American Indian Tribal Courts: The Costs of Separate Justice. By Samuel J. Brakel. Chicago: The American Bar Foundation, 1978. 142pp. $5.00.

It is axiomatic to say that the value of any research treatise is related directly to several factors: 1) the researcher's (writer's) basic knowledge and familiarity of the subject matter; 2) the scope of the subject matter; 3) the intensity of the research effort; and, 4) the trustworthiness of the research effort and the researcher's final conclusions. Within Samuel J. Brakel's book, *American Indian Tribal Courts,* many of the factors are eliminated in favor of deep criticisms and severe accusations concerning the tribal court system. To determine the validity of the research, one must start with the author.

Little is revealed about Brakel except that he is a "Research Attorney at the American Bar Foundation." However, by a close scrutiny of the work, one can deduce several things about the author: 1) he is a non-Indian whose only contact with the Indian people has occurred during his research for this book; 2) he has had very limited, if any, tribal experience and only within a confined geographic area, i.e., within the district of his practice; and 3) he seems to have knowledge of some statutes, treaties, and case law that apply to tribal courts, although it does not appear from his conclusions that he made use of this knowledge.

Of course one need not be an Indian to have an understanding of the many problems reservation Indians face. However, first-hand and inside experience help in the investigation. Researchers have been able to obtain the answers they wish by the very form and tone of their questions. More often than not the interrogator is sincere but totally naive of the true results of his interrogation. And the Indian informant is just trying to give the non-Indian researcher what he thinks is desired. In other words, neither the interrogator nor the informant really understand each other. But the understanding does not come about through a cursory contact. Brakel states that he spent about one week at each reservation he visited. He then spent a day or two visiting ("to take a quick look") state and county court systems in areas surrounding the reservations. Lastly, the author admits that he had limited contact with informants, some of which were directly or indirectly connected with the courts, or law enforcement agencies. Therefore, it appears that a very insignificant amount of time was spent in the research of a very intricate and complex subject matter. Thus the researcher

had little or no background. But tribal courts exist today on some 60 to 120 Indian Reservations. During the amount of time spent, Brakel did not investigate the total tribal court system and chose to visit only about 10 Indian courts which he thought would be representative of all.

Brakel's animadversions of the tribal court system are general and numerous. Without fustigating each of his revelations, he must be taken to task for some of his comments. For example, he states that "in this report I have refrained from faulting the tribal courts for failure to meet 'constitutional' requirements of providing counsel." Students of the American Indian tribal court system and Indian law are well aware that the rights of non-reservation Indians are guaranteed under the 1968 Indian Civil Rights Act. The Constitution guarantees that in State and Federal criminal proceedings defendants have the right to a lawyer's counsel. The Indian Civil Rights Act states that no Indian tribe shall deny to any person in a criminal proceeding his right "at this own expense to have the assistance of counsel for his defense." Thus all persons charged with a crime have the right to hire a lawyer at their own expense. Some tribes do provide a lawyer without charge. Provisions for the appointment of counsel without charge can be found in the tribal codes, although this is not true for all tribes.

Brakel states also that, "the tribal courts—with a few rare exceptions— have refused to take jurisdiction over non-Indians who engage in illegal transactions or commit offenses on reservation property." Either this article was researched and written before the *Oliphant vs. The Quinault Tribe* decision, or he failed to include it in his research. In the *Oliphant* decision Justice William Rehnquist, for the majority, held that tribal courts do not have jurisdiction to try non-Indians for criminal offenses committed on Indian reservations. Brakel does recognize the necessity of the tribal court suggesting that they take action against non-Indians who engage in illegal transactions or commit offenses on reservation property. He correctly points out the fact that presently many criminal offenses go unadjudicated and the victims are without redress.

Brakel further asserts that tribal codes are derivations of the old BIA codes and that the Indians had little or no voice in their construction. He sets forth the fact that the codes are undergoing some updating and changes "at the hands of tribal attorneys, regional BIA personnel, and/or professors from nearby universities (non-Indians all)." This, however, does not portray a true and accurate picture. While many of the individuals engaged in revising tribal

codes are non-Indians, a large (and increasing) number are Indians. It should be noted that, almost without exception, those so engaged have vast and comprehensive experience with the American Indian and his problems. Among the organizations involved are the Native American Rights Fund and the Indian Law Center at the University of New Mexico School of Law, both of which have a heavy concentration of Indian lawyers. Further, many tribes engage the services of Robert Bennett, an Oneida Indian who is a lawyer and former Commissioner of Indian Affairs. Lastly, a good number of BIA employees are Indians whose background and experience in reservation life are of tremendous assistance in modernizing tribal codes.

Finally, more and more tribes are retaining Indian lawyers as tribal attorneys to represent the interests of the tribes. This seems to draw criticism from Brakel, however, for he states that the lawyers represent the interests of the tribe only and "they do not represent the concerns of individual Indians in the tribal courts." Yet these lawyers are abiding with the canons of ethics of the American Bar Association and those of the state in which they are practicing.

Another serious criticism of *American Indian Tribal Courts* is that it leaves the reader with an erroneous impression of what exists and why. It seems to compare the tribal courts with some Utopian court system not in existence today, and to describe faults not found elsewhere. It appears that Brakel wants to direct the tribal judicial system to a higher degree to justice and fair play for those who come before it. In doing so, he points out many deficiencies. But in fact the faults exist in many courts over the nation, and not just the tribal courts. While Brakel does recognize this inequity to some slight degree, the reader is left nonetheless with the thought that reservation Indians often are left helpless before a "kangaroo court." This is not true. A vast number of tribal judges appoint private attorneys to represent indigent defendants. This occurs, for example, in the Coeur d'Alene Tribal Court, Uintah-Ouray Tribal Court and Te-Moak Tribal Court. Further, trial lawyers all over the country have experienced and have observed the very scenes as described in Brakel's work: the battered defendant, the skidrow denizen, the poor and downtrodden, the disoriented and confused, and the attorney who wants to complete the process so that he can go to another court for another client. Almost every trial lawyer also has experienced the "home town rule" either to his benefit when in a local court or

to his detriment when out of town. These are facts of life and they exist to some degree everywhere. But few of the courts—tribal, state, county or federal—display such bias. However, the reader is left with the impression that the tribal courts are overridden therewith, and that is not true.

Thus, the generalities directed against the tribal courts are generalities made from quasi-truths and distortions. There is no explanation or expansion of concepts, no historic background of the people involved (both in front of and behind the Bench). *American Indian Tribal Courts* does not give the reader any insights in a study of an ethnic group. Each reservation has certain differences and uniquenesses and should not be thrown into one pot.

The book is silent, too, about some of the activities of the National American Indian Court Judges Association, such as their development of training programs for judges and court personnel and their design of manuals for the tribal courts. The Association has a judicial performance committee which acts as a watchdog over the entire tribal court system. During 1978 they made an evaluation report on the Quinault Tribal Court, which included administration, court operations, and judges' ethics and conduct. This evaluation resulted in a number of recommendations which upgraded that court.

In conclusion, this book has done something affirmative in that it articulates our attention to a penumbral area in the Nation and demands further investigation. It is, however, not only incomplete but inaccurate and leaves the reader with an unclear and faulty picture of the situation and no procedure for reconstruction. The American Bar Foundation should attempt further investigation and research in this area.

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The End of Indian Kansas: A Study of Cultural Revolution, 1854-1871. By H. Craig Miner and William E. Unrau. Lawrence: The Regents Press of Kansas, 1978. 179 pp. $12.50