Geography and the Rule of Law in the Making of Two American Indian Reservations: A Geographic Study of Law as a Social System

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Frank Clinton Shockey

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Dedication

In memory of social systems of the past, to social systems of the future…

We must be clearly aware that there is real evil in the very commonplace order of things we call everyday living.

Kobo Abé, *Inter Ice Age 4*

Abstract

This study explores the use of Niklas Luhmann's theory of social systems in the geographic study of law. Describing law as the communication of congruently generalized normative expectations allows access to the spatiality contained within the operations of the legal system. This exploration takes place in the context of a legal system whose self-description, the so-called "rule of law," orients it toward the observation and coding of every possibility of experience. Topically the focus of this study is on the legal system's expansion into the lands and lives of indigenous people and on the making of two American Indian Reservations, the Red Lake Reservation and the White Earth Reservation, in nineteenth-century Minnesota. The conception of unorganized territory as "Indian Country," the cession of Indian lands and creation of tribes and reservations as legal entities, and the allotment of reservation lands to individual Indians in severalty provide comparative material. In addition to reformulating the geographic study of law as a study of law as a social system, the methodology allows the history of federal American Indian law to be described with emphasis on the use of space. Like time, space has been an integral medium for the legal system's infiltration of indigenous peoples' societies, as this study shows.

Keywords: Social systems, law, geography, rule of law, Red Lake, White Earth, Indian country, reservations, allotment

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I. General problems in the legal-geographic study of liberal democracy

What follows is an effort to adapt Niklas Luhmann's theory of social systems to the geographic study of law, illustrated by comparing the legal development of two American Indian reservations in nineteenth-century Minnesota. A primary value of Luhmann's theory is its adaptability to fit wide variations in observed facts–and there are many variations in federal Indian law. Many aspects of this area of law and this theoretical orientation contain unexplored issues. Adaptation of Luhmann's theory to the geographic study of law is barely begun and thus the geographic study of law lacks this potentially useful theoretical foundation. Moreover, despite the work of a few luminaries, geographic study of American Indian law has been limited.[1] The antecedents of this study have been limited in their interrelation previously, so, to begin, these antecedents must be specified and woven together.[2]

Recent debates in legal and political theory have revolved around the extent to which law, usually conceived as comprising rules that govern human behavior, can be independent of other social institutions, such as politics or economics, which are also related to behavior. The notion that law should strive to apply generally to classes of behavior, lead to predictable and consistent results, and be autonomous from social norms that are not codified according to accepted procedures, is commonly called the "rule of law."[3] This notion has evolved from ancient natural law, in which rules enforced by people were said to have been discovered from immutable properties of the universe.

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[1] Cf. Imre Sutton, *Sovereign States and the Changing Definition of the Indian Reservation*, 66 GEOGRAPHICAL REV. 281 (1976).
[2] *See* Martin Gren and Wolfgang Zierhofer, *The Unity of Difference: A Critical Appraisal of Niklas Luhmann's Theory of Social Systems in the Context of Corporeality and Spatiality*, 35 ENV'T & PLAN. A 615 (2003) (Discussing the limited reception of Luhmann's social theory among American geographers).
[3] *See generally* Richard Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1 (1997).

Through the rationalistic ideals of the political theorists of the Enlightenment the rule of law became intimately bound to the development of democratic governments that favored positive, written law, limited by founding principles expressed in constitutions and bills of rights, over natural law.[4] In the twentieth century, the rule of law was further altered by governments' efforts to solve social problems in capitalist economies, resulting in claims that the rule of law has been jettisoned in favor of the bureaucratic administration that characterizes the Welfare State.[5] As law became linked more intricately to every aspect of behavior, were fundamental ideals, such as procedural fairness, predictability, and grounding in widely accepted values, lost? Are, or were, such ideals fundamental?

In light of social changes since the nineteenth century, legal and political theorists have attempted to explain essentially what the rule of law was understood to be in the past, why in its heyday it was a satisfying ideal, and why it has become less effective in protecting the people from the potential misuse of power by governments acting with or without the sanction of a majority. Some have suggested that the proliferation of bureaucratic structures that accompany governments' reactions to economic problems have eroded the effectiveness of the rule of law. Bureaucracies are oriented toward rigid hierarchies of decision-makers: from rule by laws according to the will of the people, the rule by laws through a bureaucracy becomes the rule of experts and the will of the people may be lost.[6] Hence, the question arises as to how the notion of the rule of law became idealized as declining absolute monarchies were replaced by constitutional democracies, how it changed as those democracies industrialized and expanded through colonization,

[4] This evolution is to be traced in the second chapter, *infra*.
[5] *See* THEODORE J. LOWI, THE END OF LIBERALISM 106 (2d ed. 1979).
[6] *See generally* Id.

and how it changed again with the rise of the Welfare State as a reaction to economic problems. What was this rule of law to which political theorists of today hearken back with airs of nostalgia, or with outrage at its corruption?

At a time of rapid changes in society, American expansion westward and later also eastward into interior North America thrived through most of the nineteenth century. This thesis examines the role of law, and the rule of law, during this period of colonization and broader social changes. In western Europe, relatively stable agrarian subsistence, with some urban commerce, was being replaced by mechanized production of goods in factories and less labor-intensive methods of farming that drove farm laborers to the cities to seek work, to poorhouses, or later, westward from Europe and the American East to the American plains to seek farms of their own. At the same time, access to the less-industrialized areas of the world was expanding and the industrializing countries colonized other areas for means of production and for markets. In short, the problems of modernity were becoming apparent.

The nineteenth century was a period of colonization and rapid industrialization in the United States. The general prosperity created by expanding markets tended to restrain, rather than encourage, government interference with most social institutions, including corporations and other land owners. This laissez-faire attitude mitigated the strain on the rule of law ideals of liberal democracy that might otherwise have resulted from increasing federal or state government regulation, although one obvious exception was the American Civil War, contested mostly because most Southern states opposed particular government interventions. Nonetheless, these interventions were still clearly the expression of widely held public views in the form of commands by the government,

and were not merely the technical decisions of administrators intended to promote efficiency and order. In the context of the Welfare State, as Theodore Lowi claimed, "Modern law has become a series of instructions to administrators rather than a series of commands to citizens."[7]

Earlier than environmental regulations, social welfare projects, or corporate controls that are generally seen as the backbone of the Welfare State, the United States began to develop a bureaucratic approach to one of its legal problems—the colonization of land and accompanying subjugation of American Indian peoples. From the outset, federal relation with indigenous people made bureaucracy necessary. The Constitution authorized the President to negotiate agreements between sovereigns, referred to as treaties, which would become law with the advice and consent of the Senate.[8] As a practical matter the executive branch found it expedient to make treaties with Indian tribes, and as the number and variety of treaties between tribes and the federal government grew, the American legal system redefined tribes and their people within itself instead of viewing them as independent sovereigns. As the administrative demands of treaties grew, a special department, the Bureau of Indian Affairs, became necessary to carry out their provisions. The bureaucratization of American Indian affairs, in this sense, was merely a forerunner of the bureaucratization of other governmental functions, such as the Department of Commerce or the Treasury.

Questions about changes in society and in law have occupied sociologists, legal historians and political economists, but geographers can bring to bear ideas on the significance of space and place in relation to law. Law, like all other meaningful

[7] Id.
[8] U.S. CONST., Art. II, § 2, cl. 2.

operations of the social system, takes place in space and in particular places, so law is integrally geographic. Geographers could approach law rather simply by asking what effects law has on spatial arrangements of objects and events, as products of human behavior, and on the character of places, or similarly, by asking what effects conditions within spaces or in particular places can have on law. Studies focusing on such questions might produce useful insights, but they are not entirely geographic studies of law. Rather, they are geographic studies of the results of law, or the influence on law by outside factors, usually relegating law to the status of a cause or effect. A geographical approach to law must ask what is *innately* geographical about law. What aspects of law's ways of representing and interacting with the world have geographic character? This study attempts to provide a way of answering that question by examining the ideal of the rule of law, in the industrializing, expanding United States of the nineteenth century and its interaction with two groups of American Indian people in Minnesota. The simple answer to the question is that all of the law relies upon space just as all of the law relies upon time. Understanding the spatial underpinnings of law, however, is less familiar than identifying the relatively obvious importance of temporal relationships between events. Thus the illustration of its methodology's application is this study's contribution to this ongoing process of geographic scholarship.

Instead of focusing on the relations between groups of people or between individuals and "the law," this study focuses on law as a social system that consists of communications of generalized normative expectations. The applicability of these normative expectations expanded in the nineteenth century to include the expectations that structured indigenous people into groups and their land into areas that could be

incorporated within law. Important developments in this process were replacement of indigeneity with conceptions such as “Indian” and “mixed-blood,” the constitution of tribes as groups of Indians, and the creation of reservations as tribal homelands. Operations involved were initiated by the legislature, through statutes; by the executive and associated bureaucracy, through funded administrative programs and regulations; and by the courts, through decisions of contested questions of legislative and executive action, as well as questions of common law embodied in the prior decisions of judges.

This study focuses on the development of law relating to the Red Lake Reservation and the White Earth Reservation, both in northern Minnesota (see figure 1).

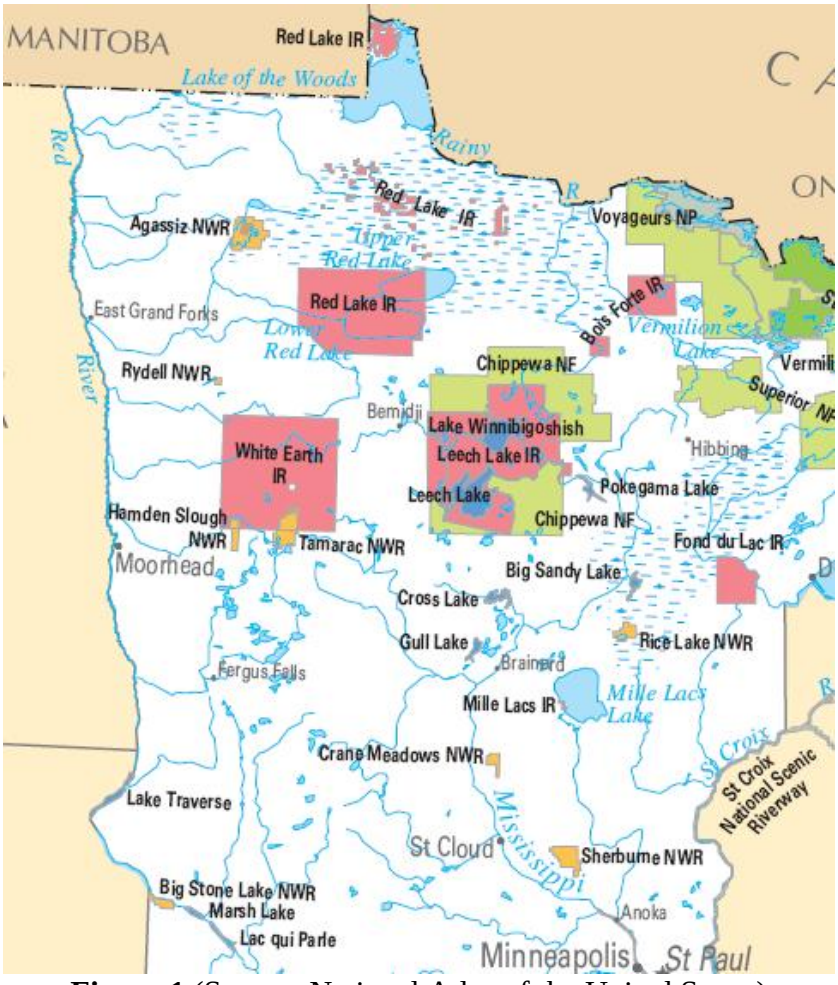

Figure 1 (Source: National Atlas of the United States)

As federally recognized American Indian tribes, the groups of people of these two reservations are called the Red Lake Band of Chippewa and the White Earth Band of Minnesota Chippewa. Both call themselves *Anishinabe* in their language, but the federal government usually uses *Chippewa*.[9] The present object of geographic study is not anthropology (observing and communicating the culture of indigenous people to outsiders) but instead sociology (observing and communicating the evolution of a functionally differentiated social system). Sensitivity to the fundamental distinctions implied by different terminologies must be preserved to analyze the use of such distinctions in the past. Thus it is necessary to refer not only to indigenous people, but to Indians; not only to Anishinabe, but to Chippewa.

American federal law dealing with American Indian tribes and their lands has come to reproduce in microcosm almost the entire body of federal law. Statutes, regulations and executive orders, and court decisions frequently have treated American Indian tribes and their reservations as essentially alike in spite of differences, but economic, political, religious, and other social characteristics of reservations have not always been similar. At other times, court cases, statutes, and regulatory programs have distinguished reservations from one another, treating them differently from one another. Why are some differences relevant and others not? Why separate groups of people and areas of land and subject them to rules, some similar, some different? The legal system represents similarities and differences between places, the people who occupy them, and

[9] *Ojibwe* and *Ojibwa* are simply alternate spellings of *Chippewa*. The problem of naming and identifying ethnic groups and their membership is fundamental. This study will return to this problem repeatedly, but at this point is sufficient to acknowledge that terms such as "Indian" and "Native American" are subsequent replacements for indigenous peoples' self-determination and contain different, colonial conceptions of indigenous people, and may often include people who would not be considered indigenous by indigenous people themselves. Use of "Chippewa" and "Indian" in distinction from "Anishinabe" or "Indigenous" is intentional throughout.

their relations among themselves and with others in its particular way. Legal distinctions rely on communication of space. Red Lake and White Earth became reservations in different ways, and for different stated purposes. Since their inceptions the two reservations' status with regard to population, land ownership, and jurisdictional patterns have diverged sharply, reflecting federal legislation, administrative programs, and court decisions. White Earth Reservation was created in 1867 as a reservation homeland for American Indian people from throughout Minnesota, established using previously ceded land. Red Lake Reservation, however, was never ceded to the United States by the Red Lake Band, and the question of whether it was a reservation was left undetermined until 1937, after it had already been treated as one for decades.[10] Much of the White Earth Reservation was subsequently allotted to individual Indians in the late nineteenth century, and eventually much of the land came to be owned by non-Indians, whereas Red Lake was not allotted and the land not ceded by the tribe remains under tribal (and hence, U.S. federal) control. This study examines the evolution of federal American Indian law and its application to the two reservations to expose the connections between law and geography, with particular attention to the rule of law. In approaching the subject, general theories of law and society must be examined initially, introducing the contributions of geographic thought and subject-matter studies of American Indian law in succession. Because of its centrality, the concept of the rule of law is more fully examined after this introductory chapter.

A. Law, society, and the rule of law

The central theoretical notion behind this study is that the rule of law is a

[10] *Infra*, chapters 4 and 5.

procedural imperative for ordering law's relation to society in general and to politics in particular. The rule of law is a fundamental ideal of British and American legal theory, which asserts that law and legal institutions can provide sufficiently neutral standards, and objective interpretations of those standards, to judge the legality of anything. Legal institutions, such as legislatures and courts, create legal meaning to form a clear and predictable division between the legal and the illegal. The implication is that law should operate according to clear, predictable rules, and not according either to arbitrary whim or to expediencies that advance particular individual or group interests. The rule of law represents American law's roots in Enlightenment rationality expressed by the philosophers of the seventeenth and eighteenth centuries. Critics of the Enlightenment philosophers have suggested that the rule of law is impossible, arguing that law is simply a means of furthering the hegemony of certain parties in the diffuse power relations of society. In this context the rule of law is viewed as an aspect of the social condition widely called *modernity*, initiated by the Enlightenment, whereas the critical description of the rule of law as a cloak for the maintenance of inequalities is a symptom of conditions called *late modernity* or *postmodernity*, depending on how one conceives the social changes to which those terms refer. A relevant question in orienting a study of the past is to ask how social theory intellectually arrived at this divide between the modern and the postmodern, and how it can be bridged to write descriptively about the rule of law and its role in nineteenth century Minnesota under colonization.

B. Natural law and positive law

Proponents of what could be called legal rationality, or the modern approach to law, take a variety of positions on both natural law and positive law, but generally agree

that unvarying rules can provide predictable results. Ideas of natural law appeared in the works of the ancient Greek philosophers Plato and Aristotle, and were more fully described by the Roman lawyer Cicero in his *De Re Publica*, but the longstanding explication of natural law was made by the Catholic theologian Thomas Aquinas.[11] Natural law rests upon the idea that there exist in the universe certain and unchanging principles for the proper comportment of individuals and the proper organization of society. These principles might derive, for example, from innate human nature or from the revealed truth of deities, depending on who claims access to them, but regardless of humans' ability to perceive them, the principles are fixed. Aquinas admitted the existence of a different kind of law, positive law, which he saw was clearly at work in society sometimes in support of, and sometimes counter to, natural law. People might not able to understand the dictates of natural law fully, but they definitely made rules to guide their behavior that have not always matched what the expositors of natural law (usually the religions) expressed as the fixed and unchanging rules of natural law. Natural law and positive law are not necessarily exclusive, however; some behaviors that societies have obviously chosen to organize by the use of rules have no clear moral import until they are organized, so natural law does not necessarily dictate what positive law should be in all situations. Natural law might claim, for example, to dictate that the property rights of indigenous people be respected, but it probably has nothing to say about whether that respect be acknowledged through treaties or through quitclaim deeds. Choices of procedure have no obvious innate moral significance, though procedures may raise legal technicalities that could take on moral significance. Though decidedly not the

[11] BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 62-64 (2d ed. 1999).

sole basis for the American legal system, natural law theories' influences extended to the Enlightenment political theories of John Locke and Jean-Jacques Rousseau, especially regarding their notions of rights, which in turn influenced American ideals in the nation's founding documents including the Declaration of Independence and the Bill of Rights, which speak repeatedly of individual and collective rights that must not be violated.

In contrast to natural law is positive law, which, as its name indicates, is posited through the actions of people. This distinction is crucial because it implies that positive law is not necessarily a restatement of morality. Put another way, understanding what the law states is separate and distinct from understanding (or arguing about) what the law ought to be. Although Aquinas recognized a difference between positive law and natural law, the argument that natural law and positive law could coexist and yet disagree did not arise until the movements toward rationalism in the Enlightenment. David Hume argued that "these two kinds of duty [natural and 'civil' (or positive)] are exactly on the same footing, and have the same source both of their first invention and moral obligation. They are contriv'd to remedy like inconveniences, and acquire their moral sanction in the same manner, from remedying those inconveniences [rather than from nature or a deity]."[12] Natural law could hardly dictate positive law, according to Hume, since natural law was nothing but positive law with delusions of grandeur. Both were founded in social organization, which proceeded according to what he described as human nature and expressed a purpose conceived by humans that could change. Such criticisms of natural law made their way into political and legal theory, and were built into a philosophy of law, known as positivism, by Jeremy Bentham and his disciple John

[12] DAVID HUME, A TREATISE OF HUMAN NATURE 594 (Penguin Books 1985) (1740).

Austin.[13] Austin is usually seen as the founder of legal positivism, which has been further elucidated since the Austin's work in the early nineteenth century.

C. Legal positivism and its critics

Adherents to the school of legal positivism argue that the appropriate method of interpreting earlier legal decisions, such as statutes and previous court cases, will lead to the true meaning, or at least to a stable meaning, of law.[14] They attempt to express legal rationality—the right way of thinking—that will stabilize the meaning of statutory or common law to maintain consistency between past, present, and future decisions. What the law means, according to legal positivists, should be strictly separate from any concern for what the law *ought* to mean or what decision in a particular situation would lead to a just outcome. Not surprisingly, distinguishing the cognitive (what is) from the normative (what should be) has led to a wide variety of positions regarding the methods to be used to find meaning, many of which diverge on the question of how to treat situations in which the text of a statute or regulation, or the opinions of judges in prior cases, seem not to direct a specific decision. In spite of the divergent views regarding method, as Max Weber argued in those sections of *Economy and Society* that were dedicated to the evolution of legal systems, the trend in the West had mostly been toward increasing standardization of method, and concern for formal qualities of justice—doing what the law says even if the outcome does not appear to be morally right.[15] Even in the early twentieth century, however, Weber noted what he called "antiformalistic tendencies" in

[13] M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 199-207 (2001); JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Noonday Press 1954) (1832).
[14] *E.g.* AUSTIN, *supra* note 13; HANS KELSEN, GENERAL THEORY OF LAW AND THE STATE (1961) (1945); H.L.A. HART, THE CONCEPT OF LAW (1961); ANTONIN SCALIA, A MATTER OF INTERPRETATION, (1997).
[15] MAX WEBER, ECONOMY AND SOCIETY 882-895 (University of California Press 1978).

modern law.[16] Judges would sometimes openly state that the reason for a decision was not the direct application of the text of the statute to the facts of the case. The obstacles preventing a simplified, consistent system of determining the meaning of law and applying it to individual situations were apparent. Judges and lawyers simply did not act as though law were entirely a matter of deductive logic.

Perhaps in recognition of these antiformalistic tendencies, legal philosophers around the beginning of the twentieth century began to criticize the formal rationality of jurisprudence, which had by then progressed to a rigid, syllogistic state, most notoriously exemplified by Langdell's "computational jurisprudence."[17] This formulation suggested that any possibility of human error could be removed from law by making it possible, or nearly possible, for legal decisions to be made by a machine. An early critical group that opposed itself to such rigidness has been called the legal realists, advocating a "realistic" cynicism toward the appearance of procedural rigidity in law to learn what was really going on when lawyers argued and judges decided cases. These legal realists attacked formalism in a variety of ways, arguing that general concepts and standards identified from previous cases or from statutes were not neutral, did not produce consistent results, and thus could not reliably be extended to individual situations to decide their outcomes. Among the legal realists was Felix S. Cohen, a noted advocate of reform of U.S. law concerning Indians and author of a long-respected treatise on the subject, the *Handbook of Federal Indian Law.*[18]

Members of the present-day school of legal pragmatism basically accept the

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[16] *Id.*
[17] BIX, *supra* note 11, at 167-169.
[18] *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1945). This handbook has been substantially revised multiple times, most recently in 2005.

realists' criticisms of formal rationality, and argue that judges should decide cases in the way they think would most benefit society. They often soften this stance by observing that the appearance of adherence to prior decisions can provide benefits in the form of consistency and predictability of decisions. If no one knew what to expect, law would be useless as a method of directing human behavior. They further argue that law should be more concerned with substantive justice (doing what is right or what is best) rather than with formal justice (doing what is required by previously enunciated rules). Some pragmatists substitute supposedly more rational systems of substantive justice, such as economic cost-benefit analysis, in place of the formal textual interpretation of the positivists.[19] Contrarily, the recent Critical Legal Studies (CLS) movement, which encompasses about the last thirty years, is similar in many ways to the American realists of early twentieth century. Like realism, CLS is more a group of loosely related criticisms of prevailing legal theory than a unified body of legal theory with a common view of law. CLS scholars have claimed, among other things, that positivism and the rule of law are methods of mystification by which power elites maintain their dominance over underrepresented groups, law is simply an instrumental extension of politics, and law in general is indeterminate and cannot by itself command particular actions. The variety of such arguments is not important for this study's purposes, but most of them represent a postmodern sense of malaise regarding modern establishments such as political liberalism and its legal counterpart, the rule of law. The history of legal thought therefore should be located within the context of wider perspectives on the history of society.

[19] *E.g.* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990).

D. Social theory and legal rationality

Theories of law can be seen from a broader perspective that examines the conditions of society as a whole. The striving to make law rational achieved a primacy over the dogmatic foundations of medieval Europe in the Enlightenment. Making the institutions of society rational has been described as a condition of modernity. To be modern means to strive to be rational, and perhaps, also means rationally to criticize striving to be rational. CLS scholars approach law with the intent to critique its attempts to be rational, and locate themselves within a constellation of theories that attempt to explain modernity and identify its problems.

Implicated in these CLS arguments concerning legal thought and practice have been social theories of deliberation, language, and rationality that criticize the heritage of the Enlightenment and the ideals of modernity. Behind mainstream legal positivism similar social theories have also operated to "save" modernity from philosophies that conjure up purportedly sinister specters of nihilism that would result if notions of rationality were abandoned. Jürgen Habermas's discourse theory of meaning is an effort to shore up the modern faith in rationality by way of a communicative process that creates fair conditions under which intersubjective agreement is possible, if not assured. Communicative action under the circumstances of this "ideal speech situation" leads to a stabilization of meaning without depending on a supposed or imposed homogeneity of people as "the subject." Habermas thus partly supports the positivist conception of law in that he can provide a replacement for the attempt to ground meaning in unshakeable origins through the hermeneutic line of theories that has been carried on from the nineteenth century through Martin Heidegger to more recent times by Hans-Georg

Gadamer and his followers. According to Habermas, the legitimacy of law depends on the rationality of the social relations that surround it, rather than a recognizable interpretive link to origins explained through hermeneutics.[20] Extending his theoretical edifice to law, Habermas asserts that if a community strives to make communicative action possible, its legal system will adhere to the rule of law.[21] The crucial ideal behind communicative action is what Habermas calls "discourse," which includes "any attempt to reach an understanding over problematic validity claims insofar as this takes place under the conditions of communication that enable free processing of topics and contributions, information and reasons in the public space constituted by illocutionary obligations."[22]

Habermas recognized that hermeneutic theories of meaning either were not empirically accurate or were not normatively satisfying, and discarded them in favor of his own intersubjective theory. In the *Theory of Communicative Action* he briefly explained his disagreement with Gadamer, pointing out that philosophical hermeneutics tends to conflate understanding with agreement.[23] In part this disagreement stems from the fact that hermeneutics relies on metaphysical assumptions about *being* in general and the way of *being* of subjects in particular in order to join the interpretation of signs with a transcendent origin. Habermas's theory is an attempt to arrive at similar results while circumventing those assumptions. Ongoing efforts by Heidegger and his disciples to

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[20] JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (1984).
[21] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS (1996).
[22] *Id.* at 106-108. Habermas made this formulation for the specific purposes of law and democracy. Earlier, in *The Theory of Communicative Action*, he had specified additionally that discourse refers only to situations in which "the meaning of the problematic validity claim conceptually forces participants to suppose that a rationally motivated agreement could in principle be achieved, whereby the phrase 'in principle' expresses the idealizing proviso: if only the argumentation could be conducted openly enough and continued long enough." HABERMAS, *supra* note 20, at 42.
[23] HABERMAS, *supra* note 20, at 135-136.

express the nature of being and of the way of being of human beings as "the subject"—so as to "save" hermeneutics—were also under more direct attacks during the middle part of the twentieth century. The central criticisms of metaphysics by Jacques Derrida are directed in that way, usually through analyses of the processes of language. Derrida argued that there can be no access to transcendental "presences" either of the things people talk (or write) about using language or of themselves as the things doing the talking, and hence no way to know if there are any such presences. In Derrida's words:

> …no pure transcendental reduction is possible. But it was necessary to pass through the transcendental reduction in order to grasp this difference in what is closest to it—which cannot mean grasping it in its identity, its purity, or its origin, for it has none. We come closest to it in the movement of *differance*.
>
> This movement of *differance* is not something that happens to a transcendental subject; it produces a subject. Auto-affection is not a modality of experience that characterizes a being that would already be itself. It produces sameness as self-relation within self-difference; it produces sameness as the nonidentical.[24]

Elsewhere, instructively, Derrida further explains his neologism, "differance," a play on the French words for differing and deferring, which are spelled the same:

> …the signified concept is never present in itself, in an adequate presence that would refer only to itself. Every concept is necessarily and essentially inscribed in a chain or a system, within which it refers to another and to other concepts, by the systematic play of differences. Such a play, then—differance—is no longer simply a concept, but the possibility of conceptuality, of the conceptual system and process in general.[25]

Such arguments have driven some of the CLS movement's attacks on positive law, such as the "indeterminacy thesis" that general rules cannot consistently compel a particular action when applied to fact situations. Habermas would view the impulse to attack

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[24] JACQUES DERRIDA, SPEECH AND PHENOMENA, AND OTHER ESSAYS ON HUSSERL'S THEORY OF SIGNS 82 (1973) (emphasis added).
[25] *Id.* at 140.

positivism in this way as flowing from a more general social development, which he has referred to as a "legitimation crisis" associated with increased technology and problems with advanced capitalist economies.[26] Habermas's discourse theory is a reaction to these problems and an effort to stabilize the epistemological bases for social organization using his intersubjective approach. An intersubjective approach to meaning does not discard subjectivity altogether, however. Instead of making human nature the centerpiece and absolute determinant of meaning, Habermas thrusts human nature into a secondary, but still essential, role subordinate to the ideal conditions of communication.

Jean-François Lyotard's claims about society, communication, and knowledge, which popularized the term "postmodern," were developed in part in response to Habermas. Like Habermas, Lyotard noted the problems of technology and advanced capitalist economies, but Lyotard was dubious about the prospects of attempts to rebuild the philosophy of meaning by intersubjective means. Lyotard described the situation that Habermas called a legitimation crisis as symptomatic of sweeping changes he labeled postmodern, and thereby creating a fundamental break with modernity, including the legitimation of knowledge and politics. According to Lyotard's view, legitimation of knowledge and politics by grounding it in "discourse" is just as impossible and undesirable as attempting to ground it in received traditions. Lyotard's *The Postmodern Condition*[27] is therefore in part a lambasting of Habermas for misapprehending the problems of legitimation in postmodern society and for proposing a hopeless replacement for the traditional narratives of legitimation, such as the hermeneutics of meaning, which had formerly propped up the rationality of knowledge and politics. As Lyotard

[26] JÜRGEN HABERMAS, LEGITIMATION CRISIS (1975).
[27] JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION (1984).

contended:

> …it seems neither possible, nor even prudent, to follow Habermas in orienting our treatment of the problem of legitimation in the direction of a search for universal consensus through what he calls *Diskurs*, in other words, a dialogue of argumentation.
>
> This [(to follow Habermas)] would be to make two assumptions. The first is that it is possible for all speakers to come to an agreement on which rules or metapresciptions are universally valid for language games, when it is clear that language games are heteromorphous, subject to heterogeneous sets of pragmatic rules.
>
> The second assumption is that the goal of dialogue is consensus. But as I have shown in the analysis of the pragmatics of science, consensus is only a particular state of discussion, not its end. Its end, on the contrary, is paralogy.[28] This double observation (the heterogeneity of rules and the search for dissent) destroys the belief that still underlies Habermas's research, namely, that humanity as a collective (universal) subject seeks its common emancipation through the regularization of the "moves" permitted in all language games and that the legitimacy of any statement resides in contributing to that emancipation.[29]

Lyotard's main concern regards "terror," as he called the social force that must be used to compel conformity to Habermas's ideal speech situation in spite of the symptoms of postmodernity:

> …our business is not to supply reality but to invent allusions to the conceivable which cannot be presented. And it is not to be expected that this task will effect the last reconciliation between language games (which, under the name of faculties, Kant knew to be separated by a chasm), and that only the transcendental illusion (that of Hegel) can hope to totalize them into a real unity. But Kant also knew that the price to pay for such an illusion is terror. The nineteenth and twentieth centuries have given us as much terror as we can take.[30]

Essentially Lyotard claimed that Habermas's intersubjectivity misuses the idealizing philosophies of Kant and Hegel in an ill-advised attempt to rejuvenate the understandings of modern society. Lyotard provided no theoretical basis of his own for understanding

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[28] The term "paralogy" appears to be Lyotard's neologism using the logic term "paralogism", which refers to a faulty line of reasoning that is not apparent to its maker.
[29] LYOTARD, *supra* note 27, at 65-66.
[30] *Id.* at 81.

society, however, because of his contention that totalizing narratives were obsolete. His direction was to avoid totalizing narratives of legitimation. Is the avoidance of narratives a narrative in itself? What does it accomplish? To make terror meaningful is to make terror meaningful, and terror becomes a narrative itself. Thus the narrative of terror seemingly begets more terror.

E. The theory of social systems and the rule of law

Current social theory is concerned with present trends in society, including law and politics, making its use to describe aspects of American legalism from the past somewhat difficult. Although the consequences of the legal orientation of the United States toward American Indian tribes in the nineteenth century have been in many ways both just and unjust, the purpose of this study is not immediately to observe or critique from a particular normative perspective but to describe. From the perspectives of some legal theories described above, the rule of law may well be simply a sham to conceal some other insidious and illegitimate forces, but the fact remains that people acted in the nineteenth century as though the rule of law was quite "real," and as though adhering to it would produce good results, or at least better results than not adhering to it. Whether this manner of acting in the context of a study of the geographic aspects of the rule of law necessarily leads to the sort of "terror" that disturbed Lyotard may become clearer later in this thesis, but making that judgment initially would be premature. This study could follow Lyotard and describe isolated and localized events in history, eschewing grand narratives, but the rule of law is a grand narrative in itself, so it must be studied at least *as though* it were real in order to study it at all.

Though not claiming to be a permanent grand theory for understanding society,

Niklas Luhmann's theory of social systems can provide a useful perspective for the study of law in nineteenth-century America. Unlike Habermas and Lyotard, Luhmann was not interested in the legitimation of power in society or its absence. Luhmann's theory is a phenomenological theory of society concerned with observation, but it does not rely upon the observations of an idealized human being, as did traditional phenomenology, or on the interactions between such idealized human beings as does Habermas. Unlike the traditional functionalist perspective of Talcott Parsons, Luhmann's perspective is that "the subject," or the individual, is not a functional element of any social system. Social systems consist of communication and individuals, though necessary for communication, are not communication themselves but a represent collections of chemical, biological, psychical (thinking), and other systems. In short, like that of Derrida, Luhmann's theory defers any claim to transcendence. Two key concepts in Luhmann's theory, which originate in general systems theory, are *system* and *environment*. For social systems and other types of self-referential systems (such as psychical systems or "minds") a given system differentiates itself from its environment through its own self-reference—the system produces and reproduces itself by reference to its own elements and exclusion of all else. The system is whatever the system treats as a part of itself, and the environment is always an environment of a particular system, so the system's environment is also constituted by the system's internal self-reference. The differentiation of a social system and its environment, and thereby the "operational closure" of system from environment, does not mean that no causal links exist between system and environment, nor does it mean that the system's boundaries are unchanging. As Luhmann stated, "the system is neither ontologically nor analytically more important than the environment; both are what

they are only in reference to each other."[31] Communication relies upon the fact that something other than communication is available to which it, as the system, can refer–a system must have an environment. Using this theoretical approach, the notion of the rule of law can be described as an internal legal structure of the relation between the legal system and its environment, including American Indian peoples and their lands.

One of the advantages of the Luhmann's theory of social systems is that it is adaptable. It can adapt itself to any new situation, because the theory's focus is on what systems do when confronted with new situations. The advantages of these adaptable descriptive capacities become obvious when describing law's encounters with new situations, and trying to describe newly observed linkages between law and geography. Rather than provide a complete introduction to the theory of social systems, additional concepts are explained as they arise throughout the remainder of this study. A glossary of some essential terms defined by Luhmann is attached after the conclusion for reference.

F. Geographers and law

Recent works in the nascent field of legal geography, which roughly encompasses the academic study of law from a geographic perspective, have made connection to legal theory primarily through the CLS movement, partly because that strand of legal theory is most willing to admit that other disciplines outside of academic jurisprudence have relevance to law. Beyond identifying with, and to an extent taking up the critical position of, the CLS movement and thus the social theorists and philosophers common to its

[31] NIKLAS LUHMANN, SOCIAL SYSTEMS 177 (1995).

heritage, geographers have rarely engaged in theoretical debates on the nature of law.[32] Rather, recent works of legal geography have used legal history to study the power relations behind legal decisions involved in "the production of space," a concept articulated by Henri Lefebvre.[33] Many recent legal geographers have interrogated the role of law in "producing" space.[34] The impulse to view law as a contributor to the production of space is a step toward more nuanced studies of law by geographers, but often geographers who have taken an interest in law have continued to study the same patterns and practices as other geographers, like political patterns of government authority resulting from urbanization[35] or patterns of racism,[36] though with special attention to law's influences in the creation of these patterns. Unlike such studies, this study makes law itself—its processes and its pronouncements—the subject of geography. Richard Ford, a law professor interested in geography, has written about the use of jurisdictions to organize the legal system, explaining how geographic notions are used, misused, or ignored in creating and changing jurisdictions.[37] Although Ford's article represents another advance integrating geographic ideas within the study of law, there must be some means for considering geographic issues imbedded more deeply in law than at the surface level of jurisdictions, since obviously not all geographic patterns coincide with the boundaries of jurisdictions! The ease of analyzing those geographic patterns that do coincide with boundaries of jurisdictions should neither inflate their

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[32] *Cf.* NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER (1994); DAVID DELANEY, RACE, PLACE, AND THE LAW (1998).
[33] *See* HENRI LEFEBVRE, THE PRODUCTION OF SPACE (1991) (1974).
[34] *E.g.* BLOMLEY, *supra* note 32; DELANEY, *supra* note 32; Audrey Kobayashi, *Racism and the Law in Canada*, 11 URB. GEOGRAPHY 447 (1990); Don Mitchell, *The Annihilation of Space by Law: The Roots and Implications of Antihomelessness Laws in the United States*, 29 ANTIPODE 306 (1997).
[35] GORDON L. CLARK, JUDGES AND THE CITIES (1985).
[36] DELANEY, *supra* note 32.
[37] Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 Mich. L. Rev. (1999).

importance nor lead to a neglect of patterns that do not.

In the entry concerning "geography of law" in the *Dictionary of Human Geography,* Blomley classified existing geographic approaches to studying law in four basic categories:

> (1) The analysis of the manner in which legal action and interpretation produces certain spaces
>
> (2) The study of the situated nature of legal interpretation, taking the perspective that legal decisions occur through interactions taking place in a particular locale
>
> (3) The study of the geographic claims and representations contained within legal discourse
>
> (4) The politics of the law-space relation.[38]

The quantity of research undertaken in all of these four categories has been small. As Blomley commented, "the theorization of the geographies of law…is still undeveloped and somewhat ambiguous" and "a deeper engagement with legal theory (both in law and in sociology/anthropology) by geographers is needed."[39] Geographers must focus on what is fundamentally geographic about law, not simply on the consequences of legal decisions that result in perceptible geographic patterns. The present study explores the largely unexplored area of category 3, "geographic claims contained with in legal discourse," using theoretical tools from Luhmann's theory of social systems.

G. American Indian studies and law

Works describing, explaining, analyzing, and criticizing U.S. federal, state, and local law relating to American Indian people come from a variety of disciplines including

[38] R.J. JOHNSTON ET AL., DICTIONARY OF HUMAN GEOGRAPHY 436-437(4th ed., 2000).
[39] *Id.*

law, political science, history, American Indian studies, and geography. One frequent assumption is that federal law related specifically to American Indians forms a coherent and distinct field within law. Federal Indian law could not stand on its own, independent from, for example, criminal law, but neither could any other "field" within law stand on its own. Many works by lawyers nonetheless attempt broad rationalizations of federal Indian law,[40] to show that federal Indian law does not detract from the overall consistency of American law. Phillip Frickey argued, however, that such attempts to explain how federal Indian law "makes sense" usually must do so by narrowing their analysis to particular issues and ignoring or assuming away others.[41] Some other analyses criticize the federal government to varying degrees for relying upon seeming contradictions, or for failing to achieve just outcomes, and use a comprehensive historical approach to explain the evolution of federal Indian law.[42] Detailed, topically focused examinations of particular conflicts,[43] actors,[44] and policy initiatives[45] also abound. Robert Williams, for example, traced the genealogy of Anglo-American legal views of American Indians back to European thought before the American Revolution.[46] The theoretical portion of this thesis is perhaps most similar to Williams's genealogy. One important difference is the present focus on the question of how the rule of law structured

[40] CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW (1987).
[41] Philip Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997).
[42] *E.g.* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE (1983); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990); PETRA SHATTUCK & JILL NORGREN, PARTIAL JUSTICE (1991); FRANK POMMERSHEIM, BRAID OF FEATHERS (1995); DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT (1997).
[43] *E.g.* JILL NORGREN, THE CHEROKEE CASES (1996).
[44] *E.g.* SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS (1989).
[45] *E.g.* Carole Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1976).
[46] WILLIAMS, *supra* note 42.

the relationship between the U.S. legal system and American Indians and their lands, and the question of what geographic elements appeared in the rule of law as that relationship evolved. The focus is on the rule of law as structure in the legal system, and on its development of a geographic perspective within a system of communication of congruently generalized normative expectations. Williams focused on describing the incorporation of external political and moral principles into the legal relation of federal law to American Indian people.[47]

The common reliance on the notion that there is a single coherent body of law, called "federal Indian law," concerning the widely different groups of people referred to within the term "Indians," deserves additional discussion here. The tribes, bands, pueblos, villages, and other communities captured unfairly within the term "Indian" have not always been treated in the same fashion, as the use of a single term to describe the law implies, nor have their relations to the United States at any level of government presented all the same issues. Put simply, the reduction of indigenous peoples to "Indians" and the reduction of U.S. law regarding them to a single body, proceed in correspondence.[48] The replacement of people with simplified abstractions allows the details of their lives to be disregarded. Similarly, replacing the details of law with generalized abstractions such as "federal Indian law" gives plausibility to the idea that "it is only when certain methodologies are used that the truth can be discerned."[49] From a systems theory perspective, the observer can be in a position to recognize the loss of detail, as well as the incorporation of detail, that takes place in the reductive selections by

[47] Id.
[48] *See* DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT, 1-2 (1999). (Citing Vine Deloria, Jr., *Indian Law and the Reach of History*, 4 J. CONTEMP. L. 1 (1977)).
[49] Id. at 1.

systems. In this study the geographic context, as well as the historic context, of nineteenth century "federal Indian law" is emphasized.

