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WOLF WARRIORS AND TURTLE KINGS: 
NATIVE AMERICAN LAW BEFORE THE BLUE COATS

Rennard Strickland*

One of the great myths of the white invention of the Indian was that there was no law among Native Americans before the white man except for a single Indian "primitive" legal system of blood revenge, uniform across the North American continent. This is not so. Law existed among Native Peoples long before white contact. Quite simply, the Indians had law. Before white contact, Native America nourished a rich and diverse system of law—a system of law that varied dramatically from people to people.

High Forehead, the early twentieth century Cheyenne informant of E. Adamson Hoebel, reflected upon law in Native America. Hoebel, the father of the modern anthropological study of Indian law, records this incident in which this Cheyenne recognizes the power and purpose of traditional social control:

High Forehead had been both intrigued and perplexed by the line of questioning I had been following in the investigation of Cheyenne law-ways.... High Forehead was bothered because the line of questioning seemed to him to put emphasis on the troublesome side of Cheyenne behavior.... The realization slowly obtruded upon his consciousness that the Cheyennes, his people, had on their own responsibility in their time dealt with and met many problems of social order.

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And one noon as we lay beneath a cottonwood tree under a blue Montana sky, beside the waters of Lame Deer creek, almost on the spot where Lame Deer, the Sioux chieftain, was killed in the spring of [1877], he quietly said, “The Indian on the prairie, before there was the White Man to put him in the guardhouse, had to have something to keep him from doing wrong.”

Law for the Native American, as for all of us, is that something that keeps us from doing wrong and tells us what is right. Together, these two functions constitute the social control mechanism we call law. It was Oliver Wendell Holmes, Jr. who said that, after all, “law [is] a great anthropological document.” Law reflects the deepest spirit and values of a civilization.

If we were to do a “word identity test” about the American Indian—asking folks in the general population to respond to the word “Indian” with the first words that popped into their minds—a frequent adjective would be “lawless.” On the movie screen and in popular literature, Native Americans appear as bloodthirsty, primitive, lawless savages.

This lawless image predates the on-screen Indian by at least four hundred years. The accounts of the earliest explorers, soldiers, missionaries, and settlers record that Indians were a people without law. Lawless! Lawless! Lawless! It was a monotonous litany, mistaken but almost unanimous. Early Europeans were searching for the cultural symbols that they had come to identify with law. They were looking for powdered wigs, silver stars, blindfolded ladies holding scales of justice, and thick, leather-bound books. When they saw none of this they concluded, in an understandable but ethnocentric judgment, that there was no law. Indians were lawless.

We, being enlightened moderns, know that law is at the center of any society—that High Forehead was right; that before the Blue Coat, before the Guard House, there was Indian law. The traditional Cheyenne Wolf Warrior wearing the skin of the totemic beast of his military society,

1. E. Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* 3–4 (2d prtg. 1961) (citation omitted). In the 1970s, the author was lucky to work with Professor Hoebel on a proposed PBS documentary on Indian law. Hoebel’s intellect, energy, enthusiasm, and sharing spirit were an inspiration to a then-young professor beginning his study of traditional social control systems. Hoebel’s published works are foundational documents for the anthropological study of law and the role of law in people’s lives.


serving his people as a public figure, is every bit as much an officer of the law as is our robed and wigged barrister.

This essay explores the law and legal systems of a selected group of Native American cultures. The author, drawing upon more than three decades of observation and reflection, compares and contrasts legal institutions in two woodland tribal groups, the Cherokee and the Creek, and three Plains tribes, the Kiowa, the Comanche, and the Cheyenne. Each tribe produced a unique system of social control, which shows that, rather than being lawless, these traditional peoples were highly legalistic, with a value-based jurisprudence that guided tribal and personal behavior.

Part of our problem in understanding the traditional law ways of Native peoples is that American society sees law in such a compartmentalized way. University of Virginia Law Professor Neill Alford, Jr. illustrated this in his legal history course. Professor Alford would tell us:

"Gentlemen," he'd say—and in those days, believe me, that was the proper gender identification for most law students—"Gentlemen, there are two kinds of societies—apple societies and orange societies. In the orange society, everything is separated, in an individual section—law, religion, economics, politics; but in an apple society, everything is one great big whole—all in there together."4

As Alford correctly observed, traditional Indian societies were apple societies.5 The people’s life ways and law ways were part of an ongoing, integrated, holistic society. In traditional Indian life, law and religion were opposite sides of the same coin; they were fused together so that they were indistinguishable. In such societies, the idea of law is intertwined with the whole ethos of the society. There is frequently a "lawgiver," a Moses-like figure who receives the laws. Laws are almost always of an identifiable spiritual or supernatural origin.

