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American Indian Courts and Tribal Self-Government

Richard B. Collins

University of Colorado Law School

Ralph W. Johnson

University of Washington School of Law

Kathy Imig Perkins

National American Indian Court Judges Association

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American Indian Courts and Tribal Self-Government

American Indian courts are expressions of Indian self-determination and should be maintained and strengthened.

**By Richard B. Collins, Ralph W. Johnson,
and Kathy Imig Perkins**

A RECENT article in this *Journal* by Samuel J. Brakel (August, 1976, page 1002), "American Indian Tribal Courts: Separate? 'Yes' Equal? 'Probably Not,'" contained a number of observations and conclusions about American Indian courts. It offered no data, however, to support its conclusions; it contained important factual errors; it attributed to Indian people, without substantiation, negative attitudes toward the Indian courts; and it contained derogatory and inaccurate comments about the integrity and independence of the Indian courts and the training available to their judges.

This article is intended to rebut several of Mr. Brakel's key assertions and to emphasize the well-established right of Indians to maintain their own courts. Each of the authors has had extensive contact and experience working with Indian courts. Mr. Collins is associated with the Native American Rights Fund. He formerly had many contacts with Indian courts when he practiced law on the Navajo Indian Reservation. Professor Johnson, who has taught law at the University of Washington School of Law for

twenty-one years, has for the past six years been an instructor in the National American Indian Court Judges Association's American Indian court judges training program. Kathy Imig Perkins has been associated with the National American Indian Court Judges Association since 1970, has participated in the growth and development of the training program for Indian court judges, and has witnessed the careful development by these judges of a court system that can form an integral part of the future of the American Indian people.

Indian Courts in the Southwest

By Richard B. Collins

MY EXPERIENCE with Indian tribal courts is largely confined to Arizona and New Mexico, where I practiced law on the Navajo Indian Reservation and observed the Navajo, Hopi, Apache, and other tribal courts. The tribes in Arizona and New Mexico include about 63 per cent of the reservation Indian population served by tribal courts. The Navajos alone are more than 41 per cent of the national total.

The Brakel article's inaccuracies fall into several distinct categories: legal errors regarding the jurisdiction



of the tribes; factual errors regarding the nature of tribal courts (at least as they exist in the Southwest); and false and invidious comparisons to rural state courts based on apparent lack of acquaintance with rural state courts. The article then concludes with value judgments about tribal courts and Indian separatism that are based on some wrong assumptions about the history of Indian affairs in this country. Since the last of these is the most egregiously incorrect, I address it first.

Indian tribal courts are only a part of the well-established legal and political institution of Indian separatism, the right of reservation Indians "to make their own laws and be ruled by them" (358 U.S. 217). Mr. Brakel strongly suggests that Indians on reservations have not been consulted about the policy of Indian separatism, but this does not square with the facts. United States policy supported Indian separatism until about 1871, but since that time the government has repeatedly forced on Indians the most exacting pressures to assimilate into Anglo-American society. All variants of both carrot and stick have been tried on a people reduced by conquest, disease, poverty, and humiliation to a vulnerable state. While some Indians succumbed, the great majority steadfastly have resisted a century of blandishments of the world's most powerful government and have insisted on their right to separatism.

For almost a century the abandonment of separatism was clearly the easier path. Instead most Indians have quietly but firmly maintained their separate ways—often at great personal cost. Few more decisive and eloquent public opinion polls exist in the history of human affairs.

The Indian tribal courts were established by the federal government and are Anglo institutions. They are now mostly Indian run and are gradually being integrated into tribal life. But given the history of government-Indian relations, discontent with tribal courts is far more likely to be motivated by the belief that they are not traditional enough rather than by a preference for rural state courts. In my experience, rural state courts are unpopular with Indians and for good reasons.

Mr. Brakel says that tribal court jurisdiction "covers and is final with respect to all civil and criminal matters occurring among Indians within reservation boundaries, with the exception of thirteen major crimes. . . ." This statement is misleading both as to coverage and finality. The authority of Indian tribes to impose criminal penalties is limited by federal law to petty misdemeanor ceilings—six months' imprisonment and \$500 fine. 25 U.S.C. § 1302 (7). Tribal court criminal jurisdiction is thus severely circumscribed.

