1890. Indian country was further reduced to about forty million acres between 1890 and 1934. Today, over three hundred federally recognized Indian governments (reservations) total about forty-five million acres, but the United States has sovereign title leaving the tribes with aboriginal title. It is like usufruct ownership. Readers who want to refresh their memories about the scope of American Indian policies, major court interventions, and territorial expansion should consult PETER PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES AND THE AMERICAN INDIAN* (abr. ed. 1986).

Indians who offered compensation, not punishment, over the theft of a cow while Americans demanded punishment of the thief.⁴³

Ex Parte Crow Dog,⁴⁴ and the subsequent Major Crimes Act of 1885,⁴⁵ are two examples of America's rejection of Chthonic law. When Crow Dog murdered Spotted Tail, Americans were so indignant about tribal use of compensation rather than hanging that they seized and tried Crow Dog.⁴⁶ Crow Dog was sentenced to hang by federal officials, but the *ex parte* ruling on jurisdiction was that the United States had no jurisdiction in intra-tribal crimes, and Crow Dog was released. The United States reluctantly accepted Chthonic law in this instance (at least in Indian on Indian crimes). Congress ruled and the situation was "fixed" by legislation.

Congress passed the Major Crimes Act.⁴⁷ Chthonic law was eliminated by assigning jurisdiction for all felonies, even if committed by Indians against Indians, to federal courts. The Bureau of Indian Affairs ("BIA") was authorized to assume jurisdiction over other crimes, including the violation of executive procedures through Courts of Indian Offenses set up on each reservation.⁴⁸ The Major Crimes Act completed what the Courts of Indian Offenses started in 1883—the elimination of Chthonic law for American Indians. An accompanying effect was that Indians being tried in federal courts were not citizens, and there was no basis for including Chthonic notions of law in proceedings conducted by Americans and judged by Americans.

Indian agents directed the Courts of Indian Offenses on reservations, even if the judges were prominent Indians appointed by the agents. If Indian judges did not punish under the American style, their decisions were overruled by the BIA.⁴⁹ The main purpose of the BIA was to enforce the law on Indian reservations. Because of the presence of the BIA, the American style of punishment—whippings, denial of rations, chain gangs, fines, and imprisonment—became the norm on Indian reservations as it was in the larger society. Felonies were punished with the Draconian style of the late nineteenth century. Hanging and long term incarceration were part of American rule.⁵⁰

43. DOREEN CHAKY, *TERRIBLE JUSTICE: SIOUX CHIEFS AND U.S. SOLDIERS ON THE UPPER MISSOURI 1854-1868* (2012).

44. 109 U.S. 556 (1883).

45. Major Crimes Act, ch. 341 § 9, 23 Stat. 362, 385 (1885) (current version at 18 U.S.C. § 1153 (2006)).

46. *See generally* PRUCHA, *supra* note 42.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

In response to the implementation of the American style of punishment, a number of unintended, ironic consequences followed. American Indians reacted to having their own legal systems erased by turning to informal justice that operated as much as possible without using the courts. Many American Indian communities maintained and reinforced their cultural norms that included forgiveness and rough compensation rather than formal adjudication. It might be argued that the apparent lawlessness of contemporary Indian reservations is a legacy of the imposition of American law.

American based courts were too foreign and were not seen as legitimate options for dealing with malefactors. Today, antipathy toward the structured criminal justice system continues, and the legacy of the Major Crimes Act prevents development of a contemporary system that is influenced by traditional Chthonic culture.

A. IT IS ALL ABOUT LAND

Another area where the historical record deviates from Chthonic theory is in the area of land ownership and private property. Theorists, native and non-native, insist that property was not a concept acceptable to American Indians. The Chthonic model, as well as ethnographic studies, contends that Indians had no private ownership. Land was held in common and everyone protected the environment. It was sacred and had existed since traditional times. Bewilderment was the dominant Native American reaction to private property and land sales insisted upon by Americans and, earlier, colonists.⁵¹ As with the issue of violence and punishment, the actuality deviated from the Chthonic model.⁵²

It is true that the sense of property among American Indian societies varied significantly from that of the European and American societies, but it is not true that they had no concept of ownership of land. Disputes about boundaries of property occurred. On the national/tribal level, American Indians knew where their boundaries were as was described in various treaty negotiations. For instance, at the first Treaty of Fort Laramie, in

51. Hope M. Babcock, “[*This*] I Knew From My Grandfather:” *The Battle for Admissibility of Indigenous Oral History as Proof of Tribal Land Claims*, 37 AM. INDIAN L. REV. 19 (2012-2013).