H. What is geographic about the rule of law?

The legal system is functionally differentiated from other social systems such as the political system and the economic system. Society can be understood as a social system consisting of communications, and functionally differentiated subsystems within society, such as economics and law, can also be understood as social systems that consist of communications. Law is a subsystem of society that consists of communications of generalized normative expectations.[50] The communications that comprise the legal system are functionally differentiated from other social subsystems in that they function to communicate generalized normative expectations using a binary code: legal/illegal. A set of programmatic operations—primarily captured as rules and rules about those rules—communicate expectations of legality to make the legal system's observations of its environment predictable.[51] The legal rules to which the ideal of the rule of law refers arise in a functional differentiation within the legal system that forms a subsystem that observes how the legal system observes its environment. Expectations about how law

[50] Nothing inherently restricts normative expectations to expectations of human behavior, although human behavior is usually the primary focus of communications of normative expectations.

[51] Systems' reduction of complexity is always ineffective because the creation of new system elements and links to the environment itself results in an increase in complexity. For example, a rule might attempt to stop jaywalking by prohibiting it, thus stabilizing motorists' expectation that pedestrians will walk on the sidewalk and not in the middle of the road. However, the jaywalking prohibition itself leads to an increase in complexity in that now a distinction exists between the legal action of walking on the sidewalk and the illegal action of jaywalking—two distinct possibilities, whereas formerly from the perspective of the legal system walking in the road and walking on the sidewalk were indistinguishable. It is important to keep in mind that the "facts" of the pedestrian's actions and the locations of the road and sidewalk only take on meaning for the legal system if communicated in the context of the code legal/illegal. The pedestrian and the motorist can take a variety of perspectives on their relative locations in space, but those perspectives are the perspectives of social systems: a legal perspective regarding the legality of their location and movement, a political perspective about how popular crossing at random locations might be, a medical perspective on the physical dangers associated with being struck by a moving automobile, and so on.

functions become institutionalized in turn, and become structures of the system that endure, like other system elements, until they are changed.

To structure the relationship between the legal system and its environment, the rule of law must direct how the system treats what geographers call "geographic" issues, such as spatial arrangement of meaningful objects and activities, the special character attributed to places, differences in scale, and so forth. Like the legal system itself, the rule of law evolves continually through reactions to the perturbations of its environment (which would include both the rest of the legal system and the legal system's environment, or "everything else").

As Euro-American migrants spread westward across the United States they moved into areas occupied by indigenous people and American Indian people. The legal system, primarily through the federal government, began developing rules to govern the relations between groups, and to provide for a way for Euro-Americans legally to acquire Indian land. The rule of law took hold in this process as the legal system began to structure the complexity of law relating non-Indians to Indians. At first the government attempted to deal with American Indian tribes individually, using treaties that became part of statutory law. These treaties and their individual provisions became incorporated within the legal system. Subsequently the system attempted to structure the complexity created by the treaties, creating general rights and powers both for tribes and specific rights for individual Indians. Thus the Indian reservations formed as bounded land areas linked to tribes or groups of tribes, many of which were later allotted to individual Indians as a part of a program of assimilation in the late nineteenth century. The assimilation era after the American Civil War represented another attempt to reduce

complexity by replacing the legal distinctions between Indians and whites, between tribal non-citizens and U.S. citizens, and between Indian country and public and private lands. As Vine Deloria put it succinctly, allotment was designed "to make Indians into white farmers [and make them] conform to the social and economic structure of rural America by vesting [them] with private property."[52] Most scholars of American Indian policy history would admit, however, that allotment succeeded in increasing, rather than decreasing, the complexity of both the legal system and its environment.

This study traces the evolution of the geographic aspects of the rule of law in nineteenth-century federal Indian law. Rather than merely to generalize historically about the broad sweep of federal Indian law, the objective is to capture how these changes operate through comparison of the system's characterization of the legal antecedents of two present recognized American Indian groups, the Red Lake Band of Chippewa and the White Earth Band of Minnesota Chippewa, and their reservations that had been established by the end of the nineteenth century. The differences in the legal characterization of various groups of people, and of these two tribes' reservations, illustrate how the evolution of the legal system has led to increases in complexity through systematic efforts to structure complexity, in which geography plays an important part.

Following this introduction is a second chapter concerning the rule of law and its history as an idea, and the spatial content of law. The second chapter fleshes out the ideas introduced above so that the objectives of the case study regarding the rule of law are clear. As the legal system developed, how did a notion, later called "the rule of law," become necessary and evolve? Exploration of another distinction within the legal

[52] VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS 46-47 (1988).

system–the development of a relationship with American Indians–must account for the roots of this development in pre-Revolutionary ideals and explain what led to its necessity. This leads through early nineteenth century federal legislation and the famous "Cherokee Cases" in the Supreme Court. These decisions established the foundations of American Indian law prior to the time when most treaties were made and reservations established in Minnesota.

The third chapter introduces the case study in its earliest stage, during the time period in which the general policy of the government was to deal with tribes individually with treaties. This narrative concerns the background circumstances and immediate results of the treaties affecting the groups that became residents at Red Lake Reservation and White Earth Reservation. The treaties include most of the treaties affecting Chippewa in Minnesota. These include the treaties between the United States and varying numbers of representatives of ethnically Anishinabe groups, which were often treated as distinct polities, negotiated from the 1820s to the 1860s. Treaties signed in the 1850s and 1860s began to reflect the movement toward dealing within Indians as individuals.[53] The federal government decided at the beginning of the 1870s to change its policy of dealing with individual tribes by treaty.

Chapter four considers the development of the legal notion of Indian reservation, which began during the treaty-making period and continued afterward. A critical part of this analysis is to connect the increasing complexity of the legal characteristics of reservations to the individual treaties that created reservations and local conditions. Considering the development of Red Lake and White Earth into areas known as

[53] Although the process, as will be seen, did not actually end with the official end of "treaty"-making, since agreements continued to be made between the government and individual tribes.

"reservations" with particular distinctive characteristics illustrates this process. This chapter addresses the national trends in the legal system's evolving use of the reservation concept and the local manifestations in the particular conditions at Red Lake and White Earth. With the institutionalization of the reservation (and hence the tribes and tribal lands) as part of the legal system, the system internalized them as system elements. Evolving subsystems of law mirrored evolving subsystems of society, as can be seen in the formation of the White Earth and Red Lake reservations.

The fifth chapter explains the seemingly sudden policy change, legally embodied in new statutes, regulations, and landmark court decisions, toward allotment of reservations to individual Indians as a part of a program for assimilation of American Indian people. In part, the shift appears as an effort to avoid what was characterized at the time as a costly, inefficient, and often corrupt bureaucracy necessitated by the administration of treaty-based relations between the government and tribes. The national trend toward allotment and assimilation, then their local manifestations at Red Lake and White Earth, reveal how federal Indian law relied on spatial conceptions. The rule of law demanded a reorientation of the legal system to its environment to structure the legal complexity represented by tribes, reservations, and individual Indians into existing legal categories and do away with their distinction from those categories.

The study concludes with a general survey of its insights about the rule of law and the role of space in legal systems. These conclusions provide some answers to the question of what is geographic about the rule of law, and suggestions regarding the usefulness of the theory of social systems both in geography generally and in legal geography specifically. They may also provide some cause for hope regarding the future,

or, depending on one's perspective, they may provide cause for despair.

As a work of social geography and a work of legal theory, this study has little precedent. Both the subject and the theoretical basis for the study are not familiar to most American geographers. Luhmann's systems theory is not widely known in America outside of the academic field of sociology, nor is it widely used by geographers, though a few legal scholars have become interested in its uses.[54] A recent article by two European geographers appears to be one of only a few attempts to introduce Luhmann's thought to Anglo-American geographers.[55] Few studies have attempted to take a geographical perspective on jurisprudence and its development, as well. Hopefully this work will advance the possibilities for geographic study of law, the understanding of relationships between American Indian peoples and the United States, and the possibilities for understanding society.

[54] *See*, *e.g.,* 13 CARDOZO L. REV. (1992).
[55] Gren & Zierhofer, *supra* note 2. *Cf.* A. Koch, *Autopoietic spatial systems: the significance of actor-network theory and system theory for the development of a system theoretical approach of space*, 1 SOC. GEOGRAPHY 5 (2005) (German geographer's article in English sketching outlines of a systems-theoretic approach to space); Wolfgang Zierhofer, *Representative cosmopolitanism: representing the world within political collectives*, 39 ENV'T & PLAN. A 1618 (2007) (European geographer's article in English incorporating Luhmann's theory of social systems within a discussion of world politics).

II. Legal geography and the rule of law in American Indian law

This chapter has three parts. The first part discusses the evolution in Western society of the rule of law, a concept that has achieved paramount importance in the characterization of liberal democracies since the eighteenth century. The second part pursues the question of how of the rule of law structures the legal treatment of spatial issues that are mainly the concern of geographers. The third part extends the conceptual frames developed in the first two parts to the early development of a specific kind of American law, commonly called "federal Indian law."

Like law itself, what scholars refer to as the "rule of law" is a system of communications that evolves and maintains its own distinction from its environment, which includes not only the legal system's environment, but also all of the legal system that is not oriented toward self-observation. The rule of law comprises the legal system's internal prescriptive expectations of its own operations, rather than expectations of its observations of its environment. Some, but not all, such expectations are institutionalized, such as in written constitutions. The legal system is coupled to the political system in that communications by a legislature, taking place within bounds set by a constitution, can result in a structure known as a statute. The legal system defines the content of a statute as congruently generalized normative expectations because the legislature followed constitutionally defined procedures, thus acting *legally* rather than *illegally*. Attributes of a legal system's couplings to its environment that have thus been rendered predictable through internal structures are then defined as contributing to or detracting from the principles of the rule of law.

A. Law and the Rule of Law

Niklas Luhmann defined law in his theory of social systems as the "structure of a social system that depends upon the congruent generalization of normative behavioral expectations," which means that law consists of those communications that tend to relate expectations of the same behaviors in the same situations.[1] "Congruent" indicates that the expectations include the general expectation that expectations are mutually the same. Unlike cognitive expectations (expectations of fact), normative expectations endure even when observations of fact do not match. Thus if the expectation was that the federal government would administer an area of land in trust for the benefit of a recognized Indian tribe, and the agents of the federal government failed to do so, the legal system would code its observation of this fact as *illegal* misfeasance on the part of those agents, instead of learning to expect that that land area was not Indian trust land. Crucially, the definition includes not only simple expectations, but expectations of expectations. Hence judges expect that federal officials administer trust lands for the benefit of tribes, and federal officials expect judges to expect this. From this network of expectations arises what can be observed, and what could be described as reliance on a mutual understanding of what the law requires: where Indian lands were inappropriately disposed by the federal government, courts have found compensation to be required.

The notion of congruently generalized normative expectations extends beyond what is usually defined as law, not limiting law strictly to recorded statutes or the commands of a sovereign. This definition of law enables Luhmann's theory to avoid implying that some societies lack law because the structuring of their subsystems does

[1] NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW 77-78, 82 (Elizabeth King & Martin Albrow, trans., 1985) (1972).

not resemble those of monarchies or of certain modern liberal democracies. The distinctive characteristics of institutionalized, positive legal orders, which normally contribute substantially to legal philosophers' definitions of law that contrast with the generalization of expectations in many non-Western societies, happen to have evolved in many places in response to increasing social complexity. Some societies reacted to the complexity of their environments through internal functional differentiation into subsystems such as law, politics, and economics. That today it can be observed that positive, institutionalized law fulfills certain functions does not indicate a value judgment, but merely that law evolved that way and has not yet been changed.

Luhmann's objectives in defining law so broadly were, of course, more general in application than federal American Indian law or the concept of the rule of law. Luhmann was theorizing law in general as a social system, and was not interested in examining subsystems of the legal system relating to specific problems. Given these specific objectives, the brevity of Luhmann's comments on the notion of the rule of law or its analogue in German legal thought, the *rechtstaatscharakter* of the State, is not surprising. Thus one of the present tasks is to consider the evolution of the rule of law using social systems theory, and then to explain how it relates to the evolution of law itself.

Luhmann's broadly applicable definition of law illustrates the commonalities between modern legal orders and those that have preceded them or paralleled them in history. For example, although the U.S. Constitution was drafted, revised, and established as the basis for American government within a 10-year period in the 1770s and 1780s, the legal structures it inscribed had been evolving for centuries in England and elsewhere in Europe, as well as in the American colonies. The functional

differentiation of society drove such changes. By functional differentiation is meant the formation of subsystems within systems that define their own identities in relation to functions to be fulfilled within the system. Law, for example, is a subsystem functionally differentiated within the social system. Some societies, in contrast, are differentiated primarily into segments such as families, clans, and villages, and can operate with a small amount of internal functional differentiation—generalization of expectations, fulfillment of subsistence needs, and other such functions of the social system can be taken care of within or among families and without specialized functional divisions that cut across family lines. The generalization of normative expectations does not strain segmentally differentiated societies because there are fewer possible solutions, and the solutions are simpler because the horizons of experience are limited by segmental differentiations. In the colonial context, societies with widely varying degrees of functional differentiation came into contact and segmental frontiers were crossed.

Increases in the complexity of particular functional areas within segmentally differentiated societies produce increased possibilities of experience, with which segmental structures, such as families, clans, and communities, cannot cope. In response, societies became functionally differentiated, though often functions were delineated in different ways. Functional systems such as law, politics, and religion differentiate themselves within the mass of communications that would otherwise be ordered mostly by segmental social divisions. Such a change rarely, if ever, occurs quickly, though the imposition of colonial European rule in the Americas provides examples of attempts to impose such a change quickly. The idea that an invariable natural law limits the variability of socially created positive law was unnecessary until law started to become

distinct from religion, economics, kinship, and other aspects of life that formerly had not been functionally differentiated.[2] Luhmann summarized this transition:

> Simple societies have relatively concrete and anthropomorphic images of the world with residual categories for the supernatural; they have a large share of undeterminable as opposed to determinable complexity and accordingly a small amount of organised selectivity. They feel overtaxed by the world and establish it as concretely and invariantly as possible. The earlier high cultures [such as Greece and Rome] still conceive of their law as the worldly order… Functional differentiation, on the other hand, leads to the overtaxing of society by means of possibilities which vary with the structures and cannot therefore be fixed within the world itself. Law is thus adjusted to a corresponding level of understanding. It rests upon normative decision-making premises about which decisions can also be made. It has its foundation and function in the decision-making process and justifies its possible uncertainties with technical and economic arguments. It must prove its suitability as decision-making programme.
>
> Finally, positivity of law can generally be understood as the *increased selectivity* of law. The expanded horizon of what is possible in experience and action also moves supposedly invariant natural law into the light of other possibilities. What was seen as constant, or presumed to be the worldly order, is now recognisable as an area of choice and must be justified by decision-making, whether the individual norm is retained or changed.[3]

The distinction between natural law and positive law, followed by the primacy of positive law, formed the roots of the rule of law, but for a long time positive law was defined by comparison to natural law. John Locke, for example, described societies with political and legal systems as founded on the consent of individuals they comprise, and analogous to their uniting to form one rational body out of many.[4] During the Enlightenment period this movement toward supremacy of positive law made the rule of law possible.

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[2] Not surprisingly, history provides many examples of societies in transitional stages with a significant degree of both segmental and functional differentiation, such as ancient Greece and Rome. It was in this context that Aristotle began to distinguish the notions of natural law and positive law.

[3] LUHMANN, *supra* note 1, at 157 (citations omitted).

[4] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 348-351 (Cambridge, 1967).

In England the foundations for positive law are traced to limitations on royal power demanded by Parliament, though the earliest origins are found in the limits agreed to by King John in the Magna Carta. The 1628 Petition of Right, for example, demanded that the sovereign govern the country according to statutes, and only arrest people for offenses against the law. Law was defined as statutory law and widely understood "common" law embodied in accumulated decisions of judges rather than as the arbitrary, ad hoc orders of a monarch. This idea took hold gradually. Several decades of civil war, ending with the "Glorious Revolution" and exile of the Stuarts, reestablished the monarchy on Parliament's terms, with such limits on the sovereign's power defined in the Bill of Rights and the 1701 Act of Settlement.[5] During this period Locke argued that law could be a safeguard of the people against the potential excesses of officials. He argued that lawgivers and their officials, as well as the people, should obey the law to avoid arbitrariness or favoritism. However, his conception of a political society was still founded on the notion that the laws of nature were ingrained in the rational individuals who joined in agreement and created such a society.[6]

Despite this reliance on natural law, Locke's formulation lent weight to democratic foundations for positive law and the notion of the rule of law. Later in the eighteenth century, however, there arose a competing liberal formulation of the rule of law, setting up a fundamental tension between procedural fairness and respect for rights of people as individuals. On the one hand, law could be the will of the majority carried

[5] Allan C. Hutchinson & Patrick Monahan, *Democracy and the Rule of Law*, in THE RULE OF LAW: IDEAL OR IDEOLOGY? 97, 103-104 (Allan C. Hutchinson & Patrick Monahan eds., 1987); *See also* FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 162-192.

[6] *See* FRANZ NEUMANN, THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM IN MODERN SOCIETY 117 (1986).

out fairly and consistently, but on the other, law could be a bulwark for an oppressed individual or minority to protect against the tyrannies of the majority. In American law this tension is partly dealt with by means of a written constitution that guides operations of the legal system, including legislation, administrative rule making, and judicial interpretation of statutes and rules. Notably the basis for such higher legal norms is still a democratic majority. The Constitution and Bill of Rights were established by a majority and can still be altered with a sufficiently *large* majority, in spite of the references to natural rights to life, liberty, and the pursuit of happiness in the Declaration of Independence.

The two views of the rule of law as a requirement of consistency of procedure and as a protection for the weak from the strong espouse two distinct ideals of the relationship between law and other social systems. There was no conception of the rule of law until observers, such as Plato, Aristotle, Locke, or Hume, noticed a system of functionally related communications that they called law, and formed expectations about which of its characteristics would support its best possible relation to other systems. The introduction of additional complexity, for example, through the formation of cities, the influx of people of varying religious persuasions, division of labor among farmers, artisans, military, and so forth, prompted further functional differentiation so that the communication structures people have called "law" could be seen as a system. Law evolved as a subsystem with links to other subsystems (such as economics and politics) that evolved simultaneously. Where subsystems within society are capable of observing the system/environment distinctions relied upon by other subsystems within their respective environments, they can become structurally coupled. For example, keeping a

police force trained and ready to act on the transgression of certain normative expectations according to consistent procedures requires structural couplings between politics, law, economics, and education. The functional differentiation of subsystems and the arrangement of links between them are contingent, which is to say that they happened to fulfill functions that demanded filling as defined within the system. For example, different structural couplings in the example above could result in either a Gestapo or a neighborhood block watch.

Accompanying the development of these functionally differentiated legal systems was the development of observing subsystems within legal systems.[7] Jurisprudence encompasses normative expectations *about* law (rules about how rules should be established and applied) which would include the concept of the rule of law, whereas law encompasses the generalization of normative expectations. Significantly, some aspects of jurisprudence as self-observation by a subsystem within law are more stable than others, just as some normative expectations within the legal system become institutionalized as statutes and others do not. Consider the notions that positive law can both protect citizens from the arbitrariness and partiality of officials, and protect individual citizens or minorities of citizens from tyrannous majorities. The political theorists such as Hobbes, Locke, Rousseau, Hume, and Burke, who described these ideas and created utopian governmental plans relying upon them, did not create them from nothing. They observed that positive law could protect everyone from arbitrariness while protecting minorities

[7] Considering the social system of society and law as one of its subsystems, law is a first-order observing system and jurisprudence is a second-order observing system that takes the distinction between law and society as fundamental. The distinction between "first-order" and "second-order" made here indicates that first-order observing systems, such as law, observe their environments, whereas second-order observing systems observe the observations made by first-order observing systems within their environments.

from tyranny, and attempted to isolate the characteristics of positive law that they thought encouraged these outcomes. Some of their observations became incorporated into positive law in the American legal system and some did not. Few lawyers or judges would cite the words of Locke or Rousseau as "part of the law," but their influence on writing of the U.S. Constitution and subsequent understandings of it make them very much a part of the Constitution. Furthermore the meaning ascribed to the words of the Constitution is often conditioned by understanding of their prior writings. With the drafting of the U.S. Constitution, many such characteristics became fundamental normative expectations of procedure in the American legal system.

Constitutions, whether written or unwritten, represent efforts to enumerate and institutionalize expectations about the linkages between the legal system and other social systems. The U.S. Constitution and the Bill of Rights were therefore works of jurisprudence, as well as simply being normative expectations within the legal system. They were crafted through the observation of existing legal structures, including the problematic Articles of Confederation, and incorporation of previous communications within the legal system about how it should be coupled to other social subsystems, including political, economic, and religious systems. Before the Revolution the American colonies were part of the British Empire, and the colonists who later wrote the Constitution and Bill of Rights were familiar with the British legal system; indeed, many of them were lawyers who practiced law in it. These ideas about how law should function in society were derived from the observation of the merits and flaws of Britain's pioneering attempts at constitutionalism and of the merits and flaws in the jurisprudence of the European political theorists of the time, viewed from the perspective of colonists

whose roles in law and politics in Britain were limited. In the U.S. Constitution are provisions that define the relationship, for example, between law and politics: "The Congress shall have Power…to make all Laws which shall be necessary and proper for carrying into Execution the…Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[8] The implication of this clause is that statutory "Laws" are distinctly both necessary and proper for the execution of the powers that the Constitution confers on Congress. The powers so conferred are not absolute, but subject to the requirement that they be executed by proper, predefined legal procedure and not by fiat such as a bill of attainder or an ex post facto statute. As a result, power alone, in the form of majority approval, is not sufficient to act lawfully.[9]

Chief Justice John Marshall remarked in *Marbury v. Madison*, less than two decades after the drafting of the Constitution, that "the government of the United States has been emphatically termed a government of laws, and not of men."[10] This notion that law governs, not people, is perhaps the fundamental ideal of the rule of law, from which other ideals have been derived. In several of the papers of the *Federalist*, that monumental defense of the newly drafted American Constitution addressed to the hesitant people of New York, Alexander Hamilton frequently argued that constitutions in

[8] U.S. CONST. art. I, §8.
[9] Hence the United States is not governed merely by pollsters who statistically ascertain the will of the majority!
[10] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The phrase has since been repeated as a clarion call against arbitrary action in landmark cases such as *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). (denying jurisdiction to military tribunals over civilian citizens arrested under suspension of writ of habeas corpus); *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904). (upholding federal antitrust legislation as a protection of the public from corporate mergers in restraint of competition and free trade); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). (striking down a congressional delegation of power to the president as unconstitutional); and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). (striking down executive seizure of private property to settle a labor dispute in time of emergency for lack of statutory authority).

general, and particular portions of the one then being ratified, would protect the people and localities from tyranny at the hands of the federal government. In one essay, for example, Hamilton attempted to justify the Constitution's lack of a formal bill of rights, later added in the form of the first ten amendments, by noting that several provisions in it offered individual protective measures of the sort demanded by critics. Among these were the prohibitions against *bills of attainder* (legislative actions declaring guilt without trial), *ex post facto* laws (statutes punishing acts committed prior to their enactment), and suspension of the right of *habeas corpus* (the right to demand trial) found in Article I, Section 9.[11] Hamilton pointed out that prohibitions against such measures would cripple "the favorite and most formidable instruments of tyranny"[12] and would restrain the manipulation of laws by officials, forcing them to act only by law. Hamilton acknowledged that misused rules could be an instrument of tyranny to be used by individuals for their own ends, and extolled specific procedural restraints he argued would protect against malfeasance.

Writing in the late nineteenth century, British jurist A.V. Dicey was perhaps the first to use the phrase "rule of law" to describe the advantages of making positive law superior to the arbitrary pronouncements of individuals out of self-interest,[13] although the context was an analysis of the unwritten British constitution. Dicey lauded the supremacy of positive law and its protection of individual rights,[14] and extended this basic concept of the rule of law to a variety of situations in which the rights of individuals

[11] THE FEDERALIST NO. 84, at 532 (Alexander Hamilton) (B.F. Wright ed., 1961)
[12] Id. at 533.
[13] A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 179-409 (8th ed. 1927) (1885).
[14] *Id.* at 180.

come into conflict with the demands of majorities, or with the discretionary actions of officials. Since Dicey's time jurists and political theorists have taken up the phrase "rule of law" to encompass various views of how normative expectations become institutionalized and interact with the other subsystems of the social system to which the legal system is coupled. Commentators with views as divergent as those of the laissez-faire libertarian Friedrich Hayek and the Marxist historian E.P. Thompson have praised the rule of law. Hayek described the rule of law as the "great principles" whose observance "distinguishes…conditions in a free country from those in a country under arbitrary government."[15] Thompson commented that "the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be *an unqualified human good*."[16]

The rule of law clearly has different meanings, but some generalities are common and most discussions of the rule of law usually emphasize one or more general principles, as Richard Fallon suggested in an article aimed at reconciling the divergent views:

> (1) Laws, individually and collectively, must be accessible to those they are to guide, and it must be possible to obey them.
>
> (2) Laws should actually be obeyed more than they are broken.
>
> (3) Laws should not change so frequently that future behavior cannot be planned using existing laws as a guide.
>
> (4) Laws should guide the behavior of those who enforce or interpret them, as well as the ordinary citizens.

[15] FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72 (1944).
[16] E.P. THOMPSON, WHIGS AND HUNTERS 266 (1975) (emphasis added).

(5) There should be institutions to solve disputes over the meaning and application of laws to individual situations, and these institutions should be fair and impartial.[17]

Each of these five general principles evolved from ideas about the advantages of relying upon positive law, but they can also be observed to have been in play in some legal systems that were neither democratic nor founded entirely upon positive law. As in the British and American constitutions, discussions of the principles that could be seen to have existed in previous institutions influenced the creation of the constitutions, not vice versa.

B. Systems-Theoretic Legal Geography and the Rule of Law

This second part of this chapter pursues the question of how of the rule of law structures the legal treatment of spatial issues that are mainly the concern of geographers, such as the distinctiveness of localities, differences and similarities across space, and distributions of objects and people, and their activities and interactions. In order to accomplish this, the basic concern of geography, space, must conceptually develop within the confines of the theory of social systems. Considering space an objective, "empty" aspect of the universe raises difficulties in linking purported immutable properties of space to observed phenomena. Considering space as a "social construction" can begin to extricate geography from those difficulties, but it does not go far enough. Departing from the suggestions of Gren and Zierhofer,[18] space, like law, must be understood as a social system. From this point the structural couplings between legal and spatial systems within

[17] Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8-9 (1997).
[18] Martin Gren & Wolfgang Zierhofer, *The Unity of Difference: A Critical Appraisal of Niklas Luhmann's Theory of Social Systems in the Context of Corporeality and Spatiality*, 35 ENV'T & PLAN. A 615 (2003).

the social system as a whole can become clear. Proceeding to the next level of abstraction raises the question of how the rule of law evolves when confronted with new, challenging questions about law formed around spatial communication.

What do geographers have to say about law? Answering this question calls also for an answer to the broader question of what geographers have to say about anything. Whereas science is a social system that codes the truth or falsehood of factual propositions, geography is a social system that codes the truth or falsehood of propositions whereby the observed operations of other systems become meaningful through the use of space as a communication medium. As a science geography is capable of observing the system/environment distinction made by any other system within its environment and using that distinction as a basis for its own observations. Thus different topical concerns of geographers are often aligned with the system/environment boundaries of the systems that are the objects of observation. Conceiving legal geography in this fashion allows geography to be oriented toward the conceptual achievements of the legal system as a social system rather than toward the attribution of causal agency to individual processes of the legal system. The use of systems theory in geography and the use of the theory of social systems in legal geography allow observation and the observation of observations to take place at a level of abstraction sufficient to recognize when selections of observations take the form of attributions of causality.[19]

Geography has a substantial history of engagement with society generally and with portions of society delineated by function or according to some other scheme.

[19] *See* NIKLAS LUHMANN, ECOLOGICAL COMMUNICATION 8-9 (1989).

Usually the objects of study remain indefinite topical areas roughly analogous to functional systems that are similar to the formulations of traditional sociological functionalism ("economic geography," for example). Geographers focus on a collection of canonically geographic issues—hence, geographies of economic development, geographies of immigration, and geographies of religion, all purportedly distinct from sociologies of development, immigration, and religion through their focus on spatial patterns attributed to spatial causes. Early legal geography examined the effects of law on particular places, and the role of environmental factors on the laws of particular jurisdictions, for example.[20] Without attempting a full-blown criticism of the assumptions many geographers have made about causality, in works identified as "geographies of law" or "legal geographies," the problems with the attribution of causal relationships relied upon by many paradigms manifest themselves in misconception of the relation between law and society. Law and society are simply conceived as distinct entities with no overlap, one or the other of which in a given situation causes events to occur in the other. Hence, depending on the situation, or on the observer's viewpoint, law is described as either a product of social conditions (hence determined by its environment) or a cause of social change (hence a determinant of its environment).

Recognizing the problems with the common assumption of simple and direct causality between social systems has led some legal geographers to declare that law and society are "mutually constitutive"—that they cause each other, and that they cannot be clearly distinguished from one another.[21] This claim is a step in a useful direction because it is an attempt to escape the linear connection of causality based on induction,

[20] *See* NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER 32-36 (1993).
[21] *E.g.* NICHOLAS K. BLOMLEY, ET AL., EDS. THE LEGAL GEOGRAPHIES READER XV-XX (2001).

but it does not completely do so. If law and society are mutually constitutive, or constitute one another, in what sense are they distinct from one another? This formulation has led to a haphazard attribution of causes: now legal changes cause social changes, now social changes cause legal changes, with no consistent basis for relating one to another except perhaps that observation of one preceded observation of another. The theory of social systems can make a path out of these metaphysical conundrums, which can lead to naïve acceptance of appearances, unproductive doubts, or confusion about both law and society.[22] The misplaced emphasis on the discovery of direct causes and effects between social systems in general, and in this situation, between law and other subsystems within the social system, must be jettisoned in favor of a more complex description of the relationships between functionally differentiated systems of communication. Social systems are not physical systems, and communication occurs under conditions of double contingency.[23] Within social systems, relationships of cause and effect may be defined within individual systems, but not between systems, because each system is self-defining. A theory of space within the theory of social systems permits explanation of how spatiality may or may not be expressed in legal systems, and in the rule of law as a subsystem of the legal system.

The theory of social systems must be adapted to geography to construct a social-legal geography. This endeavor is an extension of Luhmann's thought to include communications of spatiality. Social systems are composed of communication, and only

[22] *See* Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO L. REV. 1443 (1992).

[23] Luhmann's simplest explanation of double contingency is as follows: "[T]wo black boxes, by whatever accident, come to have dealings with one another. Each determines its own behavior by complex self-referential operations within its own boundaries. What can be seen of each other is therefore necessarily a reduction. Each assumes the same about the other." NIKLAS LUHMANN, SOCIAL SYSTEMS 109 (John Bednarz, Jr. & Dirk Baecker, trans. 1995).

communication.[24] All that which is not communication is not "part" of a social system, and is part of the social system's environment. Some parts of the social system's environment may be more closely tied to communication than other parts. Psychical systems (individual minds) or bodies are not part of any social system, for example, because they do not communicate. Only communication communicates.[25] Although consciousness might be necessary for communication, neither the system nor its environment takes priority in existence or causality—communication might equally be contended to be necessary for consciousness. Who can say which causes the other? The perspective, which is to say, the system that is the observer, sets the grounds for relating causes and effects and for understanding which causes are more direct than others.

Social systems must be viewed as systems of communications rather than constellations or networks of subjects, bodies, or minds. Legal systems consist of a particular kind of communication—normative expectations and expectations of expectations—and have become functionally differentiated subsystems within the social system. The social system and other systems within it are merely parts of the environment of the legal system: the environment includes everything that is not the legal system, whether part of another system or not (see figure 2).

[24] Id. at 138

[25] NIKLAS LUHMANN, THEORIES OF DISTINCTION 156 (William Rasch ed., Joseph O'Neil, et al., trans., 2002). Communication is the unity of information, utterance, and understanding that can serve as the basis for further communication. Communication is constituted by its coding as meaningful by subsequent communication. *See* Glossary, *infra* at Appendix.

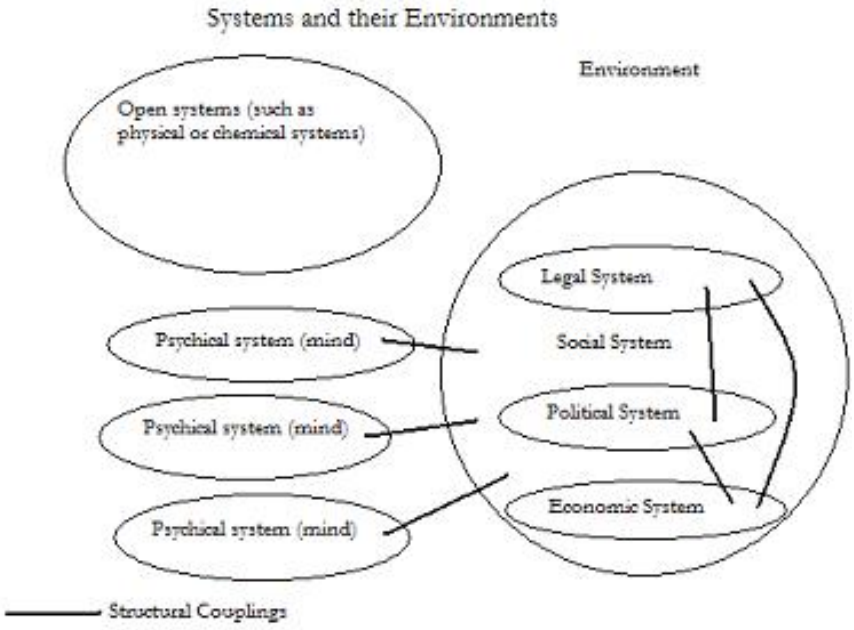

Figure 2

Legal systems are autopoietic, operationally closed systems. Autopoiesis is the constitution of systems through self-reference—hence autopoietic systems are not dependent on inputs from their environments for their operations. That they are operationally "closed" does not mean that they are isolated from their environments or that they do not react to changes in their environments, however. In the case of legal systems this means that all system elements—all communications of generalized expectations—are legal or illegal only because they are referred to as such by other elements of the system.[26] As Luhmann put it:

> There is no sense in separating law and society as if these were two different objects, and not even good sense in treating the society as the environment of the legal system. The legal system itself is an inseparable part of the societal system—it does not simply depend on external sources for social support and legitimation, but is an inextricable part of the network that reproduces the society by recursively connecting communication with communication. Nevertheless, the legal system is a

[26] *See generally* Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 CARDOZO L. REV. 1419 (1992).

> closed system, producing its own operations, its own structures, and its own boundaries by its own operations; not by accepting any external determination nor, of course, any external delimitation whatsoever.[27]

Looking outside the legal system for individual "causes" of changes within the system is a mistake, because systems can never attain a one-to-one correspondence with their environments. A system's structural couplings are limited to connections with inputs from other systems within its environment whose predictability has already been defined within the system itself. Whether coupled or not, systems respond to changes in their environments according to their internal coding of observations. In addition, the systems within any given system's environment react in their own ways to the changes in their respective environments. These relationships cannot be captured by networks of individual causal links, however complex. Systems' efforts to manage the complexity of their environments through internal structures that limit the system's selections can at best be described as *contingent*, which means that system structures that order complexity could have been otherwise.[28] In other words, although there is more than one subsystem within the social system, any given subsystem can only base its operations on its own structures: it cannot entirely predict the operations of other systems in its environment, because the environment consists in part of those other systems, which are simultaneously developing new structures to explain their environments. Hence systems evolve according to which structures develop first, fulfill their functions, and have not yet been replaced. The persistence of any structure does not indicate that it is the "fittest," but merely that it has not yet changed.

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[27] Id. at 1425.
[28] LUHMANN, *supra* note 23, at 106.

Efforts to conceive social geography through Luhmann's theory of social systems are almost nonexistent.[29] In his 1969 *Explanation in Geography*, David Harvey discussed systems theory and its use by geographers at some length, but this was the theory of general systems, then not yet modified by Luhmann for the study of societies. General systems theory has been used primarily in physical geography and geographic information science.[30] Gren and Zierhofer commented that attempts to ground the existence of space as a thing "out there" do not reconcile with the theory of social systems, but provided only cursory suggestions of how to conceive space from a systems-theoretic perspective.[31] Regarding the question of whether space is "real," the only space that matters to social systems is the space that becomes meaningful through communication. In a focused essay on power within the theory of social systems, Luhmann explained power as a medium of communication, but not, for example, as the ability of individuals to overcome resistance.[32] Similarly, in social systems space is a communication medium rather than a transcendent background condition for communication or a "social construction."[33] Space, or at least all meaningful space, is not a transcendent precondition of experience but a way of making experience comprehensible and communicable.[34]

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[29] Gren & Zierhofer, *supra* note 18.
[30] DAVID HARVEY, EXPLANATION IN GEOGRAPHY 447-480 (1969).
[31] Gren & Zierhofer, *supra* note 18, at 629.
[32] NIKLAS LUHMANN, TRUST AND POWER: TWO WORKS 107, 109-118 (Howard Davis, et al., trans., 1979).
[33] *See, e.g.* BLOMLEY, *supra* note 20, at 46: "[A]lthough legal practice may affect social life within a locality, law itself is not simply imposed upon a local setting, but is instead interpreted in and through that setting. Law is, as it were, produced in such spaces; those spaces, in turn, are partly constituted by legal norms. Either way, law cannot be detached from the particular places in which it acquires meaning and saliency."
[34] *See* LUHMANN, *supra* note 23, at 160-162. ("We would like to call *media* all the evolutionary achievements that enter at those possible breaks in communication and that serve in a functionally adequate way to transform what is improbable into what is probable. Corresponding to the three types of communicative improbability, one can distinguish three different media that mutually enable one another,

Complexity–that is, the fact that any system cannot maintain a one-to-one relation between its elements and those of its environment–implies the necessity of selection.[35] Selection can only be accomplished by processes and structures that orient the system toward its own complexity, toward that of its environment, or both. Social systems use communication to enable corresponding selections coded meaningful or not meaningful under conditions of double contingency. Double contingency means that each referent bases selections on reciprocal selections by others.[36] Communication enables connections between selections and subsequent selections, providing for continuities between what can be accepted or expected. Language is only the most obvious medium of communication; others include power and money. Efforts to capture what is unique about individual people or to discover what is common to all people might provide insight into how communication media such as language, power, and money condition selection, to the extent that social systems may be structurally coupled to psychic systems. Any such effort to explain the structural couplings between psychic systems (and the other systems involved in the composition of a person) and social systems would take place within the social system, however, because "explaining" is a communication.

What matters for analysis of space within the social system is the ways observations are coded according to binary distinctions—such as the foundational distinction between legal and illegal, in law—and semi-stable horizons of meaning arise

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limit one another, and burden one another with consequent problems. [They are language, media of dissemination (such as printing and broadcasting), and symbolically generalized communications media (such as love, truth, and power)]").