Punishment of serious crimes is complex. The fourteen major crimes (18 U.S.C. § 1153) are prosecuted in federal court. 18 U.S.C. § 3242. (It is debatable whether federal jurisdiction is theoretically exclusive of tribal



Richard B. Collins

jurisdiction, but as a practical matter it is.) So are all general federal crimes. Other serious crimes in which there is a non-Indian victim also are prosecuted in federal court pursuant to 18 U.S.C. § 1152. This leaves the so-called victimless crimes, as to which the law is un-

certain, although one reported case sustains federal court jurisdiction to convict an Indian of violation of state gambling laws on a reservation (181 F. 2d 873). Tribal court convictions resulting in a jail sentence are no more final than state ones, since habeas corpus review is available as a matter of right in federal courts. 25 U.S.C. § 1303.

Mr. Brakel states that "the tribal courts often cede to state jurisdiction." This statement is factually wrong in the Southwest and is legally questionable in light of a decision of the United States Supreme Court forbidding these cessions by tribal courts (400 U.S. 421).

Mr. Brakel writes that criminal activity "is rampant on most reservations," with reference to assault and other misdemeanors. We are not told what Mr. Brakel's standard of "rampant" is. No doubt reservation crime rates are high compared with affluent suburbs and prosperous farm country towns. But this is not a fair or meaningful comparison. Indians were left with the poorest land unwanted by white settlers and with shattered economies, and their communities are statistically the nation's poorest. Crime rates are typically high in poor communities, although comparatively, Indian reservations are low in crime compared with city slums and other areas of high unemployment. Violence exists but is far less than in Detroit or Newark.

Mr. Brakel says that civil cases in tribal courts are rare. I have no statistics, but the Navajo courts handle a large domestic relations caseload and a fair number of minor tort and debt cases. Of course, reservation areas are poor and underdeveloped, so that sophisticated commercial and financial cases do not arise. He says that English is the dominant language in tribal court affairs, except in the Southwest—that is, except where 63 per cent of the Indians served by tribal courts live. In the Navajo courts about 80 per cent of the proceedings are in the Navajo language—a lovely tongue with a proud oratorical tradition. For many adult Navajos this is an extremely important advantage over state courts, since they speak little English, and translators in border-town state courts are very poor or lacking. The Navajo courts go to much greater lengths to provide translation when appropriate, and since judges and most practitioners in the courts are bilingual, accuracy is assured.

Mr. Brakel's most incredible statement about Indian tribal courts is: "On the whole, tribal judges tend to be

more 'Anglo-American' than white judges whom the Indian judges by and large seek to emulate." This is the sort of absurd comment that impeaches itself better than any critic could. Southwestern Indian judges are mostly raised in the language and traditions of their people. Their role as judge is alien to their traditions in some ways, and they do outwardly imitate white courts. But the inner values of a lifetime are hardly so easily cast aside. These manifest themselves in subtle ways—greater humility, greater consciousness of family and traditional relationships, and a recognition of the marital and other social customs of the people. Younger judges may be less traditional, but only in degree.

Indian Tribal Courts Do Have Problems

I do not intend to suggest that all is well with Indian tribal courts. Serious problems exist, some of which Mr. Brakel identifies. Many are traceable to lack of money and many to outside pressures to force the tribes into an Anglo-American mold—a good example is Mr. Brakel's own unquestioning assumption that separation of powers is an inherent good. But Indian tribal courts certainly function more sensibly, fairly, and practically than the article would suggest.

The Brakel article contains explicit and implicit comparisons with the rural state courts that would serve Indian reservations in the absence of tribal self-government. Since most tribal jurisdiction is over domestic relations, misdemeanors, and minor torts in a rural setting, the relevant comparison should be with rural state justice of the peace level courts.

Mr. Brakel clearly believes tribal courts to be inferior to these state courts, as the title of his article states. In my view he is not well acquainted with rural state courts of this level.