52. Abundant studies of American Indian property concepts exist. The classic study is IRREDEEMABLE AMERICA; THE INDIANS’ ESTATE AND LAND CLAIM (Imre Sutton ed., 1985). Other useful studies include ZUNI AND THE COURTS: A STRUGGLE FOR SOVEREIGN LAND RIGHTS (E. Richard Hart ed., 1995), and William H. Rodgers Jr., ENVIRONMENTAL LAW IN INDIAN COUNTRY (2005).

1851,⁵³ plains tribes were able to describe their own domains, even if there were no boundaries protected by border guards and requiring passports for foreigners. Protocols existed for individuals, groups, and even whole tribes to enter one another's lands.

Tribes often created and sustained neutral areas between nations. For example, the famous hunting grounds of Kentucky, the less famous Minnesota River Zone separating Chippewa from Dakota, and the area along the Savannah River as far back as the 1540s were all areas that were considered to be neutral among the various nations.⁵⁴ Creating and observing these zones required knowing land boundaries, as well as effective negotiations of boundaries.

Another example of effective negotiation of boundaries occurred when the Dakota Sioux Tribe allowed the Chippewa to expand their trade and occupation into Dakota country in the seventeenth century through an agreement that would be called a treaty today. Not only did the Sioux and Chippewa accept the permanent nature of the population movement, but other Indian nations did as well. It is significant that European and American expansionists sought permission from tribes to occupy their lands and bought permission with presents. In most treaties, boundaries were described in terms Indians recognized as well as in map coordinates. Chthonic law was recognized by both cultures once upon a time.⁵⁵

Conflict over land use and on boundaries was really the result of colonial immigrants and Americans refusing to accept joint use and violating common practices. Insisting that hogs be allowed to run free, insisting that Indians did not retain hunting rights on private farms, and contempt for rights agreed upon were the problem. It is not so much the case that non-Indians did not understand Indian usages, but that they refused to consider them as valid. Indian efforts to get the colonials, and later Americans, to observe Indian protocols were rarely successful.⁵⁶

53. See generally PRUCHA, *supra* note 42. The purpose of the Fort Laramie treaty was for the United States to gain a clear picture of which tribe had which boundaries for their nation. Tribal testimony during the treaty negotiations indicates that leaders of each tribe could describe the boundaries of their own tribe and of other tribes. The deliberations and treaty encompassed nearly all of the northern plains tribes. The issue of how tribes used their own country in interaction with other tribes was not addressed.

54. MARY LETHERT WINGERD, *NORTH COUNTRY: THE MAKING OF MINNESOTA* (2010); ANTON TREUER, *OJIBWE-DAKOTA RELATIONS: DIPLOMACY, WAR, AND SOCIAL UNION, 1679-1862* (1994).

55. See generally WHITE, *supra* note 28.

56. See CHARLES HUDSON, *THE SOUTHEASTERN INDIANS* (1976); BERNARD BAILYN, *THE BARBAROUS YEARS: THE PEOPLING OF BRITISH NORTH AMERICA-THE CONFLICT OF CIVILIZATIONS, 1600-1675* (2013).

It is noteworthy that those who introduced western law to the indigenous people of North America did not choose to abide by and enforce it on their own subjects. As European colonists and Americans grew in power vis-à-vis Indians, they turned to their laws to dispossess native peoples through exclusive reliance on European-American law. Chthonic law was not admissible in the imperialists' courts.⁵⁷

Dispossession of Native peoples continued well into the twentieth century with little or no acceptance of Chthonic law. Ironically, the door was opened for the introduction of Chthonic law in the United States when Congress terminated reservations and nearly abandoned the Trust Doctrine in the 1950s. In order to redress legal issues, Congress created the Indian Claims Commission to allow Indian tribes to assert claims against the United States.⁵⁸ Indian tribal plaintiffs were allowed to introduce the testimony of anthropologists and other scholars in support of their case, and were allowed to draw on customary oral histories. Since the late 1940s, the introduction of Chthonic law has been possible.