Almost thirty years ago I had the pleasure of working on some Indian oral history projects undertaken with the support of the Doris Duke Foundation. My former University of Arkansas colleague Jack Gregory

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5. Do not confuse this use of "apple" with the current Indian slang term "apple Indian," which, like "oreo" in the black community, means an Indian who is red on the outside but white on the inside.
and I, working through the University of Florida, interviewed Seminoles and Creeks about everything from their current lives to their ancient traditions. One of the most touching experiences of my entire life—not just as a scholar, but more significantly as an Indian person—was sitting under a Seminole thatched roof chickee within the glow of the bright lights of Hollywood, Florida, and listening to Sam Tommie, a ninety-three-year-old man, tell the story of the origin of the Creeks and the Seminoles. Never before, and never again, have I heard someone who knew a story of an Indian society as a fully integrated whole—not just isolated legends and occasional stories. He was like a prophet of old, able to tell the biblical narrative uninterrupted from the fall of Adam. Among these tales was the story of the origin of law, which was, he explained, the gift of the Turtle King. This is what Sam Tommie told us that night, sitting under the chickee:

The Indians were lost. For in the beginning, when the world was young, there were no laws. Late in the afternoon of the first day, the Indians were wandering in circles. They did not know what to do. They did not know where to go. The Indian had no law to follow. He had no form of life to live by. The Indian was sad and lost. He could only wander aimlessly. The Indian walked on the edge of a great pond. As he walked near the water, he saw a large turtle sitting on an island in the pond.

"Come here," the turtle said. "I have something that I must tell to all of the Red Men." So the Indian walked over to the turtle and began to listen to what the turtle said. "I have a message for you. Gather all of the Indians of your group together for a Great Council. . . . When you have come together you will learn the sacred laws of the spirits. When I have given you the laws then you will no longer wander without direction. When you have the laws you will be a great people."6

It is thus for the Creeks and Seminoles that law was the gift of the Turtle King. Law was the beginning of wisdom and provided the way for a great people.

Most Indian tribes have similar stories. When I started work on Fire and the Spirits,7 a history of Cherokee law, I dismissed mythic stories

because they were not about "real law." I was guilty of an only slightly more sophisticated version of the explorer's "lawless" vision.

An essay such as this provides a chance to correct previous errors, many of which go back as far as two or three decades. My friend, New York University Professor John Phillip Reid, a distinguished American legal historian, and I have long argued about the traditional legal systems of the Cherokee Indians. John's key book is called _A Law of Blood_. 8 It is a superb piece of legal scholarship. The point at which we disagree is where law and religion intersect. Professor Reid maintains that "there never was any Cherokee religion more sophisticated or more organized than professional conjuring." 9 My view has been just the opposite. To me, the heart of traditional Cherokee law is a priest listening to the spirit world while holding the sacred wampum belts in his hand. In this society, a command from the spirit world has greater force of law than the most elaborate code devised by the most learned people. The Cherokee experience, I believe, demonstrates that law cannot be separated from the environment in which it matures. To do so does violence to the very nature of the concept of law as a living institution. Law itself is dynamic, a vital force, organic in all respects. Law was to the traditional Cherokee a part of his larger world view, a directive from his spirit world.

John Reid and I have talked about our differing views several times over the years. I hate to admit it, but in many respects he is right about the significance of the individual conjurers and their role in Cherokee law. I overlooked them, perhaps because they were minor figures who did not wear raven wings in their hair or carry tribal wampums. They were the workhorses of the legal system. To ignore them is like reporting on the U.S. legal system as if the courts of appeals and the U.S. Supreme Court were the only adjudicators.

Since that time I have come into possession of considerably more information about the relationship of Cherokee spiritual beliefs and Cherokee law. 10 This sheds light on the Kee-Too-Wah Cherokees and upon the role of what we call religion in Cherokee law. Tragedy, real deep, dark tragedy, was responsible for my opportunity to receive what I am sharing with you. In May of 1978, William Lee Smith, the traditional

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9. Id. at 22.
10. Until quite recently, I have not felt free to divulge this information to anyone. Almost 20 years have passed since I began the work that produced this new data. A conversation I had with my informant leads me to believe that I can, at long last, share this information.
religious leader of the Kee-Too-Wah Cherokees, was bound over to stand trial for harboring the fugitive Gene Leroy Hart, accused of the murder of three young Girl Scouts. That same month, perhaps because I was Cherokee by heritage and had written about the ancient Cherokee law ways, I was asked by the Smith family to prepare a historical account of the ancient tribal religious tradition of sanctuary and its rootage in the seven wampum belts kept in the custody of William Lee Smith. Hart was ultimately acquitted of the Camp Scott Girl Scout murders. Smith was never brought to trial. The documents I prepared were therefore not needed by the Kee-Too-Wahs in the court setting.

Over the last decade I have guarded the documents, the handwritten notes, and the drawings and photographs entrusted to me by Crosslin Smith on behalf of his brother, William. It is now appropriate to begin to make the story known. Much of what follows is a verbatim transcription of my notes about the relationship of law, life, and religion.