Mr. Brakel decries the level of education of tribal judges (ignoring, of course, the oral tradition education of Indian judges). However, in New Mexico and Arizona a J.P. level judge need have only a high school education. And the Supreme Court of the United States has upheld the utilization by state court systems of nonlawyer judges (427 U.S. 328).

Mr. Brakel also criticizes the sharing of quarters by tribal police and courts, pointing out (quite correctly) that this does not improve the public's image of a judge's impartiality. But he fails to observe that this same sharing is common all over the United States, even in cities. It is unfortunately true that Indians have imitated this practice, but that does not differentiate their courts from ours.

In several ways Mr. Brakel criticizes the lack of independence and impartiality of tribal courts, and this is indeed a problem in many places. But it is certainly one shared by rural state courts, which typically are close to local land-owning and business interests. And the race issue is treated too lightly by Mr. Brakel. While our most notorious cases have arisen in the trials of black

people in the South, Indians have fared little better in state courts. The United States Supreme Court once sustained federal protection of Indians from state jurisdiction observing: "Because of the local ill feeling, the people of the states where [Indians] are found are often their deadliest enemies" (118 U.S. 375). While matters are not so today, neither has racial prejudice ceased to be important.

If the choice were mine, I would choose Indian tribal courts over existing rural state alternatives as more suitable, more economical, and more just for the Indian communities they serve. But the choice is not up to me or Mr. Brakel. It is the law of the land that the Indians decide for themselves. They have opted determinedly for separation so far, a choice they are free to reverse if they wish. A study of the facts concerning tribal courts would be welcome, but one laced with manifest destiny value judgments should not be sponsored.

The Northwest Experience

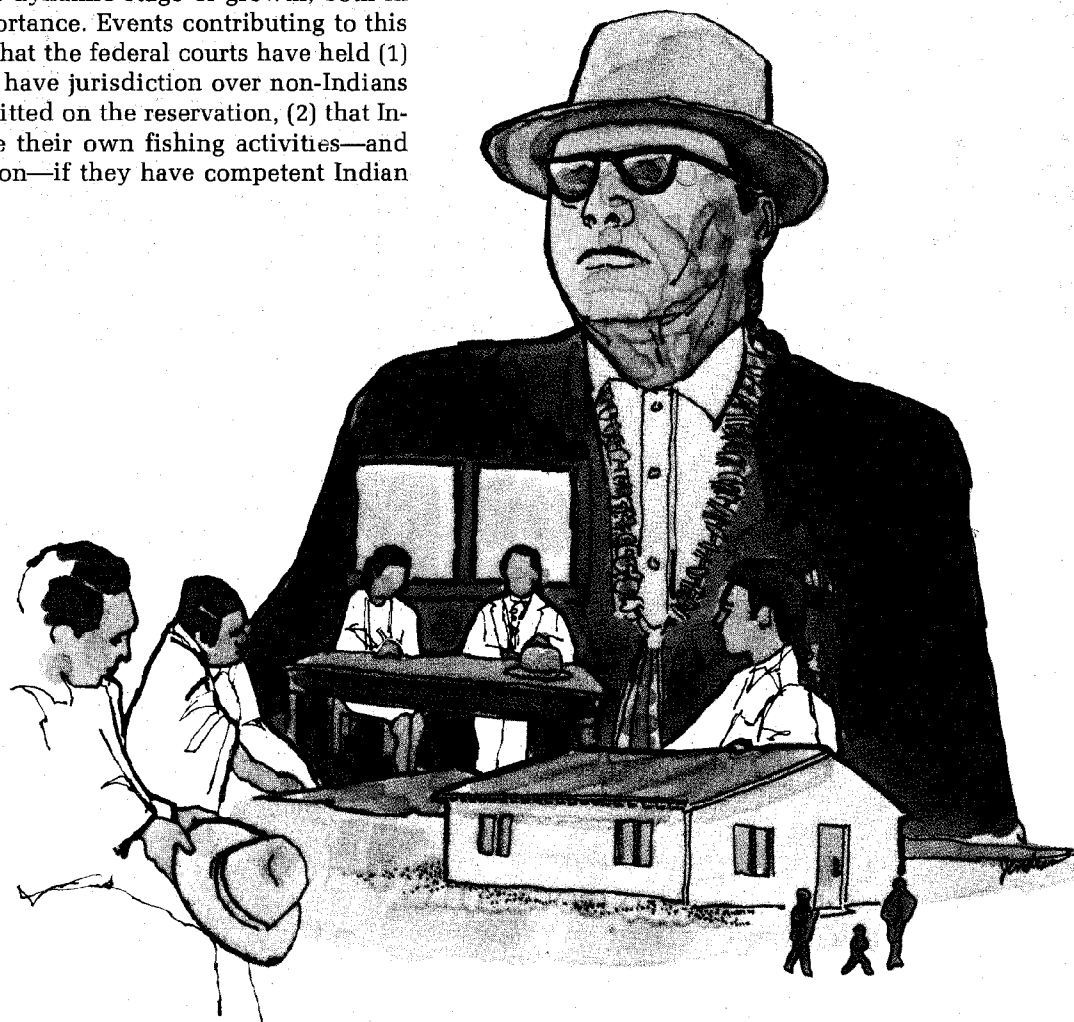
By Ralph W. Johnson and Kathy Imig Perkins