Even earlier, in the 1930s as the Roosevelt Administration pursued new approaches to the responsibilities of the federal government, Felix Cohen developed synthesized federal Indian law to describe the relationship of Indian nations to the United States.⁵⁹ His work, combined with the 1934 Indian Reorganization Act, emphasized a restored validity for tribal governments. Eventually, a canon of construction was accepted by federal courts. The canon is described in various editions of *Cohen's Handbook of Federal Indian Law*.⁶⁰

Currently, treaties are to be construed by courts in favor of Indians when there are ambiguities. Treaties are to be interpreted according to how the Indian participants understood the terms. This canon opened the way for an application of Chthonic law in all cases involving treaties. Unfortunately for Indians, the canon is often not honored in the breach.⁶¹

Contrary to the premise that Indians had no concept of private property as described in Glenn's Chthonic model, Indian societies traditionally

57. Several examples of the use of American law to dispossess includes the Doctrine of Discovery as described in *Johnson v. McIntosh*, 21 U.S. 543 (1823), *United States v. Sandoval*, 231 U.S. 28 (1913), and *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1902). Each of these cases is explicated well in LINDSAY ROBERTSON, GERALD TORRES, & ANGELA RILEY, *INDIAN LAW STORIES* (Carole Goldberg et al. eds., 2011).

58. A very good description of the Termination period and the Trust Doctrine is in STEPHEN L. PEVAR, *THE RIGHTS OF INDIAN TRIBES*, 29-44, 49-52 (1983).

59. See generally PRUCHA, *supra* note 42.

60. FELIX S. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* (1982). Versions of this handbook date back to 1941.

61. For appropriate, but not inclusive, examples see WALTER R. ECHO-HAWK, *IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED* (2010).

accepted the concept of private property within the context of their respective worldviews. Men owned their personal effects—horses, later cattle, hunting territories in some tribes, personal symbols, songs, and even spiritual powers. Women owned their personal effects—often the home and all that was in it, songs, spiritual powers, the use of land along with their sisters as guided by elders, and designs for clothing and adornment. Their peers knew and accepted this. Chthonic law did provide a means to protect private property. Generosity, as a prime virtue, mitigated extremes of private property in Indian societies but it did not eliminate the existence of private property.⁶²

My assumption is that scholars constructed Chthonic Law in response to a need to legitimize the study of indigenous customary law for students and colleagues who would be dealing with indigenous clients. Glenn implies this in his comparative law text. Historically, nation state courts refused to consider orally transmitted law as not meeting the rules of evidence, so a means to be more inclusive led to the creation of the Chthonic theory.

Generally, nation state courts still deny the validity of customary law, but some cracks in the dam are visible. Probably, the impetus for resurrecting Chthonic law as admissible in nation state courts is the changing paradigm that includes legitimizing indigenous societies throughout the world. The United Nation's Declaration on the Rights of Indigenous Peoples is one indicator of this shift in international law.⁶³

In part, Chthonic theory is founded on the sands of romantic ideas of societies that lived in balance and harmony, based on relationships to the environment and spiritualism, but legal systems abound with such legal fictions. Perhaps it is a necessary term of art. Whether or not they were ideal societies, Chthonic societies did exist. They did have different worldviews from those of modern nation states. They did have laws, and if indigenous societies continue to be accepted in national and international laws, their legal histories need to be considered.

A potential Achilles heel for injecting Chthonic law lies in the model itself, but it is surmountable with learning. Lawyers for indigenous clients need to be aware that the Chthonic model can be easily challenged. Not only is it hard to find precedents for its admissibility, but the ideal societies living in peace and harmony really did not exist as described.

62. For one of many ethnographic examples of Chthonic law, see Theodore John Rivers, *A Study of the Laws of the Ottawa Indians as Preserved in the Ottawa First Book (1850)*, 42 KAN. HIST. Q., 225 (1976).

63. REALIZING THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: TRIUMPH, HOPE, ACTION (Jackie Hartley et al. eds., 2010).

Acknowledging historical realities is required to strengthen legal arguments.

Contemporary cases should take cognizance of the reality that Chthonic law addresses issues of national boundaries, war, internal violence, and private property. They should also describe Chthonic law from a point of understanding that these societies dealt with less than perfect circumstances. Deviance did exist and means for dealing with it existed and are translatable to nation state legal systems.