The ancient Cherokee way is represented by a star, a hand, and a crescent moon. The three, taken together, are good. They symbolize the need for balance in life. All are to be read with the seven wampums, the pipe, and a cloth emblazoned with these symbols. The hand represents the spirit; the star stands for the son; and the moon is the law. These are three deities. All law, all command, all life comes from and through them.

Smoke is considered to be the most powerful spiritual sign. It is so strong in the hearts of the people. The pipe is a part of the worship. The pipe is the treaty pipe. By following the pipe the Kee-Too-Wah manage to stay away from conflict. By using the pipe they keep to the way. They follow the law.

The Kee-Too-Wahs believe that their way, that their law, will survive a coming crisis when the world will be tested. The world has been moving to this climax from perhaps 1700. At this time the whole world will be lost and will need to be shown the way by the law of the Kee-Too-Wahs. This law is represented by the cherry tree. According to the old ones, when the next world comes, the cherry on the cherry tree will be ready for a different kind of bird to

12. Id. at 265.
13. Over the next year or two, Crosslin Smith hopes to produce a book that will meet with the approval of all of the Kee-Too-Wah religious leaders as the definitive interpretation of the wampums and the law ways they symbolize. This essay does not attempt to duplicate his forthcoming analysis.
pick it. The people will be so mixed up, all of the laws will be confused. The cherry tree could be the deity who represents the law. The law will be here, to be picked, to be used, or to be left alone. Man will perish without the sustaining power of the fruit. God has given to man his fruit which is law, but man must choose to eat of the fruit.\textsuperscript{14}

The heart of the Cherokee law is memorialized in the seven wampum belts. Let me illustrate with the meaning of one of those seven belts known simply as “The Brown Wampum Belt.” Again, the verbatim description of the belt is as follows:

Through the weakness of people and the need for a record, the wampum came into being. The figures of two men stand together on the lower end of the wampum. This is the continuation of the stick figure of the main “wampum of heaven and earth”; also included on the wampum is the hatchet. At the time of the making of this wampum, the war society was done away with. The bloody hatchet as a weapon was to be placed in the ground underneath the warriors’ feet—for it to be raised no more as a weapon against mankind. It is believed that this commandment came from the revelation of the eternal flame—and also the coming of the name Kee-Too-Wah through the revelation of the eternal flame. For the revelation of the flame revealed tobacco to be medicine and the smoke a spiritual message into the heavens. The pipe replaced the bloody hatchet but one must understand that the purification act, and the power of smoke was in existence from the beginning—and the white chief had the ceremony of smoke—the significant thing was that it did away with the hatchet and the war society—and the hatchet as a weapon.\textsuperscript{15}

The most important thing is that the belt carries the commandment “Thou shall not kill.” It is against society’s rules and regulations for anyone who has taken a life to hold an office.

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\textsuperscript{14} Rennard Strickland, Unpublished Field Notes (on file with author).

The author expresses his gratitude and deepest respect for the understanding and support of William L. Smith and Crosslin Smith. They spent endless hours in describing, explaining, and translating these concepts. For almost a dozen years, they welcomed the author to the July 19th Redbird Smith celebration and allowed pictures to be taken of this Kee-Too-Wah celebration. Slides have been deposited by the author in Rare Books and Special Collections at the McFarlin Library of the University of Tulsa.

\textsuperscript{15} Id.
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The symbols on the wampum are:

One Pipe and One Hatchet.

One is down, forever; that is the hatchet;
The other is up, forever. That is the pipe.\(^{16}\)

Every Native American tribe has a law in which it believes just as strongly as these Cherokee Kee-Too-Wahs believe. We must remember that traditional Indian law was, in most respects, tribally unique. Just as the Hopi and the Navajo have very different traditional cultures, they have very different traditional laws. Even among tribes with similar material cultures, the traditional legal systems are often very different. Today, when we speak of the so-called “Five Civilized Tribes,” we often assume that the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles were culturally uniform. Not so. Contrast the legal structures of the two largest Southeastern Indian tribal civilizations, the Muskoghean (or Creek) and the Cherokee. Both were organized into villages or towns. Cherokee law rested heavily on the patriarchal clan and, even at the national level, was little more than a replication of the village clan structure writ large. The Creeks, by contrast, were a classic confederation, organized around towns, with each town retaining close to absolute autonomy within its own legal and social structures.\(^{17}\) Much like the old Greek city-states, the Muskoghean Confederation was loosely organized, with each of the towns able to adopt and enforce a different set of codes.

The heart of the Muskoghean system, as contrasted with the apparent rigidity of the Cherokee, was that the tribe could and did absorb into the Muskoghean Confederacy tribal peoples from other cultures. Thus, for example, the Natchez and the Euchee tribal groups became strong forces within the Creek Nation. Remnants of other Southeastern tribes decimated by whites and particularly by the seventeenth and eighteenth century smallpox plagues came easily into the Creek legal and political structure.