INDIAN TRIBAL courts throughout the United States are in a dynamic stage of growth, both in numbers and importance. Events contributing to this phenomenon are that the federal courts have held (1) that Indian courts have jurisdiction over non-Indians for offenses committed on the reservation, (2) that Indians can regulate their own fishing activities—and oust state regulation—if they have competent Indian

courts, policemen, jails, and the like, (3) that the 1953 federal law authorizing states to assume jurisdiction over certain Indian lands is to be construed very narrowly, (4) that due process is not denied merely because a judge is not a lawyer, and (5) that many civil and criminal issues arising on Indian reservations are exclusively under Indian court jurisdiction.

These events have combined with the rising expectations of Indian people about the role of their courts in conflict resolution, resulting in the renovation of several moribund Indian courts and the establishment of many new ones. In addition, Indian courts have begun to exercise their powers of review over administrative decisions of tribal governments.

In 1970, in response to these new demands, the Indian judges created the National American Indian Court Judges Association, whose principal goal has been to organize an increasingly sophisticated and demanding continuing judicial education program for Indian court judges throughout the country. This organization has also launched a campaign to achieve greater separation of powers between the judicial and executive branches of Indian governments.





Kathy Imig Perkins



Ralph W. Johnson

Mr. Brakel's article contains many negative and unsubstantiated conclusions about individual Indian attitudes toward Indian courts. Certainly American Indian people realize that their courts are not perfect, but the courts generally do have the support of the Indian communities in which they operate. There exists, among the Indian people in the Northwest and elsewhere, a strong desire to improve these Indian courts rather than to abdicate their judicial jurisdiction to state or federal courts.

Mr. Brakel erroneously states that Indian people living in the Pacific states "even if living on 'reservations' or otherwise designated Indian land holdings are, with a few exceptions, subject to state court jurisdiction." The legacy of Public Law 83-280 in the Pacific states—Washington and Oregon in particular—is much more complex than that. It is more accurate to state that acts committed on Indian reservations are generally not subject to state jurisdiction with certain exceptions.

Tribes Have Revamped Their Codes

In Washington, for example, some nine (of twenty-three) reservations are subject to substantial state jurisdiction at their request, although most of these have now requested return of this jurisdiction to their own tribal courts. The other fourteen reservations are not subject to state jurisdiction except for domestic relations, child welfare, mental competency, and automobile travel on public highways. Most of these fourteen tribes also have requested that even this modest element of state jurisdiction be returned to their own tribal courts.

Other criminal and civil matters are handled by Indian courts, including jurisdiction over non-Indians for acts committed within reservation boundaries, subject, of course, to the limitation of six months' imprisonment and a \$500 fine imposed by the 1968 Indian Civil Rights Act.