Nation state courts need to explore how issues were adjudicated in families, in councils, and in tradition. If Chthonic law is introduced in these terms, then it can be a practical means toward justice for indigenous plaintiffs rather than just a theoretical model used to compare different modes of law.

A crucial question is: how Chthonic law can be injected into western justice systems, particularly American federal and state courts?⁶⁴ Perhaps American laws of property are sufficient in most cases if they accept the premise that Chthonic law should be admissible as common law specific to cases involving corporation-like ownership. Perhaps provisions should be made for current tribal courts to have jurisdiction in cases involving both American and Chthonic issues. Once the principle that Chthonic law is admissible is established, approaches will evolve. Another constructed, but easily rebutted, component of the Chthonic law model is that indigenous people followed “[a] system of law centered on the sacred nature of the cosmos.”⁶⁵ Professor Glenn, the renowned comparative law scholar, indicates that Chthonic law is “in close harmony to the earth.”⁶⁶

Those familiar with common Indian tropes would recognize the ideas that the earth is sacred—as are all living things—and that American Indians lived in perpetual harmony with their environments changing nothing, taking only what they needed, and using every bit of each animal killed. According to this asserted viewpoint, Indians protected the environment through their harmonious relationship with the earth. Indians were green. In fact, their entire cultures and behaviors anticipated the Green movement of the twentieth and twenty-first centuries.

64. Although not explored for this article, private property that involves cultural patrimony (e.g., ceremonial pipes, winter coats, beaded belts, ceremonial clothing identified with historic individuals but that are also identified with a position) has been an issue in courts. This author has seen tribal courts decide issues of cultural patrimony, including at least one case that reached an appeals court. It is an interesting area open for exploration.

65. *Chthonic Law Definition*, WICKTIONARY, http://en.wiktionary.org/wiki/Chthonic_law (last visited June 8, 2013).

66. GLENN, *supra* note 6, at 60-61.

A problem is that this construction of American Indian environmentalism is inaccurate. It is true that most Indian cultures described all things as alive and sacred, but that did not mean they maintained a pristine, primitive environment.⁶⁷ Oral histories describe a partnership agreement between tribal members, animals, and plants regarding the rules of respect for one another. These agreements with fauna and flora did not prevent Indians from modifying their environments, and in some cases, wreaking havoc on it.⁶⁸

Indians in the Southwest began using irrigation thousands of years ago, and the land was degraded. Indian societies throughout eastern and southern North America regularly burned forests and plains to enhance growth and grazing for plants and animals valued as food, while destroying habitat for others. With the arrival of Europeans and their eagerness to buy furs, Indians chose to kill thousands of deer, beavers, and buffalo just for their pelts.

In order to make profits, Indians sold both finished and primary materials. Unfortunately, this meant that thousands of buffalo were killed for their hides, and countless beavers and other fur-bearing animals were trapped out of areas. As a part of Indian economies, horses, which competed with buffalo and other animals of the plains for food, posed both economic resources and environmental problems. Overgrazing led to more environmental degradation. Birds were hunted solely for their feathers; buffalo were killed for their tongues and used in ceremonies while the rest of the animal rotted. Wars were fought for scarce resources. Extra corn, beans, and squash were grown for commerce, and this taxed the land.

Of course, one could argue about degrees of destruction and altering the environment. However, Indians were fully capable of altering definitions for their needs and they did exploit their environments as they were taught by their supernatural beings. Green Indians is an anachronism culled from misunderstanding what sacred land and respect meant in American Indian cultures.

Do these major flaws in Chthonic theory change the admissibility of Chthonic law in contemporary courts? I argue that knowledge of what

67. The most extreme of the critics of the Indian as preserver of a pristine environment is Shepard Krech III, *Beyond the Ecological Indian* in *NATIVE AMERICANS AND THE ENVIRONMENT: PERSPECTIVES ON THE ECOLOGICAL INDIAN* (Michael E. Harkin & David Rich Lewis eds., 2007).

68. Shepard Krech's work cited above summarizes much of the scholarship of Indian relations with the environment. Although he might overemphasize the degradation attendant on Indian actions, it is a matter of degree. Indian understandings of the agreement with living creatures (flora, fauna, inanimate beings) is a topic that is beyond this article but worthy of exploration.