[35] *See* Glossary, *infra* at Appendix.

[36] *See* LUHMANN, *supra* note 23, at 103-136.

from which subsequent selections must be drawn.[37] These codes are the foundations of their respective systems. Programs are system structures and processes that direct the coding of observations. In the legal system, an example of a structure would be a statute; an example of a process would be court pleadings. A system's binary code is its basis for reduction of environmental complexity into systemic order by selection.

The starting point in describing space as a social system is the unity of all possible observations. To begin, an observer must draw a distinction between the system and its environment.[38] Upon the drawing of this distinction a system has constituted itself and opened the way for further observation and selection. One objection may be that there is a primordial, "natural" spatiality inherent to all possible experiences both separately and collectively, and that both system and environment are always spatial. Whether space exists prior to the distinction between system and environment is indeterminate because the self-constitution of an observing system that observes space presupposes a distinction between system and environment. This does not mean, however, that systems produce space as an artifact that endures indefinitely. In *The Production of Space*, Lefebvre did not resolve the problems of claiming that "social space" was "produced" from "natural space" by labor embodied in the actions of subjects.[39] Natural space simply exists, according to Lefebvre, prior to and outside of human experience and action. If it is outside of human experience and action, then how can its transformation by relations of production into "social space" become an object of analysis? Instead of positing a

[37] *See* LUHMANN, *supra* note 32, at 128-130 (discussing the significance of codes of social systems and the processes by which they form).
[38] *See* Luhmann, *supra* note 26, at 1421. The observer is always a system. Neither system nor environment takes priority in existence or causality. The system that is the observer need not be capable of observing its own system/environment distinction; it need only make that distinction.
[39] *See generally* HENRI LEFEBVRE, THE PRODUCTION OF SPACE 30-31 (Donald Nicholson-Smith, trans., 1991) (describing natural space as an "origin" that influences the social but is nonetheless being "lost").

transcendental background upon which changes are wrought through causality, which can only be explained inductively, the spatial system must be recognized as already within the social system. Space is not a social construction produced by the drawing of distinctions; rather it consists of the distinctions themselves. Space is not the emptiness or the non-emptiness but the distinction between the emptiness and the non-emptiness, much the same as law is not doing what is legal or doing what is illegal, but the distinction between what is legal and what is illegal.

Space is a symbolically generalized communication medium: saying something about space is itself the (meaningful) space. By saying "space" a distinction is drawn between space and non-space. Drawing this distinction is a communication separating meaning from non-meaning, and the code of a subsystem of society, so that any system involving (meaningful) space is immediately social.[40] The distinction does not persist thereafter in itself, however, because communication depends on subsequent communication to be meaningful. Spatial descriptors such as boundary, frontier, distance, pattern, and concentration, as programs of social systems, arise from further distinctions beyond the distinction between space and non-space. The communication of these distinctions places limits that form a calculable system of space rather than an incalculable chaos of complexity. Communication about space cannot take place without referring to a container that makes it calculable, and all containers comprise two distinct elements, space and non-space. Going beyond talking about containers—delimiting the

[40] It might be objected that in physics or chemistry changes and continuities in system states take place within or depend upon a meaningless space that is simply "there." The sciences of physics and chemistry are social systems that employ the symbolically generalized communication medium of space in specific coding processes and structures. That space is used in these social systems to explain the behavior of subatomic particles within atoms, or the relation of stars and planets to one another, does not establish a one-to-one correspondence between the communication medium of space and its environment.

infinite, as it were—is impossible because delimiting involves talking about containers to contain the infinite. For example, consider the set of real numbers between zero and one: an infinite set of numbers. Are there ten times as many real numbers between zero and ten as there are between zero and one? Can one "infinity" be larger than another? Both the affirmative and negative seem paradoxical. The source of the paradox is that efforts to capture infinity and talk about it place limits on it, then place more limits on those limits, and limits on those limits.[41] This drawing of distinctions is called communication—of which social systems consist—and the limits placed on space by talking about it constitute a social system. Use of words like "say" and "talk" in this context should not be taken as a restriction of this kind of communication to language alone. To the contrary, the spatial code of space/non-space crosses both language and a variety of other regimes of symbols, the most obvious of which for geographers are those of cartography.

The formation of a spatial code is an important development in the evolution of many social systems. Social systems can consist of communications about space, or, communications distinguishing or relying upon the distinction between space and non-space. The distinction is between space and non-space and not between space and matter, because matter is generally (though perhaps problematically) conceived of as that which *takes up* space, and therefore it has space. Non-space is all that which is communicated as having no space. This distinction is presupposed, for example, by boundaries. A boundary itself does not have area or volume; it delimits an area or a volume, and is itself

[41] Mathematics has conceived the possibility of different sizes or degrees of infinitude, but tellingly these "cardinalities" are compared according to the arrangement of the numbers that delimit them and that communicate containment and division. *See* GEORG CANTOR, CONTRIBUTIONS TO THE FOUNDING OF THE THEORY OF TRANSFINITE NUMBERS (1955)

non-space. Whether communications focus on the boundary or the area inside or outside it, they rely on the distinction between the non-space of the boundary and the space of the area. Interestingly the communications of non-space are themselves spatial. A fence marking a boundary, for example, is located either on one or both sides of a boundary, because a fence has space and the boundary does not. The same series of distinctions can be applied to distances. The communication of distances requires endpoints, hence a distinction between the space of the distance and the non-space of the endpoints. The space/non-space distinction is the spatial code of a spatial system that may be structurally coupled to other social systems. From this basic distinction, programs of system operations regulate the links between the spatial code and ever more complex system communications.[42] In the case of distances, for example, a process of communications provides for generalization through the application of the spatial code to communications of observations, such as comparisons of the observed extension of objects or between objects to a metal bar locked in a vault in France. The program operates through the constant comparison by communications of such containers to other containers in daily life, so that hardly anyone refers directly to the original observation of the bar in France (or any other standard) to give meaning to communications referring to meters. The programs that give rise to communications on geographers' traditional spatial concerns such as locations, regions, nodes, patterns, and concentrations could be elaborated similarly, and more thoroughly. Such programs become evident in the case studies in the subsequent chapters of this work.

[42] *See* Gren & Zierhofer, *supra* note 18, at 619-620 (discussing codes and programs).

A crucial question for legal geography concerns the structural couplings between the legal system and spatial system within the social system. This question is obviously a part of a larger problem of explaining the relationship of legal systems to their environments, and the linkages they form with particular systems within their environments. On this point Luhmann observed that

> [l]egal reasoning uses the distinction between norms and facts, between normative and cognitive expectations. It has to know in which respects it is supposed to learn (did somebody kill another woman?) and in which respects not (should she have been killed?). Legal reasoning would not get along very well by confusing these questions. In this sense, the system is normatively closed and cognitively open at the same time. But the legal system has to anticipate (that is, to know in advance of every specific operation) which norms are legal norms and which norms are simply opinions in its environment, for example, beautiful images of economic *and* ecological rationality.[43]

The other social systems within the legal system's environment contribute to the legal system's cognitive operations but not its normative operations. Law codes its observations through statutes, regulations, and court opinions to observe its environment and constitute itself through communications of normative expectations. Statutes, for example, communicate normative expectations, and are internal to the legal system and operationally closed from the environment and other systems within it.[44] However, for the political system, statutes communicate the legitimate authority of a government, and are external to the legal system. Thus a statute that is supported by the legitimate authority of elected legislators represents a structural coupling with the legal system by

[43] Luhmann, *supra* note 26, at 1426-1427 (emphasis in original) (citations omitted).
[44] That structures within the legal system are "operationally closed" from the environment does not mean that the environment is irrelevant or that structural couplings have no role in the system's operations. The legislature's discussions prior to voting on a bill are *operations* of the political system and not the legal system, but when the statute is challenged in court the legal system may use the record of the legislature's discussion for its own purposes.

providing a cognitive input. How does the legal system deal with such cognitive inputs from its environment?

In place of one-to-one causal correspondences between elements of system and environment that rely upon induction for their justification, Luhmann places the concept of structural coupling.[45] The president's signature to a bill approved by both houses of Congress and the nuclear fusion reactions taking place in the interior of the sun and stars can be said to cause a statute to have force of law in the United States, in that both are necessary preconditions, but clearly one event is more closely linked (and more likely to be used as a cognitive input by the legal system) than the other. Structural coupling means that the legal system organizes its operations more closely with regard to the operations of some systems, such as the political system, than to others. As Gunther Teubner explained:

> [A]n operationally closed system is structurally coupled to its niche when it uses events in the environment as perturbations in order to build or to change its internal structures. From external noise it creates internal order. The contact between the system and its niche are real; however, the environmental constraints are not defined externally by spatio-temporal reality. Rather, it is the system itself that defines its environmental constraints by projecting expectations on perturbating events.[46]

Systems that can internally define the system/environment distinction used by other systems within their environments can come to use predictable inputs from those systems, through structural couplings, as opportunities to extend themselves. Structural coupling does not happen, however, unless "the functional differentiation of the social system is so far advanced that the separation and cohesion of the functioning systems are

[45] NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 381-422 (Klaus A. Ziegert, trans., 2004); *see also* Luhmann, *supra* note 26.
[46] Teubner, *supra* note 22, at 1446 (citations omitted).

one and the same problem."[47] In other words, law can recognize the role of politics in the formation of normative expectations because law and politics are sufficiently functionally differentiated. This explains why there could be no rule of law until law was sufficiently functionally differentiated from politics, religion, and other social systems. Subsystems within the social system cannot be structurally coupled to their environments at large; only to other systems.

The legal system is perhaps most notably structurally coupled to the political system, though economics and religion also have important links. Such connections have led most social theorists to assume that politics and law are one unified system: hence a wealth of references to an entity encompassing both called "the State."[48] The notion of the rule of law serves in each system, however, as a means to speak of the way each system sees those connections:

> Seen from the perspective of law and its function, there can be no areas without law, no forms of conduct that cannot be subject to legal regulation, no enclaves of unregulated arbitrariness and violence. The common law calls this the 'rule of law'; as Herman Finer puts it, 'the law and the rule [of law] cover the same ground".
> …
> The *Rechtstaat* formula is used by the legal system to describe only itself. Therefore it is a fitting description.
> …
> For the political system, which defines itself as the state, the *Rechtstaat* formula expresses a further precondition for increasing complexity. Law, as the enforcement of politics, is only available if and in so far as the political system lets law be law and defers to it, and does not apply force illegally. Consequently, the *Rechtstaat* formula means different things, depending on which system is using it. However, it expresses these different aspects in one formula, or—as it can then be said—in one schema and by that it enables its definition.[49]

[47] LUHMANN, *supra* note 45, at 385.
[48] *See generally* Id. at 357-380.
[49] Id. at 368, 370-371 (alterations in original) (citations omitted).

Both the political and the legal system are subsystems of the social system, and consist of communications. Many of the operations of the legal system rely on language, obviously, but many operations rely also on other media such as power, money, and space. The reliance of the rule-of-law schema on the spatial system is clear in Luhmann's discussion. *Areas* must not be "lawless." Complexity must be attempted to be simplified, made calculable, through ordering by the system. With regard to space this may mean that areas must be bounded by law, measured by law, fragmented or combined by law. It may also mean that areas must be given characteristics by law: *legal* characteristics.

Space could be meaningful without law, or without any particular kind of functionally differentiated legal system. A society with meaningful space could conceivably lack generalized normative expectations involving space, though it would be an unusual limitation. Notions of property, for example, would probably be absent. Under the rule-of-law schema, the legal system uses space as it uses language and other communication media to give form to its programs. Often, but not always, the basic unit of space within the legal system is the jurisdiction.[50] Indigenous people have historically occupied an ambivalent location in the spaces maintained by the legal system, but ambiguities are opportunities for the legal system to expand its purview, both internally and externally. Efforts seen from some perspectives as resistance to the legal system's generalizations are processed by the legal system according to its internal organization. How the legal system uses its communication media to build structures of spatial expectations, including from what politically might be seen as resistance, and how it

[50] *See generally* KENNETH R. OLWIG, LANDSCAPE, NATURE, AND THE BODY POLITIC 17 (2002).

arranges expectations about how such structures form, are the guiding questions for the remainder of this chapter and the subsequent chapters.

The value for geography of this endeavor to develop a legal geography based upon Luhmann's theory of social systems is similar to the value of Luhmann's work for sociology. It represents a serious effort to overcome the problems with the use of the individual as a basis for the philosophy of knowledge that have become increasingly evident in modern society. Sources of these problems have been called, from different perspectives: the increasing functional differentiation of society, the fragmentation of language games, the death of the author, the condition of postmodernity, the crisis of legitimation, and, in a simplified but widely popular formulation, the breakdown of traditional values. Luhmann's approach represents a way through the conundrums of a complex society without committing to a Theory that has an Agenda. It does not seek to enforce a particular understanding of the world, and representations of "the way things should be" are located within the observable world rather than in a detached area of supposed objectivity. The theory describes itself, and it is capable of revising itself, indeed it requires that it revise itself, when it does not match observations. A legal geography based upon the theory of social system cannot expect specific results. Society is not composed of individuals, but neither are individuals merely components of society. Similarly, space is not a transcendent background condition of experience, nor is experience simply a mechanistic reaction to conditions. A geography of social systems is positioned to take the specificity of society, of space, and the world more seriously than any other existing theory of society. The ensuing case studies pursue this course.

C. The rule of law and the entry of the American legal system into Indian country

In this third part of the chapter, by way of example and introduction to the comparative study that forms the bulk of the remainder of this work, the conceptual frames developed in the first two parts extend to the early development of a specific kind of American law. Commonly referred to as "federal Indian law," this functional subsystem of the legal system is concerned with the relationship of non-Indian settlers and their governments with American Indian people and their governments. This part considers only this subsystem's early adaptations to the new difficulties presented by the fact of American Indian sovereignty in the face of European colonization of their land. The origins of these adaptations arose in the natural law theory of medieval theology, which were incorporated into the evolution of legal definitions of property in England, and then fit to American law by a set of colonial and then US federal statutes and court cases in the early nineteenth century. The endpoint of this section transitions to the outset of the case study in the third chapter, with the beginnings of the legal system's definition of nation-to-nation relationships between Chippewa Indians in Minnesota and the United States.

> The emergence of an aggressively expansionist Euro-American United States from what used to be the Indian country of eastern North America is a problem to be explained, not an inevitable process to be traced from the first planting of English seeds on Atlantic shores to their flowering in the trans-Mississippi west.[51]

The evolution of American policy, and of American law, regarding American Indians was not an inevitable chain of causes and effects. The emergence of structures within the legal system such as Indians and mixed-bloods, Indian Country, reservations,

[51] DANIEL K. RICHTER, FACING EAST FROM INDIAN COUNTRY, 7-8 (2001).

and allotments, among others involving Indians, is a lesson in the system's means of constituting its own operations. The concept of contingency, unlike causality, captures the unlikelihood of the formation and persistence of systemic structures, and thus requires thorough investigation of the relationship between system and environment. Such conditions are not environmental constraints that transmit information into the system, however, but strictly constructs of the system through satisfaction of or deviation from its expectations.[52] Indians and Indian Country were not discovered by the legal system. People living on their land in their own way, according to their own manner of generalizing normative expectations, were incorporated within the legal system to create Indians and Indian Country.

The functional differentiation of a subsystem called "federal Indian law" within the American legal system must be characterized generally, before proceeding to the examples that will illuminate the interaction between the legal system and spatial system. Like the rest of the legal system, federal Indian law has distinct continuities with previous, less functionally differentiated, legal systems. The American legal system was not suddenly generated from nothing by the ingenuity of a few powerful and clever individuals. Prior to the American Revolution and the advent of a sovereign American government, a legal system existed in the North American colonies with less complex and less functionally differentiated structures, in the form of British law that addressed the affairs of British colonies.

[52] Luhmann, *supra* note 26, at 1432.

Federal Indian law has its origins in pre-Revolutionary colonial law, and even medieval church dogma, as Robert Williams showed,[53] but the present discussion is confined to setting up background for the case studies. Immediately prior to the American Revolution, British colonialism was oriented toward measured westward expansion into North America, controlled by the Crown and its agents, limited by the perception of its potential for profit. After the ouster of the French from most of North America, the Royal Proclamation of 1763 limited settlement to the areas east of the Appalachian divide (see figure 3).

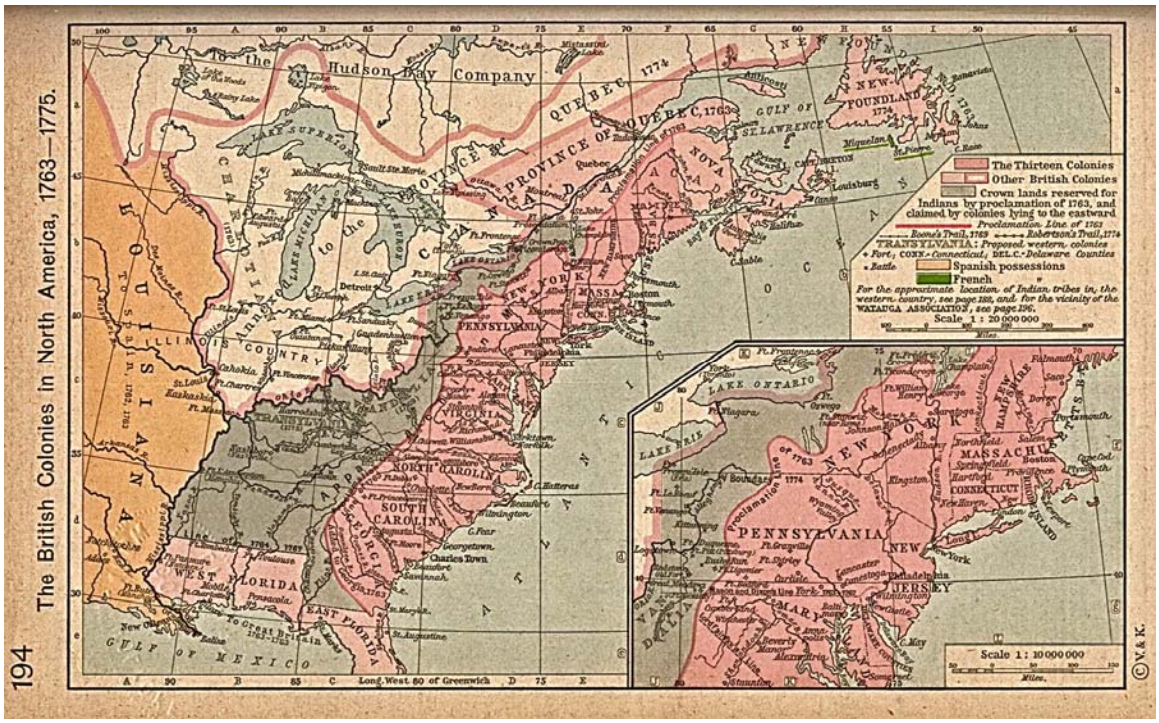

Figure 3 (Source: William R. Shepherd, *Historical Atlas*, New York: Henry Holt 1923)

The Proclamation also provided that Indian lands west of the divide would be acquired only by the Crown's agents.[54] This measure was to limit the amount of potentially violent interaction between colonists and American Indian tribes resisting their

[53] ROBERT A. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990).
[54] Id. at 237-238.

encroachment, and limit the expense of preventing or punishing trespassing. It was also a concession to the Six Nations, allies of the British, whose aid had made possible the victory over the French. The Proclamation created a boundary between Indian Country and the colonial holdings of the United Kingdom, drawing a clear distinction separating colonized (or potentially colonized) space over which British control could extend from the wild, limitless Indian Country, where British control would not extend. All of eastern North America belonged to the Crown, the royal proclamation implied, but "such parts of our [(the Crown's)] dominions and territories as, not having been ceded to or purchased by [the Crown], are reserved to [the Indians]."[55] The 1763 Proclamation embodies colonial concepts of discovery and conquest while acknowledging the Indians by reserving to them the land they already occupied and used.

Aside from avoiding conflicts and reassuring indigenous allies, the Proclamation created new spatial distinctions that were meaningful within the British legal system. The boundary line at the divide of the Appalachians created a colonial territory, available to British settlers, and Indian Country, not available to those settlers, drawing a distinction between the inside (the colonies) and the outside (Indian Country). Indigenous people would have some authority over themselves but nonetheless be subordinate to the colonizing sovereign in that the proclamation provided for Crown control over subsequent cessions or purchases from Indians.

The religious influences partly behind the British legal system's approach to colonization provided opportunities for the system to adapt to its environment while continuing to fulfill its function as a structure of normative expectations about

[55] Id. at 237.

colonization. The feudal and religious justifications of conquest of unbelievers provided a basis for the legal claim that the Crown owned and had absolute control over all the areas of North American "discovered" and claimed by its agents.[56] At the same time, the legal system had to explain the presence of indigenous peoples, and characterize them, to give them and their land meaning upon which normative expectations could be founded. Thus the program of the treaty, long used as a negotiated agreement between political powers having legal force between Christian powers, was extended to define relations between the Crown and American Indians, among other colonized peoples.[57] The utopian sentiments expressed in the colonies' Declaration of Independence from Britain indicate not the complete replacement of the British legal system, but an opportunity for the legal system to change itself through functional differentiations to reorient itself to its own complexity (rather than that of the British legal system) and that of its environment. The self-description of the American political system as an independent nation should not lead to the conclusion that pre-Revolutionary events form no part of the American legal system (or political system, for that matter). The American legal system and the British

[56] *Cf. Holden v. Joy*, 84 U.S. 211, 243-244 (1872) (citing *Johnson v. M'Intosh,* 21 U.S. 543 (1823)). In *Holden*, the Supreme Court held that "the principle established [in Johnson] gave to the nation making the discovery the sole right of acquiring the soil and of making settlements on it. Obviously this principle regulated the right conceded by discovery among the discoverers, but it could not affect the rights of those already in possession, either as aboriginal occupants or as occupants by virtue of a more ancient discovery. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell." *See also Mitchel v. United States*, 34 U.S. 711 (1835): "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. In either case their right became extinct, the lands could be granted disincumbered of the right of occupancy, or enjoyed in full dominion by the purchasers from the Indians. […]Such […] was the view taken by this court of Indian rights in the case of Johnson v. M'Intosh (8 Wheat. 571, 604), which has received universal assent."

[57] *See* VINE DELORIA, JR. & RAYMOND J. DEMALLIE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY, 6 (1999); FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES, 2 (1994); VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE, 3-6 (1983).

legal system remained functionally differentiated subsystems, though the differentiations became increasingly pronounced.

After the beginning of the Revolutionary War the American legal system described itself as separate from the British legal system, changing and adding to the set of functions it needed to fulfill. The United States was no longer a group of colonies administered as a part of the British Empire, but a nation in its own right, and social systems in the new United States adapted accordingly. The Declaration of Independence adopted July 4, 1776 was followed a few days later by a first draft of a written constitution, known as the "Articles of Confederation," adopted by the Second Continental Congress in November 1777 and ratified by the last of the thirteen states in 1781.[58] The first treaty with a group of indigenous people made by the United States was with the Delaware 1778.[59] Treaties had been used in many colonial contexts before 1778, particularly with regard to indigenous people and the land they occupied, but the fledgling American government's use of treaties began within a legal system that was participating in the assertion of American independence. Much attention is given to the emergence of the Constitution after 1787 as the original source of these adaptations, but this attention obscures the learning that resulted from the transitional failure of the Articles of Confederation during and immediately after the Revolutionary War. The system cut away the detritus of structures it identified as inefficient, and established new

[58] *See* MERILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-1781 (1970).
[59] *See* DELORIA & DEMALLIE, *supra* note 57, at 8-11.

structures as functions were redefined.[60] Even as the Constitution built new foundations from pieces of the Articles of Confederation it removed, it did not pretend to lay down the entirety of the political and legal systems, including self-observing guiding principles such as the rule of law, nor could its communication have an unchangeable rigor.

Federal Indian law was not greatly functionally differentiated from the rest of the American law in 1787 as the Constitution was drafted. Statutes, court decisions, and administrative activities oriented functionally toward Indians had not accumulated. After the fashion of British colonial law, the only regular method of communicating generalized normative expectations about American Indian people was through treaties, which provided a means for generalizing normative expectations between the American legal system and those of American Indian tribes, by way of the structurally coupled operations of the respective political systems. A treaty involved negotiation and agreement between two or more groups resulting in their collective decision. The negotiation was therefore a process within their political systems, but the record of the agreement communicated normative expectations, and therefore persisted as a structure within the legal system.[61]

In describing the processes and structures of the legal system that led simultaneously to a greater differentiation of federal Indian law and absorption of the former functions of Indian tribes' legal systems, the question arises as to whether there is

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[60] *See, e.g.* THE FEDERALIST NO. 42, at 306 (James Madison) (B.F. Wright ed., 1961) (discussing the failure of the Articles of Confederation to provide structure for federal and state regulation of commerce with Indians).

[61] Politically a treaty is irreversible because the process of reaching agreement, or seeming agreement, takes place once and cannot be undone. Another process could take place subsequently, but would not undo the political process of the prior treaty, which took place in the past. Legally, however, the treaty endures unless or until it is changed, by another treaty, by statute, or by some other process. Thus a treaty, simultaneously an element of both the political and legal systems, is a process within the political system but a structure within the legal system.

a rule of law in federal Indian law. Philip Frickey observed, for example, that "more than any other field of public law, federal Indian law is characterized by doctrinal incoherence and doleful incidents. Its principles aggregate into competing clusters of inconsistent norms."[62] Do these seemingly unusual conditions of inconsistency and incompleteness indicate there is no rule of law in federal Indian law? The topical gaps and overlaps in federal Indian law are analogous to the gaps and overlaps between Indian Country and colonized lands. Gaps and overlaps may appear in any functional subsystem, but the legal system operates as though they are not there. Such conditions, though pronounced, are not peculiar to federal Indian law, but rather are characteristic of the entire legal system, and at a higher level of abstraction, of all social systems. To the legal system the rule of law involves the system's constant efforts to adjust to its environment through structural couplings with the political system, but the adjustment is never complete. The system's failures—the slippage between the selections achieved by the system and the selections made necessary by the complexity of both system and environment—do not make the rule of law obsolete as a schema for the two systems' self-descriptions of their structural couplings to each other. Systems cannot achieve one-to-one correspondence with their environments, but they continue to operate through processes that attempt to simplify by becoming more complex.

Constitutional provisions regarding the relation of treaties to other operations of the legal system such as statutes were among the few initial means by which the legal

[62] Philip P. Frickey, "Commentary: Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law", 110 HARV. L. REV. 1754 (1997).

system oriented itself toward indigenous people and the land they occupied.[63] Ratification of the U.S. Constitution communicated the changes and the continuities of generalized normative expectations about the generalization of normative expectations (or "rules about rules") between the new American legal system and its predecessor, the British legal system. As Deloria and Wilkins observed, the Constitution is more concerned with providing structures to ensure that political and legal systems function efficiently in general than with creating infallible first principles by which to deal with American Indian tribes in particular.[64] Such Constitutional provisions were necessarily vague and open-ended, as in the Commerce Clause and the so-called Elastic Clause, which provided:

> The Congress shall have power
> …
> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;
> …And
> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.[65]

Other provisions, without mentioning Indians, have been used to structure legal processes that communicate expectations about Indian affairs, most notably the power of the President to make treaties on the advice and consent (of a two-thirds majority) of the

[63] *See* VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS, 21-31 (1999).
[64] *See* Id. at 21.
[65] U.S. CONST., art. I, §8.

Senate,[66] and the Supremacy Clause, which characterizes the Constitution, federal statutes, and treaties as "the supreme law of the land."[67]

The Constitution does not contain structures that place normative expectations about American Indians or their lands clearly within the American legal system. In the language of political scientists, tribes have inherent sovereignty upon which the Constitution did not pretend to infringe,[68] although subsequent statutes and court decisions have done so. The treaty power and the commerce clause, by referring to "Indians" separately, imply a separation between Indian tribes' ordering of their own affairs through their own systems and the American legal system's ordering of expectations about how relations with Indian tribes are to be conducted. Through the nineteenth and twentieth centuries the separation between tribal social systems and the American legal system was eroded as the American legal system evolved structures that communicated expectations about Indian/non-Indian relations, and also expectations about both non-Indian and Indian behavior in Indian country. Interestingly, a breakdown in the separation of tribal political systems from the American political system did not accompany that between the legal systems. Until the second half of the nineteenth century, Congress limited its legislation on Indian affairs to the functions described in the Constitution for regulating commerce and, in the case of the Senate, ratifying treaties.

At first, Indian Country and tribes' power over their lands were seen by the American legal system as quite outside its purview. Thus no structures developed to channel the operations that would select expectations about Indian activities in Indian

[66] U.S. CONST., art. II, §2.
[67] U.S. CONST., art. VI.
[68] *See United States v. Wheeler*, 435 U.S. 313 (1978).

country because the system had not yet defined that function for itself. Not surprisingly, the overall increase in the legal system's complexity compelled such selections in the context of American westward expansion, as other functions of the U.S. legal system began to overlap with the necessity of selecting expectations about Indian country. So, the 1810 case of *Fletcher v. Peck*,[69] rather than the Constitution, necessitated the legal system's involvement with the colonization of Indian country, and tribal sovereignty, by means of the rule of law. *Fletcher* began the legal system's consideration of Indians and their land by applying to Indian Country the rule-of-law injunction that no areas or forms of conduct must be left unregulated.

Ostensibly no Indians were involved in the *Fletcher* case, and this provided the legal system the opportunity to build structures that characterized Indians and their land from existing structures having nothing to do with Indians. Fletcher and Peck disputed the ownership of a piece of land on the Mississippi River that may or may not have been part of pre-Revolutionary land grants to some of the southern colonies, land that was later granted to individuals who traced title back to the U.S. federal government. In the midst of a series of allegations about states' ownership of lands based on such grants, the right of Indians to these lands was raised as an issue that might affect whether states could convey such land to private individuals. Although the characterization of Indian land ownership was passed over quickly and with only a brief, vague discussion, the Supreme Court did tacitly accept the task. As Chief Justice John Marshall stated in his opinion for the Court, "the majority…is of the opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as

[69] 10 U.S. (6 Cranch) 87 (1810).

to be absolutely repugnant to seisin in fee on the part of the state."[70] Through this structure the system characterized Indian title as a sort of encumbrance,[71] but not cloud,[72] upon the fee simple title held initially in this case by the government and then later granted to individuals. It also defined the generalization of expectations about Indian land as one of its own functions by defining it as a legal question rather than a political question. *Fletcher*, rather than the Constitution's Commerce Clause, provided the legal system with its early opportunities to replace within itself the functions of Indian legal systems. The American legal system would no longer rely on segmental differentiations between Indian Country and colonized areas based on a lack of communication between systems. Normative expectations in Indian Country would be functionally differentiated from normative expectations elsewhere. In short, *Fletcher* was an attack upon the relevance of the distinction between Indian Country and colonized lands to the question of whether or not Congress and American courts had jurisdiction over land ownership.

A subsequent (1823) case, much more frequently cited as a progenitor of federal Indian law, *Johnson v. M'Intosh,*[73] used a similar dispute as an opportunity to characterize the land title held by Indian tribes. In *Johnson*, as in *Fletcher*, the affected Indians were not directly involved in the case, although the situation allowed the legal system to define their land ownership. Representatives of the Illinois and Piankeshaw tribes had sold land to Johnson and Graham under the supervision of British colonial authorities before the Revolutionary War. Later the tribes had ceded an area containing that land to the United States, and M'Intosh had bought land, including tracts claimed by

[70] Id. at 142-143.
[71] *United States ex rel. Hualapai Indians v. Santa Fe Pacific Railroad,* 319 U.S. 339 (1941).
[72] *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 282-285 (1955).
[73] 21 U.S. (8 Wheat.) 543 (1823).

Johnson and Graham, from the federal government. The question for the court was whether the tribes sold the land to Johnson and Graham, or ceded it to the United States. In response, the system developed a structure to limit the range of possible selections—in this case, a definition of Indian land ownership.

Forming that definition—more accurately described as a structure limiting the ways that Indian land ownership could be defined by distinguishing it from non-Indian land ownership—was accomplished by adapting the existing structures of colonial law inherited from the British legal system, which had in turn been borrowed from some of the same medieval origins as those of other colonial powers.[74] Chief Justice Marshall's statement of the Court's method of building these adapted structures has since been widely quoted:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with one another, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.[75]

Herein are captured references to what the Court took to be historical fact, aspects of the legal system that, though not apparent in the Constitution or any statute, it recognized as

[74] *See generally* WILLIAMS, *supra* note 53.
[75] Id. at 572-573.

undeniably generalized expectations within the legal system. The well-worn justification for colonization, that civilization and Christianity (as defined in the social systems of the colonizers) were sufficient payment in exchange for fee simple title to the lands inhabited by the uncivilized and unchristian, is what upholds the normative expectation that a "discovery" by representatives of a "Christian nation" confers title upon that nation's government. The structure this decision created in the American legal system did not divest Indians of all claim to their land, as the Court limited the scope of the decision by emphasizing that the fee simple title acquired was "against all other European governments."[76]

The dispute became an opportunity for the system to create a structure to control the definition of the kinds of claims Indians had to their land, which later provided opportunities for the system to create structures controlling the definition of the kinds of authority Indians (and non-Indians) exercised over Indian Country. The potential for extending the *Johnson* statement of tribes' title to land is evident:

> Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired [by discovery] being exclusive, no other power could interpose between them. In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to

[76] Id.; *See also Holden v. Joy,* 84 U.S. 211 (1871); and *Mitchel v. United States,* 34 U.S. 711 (1835); *but cf. Martin v. Waddell's Lessee*, 41 U.S. 367, 409 (1842) ("[A]ccording to the principles of international law, as then understood by the civilized powers of Europe, the Indian tribes in the new world were regarded as mere temporary occupants of the soil, and the absolute rights of property and dominion were held to belong to the European nation by which any particular portion of the country was first discovered. Whatever forbearance may have been sometimes practised towards the unfortunate aborigines, either from humanity or policy, yet the territory they occupied was disposed of by the governments of Europe at their pleasure, as if it had been found without inhabitants.")

> whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.[77]

By the system's definition the absolute right of ownership could not be held both jointly and severally. A tribe and the federal government could simultaneously have an ownership interest in the same undivided parcel of real property, but only one could dispose of it. This is a structural coupling of the legal system to the spatial system. A single undivided bounded area can only have one title in fee simple. That title may be held jointly by a group of shareholders or a family who hold fractional interests in the undivided whole or who have an agreement of some kind such as a land trust or a corporation, according to which the whole property is administered. An undivided piece of real property may not be held severally, however, by individuals with equal claim to the entire area and equal right to dispose of the entire area.[78] Thus the relation between Indians' aboriginal title and the federal government's fee simple title has been likened to a trust agreement wherein the federal government acts as trustee for the beneficiary Indians.

Since the Court had found that discovery by Christian European nations conferred absolute right (upon the U.S. federal government, in this case) to acquire and dispose of the soil "subject only to the Indian right of occupancy,"[79] and *Fletcher* had declared that Indian title or right of occupancy did not conflict with fee simple title, *Johnson* provided the structure for that ownership.

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[77] Id. at 573-574.

[78] Incidentally, the condominium form of ownership involves a fractionalization into severable but not joint ownership of parts of a whole, with each severable interest also holding a joint interest in a "common element" usually consisting of land beneath a building or the building itself. Fundamentally the title to the undivided land is still held jointly but not severally because the joint interest in the common element of any given unit is still encumbered by the interests of the other unit owners. The unit owners then come together in an association to reach agreement about the administration of the common element.

[79] Id. at 574.

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So, too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.[80]

Not possessing fee simple title by the system's definition, Indians could not sell their land to anyone, but could only cede it to the government by treaty. Treaties were also the means by which the federal government would recognize Indians aboriginal right of occupancy. The legal force of this right of occupancy, and of the obligation of the government to protect it, remained unclear initially. From the perspective of the theory of social systems, those rights and obligations remained unstructured areas of internal complexity within the legal system. *Johnson* advanced the tentative definition of tribal sovereignty as "impaired," creating expansive vistas of complexity that would provide the system opportunities to erect more and more precise and specific structures, all the while drawing the legal/illegal distinction in Indian country and performing the generalization of normative expectations within federal Indian law in place of tribal legal systems.

The two "Cherokee cases," frequently referred to as the basis for the relationship between tribes and the governments of the United States, were opportunities created by the system from within the spatial structure provided by *Johnson*. The boundaries of the

[80] Id. at 591-592.

state of Georgia, as defined by the American legal system, contained within them an area not defined by the American legal system—the land occupied by the Cherokee Nation. The Cherokees still inhabited their land, and had not ceded it to the United States. By *Johnson*, however, fee simple title to the Cherokee Nation's lands was held by the United States, subject to the Cherokee right of occupancy. Georgia's state legislature passed an act declaring the extension of its jurisdiction to the Cherokee Nation, and the Cherokees, resenting the assault, approached the U.S. Supreme Court on the basis of its original jurisdiction over disputes involving a state and a foreign nation.[81] The result, the 1831 case of *Cherokee Nation v. Georgia*, was pivotal in American Indian law in that it confirmed the legal system's distinctive treatment of tribes as something other than foreign nations.

Chief Justice Marshall's summary of the situation at the opening of the Court's opinion in the case shows how the case clarified previous operations (such as *Johnson*) and provided structure for subsequent operations in federal Indian law.

> If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant, the present application is made [by the Cherokee Nation].[82]

Beyond the oblique reference to the *Johnson* doctrine of discovery ("found by our ancestors"), the American legal system here recognizes itself as a part of a colonizing society. From the system's perspective, tribes must be brought under control, and not

[81] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).
[82] Id. at 15.

only the de facto control of military force, but the de jure control of legal doctrine. Indeed, for the legal system the de facto exercise of control is only recognizable when defined as de jure expectation of control.

In *Cherokee Nation* the Court sidestepped the question of whether tribal lands within the external boundaries of a state became part of that state and subject to its authority, instead focusing on the preliminary question of the Cherokee Nation's standing by asking whether the legal system's definition of "foreign nations" should include Indian tribes. That is, if the system were to set itself the task of organizing the complexity of Indians' affairs, would it do so by way of the existing structures addressing "foreign nations" or would it build new, functionally differentiated structures specific to Indians? The increasing complexity of relations with tribes could not be organized by the existing structures, the Court decided:

> The condition of the Indians in relation to the United States is perhaps unlike that of any other two people [sic] in existence. In general, nations not owing a common allegiance are foreign to each other. The term foreign nation is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.
>
> The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States…[83]

Here the Court defines the situation as a contradiction between the Constitutional structure designating "foreign nations" and the way the system had already begun to define relations with Indian tribes. The "peculiar and cardinal distinctions" of the

[83] Id. at 16-17.

system's relations with Indians are neither peculiar nor cardinal unless the system so defines them. The fact that treaties were made with tribes, instead of justifying a definition of tribes as foreign, was defined in opposition to the spatial-legal implications of *Johnson*. Maps, geographical treatises, and histories, though not operations of the legal system when drawn by cartographers or written by historians, can become such when so defined legally and thereby incorporated into the legal system. Once they are defined as generalized normative expectations, rather than cognitive expectations, they are fundamentally different structures, part of the legal system rather than of the science of cartography. The legal system used them in this instance to define the contradiction between the apparent foreignness of tribes, and the existing definition of Indian territory as "part of the United States," occupied by people "under the protection of the United States," in order to generate new structures that would resolve the problem, defined narrowly as the tribe's standing under the Constitution to bring a case to the Supreme Court under original jurisdiction.

Working from the existing distinction between states, foreign nations, and Indian tribes found in the Commerce Clause,[84] *Cherokee Nation* created a new structure, the "domestic dependent nation":

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they

[84] *See* Id. at 18.