Mr. Brakel claims that Indian courts often cede probate, juvenile, and related jurisdiction to the states. In fact, exactly the opposite is true. The Quinalts, the Makahs, and other tribes in this region gradually have

worked out agreements with state officials and courts to have domestic relations and juvenile matters referred to the Indian courts for disposition, under the mutual understanding that the Indian court can do this in a way that is more satisfactory to the Indian people. It is noteworthy that in the past two years the New Mexico and Washington supreme courts have held that tribal laws are entitled to full faith and credit the same as laws of "sister states" (533 P. 2d 751 and 555 P. 2d 1334).

Mr. Brakel's assertion that Indian tribal codes are "typically . . . updated versions of the old B.I.A. codes" is no longer true. Most Indian tribes in the past ten years have completely revamped their codes. Others are in the process of doing so with the assistance of legal experts, both Indian and non-Indian. The implication that the use of non-Indian legal expertise in the revision of these codes somehow renders them "unquestionably Anglo-American" and therefore non-Indian is incorrect. We are not sure what standard Mr. Brakel used to determine the degree of "Indianness" of the tribal codes he examined.

Indians do live in the twentieth century and are required by federal law to conform in substantial respects to non-Indian legal procedures and are subject to the influence of the American legal system. It is understandable that their codes would not appear as they might have if the white man had never visited their shores. Although B.I.A. lawyers did, in earlier times, tend to copy their own models for tribal codes, that practice is seldom seen today. The lawyers who prepare these codes now do so under the direction of increasingly sophisticated tribal leaders. The codes are normally reviewed in depth at several stages of drafting by appropriate tribal members. It is distorting the reality of the attorney-client relationship to imply that the work product is non-Indian because the tribe hires a non-Indian lawyer to draft it.

The Brakel article also makes these assertions which are invalid or misleading:

1. Indian court judges are "not infrequently . . . picked from the ranks of the tribal police." This is simply false. In addition, it is misleading to say that "at times they appear to be selected precisely because they are politically weak." One needs only to make acquaintances among the Indian judges in the Northwestern states to realize the inaccuracy of such a statement. It is no doubt true that one criterion for selection of an Indian judge by a tribal council—as with presidential and gubernatorial appointments of federal and state judges—is their philosophical compatibility with the political leadership of the tribe.

2. "... [P]leading guilty is a traditional Indian response to being accused and placed before a court." Mr. Brakel seems to think that this response is different from that in non-Indian courts where well over 90 per cent of defendants brought before municipal and state courts plead guilty, particularly to misdemeanors.

3. "On the whole, tribal judges tend to be more 'Anglo-American' than white judges." We have seen absolutely no evidence to support such a conclusion in our years of extensive dealing with Indian courts. While it is true that Indian court judges are not "radical" in the sense that American Indian Movement members are sometimes perceived, nonetheless these judges take great pride in their Indian heritage and consistently reflect concern about the protection of Indian cultural values in their judicial activities.

4. There are now 127 Indian tribes, rather than the 60 Mr. Brakel cites (in 1970 there were 85), all recognized by the federal government as having responsibility for the establishment and operation of court systems within their reservation governments.

The fact that the number of Indian courts has been increasing rapidly indicates support by the Indian people of an independent Indian court system. The federal retrocession procedure requires the approval by ballot of a majority of the Indian reservation adult population. In 1975 sixteen tribes in Nevada completed this procedure and have now established Indian courts. In Washington, although eleven tribes originally requested state jurisdiction under Public Law 83-280, two tribes have now obtained a return of that jurisdiction, and eight others have attempted to obtain retrocession, which has been denied because of the uncertainty of state laws on the subject. The tribes in the Pacific Northwest are generally upgrading their court systems to exercise as much jurisdiction as possible under relevant state and federal laws.

An important aspect of this growth in the number of Indian courts has been the development of a continuing judicial education program by the National American Indian Court Judges Association, a program which Mr. Brakel passes off lightly as lacking "direction" and "relevance."