Chthonic societies really did and how they applied their laws offers greater room for Chthonic laws and principles to be established in courts. Before I hypothesize about the admission of Chthonic law, an aside is in order.

B. A NEW LEGAL RELATIONSHIP

American Indians have asserted their sovereignty in many ways for decades. Since the 1970s, American Indian policy is to recognize a government-to-government relationship between the United States and tribal governments. The Self-Determination Policy, established in a 1970 President Richard Nixon speech and referred to in legislation, has created tribal government flexibility.⁶⁹ Because of this flexibility, tribes have responded by assuming greater control of the institutions of government and service, including courts. There is a new venue for using Chthonic law and establishing precedents which can be transferred to federal and even state courts.

Nearly all tribes have established tribal courts staffed according to tribal regulations.⁷⁰ They appear similar to state or federal court systems. Criteria for the bench and for law practice are set by tribal government regulations and some systems are quite complex. Tribal courts' jurisdiction includes civil and misdemeanor cases. Despite some reform in allowable jurisdictions, tribal courts are restricted to Indians, and non-Indians are excluded from tribal jurisdiction.⁷¹

Chthonic law, which includes traditional law and customs, is admissible in most tribal courts. Some tribes have gone to the next level and introduced what most designate as peace courts.⁷² The Navajo Nation has the oldest (since 1982) and largest commitment to peace courts.⁷³ To the non-Indian, proceedings resemble mediation, but these proceedings employ tribal traditions. Peace courts' goal is the restoration of balance and harmony in society. Tribes consider these courts an improvement because Chthonic law is premised on repairing the community, not on punishing an

69. JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES (2d ed. 2010).

70. CLARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE (2004).

71. As always in Indian Country, there are a few exceptions. Non-Indians can accept tribal jurisdiction by waiver. The 2013 Violence Against Women Act allows tribal jurisdiction over non-Indians in domestic abuse situations, but these cases have yet to be tested in appeals, and the full ramifications of this reform remain murky. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4 127, Stat. 54 (2013).

72. Tribes that have established Peace Courts include the governments of: Turtle Mountain Chippewa, Navajo, Chickasaw, Shoshone, Arapaho, Grand Traverse Band, Seneca, Mississippi Choctaw, and several Canadian reserves.

73. Robert Yazzie, *Navajo Peacekeeping: Technology and Traditional Indian Law*, 10 ST. THOMAS L. REV. 95, 95-102 (1997).

offender. The jury is still out on the effectiveness of the peace courts as no systematic effort to evaluate them has been completed.⁷⁴

Even if nation state courts continue a discernible pattern of allowing Chthonic law, problems remain. Perhaps the most significant challenge is determining what Chthonic law is and how it applies in specific instances. No one is alive who ever knew the operation of Chthonic law when it was not subject to a colonial legal system. By its nature, Chthonic law is oral, and it is case specific within an amorphous theory of law. There is no specific response that can be routinely applied to a particular offense. There is much doubt as to whether there are existing elders who know enough of the ways of several generations ago to apply Chthonic law to modern cases.

No tribe has had its own justice system free from American theories of law and free from external influences that lend themselves to punishment for at least seven generations.⁷⁵ Contemporary tribal citizens and the court systems they have crafted feature law codes, punishment of perpetrators, forced compliance, and violence. Today's tribal citizens are as likely to demand punishment of miscreants as are citizens from the dominant American state system. They have lived under an adversarial legal system all of their lives and the lives of their parents and grandparents.

The existence of American style legal systems on reservations and the restrictions imposed by American laws further limit the possibilities of peace courts or Chthonic law usage. Even in peace courts where both parties agree to participate, tribal government action is required to enforce decisions. Criminal and civil proceedings are still in play if the peace court fails. Tribal court actions must comply with federal standards in order to allow for appeals from the tribal system to the federal court system.