After the American Civil War, when the slave-holding Indians were forced by the Treaty of Fort Smith to absorb their former slave populations into their tribal structures, of the Five Tribes, only the Muskoghean Confederation possessed a legal structure capable of

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16. Id.

17. The author worked among Creek tribal groups in Florida, Alabama, and Oklahoma. In addition, in recent years the author has served as historical consultant to the Tribe and as an expert witness in federal court on Muskoghean culture. He is admitted to practice law in the courts of the Muscogee Creek Nation.
dealing with this changed world. The old Creek Confederacy structure of independent towns sprang up to meet these new needs. This time it was the black slaves. Thus a series of all-black towns, inhabited almost exclusively by former Creek slaves known as Creek Freedmen, came into being. The Muskoghean national government, with its legislative structure known as the House of Warriors and House of Kings, brought these black towns directly into the governing process.

Toward the end of the Nineteenth Century, as the division of power between the traditionalist Creeks and the acculturationist Creeks became more evenly balanced, the black towns had increasing hegemony. They were often a major, if not controlling, influence in the formulation and enactment of tribal law and policy. Thus, the Creeks, unlike the other of the Five Tribes, were able to build upon the tragedy of the Civil War.

Angie Debo, a historian of the Creeks, suspected that the Tulsa race riot of the early 1920s occurred when it did and with the violence it engendered because most of these blacks were Creek Freedmen, who had, before statehood, lived under the freedom of the Creek national government. They were not accustomed to being treated as the Jim Crow blacks back in Texas and Arkansas were treated by the newly-arrived white immigrants. Choctaw and Chickasaw blacks would not have been surprised by such treatment, since it was more common in those Indian nations.

An even more vivid example of divergent Native legal systems among similar tribal economic structures is found on the Plains. The Indian, to most Americans, is the buffalo-chasing, horseback-riding Spartan of the Plains. This can be represented by the powerful Comanche, Cheyenne, and Kiowa Tribes. We know much about their legal systems from the work of E. Adamson Hoebel, Karl Llewellyn, and Jane Richardson.19 Hoebel and Llewellyn’s book, The Cheyenne Way, familiarized us with the role of the Wolf Warrior and other Soldier Societies in Cheyenne
jurisprudence. So successful is this portrait of Native Law that we somehow think that this Cheyenne system is also the law of the Comanche and the Kiowa. Again, not so! Each of these glorious plainsmen had unique and distinctive systems. The richness of Native law is apparent from its diversity.

Although the Cheyenne, the Kiowa, and the Comanche were in close contact during the historic period, each developed very different social and legal systems.\textsuperscript{20} Most significantly, each developed law ways with a markedly different degree of intrusion into the affairs of its people. The history and anthropology of these Plains tribes undermines any theory of pure economic determinism. The Cheyenne, the Kiowa, and the Comanche, though very different in legal structure, had almost identical horse-and-buffalo economic cultures.

Power, or the possession of power, was central to the legal and social system of all three tribes. Power was both personal and communal. The prime source of power was supernatural. Individuals sought power in a vision quest, groups and tribes in rites of renewal and intensification and through objects such as tribal medicine bundles. All grants of power were by spirits, and no grant of power was unconditional.

Restrictions associated with a grant to an individual had to be observed, proper form of ritual had to be maintained, and jealous guardianship of medicine was required. For instance, if the eagle were the source of power in an individual, then that person, like an eagle, could permit no person to stand behind him when he ate. Kiowans required that a captive cut the tree for the center of the sun dance because if the ritual order was violated, the captive’s tribe, not the Kiowas, suffered loss of communal power. Among the Cheyenne, the loss of the medicine arrows was thought of as the cause of defeat and dissolution. Appreciation of power as the prime value is essential to understanding the law ways of these people.

In addition to sharing similar material cultures and value systems rooted in supernatural power, the Cheyenne, Kiowa, and Comanche had

\textsuperscript{20} The author wishes to thank members of the Cheyenne, Kiowa, and Comanche Tribes with whom he has spoken over the last 30 years. This paper would have been impossible without the aid of the late Kiowa attorney and Indian health activist, Ethel Krepps, whose work, both as my student and my teacher, helped form these concepts. Her husband has been kind enough to share her extensive body of tribal notes with the author. The Krepps notes will ultimately become a part of the permanent collection of the Oklahoma Historical Society. Unless otherwise noted, materials in the following sections are drawn from the author’s personal work and notes. To the author’s knowledge, the comparison of the Kiowa, Comanche, and Cheyenne with contemporary American attitudes has not previously been suggested. Primary authorship of these concepts originates with Victor Cook.
many similar substantive and procedural rules. Among these common legal attributes were due process, personal property, contract concepts, truce, and hospitality conventions. For example, all had as the center of due process the principle of notice. In these societies, generally what was not clearly and publicly prohibited was permissible. There were also typical patterns of conflict resolution of which all tribesmen were made aware. The pipe was the seal of covenant. Subject to a defined exception of necessity, the rights of personal property were unwaveringly observed.