Funded by the Law Enforcement Assistance Administration, this training program has carried forward a carefully planned series of regional seminars, meeting periodically some sixteen days a year for study, lectures, and discussion on trial procedures, civil rights, evidence, and other topics. The number of participating judges has grown from 42 in 1970, representing 85 tribal courts, to 200 judges in 1976 representing 118 Indian courts. The seminars are taught by lawyers, judges, and law professors and have resulted in an extensive set of teaching materials, including a recent 476-page casebook, *Cases and Materials for Indian Court Judges*, as well as other publications of value to Indian courts, such as *Benchbook*, *Model Indian Court Rules of Criminal Procedure*, a book on *Child Welfare and Family law*, and a *Court Clerk's Handbook*.

One aspect of the Brakel article continues to puzzle us. We have spoken with (1) all of the tribal judges in the Pacific Northwest, (2) most of the judges from reservations throughout the western United States, (3) the fourteen members of the board of directors and steering

committees of the N.A.I.C.J.A., representing tribes from all over the western United States, and (4) the staff of the N.A.I.C.J.A. in Washington, D. C. None of these was contacted by Mr. Brakel or anyone identifying themselves as working with an American Bar Foundation study. None is aware of the sources of data that he purports to rely on for the conclusions he draws about Indian courts, their jurisdiction, operation, acceptance by tribal members, or the effectiveness of their training programs. All have major disagreements with his conclusions.

In view of the fact that all or nearly all of these judges are elected either by their tribal councils or in popular elections by their tribal members, and thus represent a very large body of Indian opinion, it seems inappropriate that Mr. Brakel should have ignored their views so completely.

Much more could be said about the revival of spirit among Indian peoples that has characterized the past twenty-year movement away from termination and toward self-determination. A flood of data from multiple sources, including Indian people, Indian courts, federal agencies, federal and state courts, and social and health service agencies, demonstrates overwhelmingly that Indian courts play a vital role in Indian life and will play an even more vital role in the future. ▲

Mr. Brakel Responds:

ONE OF THE major criticisms of my piece in the rebuttal is that it failed to substantiate all its conclusions. The simple reason is that the *American Bar Association Journal* format precludes this. With the appearance of this rebuttal, I have an opportunity to present some of the substantiating information. The full story is in a detailed report not yet published.

The authors take pains to make us aware of their various associations and experiences with the National American Indian Court Judges Association and the Native American Rights Fund, while adding that, by contrast, many prominent people in these organizations had not heard of me. I would have regarded association with N.A.I.C.J.A. and N.A.R.F. as more troublesome than reassuring from the point of view of objectivity, since these organizations have a clear stake in supporting tribal separatism and promoting favorable accounts of tribal court operations. Responsible research on tribal courts hardly requires being on familiar terms with all the politicians or administrators of the "big" organizations, any more than gaining insight into the performance of American lawyers would be helped much by cultivating the personal acquaintance of top American Bar Association personnel.

During the course of my study, however, I had personal contacts, in some cases extensive, with Judges Kirk (Navajo) and Upchego (Uintah and Ouray) of the N.A.I.C.J.A., president and member of the board of directors respectively; Mr. Colosimo of Arrow, Inc.,

major consultant to N.A.I.C.J.A.; Mr. Taylor and Ms. Ayer, directors of the Indian Civil Rights Task Force (Department of Justice); Messrs. Parker (Chippewa-Cree) and Trudell (Santee Sioux) of the American Indian Lawyers Association and several other Indian groups; plus correspondence with a substantial number of the numerous other organizations and associations that concern themselves with Indian issues and problems.

More relevant, the findings reported in my article were based on extensive firsthand study of the tribal courts as well as the rural state courts. I did observations and interviews in the courts of the Devils Lake Sioux (Fort Totten) Reservation, North Dakota; Standing Rock Sioux Reservation, North and South Dakota; Blackfeet Reservation, Montana; Uintah and Ouray Reservation, Utah; and the Navajo Reservation, New Mexico and Arizona. No study can cover all reservations, and no "sample" will ever be fully satisfactory, but the above presents a good mix in terms of activity and size, and reputed "sophistication."