> are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[85]

Cherokee Nation describes the distinction between states, foreign nations, and Indian tribes in the context of an explanation for the Commerce Clause's naming of them separately.[86] The discovery and conquest aspects of *Johnson* provide the bulk of the foundation for the *Cherokee Nation* claim that Indian tribes are in "a state of pupilage." *Fletcher* and *Johnson* established that the United States held fee simple title to all lands it discovered or acquired from the discoverer, in spite of Indians' rights of occupancy. Building on the *Johnson* ethnocentric basis for land ownership, *Cherokee Nation* created an ethnocentric basis for legal system's replacement of Indian social systems. The rhetoric of such phrases as "domestic dependent nations", "state of pupilage", and "relation…of a ward to his guardian" extend the ethnocentrism of discovery and conquest to the ethnocentrism of redefining legal systems without redefining the structural couplings with political systems. The American legal system expanded its functions to include Indians and Indian country, but Indian political systems did not become structurally coupled to the legal system in the way that the American political system is. Indian political systems are neither wholly foreign nor wholly domestic, and get both the disadvantages of being foreign and the disadvantages of being domestic. The existing options for Indians' political participation, including treaties, civil disobedience, and violence, remained, but did not immediately expand.

After the Court in *Cherokee Nation* decided that the Cherokees could not sue Georgia directly, the Cherokees contrived a situation to fit the legal system's structures

[85] Id. at 17.
[86] Id. at 18.

that placed preconditions on the initiation of legal disputes. They found American citizens willing to break Georgia laws on Cherokee lands. These Americans, missionaries Samuel Worcester and Elizur Butler, were tried and convicted in a Georgia county court, from which they appealed to the U.S. Supreme Court. The situation was another opportunity for the system to build upon its previous operations, structuring the domesticity, the dependency, and the nationhood of the Cherokees. Whereas among legal commentators *Cherokee Nation* is usually described as a debasement of tribal sovereignty, this case, *Worcester v. Georgia*,[87] is usually described as a fundamental recognition of tribal sovereignty. Its function in the system, at the time and subsequently, has been both to recognize and diminish tribal sovereignty, however.

In describing the situation the Court formulated its main question, whether Georgia could extend its power to an Indian tribe, by reference to existing system structures. "We must inquire and decide whether the act of the legislature of Georgia, under which the plaintiff in error has been prosecuted and condemned, be consistent with, or repugnant to, the constitution, laws and treaties of the United States."[88] To decide this, the Court set up that question in contrast to the question of who had jurisdiction over Indians: "The extra-territorial power of every legislature being limited in its action, to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee nation, and of the rights and powers consequent on jurisdiction."[89] Georgia was asserting jurisdiction over the Cherokee Nation and this implied the removal of jurisdiction from some other body, either the Cherokee Nation or the U.S. federal

[87] 31 U.S. (6 Pet.) 515 (1832).
[88] Id. at 541.
[89] Id. at 542.

government. What was the jurisdiction of the Cherokee Nation, and how could it change? The Court's procedure was to examine the history of colonization, treaty-making, and legislation concerning Indian tribes in general and the Cherokees in particular.

The Court emphasized the function of treaties between the United States and the Cherokee Nation as recognition of the sovereignty of other nations, not structures of subordination.[90] Concerning the 1785 Treaty of Hopewell, which described the Cherokees as "under the protection of the United States," the Court commented that "[t]he Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. …Protection does not imply the destruction of the protected."[91] Likewise, regarding the 1791 Treaty of Holston, the Court emphasized that the Cherokees were claiming the protection of the United States, not "submitting as subjects to the laws of a master."[92] The Court's construction of these treaties was combined within the *Worcester* decision, by which treaties between tribes and the United States define legally the system's recognition of tribal sovereignty. The function of these treaties was "recognizing the national character of the Cherokees, and their right to self-government; thus guaranteeing their lands; assuming the duty of protection, and of course pledging the faith of the United States for that protection."[93] Similarly the acts of Congress under the Commerce Clause defined Indian tribes as separate nations: "All these acts…manifestly consider the several Indian nations as distinct political

[90] Id. at 552.
[91] Id.
[92] Id. at 555.
[93] Id. at 556.

communities, having territorial boundaries, within which their authority is exclusive."[94] All these constructions of previous system operations built the fundamental definition that emerged: "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union."[95] Reproducing the earlier operations of the system in these ways, the Court permitted itself to answer the question it had set for itself.

> The Cherokee Nation…is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.[96]

Though this passage is often held up as the ultimate and fundamental statement of legal recognition of tribal sovereignty, commentators frequently temper that association with the caveat that subsequent system operations "ignored" or "reinterpreted" the doctrine it created.[97] From this perspective comes the conclusion that there are "strands" of federal Indian law doctrine that may or may not be reconcilable.[98] Complexity remains, and encompasses many more opportunities for the system to redefine both tribal sovereignty and domestic dependent nationhood. Whether the two are reconcilable or not is defined within the legal system, according to its terms.

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[94] Id. at 557.
[95] Id.
[96] Id. at 561.
[97] *See, e.g.* JILL NORGREN, THE CHEROKEE CASES, 142-153 (1996).
[98] *See generally* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW (1987).

To set up *Worcester* in opposition to *Cherokee Nation* and line up subsequent decisions according to whether they support or denigrate tribal sovereignty is to overlook the commonalities of these decisions. All operations of federal Indian law, whether they support or denigrate tribal sovereignty, add to complexity within the system of its definition of tribal sovereignty just as they clarify what was left undefined by previous operations. The system constitutes itself by reference to its own terms; for the system tribal sovereignty exists only by the reproduction of self-referential system operations. Subsequent operations are free to confer meaning upon previous operations by their selections. The Commerce Clause and *Worcester* contribute, for example, to the understanding of Congressional "plenary power" over Indians as a nearly absolute power,[99] developed in such cases as *United States v. Kagama*[100] and *Lone Wolf v. Hitchcock*[101] just as do *Johnson* and *Cherokee Nation*. *Worcester* supports tribal sovereignty, but it does so within the American legal system, advancing the system's functional differentiation of a special subsystem dedicated to normative expectations and Indian tribes.

D. Transition

The case studies examined in the subsequent chapters are not an effort to excavate causes and effects, or to show how law uses notions of space, as a symbolization of reality, in either rational or irrational ways. The evolution of federal Indian law has not

[99] The Congressional "plenary power" with regard to Indian affairs has been interpreted in multiple ways, only one of which is that it is complete in that it is uncontrolled or absolute power. Another understanding, also utilized by the Supreme Court, is that Congress's plenary power is complete in that it excludes state power over Indians by preempting it. David E. Wilkins, *The U.S. Supreme Court's explication of "federal plenary power,"* 18 AM. INDIAN. Q. 349 (1994) (citing *Perrin v. United States*, 232 U.S. 478 (1914)). Another understanding is that the Congress's power is plenary in that it is exclusive of other forms of Congressional authority because of Indians' extraconstitutional status. *See* Wilkins, *supra*.
[100] 118 U.S. 375 (1886).
[101] 187 U.S. 553 (1903).

been an inevitable process in which one event led to another, but neither has it been a haphazard series of unrelated accidents. It has been a contingent process of selection and reselection of meaning system elements. The process could only be called rational or irrational according to the system's own definition of what is valid and what is a mistake, through subsequent decisions. Observing the system and forming normative judgments about the system's validity begs the question of the frame of reference of the observer; in this situation it would be appropriate to reorient to observe the system of the observer. The generalization of normative expectations defining and constituting groups called the "Red Lake Band of Chippewa" and the "White Earth Band of Minnesota Chippewa" resulted from contingent selections from complexity in federal Indian law. Similarly, the structural coupling of programs of the spatial system to federal Indian law attempted to simplify the complexity with which the system confronted itself by limiting its bounds. Thus the Red Lake Band has been defined in connection with the Red Lake Reservation, and the White Earth Band has been defined in connection with the White Earth Reservation, two different spaces with different sets of legal structures conditioning their legal characteristics. Adding to the complications, the Red Lake Band stands alone as a tribe recognized by the federal government, but the White Earth Band is affiliated with the Minnesota Chippewa Tribe, which encompasses all the Chippewa bands in Minnesota other than Red Lake. Programs of reservation, assimilation, and allotment, as the case studies show, further attempted to simplify the complexity among differently constituted tribes and their lands. Their selections created structures upon which subsequent structures were built, and the law grew and grew in pursuit of a complete ordering of all normative expectations everywhere.

III. Federal Indian treaties and treaties in Minnesota

Treaties have historically played a major role in the relations between the United States and groups of Indians in North America. For much of the first three quarters of the nineteenth century, treaties were the primary method of stabilizing contested matters without resorting to violence. In addition to ending conflicts, however, treaties have functioned to recognize the existence of groups of Indians as tribes, or as bands within larger tribes, and to recognize their claims to their lands. Furthermore, treaties often provided land cessions to the United States in return for payments in money, goods, and other assistance, and recognized "reservation" lands for continued tribal occupancy. All of these functions have been virtually foundational in the history of relations between most recognized tribes and the United States, including the Chippewa of Minnesota.

Francis Paul Prucha referred to the treaties between the United States and American Indian tribes as "a political anomaly."[1] He justified this description by enumerating several characteristics common to most Indian treaties that distinguished them from international treaties. For example, Indian treaties recognized the sovereignty of tribes, but also "reflected and contributed to the inequality and dependency" of the tribes that signed them.[2] Also, treaties were interpreted as giving authority to the United States government to "civilize" Indians and transform their internal affairs into issues of U.S. domestic policy.[3] Such a description could amount to either a condemnation of treaties because anomalies are supposedly inimical to the rule of law or a justification for claims that the provisions of American Indian treaties are outmoded and should be

[1] FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 1 (1994).
[2] Id. at 2-5.
[3] Id. at 9-16.

unilaterally abrogated. Both such arguments pose a threat to the historical distinctness of tribal sovereignty recognized in U.S. federal law that many tribes cling to for their self-determination.

By calling Indian treaties anomalies, Prucha was drawing a historical distinction between them and other treaties, but in doing so he focused attention on the unusual issues within these treaties themselves rather than their interaction with other elements of the legal and political systems in which they arose. In Luhmann's terms, however, Indian treaties are not more or less anomalous than international treaties, statutes, court decisions, or constitutional amendments, because all of them might never have occurred or they might have occurred differently. All treaties, court decisions, statutes, and constitutional amendments are system structures created in response to a function defined by the system to limit the horizons of future selections. As structures they persist until they are changed, so any distinction between Indian treaties and international treaties can be meaningful for the legal system only as the distinction is defined within the system. What is anomalous from the perspective of history or politics may not be anomalous within the legal system, though the legal system does identify mistakes, anomalies, or inconsistencies through its self-observation, and replaces them accordingly. Although Prucha's characterization might suggest otherwise, that a court decision or treaty is politically or historically anomalous does not necessarily require the legal system to replace it.

American Indian treaties are not historical accidents, but programmatic structures of the legal system, like other structures such as statutes and court rulings, by which the system codes its observations according to the distinction legal/illegal. An Indian treaty

codes relations between independent or "domestic dependent" sovereign entities. It generalizes normative expectations about relations between sovereign entities. A treaty represents both a process within the political system by which an agreement between sovereigns is reached, and a structure within the legal system embodying normative expectations interwoven with the other structures of the system. All of these structures are constantly remade by the self-reference of the legal system because they endure only by giving rise to further communications of normative expectations. Though this observation might seem to place treaties on a dangerously unstable ground, because they could change at any time, they are not different in this way from any other structures of the system such as statutes or precedent-setting court rulings. The more attached a structure is in networks of self-referential elements, the more other structures rely on it and the more the system can treat it as though it is stable. Treaties, and in particular Indian treaties, are at a disadvantage because fewer structures throughout the legal system depend on their stability.

Many of the processes and structures comprising federal Indian law rely in some way upon treaties or the alternate structures, such as statutes and executive orders, that operated alongside them to fulfill similar functions, and that partly replaced them after 1871. Indian treaties' functions within the legal system changed before 1871, of course, and the progress of these changes must be described.[4] On the one hand a treaty is a process within the political system, a meeting through which groups representing separate sovereigns debated and reached agreements finalized in a written document defined by

[4] *See generally* Vine Deloria, Jr., "Reserving to Themselves: Treaties and the Powers of Indian Tribes" 38 ARIZ. L. REV. 963, 969-971 (1996).

the legal system as signifying the participants' assent.[5] The political process of treaty-making is structurally coupled to a legal structure of normative expectations that does not depend on any continuing political process, and that also may not depend on whether political agreement was ever in fact achieved. Signatories may not have been authorized by their own constituents to assent to the treaty, even though the legal system subsequently defined their signature as representing assent, or they may not have understood the treaty's terms fully. Thus the legal system defines for itself what constitutes a valid treaty without direct reference to actual agreement of the parties. The political process out of which the treaty arose does not determine its subsequent meaning in law, though the legal system may use information about the political process, among other information, to help create the treaty's meaning at any point in time. The treaty could not have occurred without the political process of negotiation from which it emerged, but its function as a structure of generalized normative expectations is defined only within the legal system. However, the independent sovereignty of the parties that took part in the political process of treaty-making depends on the functional differentiation defined and imposed by the legal structure, not on the segmental differentiation of political systems that prompted it.

Several points must condition the discussion of the evolution of the Indian treaty as a structure of the legal system, and thus the legal functions of a particular treaty at a given time. The legal system can view treaties as artifacts of the past in order to incorporate information about the political process into its creation of legal meaning. Historical information about a treaty negotiation process is incorporated into the legal

[5] *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 15-19 (1987); PRUCHA, *supra* note 1 at 24-27; Deloria, *supra* note 4 at 971-972.

system's meaning of any given treaty long after the political situation necessitating and resulting in agreement lapses. Subsequent system operations, including processes such as court trials or structures such as statutes or court rulings, that seem to contradict treaty provisions are distinct from system operations that change or replace ("abrogate") treaty provisions.[6] The legal system draws this distinction internally and sets the conditions for making such internal distinctions. The treaty's meaning is always being reconstituted by the legal system, and its stability depends on references to it by subsequent processes and the lack of change by subsequent structures. Thus the treaty becomes linked to other structures, such as statutes and court rulings, that define its function, and its meaning is constantly reconstituted by the operations to which it is are linked. For example, the Supreme Court has repeatedly stated that treaties should be construed as the Indians would have understood them when they were negotiated.[7] Far from creating an ideal and unproblematic method of determining the everlasting meaning of a treaty, this "canon of treaty construction" operates the same as any other structure within the legal system, depending equally on its links to subsequent system operations. In concrete terms: the Court attempts, after the fact, to construe how Indians would have understood a treaty, by using historical data and other available information contemporaneous to the treaty. More structures (such as additional court rulings, rules for the recognition of certain kinds of evidence, and so on) evolve as the legal system tries to define how Indians would have understood treaties, how courts should define how Indians would have understood

[6] *See Menominee Tribe v. United States*, 391 U.S. 404 (1968) (Congressional act terminating the existence of Menominee Tribe as federally recognized and supervised Indian tribe did not abrogate tribal rights under Wolf River Treaty of 1854.)

[7] DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT 86 (1997), citing *Jones v. Meehan*, 175 U.S. 1, 11 (1899); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832).

treaties, and how courts should define how courts should define how Indians would understand treaties.[8]

The meanings of treaties are complicated by the other processes and structures to which they are linked in federal Indian law because treaties were not the only programs by which the legal system generalized normative expectations in Indian affairs. Under the authority of the Commerce Clause, for example, Congress passed a series of Trade and Intercourse Acts to regulate commerce with Indians. The Act of May 19, 1796 described the boundary between Indian Country and settled areas.[9] The Act of June 30, 1834 modified that idea, defining Indian Country as "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the Territory of Arkansas, and also, that part of the United States east of the Mississippi river, and not within a state to which the Indian title has not been extinguished."[10] For the political system these acts embodied degrees of agreement between the representatives of the citizens of the United States about where non-Indians could live and where they could not, and where Indian lands began, but for the legal system the acts characterized spaces in such a way that settlement by certain people in certain areas would be illegal. In addition, treaties are related to other structures, such as clauses of the Constitution or statutes passed by Congress, to which treaties may be connected by relationships the system must always define. Some treaties, by themselves, do not directly distinguish Indian Country from the lands of non-Indians, or reserve sovereign powers to a tribe

[8] *See, e..g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 675-676 (1979) (upholding treaty fishing rights, including exercise outside Indian Country, due to construction of treaty language).

[9] 1 Stat. 469. Note that this provision carried the idea of a frontier that could advance with royal approval, which had originated in the 1763 Royal Proclamation, to the American system

[10] 4 Stat. 729. *See* FRANCIS PAUL PRUCHA, THE GREAT FATHER 300-302 (1984).

inhabiting a reservation or other area of Indian Country, but they have functioned to do so in connection with other structures of the system. For example a treaty might recognize a tribe's existence, but the tribe's reservation might have been created by executive order or by statute. Thus a treaty that does not contain a legal description of the tribe's land may, in connection with statutes, court decisions, and executive actions, recognize and delimit the tribes' lands and its authority. The history of this interaction of system operations defining "Chippewa Indians" in Minnesota, "Indian Country" in Minnesota, and the Red Lake and White Earth Reservations, is the focus of the following discussion of treaties.

A. Early Chippewa treaties in Minnesota

The indigenous people calling themselves Anishinabe and people of mixed ancestry who occupied the area that is now Minnesota made a variety of treaties with the United States throughout the nineteenth century. Politically these treaties achieved a variety of goals for both Indians and non-Indians, and the legal structures they imposed have fulfilled a variety of functions. Treaties were made with groups referred to by names such as "the Lake Superior Bands of Chippewa" or "the Mississippi Bands of Chippewa," comprising Anishinabeg and people of mixed ancestry occupying and using land in the general vicinity of Lake Superior or the upper Mississippi River (or more specific names in more specific areas, in some cases).[11] During treaty-making, who counted as a member or representative of which group, or even what groups were involved, was not always clear. People of mixed ancestry and sometimes even whites

[11] Somewhat confusing is the fact that presently federally recognized "bands" of "Chippewa" who live on particular reservations did not exist in the same form before the treaties, and therefore the signatories of the treaties did not necessarily represent the same groups.

were included in the negotiations as "Indians" or "mixed-bloods," so that there is a fundamental distinction to be preserved between "Chippewa" as defined within the legal system as "Indians" and "Anishinabe" as a group of indigenous people defining their identity within their own social and ethnic traditions. This distinction is significant from the perspective of an observer observing the distinction between the legal system (which, after treaties, included a definition of the Chippewa group who signed each treaty) and its environment (which included the people who called themselves Anishinabe). From the perspective of the legal system, then, the treaty was vital in creating a group and ensuring the land it occupied and used was recognizable to the other structures comprising federal Indian law. The treaty established normative expectations of boundaries among readily identifiable groups of people who quickly became associated with boundaries among land areas they inhabited, as the attachment of regional descriptors such as "Lake Superior" and "Mississippi" indicates. Subsequent treaties redefined groups and their ancestral lands in relation to the lands they ceded and the land they continued to occupy.

Treaties used communications of spatial boundaries and tribal groups to create the structures upon which the system's subsequent definitions of both tribal authority and federal authority over reservations and ceded lands depended.[12] In the area that became Minnesota this process began as legal definition of a boundary between Dakota (Sioux) and Anishinabeg (Chippewa) and their lands as of 1825. It then continued by distinguishing groups of Anishinabeg and associating them with parcels of land they ceded, part of which eventually became reservations.

[12] *Cf.* Nicholas K. Blomley, "Law, Property, and the Geography of Violence", 93 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 121, 123-129 (2003) (emphasizing the role of grid survey in defining land as property); TIMOTHY MITCHELL, COLONIZING EGYPT 34-62 (1988) (describing "enframing" as a method of dividing people and the spaces they inhabit for purposes of colonial administrative control).

By the early nineteenth century, Dakota and Anishinabe people had been warring intermittently over the upper Mississippi region for several decades, a conflict that had begun as Anishinabe groups had moved westward from areas north and east of the Great Lakes.[13] One factor that precipitated warfare was the rich population of valuable fur-bearing animals in the belt of deciduous parkland between the prairies of Minnesota and the coniferous forest of the northern and eastern parts of the state (see figure 4).[14]

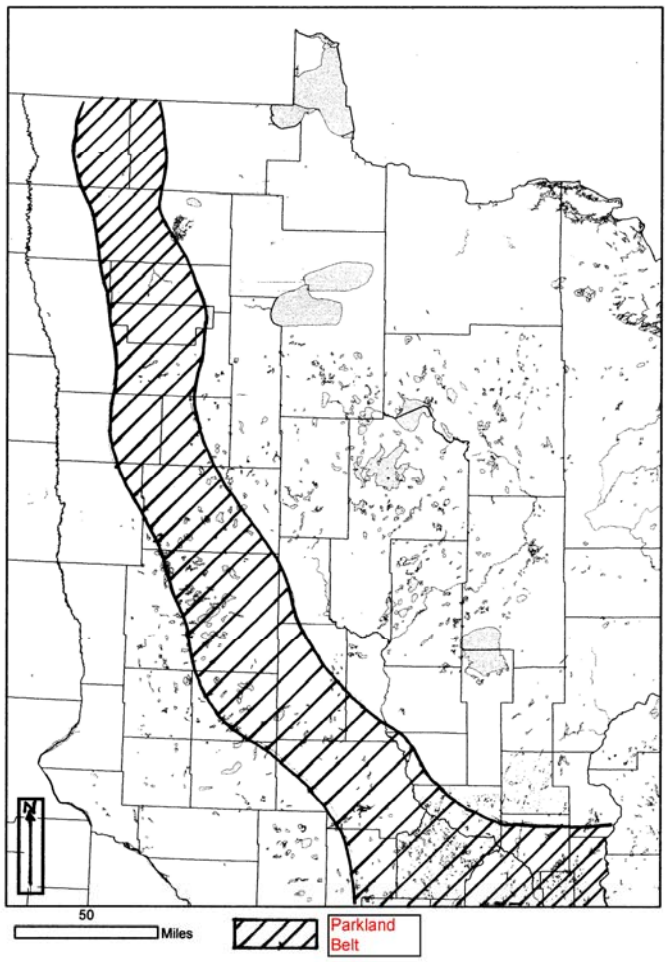

Figure 4 (Sources: Melissa L. Meyer, The White Earth Tragedy p. 19; Minnesota Early Settlement Vegetation Map compiled by Great Lakes Ecological Survey)

[13] WILLIAM W. WARREN, HISTORY OF THE OJIBWAY NATION *passim* (1974) (1853); 1 WILLIAM W. FOLWELL, HISTORY OF MINNESOTA 80-86 (1921); Melissa L. Meyer, Tradition and the Market: The Social Relations of the White Earth Anishinaabeg 27-29 (1985) (Ph.D. dissertation, University of Minnesota)
[14] Meyer, *supra* note 13, at 28.

For whites in the early nineteenth century the Upper Lakes region's economy depended on friendly trade relationships with the Indian tribes that inhabited the area. Warfare between the Dakota and Anishinabe groups in Minnesota was an obstacle to fur trade, and presented a political danger of incursion by the British from Canada with the aid of the enemies of whichever Indian group made peace with the United States. Government officials in the region—especially the Indian agents who mediated relations between the United States, its citizens, and tribes—made establishing peace between the warring groups a priority.[15]

Thus the economic and political systems defined the evolving relationship of the Anishinabeg and Dakota in Minnesota with the traders and the U.S. government in their own terms of the profitability of the area and the importance of peaceful alliance to discourage British expansion from Lord Selkirk's Red River Colony, which had been established in 1812.[16] The grand council at Prairie du Chien in 1825 was orchestrated by Indian Agent Lawrence Taliaferro in response to these issues. Initiating the political process of preparation for the council, Taliaferro had taken several Dakota and Anishinabeg with him to Washington the year before with the intent to impress them with the power of the United States.[17] At Prairie du Chien several hundred Dakota, Anishinabeg, and members of other tribes from Wisconsin and Illinois met with Taliaferro, Indian Agent Henry Schoolcraft, and the territorial governors of Michigan and

[15] *See* RICHARD G. BREMER, INDIAN AGENT AND WILDERNESS SCHOLAR 55-62 (1987) (discussing organization of Office of Indian Affairs in 1820s and Henry Schoolcraft's responsibilities as Indian agent).
[16] *See generally* ALVIN C. GLUEK JR., MINNESOTA AND THE MANIFEST DESTINY OF THE CANADIAN NORTHWEST (1965) (discussing the political dynamics between the United States and British Empire north and west of the Great Lakes during the nineteenth century).
[17] THEODORE CHRISTIANSON, MINNESOTA: THE LAND OF SKY-TINTED WATERS 110-112 (1935)

Missouri, Lewis Cass and William Clark.[18] The outcome of the council was a treaty between the United States and the several different tribes, in which the tribes "acknowledge[d] the general controlling power of the United States, and disclaim[ed] all dependence upon, and connection with, any other power," and which created boundaries between the tribes' territories.[19] The dividing line between Anishinabe territory and Dakota territory ran northwestward though the parkland belt in western Wisconsin and central Minnesota.

The political objective of the United States was an agreement that would preclude further fighting, making the parkland belt area safer and more profitable for the traders. The treaty's creation of the boundary line was a dubiously successful solution to that problem, at best. The line was not actually surveyed and marked out on the land at the time, and did not affect the movements and conflicts of Dakota or Anishinabe hunters and warriors.[20] Most importantly, however, the treaty drew a legal distinction, establishing a line that imbued the land on either side with legal meaning that was not there previously. One side would be recognized by the United States as occupied by Dakota, and the other as occupied by Anishinabe, regardless of what the Dakota and Anishinabe did subsequently. This legal demarcation of Anishinabe country and Dakota country had no immediate or direct consequences, but it persisted in the legal system and subsequent operations began to build on it. The boundary line also drew a distinction between Anishinabe and Dakota as people in a new, legal way. What made people

[18] Id.
[19] Treaty with the Sioux, etc, Aug. 19 1825, 2 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 250 (1904) (hereinafter "KAPPLER").
[20] *E.g.* THEODORE C. BLEGEN, MINNESOTA: A HISTORY OF THE STATE 127-128 (1963); CHRISTIANSON, *supra* note 17 at 127-129, 131; FOLWELL, *supra* note 13, at 146-158; EDWARD D. NEILL, HISTORY OF MINNESOTA 383-399 (1873).

Chippewa or Sioux by American law was their placement on one side or the other of a boundary between two different peoples, a structure of normative expectations that, like the spatial boundary through the parkland belt that divided their land, did not necessarily coincide with the daily behavior of individuals who might move between groups by intermarriage or adoption.

The federal government's strategy toward American Indian tribes in the 1830s was to remove Indians to the trans-Mississippi West as settlers pressed for the lands they occupied, despite the Supreme Court's legal decisions about the Cherokee Nation's sovereignty.[21] This political objective of removal was expressed legally in the Indian Removal Act of 1832, which authorized the president to relocate groups of Indians from the East onto federally owned land in the West.[22] Significantly, the Act did not mandate the removal of tribes living east of the Mississippi River, instead merely authorizing the President to negotiate for their removal through treaties of land cession. Prucha argued that one of the primary motivations for this policy was desire for the land itself: "Land was the most important commodity in early nineteenth-century America, and the sale of the public domain was a major source of funding for the national government".[23] Though generally accurate, the statement does not apply to Minnesota until the middle part of the nineteenth century. A removal policy similar to the settling of eastern tribes such as the Cherokee, Seminole, and Delaware tribes far west of their former homelands, in present-day Oklahoma and Kansas, could not be pursued toward Minnesota tribes

[21] VINE DELORIA JR. & CLIFFORD LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 6-8 (1983).
[22] 4 Stat. 411 (1830). *See* FRANCIS PAUL PRUCHA, THE GREAT FATHER 183-213 (1984); PETRA SHATTUCK & JILL NORGREN, PARTIAL JUSTICE 39-42 (1991); WILKINS, *supra* note 7, at 35-36; DELORIA & LYTLE, *supra* note 21, at 64-65.
[23] PRUCHA, *supra* note 22 at 195-196.

because the tribes inhabiting areas to the west of Minnesota would oppose it. In effect, land that appeared to Euro-Americans to be empty could no longer be treated as such.

B. Minnesota Chippewa treaties of cession

The treaties between Chippewa groups and the federal government made between the 1830s and 1850s were largely treaties of land cession. Their political and economic objective was not immediately removal to permit unimpeded immigration and settlement, but to acquire land for those purposes in the future.[24] Unlike the treaties of cession in northern Illinois and eastern Wisconsin, the early treaties in Minnesota were initially oriented toward the availability of specific resources, such as timber, that began to draw settlers and capital investment from the East.[25] The Treaty of 1837 made at Fort Snelling between the United States and the Mississippi Bands of Chippewa was the first of these in Minnesota.

Motivations for the 1837 Treaty were varied. They included the government's longstanding policy of acquiring title and surveying land to make it available for settlement by eastern immigrants, lumbermen's pressure for permission to cut timber in forested areas, and the traders' demands for repayment of debts of Indians that arose through the fur trade. Local traders' relations with Indians often included the accumulation of debts. Many traders were the descendents of earlier European traders and Anishinabe women, giving them an unusual socially mobile status that permitted them to move back and forth between Anishinabe and white communities.[26] In treaties multiethnic people, contemporaneously called mixed-bloods, half-breeds, or métis, could

[24] *See* REBECCCA KUGEL, TO BE THE MAIN LEADERS OF OUR PEOPLE 61-65 (1998); MELISSA L. MEYER, THE WHITE EARTH TRAGEDY, 36-39 (1994).
[25] KUGEL, *supra* note 24, at 59.
[26] PRUCHA, *supra* note 22, at 266-269; MEYER, *supra* note 24, at 28-35 (1994).

be selectively defined as belonging to one treating party or another, or as a separate category, and they often played important roles in making treaties.[27] Some served as interpreters for the federal government's negotiators, whereas others served as spokespeople for the "Indians" or represented a group described in the treaty as "half-breeds" or "mixed-bloods." Through their close relationships with other Indians and mixed-bloods, traders were able often able to hold notes on large amounts of debt and then manipulate treaties to get those debts paid.

These motivations were reflected in the political processes of the treaty, and then in the legal structure that remained afterward. Included in the 1837 treaty were a land cession and a payment to "the Chippewa nation." In addition, the treaty directed the President to pay one hundred thousand dollars to the "the half-breeds of the Chippewa nation," and seventy thousand dollars to several traders.[28] Emphasizing that the immediate economic goal of the treaty was not land for settlement but timber for the lumbermen's sawmills, the treaty also guaranteed "the privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers, and the lakes included in the territory ceded."[29] This provision put off to the future the issue of removing Indians from lands they occupied, while giving the federal government what the legal system could treat as

[27] *See* WUB-E-KE-NIEW, WE HAVE THE RIGHT TO EXIST 34-38 (1995).
[28] Treaty with the Chippewa, July 29 1837, 2 KAPPLER 491.
[29] Id. Opening lands to timber-cutting indirectly encouraged Indians to move away and thus made settlement by Euro-Americans less difficult. *See* KUGEL, *supra* note 24, at 59, and *Minnesota v. Mille Lacs Band,* 526 U.S. 172 (1999). Guarantees of future hunting, fishing, and gathering rights have since produced disputes over the duration and extent of such rights. In accomplishing these political and economic objectives the agreement between the government, Anishinabeg, and other parties present at the treaty succeeded. The government opened the ceded land to lumbermen's use of forest land, the traders were paid by the government, and eventually the government opened the ceded lands for sale to settlers. *See* FOLWELL, *supra* note 13, at 227-230. The extent to which the treaty's guarantee of hunting, fishing, and gathering rights encumbered the ceded lands remained undefined.

an incontestable title to the ceded lands, so that they could be sold to settlers when the time was right.

Within the legal system the treaty had other, more far-reaching ramifications. Without requiring the signatory Anishinabeg to alter their activities, the treaty created a legal structure by which the legal system defined a bounded area to be federal property in fee simple *and* no longer encumbered by the claim to occupancy and use of the Chippewa nation (known as "aboriginal title"), which it simultaneously acknowledged and supposedly extinguished through its provisions. The treaty guaranteed the Chippewa hunting, fishing, and gathering rights on the ceded land "during the pleasure of the President."[30] Thus in the nineteenth century the 1837 Treaty permitted people in the ceded territory to go on with their usual activities, not requiring them to remove elsewhere. The treaty provided the basis for definition of the territory as government land upon which some Anishinabeg were permitted to remain, but removal would be dealt with subsequently.

The 1840s were a period of general political transition in the course of treaty-making by the federal government. Earlier treaties, including the 1837 Treaty with the Chippewa and the similar treaties of 1842 at La Pointe,[31] of 1847 at Fond-du-Lac,[32] and of 1847 at Leech Lake[33] had all involved land cessions by tribes. None of these made any provision for permanent homelands for those tribes. In these treaties, members of the

[30] The fine distinction between such a guarantee of specific rights to use ceded lands and the historically tenuous form of property that was later defined as "aboriginal title" was not clarified until the 1999. In a 5-4 decision of the U.S. Supreme Court, the 1837 Treaty's guarantee of traditional uses was found to coexist with federal and state authority over lands within the ceded area, but not to affect ceded lands owned by private individuals or corporations. *Minnesota v. Mille Lacs Band*, 526 U.S. 172 (1999).
[31] Treaty with the Chippewa, October 4 1842, 2 KAPPLER 542.
[32] Treaty with the Chippewa of the Mississippi and Lake Superior, August 2 1847, 2 KAPPLER 567.
[33] Treaty with the Pillager Band of Chippewa Indians, August 21 1847, 2 KAPPLER 569.

signatory tribes were not expected to remove immediately from the lands they ceded, but were allowed to continue living in their accustomed fashion on the ceded lands. These conditions of deferred removal were precedents to the reservation system, although a few reservations had been established in other parts of the United States by the 1840s. The government was acquiring large areas of Indian land so that it could convey the land to individual settlers, while maintaining a "humanitarian" approach to the Indians themselves.[34] This approach necessitated creating reservations on which tribes would live after ceding land to the federal government, and providing tools and instruction for farming.

The 1840s were also a time of transition for those Euro-American settlers who populated some of the ceded lands in St. Croix County, a large county of the northwestern part of the Wisconsin Territory. These settlers, along with lumber interests, began to pressure Congress to create the Minnesota Territory. In the late 1840s their pressure was beginning to get some attention, and when Wisconsin became a state in 1848 with the St. Croix River as its northwestern boundary, a large area of what had been called St. Croix County was left outside the boundaries of the state, leaving the status of the area in question, according to Folwell,[35] although it simply remained the Wisconsin Territory. Congress created the Minnesota Territory from a remnant of the Iowa Territory and the remainder of the Wisconsin Territory in 1849, a year after the admission of Wisconsin to the Union.[36] The political demand for representation as a separate Territory in Congress was a symptom of increasing non-Indian settlement in the

[34] *See* PRUCHA, *supra* note 22, at 315-318.
[35] FOLWELL, *supra* note 13, at 236.
[36] Id. at 236-246.

area. As more Euro-Americans came to the area with more sedentary plans than fur-trading, such as mining and farming, they put pressure on the federal government to make their permanent settlements reconcile with the continued presence of Indians in Minnesota, who either had not ceded their land or continued to live on ceded lands. Parts of eastern Minnesota had been ceded, but large western and northern areas were still Indian Country.

Treaties began to reflect these new pressures. The federal government began to deal with individual "bands" of "Chippewa" by accepting cessions in return for permanent reservations where specific bands would live. In 1854 at La Pointe, for example, several bands of Lake Superior and Mississippi Chippewa ceded their lands in northeastern Minnesota, northern Wisconsin, and northern Michigan in return for several reservations, along with other forms of compensation. The Lake Superior Chippewa also relinquished to the Mississippi Chippewa any claim to land lying west of the western boundary of their cession.[37] The United States agreed to withhold some of the ceded lands from sale and set them aside as reservations. Among these were the reservations in Minnesota at Grand Portage and Fond du Lac, where bands have since that time resided. Special provisions were made for subsequent selection of a reservation by the Bois Forte Band, who the treaty noted lived in "poverty" and had not previously received any annuity payments.[38] In addition to the promised reservations, the bands received money, trade goods such as traps, rifles, and clothing, and in keeping with the government's developing plans to civilize and assimilate Indians, agricultural tools and cattle.[39] The

[37] Treaty with the Chippewa, September 30 1854, 2 KAPPLER 648.
[38] Id. at 650-651.
[39] Id. at 649-650.

treaty defined the Grand Portage Band, the Fond du Lac Band, and the Bois Forte Band as distinct subgroups within a group it called the Lake Superior Chippewas, and at the same time gave the system a basis to define their affairs—that is, affairs on their reservations—as issues of federal law. The reservations were not simply lands occupied by Chippewa within boundaries agreed upon with the government, in this particular treaty, although more attention was paid to the boundary of the reservation than to the boundary of the ceded lands. The reservatons were described as lands that the government would "set apart and withhold from sale," with the President and his agents administering their use in a fashion specified in the treaty.[40]

The next year, 1855, saw another treaty of cession at Washington in which members of the Pillager, Lake Winnibigoshish, and Mississippi Bands ceded all their lands in Minnesota to the federal government. In addition to payments to the bands in money and goods, the treaty created a series of small reservations in central Minnesota, at Leech Lake, Cass Lake, Gull Lake, Lake Mille Lacs, Rabbit Lake, Sandy Lake, Pokagomin Lake, and Rice Lake–some of them on lands ceded in previous treaties. The language establishing these reservations was similar to the 1854 Treaty of La Pointe: "there shall be, and hereby is, reserved and set apart, a sufficient quantity of land for the permanent homes of the said Indians…"[41] Despite the language, these homes were not permanent, because in another treaty of cession at Washington signed eight years later the bands ceded the land in six of the reservations, all of those created in the 1855 Treaty

[40] Id. at 648, 649. This approach was similar to the treaty in which the Sioux ceded their land in Minnesota and Iowa, in return for a reservation along the Minnesota River in southwestern Minnesota. Treaty with the Sioux – Mdewakanton and Wahpakoota Bands, August 5, 1851, 2 KAPPLER 591.
[41] Treaty with the Chippewa, February 22 1855, 2 KAPPLER 685.

except the Leech Lake and Cass Lake Reservations, to the government.[42] In addition to providing more payments in goods and money, this treaty created one large reservation to replace the six smaller ones. At the same time it promised, in the twelfth article, that the Indians at Mille Lacs "shall not be compelled to remove so long as they shall not in any way interfere with or in any manner molest the persons or property of the whites."[43]

C. Treaties and a system of reservations

This strategy of consolidating reservations introduced a change in policy that tried to reduce the number of groups of Indians with whom the government would deal. This policy was realized through the creation of the reservation at White Earth, which was designed to replace all the other reservations in Minnesota, which would, it was hoped, become unnecessary. As of the late 1850s there was no group of people who could be called the White Earth Band of Chippewa, and the reservation was a mere idea. At the same time, Chippewa living in northwestern Minnesota, later known as the Red Lake and Pembina Bands of Chippewa, had not signed any treaties with the United States or ceded any of their land.[44] By the mid-1860s, the legal system had defined its problem with Indians as a need to bring all the land within Minnesota under the unimpeded sovereign authority of at least the federal government. In another sense it defined the problem as a need to bring Indians, individually and collectively, into ways of living that it could regulate by using the same expectations that it used for all other people. In attempting to do so the legal system built increasingly complex structures to define reservations in

[42] Treaty with the Chippewa, March 11 1863, 2 KAPPLER 839.
[43] Id. at 842. In part because of this stipulation, the Mille Lacs Reservation has endured in some form up to the present, although the same provision could have been used differently by the legal system.
[44] The Red Lake and Pembina Bands had negotiated for a treaty in 1851, but the treaty was not ratified by the U.S. Senate. FOLWELL, *supra* note 13, at 288.

general, as well as particular reservations, and at the same time structures to define Indians individually and collectively. A fundamental aspect of the system's efforts in these directions was the legal manipulation and characterization of space. What spatial subsystems did the legal system develop in response to the complexity of its seemingly simple creation of spaces called "reservations"? Later treaties in Minnesota evinced this effort to consolidate and concentrate Indians into clearly specified areas, where they could be supervised by Indian agents and, if necessary, the military. For the legal system, treaties redefined indigenous people as Indians, and their lands as Indian Country, both of which the system could incorporate within its efforts to address internal (or "domestic") problems.

With the wide establishment of a system of reservations throughout most of the United States, the federal government was able to move largely away from dealing with Indian tribes by treaty and instead address Indian affairs administratively. The network of Indian agents administered treaty provisions and dealt with the issues of the tribes living at each reservation, and Congress created policy on a national level by statute. Treaties that established reservations late in the treaty period began to reflect the transition to this administrative approach. Although the remaining need to secure at least an appearance of agreement by Indian tribes to policy changes continued to be satisfied afterward by treaty-like agreements, Congress abolished the practice of treaty-making with Indian tribes in 1871. General policy toward reservation Indians could, it was hoped, supplant the nation-to-nation relationship indicated by the treaties, and as Vine Deloria wryly described it, could further "Congressional desire to make Indians into white farmers [and] the attitude that, since Indians have not become successful white

farmers, it is perfectly correct to take their land and give it to another who will conform to Congressional wishes."[45]

[45] VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS 45-46 (1988).