Despite their similarities, constant contact, and frequent joint enterprises, these tribes developed three very different forms of social control and legal order. These could best be described as Cheyenne republicanism, Kiowan feudal oligarchy, and Comanche libertarianism bordering on anarchy. Each order was supported by an appropriate and different law way.

The Cheyenne system of government was united by what we would call a constitution. The constitution was transmitted in the oral tradition both as myth and history. There are at least five variants of the story explaining the origin of Cheyenne law and government. Although the contents of each story varies considerably, the similarities, nevertheless, are significant. In four of the five, the creator of the tribe’s system of governance was a woman. In all of the variants, information about how to kill buffalo and the uses of buffalo is conveyed by the constitution-giver.

One of these stories, the myth of Short Woman, contains what we might think of as a combination of our Declaration of Independence and our Constitution. The myth opens with an indictment against the earlier kindred-band system of governance. A father moves away from camp, kills his wife, and abandons his two children. When the two children find their way back to camp, the father accuses them of killing their mother and eating her. The children are summarily staked out on the plain to die of thirst and exposure.

A supernatural stranger brings the children the power of the buffalo medicine and tells them to butcher the buffalo and call the camp to them by use of a crow. The children are housed with and protected by a bear and a mountain lion. The murdering father is killed by the power of the guardian animals upon order from the girl child. She tells the camp that her father killed her mother and that she set the animals on her father. This, she declares, is to be the last use of retributive homicide in the tribe. Henceforth, she ordains, the punishment for murder is to be exile.
Thereafter, the young girl declared that there be five great chiefs of the tribe and that each swear an oath of office promising honesty and due regard for the whole tribe. These five were priests as well as chiefs. The five great chiefs presided over a Council of Forty-four, including themselves. In the myth, and most likely in fact, the institution of the soldier society as a governing institution with police powers happens after the Council of Forty-four is formed.

The Cheyenne were different from their neighboring Indian tribal groups, the Caddoens, in that they were flexible. This capacity was in part because of the Cheyenne social invention: the constitution and legal organization. Among the horticulturists there were stratified social classes, monotheistic authority, and a weak warrior fraternal system. The Cheyenne, who had earlier lived much like their Caddoan neighbors in fortified villages, abandoned their sedentary lifestyle and took up horse nomadism virtually within a generation.

When the Cheyenne moved out upon the high plains in the Nineteenth Century, the soldier societies were strengthened and the Dog Band Society with expanded functions was created. Thus, the golden age of the Cheyenne began. At its best, the Cheyenne social-political system was congruent, coherent, and efficient. At its worst, it was the least effective, in terms of lifestyle and achievement, of the three tribes in dealing with external aggression and in the production of material wealth.

The Cheyenne had a tightly organized, well-balanced social control mechanism in which communal values clearly dominated. The violent urges of the high-strung warrior hunters were held in check by religion and by law. The freedom of women was attenuated by women's social status. The sexual drives of both sexes were regulated. Because high social status could be obtained only by great true generosity (giving to the poor without expectation of return), great personal wealth was unlikely. Tribal power was achieved only by giving substantial individual civil rights and adhering to a rigid code of conduct.

No one who has studied Cheyenne society has failed to admire it. Sacrifice of personal autonomy and altruistic dedication to kin, fraternity, and tribe are indeed admirable public virtues, but, in the final analysis, Cheyenne social form based on clear dominance of communal values did not result in material economic ascendancy. The Comanche and the

21. Short Woman's choice of forty-four as the ideal number may relate to the mystical number "four." Her brother is instructed to circle the camp four times before choosing a chief. Four is the number of chiefs in each soldier society. In Cheyenne prayer, one asks to overcome the "four ridges"—the four great barriers.
Kiowa had three times the Cheyenne’s per capita horse wealth and many times their military range. This result is surprising and somehow disappointing. It is especially disturbing when one considers the other social systems: Comanche chaos and Kiowan oligarchy.

It may be that the high Cheyenne costs of agency and the energy devoted to organization were inappropriate in the Plains ecology. Moreover, societies, like corporations, act only through their individual constituents. It may be that autonomy, which is obviously necessary to some degree in any society, had special value on the Plains.

Comanche laws are more elusive. Grasping this zen-like culture is made more difficult because Comanches neither liked nor respected most white folk, and there is evidence that, if pressed by anthropologists, historians, or Indian agents, the Comanches made up explanations in order to be left alone. Their intention was not truly to deceive, for there is also evidence of great good humor in the stories concocted by the Comanches.

The aboriginal origin of the Comanche and their law is not clear. Some say that the Great Spirit made white people, then a big flood came and the white people all went away as white birds. The Great Spirit then made Comanches, imperfectly at first. In another story, Wolf was the major spirit of the Northern Shoshone, and it might be said he was the father of the Comanche. After their creation, it was rather Wolf’s brother, Coyote, sometimes known as Fox, who was their constant companion—a trickster Coyote/Fox.