I visited state courts (including justice of the peace courts) in areas immediately surrounding these reservations. And I examined several reservations under state court jurisdiction: the (Eastern) Cherokee Reservation in North Carolina; the White Earth and Leech Lake Reservations in Minnesota; and the Pawnee, Osage, (Western) Cherokee and Creek Indian "concentrations" in reservationless Oklahoma. I also have been involved in extensive study of rural (state) justice in unrelated projects—diversion in criminal cases and legal services for the poor.

Indian Courts Play a Vital Role

1. While no one would deny or disparage the strong resistance to total absorption into the dominant society displayed by the Indian people, the question of whether the new brand of separatism is either desired or desirable is a different matter. It is not irrelevant that more than half the people in this country who identify themselves as Indians live integrated lives off the reservations. Even many of those on the reservations spend at one or various points in their lives significant time in off-reservation society. More precisely to the point is the empirical fact that reservation Indians are extremely skeptical of their tribal governments and institutions, including the tribal courts. This skepticism is based on their experience with these institutions. True enough, many reservation people also distrust white institutions. But it is my view that the growth of a federally dependent separatism generally and the expansion of tribal court jurisdiction specifically are in the long run futile and that it would be better and more realistic for the Indians to learn to trust and live with integrated institutions.

2. The criticism of my description of the coverage and finality of tribal court jurisdiction is difficult to understand. Mr. Collins himself asserts that "tribal

court convictions . . . are no more final than state ones." I consider that final enough to merit the term. As for coverage, I am well aware that criminal penalties in the tribal court cannot exceed six months' imprisonment and a \$500 fine. That does not mean jurisdiction is limited to "petty misdemeanors," however, as Mr. Collins insists. In theory, the courts could handle murder cases within these limitations. In practice, of course, they do not—the Major Crimes Act and the desire for more serious penalties in major crimes take care of that. But many tribal courts do not handle a great deal more than just petty misdemeanors. And the important fact to note is that, in view of the minimal role played by the federal courts in individual cases on the reservations, the tribal courts are very significant institutions on the reservations. To quote Professor Johnson: "[the] Indian courts play a vital role in Indian life. . . ." It is precisely for that reason that their inadequacy is an important matter.

The fuss over whether the tribal courts "cede" or do not cede certain matters to state courts is also spurious. The facts from my research experience were that the Uintah and Ouray tribe's juvenile cases were handled in the Utah state courts and that jurisdiction in domestic cases was not exercised by either the Standing Rock or the Devils Lake court. Professor Johnson's own description of the various amounts of jurisdiction exercised and not exercised by the tribal courts in Washington make the same point. If the big stumbling block is the word "cede," I have no objection to Mr. Collins's substituting the words "leave to," or "not assumed," or "not reassumed."

3. Criminal problems unfortunately are "rampant" on the reservations. Arrest rates range from five to thirty times the national average. There are many factors to explain (or "excuse") this fact, some of which Mr. Collins notes, but they do not contradict it. That crime rates are also horrendous in the inner city of Detroit or Newark is small cause for comfort. I would not want to wish these rates on any society.

4. Civil cases in the Navajo courts comprise about 5 per cent of the total caseload (in part this reflects the unusually high criminal caseload). Civil cases are even more sporadic in most other tribal courts. In rural state courts the criminal-civil ratio is more like fifty-fifty.

5. English remains the dominant language in tribal court affairs, even if—as I pointed out—native languages predominate in courts in the Southwest. That the Navajo comprise a large percentage of the total reservation population in this country is less relevant to my discussion than the fact that they are only one reservation, one court, among many. Statements about the Navajo language being "a lovely tongue" and so on are only patronizing. In an environment in which artificial separations have ceased to be, translators should be neither very necessary nor hard to come by, assuming for the sake of argument that this is a real problem in border towns surrounding the Navajo Reservation.

6. That Indian judges, including Southwestern ones, as Mr. Collins concedes, "do outwardly imitate white courts" is the relevant fact. The operations and decisions are what count. Whether Mr. Collins's assumptions about the judges' inner life are valid, I cannot say. I have my doubts in view of the fact that these "inner values" are so readily cast aside on the operational level.

7. Tribal courts are far more significant institutions in reservation society than justice of the peace courts are in off-reservation areas. Still, I have looked at J.P. court operations, as well as rural county and district courts. My conclusion that the tribal courts are "probably not equal" stems from comparison with all three types of white courts.