IV. The reservation system and the reservations at Red Lake and White Earth

Reservations, considered generally as land areas set aside for Indian tribes, were a common outcome of treaties of cession made between tribes and the federal government in the middle nineteenth century. The simultaneous creation of reservations and recognition of tribes in treaties provided the initial distinction within the legal system upon which further distinctions, such as those defining the "domesticity" and "dependency" of tribes, could be founded. In order for a group of Indians to be considered a domestic dependent nation, it first had to be considered a nation. Previously the legal system had defined Indians mostly as groups of people inhabiting indistinct, amorphous areas outside the United States. With the introduction of the reservations, the system began to define tribal groups and their homelands within the United States. Subsequently this definition would proceed at a finer scale, defining Indians as individuals in relation to their tribes and the United States. Though seemingly a mere intermediate step in a process that led from a generalized policy of dealing with indigenous people as an unknown and undifferentiated mass of people, eventually to an orientation of the legal system toward Indians as individuals, the recognition of tribes in the early nineteenth century and creation of reservations in the mid-nineteenth century are perhaps the most fundamental bases for the legal system's development of a subsystem functionally concerned with Indians. The notion of Indians as an unknown group of non-white, non-Christian outsiders was never fully replaced by the notion of Indian tribes as nations; similarly relations with tribal nations were never fully replaced by policies toward individuals. Within the process of these changes in focus, the refinement of the

reservation system and its application to local conditions at White Earth and Red Lake illustrate the simplification of drawing a boundary around Indian lands.

Rather than dealing with indigenous people as an undifferentiated mass of people and their land as a vague area described as Indian country, simply thrusting them outside the law into what it defined as lawlessness and lawless areas, the legal system began to construct a place for indigenous people within the legal system as members of tribes (and to construct "Indians" as a replacement for indigenous people and "Chippewa" as a replacement for Anishinabeg[1]). In spatial terms, the legal system could no longer condemn indigenous people to the limitless, undefined, *unselected* wilderness into which its ordering structures had not yet penetrated, because continuing removal into outside areas was no longer possible. The legal system had defined boundaries: boundaries with Canada, Mexico, and the Pacific Ocean, and internal boundaries between states and territories. Spatially the undefined and unordered could not practically be relegated to an outside, a place beyond the boundaries. To recall: the rule of law demands that there be "no areas without law, no forms of conduct that cannot be subject to legal regulation, no enclaves of unregulated arbitrariness and violence."[2] Rather than look outward, beyond boundaries, to find infinite areas and conduct not yet regulated, the system began to look for the internal distinctions to be drawn by subdividing the already-defined.

In a twenty-year period from the late 1840s to the late 1860s, much of the territory in Minnesota held under aboriginal title (or "subject to aboriginal right of occupancy") was ceded to the federal government. By the terms of the legal system, with its doctrine of discovery, the cessions amounted to a renunciation by Anishinabe and mixed-blood

[1] *See generally* WUB-E-KE-NIEW, WE HAVE THE RIGHT TO EXIST 97-107 (1995).
[2] NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 368 (2004).

Indians[3] of the right to demand further compensation for the taking of their land by the government, and of the right to exclude non-Indians from using the land.[4] In the years immediately following the treaties of cession, the legal effect of cession was that the fee simple title to the land held by the government was no longer considered to be encumbered by Indian claims, and the government was free to sell or otherwise convey title to individuals and corporations pressing to use the land.

The political situation created by the influx of Euro-American settlers to Minnesota was no different from the problems that had begun to confront the federal government elsewhere. The removal, or coerced migration, of indigenous people to the west of the Mississippi or to undefined areas to the west of an indefinite frontier of settlement as part of a concerted policy, was becoming a less viable option. Many eastern tribes had been removed to Ohio and Indiana in the eighteenth century, for example, where Tecumseh and Tenskwatawa had turned their discontent against the

[3] The distinction between "real" Anishinabeg and people of multiethnic ancestry may be more or less significant depending on who determines what makes an individual a real Anishinabe. The fact that the distinction was used for strategic purposes during treaty-making justifies its use in describing such events. In treaties the legal system recognized a distinction between indigenous people and multiethnic people, then constructed its own definition and constituted groups it called "Chippewa", dealing with those groups. After a treaty made by the United States with a group called "Chippewa" it is impossible to preserve a rigid or traditional distinction between Anishinabe and multiethnic people when analyzing "Chippewa" reservations as legal structures. References to "the Indians" or "the half-breeds" in both primary and secondary sources must be understood as conveniently used but doubtfully reliable categorizations of people whose identities were not necessarily so permanent or clearly determinate. Today federal programs for Indians, whether treaty-related or not, rely on an uneasy relationship between federal standards for the definition of tribal membership and the definitions adopted by organized tribal governments (which are themselves recognized by the federal government in part because they are organized according to federal standards). Thus the definitions that determine who is Indian and who is or can be a member of a tribe do not necessary correspond with a particular tradition.

[4] The issue of ownership and compensation was reopened decades later after it became clear that the government had neglected various treaty provisions and used "unconscionable" estimates for valuing the land cessions, producing a mass of claims cases brought with congressional authorization to the Court of Claims, or later to the specially created Indian Claims Commission. Thus the notion that the Indians had given up all their claim to the lands they ceded was redefined to provide remedies for subsequently defined injustices.

Euro-American settlers to the east in the early nineteenth century.[5] Many of the same tribes were removed westward again as settlers came to Ohio and Indiana a few decades later. Further westward removal was blocked not so much by lack of space as by the mounted militaries of the bison-hunting Plains tribes. Following the Mexican War the notion of a single westward-moving American frontier no longer made sense, as settlement grew on the Pacific coast and moved eastward.[6] For the legal system this convergence of the two frontiers brought into view the time when no more American territory would be lawless. Jurisdictions of various kinds would cover all land on the continent not defined by the system as part of Mexico or Canada, so that the legal system would not define any area as a part of the United States without also subjecting it to the entire panoply of federal and state law. Indian reservations would have a role inside, rather than outside, the American legal system. In the Minnesota context, Indians in Minnesota would mostly find themselves on reservations in Minnesota.

In federal Indian law, which was becoming a distinctive functional subsystem within the legal system, the system defined space as a problem to be solved by clarifications (through treaties, for example), or as a limited area to be delineated by further limits. Indigenous peoples' spaces had to be defined by the system because being left outside was becoming less possible. In response to this situation the system created an inside-outside: a possibility of being inside and outside at the same time. The Indian reservation became the fundamental structure in federal Indian law serving this purpose. Reservations, such as those created by the 1854 Treaty of La Pointe, were areas set aside for Indian occupancy and use. They were usually created and delineated by a treaty, or

[5] *E.g.* DANIEL K. RICHTER, FACING EAST FROM INDIAN COUNTRY, 228-232 (2001).
[6] *See generally* FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY (1921).

multiple treaties, with the group or groups of Indians that occupied them, though some reservations were created in other ways, such as by executive order of the President or by act of Congress. Treaties or other means for establishing reservations are only some of the legal system's operations that have characterized Indian reservations, but they provide a point of departure for observation of the series of operations that followed.

Simply defining the external boundaries of an area and setting it aside from other areas for the use of a particular group explains little about what characteristics that area has within the legal system. Since their creation many reservations have been imbued with additional legal characteristics. Defining the boundary indicates merely that the area within is different in some way from areas outside. Establishing a boundary answers the question of the location of the area set aside for the use of a tribe, but it raises many more questions about that area.

The treaty was the initial operation by which the system would select and order characteristics of both the tribe and its land that would stand in for the (to the legal system) unrecognizable complexity of being Anishinabe and being Anishinabe land. Ordered normative expectations about Chippewa Indians and their reservations, defined by treaty, statute, and standing bureaucratic procedures, could be adapted to fit any specific problems encountered and yet be generally similar enough to dealings with other native peoples to be called law and not be arbitrary or capricious. The urgency of clarifying this legal situation was provided by the structurally coupled political operations–decisions and actions by Indian Agents and traders, the state legislature, and federal treaty commissioners–for which the political outcome of the treaty was a pressing

necessity.[7] The communications of treaty intermediaries, such as traders, interpreters, and missionaries, whose meanings would begin evolving within the U.S. political system and within a tribe's political system, accelerated the process by which U.S. and tribal political and legal systems each defined the other as a functional differentiation within itself. For the U.S. government, the communications of the tribe, from speakers at the treaty council, could only mean what the legal system subsequently defined them to mean; simultaneously the tribe's social system could only define the treaty commissioners' communications according to its internal ordering of meaning. This is the problem that Luhmann called *double contingency*, in which each referent relies on the other but can only define the other by reference to itself.[8] From this formulation it is easy to see how intermediaries, whose communications could prompt further communication (and thereby be meaningful) in and between both tribal and U.S. political systems, would quickly evolve into the handle by which each system would attempt to direct the other.

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[7] Traders in this context were clearly an element of the political system in that they contributed to the system's definition of the degree of agreement on propositions that would or would not be included in the treaty. If the conventional definition of a treaty is a binding agreement between two sovereign entities–the United States as represented by its commissioners and the Red Lake and Pembina Bands by virtue of the warriors and chiefs present–then the conventional definition overlooks the role of intermediaries, including traders, interpreters, and missionaries, who gave the political system access to something it could define as the popularity of the treaty among the Bands' members. Historians have referred to the role of traders, interpreters, and missionaries as a "middle ground," a term that brings to mind a space centrally located between two opposed points. These intermediaries, the argument goes, were able to make civilization accessible to the savage mind, and the savage mind accessible to the civilized, permitting an agreement between parties who would have been unable otherwise to understand one another. This rosy view of the proceedings ignores the fact that from their own perspectives neither the United States nor the Bands could countenance the existence of any middle ground. Their social systems defined everything, as soon as observed, and encountering social systems serving the same functions, began to redefine themselves as parts of one another. The proper roles of traders, interpreters, and missionaries had all already been defined within the social systems of both Euro-America and indigenous America, when they were still segmentally differentiated from one another. They could not occupy a middle ground because a distinction has no middle ground. Their defined roles in both Euro and indigenous social systems made them operators by which those segmentally differentiated systems redefined themselves as a single functionally differentiated social system.

[8] *See* NIKLAS LUHMANN, SOCIAL SYSTEMS 117-199 (1995).

This accumulating variety of system operations that add to the system's definition of Indian reservations in general and of each individual reservation is summarized by Imre Sutton's comment that "the rubric 'Indian reservation,' unless more clearly defined […], wrongly connotes a universality of legal status [and] political organization".[9] To the contrary, many divergences in legal status and political organization among existing reservations have appeared over the last century, but in creating them the legal system has often relied on distinctions made during treaty-making and in the decades afterward.[10] In many ways the peculiar characteristics of a given reservation are as closely tied to the history of the federal government's relationship with the group of people living there as to the government's actions toward the area of land itself. The situations of the White Earth and Red Lake reservations are instructive in these respects. This chapter describes their characteristics when they were created in the 1860s.

A. The Formation of Red Lake "Reservation"

The legal system defined Minnesota before 1858 as a Territory, an area under federal jurisdiction in a transitional situation that would eventually lead to its entry into the Union on an equal footing with existing states.[11] Until statehood the legal system could temporize regarding the status of Chippewa groups and their lands, because questions of federalism, relations between state and national government, were not

[9] Imre Sutton, "Sovereign States and the Changing Definition of the Indian Reservation," 66 GEOGRAPHICAL REV. 281 (1976).

[10] Presently, after decades of refinement of each reservation's characteristics by the legal system, an extraordinary degree of divergence can be observed. Within the boundaries of some reservations the tribal government maintains degrees of authority over the entire area, whereas in other cases the tribal government's authority varies depending on whether the land is still owned by the tribe, and even in some cases the tribe's authority depends on the general pattern of ownership of lands in parts of the reservation. Among governmental entities, on some reservations and with regard to certain affairs, the tribal government shares its authority with not only the federal government but the governments of surrounding states, and in some kinds of affairs, possibly with surrounding counties or municipalities.

[11] U.S. CONST. art. IV, §3.

implicated. The federal government was the ultimate authority and had no constitutional responsibility to defer to a territorial government.[12] With Minnesota's statehood, the clarification of tribal legal status for indigenous groups within the boundaries of the new state became a matter of greater urgency, at the same time as opening of land to permanent settlement was becoming more important than opening land for some temporary uses, such as lumbering, that did not necessary require the removal of Indians. To these ends the system continued to particularize the groups of Indians it defined, a process that had already moved from the generalized references in treaties to "the Chippewa Indians" to the less general but still amorphous regional groupings of "Lake Superior Bands" and "Mississippi Bands" of Chippewa. Reservations, as bounded areas within which the system located particular groups and by which it referred to them, provided for further crystallization.

Up until 1858 the Red Lake and Pembina Bands had not agreed to cede any of their land to the federal government. The Red Lake Band lived in the general vicinity of Red Lake, in the northwestern part of Minnesota. The Pembina Band lived further to the north and west in the northeastern part of what is now North Dakota, and across the border into what the United States and United Kingdom had agreed was Canada.[13] Varied economic and political interests had converged in 1851 to encourage the negotiation of a treaty between the United States and the two bands for cessions of land in the Red River Valley. Missionary Georges-Antoine Belcourt wanted to teach "half-

[12] *See generally* U.S. CONST. art. IV.
[13] *See generally* ERMINIE WHEELER-VOEGELIN & HAROLD HICKERSON, CHIPPEWA INDIANS I: THE RED LAKE AND PEMBINA CHIPPEWA (1974).

breed" métis[14] from both sides of the disputed border between Canada and the United States to become settled Catholic farmers by clarifying the international boundary and then attracting them to his instructional missionary colonies.[15] As in other contemporary negotiations, trade interests, in this case those of Norman Kittson, wanted to see an arrangement that would pay cash to métis, which would immediately pass to the traders to discharge their debts.[16] At the same time, frontier politicians like Alexander Ramsey focused on ensuring that the Red River Valley remained U.S. (and Minnesota) territory by trying to open it to increasing settlement by American citizens.

Henry Sibley, as both fur trader and frontier politician, must have had a mixture of motivations in arranging for treaty negotiations to occur. In 1850 he used his position as territorial delegate to convince Congress to appropriate funds to negotiate a treaty at the Pembina settlement in the Red River Valley. The negotiation in 1851 produced a treaty, but political expediency in Washington led the treaty not to be ratified by the Senate.[17] The Pembina treaty was placed before the Senate at the same time as two other treaties in Minnesota between the United States and Sioux (Dakota) in the southwestern part of the Territory. Folwell attributed Congressional opposition to the wish of some

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[14] *See supra* note 3. Terms used to refer to people of mixed ancestry are inherently confusing and frequently misapplied because they have often been taken to provide clear definitions of group identity according to ancestry. The term "métis" usually refers to people whose ancestry includes both French (and sometimes Scotch) Canadians and indigenous people of North America. Other less polite terms, such as "half-breed" and "mixed-blood" more generally refer to people of ancestry including any combination of indigenous people of North America and immigrant people from Europe (or sometimes Africa). These terms conceal the fact that some people of mixed ancestry behaved and were treated as though they were not of mixed ancestry. Rather than immutably defining an individual's identity by blood, such terms capture the social delineation of groups of people by their shared activities and lifestyles.

[15] ALVIN GLUEK, MINNESOTA AND THE MANIFEST DESTINY OF THE CANADIAN NORTHWEST 104-105 (1965).

[16] *See* 1 W. W. FOLWELL, MINNESOTA: A HISTORY OF THE STATE 274-275 (1961); and GLUEK, *supra* note 15 at 108-109.

[17] 1 FOLWELL, *supra* note 16 at 288. *See also* E. WHEELER-VOEGELIN & H. HICKERSON, CHIPPEWA INDIANS I: THE RED LAKE AND PEMBINA CHIPPEWA, 130-136.

senators from southern states to delay the entry of Minnesota into the Union, which would have affected the close political divide over slavery at the time.[18] The Pembina treaty was "a conciliatory sacrifice by the friends of the other two treaties," as Sibley put it.[19]

Conditions had changed by the time of the next attempt at treating with the Red Lake or Pembina bands for cession of their land in Minnesota. By the early 1860s Minnesota was part of the Union. The Civil War was taxing the resources of the federal government, and there was little money or manpower to spare for dealing with Indians in a peripheral area of its territory. Nonetheless the federal government needed to encourage economic expansion and population growth in such areas to maintain its economic and demographic superiority over the rebellious Southern states. Ambitious Minnesotans had been eying the northern international border with hopes that it could be moved northward to include much of the Red River country north of the forty-ninth parallel.[20] Legally the Red Lake and Pembina bands, and their lands, remained unordered by the description of boundaries.

Historians disagree about the motivations guiding the 1863 Treaty of Old Crossing, between the United States and the Red Lake and Pembina Bands of Chippewa.[21] The discussions at the treaty council itself raise some additional questions about the parties' motivations, also. Concern over the safety and reliability of a Minnesota route to the existing Red River settlements is one factor mentioned in different contexts. The Sioux uprising–though mostly taking place in the vicinity of the Minnesota

[18] Id. at 290.
[19] Id. at 291; *See also* GLUEK, *supra* note 15 at 110.
[20] *See generally* GLUEK, *supra* note 15 at 131-140.
[21] Treaty with the Chippewa—Red Lake and Pembina Bands, October 2 1863, 2 KAPPLER 853.

River–and a raid on one of Kittson's merchandise convoys to Pembina by Hole-in-the-Day's Mississippi Chippewa are common explanations for the anxiety over the trail to Pembina.[22] Gluek argued that Chippewa in the Red River area were anxiously seeking to sell their land in the Red River Valley. Outsiders and métis had been living there for decades anyway, and Gluek suggested the Chippewa thought if they did not sell the land the government might simply find a pretense to take it, but if they sold they would at least receive annuity payments and supplies like their neighbors.[23] Blegen argued that transportation and other issues were simply a cover for the underlying purpose of opening the land for settlement.[24]

Members of several groups were present at the council, including the representatives of the federal government, led by Alexander Ramsey; some "full-blood" members of the Red Lake Band; some full-blood members of the Pembina Band; some "half-breeds" from Red Lake and Pembina; and some chiefs from the Leech Lake area, including Hole-in-the-Day.[25] Traders and interpreters were included in the government's party.[26] Some of these were of mixed ethnic heritage, and probably could have been seen by some at the council, perhaps including themselves, as "half-breeds" using their role as intermediaries in the council to further their interests. All of these groups had, at least potentially, their own distinct interests, even though superficially the treaty appears to be an agreement between two bands of Indians and the federal government.

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[22] *Compare* Ella Hawkinson, "The Old Crossing Chippewa Treaty and its Sequel", 15 MINNESOTA HISTORY 282, 284-286 (1934), *and* GLUEK, *supra* note 15 at 161-163. *See also* T. CHRISTIANSON, MINNESOTA: THE LAND OF SKY-TINTED WATERS 386-387 (1935).
[23] GLUEK, *supra* note 15 at 168-169.
[24] T.C. BLEGEN, MINNESOTA: A HISTORY OF THE STATE 283 (1963).
[25] WHEELER-VOEGELIN & HICKERSON, *supra* note 17, at 147.
[26] Id.

The Old Crossing Treaty was not unusual either for its negotiation or for its objectives. As Bishop Henry Whipple commented on treaties in general: "[they] are usually conceived and executed in fraud. The ostensible parties to the treaty are the government of the United States and the Indians; the *real* parties are the Indian agents, traders, and politicians."[27] Whipple's view was that the government's representatives frequently represented their own interests partly or entirely instead of the government's interests. Being thus skeptical of treaties, Bishop Whipple attempted to take part in the council at Old Crossing apparently out of humanitarian interest, but was prevented from attending the council by a stagecoach accident in transit.[28] Alexander Ramsey took the lead in speaking for the government as treaty agent for the Commissioner of Indian Affairs, as well as in reporting the events at the council in writing. Various obstacles delayed the opening of negotiations for several days after the start of the council. Little Rock, a chief from Red Lake, objected to the presence of Hole-in-the-Day, whom he claimed might be used as a negotiating tool by the government.[29] Ramsey reported that many of the Chippewa, including chiefs, gathered for the council seemed uninterested in transacting any business, spending their time racing horses.[30] As at any negotiation, parties did not fully understand one another, and what strategic motives were in play can only be inferred. Some Chippewa at the council may indeed have been indifferent to the business at hand–a council being a substantial social event in addition to a political one–but what appeared to Ramsey as reluctance to deal with important business was perhaps a

[27] BLEGEN, *supra* note 24, at 170.
[28] Hawkinson, *supra* note 22, at 287.
[29] Id. at 289.
[30] Id.

sly strategic move designed to lead Ramsey to expose some of his expectations before the negotiations actually began.

Ramsey began his business with a strategic move of his own. Instead of opening the negotiations with an offer to buy all or most of the lands claimed by the two bands, he offered to buy a right-of-way to roads and rivers in the Red River Valley area for $20,000. He repeated this offer multiple times, and was consistently refused.[31] As Ramsey knew, the result of such an arrangement would be about the same as an outright cession. The influx of settlers would make for a de facto extinction of Chippewa claim to the land, and the right-of-way would make the settlers' safe entry to the area enforceable.[32] Little Rock pointed out that the right-of-way had essentially already been taken and its ill effects were evident in the comings and goings of whites through the Red Lake and Pembina areas, scaring away game and making the land unlivable for his people.[33] By asking the Chippewa to sell a right-of-way, Ramsey was asking why they persisted in remaining there, in a threatening sense: the offer was to pay them to get out of the way.[34] Of course, Ramsey made the threat of inexorable change as apparent as possible in order to pay as little as possible. Little Rock understood this threat, and told

[31] Id.; WHEELER-VOEGELIN & HICKERSON, *supra* note 17, at 150-151.
[32] WHEELER-VOEGELIN & HICKERSON, *supra* note 17, at 151-152.
[33] Hawkinson, *supra* note 22, at 290.
[34]Homi Bhabha has ascribed this sort of communication to the accumulated content of the juridical concept of "territory" in colonial context: "From the point of view of the colonizer, passionate for unbounded, unpeopled possession, the problem of truth turns into the troubled political and psychic question of boundary and territory: *Tell us why you, the native, are there*. Etymologically unsettled, 'territory' derives from both *terra* (earth) and *terrēre* (to frighten) whence *territorium*, 'a place from which people are frightened off'. The colonialist demand for narrative carries, within it, its threatening reversal: *Tell us why we are here*." HOMI K. BHABHA, THE LOCATION OF CULTURE, 99-100 (1994) (citations omitted) (emphasis in original).

Ramsey that he knew why the whites had come, asserting in response his people's own natural possession of the soil originating from the Master of Life.[35]

Ramsey admitted in his report to the Commissioner of Indian Affairs that his offer to buy a right-of-way was a ploy to reduce the demands he might receive once he brought up a land cession in earnest.[36] Raising the government's desire for a land cession, Ramsey argued that transportation lines, and with them settlers, would come, just as Little Rock had pointed out earlier in the negotiation, so that the Chippewa and their mixed-blooded relatives had best make a deal sooner rather than later. He also told them that if they agreed to sell the land, "they could still occupy and hunt it as heretofore, probably for a long time."[37] Despite such pleadings and reassurances, the chiefs from both bands were opposed to the cession, at least under the terms offered by Ramsey. Descriptions of the proceedings hint at the methods used by Ramsey and the other members of the government party that led some of the chiefs to agree to the treaty. For example, the Pembina Band and the Red Lake Band tried to negotiate separately, but Ramsey would only deal with them jointly.[38] Chippewa relations with neighboring Sioux to the south were another form of leverage that Ramsey used, accusing the Pembina Band and people of mixed ancestry from the area of aiding Sioux during their uprising against the government and settlers in 1862. When the Chippewa spokesmen argued that they

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[35] Hawkinson, *supra* note 22, at 290. The widespread attempt to translate spiritual references by using the phrase "the Master of Life" obscures the fact that such references usually were not to a monolithic deity analogous to the Judeo-Christian god. It is impossible to know what terms Little Rock used, but he probably alluded to his people's direct spiritual connection with the *manidoog* in the areas in which they lived, which is quite different from claiming legal title bestowed by a unified higher power, that might be subject to dispossession by claimants from some other purportedly more legitimate unified higher power. *See* MELISSA L. MEYER, THE WHITE EARTH TRAGEDY 111-112 (1994) for a concise discussion of the significance of *manidoog*.

[36] WHEELER-VOEGELIN & HICKERSON, *supra* note 17, at 151-152.

[37] Hawkinson, *supra* note 22, at 291.

[38] WHEELER-VOEGELIN & HICKERSON, *supra* note 17, at 152.

had no choice but to "harbor" the Sioux at the time since the Sioux had been chased northward onto Chippewa land by the U.S. army, Ramsey countered that they did not really possess the land if they could not keep their enemies out of it.[39] Ramsey's journal of the proceedings shows that there was considerable fear over the safety of those gathered, in addition to mistrust among the parties. Chippewa were concerned about the possibility of a Sioux attack on their encampment at the council, which they felt was exposed. The Red Lake chiefs in particular accosted Ramsey with their concern that métis from the Pembina area had colluded with the Sioux to make such an attack possible.[40]

The day before the treaty was signed, Ramsey wrote in his diary that it "looked as if all hope of success was gone," but that night, he said, "the two Bottineaus, Pierre & Chas. and Frank & Peter Roy with Robt. Fairbanks & Thomson went to work industriously" with particular chiefs.[41] These individuals were intermediaries having an ambiguous role in the council. Peter Roy, for example, was a signatory described on multiple treaties as an "interpreter" or as a "special interpreter,"[42] and both he and Pierre Bottineau were signatories to the 1863 Treaty listed among interpreters and other persons "in whose presence" the treaty was signed.[43] Whether Roy's contribution to these other treaties was confined entirely to interpreting before the councils en masse has not been established. In this case it extended at least to the questionable tactic of covertly dealing with leaders separately "during the night," and possibly to still less reputable activities,

[39] Id. at 159.
[40] Id. at 160-161.
[41] Hawkinson, *supra* note 22, at 292.
[42] *E.g.* Treaty with the Chippewa, Feb. 22 1855, 2 KAPPLER 685; Treaty with the Chippewa, Sept. 30 1854, 2 KAPPLER 648; Treaty with the Chippewa, Mississippi, and Pillager, and Lake Winnibigoshish Bands, May 7 1864, 2 KAPPLER 862.
[43] Treaty with the Chippewa–Red Lake and Pembina Bands, October 2 1863, 2 KAPPLER 853.

although Ramsey's hint that the interpreters "went to work industriously" in the night is unclear. In his book on treaties, Prucha commented that interpreters were a varied group. Some of them were traders, whites who had "taken up life among the Indians," and people of mixed ancestry, all of whom knew multiple languages,[44] but all of whom frequently had their personal interests in the outcome of the treaty distinct from the interests of the parties for whom they translated. Prucha's optimistic comments about the fairness of such arrangements are difficult to substantiate because he only cited instances in which complaints were made about deception, and asserted that such complaints were unsubstantiated.[45] Concerning the 1863 Treaty, Commissioner Ramsey himself commented, albeit vaguely and privately, that the assent of signatories had been secured individually and by night.

The chiefs from Pembina and all the chiefs from Red Lake present at the council, except the head chief, May-dwa-gun-on-ind (or Matwakonoonind or "He that is spoken to") agreed to sign the treaty on October 2. In it the United States understood the bands to have ceded an area from the Thief River west of Red Lake westward nearly as far as Devil's Lake, from the border with Canada as far south as the Sheyenne River. The Red Lake Band kept the land that was east of the ceded area, surrounding Red Lake and extending northward to the Lake of the Woods. This area, subsequently diminished in size by later agreements, is the forerunner of what the United States since called the Red Lake Reservation (see figure 5).[46]

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[44] FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES 213-214 (1994).
[45] *See* Id. at 215-216.
[46] *Chippewa Indians v. United States,* 301 U.S. 358, 373-376 (1937); *See also Minnesota v. Hitchcock*, 185 U.S. 373, 388-389 (1902).

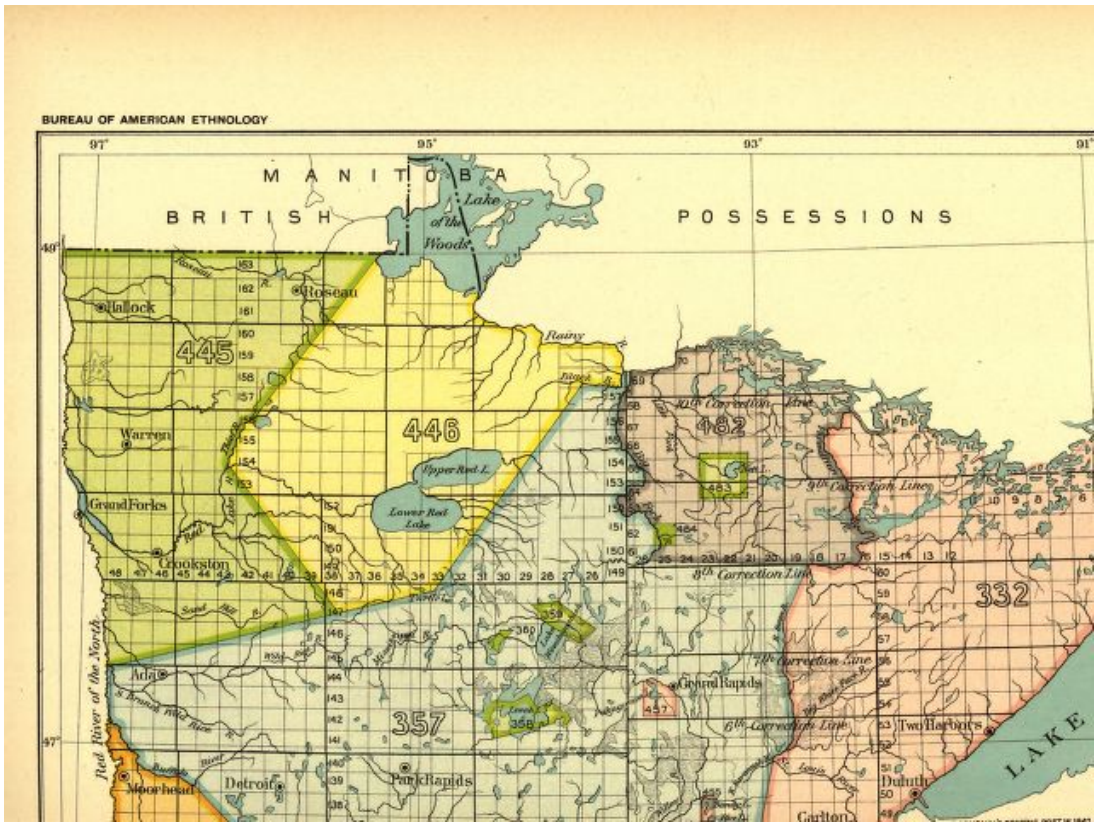

Figure 5 - Area 445 is the approximate area ceded in the 1863 Treaty (Source: Charles C. Royce, *Indian Land Cessions in the United States*, Washington DC: Bureau of American Ethnology, 1899)

The treaty also included provisions to pay $100,000 directly to traders to satisfy their claims and provisions to allow adult males of mixed ancestry to receive 160-acre homesteads within the ceded area. Individual chiefs were to receive annual money payments and land for their personal use,[47] a provision that Folwell condemned as bribery designed "to hold them subservient."[48]

May-dwa-gun-on-ind opposed the treaty, arguing that it should contain further provision for his people's welfare, though he seemed to view the cession of land as a foregone conclusion. A few days after the treaty was signed he wrote to Bishop Whipple explaining the situation:

[47] Id.
[48] 4 FOLWELL, *supra* note 16, at 477.

> Our lands were given up by persons, who had no right to do so…We do not wish to withhold our lands from our great father, but we wished to make such arrangements as to better the conditions of our people…you are aware that I was anctious [sic] to have a school whereby our children could learn to read, & we always thought of farming on a larger scale. … We intend to go to Washington.[49]

In part the chief was acting on Whipple's previous advice about what to demand when agents of the government came wanting to make a treaty.[50] After the treaty, in the spring of 1864, he traveled to Washington with some of the chiefs who had signed the treaty in October and a few warriors, where they met with the Commissioner of Indian Affairs and treaty commissioners to make a new treaty. At the same time Whipple traveled to Washington, not only to aid them in their negotiation, but to inform higher officials that the 1863 treaty was "a fraud and must sooner or later bring another Indian war."[51] The result of these visits was a supplementary treaty in which May-dwa-gun-on-ind and the other chiefs assented to the 1863 Treaty with certain amendments.[52] The 1864 Treaty altered the scheme of per capita payments to the Bands, and provided money to be spent on the Bands' behalf for agricultural goods and local economic development. Some earlier provisions, such as direct payments to the chiefs, remained a part of the treaty, as did the provision of funds to satisfy traders' claims. In place of the homesteads for "mixed-bloods" in the 1863 Treaty, which would not become their property until they had lived on the land for 5 years, the 1864 provided them with scrip entitling them to fee

[49] Hawkinson, *supra* note 22, at 295.
[50] Id. at 294.
[51] 4 FOLWELL, *supra* note 16, at 476n.
[52] Treaty with the Chippewa—Red Lake and Pembina Bands, April 12 1864, 2 KAPPLER 861

simple ownership of land within the ceded areas. Anyone electing to receive such scrip would be excluded from any future claim to per capita payments.[53]

The outcome of these two treaties was that Chippewa aboriginal title to this land in Minnesota was extinguished. The treaties created several problems, however. The remaining area claimed by the Red Lake Band, to the east of the ceded area, continued in a state of aboriginal ownership, which by the doctrine of discovery existed in addition to and as an obligation upon the absolute fee simple title of the U.S. government. This area was outside the bounds of the cession, whereas in many other treaties the "reservation" remaining to the tribe afterward was an area within the boundaries of the cession, or conferred on the tribe by the government.[54] The unceded area in the 1863 and 1864 treaties therefore could not be said to have been ceded and then reserved for the Red Lake Band by the government's choice; nor could it be said to have been given to the Band by the government as a reward for ceding land in another area. Subsequently this situation justified distinctions between the Red Lake Band's land reservation and other Indian Reservations. Whether the area not ceded, but known as the Red Lake reservation, was an Indian Reservation, was not immediately defined.

Bishop Whipple and other reformers were not pleased with the continuing method of negotiating cessions from tribes and paying them with cash or other remuneration easily subject to misuse. In addition, the relation between Chippewa and the "mixed-bloods" mentioned in the treaty remained unclear and individuals could still shift between the groups, and perhaps belong to both, for decades after the treaties. Finally,

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[53] Id.

[54] *See, e.g.*, Treaty with the Chippewa, Sept. 30 1854, 2 KAPPLER 648; Treaty with the Chippewa, Feb. 22 1855, 2 KAPPLER 685; Treaty with the Chippewa, Mississippi, and Pillager and Lake Winnibigoshish Bands, May 7 1864, 2 KAPPLER 862.

government confusion over tribal membership made fulfillment of treaty obligations difficult, and reformers began to see the ongoing relations between Chippewa, mixed-bloods, and local whites as a social problem.

B. White Earth Reservation as an Experiment in Reform

In the 1860s the political system began to define indigenous people within the boundaries of the United States as a problem that needed to be solved, recognizing that the existing policy provided an insufficient solution. Removing indigenous people to areas outside organized territories was no longer possible, and removing indigenous people to limited enclaves, merely separating them from their neighbors by delimiting areas for their exclusive use, was not sufficient. Euro-American settlers looked at tribes' existing reservation lands with longing, which they voiced to their political representatives. The cession of traditional lands to the government by no means forced indigenous people to restrict their activities to reservation lands, particularly when some treaties indefinitely preserved their right to go on hunting and fishing on the ceded lands and the government did not always immediately forcibly remove Indians to the reservations. Those who viewed indigenous people with what they saw as humanitarian interest also began to argue that "the Indian" needed to learn a new lifestyle and be assimilated or else "vanish," whereas others with less charitable interests hoped efforts to encourage assimilation would speed the vanishing. Both sides employed normatively loaded terms in describing tribal life, Euro-American society, and the processes they proposed to encourage assimilation. Political movement toward a monumental legally formalized project of social engineering was increasing. The assimilation project ripened with the General Allotment Act in 1887, but the political stimuli acting on the legal

system began at least two decades before. The White Earth Reservation, created in 1867, was one of these attempts at systemic change in policy, by giving individual Indian families responsibility for specific plots of land within the new reservation.

The notion that giving individuals or families immediate control and responsibility for a plot of land upon whose productivity they depended would bring substantial social reform was not a new idea in the 1860s. The Homestead Act, passed in 1862, allowed heads of families and single adult citizens to acquire portions of public land, subject to the sole requirement that they reside on or cultivate the land for five years before receiving title.[55] Homesteading was one of a variety of government programs to encourage migration from the relatively crowded East to the plains, and from the cities to the underused hinterlands. Unemployed urban Americans as well as dispossessed agrarian foreign immigrants could travel out to the frontier and start new lives, depending on their own industriousness and good luck for their survival. Coming during the early part of the Civil War, the conditions set on acquiring public lands under the Act–requiring residency and limiting the area acquired–promoted the Jeffersonian ideal of the yeoman farmer, personally responsible for the welfare of himself and his family.[56] By enforcing this form of expansion, rather than a system of large plantations tilled by slaves or paid laborers, the Civil War defined the nineteenth-century character of the American plains. The family farm of 160 acres or so, rather than the large plantation, would be the

[55] Act of May 20, 1862, 12 Stat. 392.
[56] These conditions on homesteading also prevented the expansion of the southern agricultural system of plantations, by limiting the size of the areas acquired and preventing immediate sale and consolidation of ownership.

norm. Ongoing land division and privatization of land in America, as it had been in England previously, was seen as an agent for moral and economic improvement.[57]

White Earth Reservation was an experiment in the usefulness of individual land use in solving what was being called "the Indian Problem" both by those who saw themselves as humanitarian advocates for American Indians and those who saw themselves as enemies of American Indians. "The Indian Problem" encompassed all senses in which tribal societies were segmentally differentiated from Euro-American society. Separate and distinct systems of family relations, property, possession and use, religion, and normative and cognitive expectations were described as facets of one problem that had to be solved. Some railed against indigenous people by contrasting the orderly and proper social systems of civilized Christendom, to what they described as barbarous savagery entirely lacking social systems. Others acknowledged tribal societies as systems of their own but steadfastly maintained their inferiority, and the rightful duty to replace them. The view that Indians needed to change was common, however. Reservations provided under earlier treaties were being found insufficient to support the former lifestyles of the tribes that occupied them. Tribes living in forested areas had long participated in the international market economy of the fur-trade, usually to their disadvantage as they accumulated debts to traders. Confinement to reservations in return for cash payments to traders and per capita payments that temporarily reduced the debts did not promote their role in the market.

[57] The earlier allotment movement in England had arisen from an even more complex group of circumstances as England passed through an industrial revolution and movements to enclose former public commons. Allotments could provide livelihood for the rural poor or supplemental support for underemployed factor workers; in both cases the necessity of government administration through costly and ineffective institutions such as workhouses and poorhouses was avoided. *See* Boaz Moselle, *Allotments, Enclosure, and Proletarianization in Early Nineteenth-Century Southern England*, 48 ECON. HIST. REV., NEW SERIES 482 (August 1995).