Perhaps many of these points scored against peace courts associated with Chthonic law are moot. Tribal governments are sovereign and if the people want a court based on perceived Chthonic law, whether or not it is

74. Most published material so far has been more like descriptive advocacy. *See generally* Robert Yazzie, *Navajo Peacekeeping: Technology and Traditional Indian Law*, 10 ST. THOMAS L. REV. 95 (1997-98). Another descriptive article is James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55 (1997). Another article with a focus on abused women, particularly pertinent since passage of the Violence Against Women Act which expanded tribal jurisdiction, is Donna Coker, *Enhancing Autonomy for Battered Women: Lessons From Navajo Peacemaking*, 47 UCLA L. REV. 1 (1999-2000). The difficulty of reconciling recent trends in American courts and mediation are explored in Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyers' Ethics in Tribal Peacemaking*, 27 U. TOL. L. REV. 821 (1996).

75. The last generation to have practiced indigenous law in its indigenous forms had to be adults before 1883 when the Courts of Indian Offenses were established.

true Chthonic law, then they can create it. Legal fictions are important because they can allow justice reform to proceed.

VI. REFLECTION

Chthonic law theory is seriously flawed by the standards of historiography. It is truly legal fiction as constructed, but as with much fiction, there are factual components floating around. These components can be valuable tools for tribal cases in the courts of the conquerors and in current tribal courts.

It seems that United States and Canadian courts have sometimes accepted the introduction of evidence based on traditional Chthonic law.⁷⁶ The principle of admissibility has been established. It is regrettable that even if Chthonic law has been admissible in some courts, many judges and lawyers remain dismissive of its applicability and legitimacy. At least the door is open, and indigenous peoples may continue to step through for justice.

One of the frustrations for practitioners of American style law is the idea that Chthonic action (i.e., compensation or punishment) is determined by the context of the offense, not by a specific punishment for a particular offense.⁷⁷ There is no automatic sentencing if one commits a particular offense. Instead, the circumstances around the action are taken into account before punishment is decided. Another frustration for those familiar with adversarial law is that Chthonic law permits “judgment” by a consensus reached by individuals not directly connected with the offense, the victim, and the offender.

Perhaps the greatest impediment to the integration of Chthonic law with nation state law is that the colonial states have too much invested in the status quo. Imagine if Chthonic law actually provided justification for negating land titles in British Columbia or South Dakota. The probability is that *res judicata* will override efforts to overturn decisions that ignored or refused to admit Chthonic law.

VII. CONCLUSION

Currently, United States Indians are wary of the courts, for good reason. A series of decisions since the 1980s appear to have reversed the

^{76.} See generally Babcock, *supra* note 51; see also *Senator v. United States*, No. CV-05-3105-RHW, 2010 WL 723792 (E.D. Wash.) (accepting Yakama traditional divorce and marriage laws).

^{77.} See generally RICHLAND, *supra* note 69.

trend toward supporting tribal sovereignty.⁷⁸ In *Delgamuuk v. British Columbia*⁷⁹ a Canadian court decisively supported Chthonic law, but British Columbia is delaying compliance and still denies that there are any rights for Indigenous people because Chthonic law is not real law. In the long view, the Chthonic law model should bear good fruit for American Indians as they pursue more accepted legitimacy in American and Canadian courts. Courts of other nations have also accepted indigenous law. This reinforces the possibility of a good future for its adoption.

The next task seems to be educating more lawyers about the Chthonic model. Lawyers will then be able to accept the premise of Chthonic legitimacy and see it count as much in evidence as facts from other sources. Some of these lawyers may well become proficient in educating judges at all levels and may then succeed them.

Ironically, Chthonic law, an oral narrative beholden to accumulated tradition, needs to yield to the need to have it written down as precedent and with rules of evidence that can be understood consistently. One wonders how Chthonic law can work effectively when subject to the American style adversarial approach. The theory needs to be modified to come closer to what really happened in Chthonic societies.

Chthonic law seems to have the greatest possibility for use in courts that are treating issues that affect different nations rather than individuals. For instance, issues dealing with how boundaries existed and tribes were treated can benefit claims between states, and tribal governments could lend themselves to Chthonic law. It could even work with individual cases involving non-Indians, but there are a great many obstacles. Regardless of what it is called, Chthonic law needs to be admissible in American courts, in front of judges who understand it.

78. Cases that have been pernicious in this sense are described by John P. LaVelle in *Beating A Path of Retreat from Treaty Rights and Tribal Sovereignty: The Story of U.S. v. Montana*, in *INDIAN LAW STORIES* 535-90 (Carole Goldberg et al. eds., 2011).

79. [1997] 3 S.C.R 1010 (Can.).