8. Educational levels are a problem among Indian judges whether or not New Mexico or Arizona requires much education for J.P.'s. Education is a valuable asset for judges in Indian as well as white courts. More generally, I am disturbed by the constant refrain that because there are deficiencies in some segments of white society and institutions—educational shortcomings, high crime rates, high guilty plea rates, political interference in nonpolitical institutions, and so forth—this somehow makes similar deficiencies in Indian society and institutions less of a problem.

9. The tribal codes of four of the six tribes that I have seen were, as I stated, little more than "updated versions of the old B.I.A. codes." The Navajo code was one of the substantially revamped and expanded jobs to which Professor Johnson refers. The Navajo code was very much an Anglo-American document, however, not necessarily because it was put together by white lawyers, but because its provisions read just like state statutes. Professor Johnson's "explanation" that Indians today have little choice but to live under Anglo-American-like laws in a twentieth century Anglo-American-dominated environment is just my point.

10. The prior police experience of a number of Indian judges was pointed out to me by the judges themselves, in particular by Chief Justice Kirk of the Navajo tribe, who has a police background.

11. The lack of political independence of tribal court judges, disputed by Professor Johnson or dismissed as nothing more than "philosophical compatibility," is a salient fact and serious problem, as is acknowledged explicitly by Mr. Collins.

12. That "pleading guilty is a traditional Indian response" was a point of view pushed upon me by the tribal judges themselves and by some "Indian experts." I have some doubts that the "tradition" argument is a valid explanation today, certainly not a full one. That guilty plea rates are high in non-Indian courts provides little comfort. High guilty plea rates may be less than desirable no matter where they occur. In white courts, moreover, they are generally the end result of a bargaining and fact-finding process, which

is not the case in tribal courts, where they generally are made unadvised and unconsidered. Guilty plea rates in misdemeanors in rural state courts and in felonies in all state courts are far lower than the 90 per cent plus figure that Professor Johnson cites for municipal courts. Finally, neither the pressures nor inducements toward pleading guilty that exist in some state or municipal courts apply generally to the tribal courts.

13. The number of tribal courts one counts depends heavily on how one defines tribes and courts and which sources one consults. The figure of 60 I used included the major ones and was pieced together from sources such as the *Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate* (Eighty-seventh Congress, first session 1961–65); James R. Kerr, "Constitutional Rights, Tribal Justice, and the American Indian," 18 *Journal of Public Law* 311 (1969); and Note, "The Indian: The Forgotten American," 81 *Harvard Law Review* 1819 (1968). Professor Johnson's count of 127 (up from 118 on his first draft, showing the elusiveness of the numbers) must include a good number of courts of very limited jurisdiction from very small bands or tribes. If his description of the varying and often minimal degrees of jurisdiction among the 23 "reservations" in Washington is accurate, that would go a long way toward explaining disparities between my and his count of the number of "tribal courts." Another fact is that the number of reservation courts of one sort or another has increased since 1975 when my article was submitted to the *American Bar Association Journal*.

14. My evaluation of the judicial education program run by the N.A.I.C.J.A. was based on personal attendance at a two-day session in Denver, talking with the judges and a few instructors about it, plus perusal of each manual of the "extensive set of teaching materials" cited by Professor Johnson. It is also based on my perception of the difficulty of successfully training as judges a group of people of limited formal education, among whom there is much discontinuity, resulting in the aggregate in a low level of practical experience to compound the deficient educational experience.

I will not bother with any other smaller points. I am no advocate of total melting-pot assimilation, nor do I entertain any of the "manifest destiny" notions with which the rebuttal charges me. My qualms about tribal courts and my reservations about Indian separatism stem solely from observation and experience. In addition, I see the integrated experience as the only promising and realistic long-term prospect for the Indian people in this country.

That does not mean I would deny their right to distinctiveness in many aspects of daily life or culture, either now or in the long run. It does mean that I would not want to be an accomplice in the perpetuation and expansion of an artificial and federally dependent separatism. ▲