The Comanche was the largest and richest tribe on the Plains, far larger and richer than the virtuous Cheyenne by four-fold. The Comanches made life look easy and fun. Of course, it was not easy, and surely it was not always fun, but Comanche life was not legally complicated.

Comanche organization was what we would call libertarianism, verging on anarchy. Comanche communities were something less than a state. Band camps, as the basic social unit, were free to develop as they chose; individuals were free to be a part of that development, depart for another community, or live by themselves if they so chose. Bands were bare legal entities, almost holding companies. The holdings varied, as did the bands’ traditions and the shifting populations that were the bands’ constituents. If the camp moved and an individual did not feel like moving, no Cheyenne-like soldier police drove the individual onward.

The Comanche band chief was not elected. “He just got that way,” the Comanches would report. The band chief had no title until white people
insisted that surely such an august person had a title; so the Comanches, infected as they were with the spirit of Coyote, remembered that he was called "Water Chief." No one could say why he was called "Water Chief," but later some linguist recalled that the modern Shoshone had such a word, and that word referred to the U.S. government Irrigation Ditch Supervisor. Band chiefs were not impeached. They were simply ignored. Their sole customary duty was to move the camp, and when one day the chief moved one way and the camp moved the other way or not at all, the chief was no longer band chief. Under the band chiefs were head men of extended families, called fathers and war chiefs. War chiefs could command war parties, but then, anyone else could do so, too. It could begin with a party of one, for if one's medicine and war record were good enough, others might follow.

Comanche law was that of contract and ancient property. Quite simply, one could keep what one could hold. Hoebel argues that among the Comanche there was but one "crime," excessive sorcery. The punishment was ambush by vigilantes. Murder was punished by death, but only if the victim had kin who were willing and able to inflict the punishment. Feuds were rare because the kinship systems were weak. The capacity to organize in the face of the utter lack of structure was by use of contract. Comanches religiously kept their agreements. When, as in wife stealing, there was tortious interference with a contract, Comanches accepted damages. They even had a word for money damages.

What made this lawless, formless society work was that everyone clearly understood what, from a Comanche point of view, life was about. Life was obtaining as much power as you could handle as fast as you could get it. There were no social barriers to the top. A nineteen-year-old once so distinguished himself in battle that he became Chief of Chiefs in the War Lodge, presiding over men years his senior. Of course, there was no barrier to the bottom either. One Comanche described it as "hero one day, goat the next."

Worn-out Comanche warriors would sit in their smoking lodges and confess their lies and misdeeds while young men would pile fresh excrement outside their teepee doors or let a colt in to knock all asunder. On such occasions, there was little reverence for age.

As a formless society with the capacity to organize without prohibitive agency costs, the Comanche were a powerful force. No enemy knew their address or when they would come knocking. When they were attacked en masse, they dissolved only to coalesce again on either flank

of their would-be tormentors. Their memories and sandbox cartography were so accurate that they could send troops of novice warriors to a rendezvous point hundreds of miles away from their traditional homelands and find them there when they arrived. They used smoke signal communications before whites had telegraphy. Their bows could shoot twenty times in the period required to load a blunderbuss. In short, given their premise, the Comanche were a culturally superior people whose law, almost formless, met their unique needs.

In the Kiowa culture, Coyote met God. The phrase “Coyote meeting God” means that Kiowas represented an amalgam of the practical independence and daring autonomy of western nomads and the communal solidarity of the riverine horticulturists. As such an amalgam, they attempted to balance the claims of both autonomy and community, much as does our Western civilization. Not surprisingly, the result in the Kiowa resembles the result in us: inconsistency and unpredictability. The Kiowa became chameleons, mimes, and all things to all people when the moment demanded. Whereas the Cheyenne were fierce and stable, and the Comanche brave and unpredictable, the Kiowa managed to be both at the same time. Kiowas were “chivalric, impulsive and daring.” It is impossible to square these differing historical accounts of Kiowas because Kiowas were, in fact, almost all these things at one time or another. This Kiowan paradox is an anomaly of law and cultural change.

Tradition has it that the Kiowa, like the Comanche, migrated from the western mountains. The Kiowa were thought to have come from the sources of the Yellowstone and Missouri Rivers. While they lived there, they, like their Shoshone neighbors, hunted small game with bow and arrow and were assisted in their frequent moves by dog traction alone.