Bishop Whipple was among those who expressed the need for reform that moved the Unites States and Chippewa throughout Minnesota toward the Treaty of March 19, 1867, signed in Washington, DC, which created the White Earth Reservation. Whipple had enough experience in Minnesota by the 1860s to develop his own characterization of the problems of Minnesota Chippewa, and his own views on how to solve those problems. The suggestions made in his letter to the President in 1862 closely resembled the eventual outcome of the 1867 Treaty.[58] Whipple's views are a striking example of the sentiments expressed by those who saw themselves as advocates for the best interests of Indians in the latter half of the nineteenth century. Outrage at mismanagement of treaty funds by federal Indian agents and at the connivance of those agents with opportunists, combined with condescending pity for the noble, yet misguided (and therefore, with proper guidance, civilizable) victims, fueled these reformers' arguments. The ideals espoused by the "friends of the Indian" were also an illustration of the process by which both good and ill intentions provided opportunities for the system to evolve structures that were more complicated and internally problematic, instead of simpler and more consistent structures. Whipple addressed the problems he saw in prose fairly standard for the period:

> Before their treaty with the United States, the Indians of Minnesota were as favorably situated as an uncivilized race could well be. Their lakes, forests, and prairies furnished abundant game, and their hunts supplied them with valuable furs for the purchase of all articles of traffic. The great argument to secure the sale of their lands is the promise of civilization: "You red men are poor; you have no houses, no cities, no fire canoes, or fire horses; you are not rich like white men–sell us your land and our great father will send you teachers to help you become like us." The sale is made, and, after the dishonesty which accompanies it, there is usually enough money left, if honestly expended, to foster the Indian's desires for

[58] S. MISC. DOC. NO. 37-77 (1862).

> civilization. Remember, the parties to this contract are a great Christian nation and a poor heathen people.
>
> From the day of the treaty a rapid deterioration takes place. The Indian has sold the hunting grounds necessary for his comfort as a wild man; his tribal relations are weakened; his chief's power and influence circumscribed, and he will soon be left a helpless man without a government, a protector, or a friend, unless the solemn treaty is observed.[59]

Whipple justified the urgency of action to correct these problems with a series of accusations of neglect and outright malfeasance by federal Indian agents and government failure to protect Indians from unscrupulous traders and worse elements. He urged several reforms, including special care to insure that each Indian agent be "a man of purity, temperance, industry, and unquestioned integrity."[60]

Whipple captured the broad shift in the legal definition of indigenous people as outsiders with their own institutions, to a socially problematic domestic group to be dealt with by means of a special formulation of law for their control, protection, and improvement. His second recommendation was "to frame instructions so that the Indian shall be the ward of the government. They cannot live without law. We have broken up, in part, their tribal relations, and they must have something in its place."[61] The notion of Indians as wards of the government was familiar, of course. Chief Justice John Marshall had asserted that "a state of pupilage" was a factual description of the status of the Cherokee Nation in *Cherokee Nation v. Georgia* thirty years earlier, while analogizing the Cherokee Nation's relation to the United States to "that of a ward to his guardian".[62]

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[59] Id. at 2.
[60] Id. at 3.
[61] Id.
[62] 30 U.S. (5 Pet.) 1, 17 (1831). Later, in *United States v. Kagama*, 118 U.S. 375, 382 (1886), Chief Justice Marshall's guardian/ward analogy was employed as though it were a factual description.

Whipple recommended ensuring that Indians be wards of the government, for their benefit. The statement that Indians cannot live without law tacitly admits that Indians had law at one time and that it was sufficient for them to live. Rather than letting Chippewa society adjust to interactions with Euro-American settlers, Whipple's letter recommended replacing "broken up" tribal relations. The terms of this recommendation suggest his concern that assimilation and civilization would not lead to a simple blending of Indians with a homogenous non-Indian majority. The legal system in particular would continue to develop a specialized subsystem–within itself, but nonetheless functionally differentiated from its other subsystems–to regulate Indians' guardian-ward relationship to the government.

Whipple also recommended changes in the administration of Indians' affairs to encourage Indians to live like their immigrant neighbors, who were generally assumed to be farmers. The government should aid Indians who chose to live as farmers or tradesmen by providing necessary goods and tools to build homes and cultivate farms, and providing schools for Indian children, he suggested. Treaty payment obligations would be fulfilled with goods and tools rather than money, and only when found to be necessary rather than at regular intervals.[63] These recommendations helped to initiate a program of paternalistic philanthropy on the part of the federal government in collaboration with a wide variety of Christian sectarian missionary societies. Bishop Whipple's ideas became increasingly popular, and his suggestions were followed, in particular his last:

> There ought to be a concentration of the scattered bands of Chippewas upon one reservation, thus securing a more careful oversight, and also

[63] S. MISC. DOC. NO. 37-77, at 3-4 (1862)

> preventing the sale of fire-water and the corrupt influence of bad men. The Indian agent ought to be authorized to act as a United States commissioner to try all violations of Indian laws. It may be beyond my province to offer these suggestions; I have made them because my heart aches for this poor wronged people. The heads of the department are too busy to visit the Indian country, and even if they did, it would be to find the house swept and garnished for an official visitor. It seems to me that the surest plan to remedy these wrongs, and to prevent them for the future, would be to appoint a commission of some three persons to examine the whole subject and report to the department a plan which should remedy the evils which have so long been a reproach to our nation.[64]

The Senate received Whipple's message in March of 1862. Within a few years these suggestions were incorporated into the legal system concerning Chippewa in Minnesota, including subsequent treaties, statutes, and executive orders.

Unlike the two treaties signed in 1863 and 1864, the 1867 Treaty that created the White Earth Reservation was a treaty not to provide land cession, but to set up a new Chippewa society overseen by the government and missionaries. The manner of its negotiation supports that conclusion. Earlier Chippewa treaties had been signed by long lists of chiefs, headmen, and warriors after large councils held in the vicinity of their homelands. The number of Chippewa representatives included in the councils had decreased, and the ability of tribes to resist demands by the government negotiators had diminished, by 1867. Treaty-making was becoming less of a negotiated agreement in which the result attempted to address the concerns of Indian participants and more of a unilateral taking or imposition of administrative remedies by the federal government. Some of Whipple's recommendations began to be implemented in treaties before 1867, including the consolidation of the many small reservations in Minnesota.

[64] Id. at 4.

In 1864 Hole-in-the-Day and another chief from the Mississippi bands, Mis-qua-dace, traveled to Washington where they negotiated a treaty with the Commissioner of Indian Affairs, W.P. Dole, and the Superintendent of Indian Affairs, Clark Thompson, with Peter Roy acting as "special interpreter."[65] In this treaty Hole-in-the-Day and Mis-qua-dace, on behalf of the Mississippi Bands, living in central and northern Minnesota, ceded several reservations established in the 1855 Treaty in return for one large reservation in the vicinity of Leech Lake.[66] These were the reservations at Gull Lake, Mille Lac, Sandy Lake, Rabbit Lake, Pokagomin Lake, and Rice Lake. A specific provision was included that inhabitants of the Mille Lac Reservation could remain so long as they did not "interfere with or in any manner molest the persons or property of the whites."[67] In return several of Whipple's suggestions for reform made in 1862 were codified, providing payments in goods and improvements for building infrastructure on the new reservation, the appointment of a board of visitors to oversee the conduct of Indian affairs by agents, and standards to ensure that teachers, agents, interpreters, traders, and other employees that were to act on the reservations would be of reputable character.[68] In return for the cession the Mississippi Bands' annuities were extended, direct payments of money to "the chiefs of the Chippewas of the Mississippi" and a direct payment to Hole-in-the-Day in compensation for the burning of his house in 1862. Hole-in-the-Day, Mis-qua-dace, and Shaw-vosh-kung, a chief from Mille Lac, each received

[65] Treaty with the Chippewa, Mississippi, and Pillager, and Lake Winnibigoshish Bands, May 7 1864, 2 KAPPLER 862.
[66] Id.
[67] Id., at 862-863, 865.
[68] Id. at 864.

grants of a section of land in fee simple at Gull Lake, Sandy Lake, and Mille Lac, respectively.[69]

This 1864 Treaty had begun putting Whipple's recommendations for Indian assimilation in Minnesota into effect. The subsequent 1867 Treaty provided the framework for the Chippewa migration to White Earth over the next twenty-five years. Like the 1864 Treaty, the 1867 Treaty was negotiated and signed in Washington by a relatively small group of Chippewa headed by Hole-in-the-Day. The Chippewa were accompanied by the government agent assigned to their agency, Joel Bassett, interpreter Truman A. Warren, and two friends of Whipple: Episcopal deacon Enmegahbowh ("John Johnson") and George Bonga, a métis trader.[70] The government's views and Bishop Whipple's views were represented at the negotiation by official agents and by like-minded friends. Hole-in-the-Day and his companions, as representatives of Chippewa, were apparently willing to accept the plans for remaking Chippewa life in a new area under new conditions, albeit with additional provisions for their own individual benefit.

This new treaty, quickly ratified by the Senate a few weeks after it was signed, ceded a large part of the Leech Lake reservation established in the 1864 Treaty in return for a new reservation. It also included language carrying out many of Whipple's recommendations. The new reservation, called the White Earth Reservation, was defined in the following terms:

> In order to provide a suitable farming region for the said bands [of Mississippi Chippewa] there is hereby set apart for their use a tract of land, to be located in a square form as nearly as possible, with lines corresponding to the Government surveys; which reservation shall include

[69] Id. at 863.
[70] Treaty with the Chippewa of the Mississippi, March 19 1867, 2 KAPPLER 974; HENRY WHIPPLE, LIGHTS AND SHADOWS OF A LONG EPISCOPATE ch. 5 (1899).

> White Earth Lake and Rice Lake, and contain thirty-six townships of land; and such portions of the tract herein provided for as shall be found upon actual survey to lie outside of the reservation set apart for the Chippewas of the Mississippi by the second article of the treaty of March 20, 1865 [the 1864 Treaty], shall be received by them in part consideration for the cession of lands made by this agreement.[71]

The new reservation boundary was described in the terms of the rectangular survey grid that was spreading across the plains, just as the Chippewa immigrants to White Earth would be expected to start to fit into the American agricultural model of the small mixed farm developed in eastern Pennsylvania and Ohio and encouraged on the plains by the incentives of the Homestead Act.

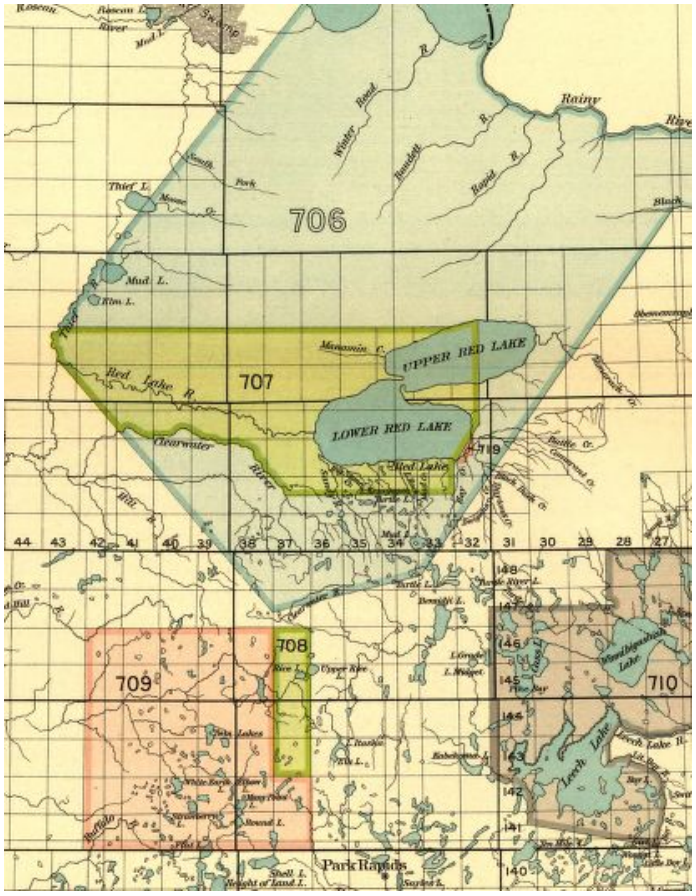

Figure 6 – Areas 709 and 708 are the original White Earth Reservation. (Source: Charles C. Royce, *Indian Land Cessions in the United States*, Washington DC: Bureau of American Ethnology, 1899)

[71] Treaty with the Chippewa of the Mississippi, March 19 1867, 2 KAPPLER 974, 975.

Hunting, fishing, and rice-harvesting in an area limited only by relations with neighbors were to be replaced by cultivation and husbandry on relatively small farms in an orderly, permanent grid, under government supervision at least at first.

To aid the Indian immigrants to White Earth in their social transition, the 1867 Treaty promised a variety of payments to build buildings for a school and support its operation, to build a sawmill, gristmill, and houses for the immigrants, to purchase livestock and farming equipment, to support a physician and provide medicines, to pay laborers among the immigrants, and to provide goods as necessary.[72] A provision prohibited payments to "any half-breed or mixed-blood except those who actually live with their people upon one of the reservations belonging to the Chippewa Indians."[73] The experimental provision of this treaty was near its end, providing for a program of allotments two decades before the nationwide allotment policy was enacted:

> As soon as the location of the reservation set apart by the second article hereof shall have been approximately ascertained, and reported to the office of Indian Affairs, the Secretary of the Interior shall cause the same to be surveyed in conformity to the system of Government surveys, and whenever, after such survey, any Indian, of the bands parties hereto, either male or female, shall have ten acres of land under cultivation, such Indian shall be entitled to receive a certificate, showing him to be entitled to the forty acres of land, according to legal subdivision, containing the said ten acres or the greater part thereof, and whenever such Indian shall have an additional ten acres under cultivation, he or she shall be entitled to a certificate for an additional forty acres, and so on, until the full amount of one hundred and sixty acres may have been certified to any one Indian; and the land so held by any Indian shall be exempt from taxation and sale for debt, and shall not be alienated except with the approval of the Secretary of the Interior, and in no case to any person not a member of the Chippewa tribe.[74]

[72] Id. at 975.
[73] Id.
[74] Id. at 976.

Thus by a system of incentives immigrants to White Earth were encouraged to cultivate farmsteads and establish 160-acre plots that they would own individually by "certificate," that were subject to protective restrictions and conditions. Individual Indians would have to capitalize on the incentives fully in order to achieve the full 160-acre allotment available under the 1867 Treaty. Some earlier treaties had permitted voluntary acceptance of individual allotments within communally occupied reservations, but under the terms of the 1867 treaty, communal occupancy and use, migratory hunting, fishing, and rice-gathering would not be recognized as legitimate activities at White Earth. Chippewa living on the new reservation at White Earth would no longer be within a segmentally differentiated social system with incomplete links to analogous Euro-American systems, but would be within a functionally differentiated reservation defined within the Euro-American legal system. People who refused to assimilate would not be recognized as acting legally. They would not be outside the system and their actions would be either legal or illegal.

Mississippi Chippewa and Chippewa from other regions of Minnesota did not migrate to White Earth immediately. Only those living at the Gull Lake Reservation relocated shortly after the treaty was ratified.[75] By the 1870s, E.P. Smith, the federal agent for Mississippi Chippewa, recommended to the Commissioner of Indian Affairs that money should be appropriated to fund the removal of various other bands. Smith's words indicate that the funding was proposed to induce the bands to move as much as it was to fund the actual logistics of the migration. Aside from some Gull Lake Chippewa who had not moved to White Earth, Smith evaluated the chances of removing people

[75] Melissa L. Meyer, "Signatures and Thumbprints: Ethnicity among the White Earth Anishinabeg, 1889-1920," 14 SOC. SCIENCE HISTORY 305, 309 (1990).

from Mille Lacs, Otter Tail, Pembina, and Leech Lake as varying in prospect.[76] Small groups initially migrated to White Earth in company with the intermediary participants in the 1867 Treaty, including Paul Beaulieu, Truman Warren, and Enmegabowh.[77] The migrations continued in small numbers for decades afterward, bringing the total number of migrants to 800 by 1875, and in 1876 the Otter Tail Pillager Band and many members of the Pembina Band migrated, bringing the total to 1427.[78] After the allotment period began in the late 1880s, migration to White Earth increased again, as other Chippewa reservations in Minnesota were allotted.[79]

C. The "End" of Treaties and the Beginning of Assimilation

The federal government's initial nation-to-nation method of dealing with American Indian tribes was being criticized from various perspectives in the 1860s, and shortly after the Civil War, the presidential power to make treaties with Indian tribes was curtailed.[80] Those who saw Indian people as obstacles to westward progress viewed negotiation, compromise, and the making of permanent promises as ways of making those obstacles more permanent. Reformers such as Bishop Whipple, who viewed themselves as advocates for Indians' welfare, saw Indian people not becoming integrated into the settler society with which they were surrounded, and divined a need for paternalistic efforts to assimilate them. A point of agreement emerged from the various schemes for removing the obstacles or assimilating the Indians. Treating Indians as equals and coming to agreements with them as though their societies were nations were

[76] S. MISC. DOC. NO. 42-40, at 2-3 (1872).
[77] *See generally* ALVIN WILCOX, A PIONEER HISTORY OF BECKER COUNTY, MINNESOTA, ch. 18. (1907).
[78] Meyer, *supra* note 75, at 309.
[79] Id.
[80] *See* VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS, 59-70. (1999).

no longer seen as appropriate. American Indians were no longer outside of the United States legally or politically according to the systems' definitions of reservations, so it was no longer considered appropriate to create further structures, such as treaties, that would maintain that separation. Indians were to be considered a domestic problem, dealt with by statutes called "agreements" or "conventions" that were debated and approved by both houses of Congress, and to which affected Indians' consent would be attempted to be gained.

Much has been made of the end of treaty-making in the history of federal American Indian policy as a definitive debasement of the sovereignty of American Indian tribes. The 1871 appropriation act that contains the provision prohibiting further treaties does not preclude negotiation, compromise, and agreement.[81] It states:

> *Provided*, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.[82]

Such terms have a tone of finality, but the continuing separation between Indians and the United States was recognizable and necessitated agreements and conventions. The legal system took its place in the drive toward social assimilation, and the end of treaties, like the creation of the White Earth Reservation, was one of its earlier steps. The legal system had (in the *Cherokee Nation* case) already defined tribes as "domestic dependent nations" rather than independent nations, although the degree of domesticity or dependency varied along with the terms of treaties. Agreements continued to fulfill a similar function within

[81] Act of March 3, 1871, ch. 120 16 Stat. 544, 566 (1871).
[82] Id. (emphasis in original)

the legal system to that of treaties before them, but the political system viewed them as a refined assertion of Indians' more nearly complete domesticity and dependency. Thus the same political inputs (disagreeing objectives on the part of federal officials and tribe members) produced a new form of legal structure fitted to the political system's goals.

In this atmosphere both the resident bands at Red Lake and any Minnesota Chippewa who might choose to migrate to White Earth had been recognized by treaties as Indian groups with whom the United States had ongoing relationships involving obligations. The nature of those obligations, and the proper method for administering them, would become a means for divesting Indian people in Minnesota of additional land and much of their self-government through wholesale institutional replacement. In this process the law was not an instrument of politics or an incarnation of politics. The legal system was a part of the same society as the political system, and both played parts in the social convergence that took place in late nineteenth century America. The structures that formed to fulfill the functions that became necessary in the legal system are uniquely local–yet many aspects of them persist because they have not yet been changed. The striking differences in the formation of reservations at Red Lake and White Earth persisted even as the allotment and assimilation program sought to shepherd them toward the same outcome.

V. **Frontiers become boundaries: allotment and the assimilation of space**

The colonial world is a world divided into compartments.[1]

At the conclusion of the American Civil war, several obstacles to westward expansion of Euro-American settlement had been removed. Territories could be admitted to the union as states without dispute over their effect on the legislative balance of power in the struggle over slavery. Federal economic, military and human resources were no longer dedicated to fighting battles that took place on the farms and in the towns of the East, and now could be used to support mining, grazing, logging, and farming the land in the West. Importantly, the segmental differentiation between the unsettled western "Indian Country" and the Euro-American East was disappearing and non-Indian social systems were confronted with complexity to which they quickly began to adapt. The West had become an area of growing Euro-American settlement within which Indians still lived, rather than an area of Indian Country in which a few Euro-Americans lived. Law, among other systems, encountered preexisting analogous systems among American Indian tribal societies from which intervening space and language differences had formerly been effective separations. The legal system's efforts to codify these encounters resulted in an assimilation and allotment program whose residues have persisted in the legal system since that era. Assimilation as a policy and the legal programs that historians have associated with it were, of course, not inevitable. They were simply the outcome of system operations that could have gone otherwise. The expansion of the legal system in the western American colonial context relied extensively on its coding of

[1] FRANZ FANON, THE WRETCHED OF THE EARTH 37 (English ed., Grove Press 1968) (1963).

spaces. This spatializing of law, or legalizing of space, underlies the story of assimilation and allotment.

In hindsight the two decades after the Civil War seem to encompass an extraordinary sea-change from the removal and concentration policies of the earlier nineteenth century toward the allotment and assimilation programs of the later nineteenth century. The late nineteenth century provided the legal system with an unusual variety of stimuli and an unusual number of opportunities to expand its purview. Railroads, factories, and other contributors to the industrialization of the country provided opportunities for the legal system to expand its role in the regulation of commerce, for example. The railroads made areas that had been difficult to reach much more accessible to Euro-American settlers, thus indirectly increasing political pressures to open such areas to settlement. Allotment and assimilation were not new and did not completely replace the former removal and concentration policies. Allotment of reservation land partly fulfilled the functions of removal and concentration in a more complicated, more defined, way than had physical removal from a particular area. From creating a distinction between the reservation and ceded lands, allotment created the further distinction on reservations between allotted lands and tribal lands held in common, or between individuals' allotments and the remainder, which could be acquired by Euro-Americans under the provisions of the Homestead Act.

These layers of spatial-legal distinction on reservations between lands under Indian control and lands under state and local jurisdiction, between allotments and tribal lands, and between tribal lands and ceded lands, along with distinctions between Indian and citizen non-Indian, and between "wild" Indian and "civilized" Indian, were the legal

system's basis for transforming what had been segmental differentiations into functional differentiations. The variety of such categories increased as the legal system drew distinctions to define them. This forcible transformation brought two social systems together into one functionally differentiated social system. Some structures defined in one system or the other were lost in the process, or lost their centrality as they were redefined to have less than general applicability. Derrida would call this loss "the violence of the supplement,"[2] whereas Lyotard would call it "terror,"[3] but from a social system's perspective the loss is what allowed, and continues to allow, the system to achieve operational closure. The localized application of the generalized rule creates peculiarities that can then be used by the system as opportunities for further clarification. Allotment and assimilation as they affected White Earth and Red Lake illustrate the divergences and convergences in system evolution that can emerge in this process.

A. Allotment and assimilation as national policies to solve "the Indian problem"

For virtually all non-Indians in the late nineteenth century, policy makers, military men, Eastern agrarian emigrants, lumbermen, miners, and the genteel idealists of various churches, sects, and charitable societies, Indians were a problem of one kind or another.

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[2] *See* JACQUES DERRIDA, OF GRAMMATOLOGY 157-159 (1976).

[3] *See* JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION 63-64 (1984). *Cf.* GILLES DELEUZE & FELIX GUATTARI, ANTI-OEDIPUS 192 (1983) (referring to "a concerted destruction of all the primitive codings, or worse yet, their derisory preservation, their reduction to the condition of secondary parts in the new machine, and the new apparatus of repression"). From a social system's internal perspective its operations cannot be characterized as violence or terror and do not bring about any loss since the system always only defines its observations according to its constituent code. That which was undefined and could not be understood, predicted, or made meaningful was focused and clarified within the system. Only another system's observations and definition (and thus generation of its own particular violence and terror when looked at from still another system's perspective) can use the legal system's activity to code between terror and not-terror, or violence and non-violence. Clarity and the extension of rule to areas in which the legal system formerly recognized no rule can be seen as benefits of the rule of law, but the system's self-observing subsystem cannot fully account for the coding of other systems. Law and law according to the rule of law do not guarantee the absence of violence and terror. To the contrary, violence and terror are inevitable results of social systems' efforts to make infinity calculable.

Social systems defined the kinds of problems Indians presented each in their own way, and the solutions those systems formulated to cope with the problems demonstrate as much about the systems themselves as about indigenous people. The fundamental agreement among non-Indians was that the solution to "the Indian problem" primarily would involve changes by Indians. Within this context, the Property Clause of the U.S. Constitution seemed to provide Congress with plenary power to regulate Indians' affairs both on their reservations and off of reservations:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.[4]

This power of Congress, which seemed more realistically enforceable as the military fortunes of plains tribes waned in the latter half of the nineteenth century, began to be reflected in the legal system's operations, such as the Major Crimes Act, discussed below. When the Act was tested, however, the Supreme Court declined to find that the Congressional authority to enact the Major Crimes Act had originated in the property clause and instead grounded it in what it described as a duty to protect Indians as "a race once powerful, now weak and diminished in numbers."[5] Attempts to resolve uncertainties within the system, such as whether to treat whites' crimes committed on reservations as crimes against the tribe's law or as crimes against U.S. federal (or state) law, used the notion of the rule of law but often merely advanced U.S. federal control over issues and areas formerly under Indian control. At the same time, the system's attempts to structure complexity in its environment–which in this case was the Anishinabeg and their ways of

[4] U.S. CONST., art. IV, §. 3, cl. 2.
[5] *United States v. Kagama*, 118 U.S. 375, 384 (1886).

living, both on and off the reservation–increased the incursion of legal coding into almost every aspect of Anishinabe life. By the legal system's terms, the indefinable complexity of *Anishinabe* had to be defined and simplified into *Chippewa*. Being Chippewa in an Anishinabe context was not enough for the legal system, because one distinction is never enough and Chippewa proved to be quite as complex a category as Anishinabe: hence, another distinction between Chippewa and American citizens of Chippewa descent. In Homi Bhabha's words, this series of distinctions inevitably creates categories that are "*almost the same, but not quite…almost the same, but not white.*"[6] The system attempts to simplify by drawing distinctions, but the distinctions themselves create further complexity and tax the system to draw still further distinctions that shade closer and closer to identity but only raise more questions for further clarification.

The shift in federal American Indian policy from the concentration of indigenous people onto reservations to the cultural assimilation of those people in what has frequently been described as a "melting pot" of ethnicities came over the latter third of the nineteenth century.[7] On the one hand, factions in favor of the reservation policy held that the innocent "noble savage" deserved to be sequestered and protected from the corruptions of civilization, or that the violence of a "bloodthirsty savage" ought to be

[6] HOMI BHABHA, THE LOCATION OF CULTURE, 89 (1994).

[7] The term "melting pot" is popularly used to indicate an optimistic outlook on the assimilation of diverse cultures to form a single (mostly) homogenous culture. It was coined in a 1908 play, *The Melting Pot*, by Israel Zangwill. The "melting pot" notion rests upon the same sort of idealistic naïve American exceptionalism that at various times has powered ideologies of manifest destiny, progress, nation-making, making the world safe for democracy, and most recently, the war on terror. Disparate ethnic groups would interact and intermarry, it was expected, losing many of their distinctive characteristics and merging to produce one great enduring ethnicity, a uniquely American ethnicity, which would resist assaults by pernicious foreign ideas and promote domestic harmony and prosperity. Paradoxically, the American melting pot produced only a wider variety of behaviors rooted in ethnic origins and combinations of origins, though many go unrecognized because the array of origins is so complicated as to defy easy explanation.

removed to a safe distance from Christian settlers. On the other hand, factions in favor of assimilation held that "wild" Indians should be civilized, or that childishly incompetent "ward" Indians could be educated and molded into productive citizens.[8] The move toward assimilation was not a result of the victory of one of these stereotypical views or factions over the others although coding of agreement within the political system is indeed based on the victory of one policy in spite of observable support for others opposed to it. Rather, the policy change was a result of another, wider sea-change in the social system. Indians and non-Indians were in such frequent contact and communication that the functional differentiation of the social systems of the non-Indians could no longer successfully maintain the segmental differentiation between colonizers and colonized. In short, Bhabha's "*almost the same, but not white*" had to become institutionalized. The boundary between system and environment had to be redrawn to include indigenous people and their land within the system. Although incorporating both colonizer and colonized within the colonizers' social system sought to accomplish this, like every other effort of systems to order their environments, it could never be complete.

For the legal system in the late nineteenth century, this process was often described as bringing law to lawless areas, as giving law and order to the lawless and disorderly. The benefits of the rule of law, through the extension of generalized normative expectations within a single functionally differentiated system to every observable facet of that system's environment, were unquestioned. Between reformers of different persuasions there were nuances, however. Some simply asserted that "the Indian" had no law. Some reformers recognized that Indians had social systems that

[8] *See generally* ROBERT F. BERKHOFER, JR., THE WHITE MAN'S INDIAN (1978).

were functionally equivalent to law, but argued generally that their continuation was unacceptable and they should be ignored and replaced. Others recognized that there was a multiplicity of functional equivalents to law among different indigenous and métis groups and that some were more or less problematic from their perspective as reformers. Most agreed, however, that the good of civilization, the interest of progress, the duty of Christian people everywhere, or some other goal of wide political currency during the period demanded that Anglo-American law be more or less forcibly extended to include Indians and Indian Country.[9]

The Dawes Act, passed on February 8, 1887, initiated several programs developed in the system that advanced the solution of "the Indian problem" by way of the rule of law.[10] An earlier generation of reformers, including Bishop Henry Whipple, had anticipated the calls for Indians to assimilate. The creation of White Earth Reservation was one of the first experiments testing the idea. The ideals of the new generation of reformers after the Civil War comprised a mixture of paternalistic self-righteousness, concern for rationality and fairness, and crassly racist white supremacy. These reformers pitted themselves against economic interests, such as mining and logging companies, who had little or no concern for high-minded ideals but simply wanted to separate indigenous people from land that could be used to make money. The solution to the Indian problem was, characteristically, not an Indian solution, but a white solution. Indians and indigenous people resisted the definition of their lifeways as a problem to be solved and they resisted the solutions to that problem that outsiders advanced. This

[9] *See generally* FREDERICK E. HOXIE, A FINAL PROMISE, 1-39 (1984); D.S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS, 8-32 (F.P. Prucha ed., University of Okalahoma Press 1973) (1934).
[10] 24 Stat. 388 (1887).

resistance could only be conceived as resistance from outside the legal system, however. For the legal system resistance is either part of the legal system or part of the environment, and is either legal or illegal. An appeal of a court decision is a process within the legal system, whereas refusal to take allotments would be part of the legal system's environment. The refusal to take allotments could be observed and coded as legal or illegal by the legal system, of course.

Indigenous social systems have changed since the nineteenth century, just as have all social systems, but the maintenance of a degree of segmental differentiation from Euro-American social systems in some cases shows that small groups of people are not powerless to resist. The outcome of assimilation programs at White Earth and Red Lake represents not only an assimilation solution to the Indian problem, but the affected Indians' solution to an assimilation problem. Resistance is politically meaningful, not legally meaningful, except insofar as political resistance becomes structurally coupled to operations of the legal system. Continuing disagreement with political initiatives that have become codified as law can lead to legal appeals. Thus what is resistance, or disagreement, in a political sense, is a necessity for clarification in a legal sense.

As in the earlier part of the nineteenth century, part of the impetus for development of new programs in the legal system came from individual incidents that were raised as questions for courts to answer. The feedback from the courts' answers was used by the political system to code levels of agreement about which normative expectations were widely enough generalized to become legislation and thereby qualify as structures of law. Several court cases in the late nineteenth century extended the rule

of law over Indian Country. These cases, *United States ex rel. Standing Bear v. Crook*,[11] *United States v. McBratney*,[12] *Ex Parte Crow Dog*,[13] *Elk v. Wilkins*,[14] and *United States v. Kagama*,[15] expanded the legal system's definition of the boundaries within which its various structures applied both geographically and conceptually to include a variety of circumstances involving Indians and locations in Indian Country. Statutes and administrative programs prompted by these cases during the same period provided for new, or newly exercised, federal authority over Indians and Indian Country. The exercise of this newly defined authority was concomitant with the evolution of the assimilation policies that led to such widely different outcomes at White Earth and Red Lake.

Chief Standing Bear and his people provided many nineteenth-century reformers with a rallying point for their arguments that the benefits of the Anglo-American legal system should be extended to Indians. Interested reformers, including the newspaperman Thomas Tibbles, used considerable showmanship in publicizing Standing Bear's case,[16] which they used to discredit the policy of concentrating Indians on reservations and then consolidating those reservations into progressively smaller areas. In this case, the Ponca Indians were removed from Nebraska southward to Indian Territory (present-day Oklahoma), and under Standing Bear's leadership many of them departed to live with their Omaha allies to the north, nearer to their homeland. The U.S. Army took custody of Standing Bear and his followers and imprisoned them. Reformers argued not that the Ponca Tribe had an inherent separate authority over its land and people and that removing

[11] 25 F. Cas. 695 (C.C.D. Neb. 1879)
[12] 104 U.S. (8 Otto) 621 (1881).
[13] 109 U.S. 556 (1883).
[14] 112 U.S. 94 (1884).
[15] 118 U.S. 375 (1886).
[16] *See* PETRA T. SHATTUCK & JILL NORGREN, PARTIAL JUSTICE 85-88 (1991).

them was thus illegal, but that the removal and imprisonment were violations of the procedural due process guaranteed by the U.S. Constitution. Thus the District Court's decision that Standing Bear and his followers were entitled to the right to petition for writ of habeas corpus in U.S. federal court was a victory for the reformers' cause of extending U.S. federal law further into Indians' affairs. The decision freed Standing Bear and his people from their imprisonment, but it extended federal authority over Indian Country, advancing the reformers' cause of converting indigenous people into Indians who could be defined as "wards" of the government. To become Indians and thereby wards of the government, indigenous people had to be transformed conceptually, and Standing Bear's case showed that this transformation could occur subtly.

The case provided Standing Bear with the notoriety to make an extensive tour of the East, making appearances before rich, powerful, and persuasive Americans who would press Congress to act further. Organizations of reformers such as the Boston Indian Citizenship Committee, the Women's National Indian Association, and the Indian Rights Association campaigned for government action to encourage the complete assimilation of Indians. Most of these organizations were formed by protestant Christian Easterners who indulged their delicate fancies in righteous indignation over the government's handling of "the Indian problem." These activists, as Fred Hoxie has described, "promised that dismantling the reservation system (and the separation strategy that lay behind it) would end frontier violence, stop agency corruption, and 'civilize' the Indians while demonstrating the power and vitality of America's institutions."[17] The justice and humanity of American treatment of Indians was their foremost priority, and

[17] HOXIE, *supra* note 9, at 10-11 (1984).

their confidence in their understanding of the requirements of justice and humanity was an essential factor in the formation of policy:

> Large scale and systematic violation of legal principles had to be prevented not because it "wronged" the Indian–whose assimilation [the reformers] felt would be promoted in any case by separating him from his communal landbase and tribal culture–but because it threatened the secular and religious prophecy of the United States as the model nation. This distinction was crucial for it permitted the satisfaction of the political and economic demands for Indian land as long as it could be done within the confines of the rule of law. It left room for a compromise between the conflicting needs of Indian policy–adherence to standards of legal and moral formalities and the demand for the dispossession of the Indian.[18]

If Indians were treated "fairly" and the laws applied to them "equally," the reformers expected that the only remaining necessity to help Indians to become American farmers just like Germans, Swedes, and other ethnic immigrants to the West was to provide them with education and land on an individual basis. The task of administering their needs and providing for their health, safety, and welfare would then be no more complicated or troublesome than for anyone else. The rosy simplicity of this formulation never eventuated, although faith in its essential rightness buttressed the entire assimilation era.

The extension of this version of fairness and equality into Indian Country and Indians' affairs progressed through Congress and the federal courts in parallel. The landmark 1881 Supreme Court case of *United States v. McBratney*[19] illustrates the conversion of what had been segmental frontiers between Indian Country, or Indian affairs, and U.S jurisdictions into a functional differentiation between Indians' residual control of their own affairs in contrast to an assumption of federal jurisdiction over Indians capable of organizing and reorganizing subordinate jurisdictions. McBratney, a

[18] SHATTUCK & NORGREN, *supra* note 16, at 81.
[19] 104 U.S. (8 Otto) 621 (1881).

white man, had murdered Thomas Casey, another white man, on the Ute Reservation, which was "within the limits of the State of Colorado" according to the Court.[20] Congress had passed a series of acts extending federal jurisdiction to some types of offenses committed by non-Indians in Indian Country between 1834 and 1874 that were known cumulatively as the "General Crimes Act."[21] Since the last amendment of the General Crimes Act, Colorado had been admitted to the Union with the standard provisos included in its enabling act under the Equal Footing doctrine. Citing the case of *The Cherokee Tobacco,*[22] the Court declared that Colorado's admission repealed any former acts (such as the General Crimes Act and the treaties between the Utes and the United States) that would have required McBratney's trial in a federal court because they were "clearly inconsistent therewith."[23] The Court's conclusion that the treaty and the General Crimes Act were clearly inconsistent with Colorado's admission on equal footing rested on the Court's repeated assertions that the Ute Reservation was "within the territorial limits" of Colorado.[24] Thus McBratney's crime was a crime against the laws of Colorado rather than federal law. Not only was Indian Country subject to the supremacy of the federal government: jurisdictions could be reorganized to make Indian Country subject to individual states' authority.

Ex Parte Crow Dog[25] was another case of murder on a reservation, but in this situation a Brule Sioux chief, Spotted Tail, was killed by another tribe member, Crow Dog, on the Rosebud Reservation. A tribal council held immediately thereafter had dealt

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[20] Id. at 624.
[21] *See* VINE DELORIA JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 166-168 (1983).
[22] 78 U.S. (11 Wall.) 616 (1870)
[23] 104 U.S. 621, 623.
[24] 104 U.S. 621 *passim.*
[25] 109 U.S. 556 (1883).

with Crow Dog's crime by requiring him to provide goods and services to Spotted Tail's relatives as compensation. Federal agents arrested Crow Dog, however, and brought him to trial before a federal territorial court, where he was sentenced to death.[26] The U.S. Supreme Court heard Crow Dog's petition for writ of habeas corpus. Referring again to the General Crimes Act, the Court found that the Act gave federal courts jurisdiction over certain crimes in Indian Country, but exempted "any Indian committing any offence in the Indian country who has been punished by the local law of the tribe, or to any case where by treaty stipulations the exclusive jurisdiction over such offences is or may be secured to the Indian tribes respectively."[27] To find a definition of "Indian Country," the Court was obliged to return to the Trade and Intercourse Act of 1834[28] even though the sections defining that term had since been repealed, and then to refer to various subsequent acts that used the same term and thus relied on the definition. Studying the 1868 Treaty and 1877 Agreement to which the Brule Sioux had been party, the Court found that neither repealed the exception contained in the General Crimes Act, since there was not even evidence to suggest that either implied the repeal of the exception.[29] Justice Matthews, writing for the Court, waxed eloquent in explaining the inappropriateness of reading in the implication that Indian crimes should be tried in federal courts:

> [A]gainst an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over members of a community separated by race, by tradition, by the instincts of a free though savage life, from authority and power which seeks to impose upon them the restraints of an external and unknown code, and to

[26] *See generally* SIDNEY HARRING, CROW DOG'S CASE (1994).
[27] 109 U.S. at 558.
[28] Act of June 30 1834, 4 Stat. 729.
[29] 109 U.S. at 570-571.

> subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man's revenge by the maxims of the white man's morality.[30]

Each of Justice Matthews's prepositional phrases contains a sense in which it would have been unjust and an arbitrary perversion of the rule of law to punish Crow Dog according to federal law. The reformers proposed to correct and prevent such injustices not by preventing the further extension of U.S. law to Indians and Indian Country, but by changing Indians to fit within the legal system to be extended over them. Thus one of Justice Matthews's concluding statements reoriented his earlier eloquent expressions of the injustices visited upon Crow Dog as a set of instructions for colonization according to the rule of law: "to uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the government towards the Indians… To justify such a departure, in such a case, requires a clear expression of the intention of Congress, and that we have not been able to find."[31]

The various factions of reformers were not idle after *Crow Dog*; aside from their separate activities many of them came together at an annual conference first held at a resort at Lake Mohonk, New York, in 1883.[32] Discussions at these conferences produced a series of resolutions that guided the work of attendees in lobbying for reform in Indian

[30] Id. at 571.
[31] Id. at 572.
[32] *See* HOXIE, *supra* note 9, at 12.

affairs. The annual Mohonk conference might be best described as a religious retreat for evangelical Protestants who dabbled in Indian affairs, along with interested politicians and journalists.[33] From the outset the participants in the conference generally agreed to advocate a policy involving allotment of land in severalty.[34] The conference immediately following the decision in *Crow Dog*, in 1884, produced a declaration of principles, and a set of recommendations about law and Indian Country, covering almost every aspect of what would become the federal assimilation policy. The depth of the attendees' feeling that allotment of land and cultural assimilation were the most humane and appropriate answers to what they called "the Indian question" is visible in the phrasing of the conference's declaration. The initial resolution held that "the organization of the Indians in tribes is, and has been, one of the most serious hindrances to the advancement of the Indian toward civilization, and that every effort should be made to secure the disintegration of all tribal organizations…".[35] The series of resolutions under the heading "What is necessary to secure Indian citizenship" describes a scheme for allotment of Indian reservation land that closely resembles the final language contained in the Dawes Act, passed three years later.[36] Citizenship, according to the agreed common program of the reformers, would be tied to ownership of land in severalty and would lead to the disintegration of tribes.

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[33] *See generally* FRANCIS PAUL PRUCHA, THE GREAT FATHER 202-203 (Abridged ed. 1984).
[34] OTIS, *supra* note 9, at 36. "Severalty" is a legal term referring to exclusive individual ownership. It is not to be confused with estate in fee simple, which is a technical term for a form of title to real property. A group of individuals (such as a corporation or partnership) could hold fee simple title to a parcel of real property communally, although the corporation would be considered the sole landowner.
[35] SECOND ANNUAL ADDRESS TO THE PUBLIC OF THE LAKE MOHONK CONFERENCE (1884), *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY, at 163 (F.P. Prucha, ed., 2d expanded ed. 1990) [hereinafter "DOCUMENTS"]
[36] Id.

Education, along with citizenship and land ownership, was another component of the reformers' program for assimilation. They argued that the government should operate or fund the operation of industrial and agricultural schools for young adult Indians, and for Indian children, extending the limited provisions for training in agriculture that had been included in some treaties. "[E]ducation is essential to civilization," they declared:

> The Indian must have a knowledge of the English language, that he may associate with his white neighbors and transact business as they do. He must have practical industrial training to fit him to compete with others in the struggle for life. He must have a Christian education to enable him to perform duties of the family, the State, and the Church. Such an education can be best acquired apart from his reservation and amid the influence of Christian and civilized society.[37]

The ideal method was to remove younger people from the reservations and immerse them in Euro-American life at a distance from their reservation homes, but since this was not always practical, training schools were also established on or near reservations. Nonetheless, many young Indian people were removed, often not willingly, from their homes and made to attend distant boarding schools operated by federal agents or by missionaries.[38] The policy of government-sponsored education provided the legal system with another opportunity to define indigenous people and place them within system-delineated boundaries. From indigenous people and métis in the fur-trade era, the distinction had shifted to Indians and mixed-bloods at the signing of treaties; now it shifted to "good" Indians, who attended to their school training and adopted "civilized" habits, and "bad" Indians, who avoided boarding-school education and tried to maintain their language, religion, and other cultural lifeways.

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[37] Id. at 164.
[38] *See generally* BRENDA J. CHILD, BOARDING SCHOOL SEASONS (1998); Donald A. Grinde, Jr., "Taking the Indian out of the Indian" 19 *Wicazo Sa Rev.* 25 (2004).

The reformers were unblinking in their assurance that American law was the only law appropriate for Indians, and that it should apply to them as soon as it could be made to do so. Their argument echoes Justice Matthews's opinion of the Court in *Crow Dog* by taking the rule-of-law ideal of fairness and consistency as obvious proof that American law ought to be extended to Indians, who were, it seemed at the time, denied the equal protection of the law:

> *Resolved,* That immediate efforts should be made to place the Indian in the same position before the law as that held by the rest of the population, but that if it is not advisable, under existing circumstances, to subject the Indian at once to our entire body of law, the friends of the Indian should promptly endeavor: *First*, to provide for him some method of admission to citizenship so soon as he has prepared himself for its privileges and responsibilities; *second*, to give him at once the right to sue in our courts, and, *third*, to provide some system for the administration of certain laws on the reservations. We believe that the laws relating to marriage and inheritance and the criminal law affecting person and property should be extended over the reservations immediately.[39]

All of the new rights to be conferred on Indians by extending American law over Indian Country seemed reasonable enough to reformers who saw Indians as savages capable of being raised to civilization, rather than as people with social systems of their own that remained segmentally differentiated from the reformers' social systems. The social Darwinist ideology of ethnologists at the time provided a scientific support for this conventional wisdom.[40] Christian civilization was an irresistible tide that would sweep westward over the continent, so the most humane approach to anyone in its path, argued the reformers, was to compel an end to any resistance.

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[39] SECOND ANNUAL ADDRESS TO THE PUBLIC OF THE LAKE MOHONK CONFERENCE, in DOCUMENTS, *supra* note 34, at 166.
[40] *See* HOXIE, *supra* note 9, at 16-25.

The issue of Indian citizenship was raised before the U.S. Supreme Court shortly after the first Lake Mohonk Conference, in 1884. John Elk, who was described as "an Indian," had left the reservation and severed ties with whatever tribe of which he had been a member.[41] As a resident of Omaha, Nebraska, Elk tried to register to vote, pointing to the 14th amendment, which states that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," but his registration was denied.[42] Writing for the Supreme Court, Justice Gray cited the precedent that "the alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect."[43] Justice Gray considered the progress of federal legislation regarding Indians, and found that it had tended to support and encourage Indians to prepare for citizenship but not to make them citizens all at once: "whether any Indian[s]…have become so far advanced in civilization, that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself."[44] Thus the Court ruled that Elk was not a citizen, and his suit, to require that he be allowed to register to vote, was denied.

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[41] *Elk v. Wilkins*, 112 U.S. 94, 98-99 (1884). The tribe was not mentioned in Elk's petition to the Supreme Court for writ of error; apparently it was not considered an important issue of fact, and the Court disposed of that question by presuming that the tribe had a treaty of some kind and had been recognized by the federal government.
[42] U.S. CONST. amend. XIV.
[43] *Elk,* 112 U.S. at 100.
[44] Id. at 106-107.

Justice Harlan's dissent in *Elk* encapsulates the reformers' argument in favor of Indian citizenship, although there was disagreement among the factions of reformers as to whether American citizenship should be immediately and fully extended to all Indians. The majority of the Court seemed to harbor no objections to government programs for "education and civilization of the Indians, and fitting them to be citizens."[45] The holding of the Court was merely that John Elk was not (yet) a citizen. Justice Harlan's dissent invokes the same ideals of fairness and equality raised by Justice Matthews in *Crow Dog* to argue in favor of further extension of U.S. authority over Indians' affairs:

> If he [Elk] did not acquire national citizenship on abandoning his tribe and becoming, by residence in one of the States, subject to the complete jurisdiction of the United States, then the Fourteenth Amendment has wholly failed to accomplish, in respect of the Indian race, what, we think, was intended by it; and there is still in this country a despised and rejected class of persons, with no nationality whatever; who, born in our territory, owing no allegiance to any foreign power, and subject, as residents of the States, to all the burdens of government, are yet not members of any political community nor entitled to any of the rights, privileges, or immunities of citizens of the United States.[46]

The implication of this argument was that American law ought to cover everyone in America equally because it would be unfair for it to cover some people but not others. This justification was persuasive and seemed both reasonable and humane. It relied on the assumptions that segmental boundaries between colonized peoples' social systems and the systems of the colonizers were breaking down, would continue to break down, and should continue to break down. Indians were not declared citizens immediately, but the programs of allotment and assimilation would be designed to encourage and even compel them to work toward becoming citizens.

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[45] Id. at 106.
[46] Id. at 122-123.

Congress was ready to oblige the increasingly vocal reformers, who were visibly garnering more support for the goals they established at the Lake Mohonk conferences. In addition to organizational meetings and their campaigns directed at Congress itself, reform groups had been bombarding the public at large with speeches and editorials appealing to widely-applauded sentiments, such as the duty to bestow the gift of Christianity upon heathens.[47] Reformers' efforts to encourage public support for assimilation and allotment policy were joined by federal bureaucrats, including the Commissioners of Indian Affairs, whose annual reports to Congress advocated various new practices including land allotment, a standard Indian educational system, federal cooperation with religious missionary societies, and the establishment of courts to handle offenses on reservations.[48]

In making general appropriations for the Bureau of Indian affairs in 1885, Congress attached a short paragraph designating seven major crimes that would be subject to federal jurisdiction if committed in Indian Country.[49] This provision has since been known as the "Major Crimes Act," and together with subsequent legislation, continues to subject criminals in Indian Country to federal jurisdiction. The fairness-and-equality justification for this legislation is evident in its wording:

> [A]ll such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons

[47] *E.g.* C.L. Brace, The Red Men: Christianizing the Indians, Address to the Niobrara League read by Mrs. J.J. Astor, *in* N.Y. TIMES, Nov. 22, 1873, at 9. (arguing in part that movement to "bring both whites and Indians under the same laws" would encourage the Christianization of Indians)
[48] *See generally* DOCUMENTS, *supra* note 35, at 153-158, 160-162. (annual reports to Congress by Secretary of the Interior Carl Schurz, 1880; Commissioner of Indian Affairs Hiram Price, 1881 and 1882; Secretary of the Interior Henry Teller, 1883, advocating these policies)
[49] Act of March 3, 1885, 23 Stat. 362, 385.

> committing any of the above crimes within the exclusive jurisdiction of the United States.[50]

Applying the same laws to Indians as to everyone else in federal jurisdictions had a double appeal. First was the due process and equal protection ideology embodied in recent amendments to the Constitution and described by Justice Harlan in his dissent in *Elk v. Wilkins*. Second was the "civilizable savage" imagery widely believed and almost always deployed by the reformers, who felt that treating Indians like whites and requiring them to answer for the same crimes in the same courts would assist them in their efforts to remake Indians as much like whites as possible.

Lost in the calls by reformers for expansion of American law to include Indians was the fundamental notion that American law applied in American territory because its citizens were voting constituents of its legislatures and executives. Visitors and other aliens subjected themselves to American jurisdictions by crossing the borders, whether legally or not. The segmental differentiation between the United States and other countries was preserved by a geographic distinction enforced by physical separation. As the nineteenth century progressed, most Indian tribes were less visibly separated from American society. Physically they were not separated by empty or sparsely populated areas; socially they came into increasing contact with neighboring non-Indian settlers, with frequent trade and communication. Combined with the prescription of reservations as enclaves within territories or states, the linkages between Indian societies and nearby Euro-American settlers provided the legal system with an opportunity to reassess the

[50] Id.

segmental differentiations between tribal social systems of normative expectations and American law. The test-case for this movement was *United States v. Kagama*.[51]

Like *Crow Dog*, *Kagama* was another case of murder in which all those involved were Indians: Kagama, with the aid of Mahawaha, killed Iyouse on the Hoopa Valley Reservation in northern California, after the 1885 enactment of the Major Crimes Act. The judges of the federal district court with jurisdiction over that region disagreed on the constitutionality of the Major Crimes Act, and requested the U.S. Supreme Court to hear the case by means of certificate of division, asking six questions, which the Supreme Court condensed into two.[52] These two questions concerned the narrower issue of the constitutionality of the Major Crimes Act and the broader issue of whether U.S. courts had jurisdiction over crimes by Indians on Indian reservations. The decision in this case was an important foundation for the doctrine that Congress has a complete and nearly unchallengeable authority over Indian affairs (often called the doctrine of "plenary power"[53]) that could be exercised unilaterally, with no consultation of the affected Indians.

In its analysis, the Supreme Court briefly examined the U.S. constitutional provisions mentioning Indians, and found little indication of the power of Congress, or any other branch of U.S. government, over Indians. The fourteenth amendment and the apportionment provisions, both of which mentioned "Indians not taxed," gave the Court no guidance, and the Commerce clause, as interpreted by the Court previously in *Cherokee Nation v. Georgia*, did not clarify whether tribes were subject to the general

[51] 118 U.S. 375 (1886).
[52] Id. at 375-376.
[53] *See* DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT, 25-27 (1999) (discussing the origins and interpretations of the Congressional plenary power with regard to Indians).

authority of Congress.[54] Nonetheless, the terminology of the Commerce clause and the *Cherokee Nation* case gave the Court a basis to establish the doctrine that tribes were not independent. The emphasis in Chief Justice Marshall's "domestic dependent nations" phrase in *Cherokee Nation* was to be placed upon the limitations of *domesticity* and *dependency* rather than on the *nationhood* of tribes.[55]

As a result, the Court found that Indian tribes were not separate, or were at any rate no longer separate, from the United States, and that the supremacy of the federal government in all affairs on lands acquired for purposes of national expansion was unquestionable. Once states were formed from those lands, reasoned the Court, Indian affairs in Indian Country within those states remained an exception to the new state's jurisdiction and remained under federal control.[56] Looking back on *Cherokee Nation* and *Worcester v. Georgia* in history, Justice Miller's opinion explained that Indians

> were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.[57]

This management of the relations between tribes and Euro-American settlers and their government had been carried out by treaty. As the Court noted, Congress's 1871 determination to make no further treaties with Indian tribes represented a new direction

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[54] Id. at 378-379.
[55] The gravity of this departure from previous practices has since been remarked, but at the time the legal and political systems were using the opportunities they found to create structures that would fulfill what they defined as necessary functions. Those systems were unable to recognize analogous structures in analogous systems found in their environments: hence the clumsy definitions of tribes as "domestic dependent nations" and of tribal authority as a minimal quantity to be greatly subordinated to U.S. federal authority. *See* WILKINS, *supra* note 53, at 67-81.
[56] 118 U.S. at 379-380.
[57] Id. at 381-382.

given the experience of making treaties for nearly a hundred years, and this new direction was to govern tribes' affairs by "acts of Congress."[58] Reviewing Justice Matthews's statement in *Crow Dog* that a clear intention of Congress to subject Indians to federal criminal jurisdiction was necessary, Justice Miller found that the Major Crimes Act was intended to remove that objection.

Essential to Justice Miller's conclusion of the Court's opinion in *Kagama* was a series of arguments that legally defined and enforced paternalism was both permissible and necessary since Indian tribes had become surrounded by Euro-American settlers. Congress, and therefore the public at large, had decided that Indians needed protection and education both to prepare and to require them to participate in American society. The importance of this Congressional policy justified its exercise, according to the Court:

> It seems to us that this [the Major Crimes Act] is within the competency of Congress. These Indian tribes are wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.
> …
> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone [sic] can enforce its laws on all the tribes.[59]

[58] Id. at 382.
[59] Id. at 383-385

Kagama enlisted law in support of colonialism out of necessity. The Court could state as fact that Indians were "a race once powerful, now weak and diminished in numbers," and that Indian Country was "within the geographical limits of the United States" because the legal system had defined them as such. The end of treaty-making cited by the Court allowed the system to pretend that agreements between opposed sovereigns need not be reached, and that Indian affairs were merely a domestic matter to be settled by unilateral decisions of Congress. The definition of Indian reservations as bounded areas within the limits of the United States, enclaves set aside by the federal government for tribes' exclusive use and occupancy, allowed the system to consider Indian Country an area legally inside, not outside, the United States.[60]

The *Kagama* decision also prepared the legal system to receive the culmination of the reformers' efforts, the Dawes Act, by justifying Congress's exercise of almost any power over Indians. The paternalism of Justice Miller's opinion announced the Court's willingness to accept unilaterally imposed programs for the social improvement of Indians. The opinion also reflects the imagery of Indians as childish, unsophisticated savages, capable under proper direction of being tamed, civilized, and enlightened. The necessity of protection was provided by the related stereotype of Indians as a "vanishing" or "dying" people who needed a government-provided shield from the difficulties of civilized life until they were individually raised to competence and majority, ready to take their place as citizens.

[60] Notably these arguments do not rely upon the Property Clause, U.S. CONST. Art. IV., §3, cl. 2, or other clauses of the Constitution, but geographical and historical notions about the status of Indians and the necessity of their "protection." Rather, such "plenary power" conceived as absolute power, is not sanctioned by the Constitution. *See* David E. Wilkins, "The U.S. Supreme Court's explication of 'federal plenary power'", 18 AM. INDIAN Q. 349 (1994).

Justice Miller's opinion in *Kagama* hinted at the enmity between Indians and their neighbors, and so reformers who believed they had Indians' best interests in mind were not the only group pressuring Congress to change policy toward Indians. Allotment in severalty appealed to both the timber baron and the farmer because it held out the prospect of additional Indian land opened for settlement or resource extraction, and confronted Indians with the choice of assimilation or death. The economic interests and the idealistic reformers had a belief in common: they believed in Progress, and they believed that Indians were in its way. Local disorder, and inconvenience, uncertainty or delay in getting access to the economic value of Indian lands, were obstacles to profit. The image of Indian reservations as lawless enclaves, inhabited by "bloodthirsty" savages and disreputable white and métis reprobates who contributed to the lawless atmosphere by providing guns and alcohol, was painted as a social menace liable to spill over into surrounding areas.

Presenting Indians with the alternative of assimilation, or death ("root, hog, or die"), was raised repeatedly in the Congressional discussions that culminated in the passage of the Dawes Act, although the reformers were not in agreement over whether Indians should be compelled to accept allotments or simply vigorously encouraged to do so. On one hand, some argued that most Indians would not choose to take allotments unless forced by the prospect of starvation; on the other, some argued that it would be unfair to force Indians to give up their tribal lands (and any surplus land after providing allotments of the specified size to each Indian).[61] The pro-coercionists focused on the cold social Darwinist hypothesis that Indians who could adapt when handed an allotment,

[61] *See, e.g.* WILCOMB E. WASHBURN, THE ASSAULT ON INDIAN TRIBALISM 16-18 (1986).

some tools, and some seeds, would root or hog, and that those who could not would die. The anti-coercionists focused on educating and prodding Indians to accept allotment voluntarily as an improvement of their situation. To do this they advocated various coercive measures, however, such as the boarding schools. The Lake Mohonk Conference provided the venue at which a compromise among the factions of reformers was reached. The reformers closed ranks regarding the coercion issue at the 1885 conference, where they agreed on a platform that left room for coercion without absolutely requiring it.[62]

The Dawes Act was not the only watershed between the reservation policy before and the assimilation policy after, but a culmination of the drive to instill an assimilation policy over several years. As Fred Hoxie has noted, the Act was "the final part of the government's new assimilation campaign. …[I]ts provisions embodied a number of ideas and expectations that already had gained acceptance and become a part of government action."[63] The main provision to make Indian ownership in severalty possible had indeed been talked about for years, and provisions allowing Indians on individual reservations to choose to take allotments had been included in treaties and agreements for two decades and more. Boarding schools, missionaries, criminal and civil laws: all these forces of assimilation had already encroached upon indigenous and Indian lifeways. The Dawes Act finally established once and for all the use of the rectangular survey of reservation lands and individual land ownership, which the reformers thought would be the essential turning point in assimilation.

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[62] Id. at 18.
[63] HOXIE, *supra* note 9, at 70.

The Act provided that land within Indian reservations suitable for agriculture or grazing would be surveyed. Agricultural land would then be allotted to individual Indians according to a schedule of set quantities, with an exception to allow larger allotments of lands found suitable only for grazing. The survey and allotment were to take place at the discretion of the President of the United States:

> [I]n all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and hereby is, authorized, whenever in his opinion any reservation or part thereof is advantageous for agricultural or grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the said lands in said reservation in severalty to any Indian located thereon…[64]

Heads of families would receive a quarter section (160 acres), single adults and orphaned children would receive an eighth section (80 acres), and any other unmarried children born before the President's order to allot the their reservation would receive a sixteenth section (40 acres). Indians not living on reservations could apply for allotments on public lands outside reservations in the same quantities.[65] In this way, at the President's order, Indians would be made individually, or at least in family units, responsible for bounded tracts.

The survey and subdivision of the land itself was the integral factor in allotment, and probably the integral factor in the policy of assimilation that allowed other institutions such as the boarding schools, the missions, the postal service, the railroads, and the newspapers, to approach Indians as individuals rather than as a group. The

[64] Act of February 8, 1887, 24 Stat. 388.
[65] Id. The Act did not specify whether these Indians need be members of any tribe, or if so, how their membership would be determined. Subsequent court cases answered some of these related questions when they were raised.

survey is implied in these other institutions: the drawing of boundaries is the first condition for spatial systems, just as a distinction between system and environment is the first condition for a system. Treaties had described the boundaries of reservations, setting apart Indian tribes and their land from outsiders. The description of these boundaries was necessary from the legal system's perspective in order distinguish reservations from ceded lands. Within reservations, for allotment to occur, tribal land had to be divided into discrete, defined units in order for individual ownership to be possible.[66] The notion that Indian land ought to be subdivided and the notion that Indians ought to own subdivided land are both integral facets of the goal of individualizing Indians and their land in the service of assimilation.[67]

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[66] Otherwise at best individual members of a tribe could have owned their reservation as a whole by some form of tenancy in common or as members of a corporate entity that actually owned the reservation land. Incidentally, this arrangement would be similar to Native Corporations created by the Alaska Native Claims Settlement Act (Pub. L. No. 92-203, 85 Stat. 688 (1971)) whereby Alaska Natives own shares in corporations that own and manage land on their behalf.

[67] In another colonial context, nineteenth-century Egypt, Timothy Mitchell recognized the role of boundaries in revising and replacing indigenous social systems within a functionally differentiated colonial social system. Mitchell named his observations with the term "enframing":

> Enframing is a method of dividing up and containing...which operates by conjuring up a neutral surface or volume called 'space'….In reconstructing the village, the spacing that forms its rooms, courtyards, and buildings is specified in exact magnitudes, down to the nearest centimetre. Rather than as an occurrence of walls, floors, and openings, this system of magnitudes can be thought of apart, as space itself. The plans and dimensions introduce space as something apparently abstract and neutral, a series of inert frames or containers.
>
> Within these containers, items can then be isolated, enumerated, and kept: three large animals and three small per courtyard; two beds end to end (and hence two persons) per room; even the positioning of pots, water jars, and food supplies was specified…The dividing up of such items is also the breaking down of life into a series of discrete functions–sleeping, eating, cooking, and so on–each with a specific location. The order of the reconstructed village was to be achieved by reducing its life to this system of locations and the objects and functions contained there, of a framework and what was enframed. The apparent neutrality of space, as the dimension of order, is an effect of building and distributing according to the strict distinction between container and contained. (TIMOTHY MITCHELL, COLONISING EGYPT 44-45 (1988))

Despite the evident differences between colonialism in Egypt and in Minnesota, the similarities are striking. To reiterate: space is a social system, which consists of communications drawing distinctions

In the context of the Dawes Act, the legal system's reliance on communications of spatial relationships translated to the drawing of conceptual boundaries around individuals in relation to groups and land parcels within formerly amorphous reservation tracts. If an Indian could be required either to own a specific parcel land, or not to own land at all, the legal system could define its authority over that Indian's activities on a piece of land. Individuals would be tied as landowners, like non-Indians already were, to individual parcels through a system of deeds and plats, with an accounting of which parcels were not attached to individuals and were available for the government to convey to others. The reservation land would be divided and each piece would have a purpose and associated value according to the decisions of its owner, who would be influenced by neighbors and the instructional efforts of the government. Actual fee simple title, the responsibility to pay property taxes, and personal citizenship would come later for allotment-holders, after they had successfully served a trust period. The federal government would hold their allotments in trust (and tax-exempt) for their individual use

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between inside and outside, container and contained. The environment of that system, "super-space" so to speak, is inaccessible to analysis because any attempt to analyze space is a second-order observing system that observes the observations of the already social system of space. There may be a homogenous emptiness beyond the limits of communication, but it is unfathomable. *See* LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS, 32, 33, 34 (Trans. C.K. Ogden, 1922):

> A spatial object must lie in infinite space. (A point in space is an argument place). … The substance of the world *can* only determine a form and not any material properties. For these are first presented by the propositions–first formed by the configuration of the objects. … Space, time, and colour (colouredness) are forms of objects. Only if there are objects can there be a fixed form of the world.

As communication, all space is entwined with other social systems, though the structural couplings may be many or few. Something in the system's environment is always lost by the communication because drawing a distinction requires an inside and an outside. Communicating space thus exhibits the "violence" of the supplement, "terror", or the "complexity of system and environment", to use the respective terms employed by Derrida, Lyotard, and Luhmann when making this observation.

for a period of twenty-five years, after which they would become fee owners.[68] This provision was expected to protect Indians from tricksters and opportunists who might want to buy the allotted lands, and from government foreclosure for nonpayment of taxes. The lands remaining on a reservation after all tribe members received allotments could be sold, or granted to homesteaders, and the proceeds from the sales would be used to fund educational and other assimilation programs for Indians.[69] The intent was that during the twenty-five year period after receiving an allotment, an Indian family would be increasingly surrounded by non-Indian farmers, who would purchase the tribe's former lands and thereby fund the boarding schools the family's children were compelled to attend. Once allotment on a reservation was complete, all the Indians on that reservation would be subject to the criminal and civil laws of the state or territory within which the reservation was located, and any Indian that had taken an allotment and "adopted the habits of civilized life," would thereby become a U.S. citizen.[70]

The Dawes Act, though distanced in tone from the enthusiasm of the more idealistic reformers, dispossessed tribes of both land and sovereignty, enforced individual land ownership, and changed the nature of reservations. Federal legal authority over tribes had already been expanded by the Major Crimes Act, and after the completion of allotment, it was expected that state law would apply uniformly everywhere. The missionaries were to keep their missions on allotted reservations, where they would be joined by farmers and by schoolteachers whose work would be funded by the sale of the remaining lands. Sale of this remaining Indian land would pay for Indian assimilation,

[68] 24. Stat. 388.
[69] Id.
[70] Id.

and Indians would become productive, peaceable members of an American society. The idealism of the reformers is captured in the Dawes Act's provisions, but the Act failed to remedy the reformers' blindness to the flaws of earlier assimilation policies that preceded the Act, such as the system of severalty that already existed on the White Earth Reservation, for example. The varying operation of the Dawes Act and other assimilation policies at White Earth and at Red Lake provide a useful illustration of the productive futility of social systems. Systemic efforts to distinguish often lead to similarity, whereas systemic efforts to homogenize often lead to difference, as these two cases show.

B. Allotment and assimilation at White Earth and Red Lake: simplification makes things more complex

Fundamental differences and similarities between White Earth Reservation and Red Lake Reservation in the late nineteenth century can be observed. Red Lake was a remnant of aboriginal tribal territory that remained unceded after the 1863 and 1864 treaties of cession and continued to be diminished in size by agreements made during the allotment period. The treaties provided for U.S. expenditures to encourage European-style agriculture and industry, and participation in the expansionist mercantilist capitalism captained by the northeastern states, but they did not look forward further than that.[71] In this way, Red Lake retained characteristics, including tribal ownership of reservation lands in common, of the measured separation of the treaty era. White Earth, on the other hand, was created from ceded lands to be an agricultural land of opportunity to which Chippewa from throughout Minnesota could be encouraged to migrate

[71] *See supra* ch. 4, at 124-127.

voluntarily, take responsibility for individual plots of subdivided land, and be taught to behave like Euro-American farmers. The creation of White Earth Reservation looked forward to the assimilation and integration of the allotment era.

After the 1867 Treaty created the White Earth Reservation, groups of Chippewa from other areas of Minnesota voluntarily migrated there, sometimes accompanied by missionaries and other intermediaries. The choice to migrate to the new agrarian reserve represented a choice about the future and an evaluation of the past and the present. It was a decision on the part of individuals to participate in the policy of assimilation and remake their lives and their identities, not necessarily in keeping with the expectations of the missionaries, Indian agents, and other human faces of the assimilation program, but as a conscious interaction with them. The lifeways and tangle of identities that emerged from these interactions were neither as the Chippewa migrants might have hoped, nor as the proponents of assimilation probably intended. The "traditional" Anishinabe group identity was a social system with a largely segmental boundary between itself, within which interactions took place, and the outside, including other groups of people, with which interactions rarely or never took place. As the maintenance of that segmental boundary became less tenable the differentiation between Anishinabe and not-Anishinabe became more functional than segmental, and functional differentiations within Anishinabe appeared. By the time of the migrations to White Earth, the terms "full blood" and "mixed blood" had become established and merged with the term "Chippewa;" whereas "Anishinabe" was rarely used by or with outsiders.

Anishinabe communities' fracture into full-blood and mixed-blood Indians, ostensibly on the basis of ancestry, provided the Euro-American political and legal

systems with opportunities to redefine more aspects of those communities as aspects of the American social system. At White Earth and across Minnesota at other reservations whose inhabitants were affected by the pressure to relocate to White Earth, the coding between mixed blood and full blood served the American political system's wider concern for separating the Indians who would "root" or "hog" from the Indians who were expected to die rather than simply labeling ancestry. In the legal system's terms, this separation would be manifested as a recognition or non-recognition of property ownership and citizenship through allotment. It would be inaccurate to say that those who participated in assimilation programs were all trying to become like whites, because many were resisting the pressure to assimilate in different ways involving varying degrees of compromise.[72] The general labels of "mixed blood" and "full blood" fail to capture the complexity of viewpoints and lifestyles they represent, but they were the terms used by the participants in the events at White Earth between 1868 and the turn of the twentieth century, as can be seen from contemporaneous accounts.

The initial group of migrants to White Earth arrived in the summer of 1868 from Gull Lake, accompanied by Truman Warren, who was in charge of distributing the weekly rations that were provided to those who relocated. Paul Beaulieu was the first professional farmer who was to provide instruction and advice on agriculture to the migrants.[73] Exactly who chose to move to White Earth, and who stayed behind at the former reservations, is difficult to pin down, but there were definite ethnic divisions. The

[72] *E.g.* MELISSA L. MEYER, THE WHITE EARTH TRAGEDY 73-74 (1994). What made a person a mixed blood or a full blood depended largely on perspective. A mixed ancestry of Anishinabeg and whites might make a person a mixed blood from one perspective, but the same person might be a full blood from another perspective of lifestyle choices and respect for Anishinabe traditions. In general the divide between mixed bloods and full bloods in the assimilation era was between those who participated in the programs of assimilation and those who tried to avoid them.

[73] ALVIN WILCOX, A PIONEER HISTORY OF BECKER COUNTY, MINNESOTA, ch. 13 (1907).

account of Mrs. Julia Spears, a sister of Truman Warren, contained in Wilcox's history of Becker County, highlights this fact. Those who moved seem to have been people who considered themselves to be mixed bloods, or who were considered by others, such as those who did not move, to be mixed bloods. From the tone of Mrs. Spears's account appears a series of fine distinctions, dependent on her perceptions and on the niceties of an individual's habits, between Indians, Chippewa Indians, mixed bloods, whites, and Christians, and members of her own family. Her own family's precise social location according to Mrs. Spears remained unclear, with some relatives seemingly located in different places in this hierarchy.[74] Though anecdotal, Mrs. Spears's account shows that descriptors referring to "blood" were by no means intuitively linked to ancestry.

Among the migrants to White Earth, the reference to an individual's ethnicity by "blood" was an indicator of that person's orientation toward Euro-American agriculture and market economics, religion, and politics. Ancestry did not necessarily define social orientation, and social orientation did not completely replace of ancestry in defining one's ethnicity. Aside from ancestry, both outward adaptations to the pressure to assimilate, and political stance toward that pressure, were involved in contemporaneous assessments of ethnicity. Although the ways of determining membership in particular ethnic groups shifted, the use of similar terminology to refer to groups persisted. Since a person could be a mixed blood or a full blood for various reasons, some of which had nothing to do with "blood," the use of such categories could be productively misread by the legal system to redefine the boundary between Chippewa and non-Indian. Later

[74] Id.

efforts by the legal system to organize the complexity of ethnicities at White Earth and other reservations served the purpose of encouraging assimilation.

National policymakers received the impression that White Earth was an exemplary Indian settlement, populated by industrious, Christianizing Indians bent on learning a regionally productive, or at least locally self-sustaining agrarian way of life that would harmonize with neighboring Euro-American immigrants and not obstruct other Euro-American economic activities such as farming, logging, mining, or the construction of railroads.[75] Many migrants to White Earth intended to participate and take what advantages they could, but maintain their own traditions as they understood them. The earliest group from Gull Lake, which began to migrate in 1868, was not followed by large numbers of others until 1876, when the Pembina Band, which had been associated with the Red Lake Band in the 1863 and 1864 Treaties, and the Otter Tail Pillager Band were encouraged to move to White Earth. Congress appropriated funds to encourage the moves after U.S. Indian Agent E.P. Smith, who thought that White Earth would be better environs for the Otter Tail Pillager Band, suggested that "some of the Pembinas" were "homeless and forlorn," and should be helped to move to White Earth.[76] In 1872 Congress appropriated funds

> to carry on the work of aiding and instructing the Indians on the White Earth reservation, in Minnesota, in the arts of civilization, with a view to their self-support, conditioned upon the assent of the Mississippi Band of Chippewas, first expressed in open council in the usual manner, to the settlement of the Otter Tail band of Pillagers upon the White Earth reservation, with equal rights in respect to the lands within its boundaries.[77]

[75] *See generally* S. MISC. DOC. NO. 42-40 (1872).
[76] Id. at 3.
[77] Act of May 29, 1872. 17 Stat. 165.

Congress also appropriated funds in 1873 to purchase a township within White Earth Reservation "from the Mississippi Band" for the Pembina Band's use and benefit,[78] a strange provision since the White Earth Reservation was designed as a new homeland for all the bands of Minnesota Chippewa. Between 1872 and 1876 the population at White Earth increased from 550 to 1427, with about two-thirds of the increase coming over the last year of that period.[79]

These Congressional expenditures, designed to prompt Chippewa from elsewhere in Minnesota to relocate to White Earth, indicated the maturation of the plan expressed in the 1867 Treaty to concentrate all Minnesota Chippewa at White Earth. Perhaps ironically, Congress placed the full support of statutory law behind the concentration plan at White Earth just as the reformers began pressing for allotment and assimilation to begin nationally. Bishop Whipple had been active in encouraging the concentration plan, and government administrators had favored it once it appeared to gain momentum. E.P. Smith argued that the government should make a shining example of White Earth:

> A few years of steady prosperity at White Earth will make that country attractive to all the Chippewas, until at no distant day it will become the civilized home of all the tribes of this State. I am confident from my years' observation that these Indians are in a transition state–that right now help will not be lost upon them, and the experiment of civilization will, in its results, declare the present expenses to the government wise and economical, as well as humane.
>
> I need not add that there is growing in the white people of this state a decided sentiment that these men cannot live among them in barbarism–that they must be civilized or removed. No steps toward civilization can be taken by a people who live as these Otter Tail Pillagers, Gull Lakes, and Mille Lacs are compelled to live in their present surroundings.[80]

[78] Act of March 3, 1973. 17 Stat. 540.
[79] *See* MEYER, *supra* note 72, at 48-49.
[80] S. MISC. DOC. NO. 42-40, at 3 (1872).

To these hopeful prospects for the future were added rosy reports of what had already occurred. A "special correspondent" to the New York *Times* visited the White Earth Reservation in 1873 and described it as very much the beacon of hopeful prosperity that Smith wanted it to be.[81] Folwell wrote that over the decade from 1876 to 1886, "the affairs of the Chippewa on the White Earth Reservation showed steady, if not rapid, progress."[82] Congress heard that assimilation was not only plausible, but proceeding as planned in places, such as White Earth, where it was being tried systematically.

The "progress" of Chippewa affairs in Minnesota was not rapid enough, however, and Congress proposed to hurry it along. In 1886 the agent at White Earth reported a population of around 1800, which was not a marked increase from the population ten years earlier. A series of federal Indian agents' reports over the preceding decade had encouraged the concentration plan.[83] Euro-American settlers rediscovered the Red River Valley as fertile farmland in the early 1880s, and in 1885 demanded the opening of the White Earth Reservation to settlements.[84] Bishop Whipple, for one, was alarmed by this call, and brought all his connections and influence into play to prevent it, writing letters to members of Congress and traveling to Washington to meet President Cleveland. The substance of his solution to this conflict between the settlers' demands and what he perceived as the Indians' interest was captured in a letter he sent to the Secretary of the Interior in late 1885:

> I respectfully suggest that you call the chiefs of the Chippewas to Washington at as early a day as consistent.
> …

[81] *Efforts to Reform the Indians*, N.Y. TIMES, July 28, 1873, at 2.
[82] W.W. FOLWELL, 4 MINNESOTA: A HISTORY OF THE STATE 197 (1961).
[83] Id. at 199.
[84] Id.; *see also* H. EX. DOC. NO. 42-188 (1873).

> The Leech Lake, Cass Lake, Winnibagoshish, Oak Point, Sandy Lake, and Mille Lac Indians cannot be protected where they are or led to civilization. There is abundant land at White Earth of the best quality. The White Earth Indians will for a fair consideration give all that is needed for the other Chippewas.
>
> Great care must be taken to secure only those chiefs who can control their people and whose influence is on the side of civilization.
> …
> I respectfully suggest that great care shall be taken to select proper representatives of the different bands, as well as the interpreters who are to accompany them. If you can do this, you will, I am sure, under God be the instrument of saving this poor race.[85]

Essentially Whipple offered several of the remaining Chippewa reservations in Minnesota as a sacrifice in return for what he hoped would be a guarantee of ongoing Congressional support for the White Earth concentration project. Congress quickly responded by appointing a commission of three, known as the Northwest Indian Commission, who would meet with all the Chippewa groups in Minnesota, discussing the concentration plan with them and securing their agreement to cede their reservations and move to White Earth.[86] Whipple was one of the three members of the commission.

The Northwest Indian Commission failed to persuade more than a few Indians to move to White Earth from any of the other reservations immediately, but the reports of its activities had a major role in Congress's actions in the half-decade afterward. As a fact-gathering expedition for Congress it succeeded admirably in finding that conditions at White Earth and elsewhere in Minnesota supported Whipple's concentration plan, and made recommendations to carry out the plan. Secretary of the Interior Lucius Lamar referred approvingly to the concentration plan and the Commission's findings in

[85] FOLWELL, *supra* note 82, at 200-201.
[86] Act of May 15, 1886. 24. Stat. 44.

transmitting them to Congress in early 1887.[87] The Commissioners themselves described the glorious progress of assimilation that had taken place at White Earth:

> The Indians now occupying the reservation have made rapid progress in civilization; they live in comfortable houses, cultivate the soil extensively, and are an orderly, law-abiding people. Indians who a few years ago were in the most pitiable condition of degradation and poverty have given up their wild life, exchanged the wigwam and the blanket for comfortable houses and decent dress, and a happy, well-to-do people. *Their prosperous condition and example cannot fail to have a salutary influence upon the others whom it is proposed to settle in their midst*.[88]

The Commissioners' overt enthusiasm is starkly apparent more than a hundred years later, but at the time enthusiastic rhetoric was a convincing support for colonial projects, and the widespread failure both of the idealism behind the rhetoric and the practical logistics of assimilation projects was not yet recognized.

In reports considering their prospective removal to White Earth, the Chippewa at Leech Lake, for example, were contrastingly described as being divided on the subject of removal and assimilation. Favorable terminology applied to the progressives: the "Working Party," as the Commissioners referred to the progressives, were "sensible of the great advantages offered by the plan of consolidation," whereas the discreditable "Smokers," were "old, ignorant, and superstitious, and believers, or pretended believers, in the theory that the 'Great Spirit' gave them their lands to 'sit upon,' and that to part with them would provoke his endless wrath."[89] To these transgressions were added the aggravating circumstances that the Smokers "dress after the most pronounced Indian fashion, wear feathers, and paint their faces." To the Commissioners, the Smokers were

[87] *See* S. EX. DOC. NO. 49-115, at 1-3 (1887).
[88] Id. at 14. (emphasis added)
[89] Id. at 16.

clearly "degraded Indians, influenced by whiskey-men, squaw-men, and emissaries of other interested parties."[90]

The Commissioners were not ignorant of the fact that the plans for concentration and assimilation were met by competing political factions among the Indians they interviewed. Moreover they knew that not all of those who supported the plan to remove to White Earth did so for the same reasons. The Commissioners used such factionalism as an opportunity to plead for the concentration plan. It would help not only the progressive Indians, but also the conservatively traditional Indians, by moving them all less or more forcibly in what the Commissioners and Congress agreed was the right direction. In spite of the factionalism the Commission managed to secure, and presented to Congress, two agreements, one with a collection of Chippewa bands from across Minnesota on the subject of White Earth, and one separately with the Red Lake band.[91] The White Earth agreement was a series of agreements with the individual bands throughout the rest of Minnesota providing for their eventual removal to White Earth, and with those already living at White Earth assenting to receive the immigrants from the other bands. Many of the Indians the Commissioners met, including those at Red Lake, were aware of the clamor among Minnesotans and residents of the Red River Valley for their land. The Red Lake agreement, made in 1886, diminished what it described as the Red Lake Reservation, comprising the land that had not been ceded in the 1863 and 1864 treaties. The Red Lake Band ceded additional land in return for promises regarding the remaining land and money to be spent for its benefit.