The Kiowa are unique among the true horse-and-buffalo Plains tribes in that they possessed an aristocracy. The aristocracy was concentrated in one band, although that band was not the oldest. Hereditary chiefs were a feature of river-bottom Indian farmers. The power of God flowed through the hereditary office to the people, insuring the viability of the society and the very fruitfulness of the earth. The divine power that infused these cultures was more abstract than the Hebraic deity. It was a featureless, endless pool of energy or power. One chief who had seen the

23. Id.

24. It is instructive that while living in the mountains the Kiowa were near the Flathead Tribe, so called because cradle boards permanently flattened the heads of their offspring. It is not particularly remarkable that Kiowas seemed to have had the same kind of cradle boards during the subject period; it is worth noting that when they moved onto the Plains, they almost immediately ceased using such boards and adopted the conventional Plains baby carrier.
expanse of the Atlantic Ocean for the first time said of it, "It was like God."

The Kiowa borrowed much of the social form of their neighbors, not out of any shame for the poverty of their own culture, but for the practical reason that it seemed to meet changed needs. Kiowas were as arrogant as Comanches, but not tied to defense of their old ways. They changed as if for protective coloration. They were, at the time of first white contact, a horseless band of less than two thousand people who could ill afford to retain their old ways.

Like the riverine tribes, the Kiowa had community power bundles, called by them "the ten grandmothers." It is said that from an Arapaho captive came another community power symbol, the traditional Kiowa religious figure known as "Taime," which was displayed commonly at the Sun Dance. Another Taime came from the Cheyenne. When the Taime were lost in battle, they were not replaced, as were the Cheyenne arrows. The Kiowa did not need to make their own magic! This merging of the salient features of two disparate societies—the autonomy of the nomad and the community of the farmer—without giving one precedence over the other, often created chaos.

Kiowa law ways are as intrusive in the lives of individual tribesmen as those of the Cheyenne, but less effective as a social control device. Among these people, breaking the law with style and bravery was an aid, not a detriment, to elevation to the highest status. Kiowa aristocrats frequently made their own law and arrogantly changed it as the situation demanded. Law among the Kiowa, of all Plains people, was truly a law of power and class. The organic relationships of the Kiowa were western nomadic like those of the Comanche; the inorganic structure of their society was a recent adoption of the social form of riverine horticulturists, like the Caddoan tribal peoples.

The material success of the Kiowa is surely related to the habit of their original social form, which permitted extended individual efforts. The Kiowa were the original Plains capitalists. The Kiowa ranged from the Black Hills to Guatemala to the Gulf of California. The Kiowa leader Big Bow, who scorned the powerful religious and medical Owl Doctors and their communal magic, raided the Navajo with only two companions, one of whom was a tame captive. Efforts such as his created as much or more per capita horse wealth as the Comanche ever had. Kiowans were gilded age "go-getters."

The social defect of Kiowan law lay in the unpredictable results of transactions, the restriction of upward mobility, and the stress of daily life generated by the Kiowan world view. These weaknesses can be attributed to the rapid and selective adoption of elements of alien cultures. Whereas a Mandan tribal member of the lower class might be content with his fixed status because he knew why he was on the bottom rung, no Kiowan enjoyed the peace of such God-ordained humility. All strove valiantly; all but a few failed. Of all the Plains cultures, the Kiowan is the one with which modern American society would feel most at home.

Each of these three Plains tribes had a system of law that was unique unto itself. The Cheyenne had a balanced but rigid Republicanism, which extended to all tribesmen; the Comanche had a kind of libertarianistic anarchy, which made all things equally possible for all people; and the Kiowa had an aristocratic oligarchy, which made all things possible, but reserved the rewards primarily for a few. Thus we see that the reality of Indian life was, in fact, exactly opposite to the myth of the white invention. Rather than being lawless, the traditional Native American was highly legalistic.

This review of aspects of the traditional Indian law of the Turtle King and the Wolf Warrior—the Creek, the Cherokee, the Cheyenne, the Comanche, and the Kiowa—should help put to rest the myth of Native Americans as either lawless people or people with but one form of law. Before we close, let us turn the mirror around and look at what the Native American sees in American law. The Cherokee call the white man’s court “where the toads chatter.”26 To the Sioux, a trial is “the place of the spiders.”27

The distinguished Cherokee linguists and ethnographers Anna and Jack Kilpatrick have gathered a series of Cherokee court incantations.
One, designed to “weary judges, to create indecision in juries, to raise
dissension in the prosecuting team, and to addle witnesses,” begins at the
doorway of the courthouse: “Now! I am going to where: the Toads are
chattering.”

Surely modern day Americans subjected to current justice
would welcome an oath similar to this Cherokee courtroom chant:

Your hearts are filled with sand.
Your hearts are filled with stone.
Your hearts are filled with earth.
Ha! It was possible to muzzle him, and one could speak for him!

The Sioux term for court as “place of the spider” has an even more
interesting origin. Tim Giago, columnist and founder of the weekly
newspaper, The Lakota Times, reports: “Iktomi is a Lakota word that
means ‘spider’... a fabulous creature such as the fox in English
literature and folklore.... [Spider] was adventurous, mischievous and
comical; but he always reflected a lesson in moral values.”