[90] Id.
[91] *See generally* Id.

The Red Lake agreement was concluded following a council on August 23, 1886. The Red Lake speakers at the council were concerned at the prospect of losing their land, and wanted further assurance that it would not be taken from them. Bishop Whipple had been aware of this concern, and seemed to view the agreement as a means to save the Red Lakers from such a fate by trading additional land cessions for strong promises from the government regarding the land that would remain. Near the end of the council, Whipple said:

> The white men are crowding you on every side; they are demanding of your Great Father that he open this reservation. There is not a single law in the United States, not one, which guarantees its possession; your fathers held it as wild men; it was their home when they lived by the chase; the game has passed out of the country, and I am afraid that when these men demand, as they will demand, of the Great Council at Washington, that you shall only retain that portion of it that you cultivate for yourselves, I am afraid no power on earth can stop it. Remember, the Government has given you no pledge, and there is no law which has been passed; and we have come here and framed an agreement which protects to the last penny everything that belongs to the Red Lake Indians; that guarantees that not one cent of your money will ever go anywhere but to yourselves, and that does put on the laws an agreement which will forever give you the same title for your land that the white man has for his. […] And I cannot say more than to say this, that there is a crisis in your history, and that one path leads to life and safety and the other leads to death and darkness.[92]

After these speeches the representatives of the Red Lake band signed or made assenting marks on the agreement. Whether all of the people, and whether others at the council or absent from the council agreed, is disputable.[93] After this document was presented to Congress it was not ratified because apparently the timber interests were dissatisfied with its terms.[94]

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[92] Id. at 92.
[93] *See* WUB-E-KE-NIEW, WE HAVE THE RIGHT TO EXIST 60-62 (1995).
[94] Id. at 62.

The Northwest Indian Commission's reports and putative agreements provided Congress with a sense that Chippewa in Minnesota were ready to make additional concessions. Some bands could be persuaded to leave the remaining reservations and relocate to White Earth, and the Red Lake Band could be persuaded to cede some of its remaining large area of aboriginal land. Congress changed the course of its policy on this basis and moved forward with the concentration and allotment plan, adopting the Nelson Act in 1889, which provided a standard process by which Chippewa reservations in Minnesota would be allotted, thus applying the 1887 Dawes Act, with certain modifications, in Minnesota.[95] This was partly necessary because much of the land in northern Minnesota was not well suited for farming or grazing, and because the voluntary removal from existing reservations to White Earth was ongoing. The separate act to apply allotment in Minnesota was partly a reaction to the pressure from lumber interests to address the fact that the lands to be allotted contained stands of timber. Allotments would be made on agricultural land only. Timber land would be allowed to pass to the lumber companies, albeit at a different price than that at which surplus agricultural land would pass to the homesteaders.[96]

The Nelson Act created another commission, the Minnesota Chippewa Commission, charged with the task of negotiating with the various bands for the complete relinquishment of all claim to all Chippewa reservations in Minnesota other than White Earth and Red Lake.[97] The Commission was also to negotiate for the cession of whatever portions of the White Earth and Red Lake reservations would not be required to

[95] Act of January 14, 1889. 25 Stat. 642.
[96] *See generally* MEYER, *supra* note 72 (discussing the alienation of land and resources, especially pine lands, at White Earth after 1887).
[97] 25 Stat. 642.

offer allotments to the Red Lakers and the remainder of the Pembina Band at Red Lake and to all the other Minnesota Chippewa at White Earth. Two-thirds of adult males "of the band or tribe of Indians occupying and belonging to said reservations" would be required to agree to the terms of the Nelson Act before the any proposed cession, other than at Red Lake, would be considered final. For Red Lake, however, the assent of two-thirds of all adult male Chippewa Indians in Minnesota would be required. In order to ascertain how many adult males lived at each reservation and in Minnesota as a whole, the Commission was directed to complete a census. Not until after the census and the finalization of the cession by the U.S. President's acceptance of the results of the census and negotiations could the Indians from a specific reservation be required to remove to White Earth and take allotments under the terms of the Dawes Act, though they could voluntarily do so without waiting for the census. Any Chippewa Indian could also choose to take an allotment at the reservation of origin and not remove to White Earth, however.[98]

After lands were ceded they would be surveyed by the General Land Office and individual 40-acre tracts appraised to determine the value of any standing timber. These lands would be classed as "pine lands" and sold at public auction; all other lands would be classed as agricultural lands, open to homesteaders.[99] The Nelson Act thus accounted for the local conditions in Minnesota. Ironically, the inhabitants of White Earth Reservation, which was an experiment designed to save Minnesota Chippewa from land loss and degradation and bring about their successful assimilation, lost more land and

[98] Id. Apparently, no reason for this provision, which essentially made removal voluntary, can be found. *See* MEYER, *supra* note 72, at 52.
[99] Id.

resources and experienced more troublesome factionalism than did the Chippewa at Red Lake.

Similar to the Northwest Indian Commission, the Minnesota Chippewa Commission, which consisted of Henry Rice of Minnesota, Martin Marty of the Dakota Territory, and Joseph Whiting of Wisconsin, negotiated following the Nelson Act and secured the agreement of various Chippewa bands under the Nelson Act's provisions. Though the various bands had seemingly agreed to remove to White Earth when they met with the Northwest Indian Commission, when confronted with the terms of the Nelson Act individually, gaining their agreement proved more difficult. As President Benjamin Harrison noted in his letter accompanying to the Minnesota Chippewa Commission's report to Congress in 1890, "any Indian [can] take his allotment upon the reservation where he now resides. The commissioners report that quite a general desire was expressed by the Indians to avail themselves of this option. The result of this is that the ceded lands can not be ascertained and brought to sale under the act until all of the allotments are made."[100] The allotment process authorized by the Dawes Act and the Nelson Act had hit a stumbling block. The identification of surplus lands would not be quick because the removal of most or all Chippewa from their home reservations to White Earth could only occur if individuals chose to do so. Instead, many individuals would take allotments on their home reservations, in fact never moving to White Earth.

Unlike White Earth Reservation, which had been created by a treaty and included land that had already been ceded to the U.S. government, the Red Lake Reservation was simply land that the Red Lake Band did not cede. At the time of the Nelson Act it was

[100] H. EX. DOC. NO. 51-247, at 2 (1890).

still an unanswered question of law whether the Red Lake Reservation was merely part of Indian Country that had not been ceded to the U.S. government, or a reservation in the strict sense, although this question was not posed until later, and not answered until 1937.[101]

The Minnesota Chippewa Commission negotiated an agreement with the Red Lake Band in 1889 in which the representatives of the band agreed to cede all of the remaining land at Red Lake except for a tract of 661,118 acres, judged to be an appropriate size for making allotments to the individual members of the Band since much of the area was not suitable for farming. Congress recognized this agreement and appropriated funds to carry out its provisions in 1890.[102] Shortly afterward it was discovered that an incorrect map had been used to delineate the cession, and in 1892 the President restored 2,303 acres to the diminished reservation.[103] Another agreement made in 1904 further diminished the reservation by 256,152 acres. These lands were sold by the federal government and the proceeds placed in trust for periodic payments to the Red

[101] In an 1876 case regarding Congressional power to regulate the introduction of alcoholic beverages into Indian Country, the Supreme Court had found that the Red Lake Reservation was Indian Country under the authority of Congress. United States v. Forty-three Gallons of Whiskey, 93 U.S. (3 Otto) 188 (1876). In 1887, following the repeal of the section of the Indian Intercourse Act that defined Indian Country, the Court again found that the Red Lake Reservation was Indian Country, relying on the decision in Ex Parte Crow Dog. United States v. Le Bris, 121 U.S. 278 (1887). As of 1902 the Court had avoided ruling on the question of whether the Red Lake Reservation was properly a reservation, though speculating that it probably was. Minnesota v. Hitchcock, 185 U.S. 372, 389 (1902). As the Court noted as late as 1926, however, the Red Lake Reservation was never formally set aside or recognized as such. United States v. Holt State Bank, 270 U.S. 49, 57 (1926). Finally in the 1937 adjudication of a dispute between the Red Lake Band and the Minnesota Chippewa Tribe–which had been organized from the other Chippewa bands in Minnesota–the Supreme Court ruled conclusively that the unceded lands at Red Lake were and had been exclusively reserved for the use of the Red Lake and Pembina bands only and were effectively reservation lands subject to the Red Lake and Pembina Bands' aboriginal title only and not that of other Chippewa bands. Chippewa Indians v. United States, 301 U.S. 358, 371 (1937).

[102] Act of August 19, 1890, 26 Stat. 336.

[103] Exec. Order of November 21, 1892, 1 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 852 (1904). *See also Chippewa Indians v. United States*, 301 U.S. 358, 367-368 (1937).

Lake band.[104] The Red Lakers agreed to these diminishments primarily on the expectation that the remaining tract would continue to serve as their reservation, and resisted efforts to induce them to accept allotments on it.

The Commissioners provided their census of the membership of the various Chippewa bands in their 1890 Report. Through allotment, the legal system had focused on the individual, indeed on the individual's body, as an object for definition and for legal coding. The infiltration of the U.S. legal system into every aspect of Anishinabe life had defined Indian Country, Indian Reservations, allotments, and finally the degree to which an individual could be said to be Indian. Who was an "Indian" and a "Chippewa" at the time of the Minnesota Chippewa Commission's census, and who was a "white" or a "mixed-blood" or a "métis"? Were some mixed-bloods also Chippewa and were some whites also mixed-bloods? Were all mixed-bloods Indians? In this panoply of different categories, what had happened to the notion of Anishinabe? This initial census was only the beginning, for the legal system, of a long series of disputes over which individuals were really Indians and which were really members of which tribes or bands. Though advocating a highly conservative and restrictive definition of Anishinabe, twentieth-century Red Lake Band member Wub-E-Ke-Niew recognized the nuances of these identity crises that were ignored by the Minnesota Commissioners and subsequent legal processes.[105] Most or all of the Anishinabeg (according to Wub-E-Ke-Niew's view of Anishinabeg as people who have direct patrilineal descent from members of Anishinabe

[104] Reviewing the matter of the diminishment of the Red Lake reservation under the 1889 and 1904 agreements and the 1892 executive order restoring the mistaken cession, the Supreme Court found in 1937 that no allotments had been made at Red Lake. At the same time, considering the matter of whether all Chippewa in Minnesota or only members of the Red Lake band should receive compensation for the ceded lands, the Court found that Red Lake reservation was and had been held for the exclusive benefit of the Red Lake band. 301 U.S. at 368, 369.

[105] WUB-E-KE-NIEW, *supra* note 92, at 62-66.

clans, called *dodems*) probably did not assent to the Commission's agreements.[106] From his perspective, the 1889 and 1904 agreements were made with Chippewa Indians, or perhaps with some Chippewa Indians, some mixed-bloods and possibly even a few whites who posed as mixed-bloods.

The Minnesota Chippewa Commission agreements allowed the legal system to declare that the necessary consent of the proper proportions of Chippewa band members, from Red Lake, White Earth, and the other remaining reservations, had been secured, that the lands had been ceded, and that individual Indians were required to take allotments or leave. The process of allotment began, but there was no mechanism to enforce its completion. By 1900 only 1,198 individuals had moved to White Earth to take allotments under the Nelson Act, while many members of the other bands had remained on their home reservations, either taking allotments or simply ignoring the Commissioners and the Indian agents.[107] In a similar display of resistance, those on Red Lake Reservation never accepted allotments at all.[108] As a result, when the allotment program began to fall into national disfavor in the early twentieth century, many individual Chippewa still remained on their home reservations and had not taken allotments anywhere, and no allotments existed on the Red Lake Reservation. The reservations could not be declared no longer to exist since the allotment process had not been completed. Various amendments to the Nelson Act and Dawes Act allowed some of the supposedly surplus lands at Red Lake to be sold. Some individual Indians, with the means to do so, took allotments and at the same time purchased "surplus" lands

[106] Id. at 63-66.
[107] MEYER, *supra* note 72, at 56-57.
[108] *Chippewa Indians v. United States*, 301 U.S. 358, 368 (1937).

around them to create larger holdings. Others refused allotments and thereby frustrated the allotment process, leading in both cases to adjustments by the legal system.

Altogether, the Chippewa participation in the allotment process played as much of a part in the future of federal Indian law as did the rules of allotment and the Commissioners. The segmental boundaries between indigenous society and Euro-American society had broken down and there were no longer two easily distinguishable systems observing and ordering their environments. Chippewa and Euro-Americans were now meaningful participants in the same legal system, their communications playing the same part as any other in comprising the totality of all communications. Nonetheless, allotment failed to assimilate Indians in Minnesota not only because it was insufficient to the task, but because the Indians themselves became part of the allotment process.

Allotment, as a part of a national cultural assimilation program for Indians, was designed to bring about simplification and more order from the chaotic and unpredictable variety in Indian Country. The westward-advancing frontier conceptually necessary for a removal policy to make sense was declared closed, and the system bent itself toward closing the frontier within. Reservations for the common use of tribe members would be scrapped in favor of orderly, surveyed tracts held by individual Indians, who would become citizens under the Dawes Act and own their allotments in fee simple after maintaining them for a period of years. The land, like the people, would be individualized and legalized within a few decades. Allotments would be held in trust or not held in trust; individuals would be citizens or not citizens. Parcel boundaries would be surveyed and a rectangular grid be laid over land, including the former reservations,

and through allotment the reservations would become indistinguishable from the landscapes Euro-American settlers were developing around them. The legal system would allow no land to remain in, or return to, an unmarked, unrecorded, unlegalized state. Subsequent purchasers would be able to trace the chain of title back to a valid sale or allotment from the federal government.

The tantalizing prospect of simplicity and order to be attained by drawing a distinction is a mirage that transforms into variegation once the distinction itself becomes the object of observation. Far from settling all the Chippewa Indians in Minnesota at one reservation on orderly plots, the Nelson Act, in conjunction with the Dawes Act, raised perplexing questions that added complexity to federal Indian law. Who was an eligible Chippewa Indian at the time of the Minnesota Chippewa Commission census? The many fluid ethnic categories that had intermingled since the time of the fur trade, including white, métis, mixed-blood, Chippewa, Indian, and Anishinabe, had to be reified by enforceable legal definitions. The legal system's efforts to distinguish between individuals according to its definitions of Indian and mixed blood raised more questions. By 1895, federal administrators had recognized that deciding who was Chippewa would require more specificity, and created a series of criteria to be met: an individual had to be of "Chippewa Indian blood," have a recognized connection with one of the bands in Minnesota, be a resident of Minnesota at the time the Nelson Act was passed, and live on or move to one of the reservations with the intention of residing there permanently.[109] The blood requirement ostensibly was added in order to exclude white people who lived among Indians. In the longer term it created an even greater degree of factionalism and

[109] MEYER, *supra* note 72, at 57-60.

raised more questions about identity than it solved, because as time passed, blood, defined as genetic ancestry, had even less correspondence with an individual's habits and relationships with others than it did prior to the allotment period.

As Melissa Meyer noted, ethnic differences among individuals on and near the Chippewa reservations in Minnesota were defined primarily by lifestyle choices rather than genetics. Full blood or mixed blood referred to more-or-less conservatively traditional lifestyle choices, rather than the fact that an individual's ancestors lived in Minnesota prior to the arrival of Europeans. In devising the allotment policy, carrying out the allotment process, then revising the policy, federal administrators interpreted the blood-quantum terms precisely with reference to genetics.[110] To the legal system, this mistaken precision was yet another opportunity to make further distinctions, and within a few years science was enrolled to decide who was Indian and who was not once and for all. Anthropometrists measured the shapes of individuals' heads, sampled their hair, and compared their complexions to decide if they were full-blooded Indians or mixed-bloods so that final rolls of tribal membership could be created in the decades after the Dawes Act.[111] In contrast, Wub-E-Ke-Niew noted that by means of blood quantum many people became Indians who were not Anishinabe and had no meaningful connection to anyone who was.[112] Blood quantum standards both excluded people who probably were meaningfully understood as members of a tribe and allowed outsiders to insinuate themselves where they were not welcome. Subsequently the inclusion of blood

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[110] Id. at 118-124.
[111] Id. at 167-181. One criticism of the use of genetic blood quantum to determine whether individuals were (or are) Indians is that it is designed to achieve the disappearance of all Indians once no one has a large enough degree of Indian blood to be considered Indian. *E.g.* Jack D. Forbes, "Blood Quantum: A Relic of Racism and Termination" (2000) at http://www.weyanoke.org/jdf-BloodQuantum.html.
[112] *See* WUB-E-KE-NIEW, *supra* note 92, at 67-107.

requirements effectively displaced the question of identity to a specific point in the past, and took the authentication of people's identity out of the hands of themselves and their community and put it in the hands of disinterested administrators and quack scientists.

C. Authenticity and the legal system at White Earth and Red Lake

The programs of allotment and assimilation have left artifacts that are still recognizable within federal Indian law today and on the two reservations at White Earth and Red Lake. Much of the land within the original White Earth Reservation was lost to lumber companies and homesteaders. The boundary of the reservation retained little of its meaning subsequently and patterns of property ownership (Indian or non-Indian) became the primary feature legally distinguishing Indian Country at White Earth from the surrounding Minnesota counties. The location of Indian Country at White Earth, the White Earth band's authority over itself and its land, and the composition of membership of the White Earth band were almost unpredictable as a result. Late in the twentieth century a movement began to restore some of the former areas of White Earth reservation to the White Earth band for common benefit of the members, repudiating the aims of both the 1867 Treaty and the allotment acts.[113]

Most of the Red Lake Reservation land remained in use for the Red Lake Band's communal occupancy after the 1889 and 1904 agreements and was not surveyed. The reservation also did not experience a discontinuity between its external boundary and tribally owned lands, or "checkerboard pattern" of ownership, as at White Earth. The Red Lake Band has retained a degree of autonomy unique in Minnesota and almost unique within the United States. When Congress extended state jurisdiction over many

[113] *See* "White Earth Land Recovery Project" at http://nativeharvest.com/node/10.

issues on Indian reservations in certain states, Red Lake alone was exempted among reservations in Minnesota.[114]

Problems of identity and authenticity have plagued both White Earth and Red Lake. Depending on the perspective taken toward indigeneity, many members of both the White Earth and Red Lake Bands can be seen as white imposters or at best as people of mixed ethnicity who think of themselves as Indians. This viewpoint is essentially what Wub-E-Ke-Niew describes, perhaps iconoclastically for many of those who live on the reservation and think of themselves as Anishinabe.[115] On the other hand, many people who have meaningful understandings of their ancestral heritage, who live on or frequently visit the reservations, and who have always seen themselves as Indians and as tribe members will not be able to pass their tribal membership to their children, because their children will not have the blood quantum required to be considered Indian or to be considered tribe members under the law. For Wub-E-Ke-Niew the solution to this problem would not be to make the labels clearer, but to do away with dependency on labels. The origin of the system is in the drawing of the first distinction. Unordered complexity is not posed as a problem until a system distinguishes itself from its environment.

[114] Act of August 15, 1953. Pub L. 83-280, 67 Stat. 588.
[115] WUB-E-KE-NIEW, *supra* note 92, at 97-107

VI. Conclusion: All frontiers are boundaries and all boundaries are frontiers

Far from being insensitive to the spatial aspects of its environment, the legal system is clearly among the most spatially invested of social systems. Within the legal system all observations take place in a jurisdiction, and possibly in multiple jurisdictions, wherein the authority to find facts, to reach conclusions about the legality of facts, and to punish, is an outcome of the legal system's characterizations of that space. Administrative action is similarly spatially situated. Such characterizations create an inhomogeneous mixture spatially oriented to functionally differentiated jurisdictions, perhaps analogous to a marble-cake. One area might differ from another in ways recognized by the legal system, but the relevance of physical or non-legal social characteristics is defined by the legal system through its internal processes. An area that is habitat for an endangered species is not legally habitat for an endangered species until the legal system defines that endangered species and identifies and delineates that area as its habitat.

Similarly, an American Indian reservation is legally set aside or recognized as an unusual jurisdiction in which the history of previous legal decisions that ordered relations between the federal government and the tribe or tribes must be carefully regarded to understand its present legal character. Around the reservation, a spatial entity defined in federal Indian law, an array of other structures has developed to clarify and further specify the character of individual parcels of land and individual owners and occupants. The grid of the rectangular survey was not the only spatial legal structure that made its way into Indian Country. Individuals were connected with their allotments, or not connected to allotments, and this was an indicator of their progress toward civilization.

Even the individual's body was divided up, with a legal boundary between the white part and the Indian part. After the repudiation of allotment, the legal system found further complications since the history of allotment could not be ignored. Some reservations, such as Red Lake, have not been allotted, whereas others were only partly allotted, though in either case they often have been diminished. On other reservations, such as White Earth, much of the land was allotted with much of both the remaining land and the allotments removed from tribal control as they passed into non-Indian ownership. The discontinuities between former reservation boundaries and the land remaining in Indian ownership raised questions about which government had what authority on allotted lands, or "surplus" lands, scattered within the former external boundary of diminished and allotted reservations. The many combinations of circumstances that arose are not fully clarified many decades after the start of allotment.[1]

Systems strive to order complexity by drawing distinctions. In colonies, European social systems had been segmentally differentiated from the social systems of aboriginal indigenous people in North America for centuries, and then began a process of breaking down of those segmental boundaries. The colonial encounter between Europeans and indigenous people in the Americas began just as European social systems themselves were becoming markedly more functionally differentiated than segmentally differentiated. Law, politics, religion, economics, art, and other social systems were differentiating themselves from their environments. Would the social system's conception of itself as "modern" have been possible without an environment (including other systems) that could be contrastingly defined as "pre-modern"? As it occurred at

[1] *See generally* Imre Sutton, "Sovereign States and the Changing Definition of the Indian Reservation," 66 GEOGRAPHICAL REV. 281 (1976).

White Earth and Red Lake, legalistic colonialism is problematically ambivalent, in Homi Bhabha's sense of that term,[2] toward its own modernity. The native cannot become white, because what would it mean to be white if there were no native? Nonetheless, the native cannot stay a native either, without taking a role set by the European social system, or, rather, being redefined within a Euro-Native social system whose functional differentiations account for the colonial encounter. Thus indigenous people could not remain Anishinabe because they became Chippewa, Indian, and full blood or mixed blood, terms that were defined and used by the social system to carry out its operations upon them and their land. Anishinabeg, Dakota, and other indigenous people may have persisted by maintaining their own systems with their segmental boundaries, but the Euro-American system overwhelmingly redefined the terms of the game, making it nearly impossible to continue without adapting.

Likewise, aboriginal indigenous lands, ways of living, ways of knowing, and ways of deciding were overwhelmingly redefined according to European legal terms. Allotment, boarding schools, missions, farmers, newspapers, and railroads were all inescapable. Internal disagreement and ambivalent adaptation to these new rules of the game amounted to resistance by Anishinabeg (or Chippewa, or mixed blood Indians) who valued their traditional systems.[3] Indigeneity was also lost when aboriginal lands became reservations, and when those reservations were allotted. At the same time, some indigeneity was conserved, because reservations and allotments represented the system's responses to its inability to define indigeneity fully within itself. White Earth and Red

[2] HOMI BHABHA, THE LOCATION OF CULTURE 85-86 (1994).
[3] Terms were redefined by the system, however, and the system could only ignore or redefine that which did not fit within its definitions, so that resistance could only be resistance within the system or risk relegation to meaninglessness.

Lake are monuments to both the Euro-American idealism and the ambivalence toward indigeneity that have shaped their legal character since the early nineteenth century.

Colonialism consisted of redefining social systems' boundaries to include additional functionally differentiated subsystems oriented toward accounting for observations across segmental boundaries that were no longer tenable. The fact that the Atlantic Ocean no longer presented an impassible barrier between Europe and America led to a process of integration of European and indigenous social systems together in one functionally differentiated social system. Simplistically, European colonists "saw" natives and defined what they were and what they would have to be. The colonists could not see that natives reciprocally saw them and defined what they were and what they would be, however. Neither group had full information on the other for a variety of reasons, so some aspects of indigenous societies went unobserved, undefined, and unordered by European social systems. The more closely European social systems attempted to observe and define indigeneity, the greater the array of detail required to be defined became. Substituting reservations for the amorphous Indian Country was one such step. Substituting allotments for reservations was another. All three legal structures–Indian Country, Indian reservation, and Indian allotment–had the same fundamental problem that the system could never be finished defining them and clarifying their characteristics. The law, like any social system, only grows. It never withers away, although structures may be replaced or changed.

All territorial boundaries are frontiers, and all frontiers are boundaries, when viewed from the perspective of the theory of social systems. Social systems constitute themselves in relation to their environments, and hence are oriented toward both their

internal elements and the unordered exterior. Since a given system's own constitution of its boundary with its environment is subject to the possibility of change at any time, the boundary is always an indicator of a zone of potential negotiation rather than a fixed non-space between two distinct spaces.[4] Luhmann described territorial boundaries as "meaning-constituted":

> A psychic system [mind] can see its boundaries as the body wherein it lives and dies. Social systems have no such indications. To a certain extent, the principle of territoriality provides a substitute. Some groups, like animals, identify themselves by the space in which they live; they know and defend it. But for the social system of these groups, the boundaries of "their" territory seem to have only symbolic significance. Moreover, for social systems, today at least, territoriality is an entirely atypical, rather exotic bounding principle, one that tends to disturb normal societal mobility. Territorial boundaries are a special case of meaning-constituted boundaries. But what are meaning-constituted boundaries? […]
> One can arrive at a plausible answer only by taking seriously systems theory's emphasis on environmental- and self-reference. Meaning-constituted boundaries are not an external skin that, like one organ among others, fulfills certain functions. Instead, they relate the elements of which a system is composed and which it reproduces to the system. Every element makes a relation and with it a boundary decision. Every communication in a social system, not just ones that cross the external boundaries, employs the system/environment difference and thereby contributes to determining or changing the system's boundaries.[5]

The difference between frontiers and boundaries suggested by Kristof therefore originates in the perspective of the observer, which is to say, in the perspective of the system that is doing the observing. For the social system of political geography Kristof's distinction between frontiers and boundaries is notably relevant, but for other social systems the distinction may not be tenable. Even in law, where a legal description may call bearings

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[4] *See* Ladis K.D. Kristof, "The Nature of Frontiers and Boundaries," in R.E. KASPERSON AND JULIAN MINGHI, THE STRUCTURE OF POLITICAL GEOGRAPHY 127-129 (1969). (Distinguishing frontiers as outward-oriented zones from boundaries as inward-oriented borders).
[5] NIKLAS LUHMANN, SOCIAL SYSTEMS 194-195 (1995).

and distances from a point of beginning to specify with finality the precise location and extent of a parcel of real property, the "boundaries" created thereby cannot be fully closed to litigation. On an excessively cloudy day, even the clearest title might find itself litigated in chancery.

Any distinction or definition inherently excludes just as it includes. Every system fails to account for every detail, to sense every input, or to recognize the full diversity of its environment. Thus there is an inevitable loss of meaning with each distinction, which Lyotard called *terror*:

> By terror I mean the efficiency gained by eliminating, or threatening to eliminate, a player from the language game one shares with him. He is silenced or consents, not because he has been refuted, but because his ability to participate has been threatened (there are many ways to prevent someone from playing). The decision makers' arrogance…consists in the exercise of terror. It says: "Adapt your aspirations to our ends–or else."[6]

It is tempting to follow Lyotard and brand the unpleasantness of communication "terror," and yet, what logical basis is there to distinguish the pain of terror from the pleasure of right judgment? Would not declaring a judgment to be right be a form of terror in itself? Who can speak of terror from a privileged position outside a social system, without perpetuating it? Many of the participants in the legal system's colonial projects at White Earth and Red Lake firmly believed that they were doing what was best, for Indians, for themselves, for the country, for the greater good, or for the grace of God. If we must be incredulous toward metanarratives, as Lyotard would suggest, we must be incredulous toward our metanarratives of justice as well, and be hesitant to forge irrevocable judgments.

[6] JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION 63-64 (1983).

Niklas Luhmann's theory of social systems is not a guide for conduct. As such it says nothing about which narratives are better (or more *meta*) than others, nor does it show a way to make decisions without them. Nor is systems theory a message of hope for anyone wishing to preserve the present or yearning nostalgically for the past. Systems theory describes. It even describes itself, so that it can change its descriptions to meet observations, and change its own descriptions of itself to meet those changes. As a result, systems theory has the capacity to observe clearly both its objects and its viewpoints toward its objects with detachment.

> By now one thing is clear: evolution has always been to a great extent self-destructive, both in the short term and the long term. Little remains of what it has created. This is true of most life forms that existed at one time or another. Similarly, almost all cultures that have affected human life have disappeared. The meaning they held for those who lived with them is barely recognizable–despite all the archeological, cultural-anthropological, historical-scientific tools we now possess. The once-contemporary mentalities are no longer self-evident or remain highly artificial fictions at best. We relate to these past cultures almost as tourists. Cultural forms that are self-evident today and the "world" of today's society will meet a similar fate. No one can seriously doubt this.
> …
> In any case, future societies, if they can continue to exist on the basis of meaningful communication, will live in another world, will be based on other perspectives and other preferences, and will be amazed at our concerns and hobbies and see in them little more than mildly entertaining oddities–insofar as traces and the ability to read them remain at all.[7]

There can be no going backward and no return, only going forward. Whether forward is up or down, or whether it will seem like it is up or down, is up to all of us whose systems participate in communication.

For law, the rule of law represents the self-imposed requirement to observe and categorize everything topically and spatially within predictable areas delineated by

[7] NIKLAS LUHMANN, OBSERVATIONS ON MODERNITY 75-76 (1998).

bright-line boundaries, not by frontiers.[8] The legal system itself must be separated from its environment by a boundary, which it maintains through internal self-reference. Yet all boundaries remain frontiers because they are subject to systems' refinements of them. At the same time, frontiers can only be understood by reference to their boundaries. A zone of transition between two distinct areas can only be understood when distinguished from those portions of the distinct areas that are not part of it. The maintenance of frontiers and boundaries involves the continual redefinition and refinement of distinctions made within a given system. Within the legal system, functional subsystems maintain their own system-environment boundaries in relation to functions prescribed for them by the legal system as a whole. Thus reliance on spatial distinctions to orient functional subsystems toward their environments reverberates through the system. Through the requirement that law must observe and define its entire environment, the rule of law was ultimately responsible for the incorporation of indigenous people and their land into the legal system. It is purportedly fair and predictable to apply the same rules to everyone in the same way. However, the fairness and predictability of congruently generalized normative expectations can, and perhaps must, involve terror. What does it mean to conclude that fairness leads to terror? Unfairness would lead to terror as well. Communication is impossible without agreement, but it is also impossible without disagreement. To observe that fairness and predictability can never be complete should be a comfort, if hope for the future is comforting, because there can be no hope without uncertainty. Does this also mean that the rule of law, and the striving for certainty, implies striving to put an end to all hope?

[8] *See generally* Kristof, *supra* note 5, 126-131 (1969) .

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From a systems perspective, conclusions are never the end of the story. To the contrary, any attempt to conclude is simply the beginning of yet another story. This particular story comes to a rest, for now, after relating events of a specific historical period using a systems-theory methodology to expose the geographic underpinnings of law. Although it is relatively obvious that processes of the legal system use structures that persist from the past, and thereby rely on linear, irreversible time, the reliance of legal processes on communications whose meaningfulness involves spatial media is less obvious. The foregoing history of American law related to Indians illustrates the use of the systems-theory methodology to identify the use of spatial media in the legal system. The legal distinctions between Indian Country and Euro-American colonies, and between reservations and ceded lands, relied upon basic spatial media delimiting territory. Legal definitions of Indian groups relied upon these territorial distinctions. Legal reorganization of Indians' daily lives through allotment relied upon yet another spatialized communication of expectations.

Space, like time, was among the communication media that the legal system relied upon to facilitate its part in colonization of American indigenous people and their land. After outlining a veritable morass of spatial problems confronting American Indian tribes, Charles Wilkinson focused instead on the legal system's use of time to the detriment of tribes.[9] The value of this study for American Indians is in its illustration of a methodology that allows the observer to focus on the use of space, extending beyond the dispossession of Indian lands, to tribes' detriment. The space of Indian Country, and

[9] CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW , 7-23, 32 (1987).

the spaces of removals, reservations, and allotments, all contribute to the colonization of indigenous social systems by Euro-American social systems, including the legal system. This encounter led not to the full integration of the social systems involved, but to the loss of elements of both indigenous and Euro-American systems. To those whose traditions demand that indigeneity be conserved, these losses are detriments that might be avoided. The culprit behind these losses, however, is the social system, and not individuals except insofar as the individuals are necessary for social systems to operate.

We should all be aware that none of us are systems. Human beings are at the same time much more and much less than systems. What the theory of social systems can provide is a means by which to focus our attentions away from our self-absorption with the interrelationships of the systems that intersect within ourselves. The meaningfulness of communication with others can be analyzed as a social system to avoid the problems of this self-absorption. Within the social system its internal organization into functional subsystems, such as law and politics, can be analyzed without conflating them or misperceiving their interrelations. The importance of taking a system's own perspective in analyzing it is that its internal workings can be observed clearly, rather than blurred by their relations with those of other systems within its environment.

Law can be understood distinct from politics and from morality or justice, and their linkages can be observed through the concept of structural coupling. Within law, federal Indian law can be understood distinct from the common law of property or the criminal law, though their linkages can also be observed. So doing has the great advantage of reliability of its close correlation between the theory and observation. A

disadvantage is that the values of justice and moral rightness, as well as political acceptability, which are commonly understood as social goals, are divorced from the operation of law and are merely inputs to the legal system. Thus to criticize the law for failing to achieve just, or righteous, or popular outcomes implies taking the perspective of a different social system. Such criticisms lose none of their force, but they are recognized as not being matters of law. For law to change in response, environmental conditions must be incorporated into the legal system through its structural couplings.

Finally, the theory of social systems will not of itself produce a cause for action. It may aid in understanding legal conditions that individuals may find motivating morally or politically, but applying the theory would require that we recognize that the motivation comes from another system than do the conditions. By understanding society in this way, we can at least understand how social systems operate, even if we must put aside questions about why they operate as they do or how they ought to operate. Then, at least, we can see the frontiers of our knowledge as boundaries.

Appendix

Glossary of Concepts Used in the Theory of Social Systems[1]

Autopoiesis Refers to (autopoietic) systems that reproduce all the elementary components out of which they arise by means of a network of these elements themselves and in this way distinguish themselves from an environment–whether this takes the form of life, consciousness or (in the case of social systems) communication. Autopoiesis is the mode of reproduction of these systems.

Code Codes arise out of a positive and a negative value and enable the transformation of the one into the other. They come into being through a duplication of a given reality and with this offer a scheme for observations within which everything that is observed appears as contingent, i.e., as possibly different.

Communication Designates not simply an act of utterance that 'transfers' information but an independent autopoietic operation that combines three different selections–information, utterance and understanding–into an emergent unity that can serve as the basis for further communication.

Complexity A state of affairs is complex when it arises out of so many elements that these can only be related to one another selectively. Therefore complexity always presupposes, both operatively as well as in observation, a reduction procedure that establishes a model of selecting relations and provisionally excludes, as mere possibilities (i.e., potentializes) other possibilities of connecting elements together.

Contingency "Something is contingent insofar as it is neither necessary nor impossible, it just is what it is (or was or will be), though it could also be otherwise. The concept thus describes something given (something experienced, expected, remembered, fantasized) in the light of its possibility without being otherwise; it describes objects within the horizon of possible variations."[2]

Coupling This concept designates the reciprocal dependency of system and environment which can be seen by an observer if the latter takes the distinction of system and environment as basic. The observer can even be the system itself if it is in the position to observe itself when it uses the distinction of system and environment.

Differentiation, functional [T]his concept refers to the formation of systems within systems. It does not necessarily designate the decomposition of the entire system into subsystems but rather the establishment of system/environment differences within

[1] NIKLAS LUHMANN, ECOLOGICAL COMMUNICATION 143-146 (1989) All entries are reproduced from this source unless otherwise noted.
[2] NIKLAS LUHMANN, SOCIAL SYSTEMS 106 (1995).

systems. The differentiation is functional in so far as the subsystem acquires its identity through the fulfillment of a function for the entire system.

Observation Is defined on the level of abstraction of the concept of autopoiesis. It designates the unity of an operation that makes a distinction in order to indicate one or the other side of this distinction. Its mode of operation can, again, be life, consciousness, or communication.

Paradox A paradox occurs when the conditions of the possibility of an operation are at the same time the conditions of the impossibility of this operation. Since all self-referential systems having the possibility of negating create paradoxes that block their own operations (for example, can determine themselves only in reference to what they are not, even if they themselves and nothing else are this non-being) they have to foresee possibilities of *eliminating the paradox* and at the same time disguise the operations necessary for this. For example, they have to be able to treat the recursive symmetry of their self-reference asymmetrically, either temporally or hierarchically, without being able to admit to themselves that an operation of the system itself is necessary for this transformation.

Process (See discussion under **Structure**)

Program Refers to [operation] of codes and, following a well-established conceptual usage (canon, criterion, regula), designates the conditions under which the positive or negative value of a specific code can be ascribed to situations or events. In social systems this is treated as a question of a decision (thus also decision-programs) between true and false, legal and illegal, etc.

Self-reference Designates every operation that refers to something beyond itself and through this back to itself. Pure self-reference that does not take this detour through what is external to itself would amount to a tautology. Real operations o[f] systems depend on an 'unfolding' or de-tautologization of this tautology because only then can they grasp that they are possible in a real environmental only in a restricted, non-arbitrary way.

Social Systems A social system comes into being whenever an autopoietic connection of communications occurs and distinguishes itself against an environment by restricting the appropriate communications. Accordingly, social systems are not comprised of persons and actions but of communications.

Society That social system which includes all meaningful communication and is always formed when communication takes place in connection with earlier communication or in reference to subsequent communication (i.e., autopoietically).

Structural Coupling "The structural coupling of system and environment does not contribute operations (or any other components) for the reproduction of the system.

It is simply the specific form in which the system presupposes specific states or changes in its environment and relies on them. […] Structural couplings are forms of simultaneous (and therefore, not causal) relations. They are analogical, not digital, coordinations.
[…]
The system in its normal dealings does not observe its structural couplings, but it has to contend with perturbations, irritations, surprises, and disappointments channeled by its structural couplings. […] But perturbations are purely internal constructs because they appear only as deviations from expectations; that is, in relation to the structure of the system. The environment does not contain perturbations or any that in a semantical sense is similar to them. Nor is there any transmission of perturbations from outside into the system."[3]

Structure "Structures capture the reversibility of time because they hold open a limited repertoire of possibilities for choice. One can negate structures, or change them, or with their aid gain security for changes in other respects. Processes, by contrast, mark the irreversibility of time. They are composed of irreversible events. They cannot run backwards. Both arrangements serve, through in different ways, to amplify selectivity in a material respect; that is, to preselect possibilities for choice. Structures comprehend the open complexity of possibility that every element could be connected with every other one… Through this selection, they can instruct further selections, by reducing the constellations that can possibly be surveyed at any moment. Processes (and this defines the concept of process) result from the fact that concrete selective events build upon one another temporally, connect with one another, and thus build previous selections or predictable selections into individual selections as premises for selection.[4]

Subsystem Subsystems result from internal differentiations within systems. All subsystems are systems, but they are systems each of which consists solely of a subset of elements of another system. A subsystem's environment includes other subsystems within the system of which it is part, as well as the system's environment, though the subsystem may be in a position to distinguish systems within its environment. For example, the legal system is a subsystem of the social system because the social system consists of communications and the legal system consists of communications of congruently generalized normative expectations.[5]

[3] Niklas Luhmann, "Operational Closure and Structural Coupling: The Differentiation of the Legal System," 13 CARDOZO L. REV. 1419, 1432 (1992).
[4] LUHMANN, *supra* note 2, at 44-45. (citations omitted)
[5] *See* LUHMANN, *supra* note 2, at 187-193.

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