Giago recounts the experiences of Charlotte Black Elk, who lives on
the Pine Ridge Reservation in South Dakota and is the great-
granddaughter of Black Elk, immortalized in the novel Black Elk Speaks.
In sharing her stories of the spider “Iktomi,” she notes:

In pre-reservation Lakota government there was a system of
truth-bearers, advisors, deciders and enforcers composed of men
who earned respect through a lifetime of respectable, responsible
example and behavior. There is now a “democratically” elected
Tribal Council whose members gain leadership by proposing
themselves to the people, usually as the lesser incompetent among a
field of incompetents....

Incredibly, the one traditional structure that has survived the
transition is the system of Iktomi. However, Iktomi has undergone
a marked physical evolution. Unlike the Iktomi of old, who
entertained and educated, he has become flesh and blood. He has
taken the role of advisor, the most respected Lakota institution. The
role of advisor in pre-reservation days was to gather information
from tribal individuals whose integrity was beyond question, and
based upon that information, provide advice for a course of action
that would insure the welfare of all of the people.

28. Jack Frederick Kilpatrick & Anna Gritts Kilpatrick, Run Toward the Nightland: Magic of the
Oklahoma Cherokees 101–02 (1967).
29. Id. at 104.
30. 1 Tim Giago, Notes from Indian Country 89 (1984).
Today Iktomi [the Spider] has become a lawyer or attorney and from that position has assumed the role of advisor to government. Consequently, the law in present Lakota society has changed from a system of social restitution based upon the principle of justice tempered with mercy, to a convoluted maze of technical precedence. This system of precedence or "what happened to the other guy" has become justice based on loopholes that are written into the text of the law.

From a mischievous manipulator, Iktomi has become an advisor to the lawmakers who then have the audacity to turn around and interpret the laws. This has allowed Iktomi's influence to permeate the tribal governmental structure and, unfortunately, is changing our system of life from one based on Lakota values to one based on an Iktomi value system.

Sound familiar? I teach a course in comparative law in which we look only at what we used to call "primitive law" and now call "the law of traditional peoples." We look at not only the Cherokee and Cheyenne, but also at the Ashanti, the Aztec, and the Trobriand Islanders. At the end of the course I ask my students the question with which I want to close. Can we, the so-called civilized, learn from the so-called savage? From his understanding of law as a part of the larger order—of law as the center of the apple, rather than law as one small segment in a divided entity?

The experiences of the Cheyenne and their Wolf Warriors and the Creeks and their Turtle King have particular relevance in our age—"an age in which lawyers have been described as secular priests." Our legal system, based upon the English common law, is a system with roots that run back before the age of Robin Hood to a medieval people with very deep and abiding beliefs—beliefs which many of us no longer share. The Native American legal experience demonstrates that a society's belief system is central to a society's law. This is suggested in the opening dialogue of Plato's Laws. Plato's Athenian asks: "Tell me, Strangers, is a God or some man supposed to be the author of your laws?"

31. Id. at 89–90.
The significance of the answer to that question—are your laws written by men or gods—should be obvious in an age such as ours. Our courts are overcrowded, our streets are full of lawlessness. Any lawyer who works in the criminal justice system will tell you that perjury rushes rampant through the courts, oaths are taken lightly, and bold-faced lies are as common as improbable. And yet, at common law, one of the earliest forms of criminal justice was determination of guilt by oath, a system that required the total absence of perjury.

In the Middle Ages, a man accused of murder might be put “on oath” and asked if he had killed the victim. The system worked. It worked because the worst that could happen to the accused, if he honestly admitted his guilt, was that he would be killed, executed, and die for the crime. What would happen if he lied under oath? Well, he would be damned for all eternity. He would be pushing that big rock up and down the hill forever. Such a system works only if there is a consensus of shared values—a belief in an avenging spirit with the powers of supernatural punishment. Not so today. The absence of such powers is surely one of the reasons our legal system does not seem to work so well.

We live under the remnants of a legal system created by and for medieval villages, often smaller than a Kiowa band. It is a giant elephant trying to roller skate on the legs of a mouse. We live in an age in which the sheer quantity of law has become overwhelming. Village law works only when the villagers know each other. The homogeneity of the creators of our village law is a thing of the past. Our apple has become an orange.

It should be obvious that law needs to address fundamental institutional change. We face a legal system whose primary validation is not to be found in any spirit world or even in human ideals, but in our material, economic, scientific, and technological achievements. Tragically, these achievements assert no moral, legal, or ethical standards of value. Today, all around us, in every aspect of the legal system, we see the absence of this clear consensus. National values are uncertain. As a people, we do not seem to know who we are or where we want to go.

In conclusion, I am reminded by our modern legal system of the Creek myth of the Turtle King and his Creation of Law that we considered earlier. Remember, in the beginning “[t]he Indians were lost.... Late in the afternoon of the first day, the Indians were wandering in circles. They did not know what to do. They did not know where to go.”

34. Gregory & Strickland, supra note 6, at 46.